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PATNA SERIES

CONTAINING

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

REPORTED BY

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

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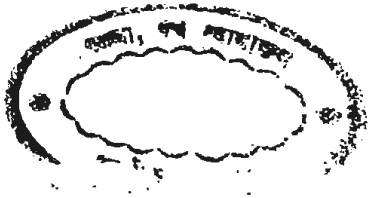
TABLE OF CASES REPORTED.



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SERVICE—*concld.*

Where the petitioners were appointed as Junior Management Trainees and in pursuance thereof they joined the Bank's service on 2nd January, 1978 and it was stipulated that they were to undergo two years training and would be on probation during that period and after completion of their probationary period, they were confirmed in the permanent establishment of the Bank in the officer grade with effect from the date they had completed their probationary period i.e., 2nd January, 1980 and it was stated that the petitioners would be paid the scale of Rs. 700—1800 in the Junior Management Grade Scale-I according to the terms of Allahabad Bank (Officers') Service Regulation 1979;

Held, that the petitioners must be deemed to be holding the post of Officer in the Junior Management in the Grade Scale-I from the date they were appointed i.e., 2nd January, 1978 and not from 2nd January, 1980, in absence of any rule or regulation showing that an officer would be deemed to have been appointed on and from the date of completion of the probationary period and not earlier. The very fact that the petitioners were confirmed in the permanent establishment of the Bank in the officer grade shows that they were in the Officers' Grade from the day of their appointment. The confirmation, therefore, must relate back to 2nd January, 1978 when the petitioners were appointed. It is well known that confirmation is not appointment. Any other interpretation in regard to their status prior to 2nd January, 1980, the date of completing their probationary period, would be unfair. The petitioners were employees and were working as officers of the Bank since 1978 and they would thus undoubtedly fall within the ambit of the expression 'Officer employee' as contained in the Bank's Officer Employees (Conduct) Regulations 1976 and

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SANTHAL PARGANAS SETTLEMENT REGULATION, 1872—[—*Sections 27 and 42—section 27—original transfer with regard to land recorded a* Mulraiyat-ka-jote, *in contravention of the section—adverse possession—prescriptive period of twelve years for perfecting title—whether, would stop running from the date of enforcement of Santhal Parganas Tenancy (supplementary Provisions) Act,* 1949—[—*section 42—ejectment of the subsequent purchaser—legality of—subsequent settlement of the land with the descendents of original raiyat—legality of.*

By a sale-deed dated 22nd March, 1939, (the original transfer) 38.09 acres of land which was recorded as *Mulraiyat-ke-jote*, were-sold in contravention of section 27 of Santhal Parganas Settlement Regulations 1872, to *B.K.R.*, who again sold the plot, along with Mulraiyat rights to father of writ -petitioner by sale deed dated 26th June, 1950. The descendents of original raiyats filed application challenging the legality of the sale and prayed for the eviction of the writ-petitioners and restoration of the some to them through the agency of the court, which was ultimately allowed in appeal and affirmed in revision.

Per curium :—

Held, that the prescriptive period of twelve years for perfecting the title by adverse possession would stop running from the 1st November, 1949, the date of enforcement of the Santhal Parganas Tenancy (Supplementary Provisions) Act, 1949.

Per Majority (B. S. Sinha and S. Ali Ahmad, JJ.).

Held, that while ejectment has got to be upheld, the authorities below erred in law in settling the lands with the original holder by the impugned order. The lands, after ejectment have got to be settled with a duly qualified raiyat of the village or otherwise disposed of according to the circumstances of the case.

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TAX CASE

Before Lalit Mohan Sharma and Ashwini Kumar Sinha, JJ.

1984

April, 30.

COMMISSIONER OF INCOME TAX, BIHAR, PATNA.*

v.

CHANDRIKA SINGH

Income Tax Act, 1961, (*Act 43 of* 1961)—*provisions of—assessment year* 1966-67—*assessee filing return after* 1*st April*, 1968, *i.e. after amendment—calculation of penalty—law to be applied.*

It is well settled that the penalty is to be imposed on account of the commission of a wronful act and this law operating on the day on which the wrongful act is committed which determines the penalty. In the instance case, admittedly, the return was filed after 1st April, 1968 when the amended law came into force. Thus the wrongful act was committed on a day on which the amended law was in force.

Held, therefore, that the Tribunal took a wrong view of law that in the instant case the penalty was to be applied according to law which was enforced on the 1st day of the assessment year.

Additional C. I. T. v. *Dr. P. N. Prasad* (1) *C. I. T.* v. *Jamuna Prasad* (2) *and C. I. T.* v. *M/s Monghyr Gun Manufacturing Co.* (3) relied on.

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*Taxation Case no. 66 of 1974. Ref:—Statement of case under section 256(1) of the Income Tax Act, 1961 by the Income Tax Appellate Tribunal, Patna Bench, 'A', Patna in the matter of assement ofIncome Tax on Chandrika Singh for the assessment year 1966-67.

(1) 120 I.T.R. 1.

(2) (1983) Tax case no. 81 of 1974, disposed of on 19th July 1983.

(3) (1983) Tax case no. 59 of 1974, disposed of on 16th March 1983.

Reference 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 Ashwini Kumar Sinha, J.

M/s. B. P. Rajgarhia (Senior S. C. I.T. D.), B. N. Agrawal and *S. K. Sharan (Junior to S. C. I. T. D.)* for the petitioner.

M/s. Rameshwar Prasad no. II and *Narayan Prasad Agrawal* for the opposite party.

Ashwini Kumar Sinha, J. This is a reference under section 256(1) of the Income Tax Act, 1961 by the Income Tax Appellate Tribunal, Patna Bench, A'A, Patna, the following question has been referred for our opinion:

> "Whether on the facts and circumstances of the case, the Tribunal was correct in holding that in calculating the penalty, the law, which was in force on the first day of the assessment year, was to be applied and not the law which had come into force on 1st April, 1968".

2. The assessment year in question is 1966-67. The assessee filed the return after 1st April, 1968, i.e., after the amendment, which came into effect on 1st April, 1968, showing an income of Rs. 4,000. The Income Tax Officer determined the assessee's income at Rs. 37,500 but it was ultimately reduced to Rs. 13,500 by Appellate Tribunal.

3. The Inspecting Assistant Commissioner was of the view that the assessee had concealed his income and furnished inaccurate particulars of income thereon and hence he imposed a penalty of Rs. 17,250. This penalty was imposed on the basis of difference between the returned income and the assessed income as reduced by the Appellate Assistant Commissioner. The Inspecting Assistant Commissioner held that it was the law after the amendment which was applicable to the

facts of the instant case and hence the penalty had to be equal to amount of income concealed and the above penalty was levied. The assessee went before the Tribunal and the Tribunal on considering the facts of the case, held that the assessee had not been able to discharge the onus which lay upon him under Explanation to section 271(1)(c) of the Income Tax Act, 1961, (hereinafter referred to as 'the Act'). The Tribunal further held that there was no basis for the estimate of returned income and in the opinion of the Tribunal this was a case where the assessee had filed the return of income knowing it to be much below of his real income. The Tribunal, however, held that the quantum of penalty imposed was not correctly calculated. The Tribunal was of the view that the assessment year being 1966-67, the law, which was in force on 1st April, 1966 was to be applied and according to the Tribunal there was no sanction in law for applying the law which had come into force on 1st April, 1978. In that view of the matter, the Tribunal directed the imposition of penalty at 25 per cent, i.e., the difference between the tax on the returned income and the tax on the finally assessed income.

4. Learned Counsel appearing for the Revenue contended that the Tribunal had taken the incorrect view of law in holding that the law which came into force on 1st April, 1968 was not applicable to the facts of the instant case and he relied upon the case of *Additional CIT* v. *Dr. P. N. Prasad* (Tax Case no. 63 of 1974), disposed of on 16th April, 1984 (120 ITR page 1). It is well settled that the penalty is to be imposed on account of the commission of a wrongful act and this law operating on the day on which the wrongful act is committed which determines the penalty. In the instant case, admittedly, the return was filed after 1st April, 1968 when the amended law came into force. Thus the wrongful act was committed on a day on which the amended law was in force. In that view of the matter, the Tribunal took a wrong view of law that in the instant case the penalty was to be applied according to law which was enforced on the 1st day of the assessment year.

5. This Court has earlier also in the case of *CIT* v. *Jamuna Prasad* (Tax Case no. 81 of 1974, disposed on 19th July, 1983) and in the case of *CIT* v. *M/s. Monghyr Gun Manufacturing Co.* (Tax Case no. 59 of 1974, disposed of on 16th March, 1983) has taken the same view.

6. The learned counsel appearing for the assessee tried to persuade us to accept his submission that the Tribunal had taken a correct view of law. In my opinion, there is no force in the submission advanced by the learned counsel for the assessee. In view of the consistent view taken by this Court on the basis of the aforesaid Supreme Court case reported in 120 ITR page 1, the question referred to this Court for opinion has to be answered in negative and I hold that on the facts and circumstances of the case and Tribunal was not correct in holding that in calculating the penalty the law which was in force on the first day of the assessment year was to be applied and not the law which had come into force 1st April, 1968.

7. The question thus is answered in favour of the Revenue and against the assessee. Hearing fee Rs. 250.

LALIT MOHAN SHARMA, J.—I agree.

M. K. C. *Question answered.*

TAX CASE

Before Sushil Kumar Jha and Ashwini Kumar Sinha, JJ.

1984

May, 7

COMMISSIONER OF WEALTH TAX, BIHAR, PATNA*

v.

JAGARNATH SINGH.

Wealth Tax Act, 1957 (Act XXVII of 1957) as amended—amendment coming into force from 1st April 1969—delay in filing return—quantum of penalty—computation of—amendment made—nature of—date of filing of return, whether relevant criterian for applying the provision of law.

The amendment made in the Act was with regard to a substantive law and not merely a procedural law and it substantially affected the liability of the assessee to his prejudice. The amendment could not be considered as a procedural law and, therefore, the law could not have any retrospective operation unless there is a specific provision made in the Act for that purpose. The date of filing of the return could not be the relevant criterian for applying the provision of particular law unless the statute provides so either expressly or by necessary intendment.

Held, therefore, that in the instant case the view taken by the Tribunal is quite in consonance with the law and it was justified in law in reducing the penalty for each of the assessment years in question.

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*Taxation Case no. 68 to 72 of 1974. Ref:—Statement of case by the Income Tax Appellate Tribunal, Patna in the matter of assessment of Wealth Tax on Jagarnath Singh for the assessment year 1964-65 to 1968-67.

Commissioner of wealth-tax Amritsar v. *Suresh Seth*(1), relied on.

Reference made 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 the Court.

M/s. B. P. Rajgarhia and *S. K. Sharan*, for the petitioner.

Mr. Rameshwar Prasad no. 2, for the opposite party.

S. K. JHA, AND A. K. SINHA, JJ.—This is a batch of five reference cases under section 27(1) of the Wealth Tax Act, 1957 (hereinafter referred to as the Act) in which the point of law involved is common and the questions referred to this Court for opinion are with regard to five assessment years in which different quantums are involved. Hence the Income Tax Appellate Tribunal, Bench "A", Patna has referred the following question of law for our opinion.

Asstt. Year: 1964-65.

"Whether Tribunal were justified in law in reducing the penalty to Rs. 346 as against Rs. 7,272 imposed by the W.T.O.?"

Asstt. Year: 1965-66.

"Whether the Tribunal were justified in law in reducing the penalty to Rs. 367 as against Rs. 7,707 imposed by the W.T.O.?"

Asstt. Year: 1966-67.

"Whether the Tribunal were justified in law in reducing the penalty to Rs. 367 as against Rs. 7,707 imposed by the W.T.O.?"

(1) (1981) A.I.R. (S.C.) 1106=129 I.T.R. 328.

Asstt. Year: 1967-68.

"Whether the Tribunal were justified in law in reducing the penalty to Rs. 406 as against Rs. 3,399 imposed by the W.T.O.?"

Assit. Year: 1968-69.

"Whether the Tribunal were justified in law in reducing the penalty to Rs. 342 as against Rs. 8,755 imposed by the W.T.O.?"

The statement of case has been submitted which will speak out for itself with regard to the facts and the point at issue.

2. The Wealth Tax returns in respect of the five assessment years were due by 30th June of the relevant assessment years. All the returns were, however, actually filed on 3rd February, 1970. The delay in the filing of the return was very long and the period of delay ranged from sixty-seven months to nineteen months. The returns filed showed net wealth ranging from Rs. 2,38,533 to Rs. 2,72,452. The assessments were made on the figures returned by the assessee. The only explanation given before the Wealth Tax Officer for the delay in the filing of the return was that the assessee filed the returns as soon as he realised the liability under the Act. It was also stated that the returns had been filed voluntarily and the taxes were paid immediately after the assessment and, therefore it was pleaded that the delay should be condoned. The wealth tax officer having not accepted the plea of the assessee, imposed penalties of Rs. 12,272, Rs. 7,702, Rs. 7,707, Rs. 8,399 and Rs. 8,755 for the respective years in question.

3. Apart from the figures, given above, the facts of the present case being similar to the cases of another assessee wherein the point was decided in favour of the assessee, the Tribunal placing reliance upon its own earlier decisions made the necessary reductions for the years in question. The order of the Wealth Tax Officer imposing penalties have been marked Annexures—A, A1, A2, A3 and A4 forming part of the statement of case. The consolidated order of the Appellate Assis-

tant Commissioner has been marked Annexure-B. The order of the Tribunal has been marked Annexure-C forming part of the statement of the case. The orders of the Tribunal in the case of the other assessee, aforementioned, namely, Saraswati Devi has been marked Annexure-D forming a part of the statement of the case.

4. We, therefore, have to fall back upon the orders of the Tribunal in the case of Saraswati Devi, Annexure-D, for the reasons which have impelled the Tribunal to reduce the quantum of penalty for each year in question with regard to the present assessee. The reasons recorded by the Tribunal with regard to the quantum of penalty, which find place in Annexure-D, that the Wealth Tax Officer had calculated the penalty for the entire period for each month of delay of the difference between the net wealth assessed and the initial exemption limit of Rs. 1,00,000. For the earlier period he has imposed penalty at the rate of 2 per cent of the tax for each month of default. As the default was for a long period it was limited to 50 per cent of the tax which was Rs. 164. In those cases of Saraswari Devi the calculation of penalty for the period after 1st April, 1969 was based on the amended provision of law which came into force from 1st April, 1969. Similar calculations had been made by the Wealth Tax Officer for all the succeeding years in the case of Saraswati Devi as in the cases of the present assessee with which we are concerned in this batch of cases. The Tribunal had, further, held that there was no specific provision which had made the amendment retrospective for the earlier assessment years. The amended provision was applicable to the assessment for the assessment year 1969-70 and onwards. It further went on to hold that in the Wealth Tax Act, as in the Income Tax Act, the law for a particular assessment year is the law which is enforced on the first day of April of that assessment year. The Wealth Tax Officer had imposed the penalty on the enhance basis on the ground that the return of income was filed much later than the due date after the amended provision had come into force. It was on this basis

that the Department had calculated the quantum of penalty. The Tribunal was of the view that the amendment in. considerable enhancement of the quantum of penalty with effect from 1st April, 1969. The amendment was with regard to a substantive law and not merely a procedural law and it substantially affected the liability of the assessee to his prejudice. The amendment could not be considered as a procedural law and, therefore, the law could not have any retrospective operation unless there is a specific provision made in the Act for that purpose. The date of filing of the return could not be the relevant criterian for applying the provision of particular law unless the statute provides so either expressly or by necessary intendment. The Tribunal, accordingly, did not uphold the imposition of penalty at the enhanced rates which was sought to be defended by the Revenue on the basis of the amended law which came into force from 1st April, 1969. Assessment years being dates prior to the coming into force of the amendment, the quantum of penalty could not be determined in accordance with such amendment. These are the reasons which have weighed with the Tribunal in reducing the quantum of penalty for the assessment years in question with regard to the present assessee.

