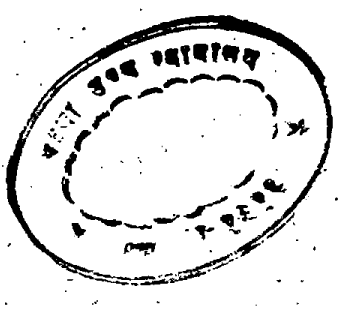

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1993

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PATNA SERIES

VOLUME LXXII

INDEX

REPORTED BY

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Patna High Court

1993

Chief Justice

1. The Hon'ble the Chief Justice Sri B.C.Basak :— Date of appointment 10.6.1974/18.3.1991. Leave on full allowances for 3 days w.e.f. 12.7.93 to 14.7.93.

Judges

2. The Hon'ble Mr.Justice S.Ali Ahmad. :— Date of appointment 28.5.74 Retired on 23.5.1993

3. The Hon'ble Mr.Justice S.H.S. Abidi Date of appointment 1.9.1983

Date of retirement 15.7.1993 (Relinguished charge as Acting C.J. on. 15.7.1993

4. The Hon'ble Mr.Justice U.P.Singh :— Date of appointment :—15.2.1984

(i) Commuted leave for 4 days w.e.f. 5.10.93 to 8.10.93

		(ii)	Commited leave for 3 days w.e.f. 29.9.93 to 1.10.93.
5.	The Hon'ble Mr.Justice Bishwa Nath Agrawal :—		Date of appointment 17.11.1986
		(i)	Leave on full allowances for 4 days w.e.f. 7.12.93 to 10.12.93. with liberty to suffix second Saturday and Sunday the 11.12.93 and 12.12.93 to the leave.
		(ii)	Leave on full allowances for 2 days w.e.f. 30.11.93 to 1.12.93 with liberty to prefix Sunday and Holiday the 28.11.93 and 29.11.93 to the leave.
6.	The Hon'ble Mr.Justice Bisheshwar Prasad Singh :—		Date of appointment 9.3.1987
7.	The Hon'ble Mr.Justice Satya Brata Sinha :—		Date of appointment 9.3.1987
8.	The Hon'ble Mr.Justice Narinder Singh Rao :—		Date of appointment 13.9.1987
			Leave on full allowances for 12 days w.e.f. 4.10.93 to 15.10.93

9. The Hon'ble Mr.Justice Narbadeshwar Pandey :— Date of appoitment 31.10.1988

10. The Hon'ble Mr.Justice Shamimul Hoda :— Date of appointment 31.10.1988

(i) Commuted leave for 76 days w.e.f. 21.6.93 to 4.9.93 with liberty to prefix annual vacation and suffix 5.9.1993 to the leave.

(ii) Leave on full allowances for one day i.e. 2.12.1993.

(iii) Leave on full allowances for 2 days w.e.f. 17.11.93 to 18.11.93.

(iv) Leave on full allowances for 3 days w.e.f. 3.11.93 to 5.11.93.

(v) Leave on full allowances for 3 days w.e.f. 12.10.93. to 14.10.93.

(vi) Leave on full allowances for one day i.e. on 8.10.93.

(vii) Leave on full allowances for 3 days w.e.f. 4.10.93 to 6.10.93.

11. The Hon'ble Mr. Justice Binod Kumar Roy :— Date of appointment 31.10.1988

12. The Hon'ble Mr.Justice Nagendra Rai :—	Date of appointment 10.7.1990
13. The Hon'ble Mr.Justice Sachchidanand Jha :—	Date of appointment 10.7.1990
14. The Hon'ble Mrs. Justice Indu Prabha Singh :—	Date of appointment 10.7.1990 Leave not taken
15. The Hon'ble Mr.Justice Om Prakash :—	Date of appointment 10.7.1990 Retired on 8.7.93 (F.N.) Commuted leave for 49 days w.e.f. 2.4.93 to 20.5.93.
16. The Hon'ble Mr.Justice Dharmpal Sinha :—	Date of appointment 10.7.90
17. The Hon'ble Mr.Justice Ravi Nandan Sahay :—	Date of appointment 10.7.90 Leave not taken.
18. The Hon'ble Mr.Justice Nunumani Prasad Singh :—	Date of appointment 10.7.90
19. The Hon'ble Mr.Justice Ram Nandan Prasad :—	Dte of appointment 27.7.90

20. The Hon'ble Mr.Justice Gopi Chand Bharuka :—	Date of appointment 27.7.1990
21. The Hon'ble Mr.Justice Shashank Kumar Singh :—	Date of appointment 27.7.90
22. The Hon'ble Mr.Justice Aftab Alam :—	Date of appointment 27.7.90.
23. The Hon'ble Mr.Justice S.K. Chattopadhyaya :—	Date of appointment 18.9.91.
24. The Hon'ble Mr.Justice A.N.Chaturvedi :—	18.09.1991. Leave on full allowances w.e.f. 2.11.93 to 5.11.93 with liberty to pre-fix Durga Puja Holidays including Laxmipuja from 16.10.93 to 1.11.93
25. The Hon'ble Mr.Justice Choudhary Sada Nand Mishra :—	Date of appointment 2.12.1991. Commuted leave for 10 days w.e.f. 29.9.93 to 8.10.93 with liberty to suffix second Saturday and Sunday the 9.10. 93 to 10.10.93 to the leave.

26. The Hon'ble Mr.Justice Radha Mohan Prasad :— Date of appointment 2.12.1991

27. The Hon'ble Mr.Justice Narayan Roy :— Date of appointment 2.12.1991

23. The Hon'ble Mr.Justice Shamim Ahsan :— Date of appointment 2.12.1991

(i) Commuted leave for 11 days w.e.f. 8.2.93 to 18.2.93 with liberty to prefix 7.2.93 (Sunday) and to suffix 19.2.93 to the leave.

(ii) Commuted leave for 10 days w.e.f. 15.3.93 to 24.3.93.

(iii) Leave on full allowances for 5 days w.e.f. 5.4.93 to 9.4.93.

(iv) Leave on full allowances for 17 days w.e.f. 13.4.93 to 29.4.93.

(v) Commuted leave for 65 days w.e.f. 21.6.93 to 24.8.93.

(vi) Leave on full allowances for 2 days w.e.f. 9.9.93 to 10.9.93.

(vii) Leave on full allowances for 11 days w.e.f. 14.9.93 to 24.9.93.

(viii) Leave on full allowances for 60 days w.e.f. 28.9.93 to 26.11.93.

(ix) Leave on full allowances for 17 days w.e.f. 30.11.93 to 16.12.93.

(x) Commuted leave for 4 days w.e.f. 20.12.93 to 23.12.93.

29. The Hon'ble Mr.Justice Amir Das :— Date of appointment 2.12.91.

30. The Hon'ble Mr.Justice Guru Sharan Sharma :— Date of appointment 19.10.92.

31. The Hon'ble Mr.Justice Naresh Kumar Sinha :— Date of appointment 19.10.92

32. The Hon'ble Mr.Justice Lok Nath Prasad :— Date of appointment 19.10.1992.

CORRIGENDA 1993

P.No.	Para No.	Line No.	for	read
1	—	2	ocparcener	coparcener
4	6	3	8	B
4	7	3	8	B
5	9	3	hotel-pot	hotch potch
5	11	10	marked	market
8	19	4	name	same
9	—	13	consequentil	consequential
9	—	14	or	on
9	23	6	cleanees	alienees
10	—	8	he	the
11	26	5	advodorem	advalorem
13	—	13	again at	against
13	—	19	The	the
14	35	4	prevent	prevalent
15	—	4	another	whether
17	5	3	139(S)(a)	139(8)(a)
18	—	30	daily	delay
20	—	1	may able	may be able
20	—	3	us	as
20	—	21	had	bad
27	—	28	sent as	send an
27	—	34	sent	send
31	2	3	total	dated
31	—	18	Hodes	Hoda
32	4	5	of	[omit and delete]
32	6	3	amalgamation with	amalgamation of

P.No.	Para No.	Line No.	for	read
32	6	4	contendes	contends
35	12	7	10.3.90	10.3.91
34	—	7	in	was
34	—	17	Generaly	General
35	—	6	give	given
37	—	16	submit	submitted.
37	—	26	orosecuted	prosecuted
37	—	32	and	an
38	—	2	Registers	Registrar
38	—	5	of	if
38	—	9	in formed	informed
39	24	1	funcyional	functionary
41	—	4	contrast	contract
42	1	4	thereby	whereby
42	2	9	intant	intent
43	6	17	evermonths	averments
45	—	4	whethere	whether
46	15	5	coverants	covenants
46	16	5	respondend	respendent
46	16	6	incerrect	incorrect
46	Footnote	—	(4) (1973) A.I.R. (Pet) 253	(1973) A.I.R. (Pat) 353.
47	19	5	coverants	covenants
47	19	18	said sets	said to have
48	20	1	after said	aforesaid
49	24	6	royal	royalty
51	31	3	so	was
53	36	1	considereg	Considering
54	—	10	neccssary is	nccessary

P.No.	Para No.	Line No.	for	read
56	—	3	lose	case
56	11	2	sabotesure	counter
58	—	2	going	being
62	—	7	therefore	therefor
63	10	9	detaind	demand
64	13	4	therefore	therefor
66	21	3	unequally	unequivocally
66	23	3	cover	Court
66	23	5	jage	page
67	—	1	potitioner	petitioner
67	—	8	hold	held
67	—	10	deminant of the	dominant object
68	25	7	suffers	suffered
71	32	2	falls	fall
75	—	Last but one line	interims	in terms
82	22	2	intends	interest
82	24	1	thus	this
83	—	17	their	there
83	—	23	stopped and	estoppel
135	—	13	tis	this
137	—	16	precendents	precedents
138	5	3rd line from bottom	ins tued	instituted
139	—	14	pased	passed
140	7	7th line from bottom	precendent	precedent
148	—	16	annexture	annexure
150	5	10	this	his

P.No.	Para No.	Line No.	for	read
153	—	17	on the other and	On the other hand
154	—	9	provids	provides
154	—	11	gstegory	category
155	—	3rd line from bottom	loose	lose
157	9	2	discrtion	discretion
158	—	2	simiarly	similarly
158	—	5th line from bottom	alloted	allotted
159	—	11	alloted	allotted
161	—	1	alloted	allotted
161	—	11	alloted	allotted
161	—	17	alloted	allotted
162	2	5th line from bottom	the said	[Delete]
162	2	3rd line from bottom	patrick	Patrick
163	—	5	daugter	daughter
163	—	8	Murnu	Murmu
165	—	7	separare	separate
166	7	4	pelaintiffs	plaintiffs'
166	8	3	een	been
167	—	1	0	to
168	11	Last line	terminatted	terminated
168	12	4	partyes	parties
168	12	5	canot	cannot
169	—	7	pititioner	petitioner

P.No.	Para No.	Line No.	for	read
169	—	10	ptitioner	petitioner
170	—	2	procdeeding	proceeding
172	1	7	princ plcs	principles
175	8	5	simplicitor	simpliciter
177	—	4	deliqent	delinquent
177	—	10	censor	censure
177	—	11	deliquent	delinquent
178	—	4	Panday	Pandey
178	2	5th line from bottom	adepartmental	a departmental
179	—	3	the dated	dated
179	—	5	and order	an order
179	3	8	awared	awarded
181	—	4	pioner	petitioner
181	—	11	circumstancess	circumstances
182	—	6	imposeed	imposed
183	—	3	diliquent	delinquent
184	—	2	shoud	should
189	—	14	directiones	directions
191	7	15	agred	agreed
191	7	4th line from bottom	lenge	longed
192	—	1	w	which
195	3	1	assesse	assessce
195	3	9	exemtion	exemption
196	4	14	cose	course
196	4	19	nom-employee	non-employee
196	5	1	consdceration	consideration
196	6	10	to	total

P.No.	Para No.	Line No.	for	read
199	8	10	fimal	final
200	10	8	a courts	a court
207	10	3	mutuated	mutated
208	16	4	pass on	pass an
210	—	12	parvat	parbat
213	6	3	ley	by
214	9	4	certificates	certificate
215	11	5	therein	there in
216	—	16	count	court
217	12	10	Acts	acts
218	—	3	balatnat	blatant
218	—	17	responsibl	responsible
222	1	9	petitioneors	petitioners
233	28	5	furnish	furnished
233	29	7	Additional	additional
234	—	6	furnishe	furnish
235	32	4	Completely	Completely
235	33	3	fre	fresh
235	33	13	place	placed
237	—	1	while	whole
238	—	1	sence	sense
238	39	2	stationary	statutory
239	—	7	recrition	(sic)
239	—	9	legal	legal
239	—	10	grammetical	grammatical
239	40	6	earier	earlier
240	—	5	the ll	the final
240	—	17	da sinha	Uday Sinha
245	—	3	positi	position

P.No.	Para No.	Line No.	for	read
255	—	17	quiry	enquiry
256	—	4	s ows	shows
256	—	5	concer g	concerning
270	(L)	**	menfest	manifest
270	(L)	5th line from bottom	consistant	consistent
276	Foot note	Last but one line	Jugasalia	Jugsalia
277	—	6	involve	involved
278	—	3	asssets	assets
279	—	7	determine	determined
283	—	3rd line from bottom	No	no
285	5	2	com-nbined	combined
285	6	2	in-teriew	interview
285	8	2nd line from bottom	scheduled	Scheduled
286	9	1	contencded	contended
286	9	2	Scheduled caste	Scheduled Caste
286	9	3	scheduled	Scheduled
286	10	15	informtiosw	information
287	13	3	pary	party
287	13	7	Univeristy	University
288	15	4	ereation	creation
288	18	3	given	give
290	23	1	persual	perusal
290	23	2nd line from bottom	comparision	comparison
290	24	1	atoresaid	aforesaid

P.No.	Para No.	Line No.	for	read
290	24	3	there in	there is
290	24	6	committe	committee
291	25	3	there after	thereafter
291	clause 5	2	Sansthono	Sansthanon
291	"	4	nimndikit	nimnalikhit
291	"	4	prqtisat	pratishat
291	Clause 11	3	namakan	namankan
291	Clause 11	3	prakshiya/ awadhen	paiksha/awedan
292	28	1	persual	perusal
292	29	last line	and	who
293	—	1	accommodate	accommodated
293	—	2	and emergecy	on emergency
295	—	3	increas	increase
295	—	4	decreas	decrease
295	33	6	or whose decision	whose decision.
296	36	4	admission	admissions
296	37	1	constitution	Constitution
297	—	1	mysore	Mysore
297	—	6	They	they
297	39	1	supreme Court	Supreme Court.
297	39	4	determing	determining
297	39	4	socially	social
298	—	6	perriakaruppans's	Periakaruppan's
299	—	2	education auy	educationally
299	43	3	of	to
299	44	7	Over and above	over and above
300	—	10	perisisting	persisting
300	—	17	They delay	the delay

P.No.	Para No.	Line No.	for	read
300	—	4th line from bottom	th eopinion	the opinion
301	—	3	precendent	precedent
301	—	5	th	the
301	—	6	ersons	sons
303	—	4	Anuchit	Anusuchit
305	10	7	must held	must be held
305	10.	9	or regularisation	for regularisation
305	20	2	roaster	roster
307	22	5	as indicated	has indicated
308	25	2	occassion	Occasions
308	27	3	decissions	decisions
309	—	1	Citizens	citizens
309	—	6	therefore	therefor
309	—	10	decisions	decisions
309	—	11	refered	referred
309	—	16	held to	held to be
309	28	Last line	decisiions	decisions
310	—	1	extent	etxtent of
310	—	3	constitution	Constitution
310	29	1	supereme	Supreme
310	29	9	interpreated	interpreted
310	29	14	which	which is
310	29	4th line from bottom	section	action
310	29	Last line	trifuned	notified
311	30	Last line	exercisee	exercise
312	7	7	ormiprasence	omnipresence
312	33	3	priciples	principles

P.No.	Para No.	Line No.	for	read
313	—	2	balatent	blatant
313	—	6	play	ply
313	—	14	neutrallised	neutralised
313	—	18	constitution	Constitution
314	—	5	supreme court	Supreme Court.
314	37	2	supreme court	Supreme Court.
315	—	5	resonable	reasonable
315	40	4	blatent	blatant
316	41	10	decission	decisions
316	41	19	employment	Employment
316	41	2nd Last line from bottom	registere	registered
316	41	2	employment	Employment
316	41	last line	an get	and get
317	—	10	trened	trend
318	—	14	lesser	less
318	—	16	meritorois	meritorious
318	—	19	toit	to it
318	—	21	extranuous	extraneous
318	—	23	rules of	rules or
319	42	2	sitaram	Sitaram
320	—	Last line from bottom	contentions	contentions
320	—	Last line from Bottom	pass &	pass a
321	—	31	purchases	purchased
322	5	Last line from bottom	deceds	deeds
322	6	6	pendeccy	pendency

P.No.	Para No.	Line No.	for	read
323	—	2	orde	order
323	—	5	astore	afore
323	—	7	petitiener	petitioner
325	—	3	othe	other
326	—	4	the	that
326	—	7	exlusive	exclusive
326	—	13	Inida	India
327	—	4	decessed	deceased
327	—	5	petitiones	petitioners
327	3	7	aofrementioned	aforementioned
329	8	7	that view	In that view
329	8	4th line from bottom	petitiones	petitioners
330	—	2	pase	pass
330	11	3	collector	collector
332	—	5	reatrictions	restrictions
332	—	7	severcignty	sovercingty
332	—	8	guranteed	guaranteed
332	—	2nd last line from bottom	th	the
333	—	7	sufficent	sufficient
334	—	2	incidnemtally	incidentally
334	—	5	lagislate	legislate
335	—	9	jammat	Jammat
336	—	7	pkebicite	plebiscite
336	—	17	owers	powers
336	—	22	notofication	notification
336	—	25	Gazett	Gazette
336	2	5	otice	notice

P.No.	Para No.	Line No.	for	read
337	(1)	4	constitution	Constitution
430	—	11	asistant teaches	assistant teachers
430	—	1	Write	writ
431	—	13	slate	state
431	1	6	Nalandan	Nalanda
431	1	7	36434 P.C.	364/34 I.PC
431	2	Last but one	revalary	rivalry
431	2	last line	remain	remains
432	5	3	to respect of	in-respect of
432	5	last line	cadra	cadre
433	9 (ङ)	2	*को शक्ति*	*की शक्ति*
434	8	10	relatings of	relating to
439	4	9th from bottom	applicance	a licence
439	4	7th line from bottom	powerers	powers
440	—	7-8	Cancel the licence reject the objection	Cancel the licence or reject objection.
440	—	3	veiw	view
444	—	2nd line from bottom	Committee	committed.
445	—	2	Suicide	Suicide
445	—	5	happended	happened
445	—	11	witness	witnesses
445	—	17	deceassed	deceased
445	—	18	revished	ravished
445	—	20 that	in the letter	in the letter
446	—	1	witness	witnesses

P.No.	Para No.	Line No.	for	read
447	—	12	nonavability	nonavailability
448	—	2	witness	witnesses
451	—	5	attendence	attendance
604	—	3	of workman	of — workman
604	—	15	Dispurtes	Disputes
605	—	10	relation	relating
605	—	18	where a	where at a
605	Footnote delete	—	—	—
608	—	8	petitipner	petitioner
609	—	12	accpted	accepted
609	—	15	give	given
611	10	13	no withustanding	notwithstanding
611	10	22	not with standing	notwithstanding
618	20	6	ays	lays
625	—	27	meterial	material
627	6	2	appellant	appellant
629	7	7	there	three
632	—	19	prefered	referred
633	—	6	begen	been
633			Lastline Delete of the word	"certain"
634	—	1	Delete in first word	"case"
642	21	6	The	the
645	24	17	percentase	percentage
653	39	4	The	the
653	39	7	Delete	word "was"

P.No.	Para No.	Line No.	for	read
659	—	1	sch	school
665	12	4	canot	cannot
669	—	20	undergo	undergo imprisonment
671	—	9	belong	belonging
671	—	11	informant	informent's
671	3	2	(PN. 10)	(P.W. 10)
675	—	1	to ire	to fire
677	—	1	remaind	remained
686	—	2	He	he
689	13	21	enemaity	enmity
695	—	1	Delete the first line	
695	—	23	nicised	incised
697	—	16	now	how
700	18	26	of	on
701	—	Foot note (2)	S.I.R.	A.I.R.
703	—	23	dwel	duel
705	—	1	pt	part
709	—	4	een	been
711	—	15	dubled	dubbed
711	—	17	rouct	court
711	—	19	(Supral)	(Supra)
712	—	11	then	them
712	—	23	tatement	statement
714	—	2	arival	arrival
717	—	6	elder	elder
717	—	6	daughteir's	daughter's
717	—	18	disolosed	disclosed

P.No.	Para No.	Line No.	for	read
718	23	8	decliared	declared
719	—	17	manirest	manifest
719	—	19	or	of
720	—	10	the selve	them-selves
721	—	5	It therefore	It is therefore
725	—	13	tainected	tainted
727	—	third line from bottom	excessive	evasive
727	—	Second line from bottom	sare	are
732	26	10	causd	caused
733	—	third line from bottom	model	modi's
736	—	last line	kantas	dentas
740	—	12	withnesses	witnesses
741	—	7	leamed	learned
742	—	5	crealy	clearly
744	28	5	exibit	exit
747	—	12	failitate	facilitate
749	—	4	contensel	counsel
753	—	15	to	Delete the word "to" before the word "totality.
753	—	14		[Delete the word "us"]
754	—	10	offencers	offences
756	—	5 line from bottom	superior	supervision
762	—	Last line	observe	observed
774	7	7	the	The

P.No.	Para No.	Line No.	for	read
774	—	15	sta	staff
772	9	6	question	quashing
781	11	1	If	It
784	4	14	absene	absence
784	—	16	bn	been
785	—	2	view possible	view are possible
785	—	3	that	the
787	—	14	The	the
788	—	19	the since	the services
			services	
789	—	12	legislatan	Legislature
795	37	3	of hi who	of his (sic)
796	—	12	As	as
797	42	7 and 8	The	the
798	—	1	tn	is
798	—	2	of	in
798	—Line 7 and 8		be read in continuation.	
807	(Name of Lawyers)		Herendra	Harendra
809	—	17	choose	chose
810	4	3	have	delete
813	8	5th line from bottom	contrary	contrary to
815	—	4th line from bottom	(1971) A.I.R. S.C. 804	(delete at P.815 and insert in Footnote of page 816.
815	—	3rd line from bottom	(1976) A.I.R. S.C. 2488	
816	—	9	A.I.R.	(delete)
816	—	15	Praveen Shankar	(delete)
816	—	4th line from bottom	inquires	inquiries

P.No.	Para No.	Line No.	for	read
830	—	5	hold	held.
840	22	Last line form bottom	expect	except
842	23	1	Case	case
848	—	3	Even ness	evenness
849	4	2	additional	Additional
853	—	Last line from bottom	year	yearly
853	3	3	state	State
862	(D)	2	in as much	inasmuch
882	—	3	Session	Sessions
88	—	5	Angal	Angad
90ɔ	—	7	do	does
925	—	11	filed grant	filed for grant
925	—	8th line from bottom	held	hold
927	—	8th line from bottom	Mahdhyame	Madhyama
935	—	2, 3	board	Board
935	7	7th from bottom	mc	frame
938	Head note:	10	18.7.1992	16.7.1992
940	1	7	state	State
941	—	2	state	State
943	—	4	canceled	cancelled
944	—	6	object job	object of
945	15	1	advertising	adverting
959	20	2	persons	person

P.No.	Para No.	Line No.	for	read
960	22	5	landhold	landholder
962	27	2nd line from bottom	ordinance	ordinances
963	30	8th line form bottom	sec	subsec
964	(5)	2	mortgage	mortgagee
965	—	3	claims	claim
965	34	4	words	word
965	34	5	remembered	renumbered
966	38	5	Stood	stood
967	39	9	rerision	revision
967	40	8	or	of
968	42	7	Upon	upon
968	44	2	provisions	provision
968	44	6	purpose	purposes
969	46	3	if	it
969	46	6	of	or
969	47	1	subsection	subsection (1)
970	—	10	matter	matter of
971	50	3	enable	enables
973	—	6	right	rights
973	—	11	civil	Civil
975	7	2	canceling	cancelling
992	8	5th from bottom	asscerted	asserted
994	10	3	advertisement	advertisements
994	10	5	are	is
994	10	7	law the land	law of the land
996	—	7	notte	notice

P.No.	Para No.	Line No.	for	read
996	—	11th line from bottom	fo	for
999	—	5th line from bottom	Superior	superior
1000	—	4	substances	substance
1006	—	Last line from bottom	an	and
1007	—	6	officer's	officers
1008	3	1	essential	Essential
1009	4	3	initiation	initiation of
1010	9	1	been	(delete)
1011	10	2	commercial	Commercial
1013	Head note	6	in	ing
1014	"	6	juvenile	Juvenile
1015	1	13	On year	one year
1022	9	17	non obstinate	non obstante
1025	—	last line from bottom	juvenile	Juvenile
1028	—	7	is	we
1031	—	12th from from bottom	non-obstinate	non obstante
1036	—	11th line from bottom	cases	ceases
1037	—	9	out	outer
1039	—	14	ar	or
1043	—	4	ceased	deceased's
1048	—	3	Letter	Letters
1051	15	4	he	she.
1054	—	3rd line from bottom.	and	under

P.No.	Para No.	Line No.	for	read
1055	—	7	te	the
1055	—	10	unwarrangted	unwarranted
1056	—	5	code	Code
1057	4	2	absene	absence
1057	4	5	voilative	violative
1059	—	2	Gurarat	Gujarat
1060	17	7th line from bottom	poisons	poisonous
1061	4	2	by	be
1061	18	3	extended	extenso
1062	19	7	regarts	regards
1062	19	10	constitutue	Constitute
1065	12	10	Act 32	Art/32
1066	27	11	cases	ceases
1066	28	2	state	State
1067	—	1	powers the	powers of the
1067	—	4	write	writ
1067	—	10	state	stage
1067	—	12	infrigned	infringed
1067	—	16	unforcement	be enforcement
1067	—	18	in violated	is violated
1067	—	5th Line from bottom	those	whose
1070	32	2	over act	overt act
1070	32	last line from bottom.	basic	basis
1073	—	2	it	its
1073	2	4	huge	higher
1074	—	3	authourity	authority

P.No.	Para No.	Line No.	for	read
1074	3	6th line from bottom	treller	teller
1076	6	5	punihment	punishment
1080	11	2	supreme	Supreme
1080	11	4th line from bottom	reported	reported
1081	—	3	supreme	Supreme
1081	—	4	recored	record
1081	12	4	appelate	appellate
1081	12	2nd line from bottom	authourity	authority
1081	—	7	authourity	authority
1082	—	13	authorurity	authority
1083	13	7	bot	not
1083	14	2	with	writ
1083	—	2	followed	followed
1084	—	4	mony	money
1084	—	5	alloted	alloted
1084	—	6	complines	compliance
1086	2	7	conspnelous	conspinous
1087	—	4	but	to
1088	4	6	pursuent	pursuant.
1200	Foot-note	1	(llys)	(Mys)
1205	23	12	group (1)	group (1)
1210	—	13	submit	submits
1213	—	17	if	(delete)
1213	—	18	mentioned	mention
1215	46	3	threfore	therefore

P.No.	Para No.	Line No.	for	read
1215	46	3	hold	held
1218	—	6	of not	or not
1218	57	1	required	enquired
1218	57	2	is	in
1218	57	3	is	in
1219	59	4	wide	wide (Sic)
1219	61	4	world	World
1221	—	1	Judament	judgment
1223	2	5	an	and
1223	2	6	(thursday)	thursday
1224	—	10th line from bottom	ali	Bali
1226	—	8th lin from bottom	appellate	appellant
1227	—	4	second	sencond invest
1227	6	2nd line from bottom	circums ances	circumetances
1228	—	5th line from bottom	the burnt	then burnt
1229	7	5	After	after
1234	—	12	women	woman
1236	—	8th line from bottom	The he	then he
1237	—	6	hot was	hot water
1238	—	16	toof	of
1244	—	7	about	but
1244	—	Last line from bottom	seize	see.
1245	—	5	hawasi	hawai

P.No.	Para No.	Line No.	for	read
1245	18	4	Mew	Mewa
1245	—	14	souls	soles
1246	—	3	cause	case
1249	21	2	extension	extenso
1249	—	3rd line from bottom	arraiged	arraigned
1250	—	5th line from bottom	fare	fare (sic)
1251	—	Last Line from bottom	of not go	do not go
1255	3	3	fregn	frenzy
1256	—	10	iscarding	discarding
1256	—	10	gui-principle	guiding principle
1257	–	1	nose else	none else
1257	—	4	by	be
1257	—	8	Maharashthara	Maharastra
1258	—	8	befit	before it
1258	—	9	exixtence	existence
1258	—	4th line form bottom	supporting	supporting
1259	—	17	linstance	instance
1261	—	3rd line from bottom	adpting	adopting
1267	26	2	hours	house
1275	—	3rd line from bottom	statining	staining
1277	—	7	raptured	ruptured
1289	33	11	empanted	emitted
1310	—	3rd line from bottom	should	should be

P.No.	Para No.	Line No.	for	read
1313	46	6th line from bottom	bouds	bounds
1314	—	Date line	agust	August
1314	—	In Name of Parties	state	State
1315	1	7	setenced	sentenced
1315	—(Against name of advocates		respondente	respondents
1315	1	last line 7	shall	shall run
1317	7	6	jugment	judgment
1317	8	2	ommission	omission
1318	9	12	odetained	detained
1320	4	3	refered	referrod
1326	10	3	transferre	transferee
1334	—	6	tone	gone
1340	17	1	inrestigation	investigation
1346	7	13	concernt	consent
1347	—	12	continue	continues
1347	—	17	is	in
1350	2	14	Ass	As
1354	23	3	regirous	rigorous
1360	12	2nd line from bottom	arise	arises
1363	—	2	Governer	Governor
1369	19	3rd line from bottom	ev if	even if
1369	19	Last	wh	which
1372	—	4	amendable	amenable
1373	—	16	inpugned	impugned

P.No.	Para No.	Line No.	for	read
1374	—	2nd line from bottom	of behalf	on behalf
1381	—	6	constr	construed
1381	—	6	char	bar
1382	12	12	dsqualification	disqualification
1384	14	11	detder	deter
1391	10	6th line from bottom	Aministration	Administration
1392	—	14	State	State
1393	15	5	analoguous	analogous
4121	—	1	therefor	therefore
1421	—	2nd from bottom	affiliationfor	affiliation for
1423	—	4	petition-college	petitioner college
1431	—	6	institutitons	institutions
1431	—	11	requiste	requisite
1435	1	8	Educationl	Educational
1436	—	1	reasonaable	reasonable
1436	—	13	concerned	concerned
1438	—	14	volats	violate
1440	—	1	governimng	governing
1440	—	3rd line from bottom	sect on	section
1443	—	6th line from bottom	touchstome	touchstone
1444	—	12	inpinges	impinges
1448	1	3	therefor	therefore
1448	2	3	therefor	therefore
1448	Footnote	2	Article	Articles

P.No.	Para No.	Line No.	for	read
1449	—	15	responded	respondent
1459	34	Last line	propraty	property
1461	—	2	subtractign	subtracting
1461	—	18	therefor	therefore
1462	40	7	formaility	finallity
1464	—		2,1993/September before N.P.Singh,J	1993/September,7
1464	1	3	advolerum	advalorem
1464	2	4	advolerum	advalorem
1465	—	11	Delete [Appealby the plainff]	[New Para to be started with Appeal by the plaintiff]
1466	—	11	defedant	defendant
1466	—	12	jusuit	suit
1467	—	2	Girl.	Giri
1467	—	5	Girl	Giri
1467	—	7	Girl	Giri
1467	7	last	propety	property
1468	10	4	mahant	Mahant
1469	—	3rd line from bottom	mahant	Mahant
1472	19	4	inconsistant	inconsistent
1472	19	8	taill	tail
1472	19	9	heriditary	hereditary
1472	19	10	immovable	immoveable
1472	Foot note no.1		(1936) A.I.R. (Pat.) 318	(1936) A.I.R. (P.C.) 318
1479	2	3rd line from bottom	in he year	in the year

P.No.	Para No.	Line No.	for	read
1489	6	5th from bottom	cailm	claim
1490	7	Lat lin	aforesaid	aforesaid
1491	10	4	1990.C.	1990 (S.C.)
1497	—	2nd line from bottom	Up.	U.P. -
1497	—	14	fondings	findings
1510	23	2	Mishara	Mishra
1512	—	6th line from bottom	Stature	Statute
1515	8	2	of the the	of the
1515	8	11	accoutrement	accompliment
1515	8	6	strite	trite
1515	8	10	took	too
1517	—	5th line from bottom	turth	truth
1518	32	6 and 7	wholwtime	wholetime
1521	—	13	afor said	aforesaid
1521	—	13	supportstacity	supports tacitly
1522	Footnote	2	aplication	articles
1522	Footnote	Last	Coustitutuion	Constitution
1525	Genea-logical	table stage	Wet	West
1527	11	4	resoution	resolution
1528	12	Last line	avilable	available
1529	—	2	andthe	and the
1529	2	1	Has been	has been
1531	15	10	there of	thereof
1531	16	2	woongly	wrongly

P.No.	Para No.	Line No.	for	read
1532	17	5	husland	husband
1533	20	6	separte 5(i)	Separate 5(1)
1533	—	1	Act.it	Act.It
1534	23	2	oppottunity	opportunity
1535	—	6	defference	difference
1535	—	9	It this connection.	In this connection
1536	—	2	there to	thereto
1539	—	3	only	any
1541	—	8	pooperty	property
1543	—	8	devoliution	devolution
1543	37	4	conclution	conclusion
1545	—	6	as pect	aspect
1545	39	12	propety	property
1547	45	11	suplied	supplied
1548	47	5	reoort	report
1548	48	2	separte	separate
1551	—	5	reasonaable	reasonable
1554	—	4	A Bihar	Bihar
1554	57	1	fdurther	further
1555	63	1	the relevant	The relevant
1557	65	2	hes been	has been
1557	65	3	celiling	ceiling
1557	69	4	opprtunity	opportunity
1557	69	4	atatcment	statement
1558	70	4	Sction	Section
1558	70	5	lendholder	landholder
1562	82	8	expalanation	explanation
P.No.	**Para No.**	**Line No.**	**for**	**read**
1562	82	12	expalanation	explanation

1562	82	19	expalanation	explanation
1563	84	Last line	Expalanation	explanation
1565	--	1	surplusage	surplus age
1566	—	4	amibiguous	ambiguous
1566	--	7	fight	right
1566	—	17	subtract	substract
1567	—	11	exapiomctic	axiomatic
1567	—	13	falyat	raiyat
1569	—	6	paresenti	presenti
1570	—	last line	opsative	operative
1570	—	last line	althourgh	although
5172	3	7	operatin	operation
1579	--	17	Rligious	Religious
1581	--	12	thats everal	that several
1583	—	last line	beeb	been
1585	--	13	aetes	aeres
1586	—	2	capavle	copable
1586	--	3	In	It
1588	—	2	edd	2nd
1588	--	2	allll	all
1588	106	3	ceilingh	ceiling
1589	107	3	the inten	The intent
1589	107	10	Legislatore: atends further clarified from	legislature stands further clarified
1589	107	16	sub-siction	sub section
1589	107	19	knpw	known
1589	107	4	ssame	same
1590	109	5	fuirther	further
1590	109	5	form	from

P.No.	Para No.	Line No.	for	read
1592	—	last line	acouires	acquires
1593	—	1	be cannot be	he cannot be
1593	—	3	expressly necessary	expressly or by necessary
1593	—	4	know	known
1593	—	7	Acouisition	Acquisition
1593	—	[illegible]	onest of	Nonest or
1593	116	2	Ecacuee	Evacuee
1594	117	4	Consstitution	Constitution
1594	117	12	vlaude	clause
1594	117	15	sshall	shall
1594	117	14	kand	land
1594	117	17	mendment	amendment
1594	117	19	preeiousin	permission
1594	117	20	refuse to	refuse to
1594	117	21	recorde	recorded
1595	—	3rd line from bottom	9.9.1970	9.9.1970
1559	—	last line	provisos	proviso
1596	—	1	seerion	section
1596	—	5	pragraphs	paragraphs
1596	—	6	(suora)	(supra)
1596	—	10	nekd ti	taken to
1597	—	1	petitioners	petitioners
1597	—	2	field	filed
1597	—	3	be fore	before
1597	2	6	requirerd	required
1597	2	10	colidation	consolidation
1597	2	Last line	ceircumstances	Circumstances

1598	—	2	bny	buy
1598	—	3	enbquired	enquired
1598	—	14	proveeding	proceeding
1599	121	3	Acy	Act
1599	122	2	129962	12962
1600	1	2	accordence	accordance
1601	—	3	Lofe	Life
1601	—	2nd line	petitinor	petitioner
1604	11	5	socicity	Society
1605	—	2	Appoinng	appointing
1605	—	9	holder if diploma	holder of diploma
105	—10th line from below	and 9th	a forementioned	aforementioned
1605	—	Last line	relxation	relaxation
1707	—	10	prepetuation	perpetuation
1608	After Para 19.	—	Order according by	Order accordingly
1611	2	1	invelved	involved
1612	5	7 and 8	asfollows	as follows
1612	7	2	ovr	over
1613	—	14.15,16	in the light of well estabi-sihed rules, in the light of well	in the light of well established rules of interpretation.
1613	9	1	Union for India	Union of India
1614	12	6	classe	classes.
1615	—	14	temporaty or actnog	temporary or acting
1615	—	6th line from bottom	neglicuce	negligence.

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Admission of girl Candidates to the Engineering Colleges established by the State Government— Policy decision as reflected in the prospectus to add 30 Marks to those actually obtained by every girl candidate — whether the State Government can decline to give effect to the same.

Where the State Government carved out a clear cut policy decision with regard to the grant of additional benefits to the girl Candidates, i.e. addition of 30 marks to those actually obtained by every girl candidate, for admission to the various Engineering College established and managed by it, in the prospectus;

Held, that the State Government cannot decline to give effect to this longstanding policy decision abruptly particularly in view of the fact that its policy is also reflected in the prospectus.

Held, farther, that the respondents are directd to prepare a panel in terms of its policy decision as contained in the prospectus.

Namita Jayaswal v. *The State of Bihar & ors. (1993) I.L.R. 72, Pat.* 75

Appointment of Assistant Teachers for Government Basic Schools— irregularities found in some of the appointments made on the basis of Panel prepared for interview of November, 1989 by committee, constituted on approval of Government, to identify specific

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irregularities ... panel of interview of November, 1989 cancelled ... fresh interview held ... out of 259 candidates appointed earlier only 155 candidates found to be appointed in order of merit ... those 155 candidates were entitled to their salary since the date of their first joining and entitled to continuity of service.

On several complaint of irregularities having been committed in appointments made of Assistant Teachers in Government Basic Schools on the basis of interview held in November, 1989, the Special Director Primary Education, Bihar ordered inquiry to be held by Special Secretary, Department of Human Resources and Development Government of Bihar who held departmental enquiry and found that irregularities had been committed on a large scale. There after notices were served on the writ petitioners and persons similarly situated but only one of them filed show cause. It was found that irregularities had been committed on a largescale which could be identified only after holding re-interview. Consequently on approval of the Government a Committe was constituted to identify specific irregularity in the matter of appointment on whose report the panel prepared on the basis of the interview held in November, 1989 was cancelled and candidates were called upon to appear at fresh interview and out of 259 candidates appointed earlier only 155 had come up in order of merit who were entitled to salary from the date they were appointed.

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Held, that the government is competent to pass an order to rectify the irregularity committed in the matter of appointment.

The action of the government is reasonable, and in the interest of the public. If the appointment made on the basis of the interview held in November, 1989 is allowed to continue, it would amount to perpetuating the illegality committed in the matter of appointment and would cause injustice to the candidates of superior merit beside other irregularities committed in the matter of appointment. Preparation of Panel is a natural consequence of the scrutiny made by the committee, as the committee had identified the irregularity in the preparation of the panel.

Held, further, that the persons who were appointed from the panel prepared on the basis of the interview held in Novermber, 1989 and their names have also been included in the panel on the basis of reinterview shall be entitled for salary from the date of their first joining and their continuity in service shall be maintained.

Umeshwar Pd. Rai and ors. v. *The State of Bihar and ors. (1993), I.L.R. 72, Pat.* 982

Appointment on compassionate grounds— Minor son of a deceased government servant applying for being appointed on compassionate ground after attaining majority —Whether entitled to be appointed.

The policy decision adopted by the State

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to provide employment to one of the dep ants of a deceaed government servant was with a view to grant immediate relief to the family at the time of distress. Even if one of the dependants of the deceased family who is not eligible for appointment keeping in view the age, the qualification and other considerations, one of the other dependants as mentioned in the government circular may be appointed on compassionate ground.

Held, therefore, that, it would not be correct to say that only because the son was a minor, he could file an application for appointment even after attaining majority. If such an intrpretation is given, the same would frustrate the very object and purport of the policy desision of the State in as much as thereby no immediate relief to the family in distress can be provided.

If such an application is entertained after a long delay, by that time not only the existing vacancies may be filled up by regular appointment, but also other cases of similar nature may arise where grant of immediate relief by providing employment to the dependent of the deseased employee may crop up. What is material for consideration is the time when the relief is to be granted to a family in distress and not to reserve a job for one of the dependants.

Anil Kumar Singh v. *The State of Bihar & Others (1993). I.L.R. 72 Pat.* ...58

Bihar consolidation of Holdings and Prevention of Fragmentation Act, 1956- 1—Consolidation Authorities, whether have jurisdiction to enquire into the matter whether the document is void— Consolidation courts whether will have jurisdiction in relation to voidable transaction.

Held, that, if on the basis of the pleadings and relief claimed, a document may be held to be void one, evidently such a question can be adjudicated upon by the Consolidation Courts and for that purpose, they being 'courts' within the meaning of section 3 of the Evidence Act, must be held to have the necessary jurisdiction to take evidence which may be adduced by the parties in support of their respective pleas. It is for the court to accept the case of one party and reject the case of other. A 'court' has the power to take evidence to decide an issue provided the same falls within his jurisdiction. When an issue is triable by a court it has also the power to decide the jurisdictional fact a fortiori the same can be done only on the basis of the materials brought on records by the parties to the lis.

Thus in the instant case, if the deed of gift executed by Radhika Tewary was invalid in law either on the ground that he did not have any authority to execute the same or the same is a manufactured document or on the ground that the same was violative of section 122 and 123 of the Transfer of Property Act, the matter

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could fall within the jurisdiction of the Consolidation Courts. It is not a case where the document has actually to be set aside before it can cease to have any legal effet. In other words, only in relation to a voidable transaction the Consolidation Courts will have no jurisdiction.

Awadh Kishore Tewary v. *The State of Bihar & ors. (1993); I.L.R. 72. Pat.* 912

2— Sections 3 and 4A ... ambit of ... Deputy Secretary of Revenue and Land Reforms Department by letter dated 16.7.1972 informing the Director of Consolidation to postpone the scheme of Consolidation in the entire State ... Section 3 .... power to cancel a notification. Whether confined to section 4A ... No notification under section 4A issued ..... direction of State Government contained in letter dated 18.7.1992 ... whether arbitrary and without jurisdiction.

The Deputy Secretary of Revenue and Land Reforms Department by letter dated 16th July, 1992 informed the Director of Consolidation. Bihar directing him to postpone the scheme of consolidation operation in the entire State of Bihar purported to be on the basis of a declaration to that effect made by the Chief Minister on the floor of legislative assembly.

From the scheme object and purport of the Bihar Consolidation of Holdings and Prevention of Fragmentation Act, 1956,

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hereinafter referred to as the Act, it has to be held that the Act is a self contained code providing for creation of new rights and obligations of the parties except in certain cases like adjudicative power on a pure question of title, the decision of the Consolidation authorities is final.

The power of State Government to cancel a notification under section 3 of the Act is confined to section 4A of the Act. No notification under section 4A of the Act has been issued. The impinged letter dated 16.7.1992 is not a notification under section 4A of the Act. The impugned letter also does not conform to the provisions of Article 162 of the Constitution. The State acting under the provisions of the Act acts as a statutory authority and it has to act within the four corners of the statute.

Held, that the State under its executive power has no jurisdiction to suspend the operation of a legislative act. The same can only be done in exercise of its legislative power.

Held, further, that the directives of the State as reflected in the impugned order dated 17.7.1992 is arbitrary and wholly without jurisdiction.

Bihar Rajya Adhivakta and ors. v. *The State of Bihar and Ors.* (1993) I.L.R. 72, Pat. 938

3— *Sections 26A and 35*, scope and applicability of ... suomotu exercise of revisional jurisdiction under section 35 - whether a

discretionary jurisdiction ... whether to be exercised within a reasonable time ... notifications closing the Consolidation proceedings under section 26A not issued for a long time - sumotu revisional jurisdiction. whether could be exercised.

Held, that in a case where the revisional authority considers it fit to exercise his suo-motu jurisdiction although no statutory period of limitation has been prescribed therefor, the remedy must be held to be a discretionary one and thus the sme should not be made available in case of great unexplaind delay. such a discretionary jurisdiction under section 35 of the Bihar Consolidation of Holdings and Prevention of Fragmentation Act, 1956, must be exercised reasonably which in turn embraces within its fold, exercise of jurisdiction within a reasonable, time.

Held, further, that where consolidation proceedings came to an end in 1976 there does not appear to be any jusifiable reasons as to why a notification under section 26A of the Bihar Consolidation of Holdings and Prevention of Fragmentation Act, 1956, closing the Consolidation operations in the unit had not been issued for such a long time. The persons who have acquired title in respect of a chak made in their favour cannot be divested of their title only because of latches and negligence on the part of the State of Bihar nor such a situation, authorises the Director,

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Consolidation, to exercise his suo-motu revisional jurisdiction.

Held, therefore, tht in such circumstances the discretionary-jurisdiction of the Director, Consolidation, under section 55 of the Bihar Consolidtion of Holdings and Prevention of Fragmentation Act, 1956, cannot be said to have reasonably been exercised.

Sheo Nandan Singh v.*The State of Bihar and ors. (1993) I.L.R., 72, Pat.* 895

Bihar Land Reforms (Fixation of Ceiling Area and Acquistion of surplus Land) Act, 1961, 1—Sections 2 (ee) and Explanation II (g) (K), 4 and 5 — unmarried daughter during the life time of her father, whether entitled to a separate unit .... Explanation II appended to section 2 (ee) ... whether confers any right, title or interest on any person or whether inserted merely by way of clarification.

Held, that, an unmarried daughter cannot be granted an additional uit during the life time of her father unless she is herself, a landholder either being a 'raiyat' 'under - raiyat' or Mortgagee' of land in question. A landholder must be a raiyat who in view of its definition as contained in section 2 (k) of the Bihar Land Reforms (Fixation of Ceiling Area and Acquisition of Surplus land) Act, 1961, must be primarily a person who has acquired a right to hold land for the purpose of cultivating it. As an unmarried daughter does not get any

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interest in the property during the life - time of her father, she being not a raiyat, could not be a landholder within the meaning of the provisions of the said Act and thus no separate unit can be alloted to her.

The Explanation II, appended to the definition of 'family' as contained in section 2 (ee) of the Bihar Land Reforms (Fixation of Ceiling Area and Acquisition of Surplus Land Act, 1961, is only explanatory in nature and does not control the main section. It merely provides that personal law of a person shall have nothing to do with regard to the composition of a 'family' The Explanation thus being not a substantive provision, does not purport to confer any right, title or interest upon a person who either in terms of the personal law governing the family or otherwise was not entitled to any interest there in. The aforementioned Explanation does not, thus, create any legal fiction. The same only clarifies that the personal law shall not be relevant for the purposes of determining the composition of the family for the purpose of the said Act and for not other purpose.

Sri Ram Prasad Ojha and ors. v. *The State of Bihar and ors. (1993) I.L.R. 72 Pat.* 152

Bihar Land Reforms (Fixation of Ceiling Area and Acquisition of Surplus Land) Act, 1961.

2—Section 2 (f) scope of ... tanks used for agricultural purposes, whether come within

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the purview of the definition of 'land' .... whether 'a pond or a ditch' is also included in the definition of 'land'.

Held, that there cannot be any doubt that a tank which is used for agricultural purposes, would come within the purview of the definition of the land as contained in section 2 -(f) of the Bihar Land Reforms (Fixation of Ceilings Area and Acquisition of Surplus Land) Act, 1961.

Within the inclusive definition of the 'land' is orchard, khamar, pasturage or forest land, and even land perennially submerged under water or the homestead of a land holder. The word 'even' was not used as an adjective to the word 'land' but is used for laying down emphasis to the word 'land' so as to convey the meaning of 'also'. Evenness of land perennially submerged under water has no relevance at all in the context of the interpretation of the word 'land' or the object or purpose of the Act. Even a hilly, rocky, sandy or forest land come within the purview of section 2 (f) of the Act.

Held, further, that the intention of the legislature is clear in as much as in terms of the definition of land the lands perennially submerged under water would not only bring within its purview a tank but also a pond or a ditch'.

K.N. Farms Industries (Pvt.) Ltd.. v. The State of Bihar and ors (1993). I.L.R. 72. Pat. 847

3— [section 5 (1)(iii) .. proceeding against the landholer .. transferees claiming on the basis of sales some having taken place prior to 22-10-1959 and others prior to 9-9-1970 .... Sales prior to 22-10-1959 whether come under the purview of the Act ... sales prior to 9-9-1970... proceeding under section 5 (1) (iii) whether bound to be initiated against the purchasers .... such proceeding not initiated—order and notification, whether liable to be set aside.

Where in a proceeding under the provision of Bihar Land Reforms (Fixation of Ceiling Area and Acquisition of Surplus Land) Act, 1961 (hereinafter referred to as the Act) the landholder filed objection claiming certain areas of land and stating that the rest of the area should be excluded from the draft statement prepared as having been transferred and the petitioners, filed writ application in the High Court, claiming that they have purchased on the basis of some sale deeds executed prior to 22-10-1959 and others prior to 9-9-1970, that is, the appointed day;

Held, that, so far as the deeds of sale which have been executed and registered prior to 22-10-1959 are concerned, they do not come under the purview of the said Act. So far as the deeds of sale executed and registered prior to 9-9-1970 are concerned, the lands covered thereby can be tagged with the land held by the landholder only in the event a proceeding

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under section 5(1) (iii) of the Act is initiated and finding is arrived at that such transfers had been made interalia with the object to defeat the provisions of the said Act. No such proceeding had been intiated as against the petitioner in the instant case. The impugned order and Notification-were, therefore, liable to be set aside.

Fullo Devi and others. v. *State of Bihar.* *(1993), I.L.R. 72, Pat.* 203

4— sections 10,11, (1) 32A and 32B .. sections 32A and 32B .. proceeding whether to be started afresh from the stage of section 10 .... section 32A ... effect of ... section 11 (1) ... notification issued under ... effect of.

In terms of both sections 32A and 32B of the Bihar Land Reforms (Fixation of Ceiling Area and Acquisition of surplus Land) Act, 1961 as amended by Bihar Land Reforms (Fixation of Ceiling Area and Acquisition of Surplus Land) Amendment Act, 1982, hereinafter referred to as the Act, the proceeding has to be started afresh from the stage of section 10 of the Act. By reason of section 32 A of the Act any appeal, revision, review or reference arising out of an order passed under section 8 of the Act doesnot abate.

Held, that the first return submitted by the land holder and/or earlier reports submitted by the concerned authorities are not

completely wiped off but in a given case the same may only be supplemented.

Held, further that the legislature delibrately and intentionally directed reopening of the proceeding from the stage of the section 10 of the Act and not prior thereto. In those proceedings in which notification under section 11A of the Act has been issued are not required to be reopened Had the intention of the legislature been that the proceedings shall have to be started afresh from the very beginning, it could have said so expressly.

It is, thus, clear that what is wiped off is the findings and orders in faour or against the landholder of the revenue and not the materials collected and informations furnished or gathered.

Bishun Rai & another v. *The State of Bihar & others (1993) I.L.R. 72 Pat.* 220

5— Section 15, sub-section (1) and subsection (3) ... provisions of section 15 subsection (1) ... notification under, during pendency of an appeal or revision, whether can be issued only with respect to surplus land of land holder with respect to which there is no claim or dispute ... section 15 subsection (3) .. ambit of.

Held, that a notification under subsection (1) of section 15 of the Bihar Land Reforms (Fixation of Ceiling Area and Acquisition of Surplus Land) Act, 1961, hereinafter referred to as the Act, can only be issued during pendency

of an appeal or revision in respect of such of the surplus land of the landholder in respect of which there is no claim or dispute or which is admitted by the land holder to be surplus. Once the State Government or the Collector, as the case may be, comes to know of the fact that any appeal o revision is pending, no notification under subsection (1) of the section 15 of the Act can be published acquiring surplus land of the landholders. Even if in a case where a notification under subsection (1) of section 15 of the Act has been published owing to ignorance of pendency of any appeal or revision, or possession of the surplus land taken by the State or the Collector, the same would be subject to any order passed on appeal or revision.

Subsection (3) of section 15 of the Act takes within its sweep of all such cases where possession had been taken over in terms of a notification under subsection (1) of section 15 of the Act either during pendency of any appeal or revision or otherwise.

Held, further, that the revisional authorities as also the Collector in the instant cases committed a serious illegality in publishing a notification under sub-section (1) of section 15 of the Act in view of the facts that at the relevant time revision applications were pending disposal before revisional authorities.

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Ram Kishore Narain Singh and others v. *The State of Bihar and others. (1993), I.L.R. 72. Pat.* 95

6— Section 15(1) and (3) ... surplus Land declaration of, in terms of section 15(1) and taking of position in terms of section 15 (3), whether subjected to any order to be passed by appellate or revisional authority.

It is now well settled that declaration of surplus lands in terms of section 15(1) as also taking of possession of lands which have been so declared surplus in terms of sub-section 3 of section 15 are subject to any order that may be passed by the appellate or the revisional authority.

Held, therefore, that in the present case in view of the order as contained in annexure 3, the notification issued under section 15 (1) of the Act has lost it's force and it will now be open to the Collector to consider the rival contensions of the parties afresh and pass a fresh order in accordance with law.

Birendra Missir and others v. *The State of Bihar and others (1993), I.L.R. 72, Pat.* 320

7— Section 16(3) ... pre-emption, right of ... purchaser himself becoming adjoining raiyat by subsequent sale— transfer, whether to be effective from the date of execution of the sale deed and not from the date of its registration ... application for premption whether maintainable.

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Where the land was sold on 15-6-1979 and the purchaser became an adjoining raiyat by virtue of a subsequent purchase by a registered deed of sale dated 29-2-1979 which was registered on 26-9-1979 and an application for pre-emption was filed in respect of the deed dated 15-6-1979 on 3-9-1979;

Held, that the application for pre-emption filed on 3-9-1979 was not maintainable as purchaser himself became an adjoining raiyat by reason of the registered deed of sale dated 29-8-1979 from the date of execution thereof and not from the date of its registration.

Mostt. Sakuntala Devi & others v. *The Stae of Bihar & other (1993), I.L.R. 72, Pat.* 1323

8— Section 16(3) scope of ... right of preemption... nature of ... transferee transferring his rihgt, title and interest in favour of third party prior to filing of application for preemption ... preemption in respect of second sale, whether and when to be claimed ... precedence... conflict between two Division Bench decisions... which to prevail.

An application for preemption in terms of section 16(3) of the Act should be filed by a person claiming himself to be adjacent raiyat or co-sharer of the vendor upon complying with the condition precedent therefor. Such an application has to be filed within three months from the date of registration of the deed in relation whereof the right of preemption is claimed. However, if prior to filing of the

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application for preemption, the transferee transfers his right, title and interest in favour of third party, the preemption in respect of the second sale deed has also to be claimed unless the subsequent transaction is held to be a sham and farzi one or is hit by the doctrine of lis pendens. The right of preemption is a very weak right which can also be defeated by a subsequent transfer unless the same is hit by the doctrine of lis pendens or the second transfer is held to be a sham and farzi one.

Held, therefore, that in the instant case as respondent nos.9 and 10 had executed the two deeds of sale in favour of the petitioners on 9.1.1974, i.e., prior to the date of filing of the pre-emption application which took place on 15.1.1974, the subsequent sale would not be hit by doctrine of lis pendens.

Held, further, that when there is a conflict between the two Division bench decisions, the earlier shall prevail.

Ram Briksh Yadav & another. v. *The State of Bihar & ors. (1993). I.L.R., Pat.* 829

Bihar Municipal Accounts Rules, 1928.... Rule 116 (a) ... provisions of .... not properly followed by Executive Officer of the Municipality ... propriety of huge amount of money spent in construction and repair of roads and drains by private contractors who were alloted work order in not proper compliance of the rule ... work order, whether could be quashed.

Wher the Executive Officer of Rosera Municipality alloted work orders for construction and repairs of roads and drains worth Rs. 25,00000/- with private contractors without proper publication of tender notice in local newspapers and even by notice in vernacular in public places in terms of Rule 116(a) of the Bihar Municipal Accounts Rules, 1928 hereinafter referred to as the Rules, was not done widely;

Held, that in the instant case, the action of the authorities in making allotment cannot be said to be fair. It was proper for the municipal authorities to have published the tender notice in local newspaper and/or by widely giving notice in vernacular in public places in terms of the Rules specially taking into consideration the cost of construction and repair of huge amount namely Rs. 25,00,000/.

Held, further, that the writ-petitioners cannot get any relief at this stage as there has been huge investment and construction work by the private contractors has already progressed so much that the said private contractors have also received advance of a good amount from the Municipality. Hence the writ-application so far as it relates to the prayer for quashing of the work order given to private contractors, cannot be allowed as. it would be against the public interest in asmuch as by inviting fresh tender for the same work the municipality will have to spend much more,

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as there has been steep rise in the prices of materials and cost of Labour.

Sudhir Prasdad Singh and others. v. *State of Bihar & ors. (1993). I.L.R. 72, Pat.* 1084

Bihar Priveleged persons Homestead Tenancy Act, 1947, and Rules framed thereunder—conditions precedent for grant of Basgit parcha .... procedures laid down under the rules whether to be followed-trespasser or squatter, whether can become a priveleged tenant.

Held, that, not only the conditions precedent prescribed for grant of Basgit parcha have to be fulfilled but also the procedures laid down therein under the rules and in particular Rules are required to be followed.

Held, further that a trespasser or squatter cannot become privileged tenant.

Deoraj Thakur v. *The State of Bihar and Ors. (1993) I.L.R. 72, Pat.* 1126

Bihar Nationalise Secondary Schools (Conditions of Service) Rules 1983-[1—rule 8 provisions of—assistant teacher in a nationalised secondary school .... Director of Secondary Education, authority of—to intiate departmental proceeding or to pass order of suspension .. Bihar Non-Government Secondary Schools (Taking Over of Management and Control) Act, 1981.

Under the provisions of the Act and the Rules, the Director, Secondary Education is the

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appointing authority in respect of the headmasters and assistant teachers of nationalised secondary school. Under Rule 6, the junior grade teachers belong to the district cadre and the District Education Officer is the controlling authority of this cadre. The senior and selection grade teachers form a divisional cadre and the Regional Director of Education is the controllig authority. The Headmaster form a State cadre and the Director is its controlling officer.

Held, therefore, that in the instant case in respect of the petitioner who is an assistant teacher in a nationalised secondary school, the Director of Secondary Education has no authority to initiate a departmental proceeding or to pass an order of suspension as contained in annexure-1 and the same must be quashed.

Yadunandan Prasad V. *The State of Bihar & Ors. (1993) I.L.R., 72 Pat.* 430

2— *Rules 6 (3) and 12* ... provisions of .... order passed by Director under the dictates of certain authorities having not been empowered in any way under the Act or the Rules, effect of— Bihar NonGovernment Secondary Schools (Taking Over of Management and Control) *Act, 1981.*

Rule 6 (3) of the Bihar Nationalised Secondary Schools (Conditions of Service) Rules, 1983 provides that the Headmasters of the

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Nationalised Secondary Schools will form a State cadre and the Director will be the controlling authority thereof. Rule 12 after its amendment provides that the transfer of headmaster/assistant teachers/employees will be effected by the Director, Secondary Education on the basis of the recommendation of the Establishment Committee constituted at the directorate level. In the present case the impugned order contained in annexture 1 itself shows that the order of transfer was passed by the director under the orders of some superior authority identified as administration.

Held, therefore, that as the impugned order was dictates of certain authorities who had not been empowered in any way under the Act or the Rules in relation to the transfer of the headmasters and accordingly the order is unsustainable in law and must be quashed.

Asnarfi Jha v. *The State of Bihar and Ors. (1993) I.L.R, 72, Patna.* 436

Bihar Non-Government Secondary Schools (Taking over of management and Control) Act, 1981,

Section 3 (1) and (3), scope and applicability of and goverment letter no. 832 dated 21-12-1982 issued by Education Commissioner, provisions of — school recognised and taken over after 2-10-1980 teacher untrained on the date of taking over of his school and acquiring requisite qualification subsequently— whether can claim a vested

right of recognition of his service like the teachers of schools taken over on 2-10-1980.

Where the management and Control of a school was taken over after the cut off date namely, 2-10-1980 and teacher though untrained at the time of such taking over has subsequently acquired the requisite qualification and, therefore, his services were not taken over by the State Government and as such, aggrieved by the aforesaid action of the State Government, the petitioner filed the present writ petiton:

Held, that, the petitioner cannot claim that like the teachers of the schools taken over on 2-10-1980 the petitioner has also a vested right of recognition of his services even if he was untrained on the date of taking over of the school.

Held, further, that on a plain reading of the provisions of Government letter no. 832 dated 21-2-1982 issued by the Education Commissioner, it clearly appears that the provisions for provisional recognition of the services of untrained teachers, who were under training on the date of taking over and payment of a stipend of Rs. 500/= per month was applicable only in relation to such schools which were recognised and has been taken over on the cut off date i.e, 2-10-1980. But the said provisions were not applicable to the schools which have been granted recognition after 2-10-1980 and have been taken over under section

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3 (3) to the Bihar Non-Government Secondary Schools (Taking over of Management and Control) Act, 1981. Para (Dha) clearly stilpulates that the services of untrained Teachers of the schools recognised after 2-10-1980 cannot be recognised except in relation to teachers in ancient subjects.

Surendra Kumar Singh v. The State of Bihar and others (1993) I.L.R. 72. Pat. 655

Bihar Panchayat Samitis and Zila Parishads Act, 1961.

Section 33 (2)— power of removal to be exercised by the State Government on conclusive finding in respect of charges.....absence of finding....order of removal, whether liable to be quashed.

Where the petitioner has been removed by the State Government from the office of Pramukh pursuant to powers conferred under section 33 (2) of the Bihar Panchayat Samitis and Zila parishads Act, 1961;

Held, that, the impugned order emoval has been passed by the State Government only by recording a prima facie opinion with regard to the charges in question and without recording any conclusive finding in respect of the charges levelled against the petitioner and, therefore, it was liable to be quashed.

Mangal Prasad Yadav v. The State of Bihar & other (1993). I.L.R. 72, Pat. 129

Bihar Pension Rules, -Rule 43(b), scope

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and applicability of....order of deduction of 5% from pension payable.....none of the two condition precedents mentioned in section 43(b) fulfilled...order, whether liable to be quashed.

Where by the impugned order of the State Government it was directed to deduct 5% from the pension payable to the petitioner;

Held, that the punishment with regard to dediction of pension can be appropriately taken only under Rule 43(b) of the Bihar Pension Rules if (i) any pecuniary loss has been caused to the Government because of the conduct of the petitioner, or (ii) if there is any finding in any departmental or judicial proceeding holding the pensioner guilty of grave misconduct. In the instant case, according to the finding of the Conducting Officer, in the departmental proceeding, no pecuniary loss was caused to the Government by the conduct of the petitioner, but there was negligence or carelessness on the part of the petitioner. Mere negligent or careless act on the part of an employee cannot in the normal course be said to be a misconduct much less grave misconduct. Thus none of the two condition precedents relevant for imposing the impugned penalty has been fulfilled in this case. The impugned order by which direction was issued for deducting 5% pension payable to the petitioner was, therefore liable to he quashed

Shamsul Bari v. The State of Bihar & ors. (1993). I.L.R. 72. Pat. 133

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Bihar Police Manual —[— Rule 726,— award of punishment — — — —period of three years, to be counted from the date of occurrence — — — —order refusing promotion/ confirmation, whether liable to be set aside.

Held, on reference to Rule 726 of the Bihar Police Manual, that the period of three years should be counted from the date of occurrence and not the date from the award of Punishment. Evidently the said Rule was framed so as to save an employee from suffering adversely from unnecessary delay in the departmental proceeding. As the award of punishment was no longer opertive the order holding that the petitioner was not fit for promotion or confirmation was passed on non-existent ground and as such it was liable to be set aside.

Jagannath Ram v. The State of Bihar and others. (1993), I.L.R. 72, Pat. 54

Bihar Sanskrit Education Board Act. 1981.

Sections 6, 11(4) and 22, scope and applicability of—absence of rules framed by the State Government and regulations framed by the Board—examination, whether can be conducted bythe Board—Chairman of the Board, whether has power to frame regulations under section 6.

Where an advertisement was issued by the Bihar Sanskrit Education Board for holding examination for the Madhyama Course in the

year 1993 as per the programme published in the advertisement and writ applications were filed for grant of permission to the students to take the examination and for directing the State Government to decide the matter regarding recognition of the institutions;

Held, that, in absence of rules framed by th State Government, and the regulations framed by the Board, it was not possible to conduct the examination by the Board and only after the rules and regulations are framed and notified, the Board shall proceed to hold examination, which, it is required to hold in accordance with the provisions of the Bihar Sanskrit Education Board Act, 1981, rules and regulations.

Held, further that the Chairman of the Bihar Sanskrit Education Board is not authorised to frame regulations under section 6 of the Bihar Sanskrit Education Board Act, 1981, in exercise of his emergency power under section 11(4) of the Act. Framing of the regulations by the Chairman of the Board is clearly impermissible and illegal because though he may pass necessary orders in exercise of the powers vested in the Board, such powers must be necessarily exercised in the discharge of executive functions and not in the discharge of power which are legislative in character. Neither the Board has power to delegate such

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functions to any member of the Board, nor the Chariman has a right to exercise those powers by himself.

SriRam Kishore Pandey Sanskrit Prathmik Sah Madhyamik Balika Vidyalaya, Fatahpur, Shivhar Sitamarhi and others v. The State of Bihar & others (1993) I.L.R. 72, Pat. 924

Bihar School Examination Board's Regulations—Regulation 1 of Chapter IV—provisions of—School whether bound to maintain and produce the records of student sent up by the school for apearing at Secondary Examination before the Bihar School Examination Board—non production of records before the Bihar School Examination Board — effect o

The Headmaster of Sri Siyaram Singh Yadav High School Shahpur Daudpur sent application along with registration fee for registrationof 773 student sent up by the School to the Bihar School Examination Board, the hereinafter refter referred to as the Examination Board, but the Examination Board issued registration numbers to only 211 students. The Board had called upon the Headmaster to produce the necessary records before the Examination Board so that the Board could satisfy itself about the number of regular student of the school but the records were not produced before it despite reminders. Sub Divisional Officer Education had reported that there were only 149 regular students in

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the school. Consequently the Examination Board refused to grant registration numbers to all students.

Held, the while performing its duty, the Examination Board can insist upon the school to maintain records in terms of Regulation 1 of Chapter IV of Bihar School Examination Board's Regulation and produce them before the Examination Board whenever required. The School is bound to produce such records before the Examination Board.

As the school did not furnish the necessary information and produce the necessary records before the Examination Board, consequently the examination Board was not satisfied that all the candidates were qualified in terms of Regulation 2 of Bihar School Examination Boards Regulations.

Ram Babu Singh and Anr. V. The Bihar School Eamination Board (1993) I.L.R. 72. Pat. 1097

Bihar Service Code— Rule 58 — — — — — — Scope and applicability of — — — employee ready and willing to work on the post but prevented from doing so — — — Rule 58. whether applicable — — — employee. whether entitled to monetary benefits.

Rule 58 of the Bihar Service Code is a general rule. The said rule is applicable in a case where a Govt. Servant does not join the post of his own.

Ordinarily the said rule will have no

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application in case where an employee although is ready and willing to wok on the post is prevented from doing so.

Held, in the instant case, the petitioners were denied promotion unjustly. They had to approach this court and the writ application was allowed, despite the Judgment of this court, the orders of promotion were not issued for a long time. The petitioners have to file an application for initiation of a proceeding under the Contempt of Courts Act and only thereafter the order of promotion was issued. It is therefore, clear that the petitioners are not to be blamed for not being able to work on a higher post although persons junior to them had been promoted. Consqeuently, the authoritic concerned are liable to pay the salary allowance and other benefits with effect from the date when they were promoted to the Higher post.

Rana Raghunath Pd. Singh & another v. The State of Bihar & others (1993), I.L.R. 72, Pat. ..93

Bihar Shops and Establishmet Act, 1953, (Section 2 (4) and 26 (2), Factories Act, 1948, sections 2 (1) Constitution of India, Articles 226 and 227....scope and applicability of...words 'worker' and 'employee' as contained in section 2(1) of Factories Act, 2(4) of the Bihar Shops and Establishment Act respectively...meaning of...an employee having no concern with the performance of any duty

which a worker under the Factories Act is required to perform....complaint filed under Section 26 (2) of the Shops and Establishment Act...maintainability of...question whether a person is a worker within the meaning of the Factories Act...nature of...exercise of Supervisory jurisdiction under Articles 226 and 227 of the Constitution of India....High Court....interference by.

Where an employee had nothing to do with the handling of raw materials being the subject matter of manufacturing process in any capacity thereof, he is not the worker within the meaning of section 2(1) of the Factories Act and thus he is not excluded from the provision of definition of 'employee' as contained in section 2(4) of the Shops and Establishment Act. Thus, any person who is not a 'worker' within the meaning go of the Act, although employed in a factory would squarely fall within the purview of definition of employee contained in section 2(4) of the Shops and Establishment Act.

Held, therefore, that in the instant case taking into consideration the nature of the duties performed by respondent No.3 the respondent No. 2 must be said to have rightly held that he is an employee within the meaning of the provision of the Bihar Shops and Establishment Act and thus his complaint petition was maintainable.

Held, further, that the question as to

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whether a person is a worker within the meaning of the Factories ACt or not is essentially a question of fact.

The High Court in exercise of its supervisory Jurisdiction under Articles 226 and 227 of the Constitution of India is not concerned with the correctness or otherwise of the decision itself, but is concerned with the correctness of the decision making process. Further sufficiency of material is not a ground for interference of the High Court with the finding of fact arrived at by a statutory authority in exercise of its jurisdiction in absence of any case that the said finding is either perverse or contains errors apparent on the face of the record. Such findings of fact cannot be interfered with by the High Court in exercise of its extra ordinary jurisdiction under Article 227 of the Constitution of India.

The Managing Director, Bihar State Industrial Development Corporation Ltd. and Anr. V. The State of Bihar and ors. (1993), I.L.R. 72. Pat. 1196

Bihar State Housing Board (Management and Disposal of Housing Estates) Regulations 1983 framed under the Act by the Bihar State Housing Board—Regulation 10, provisions of—providing the manner in which allotments are to be made by the Board—allotment by the Government and the Board, whether must be made in accordance with the Regulations...Government directing the Board to

make allotment, validity of...where allotment is to be made by draw of lots....allotment must be made by following that procedure alone notice regarding total number of dwelling units available and number of units for allotment under each category as specified in Regulation 10, whether obligatory.

Whe Bihar State Housing Board (Management and Disposal of Housing Estates) Regulations 1983 framed under the Act by the Bihar State Housing Board provide the manner in which allotments are to be made by the Bihar State Housing Board, neither the Bihar State Housing Board or the Government can exercise power contrary to the provisions of the Regulations. The Scheme of the Regulations takes into consideration different categories of applicants and provides a quota for each category. Regulation 10 provides a quota for the allotment of dwelling units, flats or house sites. In it, apart from the general quota and the quota for schedule castes and schedule tribes, retired Government servants and defence and ex-defence personnel, provision has been made for allotment by the Government directly of dwelling units in cases having special circumstances. A quota of 5% is reserved for the Government which it can allot directly in special circumstances. Similarly 2% of the dwelling unit can be alloted directly by the Board on compassionate ground in favour of helpless widows or disabled persons within this quota. The Government and the Board in their

discretion can only allot 5% and 2% of the dwelling units respectively on compassionate ground. Where such elaborate provisions have been made, it would not be permissible to read in favour of the Government or Board any further discretion in the matter. Apart from the cases envisaged by the Regulations, the government and the Board cannot make allotment on any other ground. In the instant case, if the Government were so inclined and thought that the case of respondent no 5 had special circumstances and that allotment should be made on compassionate ground, the Government could have made the allotment with in the 5% quota availables to it. The Governmentdid not purport to do that. On the other hand it compelled the Board to make the allotment in favour of respondent no. 5 of an independent dwelling unit. The Board is equally bound by the Regulations framed by it under the Act. The Government has no power to direct the Board to make an allotment in an illegal manner. Inter-ference by the Government with the exercise of power by the Board is unwarranted and illeg . The allotment by the Government as well as by the Housing Board must be made expressly in accordance with the Act and the Regulations.

Held, therefore, that the Bihar State Housing Boards has erred in law in alloting an independent dwelling unit to respondent no. 5 and as such, its decision to that effect must be quashed

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Held, further, that where allotment is to be made by draw of lots, allotment must be made by following that procedure alone, and no interference either by the Government or the Board is warranted. If any irregularity is committed in the draw of losts by the committee concerned, that may be brought to the notice of the Board for appropriate order under section 13(4) of the Act.

Held, also, that it is obligatory, having regard to the quota fixed by the Regulations, that before the allotment of dwelling units are made the notice must clearly mention total number of units available and the number of units for allotment under each category, so that there is no interpolation later on by changing the number of units available. The quota system cannot be worked unless the total availability of dwelling units is first notified. The Board is, therefore, directed to follow this direction in all future allotments.

Surya Kant Choudhary v. The State of Bihar Through the Chairman, Bihar State Housing Board & others. (1993). I.L.R. 72 Pat 142

Bihar Trade Articles (License Unification) Order, 1984. —fixing storage limit for cement—no notification issued by State Government....prosecution for violation of the order...legality of.

Where no notification was issued by the State Government fixing storage limit for cement by the 10th March, 1989;

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Held, that the unification order was not workable and the prosecution of the petitioner for violation of the provision of the Unification Order is illegal and bad in the eye of law as he did not violate any provision of the Unification Order.

Upender Choudhary v. The State of Bihar and ors. (1993) I.L.R., 72, Pat. 1002

Bihar and Orissa Excise Act, 1915- section 7(2) (g).... provision of ... Bihar and Orissa Excise Manual Volume III ..... rule 47 of the instructions of Board of Revenue ... ambit of ... power of disciplinary action including suspension delegated by Excise Commissioner to the Suprintendent of Excise ... order of suspension passed by Superintendent of Excise against the Writ-petitioner.... legality of.

The Commissioner of Excise has exercised his power conferred upon him in terms of section 7 (2) (g) of the Bihar and Orissa Excise Act, 1915 read with the Rule 47 as contained in the instructions issued by the Board of Revenue as contained in the Bihar & Orissa Excise Manual Volume 3, by delegating his disciplinary power to the Superintendent of Excise.

Held, that, in view of the facts that the Commissioner of Excise is entitled to delegate his power to the authorities mentioned therein and further in view of the fact that Rule 47 of the Board's instruction clearly stipulates that the Commissioner of Excise has delegated the

said power, there cannot be any doubt that the Superintendent of Excise has the jurisdiction to pass an order of suspension as against the writ petitioner. As the disciplinary authority of the writ petitioner, the Excise Superintendent has the right to place him under suspenion during the pendency or in contemplation of a departmental enquiry.

Tausif Ahmad Khan v. The State of Bihar and ors. (1993) I.L.R. 72, Pat. 1609

Caltex (Acquisition of Shares of Caltex oil Refining (India) Ltd And Undertakings In India of Caltex (India) Ltd. Act, 1977— Section7 (3), scope and applicability of expression on the expiry of the term of any lease', meaning of....whether applies to a case of forfeiture of lease for breach of the terms of tenancy ..... lease, whether could be statutorily renewed ..... Transfer of property Act, 1882 section 114—relief against forfeiture, when can be refused.

Held, that it is true that section 7(3) of the Caltex (Acquisition of Shares of Caltex oil) Regining (India) Ltd And of the Undertakings In India of Caltex (India) Ltd (hereinafter referred to as the (Take Over Act') used the expression on the expiry of the term of any lease which is different from the expression 'by efflux of time limited' in a lease used in clause (a) of section 111 of the Transfer of Property Act. However, in substance the two expressions convey exactly the same meaning and expiry of the

term of lease' is used to mean a determination of lease by efflux of time specified therein.

It is plain that a right under section7 (3) of the Take over Act would accrue only after a lease had survived for the entire period stipulated therein with the lesee faithfully observing the terms and conditions contained therein. It may be noted that there are several ways for the determination of a lease; it may determine by efflux of tme limited there by (vide section 111 (a) of the Transfer of property Act) or it may determine by forfeiture (Vide. clause (g) of section 111 of the *T.P.* Act). Section 7(3) of the Take over Act contemplates a statutory riht for renewal only in case of the expiry of term of the clause, that is to say. when a lease is determined in terms of clause (a) of section 111 of the *T.P.* Act. In case the lease is determined in any manner other than by efflux of time., Section 7(3) of the Take Over Act shall have no application and certainly not in case of forfeitute of lease for breach of the terms of tenancy.

Held, further, on the facts and circumstances of the case, that the action of the defendants lessees in not making payment of the monthly rent to the plaintiffs-lessors was wholly unreasonable, without any justification and calculated to harrass the plaintiffs and thus, the defendants-lessees by their conduct have thoroughly disentitiled themselves to any

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relief against forfeiture in terms of section 114 of the Transfer of Property Act.

Hindustan Petroleum Corpration Ltd. V. Chandra Prakas Bubna & ors. (1993). I.L.R. 72. Pat. ...102

Code of Civil Procedure, 1908—[1— Order 1 Rule 10 partition suit — final decree proceeding — whether in continuation of the main proceeding in the suit...application for addition of party, whether can be filed... collusive exchange of allotment in the final decree proceeding to the detriment of purchaser's right, title and interest... stage of final decree proceeding whether an appropriate stage for addition of party in the suit— order rejecting the prayer for addition of party, whether liable to be set aside.

Where, after passing of the preliminary decree in a partition suit an application for being added as a party was filed in the final decree proceeding in the suit by the petitioner having learnt about the collusive exchange of the allotment of lands between the plaintiffs and the defendents as a result of which the lands which had been alloted to the Patti of defendants, including the lands which were purchased by the petitioner from them were sought to be allotted to the Patti of the plaintiffs in exchange for such lands which had been originally allotted to the plaintiffs' Patti and with which the petitioner had no concern;

Held, that, the final decree proceeding in

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a partition suit is in continuation of the main proceeding in the suit and, therefore, the court is competent to implead any party until the final decree is signed. In the event of the lands in question being allotted to the share of the defendants, who are vendors of the petitioner, the right title and interest of the petitioner, would not have fallen in jeopardy; but as a result of the collusive exchange of allotments, the lands in question were sought to be allotted to the share of the plaintiffs, who are strangers in so far as the petitioner's right and interest are concerned and, therefore, injustice would be caused to the petitioner who is purchaser for lawful consideration and, as such, this was certainly an appropriate stage for making a prayer for addition of a party in the suit. The order of the court below rejecting the application for addition of a party in the suit was, therefore, liable to be set aside.

Mohan Himatsinghka v. Mrs. Joyce Roul and ors. (1993) I.L.R. 72, Pat. 160

2—[Order 18, Rule 4 and Order 19, Rule 1— taking of affidavit in evidence—reasons therefor, whether to be assigned by the Court— affidavit sworn before Executive Magistrate— no order passed by Collector prior to getting the same admitted in evidence — effect of.

In terms of Order 19, Rule 1 of the Code of Civil Procedure, before an affidavit is taken in evidence reasons therefor have to be assigned by the Court. Adduction of oral

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evidence as contemplated under Order 18, Rule 4 of the Code of Civil Procedure is the ordinary rule. Admission of evidence by way of affidavit is an exception to the rule. Thus, before a party can be permitted to lead evidence by filing an affidavit, reasons therefore have to be assigned by the Court concerned. In the present case, the affidavit was sworn before the Executive Magistrte. The petitioners did not contend that prior to getting the said affidavit admitted in evidence, any order was passed by the Collector.

Held, therefore, that no reliance could be placed upon the said affidavit by the Collector.

Mosit. Jankt Thakurain and Ors. v. The Additional Member Board of Revenue, Bihar, Patna & others. (1993) I.L.R. 72 Pat. 1448

Code of Criminal Procedure, 1973 — *[1— section 311* scope and applicability of....Court deciding to examine witnesses as court witnesses in exercise power under section 311,...power to be exercised only for just decision of the case....court not concerned whether evidence would support the prosecution or the defence.... whether prosecution or defence has been negligent is of no relevence...no limitation of time...power to be exercised at any stage before judgment...court not to clog the lacuna in the prosecution case or bolister the defence case.

Held, that, it cannot be disputed that the discretion vested in the court by section 311 of

the Code of Criminal Procedure is in very wide terms. It authorises the Court at any stage of the trial to summon any person an a witness or examine any person in attendence, though not summoned as a witness, or recall or re-examine any person in attendence, though not summoned as a witness, or recall or re-examine any person already examined. The power vested in such wide terms has to be exercised only if it appears to the court that the evidence of such person is essential to the just decision of the case. The discretion so vested in the court has as its objective the achievement of a just decision of the case. The court is not concerned whether the evidence, if examined, would support the prosecution or the defence. Its anxiety is to arrive at the truth so that there is a just decision. The fact that the prosecution or the defence has been negligent, is of no relevance. Even if the prosecution fails to examine a material witness, the court may examine such a witness as a court witness if it appears to it that the evidence of such a witness is essential to the just decision of the case. The section does not put any limitation of time on the exercise of the power. At any stage, before the judgment is delivered, the court may exercise the discretion vested in it under section 311 Cr. P.C. It is therefore, not of much significance that the statement of the accused had been recorded under section 313 Cr. P.C. The court can examine such evidence at any stage before it. delivers it judgement. It

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should neither attempt to clog the lacuna in the prosecution case, nor to bolister the defence case. Obviously, if such evidence is examined it may go to support the case of the prosecution or the defence. From that it should not be inferred that the court acted with a view support the prosecution or the defence case.

Held, therefore, that in the instant case, the court decided to exercise the power vested in it under section 311 Cr. P.C. not with a view to clog the lacuna in the prosecution case but only with a view to arrive at the truth so that there could be a just decision of the case.

Bishwanath Sah v. The State of Bihar (1993) I.L.R. 72 Patna. 442

?— ***Section 319,*** scope and applicability of — persons named in first information report but not sent up for trial by the police — whether can be treated as accused in the case so that section 319 Cr. P.C. will not be applicable—protest petition filed by the informant against those persons and treated as complaint dismissed—effect of—order summoning such persons for trial under section 319 Cr. P.C. — whether liable to be set aside.

Where, though the petitioners were named in the first information police did not submit charge sheet against them and thereafter on a protest petition filed by the

informant for taking recognizance against the petitioners as well the trial court rejected the protest petitions and at the trial, after the prosecution witnesses had been examined the Court found that there were serious allegations against the petitioners and their complicity in the offence was supported by evidence examined at the trial, and the trial court exercising its jurisdiction under section 319 of the Code of Criminal Procedure summoned the petitioners for trial:

Held, firstly, that (i) the petitioners came within the category of the words any person not being the accused occurring in section 319 of the Code of Criminal Procedure and thus the court had ample power to proceed against the petitioners under section 319 Cr. P.C. and secondly (ii) that the dismissal of the protest petition filed by the informant and treated as a complaint did not deter the court from exercising its power under section 319 Cr. P.C. Dismissal of a complaint, even before summoning of the accused, does not amount to a discharge. Moreover, such a person is not the accused in the case initiated on police report. Further the case of such a person does not stand on a higher footing than that of a person against whom a summon was issued, but later quashed by the High Court. The mere fact that the proceedings have been quashed

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against any person will not prevent the court from exercising its discretion under section 319 of the Code if it is fully Satisfied that a case for taking cognizance against him has been made out on the additional evidence led before it.

Held, therefore, that the impugned order cannot be set aside on the ground that the court has no jurisdistion to pass that order under section 319 of the Code of Criminal Proedure in the basis that persons named in the first information report and not sent up for trial by the police must be treated as accused fn the case or on the ground that a complaint against them was dismissed.

Chandra Mauli Singh and another v. The State of Bihar and another (1993) I.L.R. 72. Pat. 621

3— Section 207, *scope and applicability of*.... duty of the Magistrate to furnish police papers to the accused without delay .... case committed to the court of session for trial ... charges framed against the accused after a lapse of about five years and nine months ... delay, whether depicts failure of the persons who run the system.

Section 207 of the Code of Criminal Procedure, 1973, enjoins upon the Magistrate the duty to furnish without delay to the accused, free of cost, a copy of documents mentioned therein, commonly referred to as the

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police papers. These include the police report, the first information report and also the statements recorded under sub-section (3) of section 161 Cr. P.C. The court cannot absolve itself of the responsibility cast upon it by section 267 Cr. P.C. by blaming the police for not supplying the documents to it. The duty enjoined on the judicial officers by section 207 of the Code is not a mere formality, but the duty cast with a purpose.

Held, therefore, that in the instant case after cognizance was taken, there was a delay of seven years and seven months in supply of police papers. This was solely on account of the court's failure to perform the duty cast upon it by section 207 of the Code.

Held, further, that the subsequent delay of about five years and nine months in framing of the charges after the case had been committed to the court of session for trial shows that the delay really is not such due to failure of the system as the person who run the system.

Brahmdeo Paswan & ors. v. The State of Bihar (1993), I.L.R. 72, Pat. 888

4—Section 439, subsection (2)—application for cancellation of bail by the first informat—Sessions Judge, whether to be moved at the first instance before moving the High Court.

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Where the Sessions Judge as well as the High Court have concurrent jurisdiction under sub-section (2) of section 439 of the Code of Criminal Procedure for cancellation of bail but the petitioner moved the High Court for cancellation of bail;

Held, that the petitioner should move the Sessions Judge for cancellation of bail at the first instance and he may move the High Court after exhausting his remedy in the courts below. When, under the law of the land, remedy is available in a lower court the petitioner should seek his remedy in such lower court before moving the higher courts.

Upendra Singh v. The State of Bihar & ors. (1993). I.L.R., 72 Pat. 882

Consent decree .... nature of .... whether binding on a person who is not a party thereto... Co-sharer....acquisition of indefeasible title... ouster of other co-sharer whether to be pleaded and proved.

It is well known that a consent decree is merely an agreement between the parties to the suit with the seal of the court superadded to it. A consent decree can be questioned on the same grounds upon which an ordinary agreement can be questioned. An agreement merely binds the parties thereto and not others.

Held, therefore that in the present case in that view of the matter, in law, the

purported consent decree passed did not bind the petitioners and/or their predecessor-in-interest who were not parties to the suit and as such the same was a nullity and inoperative so far as the petitioners are concerned and it was not necessary for them to file a suit for setting aside the said decree inasmuch as it is open to them to question the validity thereof even in a collateral proceeding.

Held, further, that in order to lay a claim with regard to their shares the petitioners were not obliged to show that they were in actual physical possession of the properties. A co-sharer can claim exclusive title to the property for a period of 12 years but, in order to acquire indefeasible title in relation thereto, ouster of the other co-sharers had to be pleaded and proved.

Kanhaiya Prasad Sah and ors. v. The State of Bihar and ors. (1993). I.L.R. 72. Pat. 325

Constitution of India - Article 12- applicability of... National Co-operative Union of India .....whether a State within the meaning of Article 12— whether subject to writ jurisdiction.

Held, that, the National Coperative Union of India is neither a State nor an instrumentality or an agency of the State, or an authority within the meaning of Article 12 of the Constitution of India and is, therefore,

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not subject to writ jurisdiction of the High Court.

The National Co-operative Union of India functions under its own bye-laws through the Governing council and Executive Committee constituted under the bye-laws. The functions of the co-operative Union are independent and it does-not have any association with the Governmental function or with the business of the Government.

Smt. Lilawati Kumari v. National Co-Operative Union of India & anr. (1993) I.L.R. 72, Pat. 1103

Constitution—[1— Articles 12 and 226 ... Article 12 .... Indian Farmers Fertilizers Cooperative Limited, whether a "State" or an "Authority under Article 12 .... whether amenable to writ jurisdiction .... MultiState Co-operative Societies Act, 1984...Section 74 alternative remedy available to writ petition under .... writ application, maintainability of. Where the Bihar State Co-operative Marketing Union Ltd. hereinafter referred to as Biscomaun, the petitioner, incurred disqualification as per Rule 19 of th Rules framed under Multi State Co-operative Societies Act, 1984 leading to the passing of the impugned resolution by Indian Farmers Fertilizer Co-operative Ltd, hereinafter referred to as IFFCO. to the effect that Biscomaun will forfeit their right to send their nominee on the Board of 'IFFCO'and Biscomaun sought the

quashing of the aforesaid resolution by this application;

Held, that from a perusal of the Bye-Laws of IFFCO it is clear that IFFCO is neither a "State" nor an "Authority" under Article 12 of the Constitution and is thus not amenable to the writ jurisdiction of the High Court. From the said Bye-Law it appears that the Government of India has sub-scribed only a small part of the capital and that can also be retired. The Government of India has no control over the management of IFFCO. In no way the function of IFFCO can be said to be function of a State.

In the instant case it can not be said that while passing the impunged resolution, any duty was imposed on IFFCO which can be said to be of Public nature or involving people at large. High Court in exercise of its power under Article 226 of the Constitution cannot adjudicate upon such a dispute by entertaining a writ application under Articles 226 of the Constitution.

Held, further, that the remedy of the petitioners lies under section 74 of the Multi State Co-operative Societies Act, 1984 which is equally convenient remedy available to them; hence they cannot maintain this writ application.

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Bihar State Co-operative Marketing Union Ltd. and anr v. Indian Farmers Fertilizers Co-operative Ltd. and Ors. (1993).I.L.R. 72 Pat. , 1372

2— Articles 14, 21 and 226 High Court, whether can entertain and examine the question whether the allegations made in the First Information Report constitute an offence under the Terrorist and Disruptive Activities (Prevention) Act, 1987 .... such question whether can be determined only by the designated court ..... reference to violation of provisions of section 3(1) of the Act in the written report whether unwarranted and uncalled for.

Held, that, the High Court, under Article 226 of the Constitution of India, can certainly entertain and examine the question whether the facts alleged in the first information report constitute the offence under the Terrorist and Disruptive Activities (Prevention) Act, 1987, or not and, particularly, when there is a real threat to the infringement of fundamental rights under Articles 14 and 21 of the Constitution of India. such, question cannot be determined only by the designated Court.

Held, further, that from a bare reading of the allegations made in the written report, it can safely be said that absolutely no allegation has been made so as to constitute the offence under the provisions of the Terrorist and Disruptive Activities (Prevention) Act, 1987, and

as such the Investigating officer is directed to treat mentioning of violation of section 3(1) of the Act as un-warranted and uncalled for.

Santosh Kuamr Singh v. The State of Bihar and as (1993) I.L.R. 72, Pat. 1054

3— Articles 14 and 30 (1)... provisions of... Rules framed under Bihar Non-Government Physical Training College and Non-Government Teacher's Training Colleges and Non-Government Primay Education Colleges (Control and Regulation) Act, 1982 — Rule 3 (1)—ambit of—rule, whether provides for grant of affiliation to Teachers Training College and not to faculty of a College .... provision of the rule whether violative of Articles 14 or 30 (1) of the Constitution.

Where the writ-petitioner, a College declared by State Government to be a minority institution which was affiliated upto degree standard in faculty of Arts and Science, applied for grant of affiliation in the faculty of Education upto B. Ed. standard but the same was rejected by the State Government;

Held, that rule 3(1) of the Rules framed under Bihar Non-Government Physical Training Colleges and Non-Government Teacher's Training Colleges and Non-Government Primary Teacher's Education Colleges (Control and Regulation) Act '1982, which requires that affiliation will be granted only to Training

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Colleges and not to faculties of a College, is based on sound principle and does not offend the right of citizems under Article 14 of the Constitution. It also does not offend Article 30 (1) of the Constitution, since the rule does not place any fetter on the right of the minority to establish and maintain educational instituitions of their choice. The rule, without offending the minority character of the institution, and without imposing conditions which would involve surrender of the right guranteed under Article 30 (1) of the Constitution as a condition for the grant of affiliation, lays down a regultion which is conducive to attaining high standard of teaching and training and academic brilliance. The vailidity of such a rule must be upheld both on the touchstone of Article 30 (1) and Article 14 of the Constitution.

Zakia Afaque Islamia College, Siwan v. The State of Bihar & ors. (1993) I.L.R. 72. Pat. 1411

4—Article 215 ... proceedings in contempt .... Judicial directions not complied withby a staff of the High Court—Constitutional position of the Chief Justice vis-a-vis the other Judges of the High Court ... jurisdiction of the High Court Judges, whether can be curtailed by the Hon'ble the Chief Justice ..... High Court being a Court of Record .. whether has ample jurisdiction to punish any one for its contempt apart from the provisions of Contempt of Couts Act, 1971 ... the words all matters relating to Corporaion/Boards' in the notice of allocation of business to the Bench by

Hon'ble the Chief Justice, whether wide enough to cover the writ case mentioned before the Bench by the learned counsel for placing it for admission before that bench— Court allowing the prayer...Court's order not obeyed... action of the contemner; whether amounted to blocking the course of administration of Justice.

Where different subjects were put under specified groups for taking up Admission of Constitutional cases by the Specially constituted Benches by the Hon'ble the Chief justice under Rule 10-A of Chapter II of the Rule of the Patna High Court and it was directed by Hon'ble the Chief Justice that the cases should be mentioned for appropriate orders only before the Bench which has been assigned with the subject in the respective groups and on being mentioned by the learned counsel it was ordered by a Bench concerned with subjects of Group no. 7 for putting up a writ case for admission but the office failed to obey the command on the pretext that writ case relate to Group II which was not correct and the Bench accordingly, initiated proceeding in contempt invoking Article 215 of the Constitution of India against the contemner, who was the Deputy Director of Computer, High Court, Patna and the contemner took the stand in the proceeding that he was instructed by the Authority not to attend the directions made by Court which are not in seision of the subjects and shall not abide by those directions;

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Held, that, a writ proceeding cannot be converted into a proceeding of a civil suit or an application under the Arbitration Act and extraordinary jurisdiction of the High Court under Article 226 of the Constitution of India cannot be excercised for determining question arising out of the Contractual rights or obligations of the respective parties under a contract.

Ashok Kumar Chaudhary v. Hindustan Petroleum Corporation Ltd. and others. (1996), I.L.R. 72, Pat. ..41

6—*Article 226*— writ application challenging the action of the Principal filed— interim order passed allowing the petitioner to attend classes — writ application subsequently withdrawn — interim order, whether stands vacated —petitioner, whether relegated to the same position as prior to the filing of the writ application — subsequent writ application filed for issue of direction to the Principal to allow the petitioner to take the examination — relief, whether can be granted.

Where the petitioner was debarred from taking the course by the Principal of the Teachers' Training College and she filed a writ application against the said order of the Principal and in that writ application an interim order was passed by the High Court permitting her to attend her classes and thereafter the said writ application was

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withdrawn by the petitioner and the present writ application has been filed again for issuance of a direction to the Principal to allow the petitioner to fill up the form taking the examination to be conducted by Bihar Vidyalaya Pariksha Samiti for the session 1989-91;

Held, that any interim order that may have been passed by the High Court was subject to the ultimate result of the writ application. When the writ application was itself withdrawn, the interim order stood vacated and consequently the petitioner was relegated to the same position in which she was immediately prior to the filing of the writ application. It would be erroneous to contend on behalf of the petitioner that the writ petition become infructusous and so it was withdrawn. Therefore, the disability which she may have incurred, continued thereby disentitling her to continue the course, and consequently the right to appear at the examination.

Yasoda Devi Jha v. The State of Bihar & ors. (1993), I.L.R., 72, Pat. 908

7— *Article 226*— writ petitioner found guilty of committing fraud — High Court whether to exercise its discretionary jurisdiction in his favour — appellate order a nullity, whether that was a nullity and without jurisdiction was sufficient.

A disciplinary proceeding was initiated against the writ petitioner a class III of Bihar

State Road Transport Corporation and his services were terminated with effect from 24-10-1968 as he was found guilty of the offence of allowing ten passengers to travel without tickets in the bus.

Subsequently the writ petitioner was reinstated by order dated 15.9.1988 passed by the Chief Administrator, the appellate authority, and the writ petitioner rejoined his service The Chairman-Cum-Managing Director of Bihar State Road Transport Corporation terminated the service of the writ petitioner by his order dted 11.11.1992 by which he cancelled the order of the appellate authority dated 15.9.1988 holding that the appellate order was bad as it was obtained by fraud 20 years after termination of his service.

Held, that in view of the finding that fraud had been practised by the writ-petitioner in collusion with the appellate authority in obtaining favourable order although in fact no appeal was preferred by the writ-petitioner, the appellate order is a nullity and hence in relation to such an order no specific order was required to be passed, but merely a declaration that the appellate order was without jurisdiction and thus a nullity.

Held, further, that, in the facts and circumstances of the case andaparticularly in view of the fact that the writ-petitioner has been found guilty of committing fraud, this High Court in its writ jurisdiction cannot

exercise its discretionary jurisdiction in favour of the writ-petitioner.

Prayag Prasad Gupta v. The Chairman-Cum-Managing Director, Bihar State Road Transport Corporation. Sultan Palace, Bihar at Patna & ors. (1993), I.L.R. 72, Pat. 1387

8— Articles 226 and 227—applications under—whether can consider the sufficiency of reasons assigned by the collector under section 48E(1) of the Bihar Tenancy Act., 1885—Section 48E(1) provision of.

The Collector in applications under 48E(1) of Bihar Tenancy Act, 1885 hereinafter referred to as the Act, while considering large number of cases on similar point gave opportunity to the landlord also before arriving at its finding as to whether the applications should be enteratined or not.

Held, that the High Court while exercising its jurisdiction under Article 227 of the Constitution, cannot consider the sufficiency of reasons assigned by Collector under the Act.

In passing the impugned order under Section 48E of the Act, the Collector has neither committed any illegality, or irrationality.

Sukhdeo Paswan, and others v. The State of Bihar & ors. (1994). 1132

9— Articles 226 and 227— provisions of — entries in survey Records published in 1970 — writ — petitioner taking no steps

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questioning the entries therein — whether can be challenged by a writ application under Articles 226 and 227.

Entries in the survey settlement records of right were published in 1970 and the writ-petitioners did not take any step questioning the entries either by filing a proper suit or on an application under the provisions of Bihar Tenancy Act, 1885, or by filing a duly constituted suit in the civil courts.

By reason of an entry in Register II, a person merely becomes entitled to deposit rent.

Cancellation of Jamabandi cannot amount to cancellation of settlerment. It is well known that neither payment of rent creates title nor non-payment extinguishes any. An administrative order of mutation passed by the Revenue Authorities is not and cannot be a decision on the question of title.

Held, that this is not a case where this court should exercise its jurisdiction under Articles 226 and 227 of the Constitution.

Sitaram Choubey & ors. v. The State of Bihar & ors. (1993), I.L.R., 72, Pat. 973

10— Articles 226 and 227 — — writ jurisdiction of the High Court — — two Trade Unions of Rameshwar jute Mills amalgamated by the order of the Registrar of Trade Union — — Successor Registrar Trade Union refusing to review the order of amalgamation passed earlier by his predecessor — High Court in its writ-

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jurisdiction, whether can interfere in the order of amalgamation.

Where the Registrar Trade Union having taken into consideration all aspects of the disputed question, held that in the facts and circumstances of the case, it was not necessary to review the order passed by his predecessor in office allowing the scheme of amalgamation of the two Trade Unions of the Ramehswar Jute Mills, that is, Jute Mill Mazdoor Sangh and Rameshswar Jute Mill Labour Union;

Held, that the High Court while exercising its its jurisdiction under Articles 226 and 227 of the Constitution, does not function as a court of appeal. It is not concerned with the decision of the statutory authority but with the decision making process.

When a statutory functionary performs a statutory function, the same can be subject matter of scrutiny by a writ court in exercise of its jurisdiction under Articles 226 and 227 of the Constitution only if the same is malafide or contains an error of record or in arriving at its decision the statutory functionary has taken into consideration irrelevant matters or fails to take into ensideration the relevant facts.

Held, further that as the amalgamated Union has been functioning since 1982 and has been granted new registraion certificate, it is not a fit case where this court should excercise its jurisdiction under Articles 226 and 227 of the Constitution.

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Jute Mill Mazdoor Sangh v. The Registrar of Trade Union and others. (1993), I.L.R. LXXII, Pat. 30

Contract— acceptance of tender and allotment of work — no provision for distribution of work — order of distribution of work passed by Minister concerned without recording any reason — validity of.

It is no doubt true that it is open to the Minister to take a view different from the view taken by the officers of the department. However, Justice demands that when the minister takes such a view he must record his reason as briefly as it may be so that if challenged one can examine the reasons disclosed in the order.

Held, therefore, that in the instant case unfortunately as no reasons what so ever have been recorded, it is not possble to say, whether the order is sustainable in law or not. Under these circumstances, only fair order which can be passed is to quash the order of the Minister distributing the works between the petitioner and respondent not and to direct that a fresh decision be taken after considering the relevant rules and after recording reasons for the order that may be passed. The Minister will apply his mind to the facts as well as the law and pass a reasoned order.

Khursheed Alam v. The State of Bihar & ors. (1993), I.L.R., 72. Pat. 185

Criminal Trial —[1— Court, whether an

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expert and give its opinion and draw conclusions — circumstantial evidence — suspicion, whether can take place of proof based on legal evidence.

Held, that a court is no doubt, an expert of experts. But the court cannot give its opinion in place of the experts and draw the conclusion A doctor who examined the injuries of the person dead or alive is best and competent to give opinion about the nature of the injuries, nature of the weapons of assault and even to the manner of assault. That becomes the positive opinion of the doctor. But if it is found by the court that the opinion of the doctor in respect of the nature of injuries, weapons used and the manner of assault and the like appears to be obscure or oscillating, improbable or that there is no fairness or impartiality, then the court considering the circumstances and medical evidence, can give its own finding on account on the expertise and being expert of the experts.

Held, further, that in case of circumstantial evidence, the court may come across with such evidence which create suspicion about the complicity and participation of the accused in the offence. But suspicion however strong, cannot take place of proof based on legal evidence to convict an accused. Doubts and suspicion cannot be the basis of legal proof and foulness of the crime increases the degree of proof of the offence against the accused.

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Anjani Kumar Gupta & anr. v. The State of Bihar (1993) I.L.R. 72, Pat. 1221

2— injuries sustained by accused — prosecution — obligation of — failure to explain injuries sustained by the accused — whether creates doubt about the prosecution case — court — duty of.

Held, that the obligation on the part of the prosecution to explain the injuries sustained by the accused in the same occurrence may not arise in each and every case. The prosecution has only to prove the guilt of the accused beyond reasonable doubt and how the accused sustained injuries are not to be explained by the prosecution. Every failure of the prosecution to give a reasonable explanation of the injury on the accused in the same transaction cannot be taken as to creating doubt about the prosecution case and the entire evidence of the prosecution should not be disaraed or automatically rejected without any further probe. The Court is to consider the evidence and to find out if on account of the injuries to the accused, the right of self defence to the accused is made out and if so, to what extent and whether the accused had exceeded the right of self defence. But all this is to be seen when the accused have received grievous injuries in the course of the same transaction and not otherwise.

Naresh Rai @ Naresh Singh & Ors. v. The State of Bihar (1993) I.L.R., 72, Patna 481

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3— Minor accused, tried and convicted under section 396 of the Penal Code, alongwith adult accused — at the time of order of Sessions Judge, they were below 16 years of age — at the time of decision of appeal they are more that 21 years and are under going imprisonment — Juvenile Justice Act, 1986, — section 22 (2) whether applicable — appellant sentenced to pay fine—Section 21 (1) (c).

The appellants S and R were convicted under section 396 of Penal Code, were minors aged about 13 and 12 years respectively at the time of occurrence according to the Sessions Judge who tried these appellants along with other adult accused persons who have been acquitted.

At the time the Sessions Judtge passed the order of conviction and sentence they were below sixteen years of age but at the time of the decision of this appeal they have become major.

Now, they have attained the age of more than 21 years. Since this is a case of delinquents under going imprisonment which shall be suspended by order granting them bail, they have to be dealt with under section 22(2) of the Juvenile Justice Act, herein after referred to as the Act.

Held, in the circumstances in the instant case, as section 21 (1) (c) of the Act provides for an order to the Juvenile to pay fine if he is over fourteen years of age and earns money

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and since these appellants have faced the ordeal of trial and prosecution and have been in jail, each of them are sentenced to pay a fine of Rs. 4,000/- which would be recovered and paid to the informant or his successor.

Pramod Kumar Kataruka & ors. v. The State of Bihar (1993), I.L.R. 72, Pat. 1013

4— Non-examination of a witness by the investigating Officer — witness filing belated application before Senior Superintendent of Police claiming to be an eye witness — no explanation for such belated claim — evidence of such witness in court — reliance, whether to be placed.

Where a witness presented an application before the Senior Superintendent of Police not before the 13th day of the occurrence claiming to be an eye witness of the occurrence and complaining that the Investigating officer was not recording his statement without any explanation as to why he did not claim to be an witness before the Senior Superintendent of Police soon after the occurrence when his statement was not recorded any why he wasted 12 or 13 intervening days in making such a complaint.

Held, that no reliance can safely and reasonably be placed on his evidence on this ground alone.

Ramesh Dhobi and ors. v. The State of Bihar (1993). I.L.R., 72, Pat. 815

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5—Supervision note, whether can be given to the accused— non production of supervision note, whether causes prejudice to the accused— Penal Code, 1860 section 34, common intention, applicability of.

The supervision notes of the Superior Police Officer or the reports or observation of the investigating officer or his superiors are only opinions and these opinions are not admissible in evidence.

Held, that, supervision note is neither submitted under section 172 of the Code of Criminal Procedure, 1973 nor forms part of the case diary but being an opinion cannot be given to an accused.

Held, further, that non-production of the supervision note cannot be said to have caused prejudice to the accused.

Held, also, on the applicability of section 34 of the Penal Code, that on account of two shots having been fired and one having missed and the other causing entry and exit wounds it would not be said that the two appellants have not participated when the evidence of all the eye—witnesses is quite uniform and categorical in this behalf that both the accused had fired and therefore the overt act committed must be said to have been caused in furtherance of common intention of all.

Shri Bhagwan Singh & ors. v. The State of Bihar (1993) I.L.R. 72, Pat. 668

Essential Commodities Act, 1955 (As amended by Bihar Act 9 of 1978), Section 6A and Bihar Trade Articles (Licenses Unification Order, 1984 clause 30 — confiscation proceeding — when to be initiated — order initiating confiscation proceedings not showing Collector's satisfaction regarding contravention of order made under section 3— effect of — Commercial Tax Officer — competency of, to make seizure.

Where the order initiating confiscation proceeding does not show that the essential commodity was seized in pursuance of any order made under section 3 and that the Collector was satisfied that there has been a contravention of the order made under section 3, rather the order shows that the Collector was satisfied that provisions of Bihar Finance Act, have been violated which is an offence under the Bihar Finance Act;

Held, that the initiation of confiscation proceedings was illegal and without jurisdiction and as such cannot legally be sustained.

Where the edible oil was sized by the Commercial Tax Officer who was not competent to seize the same under the provisions of Bihar Trade Article (Licenses Unification), Order, 1984 as clause 30 of the order containing a list of officers competent to make search and seizure does not include any officer of the Commercial Tax Department.

Held. further that when the seizure itself

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is illegal and without jurisdiction no confiscation proceeding can be initiated on the basis of such seizure.

M/S Pawan Carrying Corporation v. The State of Bihar & Ors. (1993) I.L.R., 72, Pat. 1006

Hindu Law — Suit for partition — proporty in the name of the wife of a coparcenor — ad-valorem court fee in respect of those properties, whether payable — simple suit for partition, whether maintainable — Benami Transactions (Prohibition) Act, 1988 (Act 45 of 1988), Sections 3 and 4 provisions of — acquisition of property in the name of wife of a coparcenor — whether constituties benami transaction and whether saved by section 3(2) .

Where in a suit for partition the plantiff categorically pleaded that certain properties standing in the name of the wife of a coparcenor belonged to the joint family as having been purchased out of joint family fund and she had no right, title and interest therein;

Held, that, in such a case ad-valorem court fee was payable by the plaintiff and simple suit for partition was not maintainable in respect of those properties. Whenever in a suit for partition an alienation standing in the name of a stranger to the joint family is questioned on the ground that the same is a joint family property, the same would require independent declaration of title not nesessarily connected with the relief of partition.

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Held, further, that an acquisition of property in the name of the wife of a coparcenor by the joint family will constitute a benami transaction and will not be saved under section 3(2) of the Benami Transactions (Prohibition) Act, 1988. From a bare perusal of section 4(3) of the said Act, it is evident that even such a case is not protected there under. The suit filed by the plaintiff in respect of these properties was barred under the provisions of Benami Transactions (Prohibition) Act, 1988.

Rameshwar Mistry and another v. Babulal Mistry. (1993) I.L.R. 72, Pat. 1

Income Tax Act, 1961—[1— Section 11(1)(a) and 13(1)(a) and provisions of — application of part of the income of the M/s Tata Steel Charitable Trust for the benefit of the employees of/Tata Iron Steel Company and their relatives — whether disentitles the Trust from claiming exemption under section 11(1)(a).

From a reading of the provisions of clause (c) of subsection (1) of section 13 and sub-clause (3) of the Income tax Act 1961, hereinafter referred to as the Act, it is quite clear that neither under the term of the Trust nor under the relevant rules governing the same any part of the income ensures or any part of such income has been used or applied directly or indirectly for the benefits of any of the specified persons referred to in sub-section 3 of section 13 of the Act.

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Held, that the application of the part of the income of the Trust for the benefit of the employees of Tata Iron and Steel Company and their relatives can not disentitle the M/s Tata Steel Charitable Trust, from claiming an exemption under section 11 (1) (a) of the Act.

Commissioner of Income - tax Bihar II, Ranchi V. M/S Tata Steel Charitable Trust, Jamshedpur (1993) I.L.R. 72, Pat. 193

2— Sections 139 and 216 — charging of interest under — assessee claiming that he was not liable to levy of interest — whether appealable.

Where the assessee did not claim any waiver or reduction on any of the grounds set out in Rules 40 and 117 A of Income Tax Rules, 1962, but claimed that he was either not at all liable to levy of interest or, if at all liable, the quantum has not been correctly determined.

Held, that the assessee had the right of appeal on the question of chargeability of interest under sections 139 and 217 of the Income Tax Act, 1961.

Commissioner of Income-tax, Bihar, Patna v. M/s Nipani Tobacco Store, Patna City (1993), I.L.R. 72, Pat. 15

3— Section 215 — — — assessee after sending estimate of advance tax, failed to pay advance tax — effect of — whether liable to pay interest under section 215.

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Where the assessee does not send the estimate of advance tax under section 212 (3A) of the Income Tax Act, 1961, hereinafter referredc to as the Act, then he will be liable to pay interest under section 217 (1A) of the Act. But if after sending an estimate he fails to comply with the second requirement of paying advance tax in accordance with his estimate on the due date then he will be liable to pay interest under section 215 of the Act.

Held, that in the instant case interest is Chargeable from the assessee under section 215 and not section 217(1A) of the Act.

Commissioner of Income-tax, Bihar-I, Patna v. The Bihar Journals Ltd., Patna (1996), I.L.R. 72, Pat . 23.

***Indian Electricity** Act*, 1990-clause VI sub-clause (3) provisions of — whether applicable to requisition made for the first time by the consumer .... the clause does not apply to matters severed by tariff ..... dispute referred to Electrical Inspector, whether covered by sub clause (3) of clause VI of the schedule— Electricity Board can raise bill on High Tension basis after installation of transformer, Capicitor.

Clause VI of the Schedule appended to the Indian Electricity Act, Hereinafter referred to as the Act, deals with requisition of supply to owners or occupiors in vicinity which necessarily implies that the said clause would apply with regard to supply of electrical energy to persons acquisitioning the same for the first

time. This clause, therefore, cannot have any application in relation to the matter which is covered by the tariff. Further sub-clause (3) of the said clause is required to be constructed in the light of other provisions contained therein. Sub-clause (3) of clause VI of the Act applies only in respect of requisition made for the first time by the consumer is also apparent from a conjoint reading of clause 4 and 5 thereof.

Held, that it is evident that the dispute referred to the Electrical inspector was not served by sub-clause 3 of clause VI of the Schedule appended to the Act.

Held, further, that the Bihar State Electricity Board can raise bills of the petitioner on High Tension basis only upon fulfiment of conditions precedent namely installation of transformer capicitor etc. The Bihar State Electricity Board, therefore, may in terms of the application filed by the petitioner for conversion of energy from low tension to High Tension take necessary steps for conversion from Low tension to High Tension of energy and raise bills in terms of High Tension from the date of its conversion.

It is upto the Bihar State Electricity Board to raise fresh bill on basis of supply of Low tention energy to the petitioner in terms of installed load in the factory premises of the petitioner.

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Messrs. Trident Tubes Ltd. v. The Bihar State Electricity Board and Ors, (19930 I.L.R. 72, Pat. 1882

Industrial Disputes act, 1947, Sections 2 (K), 2—A and 10 (1) (e) scope and applicability of— workman removed from employment — industrial dispute raised by the workman— Union taking up the case of workman industrial dispute within the meaning of sections 2 (K) and 2—A both — Union entering into a settlement with the management .... settlement, whether will bring to an end the industrial dispute — industrial dispute within the meaning of section 2—A, whether would continue to persist or exist—adjudication on merits by the Labour Court, whether to be made.

Held, that, in a case where the controversy referred for adjudication before a Labour Court/Industrial Tribunal qualifies as an industrial dispute within the meanining of section 2—A of the Industrial Disputes Act, 1947, the concerned workman has right to be a party to the proceeding in his own capacity and has a right to be heard and, therefore, a settlement of such a dispute between the union and the management will not deprive him of his right and will not bring the industrial dispute to an end. The view once a Union espouses the dispute, it is the Union alone which becomes the sponsor in relation to the industrial dispute, to the exclusion of the

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concerned wrkman, appears to be contrary to the very object and purpose of Section 2-A of the Act.

Held, further that where a dispute relating to discharge, dismissal, retrenchment or termination of service of an individual workman which at its inceotion was an industrial dispute within the meaning of section 2—A of the Industrial Disputes Act, 1947, also assumes the character of an industrial dispute within the meaning of section 2 (K) of the Act if at a later stage the dispute though concerning an individual workman is also taken up by a Union, and where, at a subsequent stage, the dispute within the meaning of section 2 (K) ceases to exist, it will not also bring to an end the industrial dispute within the meaning of section 2- A remains very much inexistence in respect of which there is a reference before the Labour Court which has to be adjudicated on its merits.

M/S Kalyanpur Lime & Cement Works Ltd v. The Presiding Officer, Labour Court, Patna & ors. (1993) I.L.R. 72 Pat. 604

JUVENILE JUSTICE ACT, 1986,

Sections 21(1)(c) and 22(2). See Criminal Trial No. 3. 1013

Lalit Narain Mithila University, Regulation 2 (ii) 44.33 percent marks in B.A. Pass Course was admitted in B.A. Honours Course — got admit card and appeared at B.A. Honours Examination — result with held on

the ground that her admission in B.A. Honours Course was contrary to Regulation 2(ii) — withholding of result — validity of.

Where the writ-petitioner who had secured 44.33 percent marks in B.A. Pass course examination, was admitted to the Honours Course in Sociology by the Principal of the College as per the recommendation of the Head of the Department of Sociology and after completion of the course she got admit card and appeared at the B.A. Honours examination but her result was withheld on the ground that her admission to the Honours Course was contrary to the Regulation (2) (ii) of the *Lalit Narain Mithila University* since no student securing less than 45% in a particular subject could be admitted to Honours Course in that subject;

Held, that the Regulation 2 (ii) of the Lalit Narain Mithila University does not provide that if a student has been admitted to a particular Honours Course, contrary to the Regulation then even if he/she is allowed to be published.

Punam Kumari v. Lalit Narain Mithila University & ors (1993) I.L.R., 72. Pat. 806

Land Acquistion Act, 1894-[-Section 16 and 48 — section 16 provisions of — possession of land taken under the provisions of the section — whether can be divested — section 48 — applicability of — Land acquired by the Collector and possession given to the

allottee by Patna Industrial Development Authority — land whether could be released from acquisition, by Collector without giving opportunity to the allottee or to reqisitioning authority — natural justice, principles of — State of Bihar, whethercould rectify its mistake by revoking the order of release.

State Government acquired 230 acres of lands for establishment of Industrial Area at Jasidih Patna Industrial Area Development Authority allotted a portion of this to M/s. Hyderabad Industries Ltd. both intervenors to whom possession was given. Subsequently writ-petitioner, learning that 1764 acres of this land were not utilised by Industries Departments for a long time approached for release of the land and on report by Additional Collector Deoghar that the lands were still in possession of the writ-petitioner, the State Government by notification dated 21.3.1986 ordered for release for 17.46 acres aforesaid land but before the deed of reconveyance could be signed by the Deputy Commissioner, Deoghar, The State Government by notification dated 14.7.1987 cancelled the earlier notification dated 21.2.1986 releasing the land.

Held, that it was obligatory on the part of the State to give an opportunity of hearing to Patna Industrial Area Authority as also to M/s. Hyderabad Industries Ltd. as by reason thereof they were adversely affected; it is well known that principles of natural justice are

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required to be compiled with even in case where civil or evil consequences ensu by reason of passing an administrative order.

Held, further, that the State of Bihar in such a situation was entitled to rectify its own mistake by issuance of notification dated 14.7.1987; Such a power is inherent in the State.

Held, further that by reason of notification dated 21.3.1986 no finality can be said to have been attached to the proceeding for release of land in favour of landholder. The State therefore, could change its mind for valid reasons.

Held, also, that in terms of section 16 of the Land Acquisition Act, 1894, lands vested in the State of Bihar under the provisions of the Act cannot be divested. In that view of the matter section 48 of the Act, can not be said to have any application whatsoever in the facts and circumstances of this case.

Gyan Das Shaw v. The State of Bihar and others (1993) I.L.R. 72, Pat. 1355

Life Insurance Corporation of India Staff Regulation 1960, -[- Regulation 14(3) expiry of initial period of probation — person, whether to be confirmed automatically.

The pharaseology used in Regulation 14 do not justify an interpretation that the person promoted to a higher post for a period of one year would automatically be confirmed in service only because his initial period of

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probation had expired, Clause 3 of Regulation 14 clearly stipulates that the period of probation could not be extended for a period of more than 2 years, thus only on the expiry of the said period of 2 years the petitioner would be treated to have been confirmed in the post of Branch Manager automatically.

Held, therefore, that in the present case if the petitioner has been reverted to the post of Assistant Branch Manager within the aforementioned period of 2 years by which time he was not confirmed in the service no exception can be taken to the said order as in view of Regulation 14(3) he could not be automatically confirmed only because the initial period of probation had expired.

Awadhesh Kuamr v. The Life Insurance Corporation of India & ors. (1939), I.L.R. 72, Pat. 1402

Medical Admission Test Examination in Post Graduate Courses— examination held fairly — evauation of answer books/sheets done properly — mistake committed by the computer at the stage of preparing the merit list — mistake capable of being corrected by referring to the chart containing paper wise marks obtained by the candidates — cancellation of examination as a whole and holding of fresh examination, legality of.

Where there is no infirmity either in the holding of the examination or in the evaluation of the answer books/sheets and the only mistake which has been committed is in the

merit list in respect of certain candidates, which is rectifiable and, as a matter of fact, a correct merit list has already been prepared;

Held, that the impugned decision of the State Government as evidenced by a notice issued by the Controller of Exmaination Health Services, Bihar, by which the examination as a whole has been cancelled on the ground of some technical error in the computer is unwarranted and unsustainable in law being arbitrary and based on irrelevant considerations and publication of result and taking of admission in the post graduate courses in question be taken up by the Government immediately in accordafce with correct merit list.

Dr. Sanjay Kumar & ors. v. The State of Bihar & ors. (1993) I.L.R., 72 Pat. 595

Penal Code, 1860—[1— section 34—provisions of—evidence of individual role of five accused in administring poison to the deceased —absence of charge under to section 34—effect of— conviction can be made with the aid of section 34—In-vestigating officer not examined as he had died—no prejudice caused non examination of In-vestigating Officer effect of.

Where the accused entered the house of the deceassed and assaulted the immates and there-after there was administration of poison by one accused P (Since died) to the deceased while other four appellants cought hold of him.

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Held, that since overt act and individual role of the appellant there, by catching hold of the victim, it goes to show that they had participated in the offence by catching hold of and assaulting and so they have been convicted individually. The evidence had been brought on record and opportunity was there to the accused to rebut the same.

Held, further that even if charge under section 149 Penal Code, was there and evidence makes out a under section 34 Penal Code, and individual role is found out, then the conviction can be made with the aid of section 34 Penal Code and Omission of charge will have no adverse effect.

Held, also that since no prejudice has been alleged to the non-examination of the Investigating Officer, who had died, it has get no adverse effect on the prosecution case.

Babulal Das and ors. v. The State of Bihar (1993) I.L.R. 72. Pat. 1160

2— *Sections 34, 302 326/34*, scope and applicability of — evidence — guidelines for appreciation of evidence — motive for the offence, proof of — whether necessary — motive alleged may be flimsy, superficial or unreasonable — whether can be proved by the prosecution — common intention of murder, when can be said to have been not proved — extreme penalty of death, when and whether to be given.

Held, that, the evidence of a witness

should be read as a whole and a sentence here or there isolated and detached from the context should not be picked up to make out a case of contradiction. The evidence as a whole and the totality of the case and circumstances should be the basis for appreciation of the evidence. Minor deficiencies on trivial matters are bound to be in the evidence of natural and truthful witness but if the deficiencies and discrepancies are goning to the root of the matter, then they may have adverse effect upon the evidence, otherwise if the general tenor of the evidence shows that there is truth in the version andother circumstances of the case and material on the record support and corroborate the version given by the witness, then such evidence should be relied on.

Held, further, that the motive imputed to the accused for the offence is of secondary importance when the evidence of the witnesses is direct and gives out a case against the accused. Motive is always for the accused and in case motive is not proved, will not have any effect. In the instant case, it cannot be said that the motive was not there. The motive may be flimsy, superficious or unreasonable but the appellants/accused were under the misconception that the deceased was responsible for the death of Salim, brother of the accused, and so motive has been well proved by the prosecution.

Held, further that where the accused did

not use the arm he was carrying nor uttered any word or make any gesture for killing the victim, although he accompanied his brother also an accused, to the place of occurrence in the night hours and there only his brother did all the acts, the killing was, therefore, the individual act of his brother accused. Though there is no direct evidence of sharing the common intention of killing, yet he can be said in these circumstances to be sharing the common intention to cause at least grievous hurt by garasi which was used in killing and injuring the two women and thus his conviction under section 302/34 I.P.C. is not made out, but he is guilty for the offence under section 326/34 I.P.C.

Held, also, that death is not a normal penalty for murder but when the murder is gruesome, ghastly, revolting to human conscience causing social imbalance or danger to the society at large or even danger to the security of the State or the situation of the like then for these special reasons, death sentence is the only appropriate and legal sentence. Before awarding death sentence, circumstances of the case are to be looked into and special reasons should be found out whether to award the extreme penalty of death or not. Categorisation of the special reasons is neither easy nor appropriate and so it is for the judge to consider the circumstances of each case and find out whether special reason exists for the extreme penalty of death or not in the instant

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case, the offence of murder was commi ·d without any pre-planning or any prev ; ·us enmity under the influence of extreme mental and emotional disturbance and also superstitious belief that he was morally justified to do so. These are the special reasons for not awarding the extreme penalty. Rather they appear to be mitigating circumstances in favour of the accused for having a sentence of life imprisonment and not death sentence.

Samtul Dhobi & anr. V. The State of Bihar 1993, I.L.R. 72, Pat. 533

3— Sections 147, 148, 149, 302, and 326 — scope and applicability of — accused more than five in number coming with arms, indulging in unlawful activities and committing offence, whether to be said to be members of unlawful assembly sharing the common object — one of the accused firing his gun causing death on the spot — effect of.

Where the accused persons more than five in number assembled together armed with lethal weapons, indulged in unlawful activities and committed th offence;

Held, that the assembly was an unlawful assembly. The conduct of the members of unlawful assembly both before and after the commission of the offence has to be considered.

Where the accused persons came armed with lethal weapons in bloc remained till the end, participated in brickbating and two of the accused gave lathi blows on the head and leg

of the father of the deceased and while the deceased was going to help his father, another accused fired his gun at him causing his death on the spot but two of the accused did not use their garasa and bhala.

Held, further, that by bringing the gun, garasa, bhala and lathis, ths members of the unlawful assembly knew very well that grievous hurt was likely by to be caused because of the deadly of the members of the unlawful assembly was to cause at least grievous hurt. The firing by only one of the accused was his individual act and so his conviction under section 302 I.P.C. for his individual act makes him liable for conviction under section 302 of I.P.C. and his individual act does not bring the rest of the accused within the clutches of section 302 read with section 149 I.P.C. But the other accused, however cannot get out as they were sharing the common object of unlawful assembly which was to cause at least grievous hurt or they knew that grievous hurt was likely by to the caused because of the deadly weapons like gun, garasa, bhala and even lathis, which therefore makes them liable to be convicted under section 326 read with section 149 I.P.C.

Gupteshwar Ram @ Gupteshawar Gupta & ors. v. the State of Bihar (1993), I.L.R. 72, Pat. 1328

4— Sections 302 and 326— omission in the order whether sentences shall run

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concurrently — effect of — High Court, whether can direct sentences to run concurrently — Code of Criminal Procedure, 1973, section 31 (1).

Where the accused has been convicted and sentenced under sections 302 and 326 to Life imprisonment and 7 years imprisonment respectively but there was no specific direction of the court that the two sentences shall run concurrently.

Held, that the Criminal law treats punishment more as a reformative or corrective than as a deterrent or punitive measure. The order of the High Court therefore, deserves to be clarified for the ends of justice in exercise of inherent power and the two sentences are directed to run concurrently to make the form of sentences harmonious.

Sumitra Devi. v. The State of Bihar 1993), I.L.R., Pat. 1314

Principles of natural justice — basic principles of — person obtaning employment on the basis of forged marksheet and certificate — action, whether confer any legal right.

The principles of natural justice. as is well known, is based upon two basic principles viz. Audi Alteram Partem and Nemo Debitro Esses Judex in Propriea Causa. The principles of natural justice have been developed from time to time adding new concepts therin. Some decisions have gone to the extent of holding

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that principles of natural justice are embodied in Articel 14 of the Constitution of India.

Where a person has been found to have obtained employment on the basis of a forged marks sheet and certificate and in this way has evidently committed a fraud upon the appointing authority:

Held, that, an action based upon a fraudulent act does not confer any legal right and thus he did not derive any legal right to continue to be in employemt in terms of the appointment letter.

Ramroop Tanti v. The State of Bihar & ors. (1993). I.L.R. 72. Pat. 209

Promotion to the post of Headmasters of Nationalised Secondary School — list of Selection grade Assistant Teachers apporoved by Education Commissioner — whether the post should be filled up as per Roster Panji — Question of vires of Bihar Nationalised Secondary Shoold (Service Conditions) Rules, 1983, pending consideration in Supreme Court — order of promotion whether subject to ultimate decision of the Supreme Court.

Where large number of posts of Headmasters of Nationalised Secondary Schools were lying vacant even though list of selection grade Assisant Teachers for promotion as Headmaster was approved by the Commissioner of Education :

Held, that the State of Bihar should fill

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up the vaccant posts as per Roster Panji at an early date. As Supreme Court has has passed order of Status quo in Special Leave Petition No. 18361 of 1991 the order of Status quo shall be operative so far as parties thereto are concerned.

Held, further, that as the question of vires of Bihar Nationalised Secondary School (Service Conditions Rules, 1983) is pending consideration Before Supreme Court, the orders of promotion to posts of Headmaster which may be effected by the State, shall be subject to the ultimate decision of the Supreme Court in the said case.

Shatrughan Pd. Singh and ors. v. The State of Bihar and ors (1993). I.L.R. 172. Pat. 87

***Rajendra Agriculture University Act.* 1971** — Section 17 and 26 (2) — provisions of — Regulation framed by Rajendra Agriculture University under section 17 — Regulation 12 note(b) and (c) — power delegated by Academic Council to University to reduce or cancel number of maximum seat — Regulation 12 note(c) — right reserved by University to change number of seats — section 26(2) — whether in emergency the Vice-Chancellor could exercise the power vested in the University in terms of section 26(2).

From a perusal of the regulation 12 framed by the Rajendra Agriculture University under the provisions of section 17 of the Rajendra Agriculture University Act, 1987, here

in after referred to as the Act, it is clear that the Academic Council has already fixed the number of seats in various disciplines. in terms of notes (b) and (c) of Regulation 12. The power has been delegated by the Academic Council to the University to reduce or cancel the number of maximum seats. In terms of Note (c) of Regulation 12, a right has also been reserved by the University to change the number of seats in the campus of the University depending upon the convenience but not detrimental to the Institution or the State.