5. In our view the matter is too well settled now and need not be dilated upon in any detail. Apart from the well established principle of law which, we hold, the Tribunal has rightly taken into consideration, this question has been settled by the Supreme Court also in the case of *Commissioner of Wealth-tax, Amritsar* v. *Suresh Seth*(1). In that case the Supreme Court held:

> "That section 18 of the Act did not require to file a return during every month after the last day of filing was over. Non-performance of any of the acts mentioned in section 18(1)(*a*) of the Act gives rise to a single default and to a single penalty,

(1) (1981) A.I.R. (S.C.) 1106=129 I.T.R. 328.

the measure of which, however, is geared up to the time lag between the last date on which the return has to be filed and the date on which it is filed. The default, if any, committed is committed on the last date allowed to file the return. The default cannot be one committed every month thereafter. The words 'for every month during which the default continued' indicate only the multiplier to be adopted in determining the quantum of penalty and do not have the effect of making the default in question a continuing one. Nor do they make the amended provisions modifying the penalty applicable to earlier defaults in the absence of necessary provisions in the amending Acts. The principle underlying section 6 of the General Clauses Act is clearly applicable to these cases."

The Supreme Court went on to hold that the default complained of was one falling under section 18(1)(*a*) of the Act and the penalty has to be computed in accordance with law in force on the last date on which the return in question had to be filed. Neither the amendment made in 1964 nor the amendment made in 1969 had any retrospective effect.

6. We, accordingly, hold that the view taken by the Tribunal in all these cases in quite in consonance with law and the question for the respective years has to be answered in favour of the assessee and against the Revenue in the affirmative. We, therefore, hold that the Tribunal was justified in law in reducing the penalty for each of the five assessment years in question. On the facts and in the circumstances of these cases, however, we shall make no order as to costs.

M. K. C

Question answered.

CIVIL WRIT JURISDICTION

Before Lalit Mohan Sharma and M. P. Varma, JJ.

1984

May, 23

KUNDAL SINGH AND GIRIRAJ SINGH*

v.

THE STATE OF BIHAR AND OTHERS

Arms Act, 1959 (*Act LIV of* 1959), *sections* 17 and 18—*scope and applicability of—cancellation of licence—show cause notice issued by the District Magistrate—full facts relating to charge, whether to be incorporated—appellate authority basing its findings on new facts and circumstances—orders so passed, whether vitiated.*

Where the District Magistrate as well as the Commissioner of the Division took into consideration some extraneous materials and facts not mentioned in the notice of show cause served on the person holding a licence as to why his licence should not be cancelled and the appellate authority introduced new facts not earlier noticed and passed order cancelling the licence;

Held, that, it is not open for the appellate authority to base its finding on new facts and circumstances, which were not brought at the earlier stage before the first authority hearing the case. It is equally correct that the full facts relating to charge should have been incorporated in the notice calling upon the person to show cause, absence of which is prejudicial and as such the orders cancelling the licence are vitiated and must be quashed.

*Civil Writ Jurisdiction Case no. 5988 of 1983. 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 of India.

The facts of the case material to this report are set out in the julgment of M P. Varma, J.

Mr. Narbadeshwar Prasad Singh for the petitioner.

M/s. D. K Jha (*Government Advocate*) and *Uday Shankar Sharan Singh*, for the respondents.

M. P. VARMA, J.—The petitioner, who is a resident of village Semara, police station Bhabhua in the district of Rohtas obtained a licence from the District Magistrate at Varanasi (U.P.) for possession of fire arms under the Arms Act. 1959. The licence no. is 3380/75 and the petitioner purchased a riflle which was duly endorsed on the licence.

2. Some time after the petitioner was involved in a criminal case, registered at police station Bhagwanpur in the district of Rohtas, in which, apart from others there were allegation of outraging the modesty of a woman and that in the occurrence some of his companions bad used the various arms for terrorising the said woman and the other witnesses. The Officer-in-charge of the Bhagwanpur police station in course of investigation of the case seized the rifle of the petitioner and submitted a report to the District Magistrate at Rohtas for the cancellation of the licence.

3. The District Magistrate on receipt of the report from the police asked the petitioner to show cause vide annexure '2' to the application as to why the licence granted to him be not cancelled. The petitioner submitted explanation, but the District Magistrate, Rohtas, on examining the same, by order dated the 22nd August, 1983, cancelled the licence of the petitioner, vide annexure '5'. The order is purported to have been passed under section 17 of the Arms Act. The petitioner made an appeal against the order of the District Magistrate to

the Commissioner of the Division under section 18 of the Arms Act. Having lost the appeal as well (vide annexure '8') the petitioner has now invoked the writ jurisdiction of this Court under Articles 226 and 227 of the Constitution of India. He has prayed for quashing of the orders contained in annexures 5 and 8 and also that the aforesaid licence of the petitioner may be restored and the rifile in question be delivered to him.

4. The petitioner claims to be a registered forest contractor. It is his case that the range of the forest, where he works, is infested not only with wild animals but also humming with extramist and criminals and a fire-arm like rifle is quite indispensible for him for the safety of life and property. The allegation made in the criminal case against him has also been denied. But the main ground of attack of the orders impugned is that the District Magistrate and as well as the Commisurged that the allegations made before the first authority in hearing the proceeding may be relevant to some extent for consioner of the Division took into consideration some extraneous materials and facts not mentioned in the notice of show cause (vide annexure 2) served on the petitioner. It has also been sideration of a case, but it is beyond the jurisdiction of the appellate authority to introduce new facts not earlier noticed. It has been urged that the notice in question, annexure 2 did not contain all the material detail on which the licence was cancelled and the reasons considered being beyond the facts stated in the notice the impugned orders contained in annexures '5' and '8'.

The jurisdiction of the District Magistrate, Rohtas excercised under section 17 of the Arms Act in cancelling the licence of the petitioner is not in dispute. Counsel for the State fairly agreed to the view that the material facts relating to the case should have been incorporated in the notice (annexure 2) in asking the petitioner to show cause why the licence should not be cancelled. It has also been conceded that the District Magistrate has taken into consideration some fact not mentioned in the notice of show cause issued to the petitioner. I

further find that the Commissioner too sitting in appeal, has travelled far beyond in taking into consideration many new materials introduced at the appellate stage.

6. In my view it is not open for the appellate authority to base its findings on new facts and circumstances, which were not brought at the earlier stage before the first authority hearing the case. It is equally correct that the full facts relating to charge should have been incorporated in the notice, calling upon the petitioner to show cause, absence of which is prejudicial consequently both the orders aforementioned vitiated and are fit to be quashed.

7. In the result, I quash both the orders contained in annexures 5 and 8. The petitioner is entitled to get back his rifle and he may move the authority concerned for the release of the same. It will however, be open for the State respondent to take action afresh in accordance with law. In the circumstances, I do not propose to pass order for costs.

LALIT MOHAN SHARMA, J.—I agree.

M. K. C. *Application allowed.*

FULL BENCH

Before S. S. Sandhawalia, C. J., H. L. Agrawal and R. C. P. Sinha, JJ.

1984

July, 25.

MOHAMMAD ZAINUL ABEDIN AND ANOTHER*

v.

THE STATE OF BIHAR AND OTHERS.

Bihar Panchayat Samitis and Zila Parishads Act, 1961 (Bihar Act VI of 1962) section 32 (1), and Bihar Panchayat Samitis and Zila Parishads (Conduct of Business) Rules, 1963, Rule 3—scope and applicability of—motion of no confidence against the Pramukh or Up-Pramukh of a Panchayat Samiti—whether can be validly considered in a meeting held on a holiday—Rule 7—time limit prescribed—whether refers to actual holding of the meeting or merely the calling thereof.

Held, that in view of rule 3 of the Bihar Panchayat Samitis and Zila Parishads (Conduct of Business) Rules, 1963, a motion of no-confidence against the Pramukh or the Up-Pramukh of a Panchayat Samiti envisaged by section 32(1) of the Bihar Panchayat Samitis and Zila Parishads Act, 1961, cannot be validly considered and passed in a meeting held on a holiday.

Rule 3 is equally applicable and attracted to the holding and conduct of a special meeting (including one for considering a no-confidence motion against the Pramukh or the Up-Pramukh) and bars the same to be held on a holiday.

Kamlesh Roy v. Rudra Narain Rai and ors(1)—affirmed. *Rajendra Singh* v. *The State of Bihar and ors*(2)—distinguished. *Devta Charan Lal* v. *The State of Bihar and ors*(3),overruled.

*Civil Writ Jurisdiction Case no. 1853 of 1983. In the matter of an application under Articles 226 and 227 of the Constitution of India.

(1) (1981) A.I.R. (Pat.), 264.
(2) (1982) P.L.J.R., 159.
(3) C.W.J.C. no. 1013 of 1981 decided on the 2nd April, 1981.

H ..., further, that rule 7 of the Bihar Panchayat Samitis and Zila Parishads (Conduct of Business) Rules, 1963, merely prescribes the time-limit within which, on receipt of a requisition, the meeting is to be called either by the Pramukh or the Adhyaksha and on his failure to do so, by the Block Development Officer or the Secretary respectively. It does not prescribe the time for the actual holding of the meeting but only lays down the period of seven days and three days respectively for the calling of a special meeting as such.

Application by the Up-Pramukh of the Samiti and another.

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

On reference to the Full Bench.

Mr. Manvendra Roy, for the petitioners.

Mr. S. Hoda, Standing Counsel III and *Mr. Yogendra Mishra* and *Mr. Mihir Kumar Jha, J. C. to Mr. S. Hoda*, for the respondents.

S. S. SANDHAWALIA, C. J.—Whether a motion of no-confidence in the Pramukh or Up-Pramukh of a Panchayat Samiti envisaged by section 32 of the Bihar Panchayat Samitis and Zila Parishads Act, 1961, can be validly considered in a meeting held on a holiday—is the somewhat ticklish question necessitating this reference to the Full Bench. Equally at issue is the correctness of a Division Bench judgment in *Kamlesh Roy* v. *Rudra Narain Rai and others*(1) and a conflict of precedent within this Court on the point.

2. The facts are undisputed and lie in a narrow compass. Respondent no. 3 Baidyanath Prasad was elected the Pramukh of Belsand Panchayat Samiti some time in the year 1979. A motion expressing want of confidence was proposed against him and a notice requisitioning a meeting of the members of the respondent Samiti signed by more than the requisite number of members was made over to the said respondent on the 17th of March, 1983, who, however, refused to

(1) (1981) A.I.R. (Pat.) 264.

receive the requisition. Consequently the said requisition was presented to the Block Development Officer-Ex-Officio Secretary of the Samiti, who forwarded the same to respondent no. 3 with an endorsement to call a special meeting for considering the no-confidence motion. On behalf of the two writ petitioners it has been averred that respondent no 3 nevertheless paid no heed to the said requisition and in accordance with rule 7 of the Bihar Panchayat Samitis and Zila Parishads (Conduct of Business) Rules, 1963, respondent no. 5 called a meeting of all the members of the respondent Samiti on the 27th of March, 1983. at 1 P.M. for considering the no-confidence motion under a notice issued by him in this behalf on the 25th of March, 1983. The writ petitioners have averred that because the motion was directed against respondent no. 3, the Pramukh of the Samiti, petitioner no. 1 Mohammad Zainul Abedin, who was the Up-Pramukh of the said Samiti, acted as the Chairman of the said meeting which was attended by 33 members constituting more than two-thirds of the strength of the total members of the Samiti, and after a deliberation of over two hours the said motion was unanimously carried. Thereafter respondent no. 5 who was present at the meeting affixed the resolution expressing want of confidence in respondent no. 3 on the Notice Board of the respondent Samiti (Annexure 2 to the petition).

3. The primary grievance of the writ petitioners is that the respondent State of Bihar acting under section 68 of the Act proceeded to cancel the resolution aforesaid on the ground that the meeting had been held on the 27th of March, 1983, which was a Sunday and under rule 3 no such meeting can be held on a holiday and further that the holding of the requisitioned meeting had earlier been stayed under the orders of the State Government passed on the 25th of March, 1983; itself.

4. In the counter-affidavit filed on behalf of respondent nos. 1 and 2 it has been averred that the Director-*Cum*-Additional Secretary (respondent no. 2) by his office letter dated the 24th of March, 1983, had issued an order communicating the decision of the Government to postpone the published meeting of no-confidence against the Pramukh but despite the said decision duly communicated the meeting was nevertheless sought to be held on the 27th of March, 1983, in which a vote of no-confidence was passed. It is the case that the said meeting was a deliberate disobedience of the order of the State

Government and equally flagrant violation of rule 3, which forbids the holding of a meeting on a holiday. It is then the claim that the State Government is empowered under section 68 to cancel any resolution by the Panchayat Samiti and in the present case the said resolution being in violation of the statutory provisions has been rightly set aside.

5. Now the basic, if not the solitary, argument raised by learned counsel on behalf of the writ petitioners is that rule 3 which prescribes that the meeting of the Samiti shall not be held on a holiday has no relevance or applicability to a special meeting for considering the no-confidence motion against the Pramukh or Up-Pramukh as envisaged by rule 7. On this premise the submission was that such a meeting can be held on a holiday without any blemish, and primary reliance for this submission was on the observation in C.W.J.C. No. 1013 of 1981 which undoubtedly buttresses this stand.

6. Inevitably the contention aforesaid has to be evaluated within the parameter of the statutory provisions. Reference must first be made to section 32(1) which is in the following terms:—

> "32(1) A motion expressing want of confidence in the Pramukh or the Up-Pramukh of a Panchayat Samiti may be made by a notice signed by not less than one-third of the total number of the members of the panchayat samiti and it shall be dealt with *in accordance with the prescribed procedure.*"

Now, the prescribed procedure referred to in the aforequoted section is spelt out by the Bihar Panchayat Samitis and Zila Parishads (Conduct of Business) Rules, 1963. Therein the relevant rules, which call for notice *in extenso*, are:

> "3. Every Samiti/Parishad shall meet at least once in every two months for the transaction of business *upon such days, not being holidays* and such hours of the day as it may arrange and also at other times as *often as a meeting is called by the Pramukh of the Samiti/ Adhyaksha of the Parishad.*"

"5(1) No meeting shall be *held* unless notice of the place, date and time of the meeting and of the business to be transacted thereat, is given in writing to members at least *ten clear* days before the date of the meeting. A copy of the notice shall be pasted on the Notice Board of the Panchayat Samiti/Zila Parishad."

"7(1) The Pramukh/Adhyaksha shall call for a *special meeting* including the meeting for considering no-confidence motion against the Pramukh or Up-Pramukh/Adhyaksha or Up-Adhyaksha within seven days of the receipt of the request in writing signed by not less than one-third of total number of members of the Samiti/Parishad specifying the resolution which it is Proposed to move:

Provided that where Pramukh/Adhyaksha does not call the meeting within the time-limit the Block Development Officer/Secretary shall call the meeting within three days thereafter.

(2) The procedure for dealing with the no-confidence motion shall be the same as laid down in rules 29 to 43 of these rules:

Provided that the motion of no-confidence shall be carried with the support of not less than two-thirds of the members present and voting."

"29. Any matter requiring the decisions of the Samiti/Parishad shall be put in the form of a resolution."

"32. Notice of resolution shall be in writing and signed by the mover and should contain a copy of the resolution."

"33. Resolutions, the notice of which has been given at least seven clear days before the convening of any meeting, shall only be considered in that meeting, but the presiding member may allow, for 'reasons to be stated by him' a resolution to be entered on the list of business with shorter notice."

A plain look at the contents and language of rule 7(1) would show that it spells out the methodology for calling a special meeting of the Samiti or the Parishad. It prescribes that on the requisition in writing signed by not less than one-third of the total number of members the Pramukh must call a special meeting within seven days therefrom. Further, as a matter of abundant caution, the proviso to sub-rule (1) lays down that on the failure of the Pramukh or the Adhyaksha to call the meeting within the time-limit the Block Development Officer or the Secretary shall call such a special meeting within three days thereafter.

7. Now, the threshold question herein is whether the mandate and the prescriptions of time aforesaid for calling a special meeting mean the actual holding of such a meeting or merely the calling thereof, i.e., the fixation of the place, date and time of the meeting and adequate notice thereof to the members. On behalf of the writ petitioners, it was tenuously sought to be contended that the intent of rule 7(1) is that the special meeting for considering the no-confidence meeting should be expeditiously held forthwith, within seven days of its requisitioning. On that premise, it was further contended that rules 3 and 5 and some other rules would have no relevance or applicability to a special meeting for considering the no-confidence motion, held under rule 7.

8. I regret my inability to subscribe to the aforesaid submission of the learned counsel for the writ petitioners, which appears to me as fallacious. From what would follow in some detail hereinafter, it would be plain that merely the calling of a meeting is not the actual holding thereof. The two acts, in my view, are distinct and separate. Consequently, rule 7 merely prescribes the time-limit within which, on receipt of a requisition, the meeting is to be called either by the Pramukh or the Adyaksha and on his failure to do so, by the Block Development Officer or the Secretary respectively. The calling of a meeting herein merely means that adequate notice of the place, date and time of the meeting and of the business to be transacted therein has to be duly given to the members of the respective bodies. On this preliminary point, I would hold that rule 7 does not prescribe the time for the actual holding of the meeting but only lays down the period of seven days and three days respectively for the calling of a special meeting as such.

9. Yet again, it was contended on behalf of the writ petitioners that rule 7 was itself a self-contained code and barring rules 29 to 43, to which specific reference is made by sub-rule (2), the other rules (and. in particular, rules 3 and 5) have no relevance to special meeting called thereunder for considering a no-confidence motion. I regret my inability to accept any such submission. To my mind, rule 7, far from being a self-contained code unaffected by the other rules, is only confined to the methodology for calling a special meeting. A perusal of the same would make it plain that this rule is not confined only to a no-confidence motion as such against the Pramukh or the Up-Pramukh or the Adhyaksha or the Up-Adhyaksha but on the other hand, it is a general provision for the calling of a special meeting on the written requisition by one-third or more members of the Samiti or the Parishad for considering any other business to be transacted thereat. By virtue of section 32 (1) as also by specific reference, in rule 7(1) a no-confidence motion is also included in, and covered by, the modus of calling a special meeting. The larger scheme of the rule would indicate that under rule 3 ordinary meetings are to be called by the Pramukh of the Samiti or the Adhyaksha of the Parishad. On the other hand, an alternative method of calling or requisitioning a special meeting is also provided by rule 7 which prescribes that this must be on the written requisition of one-third or more of the total number of members of the Samiti or the parishad. The distinction betwixt the two, therefore, is that of an ordinary meeting of the Samiti or the Parishad called by its Pramukh or Adhyaksha, as against a special meeting requisitioned at the instance of the requisite number of members under rule 7. However, this distinction betwixt the ordinary meeting and special meeting loses any further significance once the said meeting has been properly called and thereafter the procedure for conducting the said meeting is broadly similar and identical. Rule 7(1), therefore, is not a self-contained code or a law unto itself but provides only a method of convening or requisitioning a meeting which thereafter has to conform to the general or special rules for the holding thereof. On this finding, when once meeting has been duly requisitioned and called in terms of rule 7 then the other rules automatically shall be attracted thereto and, in particular, the preceding rules 3 and 5 as well. Indeed, the larger scheme of the rule would indicate that rule 7 is not to be construed in isolation but as a part of the mosaic of the other rules, in which it is in-laid. Part II of the Rules has been given the heading of "CONDUCT

OF BUSINESS AT MEETINGS OF PANCHAYAT SAMITIES AND ZILA PARISHADS". Consequently, the rules thereunder would be attracted equally to ordinary or special meetings. It would appear that wherever the word 'meeting' has been used in the Rules, the same would include within its sweep both an ordinary and a special meeting requisitioned by more than one-third of the members. Therefore, rules 3 to 21, which form part of the sub-chapter labelled as 'General', are equally applicable to every ordinary or special meeting called thereunder.

10. It calls for pointed notice herein that once a special meeting has been requisitioned under rule 7, no particular procedure for giving of notice thereafter is spelt out in the said rule itself. Even though pointedly asked, learned counsel for the writ petitioners could not refer us to any provision which provides differently for the calling of a special meeting. It is, therefore, plain that straightway the provisions of rule 5 (1) would be attracted, which lay down that notice of a meeting with date, time and place thereof including the business to be transacted thereat must be given in writing to the members at least ten clear days before the date of such a meeting. One cannot easily imagine that the meeting of a large statutory body like the Samiti or the Parishad can be held *dehors* any rules for giving notice thereof and calling of the same. I am clearly of the opinion that rule 5 is equally and squarely applicable to the calling of a special meeting, as it obviously is to the ordinary meetings.

11. Again, sub-rule (2) of rule 7 itself gives a lie direct to the stand that the said rule is in any way a self-contained code for the purpose of either holding a special meeting or for considering a no-confidence motion. Indeed, the sub-rule, in terms, prescribes that the procedure for dealing with any no-confidence motion shall be the same as laid down in rules 29 to 43. The sub-chapter of 'Resolution' comprising therein rules 29 to 43 is plainly attracted to both ordinary and special meetings. It is mandated by rule 29 that any matter requiring the decision of the Samiti or the Parishad shall be put in the form of a resolution. Rule 32 itself provides that the notice of such resolution must be in writing and signed by the mover and should contain a copy of the said resolutions. It is significant that rule 33 lays down that ordinarily a resolution shall only be considered if a clear notice thereof has been given seven clear days before the

convening of a meeting. This rule again negatives the somewhat tenuous stand of the writ petitioners noticed earlier that the meeting for considering a no-confidence motion under rule 7 must be held within seven days of its requisition.

12. Once it is held that apart from the methodology of requisitioning a special meeting under rule 7, the rest of the rules for the conduct of business at such meetings are common, it would follow that rule 3 would be equally attracted to a special meeting. It, in terms, prescribes that the Samiti or the Parishad is to meet upon such days which are not holidays. The Samiti and the Parishad being large bodies (some of them have a membership of 50 to 100 persons), the framers of the rule have taken care to prescribe in great detail not only the methodology of convening a meeting but also of conducting such meetings by as many as 59 precise rules therefor. Some of the matters have been gone into in meticulous detail by these provisions. Now, if the bar of holding an ordinary meeting on a holiday has been specifically laid, one sees no particular reason why this would not be made applicable to a special meeting as well which, as I have already said, is distinct only as regards the manner of calling or requisitioning the same. It is common knowledge that Legislatures and other important statutory bodies are chary of holding meetings on notified holidays On principle and on the scheme and the language of the rule, I am clearly inclined to the view that rule 3 is equally applicable and attracted to the holding and conduct of a special meeting (including one for considering a no-confidence motion against the Pramukh or the Up-Pramukh) and bars the same to be held on a holiday.

13. Inevitably one must now turn to the precedents of this Court and doubts raised with regard thereto which, indeed, have necessitated this reference to a larger Bench. Pride of place must be given to a Division Bench judgment in *Kamlesh Roy* v. *Rudra Narain Rai and others*(1) in which, though the reasoning is somewhat cryptic, the conclusion is entirely in consonance with the view I have taken above for detailed reasons. Therein one of the principal points raised was

(1) (1981) A.I.R. (Pat.) 264.

that the meeting of the Panchayat Samiti held on holiday was hit by rule 3 and, therefore, invalid. It was observed as follows:—

> "In the meantime a special notice was given by respondent no. 2 on 4th October, 1979 fixing the meeting on 7th October, 1979 which was a holiday. It was hit by Rule 3 as no such meeting could be held on a holiday. The rules have been framed under Section 75 of the Act for carrying out the purposes of the Act and it requires to be laid before each House of the Legislature for a total period of 15 days. The rules thus being statutory rules have the same force as the provisions of the Act. Rule 3 being a complete embargo on a meeting being held on a holiday, the meeting held on 7th October, 1979, was against the express provision of Rule 3."

14. Learned counsel for the writ petitioners, however, attempted some misplaced reliance on an observation in *Rajendra Singh* v. *The State of Bihar and others*(1). In the said case, the question of applicability of rule 3 and of holding a meeting of the Samiti on a holiday did not even remotely come for consideration. The case is thus not of the least assistance to the writ petitioners. After a consideration of the scheme of the rules in general, it was observed in paragraph 5 of the report that a no-confidence motion has to be considered in a special meeting called for and conducted under section 32 read with rule 7 and not according to the procedure for convening the ordinary meeting. There can be no quarrel with this proposition. As has been repeatedly said by me earlier, a no-confidence motion, in view of the procedure prescribed, has to be considered in a special meeting called under rule 7. The aforesaid observation is thus not the least basis for the proposition that rules 3 and 5 would not be attracted or applicable to such a meeting. It must, therefore, be held that the case of *Rajendra Singh* (supra) is plainly distinguishable.

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(1) (1982) P.L.J.R. 159.

15. It now remains to advert to a single Bench judgment in *Devta Charan Lal* v. *The State of Bihar and others*(1). Reading of the brief judgment therein indicates that the matter was not adequately debated or canvassed before the Bench and neither principle nor precedent was cited nor the larger conspectus of the rules adequately high-lighted. The binding precedent of the Division Bench in *Kamlesh Roy's case* (supra) rendered on the 2nd of January, 1981 was not brought to the notice of the learned single Judge either. The finding in the judgment being plainly contrary to the larger Bench judgment in *Kamlesh Roy's* case thus seems to have been rendered *per incuriam*. However, there is no manner of doubt that an observation was made therein that the provisions of rule 3 were not applicable to the special meeting convened under rule 7, which is not sound law in view of the detailed reasons given above. With the greatest respect, therefore, the judgment in *Devta Charan Lal's* case (supra) has to be overruled.

16. To conclude, the answer to the question posed at the very outset is rendered in the negative and it is held that in view of rule 3 a motion of no-confidence against the Pramukh or the Up-Pramukh of a Panchayat Samiti cannot be validly considered and passed in a meeting held on a holiday. The earlier view of the Division Bench in the case of *Kamlesh Roy* v. *Rudra Narain Rai and others* is hereby affirmed.

17. Once the legal position is settled as above, it is plain that this writ petition must fail. It is common ground that in view of the fact that the meeting had been called for the 27th of March, 1983, which was a Sunday, the State Government, in pursuance of the mandate of rule 3, had stayed the holding of any such meeting. It could not be and, indeed, was not even remotely urged before us that the State Government did not have the power to order such stay. It must, therefore, be held as valid. Nevertheless, in flagrant violation thereof a meeting was held in haste on a holiday. Consequently, the State Government was compelled under the mandate of rule 3 to cancel the said resolution passing the vote of no-confidence on a holiday. In the writ jurisdiction I find not the least justification to interfere

(1) (1981) C.W.J.C. no. 1013 of 1981 decided on 2nd April, 1981.

with the action of the respondent State, which was within its jurisdiction and equally in conformity with the statutory rules. The writ petition, therefore, must be dismissed, but in view of the intricacy of the question and some conflict of precedent (which necessitates the overruling of the earlier single Judge judgment in *Devta Charan Lal's case*) I would leave the parties to bear their own costs.

HARI LAL AGRAWAL, J.—After having read the lucid judgment prepared by the learned Chief Justice, there hardly remains anything useful which I can add, but since the correctness of one of the judgments in the case of *Rajendra Singh* v. *The State of Bihar and others*(1) which has been rendered by me, also did arise for consideration, I would like to add a few observations of my own.

19. It has been rightly observed by the learned Chief Justice that the main question referred to the Full Bench did not arise in that case. The principal question that arose in that case was as to the limitation for holding the adjourned meeting for consideration of a motion of no-confidence against a Pramukh and an Up-Pramukh. By the observation in paragraph 5 of the judgment that "a no-confidence motion has to be considered in a special meeting called for and conducted under section 32 read with rule 7 and not according to the procedure for convening ordinary meeting", I did not mean that the other procedures and the rules for convening a meeting did not apply altogether.

I entirely agree that the period of seven days for convening a special meeting for considering a non-confidence motion under rule 7 of the Bihar Panchayat Samities and Zila Parishads (Conduct of Business) Rules, 1963, does not mean that the meeting itself must be held within the period of seven days from the receipt of the written request by the prescribed number of members of the Samiti. Similarly a three days' time limit prescribed for the Block Development Officer or the Secretary to call the meeting in case of the failure of the Pramukh to call for the meeting within the time limit prescribed for him, does not mean that the meeting itself should be held within the period of three days. Such construction would be unworkable in view

(1) (1982) P.L.J.R. 159.

of the large number of the members of the Samiti and its constitution. No time limit appears to have been fixed under the law regulating the convening of the special meetings for holding the meetings either by the Pramukh or the Executive Authority of the Samiti. The law simply enjoins upon them a duty that no delay beyond the time of seven days and three days should take place by the respective authorities in calling for the special meeting. The date of the meeting obviously may be after the respective periods of seven days and three days. In that view of the matter, while fixing the date for convening the meeting, days of holiday have to be avoided in view of the special provision contained in rule 3 in this regard. As the meeting in question had been convened on a Sunday, it was invalid in law being hit by rule 3. The application, therefore, must be dismissed.

R. C. P. SINHA, J.—I agree.

S. P. J. *Application dismissed.*

CIVIL WRIT JURISDICTION

Before Hari Lal Agrawal and S. Shamsul Hassan, JJ.

1984

July, 30

RAJU KUMAR PRASAD AND ANOTHER.*

v.

THE ADDITIONAL MEMBER, BOARD OF REVENUE BIHAR, PATNA AND OTHERS.

Bihar Land Reforms (Fixation of Ceiling Area and Acquisition of Surplus Land) Act, 1961 (*Act XII of* 1962), *section* 16(3) *and Transfer of Property Act*, 1882 (*Act IV of* 1882) *section* 52—*scope and applicability of—transfer made by the purchaser of the land on the date of filing of application under section* 16(3)—*effect of—events taking place, whether simultaneous—rule of lis pendens, whether apply in such a case—transfer by a purchaser in favour of third party—when can be defeated—plea of farzi nature of the transaction—Onus to prove.*

Where the execution of the sale deed in favour of the third party by the purchaser of the land was done on the very date of the application for pre-emption;

Held, that in such a case it will not be possible to decide the question of priority of either of the execution of the sale deed or the making of the application for pre-emption in point of time and, therefore, it must be assumed that both the events

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*Civil Writ Jurisdiction Case nos. 3095, 3097 and 3098 of 1979. In the matter of applications under Articles 226 and 227 of the Constitution of India.

Prem Shankar Prasad—Petitioner in C.W.J.C. 3097.

Ajoy Kumar Prasad & others—Petitioners in C.W.J.C. 3098.

took place simultaneously and stood on equal footing in that view of the matter, the rule of lis pendens would not apply to such a case as the transaction was made before the lis (application for pre-emption would have started its operation to attract this doctrine);

Held, further that the only ground on which the transfer by a purchaser in favour of third parties could be defeated is to establish that the subsequent transfer is either farzi or a sham transaction. The burden to prove this fact would lie on the head of the person who makes out such a case.

Case laws reviewed.

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

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

Messers Balbhadra Prasad Singh, Md. Wasi Akhtar and *Sirajul Hoda*, for the petitioners is all the cases.

M/s. Chandramauli Kumar Prasad and *Ravi Shankar Prasad*, for the respondents in all the cases.

HARI LAL AGRAWAL, J.—In this batch of three writ applications which have been referred to a Division Bench by a learned single Judge and have been heard together, the question of law arising for consideration is the effect of a transfer by the purchaser of the land in question on the date of the filing of the application under section 16(3) of the Bihar Land Reforms (Fixation of Ceiling Area and Acquisition of Surplus Land) Act, 1961. The petitioners in all the three cases are the purchasers and are related to each other so much so that petitioner no. 2 of the first case is the petitioner of the second case and brother of petitioner no. 2 of the third case. These petitioners purchased certain lands situate in village Harnath-

pur in the district of East Champaran, from respondent nos. 5 and 6 under three separate sale deeds for Rs. 9,000 each which was registered on 29th September, 1977, and according to their case the lands conveyed to the petitioners under the three sale deeds formed one compact block.

2. On 21st November, 1977 respondent no. 4 filed applications for pre-emption in the court of Land Reforms Deputy Collector Sikrahna at Motihari for transfer of the lands in question to him claiming himself to be an adjacent raiyat thereof and on the same day, i.e., 21st November, 1977, the petioners in their turn, had also executed separate sale deeds in favour of different persons for the lands/part (sic), which were however, registered on 17th December, 1977.