Held, that it is clear that the power to increase or decrease the number of seats apart from those which has been delegated to the University itself. If the University could exercise the said power there cannot be any doubt that the Vice-Chancellor of the University can exercise the said power in case of an emergency in terms of section 26 (2) of the Act.

The Vice-Chancellor of the University decided to increase the number of seats by 23 to accommodate the backward category II candidates in view of situation arising out of agitation resorted by a section of successful candidates in the University as well as pursuant to discussions held by the Vice-Chancellor of the Rajendra Agriculture University and Birsa Agriculture University with the Minister of Education. As the decision of

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the Vice-Chancellor is subject to the post facto approval of the Academic Council, no illegality can be said to have been committed by the Vice-Chancellor in this regard.

Anup Kumar Sinha v. Rajendra Agriculture University and ors (1993), I.L.R. 72, Pat. 282

Representation of the People Act, 1951 Section 26— provisions of — District Election Officer, whether can requisition the services of the employees of the State Bank of India for election duty, — Constitution Article 324 (6) — employees of State Bank being niether State nor Central Government employees, whether their services can be requisitioned for election duty, — Representation of People Act 1951 section 159 — provision of.

The District Election Officer in exercise of his powers under section 26 of the Representation of People Act, 1951, hereinafter refered to as the Act, cannot requisition the services of the employees of the State Bank of India for election duty since the employees of the State Bank of India are not State or Central Government employees as envisaged by Article 324 (6) of the Constitution of India, nor are they employees of a local authority whose services can be requisitioned under section 159 of the Act.

State Bank of India Staff Assocaition, Local-head office unit, Patna and ors. V Election Commission of India or (1993) I.L.R. 72 Pat 768

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Reservation in Admission in Post Graduate Medical Course— State, whether has the right to reserve seats for scheduled castes, scheduled tribes and backward classes— Constitution of India, Articles 14 and 15 (1) (4) , scope and applicablity of — reservation, whether violative of Articles 14 and 15 (1).

Held, that the policy of the State of Bihar to reserve seats for scheduled castes, scheduled tribes and backward classes in post-graduate medical course is not unconstitutional and violative of Articles 14 and 15 (1) of the Constitution of India. Although merit alone should be the criteria for admission in post graduate as also super speciality course, but Article 15 (4) of the Constitution of India justifies such reservation by legislation or by executive instructions.

Md. Asgar Ali Khan and ors. v. The State of Bihar & ors. (1993), I.L.R. 72 Pat. 636

Res judicata— principles of — findings of the High Court, on merit recorded against the writ-petitioner which were not set aside by the Supreme Court, whether operate as res judicata in subsequent writ-petition before the High Court for the same relief.

Held, that permitting a writ petition filed under Article 32 of the Constitution before the Supreme Court, to be withdrawn only with liberty to file a writ-petition under Articles 226 and 227 of the Constitution before High Court cannot mean that the doctrine of Res

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Judicata/Constructive ResJudicata will not be applicable if it applies.

The writ petitioner had earlier moved this Hon'ble Court for declaration which he is claiming in this writ-petition. He cannot be allowed to urge the same question through this writ-petition.

Held, that the finding of this Court on merit recorded against the writ-petitioner, which were not set aside by the Hon'ble Supreme Court, operate as res-judicata/constructive resjudicata.

Ranjit Prasad Sinha v. The State of Bihar and another (1993) I.L.R. 72, Pat. 1477

Santhal Parganas Tenancy (Supplementary Provisions) Act, 1949 section 35—provisions of—Additional Deputy Commissioner, Sahebganj whether has jurisdiction to decide complicated question of title and set aside a sale deed while exercising his jurisdiction under section 35.

Where Respondent no. 2, Additional Deputy Commissionor, Sahebganj by his order dated 28.4.1988 contained in Annexure 12, ordered can cellation of the sale deed dated 22.2.1944, which was executed by the settlee from jamabandi Raiyats with respect to a tank, recorded as "puratan patit" in record of Rights;

Held, Respondent no. 2, had no jurisdiction to decide a complicated question of title while exercising his jurisdiction under section 35 of the Santhal Parganas Tenancy

(Supplementary Provisions) Act, 1949, hereinafter referred to as the Act.

It is clear that Respondent no. 2 by reason of the impugned order made an attempt to establish the title of the State over the land in question indirectly which he could not do directly while exercising his jurisdiction under section 35 of the Act.

Ansar Ali & Ors. v. The State of Bihar and Ors (1993) I.L.R., 72. Pat 456

Service—[1— appellate authority dismissing the appeals of writ-petitioners without any discussion legality of.

The disciplinary authority of the State Bank agreeing with the finding of negligence recorded by the enquiry officer called upon the writ-petitioner, officer of the Bank, to show cause as to why they should not be punished, and on cause being shown, punished them. The writ-petitioner filed appeal to the Deputy General Managr, State Bank of India the appellate authority, who dismissed the appeals without any discussion. The appelalte orders do not disclose the reasonings of the appellate authority.

Held, that, while the appellate authority is not expected to write a detailed judgement, it is at least expected to record its reasons, even if briefly to satisfy that it had considered the relevant aspect of the matter before reaching its conclusion.

The appellate orders must be quashed

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and the appellate authority be directed to reconsider the appeals and pass orders in accordance with law.

Sada Shiva Pandey & anr. v. State Bank of India & ors (1993) I.L.R. 72 Pat. 1033

2— Appointment — panel prepared to remain alive for a long time — whether a select List of persons having their names in the Panel — legal right of.

Where a panel of a large rumber of persons is prepared, which is to remain alive for a long time the sanie cannot be termed as a select list and the persons whose names appear therein cannot have a legal right for appointment in terms of the said purported panel.

Held, therefore that in the present case as the panel was prepared only on the basis of the passing of the year of the training examination, the said panel beng not a select list, the same cannot be enforeced. in a court of law.

Subhash Chandra Dubey v. The State of Bihar and Ors. (1993) I.L.R.—72 Pat. 477

3—Appointment against permanent vacancy made initially on daily wage basis and thereafter on temporary/adhoc basis — post not advertised and no proper selection for that post made — Constitution of India, Article 16, violation of writ jurisdiction whether can be exercised to perpetuate illegality — rule of audi

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alterem partem, whether applicable to such case.

Where the petitioner was appointed against a permanent vacancy intitially on a daily wage basis and thereafter on a temporary/adhoc basis and regular appointments were never made;

Held, that the petitioner continued to occupy the post without the post being advertised and without a proper selection being made for appointment to such post. This was clearly in breach of Article 16 of the Constitution of India.The writ jurisdiction of this Court cannot be invoked to perpetuate illegality. If the order cancelling the illegal appointments is quashed, it would amount to continuing the appointments illegally made. Since the petitioner's appointment and its continuation was illegal, no relief can be granted to the petitioner in exercise of writ jurisdiction. In such cases, even the rule of audi alterem partem will not apply.

Surendra Pd. Singh v. The State of Bihar and ors. (1993) I.L.R. 72, Pat. 466

4— holding of degree or diploma, whether can be relaxed under the rules or in accordance with the terms of advertisement.

It is a settled law that holding of a degree or experience may be laid down as a condition of appointment but such a condition in a given case can also be relaxed by the appointing authority which however would

depend upon the rules governing appointment and promotion.

It is clear that the question as to whether a case of the candidate may be considered for appointment depends upon the qualification and other conditions laid down in the advertisement itself.

A bare reading of the advertisement is permissible in case of holder of diploma as also in the case of an agent or an employee, as such, the writ petitioner an agent of Life Corporation India, hereinafter referred to as Corporation, should have been considered by the Corporation. The authorities of the Corporation shall consider as to whether the writ-petitioner is fit for appointment even if some relaxation is granted in his favour with regard to qualification and whether the writ-petitioner's case comes within the purview of extraordinary or special case or not.

The writ-petitioner may now be interviewed by the authorities of the Corporation, and an appropriate order in this regard be passed.

Kishori Prasad Gupta v. The Life Insurance Corporation of India and ors (1993), I.L.R. 72 Pat. 1600

5— Names recommended by the Board to the State Government but no appointment made — fresh advertisement issued — writ can be issued only when action of the State is violative of Articles 14 and 16 of the

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Constitution of India — life of the panel to be one year — executive decision regarding the life of the panel, whether has the force of law — action of the State, whether barred by the principles of Promissory Estoppel.

Where an advertisement was issued by the Vidyalaya Seva Board on 26.1.1987 for appointment of teachers in various Govt. Schools in pursuance of a policy decision of the State in terms whereof various posts were created for imparting education in 10+2 courses and the names of the petitioners had been recommeended by the Board to the State in March 1990 but their appointments could not be made in view of lapse of time and a fresh advertisement for filling up the posts had been issued but the persons who had already applied for and whose names had been recommended by the Board were not required to apply for the said posts again and it was contended on behalf of the petitioners that the appointments could be made from the panel already validly prepared;

Held, that, it is true that the State even in the matter of appointment is bound to act reasonably, the State's action must conform to the provisions of Articles 14 and 16 of the Constitution of India. It is now well known that a person does not have any right to be appointed but has merely a right to be considered for appointment. In this view of the matter, there cannot be any doubt that an

empanelled candidate has no legal right to be appointed and thus it logically follows that no writ of mandamus can be issued unless the Court comes to a conclusion that the selectee has been discriminated against and the action of the Government is violative of Articles 14 and 16 of the Constitution of India.

Held, further, that in absence of any statute or rules, the executive decision in terms of the circular latter dated 5th April, 1955 issued by the Appointment Department of the Govt. of Bihar, must be held to have force of law. It is therefore clear that the life of the panel is only one year.

Held, also, that the action of the State is also not barred under the principles of Promissory Estoppel in as much as when an advertisement is issued only an offer for appointment is invited from the eligible candidates and it is only when their names find place in the select list that they merely get a right to be considered for appointment as contradistinguished from the right to be appointed. Thus no promise either in fact or in law is made which binds the State.

Smt. Rita Kumari & ors. v. The State of Bihar & others (1993) I.L.R. 72, Pat. 855

Service—order of reversion to the parent Department — opportunity of hearing not given—effect of.

Where the reversion of a person to the

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parent department is an order of reversion of a person to the parent department is an order of reversion simpliciter without involving any punishment and is based on administrative exigencies;

Held, that the authority concerned is competent to pass the order even if the services of the person concerned were not requested to be returned by the parent department and there is no necessity of granting any opportunity of hearing before passing of such order.

Baidyanath Ojha & anr. v. The State of Bihar & ors. (1993), I.L.R. 72, Pat. 171

7—enquiring officer recommending a minor punishment of censor—disciplinary authority awarding a major punishment of dismissal without affording an opportunity of showing cause to the delinquent as to why the major punishment of dismissal be not awarded— validity of.

Held, that where the disciplinary authority decides to award a major punishment such as dismissal in disagreement with the recommendation of the inquiring officer to award a minor punishment, such as censor, it is mandatory for it to provide an opportunity to the delinquent of showing cause as to why a major punishment be not awarded against him.

Ram Nath Singh v. State & ors (1993) I.L.R. 72 Pat 177

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8— Recruitment Rules not followed and appointment by a person not competent therefor — principles of natural justice whether to be complied with before passing the order cancelling the appointment.

Held, where in the matter of appointment of the petitioner the procedures of recruitments had not been followed at all and he was appointed by a person not competent therefor, the principles of natural justice of giving an oral hearing to the petitioner prior to issuance of the impugned order cancelling the appointment of the petitioner are not required to be complied with.

Mannu Kumar v. The State of Bihar and ors. (1993) I.L.R. 72, Pat 302

9—Transfer and— circular letter issued by this State Government directing the Heads of Department to follow the guidelines contained therein as far as possible — policy decision whether directory in nature— High Court, whether should issued a writ of or in the nature of mandamus.

Where the circular letter issued by the Bihar Cabinet Secretariat and co-ordination Department to all heads of the Department stipulates of the guidelines laid down therein should be followed as far as possible in the matter of transfer and posting of the employees of the concerned Department;

Held, that the policy decision is directory in nature and as such the petitioner is not

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entitled to issuance of a writ of or in the nature of mandamus from the High Court commanding upon the State to strictly enforce the same.

The Bihar State Non Guzetted Employees Federation Siwanjali v. The State of Bihar and ors. (1993) I.L.R. 72, Pat. 1139

10— Transfer of employee from one cadre to another on deputation — legality of — Assistant Teacher of a School— locus standi to question order of deputation of Headmaster.

Held, that although an employee cannot be transferred from one cadre to another cadre without his consent, but can be posted in a different cadre with his consent and in any event posting on deputation from one cadre to another cadre cannot be said to be illegal.

Held, further that an Assistant teacher has no locus Standi to question the order of deputation of the Head Master.

Smt. Chinta Kumari v. The State of Bihar & ors. (1993) I.L.R. 72, Pat. 1045

Suit — suit for declaration of title and for a declaration that a particular deed is illegal, invalid, and in operative — advalorem court fee paid on valuation of the suit property — relief for recovery of possession not prayed for in the plaint— court whether can grant recovery of possession — principles of res — judicata —applicability of — Mahant — position of, under the Hindu Law — Code of Civil Procedure, 1908 section 11 and Hindu Law.

Where the plaintiff filed a suit for declaration of his title over the suit land as also for a declaration that a particular deed was sham, invalid, illegal and inoperative and paid advolerum court fee on the plaint, but no relief for recovery of possession was prayed for;

Held, that as the plaintiff — appellant has paid advalorem court fee although, there is no legal difficulty in granting relief for recovery of possession of the suit properties under the issue framed to what other relief or reliefs, the plaintiff is entitled.

Held, further, that when a matter in issue between the parties is finally heard and decided by a competent court at one stage of the suit or proceeding, the matter will operate as res — judicata between the parties in the subsequent stage of the suit or proceeding if the same is not set aside by the appellate or revisional Court as the case may be.

Held, also, that so far as the position and status of a Mahant is concerned, it is well settled that the Mahant is a mere castodian or manager of the Math property and he cannot alienate Math property without legal necessity nor he can change the constitution of the Math.

Mahant Vidhaya Nand Giri v. Mahant Rama Nand Giri and ors. 1464

Unlawful Activities (Prevention) Act, 1967 — section 2(l) and, (g), sub-section (1) of

section 3 and provision to sub-section(3) — provisions of — notification by the Ministry of Home Affairs declaring the Jamat-E-Islami Hind to be unlawful association — validity of — section 3(1) read with section 2(f) and (g) — provisions of, whether suffer from procedural unreasonableness — section 3 sub-section (3) proviso — whether imposes unreasonable restriction on fundamental right of the citizen — whether lays down sufficient guidelines — whether violates Article 14 of the Constitution — Constitution — Articles 14 and 19 (a) and (c) — provisions of,

Where the writ-petitioner President, Bihar zone of Jammat-E-Islami Hind, challenged the notification dated 10th December, 1992 issued by the Ministry of Home Affairs, Government of India issued under the provision of section 3(1) read with proviso to subsection (3) of section 3 of the Unlawful Activities (Prevention) Act, 1967 hereinafter referred to as the Act, declaring the Jammat -e-Islami Hind to be Unlawful Association;

Held, that section 3(1) of the Unlawful Activities (Prevention) Act, 1967, read with section 2 (f) and 2 (g) of the Act cannot be challenged on the ground that restrictions imposed are un-reasonable from substantive point of view such provision which imposes such restriction are in the interest of sovereignty and integrity of India. Fundamental

rights guaranteed under Article 19(a) and (c) of the Constitution are no doubt very cherished rights, but the rights of an individual must be subject to the greater right of the public at large. The rights conferred by Article 19 are conferred only on citizen and it is not available to all or any person or association of persons who are not citizen. This personal right of the citizen must be subject to the interest of public at large.

Held, further, that section 3 (1) read with section 2(f) and (g) of the Act, do not suffer from any procedural unreasonableness.

Held, further, that proviso to sub-section (3) of section 3 of the Act, cannot also be struck down on the ground that it imposes unreasonable restriction, on the fundamental right of the citizen from the procedural aspect.

There is ample guideline laid down so far as the power conferred by section 3(1) and the proviso to sub-section 3 of the Act are concerned. Section 3 (1) of the Act as such cannot be challenged as violative of Article 14 of the Constitution. The State has laid down the guideline sufficiently and the object is very clear. The exercise of power by the Central Government is to be guided by the same. There is no allegation of arbitrary or uncontrolled power to the Government to enable it to discriminate between persons or things similarly situtate. Mere possibility of an abuse of power

is not sufficient for striking down the conferment of the power as such.

In the instant case the objects and reasons of the Bill, the preamble read in the light of the surrounding circumstances, which necessitated the legislation in conjunction with the well known facts of which the court may take judicial notice, it is clear that there is a guiding policy and that there is no conferment of any arbitrary or naked power.

Held, that, even the proviso to sub-section (3) of section 3 of the Act cannot be challenged on the ground that the same violates the provisions of Article 14 of the Constitution.

Held, further that section 3(1) of Act is not ultra vires Article 21 of the Constitution.

Held, further, that section 10 to 14 of the Act are not violative of the provisions of Articles 14 or 19 or 21 of the Constitution.

Held, further, by applying the principle of pith and substance that it is not a law relating to public order" but it is a law relating to "sovereignty and integrity of India," even if it may incidentally affect a "public order." This subject is not the subject matter of any specific entry of any of the Lists and, accordingly, it is the Parliament which alone can legislate regarding this subject and not any State legislature.

Held, also that the notification issued

PAGE

under section 3 read with the proviso to sub-section (3) of Section 3 of the Act has not been made mala fide or in colourable exercies of power and is not based on stale gound

Ahmad Ali Akhtar & another v. the Union of India and another. (1993) , I.L.R. 72, Pat. 331

Wealth Tax Act, 1957 section 5 (1) XXXII Explanations — provisions of — business activity of the assessee firm not being an industrial under taking, whether can claim exemption under the provisions of clause (XXXII) of sub section (1) of section 5 of the Wealth Tax, 1957.

The construction of buildings, roads, drains etc. being immovable properties, on the face of it are not embraced by the expression "manufacture or processing of goods" in explanation to clause (xxxi) of sub-section (1) of section 5 of the Wealth Tax Act, 1957

Held, that the business activities of the firm, cannot be said to be that of an industrial under-taking and, as such the assessee cannot claim exemption under clause (xxxii) of sub-section (1) of section 5 of the Wealth Tax Act.

Held, further, that the manufacturing of brick for execution of the work contract is wholly inconsequential for determination of the issued involved because it is merely an ancillary or incidental activity.

Commissionar of Wealth Tax, Bihar-II, Ranchi v. Shree Kishori Lal Agrawal, Jugsalai, Jamshedpur (1993) I.L.R. 72, Pat. 276

Writ application— disputed question of fact—High Court in its writ jurisdiction, whether can enter into disputed question of fact—Indian Forest Act, 1927 -[-section 29— notification issued on 29.12.1952 declaring the lands as forest, and waste land therein as protected forest—whether could be challenged belatedly.

The writ-petitioner questioned the Government notification dated 25.12.1952 issued under section 29 of the Indian Forest Act 1927 on the ground that the lands in question had been recorded as Gairmazarua Am land and were in the nature of raiyati. The said lands belonged to Land-lord of Rohani Ghatwal Estate and therefore it did not vest in the State of Bihar. The land were given by deed of gi. dated 6.4.1964 & 19.4.1964 to Bhoodan Yagna Committee, Deoghar by the landlord and in several cases it was confirmed by revenu authorities. Some lands had been settled by Bhoodan Yagna Committee, Deoghar, by issuance of Parchas.

Held,that in a writ application it is nto possible to enter into the thicket of disputed question of fact as to whether prior to the issuance of the Government notification dated 29.12.1952, all legal requirements were complied with or not. Under the provisions of section 114 of the Evidence Act, 1872, an presumption arises to the effect that an official

act is prsumed have been done in regular course of business.

Held, further, that question raised by the writ-petitioners requires investigation of disputed question of fact.

The High Court in its writ-jurisdiction can not act as civil court and thus cannot decide a serious disputed question of title. Even the question as to whether the purchase of the ex-land lord had vested in the State of Bihar or not is essentially a question of fact.

The writ-petitioners can not be allowed to question a notification which was issued in the year 1952. The writ petitioners did not question the Government notification dated 29.12.1952 even after purchas had been issued in their favour by the Bhoodan Yagna Committee.

Bhuneshwar Pandit v. The State of Bihar & ors. (1993), I.L.R. 72, Pat. 1148

LIST OF CASES AFFIRMED AND REVERSED

LETTERS PATENT

1. I.L.R. 72 Pat. 1355 affirms the judgment nd order dated 23.3.1992 passed by Hon'ble Mr. Justice Narbadeshwar Pandey in C.W.J.C. No. 2476 of 1988.

DIVISION BENCH

1. I.L.R. 72, Pat 655 overrules the decision reported in (1989) B.B.C.J. 714.

2. I.L.R. 72, Pat 912 overrules the decision reported in (1983) A.I.R. (Pat.) 335

Vacant even though list of selection grade Assistant Teachers for promotion as Headmaster was approved by the Commissioner of Education :
Held, that the State of Bihar should fill up the vaccant posts as per Roster Panji at an early date. As Supreme Court has passed order of Status quo in Special Leave Petition No. 18361 of 1991, the order of status quo shall be operative so far as parties thereto are concerned.
Held, further, that as the question of vires of Bihar Nationalised Secondary School (Service Conditions Rules, 1983) is pending consideration Before Supreme Court, the orders of promotion to the posts of Headmaster which may be effected by the State, shall be subject to the ultimate decision of the Supreme Court in the said case.
Shatrughan Pd. Singh and ors. v. The State of Bihar and ors (1993). I.L.R. 172, Pat. 87

APPELLATE CIVIL

Before S. B. Sinha, J.*

1990

February,12

Rameshwar Mistry and another. **

v.

Babulal Mistry.

Hindu Law – Suit for partition– property in the name of the wife of a ocparcener– ad-valorem court fee in respect of those properties, whether payable–simple suit for partition,whether maintainable–Benami Transactions (Prohibition) Act, 1988 (Act 45 of 1988), sections 3 and 4 provisions of – acquisition of property in the name of wife of a coparcener – whether constitutes benami transaction and whether saved by section 3(2).

Where in a suit for partition the plaintiff categorically pleaded that certain properties standing in the name of the wife of a cpparcener belonged to the joint family as having been purchased out of joint family fund and she had no right, title and interest therein.

Held, that, in such a case ad-valorem court fee was payable by the plaintiff and simple suit for partition was not maintainable in respect of those properties. Whenever in a Suit for partition an alienation standing in the name of a stranger to the joint family is questioned on the ground that

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* Sitting at Ranchi

** Appeal from Original Decree-No.33 of 1994 (R) Against the judgment and Decree dated 23.2.1984 passed by Shri D. N. Pathak, Special Subordinate Judge, Ranchi in Partition Suit No. 263 of 1982.

the same is a joint family property, the same would require independent declaration of title not necessarily connected with the relief of partition.

Held, further, that an acquisition of property in the name of the wife of a coparcener by the joint family will constitute a benami transaction and will not be saved under section 3 (2) of the Benami Transactions (Prohibition) Act, 1988. From a bare perusal of section 4 (3) of the said Act. it is evident that even such a case is not protected thereunder. The suit filed by the plaintiff in respect of those properties was barred under the provisions of Benami Transactions (Prohibition) Act, 1988.

Case laws discussed.

Appeal by the defendants.

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

M/s P. K. Prasad and M. Sahu for the appellants

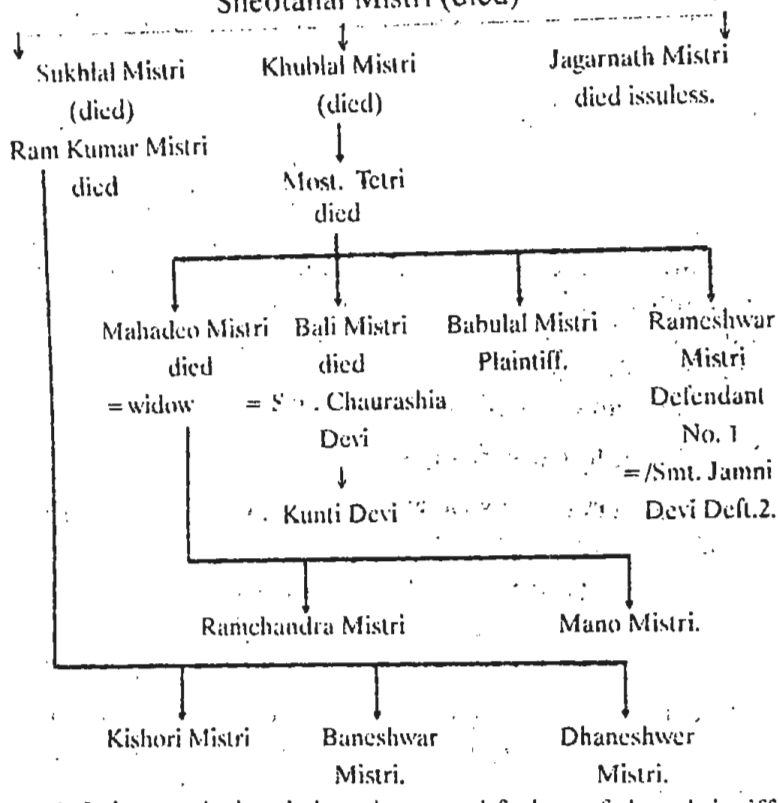
M/s Debi Prasad and Miss. I. Choudhary for the Respondents

S. B. Sinha, J: — This First Appeal at the instance of the defendants arises out of a judgment and decree dated 23.2.1984 passed by Shri D. N. Pathak, Special Subordinate Judge, Ranchi in Partition Suit No. 263 of 1982 where by and where under the said learned court decreed the plaintiff-respondent's suit for partition.

2. The Plaintiff respondent filed the aforementioned suit for partition claiming 1/2 share in respect of the properties in suit.

3. The relationship of the parties would appear from the Genealogical table as mentioned in schedule A written at the foot of the plaint which is as follows :—

GENEALOGY



4. It is an admitted that the grand father of the plaintiff Sheotahal Mistri executed a registered deed of will dated 5.1.1938 in respect of two house properties which have been mentioned in item Nos. (i) and (ii) of Schedule B of the plaint jointly in favour of the plaintiff and the defendant No. 1. The plaintiff contended that thereafter the legatees of the said will i. e. he and defendant No. 2 came in joint possession of the aforementioned properties. It has further been asserted by the plaintiff that he constructed a house over the lands standing on M. S. Plot No. 636 Municipal Holding No. 312 situated at Tewari Tank Street, Ranchi.

5. It is further admitted that a partition suit was filed by Ram Kumar Mistri along with his sons in the court of Subordinate Judge, Ranchi which was registered as Partition Suit No. 66 of 1961 wherein, inter-alia, the plaintiff and the defendant No. 1 and their other brothers were impleaded as parties. The said suit ended in a compromise and a final decree in terms of the aforementioned compromise was passed on 16.2.1961. The said aforementioned will executed by Sheotahal Mistry is dated 5.1.1938. The plaintiff has contended that the properties described in item Nos. (iii) and (iv) of the Schedule & appended to the plaint was purchased out of the joint family fund belonging to the plaintiff and the defendant No. 1. According to the plaintiff, although, the said properties stand in the name of defendant No. 2. she has no interest there in but inorder to avoid future complication, she was impleaded as defendant No. 2 in the suit.

6. In the suit aforementioned, the plaintiff claimed 1/2 share in all the four items of the properties mentioned in schedule 8 of the plaint.

7. In the aforementioned suit, a written statement was filed by the defendant No. 1.

In the said written statement, the defendant No. 1 contended that there is no unity of title and possession in respect of items Nos. (iii) and (iv) of Schedule 8 to the plaint. The defendant No. 1 further contended that the plaintiff and the said defendant No. 1 had no title or possession in respect of the aforementioned properties namely Items Nos. (iii) and (iv) of Schedule B to the plaint as the said properties were self acquired properties of the defendant No. 2 having been purchased out of her own separate fund. It was further stated that the defendant No. 2 herself constructed a Pucca building and dug a well therein. The defendant No. 1 further stated that the defendent No. 2

has got her name mutated in the State of Bihar and has been paying rent to it.

8. It was further alleged in the said written statement that the market price of the said properties would be about Rs. 1,00000/- and unless the plaintiff pays advalorem court fee thereon, the suit will not be maintainable.

9. The defandant No. 1 further contended that the suit is bad for partial partition as the plaintiff deliberately has not brought in common hotel-pot the properties which have been acquired out of the joint family fund in the name of the plaintiff on 5.11. 1969 by virtue of two registered deed of sale. The said properties have been described in Schedule A of the written statement.

10. It has further been contended that the plaintiff was the karta of the joint family along with him and their mother had also been residing with them. According to the defendant No. 1, their mother died leaving behind gold ornaments and silver coins which are also in the custody and possession of the plaintiff and the same are also available for partition. The defendant No. 1, however, admitted that he and the plaintiff have equal share in the properties described in Item Nos. 1 and 2 of the Schedule B appended to the plaint.

11. The defendant No. 2 has filed a separate written statement in the aforementioned suit. She in her written statement contended that the properties described in item Nos (iii) and (iv) the Schedule B appended to the defendant No. 1 have got no interest in the same. It was further contended by the the defendant No. 2 that the suit as framed was not maintainable and it was barred by adverse possession as also barred under the Proviso to Section 34 of the Specific Relief Act. It was further contended that unless the plaintiff pays advalorem court fee on the marked value of the properties, a simple suit for partition is not maintainable.

12. On the basis of the aforementioned pleading of the parties, the parties, the learned trial court framed the following issues :—

*1. Is the suit as framed maintainable ?
2. Has the plaintiff get any valid cause of action or right to sue in this suit ?
3. Is the suit barred by law of limitation, adverse passion and ouster ?
4. Is the suit barred u/s 34 of the Specific Relief Act ?
5. Is the suit hit by the Principles of partial partition ?
6. Is the suit bad for defect of parties ?
7. Is the court fees paid sufficient in this suit.
8. Is there existence of unity of title and possession between the parties for all the suit properties ?
9. Are the properties purchased in village Ulatu vide Ext. 1 and 1/a self-acquired properties of plaintiff or joint family properties as claimed by defendent No. 1 ?
10. Are the properties mentioned in item Nos. III and IV Schedule B of the plaint self-acquired properties of defendent No. 2 as claimed in this suit ?
11. Is the plaintiff entitled to get a decree for partition, if so, in respect of which of the suit properties.
12. To what other relief or reliefs,if any, is the plaintiff entitled?.

13. The learned court below, however, took up issue Nos. 3 to 10 together and arrived at the following findings

(a) The plaintiff and the defendant No.1 at all material time were joint and they continued to live jointly, so as to constitute a joint family despite partition of the joint family properties in the year,1967.

(b) The properties described in item Nos. (iii) and (iv) of schedule B are also joint family properties and the said properties were acquired in the name of the defendant No.2 out of the joint family fund.

(c) With regard to the properties which are situated in village Utlatu as described in Schedule A of the written statement filed on behalf of the defendant No. 1, it was held that the said properties are self acquired properties of the plaintiff. On the aforementioned finding, the learned court below decreed the plaintiff-respondent suit.

14. Mr. P. K. Prasad, the learned counsel appearing on behalf of the appellant submitted at the out-set that there cannot be any objection on the part of the client to partition the properties described in Item Nos. 1 and 2 of the Schedule B appended to the plaint. He, however, submitted that the suit filed by the plaintiff in respect of item Nos. (iii) and (iv) of Schedule B appended to the plaint were not maintainable, inter-alia, on the ground;

(a) The defendant No. 2 being not a co-parcener; the plaintiff was bound to pay advalorem court fee on the market value of the properties in suit and as the plaintiff failed and/or neglected to pay the same, the suit was not maintainable.

(b) In view of the statements made in paragraph 12 and 13 of the plaint, it must be held that according to the plaintiff, the defendant No. 2 was the benamidar of the joint family and in this view of the matter, the suit was barred under the Provisions of Benami Transactions (Prohibition) Act, 1988.

(c) Even on facts the plaintiff could not prove that the said properties were joint family properties.

15. Mr. Debi Prasad, the learned counsel appearing on behalf of the plaintiff respondent, on the other hand, submitted that as the plaintiff has categorically pleaded that the properties mentioned in item Nos. (iii) and (iv) of the

Schedule B appended to the plaint are joint family properties and thus no advalorem court fee was payable on the market value of the said properties.

The learned counsel further contended that in view of the fact that Benami transaction is not prohibited in respect of the purchase of a land by a husband in favour of his wife. in view of the provisions of Sub-section 2 of Section 3 of the Act, the defendant No. 1 being the husband of the defendant no. 2, the purported benami transaction having been done by the defendant No.1 as a member of the joint family in the name of his wife. the same is saved Under Sub-section 2 of Section 3 of the said Act.

16. The learned counsel further submitted that the learned court below has rightly held that even after partition which took place in the year, 1967, the plaintiff and the defendant No. 1 continued to have a joint business and thus there was a nesucleus of the joint family which was sufficient four acquisition of the said properties by the joint family.

Re-question No(1) :

17. Under the Hindu family, a female cannot be a member of coparcenery governed under the Mitakshra School of Hindu Law.

18. The defendant No. 2 is the wife of defandant No. 1 and during the life time of defendant no. 1, she cannot also be said to be a member of the joint family.

19. When-ever in a suit for partition, an alienation standing in the name of a stronger to the joint family is questioned on the ground that the same is joint family properties, the name would require independent declaration of title not necessarily connected with the relief of partition.

20. It is true as has been observed by the learned court below that in determining the question as to whether the plaintiff in bound to pay ad-valorem court fee or not. the allegations made in the plaint are only necessary to be

considered, as has been held by the Patna High Court in *Ramautar Sao Vrs. Ram Gobind Sao and others* reported in A.I.R. 1942 Patna page 60; but it is also well settled that a dexterity on the part of the counsel of a party in drawing up a pleading cannot be taken undue advantage of for the purpose of evading the court fee stamps.

In Mt. Ropia Vrs. Bhatu Mahton and others reported in A.I.R. 1944 Patna page 17, a Full Bench of this Court, after considering the decision reported in A.I.R. 1942 Patna Page 60 held as follows:—

"But the dexterity of the person drawing up the pleadings avoiding the use of certain words in the plaint, which would make the relief a consequentil one, should not determiner the amount of court-fee payable or the plaint. The court-fee is dependent not on the form of the pleadings, but on the real substance of the relief claimed"

21. From a perusal of the plaint, it is evident, the plaintiff categorically pleaded that the preparations described in item Nos. (iii) and (iv) of Schedule B appended to the plaint belonged to the joint family and the defendant No. 2 being a benamidar, she had no right, title and interest therein.

22. Apparently, therefore, the defendant No. 2, who, even according to the learned court below, has been held to be a necessary party, was impleaded in the said suit wherein, her title in respect of the said properties was questioned, in this circumstance, in my opinion, advaloram court fee was payable.

23. *In Tekpal Sarangi & ors vrs. Mahadeo Lal and ors* reported in A.I.R. 1951 Patna at page 526, this Court held as follows:—

> "It cannot, therefore, be said that any incidental finding of fact is necessary in order to give the main relief which the patners. claim, so far as the stranger-cleanees are concerned. Either the petnrs. are claiming no

adjudication against the stranger alieness or they are claiming an adjudication to displace their title. As there can be no relief of partition against the stranger, the only relief claimed against them is the displacement of their title based on the transfers made in their favour. That would undoubtedly be an independent declaration of title not necese–sairily connected with the relief of partition. If he relief is claimed against the strangers, then they should not have been made parties to the litigation. It seems to me that so far as the stranger-defts, are concerned, the suit is, in substance, a suit for a declaration of title. & the learned Subordinate Judge rightly held that the suit was a suit for title in the guise of a partition suit."

24. The Patna High Court again in a decision in *Kailasan Singh* and ors Vrs. *Ramdut Singh* and ors reported in A.I.R. 1951 Patna Page 633, after considering various decisions held that advalorem court fee is payable when the properties stand in the name of a stranger to the co-partcenery.

25. In the said decision, the Division Bench of this Court proceeded to observe:

"If a plaint by necessary implication contain a prayer for adjudication on a question of title, then clearly the proper court fees must be paid for in respect of that adjudication. In the present case the prayer for adjudication on this question of benami is meet clearly present by necessary implications. Indeed it might almost be called express. In para. 3 of the plaint, it is recited that owing to the common ancestor, Babu Narain Singh, being a Government servant, transactions were not carried on his name in spite of his being the karta, but properties were purchased in the names of the two ladies in question. Nevertheless, all the

members of the joint family had been in possession of those properties, and those properties constituted joint family properties in which the plaintiffs had one third share. Here is a quite clear allegation of benami, and in the relief portion of the plaint it is asked that on adjudication of the above facts the plaintiffs'share to the extent of one third in the properties sought to be partitioned may be got partitioned by deputing a Commissioner. The plaintiffs have quite clearly asked for an adjudication of this question of title and indeed they had to get an adjudication of that question before petition of such properties could be ordered."

26. From a conspectus of the decisions as referred to herein before, it is absolutely clear that as in this case also, the plaintiff contended that the properties held in the name of the defendant No. 2 was the joint family properties and she has no right, title and interest therein adrodosem court fee was payable.

27. In this view of the matter, there cannot be any doubt that a simple suit for partition was not maintainable in respect of item Nos. (iii) and (iv) of Schedule B appended to the plaint unless the plaintiff paid the advalorem court fee on the market value of the said property.

Re-contention No. 2 :

28. As noticed herein-before, the principal question which in this case is as to whether the properties described in item Nos. (iii) and (iv) of the Schedule B appended to the plaint are Benami in nature or not. The plaintiff, in paragraph 13 of the plaint alleged as follows: –

"That lands situated at village Jorar, P.S. Namkum. District Ranchi morefully described in item Nos. (iii) and (iv) of Schedule B to the plaint have also been purchased out of joint family funds belonging to the plaintiff and defendant No. 1. Although the deads stand

in the name of defendant No. 2, she has no interest in the said properties but in order to avoid future complication. She is being made defendant No. 2 in this suit. The plaintiff and defendant No. 1 are also coming in joint possession of the properties mentioned in item Nos. (iii) and (iv) of Schedule B to the plaint."

29. From the allegations made in paragraph 13 of the plaint, it is clear that it is not the case where a property has been acquired by the joint family in the name of a co-parcener.

30. According to the plaintiff himself, the defendant No. 2 had no right, title and interest in the property.

31. Benami transactions (Prohibition) Act, 1988 was enacted, inter-alia to prohibit benami transactions:

Section 2(a) of the aforementioned Act defines benami transaction to mean:

"Benami Transaction" means any transaction in which property is transferred to one person for a consideration paid or provided by another person".

32. Section 3 and 4 of the said Act read as follows:-

Sec.3" Prohibition of benami transaction:

(1) No person shall enter into any benami transaction.

(2) Nothing in sub-section (1) shall apply to the purchase of property by any person in the name of his wife or unmarried daughter and it shall be presumed, unless the contrary is proved, that the said property had been purchased for the benefit of the wife or the married daughter.

(3) Whosever enters into any benami transaction shall be punishable with imprisonment for a term which may extend to three years or with fine or with both.

Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), an offence under this section shall be non-cognizable and bailable.

Sec.4" Prohibition of the right to recover property held benami:

(1) No suit, claim or action to enforce any right in respect of any property held benami against the person in whose name the property is held or against any other person shall lie by or on behalf of a person claiming to be the real owner of such property.

(2) No defence based on any right in respect of any property held benami, whether again at the person in whose name the property is held or against any other person, shall be allowed in any suit, claim or action by or on behalf of a person claiming to be the real owner of such property;

(3) Nothing in this section shall apply

(a) Where the person in whose name. The property is held is a coparcener in a Hindu Undivided family and the property is held for the benefit of the coparcenery in the family; or (b).

33. In *Methilesh Kumari and another Vrs. Prem Beharikhara* reported in A.I.R. 1989 Supreme Court page 1247, The Supreme Court held that Section 4 of the aforementioned Act applies also to a pending suit and an appeal. In the aforementioned decision, the Supreme Court held that as the said statute is a dis-qualifying one, so far as the maintainability of the suit is concerned, the same will have retrospective operation. The same view has been taken in *Valayudhan Ramkrishnan and ors Vrs. Rajeev and ors*

reported in 1989 Kerala page 12. A.I.R. 1989 Kerala page 286 (Chaliloth Tharoth Mahanan and another Vrs. Chaliloth Yesoda and ors).

34. Recently in S.A. No. 178 of 1976 (R) *Smt. Radha Devi and ors. Vrs. Kisuralia Kaharin)* disposed on 20.9.1976, it has been held by me that if a case comes within the purview of Section 3 of the said Act, Section 4 will not operate as a bar in the maintainability of the suit.

35. *In the instant case, Section 3(2)* of the said Act has no application. By reason of the provisions of the said Act, the parliament intended to bring on statute book the doctrine of advancement which was not prevent in this country.

36. An acquisition of property in the name of the wife of a co- parcenar by the joint family will, in my opinion, constitute a benami transaction and will not be saved Under Section 3(2) of the Act.

From a bare perusal of Section 4(3) of the said Act, it is evident that even such a case is not protected thereunder.

37. In this view of the matter, in my opinion, it has to be held that the suit filed by the plaintiff in respect of item Nos. (iii) and (iv) of the Schedule 8 appended to the plaint was barred under the provisions of Benami Transaction (Prohibition) Act, 1988.

38. In the result, the appeal is allowed the part and it is declared that the plaintiff- respondent is entitled to partition in respect of 1/2 share only in relation to item Nos. (i) and (ii) properties described in Schedule B of the plaint.

However, in the facts and circumstances of the case, there will be no order as to costs.

S. P. J. Appeal allowed in part

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TAX CASE

Before Gopichand Bharuka & S.K. Chattopadhya, JJ.

1992
February 28

Commissioner of Income-tax, Bihar, Patna.*
v.
M/s Nipani Tobacco Store, Patna City.

Income Tax Act, 1961 (Central Act No. XLIII of 1961) sections 139 and 217 — Charging of interest under ..... assessee claiming that he was not liable to levy of interest .... another appealable.

Where the assessee did not claim any waiver or reduction on any of the grounds set out in Rules 40 and 117 A of the Income Tax Rules, 1962, but claimed that he was either not at all liable to levy of interest or, if at all liable, the quantum has not been correctly determined;

Held, that the assessee had the right of appeal on the question of chargeability of interest under section 139 and 217 of the Income Tax Act, 1961.

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 G.C. Bharuka, J.

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* Taxation Case No. 259 of 1980. 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 M/s Nipani Tobacco Store, Patna City for the assessment year 1975-76.

Mr. S. K. Sharan for the Applicant .
Mr. A. K. Rastogi & Mr. Shailendra Kumar for the Respondend.

G.C. Bharuka, J. — The present reference under section 256(1) of the Income Tax Act, 1961 (hereinafter referred to as the 'Act' only) involves the following question of law :

"Whether, on the facts and in the circumstances of the case, an appeal lies to the Appellate Assistant Commissioner against the charging of interest under sections 139 and 217 of the Income Tax Act, 1961, even though the assessee may deny the liability to be assessed to interest or he denies mere quantum of interest."

2. This reference relates to the assessment year 1975-76. The Income Tax Officer while making assessment, also passed an order for charging interest under sections 139 and 217 of the Act. Accordingly, the petitioner was subjected to levy of interest under the said sections. The assessee preferred an appeal before the Appellate Assistant Commissioner assailing the assessment order on various grounds. He challenged the levy of interest on the ground that there were errors in its computation. The Appellate Assistant Commissioner refused to entertain this grievance on the plea that no appeal lies against charging of interest under sections 139 and 217 of the Act. On a further appeal by the assessee, the Tribunal took the view that appeal lay even against charging of interest under the aforesaid sections.

3. Sri S.K.Sharan, learned counsel appearing for the Revenue, has submitted that the view taken by the Tribunal is not correct in view of the Supreme Court decision in the case of *Central Provinces Manganese Ore Co. Ltd. v. Commissioner of Income Tax*, reported in (1986) 160 ITR

961. According to him now Supreme Court has clearly laid down that appeal can lie only in such cases where the assessee completely denies his liability but no appeal can lie, if he merely challenges the computation of the interest charged.

4. On the other hand, Sri L.N.Rastogi, learned counsel appearing for the assessee, has submitted that according to Supreme Court, the appellate forum is not available only in such cases where the assessee claims waiver or reduction of interest in the circumstances enumerated under rules 40 and 117A of the Income-Tax Rules, 1962. He submits that in the present case the petitioner has not claimed any waiver or reduction on any of the grounds set out in the said Rules. On the contrary, the assessee's claim is that he is either not all liable to levy interest, or, if at all liable, the quantum has not been correctly determined.

5. For proper appreciation of the rival contentions it will be proper to quote the relevant provisions which run as follows:

> *Section 139(8)(a)* Where the return under sub-section (1) or sub-section (2) or sub-section (4) for an assessment year is furnished, after the specified date, or is not furnished, then / whether or not the Income-tax officer has extended the date for furnishing the return under sub-section (1) or sub-section (2), the assessee shall be liable to pay simple interest at 12 percent per annum, reckoned from the day immediately following the specified date to the date of the furnishing of the return or, where no return has been furnished, the date of completion of the assessment under section 144, on the amount of the tax payable on the total income as determined on regular assessment, as reduced by the advance tax, if any, paid, and any tax deducted at source :
>
> Provided that the Income-tax officer may, in such cases and under such circumstances as may be prescribed, reduce or waive the interest payable by any assessee under this sub-section.

Explanation 1. ....

Explanation 2. ....

"*Section 217.* Interest payable by assessee when no estimate made.-(1) Where, on making the regular assessment, the Income-tax officer finds that any such person as is referred to in sub- section (3) of Section 212 has not sent the estimate referred to therein, simple interest at the rate of twelve percent per annum from the 1st day of April next following the financial year in which the advance tax was payable in accordance with the said sub-section up to the date of the regular assessment shall be payable by the assessee upon the amount equal to the assessed tax as defined in sub-section (5) of section 215.

(1A) ....

(2) The provisions of sub-sections (2), (3) and (4) of section 215 shall apply to interest payable under this section as they apply to interest payable under that section.

Section 215. Interest payable by assessee.-

....

....

(4) In such cases and under such circumstances as may be prescribed, the Income-tax officer may reduce or waive the interest payable by the assessee under this section.

Rule 40. Waiver of interest.

The Income-tax officer may reduce or waive the interest payable under section 215 or section 217 in the cases and under the circumstances mentioned below, namely:

(1) When the relevant assessment is completed more than one year after the submission of the return, the delay in assessment not being attributable to the assessee.

(2) Where a person is under section 163 treated as an agent of another person and is assessed upon the latter's income.

(3) Where the assessee has income from an unregistered firm assessed under the provisions of clause (b) of section 183.

(4) Where the previous year is the financial year or any year

ending about the close of the financial year and large profits are made after the 1st March (or the 15 March in cases where the proviso to section 211 applies), in circumstances which could not be foreseen.

(5) Any case in which the Inspecting Assistant Commissioner considers that the circumstances are such that a reduction or waiver of the interest payable under section 215 or section 217 is justified."

Rule 117A. Reduction or waiver of interest payable under section 139.

The Income tax Officer may reduce or waive the interest payable under section 139 in the cases and in the circumstances mentioned below, namely:

(i) Where the return of income is furnished by a person who has been treated under section 163 as an agent of a non-resident and is assessed in respect of the latter's income;

(ii) Where the return of income is furnished by an assessee whose only source of income during the relevant previous year is a share in the income of an unregistered firm which has been assessed on its total income in respect of that previous year under clause (b) of section 183;

(iii) Where the return of income of a deceased individual is furnished by his legal representative and the legal representative satisfied the Income-tax officer that he had sufficient cause for not furnishing such return within time;

(iv) Where the return of income has been furnished in pursuance of a notice issued under section 148;

(v) In any case in which the assessee produces evidence to the satisfaction of the Income-tax officer that he was prevented by sufficient cause from furnishing the return within time:

Provided that the previous approval of the Inspecting Assistant Commissioner has been obtained where the amount of interest reduced or waived, as the case may be, under clause (iv) or clause (v) exceeds one thousand rupees.

From the above quoted provisions it will be found that under the main provisions of section 139 (8) and 217(1), interest is leviable at certain rates on existence of certain

foundational facts. In a given case the assessee may able to show that in the facts of his case either he was not liable to any levy of interest or the interest us calculated was based on mistaken facts,which if accepted may result in partial reduction of his liability. Under the proviso to section 139(8) and under section 217(2) read with section 215 (4),a discretion has been vested in the Income-tax Officer to waive or reduce the interest levied under the main provision of the said sections, if the case is covered by the circumstances enumerated under rules 40 and 177A of the Rules. Therefore, it is clear that a right of challenging the liability of interest either wholly or partially on the ground of incorrect assumption of foundational facts leading to levy of interest,is quite distinct from seeking waiver or reduction of interest on the ground of existence of circumstances prescribed under the Rules. The occasion for exercise of jurisdiction by the Income-tax Officer for waiver or reduction of interest could arise only when the assessee is found to be liable for paying interest under the main provisions. In cases, where in law there was either no liability or the liability created was partially had then in such a situation,the Income-tax Officer does not exercise the power of waiver or reduction under the circumstances enumerated under the Rules. Seeking of reduction in the liability of interest on the ground of errors committed by the Income-tax Officer is quite different and distinct from seeking reduction in the quantum of interest by taking shelter under the rules 40 and 117 of the rules. In the former Case, reduction refers to partial denial of liability, whereas in the later,it is referable to partial waiver.

6. In the case of *Central provinces Manganese Ore Co. Ltd* (supra) it has been held by the Supreme Court that levy of interest is a part of the process of assessment. It has been further held at page 967 that.

"If the assessee denies his liability to be assessed under the Act, he has a right of appeal to the Appellate Assistant Commissioner against the order of assessment. Where penal interest is levied under section 215 by the order of assessment, the assessee may altogether deny his liability to pay such interest on the ground that he was not liable to pay advance tax at all or that the amount of advance tax determined by the Income-tax officer as payable ought to be reduced. *In either case, he denies his liability, wholly or partially,* to be assessed. Similarly, where interest is levied under section 139 of the Act, the assessee may deny his liability to pay such interest on the ground that the return was not belated or that the penal provision was not attracted at all to his case. *In such a case also, he denies his liability to be assessed to interest.*

(emphasis supplied)

7. Adverting to the other aspect of the question before the supreme Court, it was held by their Lordships that in case the assessee intends to claim the benefit of waiver or reduction of interest levied under sub-section(8) of section 139 or section 215 (4)by relying on the circumstances enumerated under Rules 40 or 117A,then, against the order of the Income-tax Officer refusing such a claim, the assessee has a remedy only by way of revision to the commissioner and he has no right of appeal.

8. On consideration of the relevant provisions of the Act the Rules and law as laid down by the Supreme Court in the above referred case. I am of the opinion that in the facts and the facts and the circumstances of the present case, the petitioner had the right of appeal on the question of chargeability of interest under sections 139 and 217. Accordingly, I answer the question referred in affirmative i.e. in favour of the assessee.

9. Under the facts and the circumstances of the case, there will be no order as to costs.

10. Let a copy of this judgment be sent to the Income-tax Tribunal, Patna Bench, Patna.

S. K. Chattopadhyaya, J. I agree.

R.D. Question answered

***

TAX CASE

Before G. C. Bharuka & S. K. Chattopadhyaya, JJ.

1992

May, 1

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

V.

The Bihar Journals Ltd., Patna.

Income Tax Act, 1961 (Central Act No. XLIII of 1961) section 215 — Assessee after sending estimate of advance tax, failed to pay advance tax — effect of — whether liable to pay interest under section 215.

Where the assessee does not send the estimate of advance tax under section 212 (3A) of the Income Tax Act, 1961, hereinafter referred to as the act, then he will be liable to pay interest under section 217 (1A) of the Act. But if after sending an estimate he fails to comply with the second requirement of paying advance tax in accordance with his estimate on the due date then he will be liable to pay interest under section 215 of the Act.

Held, that in the instant case interest is chargeable from the assessee under section 215 and not section 217 (1A) of the Act.

Gursahai Saigal v. *Commissioner of Income Tax, Punjab (1)* — followed.

Taxation Case No. 330 of 1980. Statement of case under section 256 (2) of Income-tax Act, 1961, by the Income-tax Appellate Tribunal, Patna Bench, Patna in the matter of assessment of Income-tax on the Bihar Journals Ltd. Patna, for the Assessment Year 1974-75.

(1) (1963) A. I. R. (S. C.) 1062 = (1961) 41 I. T. R. 592 (Punjab)

Statement of case under section 256 (2) of the Income tax Act.

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

Mr. L. N. Rastogi, Sr. S. C., I. T. D.

Mr. S. K. Shoran, Sr. S. C., I. T. D. for the Applicant.

Mr. K. N. Jain, Sr. Advocate for the Respondent.

G. C. Bharuka, J. — This is a reference under *Section 256 (2)* of the Income-Tax Act, 1961 (hereinafter to be referred to as 'the Act' only). The statement of case was called for from the Tribunal on the following questions of law : —

(1) Whether on the facts and in the circumstances of the case the Tribunal was justified in law in setting aside the I. T. O's order and directing him to refund the interest of Rs. 93, 623/- if already realised from the assessee ?

(2) Whether on the facts and in the circumstances of the case, the Appellate Tribunal was justified in coming to the conclusion that the proceedings under Section 154 could not be started against the assesssee ?

(3) Whether on the facts and in the circumstances of the case the interest could be charged under Section 215 or Section 217 (1A) ?

(4) Whether on the facts and in the circumstances of the case, the Income-tax Appellate Tribunal was correct in cancelling the order passed by the I. T. O rectifying the mistake, which was apparent from the records

2. The assessment year involved is 1974-75. The assessee is a limited company. It paid a sum of Rs. 21,943/- as advance tax in accordance with the provisions of Section 210 of the Act pursuant to as order of the Income-tax Officer.

On 15-9-1973 the assessee filed an estimate of its income as provided under Section 212 (3A) of the Act estimating its income at Rs. 2,30,000/- for the assessment year in question since according to the assessee the current income was likely to be greater than the income on which the advance tax was payable by him under 210 of the Act. But it did not pay the tax in accordance with the said estimate. The total income of the assesses was assessed at Rs. 4,54,360/- under Section 143(3) of the Act, and the tax payable came to Rs. 2,62,393/-. Accordingly, the Income-tax officer, in the said order itself, apart from directing for issuance of demand notice for tax, also directed that interest for late filing of return and penal interest under Section 217 (1A) to be charged as per law.

(emphasis added).

3. In the demand notice, issued pursuant to the said assessment order, apart from demand of tax, though Rs. 69,608/- was demanded by way of interest under Section 215 of the Act but no demand was raised against any interest levied under Section 217 (1A) of the Act. Subsequently, an order under Section 154 of the Act was passed holding the assessee liable to pay a sum of Rs. 93,623/- as interest under Section 217 (1A) of the Act. The Appeal preferred by the assessee before the Appellate Assistant Commissioner against the said order having failed a second appeal was taken to the Tribunal. The Tribunal on consideration of the facts and the relevant provisions of law came to the conclusion that on the facts of the case, the Income-tax Officer could not have taken recourse to the rectification

proceeding as contemplated under Section 154 of the Act. It also took the view that since the assessee had filed the estimate under Section 212(3A) of the Act, therefore, even on merit no interest was chargeable under Section 217 (1A) of the Act. Accordingly direction was issued for refund.

4. I would first like to deal with question no. (3) referred to above. For proper appreciation of the question, it will be proper to quote the relevant provisions, of the Act, which are as under :

> Sec 212 (3A) In the case of any assessee who is required to pay advance tax by an order under Section 210, if, by reason of the current income being likely to be greater than the income on which the advance tax payable by him under Section 210 has been computed or for any other reason, the amount of advance tax computed in the manner laid down in Section 209 on the current income (which shall be estimated by the assessee) exceeds the amount of advance tax demanded from him under Section 210 by more than $33\frac{1}{3}$ per cent. of the latter amount, he shall (on or before the date) on which the last installment of advance tax is due from him, sent to the Income-tax Officer an estimate of –
>
> (i) the current income, and
>
> (ii) the advance tax payable by him on the current income calculated in the manner laid down in Section 209.
>
> and shall pay such amount of advance tax as accords with his estimate on such of the dates applicable in his case under Section 211 as have not expired, by installments, which may be revised according to sub- section 92).
>
> Provided that .....
>
> *See 215 (1)* Where, in any financial year, an assessee has paid advance tax under Section 209A or Section 212 on the basis of his own estimate including revise estimate and the advance tax so paid is less than seventy-five per-cent. of the assessed tax, simple interest and the rate of fifteen percent. per annum from the Ist day of April next

following the said financial year up to the date of the regular assessment shall be payable by the assessee upon the amount by which the advance tax so paid falls short of the assessed tax.

Provided that in the case of an assessee, being a company, the provisions of this sub-section shall have effect as if for the words "Seventy five per cent." the words "eighty-three and one-third per cent. "had been substituted."

See 217 (1A) Where, on making the regular assessment, the Income- tax Officer finds that any person who is required to send an estimate under sub-section (4) of Section 209A or any such person as is referred to in sub-section (3A) of Section 212 has not sent the estimated referred to therein, simple interest at the rate of fifteen per cent per annum from the 1st day of April next following the financial year in which the advance tax was payable in accordance with the said sub-section (4), or, as the case may be sub-section (3A) up to the date of the regular assessement, shall be payable by the assessee upon the amount by which the advance tax paid by him falls short of the assessed tax paid by him falls short of the assessed tax as defined in sub-section (5) of Section 215.

A reading of Section 212 (3A) clearly shows that if an assessee who is required to pay advance tax pursuant to an order under Section 210 finds that his income for the relevant assessment year is likely to be greater than the income on which the advance tax payable by him as per the orders of the Income-tax officer, then, (i) he has to sent as estimate of the current income and the advance tax payable by him thereon as also (ii) he has to pay the said amount of advance tax on the date specified under the Act. Under Section 217 (1A) of the Act, the legislature has provided for levy of interest only in a situation where the assessee fails to sent an estimate in respect of his current income and the amount of advance tax payable thereon in accordance with Section 212(3A). The language employed does not admit of any ambiguity. It clearly provides that the interest shall be

payable if "Such person as is referred to in sub- section (3A) of Section 21 has not sent the estimate referred to therein. "Under Section 217 (1A) it has not been provided that interest will also be payable even if the estimate is filed but the advance tax payable thereon is not paid. On the other hand, in a case where estimate is filed but advance tax payable thereon is not paid then Section 215 of the Act will come into play and interest will be payable under this Section in respect of the shortfall in the advance tax payable.

5. No doubt, if Section 215 is constructed literally, it may be possible to hold that in a case where estimate is filed under Section 212 but no advance tax is paid on the basis of such an estimate then literally constructed this provision will have no application because the opening sentence of the Section is in this way :—

> "Where, in any financial year, an assessee has paid advance tax under Section 209A or Section 212 on the basis of his own estimate". But this question has already been considered by the Supreme Court long back in the case of *Girsahai Saigal Vs. Commissioner or I. T., Punjab*, reported in AIR 1963 Supreme Court, 1062 : (1961) 41 ITR 592 (Punj.) In this case the Supreme Court has considered Section 18A (6) of the Income-tax Act, 1922, which, for the present purpose, materially corresponds to Section 215 of the 1961 Act. In para 13 of the Judgment, it has been held that the word 'paid' should be read as 'ought to have been paid' to make the provision for levy of interest workable. According to the Supreme Court such interpretation can not be said to be doing too much violence to the word used. It was also noticed that those who paid the tax but a smaller amount and those who did not pay the tax at all would then be put in the same position substantially, which is obviously fair and was clearly intended. It is needless to say that

such interpretation is also in consonance with the requirement of Article 14 of the Constitution ensuring equalityandfairness.

6. From the above, it is amply clear that what the legislature intended was that in case the assessee does not send the estimate under Section 212(3A) referred to there in then he will be liable to pay interest under Section 217(1A). But if after sending an estimate he fails to comply with the second requirement of paying advance tax in accordance with his estimates on the due date then he will be liable to pay interest under Section 215 of the Act, Accordingly. On the facts and in the circumstances of the case, it is held that the interest is chargeable from the assessee under Section 215 and not under Section 217(1A) of the Act. This answers question no. 3, referred to above.

7. Since on the facts of the case, I have taken the view that no interest is at all chargeable under Section 217 (A) of the Act, therefore, the answer to question. 2 will be merely academic. Accordingly, I decline to enter into this question.

8. Questions no. (1) and (4), referred to above, are merely consequential to the answer given to question no. (3), which has been answered in favour of the assessee. Therefore, question nos. (1) and (4) are also answered in favour of the assessee and against the revenue. However, in the facts and circumstances of the case, there shall be no order as to costs.

9. Let a copy of this judgment be transmitted to the Assistant Registrar, Income-tax Appellate Tribunal, Patna Bench, Patna, in terms of Section 260 of the Act.

S. K. Chattopadyaya, J. I agree.

R. D. Question answered.

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CIVIL WRIT JURISDICTION

Before S. B. Sinha and S.Hoda, JJ.

1992
August, 8.

Jute Mill Mazdoor Sangh.*
v.
The Registrar of Trade Union and others.

Constitution – Articles 226 and 227 – writ-jurisdiction of the High Court – two Trade Unions of Rameshwar Jute Mills amalgamated by the order of the Registrar of Trade Union – Successor Registrar Trade Union refusing to review the order of amalgamation passed earlier by his predecessor – High Court in its writ- jurisdiction, whether can interfere in the order of amalgamation.

Where the Registrar Trade Union having taken into consideration all aspects of the disputed question, held that in the facts and circumstances of the case, it was not necessary to review the order passed by his predecessor in office allowing the scheme of amalgamation of the two Trade Unions of the Rameshwar Jute Mills i. e. Jute Mill/ Mazdoor Sangh and Rameshwar Jute Mill Labour Union;

Held, that the High Court while exercising its jurisdiction under Articles 226 and 227 of the Constitution, does not function as court of appeal. It is not concerned with the decision of the statutory authority but with the decision making process.

When a statutory functionary performs a statutory

* C.W.J.C.No. 5574 of 1991. In the matter of an application under Articles 226 and 227 of the Constitution of India.

function, the same can be subject matter of scrutiny by a writ court in exercise of its jurisdiction under Articles 226 and 227 of the Constitution only if the same is malafide or contains an error of record or in arriving at its decision the statutory functionary has taken into consideration irrelevant matters or fails to take into consideration the relevant facts.

Held, further, as the amalgamated Union had been functioning since 1982 and has been granted new registration certificate, it is not a fit case where this court should exercise its jurisdiction under Articles 226 and 227 of the Constitution.

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

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

M/s. Anil Kumar Jha & Ram Briksh Singh for the Petitioner.
Mr. R. S. Roy, S. C. I. for the State.

S. B. Sinha & S. Hodas, JJ – In this writ application the petitioner has prayed for quashing of an order as contained in letter dated 6.6. 1991 (Annexture-2 to the writ application) by reason where of the petitioner's application for review of a decision of the then Registrar, Trade Union relating to amalgamation of the Jute Mill Mazdoor Sangh and Rameshwar Jute Mill Labour Union has been rejected.

2. The jute Mill's Mazdoor Sangh (hereinafter referred to as "the Sangh)) was a registered Trade Union bearing registration no. 1900/75 total 8th october, 1975.

The Rameshwar Jute Mill Labour Union (here in after referred to as the Union) was also a registered Trade Union having registration no.95/46.

3. According to the petitioner in an Annual General

Meeting of the Sangh held on 28th June, 1981, Sri Laliteshwar Jha, M. L. C. was elected President in place of Shri Muneshwar Singh and Sri Kamal Rai was re-elected as General Secretary. The same was duly notified to the Registrar of Trade Union by a letter dated 30th June, 1981

4. The petitioner has contended that Kamal Rai was at the relevant time an office bearer of the Sangh. The petitioner has contended that the management intended to damage the activities of the Sangh and with this idea a proposal to amalgamate of the same with Union was floated.

5. Allegedly by a letter dated 14th August. 1981 one Sri Ram Prasad Rai wrote a letter to the Registrar Trade Union, Bihar Patna to the effect that the Executive Committee on 14th August, 1981 has unanimously resolved that the Sangh should be amalgamated with the Union. The said letter is contained in Annexture-8 to the writ application.

6. The petitioner allegedly issued a letter dated 10th October, 1981 (Annexture-8)) to the Registrar where by he was intimated that no amalgamation with the Sangh with the Union has been taken. The petitioner contendes that some papers were manufactured to show that the meeting of the Executive Committee was held on 14th September, 1981, although the same was not convened at his instance.

7. However, by an order dated 25th January, 1982. the Registrar Trade Union allowed the scheme of amalgamation of the aforementioned two trade Unions (Annexture-1).

8. Shri Kamal Rai filed a writ petition in the court being C.W.J.C. No. 1595 of 1982 and the matter was disposed of one of us (S.B. Sinha.,J) by judgment dated 16.9.1987 Where by the matter was remitted to the respondent No.1 for determination of his objection which was Annexure-10 to the said application and Annexure -8 to the present writ

application, within a period of three months from the date of the receipt of a copy of the said judgment.

9. As the Registrar Trade Union did not dispose of the representation of the petitioner within the time granted by this court, an application for initiation of a proceeding under Contempt Act, 1970 was filed which was registered as M.J.C. No. 978 of 1990. The said application was disposed of with a direction that the representation of the petitioner must be disposed of with in one month. Thereafter the impugned order dated 6.6.1991 as contained in Annexure -2 to the write application has been passed.

10. The contention of the petitioner is that the Registrar Trade Union in passing the impugned order as contained in Annexture-1 has neither assigned any reason nor has taken into consideration the documents filed on behalf of the parties.

11. A counter affidavit has been filed on behalf of the respondent No. 1 where in it has been contended that Annexure-2 is not the order passed by the Registrar Trade Union but the same is merely a letter of communication and the order is contained in Annexure-A to the counter affidavit.

12. It has further been contended as follows : —

"That with regards to the statements made in paragraph no. 32 and 33, it is stated that the enquiry as directed of the Honble High Court started on 20.2.1991 When Shri Kamal Rai, petitioner in CWJC NO.1595/1982 requested for time for filing the documents. Next date for enquiry was fixed for 10.3. 90 on account of the date fixed being declared a gazetted holiday. The enquiry was taken up on 20.3.91. Next date was fixed for 3.4.91, when the parties to the dispute were heard in detail and they were directed to file documents in their favour. On perusal of such documents and On the basis of hearing

of parties in dispute. the Registrar Trade Union recorded his findings on 6.5.91 (copy of the extract of file no. 8/T2-10185/90 page 44- N to 46-N enclosed as Annexure-x).

That with regards to the statements made in paragraph 35 it is stated that during enquiry as per directive of the Honble High Court in produced before the Labour Commissioner - Cum"Registrar of Trade Unions that although shri kamal Rai was removed from the post of the General Secretary by the executive Committee of the Union on 20.5.1981. his removal was finally approved by the General Body meeting of the Union on 25.5.1981. According to the constitution of the Union such removals are subject to approval of the general Body meeting of the Union. With this view it has been mentioned in the impugnedorder that Shri Kamal Rai was removed from the post of the Generaly Secretary by the General Body meeting dated 25.5.1981.

13. A counter affidavit has also been filed on behalf of the respondent No.2.In that counter affidavit it has been contended that a general meeting of the 'Union' was held on 11.7.1981 which have a total number of membership 1805 and similarly a general meeting of the Sangh was held on 30th August, 1981 which had 641 members on its rolls and a decision was unanimously reached to get themselves dissolved and amalgamated in one union the name and style of Rameshwar Jute Mill Mazdoor Sangh. Thereafter an application was filed by 7 members of both the Trade Unions on 16.11.1981 before the Registrar Trade union alongwith the resolutions thereof as contained in Annexures A, A/1 and A/2 to the said counter affidavit.

14. According to the respondent No. 2 thereafter the Registrar Trade Union and also the Dy. Registrar Trade

Union by their two letters as contained in Annexures A/3 and A/4 to the said counter affidavit directed the Labour Superintendent Samastipur to make an enquiry and after the enquiry report was received, an order of amalgamation as contained in Annexure -1 to the writ application was passed. The said amalgamated Union was also give a registration number being Registration No. 2569 on 25th January, 1982.

15. It has been pointed out that Shri Kamal Rai never raised any objection with regard to proposal of amalgamation of the two unions nor raised any objection when the registration certificate was issued.

16. The Trade Union Act 1926 was enacted to provide for registration of the Trade Union and in certain respects to define the law relating to registered trade Union.

Sections 24 and 25 of the said Act reads as follows :—

"*Amalgamation of Trade Unions* -Any two or more registered Trade Unions may become amalgamated to get her as one Trade Union with or without dissolution of division on of the funds of such Trade Unions or either or any of them provided that the votes of at least one - half of the members of each or every such trade Union entitled to vote are recorded, and that at least sixty percent of the votes recorded are in favour of the proposal.

25. Notice of change of name or amalgamation

(1) Notice in writing of every change of name and of every amalgamation signed, in the case of a change of name, by the Secretary and by seven members of Trade Union changing its name, and, in the case of an amalgamation by the Seceretary, and by Seven members of each and every Trade Union which is a party thereto, shall be sent to the Registrar, and where the head office of the amalgamated Trade Union is situated in a different state, to the Registrar of such State.

(2) If the proposed name is identical with that by which any

other existing Trade Union has been registered or, in the opinion of the Registrar, So nearly resembles such name as to be likely to deceive the public or the members of either Trade Union, the Registrar shall refuse to register the change of name.

(3) Save as provided in sub-section (2), the Registrar shall, if he is satisfied that the provisions of this Act in respect of change of name have been complied with register the change of name have been complied with register the change of name in the register referred to in Section 8, and the change of name shall have effect from the date of such registration.

(4) The Registrar of the State in which the Head Office of the amalgamated Trade Union is situated shall, if he is satisfied that the provisions of this Act in respect of amalgamating have been complied with and that the Trade Union formed thereby is entitled to registration under Section 6, register the Trade Union in the manner provided in Section 8, and the amalgamation shall have effect from the date of such registration.

17. Section 26 of the said Act provides for the effect of the change in the name and amalgamation.

18. (A) In this case the only question which has been raised that no meeting was held at the instance of Shri Kamal Rai who was said to be the General Secretary of the Sangh at the material time.

18. (B) It is now well known that the question as to whether there had been a valid meeting of the general body leading to election office bearers can fall for determination of the Registrar of Trade Union in view of section 28 of the said Act.

19. A division Bench of this court in *Mukund Ram Tanti Vs. Registrar Trade Unions* reported in AIR 1962 Patna 338 held as follows : —

" It also appears from certain provisions of the Act.

though not specifically, but impliedly that it is part of the duty of the Registrar of the Trade Unions to record the changes of the office- bearers in the appropriate register in order to discharge his duties his under the Act. section 31 (1) of the Act provides for penalties for failure to submit returns. Section 33 (2) lays down that no court shall take cognizance of any, offence under this Act, unless complain thereof has been made by, or with the previous sanction of, the Registrar or, in the case of an offence under section 32, by the person to whom the copy was given within six months of the date on which the offence is alleged to have been committed. It, therefore, appears, that , if there is a failure to submit return as required under section 28 of the Act, the officers of the Trade Union have to be Prosecuted with the previous sanction of the Registrar under the Act. According to Regulation 14, the returns have to be submit to the Registrar by the 31st day of July in each year. It is conceded that the old office bearers continue up to the 31st day of March of a particular year and the 1st day of April of that year. It is, therefore, manifest that the returns required by section 23 of the Act, which have to be filed by the 31st of july in. each year will have to be filed by the new office - bearers, although the statements made in the returns related to the Period when the old office-bearers were functioning. If therefore the new office-bearers do not submit the returns, they may have to be orosecuted with the previous sanction of the Registrar for failure to submit the same, and, in order that the Registrar could give Sanction for prosecution of such new office- bearers, it is essential and a part of his duty to ascertain and know who these new office-bearers were. In other words, the Registrar, for the purpose of the Act, has to maintain and up to date Register recording the names of the office bearers existing at the relevant time. Without maintaining such register with names

of new office bearers substituted for the old ones. the Registers, in my opinion cannot be expected to see that the provisions of the Act have been legally complied with. In substituting the names of the new office bearers the Registrar has, therefore, to find of those new office- bearers were legally elected because, if their election is not legal there may be a grave doubt whether they could be prosecuted for failure to submit the returns.

It is obvious, therefore, that on being in formed about the election of the new office-bearers the Registrar is within his rights to ascertain whether they were legally elected so as to be recorded in the register maintained for the purpose and to be bound for compliance of the provisions of the Act. An other word, the Registrar has full jurisdiction to enquiry about the legality of the new election for the purpose of maintaining a proper register showing the names of the office-bearers who may be at the relevant time required to comply with the provisions of the Act or to be dealt with in accordance there with in this particular case. the order of the Registrar clearly shows that the election of the new office-bearers was not accepted by him to be legal only for the purpose of maintenance of records in his office to facilitate the administration under the Act."

20. In this case it has been brought on records that the matter was got enquired into by the Registrar Trade Union by the Labour Superintendent Samastipur. It further appears from Annexure to the counter affidavit that both the parties were given an opportunity of hearing and all the documents produced by them have also been taken into consideration. In terms of the provisions of the bye laws of the Trade union normally an election has to be held every year. It is unlikely that since 1981 no election of the sangh had been held.

21. It is the assertion of the respondent that Shri Kamal Rai was removed as General Secretary of the Sangh in the

year 1981 itself. Shri Kamal Rai, therefore, could file a suit in the civil court questioning his expulsion as also the validity of the meeting if any. He has not chosen to do so.

22. From a bare perusal of the order as contained in Annexures to the Counter affidavit, it appears that the Registrar Trade Union having taken into Consideration all aspects of the matter held that in the facts and circumstances of the case, it was not necessary to review the order passed by his predecessor in office.

23. By reason of the impugned order as contained in Annexure-2 to the writ application merely the decision of the Registrar Trade Union was committed to the petitioner but the same is not the order itself.

24. It is now well known that when a statutory functional performs a statutory functions, the same can be subject matter of scrutiny by a writ court in exercise of its jurisdiction under Articles 226 and 227 of the Constitution of India only if the same is malafide or contain an error of record or in arriving at its decision the statutes the functionary has taken into consideration irrelevant matters or fails to take into consideration the relevant facts.

Neither any such point has been raised in the writ petition nor the learned counsel for the petitioner has been able to point out any infirmity in the order as contained in Annexure to the counter affidavit.

25. This court while exercising its jurisdiction under Articles 226 and 227 of the Constitution of India, does not function as a court of appeal. It is not concerned with the decision of the statutory authority but with the decision making process.

26. Further as the amalgamated Union had been functioning since 1982 and has been granted a new registered certificate, in my opinion, it is not a fit case where

this court should exercise its jurisdiction under Articles 226 and 227 of the Constitution of India.

27. For the reasons aforementioned, this application is dismissed.

28. In the facts and circumstances of the case, there will be no order as to costs.

R. D. Application dismissed

CIVIL WRIT JURISDICTION

Before Satya Brata Sinha, J.

1988
August, 30

Ashok Kumar Chaudhary*
v.
Hindustan Petroleum Corporation Ltd. and others.

Constitution of India, Article 226 extraordinary jurisdiction under – Whether can be exercised for determining contractual rights or obligations of the parties under a contrast.

Held, that, a writ proceeding cannot be converted into a proceeding of a civil suit or an application under the Arbitration Act and extraordinary jurisdiction of the High Court under Article 226 of the Constitution of India cannot be exercised for determining question arising out of the contractual rights of obligations of the respective parties under a contrast.

Radha Krishna Agrawal and othes v. State of Bihar & ors. (1)
L. I. C. of India v. Escorts Ltd. (2) – relied on.

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

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

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* Civil Writ Jurisdiction case No. 1553 of 1987. In the matter of an application under Articles 226 and 227 of the Constitution of India.
(1) (1977) A. I. R. (S. C.) 1496.
(2) (1986) A. I. R. (S. C.) 1370.

Mr. Tara Kant Jha, Sr. Advoeate fot the Petitioner.
Mr. Navin Kumar Sinha, Adv.
Mr. N. K. P. Sinha, Advocatef for the Respondents 1 and 2
Mr. Ganesh Prasad Singh, Adv. for the Rspondent No. 3.

S. B. Sinha, J. — This writ petition,inter alia, is directed against an order issued by respondent No.1 contained in a letter dated 27th August, 1986 and as contained in Annexure-16 to the writ application, thereby and whereunder the said respondent terminated the agreement of dealership of the petitioner contained in the memorandum of agreement dated 1.10.1983.

2. Shorn of all unnecessary details the facts of the case are as follows : —

An advertisement was issued on 1.4.1982 for appointment of agent for dealership outlet at Barauni. The said dealership was to be given to the unemployed graduates. the petitioner. pursuant to the said advertisement. applied for the said dealership and ultimately. was found fit therefor there after a letter of intant dated 6.10.1982 was issued in favour of the petitioner.

3. According to the petitioner, he developed the land where the pump was to be installed and also constructed a building.

4. A dealership agreement was thereafter entered into by and between the petitioner and respondent corporation on 1.10.1983.it is admitted by the petitioner that although the outlet was commissioned on 22.12.1983 but the same was closed for lack of adequate working capital and continued to remain closed through-out the year 1984.

5. The respondent No.1 corporation gave a final notice to him by a letter dated 27.9.1984 to the effect that if the

petitioner did not recommission the outlet by 10th October,1984, alternates arrangement would be made. the petitioner by a letter dated 10th October,1981 expressed his inability to recommission the outlet for lack of adequate finance and the respondent No.1 in its turn informed the petitioner by letter dated 25.10.1984 that it was making alternate arrangement in order to protect its own interest. However, the outlet allegedly ran successfully from April, 1985 to March, 1986.

6. The petitioner in the writ petition has alleged that for starting another industry he entered into a partnership with the Respondent No. 3 and in connection with that partnership, he signed some blank papers and left the same with the said respondent. According to the petitioner, a forged partnership deed was created on the black papers which bore his signatures. The petitioner has further alleged that the said forged partnership agreement was submitted before the respondent No.2, who upon having come to learn the said fact, issued a show-cause notice dated 15.10.1986 to the petitioner asking for an explanation from him in that regard as allegedly entering into a partnership agreement with others by him was in violation of the terms of the dealership agreement. The petitioner repelled to the said show cause notice, inter alia, alleging there in that the said partnership deed was forged. The petitioner has made various overmonths in this Court for the purpose of showing that the said deed was a forged and fabricated one. The petitioner has contended that the concerned respondent without considering the effect and purport of the petitioner's show cause by the aforementioned order as contained in letter dated 27th August,1986 terminated the said agreement.

7. The petitioner has further contended that in terms of

clause 58 of the agreement in question, he was to be given a chance to remedy the defect,before the agreement could be terminated which having not been done, the same is illegal.

8. Respondents Nos.1 and 2 in their counter-affidavit, inter alia, have contended that the agreement was terminated in accordance with the provisions contained there in and the same was done after giving an opportunity to the petitioner to file his representation. The respondents have further stated that clause 58 has no application in the facts and the circumstances of this case as the breach committed by the petitioner could not have been cured even if an opportunity was given to him as he violated an essential terms of the agreement. In the alternative, it has been submitted that in any event resorting to such clause would have been futile when the petitioner could not have remedied the same within the stipulated period as contained in the agreement. The respondents have further stated that in view of the breach of the terms of the agreement committed by the petitioner the principle of promissory estoppel/equitable estoppel has no application in the facts and circumstances of the case.

9. The respondents have further contended that the impugned order being in the nature of termination of the dealership, a writ petition under Article 226 of the Constitution of India is not applicable. It has further been submitted that in any event this writ petition involves serious and complicated disputed questions of fact and on that ground too this Court should not exercise its writ jurisdiction. It has further been contended that the dealership agreement contains an arbitration clause and in that view of the matter, too this writ petition is not maintainable.

10. In view of the rival contentions of the parties noticed hereinbefore, the following questions arise for

consideration in this case :—

(I) Whether the writ petition is maintainable as it seeks to enforce a contract qua contract.

(II) Whthere this Court should exercise its jurisdiction under Article 236 of the Constitution of India in view of the serious disputed questions of fact involved there in.

(III) Whether this Court should exercise its jurisdiction under Article 226 of the Constitution of India in spite of the fact that there exist an arbitration clause, where by and where under, the parties can settle their disputes.

11. In the instant case there is absolutely no doubt that the agreement in question as contained in Annexure-A to the counter- affidavit by and between the petitioner and the respondent No.1 was a pure and simple contract and the same is not a statutory one.

12. Mr. Tara Kant Jha, learned counsel, appearing on behalf of the petitioner, however, submitted that the purported order of termination as contained in Annexure-15 to the writ application by respondent No.1 as contained in his letter dated 27th August, 1986 being arbitrary in nature, the same is hit by Article 14 of the Constitution of India and as such this writ petition is maintainable.

13. The learned conusel in support of this proposition has referred to *Madhu Singh Vs. State of Bihar and others* [1], *Ramana Dayaram Shetty Versus International Airport Authority and others* [2] and *Ram & Shyam Com. Versus State of Haryana* [3].

1. (1973) A.I.R. (Pat) 353
2. (1979) A.I.R. (S.C.) 1628
3. (1985) 3 S.S.C.267 = (1985) AIR (SC) 1147

14. The learned counsel for the respondents on the other hand, placed reliance upon *Divisional Forest officer Versus Bishwanth Tea Co. Ltd* [1]. M. S. Desai and Co. v. Hindustan Petrotiem Corporation Ltd [2]. and *Radha Krishna Agrawal and others Versus State of Bihar and others* [3].

15. In the instant case there is absolutely no doubt that the action on the part of the petitioner and respondent No.1 to enter/ into the agreement of dealership was a Voluntary one. It is not the case of the petitioner that the terms,conditions and coverants of the said agreement were governed by or under the provisions of any statute nor has it been suggested that the said agreement was statutory in nature.

16. By reason of the impugned order, the respondent No. 1 and 2 merely terminated the said agreement. The order of termination may be good or may be bad: the reason assigned may be valid or invalid; the facts found and the reasons assigned by rospondend No. 1 and 2 for existing the poses my be correct or incerrect but such questions in my opinion, cannot be a subject matter of writ application.

17. The decisions relied upon by the leaned counsel. appearing on behalf of the petitioner, have absolutely no application in the facts and the circumstances of this case. *Madhu Singh Verma State of Bihar and others* [4] was a case of statutory contract. Similarly *Airport Authority's* case (Supra) *Ram & Shyam Company's* Case (Supra) were decided absolutely on different premises. In those cases the question involved was not in relation to a termination of a contract pure and simple as is in the present case.

1. (1981) A.I.R. (S.C.) 1368.
2. (1977) A.I.R(GUJ.)19
3. (1977) A. I. R.(S. C.) 1496
4. (1973) A. I. R. (Pat.) 253

18. In *Radha Krishna Agrawal's* case *(Supra)* the Supreme Court has clearly held that the remedy provided under Article 226 of the Constitution of India is a discretionary remedy. In the said decision it has further been held that the question of termination of contract quacontract cannot be decided in a writ application.

19. In the instant case, as has been seen hereinbefore, the respondent Nos. 1 and 2 have categorically stated that the petitioner, inter alia, had entered into a partnership with the respondent No. 3 in violation of the terms, conditions and coverants contained in the dealership agreement. The petitioner does not deny that prior to termination, he was given a chance to offer an explanation in the matter and he did avail the said opportunity. The respondent No.2 has issued the impugned letter dated 27.8.1986 as contained in Annexure-15 to the writ application, on being satisfied that the petitioner has violated the terms of the agreement. The contention of the petitioner appears to be that such termination was in violation of clause 58 of the agreement in question as he was not given a chance to remedy the defect. Assuming that the petitioner's contention is correct, although it is the contention of respondent Nos. 1 and 2, that in the facts and the circumstances of this case the said clause has no application, the same can at best to said sets to have been done in violation of the contractual obligation on the part of the concerned respondents but thereby the same cannot be said to be an arbitrary action the part of the said respondents. In the facts and the circumstances of this case, the respondent can legitimately contend that the petitionership agreement with other persons in the matter of operating his business activities with respondent No.1 committed a breach of an essential terms of the agreement in question and as such the same cannot be remedied within a period of four days and in that view of the matter the said clause is not applicable.

20. Apart from the facts after said the breaches as alleged against the respondents have arisen from the terms, conditions and covenants in the agreement itself. In my opinion, small breaches or technical breaches of the terms, conditions and covenants of such agreement cannot be termed as an arbitrary action on the part of respondent Nos. 1 and 2 the context of Articles 14 of the constitution of India. In my opinion, if recourse is taken to the provision to a contract relating to its termination by one or the other party thereof and in a case of technical violation thereof, the same cannot be an arbitrary action. The word " Arbitrary " has to be given a restricted meaning.

21. In the instant case the respondent Nos. 1 and 2 have not been charged with violating any provision of any statute nor has it been contended that the impugned order terminating the petitioner's dealership agreement was done in violation of any policy decision evolved by the Central Government which is binding upon them. It is also not the case of the petitioner that concerned respondents while ostensibly discharging its contractual function had in fact exercised an executive power of the state.

22. It is a common ground that the dealership agreement can be terminated on account of its breaches or misconduct on the part of the dealer. There cannot be any doubt that such termination of dealership being in the realm of contract, the respondents Nos. 1 and 2 were entitled to exercise their contractual power under the said agreement.

23. Reference in this connection may also be made to a recent decision of the supreme Court in *L. T. C. of India Versus Escorts Ltd* [1], where in the Supreme Court observed as follows : —

1. (1986) A. I. R.(S. C.) 1370

"The Court will not debate academic matters or concern itself with the intricacies of trade and commerce. if the action of the State is related to contractual obligation or obligations arising out of the contract, the Court may not ordinarily examine it unless the action has some public law character attached to it. Broadly speaking, the court will examine actions of state if they pertain to the public law domain and refrain from examining them if they pertain to the private law field. The difficulty will be in demarcating the frontier between the public law domain and the private law field. It is impossible to draw the line with precision, and we do not want to attempt it. The question must be decided in each case with reference to the particular action, the activity in which the state or the instrumentality of the state is engaged when performing the action, the public law or private law character of the action and a host of other relevant circumstances. When the state or an instrumentality of the state ventures into the corporate world and purchases the shares of a company, it assumes to it itself the ordinary role of a share holder, and dons and robes of a shareholder, with all the rights available to such a shareholder. There is no reason why the state as a share holder should be expected to state its reason when it seeks to change the management, by a resolution of the company, like any other shareholder."

24. Apart from *Radha Krishna Agrawal's* case *(Supra)* reference may also be made to *Divisional Forest Officer Versus. Bishwanath Tea Company*[1] Where the Supreme Court held that "Where a company tried to enforce through writ petition the right to remove timber without the liability to pay royal, it was held that the company was enforcing its right not under the Rule 37 of the Assam Land and Revenue

1. (1981) (A. I. R. (S. C.) 1368.

and Local Rates Regulations but was seeking to enforce a contractual right under the specific terms of contract of lease agreed to between the company and the Government. Such contractual right, therefore, could not be enforced in writ petition.

25. Further, the main plank of the petitioner's case appear to be that respondent No.2 had issued the impugned order on wrong premises in as much as the purported partnership agreement allegedly entered into by and between the petitioner and respondent No. 3 was a forged and fabricated one. The questions as to the said deed was forged and fabricated one is a disputed question of fact. There is absolutely no doubt that in a given case even oral evidence can be taken by a writ court. However, it is also the settled law that normally a writ Court would refuse to do so.

26. In the instant case if such disputed question as involved in this case has to be gone into, in such an event it will have to decide the same upon taking evidence or the adverse contentions of the petitioner and respondent No. 3 who is a private individual which, in my opinion, is not permissible.

27. Further, the question as to whether the respondent No. 3 obtained signature of the petitioner on some blank papers and thereafter converted the same into a partnership agreement would Lead to entering into a thicket of such disputed question of fact which may not only require oral evidences to be recorded but also may necessitate the opinion of experts. There is absolutely no reason as to why such an extraordinary and exceptional course should be adopted in this case.

28. If the contention of the petitioner is to be accepted then the proceeding under section 226 of the Constitution of India would be converted into a proceeding of a civil suit for the purpose of examining the legality and validity of a particular clause in a contract.

29. Reference in this connection may again be made to *Escorts Ltd's* case where the supreme court after noting the rival contention held "Everyone of these cercumst ances is capable of some explanation, adequate or not. We do not have the necessary material to say on the record now before us. The question will involve a probe into individual purchases and the adduction of evidence, that would be beyond the scope of the writ petition in the High Court."

30. At this juncture, it may further be noted that it is an admitted fact that the agreement contained an arbitration clause. It is now well settled that where there exists an arbitration clause the writ Courts refuse to exercise its jurisdiction under Article 226 of the Constitution of India. Reference in this connection may be made *Indian Aluminum Co. Versus Kerala Electricity Board* [1].

31. Mr. Jha, the learned counsel appearing on behalf of the petitioner, however, submitted that in the instant case the arbitration clause will be no avail as the arbitrator so one of the officers of respondent No. 1. In this connection, the learned counsel has referred to a recent decision of the Supreme Court in *State of Karnataka Versus Rameshwar Rice Mills* [2]. The facts of the case upon which the said decision was rendered were entirely on a *difference* premises. In that case it was held that the state did not hold the power to assess the damages when the same required determination of the question of breach of condition which was itself disputed and in such situation it was held that even if an issue is made as to whether there has been a breach of condition or not; the government cannot take recourse to its power to assess the damages.

32. In the instant case such position is not available and, therefore, the decision of the Supreme Court referred to here inbefore and relied upon by the learned counsel for the

1. (1975) A. I. R. (S. C.) 1967.
2. (1987) A. I. R. (S. C.)1359

petition is of no assistance as the background of the facts of the said case was absolutely different.

33. Reference in this connection may be made to a decision in *Ambica Quarry works etc. Versus State of Gujrat and others*[1] *where in para 18 of the judgment it was observed as follows :–*

> "The ratio of any decision must be understood in the background 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 following from it. (See Lord Halsbury in Quin Vs. Lithium, 1901 AC 495)."

34. There cannot be any doubt that an arbitration agreement which was entered into by the petitioner with his eyes wide open where in the named arbitrator is to adjudicate upon the disputes arising out of the agreement. Reference of such a dispute to a named arbitrator by the parties, be he an officer of respondent No. 1 or otherwise is a valid agreement unless bias on the part of the arbitrator is alleged and established.

In any event the Arbitration Act 1940 itself provides that in case the arbitrator is biased or circumstances exist for revocation of the arbitration agreement or for removal of arbitrator in certain conditions. This Court while exercising its jurisdiction under Article 226 of the Constitution cannot usurp the fraction of the Civil Court in such matter, particularly when in the writ petition no foundational facts showing bias on the part of the named arbitrator has been pleaded. If such a prayer is to be entertained, the same would amount to determination of a question as to whether the arbitration should be revoked. Evidently such a prayer cannot be granted and hence, this writ petition cannot be entertained.

35. Assuming that there is some substance in the contention of the petitioner, the same cannot be examined

1. (1987) A. I. R. (S. C.) 1073

under Section 226 of the Constitution of India as this proceeding cannot be converted into a proceeding of a civil suit or an application under the Arbitration Act. Extraordinary jurisdiction of the High Court under Article 226 of the Constitution cannot be exercised for determining question arising out of the contractual rights or obligations of the respective parties under a contract.

36. Considering this case from all angles, I am of the opinion that this writ petition is not maintainable and is, therefore, liable to be dismissed.

In the result, this writ petition is as dismissed but in the facts and the circumstances of the case, there shall be no order as to costs.

S. P. J. Petition dismissed

CIVIL WRIT JURISDICTION

Before S.B. Sinha and G.C. Bharuka, J.J.

1992.

September, 2.

Jagannath Ram.*

v.

The State of Bihar and others.

Bihar Police Manual, Rule 726. — award of punishment — period of three years, to be counted from the date of occurrence — order refusing promotion / confirmation, whether liable to be set aside

Held, on reference to Rule 726 of the Bihar Police Manual, that the period of three years should be counted from the date of occurrence and not the date from the award of punishment. Evidently the said Rule was framed so as to save an employee from suffering adversely from unnecessary delay in the departmental proceeding. As the award of punishment was no longer operative the order holding that the petitioner was not fit for promotion or confirmation was passed on non-existent ground and as such it was liable to be set aside.

Ram Anugrah Singh v. *State of Bihar* [1] — relied on.

Application by the petitioner.

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

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* Civil writ Jurisdiction Case No. 1174 of 1991. In the matter of an application under Articles 226 and 227 of the Constitution of India.

(1) 1992 (1) P. L. J. R. 502

M/s. Ganesh Prasad Singh, Bishunu Kant Dubey, Sunil Kumar Singh. No. 1 and Nageshwer Prasad for the Petitioner.

Mr. R. S. Roy S. C. I. for the Respondent.

S. B. Sinha & G. C. Bharuka. JJ: – This petition is directed against an order dated 1. 3. 1990 as contained in Annexure-3 to the writ application where by and where under the petitioner was found not fit for promotion and Bhagalpur District Order No. 1101/90 dated 5. 4. 1990 issued by the Superintendent of police, Bhagalpur as contained in Annexure- 4 to the writ application, where by the earlier order of promotion passed in favour of the petitioner has been cancelled.

2. The fact of the matter lies in a very narrow compass.

3. The petitioner was appointed as a constable on 26. 4. 1963. He was promoted to the post of Assistant Sub-Inspector of police on 1. 7. 1979 and in due course was confirmed in the said post with effect from 1. 1. 1979. Thereafter the petitioner was promoted as Officiating Sub-Inspector of Police by an order dated 15. 1. 1985 as is evident from Annexure- 1 the writ application.

4. The Central Selection Board held its meeting from 28. 12. 1988 to 9. 1. 1989 to consider the case of the Officiating Sub- Inspectors of Police for their confirmation in the said posts. The petitioner allegedly was not found fit for promotion.

5. The petitioner has contended that he was awarded some black marks but the effect there of no longer operative in view of the provision of the Bihar police Manual.

6. It was, therefore, submitted that the finding of the selection Board in holding that the petitioner was not found fit for confirmation is based on non-existent ground.

7. In paragraph 18 of the writ application it has been

stated that the petitioner was awarded one black mark by an order dated 5. 8. 1987 by the Superintendent of Police, Dumka, with respect to a lose dated 26. 11. 1985 and the effect of the said black marks is stoppage of six months Increment : the same has become inoperative.

8. The statements made in paragraph 18 of the writ application have not been controverted by the respondents in the counter affidavit.

9. The State in that counter affidavit itself has annexed a copy of the order dated 7th April. 1986 which is contained in Annexure- A there to. Evidently the Selection Board did not find the petitioner fit for promotion on the basis thereof.

10. The respondents have also annexed with the counter affidavit police Order No. 204 of 1988 which is contained in Annexure- 8 there to.

11. It is not in dispute that the aforementioned police Order as contained in Annexure- A to the sabotesur affidavit stood superseded by police Order No. 226/91 in terms where of the effect of award of punishment remains valid for a period of three years from the date of occured and not from the date of Passing of the said order.

12. This aspect of the matter has recently been considered by one of us (G.C. Bharuka.J) in Ram Anugarah.

13. In that decision this court upón reference to Rule 726 read with the explanation contained in paragraph 6 of the police Order No. 99 has held that the period of three years should be counted from the date of occurrence and not the date from the award of Punishment. Evidently the said rule was framed so as to save an employee from suffering adversely from unnecessary delay in the departmental proceeding.

14. In *Ram Anugrah Singh's* case *(Supra)* it was further held that although by police amendment slip No. 1 86 : para 6 of order No. 99 had been rescinded but the same was arbitrary, unreasonable and without any rational basis and

thus violative of Article 14 of the Constitution of India. In terms of the aforementioned decisions, the effect of award of a black mark will have its effect from the date of occurrence and not from the date of passing of the orders.

15. In this view of the matter, the petitioner's case is covered by the ratio of the aformentioned decision.

16. In this view of the matter, this application is allowed, the impugned order is set aside and the respondents are hereby directed to consider the case of the potitioner in accordance with law.

S. P. J. Application allowed

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CIVIL WRIT JURISDICTION

Before S. B. Sinha & Dharampal Sinha, JJ.

1992.

September. 30.

Anil Kumar Singh and ors *

v.

The State of Bihar & others

Appointment on compassionate grounds — minor son of a deceased government servant applying for going appointed on compassionate ground after attaining majority — whether entitled to be appointed.

The policy decision adopted by the state to provide employment to one of the dependent of a deceased government servant was with a view to grant immediate relief to the family at the time of distress. Even if one of the dependents of the deseased family who is not eligible for appointment keeping in view the age, the qualification and other considerations, one of the other dependents as mentioned in the government circular may be appointed on compassionate ground.

Held, therefore, that, it would not be correct to say that only because the son was a minor, he could file an application for appointment even after attaining majority. If

* Civil Writ Jurisdiction Case No. 7411 of 1992 Civil Writ Jurisdiction Case No. 6733 of 1992. Civil Writ Jurisdiction Case No. 7272 of 1992. In the matter of an application under Articles 226 and 227 of the Constitution of India.
Binod Kumar Singh, Petitioner in C. W. J. C. 6733/92.
Anish Kumar Singh, Petitioner in C. W. J. C. 5873/92.
Arun Kumar , Petitioner in C. W. J. C. 7272/92.

such an interpretation is given, the same would frustrate the very object and purport of the policy decision of the State in as much as there by no immediate relief to the family in distress can be provided.

If such an application is entertained after a long delay, by that time not only the existing vacancies may be filled up by regular appointment, but also other cases of similar nature may arise where grant of immediate relief by providing employment to the dependent of the deceased employee may crop up. What is material for consideration is the time when the relief is to granted to a family in distress and not to reserve a job for one of the dependents.

Case laws discussed.

Applications 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. Sinha, J.

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M/s. Bipin Bihari Singh and Jai Prakas Verma. for the Petitioner in C. W. J. C. 7411/92:

Mr. Amber Nath Benerjee for the patitioner in C. W. J. 6733/92:

M/s Janardan Pd. Singh II and Harendra Kumar for the petitioner in C. W. J. C. 5673/92:

Mr. Ashok Kumar Jain for the petitioner in C. W. J. C. 7272/92:

Mr. R. S. Roy. S. C. I for the Respondents in C. W. J. 7411/92

Mr. J. N. Jha G. P. I. for the Respondents in C.W. J. C. 6733/92

Mr. J. N. Jha G. P. I. for the Respondents in C. W. J. C. 5873/92

Mr. B. N. Singh A. A. G. I. for the Respondents in C. W. J. C. 7272/92.

S. B. Sinha. J. — Interpretations of various Letters relating to appointment of the dependents of the employees who had died in harness is involved all these writ applications.

2. The fact of the matters lies in a very narrow compass.

3. It is not disputed that the State of Bihar has adopted a policy decision to give preference for appointment in Class - III and Class - IV posts to the dependents of an employee who has died in harness.

4. The preamble of the Circular by the State of Bihar in this regard being Letter No. 12754 dated 12. 7. 77 states that owing to premature death of an employee whose dependent family members sometimes face financial crisis at that time and, thus, the question of grant of some assistance to the members of the bereaved family at the time of distress was

under consideration of the State for some time past and it has been decided that any of the dependents of the Bihar public service Commission is not necessary.

5. The condition of grant of such preferences are as follows:

"मृत सरकारी सेवक के परिवार की आर्थिक स्थिति अच्छी न हो, अर्थात् उस परिवार का कोई भी सदस्य किसी प्रकार का जीविकोपार्जन का कार्य न करता हो और यदि करता भी हो, तो उसकी आमदनी पूरे परिवार के साधारण भरण-पोषण के लिए अपर्याप्त हो एवं उसकी सम्पत्ति और देनदारी को देखते हुए इस प्रकार की सहुलियत देना जायज हो।

"उपर्युक्त कोटि के सरकारी सेवक परिवार के सदस्य को पद विशेष के लिए निर्धारित अर्हताएँ उपलब्ध हों तथा उनकी उम्र विहित आयु सीमा के अन्दर हो। विशेष परिस्थिति में सेवा संहिता के नियम 54 अधीन आयु सीमा में छुट दी जा सकती है।

"नियुक्ति विभाग द्वारा निर्गत सरकारी आदेश संख्या 8167 दि० दिनांक 21 जून 1966 के अनुसार राज्य सरकार के अधीन नियुक्ति के लिए उम्मीदवारों को नियोजनालय में नामांकण कराना आवश्यक है, किन्तु उक्त सरकारी सेवक के परिवार के सदस्यों को इस आदेश से मुक्ति दी जाती है। साथ ही, संबंधित व्यक्ति पद विशेष पर नियुक्ति के पात्र है या नहीं इसका निर्णय नियुक्ति प्रदाधिकारी स्वयं करेंगे।

"इस सहुलियत का लाभ, सामान्य तथा सरकारी सेवक की मृत्यु की तिथि से दो वर्षों तक प्राप्त रहेगा।

नियुक्ति बिलकुल अस्थाई एवं तदर्थ आधार पर होगी और समवर्गीय वरीयता के लिए इनकी मान्यता नहीं दी जायेगी। विहित प्रक्रिया के पालन के बाद ही उनकी नियुक्त नियमित की जा सकेगी।

"इस आदेश में उल्लिखित "परिवार" के सामान्य तात्पर्य है, पत्नी, पुत्र एवं अविवाहित पुत्रियाँ।

"मृत सरकारी सेवक के परिवार के सदस्य की नियुक्ति के लिए आवेदन देते समय अनिवार्य रूप से अनुलग्न सूचनाएँ भी देनी होगी।

6. However, it appears that the personnel Department of State of Bihar issued another circular bearing no.6644

dated 17.5.80 where by the time limit of two years granted for filling an application for appointment in terms of the circular letter bearing no. 12754 dated 12.7.77 was made effective in a case where the government employee died on or after 12.7. 75 In that circular it was further directed that appointments on compassionate ground has to be made in terms of the procedures prescribed therefore and the application for appointment has also to be filled in a prescribed form. It was further provided therein that the candidates must give a declaration to the effect that in the event any of the informations furnished by him/ her is found to be incorrect or false, his /her services would immediately be terminated apart from other actions that may be taken against him.

7. By another circular letter bearing no. 1269 dated 13.6. 81 it was provided that in the event the matter relating to appointment on compassionate ground is pending consideration,a post for him may be kept reserved and his case may be sent to the appropriate authorcities with requisite recommendations.

8. Yet another circular letter bearing no.4211 dated 12.4.84 was issued in terms whereof certain other amendments were made in the circular letter no. 12754 dated 12.7.77. By reason of the said letter the pre-condition to take prior approval of the personnel and Administrative Department was withdrawn. By reason of the said letter. it was further directed that the appointment on compassionate ground may be made by a three man committee in terms of the directions issued by the personal and Administrative Department. It was further provided that the letter of appointment is to be issued by the Commissioner-cumu-Secretary of the concerned departments and such power would not be delegated to any of his subordinates.

9. Certain other directions have also been made by the

State by circular letter bearing no. 11946 dated 30.11. 84 in the matter of appointment on compassionate ground.

10. The personnel and Administrative Department of the State of Bihar thereafter, issued another circular letter bearing no. 6817 dated 25.5.89 where in it was pointed out that a demand had been raised by the Bihar State Non-gazetted Employees Federation and Teachers Employees officers Co-ordination Committee to the effect that the time limit of two years for filing application for appointment on compassionate ground be extended to five years. Pursuant to the aforementioned detaind, an agreement was entered into by and between the State and the Co-ordination Committee in terms of the negotiations held on 19.1.88 and 20.11.88 as a result where of it was agreed to amend Clause 4 of the circular letter no. 12754 dated 12.7.77. the translated version where of reads as follows: "the time limit for filing an application by the dependents of a deceased government servant for appointment on compassionate ground would be five years from the date of death of the government servant and the said time limit shall not be extended."

In that circular letter it has further been specifically mentioned that in the light of the said decision on proposal should be sent to the personnel and Administrative Department for relaxation of time as the said time limit shall not be extended beyond five years under any circumstances whatsoever.

11. The state of Bihar thereafter, issued another circular letter bearing no.3293 dated 15.10.1991 whereby detailed procedure relating to appointment on compassionate ground has been laid down. In terms of the said circular the bar of time limit for filling application for appointment has been withdrawn.

12. Clause 3 and 10 of the said circular read thus:

"Abedan dene ki koi sima nahi hogi.Lekin niyukti hetu adhiktam umra sima ki ahdata ka karai se palan kiya jayega."

Is paripatra ke pravdan nirgat hone ki thithi se prabhavi honge. Purb me hui mritu ke mamlo par ish paripatra ke pravdhano ke adhar par bichar/punarbichar nahi kiya ja sakega."

13. In most of the writ applications, the applications for appointment on compassionate ground have been rejected either on the ground that the same was filed after the expiry of the period of limitation prescribed therefore and/or on the ground that at the relevant time the dependent of the deceased employee was a minor.

14. The learned counsels appearing on behalf of the petitioners submitted the the policy decision adopted by the State of Bihar being beneficent in nature, the same should receive liberal construction.

15. It has further been submitted that the policy decisions of the State to provide employment to the dependent of an employee were adopted for the purpose of grant of immediate relief to the family in distress and if any time limit is fixed for filing such application or if the minors are precluded from obtaining the said benefit, the purpose and object thereof shall be frustrated.

16. The learned counsel further submitted that the orders passed by the respondents rejecting the applications for appointment on compassionate ground must be held to be violative of Articles 14 and16 of the constitution of India in as much as in a case where an employee died before 1991,the dependents were required to file application within a period of 5 years but no such time limit has been prescribed for dependents of those who died after 15.10. 1991.

17. The learned counsel in this connection has placed strong reliance upon the cases in *Brajendra Pd. Poddar Vs.*

state of Bihar & others reported in 1990 Vol.2, P.L.J.R. 668, *Bijay Kumar Sinha Vs. State of Bihar & others* reported in 1991 Vol. 1, P. L. J. R. 316 and *K. Raja Vs. Karnataka State Electricity Board* reported in 1994 L. I. C. 778.

18. There can not be any doubt that the policy decision adopted by the State to provide employment to one of the dependants of a deceased employee was with a view to grant immediate relief to the family at the time of the distress. However it is also well known that a beneficent legislation should not be interpreted in such a manner so as to extend the benefit granted beyond the object and purport there of. It is also necessary to keep in mind the fact that by grant of such to appointment the mandatory provisions of Employment Rules as also the provisions of Article 16 of the Constitution of India are being deviated from and thus atleast to that event chances of appointment eliminated.

19. In view of the implementation of the reservation policy of the State as also the policy decision of the State to provide employment to other categories of employees i. e. either to women or handicapped persons or extension of services to those persons who have been given national awards etc. the chance of appointment of general category of candidates are being decreased day by day although they may be more suited for such employment.

20. In *Bijay Kumar Sinha Vs. State of Bihar & others* reported in 1991 Volume I P.L.J.R. 316 the question which arose for consideration was as to whether the circular letters of the State of Bihar where by provisions have been made to provide employment to one of the dependents of deceased family is ultravires to the Articles 14 and 16 of the Constitution of India or not. The Division Bench in that case held that such a policy decision of the State of Bihar are not violative to Articles 14 and 16 of the Constitution of

India. In that case it was found that the petitioners had not been fulfilling one of the essential qualification for appointment as Teachers in the Elementary Schools in the State of Bihar.

21. In *Susma Gosai & Ors.Vs. Union of the India & others* in A.I.R. 1989 SC 1976 the Supreme Court headed as follows :

"We Consider that if must be stated unequally that in all claims for appointment on compassionate grounds there should not be any delay in appointment. The purpose of providing appointment on compassionate goound is to mitigate the hardship due to death of the bread earner in the family, such appointment should, therefore be provided immediately to redeem the family in distress. It is improper to keeps such case hands for years. If there is no suitable fact for appointment, super numerory has should be created to accommodate the applicant."

In that case the appellant before the Supreme Court applied for appointment in a L. D. C. Post in November, 1982 and at that time she had a right to be appointed on compassionate ground under the existing government memorandum. However, the plea for appointment on compassionate ground was rejected on the ground that in the year 1985 a ban of appointment on ladies was imposed.

22. In Smt. *Phoolwati Vs Union of India* reported in A. I. R. 1991 469, the Supreme Court reierated the views taken in the case of Susma Gosai (Supra).

23. In *Brajendra Pd. Poddar Vs State of Bihar and others* reported in 1990 Vol. 2, Bihar Law Judgment, 318, 1990 Vol. 2 P. L. J. R. 668, a Division Bench of this Cover, however, relying upon the decisions of the Supreme Court reporte ' in A. I. R. 1987, page 1010 & / A.I.R. 1985 S.C. Bags 1325 held that in appropriate case the age limit may be relaxed. In the case, the first application for his appointment was made by

the petitioner there on 18. 3. 83 when he was aged 17 years and few months. This was within a period of two years from the date of his father's death. The said application was turned down because he did not attain the age of 18 years. Another application was filed on 9. 4. 85 within a period of 5 years. The Division Bench took into consideration that in some cases in terms of the provision of Bihar Service Code. a relaxation/ can be granted and in that situation it was hold:

"the situation was beyond the control of the petitioner. Court has to keep in mind the dominant of the object behind such circulars which were issued from time to time to facilitate and to benefit such persons in destitute and any technical approach would defeat the very object behind such appointment on compassionate grounds. *Of course, such application must be made bonafide and within a period of two years, but, in a fit and proper case, the relaxation in age has to be suitably considered and the age can be relaxed in order to achieve the very purpose of granting such benefit of service on compassionate grounds.*

In that decision U.P. Singh, J. observed:

"there are peculiar circumstances in this case." In that case the application of the potitioner was pending consideration when the circular no. 6817 dated 25. 5. 89 extending the period on compassionate ground from two years to five years was issued and in that special situation it was held that the petitioner's application deserved consideration.

24. It is therefore, clear that the aforementioned circulars are applicable only in the cases of those persons who fall in the low income group and lost their bread earners. The said circular provides for giving of preference in employment to one of the dependents of the deceased

employee subject, of course,to the condition that he is otherwise eligible for appointment in Class-III and Class-IV posts in any service in the State of Bihar. This decision, therefore, does not advance the case of the petitioners.

25. In *K.Raja Vs.Karnataka State Electricity Board and others* reported in 1991 L.I.C.778, it has been held as follows:

> "the employment of a son of the deceased employee existing on the date of death of such employee can not, on any account of by any imagination be regarded as that which makes good or mitigates such loss in as much as there may exist no nexus between the loss suffers by the dependents of the deceased employee on his sudden demise and the earlier appointment of the deceased employee's son who having regard to the present normal conditions of such a family would be outside the family of the deceased employee being an adult with independent employment. Admittedly, there is no express provision in the said official Memorandum which excludes compassionate appointment to a son of the Board's employee who dies in harness because of his another son being already in employment of the Board. If such was the intention, as is now sought to be made but on behalf of the Board, it would not have been difficult for the Board to make such son ineligible for compassionate appointment as has been done with reference to a wife or husband when both of them are in the Board's employment.

The aforementioned instance, therefore,was rendered on the basis of the policy decision of the Karnataka State Electricity Board and, thus, has no application to the facts and circumstances of the case.

26. From the conspectus of the aforesaid decisions, it is clear that the policy decision adopted by the State of Bihar for employment to the dependents of a deceased

government servant, the following conditions must be fulfilled.

(i) "Only a dependent within the meaning of the said circulars may be provided employment subject to the conditions that the family fell within the low income so that it is not in a position to maintain itself."

(ii) "at least one of the dependents of the deceased employee must be eligible for appointment either on the date of dead of the deceased employee or within the period when the application for appointment on compassionate ground could be filed in terms of the circular letter no.1254 dated 12.7.77 within two years and in terms of circular letter no.6817 dt.25.5.89 becomes 5 years.

(iii) From the tenure of the aforementioned circular letters it is evident that the time limit fixed can not be altered under any relaxation possible in relation thereto.

(iv) Although, the provisions for the prescribed time limit has been done way with by reason of 1991 circular, clause 10 there of specifically provides that the said circular would be applicable only from the date of issuance thereof and in case where in death has taken prior there to, the same shall not be considered and/or re-considered.

(v) The appointment on compassionate ground must be upon compliance with all the terms and conditions laid down therein.

27. In view of the aforementioned discussions as also the decisions of the Supreme Court as noticed herein before, there can not be any doubt, that the observations made in Brajendra Poddar's case (Supra), does not lay down

any binding precedent. The said decision has to be read in the context of the circulars and in peculiar facts and circumstances of that case as it had clearly been stated therein that the State in that case was in a position to relax the age of the applicant.

28. It may further be pointed out that in case at the time of consideration of the matter of appointment on compassionate ground, that was pending consideration before the State, the same was not finally rejected when the aforementioned circular letter no. 6817 dated 25.5.89 had been issued.

29. It has further to be borne in mind that by reason of the aforementioned circular letters not only the widow or the son but even the unmarried daughter and widowed daughter-in-law are entitled for consideration for appointment on compassionate ground. In that view of the matter, even if one of the dependents of the deceased family who is not eligible for appointment keeping in view the age, the qualification and other considerations, one of the other dependents as mentioned in the said circular may be appointed on compassionate ground. It would not be, therefore, correct to say that only because the son was a minor, he could file an application for appointment even after attaining majority. In fact, if such an interpretation is given the same would frustrate the very object and purport of the policy decision of the State in as much as thereby no immediate relief to the family in distress can be provided. If any such application is entertained after a long delay, by that time not only the existing vacancies may be filled up by regular appointment, but also other cases of similar nature may arise where grant of immediate relief by providing employment to the dependent of the deceased employees may crop up. What is material for consideration is the time when the relief is to be granted to a family in distress and not to reserve a job for one of the dependents.

30. It is pertinent to note that in Bijay Kumar Sinha's case reported in 1991 Vol. 1, P.L.J.R. 316, the vires of the circular dated 12.7.1977 was upheld holding:

> "The impugned circular, however, is not a bald preference to the dependence of the employees of the State Government. It has not gone to the descent of the persons preferred for appointment. It has taken notice of a sudden demise resulting in cessation of source which had earned bread for them. It has emphasized that those who fall in an income group below Rs. 6000/- per year and lost their bread earner should be preferred. It is not a general concession to all the dependents of the deceased employees. It is confined to the selection to one to compensate the loss by giving employment to him. If one bread earner is there, another is not allowed to enter in the preference. The circular is thus, one which has conferred a preferential right to appointment to the dependents of a deceased employee who died in harness by identifying the economic backwardness and also the loss which unless compensated shall force the family to go further down.
>
> The object, thus, it may be stated at the cost of repetition is to grant immediate relief and not after a number of years.

31. This aspect of the matter as also the decision of the Supreme Court in Susma Gosagin Case had not been taken note of by this Court in *Brajendra Pd. Poddar Vs. State of Bihar*, 1990 Vol. 2, P.L.J.R. 668.

32. The question as to whether the age can be relaxed or not would falls for consideration before the appropriate authorities of the State of Bihar if and when such a prayer is made. The same is neither automatic nor this Court will use up the functions of the executive.

33. In the aforementioned backgrounds, the facts of

each cases involved in this applications may be considered separately :

C.W.J.C. NO. 7411 OF 1992 :— In this case the petitioner's father died on 4th May, 1985, leaving behind his widow and two sons. The ptitioner filed an application for his appointment before respondent no. 4 in the year 1986. Admittedly, in 1985 the petitioner was only 12 years old and, according to the petitioner himself, his mother was not in position to accept any any job. The petitioner became major on 7th September, 1991. The petitioner passed the Matriculation examination in the year 1990. The petitioner has also not stated whether his other brother was eligible for appointment on compassionate ground at the relevant point of times. Admittedly, the application for appointment on compassionate ground could not have been entertained at a point of time when the petitioner became major. His application for appointment in 1986 was premature as at that point of time he was not eligible therefor.

35. In the facts and circumstances it is clear that the petitioner was not entitled to be appointed within two years from the date of death of his father and as such his application for appointment on compassionate ground, thus, could not have been considered.

36. In terms of the policy decision of the State as contained in circular letter no. 12754 dated 12.7.1977, the widow of the petitioner could have filed an application for appointment on compassionate ground but she did not chose to do it.

37. In this view of the matter, the petitioner is not entitled to any relief.

This application C.W.J.C.7411 of 1982 is, therefore, dismissed.

38., *C.W.J.C.NO. 6733 of 1992 :—* In this case the petitioner's father died on 9.8.79. On 3.10.84 the mother of the petitioner namely Shrimati Devi filed an application for

appointment of the petitioner on compassionate ground, although, the petitioner at the time of his father's death was only 9 years old, so that he may be appointed when he attains majority. Such application was evidently not maintainable as the petitioner must have attained majority in the year 1988.

39. In this case also the petitioner's mother did not file any application for her own appointment on compassionate ground.

40. By reason of the impugned order dated 11.5.92 the District Compassionate Committee rejected the application of the petitioner on the ground of delay alone.

In view of our findings aforementioned, that an appointment on compassionate ground could not have awaited for an indefinite period in terms of the policy decision of the State as then existing, the decision of the District Compassionate Committee can not be said to be illegal.

This application C.W.J.C. 7273 of 1992 is also dismissed.

41. *C.W.J.C. 5873 of 1992*:- In this case the petitioner's father died on 12.1.85. At that point of time the petitioner was only ten years old. The petitioner's father left behind his widow, two sons and two daughters. The petitioner filed an application for appointment on compassionate ground after attaining his majority on 18.7.90. As evidently the petitioner was not eligible for appointment in terms of the aforementioned circulars, no relief can be granted to the petitioner.

This application of C.W.J.C. 5873 of 1992 is, therefore, dismissed.

42. *C.W.J.C. 7272 of 1992*:- In this case the petitioner's father died on 18th November, 1982. The petitioner filed on application for appointment on compassionate ground on

4th February, 1991. Admittedly, at that time of death of the petitioner's father, the petitioner was only 11 years old.

43. Thus, in this case also, no relief can be granted to the petitioner.

This application of C.W.J.C. 7272 of 1992 is, therefore, dismissed.

44. All these writ applications are, therefore, dismissed, but in the facts and circumstances of the case there will be nor order as to costs.

D.P. Sinha, J. I agree.

R. D. Application dismissed.

CIVIL WRIT JURISDICTION

Before S. B. Sinha & G. C. Bharuka, JJ.

1992
October, 1.

Namita Jayaswal and ors*
v.
The State of Bihar & others.

Admission of girl candidates to the Engineering Colleges established by the State Government — policy decision as reflected in the prospectus to add 30 marks to those actually obtained by every girl candidate — whether the State Government can decline to give effect to the same.

Where the State Government carved out a clear cut policy decision with regard to the grant of additional benefits to the girl candidates, i.e. addition of 30 marks to those actually obtained by every girl candidates, for admission to the various Engineering College established and managed by it, in the prospectus;

Held, that the State Government cannot decline to give effect to this long-standing policy decision abruptly particularly in view of the fact that its policy is also reflected in the prospectus.

Held, further, that the respondents are directed to prepare a panel interims of its policy decision as contained in the prospectus.

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* Civil Writ Jurisdiction Case No. 8050 of 1992. Civil Writ Jurisdiction Case No. 8080 of 1992. Civil Writ Jurisdiction Case No. 3164 of 1992.
Sandhya Das and others ... Petitioners in C.W.J.C.8080/92.
Usha Singh and others... petitioners in C.W.J.C. 8164/92.

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.Sinha,J.

Mr. Sudhir Kumar Katriar for the petitioner in C. W. J. C. 8050/92.

M/s. Ananat Bijay Singh & Rakesh Kumar Singh for the Petitioner in C. W. J. C. 8080/92.

M/s. Yogendra Pd. Sinha, No. I. Nirmal Kr. Sinha, No. 3 & Bindeshwar Pd. Singh for the Petitioner in C. W. J. C. 8164/92.

Mr. R. S. Roy, S. C. I. for the Respondents.

S.B. Sinha, J. – All these writ applications involving common questions of law and fact were taken up for hearing together and are being disposed of by this common judgment.

2. The fact of the matter lies in a very narrow compass.

3. The State has established and manages the affairs of some Engineering Colleges Viz. the Bhagalpur College of Engineering, Bhagalpur, Bihar Institute of Technology, Sindri, Muzaffarpur Institute of Technology, Muzaffarpur, Bihar Engineering College, Patna and Regional Institute of Technology, Jamshedpur.

4. Admittedly,the Science and Technology Department of Government of Bihar conducts a written entrance test for admission in the aforementioned Engineering Colleges as also in Engineering Colleges situated outside the State of Bihar and other technical institutes where some seats are reserved for the State of Bihar.

5. The minimum prescribed qualifications for appearance in the said examination are as follows :–

(i) The candidates should have passed Intermediate (I.Sc) or equivalent examination in Physics, Chemistry and Mathematics.

(ii) The candidates should have been not less than 16 years of age and not more than 22 years of age as on 1.7.1992.

6. The State for the aforementioned purposes has issued a prospectus for the year 1992-93 which is contained in Annexure-1 to C.W.J.C.No.8050/1992, Clause 5 of the said Prospectus reads us:—

"Chhatrayo ko bishes subidha:—

" Bihar Rajya me abasthith sansthano me chhatrayo Ke namankan hetu,bishesh subhidha Rajya Sarkar ne pradan ki hai. Jiske antargat chatrayo ke medha ka nirdharan unke dwara kul praptank me 30 (tis) ank jorkar kiya javega. Parantu Bihar Rajya ke bahar sthith Regional Engineering college (Bihar quota seat) me chhatrayo ka namankan unke dwara kul bastabik praptank par nirdharit medha suchi ke adhar par kiya javega."

7. Admittedly, similar provisions had been made by the State of Bihar since 1986 for grant of 30 additional marks to the every candidates.

8. In terms of the aforementioned scheme a combined merit list for the boys and girls is to be prepared upon adding 30 marks to those actually obtained by every girl candidate.

9. The petitioner (s) admittedly appeared at the aforementioned entrance examination. They were also invited for interview by the Interview Board. The State, however, granted the aforementioned 30 marks only to those candidates who sought for or obtained admission in the Bihar Engine ring College, Patna, as is evident from the following note appearing in the result sheet (Annexure-1 to C.W.J.C. 8050/92)

—

"Roll numbers with Star mark* indicate merit of girl candidates for admission to Bihar College of Engineering, Patna, only subject to availability of seats."

10. The petitioner (s) have contended that the State is bound by the promises made to the girl candidates and, thus, it has no authority or jurisdiction to resile therefrom. It has further been submitted that the decision of State of Bihar to grant benefit of 30 marks only to those girl candidates who, south for admission in Bihar Engineering College, Patna, is wholly irrational and arbitrary.

11. A counter-affidavit has been filed on behalf of respondents in C.W.J.C.No.8050 of 1992. It has been admitted in the said counter-affidavit that from the Governor's Secretariat a Notification dated 27.5.1985 was issued whereby provision was made to give weightage to women candidates in the following terms.

"Women candidates should be given a weightage of 10% of the aggregate marks that 10% of the aggregate marks will be added to the total marks obtained by such candidates and their merit will be decided on the basis of this added total."

The respondents however have contended that such a practice was in vogue in Bihar Engineering College, Patna, even before the issuance of the said Notification.

12. It has further been contended that on 7.2.92 a resolution was adopted by the Department of Personal and Administrative Reforms, Govt. of Bihar whereby and whereunder inter alia 30% seats were to be reserved for the women candidates. A copy of the said resolution is contained in Annexure-B to the counter-affidavit.

13. By letter dated 17.7. 92 (Annexure-C to the counter-affidavit) a direction was issued by the Under Secretary, Deptt. of Science and Technology withdrawing the

weightage of 10% given by way of extra marks to girl candidates in view of the aforementioned reservation policy of the State of Bihar dated 7.2.92.

14. The state has further contended that to the afore-mentioned effect an information had also been published in daily newspaper of August. 18,1992, a copy of which is contained in Annexure-H to the counter- affidavit wherein it has been specifically stated that the State intends to follow reservation policy.

15. Mr. Ram Suresh Roy, Learned Standing Counsel No.1 submitted that the Notification as contained in Annexure-A to the counter-affidavit had been issued in terms of sub-section 4 of Section 38 of the Patna University Act and.thus, the advantage of 30 marks to the actual total marks obtained by the girl candidates can only be kept confined to Bihar Engineering College, Patna, an affiliated College of the said University. The Learned Standing Counsel further submitted that in view of the reservation policy adopted by the State of Bihar the same has to be given effect to in preference to the promises made by the State in the Prospectus as contained in Annexure-1 to the writ application.

16. In this case, the following facts are admitted. The total number of seats for admission in all the Engineering Colleges is 1092. Results have been published for 959 candidates. There has been duplication in the merit list so far as of 20 girl candidates are concerned in as much as their names have been shown in both the categories i. e. under the reservation quota as also along with the candidates who had been granted the benefit of addition of 30 marks.

17. Thus, actually the results of only 930 candidates have been published.

18. If the policy decision of the State of Bihar as reflected in its Prospectus as contained in Annexure-1 to the

writ application is implemented, 159 girl candidates would be selected for admission in various Engineering Colleges situated in the State of Bihar and other Regional Colleges, Institutions outside the State of Bihar. Thus, if the impugned order is allowed to stand keeping in view of the number of seats available for girl candidates at Bihar Engineering College, about 100 girl candidates would be left out of consideration for admission in other Engineering Colleges.

19. In our opinion, the stand taken by the State of Bihar namely, that they are ready and willing to implement Annexure-I to the writ application but they at the same time intends to give effect to the reservation policy as contained in Annexure-2 to the writ application appear to be inconsistent to and contradictory with each other. So far as Annexure-A to the counter-affidavit is concerned, the same is already purported to have been issued by the Chancellor in terms of Sub-section 4 of the Section 38 of the Patna University Act.

20. Sections 37 and 38 of the Patna University Act read as follows :

Section 37 : Ordinance — The Syndicate may, Subject to the provisions of this Act and Statutes, make Ordinance to provide for all or any of the following matters, namely : —

(a) the admission of students to the University and their enrollment as such;

(b) the conditions of the students of the University, the levying of fees for residence in hostels maintained by or recognised by the University, and the recognition of hostels not maintained by the University, including the suspension or withdrawal of such recognition;

(c) the fees to be charged for courses of study in the University and for admission to the examination, degrees and diplomas of the University;

(d) the constitution, powers and duties of the Committees of the University;

(e) all other matters which by this Act or the Statutes are to be or may be provided for by the Ordinance.

Section 38: Ordinance, how made. –

(1) An Ordinance made by the Syndicate Under Section 37 shall be submitted, as soon as may be, to the Senate, and there-upon it shall be the duty of the Senate to consider the Ordinance at its next meeting and the Senate may, by resolution passed by as majority of the member present and voting at such meeting, either reject the Ordinance or approve it with such modifications, if any, from such date, as it may direct,

(2) Ordinance so approved by the Senate shall be submitted to the Chancellor who shall declare that he assents to the Ordinance.

(3) An Ordinance shall have no validity until it has been assented to by the Chancellor under Sub-Section (2).

(4) Notwithstanding anything contained in sub-sections, (1), (2) and (3), if at any time, except when the Senate is in session, the Syndicate makes an Ordinance and considers its immediate enforcement necessary, the Syndicate may recommend to the Chancellor accordingly and the Chancellor shall there-upon by order published in the official gazette, direct that the Ordinance shall come into immediate effect, but such Ordinance shall cease to have effect on the expiry of seven days from the date of the next meeting of the Senate unless confirmed by it.

21. From a bare perusal of the aforementioned provisions it would appear that the University as such has no jurisdiction to add any criteria relating to the admission of students in an institution which is not its constituent unit. An Ordinance under Section 37 of the aforementioned Act inter-alia could have been issued only in relation to the admission of students in the University. The Engineering Colleges referred to hereinbefore belong to the State of Bihar and admittedly they are merely affiliated to different Universities and not the constituent units of the Universities.

22. Further, in our opinion, as the State despite its policy decision and reservation interest to give effect to Annexure-A to the counter-affidavit by confining grant of advantage of addition of 30 marks only to those girl candidates who had sought for admission in Bihar College of Engineering, Patna, the same, in our opinion, does not satisfy the test of reasonableness as enshrined under Article 14 of the Constitution of India, particularly in view of the fact that the Patna University has no authority to issue the notification as contained in Annexure-A to the counter-affidavit. Thus, if the said notification as contained in Annexure-A to the counter-affidavit as also the decision of the State of Bihar as reflected in the marks-sheet as contained in Annexure-B to the counter-affidavit are implemented, the same, in our opinion, would per se be discriminatory in nature.

23. It is now well known that the State is bound to give effect to its policy decision. The legality of the policy decision of the state as reflected in Annexure-1 to the writ application namely grant of additional benefit to the girl candidates by adding 30 marks to the total marks obtained by them has hot been questioned before us.

24. In thus situation, there is absolutely no reason as to why the said policy decision of the state of Bihar should not be given effect to.

25. In *Anuj Gupta & others Versus state of Himachals Pradesh and others* reported in 1990, Volume 6 Service Law Reporter,page 79 it has been held that when the prospectus for admission to Engineering Colleges laid down that the admission would be given on the basis of the results of 10+2 examinations, the same method can not subsequently be altered. It was held.