On the notice of show cause being issued by the Deputy Collector, the petitioners challenged the right of the pre-emptor, *inter alia*, on the ground that they were not adjoining raiyats of all the lands and that the petitioners themselves were adjoining raiyats to one of the plots, being plot no. 1407, that being an ancestral plot of all the petitioners purchased by their ancetor Sukhram Sah and recorded in the name of Gauri Shankar Sah. The Deputy Colltctor by his order dated the 10th July, 1978 (Annexure 2) rejected the pre-emption application on the findings that the pre-emptor was not the adjoining raiyat of all the lands transferred to the petitioners and that the purchasers, namely, the petitioners, themselves were also in the western boundary of plot no. 1407.

It is necessary, however, to mention that one of the points taken by the petitioners in their defence was that the pre-emption applications were defective for not impleading the subsequent transferees from them. The transferees had also made applications before the Deputy Collector (vide Annexure 12) for being made parties to the proceeding on the ground that they were bonafide purchasers and in possession of the lands in question, they had also challenged the report of the Anchal Adhikari (Annexure B) against them. The pre-emptor, however, filed a rejoinder objecting to the prayer of the subsequent

transferees for being added as parties vide his rejoinder dated 7th December, 1977 (Annexure 13). His stand was that the transferees were *farzidars* of the petitioners.

3. It was conceded at the Bar that the Deputy Collector did not pass any separate order on the petition of the subsequent transferees and, although during the course of hearing Mr. Balbhadra Prasad Singh, appearing for the petitioners, on the instructions of the junior, stated before us that in his order (Annexure 2) also the Deputy Collector did not pass any order in this regard, I however, find from the scrutiny of the order of the Deputy Collector that he has made an observation that the transfer of the lands by the petitioners on 21st November, 1977 did not appear to be *farzi*.

4. The pre-emptor also failed before the Collector of Motihari in his appeal, who by his order dated 30th May, 1979/ 13th June, 1979 (Annexure 3), relying upon a Bench decision of this Court in *Chandradip Singh and another* v. *The Additional Member, Board of Revenue, Bihar*(1), dismissed the appeals mainly on the ground that the petitioners having transferred the land to a third party on the date the application for pre-emption was made, no order could be passed against them. The pre-emptor then filed revision before the Board of Revenue. The learned Additional Member of the Board allowed his application on committing a serious error of law, contrary to the view of this Court in a large number of decisions, that despite the sale deeds in favour of the subsequent transferees which were registered after the date of the pre-emption applications, the petitiontrs, had still sobsisting title in the lands and therefore, there was no impediment in the way of the pre-emptor for the order of pre-emption in his favour.

It may be stated that before the Board of Revenue the pre-emptor's stand that the petitioner had no status of boundary raiyat, was not challenged. The fact that the pre-emptor is in the boundary of one of the plots of the block of the land in in question is also an undisputed fact. The purchasers, therefore, have come to this court, as already said earlier.

(1) (1978) A.I.R. (Pat.) 148.

5. It appears from the order of reference of the learned single Judge that the question mooted before him was as to whether the general principle of *lis pendens* as contained in section 52 of the Transfer of Property Act, which is otherwise applicable to such alienations and transfers, would also apply to cases coming within the mischief of section 16(3) of the Act. Before us also, Mr. Balbhadra Prasad Singh on the first day of hearing had made long arguments in support of his contention that the Ceiling Act being a special statute, must be considered to be a self-contained Act and the principles of general law, unless specifically made to apply, could not be attracted to govern the rights of the parties.

It may be mentioned that this Court in several decisions, although there the question as such was not raised, applied the principle of *lis pendens*, and notwithstanding that Mr. Balbhadra Prasad Singh on the second day of his argument submitted that this question being a debatable one the matter may be remanded on other question, I, however, in order to clinch the issue and avoid any further unnecessary controversy, would like to record my views. I do not find any substance in the contention of Mr. Singh in this regard. The rights of the citizens of India must be governed by the law they are governed. The transaction of sale of agricultural lands—matter under Chapter V of the Ceiling Act—has been provided only for carrying out the intentions of this special law, namely, to avoid fragmentation and maintaining compactness of agricultural holdings and not for any other purpose. Simply because a provision of pre-emption has been made under Chapter V of the Ceiling Act imposing certain restrictions on further acquisition keeping in view the scheme and purposes of the Act, the principles of general laws otherwise governing the law of transfer such as the provisions of the Transfer of Property Act and the Registration Act etc. cannot be avoided. Section 3 of the Ceiling Act containing a non obstante provision that the provisions of this Act shall have effect notwithstanding anything to the contsary contained in any other law, custom or usage for the time being in force, or even any decree or order of any

Court, in my opinion does not mean that such provisions which are not contrary or in conflict with the provisions of this Act could also have no application altogether.

The argument of Mr. Balbhadra Prasad Singh that unless the provisions of the general law were not specifically adopted by special mention in any local law or statute they will have no application, in my opinion, must be rejected.

6. As already said earlier, this Court has repeatedly applied the law of pre-emption in the cases of a subsequent transfer by the purchaser for considering its effect on the rights of the pre-emptor. Reference at least to three reported cases can be at once made, namely, (1) *Smt. Sudama Devi and others* v. *Rajendra Singh and others*(1), (2) *Abdullah Mian* v. *Jodha Raut and others*, (2) (my own judgment) *and Chandradip Singh* (supra).

7. It is true that the law of pre-emption was not known in India before the advent of the Moghul Rule, but in course of time customs of pre-emption grew up and were adopted in village communities in different form (see *Digambar Singh and Ahmad Said Khan*: XLII Indian Appeal 10 at 18). However, after the Constitution the law of pre-emption was held to be invalid by the Supreme Court in the cases of *Bhau Ram* v. *Baijnath Singh and others*(3) and *Sant Ram and others* v. *Labh Sing and another*(4). Protection therefore, has to be provided to this legislation by including it in the Ninth Schedule of the Constitution to save it from being struck down as being violative of Article 19(1)(*f*) of the Constitution.

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(1) (1973) A.I.R. (Pat.) 199.
(2) (1976) B.B.C.J. 049.
(3) (1962) A.I.R. (S.C.) 1476.
(4) (1965) A.I.R. (S.C.) 314.

8. Be that as it may, the fact that the registration of the sale deeds in question in favour of third parties on 17th December, 1977 in would date back to their execution on 21st November, 1977 in view of section 4 of the Registration Act, is now a well settled law as repeatedly held by this Court including in the cases of (1) *Sudama Devi* (supra) and (2) *Chandradip Singh* (supra). The claim for right of the pre-emptor on the ground of being an adjacent raiyat to the vended lands in favour of the petitioners would have clearly succeeded on this ground in as much as, to neutralise that right, the plea of the petitioners being also adjacent raiyat to the plots vended in their favour from before, was given up before us. Question, therefore, is as to what will be the effect on the obvious right of the pre-emptor by transfer of the properties to third parties by the petitioners.

9 In the case of *Ramchandra Yadaw* v. *Anutha Yadav and others*(1) this Court considered three situations of subsequent transfers by a purchaser, namely, (1) second purchaser taking a document executed and registered before the filing of the application. In such a case the second transferee gets a good title to the property and there is no question of his right being defeated by a subsequent application for pre-emptor; (2) second sale deed being executed and registered after the filing of the application for pre-emption. In such a case the second transfer is clearly hit by the doctrine of *lis pendens*; and (3) document of sale being executed before the filing of the application for pre-emption, but registered after its filing. In such a case also the application for pre-emption would fail on account of the fact of registration of the document dating back to the date of execution of the deed.

The instant cases, however, are not covered by any of the above situations in as much as here the execution of the sale deeds in favour of the third parties was done on the very date of the application for pre-emption. I sitting singly, was faced

(1) (1971) B.L.J.R. 994.

with exactly a similar situation in the case of *Mir Rafique* v *Additional Member, Board of Revenue, Bihar and others*(1), where after consideration of the authorities on the point I held that in such a case it was not possible to decide the question of priority of either the execution of the sale deed or the making of the application for pre-emption in point of time and, therefore, it must be assumed that both the events took place simultaneously and stood on equal footing. Mr. Singh could not indicate any reason to take a different view in soch a situation He had to concede that it would be very difficult to find any way out to reach to a conclusion regarding priorities. In that view of the matter, the rule of lis pendens would not apply to such a case as the transaction was made before the lis (application for pre-emption) would have started its operation to attract this doctrine. The only ground on which the transfer by a purchaser in favour of third parties could be defeated was to establish that the subsequent transfer was either farzi or a sham transaction. Undisputedly the burden to prove this fact would lie on the head of the person who makes out such a case (see *Chandradip Singh's* case—supra), and as already seen. this was the stand of the pre-emptor also vide his objection petition (Annexore 13). Except makini this assertion in his rejoinder objecting to the prayer of the subsequent transferrees to be impleaded as parties to the proceeding, no effort was made by him to prove his stand. No material was brought to our notice to show that the Deputy Collector refused to take any evidence by the pre-emptor on this question. It was, however, argued before us on the basis of some authorities of this Court where this Court had remitted the matter to the first court for deciding such a question in presence of the subsequent transferees, but the situations in all those cases were different. Firstly they were cases where the transfers were made subsequent to the date of the filing of the pre-emption application and the argument was that the sole intention for those transfers was to defeat the claim of the pre-emptor, or where the question was

(1) (1981) B.B.C.J. 83.

decided in the absence of the subsequent transferees and where it was held that such a question must be decided in presence of those transferees in order to bind them.

In *Mir Rafique's* case (supra), I, however, deriving support from the case of *Bishan Singh* v. *Khezan Sing*(1), took a view that the law of pre-emption engrafted in section 16(3) was a right still weaker in nature than the customary law of pre-emption, and the application of the pre-emptor must fail if the purchaser and the pre-emptor have equal rights, since the weaker right must give way to the right acquired by the vendee. The right of a pre-emptor is a mere right to the offer of a thing about to be sold and such a right is a merely secondary right or a remediol right to follow the thing sold. In thees cases, therefore, it is not possible to hold that a different principle or standard should be applied as the present facts and circumstances are very much similar to those of *Mir Rafique's* case (supra). The only exception to this principle can be a case where a subsequent transfer is either a sham or a farzi deed because in that event the subsequent transferee has got no independent status and does not acquire any legal right.

10. Before parting with these cases, however, I may mention that at one stage the learned counsel for the pre-emptor submitted that the question of 'farzi' should be decided in presence of the purchasers and, therefore, the matter should be remanded back to the first court for re-determination of the question of 'farzi' and disposing of the petition (Annexure 12) in presence of the subsequent purchasers. This contention has lost its significance in view of the fact that the pre-emptor led no evidence in support of this plea, save and except making one sentence rejoinder in his application (Annexure 13) and, therefore, never intended to discharge his burden. In that view of the matter the Deputy Collector could not have taken

(1) (1958) A.I.R. (S.C.) 838.

any other view than to observe in his order that the subsequent transactions were not 'farzi' in nature, which has also been confirmed in appeal. Since this finding is in favour of the subsequent transferees, their absence was not material as no prejudice can be said to be caused to them in view of this conclusion. Of course, if a cantrary finding would have been recorded, then that could not have beln done without bringing them on the record, and in that event I might have thought to remit the matter back to the Deputy Collector for re-examining this question in presence of the parties including the subsequent transferees. The pre-emptor, therefore, cannot be heard to say now for a remand.

11. All the three applications, therefore, must succeed and the order of the Board of Revenue be quashed. I would accordingly allow the applications and quash the order of the Additional Member, Board of Revenue, contained in Annexure '4', but, in the circumstances, shall make no order as to costs.

S. SHAMSUL HASAN, J.—I am entirely in agreement with the conclusions arrived at by my learned Brother. I, however, wish to add a few words of mine. The question of application of the rule of lis pendense has already been sattled by several decisions which have been referred to by my learned Brother and the point is my vitw, is no longer *res integra*. The submission of *Mr. Balbhadra Prasad Singh* that the Bihar Land Reforms (Fixation of Ceiling Area and Acquisition of Surplus Land) Act, 1961, (in short, 'the Act') being a self-contained Act precludes the application of general law is entirely untenable. Section 16(3) of the Act introduces the principle of pre-emption but it relates to the sale and transfer conducted under the Transfer of Property Act and the Registration Act and, therefore, the restrictions imposed or the rights created by the enactment in questions certainly affects any transaction under section 16(3) and that will include the applicability of the law of lis pendense.

In my view, the whole question in this case is, however, academic, since it is a common ground that the transferee was also boundary raiyat of the transferred land. The pre-emptor had no right to pre-empt such a transferee. It may be that the point was not canvassed before the last Court or in this Court but the Courts of fact have stated this fact as correct and this point was raised before those Courts. Learned Junior counsel appearing for the petitioners stated that this point was actually raised before the Board also. Be that as it may, the pre-emptor does not acquire any right in the circumstances of this case.

M. K. C. *Applications Allowed.*

CIVIL WRIT JURISDICTION

Before Hari Lal Agrawal and S. Shamsul Hasan, JJ.

1984.

July, 30.

UMA SHANKAR SHARAN SHRIVASTAVA.*

v.

THE BIHAR STATE CO-OPERATIVE MARKETING UNION LTD., PATNA AND ANOTHER.

Bihar and Orissa Co-operative Societies Act, 1935 (*Act VI of* 1935), *Sections* 40 *and* 48—*Scope and applicability of*—*Society holding a person liable for shortage of property put under his custody and charge—matter, whether covered by clause* (b) *of section* 40(1) *or section* 48—*matter covered by clause* (b) *of section* 40(1)—*period of limitation prescribed for.*

Every claim for demand cannot be put under the cover of section 48 of the Act where the society held a person liable for shortage of properties put under his custody and charge which allegedly arose by reason of his negligence or misconduct, the matter is fully covered by clause (*b*) of section 40(1) of the Act and not under section 48. Once this position is understood then the period of six years limitation has got to apply. The very proviso to sub-section (1) of section 40 lays down that no order shall be passed under this sub-section in respect of any 'act or Omission' mentioned in clauses (*a*) to (*d*) *except* within six years of the date on which such act or omission occurred.

*Civi Writ Jurisdiction Case no. 373 of 1977. In the matter of an application under Articles 226 and 227 of the Constitution of India.

Held, therefore, that in the instant case as the physical verification was made on 30th June 1959 and 30th June 1961 claiming Rs. 7,242.97, the claims were apparently barred by time when the reference was made.

Purnea Ministerial Government Officers' Co-operative Society Ltd. v. *Abdul Quddus*(1) *and Madhav Prasad Singh* v. *Asst. Registrar, Co-operative Societies, Biharsharif Circle and Ors.*(2) referred to.

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

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

M/s. Rameshwar Prasad and *Amarendra Kumar Sinha* for the petitioners.

Mr. Rama Raman for the respondents.

H. L. AGRAWAL, J.—This writ application arises out of a proceeding instituted against the petitioner under section 48 of the Bihar and Orissa Co-operative Societies Act, 1935 (hereinafter to be referred to as 'the Act') in which an award for Rs. 18,365.16 has been made against the petitioner by the Joint Registrar, Co-operative Societies, Bhagalpur, on appeal.

2. The question that has been raised for our decision on behalf of the petitioner is that the claim was barred under section 40 of the Act, and, therefore, the award should be quashed.

(1) (1963) B.L.J.R. 969.

(2) C.W.J.C 82/79 decided on 6th July, 1984.

3. The relevant facts of the case shortly stated are as follows:—

The petitioner, at the relevant time, was Depot Manager at Masrakh, Sidhwalia and Banmankhi under the Bihar State Co-operative Marketing Union Ltd., Patna, from 12th July 1958 to 15th October 1966. While he was posted at Masrakh, on physical verification on 30th June 1959, a shortage of 33 tons 11 qunts. of coal valued at Rs. 1,516.04 was found and while he was at Banmankhi, a shortage of 122 tons 7 quintals of coal valued at Rs. 7,242.97 was found in the year 1961. Further, a shortage of 122 tons of coal valued at Rs. 5,798 was reported after the petitioner made over charge there on 10th August 1966. The value of the total shortage, therefore, came to Rs 14,555.01. The Marketing Union filed a claim for the said amount along with interest thereon. The Board of Directors of respondent no. 1, made a reference to the Assistant Registrar of Co-operative Societies, Purnea for proceeding against the petitioner under section 48 of the Act for making an award against him. The Assistant Registrar absolved the petitioner from all the liabilities by his order dated 2nd April 1971, vide annexure-1.

4. Then an appeal was filed by respondent no. 1 before the Joint Registrar, Co-operative Societies at Bhagalpur, who, by his order dated 13th November 1971 (annexure-2) allowed the appeal and held the petitioner liable for the amount mentioned above. The petitioner's revision petition before the Registrar, Co-operative Societies, Bihar, Patna, was withdrawn, vide annexure-3, as not maintainable.

5. While admitting this application, this court had stayed the operation of the order contained in annexure-2. Although no counter-affidavit has been filed on behalf of the respondent, a long application for vacating the order of ad-interim stay was filed stating the facts. The said application was rejected after directing the petitioner to furnish sureties to the extent of Rs. 9,000.

6. As already indicated above, the main argument made on behalf of the petitioner was that the nature of the demand fell under the mischief of section 40 and not under section 48 of the Act and, therefore, six years limitation would apply in this case.

7. In order to understand the argument, it is necessary to examine the ambit and scope of both the provisions of sections 40 and 48 of the Act.

8. Section 40 deals with the liability of a person who has taken part in any organisation or management of the society as well as of its past or present officer. It is for making an order requiring him to contribute such sum to be determined by the Registrar as appears to him that such person has—

(*a*) made any payment which is contrary to law or to the rules or bylaws of the society or is against the directions or instructions of the financing bank for which the society is acting as agent under sub-section (3) of section 16; or

(*b*) by reason of his culpable negligence or misconduct, involved the society or the financing bank for which it is acting as agent under sub-section (3) of section 16 in any loss or deficiency; or

(*c*) failed to bring into account any sum which ought to have been brought into account; or

(*d*) misappropriated or fradulently retained any property of the society or of the financing bank for which it is acting as agent under sub-section (3) of section 16.

These liabilities have been described as 'Surcharge' in the very heading of section 40.

9. Section 48, on the other hand, deals with certain kind of 'dispute' and reads as follows:—

Section 48(1)—If any dispute touching the business of a registered society (other than a dispute regarding disciplinary action taken by the society or its managing committee against a paid servant of the society) arises:—

(*a*) amongst members, past members, person claiming through members, past members or deceased members, and sureties of members, past members or deceased members, whether such sureties are members or non-members; or

(*b*) between a member, past member, persons claiming through a member, past member or deceased member, or sureties of members, past members or deceased members, whether such sureties are members of non-members, and the society, its managing committee or any officer, agent or servant of the society; or

(*c*) between the society or its managing committee and any past or present officer, agent or servant of the society; or

(*d*) between the society and any other registered society; or,

(*e*) between a financing bank authorised under the provisions of sub-section (1) of section 16 and a person who is not a member of a registered society.

10. The stand of the respondents was that the claim of the respondent no. 1 was covered by section 48 of the Act as it was dispute touching the business of the society and was not a case of surcharge within section 40 of the Act.

Mr. Rama Raman, who appeared for the respondents, took the same stand. But on examination of the ambit of section 48 of the Act, it is difficult to accept his contention.

It is well-known proposition of law that when a matter falls under any specific provision, then it must be governed by that provisions and not by the general provisions (generalia specialibus non derogant), section 48 of the Act, no doubt, speaks of dispute touching the business of a society, but, at the same time, that dispute must arise under any of the conditions or circumstances mentioned in the various clauses of that section. The only clause, which speaks of a dispute touching the case of a servant of the society is clause (*b*) and that also says that the dispute relating to the servant of the society must be between a member or his successor, on the one hand, and the servant, on the other hand. In other words, the scope of the dispute contemplated under section 48 is entirely different from the kind of dispute with which we are concerned in this case.

I may usefully refer to the case of Purnea Ministerial Government Officers' Co-operative Society Ltd. *Vs.* Abdul Quddus(1) where also it was held that a reference made to an Assistant Registrar for an award under section 48 of the Act being not a dispute within the meaning of section 48, the Assistant Registrar had no jurisdiction to make the award and, therefore, it was barred by limitation under section 63 of the Act. Therefore, it is clear that every claim or demand cannot be put under the cover of section 48 of the Act. Here the respondent, society held the petitioner liable for shortage of properties put under his custody and charge which allegedly arose by reason of his negligence or misconduct. The matter is, therefore, fully covered by clause (*b*) of section 40(1) of the Act and not under section 48. Once this position is understood then the period of six years limitation has got to apply. The very proviso to sub-section (1) of section 40 lays down that no order shall be passed under this sub-section in respect of any 'act or omission' mentioned in clauses (*a*) to (*d*) *except within six years of the date on which* such act or omission occurred.

11. We have seen that the reference was made to the Assistant Registrar in the year 1968, and the order was passed by the Joint Registrar (annexure-2) on 15th November 1972 on

(1) 1983) P.L.J.R. 969.

appeal with respect to shortages which, in any case, occurred prior to 15th October 1966.

In support of above view, I may refer to a Bench decision of this court in the case of *Madhav Prasad Singh* Vs. *the Assistant Registrar, Co-operative Societies, Biharsharif Circle and others* (C.W.J.C. 82/79), dated 6th July, 1984. In the order annexure-2 also, it is clearly mentioned that the physical verification at Masrakh was made on 30th June 1959. It is further stated therein that at Banmankhi, it was done on 30th June 1961 for which Rs. 7,242.97 has been claimed. These two claims, in any case, were apparently barred by time when the reference was made. With respect to the last item of claim for Rs. 5,796.00, it was determined on verification of the stock on 10th August 1966, vide annexure-2. Without going into the question as to when the 'act or omission' in question, was done, it must be held that the award is barred as having been made beyond the period of six years even from the date of verification. The proviso providing the period of limitation speaks of passing of the order within the period of six years, unlike the periods fixed in the Limitation Act for initiating an action or starting a proceeding within the prescribed period of limitation. It is something like the limitation fixed under the new Code of Criminal Procedure for taking cognizance by a Magistrate. The date of instituting a criminal proceeding either by way of a first information report, or a petition of complaint is not relevant here. The relevant date is when the Magistrate takes cognizance for the offence.

12. Since the application must succeed on the question of limitation itself, it is not necessary to examine any other point in the matter.

13. The result of the above discussion is that this application is allowed and the order contained in annexure-2 is hereby quashed, but without any costs.

S. SHAMSUL HASAN, J.—I agree.

M. K. C. *Application allowed.*

FULL BENCH

Before S. S. Sandhawalia, C. J., Nagendra Prasad Singh and Uday Sinha, JJ.

1984.

August, 6.

HARENDRA PRASAD SINGH *

v.

THE STATE OF BIHAR AND ANOTHER.

Bihar Land Reforms (Fixation of Ceiling Area and Acquisition of Surplus Land) Act, 1961 (*Bihar Act XII of* 1962), *sections 32A and 32B as inserted by the Bihar Land Reforms (Fixation of Ceiling Area and Acquisition of Surplus Land) (Amendment) Act*, 1982 (*Bihar Act IV of* 1982)—*proceedings pendings on the date of commencement of the Amending Act—final publication under the old unamended section* 11(1) *of the Ceiling Act after coming into force of the Amending Act—pending proceeding, whether must be disposed of afresh—final publication of the notification, whether would be without jurisdiction and* non est.

Held, as under:

(*i*) Under the mandatory provision of section 32B of the Bihar Land Reforms (Fixation of Ceiling Area and Acquisition of Surplus Land) Act, 1961, the Revenue authoritits 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 April, 1981, being the date of the commencement of the Bihar Land Reforms (Fixation of Ceiling Area and Acquisition of Surplus Land) (Amendment) Act, 1982.

*Civil Writ Jurisdictio Case no. 3821 of 1983. In the matter of an application under Articles 226 and 227 of the Constitution of India.

(*ii*) After the enforcement of the Bihar Land Reforms (Fixation of Ceiling Area and Acquisition of Surplus Land) (Amendment) Act, 1982, 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 Bihar Land Reforms (Fixation of Ceiling Area and Acquisition of Surplus Land) Act, 1961, 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 without jurisdiction and, therefore, *non est*;

Held, therefore, that the Additional Collector was within his rights to initiate the fresh proceedings under section 32B of the Bihar Land Reforms (Fixation of Ceiling Area and Acquisition of Surplus Land) Act, 1961.

Shrimati Sudha Devi v. *The State of Bihar and anr.*(1)

Umashankar Prasad Sah v. *The State of Bihar and ors.*(2), overruled.

Application by the Land-holder.

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

The case in the first instance was placed for hearing before a Division Bench, which referred the case to a Full Bench.

On this reference.

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(1) C.W.J.C no. 4679 of 1982 decided on the 25th of January, 1983.
(2) C.W.P.C. no. 2170 of 1983 decided on the 17th of May, 1983.

Mr. Bhupendra Narain Sinha for the petitioners.

Mr. Jagannath Jha, Standing Counsel and *Mr. Anand Sahay, Junior Counsel to Standing Counsel I* for the respondents.

S. S. SANDHAWALIA, C. J.—The meaningful questions formulated and referred for an authoritative decision by the Full Bench are in the terms following:—

> "(*i*) Whether a revenue authority is obliged to proceed afresh after coming into force of section 32-B of of the Ceiling Act?
>
> (*ii*) If the revenue authority proceeds to publish a notification under the provisions of *old* section 11(1) of the Act, would it not amount to ignoring section 32-B and nullifying the object in the introduction of section 32-B of the Ceiling Act?
>
> (*iii*) Whether the failure to initiate a fresh proceeding and to publish the notification under section 11(1) (old) of the Ceiling Act would be *non-est*?"

Equally at issue is the correctness of the two Division Bench judgments in *Shrimati Sudha Devi* v. *The State of Bihar, and another* (C.W.J.C. No. 4679 of 1982 decided on the 25th of January, 1983) and *Umashankar Prasad Sah* v. *The State of Bihar and others* (C.W.J.C. No. 2170 of 1983 decided on the 17th of May, 1983), which, indeed, have necessitated this reference.

2. The facts giving rise to the questions aforesaid are undisputed and lie in a narrow compass. Harendra Prasad Singh, writ petitioner, is a land holder of village Manglapur, district East Champaran. A proceeding under the Bihar Land Reforms (Fixation of Ceiling Area and Acquisition of Surplus Land) Act, 1961 (hereinafter to be referred to as the 'Ceiling Act') was initiated against him sometime in the year 1976 (vide

Ceiling Case No. 285 of 1975-76). The proceeding, as is not unusual, dragged on for some years. Whilst it was pending and before the petitioner's objection under section 10(3) of the Ceiling Act could be disposed of, the Bihar Land Reforms (Fixation of Ceiling Area and Acquisition of Surplus Land) (Amendment) Act (Bihar Act 55 of 1982) (hereinafter to be referred to as the 'Amending Act') was enacted and enforced by publication in the Bihar Gazette on the 30th of April, 1982 in substitution of its predecessor Ordinances. This Amending Act, like the earlier Ordinances, was to come into force retrospectively with effect from the 9th of April, 1981 and, apart from many significant changes in the existing Statute, it, *inter alia*, inserted section 32A and 32B in the parent Act. The latter provision provided that every pending proceeding, which is not the subject matter of appeal, revision or review, and in which final publication under sub-section (1) of section 11 of the Ceiling Act, as stood before the amendment had not been made, shall be disposed of afresh in accordance with the provisions of section 10 of the Ceiling Act. Despite this provision, the Land Reforms Deputy Collector, completely ignoring the same, and without any fresh determination proceeded to issue a notification in terms of old section 11(1), which was admittedly done on the 31st of May, 1982. However, the Additional Collector, under section 32B of the Ceiling Act, initiated fresh proceeding against the petitioner and issued a draft statement under section 10(2) of the said Act and further called upon the petitioner to file objection, if any, in terms of section 10(3) of the Ceiling Act (vide annexure 1 dated the 17th of June, 1983). Aggrieved thereby, the present writ petition has been filed seeking the quashing of the same.

3. This writ petition originally came up for hearing before a Division Bench presided over by my learned Brother, Uday Sinha, J. Before that Bench particular reliance was placed on the cases of Smt. Sudha Devi and Umashankar Prasad Sah (supra) for the proposition that the final publication under the unamended sub-section (1) of section 11 of the Ceiling Act having been made even though after the enforcement of

section 32B, the Additional Collector had no jurisdiction to initiate fresh proceeding and decide the matter afresh in accordance with the amended law. Entertaining some doubts about the correctness of the ratio in the aforesaid cases, the matter was referred to a Full Bench for an authoritative decision on the questions formulated and that is how it is before us now.

4. Inevitably one has to turn to the legislative back-drop for the purposes of true construction of the provisions of the Ceiling Act. Yet, the details of its chequered history and the amendments numerous thereto are not necessary to be adverted to. The parent Act—Bihar Land Reforms (Fixation of Ceiling Area and Acquisition of Surplus Land) Act, 1961—was enforced in 1962. It underwent substantial amendments by Bihar Act 1 of 1973 and was further amended by Bihar Act 9 of 1973. Bihar Act 22 of 1976 then introduced changes introducing the concept of the 'appointed day' of the 9th of September, 1970 and further enacted sections 4A and 4B for purposes of re-determination of the surplus area. This was followed by Bihar Act 7 of 1978.

5. It seems unnecessary and equally not quite possible to keep track of all the numerous Ordinances issued at various times which had introduced amendments and changes in the law. It suffices to mention that Bihar Ordinance no. 66 of 1981 was published in the Bihar Gazette on the 9th of April, 1981 and was quickly followed by Bihar Ordinance no. 202 of 1981 and Bihar Ordinance no. 22 of 1982 and ultimately culminated in the Bihar Land Reforms (Fixation of Ceiling Area and Acquisition of Surplus Land) (Amendment) Act, 1982, which now falls for construction. By the aforementioned Ordinances and the last Amending Act substantial amendments were made in the defining section 2 and also in section 4. What, however, deserves a pointed notice is that the computing section 5 was altogether substituted and similarly section 9, which gave an option to the family to select a ceiling area, was also substituted. In the material section 10 sub-clauses (c1), (c2) and (c3) were

inserted in clause (*c*) of sub-section (1) thereof. Changes were brought in the succeeding section 11 as well. Apart from material amendments in the other provision, sections 32A and 32B, which pointedly call for construction here, were inserted in the Statute. These obviously call for notice *in extenso*:

"32*A*. *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 or 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) Act, 1982, 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 32-A 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 of afresh in accordance with the provisions of Section 10 of the Act."

6. It is in the light of the aforesaid back-drop of legislative changes that sections 32A and 32B are now to be construed. It is manifest that by virtue of amendments in sections 2, 4, 10 and 11 and the actual substitution of sections 5 and 9 (apart from amendments in other sections) wide ranging substantive and structural changes were brought about in the Ceiling Law. To give effect and content to these changes, it was therefore, laid down in unmistakable terms by virtue of sections 32A and 32B that the surplus area would be determined in accordance therewith, from the date of the enforcement of the Amending Act. These two sections, therefore, were the effectuating or the executing provisions to give practical shape to the intent of the Legislature in making the statutory changes. It deserves recalling that the Ceiling Act was enforced nearby 20 years earlier in 1962 and surplus area had been determined in accord therewith for nearly 2 decades. Therefore, if the Legislature had not directed a re-determination of the surplus area in accordance with the new law, the same would have merely remained on paper. It is with this end in view that section 32A provided even with regard to all appeals, revisions, reviews or references, which were pending before any authority on the 9th of April, 1981 that they would abate and the Collector shall proceed with the case afresh in accordance with the amended provisions of section 10. Similarly, with regard to all proceedings pending on the 9th of April, 1981, barring those which had achieved finality already by the publication under the unamended sub-section (1) of section 11, it was directed in categorical terms that the same shall be disposed of afresh in accordance with the amended law. In the larger prospect, therefore, it is plain that the 9th of April, 1981 is in a way a clear watershed herein. It was on that day that Ordinance no. 66 of 1981 was enforced and retrospectivity has now been given to the Amending Act with effect from this very date. All proceedings, whether by way of appeal, revision, review or reference or pending proceedings by way of publication under section 11(1) of the Ceiling Act prior to the 9th of April, 1981 were left untouched. However, all such proceedings subsequent to the said date were thereafter to be decided in accordance with the changed law

and consequently it was mandated that these shall be disposed of afresh in accordance therewith. In sum, substantive changes in the law, which had been enacted, were sought to be procedurably enforced by directing a re-determination of the surplus area in accordance therewith with effect from the date of the commencement of the Bihar Land Reforms (Fixation of Ceiling Area and Acquisition of Surplus Land) (Amendment) Act, 1982, i.e., on the 9th of April, 1981 aforesaid. That, plainly, is the larger legislative intendment behind sections 32A and 32B against which their particular language has to be interpreted.