"The point arose for consideration before the Supreme Court in a case arising out of the Kerala Education

Rules, in State of Kerala and others v. K.G. Madhavan Pillai and others, A.I.R.1989 SC 49. In that case it was held that the applicant who had been granted sanction under Rule 2-A of Chapter 5 of the Kerala Education Rules for the opening of new schools or up grading of existing schools are entitled to the continuance of the statutory procedural stream and to have their applications considered and dealt with under Rules 9 and 11. Quoting with approval the passage from Wade extracted in the earlier part of this judgment the Supreme Court held that having granted sanction to the applicants under Rule 2-A(5) of the Kerala Education Rules, to open/upgrade the schools subject to satisfying the conditions under Rule 9 and obtaining a clearance under Rule 11, it is not open to the Government to stop the procedure mid-stream and cancel the order of sanction on the ground that their is no need for the establishment of new recognized schools, without giving the applicants an opportunity to put forward their case.

"The learned Advocate General submits that the concept of legitimate expectation demands only fairness in action and that is only an aspect of the principles of natural justice and not of promissory stopped. He further submits that be mere change in the criteria for selection it can not be said that there is change in the policy depriving the petitioners of any of their right of being selected but have only a right to apply for being selected and under the changed policy, they still have a right to apply and then compete with the other candidates. Even so, the change of policy after the issue of the prospectus was unfair to these candidates and can not be sustained in law.

"On the principle laid down in these decisions, we are clearly of the view that the petitioners having secured

very high marks in the qualifying examination had a legitimate expectation, of selection for admission. To the Engineering Courses on merit basis as held out in the prospectus issued in that behalf. Merit based on the result of PET cannot, therefore be imposed on them without even giving them an opportunity of sustaining the principle held out in the prospectus. The superimposition of PET after the issue of the prospectus is for that reason unfair and is also unsustainable in law."

26. Deferences in this connection may also be made in the cases reported in 1968 Supreme Court. 718,1979 Supreme Court. 1628 and 1984 Supreme Court. 362.

27.In this case also the state has carved out a clear cut policy decision with regard to the grant of additional benefits to the girl candidates in the prospectus. The petitioners and other girl candidates similarly situated rely upon the same acted thereupon.

28 It is also admitted that the aforementioned practice had been continuing since 1985. It is also admitted that atleast in one of the Engineering Colleges (possibly when no Combined Competitive Entrance test in the Engineering Colleges was being held.) such a practice had been prevailing even before issuance of the aforementioned notification as contained in Annexure-A to the counter -affidavit.

29. The State. in our opinion,can not. thus. decline to give effect to this long-standing policy decision abruptly. particularly in view of the fact that when its policy decision is also reflected in the prospectus as contained in Annexure-1 to the writ application.

30. From a perusal of the prospectus as contained in Annexure 1 to the writ application. it appears that the State

has directed reservation of 3% seats for the girl candidates in the matter of admission in the Engineering Institutions. Further grant of the same in relation to some girl candidates by way of addition of 30 marks in total marks obtained by them, does not come within the purview of reservation policy of the State. The constitutionality of such question has not been questioned before us. In fact such practice has been continuing since 1985. However, there cannot be any doubt that girl candidates cannot be given both the benefits of addition of 30 marks as also the reservation of 3% . However, in the facts and circumstances of the case, for this year it is not necessary as it appears that so far the reservation of 3% to the girls candidates is concerned, only 24 seats would be available but if 30 marks are added, 15 girl candidates would be selected in various Engineering Colleges. Out of the aforementioned 159 girl candidates as indicated hereinbefore, names of 29 girl candidates have been mentioned twice over. Thus, actually 130 girl candidates are to be admitted, in various Engineering Colleges including those situate outside the State of Bihar. In this view of the matters, interest of justice will be served if a combined gradation list is prepared amongst the girl candidates by being 3% as against their quota, who in the facts and circumstances also fulfill the policy decision of the State relation to reservation of 3% quota of the girl candidates. We may further state that the direction with regard to the empanelment of the candidates of the reserve candidate, has been given in C.W.J.C.No.8212 of 1992 (Sunil Kumar and others vs. The state of Bihar & others.

31. For the reasons aforementioned, these writ applications are allowed and the respondents are directed to prepare a panel in terms of its policy decision as contained

in Annexure 1 to the writ application and subject to the observation made hereinbefore.

32. In the facts and circumstances of the case, parties shall bear their own costs.

G.C.Bharuka J. I agree

R. D. Application allowed.

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CIVIL WRIT JURISDICTION

Before S. B. Sinha and G. C. Bharuka,JJ

1992

October. 1

Shatrughan Prasad Singh and another. *

v

The State of Bihar and others.

Promotion to the post of Headmasters of Nationalized Secondary School — List of Selection grade Assistant Teachers approved by Education Commissioner —Whether the posts should be filled up as per Roster Panic — Question of vires of Bihar Nationalised Secondary School (Service Conditions) Rules, 1983, pending consideration in Supreme Court — order of promotion whether subject to ultimate decision of the Supreme Court.

Where large number of posts of Headmasters of Nationalised Secondary School were lying vacant even though list of selection grade Assistant Teachers for promotion as Headmaster was approved by the Commissioner of Education;

Held, that the State of Bihar should fill up the vacant posts as per panic at an early date.

As Supreme Court has passed order of Status quo in Special Leave petition No. 18361 the order of status quo shall be operative so far as parties thereto are concerned.

Held, further, that as the question of vires of Bihar Nationalised Secondary School (Service Conditions) Rules, 1983, is pending consideration Before Supreme Court, the orders of promotion to the posts of Headmaster which may be effected by the State, shall be subject to the ultimate decision of the Supreme Court in the said case.

* Civil Writ Jurisdiction Case No. 8409 of 1991 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 judgment of the Court.

M/s. Uma Kant Verma and Rajendra Kumar for the petitioners.

D. K. Sinha S. C. 4 for the State.

S.B. Sinha & G.C. Bharuka. JJ: — In this case the petitioners have inter alia prayed for a direction upon the respondents to pass orders for promotion of the selection-grade Assistant Teachers to the posts of Headmasters.

2. Petitioner no.2 is a Selection grade Assistant Teacher. petitioner No. 1 is the General Secretary of the Bihar Secondary Teachers Association which was established in 1925 and is a body registered under the Societies Registration Act. 1860.

3. It is stated that 1000 posts of headmaster are lying vacant for a period of more than 10 years. The basic scale of pay of selection grade Assistant Teachers of Nationalised Secondary School at Rs. 2000 to Rs. 3500/- and that of the headmaster at Rs. 3000 to Rs. 4500/- has been fixed w.e.f. 1.1.1986. According to the petitioners, the Assistant Teacher of Selection grade, are thus, losing a sum of about Rs. 800/- per month since 1987.

4. It has been contended that a Roster Panji containing the names of about 446 teachers for promotion to the posts of Headmaster was prepared and approved by the personal Department of the State of Bihar in the year 1983. The State of Bihar framed Rules known as Bihar Nationalised Secondary School (Service conditions) Rules 1983. Validly of the said Rules was questioned before this court in several writ applications.

One of the said writ applications was registered as CWJC No. 4150 of 1987 and by an order dated 17.9.1987 passed in that case the State was restrained from granting promotion to the post of Headmaster in Darbhanga District only. However, by the terms of the letter dated 9.11.87 the Director of Secondary Education stayed the orders of promotion in the posts of Headmaster throughout the State of Bihar. The order passed by this court in CWJ No. 4150 of 1987 and the aforementioned order dated 9.11.87 are contained in Annexures 1 and 2 to the writ application.

The said writ applications were eventually referred to a Full Bench. A Full Bench of this court in Ramadhar Ojha Vs. State of Bihar reported in 1992 (1) PLJR 722 upheld the validity of the aforementioned Rules. A copy of the said judgments is also contained in Annexure -3 to the writ application.

5 It has been contended that at present about 1500 secondary schools are running without by regular Headmaster. It has further been contended that some of the aforementioned 446 teachers have retired or died. Petitioner No. 1 allegedly filed a representation before respondent No. 4 on 18.11.91 for giving effect to the orders of promotion in terms of the aforementioned Roster Panji of 446 teachers.The said representation is contained in Annexure - 4 to the writ application.

6. It has further been contended that during tendency of the aforementioned CWJC No. 4150/87 and CJWC NO. 1138/88 184 Assistant Teachers were appointed directly to the posts of Headmaster in terms of provisions of Rule 7 of the aforementioned Service Condition Rules. It has further been contended that almost all the direct appointees have joined their places of posting and are

working at present.It has also been contended that in terms of Rule 7 (i) of the said Rules 80%of the vacant posts have to be filled up by promotion and 20% vacant posts have to be filled up by direct appointment. Procedures for appointment to the post of Headmaster have been laid down in Rule 7 (ka) (3) of the said Rules. It has been further contended that by a letter dated 12.7. 1985 Director of Secondary Education issued a circular letter to all the Regional Directors of Education, Bihar for grant of adhoc promotion of the Assistant Headmasters to the post of Headmasters as allegedly 600-700 posts of Headmasters are lying vacant (Annexure-5). However, pursuant there to only about 200 Assistant Headmasters were promoted to the posts of Headmaster and rest 500 posts of Headmaster which fell vacant in the year 1985 are still vacant.

7. It has further been contended that respondent no.4 has sent a list of selection grade Assistant Teachers for promotion for the approval of the Minister of Secondary Education through Commissioner of Education and the said list has also been approved by the Commissioner, but no final order there upon has yet been passed by the Minister of Education.

8. The aforementioned facts are not disputed.

9. We have heard various writ applications involving questions with regard to the right of the Assistant Teachers to be promoted to the posts of Headmaster during three different periods:

(1) When the posts of Headmaster fell vacant prior to 2.10.80;

(2) When the posts of Headmaster fell vacant in between the period 2.10.80 and the date when the said Rules came into once.

(3) the posts which fell vacant after the coming into force of 1983 Rules.

In all those writ applications, it has been held that so far as the posts which fell vacant prior to 2.10.80, the School-in question has to be treated as an Unit, but in relation to the other two categories, the posts have to be filled up in terms of the provisions of the said Rules.

10. As it has not been disputed that a large number of posts of Headmasters are lying vacant for a long time, in our opinion, the State of Bihar should fill up the vacant posts as per the Roster Panji aforementioned at an early date.

11. However, we may observe that the decision of the Full Bench of this court has been questioned in the Supreme Court in several Special Leave Petitions: one of them being S.L.P.No. 18361/91 and by an order dated 16-12-91 an order of status quo has been granted.

12. In our judgments we should clarify that the said order of status quo shall be operative solar as parties thereto are concerned. However, as the question of vires of the said Rules is still pending consideration before the Supreme court of India, we direct that orders of promotion to the posts of Headmaster, which may be effected by the State of Bihar shall be subject to the ultimate decision of the Supreme Court in the case referred to above.

13. We, therefore, dispose of this writ application with a direction to the respondent to fill up the vacant posts of Headmaster according to the Rules except in those cases where the orders of status quo had been passed by the Supreme Court of India. Such orders of promotion shall, however, be subject to the result of the decision by the Supreme Court of India in the aforementioned Special Leave Petitions which are pending before it. We also direct

that the State shall take effective steps for filling up the said posts at an early date.

14. This writ application is disposed of with the aforementioned direction. There will be no order as to costs.

R.D. Order Accordingly.

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CIVIL WRIT JURISDICTION

Before S.B.Sinha & G.C. Bharuka, JJ.

1992
November. 5

Rana Raghunath Pd.Singh & another.*
V.
The State of Bihar & others.

Bihar Service Code, Rule 58 — scope and applicability of —employee ready and willing to work on the post but prevented from doing so — Rule 58, whether applicable — employee, whether entitled to monetary benefits.

Rule 58 of the Bihar Service Code is a general rule. The said rule is applicable in a case where a Govt. servant does not join the post of his own. Ordinarily the said rule will have no application in a case where an employee although is ready and willing to work on the post is prevented from doing so.

Held, in the instant case, the petitioners were denied promotion unjustly. They had to approach this court and the writ application was allowed. Despite the Judgment of this court, the orders of promotion were not issued for a long time. The petitioners have to file an application for initiation of a proceeding under the contempt of Courts Act and only thereafter the order of promotion was issued. It is therefore, clear that the petitioners are not to be blamed for not being able to work on a higher cost although persons junior to them had been promoted. Consequently, the authorities concerned are liable to pay the salary allowances and other benefits with effect from the date when they were promoted to the Higher post.

* Civil Writ Jurisdiction Case No. 7554 of 1990. In the matter of an application under Articles 226 and 227 of the Constitution of India.

Case laws discussed.

Application by the petitioners.

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

M/s. Sada Nand Jha, Bimlendu Mishra and Ashim Jha for the petitioner.
Mr. Prabhat Kumar J.C. to A.G. for the State.

S. B. Sinha & G. C. Bharuka JJ : — Then question as to whether the petitioners are entitled to monetary benefits by way of enhancement of salary, increments etc, with effect from 31.12.1981 and consequent upon their promotion on the aforementioned date is the question involved in this application.

2. Bereft of all unnecessary details the fact of the matter is as follows : —

3. The petitioner No. 1 was appointed in the Bihar Millatry Police Service on 11.8.1955 and was promoted to the post of Subedar on officiating basis on 15.5.1975. He was also confirm subsequently from that date.

4. The petitioner No. 2 initially appointed in Bihar Military Police Service on 6.1.1957 and was ultimately promoted to the post of Subedar on officiating basis with effect from 1.7.1975 and was confirmed on that post with effect from 26.7.1976.

5. The petitioners claim themselves entitled to be promoted as Dy. Supdt. of Police in the Police service on the basis of their respective seniority or other employee.

6. The State issued two circulars dated 5.11.1980 and 20th July, 1981, in terms whereof the seniority was directed to be counted from the date from which the incumbent started his substantive officiation and consequently the

petitioner was not considered for promotion. The said circulars came up for consideration in CWJC NO. 3130 of 1981.

7. A Learned Single Judge of this court upon taking into consideration the Sergeant-Major Rules of 1944 held as follows :—

> "I therefore, feel that the authorities should re-examine their stands in the light of the aforesaid observations and deeper study of the decisions involved before setting any criteria to be followed in the cases for determining the seniority of the members of the police force at all levels. I have, therefore, no hesitation in quashing Annexures-5 and 6 and directing the respondents concerned to re-examine the situations in the light of the above discussions and to give a final decision in accordance with law in this regard. Before they do so, They should refrain from describing the method prescribed in the 1944 Sergeant-Major Rules. I may state that in the police manual also there is no rule to indicate as to in what manner it would affect that Sergeant-Major Rules. Needless to say that in view of the interim order of this court the promotions. If any made shall be subject to the appraisal of the principle involved in Annextures-5 and 6."

8. As the respondents allegedly did not comply with the said order, an application for initiation of a proceeding under the contempt of Courts Act was filed on 10.07.1981 which was registered MJC No. 97/87.

In the meanwhile, it appears, adhoc promotion were being given to the persons junior to the petitioners.

9. By an order dated 21.4.1987 this court, therefore, granted three months' time to the State to enable the Director General of Police and his subordinate officers

concerned to rectify the situation, which, unless that is done, would in all likly hood, amount to disobedience of the order of this court.

10. As despite the said notice no order of promotion was issued, the said petition was admitted and the notices were issued to opp.-parties 2 to 5 thereof. On 22.9.1987 a notification was produced in the court to indicate that this court's order passed in CWJC NO. 3130 of 1981 has been complied with in terms whereof the petitioners were allegedly promoted on temporary and/or adhoc basis.

11. This court thereafter made certain observations in its order dated 16.10.1987 in the aforementioned application. By an order dated 1.11.1987 which is contained in Annexure-5 to the writ application, however, 11 Subedar including the petitioners were given promotion with effect from 31.12.1981.

12. The petitioners have however, contended that in terms of the aforementioned order they have not been given any monetary benefits by way of enhancement of salary, increments etc with effect from 31.12.1981.

The petitioners filed a representation on 16.12.1987 to the Home Secretary, Police Department which is contained in Annexure-7 to the writ application. Another representation was filed by the petitioners on 9.11.1989 wherein it was pointed out that they had come to learn that their claim had been turned down by the department.

13. In this situation, the petitioners filed another application under Article 215 of the Constitution of India and Sections 11 and 12 of contempt of Court Act which was registered as MJC NO. 39/90.

14. However, by an order dated 13.2.1990, it has been directed as follows :—

> "It appears that the relief sought by the petitioner is not only confined to the issuance of notice of contempt of

court but goes beyond it. Direction is sought to the State Government to pay arrears of salary etc. from 31.12.1981 and the date from which promotion has been granted on the basis of the order of this court and not from the date of joining to the promotional posts. I make it clear that my judgment did not contain any direction with regard to the period from which salary etc, would be paid. In a subsequent application being MJC NO. 97 of 1987 I had merely issued a direction that what has been paid to the juniors also be paid to the petitioners but it appears that persons who were juniors had joined the post earlier i.e. from 31.12.1981 itself and, therefore they were paid their salary etc, from that date, According to the state rules prohibit payment of any errors to a person who gets national confirmation from an earlier date but joined latter. This matter deserves to be examined in a properly heard application as if it is a matter under Article 226 of the Constitution.

I, therefore, direct that this MJC application be placed before a Division Bench dealing with the admission cases under Article 226 of the Constitution to examine the submissions of the parties.

Originally I had said that the counter affidavit will not be entertained but since the petitioner has also filed a rejoinder both of the them may now be looked into.

Let the file be placed before Hon'ble the Chief Justice that if the wishes an early date may be fixed."

15. Thereafter the said petition was converted into a writ application.

16. Dr. Sada Nand Jha, learned counsel appearing on behalf of the petitioner has raised a short question in support of this application.

The learned counsel submitted that as the petitioners

were promoted with retrospective effect, they are entitled to all monetary benefits with effect from the said date.

17. The learned counsel in support of his contention has strongly relied upon a division Bench decision of this court in *Dr. Paras Nath Pd. Vs. State of Bihar* [1] and *R.M.Ramaul Vs. State of Himachal Pradesh and others* [2].

18. On behalf of the State, however, it has merely been pointed out that the petitioners are not entitled to monetary benefits in view of Rule 58 of the Bihar Service Code.

19. Rules 58 of the Bihar Service Code is a general rule. The said rule is applicable in a case where a Govt. servant does not join the post of his own. Ordinarily the said rule will have no application in a case where an employee although is ready and willing to work on the post is prevented from doing so. This aspect of the matter has been considered by the Supreme Court recently in *Union of India Vs. K.V.Janki Raman* [3].

20. In that case the Supreme Court interalia was considering the provision of F.R. 17(1) of Fundamental and Supplementary rules which reads as follows :—

> *"Fr 17(1) :—* Subject to any exceptions specifically made in these rules and to the provisions of sub-rule (2) an officer shall begin to draw the pay and allowances attached to his entering of a post with effect from the date when he resumes the duties of that post, and shall cease to draw them as soon as he ceased to discharge those duties:
>
> Provided that an officer who is absent from duty without any authority shall not be entitled to any pay and allowances during the period of such absence."

21. Before the Supreme Court it was pointed out that the normal rules is "no work no pay".

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1. 1990 (2) PLJR 248
2. (1991) A.I.R. (S.C.) 1171.
3. 1992 (1) PLJR 27 (S.C.).

The Supreme Court however, observed:–

"We are not much impressed by the contention advanced on behalf of the authorities. The normal rule of "no work no pay" is not applicable to cases such as the present one where the employee although he is willing to work is kept by the authorities for no fault of his. This is not a case where the employee remains away from work for his own reasons although the work is offered to him. It is for this reason that F.R. 17 (1) will also be in applicable to such cases."

22. The Supreme Court further observed:-

"We are, therefore, broadly in agreement, with the finding of the Tribunal that when an employee is completely exonerated meaning thereby that he is not found blame-worthy in the least and is not visited with the penalty even of censure, he has to be given the benefit of the salary of the higher post alongwith the other benefits from the date on which he would have normally been promoted but for the disciplinary/criminal proceedings."

23. In this case, it is clear that the petitioners were denied promotion unjustly. They had approach this court and the writ application was allowed. Despite the Judgment of this court passed in CWJC No. 3130 of 1981 which is contained in Annexure-1 to the writ application, the orders of promotion were not issued for a long time. The petitioners have to file an application for initiation of a proceeding under the Contempt of Courts Act and only thereafter the order dated 1.11.1987 as contained in Annexure-5 to the writ application was issued.

24. It is, therefore, clear that the petitioners are not to be blamed for not being able to work on a higher post although persons juniors to them had been promoted.

25. In *Dr. Paras Nath Prasad's* case 1990 (2) PLJR 248 a division bench of this court upon taking into consideration a large number of decisions held :—

> "The other contentions of the learned counsel for the respondents that Rule 58 of the Bihar Service Code prohibits any grant of pay and allowances to the petitioner on a fictional and national promotion granted to him, is in my view, misconceived. A notional promotion has to be as if for service benefit he had been given due promotion. A person, who is entitled to promotion and is not promoted, can always invoke the justification of this court under Article 226 of the Constitution for a mandamus to the employer State to consider his case for such promotion. Such due promotion is not a claim of anything national but it is something that it is really attached to the status and the service contract of the employee concerned."

26. This court thereafter took into consideration the decision of the Supreme Court in *Alappal Narana Menon Vs. State of Kerala* reported in 1977(ii) SLR 656 and directed the respondents in the following terms :—

> "That being the position that is a fit case in which a direction may be issued to the respondents to promote the petitioner with the effect from due date, accordingly, fix his salary, allowances and other benefits and finally fix his position in the service at the end of his service tenure so that the consequential benefits may also be given to him".

27. In *R.M. Ramaul Vs. State of M.P.* (1991 SC 1171) the Supreme Court while dealing with a contempt application held that although technically the State might not have been guilty for commission of contempt of this court for nor paying due salary admissible to the higher post, gave such a direction in the following terms :—

"Since there was no specific direction in this behalf in the order, technically there may be no case for punishment for contempt; but we make it clear that the promotion for the period from 28.5.1982 to 3.9.1986 should be accompanied by the monetary benefits. if a specific direction is necessary we issue it here and now. The appropriate monetary benefits shall be granted within 2 months from today".

28. For the reasons aforementioned, the contentions raised on behalf of the petitioner has to be accepted and consequently the respondents are hereby directed to pay their salary allowances and other benefits with effect from the date when they were promoted to the High Post, with almost expedition and preferably within a period of two months from the date of the receipt of a copy of this order.

29. However, in the facts and circumstances of the case, there will be no order as to costs.

S. P. J. Application allowed.

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LETTERS / PATENT

Before U. P. Singh & Aftab Alam, JJ.

1992
December, 22

Hindustan Petroleum Corporation Ltd.*
V.
Chandra Prakas Bubna & ors.

Caltex (Acquisition of Shares of Caltex Oil Refining (India) Ltd And of The Undertaking In India of Caltex (India) Ltd. Act. 1977 (Central Act No. XVII of 1977) section 7(3), scope and applicability of—expression on the expiry of the term of any lease' meaning of— whether applies to a case of forfeiture of lease for breach of the terms of tenancy—lease, Whether should be statutorily renewed— Transfer of Property Act. 1882 (Central Act IV of 1882), Section 114 — relief against forfeiture, when can be refused.

Held, that it is true that section 7 (3) of the Caltex Acquisition of Shares of Caltex oil Refining (India) Ltd And of the Undertakings. In India of Caltex (India) Ltd (hereinafter referred to as the Take Over Act') used the expression on the expiry of the term of any lease' Which is different from the expression 'by efflux of time limited' in a lease used in clause (a) of section 111 of the Transfer of property Act. However, in substance the two expressions convey exactly the same meaning and expiry of the term of lease' is used to mean a determination of lease by efflux of time specified therein.

* Letters Patent Appeal No. 139 of 1991. In the matter of an appeal under Clause 10 of the Letters Patent Appeal Rule of the Patna High Court.

It is plain that a right under section 7 (3) of the Take over Act would accrue only after a lease had survived for the entire period stipulated therein with the lessee faithfully observing the terms and conditions contained there in. It may be noted that there are several ways for the determination of a lease; it may determine by efflux of time limited there by (vide section 111(a) of the Transfer of property Act) or it may determine by for feature (Vide clause (g) of section 111 of the T. P. Act. Section 7(3) of the Take Over Act contemplates a statutory right for renewal only in case of the expiry of term of the lease, that is to say, When a lease is determined in terms of clause (a) of section 111 of the T. P. Act. In case the lease is determined in any manner other than by effux of time, section 7 (3) of the Take Over Act shall have no application and certainly not in case of forfeiture of lease for breach of the terms of tenancy.

Held, further, on the facts and circumstances of the case,that the action of the defendants lessees in not making payment of the monthly rent to the plaintiffs- lessors was wholly unreasonable, without any justification and calculated to harass the plaintiffs and thus, the defendants-lessees by their conduct have thoroughly disentitled themselves to any relief against forfeiture in terms of section 114 of the Transfer of Property Act.

Namdeo Lokman Lodhi v. Narmada Bai and ors.[1]

Appeal under the Letters Patent.

The facts of the case material to this report are set out in the judgment of Aftab Alam, J

M/s. Sidhartha Shankar Ray, Navin Sinha and Bharati Mutsuddi for the appellant.

1. (1953) A.I.R. (S.C.) 228.

M/s. Thakur Prasad G. K. Agrawal, Sanjay Priya, Nita Choudhary, Kiran Bala Sahay, for respondents 1 to 7.
M/s. K. D. Chatterji and Ravi Nath Verma for respondents 8 to 12.

Aftab Alam, J. — This is a letters patent appeal arising from the judgment of a learned single judge of this Court. By the judgment under appeal the learned judge substantively affirmed the trial court's decree of ejectment passed against the appellant and (proforma) respondent no. 12 (defendants 1 and 2 respectively before the trial court).

2. Respondents 1 and 2 and one Ramawtar Bubna (whose heirs and legal representatives are now on the record as respondents 3 to 7) sued as plaintiffs for the ejectment of defendants 1 and 2 from the suit premises which was in their occupation on the basis of a lease. In addition, decrees were also sought for different amounts as (a) arrears of rent. (b) damages for use and occupation of the premises after the determination of the lease and (c) legally and validly determined the lease on grounds of (i) non- payment of monthly rent by the defendants form April, 1982 on false and untenable pretexts, (ii) failure to pay the entire municipal dues which was one of obligations of the lessee in terms of the lease and (iii) putting the lease hold premises to us other than those sanctioned by the lease. The defendants resisted the suit taking a common stand. They denied that the suit premises was used for a purpose constituting breach of the terms of the lease. They also denied that there were any municipal dues and stated that even in case there was any municipal due it would not amount to any breach of the lease. As regards non- payment of monthly rent, which fact was beyond dispute. the defendants pleaded relief against forfeiture in terms of section 114 of the Transfer of Property Act (T. P. Act. for short) by offering to pay,in course of the trial,all arrears of

rent along with interest 18% and the cost of the suit.

2. The trial court held (though for an erroneous reason) that the relief under section 114 of the T. P. Act was not available to the defendants and found them liable to ejectment on all the three counts. It, accordingly, handed out decrees for ejectment as also arrears of rent, damages and mesne profits against both the defendants.

3. In appeal, the learned single judge affirmed the decree of ejectment against both the respondents; the decrees for arrears of rent, damages and mesne profits, however, were confined to defendant no. 1 (the appellant) alone. The learned judge held that determination of the lease for non- payment of monthly rent was quite legitimate and the defendants, on account of their unreasonable and persistent refusal to pay the monthly rent, had disentitled themselves to any relief in terms of section 114 of the T. P. Act. The learned judge also found that putting the lease hold premises to use for the sale of scooters etc. manufactured by Scooters India Ltd. was in breach of the term of the lease and on this score also the defendants were liable to aviation. However, as regards the municipal dues the learned judge held that the plaintiffs could not press it as a ground for ejectment because the plaintiffs had failed to give a notice in writing to the defendants requiring them to remedy this particular breach of the term of tenancy as provided under section 114A of the T. P. Act. Thus, the learned judge affirmed the ejectment of the defendants, but on two grounds only where as the trial court had decreed the suit on all the three. grounds.

4. Conveniently in this appeal there is not much scope for the parties to differ on facts; what they differ about, however, is the import and effect of the admitted facts. The leadings of the parties and the evidences led by them unsold

the following factual matrix that remains undisputed. On 15.4. 1968 respondents 8 to 11 (proforma defendants 3 to 6) made a lease in respect of the suit premises in favour of Caltex (India) Ltd. The lease was for a period of 20 years commencing from 1.7. 1965 and expiring on 30. 6. 1983. The demised land measured to an area 16,000 sq. ft. and the lessee was required to pay rent RS. 500/- per month upto June, 1975 and thereafter Rs. 650/-per month. Under the lease the lessee was given a right "to install erect and maintain in and upon the said piece of land... for the purpose of storing. selling or otherwise carrying on trade in petrol, petroleum products, oil and kindred motor accessories and any other trade or business that can conveniently be carried on there with." The lease further provided that the lessee could let its legal dealer or agent hold and use the premise for all or any of the purposes permissible under the lease without any consent of the lessors. It was in pursuance of the lease that caltex (India) Ltd carried on the business of running a petrol pump on the suit premises throughout its dealer, M/S Bidasaria Auto Service, defendant no.2.

5. On 30.12.1976 the Caltex (Acquisition of Shares of Caltex Oil Refining (India) Ltd. And of The Undertakings In India of Caltex (India) Ltd.) Ordinance, 1976 (hereinafter referred to as 'Take Over Ordinance') came into force. The Ordinance was replaced by Act no. 17 of 1977 on 23.4.1977. On the day appointed by the Take Over Ordinance, i.e., 30.12.1976 the undertakings of Caltex (India) Ltd. were transferred to and vested in the Central Government by virtue of section 5 of the Ordinance. Section 7 contained special provisions as to certain rights and interest held by Caltex (India) Ltd. before the vesting of its undertakings in the Central Government; sub section (3) of section 7, which has been the subject of considerable discussion in this case,

provided that any lease in favour of Caltex (India) Ltd., on its expiry, shall be renewed, if so desired by the Central Government, on the same terms and conditions as the original lease. Section 9(1) empowered the Central Government to direct vesting of the undertakings of Caltex (India) Ltd, in a government company and sub section (3) of section 9 provided that the provisions of sections 5, 6 and 7 would also apply to such government company in which the undertakings of Caltex (India) Ltd. may be vested by the Central Government.

6. On December 30, 1976 itself the Central Government issued a notification under section 9(1) of the Ordinance directing that the rights, title and interest and the liabilities of Caltex (India) Ltd, in relation to its undertakings in India shall vest in a government company by the name of Caltex oil Refining (India) Ltd. instead of continuing to vest in the Central Government. Finally, by an order dated May 9, 1978 passed by the Company Law Board in exercise of powers conferred by sub sections (1) and (2) of section 396 of the Companies Act, 1956 the Caltex Oil Refining (India) Ltd. was transferred to and vested in Hindustan Petroleum Corporation Ltd. and it was further directed that it is the latter corporation which would be deemed to be the company resulting from the amalgamation. It was in this manner that M/S Hindustan Petroleum Corporation Ltd., the present appellant, became the successor of Caltex (India) Ltd. and it was in this capacity that the Corporation was sued and it has now preferred the present appeal.

7. At this stage it may be noted that defendant no. 2 who was a dealer of dependent no. 1 in the petrol pump business also obtained a dealership of M/S Scooters (India) Ltd. (strangers to the suit) and started, from the suit premises, a

business of storage and sale of scooters manufactured by the aforesaid company. It is in respect of carrying on the business of selling scooters from the suit premises that the plaintiffs allege a breach of the term of the lease which according to them, was confined to trade in petrol, petroleum products, oil and kindred motor accessories only. It is the case of the defendants that the scooters business was started on the suit premises some time in the year 1977 and it was in the full knowledge of the performs defendants, who were then the lessors and the owners of the premises. The plaintiffs do not admit this date but nothing much depends on this.

8. On 22.3.1982 the original owners, proforma defendants 3 to 6, sold the suit premises to the plaintiffs, through four registered deeds; each of the four former owners executed a separate sale deed in respect of his share in the suit premises in favour of the three plaintiffs. On the same date (22.3.1982) the former owners sent separate of atornement to defendant no. 1 giving intimation regarding the sale and advising defendant no. 1 to pay the monthly rent in respect of the demised premises to the plaintiffs from the date of the sale. The appellant, however, denies having received these letters. On 30.3.1982 a lawyer on behalf of the plaintiffs wrote to the appellant informing that the plaintiffs had purchased the suit premises from its former owners and requesting the appellant to pay the monthly rent from the month of April, 1982 to the three plaintiffs. The letter furnished the details regarding their names and address etc. Copies of the letters of atonement writer by the proforma defendants on March, 22, 1982 were also enclosed with this letter. The appellant accepts having received this letter. Further, when a cheque for the monthly rent for April, 1982 was sent by the appellant to proforma

defendant no. 5, (who under the previous arrangement used to receive the monthly rent on behalf of all the former owners) he returned the cheque to the appellant along with his letter dated 2.4.1982 clearly stating that the suit premises had been sold to the plaintiffs on 22nd March, 1982. He further advised in this letter that the cheque for April, 1982 may be sent to the purchasers (i.e. the plaintiffs). An officer of the appellant corporation gave reply to proforma defendant no. 5 by letter dated April 19, 1982 saying in substance that unless they received a letter from the purchasers along with a copy of the sale deed it would not be possible for them to effect payment to the new land lords. Similarly on 15.5.1982 a letter was sent to the plaintiffs' lawyer in acknowledgment of his letter of March 30, 1982. In this letter also the appellant made a demand for the supply of a certified copy of the purchase deed and asked for the details regarding the shares of each of the plaintiffs so as to enable the appellant to take further action to attorn the tenancy in favour of the plaintiffs. By letter dated July 10, 1982 the plaintiffs' lawyer determined the lease for non-payment of rent for the months of April to June, 1982 as also for breach of the terms of tenancy by reason of the scooter business being carried on the lease holdland and municipal taxes for the last four years not having been paid by the lessee and asked the appellant to give vacant possession of the demised premises by 31st July, 1982. On 17.7.1982 the appellant respondent, once again asking for the sale deeds as also for details regarding the extent of the interest of each of the plaintiffs in the property. Whereupon a second notice dated 14.8.1982 was sent by the plaintiffs' lawyer determining the tenancy on the aforesaid three grounds and asking the appellant to deliver vacant possession of the suit premises by September 30, 1982. Regardless of this notice, the appellant sent a series of

letters to the plaintiffs relentlessly asking for the certified copies of the sale deeds.

9. On 6.10.1982 the appellant filed an interpleader suit impleading both the plaintiffs and the performs defendants and prayed for permission to deposit the rent for the suit premises in court. This was registered as Title Suit No. 18 of 1987 in the court of Munsif III, Patna. This interpleader suit was dismissed as not maintainable on 29.10.1983. Against this order the appellant preferred a civil revision before this Court on 24.2.1984. This civil revision application registered as Civil Revision no. 362 of 1984 and admitted in this court on 2.3.1984 was finally dismissed as not maintainable by order dated 21.12.1988.

10. Shortly after the filing of the interpleader suit by the appellant, the plaintiffs, on 25.11.1982, instituted title suit no. 452 of 1982 (which had led to this appeal) for the eviction of the appellant from the suit premises. In this suit the ap- pellenate appeared and filed its written statement on 24.8.1983 contesting the suit. It was much later on 22.3.1984 while the appellant's civil revision against the order of dismissal of the interpleader suit was pending before this Court, that an application under section 114 of the T.P. Act was filed in the suit offering to pay the arrears of rent along with interest and costs of the suit. The plaintiffs filed their rejoinder to this petition and the matter was heard and rejected by the trial court vide its order dated 24.8.1985. The appellant came to this court in civil revision no. 1916 of 1985 against this order rejecting their petition under section 114 of the T. P. Act. This civil revision was disposed of by order dated 18.12.1985 wherein this Court observed that the question of granting any relief in terms of section 114 of the T P Act would be available to the defendant petitioner (appellant) subject to its depositing the current month to rent by 15th of the next succeeding month. Finally by

judgment and decree dated 21.12.1988 the trial court decree the suit on all the three grounds. In appeal a learned single judge of this Court affirmed the decree substantially as already indicated above.

11. Before concluding the facts of this case it is also to be noted that in purported exercise of the option in terms of section 7(3) of the Take Over Act the appellant gave notices for renewal of the lease to the plaintiffs on 20.4.1985 and also filed a petition before the trial court on 12.6.1985 enclosing the copies of the notices sent to the plaintiffs.

12. Mr. S. S. Ray, counsel for the appellant, placed considerable reliance upon section 7(3) of the Take Over Ordinance Act. He contended that the mandate of this provision protected the appellant from ejectment at this juncture and entitled the appellant to hold the demised premises for another period of 20 years which was the term specified in the lease dated 15.4.1968. The relevant provisions contained in sub-section (1) and (3) of section 7 of the Take Over Act are reproduced below :

> " 7 (1) Every right or interest in respect of any property in India (including a right under any lease or under any right of tenancy or any right under any arrangement to secure any premises for any purpose) which Caltex (India) held immediately before the appointed day, shall, notwithstanding anything contained in any other law or in any agreement or instrument relating to such right or interest,vest in, and be held by, the Central Government on and after the appointed date *on the same terms and conditions on which Caltex (India) Would have held it if no negotiation had taken place for the acquisition by* the Central Government of the undertakings of Caltex (India) in India or, as the case may be, if this ordinance had not been promulgated.
>
> "(2) .....
>
> "(3) *On the expiry of the terms of any lease,* tenancy or agreement referred to in sub section (1) or sub section(2),

such lease or tenancy or arrangement shall, if so desired by the Central Government be renewed or continued so far as may,on, the *same terms and conditions* on which the lease or tenancy or arrangement was originally granted or entered into."

(emphasis added)

13. Mr. Ray contended that by virtue of the aforequoted provisions the lease in question was to be statutorily renewed for a further period of 20 years.

14. In my opinion the appellant in this case cannot derive any benefit from section 7 (3) of the Take over Act. It is plain that a right under section 7 (3) would accrue only after a lease had survived for the entire period stipulated there in with the lessee faithfully observing the terms and conditions contained therein. It may be noted that there are several ways for the determination of a lease: it may determine by efflux of time limited there by (vide section 111 (a) of the T. P. Act) or it may determine by forfeiture (vide clause (g) of section 111 of the T.P. Act). Section 7 (3) of the Take over Act contemplates a statutory right for renewal only in case of the expiry of the term of the lease, that is tosay, when a lease is determined in terms of clause (a) of section 111 of the T. P. Act. In case the lease is determined in any manner other than by efflux of time, section 7 (3) of the Take over Act shall have no application and certainly not in case of forfeiture of lease for breach of the terms of tenancy.

15. In this regard Mr. Ray took an extreme stand that section 7 (3) of the Take Over Act read with Article 39 (2) of the Constitute on would have the effect or wiping off any misdoings on the part of the central Government or the successor Government company. I am afraid it is not possible for me to accept such an extreme contention. It is to be noted that both sub sections (1) and (3) give due respect to the terms and conditions of the existing lease. The

demised premises held by caltex (India) Ltd. Under an existing lease is to be held by the Central Government, in terms of sub section (1), On the same terms and conditions on its expiry is to be renewed on the same terms and conditions on which the lease was originally granted. It is, thus, manifest that the provisions contained in section 7 of the Take over Act are not intended to be a license to flout all the material terms and condition of an existing lease and yet claim the statutory right for renewal when the lease is sought to be determined by forfeiture.

16. Mr. Ray, next submitted that the expression "expiry of the term" in section 7(3) of the Take over Act was wide enough to include determination of a lease by any mode as provided in section 111 of the T. P. Act, whether under clause (e) or (g) or any other clause there of. According to him, determination of a lease by forfeiture was also included in section 7(3). (it is true that section 7(3) of the Take over Act used the expression , on the expiry of the term of any lease, which is different from the expression ,by efflux of time limited, in a lease used in clause (a) of section 111 of the T. P. Act. However, in substance the two expressions convey exactly the same meaning and ,expiry of the term of lease, is used to mean a determination of lease by efflux of time specified therein. I have carefully considered the submissions advanced by Mr. Ray and I am of the opinion that if Mr. Ray's interpretation of section 7(3) is accepted, it would make the provision so unreasonable as to make it difficult to justify its constitutionality.

17. In support of his contention Mr. Ray has placed reliance on an unreported decision of the Bombay High Court, Nagpur Bench in Special Civil Application no. 225 of 1979 (Bharat Petroleum Corporation Ltd. vrs. State of Maharashtra and others; date of disposal. January 9, 1980.

This decision is hardly of any avail to him as in this case the corporation had applied for renewal after two years of the expiry of the initial lease. The demised premises was a Nazul land and the initial lease was granted by the Collector, Vardha in favour of Burmah shell oil. Distributing Company of India Limited. The renewal of the lease was refused on the ground that the petrol pump was situated on a highway and was causing great inconvenience to the traffic. It was further stated that the existence of the petrol pump on the site in question had become a public hazard and its continuance there was highly undesirable. The court rejected the objections of the collector and held that section 5(2) of the Take over Act granted a right to the lessee to have the renewal of the lease on the same terms and conditions on which the lease was held by Burmah Shell and directed the Collector to renew the lease for a further period of 5 years from 1.8.1976. This case is no authority that section 7(3) of the Take over Act is also applicable in case of determination of lease by forfeiture.

18. Mr. Ray also relied upon decisions reported in A.I.R. 1981 Andhra Pradesh, 283, *Mustafa Hussain vrs. Union of India and ours.*, and A. I. R. 1981 Madhya Pradesh, 123, *Manohar Singh Vrs. Caltex Oil Refining (India) Limited, Bombay*. These two decisions considered the vires of the Esso (Acquisition of undertakings In India) Act (14 of 1974) and the caltex (Acquisition of shares of Caltex Oil Refining (India) Ltd. And all the undertakings In India of Caltex (India) Ltd.),Act, 1977 and found them to be intra vires. These decisions too are no authority on the point that a case of forfeiture is also covered by section 7(3) of the Take over Act.

19. Mr Ray then submitted that in case it was held that forfeiture was not covered by section 7(3) of the Act then

the plaintiffs could not rely on any forfeiture for, in the facts and circumstances of the case, relief under section 114 of the T. P. Act should have been granted to the appellant. This leads us to the main controversy in this case.

20. Mr. Ray strenuously tried to persuade us that the appellant was entitled to relief against forfeiture in terms of section 114 of the T. P. Act. He contended that the trial Court and the learned single judge of this court materially erred in not allowing the appellant relief against forfeiture even though the appellant had offered to pay all the arrears of rent along with interest and costs of the suit and, in fact, had deposited the amount in the trial court as directed by this court vide order dated 18.12.1985 passed in civil Revision No. 1916 of 1985. Trying to seek help from the decisions reported in A.I.R. 1949 Patna, 475 and A.I.R. 1969 S.C., 1349, Mr. Ray contended that the covenant for forfeiture of tenancy for non-payment of rent is to be regarded as nothing more than a clause for securing payment of rent and once the lessee offered to pay all the arrears of rent along with interest and costs of the suit the courts has no real discretion and must allow relief against forfeiture. Mr. Ray also submitted that the decision reported in A.I.R. 1953 S.C., 228, relied upon by the learned single judge to hold that the appellant was not entitled to relief against forfeiture was on facts quite uncomparable to the instant case.

21. For considering the appellant's claim for relief in terms of section 114 of the T. P. Act it will be necessary to examine the material facts relation to non-payment of monthly rent by the appellant in some detail. The former owners (proforma defendants 3 to 6) transferred the suit land to the three plaintiffs by registered sale deeds dated 22. 3. 1982. On the same date each of the former owners sent

separate letters of atornment to the appellant. However, according to the appellant, these letters were not received at its office. On 30.3.1982 the plaintiffs, through their lawyer, intimated the appellant that the demised land had been jointly purchased by the three plaintiffs from its former owners. This letter also requested the appellant to send the monthly rent for the month of April, 1982 and for the future months directly to the plaintiffs giving their names and their common address. This letters also enclosed photo stat copies of the letters of affornment dated 22.3.1982 earlier sent by the former owners to the appellant directly. It is an admitted position that this letter along with its enclosures was duly received by the appellant. Regerdless of this letter, the monthly rent for April, 1982 appears to have been sent to Paritosh Mazumdar (proforma defendant no. 5) who under the previous arrangement used to receive rent on behalf of all the four former owners. Not much exception can be taken to this as, according to the appellant.s case, till then no communication from the former owners was received regarding any change job ownership in relation to the demised land. The cheque for the monthly rent of April,1982, however, was returned by Paritosh Mazumdar to the appellant along with his letter dated 2.4.1982 clearly stating that the former owners had sold the land vide registered sale3 deed dated 22.3.1982. It was further advised that the appellant should send the monthly rent directly to the purchasers, who were entitled to the rent from the date of purchase. This is a straight forward letter and leaves no room for doubt regarding the change of ownership in respect of the demised land. An officer of the appellant then answered paritosh Mazumdar by letter dated 19.4.1982. In this letter it was stated that till that date the appellant had "neither received the details of the new purchasers of this land, nor a copy of the sale deed". It was further said that

unless the appellant received a letter from the new purchasers along with a copy of the sale deed. It would not be possible to make payment to the new landlords. It is to be noted that the statement that the appellant had till then not received the details relating to the new purchasers was quite incorrect as the letter from the plaintiffs', lawyer dated 30.3.1982 had already been received by them. As regards the demand for a certified copy of the sale deed, the appellant had no legal sanction to make such a demand or making payment of the monthly rent to the plaintiffs as the sale of the demised land had already been confirmed by Paritosh Mazumdar on behalf of the former owners. The letter dated 30.3.1982 from the plaintiffs was answered by the appellant by letter dated 15.5.1982. In substance it was stated that the payment of rent for the demised land could be made to the plaintiffs only after they supplied the certified copies of the sale deeds and also aprised the appellant regarding their respective shares in the land. In reply the appellant received a notice dated 10.7.1982 from the plaintiffs, lawyer determining the lease for non-payment or the monthly rent from April to june,1982 and for other reason as indicated earlier (the suit was, however, filed on the basis of a subsequent notice under section 106 of the T. P. Act). This time the appellant too replied through lawyer by letter dated 17.7.1982. This letter makes interesting reading and the material paragraph from it is reproduced below.

> "That it is also true that your clients, namely, Shri Ramawtar Bubna, Shri Chandra Prakas Bubna and Shri Prashant Kumar Bubna became the owners of the properties in question and one of the owner Shri Paritosh Mazumdar informed my client about the said sale of the property and change in ownership but he did not mention the names and addresses of the purchasers nor a quantum of share in the property under consideration. Hence in response to the letter dated 2.4.1982 of Shri Paritosh

> Mazumdar my client through their registered A/D letter bearing no. 5150 HB dated 19.4.1982 requested him to furnish the necessary details of the new purchasers and also asked him for a copy of the sale deed but the letter remained unresponded."

Having admitted that the plaintiffs became the new owners, wholly untenable excuses were advanced for not making payment to the plaintiffs. As regards the names and address of the new owners the same was supplied to the appellant by letter dated 30. 3. 1982 and as regards the demand for certified copies of the sale deeds and information regarding the extent of shares of each of the plaintiffs, the same was quite unwarranted. The plaintiffs. then. gave a notice under section 106 of the T. P. Act through their lawyer on 14. 8. 1982 determining the lease and demanding vacant Possession of the demised land with effect from 30. 9. 1982. The appellant regardless, of the determination of the lease persistently went on refusing to make payment of the monthly rent and did not give up its demand for the copies of the sale deeds and advice regarding the extent of shares of each of the plaintiffs in the demised land.

22. Mr. Ray sought to justify the stand taken by the appellant by submitting that the appellant after all was a public sector undertaking and its officials were subject to a most string rent check and control by the audit and they could not have possible made payment to complete strangers without first satisfying themselves. He further pointed out that there were certain discrepancies in the letters of Paritosh Mazumdar and the one from the plaintiff's lawyer in as much as Paritosh Mazumdar had mentioned sale of the demised land by one sale deed whereas the plaintiff's lawyer had stated that the land was purchased through four registered sale deeds. The appellant was demanding certified copies of the sale deeds simply to clarify these minor points.

23. I am far from impressed by this explanation. Paritosh Mazumdar had refused to accept the rent for the month of April, 1982 confirming the sale to the plaintiffs. The photo state copies of the four separate letters of atonement under the hands of the four former owners had also been furnished to the appellant: the details regarding the names and address of the purchasers/plaintiffs were also supplied to the appellant vide letter dated 30.3.1982. I see no reason why the appellant should not have issued an account payee cheque in the joint names of the three plaintiffs for the monthly rent of the demised premises. How was the amount to be approtioned among the plaintiffs, whether in equal measures or dispro portionately was no concern of the appellant. Neither was the appellant justified in making the rigid demand for the certified copies of the sale deeds. To me it appears that with characteristic apathy it look it into head to make a demand for which it had no legal sanction. The appellant seems to have forgotten that it had a relationship of lessor and lessee with the plaintiffs and treated them as one of its clients who must satisfy all its whims and fancy.

24. The appellant went to the extent of filling of inter pleader suit interpleading the plaintiffs and proforma defendants nos. 3 to 6. The suit failed on the first date of hearing as the proforma defendants fairly stated that there was no dispute between them and the plaintiffs and they acknowledge the sale and confirmed the plaintiffs as the lawful owners of the demised land. The appellant crowned its recalcitrance by not being contened even as that stage and thought it fit to take the trial court's order dismissing the interpleader suit to the High Court in a civil revision which also was finally dismissed as not maintainable. While this revision arising from the interpleader suit was pending in the High Court, the appellant filed a petition under

section 10 of the Civil 1 Procedure Code in the instant suit before the trial court praying that the proceedings in the suit may be stayed till the disposal of the civil revision by the High Court. The trial court directed that order on the petition under section 10 of the Civil Procedure Code shall be passed after the arguments in the title suit were concluded. This order by the trial court was also brought to the High Court by the appellant in Civil Revision no. 1236 of 1988 which too was dismissed on 28.9.1988 and the High Court directed that the hearing of the suit should proceed on a day to day basis.

25. On the basis of the facts as narrated here in above I unhesistatingly find that the action of the appellant in not making payment of the monthly rent to the plaintiffs was wholly unreasonable, without any justification and calculated to harass the plaintiffs.

26. As regards the legal position, the Supreme Court in the case of *Namdeo Lokman Lodhi Vs. Narmada Bai & Ors.*[1] besides dealing with the facts of the case also laid down the law relating to entitlement to relief in terms of section 114 of the T. P. Act. Paragraphs 28 to 30 of that decision are reproduced hereinbelow :

> "Mr. Daphtary contended that the High Court failed to appreciate the rule applicable for the exercise of the discretion in such cases and that the rule is that if at the time relief is asked for the position has been altered so that relief cannot be given without causing injury to third parties relief will be refused, but if that position is not altered so that no injustice will be done there is no real discretion and the Court should make the order and give the relief. Reference was made to the decision of Page J., in Debendralal Khan Vs. F. M. A. Cohen, A. I. R. 1927 Cal. 908 (T), where in it was said that the

1. (1953) A. I. R. (S. C.) 228.

Court normally would grant relief against forfeiture for non payment of rent under 114, T. P. Act, and that if the sum required under the section was paid or tendered to the lessor at the hearing of the suit the Court has no discretion in the matter and must grant relief to the tenant. We do not think that the learned Judges intended to lay down any hard and fast rule. Indeed the learned Judge proceeded to observe as follows :

> 'In exercising the discretion with which it is invested under S. 114 a Court in India is not bound by the practice of a Court of Chancery in England, and I am not disposed to limit the discretion that it possesses. Those who seek equity must do equity, and I do not think merely because a tenant complies with the conditions laid down in S. 114 that he becomes entitled as of right to relief.'

"In our opinion, in exercising the discretion, each case must be judged by its if, the delay, the conduct of the parties and the difficulties to which the landlord has been put should be weighed against the tenant. This was the view taken by the Madras High Court in Appayya Shetty V. Mohammed Beari, A. I. R. 1916 Mad. 680 (2) (U), and the matter was discussed at some length. We agree with the ratio of that decision. It is a maxim of equity that a person who comes in equity must do equity and must come with clean hands and if the conduct of the tenant is such that it disentitled him to relief in equity, then the Court's hands are not tied to exercise it in his favour. Reference in this connection may also be made to A. I. R. 1914 Mad. 706 (H), and Ramabrahmam V. Ram 1 Reddi, A. I. R. 1928 Mad. 250 (V).

"The argument of Mr. Daphtary that there was no real discretion in the court and relief could not be refused except in case where third party interests intervene is completely negatived by the decision of the House of Lords in Hymen Vs. Rose, (1912) A. C. 623 (w). Relief was claimed in that case under the Provisions of s. 14 (2) of the Convincing Act, 1881 against forfeiture for breaches of covenant in the lease. The appellants offered as the terms on which relief should be granted to deposit sum sufficient to ensure the restoration of the premises to their former condition at the end of the term and make full restitution. It was argued that the matter was one of discretion and the Court should lean to relieve a tenant against forfeiture and if full recompense can be made to the landlord the relief should be granted. Lord Loreburn in delivering the opinion of the House observed as follows :

'It desire in the first instance to point out that the discretion given by the section is very wide. The Court is to consider all the circumstances and the conduct of the parties. Now it seems to me that when the Act is so express to provide a wide discretion, meaning, no doubt, to prevent one man from forfeiting what in fair dealing belongs to some one else, by taking advantage of a breach from which he is not common surately and irreparably damaged, it is not advisable to lay down and right rules for guiding that discretion. I do not doubt that the rules enunciated by the master of the Rolls in the present case are useful maxims in general and that in general the point of view from which judges would regard an application for relief. But I think it

ought to be distinctly understood that there may be cases in which any or all of them may be disregarded. If it were otherwise the free discretion given by the statute would be fettered by limitations which have nowhere been enacted. It is one thing to decide what is the true meaning of the language contained in an Act of Parliament. It is quite a different thing to place conditions are not based upon statutory one element at all. It is not safe, I think, to say that the Court must and will always insit upon certain things when the Act does not require them, and the facts of some unforeseen case may make the court wish it had kept a free hand:

The aforequoted passage does not relate to the facts of that case alone but lays down the general principles of law relating to relief against forfeiture.

27. It is also to be noted that in the case of *R. S. Lala Praduman Kumar Vs. Virendra Goyal and others* [1] (on which reliance was placed by Mr. Ray) the Supreme Court had said :

"The covenant of forfeiture of tenancy for nonpayment of rent is regards by the Courts as merely a clause for securing payment of rent *unless the tenant has by his conduct disentitled himself to equitable relief*, the Courts grant relief against forfeiture of tenancy on the tenant paying the rent due, interest thereon and costs of the s..it".

(emphasis added)

In this case I am of the considered opinion on that the appellant by its conduct as described above has thorough disentitled itself to any relief against forfeiture in terms of section 11 of the T. P. Act.

1. (1969) (1) S.C.C. 714.

28. As regards the next ground the learned single judge has found that putting the demised land to sue for the sale of scooters constituted a breach of the terms of tenancy. With respect, I find myself unable to share this view.

29. This question involves the interpretation of two clauses of the lease. The material terms in this regard are to be found in clauses (1) and 2(b) of the lease which are reproduced below :

> "The lessor hereby let ..... with the right for the lessee to instal, erect and maintain in and upon the said place of land, roadways and pathways and underground petrol tanks and shelter for an attendant and any other building erection or equipment whether of a permanent or temporary nature for the purpose of storing, selling of otherwise carrying on trade in petrol, petroleum products, oil, *and kindred motor accessories and any other trade or business that can conveniently be carried on therewith*".
>
> "(2) the lessee agrees with the lessor as follows :
>
> (a) .....
>
> (b) to obtain and renew all necessary licences and permits and to pay all licences and other fees in respect of the demised premised by reason of their being used for storing, sellingg or otherwise carrying on trade in petrol, petroleum products, oil and kindred motor accessories and toobserve and perform all local police and municipal rules and regulations in connection with such use."

The learned single judge has applied the ejusdem generis rule in reading the expression in clause use (1). "and any trade or business that can conveniently be carried on therewith" and has held that it permitted the lessee to carri on another trade or business only in a commodity related to or allied with petrol, petroleum products, oil and kindred motor accessories. In the words of the learned single judge"

> "the word therewith' occuring in the clause or any other trade or business that can conveniently be carried on

therewith' has to be interpreted to meanen. Justem generts or' of the same kind or nature'. In other words, the lessee is permitted to do any other trade or business that can be carried on with petrol, petroleum products, oil and kindred motor accessories".

In addition to this the learned single judge has noted the absence of the expression." and any other trade or business that can conveniently be carried on therewith" in clause 2(b) of the lesse and has accepted, with approval, the contention advanced on behalf of the respondents that clause (1) of the deed was only in the nature of the permises and the actual terms and conditions which bound the lessee were to be found in clause (2) of the lease only.

30. I am unable to accept any of the two reasonings. I see no reason to restrict the plain meaning of clause (1). To me clause (1) as quoted above simply means that in addition to the petrol pump business the leasee can carry on any other trade or business that can be conveniently carried on along with the petrol pump business. Putting it differently, the lease prohibits carrying on only such other business which cannot be carried on conveniently with the business of petrol pump, such as a business in fire works or other undertakings onvolving the use of fire or other hazardous material etc. So far as the sale of scooters is concerned. I see no inconvenience in carrying on that business along with the business of runningg a petrol pump and I find full sanction for the same in clause (1) of the lease.

31. So far as clause 2(b) is concerned, it does not at all stipulate the user of the land but only obliges the lessee to run the petrol pump business under a valid licence and permit from the concerned authorities. As the immediate aim of the lessee was to establish a petrol pump on the demised land and as it is well known that the business of running a petrol pump required licenses and permits from

different authorities, such a stipulation was made in clause 2(b) of the lease. What other business trade the lessee might undertake in future was not known and neither was it known whether such business would require any licence or permits from any authority and hence the sence of the part "and any other trade" or business that can conveniently be carried on therewith"in cluase 2(b).

31 (a). It is also to be noted that the scooter business was started on the suit land while it was still owned by the proforms defendants and it was fully in their knowledge. They never objected to it. In other words, the former owners of the land and the original lessors understood the lease to permit the user in question. in that view also, it is not open to the present plaintiffs to raise any objection in that regard.

32. I may here note that Mr. Ray took pains to completely dissect the lease with the help of odgers on Documents (Vth edn.) and has relied upon a series of decisions from the Supreme Court as also on some English decisions in support of his contention that there was no breach of any term of the lease. I need not undertake a discussion on those aspects as I have already found from a plain reading of the lease deed that the user of the land for carryingg on a business in selling scooters did not constitute any breach of the terms of tenancy.

33. At this stage, I am to record one submission advanced by Mr. Thakur Prasad, learned counsel appearing on behalf of respondents plaintiffs. Mr. Prasad submitted that even in case all the points in this appeal were to be decided against the respondents plaintiffs, the Court may not interfere with the decree of ejectment against the defendants. In this connection, Mr. Prasad pointed out that in any event the lease expired on 30.6.1985, and thereafter no fresh lease came into existence by a registered instrument. Thus, after June 30, 1985, the status of the

defendants according to Mr. Prasad was no better than trespassers on the suit land. Referring to the provisions contained in section 7(3) of the Take Over Act, Mr. Prasad contended that a right for renewal even though conferred by a status was one thing and the materialisation and fructification of that right was something quite different. He greatly emphasised that a lease for more than one year could be made only by a registered instrument and in no other manner. Mr. Prasad further brought to our notice the petition filed by the appellant defendant before the trial court on 24.6.1985 enclosing the notices given by the appellant to the plaintiffs. Mr. Prasad further stated that para 4 of the petition wherein it was stated that on the basis of the notices the lease of the suit land stood renewed for a further period of twenty years did not state the correct legal position.

34. In this regard Mr. Prasad relied upon a number of decisions including those reported in A.I.R. 1931 P.C. 79, A.I.R. 1976 Madras 194 (para 77), A.I.R. 1977 S.C. 2149 at 2153, 1988 B.L.T. 370 (paras 12 and 13), 1988 B.B.C.J. 59 and A.I.R. 1988 S.C. 1470 (para 5).

35. Mr. Ray contended that the appellant had given notice exercising option in terms of section 7(3) of the Take Over Act at the appropriate time and the question of enforcing the right by proper legal action would arise only after the present lis was decided in their favour. Mr. Ray further submitted that if and when a suit was to be filed, it had to be for mandatory injunction under section 39 of the Specific Relief Act, 1983 and the period of limitation for such a suit was prescribed by the omnibus Article 113 of the limitation Act. He also submitted that the cause of action in such a case was continuing cause of action and arose from day to day unless possession was recovered when time must

run from the date of dispossession.

36. I have taken note of the rival contentions advanced by the parties only for the sake of the record as in view of my finding that relief against forfeiture was not available to the appellant, it is not necessary for me to go into this question. I have already found that the rights of the appellant under the lease were legally and validly extinguished on 30.6.1985 and there was no right surviving on 30.6.1985 which could be renewed in terms of section 7(3) of the qake Over Act.

37. No arguments were advanced challenging the notice dated 14.8.1982 given to the appellant under section 106 of the T.P.Act which was held to be validly served both by the trial court and the learned Single Judge.

38. In the result, I find and hold, respectfully disagreeing with the learned Single Judge that there was no breach of the terms of the lease so far as user of the land was concerned. However, in agreement with the learned Single Judge I find and hold that the lease was validly determined for non-payment of the monthly rent and the decree of ejectment passed against the appellant and proforma respondent no. 12 as also the decree for arrears of rent, damages and mesne profits against appellant must be upheld.

39. I, thus, find no merit in this appeal and the same is dismissed with costs.

U. P. Singh, J. I agree

S: P. J. Appeal dismissed.

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CIVIL WRIT JURISDICTION

Before Gopichand Bharuka, J.

1992

January- 22

Mangal Prasad Yadav.*

V.

The State of Bihar & others.

Bihar Panchayat Samitis and Zila Parishads Act, 1961 (Bihar Act VI of 1962), section 33 (2) --- power of removal to be exercised by the State Government on conclusive finding in respect of charges --- absence of finding --- order of removal, whether liable to be quashed.

Where the petitioner has been removed by the State Government from the office of Pramukh pursuant to powers conferred under section 33 (2) of the Bihar Panchayat Samitis and Zila Parishads Act, 1961;

Held, that, the impugned order of removal has been passed by the State Government only by recording a prima facie opinion with regard to the charges in question and without recording any conclusive finding in respect of the charges levelled against the petitioner and, therefore, it was liable to be quashed.

Application by the petitioner.

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* Civil Writ Jurisdiction Case NO. 3076 of 1983. In the matter of an application under Articles 226 and 227 of the Constitution of India

The Facts of the case material to t[illegible] report are set out in the judgement of G.C.Bharuka, J.

Mr. Amrendra KumarSinha for the petitioner

Mr. Deo Narain Yadav for the State

G.C.Bharuka, J. — In this writ application, the petitioner is aggrieved by the order of the State Government as contained in Memo No. 4084 dated 17th May, 1983 (Annexure 1) by which the petitioner has been removed from the office of pramukh pursuant to powers confered under section 33 (2) of the Bihar Panchayat Samiti and Zila Parishad Act, 1961 (hereinafter referred to as the (Act').

2. Admittedly the petitioner had been elected Pramukh of Ghorsahan Panchayat Samiti (East Champaran). The impugned order has been assailed by the learned counsel for the petitioner on issues of malafide as well as improper exercise of jurisdiction vested in the Government. He has also stated that the impugned order has been passed in violation of the principles of natural justice. Section 33 of the Act reads as under :

> 33. प्रमुख या उप-प्रमुख को हटाने के लिए सरकार की शक्ति । (1) यदि राज्य सरकार की राय में कि [illegible] पंचायत-समिति का प्रमुख या उप-प्रमुख, पंचायत समिति के सुचारू रूप से संचालन के लिए राज्य सरकार द्वारा जारी किए गये इस अधिनियम से सुसंगत निदेशों का, जान-बूझ कर पालन न करे या पालन करने से इन्कार करे अथवा सौंपी गई शक्तियोंका दूरूपयोग करे या अपने कर्त्तव्यों के

पालन में कदाचार का दोषी ठहराया जाय तो राज्य सरकार, यथास्थित प्रमुख या उप-प्रमुख को स्पष्टीकरण का उचित अवसर देगी तथा इस विषय पर जिला परिषद की सलाह लेगी, यदि उक्त सलाह के लिए पत्र भेजने की तारीख से तीस दिनों के भीतर जिला परिषद की राय प्राप्त हो जाय तो उसपर विचार करने के बाद यथा स्थिति, ऐसे प्रमुख या उप प्रमुख को आदेश के जरिए अपने पद से हटा सकेगी।

(2) राज्य सरकार उप-धारा (1) के अधीन किसी जाँच के दौरान में आदेश देकर, किसी प्रमुख या उप- प्रमुख को मुअत्तल कर सकेगी, जिसके विरूद्ध जाँच शुरू की गई हो । साथ ही वह उक्त प्रमुख या उप-प्रमुख को तीस दिनों के भीतर यह कारण बताने का अवसर देगी कि उसके विरूद्ध मुअत्तली का आदेश क्यों न दिया जाय । राज्य सरकार उक्त - प्रमुख या उप प्रमुख पर मुअत्तली की अवधि में पंचायत - समिति के किसी कार्य या कार्यवाही में भाग लेने के संबंध में भी रोक लगा सकेगी ।(3) इस धारा के अधीन अपने पद से हटाया गया कोई प्रमुख या उप- प्रमुख, हटाये जाने की तारीख से दो वर्ष तक के लिए प्रमुख या उप-प्रमुख के, रूप में फिर से निर्वाचित होने का पात्र न होगा ॥"

A reading of the Act shows that the power of removal can be exercised by the State Government only under certain specified circumstances and that too

(i) after affording an effective opportunity to the Pramukh or Up-Pramukh of explaining the charges levelled against him and (ii) after obtaining the opinion of the Zila Parishad. After following this procedure, if the Government feels satisfied that the charges against the Pramukh or Up-Pramukh have been proved, then only the State Government can resort to the power of removal.

3. Without addressing to all the issues raised before me, I feel persuaded to quash the impugned order on the simple ground that the State Government has passed the same without recording any conclusive finding in respect of the charges levelled against the

petitioner. It is apparent from the impugned order that only by recording a prima facie opinion with regard to the charges in question, the statutory power of removal has been exercised against the petitioner. The drastic power of removal of a duly elected representative of local bodies cannot be exercised in such a casual manner. A statutory authority entrusted with such stringent and drastic powers has to devote himself more before taking the decisions like the one impugned in the present writ application.

4. For the aforesaid reasons, I hereby quash the impugned order. If the State Government, so desires, it will be open on its part to pass fresh order with regard to removal of the petitioner by following the mandatory provisions of law and granting an effective opportunity of hearing to the petitioner.

5. With these observations, the application is allowed. There will be no order as to costs.

S.P.J Application allowed

CIVIL WRIT JURISDICTION

Before Gopichand Bharuka,J.

1992

Jaunary,24

Shamsul Bari. *

V

The State of Bihar & others.

Binar Pension Rules, Rule 43 (b), scope and applicability of --- order of deduction of 5% from pension payable--- none of the two condition precedents mentioned in section 43 (b) fulfilled --- order, whether liable to be quashed.

Where by the impugned order of the State Government it was directed to deduct 5% from the pension payable to the petitioner;

Held, that the punishment with regard to deduction of pension can be appropriately taken only under Rule 43 (b) of the Bihar Pension Rules if (i) any pecuniary loss has been caused to the Government because of the conduct of the petitioner, or (ii) if there is any finding in any departmental or judicial proceeding holding the pen-

*. Civil Writ Jurisdiction Case No. 1234 of 1990. In the matter of an application under Articles 226 and 227 of the Constitution of India.

sioner guilty of grave misconduct. In the instant case, according to the finding of the Conducting Officer, in the departmental proceeding, no pecuniary loss was caused to the Government by the conduct of the petitioner, but there was negligence or carelessness on the part of the petitioner. Mere negligent or careless act on the part of an employee cannot in the normal course be said to be a misconduct much less grave misconduct. Thus none of the two condition precedents relevant for imposing the impugned penalty has been fulfilled in the case. The impugned order by which direction was issued for deducting 5% pension payable to the petitioner was, therefore liable to be quashed.

Union of India and others. v. V.J. Ahmad [1]

D.V.Kapoor v. Union of India and others [2] ---- *relied on.*

Application by the petitioner.

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

Mr. M.S.Madhup

Mr. Najmul Bari, Mr. Ram Rup Jha. & Mr. Iqbal Ahmed. for the petitioner.

Mr. Ram Suresh Roy & Mr. Y.V. Giri for the State

1. (1979) A I.R. (S.C.) 1022 (Para.9)
2. (1990) A.I.R. (S.C.) 1923 (Para.6)

G.C. Bharuka,J.– In this writ application the petitioner is aggrieved by the order of the State Government as contained in Memo no. 5950 dated 31.12. 1988 (Annexure 15) and its communication to the Accountant General, Bihar as contained in Memo no. 337 dated 18.1.1990 (Annexure 17) by which it has been directed that the petitioner will be paid pension after deduction of 5% and the total amount of deduction payable to the petitioner will be calculated on the basis of the salary which he was entitled as an Excise Inspector since he was not promoted to any higher post. In C.W.J.C. No. 336 of 1983 disposed of on 12th October, 1990 which was filed by tis very petitioner, it was directed that his seniority has to be determined from 22.2.1968 which is the date on which the petitioner was promoted to the post of Inspector of Excise and not from 22.2.1970 when he was confirmed on that post. It was also directed in that case that the petitioner has to be granted all consequential benefits pertaining to his service.

2. So far as the present writ application is concerned, the relevant facts are that pursuant to a charge sheet (Annexure 6) dated 31.7.1984 a departmental proceeding was initiated against the petitioner after due notice to him. The conducting officer submitted his report dated 5.9.1986 (Annexure 10) in which it was held that though no pecuniary loss has been caused to the Government because of commission or omission on the part of the petitioner but because of negligence and

carelessness of the petitioner the concerned licensee had availed opportunity of some manipulations. In the meantime, on 31.12.1985, the petitioner retired from the service. Therefore, the Government by communication dated 19th October, 1987 (Annexure 12) intimated to the petitioner that, keeping in view the departmental enquiry and the nature of allegations, it has been decided to deduct 15% of pension payable to the petitioner since his activities were found to be unsatisfactory during the tenure of his service. The petitioner was also directed to file his explanation in this regard under Rule 139 of the Bihar Pension Rules (hereinafter referred to as the 'Rules'). Accordingly, the petitioner submitted his explanation. Thereafter, the petitioner was communicated with the order dated 31st December, 1988 (Annexure 15) containing therein that pursuant to power under Rule 139 of the Rules, the Government has decided to deduct 5% from the pension payable to the petitioner. As a consequence of this order, the State Government also communicated to the Accountant General, Bihar by Annexure '17' that the petitioner should be paid pension by deducting 5% and the pension payable to the petitioner will be calculated on the basis of salary payable to the petitioner as Inspector of Excise since he was not given any regular promotion to the post of Superintendent.

3. Mr. Madhup, learned counsel appearing for the petitioner, has submitted that the order as contained in Annexure '15' is ultra vires the powers of the State

Government, because, as is evident from Annexure '12' referred to above, the decision for making deductions from the pension has been taken pursuant to a departmental enquiry which was initiated against the petitioner while he was in service. Therefore, the punishment with regard to deduction of pension can be appropriately taken only under Rule 43 of the Rules. His further submission is that under Rule 43, the punishment of making certain deduction from the pension can be awarded only if (i) any pecuniary loss has been caused to the Government because of the conduct of the petitioner or (ii) if there is any finding in any departmental or judicial proceeding holding the pensioner guilty of gross misconduct by refering to the finding of the conducting officer as contained in Annexure '10'. It has been submitted that, in the present case, none of these two condition precendents have been fulfilled and therefore, the government was not competent to order for deduction of even 5% of the pension payable to the petitioner. In support of his submission he has relied on 1979 Supreme Court 1022, (Pr.9) and 1990 Supreme Court 1923 (Pr.6).

4. Sri Ram Suresh Roy, Learned counsel appearing for the State, has submitted that since according to the findings of the conducting officer the petitioner was found to be negligent and careless in his duties giving opportunities to the licensees to make manipulations in their transactions. therefore, it should be held that this

amounted to gross misconduct within the meaningof Rule 43 (b) of the Rules and as such, the Government was within its jurisdiction to impose penalty of deducting 5% from the pension payable to the petitioner.

5. Rule 43 of the Bihar Pension Rules reads as under :

"43 (a) Furture good conduct is an implied condition of every grant of a pension. The provincial Government reserve to themselves the right of withholding or withdrawing a pension or any part of it, if the pensioner is convicted of serious crime or be guilty of grave misconduct. The decision of the provincial Government on any question of withholding or withdrawing the whole or any part of a pension under this rule, shall be final and conclusive

(b) The State Government further reserve to themselves the right of with holding or withdrawing a pension or any part of it, whether permanently or for a specified period, and the right of ordering the recovery from a pension of the whole or part of any pecuniary loss caused to Government if the pensioner is found in departmental or judicial proceeding to have been guilty of grave misconduct; or to have caused pecuniary loss to Government by misconduct or negligence, during his service including service rendered on re-employment after retirement;

Provided that -

(a) Such departmental proceedings, if not instituted while the Government servant was on duty either before retirement or during re-employment;

(i) shall not be instituted save with the sanction of the State Government;

(ii) Shall be in respect of an event which took place

not more than four years before the institution of such proceedings.

(iii) shall be conducted by such authority and at such place or places as the State Government may direct and in accordance with the procedure applicable to proceedings on which an order of dismissal from service may be made;

(b) judicial proceedings, if not instituted while the Government servant was on duty either before retirement or during re- employment, shall have been instituted in accordance with sub cause (ii) of clause (a); and

(c) the Bihar Public Service Commission, shall be consulted before final order are pased "

6 . In my opinion, the impugned order as contained in Annexure '15' has been clearly passed under Rule 43 of the Rules and reference to Rule 139 is inconsequential so far as the Rule 43 (b) is concerned, as has been rightly submitted by Mr. Madhup, none of the two condition precedents relevant for imposing the impugned penalty has been fulfilled in this case. Mere negligent or careless act on the part of an employee cannot in the normal course be said to be a misconduct much less grave misconduct. This aspect of the matter has been considered by the Supreme Court in the Case of *Union of India and others* vrs. *V.J.Ahmad,* reported in 1979 Supreme Court 1022, I may usefully quote the relevant passage at para 9, which reads as under :

"The five charges listed above at a glance would convey the impression that the respondent was not a very

efficient officer. Some negligence is being attributed to him and some lack of qualities expected of an officer of the rank of Deputy Commissioner are listed as charges. To wit, charge No. 2 refers to the quality of lack of leadership and charge No. 5 enumerates inaptitude, lack of foresight, lack of firmness and indecisiveness. These are qualities undoubtedly expected of a superior officer and they may be very relevant while considering whether a person should be promoted to the higher post or not or having been promoted, whether he should be retained in the higher post or not, or they may be relevant for deciding the competence of the person to hold the post, but they cannot be elevated to the level of acts of omission or commission as contemplated by Rule 4 of the Discipline and Appeal Rules so as to incur penalty under R.3. Competence for the post, capability to hold the same, efficiency requisite for a post, ability to discharge function attached to the post, are things different from some act or omission of the holder of the post which may be styled as misconduct so as to incur the penalty under the Rules."

7. Further in the case of *D.V.Kapoor v. Union of India and others,* reported in 1990 Supreme Court 1923, (pr.6), it has been held that :

"As seen, the exercise of the power by the President is hedged with a condition precendent that a finding should be recorded either in departmental enquiry or judicial proceedings that the pensioner committed grave misconduct or negligence in the discharge of his duty while in office subject of the charge. In the absence of such a finding the president is without authority of law to impose penalty of with holding pension as a measure of punish-

ment either in whole or in part, permanently or for a specified period, or to order recovery of the pecuniary loss in whole or in part from the pension of the employee, subject to minimum of Rs.60/."

8. In the present case also there is neither any material nor any finding that the petitioner was guilty of the charge of any misconduct. Even if reliance is allowed to be placed on Rule 139 of the Rules there is nothing on the record to show as to how the service of the petitioner was found to be unsatisfactory. No fact or material has been placed on record to substantiate this inference.

9. For all these reasons, I quash the orders as contained in Annexure '15' and '17' by which directions have been issued for deducting 5% pension payable to the petitioner. So far as the quantum of pension payable to the petitioner is concerned, it has to be calculated by reference to the post on which they would have retired , in the light of judgment delivered in his favour in C.W.J.C.No. 336 of 1983 referred to above. Accordingly, the writ application is allowed. There will be no order as to costs.

10. It is expected that the concerned authority will take all appropriate steps to ensure grant of reliefs to the petitioner pursuant to this judgment with all expedition since he has retired long back to save him from any further harassment.

S.P.J Application allowed

CIVIL WRIT JURISDICTION

Before Bisheshwar Prasad Singh,J.

1992

August 17

Surya Kant Choudhary.*

V.

The State of Bihar through Chairman, Bihar State Housing Board & others.

Bihar State Housing Board (Management and Disposal of Housing Estates) Regulations 1983 framed under the Act by the Bihar State Housing Board --- Regulation 10, Provisions of--- providing the manner in which allotments are to be made by the Board---- allotment by the Government and the Board, whether must be made in accordance with the Regulations--- Government directing the Board to make allotment, validity of ---- where allotment is to be made by draw of lots --- allotment must be made by following that procedure alone-notice regarding total number of dwelling units available and number of units for allotment under each category as specified in Regulation 10, whether obligatory.

Where Bihar State Housing Board (Management and Disposal of Housing Estates) Regulations 1983 framed under the Act by the Bihar State Housing Board provide

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* C.W.J.C.No.6519 of 1989. In the matter of an application under Articles 226 & 227 of Constitution of India.

the manner in which allotment are to be made by the Bihar State Housing Board, neither the Bihar State Housing Board nor the Government can exercise power contrary to the provisions of the Regulations. The Scheme of the Regulations takes into consideration different categories of applicants and provides a quota for each category. Regulation 10 provides a quota for the allotment of dwelling units, flats or house sites. In it apart from the general quota and the quota for schedule castes and schedule tribes, retired government servants and defence and ex-defence personnel, provision has been made for allotment by the Government directly of dwelling units in cases having special circumstances. A quota of 5% is reserved for the Government which it can allot directly in special circumstances. Similarly 2% of the dwelling unit can be alloted directly by the Board on compassionate ground in favour of helpless widows or disabled persons within this quota. The Government and the Board in their discretion can only allot 5% and 2% of the dwelling units respectively on compassionate ground. Where such elaborate provisions have been made, it would not be permissible to read in favour of the Government or Board any further discretion in the matter. Apart from the cases envisaged by the Regulations, the Government and the Board cannot make allotment on any other ground. In the instant case, if the Government were so inclined and thought that the case of respondent no.5 had special circumstances and that

allotment should be made on compassionate ground, the Government could have made the allotment within the 5% quota available to it. The Government did not purport to do that. On the other hand it compelled the Board to make the allotment in favour of respondent no.5 of an independent dwelling unit. The Board is equally bound by the Regulations framed by it under the Act. The Government has no power to direct the Board to make an allotment in an illegal manner. Interference by the Government with the exercise of power by the Board is unwarranted and illegal. The allotment by the Government as well as by the Housing Board must be made expressly in accordance with the Act and the Regulations.

Held, therefore, that the Bihar State Housing Board has erred in law in alloting an independent dwelling unit to respondent no.5 and as such, its decision to that effect must be quashed.

Held, further, that where allotment is to be made by draw of lots, allotment must be made by following that procedure alone, and no interference either by the Government or the Board is warranted. If any irregularity is committed in the draw of lots by the Committee concerned, that may be brought to the notice of the Board for appropriate order under section 13 (4) of the Act.

Held, also, that it is obligatory, having regard to the

quota fixed by the Regulations, that before the allotment of dwelling units are made the notice must clearly mention total number of units available and the number of units for allotment under each category, so that there is no interpolation later on by changing the number of units available. The quota system cannot be worked unless the total availability of dwelling units is first notified. The Board is, therefore, directed to follow this direction in all future allotments.

Application by the petitioner.

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

Mr. Udit Narayan Singh Advocate for the Petitioner

Mr. ALakhraj Panday & Mr. Shivesh Mishra, Advocate for the respondent N0.5

Mr. Sharwan Kumar Singh & Mr. Abha Singh for the Housing Board

Mr. Raghunath Choudhary J.C. to S.C.III for the State of Bihar

Mr. Binay Kriti Singh for the intervenor

B.P.Singh,J — The petitioner in this writ petition has prayed for an order quashing the allotment made by the Bihar State Housing Board of House no. 195, Hanuman Nagar, Kankarbagh, Patna in favour of respondent no.5

herein. Consequently he has challenged the decision of the Board as recorded on 20th Feb. 1987 and 4.4.1987. It has further been prayed that the claim of the petitioner may be considered for allotment of the aforesaid house since the case of the petitioner stands on better footing. He had also applied much before respondent no.5.

2. A few facts, which are not in dispute,may be noticed. In the year 1972 the Bihar State Housing Board issued an advertisement calling for applications for allotment of dwelling units. The petitioner applied on 12.12.1972. Time for making the application was extended up to March 1973. Respondent no.5 had not applied pursuant to the advertisement of the year 1972, nor did he apply within the extended period. He applied on 6th July 1974 much after the extended period, had elapsed. However, it is not disputed that another similar advertisement was issued in August 1975. From annexure 15 it appears that by a notice dated 11 July 1983 the Board directed the applicants to file the requisite affidavit and other supporting documents for allotment of dwelling units, so that their cases could be considered in accordance with the provisions of the Regulations relating to allotment of such units. It may be noticed that the Board has framed Regulations under the Act known as the Bihar State Housing Board (Management and Disposal of Housing Estates) Regulations 1983. The aforesaid regulations provide the manner in which allotments are to be made by the Housing Board. The

petitioner as well as respondent no.5 applied in response to annexure 13. A lottery was held and the petitioner as well as respondent no.5 were alloted flats in Bahadurpur area, and not in Hanuman Nagar.

3. So far as the allotment of flat to the petitioner and respondent no.5 is concerned, neither has grievance against the other. But the facts giving rise to the instant writ petition took place thereafter. It appears that respondent no.5 was not satisfied with the allotment of a flat, since he was keen that he should be allotted an independent dwelling unit, and for that purpose he had made a representation to the Chief Minister on 6.1.1986 which is annexure 4 to the writ petition. He had explained that he had difficulty in going to the 4th floor, where his flat was located, since he was suffering from heart trouble. On the representation made by respondent no.5 an endorsement was made by the Chief Minister to the Secretary Housing Department directing him to take necessary action. On 4.4.1987 and 6.4.1987, a meeting of the Board was held, and in that meeting under agenda item no.6 the case of respondent no.5 for allotment of independent unit was considered. In the memorandum prepared for consideration of the Board it was stated that respondent no.5 had been allotted a M.I.G. flat in sector no.3 by order dated 27.11.1984. He had represented to the Chief Minister that an independent dwelling unit may be allotted to him on the ground that his wife was suffering from diabetes blood pressure, heart disease

etc. The Board by its letter dated 6.3.1986 had informed the housing Department that it was not permissible for the Board to make any other allotment in view of the allotment already made by lottery. In reply to this the Housing Department by its letter dated 7.8.1986 directed that if not in Hanuman Nagar, then in any other locality nearby a separate house may be alloted to respondent no.5, and if any extramoney had to be paid, respondent no.5, will pay such extra amount. After stating all these facts, the memorandum mentions that house no. 195 at Hanuman Nagar could be allotted to respondent no.5 after cancelling the allotment of the flat to him. The Board accordingly approved the allotment of an independent/dwelling unit bearing house no. 195 in Hanuman Nagar area in favour of respondent no.5 which is evident from annexture 7. But it further directs that this decision will not be treated as a precedent. The decision of the Board was communicated to respondent no.5 on 20th May 1987 and he as directed to deposit the further amount which was necessary. According to respondent no. 5 the hire purchase agreement was duly registered on 16.7.1987 and on the following day the Board directed its Executive Engineer to hand over the possession of the said house to the petit-ioner. However, since some one else was in unauthorised occupation of the said house, respondent no.5 could not get possession of the house in question. Respondent no.5 was therefore, compelled to file C.W.J.C.No 8650 of 1988. On the 16th of March 1989 this court was pleased to issue certain

interim directions in the writ petition directing the Housing Board to file an application for eviction of the tres-passer within one week, before the competent authority and the competnet authority to dispose of the same within three weeks and if eviction was ordered to evict the unauthorised occupant within two weeks thereafter. It is not necessary for me to go into the prolo-n-ged litigation that followed between respondent no.5 and the alleged unauthorised occupant, who sought to appear in this proceeding as intervenor because he was in possession of the house in question. I may only notice that special leave petition preferred by the said unauthorised occupant Shri H.K.Thakur was dismised by the Supreme Court on 14.12.1990.

4. Counsel for the petitioner has urged before me that the petitioner being senior to respondent no.5 he having applied earlier than the respondent no,5, his case for allotment of separatedwelling unit should have been considered and granted before the applicationof respondent no.5 was considered by the Board. He submits that in fact respondent no.5 was not even qualified for allotment of a flat in view of the fact that he owned property else where in the state and that he had obtained allotment of a flat by filing a false certificate. In any event he submits that the allotment made by the Housing Board in favour of the respondent no.5 is illegal because the action is arbitrary and contrary to the Regulations. In the alternative it was submitted that in case it is found that the Board has power to make such allotment as an

exceptional case, the case of the petitioner should also be considered because he had also claimed allotment of independent unit on health ground.

5. I will first deal with the submission urged before me that the allotment of a flat to respondent no.5 was itself illegal and therefore, the subsequent allotment of independent unit in his favour in lieu of the flat earlier allotted to him is also bad. It was submitted before me that respondent no. 5 was not qualified allotment for dwelling unit by the Housing Board in view of the fact that the note of Regulation 8 of the Regulations provides that if an applicant had a house site in any town of the State, either in this own name, or in the name of his wife or minor children, he shall not be eligible for allotment of dwelling unit. It is submitted that admittedly respondent no.5 owned a house at Ranchi and therefore, in terms of note to Regulation 8 he was disqualified from allotment of dwelling unit by the Housing Board. On the other hand it is contended on behalf of the respondent no.5 that the note was inconsistent with Regulation 8 (d) which disqualified a person from allotment of dwelling unit only if he had any other house within 8 kilometers of the concerned town or municipality or notified area. This inconsistency was brought to the notice of the Governor, and ultimately in exercise of powers under section 115 (3) of the Act the same was deleted from the Regulations. It is not necessary for me to go into this controversy because the allotment of flat was made as early as in

the year 1984 No one has challenged the allotmet of a flat to respondent no.5. It is now too late to challenge that allotment. I, therefore, refuse to go into that question. I shall now consider the submission urged before me that the allotment of independent dwelling unit in favour of respondent no.5 is illegal. It was submitted that in the matter of allotment of dwelling units the Board is bound by the Regulations framed under the Act. Chapter III of the regulations provides the procedure of allotment of dwelling units or flats or sites. The procedure for allotment under the regulation is by draw of lottery after due notice to the applicants of the date time and venue of the draw. It was, therefore, submitted that once allotment had been made by draw of lottery it was not open to the Board to change the decision and to make allotment in any other manner. Since respondent no.5 was one of the persons in whose favour an allotment had been made of a M I G flat he could not be considered for allotment of an independent unit in Hanuman Nagar after cancellation of the earlier allotment. In any event the Board had not applied its mind to the fact of the case, nor had it shown any regard for the provision and the Regulations framed under the Act. The Board acted merely at the behest of the Chief Minister and the secretary of the Housing Department, knowing fully well that its action was illegal.

6. Counsel for the respondent no.5 on the other hand submitted that in deserving cases it should be open

to the Government as well as the Board to make allotment on special considerations. In the case of respondent no.5, on health grounds allotment of an independent dwelling unit was justified. He, therefore, submitted that such a power should be read into the Regulations in favour of the Government and the Board even though the Regulations did not confer such power expressly. He refers to section 13(4) of the Act and submitted that the Board may at any time, for reasons to be recorded in writing, dissolve, or subject to the provisions of sub-section (1) of section 13 after the constitution of any such committee, modify or set aside the decision of the commitee. Since the lottery is drawn under the supervision of the committee and the decision to make the allotment is by such committee, the Board has overriding power under section 13(4) to modify or set aside the decision of the committee. Section 13 of the Act enables the Board subject to Rules from time to time, and for any particular local area to appoint one or more committee for the purpose of discharging such duties or performing such functions as it may delegate to them, and any such committee may discharge such duties or perform such functions with due regard to the circumstances and requirements of that particular area sub-section 4 vests in the Board the power to dissolve the committee itself or to modify or set aside the decision of the committee for reason to be recorded in writing. Sub-section 4 of section 13 cannot be read as a blanket power in favour

or the Board to modify of set aside any decision of the Committee. The section itself provides that this must be done only after the reasons are recorded in writing. It follows therefore that there must be justification for modification or the setting aside of the decision taken by the Committee was not in acoordance with law which provided the ground for setting aside the decision. The power under subsection 4 of section 13 cannot be arbitrarily exercised.In the instant case it is not the case of the Board that, since the Committee had not drawn the lottery as it was required to do under the Regulations or that it had committed any other error vitiating its decision that compelled the Board to cancel its decision. The resolution of the Board does not record any reason which could justify the setting aside or modification of the decision of the Committee to allot a flat in favour of respondent no 5 on the other and in order to confer a favour upon respondent no. 5, the decision of the Committee was sought to be modified. The action taken by the Board do not fall within the ambit of the power conferred upon it by section 13 (4) of the Act. The instant case is not a case where the Board sought to either modify or set aside the decision of the committee for any relevant consideration. The submission of respondent no.5 has therefore no force

7. The other submission urged on behalf of the respondent no.5, that in deserving cases the Government and the Board must have inherent power to make allotment on compassionete ground is equally untenable

having regard to the scheme of the Regulations. In the absence of statutory rules, such a submission could have been considered. But where rules have been specifically framed under the Act in the form of Regulation neither the Board nor the Government can exercise power contrary to the provisions of the Regulations. Moreover I find that the Regulations do take into consideration such deserving cases, and adequate provision has been made in this regard, Regulation 10 provids a quota for the allotment of dwelling units, flats or house sites. In the general gategory 51% of the dwelling units have to be allotted to members of the general category. 14% has been reserved for schedule caste, 10% for schedule tribes, 6% for retired Government servants or Government Servant retiring within three years from the date of the application, 10% for defence and ex-defence personnel 2% for members of Legislatures and Parliament directly under the order of the Government, 5% in favour of case having special circumstances and on compassionate ground, directly under the order of the Government, and 2% on compassionate ground by the Board to widows and disabled persons. It is, therefore, apparent that the Regulations provide that in deserving cases where some consideration has to be shown to the special circumstances, apart from the general quota and the quota for schedule caste and schedule tribes, retired Govt. servants and defence and ex- defence personnel, provision has been made for allotment by the Govern-

ment directly of dwelling units in cases having special circumstances. Similarly 2% of the dwelling unit can be allotted directly by the Board on compassionate ground. The scheme of the Regulations therefore, takes into consideration different categories of applicants and provides a quota for each category. A quota of 5% is reserved for the Government which it can allot directly in special circumstances. Similarly a quota of 2% is reserved for the Board, and the Board can make allotment on compassionate ground in favour of helpless widows or disabled persons within this quota. Where such elaborate provisions have been made, it would not be permissible to read in favour of the Government or Board any further discretion in the matter. apart from the cases envisaged by the Regulations, the Government and the Board cannot make allotment on any other ground. IN the instant case, if the Government were so inclined and thought that the case of respondent no.5 had special circumstances and that allotment should be made on compassionate ground, the Government could have made the allotment within the 5% quota available to it. The Government did not purport to do that. On the other hand it compelled the Board to make the allotment in favour of respondent no.5 of an independent unit. The Government had no justification to do so. One cannot loose sight of the fact that a Board has been constituted under the Act. The powers have to be exercised by the Board in accordance with the Act. The Board is equally

bound by the Regulations framed by it under the Act. An action of the Board or the Government which is contrary to the provisions of the Act and the Regulations cannot be sustained. The Government has no power to direct the Board to make an allotment in an illegal manner. The allotment by the Government as well as by the Housing Board must be made expressly in accordance with the Act and the Regulations. The Government and the Board in their discretion can only allot 5% and 2% of the dwelling units respectively on compassionate ground. Where the allotments are made by draw of lots neither the Board nor the Government has any discretion, once the result of the lottery is notified. I have, therefore, no doubt that the Board has erred in law in allotting an independent unit to respondent no.5 and therefore, its decision to that effect must be quashed.

Even if that is done, the petitioner cannot claim as a matter of right the allotment of that house. If independent dwelling units are available for allotment the Board has to make the allotment in accordance with the Act and Regulations, and for that purpose, if necessary, it may have to follow a fair procedure so that there is no discrimination between the applicants. It may be, that there are better claimants than the petitioner and respondent no.5 for the allotment of an independent unit, and therefore it is difficult for this court to issue any writ or direction in favour of any of the parties before the court.

8. Shri Harikant Thakur had prayed for intervention in this writ petition on the ground that the intervenor was noticed for the dwelling unit in question and therefore, no order should be passed without hearing him. I did not permit the intervenor application since it was made clear to the counsel appearing on behalf of the intervenor that no order shall be passed in favour of one or the other party for allotment of the house in question. So far as house no 195 of Hanuman Nagar is concerned, since I have come to the conclusion that the allotment in favour of respondent no.5 was illegal, the only direction that will issue to the allotment of that house and other such houses, if available, in accordance with the Act and the Regulations. The application for intervention was therefore not pressed. I accordingly dismiss the application for intervention.

9. I, therefore, hold that neither the Government nor the Board has any discretion to deviate from the regulation in the matter of allotment of dwelling units and to make allotments contrary thereto. Where allotment is to be made by draw of lots, allotment must be made by following that procedure alone, and no interference either by the Government or the Board is warranted. If any irregularity is committed in the draw of lots by the committee concerned, that may be brought to the notice of the Board for appropriate order under section 13(4) of the Act. The Government has authority under the regulation to make allotment of 5% of dwelling units in

favour of cases with special circumstances and on compassionate ground. Simiarly the Board can allot 2% of the dwelling units available for allotment on compassionate ground to helpless widows and disabled persons. Beyound this 7%, the Government and the Housing Board have no discretion to make allotments on such considerations, and they must expressly follow the procedure prescribed by the Regulation. Intereference by the Government with the Exercise of power by the Board is unwarranted and illegal. It is obligatory, having regard to the quota fixed by the Regulations, that before the allotment of dwelling units are made, the notice must clearly mention total number of units available and the number of units for allotment under each category, so that there is no interpolation later on by changing the number of units available. The quota system cannot be worked unless the total availability of dwelling units is first notified. It appears that no effort is made by the Housing Board to first notify the units available for allotment. This has given rise to a lot of complaints, and rightly so. Having regard to the scheme of the Regulations it is obligatory for the Board to notify the number of dwelling units available for allotment and to specify catagorywise the number of units that may be alloted to each category as specified in regulation 10 including those on compassionate grounds. The Board is, therefore, directed to follow this direction in all future allotments.

10. In the result this writ application is allowed

the decision of the Board as contained in annexure 5 to 8 are quashed. The Board is directed to act in accordance with the Act and Regulations for the allotment of house no. 195 in Hanuman Nagar and other such units if available for allotment and consider the cases of all applicants including the parties in this writ application in accordance with law. Nothing said in this writ application shall be construed as expression,of any opinion on the merit of the claim of either the petitioner or respondent no.5 in respect of the house in question. Having regard to the fact that the petitioner was alloted a house in the year 1984 the Board must follow the legal procedure and take decision in the matter of allotment of house no.195 within the period of three months from the date the order of this court is either received by it or is served upon it by any of the parties. If respondent no.5 is willing to take a flat as was allotted to him earlier and makes an application the Board will consider his request and allot him a flat as allotted to him earlier and give him possession there of within three months.

IN the result this application is allowed but there will be no order as to costs.

S.P.J. Application allowed

REVISIONAL CIVIL

Before U.P. Singh, J.

1992.

December,22.

M...han Himatsingka. *

V.

Mrs.Joyce Rout and others.

Code of Civil Procedure, 1908 (Central Act No. V.of 1908), Order1 Rule 10--- partition suit --- final decree proceeding --- whether in continuation of the main proceeding in the suit --- application for addition of party, whether can be filed --- collusive exchange of allotment in the final decree proceeding to the detriment of purchaser's right, title and interest --- stage of final decree proceeding whether an appropriate stage for addition of party in the suit - order rejecting the prayer for addition of party, whether liable to be set aside .

Where, after passing of the preliminary decree in a partition suit an application for being added as a party was filed in the final decree proceeding in the suit by the petitioner having learnt about the collusive exchange of the allotments of lands between the Plaintiffs and the defendants as a result of which the lands which had been

* Civil Revision No. 1738 of 1989. Against the order dated 13.6.1989 passed by Shri Umesh Chandra Prasad, Subordinate Judge, Dumka.

alloted to the patti of defendants including the lands which were purchased by the petitioner from them were sought to be alloted to the patti of the plaintiffs in exchange for such lands which had been originally alloted to the plaintiffs' patti and with which the petitioner had no concern;

Held, that, the final decree proceeding in a partition suit is in continnatior of the main proceeding in the suit and, therefore the court is competent to implead any party until the final decree is signed. In the event of the lands in question being alloted to the share of the defendants, who are vendors of the petitioner, the right title and interest of the petitioner, would not have fallen in jeopardy; but as a resullt of the collusive exchange of allotments, the lands in question were sought to be alloted to the share of the plaintiffs, who are strangers in so far as the petitioner's right and interest are concerned and, therefore, injustice would be caused to the petitioner who is purchaser for lawful consideration and, as such, this was certainly an appropriate stage for making a prayer for addition of a party in the suit. The order of the court below rejecting the application for addition of a party in the suit was, therefore, liable to be set aside.

Jotindra Mohan Tagore V. Bejoy Chand Mahata [1] ---- *referred to.*

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1. I.L.R 32 Cal 483.

Application by the petitioner.

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

Mr. Sreenath Singh, Senior Advocate. for the petitioner

Messrs Laxmi Narayan Mishra, Rajiv Ranjan Mishra, Ganpati Trivedi,& A.C.Singh for the opposite *party.*

U.P.Singh, J: — This application is directed against the order of the subordinate Judge, Dumka, dated the 13th June, 1989, passed in Title partition Suit No. 21 of 1963 whereby the petitioner's application for addition of a party defendant in the suit has been rejected.

2. The plaintiff filed the Title partition suit No. 21 of 1963 for a decree of partition to the extent of 1\3rd share in the suit properties described in Schedules 'A' to 'D' Schedule 'D' property was added later by an order of the Court. The suit properties belonged to one Balhi Murmu, a Santhal lady, who married one Fredrick william F.W. Martin died in 1926 where as the said Balhi Murmu .The said\ died in 1958. Theyhad three sons, namely, Regionald Martin alias Pui Murmu (father of defendants 1 to 1 (c), H. Martin alias Hook Murmu died in 1943 and patrick Martin had left for England in 1946. They had also two daughters namely Winnifred Martin alias Mrs.

E. M. Hood and Mable Martin alias Mrs. H.E.C. Briggs (defendant no. 2). The claim of partition was made on the ground that the parties were governed by the Indian Law of Succession and , therefore, the plaintiffs being the sons of the daugter of Balhi Murmu were entitled to 1\3rd share together with another daughter of Balhi Murmu, namely, Marble Martin and Regionald Martin alias Pui Murnu, the sole surviving son of Balhi Murmu (original defendant no. 1).

3. The suit was contested by the original defendant no. 1 Regionald Martin and, after his death in 1966, by his heirs, namely, defendants 1 to 1 (c). They resisted the claim of the plaintiffs on the ground, inter alia, that the parties are governed by the Santhal Customary Law or Inheritence where under no family or any person claimimg under any Family is entitled to any share.

4. The petitioner had purchased certain plots of land by four registered sale deeds in the year 1968 and 1969 for adequate consideration from the aforesaid defendants 1 to 1 (c) who had claimed that being the sons of late Regionald Martin they were the absolute owners of the properties in question, since their father was, as per the Santal Law of Inheritence, the only heir of Balhi Murmu. The petitioner had no knowledge about the pendency of the aforesaid partition suit. After the purchase, the petitioner came in possession of land and got his name mutated in the Revenue Records and has

been paying rent to the State of Bihar. The sister of the petitioner Smt. Sita Devi Saraf had also purchased a piece of land measurinng one bigha out of plot no. 1084 by a registered sale deed dated 7.11.1969 from defendants 1 to 1 (c) and the same was subsequently gifted to the petitioner by a registered deed of gift dated 13.11.1979. After the purchase, the petitioner developed the plots in question and after making huge investments raised pucca structures over the purchased land and has been running cold storage, timber sawing unit, timber seasoning and treatment plant and also doing agency business of jeep cards of Mahendra and Mahendra Company and further engaged in automobile body building work.

5. (A) The aforesaid suit was decreed by the Court below on 25.1 1988 holding, inter alia, that the parties are governed by the Indian Succession Act and, accordingly, the plaintiffs were entitled to 1\3rd share in the properties belonging to Balhi Murmu. Although the defendants 1 to 1 (c) had filed common written - statement denying the plaintiffs' claim and also asserting that the parties are governed by the Santhal Customary Law of Inheritence, defendants 1 (a) to 1 (c) changed their stand during the pendency of the suit and accepted the plaintiffs' case. After passing of the decree, First Appeal No. 357 of 1988 was preferred by Robin Martin, defendant no. 1 alone in the High Court which is pending.

(B) After the preliminary decree was passed on 25.1 1988 the plaintiffs took step for preparation of the final decree and an Amin Commissioner was appointed to carve out separate Takhtas in the suit proceeding in accordance with the shares of the parties as decreed by the Court below. Without making spot inspection, the Amin Commissioner prepared separare Pattis on 23.2. 1988 , each for the plaintiffs, defendants 1 to 1 (c) and defendant no. 2 Later, in pursuance of Court's order dated 8.7.1988, the Amin Commissioner prepared separate pattis of 1/12 th share each for the defendants 1 to 1 (c) out of their allotted 1/3rd share as aforesaid on 18.1.1988 . In the meantime, an application was filed on behalf of defendants 1 to 1 (c) requesting for exchange of the lands which had been allotted to them for the lands allotted by the Amin Commissioner to the pattis of the plaintiffs.

6. In other words, the lands, which had been allotted to the pattis of defendants 1 to 1 (c), including the lands which had been purchased by the petitioners from them, were sought to be allotted to the *pattis* of the plaintiffs in exchange for such lands, which had been originally allotted to the plaintiffs' *pattis* and with which the petitioner had no concern. By order dated 23.7.1988, the Court below directed the Amin Commissioner to exchange the pattis as prayed for and, accordingly, fresh *pattis* were prepared by the Amin Commissioner according to which the lands in question

which had been purchased by the petitioner and which are the subject matter of the present application, had now been allotted to the pattis of the plaintiff.

7. Having learnt about the case and the collusive exchange of the allotments of lands between the plaintiffs and the defendants as a result of which the lands in question were sought to be allotted to the pelaintiffs' share, the petitioner filed an application on 4.10.1988 for being added as a party in the final decree proceeding in the suit.The aforesaid application was entertained by the Court below on 25.11.1988.

8. By the impugned order dated 13.6.1989, the Court below held that in so far as schedule 'D' property is concerned, it has been added in the suit by amendment on 1-9-1966, subsequent to the sale In favour of the petitioner in so far as that plot of land is concerned and, accordingly, the Court below held that it was not hit by the principles of lis *pendens*. In so far as other lands as mentioned in Schedules 'A 'to 'C' are concerned, the Court rejected the prayer on the ground that there cannot be any variation in the final decree from the preliminary decree and, therefore, the Court is not competent to add any party at the stage of the final decree proceeding.

9. The fallacy in the judgment of the Court below lies here. It failed to appreciate that the final decree proceeding in a partition suit is in continuation of the main proceeding in the suilt and, therefore, the Court

is competent to implead any party until the final decree is signed. It ought to have appreciated that, in the event of the lands in question being allotted to the share of defendants 1 to 1 (c) , who are vendors of the petitioner, the right, title and interest of the petitioner would not have fallen in jeopardy ; but as a result of the collusive exchange of allotments, the lands in question have been sought to be allotted to the share of the plaintiffs, who are strangers in so far as the petitioner's right and interest are concerned, injustice would be caused to the petitioner who is purchaser for lawful consideration and, therefore, the stage of the final decree proceeding with the aforesaid allotment of shares/ plots sought to be changed, was certainly an appropriate stage for making a prayer for addition in the suit. The Court below should have considered the collusive attitude on the part of the defendants.

10. The Court below committed an illegality in holding that, since the final decree has to be in conformity with the preliminary decree, the party cannot be added at the stage of final decree preceeding . In the facts of the present case, it is clear that the exchange of allotments as a result of which the petitioner' purchased lands, were sought to be allotted to the plaintiffs at the stage of the final decree, was sufficient occasion for making an application for being added as a party and the prayer could not be rejected on account of delay. In the case of *Smt. Saila Bela Dassi Vs. Smt. Nirmala*

Sundari Dassi and another [1] It was held " as a purchaser pendente lite, a person will be bound by the proceedings taken by the party in whose favour the decree is passed in execution of her decree, and justice requires that she shoud be given an opportunity to protect her rights ".

11. In the case of *Jotindra Mohan Tagore Vs. Bijoy Chand Mahatap* [2]

It was held as under—

" A suit for partition, even when the report of the Commissioner confirmed and a decree is directed to be drawn in accordance therewith, is a pending litigation, until the court signs the final decree.

A decree for partition, to be operative, must be engrossed on stamped- paper as required by the Stamp Act. until the Judge signs the decree so engrossed, it cannot be said that the suit has terminated, and an order directing a party to be added under S. 32 of the Civil Procedure Code can be made in such a suit before it has actually teminatted.

12. In the case of *Baman Chandra Acharya* and others vs. Balaram Acharya and others (AIR 1966 Orissa 160). it was held that " in a partition suit even if co-sharers are necessary partyes, an application for their addition canot be allowed after the preliminary decree is passed except in certain exceptional circumstances such as impletion of transferees subsequent to the preliminary

1. (1958) A.I.R. (SC.) 394
2. I.L.R.32 Cal. 483

decree or death of parties whose rights were carved out in the preliminary decree." In the said case, the case reported in ILR 32 Calcutta 483 (supra) was distinguished. Here , in the present case, the lands which had been allotted to the patti of defendants 1 to 1 (c), including the lands which were purchased by the petitioner from them were sought to be allotted to the patti of the plaintiffs in exchange for such lands which had been originally allotted to the plaintiffs' patti and with which the petitioner had no concern. Thus , fresh pattis were prepared by the Amin Commissioner according to which the lands in question which had been purchased by the petitioner and which are the subject matter of the present application had now been allotted to the pattis of the plaintiffs after the collusive exchange of the allotment of thelands between the defendants and the plaintiffs as a result of which the lands in questionwere sought to be allotted to the plaintiffs' share, the petitioner filed an application for being added as a party in the final decree proceeding in the suit. In the event ofthe lands in question being allotted to the share of the defendants 1 to 1 (c) who are the vendors of the petitioner, the right, title and interest of the petitioner would not have fallen in jeopardy; but as a result of the collusive exchange of allotment, the lands in question were sought to be allotted to the share of the plaintiffs who are strangers in so far as the petitioner's right, and interest are concerned and, therefore, injstice would be caused to the

petitioner who is the purchaser for lawful consideration and , therefore, the stage of final decree procdeeding with the aforesaid allotment of shares/ Plots as sought to be changed was certainly an appropriate stage for making a prayer for addition of a party in the suit.

13. In this view, the order dated 13.6.1989 passed by the Subordinate Judge, Dumka, in Title partition suit No. 21 of 1963 is set aside and this application is allowed but there shall be no order as to costs.

S.P.J. Application allowed.

CIVIL WRIT JURISDICTION

Before Gopichand Bharuka & Narayan Roy,JJ

1992

December, 22.

Baidyanath Ojha & anr. *

v.

The State of Bihar & ors.

Service --- order of reversion to the parent Department --- opportunity of hearing not given --- effect of.

Where the reversion of a person to the parent department is an order of reversion of a person to the parent department is an order of reversion simpliciter without involving any punishment and is based on administrative exigencies;

Held, that the authority concerned is competent to pass the order even if the services of the person concerned were not requested to be returned by the parent department and there is no necessity of granting any opportunity of hearing before passing of such order.

Case laws discussed.

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

The facts of the case material to this report are

* Civil Writ Jurisdiction Case No. 9008 of 1992. In the matter of an application under Articles 226 and 227 of the Constitution of India.

set out in the j udgment of G.C. Bharuka, J.

Mr. Basudeo Prasad, Sr. Advocate &
Mr. Subodh Kumar for the petitioners

Mr. Ram Suresh Roy. S.C.I For the Respondents

G.C.Bharuka, J.— There are two petitioners in this writ application. Their prayer is that the office order dated 31.1.1992 and 1.2.1992 issued by the respondent Joint State Transport Commissioner, Patna (Annexures 4 series) by which their services have been reverted to their parent department be quashed since the same has not been passed on compliance of the princ ples of Natural Justice.

2. The petitioners are constables employed in Bihar Police Service. It appears that pursuant to the statutory requirements under the Motor Vehicles Act, the Transport Department had, pursuant to a policy decision of the Government requisitioned the services of different personnels from the Police Department to act as the Enforcement officers.The said policy decision has been filed as Annexure 1 to the writ application which, inter alia, shows that ordinarily the deputation of police personnel in the Transport Department will be for a period of three years. Keeping in view the said policy decision the services of the petitioners were placed with the Transport Department vide order dated 23.1.1991 and they joined at their places of posting in the Transport

District office , Ranchi on 9.2.1991 and 3.3.1991. Subsequently by the impugned orders dated 31.1.1992 and 1.2.1992 the respondent Joint State Transport Commissioner has returned their services to the parent department.

3. Shri Basudeo Prasad , learned Senior Counsel appearing on behalf of the petitioners, has assailed the impugned orders on the ground that their deputation being for three years pursuant to the policy decision of the Government contained in Annexure 1, the petitioners could not have been reverted to their parent department before the expiry of the said period. He has further submitted that the impugned orders of reversion are also bad because the same could not have been passed unless their services had been recalled by the parent department or in any event without granting a reasonable opportunity of being heard to the petitioner in the matter, which was admittedly not granted in the present case. In support of his submission he has placed reliance on the decision of the Supreme Court in the case of *K.H.Phadnis vs. State of Maharastra*, reported in 1971 (2) SLR 345 (S.C.) and also on the case of Dr. *Bhagat Singh Vs. the Vice - Chancellor, Punjabi University,* reported in 1981 (2) S.L.R. 329 ((P.&H.).

4. On the other hand, Mr. Ram Suresh Roy, S.C.I, appearing on behalf of the respondents, has submitted that the impugned order does not suffer from any

infirmity and since the petitioners were sent on deputation, they have not acquired any right to remain in the Transport Department. To substantiate his submission, he has placed reliance on the decision of Supreme Court in the case of *Ratilal B. Soni & ors. vs. State of Gujarat & ors.*, reported in AIR 1990 S.C 1132.

5. In *K.H.Phadnis* (Supra) it was found as a matter of fact by the Supreme Court that the appellant was reverted to his parent department on levelling certain allegations against him which were also the subject matter of police enquiry. According to the Supreme Court where reversion was in the nature of a punishment and therefore compliance with the provisions of Article 311 of the Constitution was necessary but at the same time in paragraph 17 of the Judgment while dealing with the law relating to the subject it has been held that :

" The order of reversion simplicitor will not amount to reduction in rank or a punishment. A Government servant holding a temporary post and having lien on his substantive post may be sent back to the substantive post in ordinary routine administration or because of exigencies of service. A person holding a temporary post may draw the salary higher than that of his substantive post and when he is reverted to his parent department the loss of salary cannot be said to have any penal consequence. "

6. In the case of *Ratilal B. Soni* (Supra) it has

been held by the Supreme Court that :

" The appellants being on deputation they could be reverted to their parent cadre at any time and they do not get any right to be absorbed on the deputation post."

7. The Full Bench decision of Punjab and Haryana High Court in the case of *Dr. Bhagat Singh* (Supra) has no bearing on the facts of the present case. That case devolved on interpretation of Section 9A of Punjabi University Act, 1961. According to the Court, Section 9A of that Act did not authorise the Chancellor to cut short the tenure of three years statutorily fixed, therefore, the order cutting short the term to less than three years was bad. There is no such situation in the present case.

8. Keeping in view the facts of the present case and the law laid down by the apex court, we are clearly of the view that in the present case the order of reversion of the petitioners to their parent department is an order of reversion simplicitor without involving any punishment and is based on administrative exigencies. Therefore, it was quite competent for the part of the respondent Transport commissioner to pass the impugned order even if the services of the petitioners were not requested to be returned by the parent department. There was no necessity of granting any opportunity of hearing to the petitioners before passing of the impugned order. It is also fallacious to say that the petitioners were deputed

for any fixed period which in law was not permissible to be shortened.

9. Accordingly the writ application is dismissed. There will be no order as to costs.

Narayan Roy, J. I agree.

M.K.C. Application dismissed

CIVIL WRIT JURISDICTION

Before N.Pandey & S.N.Jha,JJ

1992.

December, 23.

Ram Nath Singh.*

V.

State & ors.

Service — enquiring officer recommending a minor punishment of censor — disciplinary authority awarding a major punishment of dismissal without affording an opportunity of showing cause to the deliquent as to why the major punishment of dismissal be not awarded — validity of.

Held, that where the disciplinary authority decides to award a major punishment such as dismissal in disagreement with the recommendation of the inquiring officer to award a minor punishment, such as censor it is mandatory for it to provide an opportunity to the deliquent of showing cause as to why a major punishment be not awarded against him.

Union of India v. H.C.Goel [1]

Narayan Mishra v. State of Orissa [2] — followed.

Application under Articles 226 and 227 of the Con-

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* Order 3 dated 23/12/92 passed in C. W. J. C. No.9528 of 1992

1. (1964) A.I.R. (S.C.) 364.
2. (1969) S.L.R. 657.

stitution.

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

N.Panday and S.N.Jha, JJ :–This is an application under Articles 226 and 227 of the Constitution of India wherein the petitioner has prayed for quashing an order of respondent no. 3 dated 2.11.1992 (Annexure 5) whereby the petitioner has been dismissed from service. He has also prayed for quashing an order of the appellate authority dated 24/2/1987 as contained in Annexure 8, rejecting the appeal of the petitioner.

2. In order to appreciate the controversies, it would be appropriate to have a brief survey of some of the facts.

The petitioner at the relevant time was working as fireman and posted at Secretariat Building, State of Bihar, Patna. A criminal case under sections 457 / 380 and 411 of the Indian penal code on the allegation of theft with respect to a typewriter was instituted against the petitioner and one Haider Ali. Criminaltrial for the said offence was carried out and ultimately the petitioner was granted acquittal on 13/2/1981. However, with respect to the same offence the appropriate authority decided to initiate adepartmental proceeding against the petitioner and the said Haider Ali. Charges in this regard were served on the petitioner on 29.7.1981 Accordingly, the departmental proceeding was carried out wherein on 2.9.1992, the inquiring officer submitted his report (Annexure 4) recom-

mending punishment for censure against the petitioner and the said. Haider Ali was exonerated of the charges the dated 21-10-1992 in spite of the order of punishment of censure as recommended by the Inquiring officer, passed and order for dismissal of the petitioner from service. The petitioner thereafter moved the Bihar State Administretive Tribunal which ultimately directed him to avail the statutory remedy of appeal under the provisions of the Bihar & Orissa Subordinate Service(Discipline & Appeal) Rule,1935. Ultimately, the appeal was preferred which has been dismissed by Annexure - 8 on 28-2-1997.

3. Mr. Narendra Prasad, Senior counsel appearing for the petitioner, contended that the impugned orders are bad in law in as much as copy of the inquiry report was not served to the petitioner extending an opportunity to submit a show cause against the proposed punishment. It has been further contended that the inquiring officer upon consideration of the entire materials had suggested that the petitioner be awarded punishment of censure. The Disciplinary Authority had no jurisdiction to award any other punishment including dismissal, without giving an opportunity to the petitioner to show cause, assigning reasons upon which he wanted to pass his order of dismissal. It was lastly contended that even the order of the appellate authority is most cryptic as no reason has been assigned for dismissal of

the appeal. According to him, such orders are quasi judicial and the authority while passing such orders are required to assign reasons.

4. In the circumstances aforesaid, a short point that falls for determination are whether in absence of reasonable opportunity of showing cause against the action proposed to be taken by the disciplinary authority as also in absence of a copy of inquiry report having been served with the petitioner, the impugned order of dismissal can sustain ? The Supreme Court in the case of *Khem Chand v. Union of India* [1] upon consideration of the service jurisprudence on the subject ' reasonable opportunity ' particularly with respect to the departmental proceeding, has summed up thus :

" (a) an opportunity to deny his guilt and establish his innocence, which he can only do if he is told what the charges levelled against him are and the allegations on which such charges are based ;

(b) an opportunity to defend himself by cross examining thewitnessesin support of his defence and finally,

(c) an opportunity to make his representation as to why the proposed punishment should not be inflicted on him, which he can only do if the competent authority, after the enquiry is over and after applying his mind to the gravity or otherwise of the charges proved against the government servant tentatively proposed to inflict one of the three punishments and communicate the same to

1. (1958) A.I.R. (S.C.) 300

the government servant. "

It is not the case of the respondents that a copy of the inquiry report was served with the petitioner and / or the disciplinary authority while imposing the punishment of dismissal gave an opportunity to the petitioner to show cause as to why a punishment which was not suggested by the inquiring officer be imposed against him. It is well settled that the disciplinary authority while disagreeing with the finding of the inquiry officer to impose major punishment what has been suggested in the inquiry report has to give an opportunity to the Government servant to show cause as to why in the circumstancess of the case such punishment be not awarded. In this connection, reliance can placed over a decision of the Constitution Bench in the case of *Union of India VS. H.C.Goel* [1] Relevant passage of the report reads thus : " After the report is received by the Government, the Government is entitled to consider the report and the evidence led against the delinquent public servant. The Government may agree with the report or may differ, either wholly or partially from the conclusions recorded in the report. If the report makes findings in favour of the public servant and the Government agrees with the said findings, nothing more remains to be done and the public servant who may have been suspended is entitled to

1. (1964) A.I.R. (S.C.) 364

reinstatement and consequential reliefs . If the report makes findings in favour of the public servant and the Government disagrees with the said findings and holds that the charges framed against the public servant are prima facie proved, the Government should decide provisionally what punishmant should be imposeed on the public servant and proceed to issue a second notice against him in that behalf. If the enquiry officer makes findings, some of which are in favour of the public servant and some against him, the Government is entitled to consider the whole matter and if it holds that some of all the charges framed against the public servant are in its opinion, prima facie, established against him, then also the Government has to decide provisionally what punishment should be imposed on the public servant and give him notice accordingly. It would thus be seen that the object of the second notice is to enable the public servant to satisfy the Government on both the counts, one that he is innocent of the charges framed against him and the other that even if the charges are held proved against him, the punishment proposed to be inflicted upon him is unduly severe. This position under Art, 311 of the Constitution is substantially similar to the position which governed the public servants under s. 240 of the Government of India Act, 1935."

From a bare perusal of the aforesaid, it is crystal

clear that the requirement of reasonable opportunity, therefore, could not be satisfied unless inquiry report is furnished to the dilinquent and / or in case where the disciplinary authority decided to pass an order of major punishment differing with the inquiry report, he must extend an opportunity to the public servant to show cause as to why the proposed punishment should not be imposed against him. This requirement can only be fulfilled when before imposing such punishment, a reasonable opportunity is extended to such Government servant.

5. It would also be proper to notice another decision of the Supreme Court, namely, in the case of *Narayan Misra v. State of orissa.*[1] where in identical question to the present one fell for consideration It would be appropriate to quote paragraph 6 of the judgment in this regard:

"6 Now if the Conservator of Forests intended taking the charges on which he was acquitted in to account, it was necessary that the attention of the appellant ought to have been drawn to this fact and his explanation, if any, called for. This does not appear to have been done. In other words, the Conservator of Forests used against him the charges of which he was acquitted without warning him that he was going to use them. This is against all principles of fair play and natural justice. If the

1. (1969) S.L.R. 657

Conservator of the Forests wanted to use them, he should have apprised him of his own attitude and given him an adequate opportunity. Since that opportunity was not given, the order of the Conservator of Forests modified by the State Government cannot be upheld. We accordingly set aside the order and remit the case to the Conservator of Forests for dealing with it in accordance with law. "

It is manifest from these decisions that where the disciplinary authority decided to award a major punishment such as dismissal in disagreement with the recommendation of the inquiring officer to award a minor punishment , such as censure, it is mandatory for it to provide an opportunity of showing cause as to why a major punishment be not awarded against him.

6. On the basis of this conclusion, this application succeeds and the impugned orders as contained in Annexures 5 and 8 are quashed.

7. We would like to mention that this decision will not preclude the disciplinary authority from taking a fresh decision in accordance with law from the stage of supply of the inquiry report along with show cause notice in the matter of proposed punishment in accordance with law.

R.D. Application allowed

CIVIL WRIT JURISDICTION

Before Bisheshwar Prasad Singh, J .

1992.

December, 23.

Khursheed Alam. *

V.

The State of Bihar and others.

Contract – acceptance of tender and allotment of work – no provision for distribution of work – order of distribution of work passed by Minister concerned without recording any reason – validity of.

It is no doubt true that it is open to the Minister to take a view different from the view taken by the officers of the department . However, justice demands that when the minister takes such a view he must record his reasons as briefly as it may be so that if challenged one can examine the reasons disclosed in the order.

Held, therefore, that in the instant case unfortunately as no reasons what so ever have been recorded, it is not possible to say , whether the order is sustainable in law or not. Under these circumstances, only fair order which can be passed is to quash the order of the Minister distributing the works between the petitioner

* Civil Writ Jurisdiction Case No. 6378 of 1991. In the matter of an application under Articles 226 and 227 of the Constitution of India.

and respondent no. 8 and to direct that a fresh decision be taken after considering the relevant rules and after recording reasons for the order that may be passed. The Minister will apply his mind to the facts as well as the law and pass a reasoned order.

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 B.P.Singh, J.

Mr. Nasrul Hoda Khan for the petitioner.

M/s K.N.Jain & Shyam Narayan Sinha for the respondents no. 1 and 3 to 7

M/s Shakeel Ahmad Khan & Abul Kalam for respondent no.8.

B.P. Singh, J — The petitioner herein is aggrieved by the order dated 16-5-1991 (Annexure- 1) whereby the Chief Engineer, Rural Engineering Organisation (R.E.O. for short) respondent no.5 herein, has directed the Superintending Engineer, R.E.O. (respondent no.6) to divide the work between the petitioner and Quasim Raza (respondent no. 8 herein) . According to the petitioner, the aforesaid order is illegal, since he was allotted the work after inviting tenders and the order (Annexure-1) has been passed under political influence. He has, therefore , prayed that Annexure -1 be quashed and respondent no.7 be restrained from acting in accord-

ance therewith.

2. The facts of this case will disclose the manner in which the governmental work of a routine nature is interfered with by politicians who bring all sorts of pressure on the officers of the government to act in a particular manner so as to confer favour on the person / persons in whom they are interested. The practice has attained notoriety and must be stopped at any cost. When the political personalities get involved in such routine work of the Government, the concerned Minister is also pressurised into passing orders favouring one or the other person. This has resulted in complete demoralisation of the officers concerned, and the continuance of such state of affairs is bound to adversely affect the functioning of the Government. While it is true that representatives of the public are bound to bring to the notice of the Government any deficiency of maladministration that may come to their notice, it is certainly not their function to interfere with the day to day working of the Government..

3. There is hardly any dispute about the facts of the case. They are as follows: An advertisement was issued inviting tenders for construction of a road from village Madarpur to village Jurari in the districr of Munger. Several persons filed thier tenders in response to the aforesaid advertisement published on 5 - 3- 1991. The petitioner as well as respondent no.8 were found to be

the lowest tenderers, but since the petitioner was found to be senior to respondent no. 8 as a Contractor, having regard to his date of registration, the Superintending Engineer (respondent no.6) advised the Executive Engineer (respondent no.7) to issue work order in favour of the petitioner, and to get the necessary agreement executed by him. Consequently the Executive Engineer called the petitioner to his office to sign the agreement on 14 - 4 - 91 and that the same was counter - signed by the concerned authorities . His case is that respondent no. 8 Quasim Raza, persuaded one Mr. Ram Nath, M.L.A, to write a letter to the Chief Engineer requesting him to call for the file from the office of the Superintending Engineer. Accordingly, the Chief Engineer called for the file, but after going throuth the same he directed the Superintending Engineer by Annexure 2- A date 27 - 4 - 1991 to get the work done through the petitioner in accordance with the terms of the agreement. The same communication discloses that he called for a report on the letters of Sri Ram Nath Yadav, M.L.A. and Sri Sakuni Choudhury, M.L.A.

4. The case of the petitioner is that the Minister of State Sri Jai Prakash Yadav was again approached by political persons, and by order dated 24 - 8 - 1991 he directed that the work be distributed equally between the petitioner and respondent no. 8. The notesheet of the Department, which has been annexed as Annexure

- 6 makes an interesting reading. It appears that on 6 - 7 - 1991 the Engineer- in- Chief had objected saying that the claim of the members of the legislative assembly that work should be allotted only on the recommendation of the local M.L.A was not justified in view of the Department 's Memo no. 790 dated 29- 1-1991. Cabinet (Vigilence) Department's memo no 2347 dated 3- 12- 1983 provided for allotment of work to the siniormost tenderers and there was no provision for distribution of work . In any event, there was no justification for distribution of work involving Rs. 1.60 Lakhs. He was of the view that the work should be allotted to the seniormost tenderers subject to the conditions mentioned in the memo . He sought directiones from the Department . The noting of the Commissioner - cum - Secretary dated 8 - 7 - 1991 discloses that he took the view that the Engineer - in - Chief could himself take a decision. Below the noting it is mentioned that one Sri Prayag Choudhuri, M.L.A had made an application to the Minister of State and, accordingly, the file had been called for from the concerned Department . The Commissioner - cum - Secretary on 25 - 7 - 1991 directed that the matter be placed before the Minister of State . On 24 - 8 - 1991 the Minister of State directed that the work be distributed equally between the petitioner and respondent on. 8. The Engineer - in - Chief again wrote to the Commissioner - cum - Secretary that there is neither any rule nor was there any justification for distribution of work and that it was

necessary to reconsider the matter. The Commissioner -cum -Secretary entirely. agreed with the noting of the Engineer - in Chief and put up the matter before the Minister of State so that he may reconsider the matter if so advised. The Minister , however, directed that his earlier order be obeyed.

5. There is also a letter dated Ist. June, 1991 written by the Superintending Engineer to the Engineer - in - Chief, which is annexed as Annexure -5 . This was in response to the letter of Engineer - in- Chief dated 27 - 5 - 1991. From this it appears that three letters were written by Md.. Wali Rahmani dated 25 - 3 1991, 3 - 4 - 1991 and 9 - 4 - 1991. Similarly. Sri Dhanraj Singh and Sri Sakuni Choudhuri, both members of the legislative assembly had recommended allotment of work to the petitioner.

6. It is, therefore, apparent from the facts stated above that the petitioner as well made political approaches to secure the work. Similarly, respondent no. 8 also approached members of the legislative assembly to espouse his cause. In my view, both are guilty to the same extent and no sympathy can be shown to either of them. This has become the common practice which is wholly unwarranted in law. I fail to understand why the State of Bihar has not so far made it a condition that if any contractor brings pressure on the Government through politicians to secure a particular work, he should

be disqualified from consideration. The State will be well-advised to incorporate such a condition in the advertisement itself.

7. Coming to the merit of the case, respondent no.8 claims a preferential treatment because he is one of the beneficiaries under the scheme. The petitioner makes a similar claim while denying the claim of respondent no. 8. It is not possible for me to go into this question of fact. Unfortunately, the order of the Minister of State is one line order which does not disclose any reason as to why he was persuaded to take a view different from the one taken by the officers of the Department Prima facie, it appears to me that there was nothing illegal in the allotment of work to the petitioner. If there be any other consideration permissible in law which justified the division of work bet ween two contractors, certainly that could be done. The noting of the Engineer -in - Chief with which the Commissioner-cum-Secretary has agreed, would show that there is no provision for distribution of work in such cases, and yet the Minister of State has passed an order for distribution of the work between two tenderers without recording any reason and without referring any rule, circular or order which justifies such distribution of work. It is no doubt true that it is open to the Minister to take a view different from the view taken by the officers of the Department. However, justice demands that when he takes such a view, he must record his reasons as briefly as it may be so that if challenge, one can examine the reasons disclosed in the order. Unfortunately, in the instant case no reasons what soever have been recorded and, therefore, it is not possible to say whether the order is sustainable in law or nor.

Under these circumstances, only fair order w' ' I can pass obviously is to quash the order of the Minister of State dated 24- 8 -1991 and the consequent order issued by the Chief Engineer (Annexure-1) distributing the work between the petitione nd respondent no. 8, and to direct that a fresh decisio be taken after considering the relevanat rules etc. , and after recording reasons for the order that may be pass. ' It will be open to the Minister of State (responden no. 2) to pass any order in accordance with law. He will apply his mind to the facts as well as the law and pass a reasoned order. Nothing said in this order shall be construed as an expression of opinion in favour of any of the parties.