7. Having noticed as above, one may now advert to the three distinct questions formulated by the referring Bench. A plain look at them would, however, show that the answer thereto would turn upon a single core question. This is whether the publication of a notification even a long time after the 9th of April, 1981 under the unamended section 11(1) would be *non est* because of the Bihar Land Reforms (Fixation of Ceiling Area and Acquisition of Surplus Land) (Amendment) Act, 1982 with retrospective effect from the 9th of April, 1981.

8. Learned counsel for the writ petitioner facing an uphill task had tenuously attempted to contend that section 32B unlike section 32A does not, in term, provide that the pending proceedings would altogether abate. From this it was sought to be projected that even though the publication of the draft statement under the unamended section 11 of the Ceiling Act may be in patent contravention of the Statute and in violation of the mandate of re-determination yet the said publication would not be wholly void or *non est*.

9. The submission aforesaid, instead of aiding the stand of the writ petitioner, appears to me, in fact, as heavily boomeranging on it. By the settled canon of construction, a Statute has to be construed as a whole and its provisions have to be read harmoniously. When sections 32A and 32B are read together, they seem to run patently counter to the writ petitioner's stand. Both of them, with effect from the 9th of April, 1981, cry a halt to all the earlier proceedings and to begin on a clean slate and to have them disposed of afresh. These again

have to be re-determined or decided afresh in accordance with the provisions of section 10 of the Ceiling Act, i.e., in accord with the changes brought about in the law. As has already been noticed, the whole thrust of the Amending Act was to bring about changes in the substantive law and to effectuate them by directing a re-determination in accordance therewith. The legal pun that is sought to be made out on behalf of the writ petitioner on the ground that section 32B does not employ the word 'abatement' is of no consequence. Indeed it is well settled in legal terminology that the term 'abatement' is usually employed with regard to appeals, revisions, reviews, etc. To say that the original proceeding pending before an authority would abate appears to be inapt legal phraseology. Therefore, the Legislature has employed the term of abatement with regard to appeals, revisions, reviews or references and thereafter directed that the Collector shall proceed with the case afresh in accordance with provisions of section 10 by section 32A. However, when it came to pending proceedings (other than those covered earlier by section 32A), section 32B provided that [except those which had achieved finality or were ready before the 9th of April, 1981 by express publication under the unamended section 11(1) of the Ceiling Act] these pending proceedings must be disposed of afresh in accordance with the amended law. Far from the fact that nothing would have turned on the non-employment of the word 'abatement' in section 32B, in fact, the reading of both the sections would indicate that the Legislature had in mind the identical results to follow, namely, a re-determination or disposal afresh in accordance with the amended law in either case. Indeed, it was plausibly argued before us on behalf of the respondents that the categoric mandate to decide afresh is even something stronger and larger than mere abatement. The word 'abatement' connotes only a ceasing or putting an end to the proceeding. The direction to decide afresh not only wipes away the earlier decision or finding but directs a fresh application of mind and a decision thereafter and in a way would even be on a larger and stronger footing. The specious argument resting on the non-employment of the word 'abatement' in section 32B must fail.

10. What I have opined above is in accord with what has been authoritatively laid down in *Chandrajot Kuer* v. *The State of Bihar and others*(1). Therein, while construing this very section 32B, it was held as under:

> "The above provision shows that all proceedings pending on the date of commencement of the Ordinance of 1981 and in which final publication under section 11(1) has not been made shall be disposed of afresh in accordance with the provisions of section 10 of the Act. 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 earlier stages of the proceedings must be considered to have been wiped off whether the findings of fact were in favour of the land-holder or were in favour of the Revenue. Findings in favour or against a land-hold or Revenue must be considered afresh."

11. Yet again even on behalf of the writ petitioner it was not disputed that after the 9th of April, 1981 any publication under the old unamended section 11(1) would be under a non-existing provision and equally contrary to the mandate of section 32B, which requires the pending proceedings to be decided afresh in accordance with the amended law. Consequently, it is patent—and, indeed, was conceded—that such a publication under the unamended Act would be clearly contrary to the Statute and would have to be set aside or quashed if challenged by way of appeal or writ petition on the ground of the violation of the Act. Yet the sole argument was that the publication having been made, it must nevertheless be allowed to hold the field till it is expressly set aside by a competent

(1) (1983) B.B.C.J. 197.

authority by way of appeal, revision, review or reference. It is not easy to subscribe to this somewhat hyper-technical submission. Patently, a publication after the 9th of April, 1981 would suffer from a triple grievous infirmity. It would support to be under a provision which is non-existing having been, in terms, superseded or amended by the Statute. Apparently, it would be published *per incuriam* without noticing that the unamended section had ceased to have legal force with effect from the 9th of April, 1981. Then such a publication would be in headlong conflict with the unmistakable mandate of section 32B that such a pending proceeding must be disposed of afresh. Again, the command of the law is that the re-determination must be in accordance with the amended provisions of section 10 of the Ceiling Act. Yet, concededly, the impugned publication would be in accord with the provision which had been obliterated by the Statute. Therefore, it must follow that after the 9th of April, 1981 any final publication purporting to be under the unamended section 11(1) and without any re-determination in accordance with the amended law, would be wholly without jurisdiction and, thus, *non est*.

12. It is well settled that if any action is blatantly in violation of the mandate of law and purports to be taken under a non-existing provision then the same would be *non est* and and must wholly give way before the majesty of the law. One is aware of the somewhat thin line of distinction betwixt action which may be voidable or void but would hold the field till it is set aside and those which are wholly *non est*. I am clearly of the opinion that an action, which purports to be under a non-existing Statute and frontally contrary to the express mandate of an existing Statute and suffering from the infirmities noticed above, would come well within the category of an action which has to be classified as *non est*.

13. Lastly, what appears to me as an argument of desperation was also raised to the effect that section 32B was directory in nature and its infraction would not render the impugned

action void. Reliance was sought to be placed on observation in *H Hazari Lal Kuthiala* v. *Income-tax Officer, Special Circle, Ambala Cantt*(1).

14. In considering the somewhat tenuous stand, what first meets the eye is the fact that section 32B is couched in terms mandatory, which directs that the proceedings shall be disposed of afresh and not merely that there may be so disposed of. Learned counsel for the writ petitioner could not point out rationale why herein the word 'shall' may be construed as 'may' though it is undeniable that as a matter of construction in a specific situation it may be possible. What then calls for notice is the fact that this section casts a mandatory duty on the authority to decide the matter afresh. The whole purport and content of the section herein is to place this obligation or duty on the concerned officers in the wake of the changes brought about in the substantive law. Where a provision casts a statutory duty, it must ordinarily be construed as mandatory because if an enforceable right arises in someone, he can even seek a writ of mandamus for its performance. As has been noticed earlier, the Ceiling Act was passed way back in 1962 with considerable amendments thereafter and surplus area in accord with the unamended provision stood already determined in most, if not all cases. The whole object and purpose of the Amending Act of 1982 would thus be frustrated and the changes in law would merely remain on paper unless a re-determination was done afresh in accordance therewith. Therefore, a construction that section 32B is directory would, in essence, defeat the very purpose of the substantive changes and on sound cannons of construction such an anomalous result is to be avoided. Lastly, the whole of the section is directed solely to the mandate of re-determination of the proceedings afresh. If it were to be construed as directory in the sense that the competent authority may or may not determine the question afresh then, indeed, nothing virtually survives from this provi-

(1) (1961) A.I.R. (S.C.) 200.

sion. It is, therefore, difficult to construe a provision as directory if the result is that the same would be virtually effaced from the Statute and frustrate the very underlying purpose of this enactment. It must, therefore, be held that section 32B is plainly mandatory in nature.

15. Once that is so, learned Counsel for the respondents were right in urging that not only was section 32B mandatory but, in essence, it obliterates and wipes off what had been done earlier and inevitably things could not be left in a vacuum but have to be re-determined. The earlier proceedings, even though in accordance with the old law (barring those which were protected) were rendered nugatory and a fresh decision obliga ted on the basis of the changes designedly made in the law Therefore, a true construction of the words "be disposed of afresh" is itself a mandate that the earlier disposal of the cases is virtually nullified. To put it in a metaphor, it wipes off the writing on the slate leaving it clean to be written afresh Viewed from another angle, section 32B is itself a statutory setting aside of the previous determination. The submission that even though the final publication of draft statement under the unamended section 11(1) after the 9th of April, 1981 would be contrary to the Statute, it should be allowed to hold the field till it is set aside by way of appeal, revision or quashing, appears to me as contrary to the very grist of this law. It would be sanctifying a multiplicity of proceedings by way of individual challenge and setting aside of a determination wholly without jurisdiction when the section itself says that the earlier proceedings are obliterated and the matter is to be decided afresh. In a way section 32B, in order to avoid multiplicity of proceedings, has, by the fiat of the law itself, wiped out the proceedings under the old law and directed their re-determination in accordance with the new law. The submission that orders or actions passed or taken illegally under the old law should be individually got set aside by the tortuous process of appeal, revision or review does not at all commend itself to me.

16. Again an obvious and inevitable corollary of the admitted promise that the pending proceedings under the old law would be wiped off is that after the enforcement of the new law on the 9th of April, 1981 anything purported to be done under the old and non-existing law would be plainly *non-est*. If that, which was in accord with the existing law at the time, has been statutorily set aside, it would be anomolous to suggest that any action purporting to be under a non-existing and repealed provision would still hold the field. Even in determination matters, if no appeal, revision, review or reference were to abate and be decided afresh in accordance with the new law, then to suggest that subsequent to the date of the commencement of the Act, the action under the old law would have any legality, is plainly untenable.

17. It remains to advert to the two decisions of this Court on which primary reliance was placed, which, indeed, necessitated this reference to the larger Bench. The earlier one in point of time—*Smt. Sudha Devi* v. *The State of Bihar, and another* (supra) was rendered at the motion stage itself. The brief nature of the observations would indicate that inevitably at that stage the issue was not adequately canvassed by either side Neither principle nor precedent seems to be either sited or noticed in the judgment. The issue was taken as one of first impression and decided on the language of the section as introduced Ordinance no. 22 of 1982. It was not pointedly noticed that the Ordinance had come into force with effect from the 9th of April, 1981 whilst in the said case the final publication had been made more than a year thereafter—on the 27th of April, 1982. What was protected under section 32B itself was the final publication under section 11(1) of the Ceiling Act as it stood before the amendment by the Ordinance. The Bench noticed the language with regard to the publication under section 11(1) of the Ceiling Act but seemed to have missed the crucial phrase "as it stood before the amendment by the aforesaid Ordinance". Obviously, what stood untouched were matters prior to the enforcement of the Ordinance and also that, in which final publication had already taken place.

before the 9th of April, 1981 and clearly in accord with the unamended law, as it then stood. There could possibly have been no intendment to protect and leave out of the ambit of section 32B any publication under section 11(1) not only after the enforcement on the 9th of April, 1981 but also illegal because of having been made in accordance with the unamended law which would no longer be in existence. Inadvertently, this basic fallacy seems to have crept in by the inevitable fact on a matter of considerable import being decided at the motion stage itself without adequate assistance at the Bar. With the greatest deference, the said judgment does not lay down the law correctly and is hereby overruled. The later view in *Umashankar Prasad Sah* v. *The State of Bihar and others* (supra) primarily followed *Smt. Sudha Devi's case*. Herein again the matter was decided at the motion stage itself without being adequately canvassed. An added reason was sought to be given by the Bench that section 32B does not use the word 'abate' as section 32A does. This aspect has been already considered in detail and the distinction, far from any way aiding the case of the writ petitioner, has been found to boomerang on the same. For the earlier reasons recorded and equally with greater deference, this judgment also must be overruled as not laying down the law correctly.

18. 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 the 9th of 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.

19. 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 Ceiling 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 without jurisdiction and, therefore, *non est*.

20 Now, in the light of the aforesaid answers to the questions before the Full Bench, it is plain that the writ petition is without merit. Herein it is common ground that the final publication under sub-section (1) of section 11 was made on May 31, 1982, thus, more than one year after the enforcement of the Amending Act. Equally, it is common ground that this final publication was under the old unamended section 11(1). The same having been amended by the Statute, the notification being in accordance with a non-existing law, would be *non est* and it has to be held that the said proceeding was devoid of all jurisdiction and *non est*. Consequently, the Additional Collector was within his rights to initiate the fresh proceedings under section 32B. The challenge to the same is untenable and, consequently, the writ petition is hereby rejected without any order as to cost.

NAGENDRA PRASAD SINGH, J.—I agree.

UDAY SINHA, J.—I agree.

S. P. J. *Application dismissed*

FULL BENCH

Before S. S. Sandhawalia, C.J., S. Ali Ahmad and B. S. Sinha, JJ.

1984

August, 8.

*DEONARAYAN SINGH AND OTHERS**

v.

THE COMMISSIONER OF BHAGALPUR DIVISION & ORS.

Santhal Parganas Settlement Regulation, 1872 (*Regulation III of* 1872) *sections* 27 *and* 42—*section* 27—*original transfer with regard to land recorded a Mulraiyat-ka-jote, in contravention of the section—adverse possession—prescriptive period of twelve years for perfecting title—whether, would stop running from the date of enforcement of Santhal Parganas Tenancy (Supplementary Provisions) Act,* 1949 (*Bihar Act no. XIV of* 1949) *section* 42—*ejectment of the subsequent purchaser—legality of—subsequent settlement of the land with the descendents of original raiyat—legality of.*

By a sale-deed dated 22nd March, 1939, (the original transfer) 38.09 acres of land which was recorded as Mulraivat-ka-jote, were sold in contravention of section 27 of Santhal Parganas Settlement Regulations, 1872, to B.K.R., who again sold the plot, along with Mulraiyat rights to father of writ-petitioner by sale deed dated 26th June, 1950. The descendents of original raiyats filed application challenging the legality of the sale and prayed for the eviction of the writ-petitioners and restoration of the some to them through the agency of the court, which was ultimately allowed in appeal and affirmed in revision: *per curium*:

Held, that the prescriptive period of twelve years for perfecting the title by adverse possession would stop running from the 1st November, 1949, the date of enforcement of the Santhal Parganas Tenancy (Supplementary Provisions) Act, 1949.

*Civil Writ Jurisdiction Cases no. 1309 of 1976. In the matter of an application under Articles 226 and 227 of the Constitution of India.

Per Majority (B. S. Sinha and S. Ali Ahmad, JJ).

Held, that while ejectment has got to be upheld, the authorities below erred in law in settling the lands with the original holder by the impugned order. The lands, after ejectment have got to be settled with a duly qualified raiyat of the village or otherwise disposed of according to the circumstances of the case.

Held, further that the writ application must be allowed to the extent that the order of the Commissioner, Bhagalpur and Additional Deputy Commissioner, Santhal Parganas directing settlement of land with Respondent no. 9 and others must be set aside.

Bhaurilal Jain and anr. v. *Subdivisional Officer of Jamtara*(1)—followed.

Nakul Chandra Mandal and Ors. v. *Commissioner of Bhagalpur Division and Ors.*(2)—approved.

Godo Mahto and Ors. v. *The State of Bihar*(3).

Asharfi Mahto and Ors. v. *The State of Bihar*(4).

Mt. Pairia v. *Commissioner of Bhagalpur Division and Ors.*(5)—Overruled.

Application under Articles 226 and 227 of the Constitution.

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

The case was placed before a Division Bench for hearing which referred the case to a large Bench.

On this reference.