8. This writ petition is allowed to the extent indicated above.

9. Before parting with this case I may only observe that the petitioner is also guilty of making political approaches to secure his private ends, and this by itself would have furnished a good reason for this Court to refuse to interfere with the impugned order. However, since the impugned order has also been passed on similar consideration it would be unjust not to quash the same. I may again observe at the cost of repetition that the Government will be well-advised to evolve ways and means by which such political interference in the day to day working of the Government is not only discouraged but prevented.

M.K.C. Allowed to that extent

T A X C A S E

Before G.C. Bharuka & S.K. Chattopadhyaya, JJ

1993

January, 7.

Commissioner of Income - tax Bihar - II, Ranchi .*

V.

M/s Tata Steel Charitable Trust, Jamshedpur.

Income Tax Act, 1961 (Central Act No. XIII of 1961) section 11 (1) (a) and (13) (1) (a) and (13) (3) — provisions of — application of part of the income of the M/S Tata Steel Charitable Trust for the benefit of the employees of Tata Iron Steel Company and their relatives whether disentitles the Trust from claiming exemption under section 11(1) (a).

From a reading of the provisions of clause (c) of subsection (1) of section 13 and sub - clause (3) of the Income tax Act 1961 , hereinafter referred to as the Act, it is quite clear that neither under the terms of the Trust nor under the relevant rules governing the same any part of the income enures or any part of such income has been used or applied directly or indirectly for the

*. Taxation Case Nos. 208 to 211 of 1980. Statment of case under Section 256 (2) of the Income - tax Act, 1961 by the Appellate Tribunal , Patna Bench, Patna , in the matter of assessment on M/s Tata Steel Charitable Trust, Jamshedpur, for the assessment years 1972-73 to 1975-76.

benefits of any of the specified persons referred to in sub- section 3 of section 13 of the Act.

Held, that the application of the part of the income of the Trust for the benefit of the employees of Tata Iron and Steel Company and their relatives can not disentitle the M/s Tata Steel Charitable Trust, from claiming an exemption under section 11 (1) (a) of the *Act.*

Statment of case under section 256 (2) of the Income Tax Act, 1961.

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

Mr. K .K .Vidyathi, Mr. K. Sharan for the petitioner

Mr. K.N.Jain, Mr. V. D. Narayan, Mr. Shambhu Sharan , and

Mr. S.K. Narayan for the opposite party

G. C. Bharuka, J — These references to the assessment years 1972 - 73 , 1973 - 74 , 1974 - 75 and 1975 - 76 involved a common question of law based on identical facts and, as such, are being disposed of by a common judgment .

2. The question of law falling for consideration is as follows :–

" Whether on the facts and in the circumstances of the case, the provision of section 13 (1) (c) of the

Income - tax Act, 1961, are applicable and, therefore, the Trust income or any part there of is not exemped under section 11(1) of the said Act. "

3. The assesse Trust was created by M/s Tata Iron and Steel Company Limited by executing a deed dated 30 th March, 1966. One of the objects for which the Trust was created was to utilise the income earned by it for charitable purposes in India only by giving relief to the poor, education , medical relief and advancement of any other object of general public utility not involving the carrying on of any activity for profits. The assessee claimed exemtion in respect of the income on the ground that the same has been applied exclusively for charitable purposes enumerated in the deed. The Income- tax officer rejected the plea on the ground that part of the income of the Trust has been spent for giving relief to such persons or their relatives, who are in the employment of the author of the Trust. According to him since the income of the Trust was applied partly for charitable purposes and partly for non-charitable purposes, therefore, the assessee is disqualified for seeking exemption under section 11 (1) (b) of the Act. On appeal , the Appellate Assistant Commissioner, on appraisal of evidences on record, came to the conclusion that the Trust was a charitable Trust and its income was exempt from tax under the Act keeping in view the provisions of section 11 1) (a) there of . The said orders have been affirmed by the Tribunal.

4. It is not in dispute that the Trust Deed nowhere casts an obligation on the trustee to apply the income of the Trust either ordinarily or preferably for the benefit of the TISCO employees . It is also a matter of record that about 50 % of the Trust income has been spent on the employees of TISCO or their relations for charitable purposes as contemplated under the Trust deed. It has been found by the Income - tax authorities as well as the Tribunal that the employees of TISCO and their relations had availed the said relief by making applications to the trustee as ordinary members of the public and not in the capacity of the employees of TISCO. The applications so filed by them were processed and examined in ordinary course as in the case of a needy non- employee and when found fit and in consonance with the object of the Trust, the desired relief was granted. While granting such relief it was wholly immaterial for the trustee as to whether the awardee was an employee or nom- employee of TISCO. There is nothig on the record to show that in any given case, the fact of employment in TISCO by the applicants has, in any way , influenced the trustee in selecting the beneficiaries.

5. On consdceration of these primary facts, the Tribunal has come to a factual conclusion that it was wrong to say that the trust was created for the purpose of granting any relief to the employees of TISCO . The Tribunal has also recorded a finding of fact that the

persons, who were the employees of TISCO have been given the relief out of the Trust income only because they fulfilled the relevant conditions for the same keeping in view the object of the Trust.

6. I may now proceed to deal with the relevant provisions, which are as under :–

> 2. (15) " Charitable purpose " includes relief of the poor, education , medical relief, and the advancement of any other object of general public utility not involving the carrying on of any activity for profit.
>
> S. 11 Income from property held for charitable or religious purposes-
>
> (1) Subject to the provisions of section 60 to 63, the following income shall not be included in the total income of The privous year of the person in receipt of the income
>
> (a) Income derived from property held under trust wholly for charitable or religious purposes, to the extent to which such income is applied to such purposes in India ;
>
> S. 13 Section 11 not to apply in ceartain cases –
>
> (1) Nothing contained in Section 11 or section 12 shall operate so as to exclude from the total income of the previous year of the person in raceipt there of
>
> (a).....
>
> (b).....
>
> (c) in the case of a trust for charitable or religious purposes or a charitable or religious institution any income thereof
>
> (i) if such trust or institution has been created or established after commencement of this Act and under the terms of the Trust or the rules governing the institution any part of such income enures, or
>
> (ii) if any part of such income or any property of the trust

or institution (whenever created or established) is during the previous year used or applied,

directly or indirectly for the benefit of any person referred to in sub - section (3).

Provided .....

provided .....

(2) ...

(3) The persons referred to in clause (c) of sub-section (1) and sub - section (2) are the following, namely :–

(a) the author of the trust or the founder of the institution,

(b) any person who has made a substantial contribution to the trust or institution, that is to say, any person whose total contribution up to the end of the relevant previous year exceeds five thousand rupees.

(c) where such author, founder or person is a Hindu undivided family, a member of the family.

(cc) any trustee of the trust or manager (by whatever named called) of the institution.

(d) any relative of any such author, founder person , member (trustee or manager) as aforesaid ;

e) any concern in which any of the persons referred to in clauses (a), (b), (c), (cc) and (d) has a substantial interest.

7. From a reading of clause (c) of sub-section (1) of section 13 and sub-clause (3) thereof , it is quite clear that neither under the terms of the Trust nor under the relevant rules governing the same any part of the income enures or any part of such income has been used or applied directly or indirectly for the benefits of any of the specified persons referred to in sub-section (3) of section 13 of the Act. From a reading of the said sub-section it appears that the employees of the author

of the Trust have not , as such , been placed under the specified classes enumerated therein. Therefore, the provisions of section 13 can not perse disentitle the assessee Trust from claiming exemption as provided under section 11 (1) (a) of the Act.

8. Now the next aspect to be considered is as to whether one of the essential ingredients for claiming exemption under Section 11 (1) (a) of the Act, namely , whether the property held under the trust is wholly for charitable or religious purposes or not. The expression 'charitable purposes ' has been defined under Section 2 (15) of the Act. The object and purpose of the Trust as has been culled out from the Trust deed its if fully satisfies the statutory requirement . Again the Tribunal, as a fimal fact finding authority, has found that the income derived from the properties held under the Trust has been exclusively applied for achieving the charitable purposes for which the trust has been created. Therefore, it is apparent that the properties as held by the Trust are meant wholly for charitable purposes. As such, the assessee satisfiesthis statutory requirement as well.

9. From a reading of the aforesaid provisions, it clearly emerges that a person can seek exemption under Section 11 (1) (a) of the Act only if he can at least satisfy that , (1) the purpose for which the trust has been created is charitable purpose and (2) no part of the income of such trust enures or has been used or applied

directly or indirectly for the benefit of any person referred to in sub-section (3) of section 13 of the Act.

10. So far as the first condition is concerned, the expression ' charitable purpose ' necessarily carries with it a sense of public value, which means that for being a Trust created for charitable purpose, it should necessarily be for extending relief and benefits to the general public in contradiction to any particular group or class of person. It has consistently been held by a courts that a purpose must, in order to be charitable, be directed to the benefit of the community or a section of community and not to the benefit of particular private individuals (refer williams v. Ir 16 ITR Suppl. 41, 50 (HL). In the present case, as noticed above, the object set out in the trust deed clearly lays down that the income of the Trust has to be spent for the relief to the poor, education , medical relief and the advancement of any other object of general public utility. The author of the trust has nowhere authorised the trustee to spend the income derived from the trust of the TISCO or their relatives either directly or indirectly. Therefore, the Trust was clearly established wholly and exclusively for charitable purposes as noticed above, it is wholly immatarial if any employee of the TISCO or their relatives had acquired

any benefit out of the income of the Trust as an ordinary member of the community and forms part of general public and only because they have some contractual relationship with the author of the trust, they do not lose their primary identity as a general member of the society In that capacity they are entitled for enjoying all the benefits for which the persons falling in their category are entitled to. Therefore, in my view the trust in question has been established wholly for charitable purposes .

11. Now coming to the second condition, as said above , it seems that even if a trust has been created wholly for charitable purposes but when subsequently it is found that its income either enure or is used or applied directly or indirectly for the benefit of any person specified under sub- section (3) of Section 13 of the Act then such trust becomes disentitiled to claim any exemption under section 11 of the Act. But the list of such persons as contained under section 13 (3) does not include the employees of the author of the trust. The employess of the author of the Trust does not fall within the specified categories of person as referred to in section 13 (3). Even Section 13 (3) (d) which includes day relative of the author, can also have no application in the case of the employees of the another because 'relative ' means a person connected by birth or marriage with another person . (See ' New Lexicon Webster 's dictionary.) The

person having other relation ship pursuant to a contract like of the employer and the employee can not be said to be relative. Therefore, the application of the part of the income of the Trust for the benefits of the employees of TISCO and their relative can not disentitle the Trust from claiming an exemption under Section 11 (1) (a) of the Act.

12. In the aforsaid facts and circumstences, the question is answered in negative and in favour of the assessee. I also assess a cost of Rs.1100/- (Rupees One thousand one hundred) only payable by the department to the assessee.

13. Let a copy of the judgment be sent to the Income - tax Appellate Tribunal, Patna Bench , Patna, in terms of Section 260 of the Act.

S.K. Chattopadhyaya, J. I agree.

R.D. Question answered.

CIVIL WRIT JURISDICTION

Before S.B. Sinha, J .

1993

January, 8.

Fullo Devi and others. *

V.

State of Bihar

Bihar Land Reforms (Fixation of Ceiling Area and Acquisition of Surplus Land) Act, 1961 (Bihar Act no. XII of 1962), section 5 (1) (iii) – proceeding against the landholder – transferees claiming on the basis of sales some having taken place prior to 22-10-1959 and others prior to 9-9-1970 – sales prior to 22-10-1959 whether come under the purview of the Act – sales prior to 9-9-1970 – proceeding under section 5 (1) (iii) whether bound to be initiated against the purchasers – such proceeding not initiated order and notification, whether liable to be set aside .

Where in a proceeding under the provision of Bihar Land Reforms (Fixation of Ceiling Area and Acquisition of Surplus Land) Act , 1961 (hereinafter referred to as the Act) the landholder filed objection claiming certain areas of land and stating that the rest of the area should

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* Civil Writ Jurisdiction Case No. 4300 of 1982. In the matter of an application under Articles 226 and 227 of the Constitution of India.

be excluded from the draft statement prepared as having been transferred and the petitioners, filed writ application in the High Court, claiming that they have purchased on the basis of some sale deeds executed prior to 22-10-1959 and others prior to 9-9-1970, that is the appointed day;

Held, that, so far as the deeds of sale which have been executed and registered prior to 22-10-1959 are concerned , they do not come under the purview of the said Act. So far as the deeds of sale executed and registered prior to 9-9-1970 are concerned, the lands covered there by can be tagged with the land held by the landholder only in the event aproceeding under section 5 (1) (iii) of the Act is Initiated and finding is arrived at that such transfers had been made interalia with the object to defeat the provisions of the said Act. No such proceeding had been intiated as against tne petitioner in the instant case. The impugned order and Notification were, therefore, liable to be set aside.

Mahabir Prasad v. The State of Bihar and others.[1] — . . . . .referred to .

Application by the purchasers.

The facts of the Case material to this report are set out in the judgment of S.B.Sinha, J.

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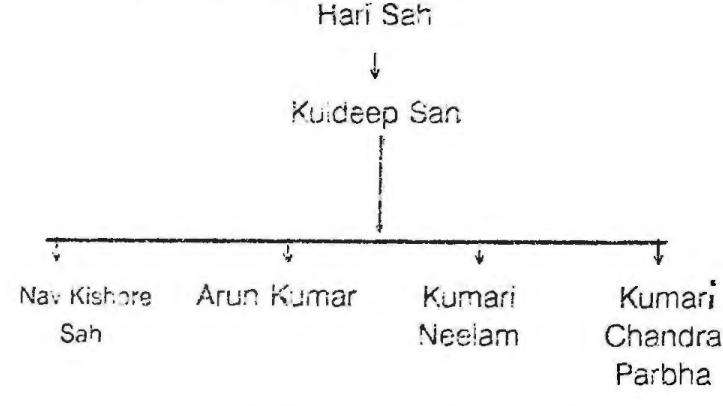
1. (1975) B.B.C.J. 701.

Mr. Narndeshwar Prasad Singh, Advocate, for the petitioner.

Mr. Raghib Ahsan standing counsel for the state

S.B.Sinha J. - This application is directed against an order dated 15.9.1975 as contained in Annexure-1 to the writ application as also the Notification dated 16.5.1975 as contained in Annexure-2 thereof.

2. Admittedly, a proceeding under the provision of Bihar Land Reforms (Fixation of Ceiling Area and Acquisition of Surplus Land) Act, 1961 (hereinafter referred for the sake of brevity as ' the Act ') was initiated as against one Hari Sah. The geneology of the family of Hari Sah is as follows:



3. The aforamentioned land holder filed a petition claiming 9 Acres 86 decimals of land when a draft statement was published. He in his objection as con-

tained in Annexure-3 to the writ application has stated that the rest of the area should be excluded from the draft statement.

4. According to the petitioner despite the impugned order and Notification as contained in Annexure -1 and 2 to the writ application have been passed / issued.

5. The petitioners are the transferees of the Respondent No. 4. The petitioners case is that they have purchased various tracts of lands from the Respondent No. 4 by reason of various registered sale deeds which are contained in Annexures- 4 to 17 to writ application.

6. It has been pointed out by the learned counsel appearing on behalf of the petitioners that all of the sales had taken place even prior to 22.1.[illegible] and others prior to 9.9.197[illegible] i.e. the aforesaid day.

7. According to the learned counsel so far as the deeds of sale which have been executed and registerd prior to 22.10.19[illegible] are concerned the same would not come within the purview of the said Act. The learned counsel further submitted that so far as the deeds of sale executed prior to 9.9.[illegible] are concerned proceedings under Section [illegible] of the Act would be bound to be vitiated and as admittedly no such proceeding had been initiated as against the petitioners no notices have been issued against them the impugned order must be held to be wholly illegal and without

jurisdiction.

8. In support of his contention, the learned counsel appearing on behalf of the petitioners has relied upon a decision in *Mahabir Prasad Versus The State of Bihar and others* reported in 1975 B.B.C.J., 701.

9. In this case, no counter - affidavit has been filed on behalf of the State.

10. From a perusal of the writ application, it appears that the purchasers have got their names mutuated and the State granted rent receipts in their favour till the year 1981.

11. There can not be any doubt that so far as the deeds of sale which have been executed and registered prior to 22.10. 1959 are concerned, they do not come under the purview of the said Act. So far as the deeds of sale executed and registered prior to 9.9.1970 are concerned, the lands coveredthereley can be tagged with the land held by the land holder only in the event a proceeding under Section 5 (i) (iii) of the Act is initiated and a finding is arrived at that such transfers had been made interalia with the object to defeat the provision of the said Act.

12. It is now well known in view of various decisions of the Court that Section 5 (i) (iii) of the Act is a mandatory one.

13. As the statements made in the writ application to the effect that no such proceeding had been initiated as against the petitioner had not been controverted by the State , the same must be accepted as correct.

14. In this situation, this application is allowed and the impugned orders / notification as contained in Annexures -1 and 2 to the writ application are set aside

15. The petitioners are, however, directed to file an applicatiton under Section 45 (B) of the Act before the Collector, Araria District who shall call for the records of the case, reopen the proceeding, hold an enquiry or cause such an enquiry to be made under Section 5 (i) (iii) of the said Act in presence of the land holder.

16. The Collector, Araria, shall, thereafter proceed to pass an order on the basis of the materials which may be brought on the records by the parties and pass on appropriate order in accordance with law.

17. It is made clear that the Collector shall issue notices and give an opportunity of hearing to Respondent No. 4 so that in the event the deeds of transfers as contained in Annexures-4 to 17 are held to be valid and genuine, appropriate steps for acquisition of other lands belonging to the land holder may be declared as surplus lands of the land - holder.

18. The petitioner must file an application under Section 45 (B) of the said Act within six weeks from today and the proceeding must be disposed of by the collector within six weeks thereafter.

19. This writ application is, thus, disposed of with the aformentioned observations.

S.P.J. Order according.

CIVIL WRIT JURISDICTION

Before S. B. Sinha & G. C. Bharuka, J.J.

1993

January, 20.

Sri Ramroop Tanti *

V.

The State of Bihar and others.

Principles of natural justice .... basic principles of ... the person obtaining employment on the basis of forged marksheet and certificate ..... action, whether confer any legal right.

The principles of natural justice, as is well known, is based upon two basic priniples viz. Audi Alteram Partem and Nemo Debet Esse Judex in Propriea Causa. The principles of natural justice have been developed from time to time adding new concepts therin. Some decisions have gone to the extent of holding that principles of natural justice are embodied in Article 14 of the Constitution of India.

... a person has been found to have obtained employment on the basis of a forged marks sheet ... and in this way has evidently committed ... upon the appointing authority.

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* Civil Writ Jurisdiction Case No. 7420 of 1991. In the matter of an application under Articles 226 & 227 of the Constitution of India.

Held - that an action based upon a fraudulent act does not confer any legal right and thus he did not derive any legal right to continue to be in employment in terms of the appointment letter.

Case laws discussed.

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

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

M/s Krishna Mohan ,Ranjit Kumar Verma

Raj Kishore Pd. & Chiranjiv Ranjan for the petitioner

M/s. D.K. Sinha, S.C. 4 & M.N. parvat for the respondents.

S. B. Sinha, J. — This application is directed against an order dated 15. 5. 1989 issued by the respondent no. 2 where by the services of the petitioner had been terminated and a direction has been issued for recovery of total salary drawn by him.

2. The fact of the case lies in a very narrow compass. The petitioner passed secondary school examination in the year 1968. He allegedly passed his teacher's training examination in the year 1970. The marks sheet issued to the petitioner allegedly by the Bihar School Examination Board in the teachers' training

examination is contained in Annexure- 1/A to the writ application.

According to the petitioner, an advertisement was issued for appointment in the post of teacher pursuant where of he filed an application and by an order dated 10. 12. 1981 he and 13 other persons were appointed on the post of Matric trained Assistant teachers on temporary basis. The said order dated 10. 12. 1981 is contained in Annexure- 2 to the writ application. The petitioner stated that he has drawn his salary from January, 1982 to November, 1985. There after payment of his salary was stopped on the ground that he has filed a false teacher's training certificate. According to the petitioner, an inquiry was made and the said certificate was found to be a genuine one. There after by an order dated 2. 6. 1986 the earlier order dated 14. 10. 1985 was revoked and the petitioner was directed to be paid his salary pursuant where of he joined again on 2. 6. 1986 The petitioner has alleged that payment of his salary was again stopped from July, 1988 to May, 1989. The petitioner filed a representation. By reason of an order dated 15th of May, 1989 as contained in Annexure 7 to the writ application, the salary payable to the petitioner was directed to be stopped and he was directed to be removed from services.

3. The petitioner has contended that prior to issuance of the said order neither any show cause notice

was issued to the petitioner nor he was given an opportunity of hearing. A criminal case had also been instituted against the petitioner.

4. In this case a counter affidavit has been filed where in it has inter alia, been contended that an inquiry was made and in the said inquiry, it has been found that the training certificate filed by the petitioner was a forged one. The said inquiry report is contained in Annexure A to the counter affidavit. It has been contended that the petitioner was appointed on a forged training certificate and thus he was not entitled to any salary. It has further been contended that in the first inquiry the petitioner influenced the enquiring officer and managed to obtain a clear remarks from him but when a detailed inquiry was made the training certificate submitted by him was found to be a forged one. It has further been submitted that it is not correct that no show cause notice was served upon him. By letter dated 16. 3. 1989 as contained in Annexure B to the counter affidavit, the petitioner was asked to produce his original certificate but he did not do so and there after a criminal case was instituted against him, a copy where of is contained in Annexure C to the counter affidavit.

5. The petitioner has filed a reply to the said counter affidavit where in it has been inter alia contended that as the petitioner was exonerated in the earlier inquiry, the impugned order as contained in annexure 7 to

the writ application is barred under the principle of res judicata. with regard to the inquiry report which is contained in Annexure A to the counter affidavit, it has been submitted that the same has been obtained behind the back of the petitioner where for he had not been given any information. It has also been contended that the District Magistrate has no power to terminate his services.

6. As the matter related to the alleged grant of a training certificate by Bihar School Examination Board. ley order dated 3.11.1992, the Bihar school Examination Board was permitted to be added as respondent no. 4 in this writ application. On date Mr. Krishna Mohan, learned counsel appearing on behalf of the petitioner handed over a copy of the duplicate certificate to Mr. Parbat appearing on behalf of respondent no. 4. By reason of the said order Mr. Parbat was directed to see as to whether the duplicate certificate granted to the petitioner is genuine or not.

7. At the hearing of this application Mr. Y.V. Giri, learned counsel appearing on behalf of the respondent no. 4 produced before us the original tabulation register and submitted that the petitioner's name does not appear there in Mr. Giri submitted that from the tabulation register, it would appear that in the relevant year there was no examination centre at Munger. It has been submitted that only 116 candidates appeared in the training examination

in 1970 but the petitioner has shown his roll number as 207 which is evidently false. It has further been submitted that the duplicate certificate produced by the petitioner is also a forged document as contained in Annexure 8 to the reply of the counter affidavit as the Bihar School Examination Board does not use the word "Dwityak". He further submitted that the Bihar School Examination Board always in describing the serial number on the certificate mention the series there of as A, B., C or D but no number of series in certificate has been mentioned. In Annexure 8, which also is a pointer to the fact that the said certificate is a forged one.

8. In view of the submissions made by Mr. Giri, learned counsel appearing for the Board, we are satisfied that the petitioner has obtained employment on the basis of a forged and fabricated document.

9. *In U.P. Junior Doctors' Action Committee* Vs. *Dr. B. Sheetal Nandwani and others* reported *in* A. I. R. 1991 S.C., 909, it has been held that when an admission was obtained on the basis of a forged certificates principles of natural justice are not required to be complied with. It was held as follows:

"In such a case, the circumstances in which such benefit was taken by the candidates concerned would not justify attraction of the application of rules of natural justice of being provided an opportunity to be heard."

10. The principles of natural justice, as is well

known, is based upon two basic principles viz Audi Alteram partem and Nemo Debitro Esses Judex in propriea causa. The principles of natural justice have been developed by the apex court from time to time adding new concepts there in. In some decisions the apex court has gone to the extent of holding that the principles of natural justice are embodied in Article 14 of the Constitution of India.

11. The Supreme Court in *Tulsiram Patel* vs *union of* India reported in 1985 S. C; page 1416 dealt with the history of the principles of natural justice in paragraphs 72 to 80 of the judgment and there after, discussed various principles involved therein paragraphs 81 to 82 there of. The Supreme court there after proceeded to consider the question as to how the said provisions have been interpreted by the courts.

The Supreme Court held: —

"The principles of natural justice have thus come to be recognised as being a part of the guarantee contained in Article 14 because of the new and dynamic interpretation given by this Court to the concept of equality which the subject matter of that article"Shortly, put the syllogism runs thus: violation of a rule of natural justice results in arbitrariness which is the result of state Action. It is a violation of Article 14. Article 14 however is not the sole repository of the principles of natural justice. what it does is to guarantee that any law or state action violating them

will be struck down. The principles of natural justice, however, apply not only to legislation and State action but also where any tribunal authority or body of men, not coming within the definition of "State"in Article 12,is charged with the duty of deciding a matter. In such a case, the principles of natural justice reqire that it must decide such matter fairly and impartially."

However, it was also held that observance of principles of natural justice can be excluded by a statute either expressly or by necessary implication.

In Union of India Vs. J.N.Sinha reported in A.I.R.1971 S.C.40,it has been held:

"But if on the other hand, a statutory provision either specific or by necessary implication excludes the application of any or all the rules of principles of natural justice then the count cannot ignore the mandate of the Legislature of the statutory authority and read into the concerned provisioh the principles of natural justice. Whether the exercise of power conferred shoud be made in accordance with any of the principles of natural justice or not depends upon the express words of the provision conferring the power, the nature of the power conferred, the purposes for which it is conferred and the effect of exercise of that power."

12. Reference in this connection may also be made to R.S.Dass Vs. Union of India reported in A.I.R.1987 S.C.,593.

13. However, it is well known that there are certain exceptions to the principles of natural justice.In case of Maharashtra Board of Secondary and High Secondary Education Vs.K.S.Gandhi and others reported in 1991(2) S.C.C.,716 it has been held:-

"From this perspective,the question is whether omission to record reasons vitiates the impugned order or is in violation of the principles of natural justice. The omnipresence and omniscience (SIC) of the principles of natural justice Acts as deterrence to arrive at arbitrary decision in flagrant infraction of fair play.But the applicability of the principles of natural justice is not a rule of thumb or a strait-jacket formula as an abstract proposition of law. It depends on the facts of the case, nature of the inquiry and the effect of the order-decision on the rights of the Person and attendent circumstances."

14. In Ex-Capt. K.Balasubramanian & anr. Vs. State of Tamil Nadu and ano. reported in 1991 (2) S.C., 708 it has been held that principles of natural justice need not be complied with when the order does not involve civil consequences.

In Baikuntha Nath Das. Vs. Chief Distt. Medical Officer reported in 1992(2) S.C.C., 299, it has been held that the principles of natural justice are not required to be complied with in a case of compulsory retirement.

15. In Ram Krishna Verma Vs. State of U.P. reported in 1992 (2) S.C. 620, it has been held :

"The 50 operators including the appellants/private operators have been running their stage carriages by belatnat abuse of the process of the court by delaying the hearing as directed in Jewan Nath Wahal case and the High Court earlier thereto. As a fact on the expiry of the initial period of grant after September, 29, 1959 they lost the right to obtain renewal or to ply their vehicles, as this court declared the scheme to be operative. However, by sheer abuse of the process of law they are continuing to ply their vehicles pending hearing of the objections. This Court in Grindlays Bank Ltd. Vs. ITO held that the High Court while exrcising its power under Article 226 . (the interest of justice requires that any underserved or unfair advantage gained by a party invoking the jurisdiction of the court must by neutralised. It was further held that the institution of the litigation by it should not be permitted to confer an unfair advantage on the party responsibe for it. in the light of that law and in view of the power under Article142(1)of the Constitution this Court, while exercising its jurisdiction would do complete justice and neutralise the unfair advantage gained by the 50 operatorsincluding the appellants in dragging the litigation to run the stage carriages on the approved route of area or promotion thereof and forfeited their right to hearing of the objections filed by them to the draft scheme dated February, 26, 1959. Moreover, since this court in Jewan Nath Wahal case upheld the approved scheme and held to be operative, the hearing of their objections would be a procedural formality with no tangible result. Therefore, the objections outlived their purpose. They are, therefore, not entitled to any hearing before the hearing authority."

16. As the petitioner has been found to have obtained his employment on the basis of a forged marks sheet and certificate, he evidently committed a fraud upon the appointing authority. An action based upon a fraudulent act does not confer any legal right. The petitioner, thus, did not derive any legal right to continue to be in employment in terms of the appointment letter.

17. In view of his conduct, therefore, he is also not entitled to any relief from this Court.

18. For the reasons aforementioned, I am not inclined to exercise our jurisdiction in favour of the petitioner under Article 226 of the Constitution of India. As a criminal case is pending as against the petitioner, I wish to make it clear that I have refused to grant any relief to the petitioner only on the basis of a finding of a prima facie case against him which may not prejudice him in the criminal trial.

19. This application is, therefore, dismissed with the aforementioned observations, but without any order as to costs.

G.C. Bharuka, J. I agree

M.K.C. Application dismissed

CIVIL WRIT JURISDICTION

Before S.B. Sinha & R.M. Prasad, JJ

1993

January, 21

Bishun Rai & another. *

v.

The State of Bihar & Others.

Bihar Land Reforms (Fixation of Ceiling Area and Acquisition of Surplus Land) Act, 1961 (Bihar Act no. III of 1962) as amended by Bihar Land Reforms (Fixation of Ceiling Area and Acquisition of Surplus Land Amenemt Act 1982 Bihar Act No LV of 1992) -- sections 10,11 (1), 32A and 32 B -- sections 32A and 32 B --- proceeding whether to be started afresh from the stage of section 10 -- section 32A -- effect of -- section 11 (1) -- notification issued under -- effect of.

In terms of both sections 32A and 32B of the Bihar Land Reforms (Fixation of Ceiling Area and Acquisition of Surplus Land) Act, 1961 as amended by Bihar Land Reforms (Fixation of Ceiling Area and Acquisition of Surplus Land) Amendment Act, 1982, hereinafter referred to as the Act, the proceeding has to be started afresh from the stage of section 10 of the Act. By reason of

* Civil Writ Jurisdiction Case No. 4176 of 1992. In the matter of an application under Articles 226 and 227 of the Constitution of India.

section 32 A of the Act any appeal, revision, review or reference arising out of an order passed under section-8 of the Act does not abate.

Held, that the first return submitted by the Land holder and/ or earlier reports submitted by the concerned authorities are not completely wiped off but in a given case the same may only be supplemented.

Held, further that the legislature deliberately and intentionally directed reopening of the proceeding from the stage of the section 10 of the Act and not prior thereto. In those proceedings in which notification under section 11A of the Act has been issued are not required to be reopened. Had the intention of the legislature been that the Proceedings shall have to be started afresh from the very beginning, it could have said so expressly.

It is, thus, clear that what is wiped off is the findings and orders in favour or against the landholder or the revenue and not the materials collected and information furnished or gathered.

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.Sinha, J.

M/s Hemandra Prasad Singh & Arbind Kumar for the Petitineors.

Mr. D.N. Yadav, G.P. II and Mr. Harishankar Roy, J.C. to G.P. II for the respondents.

S.B.Sinha J.-- In this application, the petitioners have prayed for quashing the order dated 14.2.1989 passed in Land Ceiling case no. 8 of 1983-84/1978-79 by respondent no. 4 and the order dated 1.4.1991 passed by respondent no. 3 in Revenue Appeal No. 4 of 1989-90 as also the resolution of the Member, Board of Revenue dated 31.12.1991 in Revision case no. 82 of 1991 as contained in annexures 1,2 and 4 respectively. The petitineors have further prayed for the stay of further proceeding in Land Ceiling case no. 8 of 1983-84 and realisation of the costs awarded against them by the revisional authority.

2. Admittedly, a proceeding under the provision of Bihar Land Reforms (Fixation of Ceiling Area and Acquisition of Surplus Land) Act, 1961 (hereinafter called and referred to as the Act, being Ceiling case no. 26 of 1978-79 was initiated against the petitioners. A draft statement was prepared on 1.9.1990. The petititioner no.1 did not file any objection within the prescribed period but he filed it later on which was rejected. An appeal was preferred by the petitioners against the said order which was also rejected. The petitioner, thereafter filed a revision application before the Board of Revenue being Revision Case no. 1 of 1981.

3. The petitioners have contended that during

the pendency of the aforementioned revision application, Bihar Land Reforms (Fixation of Ceiling Area and Acquisition of surplus Land) Amendment Ordinance 1981 (Bihar Ordinance 66 or 1981). Which was later on repealed and replaced by Bihar Act 55 of 1982, came into force and in terms of section 32 A and 32 B as inserted thereby, all proceedings abated and such proceedings were required to be started from the stage of section 10 of the aforementioned Act. The petitioners have contended that in that view of the matter, the Additional Member, Board of Revenue remanded the matter back to the Collector under the said Act.

4. It has been submitted that instead of proceeding afresh, the respondent no. 4 took up the case on the basis of the earlier draft statement. They admittedly, did not file any objection under Section 10 (3) of the Act and thus the Collector by an order dated 24.10.1983 directed preparation and publication of the final statement under Section 11 (1) of the Act. The petitioner no. 1 preferred an appeal against the said order which was dismissed on 14.8.1985. The petitioners thereafter filed a revision application being revision case no. 339 of 1985 and the matter was again remanded back.

5. The petitioners have contended that the original number of the case being Ceiling Case no. 26 of 1978-79 was renumbered as case no. 8 of 1983-84 and the petitioners were directed to submit their objection

against old draft statement again. They submitted their objection which was rejected by reason of the impugned order dated 14.2.1989. As noticed hereinbefore, the appeal and the revision preferred by the petitioners against the said order were also dismissed.

6. The Member, Board of Revenue while dismissing the revision application filed by the petitioners also awarded a Cost of Rs. 500/- against him.

7. In this case, a counter affidavit has been filed on behalf of respondents 3 to 5.

In the said counter affidavit, it has been stated that from the ordersheet dated 6.8.1983 it would appear that the Additional Collector directed publication of draft statement under Section 10 (2) of the Act and by an order dated 8.8.1983 it was held that the petitioners have 65.22 acres of Class IV land and were allowed to hold one unit of 30 acres of land and a draft publication was directed to be published accordingly. The said draft publication was published in the Zila Gazette dated 16.9.1983. The petitioners thereafter were called upon to file objection within 30 days. The petitioner no. 2 was a child aged about four years on 9.9.1970. The draft publication was directed to be made final by an order dated 24.10.1983 and a final publication was made under Section 11 (1) of the Act in zila Gazette dated 15.11.1983. By an order dated 17.1.1984, a notification under Section 15 (1) of the Act was issued. It has further been submitted that

upon remand of the matter by the Member, Board of Revenue, the petitioner was heard and an order was passed on 14.2.1989 again allowing 30 acres of land to the petitioners. Thereafter again draft publication was issued on 28.3.1989 and upon dismissal of the appeal by the Collector, the surplus land was again directed to be notified in the zila Gazette which was done and the surplus lands were distributed through purchas to the landless persons and possession of the lands had also been delivered in MOTIHARI and Chraiya Anchals on 21.5.1992 and 27.5.1992 respectively. It has been reiterated that after the proceeding abated a fresh draft publication was made on 6.8.1983. It has been stated that the statements of the petitioners that the earliar draft publication was acted upon was false and in fact a fresh draft statement was prepared and published. It has further been stated that the verification of the lands made by the authorities was found to be correct.

8. The respondents in their counter affidavit have annexed the copies of the draft statements as also the final publication thereof and the notifications under Sections 10,11 and 15 respectively with the counter affidavit which have been marked as Annexures A,B and C thereto.

9. In view of the importance of the questions involved we have heard not only the learned counsel for the petitioners but also the other counsels who intended

to make submissions on this point as also the Advocate General.

10. The main thrust of the submission of the learned counsel for the petitioners is that after abatement of the proceeding the matter has to start on a clean slate as a result whereof not only the effect of the earlier orders are wiped off but also the earlier returns and verification reports and/ or all other materials collected become non-existent and thus the entire proceeding has to be started from the stage of Section 6 of the said Act.

11. It has been submitted that in view of the Act 55 of 1982, a new area has to be allotted and a new classification of the land has to be made and thus, while issuing the draft statements under sub-section (1) of Section 10, the materials collected earlier cannot be looked into. It has also been submitted that in the objection under Section 10 (3) of the Act, the land holder can raise only such questions which pertain to the draft statement and thus at that stege it is not possible for the landlords to bring in fresh materials in terms of the Amending Act no. 55 of 1982.

12. The question which thus arises for consideration in this writ application is as to whether the materials collected before publication of draft statement in terms of section 10 (1) of the Bihar Land Reforms (Fixation of Ceiling Area & Acquisition of Surplus Land) Act, is completely wiped off on coming into force of Act

no. 55 of 1982, that is, introduction of sections 32A and 32B of the said Act.

13. The learned counsel appearing on behalf of the petitioners has submitted that in view of the decisions of this Court in *Motilal Padampat Sugar Co. Pvt. Ltd.* vs. *The State of Bihar,* reported in A.I.R,. 1973 Patna, 47, *Ramtahal Sah & ors* vs. *The State of Bihar* & ors, reported in 1976 BBCJ, 270 *Chandrajot Kuer* vs. *The State of Bihar* & ors, reported in 1983 BBCJ, 197, equivalent to 1984 PLJR, 90 *Smt. Kunti Sharma* & ors. Vs. *The State of Bihar* & ors, reported in 1990 (1) PLJR, 66 and a Full Bench Decision in *Harendra Prasad Singh* vs. *The State of Bihar* & ano, reported in 1984 PLJR, 908, the entire proceeding would be wholly wiped off and thus the old returns and the informations collected by the Collector including the reports called for from Anchal Adhikari and the other authorities cannot be looked into

14. It has also been brought to our notice that by amendment in the definition of 'land' as contained in Section 2 (f) and in sertion of Section 4 (f) by Act no. 55 of 1982 in terms whereof land which prior thereto did not come within the purview of the said Act, have now been included and, thus a notice to the landholder to file a fresh return and/ or to obtain informations in relation thereto has become a must.

15. By reason of amendments introduced in Bihar Act no. 55 of 1982 in the definition of 'land' the

forest lands and/or even land perennially submerged under water have been included. Section 4 (f) of the said Act introduced by the Amending Act provides ceiling limit of 45 acres equivalent to 18.211 acres of lands which are wholly sandy forest land, land perennially submerged under water or other kind of lands, none of which Yields paddy Rabi or cash crop which has been referred to as Class VI land.

16. In this situation it has been contended that a public notice to the land holders to submit return as contemplated under section 6 of the said Act as also Collection of information through other agencies afresh are necessary.

17. The question, in my opinion, has to be answered with reference to the phraseology used in Section 32A and 32B of the Act as introduced by reason of Bihar Act no. 55 of 1982.

Section 32 A and 32 B read as follows:-

" 32A: Abatement of appeal, revision, review or reference:-

An appeal, revision, review or reference other than those arising out of orders passed under Section 8 or sub-section (3) of section 16 pending before any authority on the date of commencement of the Bihar Land Reforms (Fixation of Ceiling Area and Acquisition of Surplus Land) (Amendment Act), 1982. shall abate:

Provided that on such abatement. the Collector shall proceed with the case afresh in accordance with the provisions of section 10:

Provided further that such appeal, revision, review or reference arising out of orders passed under Section 8 of sub-section (3) of Section 16 as has abated under section 13 of the Bihar Land Reforms (Fixation of Ceiling Area and Acquisition of Surplus land) (Amendment) Ordinance, 1981 (Bihar Ordinance no. 66 of 1981), shall stand automatically restored before the proper authority on the commencement of this Act.

32B: Initiation of fresh proceeding:-- All those proceedings, other than appeal, revision, review or reference referred to in Section 32A pending on the date of commencement of the Bihar Land Reforms (Fixation of Ceiling Area and Acquisition of Surplus Land) (Amendment) Act, 1982, and in which final publication under sub-section (1) of Section 11 of the Act as it stood before the amendment by aforesaid Act, had not been made, shall be disposed ofafresh in accordance with the provisions of Section 10 of the Act."

18. From a perusal of Section 32A of the Act, it is evident that only appeals, revisions, review or reference which were pending before any authority on the date of coming into force of 1982 Amendment Act, shall stand abated. The first proviso appended to section 32A mandates that the collector shall proceed with the case afresh in accordance with the provisions of Section 10.

19. . Section 32B, however, provides that proceedings other than appeal, revision or review or reference referred to under Section 32A pending on the date of commencement of 1982 Act and in which final publication under Sub-section (1) of Section 11 of the Act as it stood before amendment of the aforesaid Act shall be disposed of afresh in accordance with the provisions of section 10 of the said Act.

20. Thus both in terms of section 32A and 32B, the proceeding has to be started afresh from the stage of Section 10. It is necessary to bear in mind that by reason of section 32A of the said Act, any appeal, revision or review or reference arising out of an order passed u/s 8 does not abate.

21. Section 8 is a penal provision which provides for imposition of penalty for non-service of return in compliance with notice. Section 8 of the said Act, therefore, on a plain reading thereof appears to be mandatory in character. Thus return is required to be filed voluntarily and/ or pursuant to any notice issued by the Collector in this behalf. Non-filing of such a return entails penal consequences and such a penal proceeding does not abate and thus it cannot be said that the return filed under Section 6 of the Act becomes non-est. The landholder in terms of Section 6 of the said Act in his return is required to furnish the particulars: mentioned therein section 6 reads thus.

> " 6. Public notice upon certain land-holders to submit return: - (1) As soon as may be, after the commencement of Bihar Land Reforms (Fixation of Ceiling Area and Acquisition of Surplus Land (Amdt.) Act, 1972, the State Government shall cause to be published a notice in the manner laid down in sub-section (3) calling upon all the land holders of the State who hold land in excess of the ceiling area anywhere in the State reside within thirty days to the date specified in the notice, a return containing the following particulars, namely):-
>
> (i) the total area and description of land held by the land-holder anywhere in the State;

(ii) If the land-holder is a raiyat, the names and description of his under raiyats and the description of land held by them under him anywhere in the State;

(iii) the particulars of legal proceedings, if any, in respect of the land held by the land-holder pending on the date of submission of the return;

(iv) encumbrances on the land, if any, with their full particulars; and

(v) any other particulars that may be prescribed:

Provided that the Collector may, on an application made by the land-holder, extend the period specified in such notice for the submission of the return by a period not exceeding thirty days)

(2) If the land-holder is a minor or a person of unsound mind, the return required under sub-section (1) shall be submitted by his guardian.

(3) The substance of the notice shall be published in the official Gazette and in not less than three issues of at least two newspapers having circulation in Bihar)

(4) Where the land-holder or the guardian mentioned in sub- section (2), as the case may be, fails to submit the return required under sub-section (1) without sufficient cause, the Collector may, after giving him a reasonable opportunity of being heard and adducing evidence, impose a fine which may extend to five hundred rupees.)"

22. Sub-section (4) of section 6 of the said Act also provides for imposition of fine if the landholder or the guardian fails to submit a return under Sub-section (1) within the period prescribed without sufficient cause. The word 'and' as defined under section 2 (f) and that used in section 6 of the Act appears to convey different

meanings.

23. It is true that section 2 (f) while defining the word 'land' uses the word both 'means' and ' includes' and, thus, the same is exhaustive, but the same is only for the purpose of section 5 of the Act.

24. As indicated hereinbefore, different clauses of Section 6 postulate that not only the area and description of the land held by the landholder is to be given, but the lands and the description under occupation of an under-raiyat as also the particulars of legal proceedings in respect of the land held and encumbrances in relation thereto, have also to be furnished. This provision is pertinent in as much as in terms of the definition of a land-holder even a mortgagee or an under raiyat comes within the purview thereof.

25. Rule 5 of 1963 Rules provide that the return has to be filed in form LC2.

26. It is pertinent to note that despite coming into force of Act 55 of 1982, no amendment has been made in the aforementioned form no. LC2.

It is therefore, clear that even for the purpose of the return, all lands held and owned by the landholder or even those lands in relation whereof the question with regard to title thereof as also the nature of title etc. are disputed, were required to be furnished.

27. Section 10 provides for preparation of draft

statement. Such a draft statement has to be prepared on the basis of information given by or on behalf of the landholder or collected under Section 5,6,8 or 9. Such draft statement may also be prepared on the informations obtained by the Collector under Section 7 of the Act. Collection of information in terms of Section 7 therefore does not appear to be mandatory.

28. Section 7, however, comes into force only when a person holding land in excess of ceiling area fails to submit the return under Section 6. A draft statement, therefore, is possible to be prepared only on the basis of the informations furnish by the landholder. Once the relevant materials are available, the Collector is merely to cause a draft statement prepared on the basis thereof.

29. Rule 8 merely provides for procedure regarding checking of information given by or on behalf of the landholder under section 5,6,8,9 or as obtained by the Collector under Section 7. Therefore, even at the stage of Section 10 (1) further verification and/ or checking of materials may become necessary. Thus, only a case where an additional return has been filed or Additional information has been received by the Collector from any source whatsoever in terms of Section 6 or 7 of the Act may have to be rechecked or reverified in terms of Rule 8.

30. In my opinion, if it is the case of the landholder that he also has forest land or lands which

are perennially submerged under water, the matter may be different but in a case where the landholder does not claim any forest land or any lands which perennially remains submerged under water or any other kind of land none of which yields paddy, rabi or cash crop, in such event, the landholder is not required to furnishe an additional return and/ or fresh return incorporating the new claim. It may be mentioned that Section 2 (f) read-with clause 4 (f) as amended by Act 55 of 1982, do not operate against the interest of the landholder but in his favour.

31. Even in a case where such type of lands as detailed in clause (f) of Section 4 of the Act were owned or held by the landholder and if a notification under Section 11 (1) of the Act had already been published, the question of starting a fresh proceeding in relation thereto would not arise as in relation thereto only the proceeding can be reopened by the State or the Collector of the district in exercise of its power conferred upon it under Section 45B of the said Act. Thus as both section 10 as also section 8 of the said Act and Rule 8 of the said Rules provide for giving of the relevant particulars and/ or checking of the informations, the same must be held to be applicable in a case where additional information are furnished or additional materials are procured by the collector whether by reason of additional return or fresh return by the landholder or informations gathered by him from any other agency.

32. In sum and substance, therefore, in my opinion, the first return submitted by the landholder and/or earlier reports submitted by the concerned authorities are not Completely wiped off but may in a given case the same may only be supplemented.

33. In other words, by reason of any additional information if the Collector after coming into force of the aforesaid Act no. 55 of 1982 uses any fre~ materials against the landholder in respect whereof no notice had been served upon him, the question of prejudice of the landholder would arise, but in absence thereof, the Collector would be entitled to proceed on the basis of all the materials which were before him prior to coming into force of Act 55 of 1982. However, there cannot by any doubt whatsoever that even if additional return or a fresh return is not submitted and additional information is not supplied to the Collector nor any additional materials is not place before him, the Collector is required to apply his mind afresh on the materials which are on records in as much as in terms of Sections 32A and 32B, a fresh determination is required to be made.

34. It is in this connection, pertinent to mention that even where a draft publication has been made in terms of sub-section (2) of section 10 of the said Act, the landholder gets adequate opportunity to file objection which has to be adjudicated in terms of section 10 (3) thereof. Thus even at that stage, the landholder would

be entitled to bring any materials which might have escaped the notice/ of the Collector in publishing the draft statement.

35. This matter may be considered from another angle. Both sections 32A and 32B of the Act clearly state that the proceedings are to start afresh from the stage of section 10. It is now well known that statute has to be interpreted keeping in view the legislative intent. If the intention of the legislature was to mandate that the proceeding shall begin from the stage of section 6, it could have said so on in an unambiguous terms. By process of reasoning, the courts are not permitted to relegislate the Act.

36. Reference in this connection may be made to the case of *K.P. Verma* vs. *State of Bihar and others* reported in 1988 PLJR, 1036 at page 1064 in which it has been held:-

" Reference in this connection may be made to the case of *Reserve Bank of India* vs. *Pearless Co.* (1987) (1) SCC, 424 wherein the Supreme Court has held as follows:-

" Interpretation must depend on the text and the context. They are the basis of interpretation. One may well say if the text is the texture, context is what gives the colour, Neither can be ignored. Both are important. That interpretation match the contextual. A statute is best interpreted when we know why it was enacted. With this

knowledge, the statute must be read first as a whole and then section by section, clause by clause, phrase by phrase and word by word. If a statute is looked at, in the context of its enactment with the glasses of the statutes maker, provided by such context, its scheme, the sections, clauses, phrases and words may take colour and appear different than when the statute is looked at without the glasses provided by the context. With these glasses we must look at the Act as a whole and discover what each section, each clause, each phrase and each word is meant and designed to any as to fit in to the scheme of the entire Act. No part of a statute and no word of a statute can be construed in isolation. Statute have to be construed so that every word has a place and everything is in its place..."

In this connection, reference may further be made to "The interpretation and Application of Statutes" by *Reed Divkersen. The Author at page 135 has discussed the subject while dealing with the importance of context in the following terms:-*

"The essence of the language is to reflect, express, and perhaps even effect the conceptual matrix of established ideas and values that identifies the culture to which it belongs. For this reason, language has been called conceptual map of human experience."

37. It is now well known that ordinary rule of construction of a Statute is that the words must be

interpreted in their natural grammatical sence unless that leads to some absurdity or inconsistencies or unless there be something in the context or in the object of the Statute to suggest to the contrary. When the language is plain and unambigous and admits of only one meaning, no question of interpretation arises.

Reference in this connection may be made to *Sutters* vs. *Briggs* reported in 1922 Appeal cases page 1.

38. At the cost of repetition, it may be stated that the legislature deliberately and intentionally directed reopening of the proceeding from the stage of Section 10 of the Act and not prior thereto. It is also intresting to note that those proceedings in which notification under Section 11 (1) of the Act has been issued are not required to be reopened. Had the intention of the legislature been that the proceedings shall have to be started afresh from the very beginning, it could have said so expressly.

39. Francis Bennian in his "Stationary Interpretation"2nd Edition at page 403states thus:-

"The basic rule of stationary interpretation is that it is taken to be the legislator's intention that the enactment shall be construed in accordance with the enactment laid down by law. General guides to legislative and that where these conflict the proolem shall be resolved by weighing and balancing the factors concerned.

At page 405, the learned author state

"It is a rule of law that where in relation to the facts of the instant case-

(a) the enactment under enquiry is capable of one meaning, and

(b) on an informed interpretation of that enactment the interpretative recrition raise no real doubt as to whether that grammatical meaning in the one intended by the legislation, the legel meaning of the enactmant corresponds to legislator, that grammetical meaning, and isthe one intended by the legislator, the legal meaning of the enactment corresponds to that grammatical meaning, and is to be applied accordingly."

40. In *Chandrajot Kuer's case Uday Sinha, J* held as follows:-

"The combined effect of sections 32A and 32B therefore is that the entire procedure from beginning to end must be carried out afresh. Since the proceedings have got to be decided afresh, *all findings arrived at earlier stages of the proceedings must be considered to have been wiped off whether the findings of fact were in landholder or were in favour of the revenue. Findings in favour or against a land-holder or Revenue must be considered afresh.*

P.S. MISHRA, J in his concurrent judgment held:-

"All these arguments and discussions, however, to my mind are academic, section 32B introduced by the 1982 Ordinance has to be applied to all cases in which there were some determinations and orders made but the final publication of the draft statement had not been made under sub-section(1) of section 11 of the celling Act. Whatever may be the position as to the effect of Section 4A and/or 4B of the Ceiling Act introduced by the Bihar Act 22 of 1976 , whether the impugned order, were one passed under the law in force or not, as there has been no final publication of the draft statement as required under sub-section (1) of section 11 of the Celling Act. all such proceedings stood abated. In that view of the matter, *whether the previous order was one whichwas the order under the Act is of no relevancy and/ or consequence,* For the reasons given in the judgment of Jdai sinha, J with which I respectfully agree and the reasons that I have separately discussed, I agree with the conclusion."

(underlining is mine for emphasis)

41. In *Moti Padempat Sugar 'Co. Pvt. Ltd. Majheaulia* & ano. Vs. *The State of Bihar and others* reported in AIR 1972 patna, 47. it has been held as follows:-

"In all these cases it is clear that the procedures prescribed in Rules 8 and 9 of the Rules have not been followed. The returns had been filed, and marking them" without prejudice" could not make them non est in the

eye of law. Exemption had been claimed in respect of the entire area of the lands for which returns had been filed. That being so, it was necessary to follow the procedure prescribed in Rule 9 of the rules before preparing the draft statements under Rule 10. In the first instance, it was for the authorities to decide whether exemption could be granted under section 29 (1) (b) (V11) of the Act. or it was a case of granting exemption under section 29(2) (a) (1). since the authorities have not done so in any of the cases, the draft statements will have to be quashed and the cases will have to be sent back to the authorities concerned for proceeding in accordance with law. Because the cases have to go back, I do not propose to express any final opinion of mine on the first two points urged on behalf of the petitioners, or in regard to the validity of ORDINANCE No. 64 of 1972. I however, think that, if I record the rival contentions of the parties in these cases, the authorities may get help in deciding, under Rule 9, the matter of granting the exemption."

it is thus, clear that what is wiped off is the findings and orders in favour or against the landholder or the revenue and not the materials collected and informations furnished or gathered.

42. In *Harendra Pd. Singh's* case reported in 1984 PLJR, 908 the court was considering a case whether on the date of coming into force of Bihar Act no. 55 of 1982, the objections filed by the landholder

under sub-section (3) of section 10 was pending and only in that context it was held:-

In the light of the aforesaid discussion, it must be held that the final publication under the unamended section 11(1) of the ceiling Act long after 9th April, 1981 would be non est because of the enforcement of the Bihar Land Reforms (Fixation of ceiling Area and Acquisition of Surplus Land Amendment) Act,1982.

Once that is held the clue or indeed the answer to the three distinct questions automatically falls into its place. It is accordingly held as under:-

(i) Under the mandatory provision of section 32B the Revenue authorities are obliged to dispose of afresh all pending proceedings except those in which final publication under sub-section (1) of section 11 of the Ceiling Act has already been made prior to the 9th of April, 1981 being the date of the commencement of the Amending Act.

(ii.) After the enforcement of the Amending Act on the 9th of April, 1981, if the Revenue authority proceeds to publish a notification under the provisions of the old unamended section 11(1) of the celling Act it would plainly be ignoring and contravening section 32B and nullifying the object and purposes thereof.

(iii). The failure to dispose of the pending proceedings afresh and the final publication by way of notification

under section 11(1) of the old unamended Act after the 9th of April, 1981 would be wholly without jurisdiction and, therefore, non est."

43. In 1990 (1) PLJR 66, learned single Judge of this court merely followed the aforementioned decisions in chandrajot Kuer's case and Harendra prasad's case.

44. It is thus clear that in none of the aforementioned decisions, the questions which have been canvassed before us were raised or determined..

It is now well known that a decision is an authority for what it decides and not what can logically be deduced there from (see quiz Vs. Leatham reported in 1900-1901 All England Law Reporter (Reprint) page 1 at page 6.

45. It is also well known that decision is not an authority on the point which has not been canvassed (see Goodyear Ltd. Vs. State of *Haryana,1990 (2) SCC, 71.*

46. Recently in *Smt. Jyotsna Devi and another* Vs. *State of Bihar* reported in 1992(2) PLJR,702, one of us (R.M. Prasad,J) held as follows:-

"In my opinion, so long the final publication under sub-section (1) of section 11 of the Act is not made, the findings will not bind the authority exercising powers and disposing of a proceeding afresh under section 32B of the Act. Under the said provision, the authority has to act completly independently in disposing of the proceeding afresh in accordance with the provisions of section 10 of the Act."

47. In this case the concerned respondents did not give option before the draft publication

prepared and published prior to coming into force the Act no. 55 of 1982. As noticed hereinbefore, the respondents have contended that a fresh draft statement was prepared and an objection was invited from the land holder in terms of sub-section(2) of section 10 of the Act.

48. It is not the case of the petitioners that by reason of the amending Act no.55 of 1982, any substantial change was made so far as the determination of ceiling area of the land-holder is concerned that they had in their possession any land which comes within the purview of section 4(f) of the Act.The petitioners have further not been able to show as to whether any prejudice was caused to them by reason of the draft publication made under section 10(1) of the Act on the basis of the return submitted by the land-holder himself and/or the verification made in this regard by the authorities in terms of Rule 8 of the Rules.It is not the case of the petitioners that the procedures laid down under Rules 8 and 9 of the Rules had not been complied with at all.

49. In this view of the matter, in my opinion,no case has been made out by the petitioners for interference with the impugned orders. This application is,therefore,dismissed but without any order as to costs.

R. M. Prasad J.I agree. Application dismissed

R.D

MISCELLANEOUS JUDICIAL

Before Binod Kumar Roy & Dharmpal Sinha, JJ.

1993

Ferbuary, 2

The High Court of Judicatu. ıt Patna. *

V.

Ramawatar Singh, Deputy Director of Computer, High Court, Patna, (Contemner)

Constitution of India, Article 215--- proceedings in contempt --- judicial directions not complied with by a staff of the High Court --- constitutional positi of the Chief Justice Vis-a-vis the other Judges of the High Court --- jurisdiction of the High Court Judges, whether can be curtailed by the Hon'ble the Chief Justice --- High Court being a Court of Record --- whether has ample jurisdiction to punish any one for its contempt apart from the provisions of contempt of Courts Act, 1971 --- the words all matters relating to Corporation/Boards' in the notice of allocation of business to the Bench by Hon'ble the Chief Justice, whether wide enough to cover the writ case mentioned before the Bench–by the learned counsel for placing it for admission before that Bench Court allowing

* . Miscellaneous Judicial Case No. 124 of 1993. In the matter of Contempt proceeding against Deputy Director of Computer, High Court , Patna vide order passed by Court comprising of Hon'ble Mr. Justice Binod Kumar Roy and Hon'ble Mr. Justice Dharampal Sinha.

the prayer ---- Court's order/ not obeyed ---- action of the cont . mner. Whether amounted to blocking the course of administration of justice.

Where different subjects were put under specified groups for taking up Admission of Constitutional cases by the Specially Constituted Benches by the Hon'ble the Chief Justice under Rule 10-A of Chapter II of the Rules of the Patna High Court and it was directed by Hon'ble the Chief Justice that the cases should be mentioned for appropriate orders only before the Bench which has been assigned with the subject in the respective groups and on being mentioned by the learned counsel it was ordered by a Bench concerned with subjects of Group no. 7 for putting up a writ case for admission but the office failed to obey the command on the pretext that this writ case related to Group II which was not correct and the Bench accordingly, initiated proceeding in contempt invoking Article 215 of the Constitution of India against the contemner, who was the Deputy Director of Computer, High Court, Patna and the contemner took the stand in the proceeding that he was instructed by the Authority not to attend the directions made by Court which are not inseisin of the subjects and shall not abide by those directions;

Held, on an examination of the constitutional position of the Chief Justice vis-a-vis the other Judges of the High Court, that the jurisdiction of the High Court Judges and

their powers in relation to the administration of Justice, has been left intact, though subject to the provisions of the Constitution, and to the provisions of any law of appropriate legislature made by virtue of the power conferred on that Legislature by this Constitution. Their jurisdiction, thus, cannot be curtailed by the Hon'ble the Chief Justice. The Court which passes any interim order alone retains jurisdiction to alter/modify it, unless it is not available. It is also a settled law that the Court also retains jurisdiction to extend time granted by its peremptory orders. The Court retains its jurisdiction to direct placing of such cases in Chambers or in Court in which it had passed orders earlier before it which require modification though after notice to avoid violation of principles of natural justice. In fact this has been the consistent practice of this Court.

Held, further, that this Court being a Court of Record has got ample jurisdiction to punish any one for its contempt to maintain its dignity and not to allow the confidence of the citizens/litigants/counsel or any one to be shaken. Section 22 of the Contempt of Court's Act, 1971. which reads "the provisions of this Act shall be in addition to, and not in derogation of, the provisions of any other law relating to Contempt of Court's leaves no doubt that the contempt of Courts Act, 1971, has not done away with the powers vested in this Court by virtue of being a Court of record. Article 215 of the Constitution of India contains such provision in respect of High Court.

This Court has also got ample jurisdiction to award punishment in the form of admonition, warning, severe warning.

Held, also, that the words ' all matters relating to Corporation/Board's' in the allocation of business to this specially constituted Bench by the Hon'ble the Chief Justice under Rule 10-A of Chapter II of the rules of the High Court vested authority/jurisdiction in it to take up the cases relating to these subjects which covered the writ case which was mentioned before it. The contemner miserably failed to show that the word 'all matters' in the notice dated 4-1-1993 had any exception. Even assuming that there was any confusion in his mind it was meet and proper for him to draw the attention of this Court and not to sit tight over the repeated directions and thus the contemner blocked the course of administration of justice.

Case laws discussed.

Proceedings in contempt invoking Article 215 of the Constitution of India against a staff of the High Court.

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

Binod Kumar Roy & Dharmpal Sinha, JJ.. — As a staff of this court had nullified our judicial directions made repeatedly we initiated these proceedings in contempt

invoking Article 215 of the Constitution of India, remembering what Halsbury in Laws of England Third Edition - Volume B defined - "Any act done or writing published which calculated to bring a court or a Judge into contempt, or to lower his authority or to inferfere with the due course of justice or the lawful process of the Court is a Contempt of Courts (quoted with approval in Thakur Jugal Kishore Vs. Sitamarhi C.C. Banks Ltd. A.I.R. 1967 S.C. 1494 at 1497).

2. After the proclamation made by the Governor General of India on 22-3- 1912 constituting a separate province called provinces of Bihar and Orissa governed by Governor-General in Council, pursuant to section 113 of the Government of India Act, 1915 read with clause 1 of the Letters Patent, the High Court of Judicature at Patna i.e. to say this Court was erected and established in 1916.

3. Section 108 (1) of the Government of India Act, 1915 runs as follows :-

> "Each High Court may by its own rules provide, as it thinks fit, for the exercise, by one or more Judges, or by division courts constituted by two or more Judges, of the high court, of the original and appellate Jurisdiction vested in the Court."

4. The draft rules of this Court were prepared and considered, passed and directed to be published by the proceedings of a Full Court meeting held on the 1st of March, 1916.

5. Proviso (c) rule 1 (xv) of Part I Chapter II of the rules of this Court reads thus : "Any application in suit, appeal or other proceeding which is pending before a Bench shall be presented to that Bench."

6. This rule clearly recognises the inherent powers of any Bench to entertain motions in regard to the matters which are pending before that Bench.

7. Rule 10 of the Chapter II of the Rules of the High Court runs as follows :-

> "10. Save as provided by Law or by these rules or by an order of the Chief Justice every other case shall be heard by a Bench of two Judges.

8. Rule 10-A in Chapter II was added by another Full Court meeting, held on 31st March, 1916, which runs as follows :-

> "Subject to the provisions of these rules, the Chief Justice shall direct what cases or class of cases shall be placed before each Judge or Bench."

9. A bare perusal of Rules 10 and 10-A aforementioned show that they put an express bar on the powers of the Hon'ble the Chief Justice to do anything in regard to the pending matters before a Bench.

10. With the rise in the number of writ applications in this Court, since around sixties the previous Hon'ble Chief Justices started allotting the cases Act/Subject wise.

11. In view of the resolutions passed by the Chief Justices Conference. the Computer technology entered

this Court which became fully operational during the tenure of our present Hon'ble Chief Justice, who joined on 18th March, 1991. Re-arrangements were made for speedy disposal of writ cases pending 'For admission' before this Court by further feeding of floppiness and getting computerised lists prepared. Different subjects were put under specified groups for taking up Admission of Constitutional cases by the specially constituted Benches by the Hon'ble Chief Justice under Rule 10-A of Chapter II of the rules of the Court. The Hon'ble the Chief Justice by a notice dated 2-12-1991 had notified as follows :- (1) All matters required to be heard on priority basis or as a specially fixed matter must be mentioned before the Bench concerned and not any where else. (2) All matters shall come in the list on the basis of the date of filing, unless ordered otherwise by the particular Bench." Another notice dated 12-10-1991, which was reiterated on 19th October, 1992, was to the following effect : "It is directed that the cases should be mentioned for appropriate orders only before the Bench which has been assigned with the subject in the respective groups. The aforementioned notices were printed in the daily cause lists for the purpose of information to all concerned including us. On the basis of the aforementioned notices Counsel have been mentioning in Court showing urgency to take up the matters and we, after being satisfied, have been issuing directions to place such cases before us on a date fixed by us. It was

detected that some cases belonging to different Acts/Subjects were listed before the Benches consisting of one of us not inseisin of those Acts/Subjects. Repeated orders on the judicial side were passed delisting those cases. Grievances were made by the Bar in some cases that despite our direction they are not being listed. Earlier it was thought that it was a teething problem. & 2 X mas vacations intervened.

12. The Court's list dated 4-1-1993 showed Group No. 7 with which we are concerned presently consisting of the following subjects as having been allotted to us :-

(i) All matters relating to Corporation/Boards.

(ii) Salary.

(iii) Promotion, Excise Act. Absorption, date of Birth, Bank Services and Essential Commodities Act.

13. Group No. 2 inter alia, has been entrusted with the subject 'municipality'.

14. On 19-1-1993 amotion in writing in the pen of Shri Ashok Kumar, Advocate, in C.W.J.C. No. 589 of 1993 was made through Shri Krishna Prakash Sinha, a Senior Counsel of this Court. Relevant part of the motion in writing ran as follows :-

"Since the Patna Municipal Corporation is bent upon to attach and auction the Holding of the petitioner, there-

fore. the matter is urgent and it may be placed for admission tomorrow i.e. on 20- 1-1993 before appropriate Bench."

15. The motion was allowed by us in view of the urgency explained by Mr. Sinha. The following order made by us on 19-1-1993 was recorded by the Bench Clerk :-

"Put up for admission day after tomorrow."

16. There was some inaccuracy in recording our order as we had directed to place that case on 20-1-1993. Our Bench Clerk states that besides sending the motion incorporating our order in the Section, he had also orally informed the S.O.

17. Mr. Krishna Prakash Sinha on 20-1-1993 made yet another motion in the pen of Shri Ashok Kumar, Advocate before us in Court ventilating a grievance that the case has not been listed. We again dictated the following order which stands recorded on the motion .

"Put up tomorrow i.e. on 21-1-1993 for admission."

18. The case unfortunately was not listed again. Again a motion was made by Mr. Sinha ventilating a grievance of non-compliance of direction and his faith having been shaken and felt embarrassed and appreciating the helplessness and anxiety of the learned counsel, we dictated the following order :-

"Civil Revision NO. 39 of 1993 is said to have been converted as C.W.J.C. No. 589 of 1993 (M/S. Pradeep Lamp Works Vs. The Patna Municipal Corporation) pursuant to an order dated 15th January, 1993.

A motion was made before the Bench to place this writ application under the heading for its admission amongst priority cases, on the ground that Patna Municipal Corporation authorities have issued a warrant of attachment and sale of the properties of the writ petitioners.

Accordingly, the Bench had directed to place the said writ application for admission as in Group VII all the matters related to Corporation have been allotted to it. Unfortunately, the office failed to obey the command.

From the enquiry it transpires that this was done on the pretext that this writ application relates to Group II which does not appear to be correct.

Accordingly, the office is directed to place this case under the heading for admission tomorrow amongst priority cases, with a written explanation of the office in this regard."

19. On 22-1-1993 the writ application was listed 'For Admission'. An explanation was furnished by the Contemner, which is on the record. The Contemner showed us a list said to be the the allotments made by the Hon'ble Chief Justice with corrections in red ink. After

perusal we told him that this list has nothing to do with the present list. Then he adopted a peculiar defiant attitude. He did not even tender any apology nor expressed any willingness to comply with our directions in future. We delisted the writ case from our list as we thought proper not to hear that case. We passed the following order separately, while initialling these proceedings :-

"By our direction on a motion made by the learned counsel for the petitioner, we had directed to put up C.W.J.C. No.589 of 1993 on 20th January, 1993.

On 20th of January, 1993, the case, however, was not listed. Another motion was made by the learned counsel on a slip. We again directed to put up this writ application on 21st of of January, 1993.

On 21st of January 1993 when the case was again not listed, we got an inquiry made. The Incharge was summoned by us. He gave an explanation orally. We were not satisfied with his oral explanation and hence we directed that his explanation must be furnished in writing which has been done.

We are anguished to express for the present that our direction was nullified by the Deputy Director of Computer of this Court.

On a bare interpretation ofthe notice as printed in the daily cause list showing assignment of works to

different Benches un- equivocally showed that "all matters of corporation and Board" are to be placed for admission before Group No. 7 i.e. to say our Bench. The aforesaid notice also s ows that Group No. 2 will take up the matters concern:: g 'muncipality'. if the explanation of the office is accepted then we fail to appreciate as to why the matters connected with municipality have been placed before this Bench.

By our judicial orders, when it came to our notice that the cases arising out of municipality matters have been listed, we directed them to go out of our list and be placed before a Bench, which has been assigned Municipality matters under the orders of the Hon'ble C.J. We, therefore. call upon the Deputy Director of Computer to submit a further show cause by Thursday dated 28-1-1993.

Let a separate file be opened and the matter be putin our chambers, if we are not sitting in Court on 29-1-1993 at 2.15 P.M. The D.D.C. is directed to be present in Court at that time."

20. A notice was issued pursuant to which the Contemner appeared on 29-1- 993 and filed a show cause without supported by any affidavit, stating, inter alia, to the effect that the Bench slips in question were not moved or mentioned before the appropriate Bench; that the slips mentioned only before the appropriate Bench are required to be attend to; that only service matters

relating to Municipality, Notified Area Committee, Municipal Corporation and all other Corporation have been/are our assigned subjects; and that on a motion being made before the Hon'ble the Chief Justice, C.W.J.C. No. 589 of 1993 was listed before a Division Bench concerning Group No. 2 which has been assigned with the subject 'Muncipality'.

21. On 29-1-1993, during hearing the Contemner tried to justify his defence He also did not offer any apology and we put certain questions which he answered about which we will refer later on. Finally we passed the following orders :-

"The Contemner is present in Court. The show cause, however, has not been supported by his affidavit. He states that he does not intend to engage any counsel but will defend the motion personally. In this view of the matter, we adjourn this case to Monday next (1-2-1993) giving an opportunity to the contemner to support his show cause by his affidavit.

The Contemner shall remain present in Court on the next date.

We direct that the Court Marshal with necessary police force should be present on that date so that the proceeding could be conducted without any interruption.

Let the Registrar communicated of this direction immediately."

22. The Registrar was informed of our order aforesaid. On 1st February, we resumed the contemner hearing.

23. The contemner appeared and submitted that this proceeding is bad for defect of two necessary parties., namely, Hon'ble the Chief Justice and the Registrar, who should be summoned; that he being staff of the High Court does not come within the purview of the contempt proceeding; that there was no willful disobedience of the directions of this Court; that the proceeding is bad on the ground that the same has not been initiated in his name. that the writ petition arose out of Municipality matters which stands assigned to Group No. 2 and not to Group No. 7. with which we are concerned; that wrong mentioning and orders are not required to be attended by him: that he has been instructed by the Authority not to attend the directions made by the Court which are not inseisin of the subjects and shall not abide by those directions; that he has stopped by and large the corruption prevalent while listing of the cases on account of many Advocates.

24. The contemner also placed reliance on a Division Bench judgment of Calcutta High Court in Sohan Lal Baid Vs. State of West Bengal and others reported in A.I.R. 1990 Calcutta 168 and reiterated that he is not bound by our orders.

25. During hearing we recapitulate what we had

put to the contemner and what he answered :- (i) To the question put to him as to whether he has any authority to disregard or not to obey the command of the directions made by us on the judicial side in Court, he stated that he has instructions from the authority not to regard it. (ii) To the question as to whether he informed the Hon'ble the Chief Justice or to the Registrar of the directions made by us, he stated that he had not informed them. (iii) When we put a question to him that C.W.J.C. No. 589 of 1993 was listed before us ultimately on 22-1-1993, he said that this is not a fact. We got called for the records of the aforementioned writ application and showed him to falsify his stand, then he stated that this has been doen by the Hon'ble the Chief Justice by making it an assigned case. (v) When we pointed out that certain other matters relating to Patna Municipal Corporation has also been listed before us, and accordingly his defence is not correct, he stated that this was because of the mistake committed by his predecessor.

26. The plight of the litigants lawyers and the Court in this regard was noticed by a Division Bench consisting of one of us in two writ petitions filed by two learned Advocates of this Court, when the previous Hon'ble Chief Justice Sri G.G. Sohoni refused to delist their cases from another list of an Hon'ble Judge of this Court on the ground that he has no s[illegible] jurisdiction. The judgment of one of which is reported in 1990 B.B.C.J. 813 (An Advocate Vs. the Registrar, Patna High

Court and others). The ratio laid down therein reportedly stood affirmed by the Hon'ble Supreme Court by the dismissal of the Special Leave Petition of the learned counsel. In paragraph 16 it was observed as follows :-

"The plight of this Court, which is only at the present 11 short of its sanctioned strength, in taking up cases for their Admission/Hearing is no secret. There are cases and cases numbering from 450 plus to 1000 plus writ cases alone before specially constituted 5-6 Division Benches on our daily board, pending merely for their admission alone. Still we entertain a request made by any learned member of the Bar or litigant to take up emergent ones out of turn and we do take up them out of turn, if we really find that there would be a failure of justice."

Rule 10-A Chapter II part I of the Rules of the High Court at Patna, 1916 was also examined and held as follows :-

> * 18. A bare reading of the aforesaid Rule makes it clear that the Chief Justice of this High Court has been vested with the discretionary powers as to what case or class of cases shall be placed before a particular Judge either sitting singly or in Bench Division/Special/Full. *This rule does not permit transfer of cases, already listed before Judge or Judges, or direct placing, on the basis of appearance of a particular counsel in a case or class of cases before any Bench.*" *(Emphasis Supplied).*

26-A. Even the then Nagpur High Court through a Division Bench in Zikar Vs. The Government of State of Madhya Pradesh, reported in A.I.R. 1961 Nagpur 11,

categorically held that the power of the Chief Justice to regulate the sittings of the Court does not include a power to withdraw or transfer a case of which a Division Bench is inseisin; besides, the Hon'ble the Chief Justice as such has no special judicial power although he arranges the sittings of the Court. But it is also a settled practice of ours, when cases are required for the purpose of business of any other Hon'ble Judge, on a request made to us, we release some cases out of our Court.

27. The stand on which the Contemner has disregarded our direction and the grounds alleged by him compels us to examine the constitutional position of the Chief Justice vis-a-vis the other Judges of the High Court :-

(A) Article 216 of the Constitution of India reads thus :-

> "Every High Court shall consist of a Chief Justice and such other Judges as the President may from time to time deem it necessary to appoint."

In State of Uttar Pradesh Vs. Batik Doe Tripathi and another reported in (1978) 2 S.C.C. 102, while interpreting Article 216 of the Constitution the Hon'ble Supreme Court held that *"High Court" under Article 216 means the entire body of Judges appointed to the Court."* Thus by no stretch of imagination it can be conceived that the Chief Justice alone constitutes this Court.

(B) The Special Committee consisting of six Hon'ble Judges (M/S. M.N. Roy. B.C. Basak (our Hon'ble C.J.),

A. Bhattacharjee (present Hon'ble C.J. of Calcutta High Court) G.N. Ray (presently of the Hon'ble Supreme Court), S. Ahmad and L.M. Ghose) of the Calcutta High Court in their report dated 24-8-1990 (whereas the judgment in Sohal Lal Baid relied upon by the Contemner is of 5- 9-1989) in regard to the Arrears Committee, Volume I (popularly known as Malimath Committee) correctly stated their constitutional position as follows :-

"It is fit and proper that the relation between the Chief Justice and the puisne Judges should be proper; otherwise it would act at the detriment of the administration of justice in the State as a whole. As on the one hand the puisne Judges should have proper respect for the Chief Justice, the Chief Justice in his turn should also have proper respect for the puisne Judges.

The Chief Justice is entitled to all co-operation from puisne Judges and the puisne Judges are also entitled to all co- operation from the Chief Justice. The constitution a provision regarding the Chief Justice does not entitle him to exercise administrative supervision of the judicial work of the puisne Judges or their performance. He is merely the Chief among the equals. The Chief Justice has merely some various administrative powers and duties which the puisne Judges do not have. *A judicial work of a puisne Judge can only be judged judicially*"

(Emphasis alded)

(C) The Hon'ble Supreme Court also through a 4 Judges Bench in *Sub Committee of Judicial Accountability Vs. Union of India & others*, reported in Judgments today 1991(3) S.C. 659, rejected the prayer made for restraining a Judge from discharging judicial functions holding as follows :-

"Indeed, no co-ordinate bench of this Court can even comment upon, let alone sit-in judgment over the discretion exercised or judgment rendered in a *cause or matter before another coordinate bench*."

xxxxx xxx xxxx

"It is for that bench and that bench alone to decide that question. *Judicial propriety and discipline as well as what flows from the* circumstance that each division bench of this Court functions as the *court itself renders any interference by one bench with judicial matter before another lacking as much in propriety as in jurisdiction*."

..... (Emphesis added)

This legal position is also true in relation to the Chief Justice vis-a-vis Judges of the High Courts, Accordingly, the discretions exercised by us in regard to a cause or matter before us cannot be nullified by the Hon'ble Chief Justice either administratively or while sitting in a Division Bench.

28. Now we proceed to consider Sohal Lal Baid's case (supra) relied upon by the Contemner :-

(A) This case has got no application to the facts and circumstances of the instant case. No direction like ours was violated by any one in the Calcutta High Court.

(B) Section 108 (a) of the Government of India Act 1915 was considered by a three Judges Division Bench of the Hon'ble Supreme Court in *National Sewing Thread Co. Limited Vs. James Chadwick and Brothers Limited* reported in A.I.R. 1953 S.C. 357 and it was observed as follows :-

"The Section is an enabling enactment and confers power on the High Courts of making rules for the exercise of their jurisdiction by Single Judges or by division courts. The power conferred by the Section is not circumscribed in any manner whatever and the nature of the power is such that, it had to be conferred by the use of words of the widest amplitude. There could be no particular purpose or object while conferring the power in limiting it qua the jurisdiction already possessed by the High Court, when in the other provisions of the Government of India Act it was contemplated that the existing jurisdiction was subject to the legislative power of the Governor General and the jurisdiction conferred on the High Court was liable to be enlarged modified and curtailed by the Legislature from time to time .... We are, therefore, of the opinion that S. 108 of the Government of India Act, 1915 conferred power on the High Court which that court could exercise from time to

time with reference to its jurisdiction whether existing at the coming into force of the Government of India Act, 1915 or whether conferred on it by any subsequent legislation."

The power permitting exercise by Single Judges, Divisional Courts or Full/Special Benches flows from the Rules framed by this Court and not from its Chief Justice alone though through Rule 10 Chapter II Part I the Full Court had delegated its powers in its Chief Justice for more efficient Administration of justice. This case is no authority to hold that the Chief Justice alone has any inherent power to over rule directions/orders passed over by a Single Judge Court what to talk of those made by the Divisional Courts.

(C) In the State of Maharashtra Vs. Narayan Sham-rao Puranik and others reported in A.I.R. 1982 S.C. 1198 a question arose before a three Judges Division Bench of the Hon'ble Supreme Court about the constitutionality of a notification issud by the Chief Justice of Bombay High Court in exercise of his powers under sub- section (3) of Section 51 of the State Reorganisation Act, 1956 and in that regard it was observed that the power to appoint the sittings of the Judges and Division Courts of the High Court for a new State at places other than the place of the principal seat, is in the unquestioned domain of the Chief Justice, the only condition being that he must act with the approval of the Governor, after clarifying that

there is no territorial bifurcation of the Bombay High Court merely because the Chief Justice by the impugned order issued under sub-sec. (3) of Section 51 of the Act directs that the Judges and Division Courts shall also sit at Aurangabad. This decision has nothing to do with the powers of a High Court vested in it by the authority under section 108(1) of the Government of India Act, 1915.

(D) Article 225 of the Constitution of India runs as follows :-

> "Subject to the provisions of this Constitution and to the provisions of any law of the appropriate Legislature made by virtue of powers conferred on that Legislature by this Constitution, *the jurisdiction of, and the law administered in, any existing High Court, and the respective powers of the Judges thereof in relation to the administration of Justice in the Court, including any power to make rules of Court* and to regulate the sittings of the Court and members thereof sitting alone or in Division Courts, shall be the same as immediately before the commencement of this Constitution:
>
> Provided that any restriction to which the exercise of original jurisdiction by any of the High Courts with respect to any matter concerning the revenue or concerning any act ordered or done in the collection thereof was subject immediately before the commencement of this Constitution shall no longer apply to the exercise of such jurisdiction."
>
> ... . (Emphasis added)

The jurisdiction of the High Court Judges and their powers in relation to the administration of justice, has been left intact, though subject to the provisions of the constitution, and to the provisions of any law of appropriate Legislature made by virtue of the powers con-

ferred on that legislature by this constitution. Their jurisdiction thus cannot be curtailed by the Hon'ble the Chief Justice.

(E) Article 235 of the Constitution of India runs as follows :-

> "The control over district courts and courts subordinate thereto including the posting and promotion of, and the grant of leave to, persons belonging to the judicial service of a State and holding any post inferior to the post of district Judge shall be vested in the High Court, but nothing in this article shall be construed as taking away from any such person any right of appeal which he may under the law regulating the conditions of his service or as authorising the *High Court* to deal with him otherwise then in accordance with the conditions of his service prescribed under such law.

A bare perusal of the aforementioned provision leaves no manner of doubt that the High Court, and not its Chief Justice alone, has got control over the Subordinate Courts .

(F) Even while exercising jurisdiction under Article 229 of the Constitution, to quote the words of the Hon'ble Supreme Court in N.C. Putta Swamy Vs. Hon'ble Chief Justice of Karnataka reported in A.I.R. 1991 S.C. 299, "the Chief Justice or any other Administrative Judge is not an absolute ruler. Nor he is free wheeler."

(G) Section 108(2) of the Government of India Act authorise the Hon'ble the Chief Justice to determine only as to which Judge in each case, is to sit alone, or in a Divisional Court or in Full/Special Bench.

(H) Judgment in Sohan Lal Baid's case (Supra) was rendered on 5- 9-1989 whereas the constitutional position of the Chief Justice vis-a-vis Judge of a High Court was correctly stated later on by the Special Committee in its report dated 24-8-1990, extracted as above, which also stands fully supported in Sub Committee of Judicial Accountability (Supra).

(I) In the case reported in A.I.R. 1962 S.C. 876 it was held that Chief Justice has got inherent jurisdiction to refer a matter to a more larger bench. However the Chief Justice has got no jurisdiction to send back any case to a Single Bench or Divisional Bench when that Bench refers a case by a judicial order for its adjudication by a Full or Special Bench.

(J) Under section 108(1) of the Government of India Act, 1915 this Court had framed Rules vesting powers in the Hon'ble the Chief Justice. In 1990 B.B.C.J. 813(Supra) this Court (through one of us) had already said that allotment of cases or class of cases to a Single Judge or a Division Court by its Hon'ble Chief Justices has worked so far and should not be made subject matter of any judicial proceedings, expressing full faith and hope in its Chief Justice.

(K) A five judges' Special Bench decision of Calcutta High Court in *Chairman Budge Budge Municipality Vs. Mongru Mian reported in* A.I.R. 1953 Calcutta, 433 interpreting Section 108 (2) of the Government of India Act,

1915 was not considered in Sohal Lal Baid. The Special Bench speaking through its Chief Justice held as follows :-

" S. 108(2) is the only provision which empowers the Chief Justice to determine what Judge shall sit singly and what Judges shall constitute the Division Courts. That part of the section also is now incorporated in Art. 225. Outside S. 108(2), now Art. 225, there never was and there is not now any other provision which gives power to the Chief Justice to nominate from time to time particular Judges for particular Courts or Benches. It is inconceivable that any Legislative Act should purport to give such power to the Chief Justice in respect of any new jurisdiction that it may confer and no Act has ever sought to do so. When, therefore, a particular Judge sits in a particular Court, he does so under a determination by the Chief Justice, what ever jurisdiction he may exercise and since such determination can only be made under S. 108 (2) now Art. 225, he sits and exercises jurisdiction, pursuant to s. 108. Even if it be conceded that the exercise of a particular jurisdiction may reach the stage of S. 108(1) otherwise than under rules made under that section, it can never reach the stage of S. 108(2). All judgments of Judges of a High Court must therefore, be pursuant to S. 108 in this sense, except in the not easily conceivable case of a Judge or Judges usurping some jurisdiction. Even if a case goes to a single Judge Court or a Division Bench under rules

framed not under S. 108 but under some particular Act, still the particular Judge or Judges sitting in that Court or on that Bench will do so under a determination made under S. 108 (2) and to that extent at least, the judgment must always be pursuant to S. 108".

(L) The Court which passes any interim order alone retains jurisdiction to alter/modify it, unless it is not available. It is also a settled law that the Court also retains jurisdiction to extend time granted by its peremptory orders (See Ramesh Biju Vs. Pashupati Rai reported in A.I.R. 1979 S.C. 1769 paragraph 34). In Harban Singh Vs. State of U.P. reported in 1982 S.C. 849, the Supreme Court laid down that this Court retains and must retain, an interest, power and jurisdiction for dealing with any extraordinary jurisdiction in the larger interest of justice and for preventing menfest injustice being done." What is true of the Supreme Court is also true of this Court. In this view of the matter also the Court retains its jurisdiction to direct placing of such cases in Chambers or in Court in which it had passed orders earlier before it which require modification though after notice to avoid violation of principles of natural justice. In fact this has been the consistant practice of this Court and in this regard no Chief Justice including our present Hon'ble Chief Justice ever raised any finger, like one in Baid's case which is also not a binding precedent on us.

29. This Court being a court of Record has got

ample jurisdiction to punish any one for its contempt to maintain its dignity and not to allow the confidence of the citizens/litigants/counsel/ or any one to be shaken. Section 22 of the Contempt of Courts Act, 1971 which reads "the provisions of this Act shall be in additions to, and not in derogation of, the provisions of any other law relating to Contempt of Courts, "leaves no doubt that the Contempt of Courts Act, 1971 has not done away with the powers vested in this Court by virtue of being a court of record. The following observations of the Hon'ble *Supreme Court in Delhi Judicial Service Association Tis Hazari Court, Delhi* Vs. State of Gujarat and others, reported in A.I.R. 1991 S.C. 2176 in this regard are also relevant :- "Article 129 provides that the Supreme Court shall be a court of record and shall have all the powers of such a Court including the power to punish for contempt of itself. Art. 215 contains similar provision in respect of High Court. Both the Supreme Court as well as High Courts are Courts of record having powers to punish for contempt including the powers to punish for Contempt of itself." (Vide paragraph 19 ..... "Inherent powers of a superior Court of record have remained unaffected even after codification of Contempt of Law." (vide paragraph 26). ..... " The power to punish contempt is vested in the Judges not only for their personal protection but for the protection of public justice, whose interest requires that decency and decorum is preserved in Courts of Justice. Those who

have to discharge duty in a Court of Justice are protected by the law, and shielded in the discharge of their duties, any deliberate interference with the discharge of such duties either in court or outside the Court by attacking the presiding officers of the Court would amount to criminal contempt and the Court must take serious cognizance of such conduct." (vide paragraph 43).

30. This Court has also got ample jurisdiction to award punishment in the form of admonition, warning, severe warning (See the State Vs. *The Editors and Publishers of Eastern Times and* prajatantra reported in A.I.R. 1952 Orissa 318 and *Bijoyananda Vs. Balkrishna* reported in A.I.R. 1953 Orissa 249, *Satinath Sikdar Vs. Ratanmani Naskar* reported in (1911) 14 I C. 808).

31. The allocation of our business by the Hon'ble the Chief Justice gave no doubt in our mind that the words 'all matters relating to Corporation/Boards' vested authority/jurisdiction in us to take up the cases relating to these subjects which covered C.W.J.C. No. 589 of 1993.

32. During his earlier submissions, the Contemner wanted that the Hon'ble the Chief Justice and the Registrar be summoned by us as the violation if any was done by them. By making an oral prayer tosummon the Hon'ble the Chief Justice he had tried to embarass us. Our Full Bench in Harish Vs. Justice Ali Ahmad reported in A.I.R. 1986 Patna, 65 is clear that no contempt

proceeding can be initiated against the Judges of the High Court or of the Supreme Court. None of them has flouted any direction of this Divisional Court. We found no justifiable reason to accept his prayer rather we found the same a misconceived one and rejected orally observing that if he choose to file a written application, the same will be considered in accordance with law. The Contemner, however, did not file such an application.

33. We also do not see any merit in his objection that he has not been impleded by his own name, for the reasons that we had no doubt about his identity and that he also entered appearance and is very much before us.

34. During his submission the Contemner pressed that since he is a staff, therefore, this proceeding is not maintainable. We reject it outright as we see no force in it.

35. The contemner miserably failed to show us that the word 'all matter' in the notice dated 4-1-1993 had any exception. Even assuming that there was any confusion in his mind it was meet and proper for him to draw the attention of this Court and not to sit tight over our repeated directions. On his own statement made before us the Contemner did not inform the Hon'ble the Chief Justice or the Registrar in this matter and, thus, blocked the course of administration of justice.

36. The Contemner failed to convince us as to how other matters concerning Patna Municipal Corpora-

tion were listed before us after X-Mas vacation.

37. We clarify that our repeated directions were not nullified by the Hon'ble the Chief Justice by any executive order or were tried to be ignored, as no sooner the Registrar came to know of the defiance of the Contemner he reportedly appraised the Hon'ble Chief Justice and the case was listed before us.

38. Amidst this judgment, the Contemner tendered apology orally yesterday and filed a supplementary show cause supported by his affidavit today stating as follows :-

1. That the deponent has the highest regard for the dignity of this Hon'ble Court.

2. That the deponent tenders unqualified apology to this Hon'ble Court.

3. That it is stated that earlier the Contemner had filed a show cause petition for his discharge from the Rule of Contempt.

4. That the Contemner after re-thought to the matter does not wish to press this said show cause filed earlier.

5. That the Contemner is an employee of this Hon'ble Court having served this Hon'ble Court for long number of years and has the highest regard and reverence for the orders passed by this Hon'ble Court and sincerely believes in the majesty of law and dignity of this Hon'ble Court.

6. That the Contemner prays for un-qualified apology for any act of ommition and commission on his part being the subject matter of this proceeding."

39. Sri Ganesh Prasad Singh, Sri Rajendra Prasad Singh, learned Senior Counsel. and also a number of other learned counsel including Sri Phulendra Kumar prayed to implied them either in their own individual capacity or as representatives of the Bar stating that reck-

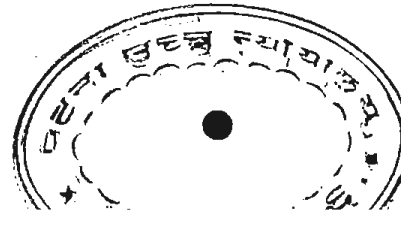
less allegations have been made against the Bar which are all false and that the Contemner himself is corrupt. The Contemner expressed regrets and apologised to the Bar and the matter was treated as closed by the Bar.

40. The question now is as to what we should do with the Contemner. The un-qualified apology came only amidst judgment and not at the earliest. Today the Contemner prays to accept his additional show cause and his un-qualified apology supported by his affidavit.

Remembering the words 'better late than never' and what Shakespeare said in *Othello through* I ago (Act III Scene III) 'I humbly do beseech you of our pardon' treating it to be a sincere, but not to be treated as a precedent, we close this unfortunate chapter and discharge the Rule.

41. Before we part, we hope and trust that now any order/direction passed by any Bench will not be disregarded on the ground as alleged by the Contemner reminding that Judicial Orders/Directions cannot be disregarded in preference to any verbal or written executive instructions. We also direct the Registrar to apprise the Bench of any change in regard to its Subjects to avoid any one's embarrassment. We also clarify that as the subjects are vivid and some topics over lap each other it would be appropriate for the office to apprise the Bench by indicating in writing while placing the cases through an office note.

S.P.J. Order accordingly



fide or in colourable exercies of power and is not based on state ground Page

Ahmad Ali Akhtar & another v. The Union of India and another. (1993), I.L.R. 72. Pat. 331

Wealth Tax Act, 1957 (Central Act No. XXVII of 1957) section 5(1) XXXII Explanations --- provisions of --- business activity of the assessee firm not being an industrial under taking, whether can claim exemption under the provisions of clause (XXXII) of sub section (1) of section 5 of the Wealth Tax, 1957.

The construction of buildings, roads, drains etc. being immovable properties, on the face of it are not embraced by the expression "manufacture or processing of goods" in explanation to clause (xxxi) of sub-section (1) of section 5 of the Wealth Tax Act, 1957.

Held, that the business activities of the firm, cannot be said to be that of an industrial undertaking and, as such the assessee cannot claim exemption under clause (xxxii) of sub-section (1) of section 5 of the Wealth Tax Act.

Held, further, that the manufacturing of brick for execution of the work contract is wholly inconsequential for determination of the issue involved because it is merely an ancillary or incidental activity.

Commissionar of wealth tax, Bihar-II, Ranchi V.Shree Kishori Lal Agrawal, Jugsalai, Jamshedpur (1993) I.L.R. 72 Pat ..... - - - - 276

TAX CASE

Before Gopichand Bharuka &
S.K. Chattopadhyaya, JJ.

1993

January, 7

Commissioner of Wealth-tax, Bihar-II, Ranchi.[1]

v.

Shri Kishorilal Agrawal, Jugsalai, Jamshedpur.

Wealth Tax Act, 1957 (Central Act no. XXVII of 1957) section 5 (1) Explanations -- provisions of --- business activity of the assessee firm not being an industrial under taking, whether can claim exemption under the provisions of clause (xxxii) of sub-section (1) of section 5 of the Wealth Tax, 1957.

The construction of buildings, roads, drains etc. being immovable properties, on the face of it are not embraced by the expression "manufacture or processing of goods" in Explanation to clause (xxxi) of sub-section (1) of section 5 of the Wealth Tax Act.

Held, that the business activities of the firm, cannot be said to be that of an industrial undertaking and as

1. Taxation Case No. 59 of 1981 . Statement of case under section 27(1) of the Wealth-tax Act, 1957 by the Income-tax Appellate Tribunal, Patna Bench, Patna. In the matter of assessment of Wealth-tax on Shri Kishorilal Agrawal, Jugasalai, Jamshedpur for the assessment year 1975-76.

such the assessee cannot claim exemption under clause (xxxii) of subsection (1) of section 5 of the Wealth Tax Act.

Held, further, that the manufacturing of brick for execution of the work contract is wholly inconsequential for determination of the issue involve because it is merely an ancillary or incidental activity.

Statement of case under section 27(1) of the Wealth Tax Act. 1957.

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

Sri B. P. Rajgarhia & Sri S. K. Sharan for applicant.

Sri K. N. Jain, Sri S. K. Narayan & Sri Shambhu Sharan for the respondents.

G.C. Bharuka, J. — In this reference made under section 27(1) of the Wealth-tax Act, 1957 (in short 'the act' hereinafter) relating to the assessment year 1975-76 the following question of law has been referred by the Tribunal for the opinion of this Court:

> "Whether on the facts and in the circumstances of the case, the Tribunal was correct in holding that the firm M/s Agrawal & Company in which the assessee was a partner was an industrial undertking within the meaning of section 5 (1) (xxxii) of the wealth-tax Act, 1957."

2. The assessee is a partner in a firm M/s Agiwal & Company. The said firm acts as a civil contrac-

tor engaged in construction of road, building and drains. The assessee claimed exemption under section 5(1) (xxxii) of the Act of the value of the interest in the asssets of the firm on the ground that the entire assets of the firm form part of an industrial undertaking belonging to the firm. The value of the assessee's interest in assets of the firm was Rs. 1,40,000/- . The Wealth-Tax officer being not satisfied with the claim, refused to grant exemption. The assessee's appeal to Appellate Assistant Commissioner failed. But on Second appeal the Tribunal accepted the claim by relying on a decision of Delhi High Court in the case of *National Projects Construction Corporation Limited v. CWT, (1969) 74 ITR 465.*

3. We have heard Mr. Vidyarthi for the Revenue and Mr. Jain, learned counsel appearing on behalf of the assessee. Their submissions are primarily based on the interpretation of the explanation appended to clause (xxxi) and clause (xxxii) of section 5(1) of the Act, which reads as under :

> " Section 5(1) Subject to the provisions of sub-section (1A), Wealth-tax shall not be payable by an assessee in respect of the following assets, and such assets shall not be included in the net wealth of the assessee -
>
> *** *** ***
>
> *** *** ***
>
> (xxxi) the value, as determined in the prescribed manner, of assets (not being any land or building or any rights in any land or building or any asset referred to in any other clause of this subsection) forming part of an industrial undertaking belonging to the assessee.

Explanation : For the purposes of clause (xxxi). this clause, clause (xxxii) and clause (xxxiv), the term "industrial undertaking" means an undertaking engaged in the business of generation or distribution of electricity or any other form of power or in the construction of ships or in the manufacture or processing of goods or in mining .

(xxxii) the value, as determined in the prescribed manner, of the interest of the assessee in the assets (not being any land or building or any rights in any land or building or any asset referred to in any other clause of this sub-section) forming part of an industrial undetaking belonging to a firm or an association of persons of which the assessee is a partner or, as the case may be, a member,

From clause (xxxii) quoted above, it is clear that an assessee being a partner in the firm can successfully claim exemption under the said clause only if the assets of the firm form part of an industrial undertaking belonging to the firm. " Industrial undertaking" as defined under the explanation, quoted above, means an undertaking engaged in the business of (1) generation or distribution of electricity or any other form of power, or, (ii) in the construction of ships, or, (iii) in the manufacture or processing of goods or (iv) in mining.

4. In the present case the business of the firm is that of constructing buildings, road, drains etc. and in that process it also manufactures bricks for consumption in the execution of works contracts. Though the exact value of the bricks manufactured has not been brought on record, but it has been noticed in the order of the Appellate Assistant Commissioner that it forms negligible part of the total turnover of the firm of the assessee.

5. Be that as it may, it cannot be doubted that construction of immovable properties like building, road, drains etc. cannot either in the legal sense or in common parlance can amount to manufacture or processing of goods. 'Goods" in the legal sense as defined in the Sales of Goods Act inter alia means every kind of movable property other than actionable claims and money.

6. In the case of *State of Madras vs. G. Dunkerlay & Co.*, AIR 1958 S.C. 560, Pr. 33 at p.573 it has been held that :

" If the words "Sales of goods" have to be interpreted in their legal sense, that sense can only be what it has in the law relating to sale of goods. The ratio of the rule of interpretation that words of legal import occuring in a statute should be construed in their legal sense is that those words have, in law, acquired a definite and precise sense, and that, accordingly, the Legislature must be taken to have intended that they should be understood in that sense."

7. Therefore, the construction of buildings, roads, drains etc. being immovable properties, on the face of it are not embraced by the expression "manufacture or processing of goods". As such, the business activities of the firm cannot be said to be that of an industrial undertaking within the meaning of the statutory definition. The manufacturing of bricks for execution of the work contract is wholly inconsequential for determina-

tion of the issue involved because it is merely an ancillary or incidental activity. The same view has been taken by the Gurajat High Court in a recent case reported in (1992) 196 ITR 44 *(Smt. Shantaban Chinubhai* v. *CWT)* by placing reliance the decision of the Delhi High Court in the case of CIT v. *Minocha Brothers P. Ltd.*, reported in (1986) 160 ITR 134. The Delhi High Court itself has distinguished its earlier Judgment in the case of National Projects construction corporation Limited (Supra) while considering a question identical to one at hand.

8. In view of the discussions made above, the question involved is answered in negative and against the assessee. There will be no order as to costs.

9. Let a copy of this order be sent to the Income-tax Tribunal, Patna Bench, Patna for passing consequential orders.

S.K. Chattopadhyaya, J. I agree

R.D. Question answered.

CIVIL WRIT JURISDICTION

Before S.B. Sinha & G.C. Bharuka, JJ.

1993.

January , 20

Anup Kumar Sinha. [1]

v.

The Rajendra Agriculture University & ors.

Rajendra Agriculture University Act, 1971 (Bihar Act No. VII of 1971) Section 17 and 26(2) --- provisions of --- *Regulation framed by Rajendra Agriculture University* under section 17 --- Regulation 12 note (b) and (c) --- power delegated by Academic Council to University to reduce or cancel number of maximum seat --- Regulation 12 note (c) --- right reserved by University to change number of seats --- section 26 (2) --- whether in emergency the vice-chancellor could exercise the power vested in the University in terms of section 26 (2).

From a persual of the Regulation 12 framed by the Rajendra Agriculture University under the provisions of section 17 of the Rajendra Agriculture University Act, 1987 hereinafter referred to as the Act, it is clear that the Academic Council has already fixed the number of seats in various disciplines. In terms of notes (b) and (c) of Regulation 12 the power has been delegated by the

1 C.W.J. No. 7895 of 1992. In the matter of an application under Articles 226 & 227 of the constitution of India.

Academic Council to the University to reduce or cancel the number of maximum seats . In terms of Note (c) of Regulation 12, a right has also been reserved by the University to change the number of seats in the campus of the University depending upon convenience but not detrimental to the Institution or the State.

Held, that it is clear that the power to increase or decrease the number of seats apart from those which has been fixed by the Academic Council have been delegated to the University itself. If the University could exercise the said power there cannot be any doubt that the Vice-Chancellor of the University can exercise the same power in case of an emergency in terms of section 26(2) of the Act.

The Vice Chancellor of the University decided to increase the number of seats by23 to accomodele the backward category II candidates in view of the Situation arising out of agitation resorted by a section of students resulting in holding up of admission of successful candidates in the University as well as pursuant to the discussions held by the Vice-chancellor of the Rajendra Agriculture University and Birsa Agriculture University with the Minister of Education. As the decision of the Vice Chancellor is subject to the post facto approval of the Academic Council, No illegality can be said to have been committed by the Vice chancellor in this regard.

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 order of the Court.

Mr. V.N. Sinha for the petitioner

Advocate General, Mr. Jyoti and Mr. Mahesh Narain Parbat for the State.

S.B. Sinha & G.C. Bharuka JJ. – This application is directed against an order dated 7th August, 1992 passed by the respondent No.4 whereby the petitioner was directed to appear in the interview seheduled to be held on 25th of August, 1992 provided he belonged to backward class Category II.

2. The fact of the matter lies in a narrow compass.

3. The respondent No. 1 University issued notice in several news papers to the effect that a combined competitive entrance examination would be conducted by the University for admission to B.Sc. Agriculture, Vetenary Surgeon (B.V.Sc and A.H) BISC, Dairy, Technical, B.E Agriculture Engineering. B.Sc. Home Science (for girls only) B.F.Sc, asking persons interested in taking admission in any of the aforementioned courses of studies to apply therefor.

4. For the aforementioned purpose a prospectus was also issued which is contained in Annexure-1 to the writ application.

5. The petitioner pursuant to the said notice applied for .and appeared at the aforementioned com-nbined competitive entrance examination which was held on 10th April, 1992.

6. By reason of the impugned order dated 25th August, 1992, the petitioner was called for in-teview by a letter dated 7th August, 1992 as contained in Annexure-2 to the writ application provided he belonged to Backward Class II Category.

7. The petitioner has contended that as the reservation policy of the state relating to backward Class II category, had not been mentioned in the notice or in the prospectus the purported letter dated 7th August, 1992 as contained in Annexure-2 to the writ application must be held to be wholly illegal and without jurisdiction as interview could not have been granted only to those candidates who belong to backward class II category.

8. A counter affidavit has been filed on behalf of the respondent-University wherein it has been contended that in the application itself infomation had to be given by the candidates as to whether he belonged to Scheduled Caste, schdeuled Tribes and backward class I category or not.

9. It has further been conteneded that 14% seats have been reserved for scheduled caste and 10% for scheduled Tribes and Backward Class-I category.

10. Howerver, after the results were published serious disturbances had been created by a group of students who also submitted a representation demanding that the admissions should be taken in accordance with the resolution of the State Government contained in Circular bearing No. 11-V-1-1022/91 K.V. being memo no. 20 dated 6.2.1992 and owing thereto taking of admission had been postponed by the local college authorities. Subsequently a meeting of the Vice Chancellors and Registrars of the Concerned Universities namely respondent No.1 University and Birsa Agriculture University, Ranchi had been called on 28.7.1992 by the Minister of Agriculture and in the said meeting it was decided that since reservation for admission of B.C.Ii candidates was not provided, the University may call for informtios from the list of suceessful candidates belonging to the general category so as to enable them to identify as to whether any of them belong to B.C. II candidates and admitted 23 candidates in various course mentioned in the light of the aforementioned Govt. circular regarding reservation of seats for admission to professional course.

11. It has been contended that in this context the impugned order as contained in Annexure-2 was issued. The letter dated 24.7.1992 of the Private

Secretary to the Ministety of the Agriculture and the circular issued pursuant thereto is contained in Annexure-R/D to the said counter affidavit.

12. It has been contended that in terms of paragraph 11 of the resolution which is contained in Annexure R/C to the counter affidavit, the reservation policy of the state of Bihar has been given a retrospective effect. It has also been contened that 23 additional seats have been created only for the purpose of giving effect to the said reservation policy of the State of Bihar.

13. An application for amendment of the writ petition was filed by the petitioner on 9.9.92 wherein the state of Bihar was sought to be impleaded as a pary and a prayer was also made that the reservation of the state Government dated 7.2 1992 as contained in Annexure R/C to the counter affidavit filed on behalf of the respondent Univeristy as also the resolution as contained in Annexure-4 there to be quashed.

14. Mr. V.N. sinha, learned counsel appearing on behalf of the petitioner has principally raised three contentions in support of this application.

Firstly the learned counsel submitted that the Vice-Chancellor of the Univrsity had no jurisdiction to create additional seats in as much as the said power under the provisions of the Rajendra Agriculture university Act has to be exercised by the Academic Council of the university alone.

15. The learned counsel further submitted that as in the prospectus or in the notices, no reservation of seats for B.C. category - II candidates was notified, ereation of 23 additional posts only for the said category of candidates and that too without considering as to whether they were economically backward or not must be held to be wholly illegal and without jurisdiction.

16. The learned counsel in this connection has strongly relied upon a decision of the Supreme Court in *M.R. Balaji Vs. State of Mysore and* ors. reported in 1963. Sc. *649 R. Chitralekha Vs. State of Mysore reported* in 1964 S.C. 1823 and *Suresh chandra verma Vs. Chancellor, Nagpur University* reported in 1990 S.C. 2023.

17. The learned counsel next contended that in any event the resolution of the State of Bihar could not have been given a retrospective effect.

18. The learned counsel appearing on behalf of the respondents, on the other hand, inter alia submitted, that the University was bound to given effect to the reservation policy of the State and as by mistake the candidature of B.C. II candidates in the reserved category had not been taken into consideration, the resolution as contained in Annexure-R/C had to be adopted and 23 additional seats had been created in order to diffuse the situation. It has further been contended that as the petitioner did not qualify for admission as a general candidate, he has no locus standing to

question the implementation of the reservation policy of the state by the University and/or creation of 23 seats therefor.

19. Before proceeding to consider the merit of the matter, the following fact may be noticed.

20. The advertisement in question was published in Hindustan Times on 18th December,1991. Admittedly the reservation of seats was made only for scheduled Castes, Scheduled Tribes and Backward Class Annexure 1 categories.

21. Clause 5 of the direction which is a part of the prospectus as contained in Annexure-1 to the writ application provides that if the applicant intends to take benefit of reservation quota then in column No. 10 to his application he must mention as to whether he belonged to scheduled caste, scheduled tribes and backward class I and he must also obtain a certificate from the competent officer in page 2 of the said application.

22. The State Government had issued a circular bearing No. 20 dated. 7.2.92 in terms whereof reservation of admission for various categories of classes had been laid down which is as follows :-

" 1. Scheduled Caste : 14%

2. Scheduled Tribes : 10%

3. Extremely Backward Class : 14%

4. Backward class :	9%
5. Female :	3%
	Total : 50%

23. From a persual of the letter dated 21st July, 1992 issued by Dr. B.B. verma, Associate Dean cum principal addressed to the Vice Chancellor, Rajendra Agricultural University, Bihar Pusa which is contained in Annexure R/B to the counter affidavit, it appears that attention of the Vice-Chancellor was drawn to the fact that a decision had been taken by the academic council in the meeting held in March, 1992 that reservation of various categories backward classes 1 and 2 could be 10% and thus there would be a short fall in 13% of reservation in comparision to the Govt. Circular aforementioned.

24. In that letter it was pointed out :-

" Thus according to the atorresaid Govt. Circular there in short fall 13% if this is follow up the number of candidates to be admitted from Backward class 1 & 2 comes to 19.3 whereas selected list there are only 12 candidates to be admitted. So there is short fall 7 candidates. The members of the admission committe discussed this issue therewere considered the applications submitted by the students alongwith the circular. Since there were problems maintaining law and order as well as to safeguards rights of the classes of students, the

admission has been postponed.

25. Admittedly a meeting was held wherein the Minister of Agriculture and the Vice-Chancellor of the two Agricultural universities participated. There after a resolution dated 7th February, 1992 as contained in Annexure-R/C to the counter affidavit was issued, the relevant clauses whereof are as follows :-

" *Clause* - 5- Atha Rajya Sarkar ne yeha Nirnay Liya hai ki beosayike Sakchnik Sansthono me pravesh hetu ausuchit jati/Jan Jati/Atyant Pichara barg/Pichra barg aweam mahila barg ke nimndikit prqtisat ke liye kor arthik adharl nahi rakha gaya hai.

Anusuchit Jati -	14 Pratisat
Anusuchit Jan Jati	10 Pratisat
Atyant Pichra Barg	14 Pratisat
Pichra barg	9 Pratisat
Mahila Barg	3 Pratisat
Kul Arkshan -	50 Pratisat.

Clasue - 11- Ese Sanklap me liye gaye prowdhan tatkaliak probhav se lagu hoge, tatha jin sansthano me namakan hetu prakshiya/awadhen patra liye ja chuke ho, prantu namakan nahi hua to unpar bhi lagu hòge."

25. It is also admitted that pursuant to the aforementioned resolution, 23 additional seats were

created in order to accommodate the backward category II, candidates.

26. Section 14(3) (iv) of the Rajendra Agriculture University Act, 1971 provides that the powers, functions and duties of the academic council inter alia would be to make regulations regarding the admission of students to the University and determine the number to be admitted. 'Academic Council' has been defined in Section 2(1) of the Act to mean ' Academic Council of the University."

27. Section 13 of the said Act provides that the Academic council shall be incharge of the academic affaris of the university and shall subject to the provisions of the Act and the statutes, superintendent, direct and control and be responsible for the maintenance of standard of institution., education and examination and other matters, connected by the degree etc. The vice chancellor is one of the memebrs of the Academic Council.

28. From a persual of the provisions of the said Act, it is evident that the matter relating to fixing the number of seats can be exercised by the Academic Council.

29. In a supplementary counter affidavit filed on behalf of the University it has been pointed out that in terms of section 6(b) of the said Act, the Academic Council has to determine the number of students and

can be accommodate in the available seats in the university or in a particular college or department. It has been contended that in view of the situation obtaining at the relevant time an emergency arose and the Vice-chancellor exercised his power under Secion 26(2) of the said Act increasing the number of seats subject to the post-facto approval of the Academic Council. The said decision of the Vice-Chancellor is contained in Annexure-E to the supplementary counter affidavit.

30. Mr. Sinha, learned counsel appearing on behalf of the petitioner has raised a contention that the power to fix the number of seats being a legislative power the said power cannot be exercised by the Vice-chancellor in terms of section 26(2) of the Act or otherwise. According to the learned counsel the power or authority derived from the Statute must be exercised in the manner laid down in the Statute itself and thus unless the vice-chancellor was also conferred with the legislative functions, he in exercise of his executive power could not usurp the legislative functions of the academic council.

31. There cannot be any doubt that the legislative functions and the executive functions conferred upon the statutory authorities under the said Act are absolutely different. The legislative functions conferred upon the State or a body of persons have to be exercised by the authority specifically designated in this behalf who if in terms of the legislation itself was empowered to do an

act and such a power of the University that could be exercised by the Vice-chancellor in case and emergency arose. In our opinion, however, the requirements of the law in this case have been fulfilled.

32. In terms of section 17 of the said Act a regulation was framed by the Respondent-University known as Regulations on resident instruction. Rule 12 of the said regulations provides for the number of seats. Regulation 12 reads a sfollows :-

> " Number of seats : The following seats have been allotted to different faculties. They may be changed from time to time as per decision of the University :
>
> *Note* : (b) Number of seats in various post graduate Diploma course offered at different campuses of the University will depend on the nomination made by he State Govt. The University reserves the right to fill or not depending upon the quality of candidates applying for admission. The University also reserves the right to reduce or cancel the number of maximum seats allotted for which no reason will be advanced.
>
> (c) The university also reserves the right to change the number of seats in any campus of the University depending upon its convenience but not detrimental to the institution and the State."

From a perusal of the aforementioned provisions, it is clear that the Academic Council has already fixed the number of seats in various disciplines. In terms of notes (b) and (c) aforementioned power has been delegated by the Academic Council to the University to reduce or cancel the number of maximum seats In terms of Note (c), a right has also been reserved by the University to change the number of seats in the campus of the

University depending upon convenience but not detrimental to the Institution or the State.

It is, therefore, clear that the power to increas or decreas the number of seats apart from those which has been fixed by the Academic Councel have been delegated to the university itself. If the Univrsity could exercise the said power, there cannot be any doubt that the Vice-Chancellor of the University can exercise the same power in case of an emergency in terms of section 26(2) of the said Act.

33. Section 26(2) of the said Act reads as follows

> " The Vice-Chancellor may take any action in any emergency which in his opinion calls for immediate action, and he shall in such case and as soon as may be thereafter, inform the authority which will ordinarily have dealt with the matter. If the authority disagrees with the Vice-chancellor the matter shall be referred to the chancellor " or whose deision shall be final . "

In this case, as noticed hereinbefore the vice chancellor has decided to increase the number of seats by 23 in view of the situation arising out of agitation resorted to by a section of students resulting in holding up of admission of successful candidtes in the University as well as pursuant to the discussions held by the Vice Chancellor of the two Universities with the Minister of Education. As the decision of the Vice- Chancellor is subject to the post-facto approval of the Academic Council, no illegality can be said to have been committed by

the Vice-Chancellor in this regard. Howerver, it goes without saying that the decision of the Vice-Chancellor being subject to thepost facto approval of the Academic Council, in the event the Academic Council negatives the proposal of the Vice-Chancellor, the matter will end there.

34. In this view of the matter the first contention raised by Mr. Sinha has no force.

35. The second contention of Mr. sinha is to the effect that no reservation could have been made for Backward Class Category II candidates as Caste cannot be made the sole basis therefore and that in any event the same will have prospective operation.

36. It is true that the resolution dated 7th February, 1992 as contained in Annexure-R/C to the counter affidavit will have prospective effect, but the said resolution shall have effect on the day on which admission are to be effected. In this view of the matter, although the advertisement had been issued in December, 1991 but as the interview took place after the aforementioned resolution has been issued on 6.2.1992, it will have prospective operation.

37. Article 15 of the constitution of India provides for a reverse discrimination. In terms of clause 4 of Article 15 of the Constitution of India the state is entitled to make special provision for the advancement of the classes mentioned therein.

In M.R. Balaji vs. State of mysore reported in AIR 1963 S.C. 649 upon which a strong reliance has been placed by the larned counsel for the petitioner it has been held that in order to identify a class which would fulfill the conditions of article 15(4) of the constitution of India. They must be both socially and educationally backward.

38. In Balaji's case (Supra) the order of the Mysore Government reserving seats was impugned in court. In that case it was not disputed tht Articles 15(4), 29(2), 46 and 342 form group of articles making special provision for the advancement of any socially and educationally backward classes of citizens in matters of admission to educational institutions but the dispute was about the extent of such special provisions and the tests to be applied for determining backward classes.

With regard to the extent of reservation permitted by Articles 15(4) of the constitution it was held that the same contains special provisions and it would be unreasonable to construe what provision as justifying total reservation of seats for such classes contended by the State.

39. The supreme court howerver, in R. chitralekha vs. State of Mysore, reported in 1964 S.C. 1823 explained Balaji's case by saying that caste was one of the relevant factors for determing socially backwardness of the citizens.

40. However, in Minor A. Perriakaruppan vs. State of Tamil Nadu and others reported in AIR 1971 S.C.

2303 the supreme court upon consideration of Balaji's case. Chitralekha's case and other decisions upheld the classification of backward classes with reference to caste subsquently in D.N. Chanchala Vs. State of Mysore reported in AIR 1972 S.C. 1762 it sought to distinguish perriakaruppan's case (Supra).

It is, therefore, clear that in a proper writ application wherein the resolution of the State dated 4.2.91 is questioned and a prayer for quashing the said notification is made, this court may consider the said aspect of the matter. Had the petition in the writ application stated the foundational facts therefor and impleaded the concerned respondents as parties, the matter would have been different. Although an application for amendment has been filed, the students who had taken admission, have not been impleaded as parties in the application.

41. Admittedly the petitioner was not selected. he could not compete with the candidates who applied pursuant to the advertisement made in terms of Annexure-1 to the writ application. He did not question the reservation policy of the State so far as backward class I is concerned on the same ground which now he has sought to raise i.e. the criteria adopted by the state with regard to the socially and educationally backward classes who are in category II.

42. The impurnged order dated 7th February, 1992 is not the notificaiton issued by the State Govern-

ment specifying the caste. the members where of would be considered as socially and education auy backward classes but thereby only percentage of reservation had been fixed.

43. In this case it has been found that 23 additional seats had been created in order to give effect of the reservation policy. The said addtional seats had been created for special reasons and for a special purpose. The said students have already been admitted and undergoing studies, Even if the creationof 23 additional seats are struck down by this court, the petitioner would not be benefited thereby in any manner.

44. In this view of the matter, we are of the opinion that the students, who had already been admitted, in the interest of justice should be allowerd to continue their studies. In *Chairman Combined Entrance Examination Vs. Orisa* Osiris Das reported in 1992(3) S.C.C. 543 the Supreme Court although struck down the reservation of 50% of seats. Over and above sanctioned strength of the seats for sons and children of the employee of the instiutions as it was held :-

" Even though we have set aside the interim order of the High Court, we are of the opinion that having regard to the facts and circumstances of the case it would not be in the interest of justice to debar the respondent -students now who had been admitted and are undergoing their studies in the University. The Univer-

sity has been granting reservation in favour of sons and wards of its employees for the last 25 years and even for the session 1990-91 the University had published the brochure wherein it had issued, information to the effect that 5 percent of the seats were reserved for the sons and wards of the employees of the University. It is in this background that the respondent-students appeared at the examination on the representation made by the University and they did not seek admission else where. Moreover the University has been perisisting in its stand to implement the reservation in favour of the sons and wards of its employees. it was only in October, 1990 that the University decided to fall in line with other institutions. During all this period the respondent-students were kept hanging on the hope that they would be considered for admission against the reserved quota. They delay in taking final decision by the University created a situation where respondent-students would not pursue their study elsewhere. The students who have been admitted under orders of the High Court and are pursuing their studies under the order of the High court, are (1) Sanjeev Kumar Singh (2) Rishabh vats (3) Km. Salma Rizvi, (4) Km. Alka Srivastava (5) Chandra Shekhar (6) Ajay Gupta (7) Anup Bhat and (8) Neeteesh Sood. We are, therefore of th eopinion that the university and other authorities will allow the aforesaid eight respondents-students to pursue the studies and appear at the examination treating them to be regular students. We

would, however, like to make it further clear this order is being passed in the special facts and circumstances of this case, which will not be treated as a prercendent and no other students will be entitled to any claim or right of admission against the aforesaid reserved quota for th esons and wards of the employees of the University."

45. In terms of Regulations 8 of the Act, the University was also bound to give effect to the policy decision adopted by the State in this behalf from time to time.

46. For the reasons aforementioned, in our opinion, it is not necessary to consider the larger question raised by Mr. V.N. Sinha.

47. However, it goes without saying that in a proper case this court may examine the said question.

48. This application is dismissed with the aforementioned observations, but without any order as to costs.

R. D. Application dismissed

CIVIL WRIT JURISDICTION

Before S.B. Sinha & G.C. Bharuka, JJ.

1993

January,20

Mannu Kumar.[1]

v

The State of Bihar & others.

Service --- recruitment rules not followed and appointment by a person not competent therefor ------- principles of natural justice, whether to be complied with before passing the order cancelling the appointment.

Held, where in the matter of appointment of the petitioner the procedures of recruitments had not been followed at all and he was appointed by a person not competent therefor the principles of natural justice of giving an oral hearing to the petitioner prior to issuance of the impugned order cancelling the appointment of the petitioner are not required to be complied with.

Case laws discussed.

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

Mr Rabindra Nath Verma & Amresh Kumar Lal for the petitioner.

Mr. R.A. Singh G.P.5. for the State

S. B. Sinha & G. C. Bharuka JJ— In this application

1 C W. J..C. No 8352/92. In the matter of an application under Articles 226 and 227 of the Constitution of India

the petitioner has prayed for quashing of an order as contained in Memo No 3936 dated 30.6.1992 whereby and whereunder the appointment of the petitioner in the post of Graduate Physical Training Teachers in Anuchit Jan Jati Awasiya uchcha Vidyalaya, Nima, Katihar has been cancelled and also for quashing of the order whereby he has been directed to refund a sum of Rs. 12,127.60 paise.

2. The fact of the matter lies in a very narrow compass.

3. The petitioner filed an application before the Director Welfare, Government of Bihar for his appointment as a Graduate Physicial training teacher in the school in question.

4. The Minister Incharge, Tribal Welfare, made an endoresment to the respondent No.3 on 21.8.1991 for his appointment in the said school. The said application of the petitioner was thereafter forwarded by the Assistant Director, welfare, vide his memo No. 6204 dated 1.10.1991 with a direction to take necessary steps for his appointment.

5. The petitioner on 27.12.1991 again filed an application before the Minister - Incharge, Tribal Welfare Department, stating therein that only the Director welfare was competent to appoint Graduate trained physical training teachers. On that application the Minister-Incharge, Tribal welfare by an order dated 16.1.1992

directed the District Welfare Officer, Katihar to appoint the petitioner on the vacant post.

6. The District welfare officer pursuant to the aforementioned direction appointed the petitioner in the school by a letter dated 17.1.1992. The said offer of appointment is contained in Annexure-6 to the writ application.

7. The petitioner joined the said school on 22.1.92. The petitioner however, has not been paid his salary from June, 1992. The Petitioner submitted an application on 25.2.1992 for regularisation of his appointment and upon that again an endorsement in favour of the petitioner had been made by the Minister.

8. The Director Welfare, Department, however by his letter dated 18.4.1992 directed the petitioner to show cause as to why he should not be removed from the said post as his appointment was illegal. A copy of the letter is contained in Annexure-10 to the writ application.

The petitioner submitted his show cause to the respondent No. 3 on 8.6.1992, a copy whereof is contained in Annexure-11 to the writ application.

9. The petitioner's appointment has been cancelled and pursuant thereto the Headmaster of the said school has directed the petitioner to refund sum of Rs. 12,127.50 paise on the ground that his appointment has been cancelled with effect from the date of appointment.

10. The learned counsel appearing on behalf of the petitionar has submitted that prior to issuance of the impugned order, he was entitled to an oral hearing. He has further submitted that the grounds mentioned in the show cause notice and the grounds mentioned in the impugned order vary and in that view of the matter too, the impugned order must held to be illegal.

The learned counsel further submitted that in any event, the petitioners application or regularisation should have been considered by the respondent.

The learned counsel in support of his contention relied upon a decision of the Sureme Court of India in *Shrawan Kumar Jha Vs. State of Bihar* reported in AIR 1991 S.C. 309.

11. In this case a counter affidavit has been filed on behalf of the respondent Nos. 2 to 4 wherein it has inter alia been contended that the petitioner's appointment was wholly illegal and void abinitio.

12. According to the respondents as soon as the illegal appointment was made, known to the District Welfare officer, he immediately took action in the matter. According to the respondent the petitioner had been appointed without observing the rules and procedures laid down by the State and further the said appointment had been made by an authortity who was not competent therefor.

13. It is one of those cases which depicts a sordid state of affairs prevailing in the state of Bihar and demonstrate as to how the back-door appointments are made.

14. From the facts as stated hereinbefore, it is evident that the petitioner himself has admitted that the District Welfare officer had no jurisdiction to appoint him in the scale of pay of Graduate Physical Trained Teacher.

15. The Director, Welfare in his show cause notice asked for the petitioner's explanation on the following points :- (1) The Distric welfare officer has not been delegated with any power to appoint a physical trained Teacher (ii) for such appointment a Divisional level committee has been constituted whose Chairman is Deputy Director Welfare, but he was not selected by the said committee (iii) In his appointment the procedures laid down by the state had not been followed (iv) In his appointment, the rule of roster has not been followed (v) No advertisement had been issued prior to his appointment.

16. The petitioner in his explanation with regard to Issue no. 1 admitted that he was appointed pursuant to the direction of the Minister of Welfare. He however, submitted that the matter as to whether the District Welfare Officer had power to appoint him or not is his departmental responsibility and therefore no explanation should have been asked for from him.

17. With regard to point no. 2 he stated that pursuant to the Directors order the matter should have been placed before the Selection Committee but the same had not been done .

18. He accepted the fact that he filed an application before the Minister, Welfare straight way but he stated that he did so pursuant to the oral order of the Director.

19. With regard to point no. 3, he stated that it was for the Deputy Director, Welfare to follow the procedure for appointment as laid down by the State.

20. With regard to point no. 4, he stated that for non- observance of the roaster also, the Deputy Director, Welfare, is responsible.

21. With regard to issue no. 6,he admitted that no advertisement had been issued, but according to him even in the said matter the Deputy Director, Welfare was responsible.

22. The petitioner, therefore admitted that he was appointed pursuant to the direction of the Minister, Welfare and not upon following the recruitment rules and the provisions of Article 16 of the Constitution of India. He as indicated herein before, further admitted that he was not appointed by the Competent authority.

23. The Director, Welfare, did not find the explanation of the petitioner satisfactory. He further held

that the High-Court had also passed an order of injunction restraining the State to fill up the vacant post in residential schools run by the Welfare Department and as such the appointment was illegal as the same had been done in vio ation of the High-Court's order.

24. It is, therefore, clear that prior to the appointment of the petitioner neither any provisions of the recruitment rules had been followed nor the provisions of Article 16 had been complied with.

25. It has been held by this court on a number of occassion that in such a matter even principles of natural justice are not required to be complied with. In this case, the petitioner himself has accepted that his appointment was illegal.

26. In Bijoy Kumar Bharti Vs. State of Bihar reported in 1983 BLJR 536, it has been held where the appointment is illegal that the principles of natural justice are not required to be complied.

27. In M.L.Gupta Vs. Instrumentation Ltd. and ors. reported in 1992(1) PLJR 137, upon taking into consideration various decissions of the Supreme Court and this court, it has been held:-

"Article 16 of the constitution of India provides that all citizens of India are entitled to get equal opportunity for the purpose of obtaining employment in state Service.

In order to fulfill such a condition, it is necessary to

consider the cases of all Citizens who are eligible to be appointed. For that purpose it is not only necessary to call for the names from Employment Exchange, but the same in some cases also requires due advertisment of posts in newspaper by notifying the vacancies and the requisite qualification therefore so that all eligible candidates may apply for their appointment in the said posts."

It was further observed : –

"From the decissions of the Supreme Court as also of this court, as refered to herein before, it will thus be evident, that any appointment which was made by a person having no authority to do so or the appointments have not been made following the mandatory provision of the recruitment rules and Article 14 and 16 of the Constitution. Such appointments should be held to a nullity. In this view of the matter, in my opinion, this court in exercise of its writ jurisdication cannot direct regularisation of the services of the employees when the same would be violative of Articles 14 and 16 of the constitution."

28. The principles of natural justice as is well known is based upon two basic principles viz audi alteram Partem and Nemo Debitro Esses Judex in propriea causa. The principles of natural justice have been developed by the apex court from time to time adding new concepts therein. In some decissions the

apex court has gone to the extent holding that the principles of natural justice are embodied in Article 14 of the constitution of India.

29. The supereme Court in *Tulsi Raj Patel Vs. Union of India* reported in 1985 s.c 1416 traced the history of the principles of natural justice in paragraphs 72 to 80 of the judgment and thereafter, discussed various principles involved therein in paragraphs 81 to 83 thereof.

The supreme court thereafter proceeded to consider the question as to how the said provision have been interpreatered by the courts

The supreme court held : —

"The principles of natural justice have thus come to be recognised as being a part of the grarantee contained in Article 14 because of the new and dynamic interpretation given by this court to the concept of equality which the subject matter of that article." Shortly, put the syllogism runs thus : violation of a rule of natural justice results in arbitratriess which is the same as discrimination where discrimination is the result of state action. It is a violation of Article 14. Article 14 however is not the sole repository of the principles of natural justice. What it does is to guarantee that any law or state section violating them will be strudk down. The principles of natural justice however, apply not only to legislation and state action but also where any trifuned authority or body of man.

not coming within the definition of "State" in Articles 12, is charged with the duty of deciding a matter. In such a case, the principles of natural justice required that it must decide such matter fairly and impartially."

However, it was held that observance of principles of natural justice can be excluded by a statute either expressly or by necessary implication.

30. In *Union of India Vs. J.N. Sinha* reported in AIR 1971 S.C. 40, it has been held :-

" But if on the other hand, a statutory provision either specific or by necessary implication excludes the application of any or all the rules of principles of natural justice then the court cannot ignore the mandate of the Legislature of the statutory authority and read into the concerned provision the principles of natural justice. Whether the exercise of power conferred should be made in accordance with any of the principles of natural justice or not depends upon the express words of the provision conferring the power, the nature of the power conferred, the purposes for which it is conferred and the effect of exercisee of that power."

31. Reference in this connection may also be made to *R.S. Das Vs. Union of India* reported in AIR 1987 S.C. 593.

32. However, it is well known that there are certain exceptions to the principles of natural justice. In

case of Maharashtra Board of Secondary and High Secondary Education vs. K. S. Gandhi and others reported in 1991 (2) S. C. C. 716 it has been held:-

" From this perspective, the question is whether omission to record reasons vitiates the impugned order or is in violation of the principles of natural justice. The omniprasence and omniscience (SIC) of the principles of n .ural justice Acts as deterrence to arrive at arbitrary decision in flagrant infraction of fair play. But the applicability of the principles of natural justice is not a rule of thumb or a strait jacket formula as an abstract proposition of law. It depends on the facts of the case, nature of the inquiry and the effect of the order-decision on the rights of the person and attendant circumstances."

33. In Ex-Capt. *K. Balasubramanian & anr. Vs. State of Tamil Nadu* and ano. reported in 1991(2) S.C. 708 it has been held that priciples of natural justice need not be complied with when the order does not involve civil consequences.

In *Baikuntha Nath Das Vs. Chief Distt. Medical officer* reported in 1992(2) S.C.C. 299, it has been held that the principle of natural justice are not required to be complied with in a case of compulsory retirement.

34. In *Ram Krishan Verma Vs. State of U.P.* reported in 1992(2) S.C.C. 620, it has been held :-

"The 50 operators including the appellants/private

operators have been running their stage carriages by blatant abuse of the process of the court by delaying the hearing as directed in Jewan Nath Wahai case and the High Court earlier thereto. As a fact, on the expiry of the initial period of grant after September, 29, 1959 they lost the right to obtain renewal or to play their vahicles, as this court declared the scheme to be operative. However, by sheer abuse of the process of law they are continuing to ply their vehicles pending hearing of the objection this court in Grindlays Bank Ltd. V. ITO held that the High Court while exercising its power under Article 226 the interest of justice requires that any undeserved or unfair advantage gained by a party invoking the jurisdiction of the court must be neutrallised. It was further held that the institution of the litigation by it should not be permitted to confer an unfair advantage on the party responsible for it. In the light of that law and in view of the power under Article 142(1) of the constitution this court, while exercising its jurisdiction would do complete justice and neutralise the unfair advantage gained by the 50 operators including the appellants in dragging the litigation to run the stage carriages on the approved route of area or promotion thereof and forfeited their right to hearing of the objection filed by them to the draft scheme dated February, 26, 1959. Moreover, since this court in Jewan nath Wahai case upheld the approved scheme and held to be operative, the hearing of their objections would be a procedural formality with no tan-

gible result. Therefore the objections outlived their purpose. They are, therefore not entitled to any hearing before the hearing authority."

35. In *S.L. Kappor Vs. Jagmohan* reported in AIR 1981 S.C. 136, the supreme court held :-

" As we have said earlier whereon the admitted and undisputable facts only one conclusion is possible and under the law only one penalty is permissible, the court may not issue its writ to compel the observance of natural justice, not because it is not necessary to observe natural justice but because courts do not issue futile writs."

36. The decision in *Sharwan Kmar Jha Vs. the State of Bihar and others* reported in AIR 1991 S.C. 309 has no application in the facts and circumstances of the case.

In that case a disputed question of fact arose on several counts including (i) as to whether the District welfare Officer was competent to appoint the petitioner thereof, (ii) whether the petitioner joined the post or not and (iii) whether the procedure for recruitment had been followed or not.

37. In the peculiar facts and circumstances of the case, the supreme court held that the principles of natural justice should have been complied with.

38. *Sharwan Kumar Jha's* case (Supra) is not an authority for the propositon that the principles of natural

justice are required to be complied with even in cases the appointment has been made in complete violation of the recruiments rules and/or Article 16 of the constitution of India. In any event as noticed hereinbefore, the petitioner had been given resonable opportunity of hearing, and thus he was not entitled to any further hearing or oral hearing as a matter of right. In this case, the question of a giving an oral hearing to the petitioner did not also arise inasmuch as the petitioner admitted the allegations made by the Director Welfare that in the matter of his appointment the procedures of recruitments had not been followed at all and he was appointed by a person not competent therefor.

39. It is really a matter of great concern of the Ministers who are custodians of law. It is high time that the Ministers of the State of Bihar as well as the other officers whould realise that they are governed by the rule of law. Rule of men which the concerned ministers are following, has no place in a democratic set -up.

40. Normally in such a case this court directs payment of salary for the period the concerned employee was in service although his appointment is illegal but the present case is such a blatent one in which we refuse to exercise out discretion to give any relief whatsoever to the petitioner in exercise of our jurisdiction under Article 226 of the Constitution of India. It will however be open to the petitioner to file a suit against the Deputy

Welfare Officer and the Minister concerned for realisation of his dues and/or damages.

41. We may further observe that our judicial experience that Article 16 is observed more in its breach in this state is highlighted in this case.

In this case appointments have not been made even for a temporary period. It is one of such cases where the recruitment rules and Article 16 have been breached with such impunity that one cannot possiblly ignore the phenomenon.

This aspect of the matter has also been considered by the Supreme Court in two recent decissions :-

"The phenomenon has recently been noticed by the apex court in two cases . In Delhi Development Horticulture Employees Union V.Delhi Admnistration ,Delhi and others(1992 (1) Judgment Today ,394),it has been observed :

" We may take note of the pernicious consequences to which the direction or rgularisation of workman on the only ground that they have put in work for 240 or more days, has been leading. Although there is employment Exchange Act which requires recruitment on the basis of registration in the Employment Exchange, it has become a common practice to ignore the Employment Exchange and the persons registere in the employment Exchanges, and to employ an get employed directly those who are

either not registered with the Employment Exchange or who though registered are lower in the long waiting list in the Employment Register. The courts can take judicial notice of the fact that such employment is sought and given directly for various illegal considerations including money. The employment is given first for temporary periods with technical breaks to circumvent the relevant rules, and is continued for 240 or more days with a view to give the benefit of regularisation knowing the judical trened that those who have completed 240 or more days are directed to be automatically regularised. A good deal of illegal employment market has developed resulting in a new source of corruption and frustration of those who are waiting at the Empoloyment Exchange for years. Not all those who gain such backdoor entry in the employment are in need of the particular jobs. Though already employed else where, they join the jobs for better and secured prospects. That is why most of the cases which come to the courts are of employment in Government Departments, Public Undertakings or Agencies. Ultimately it is the people who bear the heavy burden of the surplus labour. The other equally injurious effect of indiscriminate regularisation has been that many of the agencies have stopped undertakings casual or temporary works though they are urgent and essental for fear that those who are employed on such works are required to be continued for 240 or more days have to be absorbed as regular employee although the works are time bound

and there is no need of the workmen beyond the completion of the works undertaken. The public interets are thus jeopardised on both counts."

In Karnataka State Private Colleges stop Gap Lecturers Association V. State of karnataka & ors. (1972) 2 S.C. 29, similar feeling of anguish has been expressed in these words :-

' Adhoc appointments, a convenient way of entry usually from backdoor, at times even in disregard of rules and regulations, are comparatively recent innovation to the service jurisprudence. They are individual problems to begain with, become a family problem with passage of time and end with human problem in court of law. It is unjust and unfair to those who are lesser fortunate in society with little or no approach even though better qualified, more meritorois and well deserving. The infection is widespread in Government or semi-Government departments or State financed institutions. It arises either because the appointing authority resorts toit deliberately as a favour or to accommodate some one or for any extranuous reasons ignoring the regular procedure provided for recruitment as a pretext under emergency measure or to avoid loss of work etc. or the rules of circulars issued by the department itself empower the authority to do so as a stop gap arraangement. The former is an abuse of power it is unpardonable. Even if it is found to have been resorted to as a genuine

emergency measure the courts should be reluctant to grant indulgence. Later gives rise to equities which have bothered courts every now and then."

42. This aspect of the matter has also been dealt with by this court in sitaram Thakur and ors. Vs. State of Bihar in CWJC No. 9941 of 1992.

43. For the reasons aforementioned, this application is dismissed with the aofrementioned observations.

44. However, in the facts and circumstances of the case, there will be no order as to costs.

S.P.J. Application dismissed

CIVIL WRIT JURISDICTION

Before S.B. Sinha, J.

1993

February, 4

Birendra Missir and others.

v

The State of Bihar & others.

Bihar Land Reforms (Fixation of Ceiling Area and Acquisition of surplus Land) Act, 1961 (Bihar Act No. XII of 1962), section 15 (1) and (3) --- surplus land---declaration if, in terms of section 15(1), and taking of possession in terms of section 15(3), whether subjected to any order to be passed by appellate or revisional authority.

It is now well settled that declaration of surplus lands in terms of section 15(1) as also taking of possession of lands which have been so declared surplus in terms of sub-section 3 of section 15 are subject to any order that may be passed by the appellate or the revisional authority.

Held, therefore, that in the present case in view of the order as contained in annexure 3, the notification issued under section 15(1) of the Act has lost its force and it will now be open to the Collector to consider the rival contensions of the parties afresh and pass & fresh

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1 Civil wirit Jurisdiction Case No.1463 of 1983. In the matter of an application under Articles 226 and 227 of the Constitution of India.

order in accordance with law.

Applicaton 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.B. Sinha, J.

M/s Gopal Pandey and Mangal Pd. Mishra. for the petitioner.

Mr. Hemendra Pd. Singh S.C. for the State

Mr. R. Prasad for the Intervenors.

S.B. Sinha, J. :— This application is directed against an order dated 20.9.1982 passed in Case No. 99 of 1973-74 as contained in Annexure -1 to the writ application as also the notification dated 28.12.1982 issued under section 15(1) of the Bihar Land Reforms (Fixation of Ceiling Area & Acquisition of Surplus Land) Act, 1961, (hereinafter called & referred to as the said Act).

2. In the view of the order proposed to be passed by me it is not necessary to notice the fact of the matter in great details.

3. The petitioners allegedly purchases some lands from the Original land-holder measuring 3 Bighas, 17 Kathas and 18 Dhurs comprising of different plots by reason of two registered deeds of sale dated 6.10.1971 and 30.12.1971.

4. According to the petitioners, at the time of

sale of the said lands, the land-holder declared that no proceeding under the said Act had been pending. The petitioner has further contended that even the Registrar has called for a report from the DCLR andonly upon receipt of the report in that regard the registration of the aforementioned deeds of sale were allowed by the learned sub- registrar.

5. However, in the year, 1973 a proceeding under the said Act was initiated as against the aforementioned Ashik Tiwary. By an order dated 4.5.1982 the "Additional Sub Divisional Officer allotted two units in favour of the said land-holder. The petitioner has contended that prior to passing of the said order, no proceeding under section 5(1) (iii) of the said Act had beeninitiated for cancellation of the aofrementioned two deeeds of sale.

6. It appears that the aforementioned Ashik Tiwary had filled a writ petition in this court which was registered as CWJC No. 1092 of 1993. By an order dated 22.3.1982 the said writ petition was pemitted to be withdrawn in order to enable him to file an appeal. Thereafter an appeal was filed and during the pendeccy thereof, the aforementioned land-holder Ashik Tiwari died. His heirs were thereafter substituted in his place in the said porceeding. The learned court below after hearing the parties by an order dated 24.1.1986 allotted three units in favour of the land-holders. As against the said

order, the State preferred an appeal being Appeal No. 39 of 1986-87. By an orde dated 22.6.1988 the collector allowed the said appeal and remanded the matter to the Collector under the said Act. The heirs and legal representatives of the asfore mentioned Ashik Tiwry who are respondent Nos. 3 to 7 in this application preferred a revision application against the said order and by an order dated 22.6.1988, the learned additional Member Board of Revenue, Bihar Patna remanded the entire matter before the collector of the district.

7. The learned counsel appearing on behalf of the petitioner therefore submitted that in view of the aforementioned order, whch is contained in Annexure 3 to the supplementary affidavit, the petitioner should also be permitted to raise his grievances in the said proceeding. According to the learned counsel in terms of section 9(2) of the said Act, all the lands sold by Ashik Tiwari would be deemed to have been selected by hm and thus if such an order is passed the petitinoer shall not be prejudiced.

8. The learned counsel appearing on behalf of the Intervenor respondent nos. 8 to 24, however, submitted that in the meanwhile, lands have already been distributed in their favour.

9. It is now well known that declaration of surplus landsin tems of section 15(1) of the said act as also taking of possession of land which have been so-

declared surplus in terms of sub-section 3 of section 15 of the said Act are subject to any order that may be passed by the appellate or the revisional authority. In view of the order as contained in Annexure-3 to the writ application, the notification issued under section 15(1) of the said Act has lost its force. It will therefore, now be open to the collector under the said Act to consider the rival contentions of the parties afresh and pass a fresh order in accordance with law.

10. In this case, in my opinion, the learned collector under the said Act before passing a final order may also give an opportunity of hearing toboth the petitioner as also those persons in whose favour the parchas have been distributed.

11. In view of the fact, that the matter is pending for a long time, the Collector under the said Act should dispose of the matter as early as possible and preferably within a period of three months from the date of the receipt of a copy of this order.

12. This appliction is allowed and Annexures 1 and 2 are quashed with the aforementioned observations.

13. However, in the facts and circumstances of the cae, there will be no order as to costs.

M.K.C. Application Allowed

CIVIL WRIT JURISDICTION

Before S.B. Sinha & Radha Mohan Prasad , JJ.

1993

February, 16

Kanhaiya Prasad Sah and ors.[1]

v.

The State of Bihar and ors.

Consent decree --- nature of --- whether binding on a peson who is not a party thereto --- co-sharer --- acquisition of indefeasible title --- ouster of othe co-sharers whether to be pleaded and proved.

It is well known that a consent decree is merely an agreement between the parties to the suit with the seal of the Court superadded to It. A consent decree can be questioned on the same grounds upon which anordinary agreement can be questioned. An agreement merely binds the parties thereto and not others.

Held, therefore that in the present case in that view of the matter, in law, the purported consent decree passed did not bind the petitioner and or their predecessor-in-interest who were not parties to the suit and as such the same was a nullity and inoperative so far as the petitioners are concerned and it was not necessry

1. Civil writ Jurisdiction Case No. 6753 of 1992. In the matter of an application under Articles 226 and 227 of the Constitution of India.

for them to file a suit for setting aside the said decree in as much as it is open to them to question the validity thereof even in a collateral proceeding.

Held, further, the in order to lay a claim with regard to their shares the petitioners were not obliged to show that they were in actual physical possession of the properties. A cosharer can claim exlusive title to the property only by merely remaining in possession thereof for a period of 12 years but, in order to acquire indefeasible title in relation thereto, ouster of the other co-sharers has to be pleaded and proved.

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

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

Mr. Arun Prasad Ambastha for the petitioners

Mr. Ragnit Ahsan, Standing Counsel for the State

S.B.Sinha & Radha Mohan Prasad, JJ. - This application raises a question with regard to the effect of a consent decree in a suit where the petitioners were not the parties.

2. The fact of the matter lies within a very narrow compass. Lakshmi Prasad Sah was the original owner

of the property. He died on 29.3.1964 leaving behind three sons and four daughters. The petitioners no.1 and 3 to 8 are heirs and legal representatives of the three decessed daughters of Lakshmi Prasad Sah and the petitiones no. 2 is one of his daughters. A land ceiling proceeding was initiated as against Jagdish Prasad Sah, who is the son of Late Lakshmi Prasad Sah, and his two brothers. A draft statement under section 10(2) of the Bihar Land Reforms (Fixation of ceiling area and Acquisi tion of Surplus Land) Act, 1961 (hereinafter referred to as the Act') was published. After the draft publication was made, the petitioners filed objection claiming exclusion of lands to the extent of their shares which, according to them, devolved upon them in terms of the provisions of the Hindu succession Act, 1956.

3. The respondent no. 4, by an order dated 4.5.84, rejected the claim of the petitioners, inter alia, on the ground that they had not claimed exclusion of specific plots. The respondent no.4 further held that as their ancestors died 20 years back, they ought to have got their shares demarcated. It was further held that as the sons of the aofrementioned Lakshmi Prasad Sah got the lands partitioned in the year 1969 in Title Petition Suit No. 116/69 wherein the petitioners had not been given any share, their claim cannot be entertained.

4. An appeal was preferred by the petitioners as against the said order which was also dismissed by the

collector, by an order dated 10.7.90. The petitioners then filed a revision applicaton before the Member, Board of Revenue which has also been dismissed by an order dated 12.2.92. The said orders are contained in Annexures 1,2 and 3 to the writ application. During the pendency of the revision application, notifications under section 15(1) of the Act had been published which are contained in Annexure 4 series.

5. Mr. Arun Prasad Ambashtha, the learned Counsel appearing on behalf of the petitioners, has raiseda short question in support of this application. The learned Counsel submitted that in view of the fact that the owner of the land died in the year 1964, the petitioners became his successor-in-interest along with their three brothers and their mother. It has further been submitted that the purported decree passed in the aforementioned Title Partition Suit No.116/69 was merely a consent decree which was also not given effect to.

6. Mr. Raghib Ahsan, the learned Standing Counsel appearing on behalf of the State, on the other hand, submitted that in view of a decree passed by a competent Civil Court, the remedy of the petitioners was to get the aofrementioned decree set aside and/or raise their grievances in a duly constituted civil suit. According to the learned counsel, so long as the decree passed in the aforementioned Title Partition Suit No. 116/69 is not set aside, the petitioners cannot claim any right, title and

interest in relation to the properties of Late Lakshmi Prasad Sah.

7. By reason of the provisions of the Hindu Succession Act, 1956, the daughters of a person dying intestate also inherit along with their brothers and mother in equal shares. Such inheritance of the property is by reason of operation of statute in terms whereof a valid right, title and interest is created in the properties of the land-holder. Admittedly, in the aforementioned Title partition suit No. 116/69, the petitioners were not parties. In that case, a consent decree was passed on the basis of a compromise petition filed by the sons of the aforementioned Lakshmi Prasad Sah.

8. It is well known that a consent decree is merely an agreement between the parties to the suit with the seal of the court superaded to it, Reference in this connection may be made to a decision in the case of Baldevdas Shivlal and another vrs. Filmistan Distributors (India) P. Ltd. and others reported in 1969(2) Supreme court cases 201. that view of the matter, the consent decree can be questioned on the same grounds upon which an ordinary agreement canbe questioned. An agreement merely binds the parties thereto and not others. In this view of the matter, in law, the purported consent decree passed in the aforementioned Title Partition Suit No.116/69 did not bind the petitioners and/or their predecessor-in-interest. The said consent decree, threrefore, was a nullity and inoperative so far as the petitiones are concerned. Thus, it was not necessary for the petitioners to file a suit for setting aside the said decree in as much as it is open to them to question the validity thereof even in a collateral proceed-

ing. There cannot be any doubt that normally a Tribunal could not pase any order which is contrary and/or inconsistent to any decreer passed by a competent Civil Court but the position in this case is entirely different and the fact of the matter is not disputed at all.

9. In order to lay a claim with regard to their shares the petitioners were also not obliged to show that they were in actual pysical possession of the properties in question upon getting the same demarcated as per their share. A co-sharer can claim exclusive title to the property only by merely remaining in possession thereafter for a period of 12 years but, in order to acquire indefeasible title in relation thereto, ouster of the other co-sharers has to be pleaded and proved.

10. In this view of the matter, in our opinion, the authorities under the said Act ought to have considered the claim of the petitioners on its own merits.

11. For the reasons aforementioned, the impugned orders as also the notification cannot be sustained. The collector under the Act may decide the claim of the petitioners after giving notice to the respondents no. 10 and 11.

12. This application is, thus, allowed.

M.K.S. Application Allowed

FULL BENCH

Before B.C. Basak, C.J.N. Pandey & S.K. Singh, JJ.

1993

March

Ahmad Ali Akhtar & another.[1]

v.

The Union of India and another.

Unlawful Activities (Prevention) Act, 1967 (Central Act No. XXXVII of 1967) section 2 (f) (g), sub-section (i) of section 3 and proviso to sub section (3) of section 3 —- provisions of — - notification by the Ministry of Home Affairs declaring the Jammat-E-Islami Hind to be Unlawful Association —- validity of — - section 3 (1) read with section2 (f) and (g) —- provisions of, whether suffer from procedural unreasonableness —- section 3 sub-section (3) proviso — whether imposes unreasonable restriction of fundamental right of the Citizen —- whether lays down sufficient guidelines —- whether violates Articles 14 of the Contitsutition — Constitution —- Articles 14 and 19(a) (c) —- provisions of.

Where the writ-petitioner President, Bihar Zone of Jammat E Islami Hind, challenged the notification dated 10th December, 1992 issued by the Ministry of Home. Affairs, Government of India issued under the provisions of section 3(1) read with proviso to subsection (3) of section 3 of the Unlawful Activities) Prevention Act.1967

1. C.W.J.C.No.477 of 1983. In the matter of an application under Articles 226 and 227 of the constitution of India.

Jammat-e-Islami Mind to be Unlawful Association :

Held, that section 3(1) of he Unlawful Activities (Prevention) Act, 1967, read with section 2 (f) and 2 (g) of the Act cannot be challenged on the ground that reatrictions imposed are unreasonable from substantive point of view such provision which imposes such restrictions are in the interest of severeignty and integrity of India. Fundamental rights guranteed under Article 19(a) and (c) of the Constitution are no doubt very cherished rights, but the rights of an individual must be subject to the greater right of the public at large. The rights conferred by Article 19 are conferred only on Citizen and it is not available to all or any person or association of persons who are not citizen.This personal right of the Citizen must be subject to the interest of public at large.

Held, further, that section 3 (1) read with section 2 (f) and (g) of the Act ,do not suffer from any procedural unreasonableness.

Held, further, that proviso to sub-section (3) of section 3 of the Act, can not also be struck down on the ground that it imposes unreasonable restriction, on the fundamental right of the citizen from the procedural aspect.

There is ample guideline laid down so far as the power conferred by section 3(1) and the proviso to sub-section 3 of th Act are concerned. Section 3 (1) of the Act as such cannot be challenged as violative of

Article 14 of the Constitution. The statute has laid down the guideline sufficiently and the object is very clear. The exercise of power by the Central Government is to be guided by the same. There is no delegation of arbitrary or uncontrolled power to the government to enable it to discriminate between persons or things similarly situate. Mere possibility of an abuse of power is not sufficent for striking down the conferment of the power as such.

In the instant case the objects and reasons of the Bill, the preamble read in the light of the surrounding circumstances, which necessitated the legislation in conjuction with the well known facts of which the court may take judicial notice it is clear that there is a guiding policy and that there is no conferment of any arbitrary or naked power.

Held, that, even the proviso to sub-section of section 3 of the act cannot be challenged on the ground that the same violates the provisions of Article 14 of the Constitution.

Held, further that section 3(1) of Act, is not ultra vares Article 21 of the constitution.

Held, further, that section 10 to 14 of the Act are not violative of the provisions of Articles 14 or 19 or 21 of the constitution.

Held, further, by applying the principle of sith and substance, that it is not a law relating to public order"

but it is a law relating to "sovereignty and integrity of India," even if it may incidnentally affect a 'public order". This Subject is not the subject matter of any specific entry of any of the Lists and, accordingly, it is the Parliament which alone can lagislate regarding this subject and not any State lagislature.

Held, also that the notification issued under section 3 read with the proviso to sub-section (3) of section 3 of the Act has not been made malafide or in colourable exercise of power and is not based on stale ground.

Case laws discussed.

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

The facts of the case material to this report are set out in the judgment of B.C. Basak. C.J.

Mr. Basudeva Prasad, Sr. Advocate,

Mr. Anil Kumar,

Mr. Rajiv Sinha,

Mr. Rajiv Nandan Prasad

Mr. S.S. Nayer Hussain Advocates for the petitioners.

Mr. P. P. Malhotra, Sr. Advocate,

Mr. Sunil Kumar, Additional Central Government Standing Counsel for the respondents

B.C. Basak, C.J.. — A series of writ petitions were filed in this court in respect of several notifications issued under section 3 of Unlawful Activities (Prevention Act), 1967, (hereinafter referred to as 'the said Act") whereby certain organisations were declared as unlawful Associatons" within the meaning of the said Act. This particular writ petition has been filed by two petitioners, namely, one Ahmad Ali Akhtar, who has described himself as President, Bihar Zone of jammat-E-Islami Hind (hereinafter referred to as the said "Association") and by one Sri Quamrul Hoda, who has described himself as president, Patna Circle of the said Association. The constitutionality of the said Act and the notification issued thereunder have been challenged on various grounds in this petition. The petitioners have challenged the notification dated 10th Decembr, 1992, issued under section 3(1) read with proviso to sub-section (3) of section 3 of the said Act, whereby the said Association was declared as an "Unlawful Association" within the meaning of the said Act (hereinafter referred to as "the said Notification"). The said notification, which came into effect from the date of its publication in the official subject to any order which may be made under secti ,n 4 of the said Act, is set out hereinbelow :-

" MINISTRY OF HOME AFFAIRS

NOTIFICATION

NEW DELHI, the 10th December, 1992.

S.O. 898(D) - Whereas Sri Sirajul Hasan, Amir of the Jammat-e- islami Hind (hereinafter referred to as JEIH) declared in a meeting at Delhi held on the 27th May. 1990 that the separation of Kashmir from India was inevitable.

And whereas Shri Abdul Aziz, Naib-Amir of JEIH, addressing a meeting at Malerkotla on the 1st August, 1991, observed that the Government of India should hold plebicite on Kashmir;

And whereas JEiH has been disclaiming and questioning the sovereignty and territorial integrity of India ;

And whereas for all or any of the grounds set out in the preceding paragraphs, as also on the basis of other facts, and materials in its possession which the Central Government considers to be against the public interest to disclose, the Central Government is of the opinion that the JEIH is an unlawful association ;

Now, therefore, in exercise of the owers conferred by sub-section 91) of section 3 of the Unlawful Activities Prevention Act, 1967 (37 of 1967), the central Government hereby declares the 'Jamaat-e-Islami Hind' to be an unlawful association and directs, in exrcise of the powers conferred by the proviso to subsection (3) of that section, that this notofication shall, subject to any order that may be made under section 4 of the said Act, have effect from the date of its publication in the Official Gazett.

No. II / 14034 / 2 (i) / 92 - IS (D V)

T.N.Srivastava Jt.Secy."

2. The petitioners have described themselves as citizens of India. It is further stated that they have been active members and also holding the respective offices of the said Association as stated hereinabovehere. We directed otice to be given to Attorney General of India as the vires of a Central Act was challenged and Mr. Malhotra has appeared on behalf of the Union of India and the Attorney

General of India.

3. *Submissions*

3.1. The main submission of Sri Basudeva Prasad, learned Senior Advocate appearing on behalf of the petitioners, are as follows:-

(1) The said Act and particularly s.3 (1) and proviso to sub- section (3) of Section 3 there of are violative of the fundamental rights guaranteed by Articles 14, 19(1) (a) and (c) and 21 of the constitution of India. I should point out that during the course of his reply, Mr. Prasad made it clear that so far as Article 19 is concerned, the challenge was limited to the question of procedural reasonableness and not substantive reasonableness. In support of his contention it was submitted that the law provides for a notification under section 3(1), to be issued without giving notice to the persons concerned and without holding any enquiry. The proviso to sub-section (3) to section 3 enables the authority concerned to bring the said notification into immediate effect without any judicial enquiry and without any notice to persons affected. Accordingly, it was violative of the fundamental rights of the petitioners. The sheet-anchor of the argument of Mr. Prasad in this connection is the decision of the Supreme Court in the case of State of *Madras v. V.G. Row* : A.I.R (1952) S.C. 193. In any event, he submitted that proviso to the sub- section (3) of section 3 is ultra vires Article 14 for the additional reason that it has not

been specified in the said Act specifically as to the case in which the said proviso was to be applied, so as to make the notification under section 3(1) come into force with immediate effect.

(2) There is lack of legislative competency so far as the Act is concerned. It was submitted that the Act relates to 'public order" and in view of Entry I of list II of the VIIth the schedule it was in the State list and only a State Legislature could enact a statute in respect of the same. The parliament was not competent to legislate in respect of the matter.

(3) The notification under section 3(1) read with section 3(3) proviso was also challenged on the ground that it was ultra vires the Act. It was submitted that the grounds specified therein are not germane or relevant to the object of the Act. It does not attract Sec. 2(f) read with Section 2(g) of the Act. Further, the order was passed on stale grounds. It was passed mala fide, in colourable exercise of power.

(4) The said notification has also been challenged on the ground that this is violative of the procedural reasonableness with punitive resulting action. No reason for applying the proviso to sub-section (3) of Section 3 of the said Act has been specified therein.

(5) Sections 10 to 11 of Chapter III of the Act, which provide for punitive provisions, are also ultravires Articles 14 and 21 of the Constitution.

In support of his contentions he has relied on various decisions.

3.2.1 Mr. Malhotra appearing on behalf of the Union of India and the Attorney General of India has drawn our attention to the relevant provisions of the Constitution of India and the said Act and has submitted that the Act was enacted to maintain the soverignty and integrity of India. Mr. Malhotra has submitted that the decision in the State of *Madras v. V.G. Row* : A.I.R. (1952) S.C. 196, on which great reliance has been placed by Mr. Prasad, was clearly distinguishable. He has submitted that the provisions of the Act which is under consideration before us is not the same or similar to the provisions of the Act which was struck down by the Supreme Court. In the present Act there are adquate procedural safeguards. He has submitted that the substantive aspect of the reasonableness of the restrictions imposed by the Act cannot be challenged and has not been challenged and in this background the procedural reasonableness has to be examined. He has submitted that not only the provisions for notices to the Association concerned have been made in the Act but any member or office bearer of the Association has also got the right to make his submissions before the Tribunal.

3.2.2. On the question of legislative competency, Mr. Malhotra has drawn our attention to the amendments made to article 19 of the constitution by the 16th

constitutional Amandment in the year 1963 and pointed out that this act. was enacted after such amendment. The object of this Act was maintenance of sovereignty and integrity of India. It is not a law relating to public order as sought to be contended. Accordingly, in view of Entry 97 List I read with Article 248 of the constitution, the parliament, and only the Parliament, had the legislative competency to enact the said Act.

3.2.3. On the question of the validity of the notification issued under section 3, he has submitted that this is a matter which has to be gone into by the Tribunal constituted under section 4 of the Act at least at the first instance and the writ court should not go into the merits of the same even if it relates to jurisdictional fact. The notification was issued in the background of the incidents of 6th of December, 1992 of which judicial notice can be taken. In this connection, he has also drawnour attention to the counter affidavit filed on behalf of the Union of India.

4. Before I deal with the various contentions raised before, us , I shall first set out the relevant provisions of the Constitution of India, the impugned Act and the Rules framed there under.

4 1 *Constitution*

Article 14. Equality before law The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.

Article 19. Protection of certain rights regarding freedom

of speech, etc. - (1) All citizens shall have the right -

(a) to freedom of [illegible] and expression ;

(b) to assemble peaceably and without arms ;

(c) to form associations or unions ;

(d) to move freely throughout the territory of India ;

(e) to reside and settle in any part of the territory of India ; (and)

(g) to practice any profession, or to carry on any occupation, trade or business.

(2) Nothing in sub-c lause (a) of Clause (1) shall affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub-clause in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence.

(3) Nothing in sub-clause (b) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interest of the soverignty and integrity of India or public order, reasonable restrictions on the exercise of the right conferred by the said sub-clause.

(4) Nothing in sub-clause (c) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the intersts of the sovereignty and integrity of India or public order or morality, rasonable restrictions on the exercise of the right conferred by the said sub-clause.

(5) Nothing in sub clause (d) and (e) of the said clause shall effect the operation of any existing law in so

far as it imposes, or prevent the State from making any law imposing, reasonable restrictions on the exercise of any of the rights conferred by the said sub-clauses either in the interests of the general public or for the protection of the interests of any Scheduled Tribe.

(6) Nothing in subclause (g) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of the general public, reasonable restrictions on the exercise of the right conferred by the said sub-clause, and, in particular, nothing in the said sub-clause shall affect the operation of any existing law in so far as it relates to, or prevent the State from making any law relating to -

(i) the professional or technical qualifications necessary for practising any profession or carrying on any occupation, trade or business, or,

(ii) the carrying on by the State, or by a *Corporation owned or* controlled by the State , of any trade, business industry or service, whether to the exclusion, complete or partial, or citizens or otherwise.

Article 21. *Protection of life and pesonal liberty* - No person shall be deprived of his life or personal liberty except according to procedure established by law.

Article 245. *Extent of laws made by parliament and by the Legislatures of States* - (1) Subject to the provisions of this constitution, Parliament may make laws for the whole or any part of the territory of India, and the Legislature of a State may make laws for the whole or any part of the State.

(2) No law made by Parliament shall be deemed to be invalid on the ground that it would have extra-territorial operation.

Article 246. Subject-matter of laws made by Parliament and by the Legislatures of States - (1) *Not withstanding anything in Clauses (2) and (3),* parliament has exclusive power to make laws with respect to any of the matters enumerated in List I in the Seventh Schedule (in this Constitution referred to as the "Union List")

(2) Notwithstanding anything in Clause (3), Parliament, and, subject to Clause (1), the Legislature of any State also, have power to make laws with respect to any of the matters enumerater in List III in the Seventh Schedule (in this Constitution referred to as the 'Concurrent List')

(3) Subject to Clauses (1) and (2), the Legislature of any State has exclusive power to make laws for such State or any part thereof with respect to any of the matters enumerated in list II in the seventh Schedule (in this Constitution referred as to as the "State List").

(4) Parliament has power to make laws with respect to any matter for any part of the territory of India not included in a State notwithstanding that such matter is a matter enumerated in the List.

Article 248. Residuary powers of legislation - (1) Parliament has exclusing power to make any law with respect to any matter not enumerated in the Concurrent List or State List.

(2) Such power shall include the power of making any law imposing a tax not mentioned in either of those Lists.

Seventh Schedule - List I - Union List.

Entry 97 - Any other matter not enumerted in List II or List III including any tax not mentioned in either of those Lists

List II - State List

1. Public order (but not including the use of any naval. military or air force or any other armed force of the Union or of any other force subject to the control of the Union or of any

contingent or unit thereof in aid of the Civil power.

4.2. THE UNLAWFUL ACTIVITIES (PREVENTION) ACT, 1967 (37 OF 1967)

Section 2. Definitions. - In this Act, unless the context otherwise requires, -

(a) "association" means any combination or body of individuals ;

(b) "cession of a part of the territory of " India includes admission of the claim of any foreign country to any such part ;

(c) "prescribed" means prescribed by rules made under this act ;

(d) "secession" of a part of the territory of India from the Union" includes the assertion of any claim to determine whether such part will remain a part of the territory of India ;

(e) ' Tribunal' means the Tribunal constituted under section 5;

(f) "Unlawful activity", in relation to an individual or association, means any action taken by such individual or association (whether by committing an act or by words,either spoken or written, or by signs or by visible representation or otherwise), -

(i) which is intended, or suports any claim to bring about, on any ground whatsover, the cession of a part of the territory of India or the secession of a part of the territory of India from the Union, or which incites any individual or group of individuals to bring about such cession or secession ;

(ii) which disclaims, questions, disrupts or is intended to disrupt the soverreignty or territorial integrity of India ;

(g) "unlawful association" means any association -

(i) which has for its object any unlawful activity, or which encourrages or aids persons to undertake any unlawful activity, or of which the members undertake such activity; or

(ii) which has for its object any activity which is punish-

able under section 153-A or section 153-B of the Indian Penal Code, or which encourages or aids persons to undertake any such activity, or of which the members undertake any such activity;

Provided that nothing contained in sub clasue (ii) shall apply to the State of Jammu and Kashmir.

(a) Substituted for clause (g) by Criminal Law (Amendment) Act, 1972 (31 of 1972) S. 4(14-6-1972)

CHAPTER II

UNLAWFUL ASSOCIATIONS

Declaration of an association as unlawful - (1) If the Central Government is of opinion that any association is, or has become, an unlawful assocaitaion, it may, by notification in the Official Gazette, declare such association to be unlawful.

(2) Every such notification shall specify the grounds on which it is issued and such other particulars as the Central Government may consider necessary :

Provided that nothing contained in sub clasue (ii) shall apply to the State of Jammu and Kashmir. (S.C.) 1825

(3) No such notification shall have effect until the Tribunal has, by an order made under section 4, confirmed the declaration made therein and the order is published in the official Gazette: shall *P*

Provided that if the Central Government is of opinion that circumstances exist which render it necessary for that Government oto declare an association to be unlawfyl with immediate effect, it may , for reasons to be stated in writing, direct that the notification shall, subject to any order that may be made under section 4, have effect from the date of its publication in the Official Gazette.

(4) Every such notification shall, in addition to its publication in the official Gazette, be published in not less than one daily news paper having circulation in the State in which the

principal office, if any, of the association affected is situated, and shall also be served on such association in such manner as the Central government may think fit and all or any of the following modes may be followed in effecting such service namely :-

(a) by affixing a copy of the notification to some consipicuous part of the office, if any of the association ; or

(b) by serving a copy of the notification, where possible, on the principal office bearers, if any of the association ; or

(c) by proclaiming by beat of drum or by means of loudspeakers, the contents of the notification in the area in which the activities of the association are ordinarliy carried on ; or

(d) in such other manner as may be prescribed.

4. *Reference to Tribunal* - (1) Where any association has been declare unlawful by a notification issued under sub-section (1) of section 3, the Central Government shall, within thirty days from the date of publication of the notification under the said sub-section, refer the notification to the Tribunal for the purpose of adjudicating whether or not there is sufficient cause for declaring the association unlawful.

(2) On receipt of a reference under sub-section (1) the Tribunal shallcall upon the association affected by notice in writing to show cause, within thirty days from the date of the service of such notice, why the association should not be declared unlawful.

(3) After considering the cause, if any, shown by the association or the office-bearers or members thereof the Tribunal shall hold an enquiry in the manner specified in section 9 and after calling for such further information as it may consider necessary from the Central Government or from any office-bearer or member of the association, it shall decide whether or not there is sufficient cause for declaring the association to be unlawful and make, as expeditiously as possible and in any case within a period of six months from the date of the issue of the notification under sub- section (1) of

section 3, such order as it may deem fit either confirming the declaration made in the notification or cancelling the same.

(4) The order of the tribunal made undersubsection (3) shall be published in the official Gazette."

Section 5. Tribunal - "(1) The Central Government may, by notification in the Official Gazette, constitute, as and when necessary, a tribunal to be known as the 'Unlawful Activities (prevention) Tribunal' consisting of one person, to be appointed by the Central Government ;

Provided that no person shall be so appointed unless he is a Judge of a high Court.

(6) The Tribunal shall, for the purpose of making an inquiry under this Act, have the same powers as are vested in a civil court under the code of civil Procedure, 1908 while trying a suit, in respect of the following matters, namely :-

(a) the summoning and enforcing the attendance of any witness and examining him on oath;

(b) the discovery and production of any document or other material object producible as evidence ;

(c) the reception of evidence on affidavits ;

(d) the requisitioning of any public record from any court or office ;

(e) the issuing of any commission for the examination of witnesses.

Section 6. Period of operation and cancellation of notification -

(1) Subject to the provisions of subsection (2) , a notification issued under section 3 shall, if the declaration made therein is confirmed by the Tribunal by an order made under section 4, remain in force for a period of two years from the date on which the notification becomes effective.

(2) Notwithstanding anything contained in sub-section (1), the Central Government may, either on its own motion or on the application of any person agrieved, at any time, cancel

the notification issued under section 3 whether or not the declaration made therein has been confirmed by the Tribunal.

Section 9. Procedure to be followed in the disposal of applications under this Act. - Subject to any rules that may be made under this Act, the procedure to be followed by the Tribunal in holding any inquiry under sub-section (3) of section 4 or by a Court of the District Judge in disposing of any application under sub-section (4) of section 7 or sub-section (8) of section 8 shall, so far as may be, the procedure laid down in the code of Civil Procedure, 1908; for the investigation of claims and the decision of the Tribunal or the Court of the District Judge, as the Case may be, shall be final.

CHAPTER III

Offences and Penalties

Section 10 -	XX	XX	XX
Section 11 -	XX	XX	XX
Section 12 -	XX	XX	XX
Section 13 -	XX	XX	XX

Section 14. Offences to be cognizable. - Notwithstanding anything contained in the code of Criminal Procedure, 1898 (5 of 1898), an offence punishble under this Act shall be cognizable.

CHAPTER IV

Miscellaneous

Section 17. Prosecution for offences under this Act. - No court shall take cognizance of any offence punishable under this Act except with the previous sanction of the Central Government or any officer authorised by the Central Government in this behalf.

4.3. THE UNLAWFUL ACTIVITIES (PREVENTION) RULES, 1968.

Rule 3. Tribunal and District Judge to follow rules of evidence .. (1) In holding an inquiry under sub-section (3) of Sec. 4 disposing of any application under sub-section (4) of

Sc. 7 or sub-section (8) of Sec. 8, the Tribunal or the district Judge, as the case may be, shall subject to the provisions of sub-rule (2), follow as far as practicable, the rules of evidence laid down in the Indian Evidence Act, 1872 (1 of 1872).

(2) Notwithstanding anything contained in the Indian Evidence Act, 1872 (1 of 1872), where any books of account or other documents have been produced before the Tribunal or the Court of the District Judge by the Central Government and such books of account or other documents are claimed by that Government to be of a confidential nature then. the Tribunal or the court of the District Judge, as the case may be, shall not. -

(a) make such books of account or other documents a part of the records, of the proceedings before it; or

(b) allow inspection of, or grant a copy of, the whole of or any extract from, such books of account or other documetns by or to any person other than a party to the proceedings before it.

Rule 4. Additional modes of service of notification made under Sec. 3. - Without prejudice to the generality of the provisions of sub-section (4) of Sec.3, all or any of the following modes may also be followed in effecting service of a notification made under sub-section (1) of Sec. 3, namely :

(a) by making an announcement over the radio from a local or nearest broadcasting station of the All India Radio, or

(b) by pasting the notification on the notice-board of the office of the District Magistrate or the Tehsildar at the headquarters of the district or the tehsil, as the case may be, in which the principal office of the association affected is situated.

Rule 6. Service of notice issued by the Tribunal .- Ever notice referred to in sub-section (2) of Sec. 4 shall be serv on the affected association in such manner as the Tribunal may think fit and all or any of the following modes may be followed by the Tribunal in effecting service of such notice, namely :

(a) by affixing a copy of the notice to some conspicuous part of the office, if any, of the association ; or

(b) by serving a copy of the notice, where possible, on the principal office bearers, if any of the association, by registered post or otherwise ; or

(c) by proclaiming by beat of drum or by means of Loudspeakers the contents of the notification in the area in which the activities of the association are ordinarily carried on.

Rule 10. - issuing of summons. - The Tribunal or the District Judge, as the case may be, may issue summons to persons whose attendance is required either to give evidence or to produce documents.

Rule 11. The mode of issuing the summons. - Every summons shall be in duplicate and signed by tehRegistrar of the Tribunal or the District Judge, as the case may be, and sealed with the seal of the Tribunal or the Court of the District Judge, as the case may be, and it shall specify the time and place at which the person summoned is required to attend and also whether his attendance is required for the purposes of giving evidence or to produce, a document, or for both purposes.

Rule 12. Summons for the production of documetns. - A person may be summoned to produce a document, when being summoned to give evidence; and any person summoned merely to produce document shall be deemed to have complied with the summons if he causes such document to be produced instead of attending personally to produce the same.

Rule 13. The mode of service fo summons. - A summons may be served by sending it by registered post with acknowledgement due tothe person for whom it is intended or any such other manner as may be directed by the Tribunal or the District Judge, as the case may be.

Rule 15. Other provisions of the Civil Procedure Code, 1908 to apply. - The provisions of the Civil Procedure Code, 1908 (5 of 1908) , shall, in so far as they relate to any other

matter with regard to the service of summons, as far as may be, apply to the service of any summons issued by any Tribunal or District Judge under the Act.

5. I shall first take up the various contentions raised regarding the constitutional validity of the different provisions of the said Act.

5.1 Before doing so, I shall refer to some general principles regarding interpretation of the Constitution. In this context I shall refer to some of the decisions of the Supreme Court.

(a) In a 5 Judges Bench decision of the Supreme Court in the case of *M/S Fatehchand Himmatlal* and others v. *State of Maharashtra* [1] it was stated as follows :-

" The distance between societal realities and constitutional diletantism often makes for dilemma of statutory validity and the arguments addressed in the present batch of certificted appeals and writ petitions evidence this forensic quandary. Likewise, the proximity between rural -cum-slum economics and social relief legislation makes for verring away from verbal obsessions in legal construction. A constitution is the documentation of the of a nation and the fundamental directions for the fulfilment, so much so, an organic, not pedantic, approach to interpretation, must guide the judicial process. The healing art of harmonious construction, not the tempting

1 (1977) A.I.R.(S.C.)1825

game of hair-splitting, promotes the rhythm of the rule of law. These prologuic obsevations made, we proceed to dealwith the common subject-matter of the appeals and the writ petitions." (para 1)

" Considerable eclectic study of English, Austr-alian and American cases was displayed in the course of arguments, reverberating in Indian precedents dealing with Part XIII of the Constitution. Of course, we will refer to them with pertinent brevity, although we must administer to ourselves the caveat that the that the same words used in constitutional enactments of various nations may bear different connotations and when courts are called upon to interpret them, they must acclimatise the expressions to the particular conditions prevaling in the country concerned. Different lands and life-styles, differnent social milieus and thoughtways, different subject-matters and human categories-these vital variables influence staturoty projects and interpretations, although lexicographic aids and understandings in alien jurisdictions may also be looked into for light,, but not beyond that." (Para 6)

(b) This question was also examined by a seven Judges Bench of the Supreme Court in the case of *Pathuma and others* V. *State of Kerala and others*[1] wherein it was observed as follows :

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1 (1978)A.I.R.(S.C.) 771

" Courts interpret the consititutional provisions against the social setting of the country so as to show a compete consciouness and deep awareness of the growing requirements of the society, the increasing needs of the nation, the burning problems of the day and the complex issue facing the people which the legislature in its wisdown, through beneficial legislation seeks to solve. The Judicial approach should be dynamic rather than static, pragmatic and not pendantic and elastic rather than rigid. It must take into consideration the changing trends of economic thought, the temper of the times and the living aspirations and feelings of the people. This Court while actingas a sentinel on the quivive to protect fundamental rights guaranteed to the citizens of the country must try to strike a just balance between the fundmental rights and the larger andbroader interest of society, so that when such a right clashes with the larger interest of country it must yield to the latter "

After referring to the observations made in the case of *Jyoti* Pershad V . *Administrator for the Union Territory of Delhi*, [1] in this context, it was pointed out that hte legislature is in the position to unders and appreciate the needs of the people as enjoined by the constitution to bring about social reforms for the upliftment of the back-ward and the weaker section so the society and for the improvement of the lot of poor people. The court will,

(1)(1962)2 S.C.R 125 = (1961) AIR (S.C)1602.

therefore interfere in this process only when the state is clearly violative of the right conferred on the citizen der part III of the constitution or when the Act is beyond the legislative competence of the legislature or such other grounds. In this context it was pointed out that it is for this reason that the Courts have recognised that there is always a presumption in favour of the constitutionality of a statute and the onus to prove its invalidity lies on the party which assails the same.

(c) The observations of the Supreme Court in Jyoti Prasad's case was as follows : .

" Where the legislature fulfils its purpose and enacts laws, which in its wisdown, is considered necessary for the solution of what after all is a very human problem the tests " reasonableness" have to be viewed in the context of the issues which faced the legislature. In the construction of such laws and particularly in judging of their validity the Courts have necessarily to approach it from the point of view of furthering the social interest which it is the purpose of the lagislation to promote, for the Courts, are not in these matters, functioning as it were in vacuo, but as parts of a society which is trying by enacted law to solve its problems and achieve a social concord and peaceful adjustment and thus furthering the moral and material progress of the community as a whole ."

5.2. Keeping the same in mind, I shall take up

the various submissons made in support of the contention that the said act generally and different provisions of the said Act in particular, are violative of the fundamental rights guaranteed by the Constitution.

5.3. At first I shall take up the question whether section 3(1) of the said Act read with section 3(f) and (g) thereof is ultra vires Article 19(1) and (c) of the constitution or whether they merely imposes resonable restriction in respect of the exercise of such fundamental rights and, therefore, valid.

5.4. Before doing so I shall at the first instance consider the test of reasonableness and some general principles laid down by the Supreme Court regarding interpretation of the provisions relating to fundamental rights as envisaged in the Constitution.

5.5.1 On the question of the test of reasonableness as laid down in Article 19, we may point out that in the very case cited on behalf of the petitioners itself, that is, *The State of Madras* v. *V.G. Row* [1] the test which was laid down is being followed basically with certain clarifications and additions for the last 40 years. The test laid down in the said decision was as follows :-

" --- It is important in this context to bear in mind that the test of reasonableness, whereever prescribed, should be applied to each individidual statute impugned, and no abstract standard, or general pattern of reasonableness

(1) (1952) AIR (S.C) 196.

can be laid down as applicable to all cases. The nature of the right alleged to have been infringed, the underlying purpose of the restrictions imposed, the extent and urgency of the evil sought to be remedied thereby, the disproportion of the imposition, the prevailing conditions at the time, should all enter into the judicial verdict. In evaluating such elusive factors and forming their own conception of what is reasonable, in all the circumstances of a given case, it is inevitable that the social philosophy and the scale of values of the judges participating in the decision should play an important part, and the limit to their interference with legislative judgment in such cases can only be dictated by their sense of responsibility and self restraint and the sobering reflection that the constitution is ment not only for people of their way of thinking but for all, and that the majority of the elected representatives of the people have, inauthorising the imposition of the restrictions, considered them to be reasonable. " (Para- 15)

5.5.2 We may only refer to some of the decisions of the Supreme Court where the aforesaid observations were quoted and followed. *State of West Bengal* v. *Subodh Gopal*[1] *(5 Judges Bench), Virendra Prasad v. State of Punjab & another* [2] *(5 Judges* Bench*), Abdul Hakim v. State of Bihar* [3] *, Hari Chand Sarda v. Mizo District council* [4] *Kanti Lal Babu Lal*

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1 (1954) A.I.R. (S.C.) 92
2 (1957) A I.R. (S.C.) 896
3 (1961) A.I.R.(S.C.) 448
4 (1967) A.I.R.(S.C.) 829

& Bros. v. H.C. Patel [1] *(5 Judges Bench), State of Maharashtra V. H. N.Rao* [2] *Jagmohan Singh V. State of U.P.* [3] *Keshvananda Bharti v. State of Kerala* [4] *Addl. District Magistrate, Jabalpur V. S. Shukla* [5] *Fatehchand V. State of Maharashtra* [6] *(5 Judges bench), Maneka Gandhi V. Union of India*[7] *P.N. Kaushal V. Union of india* [8] *Excel Wear V. Union of India & another* [9]Bachan Singh *V. State of Punjab*[10] *M/S Kasturi*Lal *V. State of J & K* [11] *and Indian Express News papers, Bombay (P) Ltd. v. Union of India* [12]

5.5.3. While quoting with approval the aforesaid observations, in the following cases it was observed as follows :-

(a) In the case of *State of Uttar Pradesh V. Kaushilya* [13] (a decision of 5 Judges Bench), it was held

" ... The reasonableness of a restriction depends upon the values of life in a society, the circumstances obtaining at a particular point of time when the restriction

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1 (1968) A.I.R. (S.C.) 445
2 (1970) A.I.R. (S.C.) 1453
3 (1973) A.I.R. (S.C.) 947
4 (1973) A.I.R. (S.C.) 1461
5 (1976) A.I.R. (S.C.) 1207
6 (1977) A.I.R. (S.C.) 1825
7 (1978) A.I.R. (S.C.) 597
8 (1978) A.I.R. (S.C.) 1456
9 (1979) A.I.R. (S.C.) 25
10 (1980) A.I.R. (S.C.) 898
11 (1980) A.I.R. (S.C.) 1992
12 (1986) A.I.R. (S.C.) 515
13 (1964) A.I.R. (S.C.) 416

is imposed, the degree and the urgency of the evil sought to be controlled and similar others. If in a particular locality the vice of prostitution is endemic degrading those who live by prostitution and demoralising others who come into contact with them, the Legislature may have to impose severe restrictions on the right of the prostitute to move about and to live in a house of her choice. If the evil is rampant, it may also be necessary to provide for deporting the worst of them from the area of their operation. The magnitude of the evil and the urgency of reform may require such drastic remedies. It cannot be gain said that the vice of prostitution is rampant in various parts of the country. There cannot be two views on the question of its control and regulation. One of the objects of the Act is to control the growing evil of prostitution in public places. Under S. 20 of the Act the freedom of movement and residence are regulated, but, as we have stated earlier, an effective and safe judicial machinery is provided to carry out the objects of the Act. The said restrictions placed upon them are cetainly in the interests of the general public and, as the imposition of the restrictions is done through a judicial process on the basis of a clearly disclosed policy, the said restrictions are clearly reasonable." (Para 11)

(b) In the case of *Harakchand V. Union of India* [1] (a decision of 5 Judges Bench), it was held -

1 (1970)A.I.R. (S.C.)771

" ... It is necessary to emphasise that the principle which underlies the structure of the rights guaranteed under Art. 19 of the constitution is the principle of balancing of the need for individual liberty with the need for social control in order that the freedoms guaranteed to the individual subserve the large public interests. It would follow that the reasonableness of the restrictions imposed under the impugned Act would have to be judged by the magnitude of the evil which it is the purpose of the restraints to curb or eliminate.. "(Para 16)

(c) In the case of *Pathumma and others V. State of Kerala* and *others*[1] a seven Judges Bench of the Supreme Court while following the said observations in the *State of Madras V. V.G. Row* and after consideration of many other decisions, pointed out as follows :-

" There can be no doubt that Article 19 guarantees all the seven freedoms to the citizens of the country including the right to hold, acquire and dispose of property. It must, however, be remembered that Article 19 confers an absolute and unconditional right which is subject only to reasonable restrictions to be placed by Parliament of the legislature in public interest.

Guidelines to determine the question of reasonableness of 'restriction".

(1) that, in judging the reasonableness of the

1 (1978) A.I.R. (S.C.)771

restrictions imposed by clause (5) of Art. 19, the Court has to bear in mind the Directive Principles of State Policy.

(2) that restrictions must not be arbitrary of an excessive nature so as to go beyond the requirement of the interest of the general public.

(3) that in order to judge the quality of the reasonableness no abstract or general pattern or a fixed principle can be laid down so as to be of universal application and the same will vary from case to case.

(4) that a just balance has to be struck between the restriction imposed and the social control envisaged by clause (6) of article 19.

(5) that there must be a direct and proximate nexus or a reasonable connection between the restriction imposed and the object which is sought to be achieved. In other words, the court has to see whether by virtue of the restriction imposed on the right of the citizen the object of the statute is really fulfilled or frustrated.

(6) that court must see the prevailing social values whose needs are satisfied by restrictions meant to protect social welfare.

(7) that so far as the nature of reasonablenness is concerned, it has to be viewed not only from the point of view of the citizen but the problem before legislature and the object which is sought to be achieved by the

stature. In other words, the courts must see whether the social control envisaged in clause (6) of Article 19 is being effectuated by the restrictions imposed on the fundamental right.

(d) In the case of *M/S Laxmi Khandsari V. State of U.P.* [1] it was observed as follows :-

" It is abundantly clear that furdamental rights enshrined in part III of the constitution are neither absolute nor unlimited but are subject to reasonable restrictions which may be imposed by the State in public interest under cls. 2 to 6 of Article 19. As to what are reasonable restrictions would naturally depend on the nature and circumstances of the case, the character of the statute, the object which it seeks to serve, the existing circumstances, the extent of the evil sought to be remedied as also the nature of restraint or restriction placed on the rights of the citizen. It is difficult to lay down any hard or fast rule of universal application but this court has consistently held that in imposing such restrictions the State must adopt an objective standard amounting to a social control by restricting the rights of the citizens where the necessities of the situation demand. It is manifest that in adopting the social control one of the primary considerations which should weigh with the Court is that as the directive principles contained in the constitution aim at the establishment of an

1 (1981) A.I.R.(S.C.)873

egalitarian society so as to bring about a welfare state within the framework of the Constitution. these principles also should be kept in mind in judging the question as to whether or not the restriction are reasonable. If the restrictions imposed appear to be consistent with the directive principles of State policy they would have to be upheld as the same would be in public interest and manifestly reasonable." (Para 16)

"Further, restrictions may be partial, complete, permanent or temporary but they must bear a close nexus with the object in the interest or which they are imposed, Sometimes even a complete prohibition of the fundamental right to trade may be upheld if the commodity in which the trade is carried on is essential to the life of the community and the said restriction has been imposed for a limited period in order to achieve the desired goal". (Para 17)

" Another important consideration is that the restrictions must be in Public interest and are imposed by striking a just balance between the deprivation of right and danger or evil sought to be avoided... " (Para 18)

" These are some of the general principles on the basis of which the quality of reasonableness of a particular restriction can be judged and have been lucidly adumbrated in State of Madras V. V.G. Row's case 1952 SCR 597 : (AIR 1952 SC 196). Another important test that has been laid down by this court is that restrictions

should not be excessive or arbitrary and the Court must examine the direct and immediate impact of the restrictions on the right of the citizens and determine if the restrictions in larger public interest while deciding the quesiton that they contain the quality of reasonableness. (Para 19)

" In such cases a doctrinaire approach should not be made but care should be taken to see that the real pupose which is sought to be achieved by restricting the rights of the citizens is subserved. This can be done only by examining the nature of the social control, the interest of the general public which is subserved by the restrictions, the existing circumstances which necessitated the imposition of the restrictions, the degree and Urgency of the evil sought to be mitigated by the restrictions and the period during which the restrictions are to remain in force. " (Para 20)

(e) In the case of *Sri Kalimata V. Union of India*[1] : it was held :

" The fundamental rights enshrined in Article 19 of the constitution are not absolute and unqualified but are subject to reasonable restrictions which may be imposed under sub clauses (4) and (5) of Art. 19. Whenever a complaint of violation of fundamental rights is made the

1 (1981)A.I.R (S.C.)1030

Court has to determine whether or not the restrictions imposed contain the quality of reasonableness. In assesing these factors a doctrinaire approach should not be made but the essential facts and realities of life have to be duly considered. Our Constitution aims at building up a socialist state and the establishment of an egalitraian society and if reasonable restrictions are placed on the fundamental rights in public interest, they can be fully justified in law."

(f) In the case of *Ram Narayan Agarwal* V. *State of Uttar Pradesh* [1] , it was held :

" With regard to the determination of the question whether a restriction imposed by a statutory provision on the fundamental right guaranteed under Art. 19(1) (d) of the constitution is reasonable or not there are now well established norms. It is settled by a long line of decisions of this Court that the restriction must not be arbitrary or excessive in nature so as to be beyond the requirement of the general public. The Court should strike a just balance between freedom contained in Art. 19 (1) (d) of the Constitution and the social interest to be protected. No universal rule can be laid down in this regard. The changing social conditions, the value of human life, the prevailing social philosophy and all the surrounding circumstances should be taken into con-

1 (1984)A.I.R.(S.C.)1213

sideration. In a case like this where public dues are to be collected, some amount of coercion is necessary to make a recalcitrant defaulter who has means to pay or who has fraudulentlysecreted his assets to screenthem from being proceeded against to pay the dues."

(g) *In the case of Municipal corporation of the Ciry of Ahmedabad and others v. Jan Mohammed usmanbhai and another* [1] it was pointed out -

" ... The court must in considering the validity of the impugned law imposing prohibition on the carrying on of a business or a profession attempt an evaluation of its direct and immediate impact upon the fundamental rights of the citizens affected thereby and the larger public interest sought to be ensured in the light of the object sought to be achieved, the necessity to restrict the citizen's freedom, the inherent pernicious nature of the act prohibited or its capacity or tendency to be harmful to the general public, the possibility of achieving the object by imposing a less drastic restraint, and in the absence of exceptional situations such as the prevalence of a state of emergency, national or local, or the necessity to maintain necessary supplies or the necessity to stop activities inherently dangerous, the existence of a machinery to satisfy the admintrative authority that a case for imposing restriction is made out or a less drastic restriction may ensure the object intended to be

1 (1986)A.I.R.(S.C.)1205

achieved. " (Para- 15)

" Clause (6) of Art. 19 protects a law which imposes in the interest of general public reasonable restrictions on the exercise of the right conferred by sub-clause (g) of clause (1) of Art. 19. Obviously it is left to the court in case of a dispute to determine the reasonableness of the rectrictions imposed by the law. In determining that quesion the court cannot proceed on a general notion of what is reasonable in the abstract or even on a condition of what is reasonable from the point of view of the person or persons on whom the resrictions are impose. The right conferred by sub-clause (g) is expressed in general language and if there had been no qualifying provision like claue (6) the tight so conferred would have been an absolute one. To the persons who have this right any restriction will be irksome and may well be regarded by them as unreasonable. But the question cannot be decied on that basis. What the court has to do is to consider whether the restrictions imposed are reasonable in the interest of general public."

(Para- 15)

(h) In the case of *Charan Lal Sahu* V. *Union of India*[1] a five judges Bench of the Supreme Court observed as follows :-

" .. And the test of reasonableness, wherever prescribed. should be applied to each individual statute impugned. and no abstract standard or general pattern

of reasonableness can be laid down as applicable to all cases. *The nature of the right alleged to have been infringed, the underlying purpose of the restrictions imposed, the extent and urgency of the evil sought to be remedied thereby, the disproportion of the imposition, the prevai conditions of the time, should all interline into the judicial verdict.* (The emphasis supplied). Chief Justice Patanjali Sastri reitereted that in evaluating such elusive factors and forming their own conception of what is reasonable, in the circumstances of a given case. it is inevitable that the social philosophy and the scale of values of the Judges articipating in the decision would play an important role;." (Para- 27)

In this case it was also pointed out as follows :

" Hence, both the restrictions or limitations on the substantive and procedural rights in the impugne liegislation will have to be judged from the point of view of the particular statute in question. No abstract rule or standard or reasonableness can be applied. That question has to be judged having regard to the nature of the rights alleged to have been infringed in this case, the extent and urgency of the evil sought to be remedied. disproportionate imposition, prevailing conditions at the time, all these facts will have to be taken into consideration." (Para- 99)

5.6 It is also well settled that the *procedural provisions* of a statute are also to be examine to ascer-

tain the reasonableness of the statute. In this connection reference may be made to the following decisions :

(a) *Kishan Chand Arora v. Commissioner of Police*[1] the Supreme Court after referring to V.G. Row's case observed as follows :-

" There is no doubt that procedural provisions of a statute also enter into the verdict as to its reasonableness; but at the same time there can be no abstract or general principles which would govern the matter and each statute has to be examined in its own setting. It is undoubtedly correct that no provision has been made for giving a hearing to a person applying for a licence and the Commissioner has not to give reasons when refusing the licence, but it cannot be laid down as a general proposition that where in the case of licensing statute no provision for giving reasons for refusal the statute must be struck down as necessariy an unreasonable restriction on a fundamental right. No case has been cited before us which lays down as a general proposition." (Para - 5)

(b) In the case of the *State of Bihar V. K.K. Misra*[2]. It was observed as follows: " As observed in *Dr. Khare V. State of Delhi* 1950 SCR 519 : (AIR 1950 SC 211) and reiterated in *V.G. Row's* case, 1952 SCR 597 : (AIR 1952 SC 196) that in considering reasonableness of laws

1. (1961) A.I.R (S C) 705
2 (1971)A.I.R.(S.C.)1667

imposing restrictions on fundamental rights both substaintive and procedural aspects of the law should be examined from the point of view of reasonableness and the rest of reasonableness whever prescribed should be applied to each individual statute impugned and no abstract standard or general pattern of reaonableness can be laid down as applicable to all cases. It is not possible to formulate an effectve test which would enable the Court to pronounce any particular restriction to be reasonable or unreasonable perse. All the attendant circumstances must be taken into consideration and one cannot dissociate the actual contents of the restrictions from the manner of their imposition or the mode of putting them into practice." (Pr. 31 of A.I.R. 1979 S.C.25)

(c) this was followed in the case of *Excel Weer V Union of India* [1]

(d) This was also made clear in the case of *Charan Lal Sahu* V. *Union of India* [2] as follows :

" ... Hence, both the restrictions or limitations on the substantive and procedural rights in the impugned legislation will have to be judged from the point of view of the particular Statute in quesion. No abstract rule or standard of reasonableness can be applied. That question has to be judged having regard to the nature of the rights alleged to have been infringed

1 (1979)A.I.R. (S.C.)25
2 (1990)A.I.R.(S.C.)1480

in this case, the extent and urgency of the evil sought to be remedied, disproportionate imposition, prevailing conditions at the time, all these facts will have to be taken in to consideratin. " (para 99)

5.7. It is also well settled that expression restriction' used in Art. 19 (2) to (6) also includes " prohibition" depending on the nature of the case. The following decisions may be referred to in this connection ;

(a) In the case of *Narendra Kumar V. Union of India* [1] It was printed out as follows :-

" ... It is reasonable to think that the makers of the Constitution considered the work restrictioon' to be sufficiently wide to save laws 'inconsistent' with Art. 19(1), or taking away the rights conferred by the Article, provided this inconsistency or taking away was reasonable in the interests of the different mattes mentioned in the clause . There can be no doubt therefore that they intended the word'restriction' to include cases of 'prohibition' also. The contention that a law prohibiting the exercise of a fundamental right is in no case saved, cannot therefore be accepted. It is undoubtedly correct, however, that when as in the present case, the restriction reaches the stage or prohibition special care has to be taken by the Court to see that the test of reasonableness

1 (1960)A.I R.(S C.)430

is satisfied. The greater the restriction, the more the need for strict scrutiny by the Court."

(b) In the case of *State of Uttar Pradesh V. Kaushalva*[1] the Supreme court pointed out the magnitude of the evil and the urgency of the reform may require drastic ramedies.

(c) In the case of *State of Maharastra* v. *Himatbhai Narbheram*[2] Rao the Supreme Court made it clear that the power of the State to impose reasonable restrictions may extend to prohibiting acquisition, holding or disposal of a commodity if the commodity is likely to involve grave injury to the health of welfare of the people. This was with reference to Article 19(1) (g).

(d) In the case of *Har Shankar* v. *Dy. Excise & Taxation Commissioner*[3] the Supreme court pointed out that the State has the power to prohibit trades which are injurious to the health and welfare of the public.

(e) In the case of M/S *Laxmi Khan Sari etc v. State of U.P. & Ors*[4] it was observed by the Supreme Court that the restrictions may be partial, complete, permanent or temporary but they must bear a close nexus with the object in the interest of which they are imposed. Sometimes even a complete prohibition of the fundamental right to trade may be upheld if the commodity in which the trade is carried on is essential to the life of the community and the said restriction has been imposed for a limited period

1 (1984)A I R (S C.)416
2 (1970)A I R.(S C)1157
3 (1975) I SC C 737
4 (1981)A I R (S C)873

in order to achieve the desired goal. It was further pointed out that another important consideraion is that the restricion must be in public interest and are imposed by striking a just balance between the deprication of right and danger or evil sought to be avoided.

(f) in the case of *Municipal corporation of the City of Ahmedabad and others* v. *Jan Mohammad* Usmanbhai *and another:* [1] The Supreme Court pointed out that the rights conferred by Part III are subject to reasonable restrictions and the constitution provides that enforcement of some of them may, in stated uncommon circumstances, be suspended. The Supreme Court while referring to some well established principles in the construction of the constitutional provisions pointed out, inter alia, that imposition of restriction on the exercise of fundamental right may be in the form of control or prohibition. I have already quoted some of the observations made in this regard in the said judgment.

5.8 It is to be noticed that in Articles 19(2) to 19(6) while allowing reasonable restrictions, the expression used is "in the interest of". This expression was considered in the case of *Ramji Lal Modi* v. *State of U.P.*[2] Wherein it was pointed out that the expression used in these Articles is "in the interest of" and not "for the maintenance of. " It was held that the expression "in the interest of" makes the ambit of the protection vary wide. A law may not have been designed to directly maintain public order and yet it may have been enacted in the interest of public

1 (1986) A.I.R.(S.C.)1205

2 (1957)A.I.R. (S.C.)620

order or the general public, as the case may be. This was followed in the case of *Virendra* v. *State of punjab.*[1]

5.9 So far as the burden of proving reasonableness is concerned, in the case of *State of Madras* v. *V.G. Row* as followed in subsequent judgments, it was pointed out that the burden is on the State to show that the restriction imposed by the impugned statute is reasonable and in public interest. However, the extent and the manner of discharge of the burden necessarily depends on the subject matter of the legislation, the nature of the inquiry, and the scope and limits of judicial review. Reference may be made in this connection to *Bachan Singh* v. *State of Punjab* [2]

5.10 In determining the constitutional validity of a measure or a provision therein regard must be had to the real effect and impact thereof on the fundamental right. Reference may be made in this connection to the 7 Judges Bench decision in Re : *Kerala Education Bill, 1957* [3]

5.11 In this context another aspect of the matter may be pointed out. In the case of *Babulal Parate* v. *State of Maharashtra.*[4] On the equestion of validity of section 144 Cr. P.C. a contention was raised that in order to enable the State to avail of the provisions of clauses (2) to (6) of Art. 19 a special law has to be passed.

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1 (1957)A.I.R. (S.C.)896
2 (1980)A.I.R.(S.C.)893
3 (1958)A.I.R (S.C.)956
4 (1961) A.I.R.(S.C.)884

while rejecting this contention it was made clear that clauses (1) to (6) of Art. 19 do not require the making of a law solely for the purpose of placing the restrictions mentioned in them. (Para-17)

5.12 Another aspect of the matter is that while the Courts can declare a statute unconstitutional when it transgress constitutional limits, they are precluded from inquiring into the propriety of the exercise of legislative power. It has to be assumed 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 of 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. No legislation can be challenged on the ground of mala fide. Reference may be made in this connection to *T.Venkata Reddy* v. *State of Andhra Pradesh* [1]

5.13 In this context another aspect has to be kept inmind. in ChapterIII of the Constitution, wherein several fundamental rights have been provided for, some of them are conferred on all persons, natural and artificial, which includes the citizen but some of them are conferred only on the citizen and not on" any person in the

1. (1985) A I R (S C) 724

case of *R.C. Cooper* v. *Union of India*[1] *(Bank Nationalisation Case)* it was observed as follows:

" A company registered under the companies Act is a legal person, separate and distinct from its individual manners. Property of the Company is not the property of the shareholders. A shareholder has merely an interest in the Company arising under its Articles of Association, measured by a sum of money for the purpose of liability, and by a share in the profit. Again a director of a company is merely its agent for the purpose of management. The holder of a deposit account in a company is its creditor; he is not the owner of any specific fund lying with the Company. A shareholder, a depositor or a director may not therefore be entitled to move a petition for infringement of the rights of the company, unless by the action impugned by him,his rights are also infringed." (Para- 13)

' By a petition praying for a writ against infringement of funamental rights, except in a case where the petition is for a writ of habeas corpus and probably for infrninge-ment of the guarantees under Articles 17,23 and 24 the petitioner may seek relief in respect of his own rights and not of others. The shareholder of a company, it is true, is not the owner of its assets; he has merely a right to participate in the profits of the Company subject to the contract contained in Articles of Associaiation. But on that account the petitions will not fail. A measure execuive or legislative may impair the rights of the company alone, and not of its sharesholers; it may impair the righs of the

1. (1970) A I R (S C.) 564

shareholders and not of the Company ; it may impair the rights of the shareholders as well as of the Company. Jurisdiction of the Court to grant relief cannot be denied, when by State action the rights of the individual shareholder are impaired, if that action impairs the rights of the company as well. The test in determining whether the shareholder's right is impaired is not formed; it is essentially qualitative; if the State action impairs the right of the shareholders as well as of the Company, the Court will not, concentrating merely upon the technical operation of the action, deny itself jurisdction to grant relief."

(Para 14)

6. In the light of the general principles as set out above, I shall take up the question as to whether section 3(10) read with section 2(f) and (g) or the proviso to section 3(3) or sections 10 to 14 of the said Act are ultra vires Article 19(1) (a) or 19(1) (c) of the Constitution.

7. I Shall first consider the question as to whether section 3(1) of the said Act, read with section 2 (f) and (g) thereof, are violative of the fundamental rights guaranteed by Art. 19(1) (a).or (c) of the Constitution.

7.1.1. As pointed out earlier, during his reply Mr. Prasad has made it clear that he is raising the question of procedural reasonableness only in this connection. However, I shall have to consider the question of substantive reasonableness also to some extent, before considering the question of procedural reasonableness consideration of one, cannot be totally isolated from the other. While considering the question of procedural reasonableness the question of substantive reasonableness of the provisions should also be kept in mind.

7.1.2 Prior to the 16th Constitutional Amendment introduced in the year 1963, clauses (2) , (3) and (4) of Art. 19 did not contain the expression " the sovereignty and integrity of India". This was inserted for the first time by the Constitution (Sixteenth Amendment) Act, 1963 whereby clauses (2), (3) and (4) of Art. 19 were amended by inclusion therein the expression 'the maintenance of sovereignty and integrity of India' as a ground of reasonable restriction of the fundamental rights guaranteed by Art 19(1) (a) to (c) of the Constitution. This amendment was introduced in the year 1963 pursuant to the acceptance by the Government of an unanimous recommendation of the Committee on National Integration and Regionalism appointed by the National Integration Council. The Act impugned here in was enacted thereafter in the year 1967. The preamble of the Act states that this was enacted to provide for more effective prevention of certain unlawful activities of individuals and associations and matters connected therewith The object of the Bill introduced, as it would appear from the objects and Reasons was to make powers available for dealing with activities directed against the integrity and sovereignty of India. I have considered the different aspects of the principles regarding interpretation of the Constitution with particular reference to Article 19. I have set out here in abvoe the object and relevant provisions of the said Act. Having regard to the same, particularly section 2(b) which defines secsion of a part of the territory of India", 2 (d) which defines secession of a part of the territory of India from the Union", section 2(f) which defines Unlawful activities and section 2(g) (i) and (ii) which defines unlawful associa

tion, which I have ... ted in details, I have no hesitation in holding that section 3(1) of the said Act read with section 2(f) and 2(g) there of cannot be challenged on the ground that restrictions imposed are unreasonable from substantive point of view. In my opinion, such provision which imposes such restrictions are in the interest of sovereignty and integrity of India. Fundamental rights guaranteed under Article 19(1) and (c) are no doubt very charished rights; but the rights of an individual must be to the greater right of the public at large. The rights conferred by Article 19 are conferred only on citizen and it is not available to all or any person or assocaition of persons who are not citizens. This personal right of the citizen must be subject to the interest of the public at large. As pointe out in the case of *Pathuma and others* v. *State of Kerala and others* (ibid) the Courts must try to strike a just balance between the fundamental righs and the larger and broader interest of society so that when such a right clashes with the larger interest of the country, it must yield to the latter. Similar observations were made in *Harakchand* v. *Union of India* (ibid), *Laxmi Khandsari* v. *State of U.P.* (ibid) and *Municiapal Corporation* v. *Jan Mohammad,* (ibid)

7.1.3 In my opinion, Section 3(1) read with Sec. 2(f) and 2(g) of the said Act, which enables the Central government to declare an association as an unlawful association under the circumstances referred to therein cannot be said to have imposed any unreasonable restriction,, on the substantive stand point, so far as the fundamental rights guaranteed by Article 19(1) (a) and (c) of the Constitution are concerned.

7.2.1. So far as the procedural standpoint of the

reasonableness is concerned. as pointed out earlier. the sheet anchor of the petitioners case was *V.G. Row's* case Accordingly, I shall consider the said decision in detail in order to ascertain firslty the reasons for striking down the impugnned provisions there in and whether the same or similar infirmities exist in the present Act.

7.2.2. In the case of *State of Madras* v. *V.G. Row*[1] the appeal before ethe Supreme Court was from an order of the High Court of Madras adjudging section 15(2) (b) of the Indian Criminal Law Amendment Act 1908, as amended by the Indian Criminal Law Amendment (Madras) Act, 1950, as unconstitutional and void, and quashing Government Order No. 1517 dated 10th march, 1950. whereby the State government declared a Society called the people's Education Society an unlawful assocaition.

The respondent, who was the general secretary of the Society, applied to Hgh Court under Article 226 of the Constitution complaining that the impugned Act and the order referred to above infringed the fundamental rights conferred on him by Article 19(1) (c) of the Constitution to form associations or unions and seeking appropriate reliefs. A full Bench of the High Court. consisting of three Hon'ble Judges, allowed the application and granted a ceitıcate under Article 132. In that case the Government order was to the following effect :

1 (1952)A.I.R.(S C.)196

" Whereas in the opinion of the State Government, the Association known as th people's Education Society, Madras ,, has for its object interference with the administration of the law and the maintenance of law and order, and constitutes a danger to the public peace;

Now, therefore, His Excellency the Governor of Madras, in exercise of the powers conferred by S. 16 of the Indian Criminal Law Amendament Act, 1908 (Central Act 14 of 1908) hereby declares the said association to be an unlawful association within the meaning of the said Act.

It has to be pointed out that in that case no copy of the order was served on the respondent or any other office-bearer of the society but it was notified in the official gazette as reauired by the said Act.

As the Madras Amendment Act was passed on 12.8.1950 during the pendency of the petition, which was taken up for hearing on 21.8.1950, the issues involved were decided to be determined in the light of the original Act as amended.

Before the amendment of the Madras Act, the material provisions were as follows :-

15 In this part :

(1) 'association' means any combination or body of persons whether the same be known by any distinctive name or not ; and

(2) 'unlawful association' means an association :

(a) which encourages or aids persons to commit acts of violence or intimidation or of which the memebrs habitually

commit such acts. or

(b) which has been declared to be unlawful by the Provincial Govenment under the powers hereby conferred.'

16. If the provincial goverriment is of opinion that any assocaition interferes or has for its object interference with the administration of the law or with the maintenance of law and order, or that it constituted a danger to the public peace. the Provincial Government may be notification in official gazette declare such asscoation to be unlawful

The amending Act substituted for Cl. (b) in section 15(2) the following clause :-

(b) which has been declared by the State Government by notification in the official gazette to be unlawful on the ground (to be specified in the notification) the such assocaition:

(i) constitutes a danger to the public peace etc.

(ii) has interfered or interfers, with the maintenance of public order or has such interference for its object, or

(iii) has interfered or interfers with the administration of the law. or has such interference for its object.

For old section 16, section 16 and 16 A were established as follows :-

16(1) A notification issued under caluse (b) of sub-section (2) of section 15 in respect of any assocaition shall :

(a) specify the ground onwhich it is issued, the reasons for its issue, and such other particulars. if any, as may have a bearing on the necessity therefor . and.

(b) fix a reasonable period for any office bearer or member of the association or any other person interested to make a representation to the State Government in respect of the issue of the notification.

(2) Nothing in sub-section (1) shall require the State Government to disclose any facts which it considers to be against the public interest to disclose."

Under section 16-A the government was required, after the expiry of th time fixed, in the notification for making representations, to place before an Advisory Board constituted by it a copy of the notification and of the representations, if any, received before such expiry and the Board was to consider the materials placed before it, after calling for such further information as it might deem necessary from the State government or from any office bearer or member of the association concerned or any other person, and submit its report to the Government. if it was found by the Board that there was no sufficient cause for the issue of the notification in respect of the association concernd the Government was required to cancelthe notification.

By section 6 of the amending Act notifications already issuedand cancelled before the amendment were to have effect as if they had been issued under section 15 (2) (b), as amended, and it was provided in such cases a supplementary notification should also be issued as required under section 16(1) (a) and (b) as amended and therafter the procedure provided by the new S. 16-A should be followed. It was under this provision that the validity of the notification issued on the 10th March, 1950 under old S. 16 fell to be considered in the light of the provisions of the amended Act when the petitionscame up for hearing in the High Court on 21.8.1950.

After consideration of the relevant provisions of the said Act, the Supreme Court pointed out that it is on this basis that the question has to be determined as to whether S.15(2) (b) as amended, fell within the limits'y constitutionally permissible legislative abridgment of the fundamental right conferred on the citizen by Ar. 19 (1)(c). The Supreme Court pointed out that those limits were defined in Clause (4) of the same Article. It is to be remmered tha clause (4), which was the subject matter of consideration of th Supreme Court, was cl. (4) as it wsa before the 16th constitusiona Amendment. Before the Supreme Court it was not disputed that the restrictions in question were imposed "in the interests of public order " but the question involved was whether they were reasonable restrictions within the meaning of Art.19(4) ?

As pointed out by the Supreme Court, the learned Judges of the High Court unaimously held that the restrictions under S.15 (2) (b) were not reasonable on the ground of (1) the inadequacy of the publication of the notification, (2) the omission to fix a time limit for the Government sending the papers to the Advisory Board or for the latter to make its report, no safe guards being provided against the government enforcing the penalties in the meantime, and (3) the denial to the aggrieved person of the right apper either in person or by pleader before the Advisory Board to make good his representation. In addition to these ground one of the learned

Judges of the High Court held that the impugned Act ofended against Art. 14 of the constitution in that there was no reasonable basis for the differentiation in treatment between the two classes of unlawful associations mentioned in S.15(2) (a) and (b). The other learned Judges of the High Court did not, however, agree with this view. Vishwanath Sastri, J., one of the learned Judges of the High Court, further held that the provisions for forfeiture of property contained in the impugned Act were void as they had no reasonable relation to the maintenance of public order. The other two Judges of the High Court expressed no opinion on this point. It is to be pointed out that while agreeing with the conclusion of the learned Judges of the High Court that S 15 (2) (b) was unconstitutional and void, the Supreme Court expressed the opinion that their decision could be rested on a broader and more fundamental ground. In this context, after laying down the test of reasonablness, which I have quoted here in above, the Supreme Court held that upon givingdue weight to all the cosiderations indicated in the test laid down, section 15 (2) could not be upheld as falling within the limits of authorised restrictions on the right conferred by Art. 19(1) (c). in this context it was observed as follows :-

The right to form associations or unions has such wide and varied scope for its exercise, and its curtailmewnt is frought with such potential reactions in the religious, political and economic fields that the vesting of authority in the executive Government to impose restrictions on such right, without following the grounds of such imposition, both in their factual and legal aspects, to be

duly tested in a Judicial enquiry, is a strong element which, in our opinion must be taken in to account in judging the reasonablness on the restrictions imposed by S.15 (2) (b) on the exercise of the fundamental right under Art. 19 (1) (c) for no summary and what is bound to be a largely one sided review by an Advisory Board even where its verdict is binding on the executive Government, can be a substitute for a judicial enquiry.The formula of subjective satisfaction of the government or of its officers, with an Advisory Board thrown into the review the materials on which the Government seeks to over ride a basic freedom granted to the citizen, may be viewed as reasonable only in a very exceptional circumstances and within the narrowest limits and cannnot receive judicial aproval as a general pattern of reasonable restriction on fundamental rights."

After considering and distinguishing the two decisions in the case of *A.K. Gopalan* v. *State of Madras*[1] Dr. Khare's case[2] the Supreme Court made a distinction between the case of preventive detention and unlawful association both and other cases and observed as follows :-

" Besides, both involve an element of emergency requiring prompt steps to be takento prevent apprehended danger to public tranquillity, and authority has

1 (1950) S C R 88
2 (1950) S C R 519

to be vested in the Government and its Officers to take appropriate action on their own responsibility. These features are, however, absent in the ground on which the Government is authorised, under S. 15(2) (b), to declare associations unlawful. These grounds, taken by them selves, are factual and not anticipatory or based on suspicion. An association is allowedto bedeclared unlawful because it 'constitutes' a danger or 'has interfered or interfers' with the maintenaqnce of public order or has such interference for its object etc. The factual existence of these grounds is amendable to objective determination by the Court, quite as much as the grounds mentioned in cl. (a) of Sub- (2) of S.15, as to which the Attorney General conceded that it would be incumbent on the Govt. to establish as a fact, that the association, which it alleged to be unlawful, 'encouraged' or 'aided' persons to commit acts of violence, etc. We are unable to discover any reasonableness in the claim of the government in seeeking, by its mere declaration, to shut out judicial enquiry into the underlying facts under cl. (b). Secondly, the East Punjab Public Safety Act was a temporary enactment which was to be in force only for a year, and any order made there under was to expire at the termination of the Act. What may be regarded as a reasonable restriction imposed under such a statute will not necessirily be considered reasonable under the impugned Act, as the latter s a permanent measure, and any declaration made there under would continue in

operaton for an indefinite period until the Government should think fit to cancel it. Thirdly, while, no doubt, the Advisory Board procedure under the impugend Act provides a better safeguard than the one under the East Punhab Public Safety Act, under which the report of such body is not binding on the Government, the impugned Act Suffers from a far more serious defect in the absence of any provision for adequate communication of the Government's notification under S. 15(2) (b) to the association and its members or office-bearers. The Government has to fix a reasonable period in the notification for the agrieved person to make a represntation to the Government. But, as stated already, no personal service on any office bearer or member of the association concerned or service by affixture at the office, if any, or such association is prescribed. Nor is any other mode of proclamation of the notification at the place where such association carries on its activities provided for. Publication in the official gazette, whose publicity value is by no means great, may not reach the members of the association declared unlawful, and if the time fixed expired before they knew of such declaration, their right of making a representation which is the only opportunity of presenting their case, would be lost. Yet, the consequences to the members. which the notification in volves, are most serious, for, their very membership thereafter is made an offence under S. 17."

7.2.3. In my opinion. the lacunea in the Act for

which it was struck down by the supreme Court in *V.G. Row's case*, is absent in the present case. For the time being, I shall consider this aspect of the matter without taking into consideration the proviso to sub section (3) of section 3. I shall take into consideration the question of the proviso sub-section (3) of section 3 separately subsequently. In my opinion, the reasons given for striking down the Act by the Supreme Court are not applicable in respect of the Act which is challenged before us for the following, amongst other, reasons. Firstly, in the present Act, unlike the Act in the *V.G.* Row's case, there is no shuting out of a judicial enquiry. Secondly, though the present Act is a permanent one, the declaration made under section 3(1) does not remain operative for any indefinite period as it was in respect of the Act in *V.G. Row's* case. Thirdly, in the said Act, unlike the Act before the Supreme Court, there are provisions for adequate communiction of the Government's notificatiion under section 3(1) to the association and its members and office bearers; there is no absence of personal service or service by affixation; there is no absence of proclamation of the notification at the place where such association carried on its activities. I shall deal with this aspect of the matter in details.

7.2.4. Under sub-section (2) of section 3, such notification under sub-section (4) of section 3, every such notification under sec 3 (1) shall, in addition to the publication in the Official Gazette, be published in not

less than one daily newspapers having circulation in the State in which the principal office if any, of the Association concerned is situated. Over and above the same, such notification has also to be served on such association in the manner specified in the sub-section (4) of section 3 itself which includes affixation of a copy in some conspicuous part of the office of the association; serving copies on the principal office bearers of the association concerned: by proclaiming the contents of the notification by beat of drum or by means of loud speaker in the area in which the activities of the association are ordinarilly carried on or in such manner as may be prescribed by the Rules. In this connection reference may also be made to the relevant Rules framed under the Act which I have quoted here in above particularly rule 4 which provides for additional modes of service of such notification. A notification under section 3(1) as published in the Official Gazette, does not come into effect (where proviso to section 3(3) is not attracted, which I shall consider later), until and unless the Tribunal constituted under section 5 of the said Act confirms the declaration made in the notification under section 3. Such notification under section 3(1) has to be referred to the Tribunal within 30 days for adjudiation whether or not there is sufficient cause for declaring the association unlawful. Under sub-section (2) of section 4, the Tribunal has to, on receipt of a reference under 4(1), call upon the association concerned by notice in writing to show

cause why the said association be not declared unlawful. Every notice referred to under section (2) of section 4 shall be served on the affected association in the manner provided in Rule 6 of the rules which I have qoted in details here in above. Under sub-section (3) of section 4 there is also a provision for representation before the Tribunal by the office bearers and the mebers of the association. As provided in sub section (3) of section 3 the decision has to be taken by the Tribunal as expeditiously as possible and in any case within a period of 6 months from the date of the issue of the notification under sub section (1) of section 3. Under subsection (6) of section 5 the Tribunal shall, for the purpose of making such enquiry, have the power as vested in the civil court, as specified there in. Under sub section (7) of section 5 any proceeding before the Tribunal shall be deemed to be judicial proceeding shall be deemed to be a civil court for the purpose of section 195 and Chapter XXXV of the Criminal Procedure. Code. Under section 9 of the said Act the procedure to be followed by the Tribunal in holding any enquiry under subsection (3) of section 4, amongst others, shall, so far as may be, the procedure laid down in the Code of Civil Procedure. Further, Rule 3 of the said Rules provide that in holding an inquiry under sub-section (3) of section 4, amongst others, the Tribunal shall follow, as far as practicable, the rules of evidence laid down in the Indian Evidence Act. Rules 10, 11,12,13 and 15 of the Rules confer power upon the Tribunal to

issue summons for giving evidence or production of documents. One important aspect of the matter is that by virture of the proviso to sub section(1) of section 5 of the Act, no person shall be appointed as a Tribunal under the said Act, unless he is a Judge (and not merely a retired Judge) of a High Court. It is to be further noticed that though in a sense it is a complet prohibition for the time being but it is not in the nature of permanent prohibition. In view of section 6(1), a notification under section 3, even if confirmed by theTribunal, remains in force only for a period of two years from the date on which the notification becomes effective. This is subject to the provisions of sub section (2) of section 6 which provides that, whether or not the notification is confirmed by the Tribunal, the Central Government may, either on its own motion or on the appliation of any person aggrieved cancel such notification at any time.

7.2.5 Accordingly, in my opinion, section 3(1) of the said Act cannot be struck down for the reason for which the Act before the Supreme court was struck down in *V.G. Row's case* or for any other reason. Apart from the consideration of th *V.G. Row's* case, in my opinion section 3(1) read wit section 2(f) and (g) of the Act do not suffer from any procedural unreasonableness.

8. The next question is, even if section 3(1) cannot be challenged unconstitutional, whether the proviso to section 3(3) can be challenged on the ground

that it is violative of the fundamental rights guaranteed by Article 14 of the Constitution on the ground of procedural unreasonableness.

8.1. This proviso makes an exception to the general provisions which provide that a notification under section 3(1) shall not come into effect until and unless it is confirmed under section 4 by the Tribunal constituted under section 5 of the Act.

8.2. In my opinion section 3(1) deals with ordinary circumstance whereas the proviso to sub-section (3) of section 3 deals with extra-ordinary circumstances. In ordinary circumstances if the section 3(1) of notification is made effective after confirmation by the Tribunal, the object and purpose of the Act may serve. However, there may be some extraordinary situation: a situation of urgency; a situationof emergency. There may be circumstances where it becomes absolutely necessary to take immediate action in the matter. In this cotext, I may point out that the notification under section 3(1) in the present case is preceded by the incidents of 6th December , 1992, and its aftermath, of which we can take judicial notice. Reference may also be made in this connection to the counter affidavit filed on behalf of the Union of India. Referred to in details hereinafter. Unless some provision is made for dealing with situations arising out of an extraordinary circumstance or to deal with a case of emergency the whole object and purpose of the said Act may become infructuous. As it is made clear in

the proviso itself, the proviso is not attracted unless the Central Government is of the opinion that circumstaces exist which render it necessary for that Government to declare an association to be unlawful with immediate effect. Only in such cases that the notification under section 3(1) can be made to come into effect from the date of its publication in the official Gazette. However as provided in the proviso itself, even in such cases, the necessity of confirmation by the Tribunal of the declaration under sec. 3(1) is not dispenses with. If the notification under sec. 3(1) cannot under any circustances be given effect to unless certain formalities regarding enquiry by the Tribunal is complied with, it might serve the interest of a particular unlawful association or the office-bearers or the individual member of the association concerned, but it will certainly not serve the interest of the general public or the interest of the sovereignty or integrity of India even when the question of urgency or emergency is involved and even if ultimately it is confirmed by the Tribunal. This is an Act for preservation of the sovereignty and integrity of India. It is in the interest of the sovereignty and integrity of India. A situation might arise where the sovereignty and integrity of India is seriously threatened. In such a case, unless some immediate action is taken, the whole purpose of the Act will be made in fructuous. By the time the confirmation is made by the Tribunal, the country might suffer irreparable damage so far as its sovereignty and/or

integrity is concerned and no useful purpose may then be served in enforcing the notification issued under sec. 3(1) of the Act if the confirmation of the Tribunal is to be awaited before any action can be taken.Such action includes action to be taken under sections 8 and 9 of the Act quoted above. Such action includes prosectuion foroffences specified in Chapter III of the Act.

8.3 As already pointed out, the test of reasonableness cannot be put in a straight-Jacket. It would depend on the facts and circumstances of each case.

8.4 As pointed out in *State of Madras* v. *V.G. Row* (ibid) itself, the entent and urgency of the evil sought tobe remedied is one of the factors to be taken into consideration in ascertaining the reasonablenses. Similar observations were made in the case of *State of U.P.V. Kaushailya* (ibid) and *Laxmi Khandsari* v. *State of U.P.* (ibid). This proviso is to be applied in exceptional situation as contemplated inthe case of *Municipal Corporation* V. *Jan Mohammad* (ibid).

8.5 Accordingly, in my opinion, the proviso to sub-section (3) of section3 of the said Act cannot also be struck down on the ground that it imposes unreasonable restrictions on the fundamental right of a citizen from the procedural aspect.

9. The next question is whether the said section 3(1) or proviso to sub-section (3) of section 3 is arbitrary

and ultra vires on the ground that it violates the fundamental rights guaranteed by *Article 14* of the Constitution.

9.1 The principles underlying this Article are now well settled.

(a) In the case of *Sri Ram Krishna Dalmia* v. *Shri Justice S.R. Tendolkar* where, after consideration of various judgments,it was observed as follows :-

"A close perusal of the decisions of this Court in which the above principles have been enunciated and applied by this Court will also show that a statute which may come up for consideration on a question of its validity under Art. 14 of theconstitution maybe placed in one or other of the following given classes :

(i) A statute may itself indicate the persons or things to whom its provisions are intended to apply and the basis of the classification of such persons or things may appear on the face of the stature or may be gathered from the surrounding circumstances known to or brought to the notice of the Court. In detemining the validity or otherwise of such a stature the Court has to examine whether such classification is or can be reasonably regarded as based upon some difference which distinguishes such persons or things grouped together from those left out of the group and whether

1 (1958) A.I.R. (S.C.) 538

such differentia has a reasonable relation to the object sought to be achieved by the statute, no matter whether the provisions of the statute are intended to apply only to a particular person or things. Where the Court finds that the classification satisfies the tests, the Court uphold the validity of the law.

(ii) A statute may direct its provisions against one individual person or things or to several individual persons or things but no reasonable basis of classification may appear on the face of it or be deducible from the surrounding circumstaces, or matters of common knowledge .In such a case the Court will strike down the law as an instance of naked discrimination.

(iii) A statute may not make any classification of the persons or things for the purpose of applying its provisions but may leave it to the discretion of the Government to select and classify persons or things to whom its provisions are to apply. In determining the question of validity or otherwise of such a statute the Court will not strike down the law out of hand only because no classification appears on its face or because a discretion is given to the Goverment to make the selection of classification but will go on to examine and ascertain if the statute has laid down any principle or policy for the guidance of the exercise of discretion by the Government in the matter of the selection or classification. After such sarutiny the Court will strike down the

statute if it does not lay down any principle or policy for guiding the exercise or discreton by the Government in the matter of selection or classification, to the ground that the statute provides for the delegation of arbitrary and uncontrolled power to the government so as to enable it to discriminate between persons or things similarly situate and that, therefore, the discrimination is inherent in the statutte itself. In such a case the Court will strike down both the law as well as the executive action taken under such law.

(iv) A statute may not make a classification of the persons or things for the purpose of applying its provisions and may leave it to the discretion of the Government to select and classify the persons or things to whom its provisions are to apply but may at the same time lay down a policy or principle for the guidance of the exercise of discretion by the Government in the matter of such selection or classification ; the court will uphold the law as constitutional.

(v) A statue may not make a classification of the persons or things to whom their provisions are intended to apply and leave it discretion of the Government to select or classify the persons or things for applying those provisions according to the policy or the principle laid down by the statute itself for guidance of the exercise of discretion by the Government in the matter of such selection or classification. If the Government in making

the selectin or classifiction does not proceed on or follow such policy or principle, it has been held by this Court, e.g. in *Kathi Raning Rawat* Vs. *The State of Saurashtra* (E) supra that in such a case the executive action but not the statute should be condemned as unconstitutional." (Para-12)

(b) In the case of Jyoti Pershad Vs. *Administration for the Union Terriroty of Delhi* [1] it was pointed out as follows :

(1) If the statute itself or the rule made under it applies unequally to persons or things similarly situate, it would be an instance of a direct violation of the constitutional quarantee and the provision of the statute or the rule in question would have to be struck down.

(2) The enactment or the rule might not in terms enact a discriminatory rule of law but might enable an inequal or discriminatory treatment to be accorded to pesons or things similarly situated. This would happen when the legislature vests a discretion in an authority, be it the Government or an administrative official acting either as an executive officer or even a quasi-judicial capacity by a legislation which does not lay down any policy or disclose any tangible or intelligible purpose, thus clothing the authority with unguided and arbitrary powers enabling it to discriminate.

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1. (1961) A I R (S.C.) 1602

In such circumstances the very provision of the law which enable or permits the authority to discriminate, offends the guarantee of equal protection afforeded by Art. 14.

(3) The above rule would not apply to cases where the legislature lays down the policy and indicates the rule or the line action which should serve as a guidance to the authority Where such guidance is expressed inthe statutong provision conferring the power, no question of violation of Art 14 could arise. unless it be that the ' . es themselves or the policy indicated lay down. different rules to be applied to persons or things similarly situated.Even where such is not the case. there might be a tansgression by the authority of the limits laid down or an abuse of power, but the actual orde would be set aside in appropriate proceedings not so much on the ground of violation of Art. 14, but as really being beyond its power.

(4) It is not, however, essential for the legislation to comply with the rule as to equel protection, that the rules for the guidance of the designated authority, which is to exercise the power or which is vested with the discretion, should be laid down in express terms in the statutory provision itself.

Such guidance may thus be obtained from or afforded by(a) the preamble read in the light of the surrounding circumstances which necessitated the

ligislation, taken in conjunction with well-known facts of which the Court might take judicial notice or of which it is appraised by evidence before it in the form of affidavits.

In the circumstances indicated under the fourth head, just as in the third, the law enacted would be valid being neither a case of exessive delegation or application of legislative authority viewed from one aspect nor open to objection on the ground of violaton of Art 14 as authorising or pemitting discriminatory treatment of persons similarly situated. The particular executive or quasi- judicial act would, however, be open to challenge on the ground not so much that it is in violation of the equal profection of the laws guaranteed by Art. 14 because ex concessis that was not permitted by the statute but on the ground of the same being ultra vires as not being sanctioned or authorised by the enactment itself. The situation in such cases would be parallel to the test to be applied for determining the validity of rules made under statute which enable the rule making authority to enact subdiary legislation " to carry out the purposes of the Act". The criteria to be applied to determine the validity of such rules could be appropriately applied to determine the validity of the action under the provisions like the one dealt with under the last two heads."

9.2 Applying the test laid down, in my opinion, there is ample guideline laid down so far as the power

conferred by Sec. 3 (1) and the proviso to sub-section (3) of the said Act are concerned. Section 3(1) as such cannot be challenged as violative of Article 14. The statute has laid down the guidelines sufficiently; the object is very clear. The exercise of power by the Central Govt. is to be guided by the same.There is no delegation of arbitrary or uncontrolled power to the Government to enable it to discriminate between persons or things similarly situate. It cannot be said that discrimination is inherent in the statute itself. While making the selection or classificaions, if the Government does not proceed or follow such policy or principle, if the Government acts outside the scope of the Act, the particular notification may be challenged but for that reason alone the provisions of the Act itself cannot be struck down as unconstitutional Mere possibility of an abuse of power is not sufficient for striking down the conferment of the power as such .As it is well settled, it is not necessary that the rules as to equal protection, the rules for the guidance of the designated authority, would be laid down in express terms in the statutory provision itself. In the present case the objects and Reasons of the Bill, the preamble read in the light of the surrounding circumstances, which necessitated the legislation in conjunction with the well known facts of which the courts may take judicial notice, it is clear that there is a guiding policy and that there is no conferment of any arbitrary or naked power. Accordingly, there is no merit in this

contention and it is rejected.

9.3 In the light of the same, in my opinion, even the proviso to sub section (3) of Sec. 3 cannot be challenged on the ground that the same violates the provisions of Art. 14. As already discussed hereinabove it is made clear from the said provison itself, the cases where the said provison can be taken resort to. Where such extra-ordinary power can be exercised , has been indicated in the proviso itself. In this connection reference may also be made to the Object and purpose of the said Act. The guideline has been laid down in the Act itself. It cannot be said to be arbitrary or discriminatory or in any manner violative of Art. 14. In the facts of a case, there may be an urgent necessity of applying a notification immediately in the greater public interest. The provisions of an Act, which confer such power cannot be challenged, though, if in a given case, while exercising such power there is any abuse of such power, the exercise of such power can be challenged.Reference may be made in this connection to *Pannalal Binjraj* v. *Union of India* [1] *and Virendra V. State of Punjab* [2]

9.4 Accordingly, there is no merit in this connection and the same is rejected.

10. The next question is whether section 3(1) or section 3(3) proviso is ultra vires Article 21.

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1. (1957) A.I.R (S.C.) 397
2. (1957) A.I.R. (SC.) 896

10.1 It is no doubt true that so far as the relationship between Articles 14,19 and 21 is concerned, the correct position in law is that even if there is a law depriving a person of personal liberty and prescribing a procedure for that purpose within the meaning of Article 21, this has to stand the test of one or more of the fundamental rights conferred under Article 14 or 19 which may be applicable in a given situation. This position was made clear in the cases of *Shambhu Nath Sarkar* v. *State of West Bengl* [1] Hardhan Saha v. *State of West bengal*[2] and *Mrs. Manekа*Gandhi v. *Union of India*[3]

I have already held that section 3 (1) and the proviso to section 3(3) are not violative of the provisions of Article 14 and 19 of the constitution. Under these circumstances there is no additional ground to hold that the said sections are ultra vires Article 21, though they are not ultra vires Articles 14 and 19 of the Constitution.

10.2 Accordingly, there is no merit in this contention, and the same is rejected.

11. The next question is the question of constitutionalityof the provisions of sections 10 to 1- of the said Act.

11.1. In : context it is to be pointed out that they come under chapter III which provides for "offences

1. (1973) A.I.R. (SC.) 1425
2. (1975) 3 S.C.C 198
3. (1978) A.I.R. (S.C.). 597

and penalties". This is in order to achieve the purpose and object of the Act. I have held that the main provisions are not violative of Art. 14 or 19 or 21 of the Constitution. When such an Act is enacted, some provisions regarding offences and penalties must be provided for without which no purpose would be served by merely issuing a notification under section 3(1) of the said Act, even if it is issued in conjuction with the proviso to section 3(3). The provisions of sections 10 to 14, which are merely corollary thereto, cannot also be challenged on the alleged ground of violation of any such fundamental right. In this context, may also point out that in view of section 14 of the said Act the offence punishable under this Act shall be cognizable. Further, under section 17 of the Act, no Court shall take congnizance of any offence under the said Act except with the previous sanction of the Central Government or any officer authorised by the Central Government. Accordingly, there is sufficient safeguard.

11.2 Accordingly, I hold that sections 10 to 14 of the said Act are not violative of the provisions of Articles 14 or 19 or 21 of the Constitution.

12 I shall now take up the question of legistative competancy of the Parliament to enact the said Act.

12.1. At the outset, I must point out certain principles to be followed regarding interpretation of legislative lists.

(a) In the case of *State of Rajasthan* Vs. G. Chawla *and another*, reported in A.I.R.(1959) SC 14, a 5 Judges Bench of the Supreme Court observed as follows ;

" ... it must beheld as settled that the legislature in our Country posses plenary powers of legislation This is so even after the division of legislative powers, subject to this that the supremacy of the legislatures is confined to the topics mentioned as Entries in the List conferring respectively powers on them. These Entries, it has been ruled on may an occasion, though meant to be mutually exclusive are sometime not really so. They occasionally overlap, and are to be regarded as enumeration simple of board categories. Where in an organic instrutment such enumerated power of legislation exist and there is a conflict between rival lists, it is necessary to examine the impugned legislation in its pith and substsnce, and only if that pith and substance falls substantially within an Entry or Enries conferring legislative power, is the legislation valid, a slight transgression upon rival List noth withstanding."

(b) In thiscontext reference was made to the observation made by the Federal court in *Subramanayam Chetiar* v. *Muthuswamy Gounda* [1] to the following effect;

"It must inevitably happen from time to time that legislation., though purporting to deal with a subject in

1. (1940) F.C.R. 188,201.

one list, touches also on a subject in another list, and the· differenet provisions of the enactment may be so closely interwined that blind adhernce to a strictly verbal intepretation would results in a larger number of statutes being declare invalid because the legislature enacting them may appear to have legislated in a forbidden sphere Hence the rule which has been evolved by the judicial Committee whereby the impugned statute is examined to ascertain its pith and substance or its true nature and character for the purpose of detemining whether it is legislation with respect to matters in this list or in that."

(c) It was further pointed out that this dictum was expressly approved and applied by the Judical Committee in *Prafulla Kumar* v. *Bank of Commerce Ltd.*[1] It was noted that the same view was expresssed by the Supreme Court on more than one occasion. In this context it was further pointed out that it is equally well settled that the power to legislate on a topic of legislation carried with the power to legislate on an ancillary matter which can be said to be reasonal included in the power given.

(d) In the case of the *Kannan* Devan *Hills Produce Company Ltd.* v. *The State of Kerala* [2] the constitution Bench of the Supreme Court held that the State has

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1 74 Ind App 23

2. (1972) A.I R (S C)2301

legislative competency to legislate on Entry 18 List II and Entry 42 List III. In this context, it was pointed out that this power cannot be denied onthe ground that it has some effect on an industry controlled under Entry 52 List I. It was pointed out further that the 'effect' is not the same thing as subject-matter. If a state Act, otherwise,valid has effect on a matter List I, it does not cease to be a legislation with respect to an entry in list II or List III.

(e) In the case of *Calcutta Gas Company* (Proprietary) Ltd. V. *State West Bengal and others*. reported in A.I.R. 1962 S.C. 1044, a 5 Judge Bench held as follows :

" The power to legislate is given to the appropriate Legislatures by Art. 246 of the Constitution. The entries in the three Lists are only legislative heads of fields of legislation; they demarcate the area over which the appropriate legislatures can operate. It is also well settled that widest amplitude should be given to the language of the entries But some of the entries in the different Lists or in the same Lists may overlap and sometimes may also appear to be in direct conflict with each other. It is then the duty of this court to econcile the entries and ring about harmony between them. When the question arose about reconciling entry 45 of List I, dutites of excise, and entry 18 of List II, taxes on the sale of goods, of the Government of India Act. 1935, Gwyer, C.J. in Central Provinces and Lubricants Taxation Act, 1938,in the matter of.1939 FCR 18 at pp.42. 44 (AIR 1939

FC I at pp 7,8 observed ;

" A grant of the power in general terms, standing by itself, would no doubt be construed in the wider sense; but it may be qualified by other express provisions in the same enactment, by the implication of the context, and evenby considerations arising out of what appears to be the general scheme of the Act"

The learned Chief Justice proceeded to state

"... an endeavour must be made to solve it, as the JudicialCommittee have said, by having recourse to the cotext and scheme of the Act and a reconciliation attempted between two apparently conflicting jurisdictions by reading the two entries toghether and by interpreting, and, where necessry, modifyig the language of the one by that of the other. If indeed such a reconciliation should prove impossible, then and only then, will be non-obstante clause operate and the federal power prevail."

(f) In the case of *Harakchand Ratanchand* v. *Union of India* [1] It was observed as follows :

'The power to legislate is given to the propriate legislatures by Article 246 of the Constitution. The entries in the three lists are only legislative heads or fields of legislation;they demarcate the area over which the appropriate legislatures can operate. It is well etablished that the widest amplitude shened given to the language

1 (1970) A.I.R. (S.C.) 145

of the enries. But some of the entries in the different lists or in the same list may overlap or may appear to be in direct conflict with each other. It is then the duty of this Court to reconcile the entries and bring about a harmonious construciton. In re . The Central Provinces and Berar Sales of Motor Spirit and Lubricants Taxation Act, 1938, 1939 FCR 18 (A.I.R. 1939 F.C.I.) Sir Maurice Gwayer proceeded to state.

" Only in the Indian Constitution Act can the particular problem arise which is now under consideration ; and an endeavour must be made to solve it, as the judicial Comittee have said by having recourse to the context and scheme of the Act, and a reconciliation attempted between two apparently conflicting jurisdictions by reading the two entries together and by interpreting and, where necessary, modifying, the language of the one by that of the other. If indeed such a reconciliation should prove impossible, then, and only then, will the non obstante clause operate and the federal power prevail; for the clause ought to be regarded as a last resource, a witness to the imperfections of human expression and the fallibility of legal(P.44) draftsmanship."

"...It is well settled that the entries in the three lists are only legislative heads or fields of legislation and they demarcate the area over which the can operate. The legislative entries must be given a large and liberal interpretation, the reason being that the allocation of subjects

to the lists is not by way of scientific or logival definition but is mere enumeration of broad and comprehensive categories ... "(Pr.7)

(g) In the case of *M/S Intenational Tourist Corporation etc* v. *State of Haryana and others. reported in A.I.R.* 1981 SC 774, it was held by the Supreme Court as follows :

"Before exclusive legislative competence can be claimed for Parliament by resort to the residiary power, the legislative incompetence of the State ligislative must be clearly established. Entry 97 itlself is specific that a matter can be brought under that entry only if it is not enumerated in List II or List III and in the case of a tax if it is not mentioned in either of those lists. In a Federal Constitution like ours where there is a division of legislation subjects but the residuary power is vested in Parliament, such residuary power cannot be so expensively interpreted as to whittle down the power of the State legislature. That might affect and jeoparadise the very federal principle. The federal nature of the constitution demands that an intepretation which would allow the exercise of legislative power by Parliament pursuant to the residuary powers vested in it to trench upon State legislation and which would thereby destroy or belittle State autonomy must be rejeted. In Attorney-General for Ontario v.Attorney-General for the Dominion, 1896 AC 348 it was observed by the House of Lords at pp. 360-361;

" ... the exercise of legislative power by the Parlia-

ment of Canada, in regard to all matters not enumerated in S.91 , ought to be strictly confined to such matters as are unquestionally of Canadian interest and importance, and ought not to trench upon Provincial legislation with respect to any of the classes of subjects enumerated in S.92. To attach any other construction to the geneal power which, in supplement of its enumerated powers,is conferred upon the Parliament of Canada by S.91, would, in their Lordship's opinion, not only be cotrary to the intendmet tendment of the Act, but would practically destroy the autonomy of the provinces."

(h) *In Subrahmanya Chettiar* v.*Muttuswami Goundan,*[1]

" But resort to that residual power should the very last refuge. It is only when all the categories in the three lists are absolutely exhausted that one can think of falling back upon a non descript".

(i) Again *Manikkasundra Bhatter v. R.S. Nayudu,* 1946 FCR 67[2]

" In the India Constitution Act, S. 104 has been inserted for the very purpose of enabling legilation to be enacted in respect of subjects omitted from the three lists in the Seventh Schedule. There is not therefore the same necessity for Courts in India to find that a subject must be comprised within the entries inthe List. But when

1 (1941) A.I.R. (F.C.) 47

2. (1946) A.I.R. (F.C.) 1

there is a choice between two possible constuctions of an entryor entries, one of which will result inlegislative power being conferred by some entry or entries in the List and the other in a finding of no existing power, but if legislation is required that recourse must be had to S. 104, the first construction should on principles analogous to those applied to the Canadian constitution be preferred."

It is, therefore, but proper that where the competing entries are an entry in List II and entry 97 of List I, the entry in the State list must be given broad and plentiful interpretation.

(j) In the case of *Federation of Hotel& Restaurant V. Union of India,* reported in A.I.R (1990)) S.C. 1637 the constitution Bench consisting of the five Judges was considering the question of, inter alia, the legislative compentency of the Parliament to enact Expenditure Tax Act, 1987. In connection with the question of construction of the entries in the different Lists it was observed as follows :

" ... The Principal question is whether the tax envisaged by the impugned law is within the legislative competence of the Union Parliament. In that sense, the constitutionality of the law becomes essentially a quesion of power which in a federal conscitution, unlike a legally omnipotent legislature like the British Parliament, turns upon the construction of the entries in the legislative lists. If a lagislature with limited or qualified jurisdiction transgresses its powers, such transgression may be open, direct and overt, or disguised, indirect and covert.

The latter kind of trespass is figuratively referred to as "colourable legislation", connoting that althought apparently the legislature purports to act within the limits of its own powers yet, in substance and in reality, it encroaches upon a field prohibited to it, requiring an examination, with some strictness, the substance of the legislation for the purpose of determining what is that the legislature was really doing. Whereever legislative powers are distributed between the Union and States, situations may arise where the two legislative fields might apparently overlap. It is the duty of the courts, however difficult it may be, to ascertain to what degree and to what extent, the authority to deal with matters falling within these classes of subjects exists in each legislature and to define, in the particular case before them, the limits of the respective powers. It could not have been the intention that a conflict should exist; and, in order to prevent such a result the two provisions must be read together, and the language of one interpreted, and, where necessary modified by that of the other.

The judicial Committee in Prafulla Kumar Mukherjee V. Bank of Commerce, (1945 FCR 179) referred to with approval the following observations of Sir Maurice Gwyer C.J in Subrahmanyan Chettiar's case (AIR 1947 FC 47 at p.51).

"It must inevitavly happen from time to time that legislation, though purporting deal with

a subject in one list, touches also on a subject in another list, and the different provisions of the enactment may be so closely interwined that blind observance to a strictly verbal interpretation would result in a large number fo statutes being declared invalid because the legislature enaction them may appear to have legislated in a forbidden sphere. Hence the rule which has been Judicial Commitee, whereby the impugned statute is examined to ascertain its' pith and substance', or its ' true nature and character ', for the purpose of determining whether it is legislation with respect to matters in this list or in that."

This necessitates as an " essential of federal Government the role of an impartial body, independent of general and regional Governments", to decide upon the meaning of decision of powers. The Court is this body."

(Para 12 at p. 1647)

On the question that sujects which in one aspect and for one purpose fall within the power of a particular legislation may in another aspect and for another purpose fall within another legislative power it was observed as follows :

" Indeed, the law 'with respect to' a subject might incidentally ' affect another subject in some way ; but that is not the same thing as the law being on the latter subject. There might be overlapping; but the overlapping must be in law. The same transaction may involve or more taxable events in its different aspects. But the fact

that there is an overlapping does not detract from the distinctiveness of the aspects. Lord Simonds in Governor General in Council V. Province of Madras, 1945 FCR 179 at p.193: (AIR 1945 PC 98 at p.101) in the context of concepts of duties of Excise and Tax on Sale of Goods said:

" .... The two taxes, the one levied on a manufacturer in respect of his goods, the other on a vendor in respect of his sales, may, as is there pointed out in one sence overlap. But in law there is no overlapping. The taxes are separate and distinct imposts.If in fact they overlap, that may be because the taxing authority, imposing a duty of excise, finds it convenient to impose that duty at the moment when the excisable article lea ves the factory or workshop for the first time on the occassion of its sale ..... "

Referring to the "aspect" doctrine Laskin's " Canadian Constitutional Law" states :

" The' aspectg' doctrine bears some resemblance to those just noted but, unlike them, deals not with what the ' matter' is but with what it ' comes within' ...."

"..... it applies where some of the constitutive elements about whose combination the statute is concerned (that is, they are its ' matter '), are a king most of ten

met with in connection with one class of subject, and others are of a kind mostly with in connection with one class of subjects and others are of a kind mostly dealt with in connection with another. As in the case of a pocket gadget compactly assembling knife blade, screwdriver, fishealer, nailfile,etc. a description of it must mention everything but in characterizing it the particular use proposed to be made of it determines what it is ."

" ..... I pause to comment on certain corelations of operative incompatibility and the ' aspect' doctrine .Both grapple with the issues arising from the composite nature of a statute, one as regards the preclusory impact of federal law on provincial measures bearing on constituents of federally regulated conduct, the other to ide ntify what parts of the whole making up a' matter' bring it within a class of subject ...." (P.117)

The distinction between what is " ancillariness" and what " incidentally affecting" the treatise says:

"..... There is one big difference though it is little mentioned. Ancillariness is usually associated with an explicit statutory provision of a peripheral nature; talk about ' incidentally affecting ' crops up in connection with the potential of a non - differentiating statute to affect

indiscriminately in its application matters assertedly immune from control and others.

But it scens immaterial really whether it is its words or its works which draw the flotsam within the statute' swake." (P.115)

(K) In a recent decision of the Supreme Court in *Krishna Bhimrao Deshpande V. Land Tribunal. Dharwad and others* [1], the observations made in *Calcutta Gas Company* (Proprietory) Ltd. V. *State of West Bengal* (Ibid) was quoted with approval. Further, while referring to the decision in *Kannan Devan Hills Produce co. Ltd.* V. *State of Kerala* (ibid), it was observed as follows :-

" It is well settled that the legislative power of the State has to be reconciled with that of the Parliament and that in their respective fields each is supreme. Even assuming that the State enactment has same effect on the suvject - matter falling within the Parliament 's legislative competence, that by itself will not render such law invalid or inoperative."

(1) This aspect of the matter has been considered and dealt with by me in the case of *Delhi Cloth and*

1. (1993) 1 S.C.C. 287

General Mills Co. Ltd. and others V *The Agricultural Produce Market Commitee and others* [1] Where the question of competency of the State legislature, to enact section 27 of the Bihar Agricultural Produce Markets Act, 1960 was under consideration. In this context I have observed as follows:—

" It is the question of application of the doctrine of pith and ubstance. A State legislation falls entirely within the competence of State Legislature, the State Act will not be struck down. If in pith and substance, the State Legislation falls within one entry or the other of the state List, then it must be held to be valid in its entirety, even though it might incidentally trench upon and enter a field ı the Union List. If such entrenchment is minimal and that does not affect the dominant part which is within the competence of the State Legislature, the State Act must be upheld as constitutionally valid. Unless the field is completely occupied by List I, the State Legislature is not incompetent to legislate. On the contrary , if the field is not wholly occupied, a mere minimal encroachment or entrenchment would not affect the validity of the State Legislation."

12.2. I have no hesitation in holding that Entry I

1. (1993) A.I.R. (Pat.) 43.

of list II, that is, the state list, of 7th schedule, has no applicatoin in the present case. The said entry relates to "public order". What is meant by "public order" has been dealt within various decisions. Mostly they deal with the preventive detentions where the question is whether the grounds relates to "law and order". *In the case of Stainislaus Vs. State of Madhya Pradesh and others reported in A.I.R. 1977 SC 908, a five judges bench of the Supreme Court* considered what is meant by "public order". In this context it was observed as follows :

"The expression "public order" is of wide connotation. It must have the connotation, which it is meant to provide as the very first Entry in List II. It has been held by this court in Ramesh Thappar Vs. The state of Madras(1950) S.C.R. 594 = (A.I.R. 1950 SC 124) that "public order is an expression of wide connotation and signifies state of tranquility which prevails among the members of the political society as a result of internal regulations enforced by the Government which they have estabished".

12.3. Even if the expression may be treated as of wide connotation, but the question whether in pith and substance the Act. relates to "public order", I have already examined in details the scope of object of the Act and I have no hesitation in holding that in pith and substance it is not a law relating to "public order".

12.4 As pointed our earlier, this Act was framed pursuant to the acceptance by the government of the unanimous recommendation of the commitee of nation integration and regionalism appointed by the national integration council. The 16th constitutional ammendment empowered the State, within the meanig of the Act 12, to impose by law some reasonable restrictions regarding the fundamental rights guaranteed under Art 19 in the interest of soverereignty and integrity of India. This is clear from the statement of "objects and reasons" of the Bill itself. This would also be clear from the " objects and reasons" of the amending Act of 1969 itself, wherein it was specified that as Article 248 of the Constituion and Entry 97 of the Union List, relating to the residuary powers of Parliament did not apply to the State of Jammu and Kashmir when that Act was enacted, some doubts were extended the Act was extended to that State. To remove any such doubt, the constitution (Application to Jammu and Kashmir) Amendment order, 1969 was issued, By Act of 1969, the said Act was amended by re-enacting sub-section (2) of section 1 to put the application of the law to Jammu and Kashmir beyond doubt. It would also be clear from the definition of 'unlawful activity' as quoted above that it is not a mere matter of " public order". At the most, it may be said that that Act touches, incidentally, the subject of "public order". At the most, it may be said that there is some overlapping but it is a minor one . In this connection reference may be made to the cases of State of *Rajasthan V. G. Chawla* (ibid), *Harakchand Ratanchand* v. *Union of India* (ibid) and *Federation of Hotel and Restaurant v. Union of India* (ibid). By applying the principle of

pith and substance, I have no hesitation in holding that it is not a law relating to " public order" but it is a law relating to " sovereignty and integrity of India",even if it may incidentally affect "public order". This subject is not the subject matter of any specific entry of any of the lists and, accordingly, in view of Article 248 read with List I entry 97, it is the Parliament which alone can legislative regarding this subject and not any State Lergislature. Accordingly, there is no merit in this contention and the same is rejected.

13. I shall now consider the submissions made regarding the validity of the notification as such,

13.1 It is no doubt true that though an Act confirming power may not be successfully challenged, if there is any abuse of power it can be challenged by appropriate action. What can be struck down in such cases is not the provision Contained in the Act but the order passed thereunder which may be mala fide. If there is any abuse of power what will be struck down is not the statute but the abuse of power. Reference may be made in this connection to *Pannalal Binjraj V. Union of India*[1] and Virendra V. State of Punjab[2] The notification can be challenged on the ground that the grounds are not germane to the object of the power conferred or that it is mala fide whether on fact or in law. However, as already noticed, the Tribunal, which has been conferred with all the powers of a Civil Court and where even the principles of Evidence Act would apply, is fully empowered to go into the question of the merits of the issuance of such notification. It shall be entitled to

1. (1957) A.I.R. (S.C.) 397
2. (1957) A.I.R. (S.C.) 896

decide whether or not there was any sufficient cause for declaring the association in question to be unlawful. It can confirm the notification. it can cancel the notification, In the process it can go in to the merits of the grounds stated in the notification. It can go into the correctness of the allegations made therein. It go into the question as to whether any " unlewful activity" within the meaning of the Act is involved or whether it is an "unlawful association" within the meaning of the said Act. These considerations involve consideration of the factual aspect of the allegation made therein.

13.2 In the case of *Carl Still G.M.B.H.* v *The State of Bihar*[1] the Supreme Court pointed out that if a statute sets up a tribunal and confines to it, jurisdiction over certain matters and if a proceeding is properly taken before it in respect of such matters, the High Court will not, in the exercise of its extra-ordinary Jurisdiction under Art, 226, issue a prerogative writ so as to remove the proceedings out of the hands of the Tribunal or interfere with their course before it. However, when proceedings are taken before a Tribunal under a provision of law, which is ultra vires, it is open to a party aggrieved thereby to move the court under Art. 226 for issuing appropriate writs for quashing them on the ground that they are incompetent, without his being obliged to wait until those proceedings run their full course.

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1. (1961) A.I.R. (S.C.) 1615

13.3 It is true that no authority, much less a quasi judicial authority can confer jurisdiction on itself by deciding a jurisdictional fact wrongly. The question whether the jurisdictional fact has been rightly decided or not is a question that is open for examination by High Court in an application for a writ of certiorari. Reference may be made in this connection to the decision in *M/s Raza Textiles Ltd. Rampur* V. *The Income Tax Officer, Rampur reported in* A.I.R. (1973) S.C. 1362.

13.4 However, even if it can be termed as "Jurisdictional" fact, it is a matter for the Tribunal, at least at the first instance, to go into the same. It is not for this Court at this stage to take up the role of the Tribunal and decide as to whether there was any Justification for issaunce of such notification or whether the grounds are Justified or not. Reference may be made in this connection to the decision in the case of *Express Newspapers (P) Ltd*. V. *The Workers* [1]

13.5 Of course it is open to the Court even at the preliminary stage and without waiting for the decision of the Tribunal on the merits to strike down any notification under the said Act when it is shown that, on the face of the notification itself, it is based on extraneous ground or that the grounds specified therein are not germane to the scope and object of the Act empowering the issuance of such notification. However, in the present case,

1. (1963) A.I.R. (S.C.) 569

having regard to the facts set out in the notification and having regard to the scope and object of the Act, I am unable to held that the notification, on the fact of it, shows that any opinion, if the grounds set out in the notification exist and they are correct which question can be gone into by the Tribunal then it certainly amounts to " unlawful activity" within the meaning of 3(1) read with sections 2 (f) and section 2(g) of the said Act and it cannot be said that such notification is ultra vires the said Act.

13.6 Further, in my opinion, it was not necessary to set out in the notification the justification for issuance of the notification under section 3(1) of for resorting to the proviso to sub-section (3) of section 3. If challenged, it can be justified, as it has been done in the present case in the counter affidavit filed on behalf of the Central Government the relevant portion of which is set out hereinbelow:

"17. In the wake of unfortunate events of demolition of the disputed Ram Janma Bhoomi Babri Masjid structure, the Central Government, in the Ministry of Home Affairs, has issued a notification dated 10.12.92 in exercise of powers conferred under sub-section (1) of Section 3, read with proviso to sub-section (3) of that section, declaring five associations, namely, R.S.S., V.H.P., Bajrang Dal, JEIH,. and ISS as unlawful asociations and has further directed that the said notification shall have the effect from the date of their publication in the official

gazette forthwith, subject to any order that may be made under section 4 of the Act by the Tribunal to be constituted. The course of events and facts leading to the demolition of the disputed structure are no longer uncommon and the answering respondents do not wish to dilate upon the various factual aspects of the same for the purposes of answering the legal challenge raised by the petitioners to the validity of the Act, Rules and the notification, except in so far as it is considered relevant. The notification was issued after the Government was satisfied and had recorded its satisfaction in its files in accordance with the provisions of the Act.

18. There was sufficient material before the Central Government for exercise of power u/s 3(1) read with proviso to sub-section (3) of section 3. It is against public interest to disclose the material and activities of the banned parties to them or to the public. Judicial notice can be taken of the fact that as a result of demolition of the disputed structure on 6.12.92, as a backlash to the incident, uncontrollable communal riots have broken out throughout the country. It is submitted that the sufficient material in its possession and knowledge establishing with definiteness that members of banned organisations were the members of R.S.S. were likely to promote communal disharmony and excite communal feelings amongst different religious sects in the country. In this background of circumstances, of which the entire country is fully aware, the Central

Govermnent had to take recourse to the exercise of power u/s 3(1) read with the proviso to sub-section (3) of section 3 of the Act to declare R.S.S. as an unlawful association with immediate effect. The declaration was made also with a view to prevent further spread of communal disharmony and hatred between the two different religious sects for which the leaders and members of banned organisations were found largely responsible. It is submitted that for such purpose, sufficient materials were available with the Central Government.

19. That in the body of the notification dated 10.12.92, respondent no.1 has set out in detail the facts constituting grounds mentioned in the notification, it has more materials and facts in its possession which the Central Government considered to be against public interest to disclose. Thus, the notification dated 10.12.92 has been issued for reasons which are sufficient and relevant. The exercise of power has been in good faith for achieving the object of the Act and is not used as a weapon in the hands of political parties used against adversaries.

20. The answering respondents respectfully submit that for exercise of power under proviso to sub-section (3) of section 3, overwhelming reasons constituting jurisdiction exist. The reasons which are set out in the notification are also appropriately the relevant reasons justifying minimum exercise of power to declare the

association as unlawful with minimum effect within the contamplation of proviso to sub-section (3). A part from the above, the reasons do exist on file which were taken into account and recorded at the time of issuance of the notification dated 10.12.92. The answering respondents categorically deny that there has been an breach of the provisions of section 3 or proviso to sub-section (3) of section 3 while issuing the notification in question.

13.7 For the aforesaid reasons the said notification cannot be challenged as mala fide.

13.8 The notification cannot also be challanged on the ground that it was made on state grounds. Any sole and individual ground based on some incident which had taken place 2 or 3 years back, may or may not be a stable ground depending on the facts and circumstances of the particular case. In some case a solitary ground based on some fact which took place some time back may not be, without anything else, sufficient for passing such a notification. But when not only one incident of 2 years back, but the same along with some other relevant grounds are taken into consideration, in the background of the recent happening, it cannot certainly be said that the grounds are stale. Some incident might occur which the authority concerned might ignore for the time being on the basis of the same being treated as an isolated incident. But having regard to the subsequent situation and/or subsequent acts or conduct and the atmosphere prevailing they may decide to take action under the said Act though no such action was taken earlier on some isolated grounds. In my opinion, the grounds cannot be

held to be stale and accordingly an abuse of power conferred.