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(1) (1973) A.I.R. (Pat.) 1.
(2) (1978) I.L.R. 57, Pat. 584.
(3) (1980) Bihar Law, Judgment 72.
(4) (1978) B.B.C.J. 572.
(5) (1978) Bihar Law Judgment, 272.

Messrs. Balbhadra Prasad Singh, Kalika Nandan and *Devendra Prasad Sinha* for the petitioners.

Messrs. Tara Kant Jha, Shree Nandan Prasad Singh, Mihir Kumar Jha and *Murari Narain Choudhary, Mr. Mani Lal, Standing Counsel No. 4 with Mr. R. C. Sinha, Junior Counsel to Standing Counsel No. 4* for the respondents.

S. S. SANDHAWALIA, C.J.—Whether the prescriptive period of twelve years for perfecting the title by adverse possession (the original transfer being in contravention of section 27 of Regulation 3 of 1872) would stop running from the 1st of November, 1949, being the date of the enforcement of the Santhal Parganas Tenancy (Supplementary Provisions) Act, 1959—is the significant solitary question arising from a deep-seated conflict of precedent within this court which has necessitated this reference to the Full Bench.

2. The facts deserve notice within the narrow confines of their relevance to the issue aforesaid. The whole dispute focusses on Jamabandi no. 65 of Mouza Billi, police station Madhupur, which is recorded as *Mulraiyat-ka jote* in the name of Sitaram Singh 8 annas Mulraiyat of the said Mouza and Jaleshwar Singh, Yudhisthir Singh and Kesturi Devi. The plot stands recorded in the names of different cosharers. By a sale deed dated the 22nd of March, 1939, 38.09 acres of land were sold to one Bimal Kanti Raichoudhary. He got his name duly mutated in the revenue records by an order dated the 27th of November, 1939, of the Subdivisional Officer, Deoghar, which, in turn was approved by the Deputy Commissioner, Santhal Parganas, on the 28th of December, 1939. The said Bimal Kanti Raichoudhary again sold the plot along with *Mulraiyat* rights and interests to Radha Prasad Singh, (father and predecessor-in-interest of the petitioners) by a registered sale deed dated the 26th of June 1950. According to the writ petitioners, so long as Radha Prasad Singh was alive, he remained in peaceful possession over the said 38.09 acres of land of Jamabandi no. 65 as also over the *mulraiyati* jote of Jamabandi no. 3 and was also acting as 8 annas Mulraiyat of Mouza Billi

3. In the year 1970-71 respondent Jagarnath Singh along with seven others filed a petition before the Subdivisional Officer, Deoghar, challenging the legality of the sale of some portion of *Mulraiyat ka jote of jamabandi* no. 65 to Radha Prasad Singh, father of the writ petitioners, and praying for their eviction from the aforesaid land and restoration of the same to them through the agency of the Subdivisional Court. By his order dated the 19th of November, 1971, the learned Subdivisional Officer held that the original sale in favour of Bimal Kanti Raichoudhary was executed against the express provision of Mulraiyat records. However, he held that because the said sale had been accepted by the Subdivisional Officer and later approved by the Deputy Commissioner by allowing mutation, he had no authority to challenge the order previously passed by his predecessor. He, therefore, opined that for the redressal of their grievance the applicants should approach the higher Courts. The respondents thereafter preferred an appeal to the Deputy Commissioner and by his order dated the 30th of September, 1975, the Additional Deputy Commissioner allowed the same and directed restoration of the disputed land to the respondents. The writ petitioners then preferred an appeal before the Commissioner, Bhagalpur Division. By his detailed order (Annexure 3), the Commissioner affirmed the findings of the court below that there had been an illegal alienation of the land of *mulraiyati ka jote* appertaining to Jamabandi no. 65 of Mouza Billi, and, therefore, the ejectment of the appellants under section 42 of the Santhal Parganas Tenancy (Supplementary Provisions) Act, 1949 (hereinafter referred to as "the Act") and the restoration of the same to the respondent was justified. The appeal was consequently rejected.

4. Aggrieved by the aforesaid orders the present writ petition has been preferred. When it originally came up for hearing before the Division Bench, the primary point that was apparently pressed on behalf of the writ petitioners was that in any event the vendees had perfected their title by adverse possession by 1970 and they could not, therefore, be evicted under section 42 of the Act. The Bench noticed that the sole point involved was whether the Deputy Commissioner could evict a transferee who had not completed possession of twelve years or more before 1st November, 1949 when the

Santhal Parganas Tenancy Act 1949 came into force. On this significant issue they noticed that the Full Bench decision of this Court in *Bhauri Lal Jain and another* v. *Subdivisional Officer of Jamtara*(1) had been divergently interpreted by two Division Benches of this Court in 1978 Bihar Law Judgments 272 (*Mt. Pairia* vs. *Commissioner of Bhagalpur Division and others*) and in 1979 B.L.J.R. 201 (*Nakul Chandra Mandal and others* vs. *Commissioner of Bhagalpur Division and others*). The Division Bench, therefore, felt compelled to refer the issue for an authoritative decision by a larger Bench and to resolve the apparent conflict. That is how the matter is before us.

5. As before the Division Bench, so before us, the focal point that has been canvassed is whether on the concurrent finding of all the three authorities below that the transfer by sale deed dated the 22nd of March, 1939, being contrary to section 27 of Regulation III of 1872, the vendees could perfect their title by adverse possession, even after the enforcement of the Santhal Parganas Tenancy (Supplementary Provisions) Act, 1949. To put it in other words, would the time for calculating the prescriptive period of twelve years stop running from the 1st of November, 1949, or would it continue to do so even thereafter, till the order of eviction is passed. Inevitably, this issue has to be decided in the light of the corresponding provisions of Regulation III of 1872, and those of the Act, which in turn have to be viewed in the context of their legislative background.

6. The historical retrospect here spans a period of more than a century. Its true perspective is against the back-drop of the primordial backwardness of the Santhal Tribes interspersed the deeply wooded and semi-tropical forests of the district of Santhal Parganas. The underlying rational of Regulation III of 1872 and the earlier Regulation going back even beyond the middle of the 19th century may well be noticed from the final settlement report in the district of Santhal Parganas by J. F. Gantzer, which is supplemental to the earlier and more celebrated and exhaustive report of Sir Hugh McPherson:

(1) (1978) A.I.R. (Pat.) 1.

"The question of transfers is one of the most important with which this settlement has had to deal, and it is in fact one which affects the very root of the whole Santhal Parganas system.. Broadly speaking it may be said that *the whole object of the agrarian law of the district* since 1872, when Regulation III of that year was introduced, *is to ensure that the population should be allowed to remain undisturbed in possession of its ancestral property,* and that any reclamation of waste lands which is done in any village shall be done only by the Jamabandi Raiyats of the village. The history of the district plainly shows that the vast majority of the people in it are quite unable to grasp the principle of outsiders taking possession of their land whether legally or illegally, that is to say, either by force or by the ordinary means of acquiring land such as sale, mortgage or certain forms of sub-lease."

For our purpose it is, perhaps, unnecessary to delve beyond the year 1872, when Regulation III was enacted, and subsequently, amendments were made therein. In chronological order, this was followed by the Santhal Parganas Tenancy (Supplementary Provisions) Act, 1949, which came in to force on the 1st of November, 1949. As the very heading of the statute indicates, it was not intended to altogether repeal or substitute the earlier Regulation III of 1872, but was somewhat supplementary in nature. While some of the provisions of Regulation III of 1872 continued as supplemented by the Act, certain sections thereof were, however, repealed and substituted by more eleborate provisions of the Act, which might have become necessary by passage of time. In this category falls section 20 of the Act, which in terms substituted section 27 of the earlier Regulation III of 1872. At this stage it is not only apt, but indeed necessary to juxtapose the corresponding provisions:

SECTION 27 OF REGULATION III OF 1872

"27.(1) No transfer by a Raiyat of his right in his holding or any portion thereof, by sale, gift, mortgage, lease or any other contract or agreement, shall be valid unless the

right to transfer has been recorded in the record of rights, and then only to the extent to which such right is so recorded."

(3) If at any time it comes to the notice of the Deputy Commissioner that a transfer in contravention of sub-section (1) has taken place; he may, in his discretion, evict the transferee and either restore the transferred land to the Raiyat or any heirs of the Raiyat who has transferred it, or re-settle the land with another Raiyat according to the village custom for the disposal of an abandoned holding:

Provided—

(*a*) that the transferee whom it is proposed to evict has not been in continuous cultivating possession for twelve years;

(*b*) that he is given an opportunity of showing cause against the order of eviction; and,

(*c*) that all proceedings of the Deputy Commissioner under this section shall be subject to control and revision by the Commissioner."

SECTION 20 OF ACT XIV OF 1940

"20. Transfer of Raiyat's rights—

(1) No transfer by a Raiyat of his right in his holding or any portion thereof, by sale, gift, mortgage, will lease or any other contract or agreement, express or implied, shall be valid, unless the right to transfer has been recorded in the record of rights, and then only to the extent to which such right is so recorded:

Provided that a lease of Raiyati land in any subdivision for the purpose of the establishment or continuance of an excise shop thereon may be validly granted or renewed by a Raiyat, for a period not exceeding one year, with the previous written permission of the Deputy Commissioner:

Provided further that where gifts by a recorded Santhal Raiyat to a sister and daughter are permissible under the Santhal law, such Raiyat may, with the previous written permission of the Deputy Commissioner, validly make such a gift:.

"Provided also that an aboriginal Raiyat may, with the previous written permission of the Deputy Commissioner, make a grant in respect of his lands not exceeding one half of the area of his holding to his widowed mother or to his wife for her maintenance after his death."

(5) If at any time it comes to the notice of the Deputy Commissioner that a transfer in contravention of sub-section (1) or (2) has taken place he may in his discretion evict the transferee and either restore the transfered land to the Raiyat or any heirs of the Raiyat who has transferred it, or re-settle the land with another Raiyat according to the village custom for the disposal of an abandoned holding:

Provided that the transferee whom it is proposed to evict shall be given an opportunity of showing cause against the order of eviction."

7. Particular attention herein is called to the fact that sub-section (5) of section 20 of the Act is not in *quri materis* with the earlier sub-section (3) of section 27 of Regulation III of 1872. The legislature, by design, out of three clauses (*a*), (*b*) and (*c*) of the proviso to sub-section (3) of section 27 of the Regulation retained only the provision with regard to the notice to the transferee as the solitory proviso to sub-section (5) of section 20 of the Act. Now, apart from repealing section 27 of Regulation III of 1872, the Act also, *inter alia*, enacted sections 42, 64, 65 and 69, which undoubtedly cover the somewhat analogous field of the ejectment of persons in unauthorised possession of the agricultural lands by transfers in contravention of the provisions of this Act or equally of any other provision having the force of law in the Santhal Parganas, which, inevitably includes Regulation III of 1972. Lately, what calls for notice in this context

is the fact that later sub-section (5) of section 20 of the Act was itself repealed and substituted by a much more comprehensive provision on the same subject by the Bihar Scheduled Area Regulation, 1969 (Bihar Regulation 1 of 1969).

8. Now, against the aforesaid vista of the legislative back-drop, Mr. Balbhadra Prasad Singh, learned Counsel for the writ petitioner, move a web of an elaborate and erudite submission on the history and purpose of the statute in Santhal Parganas and the true import of the earlier section 27 of the Regulation and the later sections 20, 42, 64, 65 and 69 of the Act and the canons of construction for arriving at the intent of the legislative therein. One is somewhat deeply tempted to beckon to this invitation to examine the matter refreshingly on principle and the language of the statutory provisions. However, the discipline of the law and the doctrine of precedent categorically prevent any such exercise in futility. It was the common stand of the parties before us that the matter is not *res integra*. Indeed, the Counsel were agreed that it was covered by precedent and that too by the Full Bench decision of this Court in *Bhauri Lal Jain's case* (supra) which has ever since held the field. I would wish to record that neither of the eminent Counsel on either side did at any stage even attempt to as sail the correctness of this Full Bench or urged its reconsideration by a larger one. Though it is no compliment to the clarity of president, it must be noticed that both Mr. Balbhadra Prasad Singh for the writ petitioner and Mr. Tara Kant Jha for the respondents heavily relied on it and canvassed that its true ration was in support of the diametrically opposite stand which they were projecting.

9. From the above, it would be manifest that the sole question before this Full Bench now is a two-fold one. Firstly, whether the question posed at the very outset has been considered and adjudicated upon by the earlier Full Bench in *Bhaurilal Jain's case* (supra); and, if so, what is its precise mandate on this specific issue. It is within the aforesaid parameter alone that the submissions of the learned Counsel for the parties can now be legitimately examined.

10. With his usual perspicacity and eloquence, Mr. Balbhadra Prasad Singh (apparently conscious of the binding nature of precedent) primarily fell back for support on certain observations in

Bhaurilal Jain's case and butteressed it with the constructions placed thereon (if one may say so) by three Division Benches in 1978 B.B.C.J. 572 (*Asharfi Mahto and others* vs. *The State of Bihar and others*), 1978 B.L.J. 272 (*Most. Pairia v. Commissioner of Bhagalpur Division*) and 1980 B.L.J. 72 (*Godo Mahto and others* vs. *The State of Bihar*). He further invited the Bench to overrule, what for his purpose was an erroneous and discordant note by the Division Bench struck in I L.R. 57 Patna 854 (*Nakul Chandra Mandal and others* vs. *Commissioner of Bhagalpur Division and others*).

11. On the other hand, the frontal and somewhat ruthless contention of Mr. Tara Kant Jha for the respondents was that the Full Bench in *Bhaurilal Jain's case* had directly considered the matter and unreservedly adjudicated upon it in his favour and consequently, no observation by any subequent Division Bench could whittle down its clarion ratio. Inevitably he canvassed for the affirmance of I.L.R. 57 Patna 854 (*Nakul Chandra Mandal's case*) (supra) and the overruling of all contrary views by the Division Benches. The theme song on his behalf was that the question before us having been considered and answered in unequivocal terms by a Full Bench unless a larger Bench overrules the same or the final Court obliterates it, the strict discipline of law prevented any deviation from what had been earlier laid down.

12. The rival stands having been put in focus, the primal issue now before us is whether the Full Bench in *Bhaurilal Jain's case* (supra) has directly considered and pronounced on the identical question now raised before us, and, if so, whether its ratio would still hold the field. I am inclined to answer both these questions in no uncertain terms in the affirmative.

13. Inevitably turning now to *Bhaurilal Jain's case* (supra) it deserves recalling that the larger question before the Full Bench was the very constitutionality of sections 20(1) and 42 of the Act and that of sub-section (5) of section 20 of the same, as amended by the Bihar Scheduled Areas Regulation 1969. A perusal of the judgment would disclose that the manner in which the challenge to the vires was posed, the question now before us became integral and, if one may say so, a precondition before the said Full Bench. Neces-

sarily, therefore, it had to be considered and adjudicated upon. A reference to Paragraph 20 of the report will indicate that the same was in terms posed as under:—

> "Coming to the question whether title by adverse possession could be acquired after the 1949 Act came in, it will be useful to refer to the impugned provisions of the Act."

Thereafter the Bench quoted and construed the provisions of sections 42, 64 and 69 of the Act and in an elaborate discussion, both on the language of the statute and precedent, it observed as follows in Paragraph 31 of the report:—

> "I have already found that title by adverse possession could not be acquired under the Act by a transferee, in view of clear bar to acquisition of any such title under section 69 of the Act. Therefore, resorting back the property from the unlawful possession of a transferee, who could not acquire any title from such invalid transfer in spite of his long possession, to the transferor, whose title, at no point of time, was extinguished, will not come under the mischief of Article 31 of the Constitution. It only meant restoring possession of the property to the original and rightful owner."

And finally, the Full Bench lucidly formulated its conclusion in paragraph 36 of the report and the proposisions (*iv*) and and (*v*) in the following terms, appear to me as an unequivocal adjudication of the issue :—

> "(*iv*) That the Limitation Act was applied to the District of Santhal Parganas under Regulation III of 1872, and adverse possession could be acquired under an invalid transfer, in contravention of section 27(1) of the Regulation. Those, who did not acquire title by adverse possession under Regulation III of 1872, could be evicted under the old section 20(5) or section 42 of the Act, even after the repeal of section 27(3) of the Regulation as the Act was supplemental to the Regulation."