13.9 Accordingly, I am not inclined to hold that the particular notification in the present case issued under section 3, read with the proviso to sub-section (3) of section 3, has been made male fide or in colourable exercise of power.

14. Before concluding, I may point out some salient features of my decision, without any intention of summarising the same.

(1) Section 3(1) of the Unlawful Activities (Prevention) Act, 1967 is not ultra vires Article 19(1)(a) or (c) of the Constitution either from substantive or procedural point. The Restrictions imposed are reasonable. (Para 7)

(2) The proviso to sub-section (3) of section 3 of the said Act is also not ultra vires Article 19 (1) (a) or (c) of the Constitution, (Para -8)

(3) The said section 3(1) and proviso to sub - section (3) of section 3 thereof are not ultra vires Article 14 of the Constitution. (Para-9)

(4) The said section 3(1) and proviso to sub-section (3) of section 3 thereof are not ultra vires Article 21 of the constitution. (Para-10)

(5) Sections 10 to 14 of Chapter III of the said Act are not ultra vires Articles 14 or 21 of the Constitution. (Para-11)

(6) The parliament had legislative competency to enact the said Act. (Para- 12)

(7) The notification under section 3(1) cannot be challenged as mala fide or in colourable exercise of power. It was not based on stale grounds. (Para -13)

15. All the contentions raised in support of the writ petition having been rejected, this writ petition is dismissed. There will be no order as to costs.

N. Panday, J. I agree. Application Dismissed

S.K. Singh, J. I agree.

R.D.

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Page

perpetuate illegality. If the order cancelling the illegal appointments is quashed, it would amount to continuing the appointments illegally made. Since the petitioner's appointment and its continuation was illegal, no relief can be granted to the petitioner in exercise of writ jurisdiction. In such cases, even the rule of audi *alterem partem* will not apply.

Surendra Pd. Singh V. The State of Bihar and ans (1993) I.L.R.72 Pat. 466

Service - appointment --- panel prepared to remain alive for a long time --- whether a select list persons having their names in the panel --- legal right of.

Where a panel of a large number of persons is prepared which is to remain alive for a long time the same cannot be tormed as a select list and the persons whose names appear therein cannot have a legal right for appointment in terms of the said purported panel.

Held, therefore that in the persent case as the panel was prepared only on the basis of the passing of the year of the training examination, the said panel being not a select list, the same cannot be enforced in a court of law.

Subhash Chandra Dubey V. The State of Bihar and Ors (1993) I.L.R.-72 Pat. 477

CIVIL WRIT JURISDICTION

Before G.C. Bharuka & Shamim Ahsan, J.J.

1992

Dec, 21

Yadunandan Prasad *

V.

The State of Bihar & Ors.

Bihar Nationalised seconoary Schools (Conditions of Service) Rules, 1983, rule 6 --- provisions of ---- assistant teacher in a nationalised secondary school --- director of secondary education --- authority of to initiate departmental proceeding or to pass order of suspension --- Bihar Non-Government Secondary Schools (Taking Over of Management and Control) Act, 1981 (Bihar Act No. XXXIII of 1982).

Under the provisions of the Act and the Rules, the Director, Secondary Education is the appointing authority in respect of the headmasters and asistant teaches of nationalised secondary schools. Under Rule 6, the junior grade teachers belong to the district cadre and the District Education Officer is the controlling authority of this cadre. The senior and selection grade teachers form a divisional cadre and the Regional Director of Education is the controlling authority. The headmasters form a state

* Civil Write jurisdiction Case No. 11003 of 1992 . In the matter of an Application under Articles 226 and 227 of the Constitution of India.

cadre and the Director is its controlling officer.

Held, therefore, that in the instant case in respect of the petitioner who is an assistant teacher in a nationalised secondary school, the Director of Secondary Educaton has no authority to initiate a departmental proceeding or to pass an order of suspension as contained in annexure-1 and the same must be quashed.

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

The facts of the case material to this repdort are set out in the judgment of G.C. Bharuka, J.

Mr. Bijay Kumar Panday for the petitioner.

Mr. P. N.Jha, G.P.4 for the slate

G.C. Bharuka, J. The present writ application has been filed by the petitionar for quashing the order dated 18.8.92 (Annexure-1) passed by the Director of Secondary Education, Respondent no.2, by which he has suspended the petitioner from service on the ground that the petitioner has been made an accused in Nalandan P.S. Case No. 158/90 under sections 36434.P.C.

2. The petitioner is an assistant teacher posted in Vidya Vihar High School, Eksara, in the district of Nalanda. According to the petitioner he has been falsely implicated in the present case because of village revaar Nonetheless, the fact remain that he is an accused in a

criminal case, which has led to the passing of the impugned order of suspension by the respondent - Director.

3. Mr. Panday, learned Counsel apearing for the petitioner has assailed the impugned order on the ground that under the provisions of the Bihar Nationalised Secondary Schools (Conditions of service) Rules, 1983 (hereinafter to be referred to as the Rules only), the Director of Secondary Education is not competent to either initiate disciplinary proceeding against an assistant teacher or to pass an order of suspension in course of or in contemplation of any such proceeding and, as such, the impugned order is unsustainable in law.

4. Learned State Counsel on the other hand has placed reliance on the Bihar Service Code and other disciplinary rules applicable to government servants and submitted that the impugned order has rightly been passed.

5. Under the provisions of the relevant Act and the Rules admittedly the Director, Secondary Educaton is the appointing authority to respect of the headmasters and assistant teachers of Nationalised secondary school: under Rule 6 of the Rules, the Junior grade teachers belong to the district cadre and the District Education Officer is the controlling authority of this cadre. The senior and selection grade teachers form a divisional cadra and the Regional Director of Education is the

controlling authority of this cadre. The headmasters form a State cadre and the director is its controlling authority.

6. Rule 9(1) of the Rules as substituted by the Notificaton No. 437 published in the Gazette on 15.7.1983 read with a subsequent Notification dated 6.7.1989, reads as under :

9 [I] सरकारी सेवकों के विरूद्ध अनुशासनिक कार्रवाई के लिये विहित नियम एवं प्रक्रिया का अनुसरण करते हुए—

(क) राजकीयकृत माध्यमिक विद्यालय के प्रधानाध्यापक के विरूद्ध अनुशासनिक कार्रवाई करने,उन्हें निलम्बित करने एवं वैसे अनुशासनिक कार्रवाई के फलस्वरूप दण्ड देने की शक्ति निदेशक, माध्यमिक शिक्षा को होगी।

(ग) राजकीयकृत माध्यमिक विद्यालयों के सभी कोटि के सहायक शिक्षकों के विरूद्ध अनुशासनात्मक कार्रवाई करने उन्हें निलम्बित करने तथा वैसे अनुशासनात्मक कार्रवाई के फलस्वरूप दण्ड देने की शक्ति अपर शिक्षा निदेशक को होगी,

(घ) राजकीयकृत माध्यमिक विद्यालय के शिक्षकेतर कर्मचारियों (चतुर्थवर्गीय कर्मचारियों को छोडकर) के विरूद्ध अनुशासनात्मक कार्रवाई करने,निलंबित करने तथा वैसे अनुशासनात्मक कार्रवाई के फलस्वरूप दण्ड देने की शक्ति जिला शिक्षा पदाधिकारी को होगी,

(ङ) चतुर्थवर्गीय कर्मचारियों के विरूद्ध अनुशासनात्मक कार्रवाई करने, निलंबित करने तथा वैसे अनुशासनात्मक कार्रवाई के फलस्वरूप दण्ड देने को शक्ति विद्यालय के प्रधानाध्यापक को होगी।

7. Rule 20(1) of the Rules provides that in all such matters for which no specific provision has been made under the Rules, the provisions of Bihar Service Code or other code including the conduct rules applicable to the Government employees of the state will be applicable. From the aforesaid provisions, I find that specific provisions have been made in relation to initiation of

disciplinary proceeding and awarding of punishment pursuant thereto including for suspension from service of assistant teachers under Rule 9(1) (Kha) and thereunder the said power can be exercised only by the Additional Director of Education, Therefore, even if under the provisions of the Bihar Service Code or other relevant rules relating to disciplinary proceeding the said power in relation to disciplinary proceeding and suspension is exercised by the appointing authority, the same will have no application in relation to the teaching and non-teacing employees of the nationalised secondary schools.

8. In this connection I may also refer to another notification dated 30th December, 1985, issued by the State Government where in it has been provided that keeping in view the provisions of the Bihar Non-Government Secondary Schools (Taking over of Management and Control) Act, 1981, and the rules framed thereunder, the Director of Secondary Education has been authorised to decide and take action in relation to appointment, promotion and disciplinary proceedings of headmasters and in relation to all matters relatings of headmasters and in relation to all matters relating to teaching and non teaching employees of the said schools. In my opinion the general powers conferred under this notification has to be read as subject to specific powers conferred on other authorities under the rules subsequent to the issue of this notification. This view has to be taken keeping in view two well established rules of interpretation namely,

(i) general ibus specialia derogant (special provisions over-ride general ones) and (ii) in case of inconsistency, the later provisions impliedly repeals the earlier.

9. In the above view of the matter, I am constrained to hold that the Director of Secondary Education has no authority to initiate a departmental proceeding or to pass an order of suspension as contained in Annexure-1 against the petitioner, who is an assistant teacher in a nationalised secondary school. Accordingly, the order as contained in Annexure-1 is quashed. But it will be open for the disciplinary authority, namely, the Additional Director of Education to pass appropriate order in this respect.

10. The writ application is, accordingly, allowed to the extent indicated above.

Shamim Ahsan , J I agree

M.K.C. Application Allowed

CIVIL WRIT JURISDICTION

Before S.B. Sinha & G.C. Bharuka, JJ.

1993

January, 20

Asharfi Jha *

v.

The state of Bihar and others.

Bihar Nationalised Secondary Schools (Conditions of Service) Rules, 1983, rules 6 (3) and 12 --- provisions of --- order passed by Director under the dictates of certain authorities having not been empowered in any way under the Act or the Rules -- - effect of Bihar Non-Government Secondary Schools (Taking Over of Management and Control) Act, 1981 (Bihar Act No. XXXIII of 1982).

Rule 6 (3) of the Bihar Nationalised Secondary Schools (Conditions of Service) Rules, 1983 provides that the Headmasters of the Nationalised Secondary Schools will form a state cadre and the Director will be the controlling authority thereof. Rule 12 after its ammendment provides that the transfer of headmasters/assistant teachers/employees will be effected by the Director, Secondary Education on the basis of the recommendation of the Establishement Committee constituted at the directorate level. In the present case the impugned order

* Civil Writ Jurisdiction Case No. 7247 of 1988. In the mattor of an application under Articles 226 and 227 of the Constitution of India.

contained in annexture 1 itself shows that the order of transfer was passed by the director "under the orders of some superior authority identified as administration."

Held, therefore, that as the impugned order was passed under the dictates of certain authorities who had not been empowered in any way under the Act or the Rules in relation to the transfer of the headmasters and accordingly the order is unsustainable in law and must be quashed.

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 G.C. Bharuka, J.

Shre Rakesh Chandra for the petitioner.

Shri J.P. shukla, G.P.I. for the state.

G.C. Bharuka, J. The present writ application has been filed by the petitoner challenging the validity of the order dated 5.9.1988 passed by the respondent Director, Secondary Education, (Annexure-1) by which he has transferred the private respondent, Shri Rajendra Pd. Choudhary to Nar Narayan Singh High school, Mansoorchak (Begusarai) hereinafter to be referred to as 'the school' only) as headmaster from high school, Pachapika (Samastipur) under the orders of the administration (Shashan Ke Adeshanusear).

2. According to the petitioner, he being the seniormost assistant teacher in the school has been authorised to discharge the functions of the headmaster. He assails

the impugned order on the ground that the same has been passed pursuant to political interference and the respondent Director, who has the statutory authority in this regard, has merely acted on the dictates of the political high-ups. It has been further stated that there is a State Level Establishment Committee. which has been constituted for the purpose of considering the issue relating to transfer of headmasters. But in this case, no such consultation was held with the said committee.

3. Under the provisions of the Bihar Non-Government Secondary Schools (Taking over of Management and Control) Act, 1981, the State Government has framed statutory rules known as Biharke Nationalised Secondary Schools (Conditions of Service) Rules, 1983 (hereinafter in short 'the Rules'). These Rules have been subjected to various amendments by Notification no. 437 dated 23rd April, 1988. These amending Rules were published in the official gazette on 15th July, 1988, and, therefore, the amendments have come into force from the said date. Rule 6(3) of the said Rule provides that the headmasters of the Nationalised secondary schools will form a State cadre and the Director will be the controlling authority thereof. Rule 12 after its amendment by the aforesaid notification, provided that the transfer of headmaster/assistant teachers/employees will be effected by the Director, Secondary Education on the basis of the recommendations of the Establishment Committee constituted at the Directorate level. In this case, admittedly,

the Establishment Committee had not made any recommendation for transfer of respondent no. 4 to the school in question.

4. In the present case, it is writ large from the impugned order (Annexure -1) itself that the order of transfer has been passed by the Respondent Director under the orders of some superior authority identified "administration". We are not sure as to what the word "administration" in the present context means. But it clear that is the respondent Director, who has been conferred with the statutory authority for passing the order of transfer, has acted under the dictate of some non statutory authorities. It is established rule of administrative law that where statute direct that certain acts shall be done by specified person, their performance by or under the dictates of any other person is completely prohibited. In the case of *Commissioner of Police* vs. *Gobardhandas, reported* in A.I.R. (39) 1952 S.C., 16 where a statute vested the power of granting and cancelling aplicance is the Commissioner of Police, an order of cancellation issued by the commissioner was held not to be in exercise of his statutory powrers in that behalf because it was made in pursuance of 'instructuons' received from the Government. It was held by the supreme court that, .. "the Commissioner did not in fact exercise his discretion in this case and did not cancel the licence he granted. He merely forwarded to the respondent an order of cancellation which another

authority had purported to pass. It is evident that the commissioner had before him objections which called for the exercise of the discretion regarding cancellation specifically vested in him by rule 250. He was therefore, bound to exercise it and bring to bear on the matter his own independent and unfettered judgment and decide for himself whether to cancel the licence reject the objection."

5. Similarly in the case of Purtabpur company Limited Vs. Cane Commissioner, Bihar, reported in A.I.R 1970 S.C., 1896 the purported order of the Cane Commissoner was quashed by the Supreme Court holding that, "the power exercisable by the Cane Commissioner under clause 6(1) is a statutory power. He alone could have exercised that power. While exercising that power he cannot abdicate his responsibility in favour of anyone - not even in favour of the State Government or the Chief Minister. " In this case what had happened was that the power of the cane commissioner was exercised by the Chief Minister, authority not recognised under 6 clause read with clause 11 but the responsibility for making this order was asked to be taken by the Cane Commissioner.

6. In the present case as well, as stated above, the impugned order has been passed under the dictates of certain authorities, who have not been empowered in any way under the Act or the Rules in relation to transfer of

the headmasters and, accordingly, the impugned order (Annexure 1) is quashed being unsustainable in law. It will be open for the statutory authority to pass appropriate order keeping in view the provisions made in this regard under the rules.

7. The writ application is, accordingly, allowed. There will be no order as to costs.

S.B.Sinha, J I agree

Application Allowed

M.K.C.

MISCELLANEOUS CRIMINAL

Before Bisheshwar Prasad Singh, J.

1993

January, 28

Bishwanath Sah *

v.

The State of Bihar.

Code of Criminal Procedure, 1973 (Central Act no. II of 1974) section 311, scope and applicability of --- Court deciding to examine witnesses as court witnesses in exercise power under section 311, --- power to be exercised only for just decision of the case --- court not concerned whether evidence would support the prosecution or the defence --- whether prosecution or defence has been negligent is of no relevance --- no limitation of time - -- power to be exercised at any stage before judgment --- court not to clog the lacuna in the prosecution case or bolster the defence case.

Held, that, it cannot be disputed that the discretion vested in the court by secton 311 of the Code of Criminal Procedure is in very wide terms. It authorises the court at any stage of the trial to summon any person as a witness or examine any person in attendance, though not summoned as a witness, or recall or re- examine any

* Cr. Misc. No.8987 of 1991. against the order dated 1.7.1991, passed by the xth Additional Sessions Judge., Patna, in S.T. No 225 of 1990

person alredy examined. The power vested in such wide terms has to be exercised only if it appears to the court that the evidence of such person is essential to the just decision of the case. The discretion so vested in the court has as its objective the achievement of a just decision of the case. The court is not concerned whether the evidence, if examined, would support the prosecution or the defence. Its anxiety is to arrive at the truth so that there is a just decision. The fact that the prosecution or the defence has been negligent, is of no relevance. Even if the prosecution fails to examine a material witness, the court may examine such a witness as a court witness if it appears to it that the evidence of such a witness is essential to the just decision of the case. The section does not put any limitation of time on the exercise of the power. At any stage, before the judgment is delivered, the court may exercise the discretion vested in it under section 311 Cr. P.C. It is, therefore, not of much significance that the prosecution evidence had been closed, or that the statement of the accused had been recorded under section 313 Cr. P.C. The court can examine such evidence at any stage before it delivers its judgment. It should neither attempt to clog the lacuna in the prosecution case, nor to bolster the defence case. Obviously, if such evidence is examined, it may go to support the case of the prosecution or the defence. From that it should not be inferred that the court acted with a view to support the prosecution or the defence case.

Held, therefore, that in the instant case, the court decided to exercise the power vested in it under section 311 Cr. P.C. not with a veiw to clog the lacuna in the prosecutin case, but onlywith a view to arrive at the truth so that there could be a just decision of the case.

Application by the accused.

The facts of the cas material to the report are set out in the judgment of Bisheshwar Pd. Singh , J.

Mr. Ranjit Sahay, Advokete for the petitioner

Mr. A.K.Samaiyar, Addl. P.P. for the State

ORDER

1. The petitioner who is the accused in S.T. No. 225 of 1990 pending in the court of the xth Additional Sessions Judge, Patna, has preferred this application under section 482 of the Code of Criminal Procedure praying for quashing of the order of the learned Xth Additional Sessions Judge, dated July 1, 1991 whereby he decided to examine four witnesses as court witnesses in the trial, despite the opposition of the petitioner. It is the submission of the petitioner that by examining those witnesses, the court will clog the loop holes in the prosecution case which is not the purpose for which the power vested in him under section 311 Cr. P.C. can be exercised.

2. Briefly stated the allegation against the petitioner is that on the 22nd August 1989, he committee rape on the victim girl namely, Sarita, who on account of shame

committed Suicide by putting hereself on fire. The victim girl was taken to the hospital for treatment but succumbed to her injury. The first information report was lodged on the following day by one Mira Rani who happended to be the aunt (mothers sister) of the vic n girl. The matter was reported to her by Samir Bishwas aged about 10 years, the younger brother of the victim girl. C the basis of the first information report lodged by the informant a case was registered and after investigation a charge sheet was submitted by the police. There are 12 witness named in the charge sheet including the formal and official witnesses. From the charge-sheet it appears that on investigation it was found that the petitioner had raped the victim girl and out of shame she committed suicide by setting herself on fire. In the charge-sheet there is a reference to a letter written by the deceassed to her friend Guddu, stating that she had been revished by the petitioner and she was so ashamed that she did not want to live any longer. She further stated that in the letter that he must take revenge. Such is the nature of the allegations against the petitioner. On 31.7.1990 charges were framed against the petitioner under sections 376 and 306 I.P.C. Summons were issued to all the witnesses named in the charge-sheet.

3. From the order-sheet of the court below it appears that the matter was before the court for recording of evidence on several dates. On some of the dates fixed in the trial, the accused was not produced by the jail

authorities. That apart, the witness were not producted before the trial court for recording of their deposition. It also apears that the court made several requests to the learned Assistant Public Prosecutor and wrote several letters to the Senior Superintendent of Police to see to it that the witnesses were produced so that their statements could be recorded. Despite his best efforts the witnesses were not produced, except that on 22.1.1991 two formal witnesses were examined to prove the seizure list. The petitioner, who was in custody. moved the High Court for grant of bail. The High Court by its order dated 14.9.1990 found that the allegation against the petitioner was serious and did not justify grant of bail to him. However, the court directed the Sessions Judge to expedite and conclude the trial within a period of six months. This order of the High Court was communicated to the trial court and the trial court took note of the direction of the High Court as is evident from the order dated 20th December, 1990.

4. As observed earlier, despite the best efforts of the court, the prosecution witnesses were not produced and therefore on 16th of May 1991 when the counsel for the petitioner pressed upon the court to close the prosecution evidence and to record the statement of the accused, having regard to the direction of the High court to conclude the trial within six months, the court felt compelled to do so it noticed that the charges were framed against the accused on 31.7.1990 and despite

several opportunities given to the prosecution, not a single witness of the occurrence was produced before the court This was despite the issuance of warrants of arrest and several requests to the Senior Superintendent of Police to take necessary action. It appears that even service report with regard to warrants of arrest were not received by the court. In these circumstances the court closed the prosecution evidence and recorded the statement of the accused under section 313 Cr. P.C. He fixed 22nd May 1991 for defence evidence and arguments. The matter was adjourned on several occasions on account of nonavability of the Assistant Public Prosecutor but on 12th of June 1991 the prosecution produced four witnesses and prayed that their evidence may be recorded as court witness. The public prosecutor himself appeared on that date and stated that he would himself take charge of the case and conduct the trial. The counsel for the petitioner, however, opposed the prayer made on behalf of the prosecution to examine those witnesses as court witnesses, since the prosecution evidence had been closed and the statement of the accused had been recorded.

5. On Ist July 1991 when the trial court examined one of the witnesses as a court witness, counsel for the defence again raised an objection and wanted the court to pass an order on his objection. The learned Additional Sesions Judge in his impugned order dated 1.7.1991 has adverted to the various steps taken for securing the

presence of the witnesses. Despite the fact that several opportunities were given, four witness appeared before the court only on 12.6.1991. The court was of the view that section 311 of the Code of Criminal Procedure empowered the court to summon any material witness or examine any person present in court, though not summoned as witness. It was also open to the court to exercise that power at any stage of the trial for the just decision of the case. He, therefore, decided to proceed with the examination of those witnesses as court witnesses. The aforesaid order is under challenge in this application.

6. Learned counsel for the petitioner contended that having regard to the fact that several opportunities were given to the prosecution to examine its witnesses, no further opportunity should have been given to the prosecution, particularly when the statement of the accused had been recorded under section 313 Cr. P.C. It was further submitted that if the four witnesses were examined as court witnesses, that would amount to filling up the lacuna in the prosecution case. Reliance was placed upon a judgment of a learned Single judge of this court reported in 1984 L.J.R, 936 (*Rajendra Pd. Singh* Vs. *Ramuchit Singh*). The judgement is a brief judgement which refers to a decision of the Supreme Court reported in 1980 Criminal Law Reports, 84. Unfortunately the aforesaid judgement of the Supreme Court could not be cited at the bar because neither the counsel for the

petitioner nor the counsel for the State could find any such judgement.

7. So far as the first submission advanced on behalf of the petitioners is concerned, it has no merit because the court did not permit the prosecution to examine its witnesses, but exercised its discretion under section 311 Cr. P.C. to examine those witnesses as court witnesses. It cannot be disputed that the discretion vested in the court by section 311 of the Code of Criminal Procedure is in very wide terms. It authorises the court at any stage of the trial to summon any person as a witness or examine any person in attendance, though not summoned as a witness, or recall or reexamine any person already examined. The power vested in such wide terms has to be exercised only if it appears to the court that the evidence of such person is essential to the just decision of the case. The discretion so vested in the court has as its objective the achievement of a just decision of the case. The court is not concerned whether the evidence, if examined, would support the prosecution or the defence. Its anxiety is to arrive at the truth so that there is a just decision. The fact that the prosecution or the defence had been negligent, is of no relevance. Even if the prosecution fails to examine a material witness, the court may examine such a witness as a court witness, if it appears to it that the evidence of such a witness is essential to the just decision of the case. The section does not put any limitation of time on the exercise of the

power. At any stage, before the judgement is delivered, the court may exercise the discretion vested in it under section 311 Cr. P.C. It is, therefore, not of much significance that the prosecution evidence had been closed, or that the statement of the accused had been recorded under section 313 Cr. P.C. The court can examine such evidence at any stage before it delivers its judgement. It, therefore, follows that if the court proceeds to examine such evidence, its only objective should be to consider such evidence as is likely to enable the court to give a just decision of the case. It should neither attempt to clog the lacuna in the prosecution case, nor to bolster the defence case. Obviously, if such evidence is examined, it may go to support the case of the prosecution or the defence. From that it should not be inferred that the court acted with a view to support the prosecution or the defence case. The anxiety of the court should only be to come to a just decision, and for that purpose to examine such evidence as may be available to it. The wide discretion vested in the court is with a view to achieve a just decision of the case.

8. Adverting to the facts of this case, as noticed earlier, the allegations against the petitioner are serious and the offence with which he is charged a heinous offence. Despite the fact that the court had summoned the witnesses and had even issued warrants of arrest to secure their presence, the witnesses were not produced by the prosecution. It is not difficult to find the reason

for this default. Unfortunately, the courts have no machinery of their own by which they can secure the attendence of witnesses. They have, therefore, to depend on the State machinery even in the matter of securing the attendence of witnesses. Apart from the inefficiency of the police in this State, the apathetic attitude which they have acquired towards the courts has created a situation where it would be impossible for a court to conduct a speedy trial. As in this case, on several occasions the accused was not produced from the jail. Despite issuance of summons and warrants, and despite several reminders to the Superintendent of Police in this regard, the witnesses were not produced for recording of their depositions. There was also an order of the High court to conclude the trial within six months. Such was the pressure of circumstances under which the learned Additional Sessions Judge was required to discharge his judicial functions. A speedy trial is a fundamental right of a citizen. This pre- supposes the existence of an effective machinery to do all that is necessary for speedy trial. We can take judicial notice of the fact that so far as this State is concerned, the police has always shown complete indifference in this regard. In large number of cases it does not even show the court sey of sending service reports with regard to the service of summons or warrant of arrest etc. In most cases, the warrants issued by the court are not attended to. In the absence of the witnesses no progress can be made in the trial, and the

prosecutor is compelled and embarassed to ask for adjournments. In large number of cases even requests sent to the Director of Prosecution evokes no response, and some times the court is informed that it may direct the local police to take necessary steps. The greatest difficulty is with regard to examination of official witnesses such as the Medical Officers and the such witnesses are transferred pending the trial, it is impossible for the investigating offices. If such court to secure their presence, because the usual reply given to the court is that the where abouts of the witnesses are not known. It is really surprising that the administration does not know where its officers are posted. All these factors militate against a speedy trial, and though no effort is made to bring about any improvement in the situation, the courts are being continuously criticised for its slowness. While one cannot lose sight of the fact that a speedy trial is guaranteed to a citizen, one cannot ignore the circumstances in which courts function in this State which do not assist the court in concluding the trial within reasonable time. As a consequence in large number of cases, with a view to concluding the trial within reasonable time, the courts are compelled to close the prosecution evidence and to acquit the accused on the ground that no evidence was produced by the prosecution in support of the charge. This has resulted in the large number of trials ending in acquittals, even though the accused were charged of serious and heinous offences.

9. The interest of the justice has to be viewed in the light of the circumstances in which the justice system operates. In the instant case for instance, if the court refused to examine the witneses as court witnesses, the result of the trial was a foregone conclusion. The petitioner must necesarily be acquitted because no evidence was examined by the prosecution to support the charge. Having regard to the fact that the charge is a serious one, can it be said that the court did not exercise its discretion under section 311 of the Code of Criminal Procedure for securing a just decision of the case ? a fair trial must normally lead to a fair decision. it is of as much importance that one who is guilty must be punished, as much as it is that an innocent person should not be convicted. it is the interest of society which is sought to be protected by a fair trial and a just decision. the claim of the individual must be balanced against the claim of society, and no individual should claim an acquittal merely because the state machinery is lethargic and inefficient. in many cases, the courts cannot help the situation, but in a case where the court finds that material witneses are present in court, should it not exercise its discretion and examine them as court witnesses, having regard to the fact that the prosecution evidence had been closed ? I am inclined to take the view that in a case of this nature, even the appellate court may exercise its power to record additional evidence if witnesses are available. The petitioner is

charged of a heinous offence, and if he is to be acquitted merely because there was delay in introducing the witnesses, the interest of justice will suffer. The reluctance of witnesses to come to court is further compounded by the fact that pressure is brought upon them not to depose in such cases. It will be difficult for a court to ignore the realities of the situation.

10. In the instant case, it is no doubt true that the prosecution did not succeed in producing the witnesses despite several opportunities given to it. But it is equally true that four material witness did appear before the court on the 12th of June 1991, perhaps on account of the request made by the Additional Sessions Judge to the Sr. Superintendent of Police. The four witnesses are members of the family of the deceased and it is, therefore, expected that they have knowledge about the events that took place on the date of occurrence. One of them is the informant, while another is the sister of the decersed. The thiad witness is Samir Bishwas aged about 10 years who gave information to the informant, and who happens to be the younger brother of the deceased. The fourth witness appears to be the father of the deceased Assuming that these witneses should have been earlier examined by the prosecution, I find nothing wrong if they are examined as court witnesses, because the court will be able to reach a just decision of the case if it takes into consideration the evidence of such witness. Having regard to the nature of the offence,

justice demands that there should be a fair trial, because such a trial protects not only the interest of the individual under trial but also the interest of society. I have not doubt that the learned Additional Sessions Judge decided to exercise his discretion not with a view to clog the lacuna in the prosecution case, but only with a view to arrive at the truth so that there could be a just decision of the case. Otherwise, the petitioner had to be acquitted of such a serious charge even without a fair and proper trial. I, therefore, find no reasons to quash the impugned order. I however, make it clear that in case the witnesses are examined as court witnesses, the defence will have an opportunity to cross examine those witnesses and to produce evidence in defence, if so advised.

This application has no merit and the same is therefore, dismissed.

S.P.J. Application dismissed

CIVIL WRIT JURISDICTION

Before S.B. Sinha, J.

1993

February, 9

Ansar Ali & others.*

v.

The state of Bihar & others.

Santhal Parganas Tenancy (Supplementary Provisions) Act, 1949 (Bihar Act no. XIV of 1949) section 35 --- provisions of --- Additional Deputy Commissioner, Sahebganj , whether has jurisdiction to decide complicated question of title and set aside a sale deed while exercising his jurisdiction under section 35.

Where Respondent no. 2, Additional Duputy Commissioner, Sahebganj by his order dated 28.4.1988 contained in Annexure 12, ordered cancellation of the sale deed dated 22.2.1944. which was executed by the settlee from Zamabandi Raiyats with respect to a tank, recorded as "puratan patit " in record of Raiyats ;

Held, Respondent no. 2. had no jurisdiction to decide a complicated question of title while exercising his jurisdiction under section 35 of the Santhal Parganas Tenancy (Supplementary Provisions) Act, 1949, hereinafter referred to as the Act.

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* Civil Writ Juridiction Case No. 532 of 1991. In the matter of an application under Articles 226 and 227 the Constitution of India.

It is clear that Respondent no. 2 by reason of the impugned order made an attempt to establish the title of the State over the land in question indirectly which he could not do directly jurisdiction under section 35 while exercising his could not do directly while exercisibg his jurisdiction undeer section 35 of the Act.

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. Sinha, J.*

M/s. Upendra Prasad, Krishna Pratap Singh, Braj Nandan Kumar Tiwari, Awadhesh Kumar Singh No.II and Ashok Kumar Singh. For the petitioner

M/S J.P. Karn, S.C.V., Panditjee Pandey, Vijay Kumar Sinha No.1 & Prakash Chand Gupta for the respondents.

S.B. Sinha J. - This writ petition is directed against the order dated 28.4.1988 passed by the Additional Deputy Commissioner, Sahebganj in Revenue Misc. Revision No. 23 of 1987-88 as contained in Annexure 12 to the writ application as also the order dated 29.5.1989 passed by the Commissioner, Santhal Pargana in Revenue Misc. case no. 24 of 1988-89 as contained in Annexure 13 thereof.

2. The fact of the matter lies in a narrow compass.

3. The lands in question involved in this writ appliction

are plot numbers 1445 which is a Tank and measuring 16 bigha, 3 kathas and 13 dhurs and plot no. 1445/1789 which has been recorded as puratan patit measuring 3 bigha 5 kathas and 9 dhurs; thus in total measurig 14 bighas 19 kathas 12 dhurs The petitioners counted that their predecessor in interest were Zamabandi Raiyats of Mauza Chanchi, Sitesh Nagar, According to the petitioners, Rani Jyotirmay Devi who was one of the landlords granted settlement to one Nand Lal Ghosh in respect of plot no. 1445. One Binayendra Chandra Pandey and Amrendra Chandra Pandey purchased Lakhraj plot no. 1445. It is also stated that the aformentioned Binayendra Chandra Pandey and Amarendra Chandra Pandey took settlement of plot nos. 1445/1789, the ridge or bhind of tank of plot no. 1445 from Rani Jyotirmayee Devi. The said lands ultimately, devolved upon Prasunendra Chandra Pandey son of Binayendra Pandey as allegedlyAmarendra Chandra Pandey died issueless. The petitioners purchased the lands in question by reason of a deed of sale dated 22.2.1974 as contained in Annexure 1 to the writ application.

4. The petitioners have contended that the aforementioned plots were wrongly recorded under Anawali Khata no. 647 and an objection to the said errors was filed by the recorded tenant before the revenue authorities. By an order dated 26.7.1989 the Assistant Settlement Officer, Pakur directed that necessary corrections be made. The relevant orders are contained in

Annexures 4/A and 5/A to the writ application.

The petitioners have further contended that their names were mutated in the office of the State of Bihar and rent was also fixed by the Revenue authorities.

5. The respondants 4 and 8 purported to have filed an application against the petition for cancellation of the said deed of sale before the Sub-divisional Magistrate, Pakur purported to be under section 35 of the Santhal Parganas Tenancy (Supplementary provisions) Act on 10.5.1982 on their behalf as also on behalf of 16 annas raiyats on the ground that the lands had been recorded as Anawali Khata. By reason of an order dated 8.11.1985 the Subdivisional Magistrate, Pakur rejected the claim of the said respondents in Revenue Misc. case no. 38 of 1982-83.

Against the said order, the aforementioned respondents filed a revision application purported to be in terms of section 59(1) of the Santhal Parganas Tenancy (Supplementary Provisions) Act, 1949 for cancellation of the aforementioned deed of sale. By the impugned order dated 28.4.1984 as contained in Annexure 12 to the writ application, the said revision application was allowed. The petitioners filed a Revision application in the court of learned Commissioner who by reason of his order dated 29.5.1989 dismissed the same.

6. The petitioners in this writ application have contended that they have never objected to the raiyats using

the water of the tank for irrigation, bathing or drinking purposes. Further, in the supplementary affidavit it has been contended that the land in question is a raiyati land and has never been used for agricultural, bathing and drinking purposes for the last over hundred years. It has been contended that the lands in question are transferable and salable lands as would be evident from the report of the Karamchari which is contained in Annexure 24 to the supplementary affidavit.

7. In the counter affidavit filed on behalf of the respondents, however, it has been contended that the lands in question belonged to the State of Bihar having vested in it under the provisions of Bihar Land Reforms Act, 1950. It has been accepted that plot no. 1445 of Mauza Arjani in *Mr. Gangzer's* settlement corresponds to plot no. 1109 of Macpherson's settlement in the district of Santhal Pargana and the same had been recorded as 'Lakhraj land' but according to the respondents, there is nothing to show that the same had been purchased by Pandey brothers and it has been stated that Pandeys had no raiyati interest in the lands in question. It has also been contended that the sale deed dated 9.4.1974 is a collusive document which has been prepared only for the purpose of laying false claim over the disputed lands as the registration of the said deed was illegally made at Calcutta.

8. It has further been stated that the petitioners are not in possession of the Tank in dispute and the private respondents had been taking yearly settlements thereof which had been made after publication of general notices. The respondents 5 to 7 and 9, in their counter

affidavit have annexed the documents of settlement which are contained in Annexures B,C and D thereof.

9. Learned counsel appearing on behalf of the petitioners had raised a short question in support of this application. Learned counsel submits that the respondants 2 and 3 had no jurisdiction to pass the impugned orders purporting to annul the deed of sale dated 22.2.1974 in exercise of the powers under section 35 of the said Act. Learned counsel submitted that respondent no.2 held that the tank in question has been recorded in their favour but he proceeded to pass the impugned order on the ground that the same was in violation of section 35 of the Act.

10. *Mr. J.P. Karn*, learned standing counsel no.5, however, drew my attention to paragraph 11 of the writ application and submitted that as the title of the petitioners in respect of the lands in question is itself doubtful, this court should not exercise its extra ordinary jurisdiction.

11. *Mr. S.S.* Dwivedi learned counsel appearing on behalf of the private respondents submitted that although his clients do not claim any title in respect of the lands in question but they have an interest in the property as the state has settled the right to catch fish in the said tank in their favour. Learned counsel, however, submitted that the deed of sale although could not have been cancelled under section 35 of the said Act but this Court

should not exercise its jurisdiction in favour of the petitoners as the deed of sale is void in view of section 20 of the said Act.

12. The only question, which therefore, arises for consideration in this writ application is as to whether in the facts and circumstances of the case, section 35 of the said Act could have been taken recourse to by respondents 2 and 3 for passing an order of annulling that deed of sale dated 22.2.1974.

13. Section 35 of the said Act reads as follows :-

> "35. Water reservoirs and channels for irrigation, etc, not be to cultivated or converted to other purposes :-
>
> (1) Bandhs, aharas, tanks and other water reservors of protection from flood or for irrigation, bathing, converted to any other purpose without the consent of the raiyats and the village headman or mulraiyet, or the landlord in khas village, and the approval of the Deputy Comissioner. No one shall bring under cultivation any such wate rreservoir or channel.
>
> (2) No proprietor or landlord shall be entiled to levy any charge for the use of water reservoirs and channels mentioned in sub-section (1) for irrigation, bathing, washing or drinking purposes."

from a plain reading of the aforementioned provision, it is evident that Section 35 puts two embargos viz. (a) no settlemet shall be made in respect of Bandhs, aharas, tanks and other water reservoirs or channel and the same cannot be converted to any other purposes without the consent of the raiyats and the village headman or Mulraiyat of the landlord in khas village and the approval of the Deputy Commissioner; and

(b) such water reservoir or channel cannot be brought under cultivation by any person.

14.(A) The respondent no.2 in his impugned order noticed that the plot no. 1789 has been recorded as puratan patit. He observed :-

> " It admits the fact that plot no. 1445 is still being used by the sixteen anna raiyats of the village for irrigation purposes and I find the transfer through sale deed in the name of the Respondents bearing plot no. 1445 completely violates the provision of section 35 of the S.P. T.Act. As to plot no. 1789 it was recorded as puratanpatit. The executor of the saledeed had no legal right to sell the disputed land."

He thereafter held :-

> " I find the transfer of these two disputed plots have been made against the provision laid down under Section 35 of the S.P.T. Act debarring the sixteen anna raiyats to use the water of the tank for irrigation and drinking purposes. As regards the cancellation of these sale deeds, the Appellants may file a proper suit in the relevant court but with this observation that the transfer in the name of the Respondents has been made in utter violation of the S.P.T. Act is illegal and void transfer."

14.(B) Respondent no.2 evidently had no jurisdiction to decide a complicated question of title while exercising his jurisdiction under section 35 of the said Act. The respondents have contended that no sale of a tank can be made by a raiyat.

What is noticed hereinbefore, is prohibited under the said provision inter alia, is to make settlement i.e. no settlement shall be made by the landlord in favour of anybody. However, the tank in question, as noticed hereinbefore, had already been settled and as has been

admitted is recorded as Lakhraj land. Even from the perusal of Annexure 24 to the writ application, it is clear that office of the Revenue department admitted that the land in question is salable.

15. The respondents 2 and 3 have not held that the said report was incorrect or the deed of sale was executed in utter violation of the provisions of section 20 of the said Act. The said question was never raised before respondents 2 and 3 thus it cannot be allowed to be raised for the first time in this court.

16. Respondent no.2, further has committed an illegality in holding that the deed of sale was void being hit by section 35 of the said Act although, he himself held that the same cannot be annulled in terms of the aforementioned provisions and himself having held that in order to decide the question of title, a suit may be filed by the petitioners. The respondent no.2, therefore, exceeded his jurisdiction in passing the impugned order. The respondent no.2 further committed an illegality in purporting to hold that by reason of the said deed of sale a right of 16 anna raiyats of taking water for drinking, bathing, irrigational facility from the said tank had been interfered with although the petitioners categorically stated before the said authority that such rights of the villagers have not been interfered with by them. It is, thus, clear that respondent no.2 by reason of the impugned order made an attempt to establish the title of the state over the lands in question indirectly which he could not do directly while exercising his purported jurisdiction under section 35 of the said Act.

17. For the reasons aforementioned, the impugned orders as contained in annexures 12 and 13 to the writ applications cannot be sustained.

18. Before parting with this case, I must observe that if the tank is converted for use of any other purpose or brought under cultivation, it would be open to the affected raiyats or the State to initiate an apropriate legal action againt the petitioners. It is further made clear that the disputed question of title of the petitioners in respect of the aforementioned tank may be decided in an appropriate proceeding.

19. This application is, therfore, allowed and the impugned orders as contained in Annexures 12 and 13 to the writ application are quashed with the aforementioned observations.

20. In the facts and circumstances, there shall be no order as to costs.

R.D. Application Allowed

CIVIL WRIT JURISDICTION

Before Bisheshwar Prasad Singh &
Sanat Kumar Chattopadhaya, JJ.

1993

February. 11

Surendra Prasad Singh *

v.

The State of Bihar and another.

Service —- appointment against permanent vacancy made initially on daily wage basis and thereafter on ad-hoc basis —- post not advertised and no proper selection for that post made—- Constitution of India, Article 16, violation of —- writ jurisdiction, whether can be exercised to perpetuate illegality — - rule of audi alterem partem, whether applicable to such case.

Where the petitioner was appointed against a permanent vacancy initially on a daily wages basis, and thereafter on a temporry/ad-hoc basis and regular appointments were never made ;

Held, that, the petitioner continued to occupy the post without the post being advertised and without a proper selection being made for appointment to such post. This was clearly in breach of Article 16 of the

* Civil Writ Jurisdiction Case No.2878 of 1990. In the matter of an application under Articles 226 and 227 of the Constitution of India.

Constitution of India. The writ jurisdiction of this Court cannot be invoked to perpetuate is quashed, it would amount to continuing the apointments illegally made. Since the petitioner's appointment and its continuation was illegal, no relief can be granted to the petitioner is exercise of writ jurisdiction. In such cases, even the rule of audi alterem partem will not apply.

Dr. Suresh Chandra Verma and ors. V. The Chancellor, Nagpur University and ors.1 ---

Application by teh petitioner.

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

M/S. Ashok Kumar Sinha & Subhat Ranjan for the Patitionar.

Mr. M. A. Rahmani, S.C. III for the Appliant.

B.P. Singh, J. —We have heard counsel for the parties at length, and after hearing them we are disposing of this writ petition at the admission stage itself. The respondents have not filed counter-affidavit and, therefore, we shall proceed on the basis of the facts as stated in the writ petition, and as apparent from Annexures annexed therewith.

2. This is yet another case where appointments made on 14th May, 1987 and thereafter have been

1. (1990) IV S.C.C. 55

cancelled by order dated 18th June, 1989 (Annexure-4). The petitioner has, therefore, challenged the validity and legality of Annexure -4. We have come across large number of such cases where the Government finding no alternative has cancelled appointments made by the appointing authority, obviously because the appointments were illegal and unauthorised. it is indeed unfortunate that in the last 10 or 15 years, rarely have appointments been made in accordance with rules, if any, or in accordance with the Circulars, Notifications etc. issued by the State of Bihar laying down the procedure for making appointments. In different Departments, instructions, Circulars etc. have been issued from time to time wherein, in the absence of rules, fair procedure for making appointment has been laid down. In most of those instructions, notifications etc. the Government has directed the appointing authority to advertise the post and/or to call for names from the Employment Exchange. A selection committee or establishment committee has been constituted to consider the relative merit of the applicants, and of those persons whose names are sponsored by the Employment Exchange, Such a procedure obviously is calculated to give an equal opportunity to all intending candidates having regard to the equality of opportunity doctrine enshrined in Article 16 of the Constitution of India. The minimum requirement of Article 16 of the Constitution is that citizens must have an opportunity apply for jobs in public services. Equality

of opportuhity is chieved by subjecting all candidates to a process of selection whereby their relative merit is determined. Subject to the laws relating to reservation, appointments must be made on the basis of merit. Unfortunately the state of affairs as is prevalent in the state is most depressing. The rules, instructions etc, are never followed by the appointing authority. In the matter of making appointments, even the constitutional mandate is ignored. Article 16 of the constitution is observed only in its breach. The devise adopted by the appointing authority is ingenious. Not only where a temporary need exists, but even where there is a Substanting vacancy, the appointing authority without advertising the post and without considering the relative merit of the candidates who may apply, chooses to appoint persons on personal approach. To give it a colour of legality, appointments are initially made on daily wage basis. The tenure is precarious, whether it is described as purely temporary, ad-hoc or on daily wage basis. Persons so appointed are continued for sometime and thereafter they are sought to be granted a regular scale of pay, and very often a daily wage employee is thereafter described as purely temporary employee or ad-hoc employee. The appointee continues to work for two or three years, and thereafter a recommendation is made for his regularisation or absorption in service. Very often the game succeeds and appointments are made under the State without advertising the posts and without judging the

relative merit of the candidate who may apply. This is in complete defiance of the instruction/circular issued by the State from time to time and obviously in breach of the principles enshrined in Article 16 of the Constitution of India. The question is, when such illegal appointments are terminated, should the Court come to the aid of such appointee who has procured the appointment by illegal means. I may only notice the observation of the Supreme Court in the case of Delhi Development Horticulture Employees Union Vs. Delhi Administration, Delhi and others. (AIR 1992 SC 789), wherein it was observed that such appointments are given and taken on monetary considerations. The appointing authority obviously acts on ulterior considerations in appointing such a person. The misfortune is that when that appointing authority is transferred the successor follows the same pattern, and the game has to be played over again.

3. The facts of this case also demonstrate this ingenious modus operandi. The petitioner himself states that in the year 1984 permanent post of clerk fell vacant in the Accounts Division of the Adult Education Department, Government of Bihar, Patna. The petitioner was an applicant who was interviewed by the competent authority and was appointed as a Clerk on daily wages with effect from 25.4.1984. Annexure -1 is his letter of appointment which is dated 7th December, 1984, but the appointment is with effect from an earlier date, namely, 25.4.1984. This is quite unusual, but what is noticeable

in the letter of appointment is the statement that the petitioner will have no claim for regular appointment on the basis of such appointment, and further his service can be terminated at any time without notice to the petitioner. The appointing authority is the Director, Adult Education and Informal Education, Government of Bihar, Patna. It is not the case of the petitioner that the permanent posts which fell vacant were advertised and that intending candidates were asked to apply. It is also not stated that the petitioner was interviewed by any establishment committee or the selection committee. One could understand the appointment of the petitioner on daily wage basis pending regular appointment, because the exigencies of the situation may compel the appointing authority to make appointment on daily wage basis till regular appointments are made, particularly when the post was a permanent post. That was never done, and according to the petitioner his name was recommended for absorption on temporary and ad-hoc basis on daily wages. Annexure -2 is another letter of appointment dated 4th January, 1986 whereby the petitioner, a daily wager was appointed on temporary and ad-hoc basis on the post of clerk-cum typist in the scale of Rs. 580-860/- and posted to work under the Adult Education Scheme, Gaya. It will appear from Annexure-2 that the petitioner who had been working on daily wage basis was appointed on temporary and ad-hoc basis with a scale of pay. The letter of appointment (Annexure-2) again men-

tions that his services would be terminated at any time without notice to the petitioner.

4. According to the petitioner, he worked at Gaya till he was transferred to Patna by order dated 14th May, 1987. It is the case of the petitioner that since his mother was suffering from a serious disease he had requested to be transfered to Patna, which was granted. However, it later transpired that there was no existing vacancy at Patna and, therefore, he could not join his post and was not even paid his monthly wages. Annexure 3/1 does not mention that the petitioner was being transferred, but the letter of appointment states that the petitioner, a clerk on daily wages, was being appointed as a clerk in the office of the District Adult Education Officer, Patna on a temporary basis. The appointment was purely temporary and could be terminated without prior notice. He was deputed to work in the office of Adult Education Directorate, Bihar, Patna, till further orders. From the facts stated above it would be apparent that though the petitioner claims that permanent posts were lying vacant against which he had been appointed, his initial appontement was on daily wages basis. He was thereafter appointed under Annexure-2 on a temporary and ad-hoc basis with a monthly scale of pay. Again by Annexure 3/1 he was appointed on a purely temporary basis and continued to work at Patna. The post was never advertised, and it is difficult to find a justification for continuing such an appointment against a permanent vacancy for continuing such an

appointment against a permanent vacancy for so long a period. By order (Annexure-4) issued by the Director, Adult and Informal Education adressed to all District Adult Education Officers, all appointments made to the posts as mentioned therein including the post of Clerks made on or after 14th May, 1987 were cancelled. the petitioner has challenged this order on the ground that the termination of his services was as a measure of punishment. because there were some charges against him. but he was not communicated those charges or allegations. He further challenged this order only the ground that some other persons including one Gautam Kumar Singh (not a party in this writ petition) were retained in service, even though they were appointed alter. The petitioner calims to have made a representation for his transfer to Munger since there was no vacancy at Patna. This representation was made on 30th December, 1987,much after the issuance of the order (annexure-4) dated 18-6-1987 cancelling such appointment. It will be noticed that the last appointment letter of the petitioner bears the date 14th may, 1987 (Annexure 3/1). Obviously, therefore, there. the petitioner's case is that though his representation was rejected, he made another represetation, which is Annexure-7 . By a supplementary affidavit it was brought to the notice of this Court that the petitioner's representation was finally rejected on 6-11-l900 -vide Annexure-8.

5. It is difficult of accept the contention of the

petitioner that the termination of his employment was by way of punishment. Annexure-4 is a general direction issued by the Director, Adult and Informal Education cancelling all appointments made on or after the petitioner nor does the order of termination refer to any charge against the petitioner. Annexure-4 therefore, cannot be assailed on the ground that the order was passed as a measure of punishment without notice to the petitioner. so far the other submission is concerned, namely, that one Gautam Kumar Singh was retained in service, though appointed later, I would not like to express any opinion on this aspect of the matter. No particulars have been given as to when Gautam Kumar Singh was appointed and in what manner. Moreover, Gautam Kumer Singh is not a party in this writ petition and, therefore, no order can be passed at this stage affecting his interest. At best. the submission of the petitioner is that if his appointment was cancelled on the basis that it was illegal, other illegal appointments should also be cancelled.One cannot take exception to this submission. but assuming that other illegal appointments were not cancelled, that would not entitle the petitioner to the relief that he should be continued illegally. In appropriate cases with a view to avoid discrimination,the Court may direct such illegal appointments also to be cancelled, if not already done.

6. It was then submitted by the petitioner that Annexure-4 will not apply to the case of the petitioner

because he was initially appointed on 7-12-84 with effect from 25-4-84. that may be so, but thereafter the petitioner was again appointed on temporary and ad-hoc basis by order dated 4th January, 1986(Annexure-2) and posted at Gaya. He was thereafter again appointed on 14-5-1987 and posted at Patna on a temporary basis. The last letter of appointment bears the date 14th May, 1987, and is, therefore governed by the order as contained in Annexure -4

7. It was then submitted that a Screening Committee was appointed which recommended that the petitioner may be absorbed in service. That recommendation was apparently not accepted by the Government and the petitioner's representation was, therefore, rejected.

8. In a case with such feature I do not feel persuaded to exercise my writ jurisdiction,and to grant relief to the petitioner. If the Order (Annexure-4) cancelling the illegal appointments is quashed, it would amount to continuing the appointments illegally made. the writ jurisdication of this court cannot be invoked to perpetuate illegality. it is apparent from the facts of the case that the petitioner was appointed against a permanent vacancy initially on daily wage basis, and thereafter on a temporary/ ad-hoc basis, Regular appointments were never made. The petitioner, therefore, continued to occupy the post without the post being advertised and without a proper selection being made for appointment to such posts. This

was clearly in breach of Article 16 of the Constitution of India. Since I am satisfied that the petitioner's appointment and its continuation was illegal, no relief can be granted to the petitioner in exercise of writ jurisdiction. In such cases, even the rule of audi alterem partem will not apply as laid down by the Supreme Court in the case of Dr.Suresh Chandra Varma & The chancedllor Nagipur University and ors.

(1990-volume IV S.C.C. page 55).

9. The writ petition has, therefore, no merit and the same is, accordingly, rejectod.

S.K. Chattopadhyaya, J I agree. Application Dismissed

S.P.J.

CIVIL WRIT JURISDICTION

Before S.B.Sinha & G.C.Bharuka, JJ.

1993

February, 25

Subhash Chandra Darbey. *

V.

The State of Bihar & ors.

Service -- appointment ----- panel prepared or remain alive for a long time--- whether a select list -------

persons having their names in the Panel ---- legal right of.

Where a penel of a large number of persons is prepared which is to remain alive for a long time, the same cannot be termed as a select list and the persons whose names appear therein cannot have a legal right for appointment in terms of the said purported panel.

Held. therefore, that in the present case as the panel was prepared only on the basis of the passing of the year of the training examination, the said panel being not a select list, the same cannot be inforced in a court of law.

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

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* Civil Writ Jurisdiction Case No. 8997 of 1991. In the mattor of an application under Articles 226 and 227 of the constitution of India.

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

S.B. Sinha & G.C. Bharuka JJ. — In this application the petitioner has prayed for issuance of an appropriate writ or direction directing the respondents to consider his case for appointment on the post of Assistant Teacher in the Elementary school to Godda district.

2. The fact of the matter lies in a very narrow compass.

3. The petitioner is holder of a certificate of Upadhyaya granted by Mandar Vidyapith, Bhagalpur, which is said to be iquivalent to Matriculation examination a vacancy was advertised on 12.12.1986 in newspaper' Aaj' inviting applications for appointment on the post of Assistant Teachers in Elementary Schools in Godda district. In the Said advertisement it has been stipulated that a panel for appointment was to be prepared from amongst the trained teachers. According to the petitioner, he passed that training examination in 1980. He also applied for the said post, and his certificates etc. were examined by a Committee. According to the petitioner in terms of item no. 2 of the Govt. order dated 11th May, 1974 a panel of the trained teachers was to be prepared on the besis of the marks obtained in the academic and training examination in preferential order. Admittedly, a panel was prepared on 26.9.1987 which contained 527 names. The petitioner has contended that the said panel

has not been prepared in terms of the Govt. order dated 11th May, 1974. The petitioner and others alilegedly filed a protest in relation to that panel on 23.10.1987 whereafter a supplementary panel consisting of 70 persons including the names of those who have completed training after the petitioner had been included . The petitioner was admittedly informed that his name was not including the panel as the certificate granted to him by Mandar vidyapith, Bhagalpur has been declared invalid. The petitioner has contended that the said order is violative of principles of natural justice. The petitioner has contended that a writ petition was filed in this court by Ram Kumar Purvey & ors. being C.W.J.C. No. 1358 of 1988. In the facts and circumstances of this case.

4. The petitioner's name was not included in the panel which was prepared in 1987. Evidently, at that point of time, he was aware of the said fact. He did not question the said panel at that time.

5. The petitioner has himself annexed a copy of the circular letter dated 25th june, 1973. The said circular letter refers to an earlier letter of the appoiment department bearing no. 10275 dated 16th August, 1965. The said letter dated 16th August, 1965 has not been produced before us and thus we are not aware as to in what circumstances, if any, the certificate granted by Mandar Vidapith was recognised. It is now well settled that when a panel of a large number of persons is prepared which is to remain alive for a long time the same cannot be termed as a select list and the persons whose names appear therein cannot

have a legal right for appointment in terms of the said purported panel. Evidently, the said panel was prepared only on the basis of the passing of the year of the training examination. Thus, the said panel being not a select list, the same can not be enforced in a court of law. In any event, in this case, as the petitioner was not included in the said panel, the petitioner should have questioned the same within a reasonable time after the publication thereof . He has not done so. We do not thus think it a fit case where we should exercise our jurisdiction in favour of the petitioner . This observation is also being made in view of the fact that the State Government has since framed rules for appointment of teachers in Elementary Schools. The said rules have been framed under the proviso to Article 309 of the constitution of India and the appointments which may be made now must conform to the provisions of the said rules. Any circular letter or a panel which was prepared prior thereto cannot have any relevancy in the matter of any appointment to be made after the rules have come into force.

6. For the reasons aforementioned, there is no merit in this application. It is accordingly, dismissed, but without any order as to costs.

M.K.C. Application dismissed

APPELLATE CRIMINAL

Before S. Haidar Shaukat Abidi &

Loknath Prasad, JJ.

1993

February, 16

Naresh Rai @ Naresh Singh & ors. *

V.

The State of Bihar.

Criminal trial --- injuries sustained by accused -- prosecution --- obligation of --- failure to explain injuries sustained by the accused --- whether creates doubt about the prosecution case --- court --- duty of.

Held, that the obligation on the art of the prosecution to explain the injuries sustained by the accused in the same occurrence may not arise in each and every case. The prosecution has only to prove that guilt of the accused beyond reasonable doubt and how the accused sustaincs injuries are not to be explained by the prosecution. Every failure of the prosecution to give a reasonable explanation of the injury on the accused in the same transaction cannot be taken as to creating doubt about the prosecution case and the entire evidence of the prosecution should not be discarded or be automatically rejected without any further probe. The Court is to con-

* Criminal Appeal Nos. 306 of 1989. From the Judgment of Mr. P.L. Konrgari, 5th Additional District & Sessions Judge Siwan, Dated 29.6.1989. Thakur Rai – 300 and 306 of 1989

sider the evidence and to find out if on account of the injuries to the accused, the right of self defence to the accused is made out and if so, to what extent and whether the accused had exceeded the right of self defence. But all this is to be seen when the accused have received grievous injuries in the course of the same transaction and not otherwise.

Case laws reviewed.

Appeal by the accused.

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

M/S. Rana Pratap Singh, Anant Bijay Singh & Basant Kumar Singh for the appellants

Mr. K.P. Gupta for the appellants respondentss.

S.H.S. Abidi , J. – In Criminal Appeal No. 300 of 1989 all the seven appellants have been convicted under section 148 of the Indian Penal Code and sentenced to two years regorous imprisonemnt. Apellant No. 2 Mokhtar Rai has further been convicted under section 307 and 323 of the Indian Penal Code (for short I.P.C.) and sentenced to six years and six months rigorous imprisonment under the respective counts. Appellant no. 4 Sheoji Rai has also been convicted under section 324 I.P.C. and sentenced to one year rigorous imprisonment. Criminal Appeal No. 306 of 1989 has been preferred by appellant Thakur Rai against his conviction under section

302 and 148 I.P.C and sentenced of rigorous imprisonment for life and two years under respective counts. Both the appeals arise of the same judgment and they have been heard together and they are being disposed of this common judgment.

2. According to the fard-beyan (Ext. 4) given by Hari Charan Yadav (P.W.9) on 27.1.1977 at 8.15 at the Bathan of Phulena Choudhary in village Derarai Ke Bangara, police station Sisawan district Siwan to the sub Inspector of police, Md. Nasiruddin (P.W.14) it appears that on 26.1.1977 at 4 P.M. he has gone to bring fodder for his cattle and his father Phulena Choudhary (P.W.10) and Lal Mohan Choudhary (not examined) were cutting fodder ; younger brother Dwarika Yadav (P.W.4) were cutting fodder from the field, then from the north they heard sound of Jai Bajrang Bali. Phulena Yadav and Lal Mohan Choudhary came out from Bathan and began to see as to why there was noise. Informant-Hari Charan Yadav further stated that Sampat Rai, Radha Rai, Thakur Rai, Sheoji Rai, Mahatam Rai, Mokhtar Rai, Naresh Rai, Moti Rai and Ram Pravesh Rai came armed with bhala at the bathan and they were abusing appellants Radha Rai and Sampat Rai said abusing to kill all and the needed money would be spent. Upon this Thakur Rai gave a bhala blow on the left side of the chest of Ram chandra When the victim took out the bhala from his chest he fell down dead. The informant Hari Charan Yadav was assaulted by Naresh Rai by Bhala on the left side of the stomach

and his banian in (ganji) was torn and the stomach was cut. Mokhtar Rai gave bhala blows upon Dwarika Rai and Phulena Rai (P.Ws. 4 and 10). Appellant Sheoji gave two bhala blows to Mohan Rai (P.W.). The motive for the occurrence was said to be that one day earlier i.e. on 20.1.1977 at 8 A.M. Sampat's field was grazed by the she-buffaloo of Phulena Rai (father of the informant) for which the father of the informant had apologised and assured that the occurrence would not be repeated but in the evening the accused, forming an unlawful assembly, came and assaulted the injured and killed Ram Chandra. On the basis of this fard-beyan (Ext. 4) the first information report (Ext. 3) was legisteredat at Siwan P.S. on 27.1.1977 at 4.20 P.M.

3. Investigation of the case was taken up by P.W.14 Md. Nasiruddin , S.I. , whe went to the spot, recorded the statement of the informant and the witnesses, prepared the inquest report and sent the dead body for postmortem examination to Siwan Sadar Hospital, besides sending three injured also namely, Mohan Rai, Dwarika Yadav and Phulena Rai (P.Ws. 1,4 and 10) where medical examination was done by Dr. Shyam Balak Sinha and the injury reports of Phulena Yadav and Mohan Rai are Exts. 7 and 7/1. Since the condition of (P.W 4) Dwarika Yadav was serious his dying declaration was recorded by Sri R.K. Mishra Judicial Magistrate, Sisauan upon which he put his left thumb impression. Ext. 12 is said to be the statement of P.W. 4 which is said to have been

recorded by A.S.I. Ramekbal Singh (not examined) which was brought to Siwan police-station on 27.1.1977 at 2 P.M. a constable Md. Din which an entry no. 21 was made in the casediary, but already the fard- beyn. (P.W.4) was recorded at 8 A.M. on 27.1.1977 on the basis of which first information report was already registered. After completing investigation charge sheet was submitted against the appellants.

4. The accused, in defence, denied the prosecution case and alleged that they have been falsely implicated in this case. Appellant Mahatam Rai gave fard-beyan to A.S.I. Ramekbal Singh on 26.1.1977 at 10 P.M. at Sadar Hospital, Siwan for which a counter first information report (Ext. C) had been registered on 27.1.1977 Two witnesses in defence have been examined being Lallan Prasad and Krishna Singh who said about fard-beyan of counter-first information report (Ext. B) respectively.

5. The prosecution, in support of its case, examined sixteen witnesses. Mohan Yadav, Mundrika Yadav, Ram Rekha Yadav and Dwarika Yadav (P.Ws. 1,2,3 and 4) are eye witnesses. Out of them Mohan Yadav and Dwarika Yadav are injured. P.W. 5 is Sri R.K. Mishra, Judicial Magistrate who recorded the dying declartion of Dwarika Yadav. P.W. 6 - Dr Lakhichand Prasad had conducted post mortem examination of Ramchandra on 27.1.1977 at 4 P.M. and submitted post mortem report (Ext.2) p.W.7 Rameshwar Singh has proved the fard-beyan recorded

by S.I. Md. Nasiruddin (P.W. 14). P.W. 8- Bhagwan Prasad has proved the signature of P.W. 14 on the fard-beyan. P.W. 9 is Haricharan Yadav the injured (informant). P.W. 10 Phulena Yadav being injured had been tendered. P.W 11 Bhagwan Prasad has proved the inquest report. P.W. 12 achhey Lal Yadav has proved the fard-beyan, inquest report and the seizure list. P.W. 13 Dr. Shyam Balak Singh had medically examined to three injured, namely, Mohan Yadav, Dwarika Yadav and Phulena Yadav as well as Srimatia Devi not examined as witness and also the three accused, namely, Mahatam Rai, Sheoji Rai and Radha Rai. P.W. 14 Md. Nasiruddin S.I. had recorded the fard-beyan and after completing investigation submitted chargesheet. P.W. 15 Mujibula Khan has proved the Sanaha no. 428 dated 27.1.1977 P.W. 16 Jagdish Pathak , Taid had said that A.P.P. had given requisition to Malkhana for the protection of material exhibits.

6. Learned trial court after considering the entire material on the record has convicted and sentenced the appellants as said above.

7. Learned counsel for the appellants has urged that the order of conviction of the appellants is bad in law. The occurrence has been admitted by both the parties and the time of occurrence is at 4 P.M., but only the differentes about the earlier occurrence. The prosecution says that in the morning at 8 A.M. the cattle had grazed

whereas the defence contention is that the grazing as well as mar-pit had taken at 4 P.M. as is made out from the earlier statement (Ext. 4) given by Dwarika Rai (P.W.4) to A.S.I. Ramekbal Singh at Sadar Hospital, Siwan, and therefore the prosecution has not give out the true version about the genesis of the occurrence which creates doubt about the version of the prosecution. Next, it was submitted that three persons from the side of the accused had been injured in the same transaction and at the same time but they have neither been mentioned in the fard-beyan (Ext.4) by Haricharan Yadav (P.W.9) nor the witnesses say about the same in the evidence, Rather the same has been denied by them and also it is a fact that the same doctor had examined the injuries of both the sides and had given injury reports (Exts. 7 and 7/1) and for the accused side (Exts. 73/ and 7/4) and some of the injuries on the side of the accused are grievous for which was there is no explanation.

Further it was argued that the case of the prosecution is falsified by the fard-beyan given by P.W. 4 at the Sadar Hospital and so the doubt is created about the occurrence itself as given by the prosecution. It was also said that all the P.W. are interested and no independent witnesses had been examined including a chaukidar and other people who had collected there and so independent witnesses had been withheld and only partisan and interested witnesses had been examined whose evidence in these circumstances does not inspire con-

fidence. It was also said that the I.O. of this case at the time of giving evidence was not able to read the case diary and on account of its failure to refer the case diary has caused miscarriage of justice and prejudice to the accused, specially, when the reference of the counter-case was put to the I.O. that is grazing of the she buffaloes in the field of Sampat. It was also said that blood stained clotnes which were seized, not sent for forenèic laboratory for its report but if sent & would have been then, it would have madc out that the mar-pit had taken place in the manner said by the defence. To appreciate these contentions raised by the learned counsel for the appellants the evidence will have to be scrutinised with care and caution.

8. The prosuection has examined P.W. 1,2,3,4 and 9 as eye- witnesses. Out of the P.W.s 1,4 and 9 are injured P.W. 10 an injured witness has been tendered for cross-examination and accordingly cross-examined. P.W. 9-Haricharan Yadav has lodged the first information report. He has collobrated in entire the version given by him in the first information report, He has said that in the evening on the day of occurrence he had gone for bringing fodder from Bathan which is at the south-eastern corner of the village. His father Phulena choudhary and uncle Lal Mohan Choudhary (not examined) were cutting the foddar. Ramrekha, Mundrika and Dwarika (P.Ws. 2,3 and 4) were weeding out grass at the easpernside from the bathan. Then there was a sound of Bajrang Bali. On

hearing the same his father and uncle left cutting the fodder and came out to see. In the meantime the appellants came asmed with bhalas. First abusing Radha said to kill and all money will be spent out at . Upon this Thakur Rai gave a bhala on the left side of the chest of Ramchandra Choudhary which, on warding off hit on his (victim's) thumb. Leter injury was also caused on his lip. Naresh Rai hurled two bhala blows on the information; one hit at the stomach by which the Baniain (ganji) was torn and stomach was abraised and the other assault was to the informant by lathi portion of the bhala on the Knees Mokhtar Rai gave bhala blow on the chest of Dwarika Rai who on receiving the same fell down and became restless. When his father Phulena Choudhary ran towards the house of Ramesh Chamar then Sampat and Raja injured him by beating him with the lathi portion of bhala. The informant aunt Srimatia Devi was given assault by the lathi portion of bhala Sheoji Rai hurled two bhalas but only one hit and the other missed. There was alarm of mar-pit. People ran towards the place of occurrence but only came to the spot and others did not come on account of fear. Ramchandra on getting the injury of Bhala fell down. Earlier in the morning a kin of the family had grazed the wheat crop of appellant Sampat Rai who had caught and brought it to the house of the informant and abused his father who apologised for the same. But appellant Sampat Rai abusing said that he would come at 4 P.M. The wheat-field was towards

south- east from the house of the informant. The injured were taken from the place of occurrence to the Sadar Hospital Siwan but the dead body was left there. The next day at about 8.15 A.M. the police came to the spot and recorded his statement and the same was read over to him before Achhelal and Laldeo. The dead body was sent for postmortem . The occurrence took place at 4 P.M. on account of grazing of the wheat crop by the kid. He did not know if any statement was given by P. W. 4 or any counter case has been filed. Chaukidar was neither informed nor examined. He denied the suggestion that he was not injured. He denied to have made any assault upon the accused party. He also denied any knowledge about litigation. He said that he had not gone to the hospital.

9. P.W. 1- Mohan Yadav is an injured witness. He also says that at 8 A.M.the king hao grazed the wheat crop of the Sampat's field. it was driven out and Sampat RAi went away saying that he would come again. In the evening when his brother Phulena Choudhary was cutting fodder for the cattle in the Osara of the Bathan they heard sound of 'Bajrang Bali" so they went out and saw the accused persons coming arenged with Bhalas and then they started abusing Sampat and Radha ordered to kill. Appellant Thakur Rai gave bhala blow on the chest of Ramchandra Choudhary and another blow on his neck. Naresh Rai gave bhala blow on the stomach of Haricharan which pierced through the baniain (ganji).

Mahatam Rai gave a lathi blow from the reverse side of the bhala upon Haricharan Rai. Mokhtar Rai gave a bhala blow on the chest of Dwarika Yadav. Where upon Dwarika fell down. Sheoji Rai gave a bhala blow to this witness on the stomach and he gave another blow to him. Srimtia Devi ran to the scene of occurrence but she was also as saulted by Sampat Rai and Radha Rai by the lathi portion of Bhala. She got injury on her hed. Phulena Rai ran to save but he was also assuited by Sampat Rai and Radha Rai by lathi portion on his head. He got injuries on his head and others part of his body. Ram chandra Rai died on the spot. Thereafter the accused ran away. The I.O. came on the spot. The injured were taken to the sadar Hospital, Siwan, where his statement was recorded. In cross- examination he said that P.Ws. 1,4,9 and 10 and deceased Ramchandra Rai being of the same family and all adult members of the family were there. There was no previous enmity with the accused. The place of occurrence is near his bathan. They have 10-12 bighas of land. They did not keep lathis in the Bathan. On the day of occurrence there was loss to the accused due to grazing by the cattle. He is also an accused in the case started by Mahatam Rai and in that Mohan Yadav (P.W. 1) , Haricharan (P.W.9) Kausilaya Devi (not P.W.) Phulena Choudhary (P.W.10) and Dwarika Yadav (P.W.4) were also accused and the same is pending. It is a case for grazing and mar-pit. Sheoji, Mahatam and Radha Rai were in the hospital. We did not know if

they were admitted in the hospital, or they had injurls on the head or chest by Bhala or lathis. The injured from the prosecution side were in hospital for 18 or 19 days where they had been taken and the police recorded their statements. He did not know if Dwarika Yadav's statement was recorded by the police. All the accused came and assualted and there was mar-pit only once. Even after failing down of Ramchandra the accused had been assaulting him. The place of occurrence is at a distance ,of 6 Kilometers from the police-station and Siwan is 10-12 kilometers.

10. P.W. 2- Mundrika Yadav has said that on the day of occurrence at 4 P.M. he was in his field and heard the sound of Bajrang Bali and so he went there and found the accused armed with bhala. Mohan and Phulena Yadav (P.Ws. 1 and 10) were cutting the fodder. They came out. He has also given out the same version as given by the informnt as well as P.W. 1 about the asault. Inardeo Chaukidar was not examined as witness. He had come from the east and saw the occurrence. Many people had seen the occurrence but they were not prepared to come forward to depose on account of fear of the accused. On account of grazing of wheat crop standing in the field of the appellant by the kid of the prosecution, apology had been tendered to the accused persons, yet they came abusing. He admitted that Haricharan (P.W.9) is has cousin and pw 10 Phulena is uncle and that there was no previous enmity with the accused.

He did not know that Mokhtar Rai has filed any case. He is neither an injured nor an accused nor had gone to the police-station nor did he say to any one about the occurrence. he denied to have seen any mark of assault on appellants Mokhtar Rai, Sheoji Rai and Radha Rai. They used to stay in the Bathan on account of thieves. The police after coming on the next day, recorded his statement.

11. P.W. 3 Ramrekha Yadav son of Phulena Yadav (P.W.10) has said that he was uprooting grass at the place of occurrence. He also said about cutting of the fodder and the alarm of Bajrang Bali and P.W.s1 and 10 coming out and seeing and then accusred assaulting the victims as given out in the first information report. He denied to have any knowledge about counter-case or any of the three accused having received any injury. He is the real brother of Haricharan yadav. P.W. 4 is also his real brother and he did not know it the statement of P.W. 4 had been recorded at the Hospital. After the mar-pit many people had come including chaukidar. He was also examined by the police. No statement was recorded before him.

12. P.W. 4 - Dwarika Yadav is an injured witness. He has also corroborated the version given in the evidence of P.W.s 1,2,3 and 9 about assault and its details. He has said that the grazing occurrence had taken place in the morning at 8 A.M. and the assault on the same day at

4 P.M. He admitted that he was taken to the Hospital in injured condition and he was examined by a Magistrate Sri R.N. Mishra (P.W.5) to whom he had given his statement (Ext.1). He could not say anything as he was not well. He was not examined by the police. He denied to have put any signature or L.T.I. on the statement before the Magistrate as his condition was bad.

13. Besides these oral witnesses, P.W. 5 - Sri R.K. Mishra, Judicial Magistrate, Siwan, has said that he recorded the dying declaration (Ext.1) of P.W. 4 Dwarika Yadav as his condition was bad. He had taken the L.T.I. of P.W. 4.

14. P.W. 6 is Dr. Lakhichand Prasad who conducted postmortem examinationa on the dead body of Ramchandra on 27.1.1977 at 4 P.M. and submitted the postmortem report (Ext.2). He has found the following ante mortem injuries :-

(I) Penetrating wound 1 $\frac{1''}{4}$ × $\frac{1''}{2}$ deep into chest cavity on left side of chest near axilla.

(II.) Inclsed wound 1/4 x 1/4 muscle deep on the base of left thumb.

(III.) Incised wound 2" x 1/4" scalp deep on the back part of vault of scalp near the hair tail."

In this opinion death was due to injury no. 1 to vital organs, left lung and heart leading to naemorrnage and death. This injury was caused by sharp cutting penetrat-

ing substance like bhala. Injury nos. 2 and 3 were also caused by sharp cutting substance may be by sharp edge of bhala and that injury no. 1 was sufficient in ordinary course of nature to cause death, and the time elapsed since death was within 24 hours of holding of the post mortem examination on 27.1.1977 at 4 P.M.

15. Dr. Shyam Balak Sinha (P.W. 13) had examined the injuries on the persons of Dwarika Yadav, Mohan Yadav and Phulena Yadav (P.Ws. 4,1 and 10 respectively) and one Srimatia Devi (not produced as witness) on 26.1.1977 between 7.5 P.M. to 7.15 P.M. and has submitted injury reports Exts. 7 to 7/3. On the person of Phulena Yadav following injuries were found:-

"1. Lacerated wound $\frac{1''}{2} \times \frac{1''}{4}$ × skin deep on the left side of the head.

2. Lacerated wound $\frac{1''}{2} \times \frac{1''}{2}$ sken deep on middle finger of left hand following

3. Abrasion $\frac{1''}{2} \times \frac{1''}{4}$ on right forearm.

4. Abrasion 2." × $\frac{1''}{2}$ on the right shoulder Joint.

5. Abrasion 3" × 1/6" on the upper part of back in mid line.

6. Abrasion 5" × 1/6" in the linear part of back right side,"

The following injuy was found on the person of

Mohan Yadav:-

"Incised wound 1/4"x1/4"x skin deep on the linear part of his back on the left side.

The following iniury was found on the person of Dwariks Yadav.-

" Punctured wound 1"x$\frac{3}{4}$"x communicating with the plural cavity in the linear part of his chest right side, and was coming out of the wound. Injury was caused by sharp pointed and cutting weapon such as bhala. Nature grievous. Age within 6 hours.

Srimatia Devi was also examined and the following injury was found:-

"Lacerated wound 1"x1$\frac{1}{4}$"x skin deep on the left side of the scalp. Injury was caused by hard and blunt substance such as woody portion of bhala. Age within 6 hours . Nature simple in nature."

This P.W/13had also examined on the same day helwen 8.5 to 9 P.M the appellants Mahatm Rai Sheoji Singh and Radha Rai The following injuries were found on Radha Rai

" I. One incised wound 1 $\frac{1"}{2}$ x1/4x skin deep on the rt. side of chest above nipple.

II. Lacerated wound 1"x1/4 x skin deep on the

posterior surface of left forearm on its upper part.

III. Bruise with swelling $1\frac{1''}{2} \times \frac{1''}{2}$ the back of the left wrist,

IV. Lacerated wound $\frac{1''}{2} \times \frac{1''}{4}$ skin deep on the little ginger of left hand on its palmar surface.

V. Lacerated wound 1/4 x $\frac{1}{4}$ x skindeep on the index finger of left hand on its dorsam surface.

VI. Bruise with swelling $1\frac{1''}{2} \times \frac{1''}{2}$ the lower part of back.

The following injurise were found on the person of Sheoji Singh:-

" Incised wound 2"x1/2" x bone deep on the dorsam surface of rt. hand.

11 Lacearted wound 1"x1/2"x skin deep on lthe lower part of left hand.

III Contusion $1'' \times \frac{1''}{2} \times 1''$ on the right side of the head

The following injuries were found on the person of Mahatam Rai -

I. Incised wound 3"x 1/2" with fracture of the upper plate of right parietal bone of the head.

II. Incised wound 1/2" x 1/2" scalp deep on lthe right side of skull.

III. Bruise with swelling $3\frac{1''}{2} \times 1''$ on the posterior surface of right shoulder.

The Doctor has said that all the injured persons were

referred to him by the police copies of the injuries reports have not been brought on the record and it is only the statement of P.W. 13 that he had examined and so the injuries have been given out.

16. Thus considering the entire material on the record itis well made out by the prosecution that in the morning of 26.1.1977 the kid of the family of the informant had grazed the wheat crop of appellant Sampat who brought the kid to phulena Rai father of the informant and complained for which phulena Rai apologised and assured that the same would not be repeated yet Sampat Rai did not feel satisfied and went away threatening that he would be coming in the evening again.

It was at about 4 P.M. the same day that when ;the informant was grazing cattie and his father and uncle were cutting fodder, the applellants came raising hulia Jai Bajrang Bali which he was heard by the father and uncle of the informant who came out. The appellants came to the Bathan of the informant and began abusing. Radha Rai and uncle of the infrormant who came out The appellants came to the Bathan of the informant and began abusing. Radha Rai end Samoat Rai asked to kill and a said that whatever amount needed would be spent. upon this Thakur Rai gave a bhala blow on the left side of the chest of Ramchandra Rai who took out the bhala from his chest and fell down dead. the informant (P.W.9) was given bhala blow by Naresh Rai on the left side of

the stomach, piercing the banian and cutting the stomach. Mokhtar Rai also gave bhala blows on Dwarika and Phulena Rai and appelinat Sheoji Rai gave two blows to Mohan Rai. Thereafter the accused ran away . The occurence was seen by the witnesses. Further the prosecution has examined the witnesses including the injured being P.W.S. 1,4, 9 and 10. Phulena has been endered. Their presence the spot could not be doubted because of the injuries sustained by them. Mundrika and Ramrekha the other eye-witnesses have established their presence on the spot. The evidence of the witnesses has been scrutinsed and it has been found that there is no contradiction or infirmity. The manner of assault has been given out by them uniformly without any contradiction. Further the version given by them is corroborated by the medical evidence of the two doctors who had examined them without loss of time. The first information report has also been lodged which does not give out any interpolation for falsely roping the accused persons. The witnesses had admitted that there was no previous enmity between his party and the accused and nothing has come out in their evidence to show that these witnesses have got any motive or animosy to falsely rope in the accused persons. The accused are well known to the witnesses and the occurrence is of day time so there is no question of mistaken identity.

17. Learned counsel for the appellants has urged that the prosecution has not come with clean hands as

the fard-beyan (Ext.8) about the occurrence has been given by appellant no. 3 Mahatam Rai on 26.1.1977 at 10 P.M. in Sadar Hospital, Siwan, to A.S.I. Ramekbal Singh on the basis of that counter first information report (Ext.C) had been registered and further the same night (16.1.77 to 8 P.M.) Ramekbal Singh , A.S.I. had recorded the fard-beyan (Ext. 12) of Dwarika Yadav (P.W.4) and the dying declaration of P.W. 4 was recorded by P.W. 5 Sri R.K. Mishra, Judicial Magistrate, Siwan, at the State Dispensary, Siwan, and lastly the fard-beyan (Ext. 4) of this case was given by P.W. 9- Hari Charan Yadav (informant) to S. Md. Nasiruddin (P.W.14) at the Bathan of Phulena Choudhary (P.W. 10) on the basis of which first information report (Ext.3) was registered on 27.1.77 at 8.15 A.M. at Siwan police-station and looking to all these documents it appears that the case of the prosecuction is not made out. The evidence of P.W.s 1,2,3,4, 9 and 14 is consistant that the occurrence had taken place at 4 P.M. at the bathan of Phulena Choudhary. Thereafter the injured were sent to the hospital where Dr. Shyam Balak Singh (P.W.13) had examined Mohan Yadav, Dwarika Yadav, Phulena Yadav (P.W. 1,4 and 10) and Srimatia Devi on 26.1.1977 between 7.5 P.M. to 7.15 P.M. for which he submitted injury reports (Ext.7 series). P.W. 14 is the of this case. He has said in para 22 of his statement that he did not remember if on 27.1.77 at 2 P.M. the fard-beyan of P.W. 4 had been brought to him by constable no. 122- D in Mohammad

of Siwan Town police-station and he had made an entry in the case dairy about the fard-beyan. He denied the suggestion that he had suppressed it. He rather said that since the case had already been earlier registered so he did not think to register the fard- beyan as first information report. He denied the suggestion that he suppressed the fard-beyan of Dwarika Yadav as the case of the accused was made out by the same. When the condition of P.W. 4 deteriorated, his dying declaration (Ext.1) was recorded by P.W. 5 Sri R.K. Mishra at the State Dispensary, Siwan. This fact has been admitted by Sri Mishra in his statement. He has proved the dying declaration which is said to have been written by him. Further the fard-beyan (Ext.2) is said to have been given on 26.1.77 at 10 P.M. at Sadar Hospital, Siwan, to A.S.I. Ramekbal Singh by appellant no. 3 Mahatam which formed the basis or the counter -first information report (Ext. E) registered on 27.1.1977. In these circumstances it appear that the first version about the occurrence appears to have been given by Dwarika Yadav (P.W.4) being Ext. 12 - fard-beyan to A.S.I. Ramekbal Singh.

18. P.W. 4 in his statement has categorically stated that he had not given any statement to A.S.I. Ramekbal Singh, A.S.I. Ramekbal Singh has not been examined to say that he had recorded the statement of P.W. 4. A petition said to have been filed by the prosecution that where abouts of the A.S.I. Ramekbal Singh were not known and so the prosecution did not examine him. The

defence has also not examined Ramekbal Singh as defence witness. This statement has been brought on record as Ext. 12 and an entry in respect of its receipt appears to have been made by P.W. 14 in the case diary and so its formal proof has been waived . But still the question remains as to how far it can be read in evidence when it genuineness disputed. Neither P.W. 4 Dwarika Yadav accepted to have given any statement to A.S.I. Ramekbal Singh nor Ramekbal Singh has been examined to say that he had written this statement. There is no witness to say that such a statement had been recorded before him by Ramekbal Singh. P.W. 4 has said that he is a matriculate and so he appears to be a literate person. He has signed the deposition in the court. On Ext. 12 there appears to be left thumb impression of P.W.4. There is nothing to show that till Ext. 12 was recorded the condition of P.W. 4 had deteriorated so much so that he was unable to put his signature. Except bringing Ext. 12 on record there is no other evidence to show that this fard-beyan (Ext.12) had been given by P.W.4 and recorded by Ramekbal Singh. The very genuineness of this document has been disputed and the same has not been proved, specially when the maker of the document him self denies to have given such statement . If this document has been admitted as a genuine one then it could have been read as a substantive evidence and there was no necessity to examine Ramekbal Singh to prove the same. In the case of *Saddiq & others. Vs.*

State [1] a Full bench of the Allahabad High Court nas observed at page 381 in para:9:-

"Section 294, Cr. P.C. is new section as it has no equivalent in the Code of Criminal Procedure. 1898. It is based on the rule of evidence that facts admitted need not be proved contained in Section 58, Evidence Act. The object of enacting the section appears to be to avoid the time of the Court being wasted by examining the signatory of the document filed by the prosecuction or the accused under sub-section (1) of Section 294, Cr. P.C. to prove his signature and the correctness of its contents if its genuinc-ness is not disputed by the opposite party. If the signature and correctness of the contents of a document filed by the prosecution or the accused under Sub-section(1)of section 294.Crp.whose genuiness is not disputed by the opposite party are still required to be proved by examining the signatory of the document, the very object of enacting Section 294, Cr. P.W. will be defeated. We are,therefore, of the opinion that all documents filed by the prosecution or the accused under-sub-section (1) of section 294. Cr. P.C. whose genuineness is not disputed by the opposite party may be read as substantive evidence under sub-section (3) of Section 294, Cr. P.C."

Thus this Ext. 12 whose genuineness has been callenged by P.W.4 himself by categorically denying to have given any statement at All to Ramekbal singh and further there being his left thumb impression instead of signature when P.W.4 is a the person who has signed his statement in the court, then this document (Ext 12) cannot

1. (1981) Cr. L J. 379

be relied upon. It could have been relied upon if Ramek bal Singh had been examined to say that it was this very document was written by him at the dictation given by P.W.4 and who had put his left thumb impression in stead of signature. whom Ramekbal Singh had not been examined, then there should have been some withess to vouch the genuineness and correctness of the document. in the absence of any such evidence this document cannot be relied on. either fard beyan in first information is substantive piece of evidence and has got no value in evidence. Hence they are liable to be discarded.

19. As regared the dying declartion of Dwarka Yadav (P.W.4) it cannot be called a dying declaration as the victim has surived. The dying declaration is said to have been recorded on 26. 1. 1977 at 8.15 P.M by Shri R. K. Mishra,

Judicial Magistrate, Siwan who has said that the condition of P.W.4 was bad and so he had taken his (P.W.4) left thumb impression.This P.W.4 Dwarika Yadav says that he did not remember it on that date he had given statement. He furthers says that he heard that he was examined on the day of occurrence in the night he did not know as to how the Magistrate has come The police of siwan police station had not recorded his statement. His condition was bad On the statement before the Magistrate he did not put his signature but

1. (1981) Cr. L.J. 379

put his left thumb impression.since P.W.4 has survived this statement cannot be called dying declaration but only a formal statement under section 157 or the Evidence Act can be used only to corroborate or contradict the witnesses in the court. In the case of *Moti Singh & anoth. vs. State of Uttar pradesh*[1] the Supreme Court has observed at page 901 in the para 5:-

" .. Ram Shankar and Jageshwar, have been disbelieved by the Sessions Judge and it appears that the High Court did not take any more favourable view of their deposition in court. It, however seens to have relied on their statement Exs. Kha 5and Kha 8 respectively, recorded by a Magistrate at the hospital Ir this it was in error. Those statements could have been used only in either corroborating or contradicting the statements of these withnesses in Court. If those withesses were not to be believed, their previous statements could not be believed, their previous statements could not be used as independent evidence in support of the other prosecution evidence.

In the case of *Maqsoodan antoths vs. State of U.P.*[2] (AIR 1983 so 126) the Supreme Court has obserned at page 129 in para 7:-

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1. (1969) A.I.R. (S.C.) 900
2. (1983) A.I.R. (S.C.) 126

" When a person who has made a statement, May be in expectation of death, is not dead,it is not a dying deciaration and is not admissible under Section 32 of the Evidence Act. In the instant case the makers of the statements Exts. Ka 22 and Ka 23 are not only alive but they deposed in the case Their statements, therefore are not admissible under Section 32; but their statements however are admissible under section 157 of the Evidence Act as former statements made by them in order to Corroborate their testimony in Court In the instant case Exs. Ka- 22 and Ka-23 respectively Corroborate the testimony in Court of P.W.3 and C.W.1 respectively."

Looking to this Ext. 1 it does not appear that there is any contradiction between it and the statement in the court.

20. As regards the fard-beyan (Ext.B) of appellant Mahatam Rai it is said to have been recoroded by A.S.I. Ramekbal Singh on 26.1.1977 at 10 P.M. in the Sadar Hospital Siwan and on that basis counter-first information report (Ext.C) was registered on 27.1.1977 at Siwan police-station. In this fard-beyan (Ext. B) it has been said by Mahatam Singh that on 26.1.1977 the buffalo of Phulena Choudhary was grazing the wheat crop sown by him (Mahatam Rai) in the field towards west of the village and so he went there and seeing it grazing they were bringing the cattle to the house. Upon this Haricharan (P.W.9) said abusing as to why he was taken

his cattle. This ensured into altercation and many people collected on the spot. Phulena Yadav (P.W.10) ordered to kill upon which Haricharan Yadav gave a pharsa blow on his head which began bleeding very much. Then by the reverse side of bhala he gave a blow on the right shoulder of appellant no. 3 causing sufficient injuries. Mohan Yadav (P.W.1) assaulted Sheoji Singh (appelant no.4) by pharsa on his right hand and wrist. Matia Devi also threw brickbats hitting on his left arm, wrist and head. Appellant Radha Rai was assaulted by Phulena Rai by bhala on the right side of his chest which too began bleeding very much. P.W. 4 Dwarika Yadav gave lathi blow on the arm. Upon this many people came to the spot including Ramnaresh Dubey, Gautam Singh and Briksha Rai. The assault was made by lathi and pharsa with intention to kill. The injured were taken to Sadar Hospital Siwan where they were being treated. On the basis of this fard-beyan the first information report (Ext. C) was registered at Siwan police-station being Case No. 4 dated 27.1.1977 147,148,323,324,347 of I.P.C. and 24 Cattle Trespass Act. Chargesheet was submitted and ultimately the case ended in conviction of Dwarika Yadav and Sushila Devi @ Motia Devi u/ss 147 and 323 I.P.C. and three other accused Haricharan Yadav, Phulena Yadav and Mohan Yadav were convicted u/ss 148 and 324 I.P.C. The court took a lenient view in favour of Phulena Yadav and Sushila as they were 70 years old and had weak health and so they were directed to execute a bond of

Rs. 2000/- with two sureties of like amount for a period of one year u/s 4(1) of the Probation of Offeners Act. As regards three other accused Dwarika Yadav was sentenced to one year rigorous imprisonment us147 and 323 I.P.C. and Harucharan and Mohan were sentenced to two years rigorous imprisonment u/ss 148 and 324 I.P.C. and sentences were ordered to run concurrently. This judgment of the learned Judicial Magistrate 1st class Siwan dated 25.1.1988 has been filed as Ext. D.

21. Looking to both the versions given by the prosecution as well as defence in this case, no one has said about the injuries having been given to each other. The fard-beyans and the first information reports of both the cases being Exts. 4,3 and B.C. respectively are also silent about this aspect as persons of both sides having been injured. It is only Dr. Shyam Balak Sinha (P.W.13) who says about the medical examination of P.W.S. 1,4,10 and Srimatia Devi on 26.1.1977 at 7.5 to 7.15 P.M. and giving injury reports (Exts. 7 series). He also says about the medical examination of the appellants Mahatam, Sheoji and Radha on 26.1.1977 between 8.15 to 9. P.M. Though injury reports have not been brought on the record but the Doctor has said in his statement about the injuries received by the said three appellants. He says that he had examined the three appellants on the police report but no police report has been brought on record. About the injuries of the three P.Ws. namely , P.W.s. 1,4,10 and Srimatia Devi there is a requisition dated

26.1.1977 on prescribed form while about P.W. 4 Dwarika and Srimati Devi is on plane paper. Only this much is made out that this Doctor had examined four persons from the side of the prosecution and three from the side of the appellants on 26.8.1977 in the evening between 7.5 P.M. 9 P.M.

22. The contention of the learned counsel for the appellants that the prosecution has suppressed the injuries of the accused which are said to have been received in the same transaction and so the prosecution has suppressed the genesis of the occurrence and that creates doubt. Whereas learned counsel for the State has said that the occurrence had not taken place in the same transaction and so the prosecution case cannot be doubted on that score. In the case of *Mohar Rai v. State of Bihar* [1] it has been observed at page 1284 in para 6. -

" The evidence of Sri Bishun Prasad Sinha (P.W. 18) clearly shows that those injuries could not have been self-inflicted and further according to him it was most unlikely that they would have been caused at the instance of the appellants themselves. Under these circumstances we are unable to agree with the High Court that the prosecution had no duty to offer any explanation as regards those injuries. In our judgment the failure of the prosecution to offer any explanation in that regard shows that

1. (1963) A.I.R. (SC) 1287

evidence of the prosecution witnesses relating to the incident is not true or at any rate not wholly true. Further those injuries probabilise the plea taken by the appellants."

In the case of *Bankey Lal & oths. vs. State of U.P.* [1] where the learned counsel contended that the prosecution has not explained the injury found on the person of Bankey Lal, the entire prosecution case has to be discarded and in support of his contention he relied upon the case of *Mohar Rai v. State of Bihar (Supra)* [2] and ugar Ahir v. State of Bihar in which their Lordships of the Supreme Court observed about the case of Mohar Rai that failure on the part of the prosecution witnesses to explain the injuries on the persons of the accused went to show that the prosecution witnesses were not truth-ful witnesses and further on the material on record the possibility of self-defence could not be ruled out. For the second case their Lordships said that the maxim falsus in uno, falsus in omnibus is neither a sound rule of law not rule of practice. Then their Lordships observed at page 2235 in paid 10 :-

" ... We fail to see how these decisions are of any assistance to the apellants. It is true the if prosecution witnesses are proved to have not deposed truly in all respects their evidence is required to be scrutinised with care."

1. (1971) A.I.R. (SC)2233
2. (1965) A.I.R. (SC.) 277

In the case of *Ram Narain & oths. vs. The State of Uttar Pradesh* [1] it has been observed in para 8 :-

" The absence of any explanation with regard to the injuries in Ram Narainon certainly an infirmity in the case of prosecution which cannot be lost signt or, but it must be remembered that generally the witnesses are anxious to suppress any injury which might have been inflicted by any one from the complainant's party

... In view of the medical and circumstantial evidence which corroborates the eye witnesses the case of the prosecution with regard to Ram Narain, Jagmohan Hari pd. and Chasitay cannot be rejected."

In the case of Bhagwan Tana Patil vs. The State of Maharastra[2] it has been held at page 25 (para 15) :-

" True that the explanation given as not found impeachable but there is no hard and fast rule that simply because the prosecution witnesses did not explain the injuries on the person of the accused, their entire evidence should be discarded. The observation of this Court in *Bankey Lal vs. State of Uttar Pradesh* Cr. Appeal No. 199 of 1968, Dt. 4.2.1971 : (reported in 1971 SC 2233) are in point. The evidence of Bhagwan Parashram could not be brushed aside merely he had not given a flawless explanation of the injuries of the appellant which according to Dr. Guna P.W. 8 were very superficial and

1. (1972) A.I.R. (SC) 2545 = (1973) S.C.C. (Cri) 241
2. (1974) A I R (SC) 21

could be suffered by consent with a razor blade."

In the case Onkarnath Singh & oths V O .P.[1] Lordships have been pleased to observe at page 1557, paras 34 and 35

34. The question is, what is the effect of the injuries of Parashnath. This is a question of fact and not one of law. Answer to such a question depends upon the circumstances of each case. This Court has repeatedly pointed out that the entire case cannot be thrown over board simply because the prosecution witnesses do not explain the injuries on the person of the accused (see AIR 1971 SC 2233) (spra) ad *Bhagwan Tana Patil. V. State of Maharashtra*, Appeal No. 78/70, Dt. 9.10.1973 reported in AIR 1974 SC 21:1974 (Crl. LJ 145)."

35. In some cases, the failure of the prosecution to account for the injuries of the accused may undermine its evidence to the core and falsity the 'substratum' of its story, while in others it may have little or no adverse effect on the prosecution case. It may also, in a given case, strengthen the plea of private defence set up by the accused. But it cannot be laid down as 'invariable' proposition of law of universal application that as soon as it is found that the accused had received injuries in the same transaction in which the complainant party was assaulted, the plea of private defence would stand prima

1. (1974) A I R 1550
2. (1974) A.I.R. (SC.) - 1550
3. (1975) A.I.R. (SC.) 1478

facie established and the burden would shift on to the prosecution to prove that those injuries were caused to the accused in self defence by the complainant party. For instance there two parties come armed with a determination to measure their strength and to settle a dispute by force of arms and in the ensuing fight both sides receive injuries, no question of private defence arises."

In the case of *State of Gujarat v.s Bai Fatima & anoth.*[1] again their Lordships observed at 1482 in para 17:

" In a situation like this when the prosecution fails to explain the injuries on the person of an accused, depending on the facts of each case, any of the three results may follow :-

(1) That the accused had inflicted the injuries on the members of the prosecution party in exercise of the light of self defence.

(2) It makes the prosecution version of the occurrence dobtful and the charge against the accused cannot be held to have been proved beyond reasonable doubt.

(3) It does not affect the prosecution case at all. Question is in which category the present case fails ?"

In the case of *Lakshmi Singh & oths. vs. State of Bihar* [2] the Supreme Court considered this aspect of the matter at page 2269 in par 11 :-

" It seems to us that in a murder case the non-explana-

1. (1975) A.I.R.(SC) 1478
2. (1976) A.I.R. S. C. 2263

tion of the injuries sustained by the accused at about the time of the occurrence or in the course of altercation is a very important circumstance from which the court can draw the following inferences :

(1) That the prosecution has suppressed the genesis and the origin of the occurrence and has thus not presented the true version:

(2) that the witnesses who have denied the presence of the injuries on the person of the accused are lying on a most material point and therefore their evidence is unreliable;

(3) that in case there is a defence version which explains the injuries on the person of the accused it is rendered probable so as to throw doubt on the prosecution case .

The omission on the part of the prosecution to explain the injuries on the person of the accused assumes much greater importance where the evidence consists of interested or inimical witnesses or where the defence gives a verson which competes in probability with that of the prosecution one...

In the case of *Bhaba Nanda Sarma & oths vs. State of Assam* the Supreme Court has observed in para 2 at page 2253 :-

" ... In a case of this nature before an adverse inference is drawn against the prosecution for its alleged suppression or failure to explain in the injuries on the person of an accused, it must be reasonably shown that, in all probability, the injuries were caused to him in the same occurrence or as a part of the same transaction in

1. (1977) A.I.R. 2252

which the victims on the side of the prosecution were injured. The prosecution is not obliged to explain the injuries on the person of an accused in all cases and in all circumstances. This is not the law. It all depends upon the facts and circumstances of each case whether the prosecution case becomes reasonably doubtful for its failure to explain the injuries on the accused. In the instant case the Sessions Judge was not justified in doubting the truth of the version given by the eye witnessess-three of whom were wholly independent witnesses. Gopi Nath was surely present on the scene of the occurrence as he himself had received the injuries in the same transaction. The High Court has rightly believed the testimony of the eye witnesses."

In the case of *Jagdish v. State of Rajasthan* [1] the Supreme Court observed at page 1011, para 1. It is true that the accused had some injuries on their persons. The injuries on their persons were extremely superficial and could be easily explained. As regards Nanda, it is true that he had five injuries out of which two are confused would. It was the evidence of P.W. that he examined the injuries on 25.6.67 i.e. two to four days after the occurrence. It has not been proved that all the injuries sustained by him were sustained in the course of altercation which resulted in the death of the deceased, so as to lay the burden on the prosecution to explain the presence of these injuries. Even the contusions are not of serious nature. It is true that where serious injuries.

1. 1979 A.I.R. (S.C.) 1010

are found on the person of the accused, as a principle of appreciation of evidence, it becomes obligatory on the prosecution to explain the injuries, so as to satisfy the Court as to the circumstances under which the occurrence originated. But before this obligation is placed on the prosecution, two conditions must be satisfied :

1. that the injuries on the person of the accused must be very serious and ·ever·· and not superficial;

2. that it must be shown that these injuries must have been caused at the time of the occurrence in question."

In the case of *Abdul Waheed v. The State of Maharashtra*[1] their Lordships observed in para 2:-

" The genesis of the defence case was that threre was a grazing dispute in the field of the appellant which led the deceased to assault the appellant and in the course of the mutual scuffle, the deceased was given a knife·blow which resulted in his death. Although F.I.R. was lodged by the defence, there was nothing to show that the investigating officer was taken to the field to find out whether any grazing incident had taken place or not. Furthermore, P.W.S1,3,4 and 5 have proved the case against the accused as eye-witnesses and out of them P.W.1 , Shekh Chand, is an absolutely independent witness, hence there is no reason to distrust his evidence. It may be as the Sessions Judge has, pointed out, that after the appellant caused the murder of the deceased,

1. (1979) A.I.R. (SC.) 1828

there may have been mutual scuffle by way of reprisal and some of the accused were assaulted in that incident. That is why the appellant lodged his F.I.R. more than an hour after the F.I.R. lodged by hte complainant. Having gone through the medical evidence and the defence evidence, we are not satisfied that the defence came out in this case with the true version."

In the case of *Hare Krishna Singh & oths v. State of Bihar* [1] their Lordship after referring to many of the above mentioned decisions observed at page 868 in paras 18, 20-21 :-

> " We have referred to the above decisions in exten so in order to consider whether it is an invariable propostion of law that the prosecution is obliged to explain the injuries sustained by the accused in the same occurrence and whether failure of the prosecution to so explain the prosecution has suppressed the truth and also the genesis or origin of the occurrence. Upon a conspectus of the decisions mentioned above, we are of the view that the question as to the obligation of the prosecution to explain the injuries sustained by the accused in the same occurrence may not arise in each and every case. In other words, it is not an invariable rule that the prosecution has to explain the injuries sustained by the accused in the same occurrence. The burden of proving the guilt of the accused is undoubtedly on the prosectuion. The accused is not bound to say anything in defence. The prosecution has to prove the guilt of the accused beyond all reasonable doubts . If the witness examined on behalf of the prosecution are believed by the Court in proof of the guilt of the accused beyond any reasonable doubt, the question of the obligation of the prosecution to explain the injuries sustained by the accused will not arise. When the prosecution comes with a definite case that the offence has been committed

1. (1988) A.I.R. (SC.) 863

by the accused and proves its case beyond any reasonable doubt, it explain how and in what circumstances injuries have been inflicted on the person of the accused."

"20. All the decisions of this court which have been referred to and discussed above, show that when the court has believed the prosecution witnesses as convincing and trust - worthy, the Court overruled the contention of the accused that as the prosecution had faled to explain the injuries sustained by the accused in the same occurrence, the prosecution case should be disbelieved and the accused should be acquitted. Thus, it is not the law or invariable rule that whenever the accused sustains an injury in the same ocurrence, the prosecution has to explain the injuries failure of which will mean that the prosecution has suppressed the truth and also the origin and genesis of the occurrence."

21 But, even then, in the fact and circumstances of the case the prosecution, in our opinion, is not obliged to account for the injury and that the failure of the prosecution to give a reasonable explanation of the injury would not go against or throw any doubt on the prosecution case."

In the case of Bijayee Singh & oths. V. State of U.P. [1] have observed at page 388 sec (4) in para 9.

We are not prepared to agree with the iearned counsel for the defence that each and every case where prosecution fails to explain that injuries found on some of the rejected without any further prob.

He placed considerabler reliance on some of the Judgments of this court." Mohar Rai & Bharat Rai (supra) and *Laksmi Singh* (Supra) their lorddhips of the Supreme Court observeds page 389 and 401 para 10 and 34 Sec (cr) as follows.

1. (1990) Cr. L.J. 1510 = (1990) SCC (Cri) 378.

'Relying on these two cases that learned counsel for the defence contended that in the instant case the prosecution has failed to explain the injuries on the two accursed and the genes is and the origin of the occurrence have been suppressed and a true version has not been presented before the court and consequently the truth from faisenood cannot be separated and consquently the entire prosecution case must be rejected. We are unable to agree. In Mohar Raj's Case 1968 Cr. LJ 1479, It is made clear that failure of the prosecution to offer any explan nation regarding the injuries found on the accused my show that the evidence related to the incident is not true or at any rate not wholly true, likewise in Laksmi Singh's case (1976) Cr. L.J. 1736) also it is observed that any non-exaplantion or the injuris on the accused by the prosecution may affect the prosecution case. But such a non-explantation of the injurres on the accused by the prosecution may affect the prosecution ase. But such a non-explanation may assume greater importance where the evidence consists of interested or inmical witnesses or where the defence gives a version which competes in probability with that of the prosecution. But where the evidence is clear, cogent and creditworthy and where the court can distinguish the truth from falsehood the mere fact that the enjuries are not explained by the prosscution cannot by itself be a sole basis to reject such vidence and consequently the whole case much depends on the facts and circumstances of each case."

10. As discussed above we are satisfied in this case that non-explanation of injuries on these two accused persons does not affect the prosecution case as a Whole but in a case of this nature what all that the defence can contend onthe basis of non-examination of injuries foun on these two a ccused in that the accused could have had a right of private defence or at any rate a reasonable doubt arlses in this regard.

"34. The Place that the non-explanation of these injuries by the prosecution warrents rejection of the prosecution case, is rejected as the evidence of the material Witnesses even otherwise found to be cogent, convincing and acceptable but from the circumstances these two a ccused particularly one

of them had received gun-shot injrures during the course of the same occurrence is established. The accused have also adduced defence evidence namely. that of a Doctor in a spport of their plea. This material though by itself is not sufficient to establish the General Exception under Section 96 or the special exception No. 2 to Section 300, IPC but creates a reasonable doubt the existence of such a right. The accused have proved the infliction of injuries on them by the complainant party in the course of the occurrence. Therefore, the obligatory initial presumption against them is removed and their plea appears to be reasonably true and consequently they are entitled to the right of self-defence.

In the case of *State of Rajasthan v. Madho & anotn* [1] (1991, it has been observed in para 2:-

• "if the prosecution witnesses shy away from the reality and do not explain the injuries caused to the respondents herein it casts a doubt on the genesis of the prosecution. case against since the evidence shows that these injuries were sustained in the course of the same incident. It gives impression that the witnesses are suppressing some part of the incident. The High Court was, therefore, of the opinion that having regard to the fact that they have failed to explain the injuries sustained by the two respondents in the course of the same transaction, the respondents were entitled to the benefit of the doubt it was hazardous to place implicit reliance on the te's tmony of the injured P.W.2.

In the case of *Patori Devi and another. v. Amar Nath & ors.*[2] where the judgment of the High Court was that the version given by the defence that they were attacked first and were given various injuries indiscriminately appears to be reasonably true and at any rate the prosecution has suppressed the true version of the story, their

1. (1991) A.I.R. (SC.) 1065)
2. (1988) A.I.R. (SC.) 560

Lordships or the Supreme Court after giving anxious consideration to the rival contentions in the appeal by the State, and the informant, particularly, the contention that the accused had exceeded the right or private defence, observed at page 562 in paragraph 9 as under:-

> " Indeed, that appears to be the only contention that required to be considered, but unfortunately, in view of the intrinsic evidence on record and the number of injuries suffered by the accused, we do not think we can accede to the contention of Mr. Kohli. We are of the view that therewas a soft pedaling in the investigation, if not suppression of a part of the incident. If the prosecution had revealed the entire story, we would have been able to find the nugget of truth. On the material on record, however, we are unable to find fault with the facts recorded by the High Court.
>
> The number and nature of injuries sustained by the accused and the deceased in any case, may furnish good evidence to consider whether the accused had exceeded the right of private defence. But in the instant case, we do not want to rest our conclusion solely on the injuries sustained by the accused and the deceased."

In the case of *Pattad A marappa and oths. vs. the state of Karnatka* [1] their lordships observed at page 194 para 34 as under ;

> " An attempt was made to draw comparison with the decision in Patori Devi vs. Amar Nath (1988 SC 560)::1948 SSC(Cri) 206 to contain that when the version of eye witness was not fully acceptable on account of the prosecution suppressing the fact of the injury being caused to the find the fact in Patori Devi case to be entirely different. that was a case where the High Court set aside the conviction awarded by the Sessions Judge and acquitted the accused because High Court found that the prosecution had advanced a false storey that the appellants had assaulted the deceased and

1. (1990) S.C.C.-(Cri) 179 = (1989) Suppl. (2) S.C.C-389

that the version given by the defence that they were attacked first and grievous injuries given indiscriminately to be reasonably true and High Court acquitted as prosecution failed to give true story."

23. Thus from these observations of the Supreme Court it appears that failure of the prosecution to offer any explantion in regard to the grievaous and serious injuries of the accused may show that the evidence of the prosecution witnesess as to the incident is not true or at any rate not wholly true and the prosecution witnesses are not truthful and the version of the occurrence becomes doubtful and if the witnesses deny the injuries on the person of the accused then they are telling a lie on a most material point and thus the prosecution has suppressed the genesis and origin of the occurrence and the true picture has not been given out and this aspect assumes greater importance when evidence consists of interested or inimical witnesses or when the defence gives out a version completely improbable with the prosecution case. This standard is not so, in cases of superficial and simple injuries to the accused side where non-explanation of such injuries does not affect the prosecution version at all. In cross cases the witnesses are reluctant to say about the injuries which they have given to the otherside, on account of feal of their conviction on their own admission. Therefore the Court has to see the instrinsic worth of evidence supported by medical evidence and other reliable circumstances of the case. The prosecution has to satisfy the Court as to the

circumstances under which the occurrence originated. However, it is possible in some cases that after the accused has caused the murder of the deceased and in the scuffle by way of reprisal some accused got injuries and so first information report was lodged after delay and also the medical report obtained. At times the accused have self suffered injuries by way of self defence. The Court has to consider all the circumstances and the defence suggestions about their injuries. The obligation on the part of the prosecution to explain the injuries sustained by the accused in the same occurrence may not arise in each and every case. The prosecution has only to prove the guilt of the accused beyond reasonable doubt and how the accused sustained the injuries are not to be explained by the prosecution. Every failure of the prosecution to give a reasonable explanation of the injury on the accused in the same transaction cannot be taken as to creating doubt about the prosecution case and the entire evidence of the prosecution should not be discarded or be automatically rejected without any further probe. The Court is to consider the evidence and to find out if on account of the injuries to the accused, the right of self defence to the accused is made out and if so, to what extent and whether the accused had exceeded the right of self defence. But all this is to be seen when the accused have received grievous injuries in the course of the same transaction and not otherwise.

24. In the instant case the prosecution version is that

in 26.1.1977 at about 8 A.M. the kid of the prosecution party had grazed wheat crop of Mahatam Rai for which the accused Mahatam Rai had protested and Phulena Choudhary in turn apologised and assured for non-recurrence of such incident in future. But the accused party did not feel contained and went away threatening that they would come in the evening and so in the same evening they came back at about 4 P.M. shouting Jai Bajrang Bali at the Bathan of Phulena Rai father of the informant and the occurrence took place. The case of the prosecution about the place of occurrence being the Bathan of Phulena Rai is uniform throughout as is evident from the evidence of P.Ws. 1,2,4 and 9. Even P.W.14, the investigating officer Nasiruddin who has also investigated the cross case on the basis of Exts. A and B, has said that be inspected wheat field of Mahatam Rai and did not find any marks of grazing or mark of trampling and that he found the Bathan, as the place of occurrence from where he found blood and from where he seired boood sticined earth sticined seized the a nothing earth is made out from the evidence to show that the place of occurrence is other than the Bathan of Phulena Rai. The prosecution evidence about this occurrence at 4 P.M. is the Bathan of Phulena Rai and not the wheat field of the accused. On the contrary, the defence in the fard-beyan and first information report (Exts. A and B) has said that on 26.1.1977 at about 4. P.M. in the field which is towards west of Bathan of Phulena Yadav in village Bangara cow and seven buffaloes were grazing the wheat crop. seeing this he went there and started

driving the cattle to which Hari Charan protested and so there was altercation between them which attracted many people. Then *Phulena Yadav* asked his men to kill.. Upon this Hari charan gave a pharsa blow on the head of Mahatam Rai with intention to kill and as a result of that his head got cut and bleeding started. A lathi blow was also given on the right side of his Shoulder and then sheoji was assaulted by Mohan Rai on the right ankle and Srimatia Devi gave an assault on the shoulder and ankle and Radha Rai was assaulted by Phulena Yadav by a bhala on hiis chest which too started bleeding . Thus not only the place of occurrence is different but the transaction is also defferent . The prosecution paty alleges the place of occurrence as Bathan where the accused party and come in the evening after grazing matter was over in the morning where as the defence has put a posiitiive case that no occurrence took place. in the morning rather both grazing and assault were done in the evening at 4 P.M. in the field of Mahatam Rai alone and none else. Thus it is not made out that the asssault had been giiven to the accused in the same transaction .

25. Further in the cross-case the accused P.WS. 1,4,9 and 10 Mohan Yadav, Dwarika Yadav, Harichandra Yadaw and Phulena Choudhary, are the aeoused Ramchandra Choudhary the directed in that case is not an accused which was filed by Mahatam Rai (Ext B and C) and Similarly srimatia Devi, who is said to have given brickbat on the shoulder,

has not been made an accused. If the occurrence had taken place in the same transaction sometning ought to have been giiven out about Ramchandra Choudhary being to death. It goes to show that Ramchandra Choudhary for whose murder the prosecution has filed fard-beyan and first information report (Exts.4 and 3) was not killed in the same transaction in which fard-beyan is first information report exts B and C) are there. Thus when the transactions and occurrence are different one then the prosecution is not to explain even the grievous injuries of the accused, the prosecution is bound to explain the injury on the accused if the grevievous injuries have been coused in the same transaction. Therefore, the prosecution cannot be doubted of the ground of suppressing the genesis of the occurrence or not giving out correct version.

26.It is also to be seen that the medical examination of the accused had been done bv. P.W. 13 Dr. Shyam Balak Sinha on 26.1.1977 between 8.45 P.M. to 9 P.M. after the examination of P.Ws. 1,4, 10 and Srimatia Devi between- 7.5.P.M. to 7.15 . For the injuries suffered by the said P.ws. 1, 4,10 and Srimati Devi there is injury reports. (Exts. 7 serles) but the doctor has not prove any injury report but only given out about the injury in his statement. Further he has said that he has examined the injuries on the accused on the basis of the police report. The I.O. of this case is P.W.14 who has not said anything about the alleged police report A.S.I. Ramekbal Singh has not been examined nor any police personnel has come to say that the inury report had been prepared

by him for the examination of appellants Mahata Rai, Sheoji and Radha Rai, Further it also appears strange that the fard-beyan (Ext. B) had been given there at 10. P.M. on 26.1.1977 whereas the medical examiation of the three accused hed been done between 8.45 P.M. The injury reports have not been brought on record. The doctor has only given out about the injuries of the three appellants Radha Rai is said to have got six simple omkiroes. Sheoji Rai had three simple injuries. Out of three injuries to Mahatam Rai, only one was griveous caused by sharp cutting weapon and the two were simplle in nature. The doctor has not said that the condition of the accused side was so serious or grave that he examined the three accused even without police report. He is categorical in saying that he examined three appellants on the basis of police report. How the police report came into existence for medical examination of the accused between 8.45 to 9 P.M. when the fard- beyan itself is said to have been recorded in the same Hospital A.S.I Ram Iqbal Singh at 10 P.M. on 26.1.1977 . Neither A.S.I. Ramekbal Singh nor anyone was examined to show that on account of seriousness and emergency the medical examination was got done without fard-beyan by Mahatam Rai and also without any report by the police for examination of three appellants. So all this creates doubt about the version given by the defence. Though the evidence by the accused is not to be tested on the same strict and stingent standard as that

of the prosecution, yet the court is to appreciate the evidence and contentions of the accused side to have some reasonable basis for acceptance. On scrutiny the version and defence contention are not able to create even reasonable doubt for disbelieving the prosecution version.

27. The defence has filed not only the fard-beyan and first information report (Exts. A and B) but also the certified copy of the judgment for the case they have set up. As seen earlier the fard-beyan is said to have been given by Mahatam Rai to A.S.I Ramekbal Singh who has not been examined to prove that he had written this very fard-beyan. Even appellant Mahatam Rai in his statement unde section 313 Cr.P. C. has said only that he has been implicated in this case, to save from the cross-case and he has not said that he had lodged the fardbeyan and the report. As such the contents of Exts. A and B. cannot be relied on. No doubt Ext. D is the certified copy of the judgment on the basis of Exts. A and B but the present case has to be decided on the basis of the evidence in this case and not in the cross-case. Each case has to be decided on the evidence recorded in it and the evidence recorded in the other case cannot be the basis for judgment in this case nor can this court be influenced by that judgment. In the case of *Mithulal and another v. The State of Madhya Pradesh* [1] for the cross-case, the

1. (1975) A.I.R. (SC.) 149

Supreme Court said at page 151, para 4) :

" This was clearly impermissible to the High Court . It is difficult to comprehend as to how the High Court could decide the appeal before it by taking into account evidence recorded in another case, even though it might be what is loosely called a cross-case. It is elementary that each case must be decided on the evidence recorded in it and evidence recorded in another case cannot be taken into account in arriving at the decision. Even in civil cases this cannot be done unless the parties are agreed that the evidence in one case may be treated as evidence in the other. Much more so in criminal cases would this be impermissible. It is doubtful whether the evidence in the other, even with the consent of the accused. But here there was clearly no consent of the appellants to treat the evidence recorded in the cross-case against them. The High Court was, therefore, clearly in error in taking into consideration the evidence recorded in the cross-case against Ganpat and Rajdhar. The High Court ought to have decided the appeal before it only on the basis of the evidence recorded in the present case and ought not have allowed itself to be influenced by the evidence recorded in the cross-case against Ganpat and Rajdhar. It is regrettable that the High Court should have fallen into such an obvious error. The judgment of the High Court must, therefore, be set a side and we must proceed to consider whether, on the evidence recorded in the present case- without looking into the evidence recorded in the other cross case the conviction and sentence recorded against the appellants can be sustained. "

In the case of *Nathilal and others vs. State of U.P. another.* [1] it was observed in para 2:-

"... In deciding each of the cases, he can rely only on the evidence recorded in that particular case. The evidence recorded in the cross-case cannot be looked into. Nor can the judge be influenced by whatever is argued in the cross-case. Each case must be decided on the basis of the evidence which

1. (1990) S.C.C. (Cri) 638 = (1990) Supp. S.C.C. 145

has been placed on record in that particular case without being influenced in any manner by the evidence or arguments urged in the cross- case."

28. Learned counsel for the appellants has argued that the defence has been prejudiced because the investigating officer has said that his vision has become dim and he could not read the case diary and that he had given out his statement by memory. As to this contention the I.O. (P.W.14) himself has said that he is a retired person and that vision in his eyes has become dim and he was not able to read the case diary but the case diary was read over to him and so he had given the statement by memory. If the statement of P.W. 14 was contrary to the matter in the case diary it ought to have been pointed out to the court below which was the best of forum to look into the matter. Matters in the statement of the witnessess and the case diary should have been pointed out to the court and the court would have compared the same because if a witness for reasons beyond his control and also natural reasons is not able to see the writing which are before the court the court would have been in a better position to see the same on the pointing out by the parties and the matter could have been decided This argument is based on supposed prejudice and no demonstrable prejudice appears to have been made out, nor any prejudice was pointed out in the court below hen the witness was in dock and was able to give the answer. As such this contention has got no force.

29. After careful scrutiny and consideration in of the entire material on the record and also the contentions raised by the learned counsel for the parties at length, the conviction recorded by the court below on the basis thereof appears to be made out in accordance with law and fact. So the convictions of appellant of Thakur Rai u/ss 302 and 148 I.P.c. and sentences of the rigorous imprisonment for life and two years there under are up held and his Criminal Appeal No. 306 of 1989 is dismissed. In Cr. Appeal No.300 of 1989, the conviction of Mukhtar Rai u/ss 307 and 323 and 148 I.P.C. and sentence of six years R.I., two years R.I and six months R.I. under the respective courts are maintained. His appeal is dismissed. Since the appellants have been in jail and the matter is of the year 1977, so the conviction of apellant nos. 1, 8 to 7 of the Cr. Appeal No. 300/89, namely, Naresh Rai, Mahatam Rai, Sheoji Rai, Radha Rai, Sampat Rai and Ram Prakash u/s 148 I.P.C. and that of Sheoji Rai also u/s 324 I.P.C though upheld, but their sentences of 2 years R.I. u/s 148 and sentence of one year I. u/s 324 I.P.C. are reduced to the periods already under gone by them plus a fine of Rs 2000/=on each of them to be paid by each or them within a period of three months from today. In case the finde is deposited, then it will be paid to the wife of legal heirs of the deceased-Ramchandra, and other injured P. W.s. namely, Mohan Yadav. Dwarika Yadav, Haricharan Yadav and Phulena Yadav (P.ws. 1,4,9 and 10). It is further made clear that out of the fine so realised, half of the amount

will be paid to the wife or legal heirs of deceased Ramchandra and the other half amount will be paid to the aofresaid injured P.W.S. 1,4,9 and 10, namely, Mohan Yadav, Dwarika Yadav, Haricharan Yadav and Phulena Yadav. In case of default in payment of fine the appellant nos. 1,3 to 7 of Cr. Appeal No. 300/89 will undergo rigorous imprisonment for the period of sentence awarded to them by the court below. With this modification in the sentence the appeal (Cr. Appeal No. 300/89 is dismissed.

Lok Nath Prasad, J. I agree Order accorrdingly

M.K.C.

APELLATE CRIMINAL

Before Syed Haidar Shoukat Abidi & Lok Nath Prasad, JJ.

1993

March, 30

Samtul Dhobi & anr. *

v.

The State of Bihar.

Penal Code, 1860 (Central Act XLV of 1860, sctions 34, 302, 326/34, scope and applicability of --- evidence --- guidelines for appreciation of evidence --- motive for the offence, proof of -- whether necessary --- motive alleged may be flimsy, superficial or unreasonable whether can be proved by the procstion --- common intention of murder, when can be said to have been not proved --- extreme penalty of death, when and whether to be given.

Held, that, the evidence of a witness should be read as a whole and a sentence here or there isolated and detached form the context should not be picked up to make out a case of contradiction. The evidence as a whole and the totality of the case and circumstances should be the basis for appreciation of the evidence.

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* Death Ref. No. 3 of 1992, with Cr. Appeal No. 230 of 1992. Against the judement and order of Shri D.D. Jha 2nd Additional Sessions Judge Bettiah passed in Sessions Trial No. 311 of 1991 on 11.6.1992.

Minor deficiencies on trivial matters are bound to be in the evidence of natural and truthful witness but if the deficiencies and discrepancies are going to the root of the matter, then they may have adverse effect upon the evidence, otherwise if the general tenor of the evidence shows that there is truth in the version and other circumstances of the case and material on the record support and corroborate the version given by the witness, then such evidence should be relied on.

Held, further, that the motive imputed to the accused for the offence is of secondary importance when the evidence of the witnesses is direct and gives out a case against the accused. Motive is always for the accused and in case motive is not proved, it will not have any effect. In the instant case, it cannot be said that the motive was not there. The motive may be flimsy, superficious or unreasonable but the appellants/accused were under the misconception that the deceased was responsible for the death of Salim, brother of the accused, and so motive has been well proved by the prosecution.

Held, futher that where the accused did not use the arm he was carrying nor uttered any word or make any gesture for killing the victim, although he accompanied his brother, also an accused, to the place of occurrence in the night hours and there only his brother did all the acts.the killing was, therefore, the individiual act of his

brother accused. Though there is no direct evidence of sharing the common intention of killing, yet he can be said in these circumstances to be sharing the common intention to cause at least grievous hurt by garasi which was used in killing and injuring the two women and thus his conviction under section 302/34 I.P.C. is not made out but he is guilty for the offence under sectin 326/34 I.P.C.

Held, also, that death is not a normal penalty for murder but when the murder is gruesome, ghastly, revolting to human conscience causing social imbalance or danger to the society at large or even danger to the security of the State or the situation of the-like then for these special reasons, death sentence is the only appropriate and legal sentence. Before awarding a death sentence, circumstances of the case are to be looked into and special reasons should be found out whether to award the extreme penalty of death or not. Categorisation of the special reasons is neither easy nor appropriate and so it is for the judge to consider the circumstances of each case and find out whether special reason exists for the extreme penalty of death or not. In the instant case, the offence of murder was committed without any pre-planning or any previous enemity under the influence of extreme mental and emotional disturbance and also superstitions belief that he was morally justified to do so. These are the special reasons for not awarding the extreme penalty Rather they appear to be mitigating

circumstances in favour of the accused for having a sentence of life imprisonment and not death sentence.

Case laws discussed.

Death reference and Appeal by the accused.

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

Mr. Kanhaiya Pd. Singh, Sr. Advocate,

Mr. Shyam Narain Sinha.

Mr. Ganesh Prasad Singh,

Mr. Ashutosh Kumar, Advocates. for the appellants.

Mr. K.P. Gupta. A. P. P. of the State

S.H.S. Abidi, Appellant, Samtul Dhobi has been convicted under section 302 of the Indian Penal Code (for short the IPC) and has been awarded sentence of death while appellant, Sukhal Dhobi has also been convicted under section 302 IPC and sentenced to under rigorous imprisonment for life. Both the appellants have also been convicted under sections 307 and 307/34 IPC but no sentence has been awarded. Hence, this. Death reference 3 of 1992 and criminal appeal No. 230 of 1992 by both the appellants.

2. A First Information Report (Ext.4) was lodged by the informationRamzanMian on 3.5.1991 at 7.30 A.M. at Majhaulia Police Station in which it has been said by the informat (P.W.9) that in the night of 2.5.1991 at about 8

P.M, while his daughter (Ambud Nisa, P.W.11) aged about 14 years, was sleeping with his wife. Sakina Khatoon aged about 45 years on the floor by spreading a mat infront of the door of his house and while his daugther-in-law (Saimul Nisa, P.W.8) wife of Manzoor Alam was feeding milk to her child in-side the house, appellant, Samtul Dhobi armed with Garasi and appellant Sukhal Dhobi armed with Goji, both residents of village chanian Bandh, came to his darwaza where his wife Skina Khatoon and daughter Abud Nisa were sleeping on the mat and having seen Sakina Khatoon sleeping, Samtul Dhobi assaulted her on her neck and temple region with Garasi with the result that blood started oozing out profusely and neck and temple were chopped off. His wife began flottering and thereafter, she died instantaneously On seeing this when his daughter Ambud Nisa cried, appellant Sukhal Dhobi assaulted her also with the bent of Garasi on her neck with the result that her neck got swollen. When his daughter-in-law, Saimul Nisa came out of the house and saw Samtul Dhobi chopping the neck of his wife with garasi, she began to cry. After the call of nature, he rushed to his darwaza on the hulla and saw that Samtul Dhobi armed with blood stained garsi and Sukhal Dhobi with Goji, were fleeing away from his darwaza and when he wanted to catch them. then Samtul pushed him with the result he fell down and began to cry. Then at that very time, Tulsi Mahto, P.W. 1, Pramulla (P.w2.) Sattar Mian, P.W. 6 and many others came to the

place of occurrance who saw both the accused running away after killing his wife. The reason for the murder was that there was quarrel with regard to an orchard. The dead body of his wife, Sakina Khatoon was lying at his darwaza.

3. After registeration of the first information report, the investigation of the case was taken up by the officer-in-charge of Majhaulia Police Station, S.I. Uma Nath Sahay who reached the spot at 8.30 A.M. The place of occurrence of this case is the east facing land of the informant, Ramzan Mian and the Sehan I and which is about 30 feet long east-west and about 20 feet north-south. He found the dead body to the east of the darwaza of the house at a distance of $1\frac{1}{2}$ years upon a mat. Her neck and cheek were chopped. He prepared the inquest report and sent the dead body for post mortem examination to M.J.K. Hospital, Bettiah where he recorded the statement of the informant and other witneses, namely, Amfud Nisa, Saimul Nisa and others . He found four injuries on the person of Amfud Nisa for which injury report (Ext.7) was prepared and she was sent to the State Dispensary, Majhaulia for medical examination. He has also prepared seizure list of the blood stained mat and earth. He had also recorded the statement of Tulsi Mahto, Pramulla P.Ws. 1 and 2. After completing investigation, he submitted charge sheet against the appellants.

4. The accused, in defence, denied the prosecution case and alleged that they have been falsely implicted in this case. Four witnesses in defence have been exmine.d Rahman Mian, Lakshmi Mahto, Ratan Mahto and Raghunath Mathto have been examined.D.W.1 Rahman Mian has said that he reached after the occurrence and nobody gave the names of the accused persons. D.W. 2 has said that when he rached te spot, Ramzan Mian or his dauther in law were not there and nobody gave out the names of the accused persons. D.W. 3 has said that when he reached there, wife of Ramzan was lying dead and so, his dauther was also lying unconscious. Ramzan and his daughter-in-law were in side the house and nobody at the spot said that the accused persons committed the offence. Ramzan came after two hours. D.W. 4 has also said that he reached the spot on hearing hulla and found the wife of the informant lying dead and daughter -lying injured and unconscious

5. The prosecution, in support of its case, has examined 12 witnesses Tulsi Mahto and Parmulla Mian (P.ws 1 and 2) have turned hostile. P.W. Dr. Gajendra Narain Yadav of M.J.. Hospital, Bettiah has conducted the post mortem examination on 3.5.1991 at 5.15 P.M. and submitted his report, Ext.1) P.W. 4 and 5, Harendra Prasad and Shankar Sahi have deposed about their putting L.T.L, in the inquest report Ext. 2. P.W. 6 Sattar Mian is said to have come on the spot after hearing the alram. P.w. 7 Dr. Victor Sowator the Medical Officer, State

Dispensary, Majhaulia has examined Ambud Nisa on 3.5.1991 at 3.20 P.M. and given injury report, Ext. 3. P.W. 8, Saimul Nisa, wife of Manzoor and daughter- in-law of the informant has deposed about the occurence. P.W. 9 is ramzan Mian the informant himself. P.w. 10 Tilak Singh, a tayeed, has proved the signature of the S.I. Uma Nath Sahay, (P.W.12) on the first information report. P.W. 11 Ambud Nisa, dauther of the informant, is an eye witness and also injured P.W. 12 Om nath Sahay has investigated the case and submitted the charge sheet against the appellants.

6. The learned trial court, after considering the entire material on the record, has convicted and sentenced the appellants as said above.

7. The learned counsel for the appellants has urged that about the place of occurrence, there is variation in the statement of P.W. 8 and the Investigating Officer (P.W.12). It was also contended that the deceased and his daughter were sleeping in a deep slumber and so, Ambud Nisa, though the injured witness, could not see the occurrence. Similarly, Saimul Nisa who was feeding the child out side, also could not see the occurrence. It was further said that the informant could not be on the spot as he a had gone to case. There is delay of 12 hours in lodging the first information report though the police station was at a distance of 6 kms. from the place of occurrence. The prosecution has also withheld the

witnesses examined by the Investigating officer. Even the evidence of prosecution witnessses is at variance about the occurrence. In the last, it was submitted that the sentence given to appellant no. 1, Samtul Dhobi was not a rare case for giving death sentence, and the appellant no.2, Sukhal Dhobi could not be convicted under section 302 IPC as he is not said to have given any injury to the decessed or her daughter. To appreciate these contentions of the learned counsel for the appellants the evidence will have to be serutinised with care and caution.

8. Ramzan Mian, P.w. 9, husband of the deceased, Sakina Khatoon, father of Ambud Nisa, P.W. 7 and father in-law of Saimul Nisa (P.w.8) is the informant. He has said that his wife has been killed on Thursday at about 7 O'clock at that time, he had gone to attend the call of nature. He heard alarm whereupon he rushed running. While he was coming, he saw Samtul Dhobi armed with garasi and Sukhal Dhobi with lathi running away. He made an attempt to apprehend them but Samtul pushed him and so, he fell down and both the accused ran away towards south. He came to his darwaza where his daughter and daughter-in-law (P.ws 7 and 8) said that both Samtul and Sukhal have chopped of his wife Sakina Khatoon's neck, whom he saw lying with injuries on her right side of the head and blood was oozing and the mat had got wet. She was restless till his arrival but died as soon as he reached there. His daughter Ambud was

sleeping by the side of his wife and she said that after hitting her, accused Samtul gave his daughter garasi blow causing injury to her. Salim Dhobi, brother of Sukhal and Samtul had died on Wednesday, a day earlier than the occurrence on account of snake bite and the accused are said to be under the impression that it was on account of witch craft of Sakina Khatoon that Salim had died. He (witness) had a dispute with the appellant for a Sheesham tree. He went to the police station with the choukidar in the morning on Friday where his statement was recorded upon which he put his L.T.I. The police sent his daughter Ambud Nisa to Majhaulia Hospital for treatment as he had gone to the police station with his daughter. The police sent the dead body of Sakina Khatoon for post mortem examination to Bettiah on Friday. In cross examination, he has said that Chokar is his brother whose house is near his house and Chirkut Dhobi's house was contiguous south of his house and he has also family members but Chokar and Chirkut did not come after the occurrence. One Chandrika's child had died by snake-bite but he had not made any allegation against his wife. But allegation against his wife, being a witch was made a year earlier to the occurrence by the Dhobies but his wife Sakina was never gheraoed or tortured. On the night of the occurrence, the Barat had come to the place of Salim, the pattidar of Sattar (P.w.6). The house of the accused are near by. He had gone to the place of Salim to see the Barat which had not come

though it came one hour after the occurrence. Many people had come near the house of Salim. He remembered the names of only Tulsi and Parmullah Mian among the persons who had come there and did not remember names of other as he was weepig. He had gone to the field to the east of his house at a distance of about one katha. He had heard alarm raised by his daugther-inlaw asking the people to come as accused Samtul and Sukhala were fleeing away after chopping his wife and so, he ran after answering the call of nature in a perflexed condition. the accused were found running away at the place beyond his Sehan when he saw them at a distance of about 8-10 steps east. They jumped into the field of one Sheo Kumar Sahi which is about 1-1$\frac{1}{4}$ cubits from his sehan. He (witness) did not jump in to that field as Chokar had sown brinjal in it. The field had developed marks, as a result of fall and none else except the witness had chased. The blood had fallen up to his Sehan for 5-6 steps. But the marks had disappeared on account of the people who had come in the night. He had found three injuries on the person of his wife, i.e. on the porftion above the ear and adjoining portion of her head and there was only one injury on the neck of his daughter which appeared to have been caused by garasa. His daughter was sensless when he reached there and she regained consciousness at about 2 in the night. He had gone to the police station before the sun- rise and his

statement was not taken and after the statemnet was taken, the police reached the spot at about 10 AM. The choukidar, who had come after the occurrence and to whom, he said about the occurrence was not examined. No panchayati was held in respect of the occurrence. It was not a fact that the shesham tree belongs to the accused.

9. P.W. 8, Saimul Nisa, wife of Manzoor, daughter in-law of the informant, has said that her mother-in-law had been killed about a year ago on Thursday at about 8 P.M. while she with her Nanad Ambud Nisa, was sleeping on a mat at the darwaza of sehan and she was feeding milk to her child by sitting at a distance of 2 cubits. Samtul and Sukhal came at the place where her mother-in-law was sleeping. Accused Samtul with farasa and Sukhal with lathi case and Samtul assaulted her mother-in-law with the garasi on the held and joint of the neck towards right side and when her Nanad Ambud Nisa cried out, Samtul assaulted her also with garasi on her face towards left side. On being injured, her mother-in-law died in the state of restlessess and she began to raise alarm where upon, her father in law Ramzan Mian came and so, also other witnesses. Salim Mian was the brother of Sukal Mian who was beaten by snake a day before the occurrence and so, Sukhal who are brothers-interse, used to say that her mother-in-law was a witch and she had got him beaten by snake and thus, she has been killed. In cross-examination, she has said that the son and daughter of Chandrika, the cousin

of the village choukidar were dead by snake bite. The daughter's son of Chokar had not died of snake bite. The people of entire village used to call her mother in-law as a witch. Chandrika never tortured her mother-in-law nor she knew if anybody had tortured her as she was not there. There is only one room in the house with one Osara Verandah) which is on the east with a machan-made of bamboo etc, and the house is surrounded by Tati from all side. The occurrence had taken place after 7-8 P.M. when she was feeding her child by sitting on the floor of osara and her mother-in-law and sister in law were sleeping in front of her only at a distance of 2 cubits. It was a dark night. She remained at the place of occurrence and did not go away when the accused were running and she came to the Sehan through osara leaving hir childs there. There was no out-sider till the accused were there. People came running on her alarm but by then, the accused had ran away through the brinjal field of Chokar. She continued to raise alarm. When the accused fled away, her father-in-law, Sattar, Tulsi Mahto and Parmullah PWs. 9,6,1 and 2) came besides others including Lakhsman Mahto, (D.w2). Faudar, Raghunath (D.W.4) and Rahaman Mian, D.W.1 who enquired from her and she said to her father-in-law about the entire occurrence. She began to weep and cry. Samtulgave garasi blow when she was standing east west of her mother-in-law who was not aware. The three places of injuries given by him were on the neck, her

head and portion of above the year.Clothes were cut, her sister-in-law got up and she cried and so she was assaulted. One injury was given by garasi's blade and other was by handle portion causing one span long injury to her. The handle portion of the garasi hit her back and the injury was a swalnen one. She was at the osara and not in the room of gate. It was not a fact that she had said to the police that she came out of her door and saw her mother-in-law withering with pain and with profuse pain died instantenuously.

10. A P.W. 11, Ambud Nisa, daughter of the informant and also the injured eye witness has said that it was a Thursday night, and light had been burning in the house and was so much light there that one could see each other. She was sleeping on a mat near her mother Sakina Khatoon. Her father had gone out for easing when both the accused Samtul and Sukhal reached the place where she and her mother were sleeping and she and her mother were awaken. Samtul was armed with garasi and Sukhal was with lathi. Samtul assaulted at the portion of temple region of her mother with garasi. She threw away the chadar from which she had wraped her self and raised alrm that Sukhal and Samtul were assaulting her mothe wherepon Samtul hit her (witness) with garasi on the left portion of her ear. Her mother died instantaneously as a result of assault, The motive for the murder was that Samtul's brother, Salim had died of Snake bite and appellants were saying that on account of witch craft,

she got him bitteny the snake. In cross-examination , she has said that her house is towars west in the big village with many affluent persons and she saw non else except her father and brother's wife reaching on hulla. She had becoe unconscious a few moments after assault and regained consciousness at 12 in the same night and found her brother's wife in the house and she had no talk with anybody. Her east facing house had got a room and Virandah towards east and there is a cattle shed (2-3 cuit 3 cubxit) to the east of the Osara. The rest of the cattle shed is the duar (sehan). She and her mother were sleeping between the house and cattle shed. Towards west of her house, are many houses of the persons whose names she could not give. She admitted that Chokar is her uncle. She has said that her mother had not wraped heself with chadar but had spread only her sari and the neck was open. Her father had gone outside the house moments prior to the arrival of the accused and had gone to such a distance from where he was visible. He returned running and was alone. While he was coming the accused were returning. Her father met the accused at the place towards east of the cattle shed. None had come from the village at that time She had become unconscious when her father reached and she said nothing to him. She was assaulted when she saw had thrown the chadar and then she her mother wriggling. She was assaulted twice with the iron portion and wooden portion of the garasi. The police had taken

her statement and it is not correct that she had said to the police that she was assaulted by Samtul Dhobi with the wooden portion of the garasi.

10 B. Besides these three witnesss, are the other witnesses who are said to have reached the out of whom P.W. 1 and P.w.2 Tulsi Mahto and Parmullah Mian have been delcared hostile. P.,w. 1 has said that he does not know anything about the occurrence and that the police had not recorded his statement. In cross examinations by the Public Prosecutor, he has said that he had not stated before the police that Samtul was armed with garasi and Sukhal was armed with lathi when they were running away from the place of the occurrence and also that he saw Sakina Khatoon in injured condition and that the blood was coming down from her cheek and neck. In cross-examinatin by the defence, he said that the house of Samtul is at a distance of 5/6 bighas from the house of Ramzan and the house of Sukhal is at a distance of 6/7 bighas. P.W. 2 has also said that he does not know anything about the occurrence. He, in cross-examination, has said that the police had not recorded his statement and it is not correct that he had stated before the police that he went to the place of occurrence on hulla and saw Samtul Dhobi armed with garasi and Sukhal Dhobi with lathi and that Sakina Khatoon was lying dead on a mat. It is also not correct that he is concealing the truth in collusion with the accursed persons. In cross-examination by the defence,

he has said that the house of Ramzan is at a distance of about one katha from his house.

11. P.W. 6, Sattar Mian has said that on a Thursday about 7.30 to 7.45 PM, he was at his darwaza where he heard hulla being raised by Ramzan and so, he went to his darwaza and that somebody had cut the neck of Ramzan's wife Sakina Khatoon and Ramzan said that it was Samtul Dhobi who has killed his wifewhiteshe was sleeping and that Sukhal Dhobi was also with him and he (witness) saw injuries on the person of Ambud Nisa, daughter of Ramzan. In cros-examination, he has said that the marriage of his niece was to be performed on the day of the occurrence. Barat had not come at that time, but the guests had come. Ramzan Mian prepares meat on the occasions of marriage and festivals in his caste and on the day of the occurrence, he had prepared meat at his place for the Barat but returned before the occurrence as he had to answer the call of nature and also gather the cattle in the cattle shed. He has also said that mosque is adjacent to his house and he had offered Namaz (prayer) of Isha in the night much after the occurrence and and Ramzan had not offered his namaz of Isha on that day. The house of Ramazan is at a distance of about 2-3 Bighas south from his house. People of the village go to the Pokhra for answering the call of nature etc. The guest had not gone to the place of occurrence on hulla. Chokar, Rahman, Tulsi Mahto, Karmullah Mian and others had gone there. He had

reached the house of Ramzan after Chokar and Rahman had reached. Ramzan's daughter and daughter-in-law were sitting near the dead body and he had no talk with them. He returned from the darwaja of Ramzan after staying there for about 20 minutes and he did not meet Ramzan after the occurrence but on the next day, when he was asked to burry the dead body. He denied the suggestion that he is a man of Ramzan . He is Ansari by caste and Ramzan is a Dhobi.

12. P.w. 7, Dr. Victor Sowator, Medical Officer, State Dispensary of Majhaulia Hospital has said that on 3.5.1991 at about 3.20 P.M. he examined P.W. 11 Ambud Nisa who had long abrasion $6'' \times 1\frac{1''}{8}$ including a sharp out injury nearby in the middle below and anterior to the ear 10 bate $1'' \times 1\frac{1''}{5}$. They wound injury extended from the middle of the cheek to lateral side of the neck on the left side,and associated with this injury as a tender swelling 1" in diameter below and behind the ear lobule on the same side. The injury was simple and caused by hard and sharp cutting instrument like garasi or sword within 24 hours from the examination. His report is Ext. 3. In cross-examination, he has said that he had examined the injured at the report of the police. The abrasion was caused in the present case by sharp edge on account of the superficial touch of weapon with the body. The middle posterior of the weapon had gone deep and had caused the cut injury. He did not find any blood

clots on the injury.

13. P.W. 3, Dr Gajendra Narain Yadav. Civil Assistant Surgeon, M.J.K. Hospital, Bettiah is said to have conducted the post mortem examination on 3.5.1991 at 5.15 P.M. and submitted his report (Ext.1). He had found the following antemortem injuries :

(i) One incised wound the right side of the head $4\frac{1}{2}''$ × Cranial cavity deep.

(ii) One incised wound on the back of right ear crossing injury no. (i) of the dimention $1\frac{3}{4}'' \times \frac{1}{2}''$ .. Cranial cavity deep.

(iii) One incised wound $4\frac{1}{2}'' \times 1'' \times$ vertebran column deep on the right side of the head.

On dissection of injuries nos (i) and (ii) parietal and temporal bones were found cut and brain matter was also found out. On discection of injury no. (iii). mandibul was found cut at its right angle and the 3rd cervical vertibra was also found partially cut. In his opinion, the death was due to the above mentioned injuries causing heamorrhage and shock and was caused by some heavy sharp cutting weapon such as Garasi used for foddar cutting. The injureis individually were sufficient in the ordinary course of nature to cause death and the time elapased since death and holding of post mortem examination was 36 hours. The postmortem repert is Ext.1.

In cross examination. he has said that he did not himself dissect the dead body but one of his assistant had assisted him and in which, head, neck, chest and abdomen were the parts of the dead body which were dissected as the dead body was not in a high condition of decomposition. The injuries were possible by any heavy sharp cutting weapon. He did not think that a broken piece of glass will cause the injuries similar to those described by him on fall because bones were also found out and in fall from a height, the same sharp cutting weapon injuries may be caused but in the present case there were multiple incised wound which do not suggest such eventuality.

14. P.W. Umanath Sahay, the Investigating officer of this case, has said that Ramzan Mian, accompanied by Chirkut Haza, the Mahal choukidar, came to the police station, Majhaulia where Brajnandan Singh, had recorded the statement and first information report was registered. After that, he reached the village Chanyan Bandh at about 8.30 0' Clock and inspected the place of occurrence being the east facing land of the informant Ramzan Mian and the sehan land which is about 30 feet long east-west and about 20 feet north - south, opposite ot the tiled house. To the east of the darwaza of the house, he found at a distance of 1 $\frac{1}{2}$ Yards a mat spread on the Sehan-land and on which he found a dead body the portion of which from head to neck stained with blood

and also. neck and cheek chopped off. the blood had fallen on the mat and on the ground close by. Near the dead body. Ambud Nisa and Saimul Nisa were beating their breast and were weeping. He also said that to the north of the place of occurrence, is the house of Md. Habibia. Sheonath Mahto and Bhubneshwar Mahto and to the south is the north facing house of Chirkut Mian and contiguoue south ot the house of Ramzan Mian is the house of Chokar Mian and in the east, is the field belonging to Sheo Kumar Sahi and female apartment of the informant Ramzan Mian in; the west and to the West there of is the house of Lochann Mahto. He prepared the inquest report and in presence of Shankar Shahi and Surendra Prasad. Thereafter he sent the dead body for post mortem examination to M.J.K. Hospital Bettiah. He also prepared the seizure list of mat and blood stained earth before the witnesses Arun Kumar Shahi and Shahid Mian. He recorded the statements of the informant, Ambud Nisa, and Saimul Nisa and also of the other witnesses. He also found injuries on the person of Ambud Nisa for which he prepared injury report and senther for medical examination to the State Dispenasary Majhaulia.

He had also recorded the statement of Tulsi Mahto and Parmullah who had said that they had seen the accused with garasi and lathi running away and the victim lying dead and blood fallen from her cheek and neck. In cross-exanination, he has said that he had not prepared

the map. He had recorded the statement of Ambud Nisa, Saimul Nisa and also the other villagers, namely, Bachan Mahto. Bothan Mahto, Gulli Hazra, Bishwanath Mahto. He did not give their names as witnesses in the charge sheet. Though, he had also seized the blood but the same was not sent any where for examination. He did not seized any-thing except the mat from the spot. He had recorded the statement of Saimul who had said that she, having heard the sound, came out through the door of the room and saw that her mother-in-law Sakina Khatoon was in a pool of blood and was lying dead instantaneously. He did not recorded the statement of the choukidar, Chirkut Hazra. After completing investigation, he submitted the charge sheet.

15. The defence has also examined four witnesses, namely, D.W.1 Rahman Mian, D.W.2, Lakhsmi Mahto, D.W.3 Ratan Mahto and D.W.4 Raghunath Mahto. D.W.1 Rahman Mian has said that at about 8 P.M. on the Thursday night, after taking meal, he was going to ask for the light, when he heard growing sound at the darwaja of Ramzan, so he went and did not find any-one. Ramzan and his son were not there. He found the wife of the informant Ramzan Mian killed and injuries on the person of the informant's daughter who was unconscious. He, after giving her water when she regained consticousness and on being asked she told that she had not seen anybody cutting the neck. Ramzan's daughter-in-law had said that she was cooking food

inside. He cried out and asked to come out with a dibia where she came with a dibia. Ramzan and Sattar reached thereafter about 2 hours. Ramzan Mian Laxmi Mahto, Ratan Mahto, Bechan Mahto and many other persons had assembled there and nobody had given out the names of the accused persons. In cross- examination, he has said that he did not hear any hulla and he was the person who raised hulla that Sakina was chopped of. His statement had been taken for the first time and he has come to depose in the court after consulting to get Samtul released and to extending help to him. D.W. 2 Lakshmi Mahto has said that his house is beyond two house west of the house of Ramzan and at about 8 P.M. in the evening of the occurrence, on the alarm of Ramzan, he went to the darwaja of Ramzan and saw Ramjan's wife Sakina killed and daughter injured and in unconscious. Ramzan and his daughter-in-law were not there. The daugther-in-law was in the Angan and no body was naming the accused persons Ramzan reached there lateron and many people of the village assembled. In cross-examination, he has said that he had not received any summon from the court and had been brought by the wife of Samtul. He has said that 30-40 persons had assembled there when he reached there. Ramzan's wife was on a mat at the darwaza of Ramzan. The darwaza and Angan (court yard) are contiguous to each other. It was known on the second day that Samtul and Sukhal were accused in the case. It was not a fact

that he came to give evidence as a token of help to the accused. D.W.3 has said that his house is contignous west to the house of Ramzan. He has further said that on the day of the occurrence, he was at his darwaza and after hearing the hulla raised by Ramzan, he went there and saw Sakina Khatoon lying dead and his daughter lying unconscious. Ramzan's dauther-in-law was in side the house but Ramzan was not there. Nobody said at that place that accused had killed Sakina and Ramzan came there after two hours. In cross-examination, he has said that Sukhal Dhobi's wife had brought him for giving evidence and he had come without summons of the court. He himself used to ask her to inform him to give evidence wherever required. He had said the S.I. of Police also the same thing which he said but to the S.I. of Police chided him. He came to know about the complicity of the accused, Samtul and Sukhal in the case after 3-4 days of the occurrence. When the Police rad come the next morning, he had said so. D.W.4 Raghunath Mahto, living at a distance of 5 kathas south from the house of Ramzan, has said that on the Thrusday night at 8 P.M. when he was taking meal, Rahman had raised hulla. When he went to the place he saw Ramzan's wife were lying killed and daughter unconscious and Ramzan's wife was cooking food but Ramzan was not there. Nobody named the accused persons as the offenders. In cross-examination, he has said that he has come to court without notice of the court to help Samtul.

He did not know as to in how many cases, he had helped Samtul. He had come at his own expense to help him. There were houses(30-40) persons in between his house and the house of Ramzan Mian. There were 30-40 persons at the darwaza of Ramzan Mian. He reached there but he could not give out their names. The name of Samtul and Sukhal figured as offender in the case the next morning. Ramzan's daughter-in-law was cooking food in side the house and the dead body of the wife of Ramzan was lying on a mat which was outside the darwaza and she was in pool of blood. The daughter of Ramzan had got injuries on her cheek and neck. Ramzan's daughter-in-law was in the court-yard at a distance of 4-5 cubic feet from the mat on which the dead body was lying. The chachra (gate) made of bamboo in the house of Ramzan was open. It was not correct that he had given a wrong statement to help the accused.

16. This is the entire evidence which has to be shifted, scrutinised and considered carefully specially in this case where death sentence has be given. The evidence consists of Ambud Nisa, an injured eye witness and also Samimul Nisa, the daughter-in- law, who was present on the spot and then Ramzan Mian, who saw the assailants running away and on reaching his house, It was given out to him by his dauther-in-law about the occurrence and the complicity of the accused persons. Immediate disclosure is to Sattar Mian, P.W. 6. Two witnesses, Tulsi Mahto and Parmullah have been turned

hostile. Ambud Nisa is the injured witness. In the case of *Ramaswami Ayyenger and others V. State of Tamil Nadu,* [1] it has been observed at page 2030 (para 7) : "Since he was injured in the same occurrence undoubtedly his ocular version of the incident is of great value to the prosecution." In the case of *State of U.P. V. Moti Ram,* [2] their lordships observed at page 1717 (para 32) : " The very fact that those two witnesses had sustained certain gun shot wound probablises the presence of these two witnesses at or about the time of occurrence at the scene. Threfore their evidence might command acceptance, provided the evidence inspirs confidence in the minds of the court and the said evidence is free from any infirmity." In the case of *Malkiat Singh and others V. State of Punjab, Judgment Today (JT)* (1991) 2 SC 190 = 1992 Eastern India Criminal Cases 90 at page 105 (para 7). It has been said by the said Supreme Court : " Nothing worthwhile was brought out in the cross-examination to disbelive his testimony. He had no axe to grind against any of the accused. No motive to make false implication of the accused was even suggested. He cannot be expected to allow his own assailants to go unpunished and would implicate innocent persons. Moreover the medical evidence of P.W. 2 fully corroborated the evidence of P.w. 4. " In the light of these observations, while appreciating the evidence of Ambud

1. (1976) A.I.R.
2. (1990 A.I.R. (SC.) 1709

Nisa, we find that she is an injured which is made not only by the oral evidence on the record but also by the medical evidence. She is the daugther and most natural witness and her presence on the spot has been proved. She has said that with her mother, she was also given injuries. She with her mother was sleeping on the mat but they were awake. Then the appellants came armed with garasi and lathi. Samtul assaulted her mother with garasi and when she threw off her chadar and raised alarm, then Samtul assaulted her also with garasi at the left portion near her ear. She has also said that she saw none but only her brothers's wife and also her father who reached there on hearing hulla and then she became unconscious after a few moments of assault to her. She has also said that the accused persons were returning at the time when her father was coming and her father met them at the east of the cattle shed, she became unconscious when her father came near her and she could not say anything to him. When she regained conscious at about 12^0 " Clock, she found her sister-in-law at the residence. Her statement about complicity of the accused, Samtul as the person assaulting her and her mother also is well made out.

17. The next eye witness is Saimul Nisa, P.W. 8. She claims to be feeding her child by sitting where her mother-in-law and Nanad Ambud were also sleeping on a mat on the darwaza of sel an. She was sitting only at a distance of two cubit from the mat. She has categori-

ally said about the assault given by Samtul with garahi and also made about Sukhal being aremed with lathi. she speaks about the assanlt to her mother-in-law but to sister-in-law also on the left side. On alarm, immediately her father-in-law came and so also the witnesses. She has said that she was feeding her child by sitting on the osara and infront of her, her mother-in-law and sister-in-law were lying down on the mat. She speaks about P.ws 1,2 and 4 and one Fouzdar to whom she had given out about the entire ocurrence. Her presence on the spot has been made out by the evidence of all the defence witnesses including the defence witnesses though the defence witnesses say that she was cooking food. If she as cooking food, then there was no question of Ambud Nisa and her mother lying for sleeping. That is why Ambud Nisa has said that she was feeding her child in the osara. She has given out the details about the occurrence, assault and the injuries caused to the victims at the earliest by way of immediate disclosure to her father-in-law and other witnesses. It was observed by the Supreme Court in the case of *Zahoor and others Vs. State of U.P.* [1] "Unless the witnesses were present and witne ssed the occurrence they could have not imagined and mentioned the same in the earliest report." If this witness had not been present on the spot and had not seen the occurrence, she could have not given out about the injuries which are in line with the post mortem report and there is nothing to show that her version came out after looking to the post mortem report and the injury

report The learned counsel for the appellants in support of his contention that she had not seen the occurrence, has referred to various paragraph of her statement namely. para no. 1 wherein she has said that her mother-in-law was sleeping on a mat at the darwaza of the sehan. in para 8 she has said that she was sitting in the osara. in para 13 she has said that she was sitting in the osara and not in the room containing door. and that it was not a fact that she had said to the police that having heard the hulla she came out of the room containing the door and saw that her mother-in-law was withering with profouse bleeding and died immediately but the Investigating Officer (P.W. 12) has said that she had so. As to contention, when this witness, Saimul Nisa has clearly said that she was sitting and feeding her child at a distance of 2 cubic feet from the mat on which the victims were assaulted and the Investigating Officer has said that the mat was spread at the sehan being only $1\frac{1}{2}$ yards there cannot be any doubt that she was not able to see the occurrence. The evidence of a witness should be read as a whole and a sentence here or there isolated and detached from the context should not be picked up to make out a case of contradiction. The evidence as a whole and the totalily of the case and circumstances should be the basis for apreciation of the evidence. Minor deficiencies on trivial matters are bound to be in the evidence of natural and truth full witnesses but if the deficiencies and discrepancies are going to the

root of the matter, then they may have adverse effect upon the evidence, otherwise if the general tenor of the evidfence shows that there is truth in the version and other circumstances of the case and material on the record support and corroborate the version given by the witness, then such evidence should be relied on. The Supreme Court has been laying down guidelines for the appreciation of evidence. In the case of *Indar Singh and another Vs. State (Delhi Administration* [1] it has been observed by the Supreme Court at page 1092 (p.2) as follows :

" Credibility of testimony, oral circumstantial, depends considerably on a judicial evaluation of the totality, not isolated scrutiny. While it is necessary that proof beyond reasonable doubt should be adduced in all criminal cases, it is not necessary that it should be perfect. If a case is proved too perfectly, it is argued that it is artificial. If a case has some flaws, inevitable because human beings are prone to erxr, it is argued that it is too imperfect. One wonders whether in the meticulous hypersensitivity to eliminate a rare innocent from being punished, may guilty men must be callously allowed to escape. Proof beyond reasonable doubt is a guideline not a fetich and guilty man cannot get away with it because truth suffers some infirmity when projected through human processes. Judicial quest for perfect proof often accounts for police presenta-

1. (1978) A.I.R. (SC.) 1091

ion of fool-proof concoction Why fake up? Because the court asks for manufacture to make truth look true ? No, we must be realistic."

Further, in the case of *State of U.P. Vs. N.K. Anthony* [1] at page 54 (p.10) the Supreme Court has been pleased to observe as follows :

"While appreciating the evidence of a witness, the approach must be whether the evidence of the witness read as a whole appears to have a ring of truth. Once that impression is formed, it is undoubtely necessary for the Court to scrutinise the evidence more particularly keeping in view the deficiencies, draw-backs and infirmities pointed out in the evidence as a whole and evaluate them to find out whether it is against the general tenor of the evidence given by the witness and whether the earlier evaluation of Minor discrepancies on trivial matters not touching the core of the case. hyper-technical approach by taking sentences torn out of context here or there from the evidence attaching emportance to some technical error committed by the investigating officer not going to the root of the matter would not ordinarlily permit rejection of the evidence as a whole. If the court before whom the witness gives evidence had the oppartunity to from the opinion about the general tenor of evidence given by the witness, the appellate to Court which had not this benefit will have to attach due weight to the appreciation of evidence by the trial Court and unless there are reasons weighly formidable it would

1. (1985) A.I.R. (S.C.) 48

not be proper to reject the evidence on the ground of minor variations or infirmities in the matter of trivial detalls. Even honest and truthful witnesses may differ in some details unrelated to the main incident because power of observation. retention and reproduction differ with individuals. Cross examination is an unequal dual between a rustic and refind lawyer."

18. Besides these two eye witnesses, is the evidence of P.w.9, the informant himself who claims to have reached the place of occurrence on hearing the alarm and saw Samtul with garasi ans sukhal with and lathi fleeing away and when he attempted to catch hold of them, Samtul pushed him aside and made good their escape. When he reached his darwaza, he was told that Samtul and Sukhal had chopped off his wife and he found his wife lying dead and daughter Ambud with injuries. So, the immediate disclosure by the daughter and the daughter-in-law to this witness is there and also this witness saw the appellants running away with the weapons and pushing him aside. It was but natural for P.w. 9 to enquire from P.w. 7 and 8 and so was natural for them to give out to P.w. 9 about the occurrence which both of them have done. The purpose of an immediate disclosure without loss of time is to get an unadulterated, undistorted or unembellished version, so that the true and sponteneous account of the matter may be there for the correct and truthful appreciation of the occurrence.

The learned counsel for the appellant has urged that Ramzan has said that he was told both by his daughter and daughter-in-law about the occurrence, while the daughter Ambud Nisa does not say so. As to this contentions, Ambud Nisa has said that she had not said anything to her father and Ramzan, her father has said that she also told him. But the daughter has also said that she was not in sense when her father came. She might not have given out all the details about the occurrence to her father but the saying about his assault in a hurried manner by the daughter is possible before becoming corieonscious when the daughter-in-law was also saying so. That is why, this witness (Ramzan) has said that his daughter and daughter-in law told him about the occurrence. It is possible that she might have said later on to her father after getting consciouaness in the night. For this single minor so called discrepancy, the evidence of P.w. 9 does not suffer from any infirmity when other evidence was that the details of the occurrence had come to the knowledge of the informant through the daughter and daughter-in-law and his version is also supported by the medical evidence. His evidence is not against the general tenor of the evidence given by the witnesses and so, his evidence cannot be said to be unworthy of belief for this minor discrepancy not touching to the core of the case. His evidence has been found to be truthful on material facts and there cannot be too sophisticated or too hypertechinical approach to this

aspect specially when Ramzan has got this information from his daughter-in law who also says that she told all to her father-in- law. So, the statement of the daughter alone is not a source of information to the informant and the daughter also says that she had seen her father coming and thereafter, she became unconscious In the case of *Krishna Pillai Sree Kumar and another Vs. State of Kerala*[1] it has been observed at page 1239 (para 11) asfollows . · "It is not doubt true that the prosecution evidence does not suffer from inconsistencies here and discrepancies there but that is a shortcoming from which no criminal case is free. The main thing to be seen is whether those inconsistencies, etc, go to the root of the matter or pertain to insignificant aspects thereof. In the former case, the defence may be justified in seeking advantage of the incongruities obtaining in the evidence. In the latter, howerver, no such benefit may be available to it. That is a salutary method of appreciation of evidence in criminal cases."In the case of *Bharwada Boginbhai Hirjibhai V.s State of Gujarat* [2] the Supreme Court has observed at page 755 (p.5) Overmuch importance cannot be attached to minor discrepancies. In paragraph-6 of the aforesaid case, the Supreme Court has further observed : " Discrepancies which do not go to the root of the matter and shake the basic version of the witnesses, therefore cannot be annexed with undue

1. (1981) A.I.R. (SC.) 1257
2. (1983) A.I.R. (SC.) 753

importance. More so when the all important probabilities-factors echoesin favour of the version narrated by the witnesses. In the case of *Appabhai and another V. state of Gujrat*[1] it has been observed at para 13 as follows

The court while appreciating the evidence must not attach undue importance to minor discrepancies.The discrepancis which do not shake the basic version of the prosecution case may be discarded. The discrepancies which are due to normal errors of perception or observation should not be given importance. The errors due to lapse of memory a may by given due allowance. The Court by calling into aid its vast experience of men and matters in different cases must evaluate the entire material on record by excluding the exaggerated version given by any witness. When a doubt arises in respect of certain facts alleged by such witness, the proper course is to ignore that fact only unless it goes into the root of the matter so as to demolish the entire prosicution story, The witnesses nowadays go on adding embellishments to their version perhaps for the fear of their testimony being rejected by the Court, The Courts, however, should not disbeliive the evidence of such witnesses altogether

1 (1988) A.I.R. (SC.) 696 = (1988) Cr. L.J.848

if they are otherwise trustworthy."

19. Though P.WS 1 and 2, who are said to have reached the spot, have turned hostile but their evidence about the occurrence is very much there. These two witnesss have said that they do not know anything about the occurrence. Both these persons are said to have come on the spot, by the informant, as they are neighbours and inspite of that, if they say that they know nothing about the occurrence, then the reasons are abvious as they are neighbours to the appellants as well as to the prosecution witnesses and inspite of seeing the occurrence, if they do not depose, it may be for the reasons best known to them. The following observation of the Supreme Court, in the case of *Appabhai and another Vs. State of Gujarat*[1] in para -11 may be reasons for these two witnesses to keep away from both sides and say that they do not know about the occurrence although they have reached th spot,

"Experience reminds us that civilized people are generally insensitive when a crime is committed even in their presence. They withdraw both from the Victim and the vigilante. They keep theselves away from

1. (1988) A.I.R. (SC.) 696 = (1988) Cri C.J.. 848

away from the Court unless it is inevitable. They think that crime like civil dispute is between two individuals, or parties and they should not involve themselves. This kind of apathy of the general public is indeed unfortunate, but it is or cities. One cannot ignore this handicap with which the investigating agency has to discharge its duties. The court, therefore, instead of doubting the prosecution case for want of independant witness must consider the broad spectrum of the prosecution version and then search forthe negget of truth with due regard to probability, if any, suggested by the accused."

The prosecution cannot be held to withhold the witneses who reached immediately after the occurrence However, the evidence of P.w. 6 Sattar who reached immediately after the occurrence besides P.w. 1 and 2 is quite clear that among the people, like, Chokar, Karmullah and others had arrived there. When he had gone to the darwaza on Ramzan of hulla and Ramzan had given out that it was Samtul Dhobi who had chopped his wife with garasi. He had seen the dead body of Sakina with injuries and also found injuries on the person of Ambud Nisa, daughter of Ramzan. There is immediate disclosure by Ramzan to this witness who reached the spot. He is not found to be inimically deposing against the accused and nothing has come cut to show that he has got any motive to falsely implicate the appellants in such an offence. Even suggestion of enmity is not there. He is not even the caste- man of Ramzan who is Dhobi

by caste and this witness is by caste, Ansari. It was a natural phenomenon, that on the alarm people rushed to the spot and the victims of the offence gave out about the occurrence to the visitors who reached there for the sake of sympathy and any help as human beings. At that time, there was no question of any distortion, embroidery or manupulation because there is no time for them to manupulate and when there is disclosure by the persons seeing the occurrence, then the evidence should be accepted. The immediate disclosure by Saimul Nisa to Ramzan and then disclosure by both of them to persons who came after the occurrence specially this P.w. 6 Sattar is the same as the statement of the injured eye-witness daughter Ambud Nisa. Further, the cular version finds corroboration from the medical evidence of both the doctors. The Post Mortem Report with statement of the doctor give out the same injuries as said by the witnesses. Similar is the position about injuries of Ambud Nisa, whom the same doctor had examined on 3.5.1991 at 3.20 P.M. and in his report, Ext. 3, whatever injuries have been given out by the doctor, are in line with the evidence of the injured herself and the other witnesses. The objective finding of the Investigating officer also lend support to the ocular and medical evidence . Thus, the entire evidence, on scrutiny and careful consideration,

gives out that it was Samtul Dhobi who had caused injuries to Sakina Khatoon who died on account of the same and that, he also gave injurised to Ambud Nisa, at the time and place as said by the prosecution witnesses and that the injured witness herself and also the daughter -in-law have seen the occurrence and thereafter, they disclosed the matter to Ramzan Mian, P.w. 9, who had been rushing back home after eaging hurriedly and in the way he saw accused persons running away and the appellant Samtul pushed him a side and that the further immediate disclosure is to P.w.6, Sattar, who have no motive to falsely implicate the appellants.

20. Learned counsel for the appellants has urged that the motive imputed to the appellants for the offence is not made out. P.ws. 8,9 and 11 have said that on account of snake bits Salim Mian had died and so, the appellants thought it to be on account of the witch craft of the victim. So, the motive as said to be of the accused persons, whatever people were saying in general against her, has been given out by the witnesses. The motive is of secondary importance when the evidence of the witnesses is direct and gives out a case against the accused, Motive is always for the accused and in case, motive is not proved, it will not have any effect. In the case of *Faqira Vs. State of U.P.*[1] it has been observed at page 916 (para 4), "The fact that the apparent motive

1. (1976) A.I.R. (SC.) 915

was too flimsy to no reply to the unshaken testimony of creditable and natural eye-witnesses who had no motive whatsoever to implicate the appellant falsely. Further in the case of *Molu and others Vs. State of Haryana*,[1] the Supreme Court has observed at page 2505 (para 11) : "If, however, the evidence of the eye-witness is credit-worthy and is believed by the Court which has placed implicit reliance on them, the question whether there is any motive or not becomes wholly irrelevant. Further, in the case of *State of Haryana*, Vs. *Sher Singh and others*, AIR 1981 SC 1021, at page 1023(para6), it has been observed : "The prosecution is not bound to prove motive of any offence in a criminal case, in as much as motive is known only to the perpetrator of the crime and may not be known to others. If the motive is proved by procecution, the court has to consider it and see whether it is adequate". In the case of *Mulakh Raj etc ; Vs. Satish Kumar and others*,[2] at pagw 1181 (para17) it has been observed : "The failure to prove motive is not fatal as a matter of law. Proof of motive is never an indispensable for conviction. When facts are clear it is immeterial that no motive has been proved. Therefore, absence of proof of motive does not break the link in the chain of circumstances connecting the accused with the crime, nor militates against the prosecution case. In the case of *Krishna Pillai Sree Kumar and another vs. The State of*

1.. (1976) A.I.R. (SC.) 2499
2. (1992) A.I.R. (SC.) 1175

Kerala [1] it has been observed at page 1238 (para 3) : In any case. it is not sin quonon for the uccess of the prosecution that the motive must be proved. So long as the other evidence remains convincing and is not open to reasonable doubt, a conviction may will be based on it. " It has also been said in the case of *State of U.P. Vs. Hari Prasad and others* [2] at age 1741 (para 2) : "This is not to say that even if the witnessess are truthful, the prosecution must fail for the reason that the motive of the crime is difficult to find. For the matter of that, it is never incumbent on the prosecution to prove the motive for the crime. And often times, a motive is indicated to heightend the probability that the offence was committed, by the person who was impelled by that motive. But, if the crime is alleged to have been committed for a particular motive, it is relevent to inquire whether the pattern of the crime fits in with the alleged motive. If the motive, here, was direated against Kanahaiya Bux Singh and his family, how strange it is that Kanhaiya Bux Singh his Siste Chandrawal and his brother Kishan Pal Singh should have been allowed to escape unscathed when they were within the easy reach of the accused and how strange again that Bhagwan Bux, Ram Dulari and Raja Munni, should escape, as if through a passing household scramble. The accused, according to the prosecution, pooled their strength to

1. (1981) A.I.R. (SC.) 1237
2. (1974) A.I.R. (SC.) 1740

murder a foe-Kanahaiya Bux Singh but murdered through mistake a friend Vishwanath Panday and for no apparent reason, an innocent servant Ram Gopal."

Further, in the case of *State of Punjab vs. Pritam Singh and others* [1] where the evidence of the witness was interested and inimical and that there was enmity between the parties and there was sufficient motive to falsely implicate the accused and equally there was a motive for the accused to kill in order to wreak vengeance, the Supreme Court, at page 2006 (para 4) has held " When the motive were thus equally balanced, the court had to look to surrounding circumstances in order to find out the truth.

In the case of *Chandra Mohan Tiwari and another vs. State of Madhya Pradesh* [2] where there was over whelming evidence both oral and documentary in clealry establishing a strong motive for the appellants accused to put an end to the life of the deceased Saroj who was examined before the Magistrate saying that she was kinapped by both the appellants, wornglfully confined and subjected to sexual intercourse and both the appellants were on bail in the case of kidnapping an rape during the period of occurrence of the night intevenning between 20/21 of August. 1972, then the learned counsel for the appellants submitted that P.W. 5 and 6 had

1. (1977) A.I.R. (SC.) 2005
2. (1992) A.I.R. (SC.) 891

sufficient motive to implicante both the appellants in this heinous crime of murder as both the appellants had spolied the future carrer of their daughter Saroj, their lordships, dealing with the aspect of the matter, had observed at page 89 (para 26) "As stated by Fazal Ali, J. in *State of Punjab V.s Pritam Singh* [1] When the motive was equally balanced, the court had to look to surrounding circumstance in order to find out the truth. "Further, in paragraph 27 of this case, their lordships have also said that is not a case solely based on circumstanital evidence, but on the other hand there are two eye-witnesses to the occurrence, namely P.w. 5 and 6, unevasievely and unerrigly show that these two appellants had strong motive to snap the life thread of the victim so that she could not give evidence on the next day in the case of kidnapping and rape."

In the instant case, nothing has come out to show that these prosecution witnessess had got enmity to falsely implicate the appellants in such a heinous crime. Further from the evidence of the witnesse, it is made out that Slim, the brother of the appellent, Samtul, had died because of the snake bite and it was given out in the village that was on account of witch craft of the deceased, so, the appellents went to the place of the occurence for doing away with the life of the deceased end accordingly, Sakina Khatoon was the first victim of attack and when her daugther Ambud Nisa raised alarm,

1. (1977) 4 SCC 56 = (1977) A.I.R. (SC.)-2005

she was also assulted, So it cannot be said that the motive was not there. The motive may be flimsy, superficial or unresanable but the appellants were under the imsconception that she was reasponsible for the death of Salim and so, motive has been well proved by the prosecution.

21. Learned counsel for the appellents, has urged that the conviction of appellant no.2 Sukhal Dhobi, under section 302/34 of the IPC is not made out us he had done nothing and there is nothing to show that he had shared the common intention. As to this contention, the evidence of the witnesses throughout is that the appellant, Sukahal Dhobi is the brother of Samtul Dhobi and Salim had died of snake bite and the appellants have got supersitious belief that on account of witchcraft of the deceased, Salim had died, So, both the appellants came together and Samtul was armed with garasi while Sukhal with goji (lathi) to the house of the deceased. Saimul Nisa has said that the house of Samtul is on the pkhra at a distance of little more than a bigha and the house of Sukhal is far from the house of Samtul and is near by her house. So, the houses of the appellants were not adjacent to the house of Ramjan. and both of them could not be found at the spot in the ordinary course. The very presence of these two appellants in the night hours at the place of the occurrence, is not a natural conduct and that too with arms and under the circumstances of the death of Salim. This is also the evidence through out that

Samtul Dhobi assulted Sakina Khatoon and then Ambud Nisa and when both of them were running to gether, the informan was pushed aside by Samtul Dhobi. No part of assault or use of goji has been given out to appellant, Sukhal Dhobi. But his coming together, with goji, remaining through out at the place of occurrence and then, running away together, is well made out from the evidence. Section 34 IPC can be applied only when there is criminal act done by several persons in furtherance of common intention, so, the physical presance and participation in the commission of the offence preceded by a preliminary planning among the accused, is also essential and any act done in furtherance of the common intention will make liable under section 34 IPC although the common intention is not by itself an offence. Common intention is to be gatherd from the facts circumstance as it is subjective. In the case of *Yogindra Ahir and other Vs. The State of Bihar* [1] (i) is has been said at page 1835 (para 4) : "Section 34 can only be applied when a criminal act is done by several persons in furtherence of the common intention of all. No overt act been proved or established on the part of the appellants which showed that they sharel the intention of the person or person inflicted the injury on the head of the deceased which led to his death. They cannot, therefore possibly be held guilty of an offence under S. 304 Part II read with s.34 of the Indian Penal Code."

1. (1971) A.I.R. (SC.) 1834

In the case of *Gupteshwar Nath Ojha ans another Vs. State of Bihar.* [1] , the supreme Court at page 1651 (para 10), has observed as follows—

"So far as Bishwansth Ojha is concerned, s.34 I.P.C could be used against him to make him liable for an offence under S.304 part II read with S.34 only if his participation was established. It is clear that so for as a prticipation is concerned there is a clear finding that he did not participate in the incident. They only act alleged against him was that he by shouting directed the other accused persons to beat the deceased and other prosecution witnesses. And it is for this positive act that he was independently charge with the aid of s.114 IPC. This charge has been held to be not proved as he has been acquitted from this charge by the High Court and in view of this the only conclusion could be that he did not either shout or direct the other accused persons to attack the deceased or other prosecution witnesses. In absence of any overt act or even a shout or an oral stsatement, he could not be convicted even with the aid of S. 34.

In the case of *Hare Krishna Singh and others Vs. State of Bihar*, [2] AIR 1988 SC 863, the Supreme Court has, at page 871 (Para 28), observed as follows:

"Common intention under S. 34, IPC is not by itself an offence. But, it creates a joint and constructive liability

1. (1986) A.I.R (SC.) 1649
2. (1988) A.I.R. (SC.) 863

for the crime committed in furtherance of such common intention. As no over act what so ever has been attributed to the appellants, Ram Kumar Upadhyay and Sheo Narain Sharma, it is difficult to to hold, in the fact and circumstances of the case, that they had shared the common intention with Hare Krishna Singh and Paras Singh of Dhobana When these two appellants were very much known to the eyewitnesses, non-mention of their names in the evidence as to their participation in firing upon the deceased, throws a great doubt as to their sharing of the common intention."

In the case of *Rambilas Singh and others Vs. State of Bihar*, [1] the Supreme Court, at

Page 1595 (para-7), has observed as follows :

"Even accepting the prosecution case in full and holding that the appellants were present at the scene at the time of occurrence, the materials on record would not warrant a finding that the individual act of Dinesh Singh had been perpetrated in furtherance of the common intention of all the accused assembled there or in prosecution of a common object formed by all of them.

It is true that in order to convict persons vicariously under S.34 or S. 149/34 I.P.C. it is not necessary to prove that each and everyone of them had indulged in overt facts overt acts.

1. (1989) A I R (S.C.) 1593

Even so, there must be material to show that the evert act or acts of one or more of the accused was or were done in furtherance of the common intention of all the accused or in prosecution of the common object of the members of the unlawful assembly."

In the case of *Ramlal Singh and others. Vs. State of Haryana* [1] the Supreme Court has observed at page 3(para5) : But in the present case, these is absolutely no evidence that except appellant no. 2, none of the other appellants assaulted the deceased nor any of these three appellants exhorted the second appellant to attack the deceased. The evidence let in by the prosecution and the circumstances attending the case, does not unfold any prior concert or meeting of minds of the appellants in sharing the common intention of the second appellant, theperpeprator of the murderous assault on the victim."

21. But the Supreme Court in the case of *Rama Swami Ayyer Vs. State of Tamil Nadu* [2] has observed :-

"Section 34 is to be read along with the preceeding section 33 which makes it clear that the act spoken of in section 34 includes a series of acts as a single act. It follows that the words when a criminal act is done by several persons" in section 34, may be constructed to mean when criminal acts are done by several persons".

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1. (1992) Cr. I.J.I.
2. (1976) Scc (Cr) 588 = (1976) A.I.R (SC) 2027

The acts committed by different confederates in the criminal action may be different but all must in one way or the other participate and engage in the criminal enterprise, for instance, one may only stand guard to prevent any person coming to the relief of the victim or to otherwise facilitate the execution of the common design. Such a person also commits an "act'; as much as his co- participants actually committing the planned crime. In the case of an offence involving physical violance, however, it is essential for the application of Sec. 34 that the person who instigates or aids the commission of the crime must be physically present at the actual commission of the crime for the purpose of facilitating or promoting the offence, the commission of which is the aim of the joint criminal venture. Such presence of those who in one way or the other facilitate the execution of the common, design, is itself tantamount to actual participation in the criminal act. The essence of section 34 is simultaneous consensus of the minds of persons participating in the criminal action to bring about a particular result. Such consensus can be develped at the spot and thereby intended by all of them. In the case before us, A-2 obviously, was acting in concert with A-3 and A-4 in causing the murder of the deceased, when he prevented P.w. 1 from going to the Relief of the decessed. Section 34 was therefore, fully attracted and under the circumstances A-2 was equally responsible for the murder of the deceased."

In the case of *Dharam Pal and others Vs. State of Haryana,*[1] Unreported Judgment, 1979 (SC) 9, it has been held :

"There is no law to our knowledge which lays down that a person accompanying the principal culprit shares his intention in respect of every act which the latter might eventually commit. The existence or otherwise of the common intention depends upon the facts and cricumstances of each case. The intention of the principal offender and his companions to deal with any person who might be apparent from the conduct of the persons accompanying the principal culprit or some other clear and cogent incriminting piece of evidence. In the absence of such material, the companion or companions cannot justifiably be held guity for every offence committed by the principal offender. The common intention to commit an offence graver than the one originally designed may develop during the execution of the original plan e.g. during the progress of an attack on the person who is intened to be beaten but the evidence in that behalf should be clear and cogent for suspicion, however strong, cannot take place of the proof which is essential to bring home the offence to the accused."

In the case of *Rana Pratap and others v. State of Haryana,* the Supreme court observed at page 684(p.11)

1. (1983) A.I.R. (SC) 680

But the circumstances that the three accused came together, and that two of them held the deceased while the third one stabbed him clearly indicated that they shared some common intention. The question is whether the common intention was to do away with the decesed ? The evidence is not very clear whether Rana Partap and Sat. Pal continued to hold the deceased even after Manmohan started stabbling him. Neither Rana Partap nor Sat Pal is alleged to have said anything to indicate that they wanted the deceased to be done away with. Manmohan himself did not say that he was going to finish the deceased. He only said that he wanted to teach him a lesson. In the circumstances, we are unable to hold that the only inference possible is that Rana Partap and Sat Pal shared the common intention with Monmohan to kill the deceased. No doubt they held the deceased and this facilitated the stabbing by Manmohan. But there is nothing whatever to indicate that they knew that Manmohan would cause fatal injuries to the deceased, though they must have anticipated that he would cause grievous injuries. It is one of those borderline cases where one may with equal justification infer that the comon intention was to commit murder of to cause grievous injury but the benefitof any such doubt must go to the accused. In the circumstances, we conclude, but not without hesitation, that the common intention of the accused has not been established beyond reasonable But it certainly was to cause grievous injuries to the

deceased. The conviction of Rana Partap and Sat Pal under sectin 302 red with S. 34 and the sentence of life imprisonment are therefore set aside and instead they are convicted under sectin 326 read with section 34, and sentenced to suffer rigorous imprisonement for a period of five years each. So far as Manmohan is concerned, the three stab injuries inflicted by him were sufficient to cause death. His conviction and sentence are confirmed.

In the case of *Dajya Moshya Bhil and othes V. State of Maharashtra.*[1] Where appellants 2 and 3 had accompanied appellant no.1 not armed and empty handed and there was no evidence of prior meeting of minds, yet, the court has said at page 1719 (para 11):- therefore, in the circumstances of this case, the minimum common intention that can be attributed to appellants 2 and 3 is one of causing grievous hurt with a sharp cutting weapon like a dharya. Thus appellants 2 and 3 are shown to have committed an offence undr S. 325 read with S. 34 of the Penal Code and they should be convicted accordingly. In the case of *Gurdeep Singh V. Jaswant Singh and others*, [2] their lordships observed at page 988 (para 4):

As regard other two accused despite, we do not find any good reason to interfere with the finding of the High Court that these appellants did not share the common intention of appellant No.1. They had no doubt come

1. (1984) A.I.R. (SC.) 1717
2. (1992) A.I.R. (SC.) 987

armed with weapons but none of them caused any injury on any vital part of the deceased. The finding of the High Court that the common intention of the appellant was to chastise and not to kill him, appears to be well founded.

In the case of Malkiat Singh and others. V. State of Punjab, (1992) East Cr. C98 (Sc), the Supreme Court has sai J at page 108 (Para 14).

"When A-1 and A-3 left the shop in anger,it is clear that they left the shop in a huff smarting from huraliation at the herds of the contuaction from out side the state and their stff. To avenge the humiliation heaped upon them,they animated to finish the prosecution party, obviously they chose past mid-might to be sure that all would be asleep and no evidence of their crime would be available. Thus they have strong motive to kill the deceased and to make murderous attack on P.w. 4 Morepvergamdasa was recovered pursuant to A -3 ' statement under section 27 of Evidence Act leading to its discovery and it contained human blood though blood group could not be detected due to disintegeration, The two incised injuries each on the persons of D-W-3 and D-4 as corroborated by medical evidence clearly established the participation of A-3 in attacking the deceased. He accompanied A-1 at dead of night to the liquor shop and killed D-1 to D-4 and attempted to kill P.W.4. Thus he shared with A-1 the common intention to kill the deceased D-1 to D-4 and attempt to kill P.W.4"

In the instant case, both brothers, *Samtul Dhobi and Sukhal Dhobi,* armed with garasi and goji came to the house of the deceased in the night hours at 8 PM they were animated by the revenge as they are said to be under the superstitious belief that on account of witch craft of Sakina Khatoon, their brother had died of snake bite. Though the circumstances are that Samtul was armed with a garasi and that there was feeling of revenge, and further Samtul assaulted the deceased and also her daughter and also pushed aside the informant also while they were running, but the appellant Sukhal did not use the goji nor uttered any word or made any gesture for killing the victim, although Sukhal, being the brother of Samtul and also of Salim, accompanied Samtul to the place of occurrence in the night hours and there, only Samtul did all the acts. The killing was therefore the individual act of Samtul. Though there is no direct evidence of sharing the common intention of killing, yet Sukhal can be said in these circumstances, to be sharing the common intention to cause at best grievous hurt by garasi which was used in killing and injuring the two women. Therefore, he is found liable to be convicted under section 326 read with section 34 IPC and also a sentence of seven years RI. Therefore, this conviction of appellant, Sukhal Dhobi under section 302/34 IPC and rigorous imprisonment for life and further conviction under section 307 and 307/34 IPC are not made out and so, he is found guilty for the offence under section 326/34

IPC . In the circumstances, RI. is convicted u/s 326 read with setaion 36 I.P.C. and sentenced to rigorous improsnment for seven years.

22. As regards the death sentence of appellant, Samtul Dhobi, learned counsel for the appellant has urged that in the circumstances of the case, the appellant, Samtul Dhobi was not liable to be given the extreme penalty of death and he has referred to the decision in *Bachan Singh's* [1] case to this contention, no doubt, death is not a normal penalty for murder but when the murder is gruesome, ghastly, revolting to human conscience causing social imbalance or danger to the society at large or even danger to the security of the State or the situations of the like, then for these special reasons, death sentence is the only appropriate and legal sentence. In the case of *Asharfi Lal and Son V. State of M.P.* [2] the Supreme Court has been pleased to observe at page 1722 (para 3) : "Failure to impose a death sentence in grave cases, where it is a crime against the society, particulary in cases of murders committed with extreme brutality, will bring to naught the sentence of death provided under section 302 of the Penal Code. It is the duty of the court to impose a proper punishment depending upon the degree of criminality and desirability to impose such punishment. The only punishment which the appellant deserve for having committed the

1. (1980) A.I.R. (SC.) 898
2. (1987) A.I.R. (SC.) 1721

reprehesible and gruesome murders of the innocent girl to wreak their personal vengeance over the dispute they had with regard to the property with their mother Smt. Bulakan is nothing but death. As a measure of social necessity and also as a means of determing other potential offenders, the sentence of death on the two appellants Asharfilal and Babu Lal is confirmed. Before awarding a death sentence, circumstances of the case are to be looked into and special reasons should be found out. There are many considerations like, minority or the old age of the offender, drunkerness, self-preservation or preservation of some other near one or exceeding the limits of self defence, suddenness of the occurrence and without premeditaton, unsoundness and imbalances of the mind of the offender, goaded misguided, motivated or instigated offence, socio-economic compulsion, provocation, sex, ill-health and sex of the delinquent, helpless state of the accused himself, suspected or actual infedility of the life partner or imbalanced sex or deprivation of the home life or sex life or even the deprivation from the family, assets and properties. Categorisation of the special reasons is easy nor appropriate and so it is for the judge to consider the circumstances of each case and find out whether special reason exists for the extreme penalty of death or not. The theory of retribution is not being accepted. There is a trend for reformation and detergence and social justice. The protagonist of the penological reform have also gone

to the extent that if there is delay in the disposal of the case for a considerable period of time, then life sentence should be preferred as said in the case of *State of U.P. Vs. Lalla Singh* [1] where the Supreme Court, for an occurrence of 18.6.1971, said that more than six years have elapsed, so death sentence should be reduced to life sentence. In the case of *Chandran Alias Surendra and another Vs. State of Kerala,*[2] 1991 sup-(1) SCC-39, the supreme Court has said : "As the appellants are awarded extreme penalty of law only on the above two pieces of the evidence, we have to scrutinise the evidence in a very careful, cautions and meticulous way and see whether this evidence can be accepted and acted upon to correct these appallants with this dastardly crime. The fact that these two murders which are cruel and revolting, have been perpetuated in a very shocking nature, should not be allowed in any way to influence the mind of the court while examining the alleged involvement of the appellants. It is worth-while to recall an observation of this court in Datar Singh vs. State of Punjab, (1975-SCC (Cri) 530) articulating that (SCC P-275-para3) : Courts of justice cannot be a wayed by sentiments of prejudice against a person accused of reprehensible crime. In the case of *Smt. Shashi Nayar V. Union of India* [3] wherein the court was requested to reconsider the decision in *Bachan Singh* case, it has been said at page 396 (para5)

1. (1978) A.I.R (SC.) 368 at P.374 (Para 18)
2. (1992) A.I.R. (SC.) 395
3. (1983) A.I.R. (SC.) 957

and 6) :-

(5) having regard, however, to the conditions in India, to the variety of the social upbringing of its in habitants, to the disparity in the level of morality and education in the country, to the vastness of its area, to the diversity of its population and to the paramount need for maintaining law and order in the country at the present juncture India cannot risk the experiment of abolition of capital punishment.

(6) The death penalty has a determent effect and it does serve a social purpose. Further, a judicial notice can be taken of the fact that the law and order situation in the country has not only improved since 1967 but has deteriorated over the years and is fast worsening today. The present is, therefore, the most inopportune time to reconsider the law on the subject. Hence, the request for referring the matter to a larger Bench is rejected.

23. In *Bachan Singh's* case, their lordships have given out the various guidelines. It has also been said at page 944 Para 206) :-

Nonetheless, it cannot be over-emphasised that the scope and concept of mitigating factors in the area of death penalty must receive a liberal and expansive construction by the courts in accord with the sentencing policy writ large in section 354 (3). Judges should never be blood-thirsty. Hanging of murderers has never been too good for them.

In the case of *Machhi Singh and others vs. State of Punjab their* lordihips relying upon the observations mude in Bachan Singh have observed at page 966 (para 33,34 and 35) as follows :-

(33) In this back-ground the guidelines indicated in *Bachan Singh's* (supra) will have to be called out and applied to the facts of each indidual case wher the question of imposing of death sentence arises. The following propositions emerge from *Bacham Singh's* case.

(i) The extreme penalty of death need not be inflicted except in gravest cases of extreme culpability.

(i) Before opting for the death penalty by the circumstance of the offender aso require to be taken into consideration along with the circumstances of the crime.

(iii) Life imprisonment is the rule and death sentence is an exception. In other words death sentence must be imposed only when life imprisonment appears to be an al together inadequate punishment having ragard to the relevant circumstances of the crime, and provided and only provided, the option to impose sentence of imprisonment for life cannot be conscientiusly exercised having regard to the nature and circumstances of the crime and all the relevant circumstances.

(iv) A balance-sheet of aggravating and mitigating circumstances has to be drawn up and in doing so the

mitigating circumstances has to be accorded full weightage and a just balance has to be struck between the aggravating and the mitigating circumstances before the option is excercised.

(34) In order to apply these guidelines inter alia the following questions may be asked and answered :

(a) Is there something uncommon about the crime which renders sentence of imprisonment for life inadequate and calls for a death sentece ?

(b) Are the circumstances of the crime such that there is no alternative but to impose death sentence even after accorduing maximum wightage to the mitigating circumstances which speak in favour of the offender ?

35. If upon taking an overall global view of all the circumstances in the light of the aforesaid propositions an taking into account the answers to the questions posed herein above, the circumstances of the case are such that death sentence is warranted, the court would proceed to do so.

24. In the light of the above observations and guidelines by the appex court, in the instant case, it appear that immediataly prior to this occurrence, one Salim brother of both the appellants, had died of snake bite and the appellants, though wrongly and absurdly, had the superstious belief that the snake bite to Salim was the out come of the witch craft of deceased Sakina

Khatoon who in the village, was earlier known as a lady of this type. The appellants had got no previous enmity with the deceassed or his family. It was on account of this superstitious belief that both the appellants got imbalanced and went to the house of Sakina armed with garasi and goji, may be with the intention of teaching her a lession or assaulting her at the most, as there is no evidence to show that they had preplanned to kill her. the appellant, Samtul armed with garasi and Sukhal with lathi (goji) while going to the spot, as at least, knew and shared the common intention of causing rieveus hurt to the deceased. But it was the individual act of appellant, Samtul who gave three grievous fatal injuries to the deceased and two also to her daughter. Sukhal did not use his goji against the deceased, injured Ambud Nisa or even the informant when they were running awa . It is appellant, Samtul alone who had pushed him aside. So, appellant Samtul appears to have committed the offence under the influence of extreme mental and emotional disturbance and also superstitious belief that he was morally justified in committing the murder of Sakina Khatoon who, he thought, had caused the death of his brother. These are the special reasons for not awarding the extreme penalty. Rather they appear to be mitigating circumstances in favour of the accused for having a sentence of life and not death sentence. So, the sentence of death awarded to appellant, Samtul Dhobi by the learned trial court, is commuted to rigorious improson-

ment for life.

25. Thus, maintaining the conviction of appellant, Samtul Dhobi under section 302 IPC, his sentence of death is commuted to rigorious improsonment for life and conviction and sentence of appellant, Sukhal Dhobi, is altered from section 302/34 IPC to one under section 326/34 IPC and sentence of rigorious imprisonment for seven years.With this modification in the conviction and sentences of the appellants, this appeal is partly allowed and the death reference is not accepted as both the appellants are in custody, they will serve out their ramaining period of sentece.

Lok Nath Prasad,J. I agree

S.P.J.

Reference not accepted
and appeal party allowed.

CIVIL WRIT JURISDICTION

Before G.C.Bharuka & Narayan Roy, JJ.

1992

December, 22

Dr. Sanjay kumar and others.*

V.

The State of Bihar and others

Medical Admission Test-Examination in Post Graduate Courses – examination held fairly – evaluation of answer books sheets done properly – mistake committed by the computer at the stage of preparing the merit list – mistake capable of being corrected by refering to the chart containing paper wise marks obtained by the candidates – cancellation of examination as a whole and holding of fresh examination, legality of.

Where there is no infirmity either in the holding of the examination or in the evaluation of the answer books/ sheets and the only mistake which has been committed is in the merit list in respect of certain candidates, which

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* Civil writ Juridiction Case No.12579 of 1992 with Civil Writ Jurisdiction Case No. 12581 of 1992. With Civil Writ Jurisdiction Case No. 12983 of 1992. In the matter of Application under Articles 225 and 227 of the Constitution of India.

Dr. (Mrs.) Sarita Kumari .... Petitioner in C.W.J.C.No. 12581 of 1992.

Dr. (Mrs.) Kahamta Shalini .. .... Petitioner in C.W.J.C. No. 12983 of 1992.

is rectifiable and, as a matter of fact, a correct merit list has already been prepared;

Held, that the impugned decision of the state Government as evidenced by a notice issued by the Controller of Examination, Health services, Bihar, by which the examination as a whole has been cancelled on the ground of some technical error in the computer is unwarranted and unsustainable in law being arbitrary and based on irrelevant considerations and publication of result and taking of admission in the post graduate courses in question be taken up by the Government immediately in accordance with the correct merit list.

Kumari Anamika Mishra v. U.P. Public Service commission [1] ..... relied on.

Application by M.B.B.S Graduates.

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

M/s Thekur prasad & Ferooq Moazzam for the petitioner in CWJC/2597/92

Mr. Siya Ram shahi for the petitioners in CWJC 1258/92

M/s.Basudeo Prasad, Rajeev Prakash, Subodh Kumar, Rajeev Nandan Pd, & Sunil Kumar for the petitioner in CWJC 12983/92

M/s. S.P. Mukharjee & B. Sharma for the interverors.

M/s. Ram Balak Mahto Advocate General

1. (1990) A I R. (S C)461.

and P.K. Shahi G.P.7 for the Respondents.

G.C. Bharuka, J.—These writ applications have been filed by the petitioners for quashing the notice as contained in Annexure-1 to the wirt applications published by the Controller of Examination, Health Services, Bihar, by which the Post Graduate Medical Admission Test, 1992 (in short P.G.M.A.T.- 1992) held on 30-8-1992 has been cancelled and fresh examination has been scheduled to be held on 10-1-1993 in respect of all the candidates, who had appeared in the said P.G.M.A.T.-1992 examination.

2. The petitioners are M.B.B.S, graduates. In accordance with the prospectus for P.G.M.A.T.- 1992 (Annexure -2) a test was held on 30-8-1992. But before the result could be finally published, a writ application being C.W.J.C, No. 9457 of 1992 - Dr. Ashok Prasad and others vs. The state of Bihar and another (Annexure 5 to C.W.J.C. No. 12597 of 1992) was filed in this court for restraining the Respondent state from declaring the result because certain infirmities had appeared in the question papers. The grievance was based on Item no. IV of the prospectus. Clauses (iv) and (v) of Item no. IV of the prospectus are relevant, which are being quoted hereunder :

IV EXAMINATION.

(iv) There will be three sets of question papers marked 'A' 'B' 'C' wherein questions remaining the same,

but serial number of question will be variable.

(v) There shall be two papers of two hours duration each containing 150 multiple choice questions. The number of questions for these will be distributed approximately as given below.

What happened is that though in all the three sets, subject to variance in serial number, the questions were required to be the same, but out of 300 questions, 20 questions relating to the subject Microbiology Paper - I slightly varied in the three sets. Out of 1200 total marks in all the questions, the said 20 questions carried 80 marks.

3. After hearing all the concerned parties, a Bench of this court to which one of us (G.C.Bharuka, J.) was a member, keeping in view the facts that the session was already delayed by four months and also keeping in view the interest of all concerned, held that instead of holding a fresh examination, it will be proper if the marks in relation to the aforementioned questions are not taken into consideration and the result be published by taking into consideration the questions carrying 1120 marks. It was also directed that since studies in other institutions have already commanced therefore, the result should be immediately published.In view of this judgment, the result of the test was published.

4. Now from the impugned notice (Annexure-1), it transpires that the Government has decided to cancel the very examination which was held on 30-8-1992 on

the ground that due to some technical error in the computer, the result was not computed, which resulted in incorrect publication of the same.

5. A counter affidavit has been filed on behalf of the respondents, which has been sworn in by the Controller of Examination, respondent no. 3, himself. The chart showing set wise and paper wise marks obtained by the candidates as also the first & the second merit list have been produced before us. It has been admitted in the counter affidavit as also at the Bar by the learned Advocate General that the examination was held fairly and neither there was any allegation of use of any unfair means at the examination by the candidates nor any other illegality or irregularity was alleged to have been committed at the said examination. It has also been admitted that evaluation of the answer books/sheets has been done properly by the computer and there is no error in this regard. The chart produced before us clearly shows the number obtained by each candidate in paper - I and paper 2° at the said examination. The mistake, which appears to have been committed by the computer is at the stage of preparing the merit list. It is quite basic that for preparing the merit list, the marks obtained by each candidate in both the papers have to be summed up. But it seems that out of 2406 candidates, who had appeared at the test, the discrepancy had occurred in the result of 248 candidates. The cause of the discrepancy, as has been explained to and as is also apparent from the first merit

list produced before us, is that because of some error somewhere in the programming or data processing the computer has taken the marks obtained by these candidates in paper - II as 'zero It is clearly a mistake apparent on the face of the record and is capable of being corrected by refering to the chart containing paper wise marks obtained by the candidates.

6. It has been also stated by the learned Advocate General that as soon as the above said mistake came to the notice of the respondents, the personnels of the computer centre were called and they having realised the mistake, after debugging the error in the computer, have made out a second merit list, which is now free from the error. The said list has also been produced before us. According to the statements made in the counter affidavit in para 5(v), fresh merit list prepared by the computer will alter the result of merely 51 candidates out of 231 in general category.

7. Learned counsel appearing for the Intervenors have sought to support the impugned Government action by raising the same objections which were the subject matter in C. W. J. C. No. 9457 of 1992 (supra) but the said dispute having acquired its finality, the intervenors can not be allowed to re-agitate once again. It was also submitted by Mr. Mukherji that for maintaining the fairness and the credibility of the examination, the decision of the Government should be upheld. Dr. Banwari Shar-

ma appearing for the another set of intervenors has submitted that the Government is guilty of not trying to defend its action in proper perspective. though the decision was taken in right direction.

8. In the above said factual back ground it has to be decided as to whether only cropping of clerical error in preparation of final merit list can justify the cancellation of the examination as a whole.

9. A similar question had fallen for consideration before the Supreme Court in the case of Kumari Anamika Mishra vs. U.P Public Service Commission, reported in A. I. R. 1990 S. C., 461. In this case the Service Commission had held a test for recruitment to certain post. The examination was in two stages written and interview personality test. After written examination was over, on the basis of result thereof, the successful candidates up to a base limit were to be called for interview. On account of improper feeding in the computer some of the candidates, who had better performance in written examination were not called and the candidates securing lessor marks were called for interview and thereupon finally selected. When the commission learnt about this fact, it decided to cancel the entire examination and directed for re holding of the same. On being challenged by way of writ application, the High Court affirmed the action of the Service Commission. The writ petitioner went in appeal to the Supreme Courts which was allowed. The Supreme

Court took the view that,

" When no defect was pointed out in regard to the written examination and the sole objection was confined to the exclusion of a group of successful candidates in the written examination from the interview, there was no justification for cancelling the written part of the recruitment examination. On the other hand, the situation could have been appropriatey met by setting aside the recruitment and asking for a fresh interview of all eligible candidates on the basis of written examination and selecting those who on the basis of written and freshly held interview became eligible for selection."

10. In our opinion, the dispute in question is aptly covered by the dictum of the Supreme Court in the above referred case. In the present case as well, there is no infirmity either in the holding of the examination or in the evaluation of the answer books/ sheets, The only mistake, which has been committed is in the merit list in respect of certain candidates, which is rectifiable and, as a matter of fact, a correct merit list has already been prepared. Therefore, in my opinion, the impugned decision of the State Government as evidenced by the notice (Annexure -1) by which the examination as a whole, held on 30-8- 92, has been cancelled is unwarranted and unsustainable in law being arbitrary and based on irrelevent considerations. It is directed that steps for publication of the result and taking of admission

in the post graduate courses in question should be taken up by the Government immediately in accordance with the correct merit list and the provisions of the prospectus subject to this Court's judgment in C.W.J.C. No. 9457 of 1992 (supra).

11. Accordingly, the impugned notice (Annexure 1) is quashed and the writ applications are allowed. But keeping in view the facts and circumstances of this case, there will be no order as to costs.

Narayan Roy, J. I agree Application Allowed

S.P.J.

CIVIL WRIT JURISDICTION

Before Aftab Alam, J.

1993

Jaunary,

M/s Kalyanpur Lime & Cement works Ltd.*

V.

The Presiding Officer, Labour Court, Patna & ors.

Industrial Disputes Act, 1947 (Central Act XIV of 1947)— Sections 2 (k), 2-A and 10 (1) (e) scope and applicability of workman removed from employment . . . . industrial dispute raised by the workman . . . . . Union taking up the case of workman —industrial dispute within the meaning of sections 2 (K) and 2-A both — Union entering into a settlement with the management —settlement, whether will bring to an end the industiral dispute —industrial dispute within the meaning of seetion 2-A, whether would continue to persist or exist-adjudication on merits by the Labour Court, whether to be made.

Held, that, in a case where the controversy referred for adjudication before a labour court/ Industrial tribunal qualifies as an industrial dispute within the meaning of seetion 2-A of the Industrial Dispurtes Act, 1947, the concerned workman has a right to be a party to the proceeding in his own capacity and has a right to be heard and, therefore, a settlement of such a dispute

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* Civil Writ Jurisdiction case no. 37 of 1982. In the matter of an application under Articles 226 and 227 of the constitution of India.

between the union and the management will not deprive him of his right and will not bring the industrial dispute to an end. The view that once a Union sponsors the dispute, it is the Union alone which becomes the sponsor in relation to the industrial dispute, to the exclusion of the concerned workman, appears to be contrary to the very object and purpose of section 2-A of the Act.

Rohtas Industries Ltd. V Ghanshyam Das Premi and others —referred to

Held : further, that where at a dispute relation to discharge, dismissal, retrenchment or termination of service of an individual workman which at its inception was an industrial dispute within the meaning of section 2-A of the Industrial Disputes Act, 1947, also assumes the character of an industrial dispute within the meaning of section 2 (K) of the Act if at a later stage the dispute though concerning an individual workman is also taken up by a Union, and where a subsequent stage the dispute within the meaning of seetion 2 (K) ceases to exist, it will not also bring to an end the industrial dispute within the meaning of sectioon 2-A of the Act. It is, thus., clear that in the instant case, an industrial dispute within the meaning of section 2-A remains very much in existence in respect of which there is a reference before the

1. Civil writ Jurisdiction case No. 37 of 1982. In the matter of an applicating under Articles 226 and 227 of the Constitution of India.

Labour Court which has to be adjudicated on its merits.

Application by the management.

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

M/s Ranjeet Kumar Das & Shivajee Pan day for the petitioner

M/s K.N.Gupta, Satyendra Krishna Pd. & Bindeshwar Jha for the Respondents

Aftab Alam, J. — This application under Articles 226 and 227 of the Constitution has been filed challenging an order dated 7.11.1981 passed by the Presiding officer, Labour Court, Patna in Reference no. 18/1977. By the impugned order the Labour Court refused to accept a settlement, said to have been arrived at between the Union (respondent no. 2) and the management (the petitioner) and directed that he would proceed to adjudicate on the dispute under reference on its merits. It is to be noted at the out set that the reference relates to the removal from service of an individual workman, respondent no. 3.

2. The facts of this case are brief and not in dispute; it is another matter that those facts are being interpreted differently by the contending parties.

3. Respondent no. 3 (hereinafter referred as, the concerned workman) was a workman of the petitioner-

company. He was removed from employment by notice dated 24.11.1975 copy of which has been enclosed as Annexure - 2. The notice did not assign any reason for his removal from service but simply stated that his services were being terminated with immediate effect under the provisions of the Standing orders of the company. On receipt of the notice, the concerned workman wrote a letter to the management on 26.11.1975. A true copy of this letter is enclosed as Annexure 'A' to the counter affidavit filed on his behalf. In this letter the concerned work man asked the management the reason for his removal from service and went on to add that on account of certain incidents involving another workman, he apprehended that the action of the management was inspired by malafide. Failing to get any reply to his aforesaid letter, the concerned workman appears to have approached the Union which took up his case. The Union sent a letter dated 6.1.76 to the General Manager of the company wherein a demand was made for the reinstatement of the concerned workman. A copy of the demand letter is on the record as annexure 3 to the writ petition. It is signigficant to note that the demand letter was also signed by the concerned workman, in addition to the General Secretary of the Union.

4. The industrial dispute relating to the removal from service of the concened workman was first sought to be resolved in a conciliation proceeding. On the failure of the conciliation proceeding. the state Government in

exercise of its powers under section 10 (1) (c) of the Industrial Disputes Act, 1947 ('the Act; for short) made a reference of the dispute to the Labour court for adjudication. A true copy of the reference notification dated 23.7.77 has been enclosed as Annexure 4 to the writ petition. The reference notification stated that the appropriate Government was of the opinion that a dispute existed between the petitipner and their workmen represented by Kalyanpur Mazdoor Panchayat regarding the matter specified in Annexure 'A' there to; Annexure 'A' to the reference notification reads as follows :

" Whether termination of service of shri Babu Ram Khalasi (Ticket No. 420), Mechanical Engineering Department, Kalyanpur Lime & Cement Works Limited Banjari is proper and justified ? If not what relief he is entitled to?"

The aforementioned dispute referred to the Labour Court under notification dated 23.7.77 was registered as Reference No. 18/ 1977.

5. It is to be noted at this stage that at the material time another reference being reference No. 20/1977 was also pending before the Labour court involving the petitioner management and the Union. This reference was in respect of an industrial dispute related to removal from service of a number of other workmen.

6. It appears that the Union entered into a settlement with the management in relation to both the disputes under references 18 and 20 of 1977 and a common

compromise petition was filed in both these references. Concerning reference 18, relating to the concerned workman, the compromise petition merely stated:

"That in case of Reference No. 18/1977 the parties agree to drop the issue."

The compromise petition was filed in court on 30.6.78 On the same date the general secretary of the Union appears to have filed a petition before the Labour Court disowning the compromise in so far it related to Reference No. 18/ 1977. On 21.11.78 the concerned workman also appeared and filed a petition objecting to the alleged compromise and praying that it may not be accpted by the Labour court. The management pressed for the acceptance of the compromise and prayed that an award may be give . in terms of the compromise as had already been given in Referance No. 20/1977. After hearing the parties, the Laobur court passed the impugned order refusing to accept the compromise and directing that it would hear the reference on its merits.

7. Mr. Ranjeet Kumar Das, learned counsel appearing on behalf of the petitioner submitted that the action of the Labour Court in not accepting the compromise was wholly untenable in law as the Labour Court was bound to accept the compromise and make an award in terms thereof. Mr. Das contended that in cases of industrial disputes the union which represented the collective will of the workmen was fully competent to enter into a

settlement with the management even adversely affecting the interest of an individual workman and in matters of industrial dispute an individual workman had no right to pursue or to carry on his dispute with the managemant in the face of a settlement arrived at between the management and the Union. Mr. Das vehemently argued that an individual workman's claim to pursue an industrial dispute individually and independently of the Union, would be quite contrary to the very idea of collective bargaining which was one of the cardinal principles of industrial adjudication. In support of his contentions, learned counsel relied upon a Supreme Court decision reported in A.I.R. 1961 S.C. 857 and two division Bencn decisions of this court reported in 1968 (vol.II) L.L.J 817 and 1988 P.L.J.R. 125.

8. Before considering how far the precedents relied upon by Mr. Das provide guide lines for deciding this case, it will be apposite to take a look at the relevent provisions of the Act.

9. The Act defines 'Industrial Dispute' in section 2 (K) which is reproduced below :

> 'Industrial Dispute' means any dispute or difference between employees and employers, or between *employers and workmen,* or between workmen and workmen, which is connected with the employment or non-employment or the terms of employment or with the conditions of labour, of any person."

In other words, though the subject of dispute may be the employment or non- employment or the terms of employment or the conditions of labour of a single

individual, the dispute would qualify as an 'Industrial Dispute' (between employers and work men) only if it is raised by a body or a group of workmen; that is to say a dispute or difference involving a single workmen will not give rise to an industrial dispute within the meaning of section 2(K) of the Act.

10. The aforesaid concept of industrial dispute was given an extended meaning by insertion of section 2A which provided that on subjects specified in that section an industrial dispute could be raised even at the instance of an individual workman and without the involvement of a body or group of workmen to espouse the dispute. Section 2A of the Act is as follows :

> Where any employer discharges, dismisses, retrenches or otherwise terminates the services of an individual workman, any dispute or difference between that workman and his employer connected with, or arising out of such discharge, dismissal, retrenchment or termination shall be deemed to be an industrial dispute no twithustanding that no other workman or any union of workmen is a party to the dispute.'

It is plain that any dispute on the subject specified in section 2A i.e. discharge, dismissal, retrenchment or termination of an individual workman is not likely to directly affect a body or group of workmen but would affect only the workman concerned and in such cases, by virtue of section 2A, a dispute or difference raised by the concerned workman also constitutes an industrial dispute not with sanding that no other workman or any union of workman came forward in support of that

dispute.

11. Section 10 of the Act which empowers the appropriate Government to make reference of an industrial dispute is in the following terms:

> " 10. Where the appropriate Government is of the opinion that any industrial dispute exists or is apprehended, it may at any time, by order in writing._
>
> (a)_ _ _
>
> (b)_ _ _
>
> (c) refer the dispute or any matter appearing to be connected with, or relevant to, the dispute, if it relates to any matter specified in the Second schedule, to a Labour Court for adjudication; or
>
> (d)_ _ _
>
> Provided - - -
>
> Provided - - - ."

It is significant to note that what is to be referred under section 10 of the Act is an industrial dispute irrespective of whether it is an industrial dispute within the meaning of section 2(K) or section 2- A. As soon as a difference or dispute qualifies as an industrial dispute either under section 2 (K) or under section 2-A, it is within the authority of the appropriate Government to make refernce for its adjudication under section 10 which does not make any distinction between an industrial dispute within the meaning of section 2 (K) or one under section 2-A of the Act.

12. This being the legal position, it is very easy to envisage a situation where a dispute relating to dis-

charge, dismissal, retrenchment or termination of service of an individual workman which at its inception was an industrial dispute within the meaning of section 2-A also assumes the character of an industrial dispute within the meaning of section 2 (K) if at a later stage the dispute, though concerning an in dividual workman is also taken up by a Union . It is also possible that a Union or a group of workmen or a group of workmen having at one stage given its support to the dispute may at a subsequent stage withdraw its support and drop out of the dispute. But the withdrawal of support by the Union would by no means extinguish the difference between the employer and concened individual workman and hence an industrial dispute within the meaning of section 2-A of the Act would still continue to persist, notwithstanding the union ceasing to support the dispute. To my mind, there is no question of an industrial dispute within the meaning of section 2-A getting submerged or losing its identity or existence in case a union or a group of workmen decide to support the dispute. Whether or not an industrial dispute would be taken up by the union is not in the hands of the concerned workman. The union may or may not take up a dispute concerning an individual workman. And hence the view that once a union espouses the dispute, it is the union alone which becomes the sponsor in relation to the industrial dispute, to the exclusion of the concerned workman, appears to me contrary to the very object and purpose of section

2-A of the Act.

13. Though it is quite unlikely but not impossible that in a given case concerning removal from service of an industiral workman an industrial dispute within the meaning of section 2-A does not come into existance at all and what comes into existance is only an industrial dispute within the meaning of section 2 (K) of the Act. That situation may arise when there is no overt act on the part of the concerned workman raising any differnce, demand or dispute with the management and the only demand, difference or dispute which is raised with the management relating to his removal from service comes from the union. In such a situation if the union backs out of the dispute or settles the dispute with the management, the position may be somewhat different but the facts and circumstances of this case do not require me to make any conclusive pronouncement in that regard.

14. Now coming to the decisions relied upon by Mr. Das, it is to be noted that the supreme court decision in the case of *Ram prasad Vishwakarma vrs. Chairman, Industrial Tribunal, Patna and other*[1] was rendered when there was no section 2-A in the Act and, thus, it is of no help to the petitioner. The position in the Division Bench decision of this court in the case of *Eastern Mangnize & Minerals Limited, Shivsagar vrs. The In dustrial Tribunal (Central),*

1. (1961) A.I.R. (S.C.) 857

Dhanbad [1] was the same, that is to say, the decision was rendered when there was no section 2-A. This decision also, therefore, has no application to this case.

15. The position is, however, different in the second division Bench decision of this court in the case of *Rohtas Industries Limited* vrs. *Ghanshyam Das Premi and others* [2], as this decision does not fail to take in to consideration section 2-A of the Act. Mr. Das places considerable reliance on this decision and at first glance it indeed appears to support him. On a deeper examination, however, it is to be noted that while taking in to consideration the introduction of section 2-A of the Act, Their Lordships did make a qualification in relation to an industrial dispute falling within the meaning of section 2-A and made the following observations:

7. Section 2A (in serted by Act 35 of 1965) of the Industrial Disputes Act however has introduced a fiction. It envisages that a dispute and difference between individual workman and his employer may also give rise to Industial Dispute without, intervention of the Union, if it relates to the workman's discharge, dismissal, retrenchment and termination.

Therefore where the grievance is under section 2A, or section 33A or for that matter under section 33 (c), the worker is a party to the proceeding in his own capacity and therefore has a right to be heard or repre-

1. (1968) 2 L.L.J. 817
2. (1988) P.L.J.R. 125

sented by a person of his choice under section 36 of the Act.

8. There an industrial dispute of collective nature is raised by the Union with the employer, resulting in a reference the workers as individual do not come into the picture. It is an adjudication between the Management and the union. *The question might be little different if the industrial dispute would have been raised both by the union and individual members as envisaged under section 2A of the Act.*"

(emphasis added)

From the above observations, it is clear that in a case where the controversy referred for adjudication before a labour court/ Industrial tribunal qualifies as an industrial dispute within the meaning of section 2-A, the concerned workman has a right to be a party to the proceeding in his own capacity and has a right to be heard and, therefore, a settlement of such a dispute between the union and the management will not deprive him of his right and will not bring the industiral dispute to an end.

16. I find my view fully supported by a decision of the Delhi High court reported in 1975 L.I.C. 702. The Delhi decision after considering at some length this aspect of the matter held as follows :

"After the incorporation of section 2-A the necessary

balance between the importance of collective bargaining and the right of a party concerned to have a fair hearing could only be established if in case in which an individual dispute has been raised without it having to be sponsored by the union the right of individual concered to change his representative any time he likes was accepted. The workman himself can now raise an industrial dispute, the dispute relating to discharge, termination of service. The workman now is not dependant on the union or on a number of workmen for converting his dispute into industrial dispute. Statute gives him the right to raise such a dispute himself. In such circumstances, it would not be appropriate to seek to apply the rule laid down in Ram prasad Vishwakarma's case (1968) 2 "Lab L J" 817 = (1968 "Lab I.C. 1430) (Pat) and to suggest that even in the case of dispute regarding termination of services of the concerned workman, the union continued be supreme even to the extent of entering into a settlement with the management concerning the workman against his consent and in opposition to his wishes. To read such untrammelled power to the union would run directly in conflict with the object of section 2-A."

Up to now, I had been examining as an abstract proposition the question whether reference must necesarily come to an end with the union entering into a settlement with the management, though the dispute under adjudication also qualifies as an industrial dispute within the meaning of section 2-A; and I have given my

answer in the negative.

17. The next question that remains to be considered is as to whether in the given facts and circumstances an industrial dispute within the meaning of section 2-A came in to existance or not.

18. Mr. Das, learned counsel appearing on behalf of the petitioner strenuously argued that the concerned workmen never raised an industrial dispute with the management in regard to his removal from service and the only dispute that came into being was by means of the demand letter sent by the union as contained in Annexure 3.

19. Mr. K.N. Gupta, learned counsel appearing on behalf of the concerned workmen, on the other hand, has relied upon a decision reported in 1978 L.I.C. 1531. In this decision a division Bench of Madhya Pradesh High Court held that though no formal demand was raised by the dismissed workmen but the circumstance that the workman were dismissed in face of their opposition in the domestic enquiry would give rise to an industrial dispute within the meaning of section 2-A of the Act.

20. I am not required to go to such length, for in the facts and circums tances of this case I have no hesitation in finding that an industrial dispute within the meaning of section 2-A had definitely come into being at the instance of the concerned workmen. It is to be noted that section 2-A ays :

"any dispute or difference connected with or arising out of such discharge, dismissal, retrenchment or termination shall be deemed to be industrial dispute."

Now, in his letter addressed to the personnel officer of the company, the workman had asked for the reasons of his removal from service and characterised the action of the management as inspired by malafide. It has been also noted that the demand letter sent by the union was also jointly signed by the concened workman. These two documents leave no room for doubt that there had been a dispute between the concened workman and his employer on a matter connected with and arising out of his removal from service. This was more than adequate to constitute an industrial dispute within the meaning of section 2-A of the Act and this dispute remains very much in existence notwithstanding the settlement entered into between the union and the management.

21. Mr. Das, learned counsel for the petitioner then pointed out that the reference notification was in respect of an industrial dispute between the management and their workman represented by Kalyanpur Mazdoor panchayat and this indicated that the industrial dispute under reference was not under section 2-A of the Act. To my mind, nothing hangs on this description. The description might have been correct when the reference was made as at that time there was indeed a dispute within the meaning of section 2 (K) also. But I have already held that if the dispute within the meaning of

section 2 (K) ceases to exist, it will not also bring to an end the industrial dispute within the meaning of section 2-A. It is, thus, clear that an industrial dispute within the meaning of section 2-A remains very much in existence in respect of which there is a reference before the Labour Court which has to be adjudicated on its merits.

22. I, therefore, find no merit in this applicaltion and the same is hereby dismissed.

23. Before parting with the records of this case, I must take note that the removal of the concerned workman took place in the Year, 1975. The reference was made on 23.7.1977 and the impugned order was passed on 7.11.1981. It is unfortunate that this case has remained pending before this court now for more than 11 years greatly delaying the adjudication of the reference before the Labour Court. I accordingly by direct the Labour court to take up this reference on a priority basis. The hearing of the reference shall proceed on a day to day basis so that the award is made within three months from the date of production/receipt of a copy of this order.

S.P.J. Application dismissed

MISCELLANEOUS CRIMINAL

Before Bisheshwar Prasad Singh, J.

1993

January,23

Chandra Mauli Singh and another. *

V.

The State of Bihar and another.

Code of Criminal Procedure, 1973 (Central Act No. II of 1974), section 319, scope and applicability of . . . . persons named in first information report but not sent up for trial by the police . . . . Whether can be treated as accused in the case so that section 319 Cr. P.C. will not be applicable. . . . . protest petition filed by the informant against those persons and treated as complaint dismissed . . . .effect of . . . . . order summoning such persons for trial under section 319 Cr. P.C. whether liable to be set aside.

Where, though the petitioners were named in the first information report, the police after investigation did not submit charge sheet against them and thereafter on a protest petition filed by the informant for taking cognizence against the petitioner as well the trial court rejected the protest petition and at the trial, after the prosecution witnesses had been examined the court found that there were serious allegations against the petitioners and their complicity in the offence was sup-

* Cr. Misc. No. 11654 of 1992. Against the order dated 4.5.1992, passed by the Judicial Magistrate, Ist Class, Gaya, in C.R. Case No. 2235/84, Dr. No. 165/92.

ported by evidence examined at the trial, and the trial court exercising its jurisdiction under section 319 of the Code of Criminal Procedure summoned the petitioners for trial ;

Held, firstly, that (i) the petitioners came within the category of the words "any person not being the accused" occurring in section 319 of the Code of Criminal Procedure and thus the court had ample power under section 319 Cr. p.c., and secondly (ii) that the dismissal of the protest petition filed by the informant and treated as a complaint did not deter the court from exercising its power under section 319 Cr. p.c. Dismissal of a complaint, even before summoning of the accused, does not amount to a discharge. Moreover such a person is not the accused in the case initiated on police report. Further the case of such a person does not stand on a higher footing than that of a person against whom a summons was issued, but later quashed by the High Court. The mere fact that the proceedings have been quashed against any person will not prevent the court from exercising its discretion under section 319 of the Code if it is fully satisfied that a case for taking cognizance against him has been made out on the additional evidence led before it.

Held, therefore, that the impugned order cannot be set aside on the ground that the court had no jurisdiction to pass that order under section 319 of the Code of

Criminal Procedure on the basis that persons named in the first information report and not sent up for trial by the police must be treated as accused in the case or on the ground that a complaint against them was dismissed.

Joginder Singh v. State of Punjab [1] and Municipal *Corporation, Delhi v. Ram Kishan Rohatagi and ors.*[2] . . relied on.

Sohan Lal and ors v. State of Rajasthan [3] distinguished Raghubansh Dubey v. the State of Bihar [s] *referred to*

Application by the petitioners.

The facts of the case material to thes report are set out in the judgment of B.P. Singh, J

Mr. Shakil Ahamad Khan, Sr. Advo. Md. Mushtaque Alam, Advocates for the petitioners

Mr. A.K. Samaiyar Advocate, Addll. P.P. for the State

B.P. Singh, J :- The instant application under section 452 of the Code of Criminal Procedure has been filled by Chandra Mauli Singh and Lachhu Singh impugning the order of the Judicial Magistrate, Ist Class, Gaya, in C.R. No. 2235 of 1984, tr. No. 165 of 1992 dated 4.5. 1992, where by the learned Magistrate has summoned

1. (1979) A.I.R. (S.C.)339
2. (1933) A.I.R. (S.C.) 67
3. (1990) A.I.R. (S.C.) 2158.
4 (1967) A.I.R. (S.C.) 1167.

the petitioners for trial along with the other accused persons who were already facing trial on the basis of a first information report lodged on 20th.August 1984 by one Parmanand Singh Sharma. The only submission urged before me in support of the application is that the impugned order is illegal, and the learned Magistrate had no jurisdiction under section 319 of the Code of Criminal Procedure to summon the petitioners for trial because the petitioners were accused in the case, and the aforesaid provision applies to "any person not being the accused. The sole question which therefore falls for determination in the instant case is as to whether the petitioners can be said to be accused in the case so that the provision of section 319 Cr. P.C. will not apply to them.

2. The case of the petitioners is that a first information report was lodged on 20.8.1994 at about 6.45pm by one Parmanand Singh Sharma at the Atri Police Station alleging that when he was returning to his residence after making payment to Maksudan Ram, he saw the petitioners along with Saryu Singh standing near their door. Chandra Mauli Singh was armed with a sword while Lachhu Singh was armed with lathi. All of them surrounded him and assaulted him as a result of which he felldown. He had sustained several injuries.

3. On the basis of the report the case was investigated by the police and ultimately on 10th of April 1985

charge-sheet was submitted only against Saryu Singh and not against the petitioners, because it was found by the investigating agency that the petitioners had been falsely implicated in the case. Consequently the petitioners were not sent up for trial by the police. The final form submitted by the police was accepted by the learned Magistrate. Thereafter the learned Magistrate considered the protest petition filed before it praying that cognizance be taken against the petitioners as well. The protest petition was rejected. Several witnesses were thereafter examined at the trial. It appears from the record that the informant had prayed before the trial court that the petitioners as well should be summoned for trial. That application was disposed of on 9.3.1988 with an observation that it may be pressed after closing of the prosecution evidence. Another application for the same purpose was again moved on 15.5.1989 but again by order dated 2nd July 1990 the learned Magistrate rejected the application observing that the prosecution evidence was still continuing, and in terms of the earlier order dated 9.3.1989 it should be pressed after closing of the prosecution evidence. Thereafter an application was again moved after the prosecution closed its evidence. By the impugned order dated 4.5.1992 the learned Magistrate after appreciation of the evidence which had come on record, came to the conclusion that there was sufficient meterial against the petitioners since all the witnesses supported the case against them. He,

therefore summoned the petitioners for trial.

4. As observed earlier this order has been impugned on the ground that a person may be summoned for trial under section 319 Cr. P.C. only if he is not an accused in the case. In the instant case it was submitted that the petitioners were named in the first information report, yet after investigation the police did not send then up for trial as it was satisfied that the petitioners have been falsely implicated, Secondly it was submitted that the protest petition of the informant which was treated as a complaint was also rejected since the court did not find any substance in the said petition. It was therefore, submitted that despite the fact that there was an accusation against the petitioners, the court did not choose to proceed against them either in exercise of its power under section 173 Cr. P.C. or on the basis of the complaint lodged by the informent. Consequently the court having applied its mind to the facts of the case held that there was no case against them even though they were accused of an offence. The power under section 319 Cr. P.C. could not be exercised as against them not only for the reason that they were accused in the case, but also for the reason that the court had applied its mind to the accusation made against them and had found no substance in them. The court, therefore, found that the accusation against them was false, and such finding cannot be ignored in exercise of the power vested under section 319 Cr. P.C. Strong reliance was placed upon a judge-

ment of the Supreme Court reported in A I R 1990 SC, 2158.

5. The first question which arises for consideration is as to whether the petitioners can be said to be accused in the case so that the court had no power to proceed against them under section 319 Cr P.C. the relevant part of section 319 Cr. P.C. provides as follows

> 319 (1) "Where, in the course of any inquiry into, or trial of, an offence, it appears from the evidence that any person not being the accused has committed any offence for which such person could be tried together with the accused, the Court may proceed against such person for the offence which he appears to have committed."

It is, therefore, obvious that in the course of the trial if it appears from the evidence that any person, not the accused, has committed any offence for which such person could be tried together with the other accused the court may proceed against such person for the offence which he appears to have committed. The crucial words in the section are "any person not being the accused". It was urged on behalf of the State that in the facts of this case it could not be said that the petitioners were accused in the case, because at no stage had the court summoned them for trial.

6. In the case of *Raghubansh Dubey* Vs. *The State of Bihar* [1] the name of the appeillant was mentioned in the first information report but after investigation the appellant was not sent up for trial because the defence

1. (1967) A.I.R (S.C.) 1167

of ali bi set up by him was found to be true by the investigating officer. The learned Magistrate took cognizance of offence under section 149, 302, 201, I.P.C. and transferred the case to the court of a Magistrate for inquiry under Chapter XVIII of the Code of Criminal Procedure while discharging the accused not sent up for trial. Before the trial Magistrate, after some witnesses were examined, the informant pressed his application for summoning the appellant as well for trial. The trial Magistrate, having regard to the evidence produced before him, summoned the appellant for trial. The order summoning him, for trial was upheld by the sessions judge as well as by the High Court in revision. Before the Supreme court it was urged that since the Sub-divisional Magistrate by his order dated 5th of April 1961 discharged the appellant, the same became final and the appellant could not be summoned for trial. The submission was rejected holding that there was no question of discharge, when the appellant was not sent up upon the charge sheet submitted by the police. Though the case arose under the old Code, there is no significant change in the law except some minor changes introduced to clog the loop holes in the light of the report of the Law Commission. It is, therefore, apparent that the decision in *Raghubansh Dubey's* case is an authority for the proposition that by not summoning an accused for trial, who has not been sent up by the police for such trial, the court does not discharge an accused. In such a case

if the material on record justifies the summoning of such a person for trial, it is open to the court to summon him for trial.

7. In the case of *Joginder Singh Vs. State of Punjab,*[1] the expression occurring in section 319 fell for consideration of the court. In that case though the first information report directly involved five accused persons, the police after investigation submitted a charge-sheet only against three of them, excluding the two appellants before the "Supreme Court. Thus only there accused persons were committed to the Court of Sessions and against them charges were framed by the learned Additional Sessions Judge. At the trial evidence of two witnesses was recorded during the course of which both the witnesses indicated the appellants, namely Joginder Singh and Ram Sanehi. At the instance of the informant the public prosecutor moved the application before the learned additional sessions judge for summoning and trying Joginder Singh and Ram Sanehi along with the three accused who were already facing their trial. The application was allowed and the trial Court directed that the attendance of the two appellants be procured and further that they should stand their trial together with the three accused. A revision before the High Court failed and thereafter the matter was taken the Supreme Court by special leave. One of the submisslons urged before the

1. (1979) A.I.R. (S.C.) 339

Supreme Court was that the phrase "any person not being the accused" occuring in the section excludes from its operation an accused who had been released by the police under section 169 of the Code, and had been shown in column no. 2 of the chargesheet. The submission was clearly negatived by the Supreme Court in the foliowing words :-

"As regrards the contention that the pharse "any person not being the accused" occuring in section 319 excludes from its operation an accused who has been released by the police under section 169 of the Code and has been shown in column no.2 of the chargesheet, the contention has merely to be stated to be rejected. The said expression clearly covers any person who is not being tried already by the court and the very purpose of enacting such a provision like section 319 (1) clearly shows that even persons who have been dropped by the police during investigation but against whom evidence showing their involvement in theoffence comes before the Criminal Court are included in the said expression."

8. The same question again came up for consideration before the Supreme Court in *Municipal Corporation Delhi Vs. Ram Kishan Rahatagi and others* [1]. The court referred to the ratio in *Joginder Singh's case* and held that there are ample provisions in the Code of Criminal

1. (1983) A.I.R. (S.C.) 67

Procedure 1973 in which the court can take cognizance against the persons who have not been made accused and try them in the same manner along with the other accused. Section 319 gives ample powers to court to take cognizance and add any person not being the accused before it, and try him alongwith other accused. If the prosecution can at any stage produce evidence which satisfies the court that the other accused, or those who have not been arrayed as accused against whom proceedings have been quashed, have also committed the offence, the court can take cognizance against them and try them along with the other accused. The power conferred was an extraordinary power and should be used very sparingly and only if compelling reasons exist for taking cognizance against the other person against whom action has not been taken.

9. I shall now refer to the case of *Sohan Lal and others* Vs. *State of Rajsthan* [1]. The facts of the case were that a report was lodged at the police station alleging that the appellants before the Supreme Court and two others had pelted stones at the informant's house causing damage to it and that three female members of the family were injured. The police after completion of investigation filed chargesheet under various sections namely sections 147, 323, 325, 336 and 417 I.P.C. The learned Magistrate after taking cognizance and

1. (1990) A I R (S.C) 2158

after hearing the arguments was pleased to discharge two of the accused persons namely Bijaya Bai and Jiya Bai of all the charges levelled against them. Against the remaining three accused he farmed charge only under section 427 I.P.C. on the basis of the site inspection and injury report. An application was filled by the Public Prosecutor under section 216 Cr. P.C. praying that the accused should also be charged under section 147, 325 and 336 I.P.C. having regard to the entire evidence including the medical avidence. The Prosecution examined four witnesses after the application was filed and thereafter the learned magistrate was pleased to take cognizance of offence under section 147, 427, 336, 323 and 325 I.P.C. and was further pleased to summon for trial the two female accused and 2 others. The aforesaid order was challenged by way of criminal revision before the High Court which was dismissed. Against that order an appeal was referred to the Supreme Court. The Court Prefered to the various judgements of the Supreme Court on the subject, including the judgements in Joginder Singh and Municipal Corporation Delhi to which I have referred earlier. The court distinguished those cases and held that those accused persons who had been discharged, were discharged under the provision of section 245 of the Code of Criminal Procedure which was included in Chapter XIX of the Code and dealt with the trial of warrant cases by the Magistrate. It was held that the provisions of section 319 had to be read in

consonance with the provisions of section 398 of the Code. Once a person is found to be the accused in the case he goes out of the reach of section 319. Whether he can be dealt with under any other provision of the Code, is a different question. In the case of the accused who had begen discharged under the relevant provisions of the Code, the nature of finality to such order had the resultant protection of the persons discharged, subject to the revision under section 398 of the Code, may not be lost sight of. Thus the ratio of Sohan Lal's case is only to the effect that a person validly discharged under section 245 Cr. P.C. cannot be again summoned for trial under section 319 Cr. p.c.

10. So for the facts of the present case are concerned, the petitioners were never discharged by the court under the provisions of section 245 Cr. P.C. In the first information report, the police after investigation did not submit charge sheet against them. At the trial, after the prosecution witnesses had been examined, the court found that there were serious allegations against the petitioners and their complicity in the offence was supported by evidence examined at the trial. In these circumrtances, the trial court exercising its jurisdiction under section 319 Cr. p.c. summoned the petitioners for trial. In my view, the ratio of Sohan Lal's case does not apply to the facts of this case. The ratio of Joginder Singh's case squarely applied to the facts of case in certain

case,In the instant caseas well the petitioners were not sent up by the police, and only when the evidence examined at the trial made it appear to the court that the petitioners had committed the offence for which they should be tried, did the court summon them for trial. Clearly the petitioners come within the category of "any person not being the accused".

11. The second submission proceeds on the basis that a protest petition filed by the informant was treated as a complaint and dismissed. No such order was shown to me, but I will proceed on the basis that such a complaint was rejected. The fact that a protest petition was filed by the informant which was treated as a complaint and then dismissed, will also not advance the case of the petitioners, Dismissal of a complaint, even before summoning of the accused, does not amount to a discharge. Moreover such a persons is not the accused in the case initiated on police report. Further the case of such a person does not stand on a higher footing than that of a person against whom a summon was issued, but later quashed by the High Court. In Municipal Corporation of Delhi (supra) the Supreme Court clearly held that the mere fact that the proceedings have been quashed against any person will not prevent the court from exercising its discretion under section 319 of the Code if it is fully satisfied that a case for taking cog-

nizance against him has been made out on the additional evidence led before it.

12. The impugned order, therefore, cannot be assailed on the ground that the court had no jurisdiction to pass that order under section 319 Cr. p.c. on the basis that persons named in the first information report and not sent up for trial by the police must be treated as accused in the case or on the ground that a complaint against them was dismissed. This application has, therefore, no merit and the same is, therefore, dismissed.

S.P.J. Application dismissed.

CIVIL WRIT JURISDICTION

Before S.B.Sinha & G.C. Bharuka, JJ.

1993.

February, 12.

Md. Asgar Ali Khan and ors.*

V.

The State of Bihar & ors.

Reservation in Admission in Post Graduate Medical Course —State, whether has the right to reserve seats for scheduled castes, scheduled tribes and backward classes—- Constitution of India, Articles 14 and 15 (1), (4), scope and applicablity of- reservation, whether violative of Articles 14 and 15(1).

Held, that the policy of the state of Bihar to reserve seats for scheduled castes, scheduled tribes and backword classes in post- graduate medical course is not unconstitutional and violative of Articles 14 and 15(1) of the Constitution of India. Although merit alone should the criteria for admission in post-graduate as also super-speciality course, but Article 15(4) of the Constitution of India justifies such reservation by legislation or by executive instructions.

case laws discussed.

Application by the petitioners.

1. Civil Writ Jurissdiction Case No. 5641 of 1992. In the matter of an application under Articles 226 and 227 of the Constitution of India.

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

M/s Banwari Sharma and Mritunjay Jha. for the petitioner

Mr. P.K. Sahi G.P.7. for the State

S.B. Sinha & G.C. Bharuka, JJ :— In this application the petitioners have prayed for a declaration that the provision for reservation contained in paragraph 5 of the prospectus of the post Graduate Medical Admission Test 1992 is violative of Articles 14 and 15(1) of the Constitution of India.

2. The fact of the matter lies in a very narrow compass.

3. The State of Bihar through the Controller of Examination of Health Services Bihar Patna issued a prospectus for post Graduate Medical Admission Test, 1992 for the students intending to be admitted inthe post graduate degree and diploma course in various colleges mentioned therein, which is contained in Annexure-1 to the writ application.

4. Caluse (V) of the said prospectus provides for reservation of seats for various categories of candidates as per the decision of the Goverment. The reservation of seats for the reserved categories of candidates is in the following terms :-

"Scheduled Caste - 14 %

Scheduled Tribe - 10 %

Extremely Backward Class - 14 %

Backward Class - 9 %

Ladies - 3 %

5. The petitioner has questioned the constitutionality of the aforementioned reservation policy of the State of Bihar interalia on the ground that the same is violative of the directives of the Medical Council of India as well as Article 15(1) of the Constitution of India. It has further been contended that sofar as Post Graduate Medical Education is concerned , as the same is imparted for holding higher posts in Neuro Surgery, and other super speciality posts, the criteria for admission in the said course should only be on the basis of marks obtained at the entrance examination.

6. Mr. Banwari Sharma, learned counsel appearing on behalf of the petitioner has drawn our attention to Article 15 as also Articles 45, 46, 338, 341 and Article 342 of the Constitution of India and submitted that the said provisions had been made is the Constitution for granting facilities to the members of the scheduled caste and scheduled tribe in various fields and thus in the field of higher education in medicine/surgery, no reservation of seats for the members of scheduled caste, scheduled tribe and backward Classess can be made by the State

of Bihar.

7. The learned counsel submitted that the scheduled castes and scheduled Tribes had been identified under the orders made under the Constitution but determination of backward class was not contemplated by the constitution makers as would be evident from paragraph 3 of Article 338 of the Constitution of Inida.

8. It has also been submitted that all backward classes had to be assimilated with the scheduled castes and scheduled tribes and no third category could be carved out.

9. The learned counsel in support of his contention placed strong reliance upon *Gujarat University Vs. Shri Krishna* reported in 1963 S.C. 703, *Dr. Jagdish Saran V. Union of India* reported in 1930 S.C. 820, *Pradeep Jain Vs. Union of India* reported in 1984 S.C. 1420, K.C. *Vasanth Kumar Vs. State of Karnataka* reported in 1985 S.C. 1495, *P. Rajendra Vs. State of Madras* reported in 1938 S.C. 1012 and *Surendra Kumar Vs. State of Bihar* and ors. reported in 1985 S.C. 87.

10. Mr. P. K. Sahi, the learned Govenrnment Pleader No. 7 on the other hand submitted that the Supreme Court in no case has held that no reservation can be provided for admission in post graduate degrees and diploma courses.

11. According to the learned counsel as the petitioner

also concedes that a reservation policy can be adopted by the State in respect of under graduate medical courses and thus there cannot be any reason why the policy of reservation which has been introduced would be held to be invalid.

12. The learned counsel further submitted that similar reservation policies of the Central Government as also the State Government has been tested by the Supreme court on many occassions and their constitutionality have been upheld on the touch - tone of Articles 14 and 15 the Constitution of India.

The learned counsel submitted that in this view of the matter, the Medical Council of India cannot be said to have any authority whatsoever to lay down any guideline for weeding out reservation of seats for scheduled castes, scheduled tribes and backward class candidates.

13. The question which, thus arises for consideration is as to whether the policy decision of the State in the matter of reservations of seats for scheduled castes, scheduled tribes and backward class candidates in Engineering and Medical education is permissible in law ?

14. Article 15(4) of the Constitution reads as follows

> "Nothing in this article or in clause(2) of the Article 29 shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or the scheduled castes and the scheduled

tribes.

15. It cannot be disputed that the aforementioned provision justifies reservation of seats for scheduled castes, scheduled tribes and socially and educationally backward class of citizens.

16. In this writ application it has not been contended that the criteria adopted by the State of Bihar in classifying backward class category I and category II are illegal or they do not satisfy the requirements of law.

What is, however, contended by the learned counsel appearing on behalf of the peitioner is that admission of students in M.D. and super-speciality courses should be based strictly on merits of the respective candidates and in relation thereto, no reservation in terms of Article 15(4) of the Constitution of India is permissible.

17. Clause 4 of Article 15 was inserted by reason of Constitution (first Amendment) Act, 1951 in order to nullity the decision of the Supreme Court of India in *State of Madras. Vs. Champs Kaina* reported in AIR 1951 S.C. 226.

18. Article 15(4) authorises the State to make any specific provision for the advancement of the backward classes of the citizens the object being to make a special provision to carry out the directive principles enshrined under Article 46 of the Constitution. The said provision read with Article 29 (2), 46 and 342 form a group of articles making special provisions for the advancement

of any socially and educational backward classes of citizens or fo. scheduled castes and scheduled tribes.

19. In *Balaji Vs. State of Mysore* reported in AIR 1963 S.C. 649 it has been held that political freedom and even fundamental rights have very litte meaning and significance for the backward classes as also the scheduled castes and scheduled tribes unless the backwardness from which they suffer are immediately redressed.

20. The power of the court to interfere with an executive order of the State is limited. The court may interfere interalia in a case where reservation of the backward classes is so excessive that the national interest is likely to be jeopardised by overlooking the consideration of merits and efficiency, but that is not the case of the petitioner herein.

21. However, Mr. Sharma has placed strong reliance upon certain observation made by a Division Bench of the Supreme Court of India in *Dr. Jagdish Saran & others Vs. Union of India and others* reported in AIR 1980 S.C. 820. In that for the students- applicants who had taken their M.B.B.S. degrees from the University of Delhi.The question as to whether there can be a University-wise reservation fell for consideration and in that context the Supreme Court held :-

"A caveat or two may be sounded even in this approach lest exception should consume the rule. The first caution is that reservation must be kept in check by

the demands of competence. *You cannot tend the shelter of reservation where minimum qualifications are absent. Similarly, all the best talent cannot be completely excluded by wholesale reservation.* So, certain percentage which may be availabe, must be kept open for meritorious performance regardless of university, state and the like. Complete exclusion of the rest of the country for the sake of a province, *hopefully some dalit talent* total scrifice of excellence at the alter of equalisation when the Constitution mandate for everyone equality before the equal protection of the law-may be fatal folly, self-defeating educational technology and anti national if made a routine rule of state policy. *A fair preference, a reasonable reservation, a just adjustment of the prior needs and real potential of the weak with the partial recognation of the presence of competitive merit-such is the dynamics of social justice which animates the three eqalitatrian articles of the Constitution.*

Flowing from the same stream of equalism is another limitation, The basic medical needs of a region or the preferential push justified for a handicapped group cannot prevail in the same measure at the highest scales of speciality where the best skill or talent, must be hand-picked by selecting according to capability. At the level of PH. D. M.D. or levels of higher proficiency losing one great scientist or technologist in the making is a national loss, the considerations we have expanded upon as important lose their potency. Here equality measured by

matching excellence, has more meaning and cannot be diluted much without great risk. The Indian Medical Council has rightly emphasised that playing with merit for pampering local feeling will boomerang Midgetry, where summitry is the desideratum, is a dangerous art. *We may here extract the Indian Medical Council's recommendation,* which may not be the last word in social wisdom but is worthy of consideration :.

Students for post-graduate training should be selected strictly on merit judged on the basis of academic record in the undergraduate course. All selection for post-graduate studies should be conducted by the Universities.

However, the Apex Court also observed :-

"We hasten to keep aloof from reservations for backward classes and scheduled castes and tribes because the Constitution had assigned a special place for that factor and they mirror problems of inherited injustcies demanding social surgery which is applied thoughtlessly in other situations may be a remedy which accentuates the malady."

Pathak,J (as the learned Chief Justice then was) who delivered a separate judgment also observed :-

"No question of backword classes, scheduled castes and scheduled tribes is involved because the criteria appertaining to reservation concerning them are, it seems to me, not relevant at all."

22. In that case the Supreme Court did not strike down the rule reserving 70% of seats for the students who had passed from Delhi University. However, it was observed that normally the recommendations of the Medical Council of India should be adhered to.

23. *Jagdish Saran's case*, thus is not an authority on interpretation of clause 4 of Article 15 of the Constitution vis- a-vis clause 1 thereto.

24. Saran was followed by *Shagwati J* (as the learned Chief Justice then was), in Pradip Jain Vs. Union of India reported in AIR 1984 S.C. 1420.

In paragraphs 23, 39, 44 of the Pradip Jain's case, the judgment of Krishna Iyer, J in *Jugdish Saran's* case had been referred to and it was held :-

"We are therofore of the view that so far as admissions to post- graduate courses such as M.S.M.D. and the like are concerned, it would be eminently desirable not to provide for any reservation based on *residence requirement within the State or on institutional preference*. But having regard to broader considerations of equality opportunity an Institutional continuity in education which has its own importance and value, we would direct that though residence requirement within the state shall not be a ground for reservation in admissions to post graduate course, a certain percentase of seats may in the present circumstnaces be reserved on the basis of institutional preference in the sence that a student who has passed MBBS course from medical

college or university, may be given preferance for admission to the post-graduate course in the same medical college or university but such reservation on the basis of institutional preference should not in any event exceed 50% of the total number of open seats available for admission to the post graduate course. This outer limit which we are fixing will also be subject to revision on the lower side by the Indian Medical Council in the same manner as directed by us in the case of admission to the MBBS Course. But even, in regard to admissions to the post graduate course, we would direct that so far as super specialties such as neuro-surgery and cardiology are concerned, there should be no reservation at all even on the basis of institutional preference and admissions should be granted purely on merit on all India basis."

(Emphasis supplied)

25. In *Pradip Jain's* case, the question which fell for consideration was as to whether on the basis of domicile or residence in a particular state for a specified number of years any reservation can be made irrespective of merit. It is also pertinent to note that in a recent decision in Miss Mohini Jain Vs. State of Karnataka and others reported in 1992 (3) S.C.C. 666, the Supreme Court while striking down the practice of certain Medical Colleges to charge capitation fees from the students held that merit alone should be the criteria.

26. However, as noticed hereinbefore, none of these cases, the question which arose therein was considered in the context of Article 15(4) of the Constitution of India.

27. Members of scheduled castes and scheduled tribes and the socially and educationally backward classes have occupied a special position in our Constitution. They had to endure great ill-treatment for centuries and the reversed discrimination contemplated by clause (4) of Article 15 of the Constitution of India is justified not only because of their backwardness, but also on the ground that such discrimination is meant to right great historic wrong.

28. In *M.P. Rajappan* Vs. *State of Kerala* reported in AIR 1980 S.C 838 the claim by the petitioner was that she being belonging to Kalikut district which is a backward district should be given the same benefit which had been given to the students of Kalikut University. It was held that the reservation was University-wise, Krishna Iyer,J for himself and Pathak,J (as his Lordship then was) held : Once we hold that Universitywise allocation of seats is valid, the misfortune of the petitioner was damnem sine injuria (See page 839).

29. In *Surendra Kumar* Vs. *State of Bihar* reported in AIR 1985 S.C. 87 seats reserved for candidates of Bihar State for admission to medical colleges in State of

Jammu & Kashmir was struck down as nomination of candidates was to be made by Government on the basis of selection by Chief Minister without any guideline whai soever. In the said decision the Supreme court relied upon its earlier decisions reported in AIR 1983 S.C. 1235 and AIR 1984 S.C. 322.

These decisions have also thus no application to the facts and circumstances of the present case.

30. In *K.C. Vasanth Kumar* V. *State of Karnataka* reported in AIR 1985 s.c. 1495, the Supreme Court expressed its opinion on the issue of reservation which shall serve as a guideline to the Commission which the Government of Karnataka proposed for appointment for examining the question of affording better employment and education opportunities to Scheduled Castes, Scheduled Tribes and other backward classes. The Supreme Court upon consideration of various decisions and in particular Balajee's case (Supra) and Thomas's case reported in AIR 1976 S.C. 490 held :-

"While we agree that competitive skill is relevant in higher posts, *we do not think it is necessary* to be apologetic about reservations in posts, higher or *lower, so long as the minimum requirements are* satisfied. On the other hand, we have to be apologetic that there still exists a need for reservation. Earlier, we, extracted a passage from Tawney's Equality where he be moaned how degrading it was for humanity to make much of their

intellectual and moral superiority to each other. Krishna Iyer J once again emphasised that Art. 16 (4) was one fact of the multifaceted character of the central concept of equality. One of us (Chinnappa Reddy, in the same case explained how necessary it was to translate the constitutional guarantees given to the Scheduled Castes, Scheduled Tribes and other backward classes into reality by necessary State action to protect and nurture those classes of citizens so as to enable them to shake off the heart-crushing burden of a thousand years' . . . . of deprivation from their shoulders and to claim a fair proportion of participation in the administration."

31. In *Rajendran* Vs. *State of Madras* reported in AIR 1968 S.C. 1012, it was held that the allocation of seats in the medical colleges on the basis of district to which a candidate belongs was not warranted by Article 15 (4) but the Court observed that persons belonging to a particular caste were also a class of citizens and if the caste as a whole is socially and educationally backward, reservation can be made in favour of such castes under Article 15 (4) of the Constitution.

32. It is, therefore, clear that although there had been certain observations in certain decisions that merit alone should be the criteria for admission in Post Graduate as also super-speciality course, but in view of Article 15 (4) of the Constitution of India, the executive order reserving some seats for socially and educationally backward clas-

ses cannot be struck down only on the ground that they have not competed in merits with the general candidates. Even any direction to that effect by the Medical Council of India would be of no avail unless the determination of such socially and educationally backward classes by the State becomes vulnerable as violative of Articles 14 or 15 of the Constitution of India.

In this connection the Pharaselogy used in the Article 15 (4) requires our notice which is of great significance i.e. nothing stands in the way of the State from making any special provision for the classes mentioned therein, although there is no constitutional compulsions therefor.

33. We may, however, observe that even in *Jagdish's case Krishna Iyer* J, asked the question what is merit or excellence ? and answered it thus :-

"Excellence is composite and the heart and its sensitivity are precious in the scale of educational values as the head and its creativity and social medicine for the common people is more relevant than peak performace in freak cases."

It was further observed :-

"We are aware that measurement of merit is difficult and the methods now in vogue leave so much to be desired that screening by marks as measure of merit may even be stark superstition."

Proceeding further the learned Judge observed :-

"The heart was as much a factor as the head in assessing the social value of a member of the profession.

Dr. Samuel Johnson put this thought with telling effect when he said : want of tenderness is want of parts and is no less a proof of stupidity than of depravity."

Thus the meaning of 'merit' may vary in different situations.

34. While observing that prima facie 'equal marks must have equal chances, Krishan Iyer J, however, himself pointed out that in respect of backward region, the rule may be relaxed holding :-

"But it must be remembered that exceptions cannot overrule the rule itself by running riot or by making reservation as a matter of course, in every university and every course. For instance, you cannot wholly exclude meritorious candidates as that will promote sub-standard candidates and bring about a fall in medical competence, injurious, in the long run, to the very region. It is no blessing to inflict quacks and medical midgets on people by wholesale sacrifice of talent at the threshold. Nor can the very best be rejected from admission because that will be a national loss and the interests of no region can be higher than those of the nation. *So within these limitations, without going into excesses, there is room for play of the state's policy choices."*

35. It is, therefore, clear that the best talent cannot be completely excluded by wholesale reservation and a certain percentage which may be available must be kept open for meritorious perfomances regardless of

the University, the State and the like.

36. The decision in Pradeep jain's case was later on modified by the Supreme court in *Reita Nirankari.* Vs. *University of Delhi* (1984 s.c. 1569) and explained in *Dinesh Kumar* Vs. *Motilal Nehru College* (1985 S.C. 1050) and 1986 S.C. 1877.

In *Pradeep Jain's* case (Supra) it was held that in the matter of admission in medical college, merit can interalia be departed from in order to remove defacto inequality.

It was held :-

"We cannot, therefore, have arid equality which does not take into account the social and economic disabilities and inequalities from which large masses of people suffer in the country. Equality in law must produce real equality dejure equality must ultimately find its raison d'etre in de facto equality. The state must, therefore, resort to compensatory state action for the purpose of making people who are factually unequal in their wealth; education or social environment, equal in specified area. The State must to use again the words of Krishna Iyer J, in Jagdish Saron's case (AIR 1980 S.C. 820) (supra) weave those special facilities into the web of equality which, in an equitable setting, provide for the weak and promote their lavelling up so that in the long run, the community at large may enjoy a general measure of real equal opportunity. Equality is not negated or neglected where special

provisions are geared to the large goal of the disabled getting over their disablement consistently with the general good and individual merit. The scheme of admission to medical colleges may, therefore, depart form the principle of selection based on merit, where it is necessary to do so for the purpose of bringing about real equality of opportunity between those who are unequals."

37. In *State of U.P. Vs. Pradip Jain reported* in 1975 S.C.C. 267 reservation for candidates for village area and Uttard Khana division was held to be valid.

38. In *Dr. Shehelats Patnaik* Vs. the State of Orissa reported in 1992 (2) S.C.C. 26, weightage of a marks of 5% in favour of candidates who have done rural services for 5 years or more was suggested.

39. In the recent decision of the Supreme Court in *India Sahney and ors. Vs. Union of India* & ors reported in (992) 6 J.T. (S.C.) page 272, to which our attention has been drawn by shri Sharma, The constitutionality of Mandal report was considered on the touchtone of Article 16 and on Article 15(4) of the Constitution, was has no relevence to the fact of this case.

40. From the discussions made hereinbefore it is absolutely clear that the Supreme Court had not only recognised the reservation policy of the State which comes within the purview of Article 15(4) of the Constitution. But has also upheld reservation of seats within

reasonable limits University wise, Statewise, or districtwise.

It is, thus, clear that the State has the right whether by way of leglislation or excutive instruction to reserve certain percentage of seats for backward classes in terms of clause Article 15 of the Constitution of India. It has also power to reserve seats for other type of candidates so long it does not violate the constitutional guarantee of equality before law and equal protection before law as enshrined in Article 14.

41. We may however, observe that although at the time of admission the students belonging to socially and educationally backward classes may get some preference but they have to undergo the rigours of some standard of education set out by the Medical Council of India. They have to undergo the same course of training and will have to pass the examination held by the Universities.

42. For the reasons aforementioned, we hold that the policy of the State of Bihar to reserve seats for scheduled castes, scheduled tribes and backward classs in the matter of admission in post graduate medical course is not unconstitutional.

43. In the result, this application is dismissed but in the facts and circumstances of the case, there will be no order as to costs.

S.P.J. Application Dismissed

CIVIL WRIT JURISDICTION

Before S.B. Sinha & G.C. Bharuka, JJ.

1993

March,4

Surendra Kumar Singh. *

V.

The State of Bihar of others.

Bihar Non-Government Secondary Schools (Taking over of Management and Control) Act, 1981, (Bihar Act XXXIII of 1982), Section 3 (1) and (3), scope and applicability of and Government letter no. 832 dated 21-12-1982 issued by Education Commissioner, provisions of —- school recognised and taken over after 2-10-1980 —- teacher untrained on the date of taking over of his school and acquiring requisite qualification subsequently —- whether can claim a vested right of recognition of his service like the teachers of schools taken over on 2-10-1980.

Where the management and Control of a school was taken over after the cut off date namely, 2-10-1980 and a teacher though untrained at the time of such taking over has subsequently acquired the requisite qualification therefore his services were not taken over by the State Government and as such, aggrieved by the aforesaid

1. Civil Writ Jurisdiction Case No. 6654 of 1982 in the matter of an application under Articles 226 and 227 of the Cnstitution of India.

action of the State Government the petitioner filed the present writ petition ;

Held, that, the petitioner cannot claim that like the teachers of the schools taken over on 2-10-1980 the petitioner has also a vested right of recognition of his services even if he was untrained on the date of *taking over of his Schoool.*

Ram .Naresh Prasad Nirala V. State of Bihar and others [1] . . . . . relied on

Held, further, that on a plain reading of the provisions of Government letter no. 832 dated 21-12-1982 issued by the Education Commissioner, it clearly appears that the provisions for provisional recognition of the service of untrained teachers, who were under training on the date of taking over and payment of a stipend of Rs. 500/= per month was applicable only in relation to such schools which were recognised and had been taken over on the cut off date i,e, 2-10-1980. But the said provisions were not applicable to the schools which have been granted recognition after 2-10-1980 and have been taken over under section 3 (3) of the Bihar Non-Government Secondary Schools (Taking Over of Management and Control) Act, 1981. Para (Dha) clearly stipulates that the services of untrained teachers of the Schools recognised after 2-10-1980 cannot be recognised except in relation to teachers in ancient subjects.

1. (1987) P.L.J.R. 341 F.B.

Smt, Shakuntala Devi and others V. State of Bihar and others [1] - . . . .over ruled.

Application by the petitioner.

The facts of the case material to this report are set in the judgment of G.C. Bharuka, J.

Mr. Kumar Veerendra Narayan. for the petitioner

Mr. R.N. P. Yadav, Govt. Advocate. for the State

G.C.Bharuka, J —The present writ application has been filed by the petitioner for directing the respondents to recognise the services of the petitioner an assistant teacher in Sardar Ballabh Bhai Patel High School, Chota Govindpur, in the district of Singhbhum (hereinafter to be referred to as the school) and to give him all consequential benefits like that of salary etc.

2. The facts as set out by the petitioner in the writ application may briefly be stated first. The school was established in the year 1971 as a Middle school. The petitioner, who was having qualification of B.SC. had been a appointed as an assistant teacher in the school which effect from 27.8.1980 by the Managing Committee of the school.

3. Pursuant to a letter dated 2.8.82 of the Respondent - Director, Secondary Education, a special Board was constituted to test the feasibility for grant of

1. (1989) B.B.C.J. 714

permanent recognition to the school, which submitted its report dated 7.12.1982. Thereafter the school was recognised and simultaneously taken over on 26.12.1983. In the said report the name of the petitioner was shown at serial no. 11. It has been stated in the said report that, as intimated, the petitioner had gone for completing his B.Ed. course. The petitioner has filed a letter dated 6.6 1985 (Annexure - 2) written by the District Education Officer to the Respondent - Director that the petitioner had passed his B.Ed. examination in 1984. Admittedly, since at the time of taking over, the petitioner was not a trained teacher, therefore, his services were not taken over by the State Government.

4. Aggrieved by the aforesaid action of the State Government, the petitioner filled a writ petition a being C.W.J.C. No. 2854 of 1985, which was disposed of on 16.7.1985 with a direction that the representation filed by the petitioner for taking over of his services should be disposed of by the Respondent - Director, Secondary Education, after taking into consideration all the relevant facts and circumstances of the case. Pursuant to the said direction the learned Director, after taking into consideration all the material facts, rejected the claim of the petitioner by his order dated 8.4.1987 (Annexure 4).

5. It may be relevant to state here that two more teachers, namely, *Jai Prakash Singh* and *Ramkesh-*

war Singh, who had been appointed in the schc ! prior to the petitioner and who were similarly situated, also preferred similar claims. All the contesting claiments, namely, Sri Jai Prakash Singh and Ramkeshwar Singh as also the petitioner are B.Sc. in Mathematics and their respective dates of appointment in the school are 27.8.79, 1.7.78 and 27.8.80. The learned Director has held that recognition was given to the services of only six teachers, out of whom one Ramdeo Prasad was of science (mathematics). It was further observed that since said Ramdeo Prasad had been transferred to another school, therefore, a vacancy was created. Though creation of said vacancy was not sufficient enough for recognising the service of the claimants against the said post but on compassionate ground it was treated to be a vacancy for giving recognition to the services of one of the aforesaid three persons. The Director, accordingly, gave recognition to the service of Sri Ramkeshwar Singh being the seniormost amongst the three claimants, referred to above.

6. Learned counsel appearing for the petitioner has submitted that the respondent-authorities have erred in not recognising the services of the petitioner in as much as, according to the Government decision contained in letter no. 832 dated 21.12.1982 issued by the Education - Commissioner, if at the time of taking over, any untrained teacher was found to have been appointed within the sanctioned post and if he was

under training then, his services were to be recognised provisionally and during the period of such training till the publication of the result, he was to be granted Rs. 500/= as stipend per month and, in case, he fails in the said training course then his services will be deemed to be automatically terminated. Therefore, as submitted, in view of this Government decision it was incumbent upon the respondents to treat the petitioner as in continuous service from the date he has completed his B.Ed. course and earlier to that during the period of training he was entitled to a stipend at the rate of Rs. 500/= per month. In support of his submission, learned counsel has placed reliance on a Single Judge judgment of this Court in the case of *Smt. Shakuntala Devi* and others Vs. *State of Bihar* and others, reported in 1980 BBCJ, 714, where in under similar facts as appearing in this case, it has been held that since the petitioner in this case had acquired the requisite qualification of training subsequent to the date of take over of the school, in view of the aforesaid Government decision her services have to be recognised.

7. On the other hand, learned counsel for the State has drawn my attention to clause (Dha) of the aforesaid Government letter and has submitted that the provisions contained in clause (Jha), which has been relied upon by the learned Single Judge has no application in the case of untrained teachers of such schools, which have been recognised after 2.10.1980, which was the cut off date for automatic taking over of all the

recognised secondary schools on promulgation of the first ordinance, subject to certain exceptions. According to him, learned Single Judge has erred in taking a view contrary to the Full Bench decision in the case of *Ram Naresh Prasad Nirala* Vs. *State of Bihar* and others, reported in 1987 PLJR, 341 and, therefore, the case of smt. Shakuntala Devi (supra) is liable to be over-ruled.

8. The Act was preceded by various ordinances containing identical provisions - the first in the series being Ordinance no. 146 of 1980 published in the Bihar Gazette dated 11th August, 1980. A reading of section 3(1) read with the definition of Non- Government Secondary Schools under section 2(a) of the Act shows that control and management of all such schools which have been recognised by the Bihar Secondary Education Board till 2nd October. 1980, subject to certain exceptions, will be deemed to have been taken over by the Government with effect from the said cut off date.

9. For the take over of management and control of all such schools which were not recognised till the cut off date, provision was made under section 3(3) for taking over of the management and control of such schools in the following terms :

> "3(3) The State Governement may by notification in the official gazette take over the management and control, of such schools and on such terms and conditions as the Government may deem proper, which have already received permission of establishment from the Bihar Secondary Education Board or of such schools imparting secondary education which have

applied for permission of establishment to the said Board immediately before the date of promulgation of this ordinance and the utility of such school is proved in the eye of the Government and which fulfil within three years of the promulgation of the ordinance the conditions laid down by the State Government with regard to land, building, furniture, equipments and enrolment.

The qualification and suitability of teachers working against nine posts of the school, one clerk and two crderlies of such school before the promulgation of this Ordinance, shall be examined by a committee constituted by the State Government for the Government service they shall be appointed in the purpose and if found suitable for appointment in Government service along with taking over the management and control of the school."

Section 4 of the Act provides for consequences of taking over of management and control and sub-section (2) thereof reads as under :

"4(2) The services of every headmaster, teacher or other employees of the school taken over by the state government shall be deemed to have been transferred to the State Government, with effect from the date of taking over of the school and became employees of the State Government with such, designation as the State Government may determine.

10. In the case of *Ram Naresh Prasad (supra),* resolving a dispute as to whether a teacher of a school, which was taken over under section 3(3) of the Act, though untrained at the time of such taking over, but had subsequently enhanced his qualification by acquiring the requisite qualification, has any right of recognition of his services in the taken over school or not, after addressing itself to all the relevant provisions, the Full Bench has held (at para, 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 can not claim to be considered for absorption in Government service on the ground of having subsequently acquired the requisite qualification."

In an earlier decision a Full Bench of this Court in the case of Ram *Ballabh Prasad Singh* Vs. *State of Bihar reportud* in 1986 P.L.J.R, 373 has held that, sub-section (3) of section 3 stands as a class by itself with regard to unrecognised schools which is distinct from classes of schools referred to in sub-sections (1) and (2) thereof. Under second paragraph of section 3(3) the existing teachers have to fulfil all the requirements of the said provision as elaborated by the Government in notification no. 129 dated 30th November 1981, prescribing Qualification. It was further held that.

".. section 4(2) in its application to section 3(3) inevitably presupposes a strict compliance with the provisions of its second paragraph and the statutory instructions contained in notification no. 129 dated 30th November, 1981, unless the pre- conditions therein are satisfied, plainly anough, section 4(2) can hardly come into play."

11. What was read as implicit under the scheme of the Act has been made explicit by the legislature by making retrospective amendment with effect from 2nd october, 1980, in Sections 3 and 4 as is evident

from the Bihar Non-Government Secondary schools (Taking over of Management and Control) (Amendment) Ordinance, 1991, which has been subsequently repromulgated. Pursuant to this amendment section 4(2) stands deleted and provisions there of have been placed at clause (b) to section 3(1). The sub-section (3) has been substituted by new provisions in the following terms

> (3) (1) The State Government may, by notification, in the official Gazatte, take over the management and control of such schools as have received permission of establishment from the erst while Bihar Secondary School Examination Board or which have applied for permission of establishment to the said Board with requisite fee prior to 11th August, 1980, and the utility of such schools is proved in the eyes of the Government and which fulfil the condition laid down by the State Government with regard to land, building, furniture, equipment and enrolment on such terms and conditions as the State Government may deem proper."
>
> (2) The following conditions shall govern the take over of management and control of such schools :-
>
> :(a) The State Government shall determine the number of schools of which the management and control are to be taken over in a particular year ;
>
> (b) Out of the nine posts of teachers in a school taken over by the State Government, one post shall be earmarked for the Headmaster ;
>
> (c) It shall not be obligatory for the State Government to take over the services of the Headmaster, teachers and non-teaching staff of the taken over school appointed by the managing committee of the said school ;
>
> (d) The Headmaster shall be appointed by the State Government or by an officer authorised by the State Government under the rules and procedure laid down for this purpose

(e) The services of such teachers who held requisite qualification for the post as laid down by the State Government may be taken over by the State Government on the recommendtion of the Bihar School Service Board ;

(f) Services of one clerk and two peons of a school taken over by the State Government, may be taken over, provided they hold requisite qualification and fitness for the post as laid down by the State Government ; and

(g) The teacher/non-teaching staff of the taken over school, whose services are taken over by the State Government under clauses (a) and (f) shall become Government servant ."

12. Therefore, in view of the Full Bench decision in the case of Ram naresh Prasad Nirala case (supra) and the provisions as stands substituted by the retrospective amendment the petitioner c ıot claim like that the teachers of the schools taken over on 2.10.1980, the petitioner has also a vested right of recognition of his services even if he was untrained on the date of taking over of his school.

13. Now coming to the last part of submision based on above referred letter of the Education Commissioner dated 21st December, 1982, it is better to quote the relevant paragraphs of the said letter.

(ज्ञ) अधिगृहित किये जाने वाले विद्यालयों में राज्य सरकार अथवा विश्व विद्यालय द्वारा मान्यता प्राप्त प्रशिक्षण महाविद्यालयों में प्रशिक्षण अधिग्राहीत शिक्षकों को नियुक्ति, यदि वह स्वीकृत पद के अन्दर हो तो, को मान्यता औपबंधिक रूप से दी जाय । प्रशिक्षण परीक्षा में अनुतीर्ण होने पर ऐसे शिक्षकों की सेवा स्वतः समाप्त समझी जायेगी । प्रशिक्षण का परीक्षाफल निकलने तक उन्हें केवल 500/- रु० मासिक वृत्तिका देय होगी । वरीयता

हेतु उनकी सेवा की गणना उनके प्रशिक्षित होने की तिथि से की जाएगी।

(ढ) 2-10-80 के बाद से प्रस्वीकृत होने वाले किसी माध्यमिक विद्यालय में (प्राच्य शिक्षकों को छोड़कर) अप्रशिक्षित शिक्षकों की सेवा को मान्यता गुणवत्ता तथा एक बड़ी संख्या में प्रशिक्षित बेरोजगारों की समस्या को देखते हुए नहीं दी जायगी।
किन्तु कन्या विद्यालयों में, प्रशिक्षित महिला शिक्षिका की अनुपलब्धता की स्थिति में, अप्रशिक्षित महिला शिक्षिका की नियुक्ति विद्यालय सेवा बोर्ड की अनुशंसा पर करने का आधिकार निदेशक (मा० शि०) को होगा। ऐसे अशिक्षित शिक्षकों के लिए विहित वेतनमान देय होगा वरीयता हेतु उनकी सेवा की गणना उनके प्रशिक्षित होने की तिथि से की जायगी।

14. On a plain reading of the aforesaid two paragraphs it clearly appears that the provisions for provisional recognition of the services of untrained teachers, who were under training on date of taking over and payment of a stipend of Rs. 500/ - per month was applicable only in relation to such schools which were recognised and had been taken over on the cut off date i.e. 2.10.1980. But the said provisions were not applicable to the schools which have been granted recognition after 2.10.1980 and have been taken over under section 3(3) of the Act. Para (Dha) clearly stiuplates that the services of u: trained teachers of the schools recognised after 2.10.1980- can-not be recognised except in relation to teachers in ancient subject. In the case of Smt. Shakuntala Devi case (supra) as is evident from the judgment, his lordships attention was not drawn to this para of the above said letter, which was the only relevent para even on the facts of that cae.

15. In view of the discussion made above. in my

opinion, the law as laid down in Smt. Shakuntala Devi's case (supra) is not a good law and, accordingly, the same is over-ruled.

16. For the above reasons, in my opinion, there is no merit in this writ application and it is, accordingly, dismissed but without any order as to costs.

S.B.Sinha,J. I agree

S.P.J. Application dismissed

APPELLATE CRIMINAL

Before S. Haider Shaukat Abidi & Lok Nath Prasad, JJ.

1993

May, 13

Shri Bhagwan Singh & Ors *.

V.

The State of Bihar.

Criminal trial — Supervision note, whether can be given to the accused — non — production of supervision note, whether causes prejudice to the accused -— Penal Code, 1860 (Central Act XLV of 1860), section 34 — common intention, applicability of.

The supervision notes of the superior police officers or the reports or observations of the investigating officer or his superiors are only opinions and these opinions are not admissible in evidence.

Held, that, supervision note is neither submitted under section 172 of the Code of Criminal Procedure, 1973 nor forms part of the case diary but being an opinion cannot be given to an accused.

Held, further, that non-production of the supervision note cannot be said to have caused prejudice to the

1. Criminal Appeal No. 479 of 1984. From the judgment of Mr. Bageshwari Prasad Sinha. 6th Additional sessions Judge Arrah, dated 28th May 1984.

accused.

Held, also, on the applicability of section 34 of the Penal code, that on account of two shots having been fired and one having missed and the other causing entry and exist wounds it could not be said that the two appellants have not participated when the evidences of all the eye-witnesses is quite uniform and categorical in this behalf that both the accused had fired and therefore the overt act committed must be said to have been caused in furtherance of common intention of all.

Appeal by the accused.

The facts of the case material to this report is set out in the judgment of S.H.S. Abidi, J.

M/s. Trivogi Narain Pandey & Jagada Nand for the appellents

Mr. K.P. Gupta for the State

Mr. S.K. Gupta, Mr. Ramashish, Mr. Ram Kumar Sharma and Mr. Shailendra Kumar Singh for informant

S.H.S.Abidi, J. – Appellants Shri Bhagwan Singh and Sudarshan Singh have been convicted u/s 302/34 and section 148 I.P.C. and sentenced to undergo for life and two years rigorous imprisonment under the respective counts. They have been further convicted u/s 27 Arms Act and sentenced to undergo rigorous imprson ment for two years. Appellant-Basudeo Singh had died during the pendency of the appeal and so his appeal has

become infructuous. Two of the accused, namely, Bikrama Singh and Krishna Nandan Singh have already been acquitted by the trial court. So remains the appeal of appellants-Shri Bhagwan Singh and Sudarsan Singh only.

2. A fard-beyan (Ext.1) was given by informant- Krishnawati. Kumari (P.W. 4) daughter of deceased Rajkeshwar Rai on 11.4. 1980 at 11.30 P.M. in village Ekwari, Police-Station Sahar district Arrah to S. I. Ramesh Kumar Singh (P.W. 10) Saying that on the day of occurrence at about 6 P.M. she along with her father deceased Rajkeswar Rai was going to the flour mill of one Sri Rai for grinding grain powder (satu) and when they reached the turning of a gali (lane) at the house of one Siwkriti Singh of the village, the two appelliants, Shri Bhagvan Singh and Sudershan Singh being armed with country made guns stopped them there. Thereafter appellant Basudeo Singh (deceased) armed with pharsa and the two acquitted accused Bikrama Singh and Krishnandan Singh armed with bhala come out from behind the heaps of straws and Basudeo abusingly said to kill and ordered to fire. Upon this appellant Shri Bhagwan Singh and Sudershan Singh fired from their guns at her father who fell down. Then Basudeo Singh, Bikramam Singh and Krishnandan Singh assaulted him by pharsa and bhala. She raised alarm which attracted the villagers and the family members and then the accused ran away. Her father's injuries by pharsa and bhala were bleeding

and he died. She gave out the names of the accused and the occurrence to the villagers. Motive for the occurrence was said to be that the parties have a common-court yard (angan) and the accused wanted to forcibly occupy one more room (kothari) out of share of her father, which he was refusing for which a threat was extended by Sukhdeo Singh, father of appellants 1 and 2. They also wanted to take forcible possession over an orchard (bagicha) belong to the informant's father and for that there was a litigation between the parties in the court and for that reason informant father had been killed by fire-arms, pharsa and bhala. On the basis of this fardbeyan a first information report (Ext.6) was recorded at the Policestation Sahar on 12.4.1980 at 8.30 A.M. which is said to have reached the court of the learned (C.J.M. Arrah), on 16.4.1980.

3. The investigation of the case was taken up by S.I. Ramesh Kumar Singh (P.N.10) who had recorded the fard-beyan. He prepared the inquest report, examined the witnesses, namely, Ramawati Kumari, Ramdulari Devi Sakaldip Rai, Baliram Rai, Hari Krishan Rai, Ram Ji Rai (P.Ws1,7,8,2,3,6 and 5) and sent the dead body for post mortem examintation. After completing investigation he submitted chargesheet against the five accused including the appellants.

4. The accused in defence denied the prosecution case and alleged that they have been falsely implicated in this case. They examined Nagendra Prasad Singh, Ramchandra Prasad Chitranjan Prasad and Nandi

Verma, Taids and they have proved documents which will be referred later on.

5. The prosecution in support of its case examined ten witnesses,P.W.1 is Ramavati Kumari aged about 16 years daughter of the deceased who reached the spot after hearing the gun fire. P.W. 2 Baliram Rai, brother-in-law (sala) of the victim also arrived at the spot on hearing. P.W.4 Hari Krishna Rai a co- villager has deposed as an eye witness. P.W.4 Krishnawati Kumari is informant herself and also an eye witness. P.W.5 Kesho Singh a co-villager is also an eye witness. P.W.6 Ram Ji Rai a co-villager has turned hostile. P.W.7 Ram Dulari Devi wife of the deceased had reached the spot on heating. P.W.8-Sakaldip Rai father of the deceased had reached the spot on hearing. P.W. 9 had conducted the post mortem examination and given his report(Ext.3).P.W.10 Ramesh kumar is I.O. who after completing the investigation submitted chargesheet.

6. Learned trial court after considerering the entire material in record has convicted and sentenced the appellants as said above.

7. Learned counsel for the appellants has challenged the order of conviction saying that it is against the materials on record. He has contended that the first information report has been suppressed as the first report had been made by the Jamadar of the police Camp who had rushed the spot and examined witnesses and family members and then he had sent a report to the police-station Sahar and so the police came and recorded the said-beyan which is different from the one

given earlier. It was also submitted that the dead body of the victim was taken to the Police Camp and was not at the P.O. as Ramawati Kumari and other witnesses have said that before the arrival of the police the relation of the victim returned home from the police camp and the dead body remained there and the dead body was seized at 1.30 A.M. and then inquest report was prepared at 6 A.M. on 12.4.1980, It was also said that the first information report dated 12.04.1980. which is said to have been sent to the C.J.M. could reach there on 16.4.1980 for which the explanation was called for by the C.J.M. and it is made out that the first information report has been manipulated and was written later on. Further the investigation is defective as the I.O. has not examined the chaukidar or any independent witnesses of the police party of the camp The accused were also not examined nor site plan has been prepared, nor the clothes were sent for chemical examination. It was also said that the supervision note of the Deputy Superintendent of Police was not sent by the prosecution in spite of an order of the court dated 18.8.1982.

Further there is discrepancy in the statements of the witnesses and further specially in the fard-beyan and the statement of the informant Krishnawati who is the sole witness in this case. The witnesses have also contradicted themselves and so their evidence does not inspire confidence specially for the reason that they are relations. Brother P.W.S.1 and 3-Ramawati and Harekrish-

na Rai are non- F.I.R. witnesses. Ramji Rai (P.W.6) a Co-villager, though non-F.I.R. witness, has turned hostile The wife of the decensed Ramduri Devi (P.W.7), though non- F.I.R. has been tendered. It was also said that the two accused Bikrama Sindh and Krishna Nandan Singh, who are said to have given bhala injury, have been acquitted by the trial court, as the injury did not appear to be by bhala and so the prosecution version appears to be doubtful as the major.

Part of the prosecution version has been found to be not reliable against the two acquitted accused. It was also said that the motive for the occurrence is a very weak and it is not made out and it cannot be said tobe the cause of murder. To appreciate all these contentions. The evidence will have to be scrutinised with care and caution.

8. P.W.4 Krishnawati Kumari is the informant aged about 16 years at the time of the occurrence has said that on 11.4.1980 at about 6 P.M., she along with her father was going to the flour mill of Sri Ram Rai for grinding grain powder (sattu) when they reached near the khand of Swrikriti Singh at the turning of the gali, appellants Sri Bhagwan Singh, Sudersan Singh came armed with country made guns, Basudeo Singh and the two other accused Bikrama Singh and Krishna Nandan Singh armed with pharsa and bhala respectively came from behind the heap of straw which was there and surrounded the informant and the deceased. Basudeo

abusing said to kill Rajkishore Rai and asked to fire. On his asking Shri Bhagwan Singh and Sudersan Singh both fired form their country made guns at her father who getting the shot fell down. Then Basudeo Singh gave pharsa blows and Bikrama Singh as well as Krishnandan Singh also began to assault by the bhala. She was raising alarm and then the five accused after assaulting her father ran away towards north. Her father died on the spot due to assault. At the place of occurrence Ramavati Kumari, Harikishan Rai and her mother (P.Ws. 1,3, and 7) and her sister also come. Ramji and Keshav Singh (P.ws.6 and 5) had also arrived. She gave out the entire story of the occurrence to them. Ramawati and Harikishan Rai also told her that they had seenthe accused assaulting.

When the I.O. came she give her fard-beyan. The motive for murder of her father was that the accused wanted to occupy the Kothari of her share and her father did not want to give the same to them (appellants). Krishnandan Singh and Sudersan Singh had sold their field which was adjacent to the field of her father and her father had deposited money for the purchase of the said field. The accused had also given out threats earlier and a proceeding u/s 107 cr. P.C. was also pending.when she was trying to save her father, her clothes had got bloodstained and she had given out her sari to the Sub Inspector of Police. In cross-examination she said that the three appellants are brothers and appellants Sri

Bhagwan Singh and Basudeo Singh(deceased) son of Sukhdeo Singh who is real brother of Krishnandan Singh. At the time of occurrence talk of her marriage was going on and even earlier than the occurrence she used to go for grinding Satu as and when needed. On the ground of fear of the accused nobody would come to say that she used to go for grinding satu to his flour mill. She might have been seen by 2,4, or 10 people going to flour mill for grinding sattu but she did not remember their name. She was taking the parched grain (bhuja hua grain) for grinding which was kept from before at the house. When her father came and asked to accompany for grinding satu, she accompained him. She did not know if any girl of the Bhumihar family who used to go for grindng satu and on that particular date there was no such occasion and it was wrong to say that because she was grown up she did not go with her father for this purpose. She has got a ten years old brother and also a younger sister Lilawati. When she was going for grinding satu her younger sister Lilawati was playing there. The younger brother was not there and Ramawati was not asked by her father to accompany him. While going through the gali she had not met other persons. The mill of Sri Ram Rai is about 15-16 houses away from the place of occurence. The occurrence had taken place at tri- junction Seeing the accused she did not get afraid. The accused had attacked from behind the heap of straw. Her father was 4-5 steps ahead. First firing was

done. She remaind standing there and restless and crying but had not fallen on the ground and did not run away towards her house on seeing the firing. Besides the witnesses named many other persons had come but she did not remember their names. Out of 100 people collected there none asked them to go for reporting to the police as she and others were weeping. The police arrived there on its own and she had given out about the occurance to the police of the Camp. Two- three police personnel had come and they went away from the place of dead body. Then the police (S.I.) came. It was not said to the police personnel that it was dead body for the reason that they may stay behind. She herself said that the I.O. had come with police but she could not say whether they were police of the Camp or other police-station. The I.O. had not made enquiry before her from the police. When the Sub Inspector of police came near the dead body then her family members were also there, besides the 20/30 people. She did not know if the I.O. made enquiries from others besides the witnesses in this case. To her knowledge there is no other witness besides the witnesses going to give evidence. On account of the fear of the accused none had dared to go to give statement. She did not remember if she had said before the police or the Deputy Superintendent of Police (for short Dy S.P.) that on account of fear of the accused persons from the village had not come to give statement. When the I.O was examining

her, Ramji was near Harekrishna Lal and that her statement was recorded at a distance of about five steps from the dead body. In her fard-beyan she had given out that at the time of occurrence many people had come. She was examined by Dy. S.P. to whom she had given out as to when the occurrence took place and that her father was going ahead and she was following him. She had also said to the police and the Dy. S.P. that Shri Bhagwan and Sudershan had come from behind the heap of straws and from which distance they had fired. Basudeo had exhorted and so they had fired. It was not correct that at the time of giving fard-beyan she had not given out the names of Ramawati, Hare krishna, her mother and grand-mother, Ramji and Kesho. It was not correct that when the Dy.S.P. had come she had not said to him that other people had came and she had not said about the occurrence to them. Also it is not correct to say that she had not said to them that Hare Krishna and Ramawati had also not said to them that they had seen the accused. She does not know as against which of the accused her father had filed case but he had deposited money so that the field which was on his Aal may become his own. She had not seen any paper about the proceedings u/s 107 Cr. P.C. But she had said to the I.O. about 107 proceedings. She has said to the I.O. that while saving her father her sari had got bloodstained and the I.O. had seen the sari and while giving fard-beyan and also making statement before the Dy.S.P. she had

said that her sari had got bioodstained. She denied the suggestions the her father had been killed by the naxalites and none had seen the occurrence, or that she had not seen the occurrence or that her statement had not been recorded by the police in the night or her statement is said to have been got written in the night or that she had falsely implicated the accused on account of enmity.

9. Besides Krishnawati Kumari-informant P.W.3 Harekrishna Rai a co-villager is also an eye witness, though his name does not appear in the first information report. He has said that he knew Rajkeshwar Rai who has been killed. It was at about 8 P.M. and the Sun had not set, that he was going to irrigate his field. He heard gun fire and hulla. He went running When he went infront of Khand of Swikriti Rai, he saw accused Krishnandan Rai assaulting Rajkeshwar Rai with bhala and Basudeo was assaulted with pharsa. Accused Shri Bhagwan Rai and Sudersan Rai were standing with country made guns. He went there and asked them they were committing atrocities. The daughter of Rajkeshwar was there who was crying. On their crying the accused one after the other assaulted Rajkeshwar Rai and ran away towards north. Rajkeshwar Rai died on account of the injuries on the spot. He and the elder and younger daughters of the deceased said about the occurrence. Krishnawati had also told him that Shri Bhagwan and Sudershan had fired from the guns and injured the

deceased. Blood had fallen on the ground. On the ground had also fallen two baskets of parched grain besides chappal and gamachhi. In cross-examination he has said that adjacent south to his house is a canal in which water does not remain for the whole year and at that time there was no water and that there is road also. He had heard the sound of gun fire and hulla when he was on the road about 50-60 steps away from the place of occurrence. First of all he saw that Basudeo Rai with pharsa and Krishnandan Rai with bhala, were assaulting the deceased. He had seen that the daughter of Rajkeshwar Rai was trying to save her father and that Sudershan Rai and Krishnandan Singh were standing with country made guns, and Ramawati daughter of the deceased was reaching there. He stayed at the place of occurrence for the whole night and went to his place at about 3.30 or 4 A.M. There were also 7-9 persons there P.Ws. 5,6,2 and 8 Kesho Singh, Ramji Rai, Baliram Rai, Sakaldip Rai and two or four other persons also stayed there in the night. He remembered the names of those persons who are witnesses. he had no talk with any person of the village regarding occurrence. But himself added that he said to the villagers as to who had killed the deceased. He had thought that the police might be informed but he did not send any-body though police came of its own within an hour of the occurrence. He did not remember if any person whom he had met in the way while going to the village. While he was going to the place of

occurrence he did not meet any body. The police had made enquiries from the family members of Rajkeshwar Rai and also from Ramji Singh, Kesho Singh and the witnesses one by one and not before them. At the door of the deceased police officer had taken statements. It was not correct to say that he had not given statement to the police or police officers nor it is correct that he or Ramji Singh had not given statement before any officer. He lives in the village regularly. He does not remember the name of his grand-father. Then added, the name of his grand-father was Faguni Rai who had died. He does not know it there was money in the name of Rajkeshwar Rai or that Rajkeshwar had sold some field. The I.O. came 3-4 hours after the coming of the constables and the constables had also given information to the I.O. Some constables had stayed behind and some had gone to bring the I.O. Women of the house of the deceased had come to the spot and then they had gone away and they again came when the police came. When he left the place women of the house of the deceased were there.

10. P.W.1 Ramawati Kumari daughter of the deceased has said that on 11.4.1980 at about 6 P.M. deceased along with her sister had gone to the Mill for grinding of Satu and immediately within two minutes of leaving the house she heard the gun fire and also crying of her sister and so she ran towards east of her house and as soon as she reached the crossing of the gali, she found her father fallen. There she also saw Basudeo

with pharsa assaulting her father and also Bikrama and Krishnandan assaulting her father with bhala. Besides the three accused Sri Bhagwan and Sudershan were also standing with country made guns. She cried and her sister was also crying. Her sister also said that Shri Bhagwan and Sudershan had fired from the guns and injured her father who died there. After assaulting her father the accused ran away towards north. While she was reaching Harekrishna, Ramji Singh, Kesho Singh had reached and other also arrived. On the alarm her mother sister and maternal uncle had come. Her grand-mother had also arrived. The motive for the occurrence was that on account of land there was litigaiton between her father and the accused. The accused also wanted to occupy her garden also. In cross- examination she said that adjacent to her baithaka is the baithaka of the accused towards east. In the zanani Qita towards east she and other family members live while towards west the accused live. She herself said that after the occurrence wall had been raised in the angan. She also gave out about the location of the houses including those of Sheopujan Sah, Bindesh wari Singh, Najir Mian and others besides. Swikriti Singh and Dudul around the place of occurrence and said that none of those persons are witness. Her family is agriculturist and prospereus family and halwahas charwahas used to work at her place. In the name of her father 56 to 60 thousand rupees were deposited. in the Bank. In her village police was posted earlier than

the occurrence. It is not so that in her village 17-18 Bhumihars had been killed by naxalites and that the police had been posted there to control the naxalites. She did not know if her father used to go to court or not. There are 5-6 flour mills in her village. From before the occurrence proceeding u/s 107 Cr. P. C. was pending with the accused and there was no case of mar-pit with the accused before the occurrence. When there was alarm then she left the house saying to go and see that sister were crying. She had asked her mother and grand mother to accompany. She ran first. She did not look behind as to whether her mother or grand mother were coming. She was going crying in the way asking the people to run, as her father was being killed. Hare krishna also reached there. Both of them had reached together. Harekrishna house is towards north of the village. She saw first her father had fallen. saw from her own eyes that Basudeo gave 2-2 blows of the pharsa. She also saw that Krishnandan and Bikrama had given the injuries. She could not say as to how many injuries were given before her, as she had not counted After the assault the accused ran away. She ran to the trinjunction and stood up about 2-3 hands away from the place of assault. She had given out about the occurrence to the people who had come thereafter and so her sister had also given out. She was weeping and saying, as to who had killed her father, to the people who were hearing. She said on her own that these were Kesho Singh, Ramji

Singh and her maternal uncle Baliram Rai and these persons are witnesses. If she would have said to others she would have given out their names. The dead body of her father was allowed to remain there till the arrival of the police and the dead body was taken in possession by the police at about 11 to 10.30 A.M. and it was taken to the police camp. The reafter she and others went away home. She and her grand-mother were at the place when the police had taken charge of the dead body. None from her side had said to anybody to go and inform the police. The police itself came when there was hulla that her father had been killed. The police had come $1\frac{1}{2}$ hours of the occurrence. When the police came, she and her grand- mother gave out about the occurrence. Camp police had not done any writing. The police constable had said that information had been sent to the S.I. and when the S.I. would come he (constable) would take in writing. She said that 2-3 police personnels came on hearing about the occurrence and then went away to call the S.I. and they came before the S.I.. All the members of her family remained near the dead body till the arrival of the S.I. four persons of the village were there. Then her statement was recorded. The police went to her place also and searched for the accused. Her house and house of accused are at the same place but no accused was found. She could not say whether at the place of occurrence statment of any other person was recorded besides her statement and that of her grand-mother. She

also went to her place along with the S.I.. Thereafter the S.I. again came in the morning. The dead body of her father was not bought to her house from the camp. The Dy.S.P. also came for investigation and made enquires. He made enquiry from her grandmother. She couldnot say if enquiry had been made from others also. She had said to the I.O. as well as to the Dy.S.P. that the occurrence had taken place in the evening and that her sister had gone with her father and on hearing the alarm from her sister she had gone running to the place of occurrence.

11. P.W. 2 Baliram Rai brother-in-law (Sala) of the deceased has said that on 11.4.1980 before sunset his brother-in-law (Bahnoi) Rajkeshwar Rai was killed On that day he had come to meet him (deceased) and was sitting in the baithaka, when he heard the gun fire and the hulla. Upon this he went to the spot where his bahnoi (brother-in-law) was killed. On reaching there he saw his bahnoi fallen down dead and his niece Krishnawati and Ramawati there, crying and saying that Shri Bhagwan and Sudershan had injured and killed their father by firing and Basudeo by pharsa and Krishnadeo by bhala and that they ran away. They had given out the names of the five accused. In cross-examination he had said that his village is at a distance of 7 kilometers from village Ekwari. On the day of occurrence he had come to Ekwari at about 4 p.m. in connection with consultation for the marrage of his niece. He had come in the same connec-

tion about 20-25 days earlier in the noon and then returned in the evening. While coming to Ekwari. He might have seen people but he did not remember their names. On reaching the village Ekwari he had talk with the father of the deceased and could not talk to the deceased. Of and on in connection with the marriage, his sister used to come to his place. After the occurrence he stayed there in the night. He had not sent information to his village where also the news had reached. When he returned people told him that they had got information about the murder on 12.4.1980. It is wrong to say that on the day of occurrence his sister was not in village Ekwari and that she had gone to his place where he was there, and that on hearing the news of murder of the deceased on 12.4.1980 he came to village Ekwari with his sister. He had said to the Dy.S.P. about his coming to village Ekwari in connection with the marriage of his niece but the I.O. had not enquired from him in this respect. He did not remember if he had said to the I.O. in which connection he had come to Ekwari. He had gone alone to the place of occurrence on hearing the alarm. The father of the deceased had also started for the place. He is old man. He could not walk fast. He had not asked him (witness) to accompany when he started. Then he followed. While going to the place of occurrence he saw the neighouring persons going to the place of occurrence but he did not recognise them. He stayed at the place of occurrence for the whole night. He did not

know as to whether Camp was there. He had no talk with any body to inform at the Camp. Police of the Camp did not make enquiry about the occurrence. The I.O. came in the night and recorded his statement in the midnight, besides recording the statements of Krishnawati and Ramawati. He returned to his village on 12.4.1980 in the evening. He has said to the Dy. S.P. that at the place of occurrence both the nieces were giving out the names of the accused and they were saying that they (*deceased*) had killed the deceased. It was wrong to say that he had not gone to the place of occurrence and that he had not seen anything.

12. P.W. 5 Kesho Singh is a co-villager who has said that Rajkeshwar Rai had been killed at about 6 P.M. At that time he had gone to the carpenter. He heard two gun fires and also alarm. He proceeded ten steps from the house of carpenter towards south, then he saw that accused Sudersan, Shri Bhagwan both with country made guns, Bikram and Krishnandan with bhala and Basudeo with pharsa, were running away towards south. He went to the spot and found the deceased lying dead and also found the deceased 's daughter Krishnawati, Harekrishna and Ramji there. Krishnawti told him that her father had been killed by the accused and he also told her that he has seen the accused running away. On the ground there were lying parched grain and two baskets. The I.O. came and prepared the inquest report (Ext.2) which was signed by him and also by one Dinanath. He admitted that he was accused in the case of Sudarsan which had not yet started. He denied to be an accused in the case of

Daroga. Shekhar Singh is his brother and so is also Gandhi Singh, Vakil. He did not know if his brother Gandhi Singh is working for the accused as lawyer. He did not know if his father Nathuni Singh and Fagu Rai grand-father of Harekrishna and Basgit Rai grand-father of the deceased Rajkeshwar Rai were accused in any case. He did not know if Shekhar Singh is a witness but when he reached, he did not find Shekhar Singh on the spot. He reached there next morning and remained there for the whole night. He went away after the going away of the I.O. He went when the dead body was taken away.

His house is at a distance of 100 to 150 steps from the place of occurrence and not one mile. Police camp was about 2 to 4 bighas away from the place of occurence and according to him one bigha is equal to 100 yards. Chaukidar, Dafadar and Surpanch had also come to the spot. The Mukhiya is still alive and no enquiry was made from him by the I.O. before the witnesses. He gave out the name of Krishnawati in his statement to the I.O. He had also seen Harekrishna and Ramji at the place of occurrence and that he had seen the accused running away. He had also given his statement to the Dy. S.P. He had not seen Ramjas Rai and Bharat Rai on the spot as their doors were closed and these two had not come to the spot till he remained there. The constables, who had come, remained there for the whole night. First 4-5 constables had come who remained till arrival of the I.O. and their statements were recorded by the I.O. He and and Dinanath signed the inquest report. The house of

Dinanath is at a distance of about 2 bighas of the police camp.

13. P.W. Ramji Rai, a co-villager, has turned hostile. He has said that when the murder of Rajkeshwar Rai of his village took place at about 6 P.M., he was at his house. He heard the gun fire and halla and so he went there. When he went some distance, he saw Shri Bhagwan, Sudersan, Basudeo, Bikrama and Krishnandan running away. Out of whom Sudersan and Shri Bhagwan had country made guns, Basudeo had pharsa, Krishnandan and Bikrama had bhalas. When he reached the spot he saw Rajkeshwar lying injured bleeding and dead at the trijunction near the khand of Sri Swikrit Singh. He also found parched grain scattered and two baskets fallen Many people of the Village had collected Krishnavati told him that many people had killed her father and ranaway he identified the accused in dock. In cross examination he has said that his village is a big one with a population or about ten thousand people. Police camp is on the south of the village with one Jamadar and 12-14 armed constables. Before this occurrence 8 to 10 person of Bhumihar family had been killed and there was no enemaity between them and the naxalities about the land. He had not met any body when he was going from his mill to the place of occurrence. Many people had collected they being 30- 34 in number. He had taken ten minutes time to reach from the mill to the place of

occurrence. After his going to the place of occurrence Jamadar and cons tables came. They were of the camp. There the father of the victim and others had collected. In his presence jamadar did not record statement of any body and none said about the names of the accused to the Jamadar. In his presence jamdar or constables did not go for arresting anybody. To court he said that he had been at the place of occurrence for about an hour. In further cross-examination he said that after staying for about an hour he went away. He volunteered that after staying at his house for about ten minutes he returned to the place of occurence. One or two hours after his return, the police from the camp, came and they took the dead body to camp. All the people there went away to their places. He was examined by the police after two days of occurrence. He had not gone to the Dy.S.P. for statement though he was in the village when the Dy.S.P. came. The I.O. examined him after the going away of the Dy. S.P. . The police took away that dead body from the place of occurrence to the camp at about 9 or 9.30 P.M. He did not know till the giving of his statement to the police as to who was witness in the case. The deceased used to visit his flour mill for grinding. His mill is adjacent to his house. His Nanihal (grand-fathers place) and that of Rajkeshwar Rai is at the same place. He and the deceased are maternal cousins as his mother and the mother of the deceased are cousin sisters. In his state-

ment to the police he had not give time as to when he heard gun fire. It was wrong to say that he was concealing facts on account of being cousin of Rajkeshwar Rai. At this stage an application was given by the prosecution. to declare him hostile which was opposed by the defence, After hearing the parties the court declared him hostile and so he was cross-examined by the prosecution. The accused Sri Bhagwan is married to the daughter of the pattidar of the Mama of the witness. The I.O. had enquired from him about the occurrence near the khand of Swikriti Singh not in the night of the occurrence. The inquest report was not prepared before him. The S.I. of Sahar had not come before him. It is not correct to say that on the night of the occurrence the S.I. had recorded his statement near the khand of Swikriti Singh. He did not know the name of the A.S.I. of the camp. It was not correct to say that in collusion with the accused he was giving false statement/. Before him the Jamadar of the Camp took away the dead body to the Camp. Krishnawati had not said to him as to how the accused had killed her father. She was weeping at the place of occurrence. She had not said that she was going with her father for grinding satu. With objection he said that he had not said to the police that Krishnawati while weeping, was saying, giving out the names of the accused that she was going with her father for grinding satu and when she reached near the khand of Swikriti Singh at the

turning the accused assaulted the deceased with the weapon.

14. The father and mother of Rajkeshwar Rai have also appeared as P.Ws. 7 and 8 P.W. 7 Ram Dulari Devi mother of the deceased has three daughters and one son. P.W. 8 Sakaldip Rai the father of the deceased, has said that the deceased was his only son. On the day of occurrence at about sunset he was in his dalan sitting with the Bali Rai (brother-in-law of the deceased). He heard the gun fire and hulla and ran towards that side from where the hulla was heard and reached there. He saw Sri Bhagwan Sudershan with country made gun, Basudeo with pharsa, Bikrama and Krishnandan with bhalas who were running towards north. Motive for the murder was earlier enemity. Witness Awadesh Rai has died. Witness Ramakant Rai Bechan Rai and Ramanuj Rai have colluded with the accused. In the cross-examination he has said that except the accused there is not other male member in their family. His son did not keep an elephant and his son used to look atter the fields.

He used to go Arrah when needed. He did not know that in 1978-79 Swikriti Singh had filled a case against Munila Kahar and others and in that his son was a witness. After the occurrence he sold 4 bighas of land and in none of the documents Hare Krishna Rai is a witness. Hare Krishna Rai is also not a witness in the

two documents in favour of Achhuta Rai. He is able to see with from his eyes. On hearing alarm Bali Rai went ahead and he followed. On the way he did not say to any body that his son had been killed. He had gone 20-25 steps when he saw the accused running away. His son was covered by his own chadar. he did not ask any body to catch the accused. His grand-daughters had reached there. He had told the police as well as the Dy. S.P. that his grand- daughters had said to him as to which of the accused had killed their father. Many villagers had collected there besides the witnesses and he could not give out their names. When the police came he gave out details of the occurrence but they did not do any writing. They had said that they would go individually.

It is not correct to say that the statement was recorded on a paper and he had signed the same which had been changed. The Dy. S.P. had come on the next day of the occurrence, before whom Harekrishna. Ramji, his grand-daughters and he himself had given statement. Before the I.O. none else than him and his grand-daughters had given statement. Police went away saying to keep wach and so he and others remained with the dead body. The I.O. came in the night and remained there and took away the dead body. By the morning he meant to say that the face was not visible, then the S.I. did not come. On the information of the constables the S.I. from the police station come at about 11.P.M. in the

night who recorded the statement and remained there through out the night and in next morning sent the dead body to Arrah. His door is at about 100 steps from the place where the dead body was lying.

15. Besides this ocular evidence is the evidence of Dr. K.B. Sahai (P.W.9) who had conducted the post mortem examination on 12.4.1980 at 1.35 P.M. and submitted postmortem report (Ext. 3) in which he found the following injuries :-

" 1. Incised wound 2 " × 1" × $\frac{1"}{2}$ just behind right ear.

2. Incised wound 4" × $\frac{1"}{2}$ xbone deep on the left side of the forehed.

3. Incised wound 1 $\frac{1"}{2}$ × 1" × 1" on the right shoul-det joint.

4. Incised w 2" × 1" xcavity deep on the mid back at the thoracic resion.

5. Incised wound $\frac{1"}{2}$ × $\frac{1"}{2}$ × $\frac{1"}{2}$ on left ear.

6. Incised wound 3" × 2" xbone deep on the left elblow joint.

7. Incised wound 1"× $\frac{1"}{2}$ × $\frac{1"}{2}$ on the right thumb.

7. Incised wound 1" × $\frac{1"}{2}$ × $\frac{1"}{2}$ on the right thumb.

8. Incised wound 1$\frac{1"}{2}$ × $\frac{1"}{2}$ × xbone deep on the right temporal bone of the head.

9. Lacerated wound $\frac{1}{4}$ "× $\frac{1}{4}$ "× neck cavity deep on the left side of the neck, point or entry, margins inverted no tattooing."

10. Lacerated wound 1" × $\frac{1"}{2}$ xneck cavity deep point of exit."

He has said that injury nos. 9 and 10 were communicating with each other. Their margins were overted- and both were caused by fire arm, may be firing made by country made gun. Injury nos. 1,2, 4 and 6 might have been caused by garasa, a sharp cutting weapon, and the rest four injuries, namely, injury nos. 3,5,7 and 8 might have been caused by bhala. In his opinion the death was due to shock and haemorrage, as a result or all those injuries and they were sufficient in ordinary course of nature to cause instataneous death. In cross-examination has said that the penetrating wounds were caused by sharp pointed weapons and incised wounds might be caused by sharp cutting weapons. He also said in cross-examination that the cut injuries are generally described as nicised wounds and penetratig wounds. He was not in agreement with the views given in Modi

Medical Jurisprudence that penetrating wound is caused by sharp cutting pointed weapon and incised wounds are caused by sharp cutting weapon. In his opinion there is nothing to suggest that the cut injuries were caused by sharp pointed weapon. He has described that all the injuries having been caused by sharp cutting weapons due to pharsa and garasa which are two types of weapons.

16. P.W. 10 Ramesh Kumar is the I.O. On 11.4.1980 he was officer- incharge of Sahar police-station. At 10.30 P.M. he got information through the incharge of the Ekwari police camp about the murder whereupon he reached the village Ekwari at 11.30 P.M. where deceased Rajkeshwar's daughter Krishnawati gave her fardbeyan which he later on sent for registering the F.I.R. to the Sahar Police-station. After that he inspected the place of occurrence, being village Ekwari at a distance of about 300 yards from the house of the deceased, at the trijunction and at turning of khand of Swikriti Singh. The dead body was found there and sufficient quantity of blood had fallen there Blood spot had spread around. He seized the articles found near the place of occurrence vide seizure memo (Ext.4). He examined witnesses Ramawati Kumari, Ram Dulari Devi, Sakaldip Rai, Baliram Rai, HariKrishna Rai and Ramji Rai He prepared the inquest report (Ext.5) and sent the dead body for post mortem examination. He tried to apprehend the accused but they were not available. He got

the post mortem report on 15.4.1980. The case was supervised by the Dy. S.P. He posted a chaukidar at the house of the deceased and the family was very much terrfied. Proceedings under sections 107 and 116 Cr. P.C. were started against the accused. He submitted chargesheet against the accused persons u/s. 302/34 I.P.C.. He examined witness Ramji Rai on 12.4.1980 at the spot who had said that Krishnawati was weeping and giving out the names of the accused persons and she had also said that she was going with her father for grinding satu, then the two accused fired, two accused gave bhala injuries and one accused gave pharsa injury. He has not written in the diary at what time he had recorded the statement of the witnesses nor written the time of inspection of the place of occurrence and also not written as to now the information was sent by Ekwari camp to him.

He volunteered to say that some body had come to give information. He did not remember in writing or oral and who had brought the information and had not recorded the statement. This information was not recorded in the case diary. On receipt of the information about occurrence entry in the station diary was made. There was wireless set in the Ekwari camp ; then says he has not written in the diary as to when he had started for Ekwari village, but he reached Ekwari at about 11.15 P.M.. How he went from the police station is not written in the diary. He met the camp police but did not record their statement and he met them during investigation. He

came to know about the name of the accused at the time of recording the fard-beyan. Name of the witnesses is written in the fardbeyan. He did not record the statement of Mukhiya and Surpanch. From the place of occurrence he sent the dead body to Arrah for post moterm examination. He had prepared the seizure list at the time of inspection of the place of occurrence. It is not so that the camp officer had taken the deceased before his (witness) arrival at the place of occurrenc that he had not found any dead body at the place of occurrence. The Dy. S.P. inspected the place of occurrence before him on 15.4.1980. It is not correct to say that till Dy. S.P. inspected the place of occurrence no witness had been examined. He does not remember if after five days of occurrence the fard-beyan was sent to the court of S.D.J.M. and show cause had been issued and he had filed show cause. He does not remember if he had gone to the court of S.D.J.M. and seen the record of this case. During the investigation he had not recorded the statement of the accused. It is not correct that on account of fear of show cause he has not recorded the statement of the accused in jail. Later on also he did not record the statement. He did not record the statement of Sri Ram Singh whose mill is also in the village. The original copy of the inquest report was sent for post mortem examination. From Arrah is Sahar of 45 kilometers. It was not correct that he had recorded the fard-beyan of the Incharge of the police camp Sakaldip

Rai which was sent to the police station and he (witness) substituted it by the statement of Krishnawati Devi. It was also not correct to say that they had not written statement of Krishnawati at the relevant time and place. He inspected the house of the accused persons and nothing incriminating was recovered. He has not written as to what time Fard-beyan had been sent.

17. Besides, the evidence of these witnesses for prosecution the defence had also examined four witnesses who were taids and they have proved the documents. D.W. Nagendra Prasad Singh has said that he had received summons (Exts. A to A/2 series) for Uma Shanker Rai, Sachita Rai and Kashi nath Sah to produce documents which are said to produce documents which are said to have been executed by Sakaldip Rai (P.W.3) father of the deceased). He admitted that he was pairvikar of the accused. Ram chandra Rai (D.W.2) is another said who had proved the certified copies of the two sale-deeds (Exts. R and B/1) produced from the accused side. He also said about the execution of these documents in his presence. D.W. 3 is Chitranjan Pd. who is another taid. He has proved the sale-deeds (Exts. 3/2 and 8/3) dated 20. 11. 1981 executed by Sakaldip Rai (P.W.8) in fovour of Achhuta Rai of village Ekwari. D.W.4-Nandji Verma is also an Advocate's clerk who has proved the certified copy of the sale-deed (Ext.A/4) dated 18.9.90 said to have been executed by Smt. Ram Dulari Devi (P.W.7) mother of the deceased and wife of P.W.3 Sakal-

dip Rai.

18. Thus from the appreciation and scrutiny of the evidence produced by the prosection and the defence it appears that Krishnawati Kumari (P.W.4) is the main eye witness while p.w.s. 1 and 3 Ramavati Kumari and Harekrishna had seen part of the incident and also the accused running away P.W.s. 5,6 and 8 namely, Kesho Singh, Ramji Rai and Sakaldip Rai had also seen the accused persons making good their escape after the occurrence. Besides this there is immediate disclosure about the occurrence to P.Ws., 1,2,3,5 and 8, namely, Ramawati, Baliram Rai, Harekrisna, Kesho Singh and Sakaldip Rai. Presence of PW.4 has been well established by the evidence of these witnesses besides her own statement. She has said that she was going with her father for grinding satu. The parched grain with two baskets had been found by the I.O. on the spot, besides the evidence of the witnesses who had admitted the presence of the same including P.W.4. Ramji Rai a hostile witness. Her statement has been subjected to severe cross-examination which she had with stood and has not at all been shaken. Against her statement it has been said that she had made improvement in her statements and so her statement has been contradicted. For that if reference it made to the statement of I.O. (P.W.10) it found that he has said in paragraph no. 47 that she had not said to him that of account of fear of accused none of the villagers came to depose and that on account of

the selling of the fields there was quarrel and that she could not say about 107 proceeding these are the only contradictions said to have been brought out from the statement by putting the same before the I.O.. No doubt, contradiction have got vital role in discarding the evidence of a witness but it should be a major one going to the root of the matter and if they are minor, in significant and unrelated to the main occurrence which amount to mere omission, then they are not at all relevant or material and such omissions have got no adverse effect. In the case of State of *Rajasthan* V. *Smt Kalki & another* [1] at page 1392 in para 6 it has been said :

In the deposition of witnesses there are always normal discrepancies however honest and truthful they may be. These discrepancies are due to normal errors of observation, normal errors of memory due to lapse of time, due to mental disposition such as shock and horror at the time of occurrence, and the like. Material discrepancies are those which are not normal, and not expected of a normal person.. "In the case of *Krishna Pillai Sree Kumar another* vs. *State of Kerala* [2] it has been observed at page 1239 in para 11 :-

"It is no doubt true that the prosecution evidence does suffer from inconsistencies here and discrepancies there but that is a short coming from which no criminal

1. (1981) A, IR (S.C.) 1390
2. (1981) S I.R. (S.C.) 1237

case is free, The main thing to be seen is whether those inconsistencies, etc., go to the root of the matter or pertain to insignificant aspects there of. In the former case, the defence may be justified in seeking advantage of the incongruities obtaining in the evidence. In the latter, however, no such benefit may be available to it. That is a salutary method of appreciation of evidence in criminal cases.."

In the case of *Bhaiwada Bhoginibhai Hirjibhai* v. *State of Gujarat* [1] it has been observed in paragraphs 5 and 6 :- : "..Over much importance cannot be attached to minor discrepancies .. (5). 'Discrepancies which do not go to the root of the matter and shake the basic version of the witnesses, therefore cannot be annexed with undue importance. More so when the all important " probabilities-factor" echoes in favour of the version narrated by the witnesses (Para 6) :In the case of *State of U.P.* vs. *M.K. Anthony* [2] at page 54 para 10 it has been said :

"While appreciating the evidence of a witness, the approach must be whether the evidence of the witness read as a whole appears to have a ring of truth. Once that impression undoubtedly necessary for the court to scrutinise the evidence more particularly keeping in view the deficiencies, drawbacks and infirmities pointed out in

1. (1988) A.I.R. (S.C.) 753 = (1988) Cr.L.J. 1096
2. (1985) A.I.R. (S.C.) 48

the evidence as a whole and evaluate them to find out whether it is against the general tenor of the evidence given by the witness and whether the earlier evaluation of the evidence is shaken as to render it unworthy of belief. Minor discrepancies on trivial matters not touching the core of the case, hyper - technical approach by taking sentences torn out of context here or there from the evidence., attaching importance to some technical error committed by the investigating officer not going to the root of the matter would not ordinarily permit rejection of the evidence as a whole. If the Court before whom the witness gives evidence had the opportunity to form the opinion about the general tenor of evidence given by the witness the appellate court which had not this benefit will have to attach due weight to the appreciation of evidence by the trial court and unless there are reasons weighty and formidable it would not be proper to reject the evidence on the ground of minor variations or infirmities it the matter trivial details. Even honest and truthful witnesses may differ in some details unrelated to the main incident because of power of observation, retention and reproduction differ with individual's. Cross-examination is an unequal dwel between a rustic and refined lawyer.."

Therefore the evidence of P.W.4 who is the daughter of the deceased and had seen the ghastly murder of her father with her own eyes cannot be discarded for mere minor omissions. She will be the last person to screen

away the real offenders and falsely implicate the appellants. It was the occurrence of before the sunset and so there was no question of mistaken identity, specially when the appellants are the own kith and kins of the deceased and the witness. After full scrutiny of her evidence there does not appear to be any iota of untruthfulness and there is ring of turth which creates confidence in her statement and so she is to be believed.

19. As regards Ramawati Kumari (P.W.1) she too is a daughter of the deceased and she on hearing the gun fire and cry of her sister rushed towards the place of occurrence. She saw the appellants running away with their weapons and found her father lying injured. Her sister had given out to her about the occurrence. Similar is the statement of P.W.3 Harekrishna Rai a co-villager who too reached the place of occurrence on hearing the gun fire and hulla. He saw Krishnandan Rai assaulting the victim with bhala, Basudeo with pharsa and Shri Bhagwan and Sudershan standing with gun. He asked them as to why they were committing attrocities but after committing the offence the accused ran away towards north.

The victim died on the spot on account of the injuries P.W.4 was crying when the witness reached there and the two daughters of the deceased, namely, P.Ws. 4 and 1, were giving out about the occurrence to the witnesses.

This witness is a co-villager and he had seen part of the occurrence. Nothing has come out in his evidence to show that he has got enmity or motive against the appellants for falsely deposing against them and falsely implicating them in such a heinous crime P. Ws. 1 and 3 have been subjected to searching and severe cross-examination but nothing has come out from their evidence to show they were not at all on the spot. It has been said about them that they are not named in the first information as eye-witnesses. It is a fact that their names do not find place in the F.I.R. But P.W.4 in her statement has said that when she raised alarm it attracted the villagers and family members P.W. 1 is own sister of the informant (P. W.4) and P.W. 3 is a co-villager. A witness not named in the F.I.R. cannot be discarded only on account of his not being named in the F.I.R although his evidence makes out that he was a witness to the occurrence.

In the case of *State of U.P. Lalla Singh* [1] at page 373 in para 11 it has been said :-

"... These two witnesses are not mentioned in the first information report but from their testimony it is clear that they are natural witnesses to the occurence and there are no grounds for disbelieving thier testimonies...It is not necessary that the names of all the eye-witnesses

1. (1978) A.I.R. (S.C.) 369

should be mentioned in the first information report. P.W. 1 while narrating the occurrence and part played by the accused also mentioned the name who accompanied the party and were prominent in his mind. The mere non-mention of the names of the eye witnesses will not justify the rejection of the evidence of the eye witnesses P.W. 2 has already said, he is Sabhapati of the village and there is no reason why he should testify falsely against the accused. No enmity had been proved between P.W. 2 and the accused. Moreover, this witness was examined by the police on the same day.

Equally unconvincing is a reason given by the High Court by rejecting the testimony of P.W. 8 independent witness and resident of the village near the scene of the occurrence. According to P.W. 8 he was going to his sugarcane field when he heard an alarm saw the incident ... The scene of the occurrence is very close of the village and according to the witness he saw from a distance of 28-30 paces.."

Thus P.W.3, who is a covillager, has given out reasons for his presence, on the spot. He could and did reach there and has given out about the occurrence which is fully corroborated by the evidence of the eye witness, P.W.4 and he had no axe to grind against the appellants. The P.W.4 has said that the villagers had reached there. So- non-mention of name of P.W. 3 in the F.I.R. will not have any adverse effect. Similar is the

position about P.W. 1, the own daughter of the de ceased. She too is a natural witness who rushed to the spot on alarm of her sister and saw the occurrence and so said to others whatever she could see and also gave out the same in the witness box which has not been found to be improbable and unbelievable on the facts and circumstances of the case. So if her name got omitted inadvertently it will not have any adverse effect when P.W. 4 says that her family members had reached the spot.

20. P.W. 2 Baliram Rai is the brother-in-law (sala) of the victim who is said to have reached the village on the day of occurrence in connection with talks about marriage of P.W.4 Krishnawati Kumari and has given out this reason for being there. He has said that while he was talking with P.W. 8 father of the deceased, which fact is also admitted by P.W. 8 himself, that he heard the gun fire and alarm and went to the spot. His name also does not find place in the F.I.R. Though he is not a member of the family and is resident of different village, but he has given out reasons for his presence which could not be shaken in his cross- examination. P.W. 4 also said that her marriage was to be performed. Though this witness is a near relation of the deceased but nothing had come out to show that this witness had any motive to falsely implicate the appellants who are own relations of the deceased. His evidence has not been shaken in cross-examination. He had been throughout in the night on the spot. He is also a non-F.I.R. witness but resident of the

same village and nothing has come out to show that he could not be on the spot or that at the relevant time he was elsewhere or that he was not able to see the occurrence.

He too is not found to be inimical or ill-disposed towards the accused. A witness will not implicate a person falsely in any case specially in such a heinous case like murder and nothing has come out to show that he had motive otherwise to depose falsely against the appellants. His evidence on scrutiny is found to be trustworthy and unshaken and so it is to be believed. P.W.8- father of the deceased and an old man also reached the spot and has been given out about the occurrence. He too does not appear in the F.I.R. But that will not be a ground to discard his evidence. The motive about the occurrence may be there, because the accused wanted to take more share than the due which he was resisting and the accused also wanted to take over the garden and that was a motive for them to commit the offence. This witness had got no motive to falsely implicate them, as it has not come out that this witness or the deceased or any one of the deceased side was trying to grab the land or property of the appellants. Rather evidence led by the prosecution shows that the appellants had wanted to grab the property of the deceased, as said above, which was being resisted and so motive was to the appellants to commit the offence of murder and no motive for the father or

the deceased or to his daughters to falsely implicate the appellants who are their own relations and family members. Ramdulari Devi mother of the deceased has been tendered but she had not been cross-examined. She is also a natural witness. The prosecution did not with hold her and produced her but the defence did not want to get anything from her.

21 . P.Ws. Ramji Rai, who is a covillager, too admits about the occurrence. He has been declared hostile. He says that he reached the spot from his Dhan, Flour & Kutti Mill on hearing the gun fire at about 6 P.M. While going for some distance he saw the accused running away with their weapons i.e. Sudershan had small countrymade gun, Basudeo a pharsa and Vikrama and Krishnanand Bhala. On reaching the spot he found Rajkeshwar Rai lying injured, dead and bleeding at the trijunction near the khand of Swikriti Singh and also found the parched grain scattered with two baskets. After being declared hostile he has said that Krishnawati had not said to him as to how the accused had killed her father. She was weeping at the place of occurrence and she has not said that she was going with her father for grinding satu. With objection he has also said that he had not said to the police that Krishnawati while weeping was giving out the names of the accused and that she was going with her father for grinding satu and when she reached near the khand of Swikriti Singh and at the turning, the accused assaulted the deceased with their

weapons. The Court has to consider the same how far it is of use to the prosecution or defence and to arrive at the truth, but the evidence of such witness cannot be treated as a version of the prosecution. In the case of *Sat Paul* v. *Delhi Administration* [1] It has been observed by the Supreme Court at page 308 in para 51:-

"...it emerges clear that even in a criminal prosecutiorn when a witness is cross-examined and contradicted with the leave of the court, by the party calling him, his evidence cannot, as a matter of law, be treated as washed off the record altogether. It is for the Judge of fact to consider, in each case whether as a result of such cross-examination and contradiction, the witness stands thoroughly discredited or can still be believed in regard to a part of his testi mony. If the Judge finds that in the process, the credit of the witness has not been completely shaken, he may, after reading and considering the evidence of the witness, as a whole, with due caution and care, accept, in the light of the other evidence on the record, that part of his testimony which he finds to be creditworthy and act upon it. If in a given case, the whole of the testimony of the witness is impugned, and in the process, the witness stands squarely and totally discredited, the Judge should, as matter of prudence, discard his evidence in toto."

It has also been observed at page 301 page 48:-

Therefore, neither the party calling him, nor the adverse party is, in law precluded from relying on any part of the statement of such a witness."

1. (1976) A.I.R. (S.C.) 294.

In the case of *Bhagwan Singh Vs. State of Haryana*[1]

It has been observed at page 203 in para 8 .—

"But the fact that the court gave permission to the prosecuter to cross examine its own witness, thus characterising him as, what is described as a hostile witness, does not completely efface his evidence. The evindence remains admissible in the trial and there is no legal bar to base a conviction upon his testimony if corroborated by other reliable evidence."

In the case of *Syed Akbar v. State of Karnataka* [2]

it has been observed at page 1851 in para 12:-

" As a legal proposition, it is now settled by the decisions of this court, that the evidence of a prosecution witness cannot be rejected wholesale, merely on the ground that the prosecution had dubled him hostile and had crossexamined him. We need say no more than reiterate what this rouct said on this point in Sat paul v. Dei Administration (1976)2 SCR 11:AIR 1976 SC 294 (supral)."

In the case of *Narayan Nathu Naik* v. *State of Maharashtra* [3]

their Lordships have been pleased to observe about the witnesses who have resiled from their earlier state-

1. (1976) A.I.R.(S.C) 202
2. (1978) A.I.R (S.C.) 1848
3. (1971) A.I.R. (S.C.) 1656

ment at page 1657/ para 5:-

" We have read the evidence of these witnesses and we have thoroughly checked it and we are satisfied that what has been stated by these withness is the true version of what happened on that fateful night. The story is a simple one, of an attack in the middle of the night by an assailant who was not only grappled with but was seen and identified in the light. The Witnesses who have resiled have also stated that the occurrence took place at the door of the cottage. They have also stated that there was sufficient light for then to see although they changed that they did not see the assailant nor heard what the victim stated to his mother about the appeilant having assaulted him. This version comes from the witnesses who no doubt are interested, but they are not interested enough to let the real assailant escape and charge someone else. Report of this case was made almost immediately and in fact the police arrived within a couple of hours and the statements were recorded the very next morning. There was no time available to concoct a false case with such details against the applieant."

In the light of these observations of the courts the tatement xxxx she did not recognise thiem. She volunteered the S.I. had come with the police. She could not say if they were camp people or from the police-station. The S.I did not make any enquiry before her. In para 21 she has said that when the Sub Inspector came to

the dead body, then all the members of their family were there and there were 20 to 30 persons. In para 23 she has said that the I.O had recorded her statement five steps away from the dead body. P.W.1 Ramawati Kumari has said (in para 27) that dead body of her father was allowed to remain till arrival of the police and dead body was taken in charge by the police the same night at 11-11.30. The dead body was taken to the police camp and after the dead body was taken over, she and others went away. She and her sister were on the spot through till the dead body was taken away by the police. In para 30 she had said that the police constable had said that information had been sent to the S.I. and the S.I. would come and would record the statement. Two-three constables had come on hearing the occurrence and they had gone to call the S.I. and they came along with the sub Inspector and till arrival of the S.I. her family members remained near the dead body besides 4-5 others of the village. The S.I. came and examined her sister and then her. The investigating officer (P.W.10) has said that on 11.4.1980 at 10.30 P.M. on getting information through the Incharge of the police came he reached the spot at 11.30 and recorded the fard-beyan of Krishnawati Kumari. There he found the dead body of Rajkeshwar Rai at the turning of the gali. The body was west-east and there was sufficient quantity of blood on the ground and the blood spots were spread upto the north on the bricks of the khand of Swikriti Singh. Besides he also

found one gamcha and chappal on the spot. Thus from this it appears that till the a rival of P.W.10, no statement was recorded by any one from the camp police and when the camp police sent information, then P.W.10 came and recorded the statement of P.W.4 and also found the dead body at the place of occurrence and not at the police camp. Therefore the contentions that the dead body was taken by camp police and there is nothing as to how the police came to the spot are not made out.

22. It was next contended that there was no motive for the offence. As to this it has been throughout the case of the prosecution and the informant had been saying that the accused being the own brothers had been demanding more share in the property and they wanted to occupy a room and the garden of the deceased which was being resisted by the deceased. This version of the informant has not been challenged. Moreover motive becomes of academic nature when there is direct evidence about the involvement of the appellants in the occurrence. In the case of *Molu* v. *State of Haryana* [1] at page 2505 (para-11), the Supreme Court has observed:-

It is settled that where direct evidence regarding the assault is worthy of credence and can be believed, the question of motive becomes more or less academic. Sometimes motive is shrouded in mystery and it is very

1. (1976) A.I.R (S.C.) 2499

difficult to locate the same. If however the evidence of eye witness is credit worthy and is believed by the court which has placed implicit reliance on them, the question whether there is a motive or not becomes wholly irrelevant."

In the case of *Faquira v. State of U.P* [1] their Lordships have held at page 916 (para 4).

" The fact that the apparent motive was too flimsy is no reply to the unshaken testimony of creditable and natural eyewitnesses who had no motive whatsoever to implicate the appellant falsely."

In the case of *Krishna Pallai* v. *State of Gujarat* [2] it has been held at page 1238 (Para 7):-

" In any case, it is not a sine qua non for the success of the prosecution that the motive must be proved. So long as the other evidence remains convincing and it is not open to reasonable doubt, a coviction may well be based on it.

In the case of state of *A.P.* v. *Bogam Chandraih & another* [3] the Supreme Court has observed at page 1901 (para 7)

"Another fault in the judgment is that the High Court has held that the prosecution has failed to prove ade-

1. (1976) A.I.R. (S.C.) 915.
2. (1981) A.I.R. (S.C.) 1237.
3. (1986) A.I.R. (S.C.) 1899.

quate motive for the commission of the offence without bearing in mind the well settled rule that where there is direct evidence of an acceptable nature regarding the commission of an offence the question of motive cannot loom large in the mind of the court."

22/A It has also been said that there is only one witness of the occurrence, namely, Krishnawati and her sole statement should not be relied on and so be discarded. As to this contention there is not only the statement of Krishnawati but also or P.W.s.1 and 3, namely, Ramawati and Harekrishna who had reached the spot and had seen part of the occurrence. Besides, them are the co-villager Kesho Singh (P.W.5) who had also seen the accused running away; Bali Ram (P.W.2) and also P. W. 8 Sakaldip Rai, father of the deceased to whom immediate disclosure had been made. P.W. 1 is clear in saying that on alarm of her sister she rushed to the spot and the informant (P.W.4) made immediate disclosure to her that appellants 1 and 2 had given injury to the deceased by fire arm and also disclosure to others who had come, namely, Kesho Singh, Ramji Singh and Baliram Rai (P.W.s. 2,5 and 6). P.W.2 says that when he reached the spot he found his brother-in-law fallen and his nieces Ramawati Kumari and Krishnawati Kumari crying and saying that appellants Shri Bhagwan and Sudershan had injured their father by fire-arms, Basudeo by Pharsa and Krishnandan, P.W.3- Harekrishna is a co-villager who claims to have gone to the spot on

hearing gun fire to the khand of Swikriti Singh and saw Krishnandan armed with bhala, Basudeo armed with pharsa, Sri Bhagwan and Sudershan were standing with country made gun and when he asked why there were committing these attrocities then they ran away and the eider and younger daughtei's of the deceased said about the occurrence. P.W.4 has said that she had given out about the occurrence to those who had arrived at the spot. P.W.5 Kesho Singh a co-villager also reached the spot and saw the victim dead and the daughter of the deceased told him about occurrence. So is the version of P.W.8. Not only that. P.W. 5,6 and 8 are clear in saying that they saw the accused running away. Purpose of immediate disclosure is that there should be no adulterated or embellished version and truth may come out at the earliest. In the case of *Pana Nana Kare v. State of Maharashtra* [1] it has been held that as the solitary eye witness had not disolosed the name of the assailant immediately after the occurrence conviction was not held proper on this ground besides other ones. Similarly in the case of *Sonia Bahera vs. Sate of Orissa* [2]. P.W. 2 Rosani wife of P.W.8 Markanda had given information to the police and had said that she had seen the appellant attacking the deceased but did not disclose the incident to anybody in the village and when her husband also came she did not tell him that such incident had taken

1. (1979) A.I.R (S.C.) 697
2. (1983) A.I.R (S.C.) 491

place due to fear. Thus the immediate disclosure to the witnesses or the village people who had come on the spot on alarm or out of sympathy as to who assaulted the victim is essential. Therefore there is no immediate disclosure then there is every possibility of concocted, embellished and motviated version which is not so in the instant case, as the informant (P.W.4), her sister P.W.1 and Harekrishna (P.W.3) had given out to the villagers who had come to the spot immediately after the occurrence.

23. It has also been alleged that no independent witess had been examined. As to this contention the prosecution has produced p.w. 3,5 and 6, namely, Harekrishna, Kesho singh, and Ramji Rai who are co-villagers and not related to the accused or the prosecution. The evidence or P.W. 3 and 5 does not suffer from any infirmity and they have supported the prosecution case but P.W.6 did not and so decliared hostile. Inspite of seeing the occurrence these days the people keep themselves away from the crime and the persons connected with the crime for various reasons, as this apathy of the general people has become rampant and the Court has to remain confined to the witnesses examined and consider if their evidence inspires confidence. In the case of *Sarwan Singh & others* v. *State of Punjab* [1] it has been said at page 13 (Para 2311):-

1. (1976) A.I.R. (S.C.) 2306

"But it is not the law that the omission to examine any and every witness even on minor points would undoubtedly lead to rejection of the prosecution case or drawing of an adverse inference against the prosecution. The law is settled that the prosecution is bound to produce only such witnesses as are essential for unfolding of the prosecution narrative. In other words before an adverse inference against the prosecution can be drawn, it must be proved to the satisfaction of the court that the witnesses who had been withheld were eye-witness who had actually seen the occurrence, and were therefore material to prove the case. It is not necessary for the prosecution to multiply witnesses after witnesses on the same point; it is the quality rather than quantity of evidence that matters. In the instant case the evidence of eye-witness does not suffer from any infirmity or any manirest defect on its intrinsic merits. Secondly, there is nothing to show that at the time when the deceased was assaulted a large crowd had gathered and some or the members of the crowd had actually seen the occurrence and were cited as witnesses for the prosecution and been withheld. We must not forget that in our country there is a general tendency amongst the withnesses in mofussil to shun giving evidence in courts because of the cumbersome and dilatory procedure of our courts. Therefore nobody wants to be a witness in a murder or in any serious offence if he can avoid it."

In the case of *Appabahai and another.* v. *State of*

Gujarat [1] the Supreme Court has observed in para 11:-

" It is no doubt true that the prosecution has not been able to produce any independent witness to the incident that took place at the bus stand. There must have been several of such witnesses. But the prosecution case cannot be thrown out or doubted on that ground alone. Experience reminds us that civilized people are generally insensitive when a crime is committed even in their presence. They withdraw both from the victim and the vigilance. They keep the selves away from the court unless it is inevitable. They think that crime like civil dispute is between two individuals or parties and they should not involve themselves. This kind of apathy of the general public is indeed unfortunate, but it is there every where whether in village life, towns or cities. One cannot ignore this handicap with which the investigating agency has to discharge its duties. The court, therefore, instead of doubting the prosecution case for want of independent witness must consider the broad spectrum of the prosecution version then search for the nugget or truth with due regard to probability, if any, suggested by the accused.."

It has also been said in the case *of state of U.P. v. Anil Singh* [2] *at page* 2001 in para 13:-

" In some cases, the entire prosecution case is

1. (1988) A.I.R. (S.C.) 696 = 1988 Cr.L. J. 848.
2. (1988) A. I. R. (S.C) 1998.

doubted for not examining all witnesses to the occurrence. We have recently pointed out the indifferent attitude of the public in the investigation of crimes. The public are generally reluctant to come forward to depose before the court. It therefore, not correct to reject the prosecution version only on the ground that all witnesses to the occurrence have not been examined. Nor it is proper to reject the case for want of corroboration by independent witnesses if the case made out is otherwise true and acceptable."

In the instant case, there is nothing to show that the P.W.s. 5 and 6 are not independent and have got any motive to falsely impicate the appelliants. It is something different that P.W.6 Ramji Rai has turned hostile. As such in these circumstances, the contention about non-examination of independent witness has got no force.

24. It has also been urged by the learned counsel for the appellants that there is delay in the despatch of F.I.R. which creates doubt about the genuineness of the F.I.R. and there is every possibility of being ante-timed or concoctions made therein, specially when the version given by the Incharge of police camp to the I.O. has not been brought on the record. As to this contention P.Ws.4 and 1 are clear in saying that the police from camp came and then they went away and thereafter the I.O. came in the night. P.Ws. are clear in saying that they have not sent any information to the I.O.

.The I.O. says that on getting information from the In-charge of the Police camp at 10.30 P.M. he made entry in the register and then he reached the spot at 11.30 P.M. and recorded the fard beyan . P.w. 4 also gave out the fard - beyan in the same night. The I.O has said that after recording the fard beyan he had despatched the same for being registered as first information report at the police station and then he started investigation, which fact is also borne out by the other witnesses that he had held inquest report and sent the dead body for postmortem examination and that the I.O. also recorded the statement of the witnesses. He also prepared the seizure memo on the spot. So after recording the fard beyan investigation was started and that continued. There is nothing to say that the I.O. had not reached on the night of occurrence and he had not recorded the fard beyan or not examined the witnesses, nor prepared the inquest report nor sent the dead body and nor prepared the seizure memo. The record shows that the inquest report is dated 12.4.1980 at 6 A.M. and the investigating officer says that he sent the dead body on 12.4.1980 at 6 A.M. The doctor says that he conducted the postmorten examination on 12.4.1980 at about 11.30 A.M. and submitted his report (Ext.3). The F.I.R. is said to have been registered on 12.4.1980 at 8.30 A.M. at the police station Sahar. It appears to have reached the court of the Learned C.J.M. on 16.4.1980 at 10.30 A.M. On 12.4.1980 was Saturday, 13.4.80 Sunday, 14.4.80

Monday, 15.4.1980 Tuesday and 16.4.1980 Wednesday. On account of late reaching of the F.I.R. to the court of learned C.J.M. an explanation was called for from the I.O. Section 157 Cr.P.C. provides for sending of the F.I.R. forthwith.

In the case of *Pala Singh & anoth.* v. *State of Pun,ab*[1] it has been said by the Supreme Court in para 7 at page 2081 :-

" No doubt the report reached the Magistrate about 6 P.m.S. 157, Cr.p.c. requires such report to be sent forthwith by the police officer concerned to a magistrate empovered to take cognizance of such offence. This is realy designed to keep the magistrate informed of the investigation of such cognizable offence so as to be able to control the inves ation and if necessary to give appropriate direction under S.159. But when we find in this case that the F.I.R. was actually recorded without delay and the investigation started on the basis of that F.I.R. and there is no other infirrmity brought to our notice, then, however, improper or objectionable the delayed receipt of the report by the magistrate concerned it cannot by itself justify the conclusion that the investigation was tainted and the prosecution insupportable. It is not the appellants' case that they have been prejudiced by this delay."

In the case of Sarvan Singh & oths. v. State of Punjab

1. (1972) A. I R (S C.) 2679.

(Supra) the Supreme Court observed at Page 2309 (Para – 9)

"Apart from this it is well settled that mere delay in despatch of the F.I.R. is not a circumstance which can throw out the prosecution case in its entirety.."

Their lordships quoted the observations made in Pala Singh's case (supra). In the case of *State of U.P. V. Gokarn & oths* [1] the Supreme Court has observed at page 135 in para 13 :-

"As regards the last circumstance, it is true that the special report was received by the District Magistrate on 29th March but it is not as if every delay in sending such a delayed special report to the District Magistrate under S. 157 (Cr.p.C. would necessarily lead to the inference that the F/R has not been lodged at the time stated or has been ante timed or antedated or that the investigation is not fair and foithright.

As has been pointed out by this court in *Pala Singh V.State of Punjab (1973)* S.C 964 (AIR 1972SC 2679) the relevant provision contained in s. 157 Crp c. is really designed to keep the Magistrate informed of the investigation of a cognizable offence so as to be able to control the investigation and if necessary to give appropriate direction under S. 159 C.P.C., but if in a case it is found that the F.I.R. was recorded without delay and the investigation started on that F.I.R. then however

1. (1985) A.I.R. (S.C.) 131

improper or objectionable the deayed receipt of the report by the in Magistrate concerned that cannot by itself justify the conclusion that the investigation was tainted and the prosocution insupportable. In the instant case the material on record clearly shows that steps in investigation by way of drawing inquest report and other Panchanamas had been taken in the early hours of the morning of 28th march and these could only follow the handing over of F.I.R. Ex. Ka-1 by Ram Narain singh to the Station efficer at about 2.15 a.m. In view of these facts the delayed receipt of the special report by the District Magistrate on 29th march would not enable the court to dub the investigation as taineted one nor could Ex. Ka-1 be regarded as ante-time or antedated. For the same reasons the delay insending the necessary papers to the Medical officer which were received by him on 29th March will be of no significance.

In the case of *Subhash Shiv Shankar* v. *State U.P.* [1] it has been observed at page 1225 in para 11:-

" Mr. Anthony argued that Exhibit Kha 1 could not have been given at 1.12 p.m. because there is no evidence to show when the report was sent to the magistrate and when it was received by him. The learned counsel referred to Gurdev Singh v. The state (1963) 65 pun LR 409. where the dangers ensuing from

1. (1987) A I R (S C) 1222

a First Information Report not being lodged promptly have been pointed out. We are unable to accept the argument of Mr. Anthony because there is no materials to warrant an inference that Exhibit kha 1 had been given later but ante-dated to cover up the delay in taking the report. It is true that the First Information Report sent to Court does not contain the Magistrate's endorsement regarding the time of its receipt, but Ram Kishan, Head Constable (P.W.5) has deposed that the special report was despatched to the Magistrate at 1.20 p.m. itself through constable Chiman Lal and that the General Diary contains an entry to that effect.

In the case of *Dalbir Singh & othser's* v. *State of Punjab* [1] it has been observed at page 1332 in para 14:-

"It is apparent that if the report itself was recorded at 3.25 p.m. and the police officer was investigating the offence, next morning the report had been despatched to the Magistrate. It is also significant that initially as the report was recorded on the basis of dying declaration of Makhan Singh an offence under S.307/ read with Ss. 148 and 149 only was registered. It therefore could not be said that there was any deiay insending the report to the Magistrate."

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1. (1987) A.I.R. (S.C.) 1328

In the case of *State of U.P. Vs. Anil Singh* (supra) the supreme court has said at page 2002 in para 17:-

"According to counsel, the report must have been prepared after the inquest and non-mentioning of the time of despatch of FIR to the court would lend support to his submission . We carefully examined the material on record. We are unable to accept the submission of learned counsel.In the first place, P.W.1 was not specifically cross-examined on this matter.The court cannot, therefore, presume something adverse to the witness unless his attention is specifically drawn to .Secondly , the records contain unimpeachable evidence to the contrary, Apart from the records of the Police Station, the Panchanama (B.Ka.7) to which Ramesh Chandra Dube (D.W.1) has admittedly appended his signature shows that the reporting time of crime was 9.15 p.m..."

In case of *Balu Ramu Mochi* v. *State of Gujarat* [1]*a Division Bench* has observed at page 986 in para 9:-

".. It is difficult to understand how so much time was taken for the F.I.R. to reach the Judicial Magistrate in the same district. The presecution has not made effort to explain this delay. The police officer-Bharatakant, Ext. 31, when aksed to explain this delay gave excessive replies. We sare constrained to observe here that there is delay of five days and the delay has not been explained. The

1. (1986) Cr. L.J. 983

question. however. is whether simply because there was delay on the part of the police in sanding the F/R to the judicial Magistrate, First class we should look at the evidence of Bhagilal with any suspicion. The question as to what is the effect of the delay in sending the F.I.R. to the Judicial Magistrate will depend upon the facts and circumstances of each case. In a given case, delay of some hours may assume importance, while in a case like the present one, even the delay of five days may not adversely affect the prosecution case.."

In the case of *Lallan* v. *State of U.P.* [1] a Division has observed at page 400 in para 17:-

Besides. it may be noted that it is not that as if every delay in sending a delayed special report to the District Magistrate S157/, Cr.P.C. would necessarily lead to inference that the first information had not been lodged at the time stated or has been ante-timed or ante dated or that the investigation is not fair and fortih right. If in a case it is found that the first information report is recorded without delay and the investigation started on that first information report, then, however, improper or objectionable the delayed receipt of the report by the Magistrate concerned that cannot by itself justify the

1. (1990) Cr. L.J. 468

conclusion that the investigation was tainted. (See stateof u.p. V. Gokaran, A.I.R. 1985 sc 181). In our view when in this case the first information report was recorded within two hours of the incident and the invesigation was immediately started then the delay of a few hours, if any, in sending the special report was not significant "

Thus the contention about delay in the receipt of the F.I.R. to the magistrate in these circums tances that the frard beyan lodged, F.I.R. drawn, investigation started, statement of witnesses recorded, inquest report prepared, and dead body sent for post mortem examination has got no effect and so this contention also fails.

(25) Learned counsel for the appellants has also urged that two accused, namely, Bikrama Singh and Krishnandan were said to have been armed with bhala, have been acquitted and so the evidence of the prosecution witnesses on that score impleading the other accused appellants should be disbelieved. As to this contention, learned Sessions Judge has considered the case of the two appellants in paragraph no. 29 of the judgement and has given the following findings:-

" But so far the causing of injuries with bhala by accused Krishna Nandan and Bikrama is concerned, the evidence of the P.W.S. does not get support or corroboration from the evidence of the doctor P.W. 9. The doctor P.W. 9 has deposed in his evidence in cross-examination

that incised injuries are caused by sharp cutting weapons. He had admitted that he has mentioned nothing in the P.M. report, Ext.3 to suggest that any of the injuries was caused by sharp pointed weapon like bhala. Though the doctor has said in his evidence that injury nos. 3,5,7 and 8 may be caused by bhala but there is no mention of such thing in his P.M. report Ext. 3. He has, simply mentioned that all the incised injuries are caused by sharp cutting weapon. So in this view of the doctor's evidence, it has been vehemntly argued by the learned defence counsel Shri Ram Bilash singh that the charges of participating in the crime by acused Krishna Nandan and Bikrama by causing bhala injuries resulting into the death of Rajkeshwar Singh is not proved beyond all reasonable doubts. I also do feel and find that though the evidence of the eye witnesses is that these two accused persons namely Bikrama and Krishna Nandan caused bhala injuries on the person of Rajkeshwar but there is not even a single punctured wound so as to hold that they had their participation in this crime in furtherance of their any common intention to kill Rajkeshwar or in prosecution of the common object of any assembly formed to kill Rajkeshwar Singh. So I agree with the learned defence counsel that the charges brought against the two accused namely Krishna Nandan and Bikrama are not proved beyond all reasonable doubts. So they are entitled to the benefit of doubt and they deserve to be acquitted of the charges brought against

them. Therefore these two accused persons are acquitted of the charges brought against them giving them benefit of doubt."

In the case of *Solanki Chimanbhai Kabhi* v. *State of Gujarat* [1] at page 487 in para 12 the Supreme court has observed:-

"Ordinarily, the value of medical evidence is only corroborrative. It proves that the injuries could have been caused in the manner alleged and nothing more. The use which the defence can make of the medical evidence is to prove that the injuries could not possibly have been caused in the manner alleged and thereby discredit the eye witnesses, Unless, however, the medical evidence in its turn goes so far that it completely rules out all possibilities whatsoever of injuries taking place in the manner alleged by eye witnesses, the testimony of the eye witnesses cannot be thrown out on the ground of alleged inconsistency between it and the medical evidence."

No doubt in the *case of Anwaruddin v. Shakoor & oths. the Supreme Court* [2] in para 12 has said that"

"Therefore the mere absence of spear injury on the person of the two deceased cannot reject the evidence of the eye-witnesses to the actual commission of the crime doubtful. All that one can say is that as the eye witnesses are highly interested and since the evidence

1. (1983) A.I.R. (S.C.) 484.
2. (1991) A.I.R. (SC.) 318.

regarding the part played by Alam is not corroborated for want of spear injuries they should be given benefit of doubt".

26. Though the learned Addl. Sessions Judge has admitted that all the witnesses including P.W.s. 1,8, and 4 are clear in saying that bhala injuries had been given by the two acquitted accused and Doctor (p.w.9) has said in the post mortem report (Ext.3) that injury nos. 1 to 8 were incised wounds while injury nos. 9 and 10 lacerated wounds and injury nos. 9 and 10 were communicating each other and their margins were overted caused by fire arm injuries like country made gun. Injury nos. 1,2,4 and 6 were causd by sharp cutting weapon like garasha and the rest of the injuries, namely, 3,5,7 and 8 might be caused by bhala. It is also a fact that the trial court,as seen above. has given benefit of doubt to the said two accused said to be armed with bhala and this matter about the injuries are being considered, as evidence these eye-witnesses are being doubted. So reference can be made to the observations of the supreme court in the case of *Brath Sukhdev Singh* v. *State of Punjab* [1] in para 13 and 21at pages 825 and 326:-

" ... Where the evidence examined by the appellate court unmistakenly proves that the appellant was guilty under S. 34 having shared a common intention

1. (1991) A I R. (SC.) 318

with the other accused who were acquitted and that the acquittal was bad, there is nothing to prevent the appellate court form expressing that view and giving the finding and determining the guilt of the appellant before it on the basis of that finding. (Para 18)

We are of the opinion that the High Court was fully justified in re - assessing the evidence with a view to determining if the infirmities pointed out by the trial court while acquitting the co accused existed on record. In doing so, the High Court was not fettered by the conclusions of the trial court. The entire evidence was before it and it was free to reach its own conclusions. It was free to examine the infirmities for the limited purpose of assessing the impact thereof on the case of the appellant .. .." (Para - 21)

So without interfering with the order of acquittal of the two accused this court has got power to reappraise the evidence and give its own finding about the part assigned to the acquitted accused by the prosecution witnesses when the evidence of these witnesses is under challenge in respect of the other convicted accused. In cross-examination P.W.9- doctor has said that the injuries are generally described as incised wound and penetrating wound. He is in general agreement with the views given in Model Medical Jurisprudence. Penetrating wounds are caused by sharp pointed weapon and he had described all the injuries having been caused by

sharp cutting weapon. Pharsa and garasa are two types of weapons. This statement of the doctor that he has discribed all the injuries caused by sharp cutting weapons in the postmortem report is not correct as he has clearly said that the injury nos. 3,5,7 and 8 might be caused by bhala and injury nos. 1,2,4 and 6 by sharp cutting weapon. H.W.V. Fox in his Medical Jurisprudence & Toxicology 5th Edition page 240 has given about incised wounds:

" 5. Incised wounds- are lacerations caused by a sharp cutting edge, where the force has been delivered over a very narrow area, corresponding with the point or edge of the blade.

Incised wounds may be caused by a knife, cleaver, spear, razor, sharp axe or any other metal cutting instrument or by sharp material such as broken glass, bottles etc. The common feature is delivery of the forde over a very narrow are."

In Modis Medical Jurisprudence & Toxicology-12th Edition (page 200), it has been said that "an incised or slash wound is produced by sharp cutting instrument such as a knife, razor, scissors, sword, gandasa (a chapper), axe, hachet, scytha, kookri, or any object such as broken piece of glass or metal which has a sharp cutting pointed or linear edge and are mostly intentionally infilicted. The cutting edge of a knife may be completely or partly sharp and partly blunt and the other edge may be blunt, separated, scalped or hollow, all these varieties

effect the shape of the wound.

An incised or slash wound is broader than the edge of the weapon causing it owing to retraction of the divided tissues. It is some what spindle-shaped and gasping, its length being greater than its depth. This gasping is greater in deep wounds when the muscle fibres have been cut transversely or obliquely. Its edges are smooth, even clean cut, well defined and usually everted. The edges may be inverted, if a three layer of muscular fibres is closely united to the skin as in the scrotum. They may be in irregular in cases where the skin is loose or the cutting edge of the weapon is blunt as skin will be puckered in front of the weapon before it is decided lenght of the incised wound has no relation to the length of the cutting edge of the weapon, but it may give some idea of the penetration.

The edges of the wound made by a heavy cutting weapon such as axe, hatchet or shovel, may not be as smooth as those of a wound caused by a light cutting weapon such as a knife, razor, etc. and may show signs of contusion. Such a word is, as a rule, associated with extensive injuries to deep under lying structures or organs. A sharp weapon edge if struck obliquely will cause bevelling of one edge of the wound and also indicate the direction of the blow, while if the sharp edge is struck almost horizontally it produces a wound with a flap.

A curved weapon, such as a scytha, or sicklefirst

produces a stab or puncture and then an incised wound; sometimes the interventing skin may be left intact.

While describing an incised wound it is always necessary to note its direction. The commencement of the wound is deeper and it becomes shallower and tails off towards the end, but no direction is notice-able when the weapon has been drawn while inflicting a wound."

In the case of *Sonelal* v. *State of U.P* [1]. it has been held in para 20:-

"Normally a sharp pointed weapon would cause a punctured wound but the weapon like Banka or Ballam can cause incised wound provided instead of the pointed end the surface of the weapon is used. In the melee that followed it would have become difficult for the witnesses to say with exactitude that injuries were caused by the surface or by the pointed end. The injuries found on the deceased persons would, therefore, be sufficient evidence of the assault. . . "

In the case of *Pal Singh & oths.* v. *State of U.P.* [2] it has been obsered in paragraph 2:-

"... Lastly, it was submitted that the injuries caused to the deceased are inconsistent with the manner in which the deceased is alleged to have been a ssaulted. For instance, while the accused were armed with kantas

1. (1978) A.I.R. (S.C.) 1142
2. (1979) A I.R. (S C.) 1116 · (1979) 4 S.S.C 345

and spears, only one punctured wound was found. We might point out that this is purely artificial argument. The High Court has rightly pointed out that if the accused assaulted with side portion of the blade of the weapons in a slanting fashion, only incised wounds be caused. Thus the injuries sustained by the deceased are not inconsistent with the medical report which finds a number of incised wounds inflicted on the deceased..."

In the case of *Veluswamy & oths.* v.*State of Tamil Nadu* [1] it has been said at page 837 in para 16:-

" It is not necessary when a bichuva is used on a fleshy part of the body that there would be a punctured wound. A bichuva has sharp edges on both sides and when it is drawn out, the outer appearance it leaves is of an incised wound.."

27. A medical man who examines a victim of assault, at the earliest is no doubt the best person to give his opinion about the nature of injuries, the sites of injury, the weapon of offence and the like . The Supreme Court has said in the case of *Munir Ahmed* V. *State of Rajsthan* [2] that the doctor who examined the injuries of the dead person while alive and also conducted the postmortem on the dead body is competent to opine about the nature of the weapon of assault having regared to the nature of the injuries sustained. In the case of *Mufabhai*

1. (1983) A I R (S C) 832
2. (1989) S C C (CRI) 455 (1989) A I R (S C) 705

Nagarbhai Ravel v. *State of Gujarat* [1] the Supreme Court observed at page 36 (para 3)" It is needless to say that the doctor who had examined the deceased and conducted the potmortem is the only competent witness to speak about the nature of the injuries and the cause of death. Unless there is something inherent defect the court cannot substitute its opinion to that of the doctor."

In the case of *State of U. P.v. Shanker* [2] their Lordships have been pleased to observe at page 904 (para 31):-

" Dr. Bhuneshwar Pd. (P.W.3) also, who had examined the child Jai Dev testified that the injuries found on the child had been caused with some sharp edged weapon including a "pharsa". The High court was thus clearly in error on conjectural premises of the medical experts regarding the nature of the inflicting weapon."

In the case of *Mange* v. *State of Haryana* [3] it has been observed by the supreme court in para 2:-

"... It is difficult for any medical expert to give the exact duration of time when the rape was committed, more particularly when we have the evidence of P.W. 4 as to the time and date of the occurrence, the medical evidence can hardly be relied upon to falsify the evidence of the eye witness because the medical evidence is

1. (1993) (1) P.L.J.R. 34
2. (1981) A.I.R. (S.C.) 897
3. (1989) 4 S.C.C. 349 = 1979 A.I.R (S.C)1194

guided by various factors based on guess and certain calculations..."

In the case of *State of U.P.* v. *Krishna Gopal & anoth* [1] it has been observed in para 13 at page 2160:-

"There might also be some justification for the grievance of the appellant that the High Court had preferred some observations in the medical evidence which Sri Prithviraj characterised as merely conjectural answers to the other categoric answers by the very medical witnesses themselves. Sri prithviraj also submitted that it would be erroneous to a accord undue primacy to the hypothetical answers of medical witnesses to exclude the eye witnesses account which had to be tested independently and not related as the variable keeping the medical evidence as the "constant".

27/A. About the appreciation of the evidence of eye witness in the light of the medical opinion, the Supreme Court has been holding throughout that the value of medical evidence is only corroborative to the substantive eye witness account and it gives out only this much that the injuries may have been caused in the manner as alleged. It is based only on hypothesis, theories and calculations and so opinion and not positive evidence. Medical evidence is not the sole touch stone for discarding the substantive, positive and direct eye witness account. But when the medical opinion completely rules out the possibility of the direct evidence account then it can be con-

1. (1988) A.I.R. (SC.) 2154

sidered effectively to rely or not the oral version of the withness. So each case has to be looked into in its own perspective. In the c ase of *Sohanki Chimmanbhai Ukabhai* vs. *The State of Gujarat* [1] their Lordships of the Supreme Court observed at page 1487 (Para 12) :

"Ordinarily the value of medical evidence is only corroborative It appears that the injuries could have been caused in the manner alleged and nothing more. The use which the defence can make of the medical evidence is to prove that the injuries could not possibily have been caused in the manner alleged and thereby discredit the eye- withnesses. Unless however the medical evidence in its turn goes so far as to completely rule out all possibilities whatsoever of injuries taking place in the manner alleged by the eye witnesses, the testimony of eye witnesses cannot be thrown out on the ground of alleged inconsistency between it and the medical evidence."

In is the case of *State of U.P.* V.*Krishna Gopal* [2] (supra) Their Lordships held at page 2160 (para 13):—

"It is trite that where the eye witnesses' account is found credible and trustworthy, medical opinion pointing to the alternative possibles, is not accepted as conclusive. Witnesses, as Benthan said, are the eyes and ears of the justice. Hence importance and primacy of the quality of the trial process. Eye witness' account

1. (1983) A I R (S C) 484
2. (1988) A I R (S C) 2154

would require a careful independent assessment and evaluation for their credibility which should not be adversely prejudged making any other evidence, including medical evidence, as the sole touchstone for the test of such credibility."

In the case of *Gurmej Singh & oths.* V.*State of Punjab* it has been contended by the learned counsel for the appellants that when a witness deposes about the use of a particular weapon there is no warrant for supposing that a blunt side of weapon was used by the assailant and in support of this contention he referred to two decisions, namely, Hallu *v.State of Madhya Pradesh* [1] and Nachhatra Singh v. State of Punjab [2] Their Lordships of the Supreme Court did not see merits in the contention for the simple reason that the prosecution witnesses have categorically stated that Gyan Singh had used blunt side of garasi and so there was no room for plea that the sharp side of weapon, which would be normally used, had, in fact, been used and that the observations in the said judgments do not lay down to the contrary and, in fact in the first case it has been said that when the prosecution witnesses have clarified the position, their evidence would prevail and not the normal inference. It was also urged that the prosecution had not tried to elicit the opinion of doctor on the question whether abrasion

1. (1974) 45 C.C. 300.
2. (1971) S.C.C. 750

was possible by a garasi as said by the Supreme Court in the case of *Kartare* v.*State of M.P.* and Ishwar Singh v. State of U.P.[1] Their Lordships considering the contention held :

" P.W.1 crearly stated in his examination-in-chief that injury nos. 2,3 and 4 were caused by a blunt weapon. It is true that he was not specificaly asked if the chest injury could have been caused by blunt side of garasi. It cannot be gainsiad that the prosecution must endeavour to elicit the opinion of medicalman where a particular injury is possible by the weapon with which it is blieved to have been caused by showing the weapon to the witnesses. In fact presiding officer should himself have elicited the opinion. However, in this case it should not make much difference because the evidence of P.Ws.2 and 3 is acceptable and is corroborated by the first information report as well as P.W.4 if the medical witness had also so opined it would have lent further corroboration. But the omission to elicit his opinion cannot render the direct testimony of P.W.s.2 and 3 doubtful or weak. We do not see any merit in the submission."

Here, as seen earlier, all the witnesses are one in saying that bhala had been used. The first information report also mentions the same. In the postmortem report the doctor has said about the use of the bhala. The

1. (1976) 4 S.C.C.172

injuries are cut injuries and inclsed wound and can also be caused by knife, cleavar, spear and razor. Simply because of the opinion of the doctor the court below extracautionsly took the view that there was no use of bhala although the direct evidence is clear and categorical in this behalf and medical evidence also does not rule out the use of bhala. So the order of acquittal of the accused was not proper. But this court while judging the case of other appellants is not going to interfere with the order of acquittal. But this much can be said that the bhala had been used by the acquitted accused and they participated in the offence and so on account of their participation there was an unlawful assembly and the accused could have been convicted under section 302 read with section 149 I.P.C. as they were members of unlawful assembly whose common object was to assault and they had taken part in the offence. Ever ... e finding of the acquittal is not disturbed, the conviction of the appellants under section 302 read common of killing the deceased and they have participated in the offence. Shri Bhagwan and Sudarshan are said to have fired from the countymade weapon. Appellant Basudeo, who is reported to be dead during the pendency of the appeal had used pharsa. This is a clear proof of their common intention to cause death. In the case of *Gupteshwar Nath jha & anoth.* v. *State of Bihar* [1] *their Lordships have been pleased* to observe at page 1651 in para 9:-

1. (1986) A.I.R. (S.C.) 1649.

"... If is no doubt true that in a case like this, if the facts are not sufficient for a conviction with the said of s. 149, the conviction can be maintained with the said of s. 34 and therefore the case of the appellants can be considered in that light as well.."

28. It has been contended on behalf of the appellants that Shri Bhagwan and Sudarshan Singh are said to have used country made guns and firing is said to have been assigned to them but injury nos. 9 and 10 on the deceased show being entry and exibit wounds and so on account of single shot and therefore it cannot be said as to who alone was responsible for these. As to this contention, no doubt, the postmortem report shows that injuries nos. 9 and 10 being entry and exit wounds caused by one single shot. In the first information report Krishnawati Kumari is clear in saying that both the appellants Shri Bhagwan and Sudarshan fired at her father who fell down, and then pharsa blow was given by Basudeo and bhala blows by Bikrama Singh and Krishnandan Singh. In her statement before the court also she has said that both the appellants came armed with countymade guns and both fired from their weapons at her deceased father *Ramawati* P.W.1 also says that she heard gun fire and when she reached there her sister gave out to her that Shri Bhagwan and Sudershan had fired from their guns and injured her father. P.W.2 also says about the hearing of gun fire and upon reaching

1. (1986) A.I.R. (S.C.) 1649.

there disclosure to him by his niece about the firing. P.W. 3 Harekrishna Rai also says that when he reached the spot hearing gun fire he found that appellants standing with countrymade guns and that the informants had given out about firing by both the appellants. P.W.5 Kesho Singh says about two gun fires and when he proceeded ten steps from the house of the carpenter towards south, he saw the accused including the two appellants with guns running away to wards south and that on reaching the spot there was disclosure to him also by the informant. Thus from all this evidence it is made out that the firings by the two appellants had been deposed by all the witnesses and the firing had been seen by the informant herself and so she gave out in the first information report and also there was immediate disclosure by the informant to the witnesses and the witnesses also had heard two gun fires so it is established that there were two gun firings. Though medical evidence establishes two injuries; being entry and exit wounds which will be one wound caused by one fire yet that will not make any difference because the firing had been done by both the appellants and possibility of a fire missing the target cannot be ruled out. In the case of Kunwar *Bahadur & oth.* v. *State of Uttar Pradesh* [1] it has been observed in para 1:-

"Secondly, that this appellant was also armed with a

1. (1979) A.I.R. (S.C.) 1509

gun and there is consistent evidence of the eye-witnesses that all the three guns were fired though only one fire hit Nathu. The mere fact that only one person was hit by the gun cannot exclude the possibility of the other guns having been fired because it may be that even though the other guns were also fired their bullets did not hit anybody.."

Therefore on account of the two shots having been fired and one having missed and the other causing entry and exit wounds, it could not be said that the appellants have not participated when the evidence of all the eye-witnesses is quite uniform and categorical in this behalf that both the accused had fired.

29. It is also borne out that in furtherance of the common intention of all the overt act of the appellants is there. Their physical presence is there. Their actual participation in the offence is there. Had there not been two firings and had there been only one firing, then the overt act of one of them was doubtful. Both of them by their actual firing are the co- participants in the actual commission of the crime and their conscience was to commit the murder and both of them did their part by firing, though it was accidental that one of the shots missed and the other hit. In the case of *Ramaswami Ayyangalr oths v. State of Tamil Nadu* [1] it has been observed at page 2031:-

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1. (1976) A.I.R. (S.C.) 2027.

"..Section 34 is to be read along with the preceding section 38 which makes it clear that the act spoken of in section 34 includes a series of acts as a single act. It follows that the words" when a criminal act is done by several persons" in section 34, may be construed to mean when criminal acts are done by several persons." The acts committed by different confederates in the criminal action may be different but all must in one way or the other participate and engage in the criminal enterprise, for instance, one may only stand guard to prevent any person comming to the relief of the victim or to otherwise to failitate the execution of the common design. Such a person also commits an "act" as much as his co participants actually commiting the planned crime. In the case of an offence invqlving physical violence, however, it is essential for the application of Sec. 34 that the person who instigates or aids the commission of the crime must be physically present at the actual commission of the crime for the purpose of facilitating or promoting the offence, the commission of which is the aim of the joint criminal venture. Such presence of those who in one way or the other facilitate the execution of the common design, is itself tantamount to actual participation in the 'criminal act'. The essence of section 34 is simultaneous consensus of the minds or persons participating in the criminal action to bring about a particular result. Such consensus can be developed at the spot and there by,inteuded by all of-

them. In the case before us A-2 obviasly was acting in concert with A- 3 and A-4 in causing the murder of the deceased, when he prevented P.W. 1 from going to the relief of the deceased. Section 34 was therefore fully attracted and under the circumstances A-2 was equally responsible for the murder of the deceased.."

In the case of *Rambilas Singh oths.* v. *State of Bihar*[1] it has been said at page 1596 in para 7:-

"It is true that in order to convict persons vicariously under 34 or s.149 I.P.C. it is not necessary to prove that each and every one of them had indulged in over acts. Even so, there must be material to show that the overt act or acts of one or more of the accused was or were done in furtherance of the common intention of all the accused or in prosecution of the common object of the members of the uniawful assembly ..."

30. Learned counsel for the appellants has also urged that in this case section 34 of the I.P.C. will not apply, but section 38 I.P.C comes into play, as intention was only to harm and not to kill as Basudeo deceased had given a call and pharsa blow had been used and then case comes under the clutches of section 304 I.P.C. part II and not u/s 302 I.P.C. As to this contention, the evidence has been appreciated earlier that the accused had come on the spot armed with the weapons and on

1. (1989) A.I.R. (S.C.) 1593.

the call of Basudeo firing had been done. Basudeo also gave pharsa blow. Shri Bhagwan and Sudershan fired and the acquitted accused Bikrama Singh and Krishnandan Singh gave bhala blows. Learned cotensel for the appellant has referred to some of the decisions, namely, the case of *Baul & anoth v. State of U.P.* [1] it has been observed by their Lordships at page 730 in para 7:-

"No doubt the original prosecution case showed that Sadha and Ramdeo both hit the deceased on the head with their lathies. One is tempted to divide the two fatal injuries between the two assailants and to hold that one each was caused by them. If there was common intention established in the case the prosecution would not have been required to prove which of the injuries was caused by which assailant. But when common intention is not proved the prosecution must establish the exact nature of the injury caused by each accused and more so in this case when one of the accused has got the benefit of the doubt and has been acquitted. It cannot, therefore, he postulated that Sadhai alone caused all th injuries on the head of the deceased. Once that posit rises the doubt remains as to whether the injuries cai by Sadhai were of the character which will bring his within 302. it may be that the effect of the first become more prominent because another blow lar immediately after it caused more fractures to the s

1. (1968) A.I.R. (S.C.) 723.

than the first blow had caused. These doubts prompt us to drive the benefit of doubt to Sadhai We think that his conviction can be safely rested under S.325 of the Indian Penal code, but it is difficult to hold in a case of this type that his guilt amounts to murder simpliciter because he must be held responsible for all the injuries that were caused to the deceased. We convict him instead of S. 302 for an offence under S. 325, Indian Penal Code and set aside the sentence of imprisonment for life and instead sentence him to rigorous imprisonment for seven years.."

However, later, their Lordships in the case of *Shobran singh v. state of U.P.* [1] have been pleased to observe at page 331 (para 12):-

"There is no evidence to show that the shot fired by the appellant hit the deceased and his shot was one of the two which had missed the target. Even assuming that his shot hit the deceased it is impossible to say which of the three wounds of entry could he attributed to him. The opinion of Dr. Mishra was not that each of the three injuries was sufficient in the ordinary course of nature to cause death. Indeed it could not be because one of them was at the thigh a part and vital. His opinion was that the injury found by him was sufficient to cause death, which clearly means that they were cumulatively but not individually sufficient in the ordinary course of

1. (1976) U.J. (S.C.) 328.

nature to cause death. The result is that the appellant could have been convicted under section 302 read with section 34 and not section 302 simpliciter.

In the case of *Ninai Raoji Baudha & anoth. v. State of Maharashtra* [1] *it has been held at page 1541 in para 12:-*

"As has been shown, there was no reliable evidence on the record to prove whether the fatal blow on the head was caused by Ninaji or Raoji. The other blows did not fall on any vital part of the body and in the absence of evidence to establish that their common intention was to cause death, it appears that the appellants had the common intention of causing grievous injury with the lathi and the Kunti. They could therefore be convicted of an offence under section 34 I.P.C. and not section 302 read with section 34.

31-A. The Supreme Court in the case of *Afrahim Sheikh & oths. v. State of West Bengal* [2] has dealt with the application of section 34 and 38 in the following words at page 1267 in paras 6,7,8 and 9:-

" (6) section 34 is a part of group of sections, of which some other sections may also be been. Section 35 is as follows:-

"Whenever an act, which is criminal only be reason

1. (1976) A.I.R. (S.C.) 1537.
2. (1964) A.I.R. (S.C.) 1537

of its being done with a criminal knowledge or intention, is done by several persons, each of such persons who joins in the act with such knowledge or inention is liable for the act in the same as if the act were done by him alone with that knowlege or intention.

In this section also the responsibility is shared by each offender individually if the act which is criminal only by reason of certain criminal knowledge or intention is done by each person sharing that knowledge or intention. Indeed, this section also was applicable here. Under S.37, when an offence is committed by means of several acts, whoever intentionally co-operates in the commission of that offence by doing any one of those acts, either singly or jointly with any other persons, commits that offence", By co-operating in the doing of several acts which together constituted a single criminal act, each person who co-operates in the commission of that offence by doing any one of the acts is either singly or jointy liable for that offence. section 38 then provides:

"Where several persons are engaged or concerned in the commission of a crimina. act, they may be guilty of different offences by means of that act."

That is to say, even though several persons may do a single criminal act, the responsibility may vary according to the degree of their participation. The illustration which is given clearly brings out that point.

(7) Viewing these sections in this manner, it is ob-

vious that two sections in this group deal with individual responsibility for a single criminal act perpetrated by a large number of persons who either share a common intention or possess the criminal knowledge (section 34 and 35) and the third with co-operation between several accused in the completion of the criminal act (S.37). Lastly S.38 provides that the responsibility for the completed criminal act may be of different grades according to the share taken by the different accused in and this section does not mention anything about intention common or otherwise or knowledge.

(8) Section 34, when it speaks of a criminal act done by several persons in futtherance of the common intention of all, has regard not to the offence as a whole but to the criminal act, that is to say, the to totality of the series of acts which result in the offence. In the case of a person assaulted by many accused, the criminal act is the offence which finally results, though the achievement of that criminal act may be the result of action of several persons. No doubt, a person is only responsible ordinarily for what he does and s.38)ensures thatbut the law in s,34(and also s,35) says that if the criminal- act is the result of a common intention then every person who did the criminal act with the common in tention would be responsible for the total offence irrespective of the share which he had in its perpetration. In Barendra Kuar Ghos's case, ILR 52 Cal 197 : (AIR 1925 PC 1) the Judicial

committee observed :

"Section 34 I.P.C. deals with the doing of separate acts, similar or diverse, by several persons; act if all are done in furtherance of a common intention, each person is liable for the result of them all as if he had done them himself. That act and then again it' in the latter part of the section must include the whole of the action covered by the criminal act in the first part of the section."

(9) Provided there is common intention, the whole of the result perpetrated by several offencers, is attributable to each offender, notwithrstanding that individually they may have done separate acts, diverse or similar."

Again the supreme court in the case of *Bhaba Nanda Sarma & oths. V. the State of Assam* [1] us observed at page 2254 in para 4 :—

"To attract the application of S.34 it must be established beyond any shadow of doubt that the criminal act was done by several persons in furtherance of the common intention of all. In other words, the prosecution must prove facts to justify an inference that all the participants of the act had shared a common intention to commit the criminal act which was finally committed by one or more of the participants. Section 33 of the penal code says:-

1. (1979) A.I.R (S.C.)2252

"Where several persons are engaged or concerned in the commission of a criminal act, they may be guilty of different offences by means of that act."

In Afrahim sheikh v. State of West Bengal (1964) SCR 172: (AIR 1964 Sc 1263) Hidyatullah J., as he then was, has pointed out that it was possible to apply the ingredients of s.34 in relation to the commission of an offence under s. 304 part II, even though death is caused with the knowledge of the persons participating in the occurrence that by their act death was likely to be caused. The sharing of the common intention, as pointed out in that case, is the Commission of the act or acts by which death was occasioned. With reference to S.38, the learned Judge observed at p. 178 (of SCR) : (at p. 1267 of AIR):

"That is to say, even though several persons may do a single criminal act, the responsibility may vary according to the degree of their participation. The illustration which is given clearly brings out that point.

Lastly S. 38 provides that the responsibility for the completed criminal act may be of different grades according to the share taken by the different accused in the completion of the criminal act, and this section does not mention anything about intention common or other wise or knowledge."

But on the evidence seen earlier it is well made out that all the appellants came together, assauited the deceased with their weapons and the deceased received

the injuries, although he was unarmed and he had not caused any provocation nor had done anything for the reward of death. The injuries given by the appellants including the two acquitted accused are well made out and the evidence of the eye-witness is quite cogent and clear that they had used their arms and the medical evidence also corroborates the same. So it all makes out that there was common intention of the appellants and the acquitted accused to kill the deceased. In these circumstance section 34 is fully applicable to this case and there is no question of application of other sections of the group.

31. Learned counsel for the appellants has also urged that this case had been supervised by the higher police officers and the supervision note has been prepared and on the basis of the supervision note when cross - examination was being done objections were raised and the court specifically directed the Additional P.P. vide ordersheet dated 18.3.1982 to produce the supervision note of the S.P. and the Dy. S.P., yet the same was not produced and so prejudice has been caused to the appellants. As to this contention no doubt, ordersheet dt. 18.3.1982 shows that the supervision notes were with the accused and they were cross examining the witnesses from the same and so the Addl. P.P. was directed to get the superior note from the S.P. and the 'Dy. S.P. and keep on record for the perusal of the court and 19.3.1982 was fixed as next date. Section 172 Cr. P.C. deals with the diary of proceedings in investigation and it reads as follows:-

necessary action being taken will be kept with the file of the case. The second copy will be kept by the officer who writes the forms and the third copy in the police station. These form shall not at first form part of the case diaries but shall be filed with them on the conclusion of the case.

Test notes on completed investigations shall be made on plain paper in triplicate, the fact that this has been done being mentioned in the tour or personal diaries as the case may be. They shall also be disposed of in the same way as supervision notes.

(e) Submission of case diary by superior officers-when a superior officer undertakes the conduct of an investigation under chapter XII, Cr. P. C. he shall submit a case diary under section 172, Cr.P.C. instead of the note prescribed above."

Paragraph 49 also deals with the share of the superintendent in investigation." The duties of superintendents are not confined to office work inspection and general supervision, but they are expected to take a share in the actual investigation of important crime. They shall take the investigation out of the hands of their subordinates only in exceptional circumstances, but they shall by frequent local enquiry and careful scrutiny of case records, both at the time of investigation and subsequently, satisfy themselves that the proceedings are honest and energetic, that the public are properly treated

and that no important line of enquiry has been shirked or overlooked. In particular they shall supervise the investigation of cases enumerated in Appendix 8, all cases presenting difficulty and all cases in which the conduct of the subordinate police is in any way unstatisfactory by going to the spot at all stages of the investigation, whenever possible, without undue detriment to touring, inspection or other important work." From these provisions it is made out that every police officer during the investigation shall make day-to-day entry of the proceedings investigation in a diary giving out the time by which the information reached him, the time at which he closed the investigation, the place he visited and the statement of the circumstances ascertained through the investigation. This case diary can be called for by the court during enquiry or trial and the court may use such diary to aid at such enquiry or trial to know as an evidence in the case. Further neither the accused nor his agent shall be entitled to call for such diary nor shall he or they have any right to see other material because they are referred to by court and if they are used by the police officers who made them to refresh their memory or the court uses them for the purpose of contradicting such police officer, the provisions of section 161 or section 145 of the Evidence Act, as the case may be, shall apply. After completion of the investigation, as provided under section 173, the investigating officer shall for ward to a magistrate empowered to take cognizance

of the offence, through police report in the from prescribed by the state Government and in the manner prescribed by section. During the course of the investigation the police officers superior in rank to the officer incharge of the police station may exercise the same power throughout the local, area as may be exercised by such officer within the limits of his station. The officers supervising the case shall prepare a daily note of the supervision in triplicate in police manual form no. 2 mentioning the fact in their proceeding or tour diaries as the case may be. One copy of the form shall be sent to the S.P. through proper channel which after necessary action being taken will be kept with the file of the case and the second copy will be kept by the officer who writes the form and the third copy in the police station. These forms shall not at first form part of the case diary but shall be filed with them on the conclusion of the case. Both when a superior officer undertakes to conduct an investigation under chapter XII Cr.P.C. he shall submit the case diary u/s 172 Cr.P.C. in respect of the note prescribed above. The S.Ps. are also expected to take a share in the actual investigation of important crime and they shall take the investigation out of the hands of the rill subordinates only in exceptional circumstances. But they shall by frequent local enquiry and careful scrutiny of the case records, both at the time of investigation and subsequently satisfy themselves that the proceedings are honest and energetic and that the public are properly

treated and that no important line of enquiry has been shirked or overlooked. In particular, they shall supervise the investigation of cases enumerated in Appendix 3 of the Police Manual, all cases presenting difficulty and all cases in which the conduct of the subordinate police is in any way unsatisfactory, by going to the spot at all stages of the investigation when ever possible.

31A The courts have been holding throughout about the use of the case diary. In the case of *Habeeb Mohammad State of Hydrabad* [1] the Supreme Court has said in para 13 at page 60 as follows:-

".. It seems to us that the learned judge was in error in making use of the police diaries at all in his judgment and in seeking confirmation of his opinion on the question of appreciation of evidence from statements contained in those diaries. The only proper use he could make of these diaries was the one allowed by S. 172, Cr.P.C.i.e., during the trial he could get assistance from them by suggesting means of further elucidating points which needed clearing up and which might be material for the purpose of doing justice between the State and the accused."

A Full *Bench in the case of* State of *Kerala* v. *Ammini & oths.*[2] *has observed at page 122 in para 57:-*

" The diary mentioned in S. 172 (1) and the statements recorded under s. 161 (3) of the Code and obviously different statements recorded under s. 161 (3) are covered by the sweep of inhibition contained in s.

1. (1954) A.I.R. (S.C.) 51
2. (1988) Cr.LJ. 107.

162 of the Code. The prohibition imposed in s. 162 cannot be circumvented by resort to S. 172 (2) of the Code. The two are different records, though the statements recorded under s. 161 (3) and that diary envisaged in s. 172 may together be incorporated in the same file which police call case Diary file for the sake of convenience. That apart s. 172 (2) it self embodies an inhibition that the diary oenvisaged in that section is not to be used as evidence in the case. The only use of the diary is to aid the court in the trial to ascertain the time at which the investigation was begun and closed on each day, the places visited by the officer, and the circumstances ascertained through investigation. It is not a substitute for evidence in the case for the purpose of making a comparision with the testimonies of witnesses or judicial dying declarations or judicial confessions. The sessions Judge by adopting the above method had committed an illegality."

A Division Bench of this court in the case of *Brahmdeo Hazra & oths v. State of Bihar* [1]has observed at page 737 in para 13:-

" The use of the police diary cannot go beyond the legitimate limits provided under s. 172 of the Cr.P.C. The

1. (1992) East Criminal Cases 98

court cannot take out facts from the police diary as material evidence to arrive at any finding. In absence of any proof, the police diary can never be taken as evidence. If a court discovers any material in the diary of any matter which may be important for a just decision of a case, then it is open for a court to call for necessary material evidence and document and to have the same legally proved in evidence. It is not open for a court to read the diary and to take out a few facts and the statements made in it as evidence and to use it to come to a finding. In any case the entries in a diary are in the shape of secondary evidence and cannot be used either as substantive or corroborative evidence in a case and even the objective findings or circumstances entered in the diary cannot be used unless they are legally admissible and proved by the witnesses recording the same. In the instant case, we find that grave error has been committed by the court below in using the extracts from the diary as substantive evidence to a great prejudice to the accused. The court could have asked the parties concerned to bring such fact in the evidence by legal proof, if so found and elucidated in diary, and in absence there of, it was wrong for the court to accept and use the same in evidence in support of its judgment of convictioon recorded against the accused on trial.."

In the case of *Miikiat Singh* v. *State of Punjab*[1] their Lordship of Supreme Court have Observe at Page 106

1. (1992) East Criminal Cases 98

in Para 11:-

"It is manifest from its bare reading without speaking to detail and critical analysis that the case diary is only record of day-today investigation of the investigating officer to ascertain the statements of circumstances ascertained through the investigation. Under sub-section (2) the court is entitled at the trial or enquiry to use the case diary not as evidence in the case but as to aid to it in the enquiry or trial. Neither the accused nor his agent by operation of sub- section (3) shall be entitled to call the case diary nor shall he be entitled to use as evidence merely because the court refer to it. Only right given therein it that if police officer, who made the entries in the diaries uses to refresh his memory and if the court uses it for the purpose of contradicting such witness by operation of section 161 of the code and section 145 of the Evidence Act, it shall be used for the purpose of contradicting the witnesses that is investigating officer or to explain it in re-examination by the prosecution with the permission of the court. It is, therefore, clear that unless the investigating officer or the court uses it either to refresh the memory or contradicting the investigating officer his previous statement under section 161 that too after drawing his attention there to as is enjoined under section 145 of the Evidence Act. The entries cannot be used by the accused as evidence. Neither P.W. 6 nor the court used the case diary. Therefore, the very use there of for contradicting the prosecution evidence is absolutely

illegal and it is inadmissible in evidence. There by the defence ca not place reliance there on. But even if we were to consider the same as admissible that part of the evidence does not impinge upon the prosectuion evidence.

In the case of *Mukund lal v. Union of India & another*[1] their Lordships have held at page 146 in para 3:-

"The Legislature has reposed complete trust in the court which is conducting the inquiry or the trial. It has empowered the court to call for any such relevant case diary, it there is any inconsistency or contradiction arising in the context of the case diary the court can use the entries for the purpose of contradicting the police officer as provided in sub-section (3) of section 172 of the Cr.p.c. utimately there can be no better custodian or guardian of the interest of justice than the court trying the case. No court will deny to itself the power to make use of the entries in the diary to the advantage of the accused by contradicting the police officer with reference to the contents of the diaries. In view of this safeguard, the charge of unreasonableness, or arbitrariness cannot stand scrutiny. The petitioners claim an unfettered right to make roving inspection of the entries in the case diary regardless of whether these entries are used by the police officer concerned to refresh his memery regardless of the fact whether the court was used these entries for

1. 1989) A.I.R (S.C.) 144.

the purpose of contradicting such police officer. It cann't be said that uness such unfettered right is conferred and recognised, the embargo engrafted in sub-section (3) of section 172 of the Cr.P.C. would fail to meet the test of reasonablenss. For instance in the case diary there might be a note as regards the identity of the informant who gave some information which resulted in investigation into a particular aspect. Public interest demands that such an entry is not made available to the accused for it might endanger the safety of the informants and it might deter the information from giving any infeormation to assist the investigating agency, as observed in Mohinder singh v. Emperor, Air. 1932 Lahore 103 (104);-

The accused has no right to insist upon a police witness referring to his diary in order to elicit information which is privileged. The contents of the diary are not at the disposal of the defence and cannot be used except strictly in accordance with the provisions of section 162 and 172. Section 172 shows that witness may refresh his memory by reference to them but such use is at the discretion of the witness and the Judge, whose duty it is to ensure that the privilege attaching to them by statute is strictly enforced."

and also as observed in *Mahabirji Birajman Mandir* v. *Prem Narain Shukla, AJR* 1965 All 494 (at p. 495).

The case diary contains not only the statements of witnesses recorded under s. 161, cr.p.c. and the site plan or other documents prepared by the Investigating officer,

but also reports or observations of the Investigating officer or his superiors. These reports are of a confidential nature and privilege can be claimed thereof. Further, the disclosure of the contents of such reports cannot help any of the parties to the litigation, as the report invariably contains the opinion of such officers and their opinion is inadmissible in evidence."

32. Thus the supervision notes of the superior officers or the reports or observations of the investigating officer or his superiors are only opinions and these opinions are not admissible in evidence. The supervision notes do not form part of case diary and are to be filed on the conclusion of the case and if at all the supervising officer undertakes investigation under Chapter XII of Cr.p.c. he will have to submit a case diary u/s 172 Cr. C.P. instead of note prescribed. There is no provision that a copy of the case diary, what to say of supervision note, should be given. Section 207 provides for police report, first information report u/s 154 Cr.p.c. and the statements recorded under sub- section (3) of section 161 of all persons whom the prosecution proposes to examine as its witnesses excluding therefrom any part in regard to which a request for such exclusion has been made by the Police Officer under sub-section (6) of section 173, the confession and statements, if any, recorded u/s 164 and any other document or relevant extract therefrom forwarded to the Magistrate with the Police report u/s 173 (5). So supervision note is neither submitted u/s 172

nor forms part of the case diary but being an opinion cannot be given to an accused. How in the present case the supervision note was received by the counsel for the accused who cross-examined the witnesses on the basis there of is not known. But the court directed the A.P.P. to obtain the supervision note from the S.P. and the Dy. S.P. office. When the report of the S.P. or the Dy. S.P. is not forming part of the case diary and when the Police Officer has not sent supervision report along with his report u/s 173 then how could the supervision note be used. There is no such provision for the use of the supervision note. As such the non-production of the supervision note cannot be said to have caused prejudice to the appellants and the contention is not made out.

33. Thus considering the entire material on the record it is well made out that the order of conviction recorded by the trial court against the appellants 1 and 2 (The appeal of appellant no. 3 has abated on account of his death) does not suffer from any infirmity. We do not say about appellant no. 3 whose appeal has abated. So this appeal is liable to be dismissed and is accordingly dismissed.

Loknath Prasad's J.lagree

R.D. Appeal dismissed

CIVIL WRIT JURISDICTION

Before Bisheshawar Prasad Singh & Satya Brata Sinha, JJ.

1993

May,21

State Bank of India staff Association, Local Head office unit, Patna, and others. *

v.

Election Commissioner of India & others.

Representation of the People Act, 1951 (Central Act no. XLIII of 1951) section 26 provisions of-District Election officer, whether can requisition the services of the employees of the State Bank of India for election duty-Constitution-Article 324 (6)—employees of State Bank being niether State nor Central Government employees, whether their services can be requisitiond for election duty—Representation of the Peoples Act, 1951—Section 159—provisions of.

The District Election Officer in exercise of his powers under section 26 of the Representation of the People Act, 1951, hereinafter referred to as the Act, cannot requistion the services of the employees of the State Bank of India for election duty since the employees of the State Bank of India are not State or Central Government employees as envisaged by Article 324 (6) of the Contitution of India,

* Civil writ jurisdiction case No. 7815 of 1991. In the matter of an application under Articles 226 and 227 of the Constitution of India

nor are they employees of a local authority whose services can be requisitioned under section 159 of the Act.

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 B.P. singh, J.

M/S. Basudeo Prasad, Sunil Kumar Subodh Kumar & Rajiv Prakash for the petitioner

M/S Shailesh Kumar Sinha & Kishore Kumar Sinha for Respondent no-3

Mrs. Renuka Sharma & Mrs. Rite Kishore & Mr. Chakradhari Sharan Singh for the Respondent no-1

M/s R.S. Rai and Ram Balak Mahto (A.G.) for the perposer Respondent no-2

The petitioners herein are the State Bank of India Staff Association, Local Head office Unit, State Bank of India Officers Association, Local Head office and three employees of the State Bank of India working in its local Head office at Patna. They had originally challenged the requisition made by the District Election officer cum District Magistrate, Patna, dated 22nd September, 1991 (Annexure-1) calling upon the chief General Manager of the State Bank of India to furnish the list of employees

of the State Bank of India with full particulars for the purpose of deputing such employees on election duty. They had also challenged the letters dated 30th october, 1991 and 1-11- 1991 (Annexure-2 series) issued by the District Election officer appointing and deputing some of the employees of the State Bank of India on election duty in connection with the elections to the Barh parliamentary and Pali Assembly constituencies scheduled to be held on 16-11-1991. The writ application was admitted for hearing on 11-11-1991, but no interim order was passed having regard to the fact that the election was to be held on 16th November, 1991, and this court did not wish to dislocate the arrangements made for holding the election. However, this court observed in the interim order that it will be open to the respondents to reconsider the matter and to make alternative ...rangement, if so advised. The respondents were directed to file their counter- affidavit within three weeks, and it was directed that the writ application be placed for final disposal on 16th December, 1991. No counter-affidavit has been filed, and for whatever reasons the writ application could not be disposed of on 16th December, 1991.

2. Thereafter, the District Election Officer-cum-District Magistrate, Patna, issued similar letters of appointment which were communicated to the Assistant General Manager of the State Bank of India appointing several employees of the State Bank of India as presiding officers and Polling Officers in connection with the par-

liamentary election to be held on 19th may, 1993 fro the 35 Patna Parliamentary Constituency. The petitioner filed an application for amendment of the writ applicatio and have challenged the letters of appointment issue by the District Election Officer, which have been annexe as Annexure-4 series. Such letters were communicate to the persons so appointed by the Assistanct Gener Manager of the State Bank of India requesting them t attend the training programme for election duty as pe the details given in the letters of appointment. The lette of appointment are said to have been issued und sub-section (1) of section 26 of the Representation People Act, 1951 (Act 43 of 1951). The application cam up for orders on 6th May, 1993. The respondents wer granted time to file objections by Friday, 7th may, 199 It was further directed that the writ application be place for hearing at the top of the list on 10th May, 1993, havin regard to the fact that the election was to be held o 19- 5-1993. No objection to the amendment applicatio has been filed and, accordingly, the amendment applica tion was allowed and the parties were heard at lengt on 10th May 1993 and 11th May, 1993. Since no forma order has been recorded allowing the application fc amendment of the writ application, we hereby formall allow the amendment application.

3. The petitioners have challenged the legalit and validity of the letters of appointment (Annexure- series) on the ground that neither any constitutiona