"(v) That section 20 of the Act was prospective and that there could not be acquisition of title by adverse possession in case of transfer or settlement, etc., in contravention of section 20(1) and (2) of the Act."

14. Now, once it has been succinctly held, as above, I see not the least reason to depart from the law so laid down more than a decade ago, which has held undisputed sway within this jurisdiction. It calls for notice that no contrary view of a co-equal Bench or of the final Court on this point could at all be brought to our notice. It bears repetition that no challenge to the aforesaid ratio of the Full Bench was at all made before us. Indeed, as already noticed, there was only an attempted reliance on the part of the writ petitioners to seek support from the Full Bench in *Bhaurilal Jain's case* (supra), rather than any assailing thereof. Even otherwise the passage of nearly 35 years since the enforcement of the Act has now rendered the question before us of a prescriptive right as one of somewhat rare occurrence, rendering it doubly inexpedient to now deviate from the earlier ratio.

15. On the doctrine of precedent, it is well settled that once a question has been considered and answered by the Full Bench, then all decisions of a Division Bench or a Single Bench, whether prior or subsequent thereto, running contrary to its ratio, must be held as no longer good law. In A.I.R. 1960 Supreme Court 1118 (*Jai Kaur and others* vs. *Sher Singh and others*) it was observed:

"It is true that they did not say in so many words that these cases were wrongly decided; but, when a Full Bench decides a question in a particular way every previous decision which had answered the same question in a different way cannot but be held to have been wrongly decided."

In A.I.R. 1964 Madras 448 (*C. Varadarajulu Naidu* vs. *Baby Ammol and another*), whilst holding that even though there may be much to be said in favour of the contrary view, it is not apt to depart from a law settled by the Full Bench, the following observation was made:

> "The evil of unsettling consistent judicial opinion would be much greater than the evil of laying down what is alleged to be bad law. The Full Bench decisions should, as far as possible, be held to be binding on unless they be so glaringly bad as not being in conformity with any statute or with any decision of a superior court like the Supreme Court."

16. In view of the above, it is rendered somewhat unnecessary to advert in very great detail to the Division Bench decisions, which with the greatest respect, in my view, have not correctly applied the ratio of the Full Bench. However, before referring to them briefly, it is significant to note that the view I am inclined to take is in consonance with that of the Division Bench in *Nakul Chandra Mandal's case* (supra). Therein the lilegal transfer had taken place prior to the enforcement of the Act on the 6th of July, 1949. Holding that the title could not be perfected after the enforcement of the Act, S. K. Choudhuri, J., speaking for the Bench, observed as follows:—

> "This contention of Mr. Ghose that the petitioners could not have been evicted under section 42 of the Act as they have perfected their title at a time after the 1949 Act had come into force by remaining in possession for more than 12 years under illegal settlement has no substance."

It calls for pointed notice that Mr. Justice S. Sarwar Ali, who had the privilege of being a member of the Full Bench in *Bhaurilal Jain's case* (supra) was a party to the judgment aforesaid. In my view, this is wholly in consonance and in accord with the earlier Full Bench, holding the field within this Court.

17. It remains to briefly refer to the discordant and contrary views taken by Division Benches. In 1980 Bihar Law Judgments 72 (*Godo Mahto and others* vs. *The State of Bihar*) (the case has been reported belated, having been decided on the 2nd of January, 1973) the brief judgment indicates that the issue was hardly canvassed and the case was merely remanded to the Subdivisional Officer to investigate the relevant fact and to decide the same in accordance with law as laid down in *Bhaurilal Jain's case* (supra). However, there

is no gain saying the fact that the illegal transfer having been that of March and April, 1949, hardly any question of perfecting the same by adverse possession could arise after the enforcement of the Act. With the greatest respect, the inference arising from the case is unsustainable and the judgment has, therefore, to be overruled.

18. Again in 1978 B.B.C.J. 572 (*Asharfi Mahto and others* vs. *The State of Bihar and others*) the issue was not deeply examined and the Bench followed the decision in *Goda Mahto's case* (supra). For the reasons recorded in the context of the latter case, this judgment also does not lay down the law correctly and is contrary to the ratio of the Full Bench, and, with deep deference, has to be overruled.

19. What has been said above would apply broadly to the observations of the Division Bench in 1978 Bihar Law Judgments 272 (*Mt. Pairia* vs. *Commissioner of Bhagalpur Division and others*). Therein, even though it was observed that the point at issue was concluded by the Full Bench decision in *Bhaurilal Jain's case* (supra) its ratio seems to have been misconstrued. Herein also the Bench followed *Goda Mahto's case* (supra). However, it was further observed that this result also flows from the application of the law by the Full Bench itself in paragraphs 41 to 43 of the report. It seems to have been assumed that the remand in the said case was with regard to an alleged *Kurfanama* of the year 1938 which could not be perfected by adverse possession by November, 1949, when the Act came into force. However, a close reading of paragraphs 41 to 43 of the report would indicate that the Kurfa settlement of 1938 was with regard to only one Plot no. 125 in a composite transfer. There were as many as 3 separate petitioners laying claim to as many as five separate plots. The counter-affidavit in the said writ petition had taken the firm stand that there was, in fact, no such *Kurfanama* or other document and the respondents being illiterate aboriginals had been inveigled into signing and thumb marking blank documents on which the deeds and agreement had been apparently forged. It was in this context that the Bench remanded the matter for a clear determination of the facts and disposal in accordance with the law laid down in the Full Bench. In my view, no contrary inference arised from the particular facts of the case. How-

ever, I am willing to go to the extent that if there be any discordance betwixt the unequivocal declaration of law formulated by the Full Bench and its subsequent application, then it is the former that must prevail and the declaratory part has obvious supremacy over the applicatory one. Again, when faced with the categoric conclusion of the Full Bench in proposition (*iv*) in paragraph 36 of the report, the same was sought to be whittled down by the succeeding (*v*). Herein also with respect, I do not find how the latter is in any way contradictory or modificatory of what has been expressly formulated by the Full Bench itself in proposition (*iv*). Indeed the effect of section 20 of the Act, being prospective, in no way cuts down the clear ratio that those who did not perfect their adverse possession under Regulation III of 1872 were barred from doing so later after the enforcement of the Act and could be evicted under the Act. With the greatest respect, this case also does not lay down the law correctly and I am constrained to overrule the same.

20. On a conspectus of the relevant statutory provisions, on principle and in the light of the aforesaid precedent, it would appear that three distinct situations may arise in the context of perfecting title by adverse possession where the original transfer is in contravention of the statute. For the sake of clarity these may be dealt with individually in the reverse chronological order.

(*i*) *A transfer in contravention of sub-section* (1) *or* (2) *of section* 20 *of the Act.* Obviously such a transfer would inevitably be after the enforcement of the Act on the 1st of November, 1949. In view of the clear provisions of sub-sections (3), (4) and (5) of section 20 itself and the related provisions of sections 42, 64, 65 and 69 of the said Act and the adjudication of the Full Bench in proposition (*v*) in *Bhaurilal Jain's case* (supra), no question of any acquisition of title by adverse possession or perfecting the same in this context can at all arise.

(*ii*) A *transfer in contravention of section* 27 *of Regulation III of* 1872 *with regard to which the prescriptive period of* 12 *years has not elapsed on the* 1*st of November*, 1949. In such a case time for perfecting title by adverse possession would in law stop running from the date of the enforcement of the Act on November 1, 1949, and if the prescriptive period of 12 years is not completed before that

the right or title would remain inchoate and cannot be perfected thereafter by virtue of adverse possession. This would follow from proposition (*iv*) of the Full Bench in *Bhaurilal Jain's case* (supra). In such a case the Deputy Commissioner under section 42 of the Act read with the other relevant provisions may at any time on his own motion or on an application made to him pass an order ejecting the transferee holding the transfer in contravention of the statute.

(*iii*) *A transfer in contravention of section 27 of Regulation III of 1872 in which the transferee has been in continuous adverse cultivating possession for 12 years prior to the 1st of November, 1949.* In view of clause (*a*) of the proviso to sub-section (3) of section 27 of the said Regulation, the transferee herein became immune to eviction if he had been in continuous cultivating possession for 12 years. He was thus allowed to perfect his title by way of adverse possession. This equally follows from proposition (*v*) in *Bhaurilal Jain's case* laying down that the provisions of section 20 were prospective and not retrospective in effect and consequently they would not invalidate the title already perfected by adverse possession under Regulation III of 1872 despite its repeal and substitution on the 1st of November, 1949 by section 20 of the Act.

21. To finally conclude: The answer to the question posed at the outset is rendered in the affirmative and it is held that the prescriptive period of 12 years for perfecting the title by adverse possession (in case of a transfer which was originally in contravention of section 27 of Regulation III of 1872) would stop running on the date of the enforcement of the Act on the 1st of November, 1949.

22. Once that is so, it is plain and indeed common ground that the whole claim of the writ petitioners herein is rested on a transfer effected on the 23rd of March, 1939. The prescriptive period of 12 years for perfecting the title by adverse possession would thus not be completed on the 1st of November, 1949, when it would stop running. Consequently the power of the authorities to eject such an unauthorised transferee under the Act would remain untrammelled. The writ petitioners on their own showing are only successors-in-interest of the original transferee Bimal Kanti Raichoudhary and plainly enough cannot claim a better title than him.

Herein there is a concurrent finding of the Subdivisional Officer, the Deputy Commissioner and then the Commissioner that the said transfer was in violaton of the record-of-rights of the estate and consequently section 27(1) of Regulation III of 1872. This concurrent finding was not challenged before us and indeed being based on the relevant records is thus wholly unassailable. That being so, no amount of subsequent delay in initiating the ejectment proceedings or the continuity of possession by the writ petitioners or their predecessor-in-interest after the 1st of November, 1949 can perfect the transfer originally in contravention of the statute. The Deputy Commissioner and the Commissioner were patently right in their view, which was in consonance with the one enunciated by the Full Bench in *Bhaurilal Jain's case* (supra), and consequently in rejecting the appeal. In this context it is equally well to recall the categorical observation of the Supreme Court in *Ram Kristo Mandal* v. *Dhankisto Mandal*(1) in paragraph 8 :

> "The language of section 27 is clear and unambiguous. It prohibits any transfer of a holding by a raiyat either by sale, gift, mortgage or lease or by any other contract or agreement. The section is comprehensive enough to include a transfer of the holding by way of an exchange. The Schedule B properties were admittedly of raiyati character and were, therefore, inalienable. Sub-section (2) of section 27 in clear terms enjoins upon the courts not to recognise any transfer of such lands by sale, mortgage, lease etc. or by or under any other agreement or contract whatsoever."

23. Before parting with this judgment it perhaps deserves mention that apparently sensing the stone-wall of precedent in *Bhaurilal Jain's case* as against him, learned counsel for the writ petitioners had attempted some ancillary submissions to outflank or bypass the same. However, in the extraordinary jurisdiction of this Court, invoked against the hierarchy of three statutory authorities below, namely, the Subdivisional Officer, the Deputy Commissioner and the Commissioner, taking a concurrent view on the primal issue before

(1) (1969) L.L.J.R. 270.

them, no other argument would either be possible or, in my view, would be permissible. The judgments of the two appellate courts below make it plain that the sole issue which was agitated on behalf of the petitioners and adjudicated upon by the authorities was the claim with regard to the validity of the original transfer or perfecting the same by way of adverse possession. Indeed, even the Subdivisional Officer had taken the view that the transfer was in contravention of the statute but only on the ground of propriety that because the Deputy Commissioner had sanctioned the said mutation he declined to interfere himself and relegated the respondents to seek the relief from the superior authority. In this view of the matter I am wholly disinclined to permit or advert to the ancillary contentions sought to be urged in the alternative for the first time in the writ jurisdiction in order to bypass the concurrent judgments of the appellate courts below.

24. In the result, the writ petition is hereby dismissed. In the circumstances, the parties are directed to bear their own costs.

BRISKETU SARAN SINHA, J.—I have had the advantage of reading the judgment of my Lord the Chief Justice. I am in complete agreement with him with regard to the issue referred to the Full Bench. However, as we have proceeded to dispose of the case on merits as well, I regret, I am unable to persuade myself to hold that there is no merit in this application and should be, accordingly, dismissed.

2. In order to appreciate the reasons for my coming to a different conclusion with regard to the merits of the case, it would be convenient to refer to facts as found in the order of the Additional Deputy Commissioner dated 30th September, 1975, copy of which is Annexure '2' and the order of the Commissioner dated 2nd June, 1978, copy of which is Annexure '3'.

3. The relevant facts as found in those orders which rightly, have not been challenged before us are as follows:

The subject of dispute, pertains to Jamabandi no. 65 of mouza Billi which was recorded as Mulraiyat-ka-jote in the name of Sitaram Singh, eight annas Mulraiyat of mouza Billi. On the death of Sitaram Singh his eldest son Saryu Prasad Singh *alias* Bhatu

Singh was appointed eight annas Mulraiyat of the village which was approved by the Deputy Commissioner, Santhal Parganas, on 20th March, 1939. On 22nd March, 1939, Mulraiyati jote pertaining to jamabandi no. 3 as well as portion of Mulraiyat-ka-jote pertaining to Jamabandi no. 65 measuring 38.09 acres was sold to Bimal Kant Rai Choudhary for a consideration of Rs. 10,000. After the sale, the name of Bimal Kant Rai Choudhary was mutated as eight annas Mulraiyat of the said mouza in Revenue Miscellaneous case no. 21/1939-40 by an order dated 27th November, 1939, of the Subdivisional Officer, Deoghar. This order was approved by the Deputy Commissioner on 28th December, 1939. On 26th June, 1960, Bimal Kant Rai Choudhary sold 38.09 acres of land of Mulraiyat-ka-jote pertaining to Jamabandi no. 65 as well as Jamabandi no. 3 to Radha Prasad Singh, father of the petitioners by a registered deed of sale. Radha Prasad Singh, so long as he was alive was in peaceful possession over the aforesaid land and was also acting as eight annas Mulraiyat. Jagarnath Singh, respondent no. 9 along with seven others filed a petition before the learned Subdivisional Officer, Deoghar, challenging the legality of the sale of a portion of the Mulraiyat-ka-jote of Jamabandi no. 65 to Radha Prasad Singh and further prayed for their eviction and restoration of the same to them. On such a petition Raiyati Auction case no. 65 of 1970-71 was started by the Subdivisional Officer, who by order dated 19th November, 1971, rejected the petition on the ground that the transfer having been accepted in mutation proceedings by the Deputy Commissioner, he was not competent to set aside the order. A copy of the order dated 19th November, 1971, is Annexure '1'. Hence an appeal to the Additional Deputy Commissioner was preferred. The Additional Deputy Commissioner by his order dated 30th September, 1975 (Annexure '2') allowed the appeal and directed restoration of the disputed land. The Deputy Commissioner held that as part of the interest of Mulraiyat-ka-jote had been transferred, it was in violation of clause 18 of the Record of Rights of the village concerned which lays down that if there has been an alienation contrary to the provisions of the Act, the Deputy Commissioner can set aside the alienation and settle it with a duly qualified raiyat of the village or otherwise settle according to the circumstances of the case. The rights of a Mulraiyat who is a village headman or a settlement-holder in the Santhal Parganas, are, it was held, entirely transferable, saleable and attachable. The privilege which a Mulrai-

yat possesses of transferring his tenure must be exercieed in respect of the whole tenure at the same time. In other words, the learned Additional Deputy Commissioner held that if a Mulraiyat so chooses to transfer his tenure, he must alienate the whole of his rights in the village including the right of managing the village and collecting rent as well as his right and possession in the land and he cannot split up the tenure so as to part with a portion and to retain the remainder. The sale of a portion of the tenure confers no title on the purchaser.

4. The case that there was a family partition was also disbelieved by the learned Additional Deputy Commissioner as no document was produced to substantiate it. Further, according to the Mulraiyati Record of Rights, such partition is illegal unless the same is sanctioned by the Subdivisionel Officer. Nothing was brought on the record to show that sanction of the Subdivisional Officer was obtained in respect of partition between the co-sharers of the lands of Jamabandi no. 65 of mouza Billi. It was, therefore, held that the alienation was illegal and in violation of clause 18 of the Record of Rights. He further directed the return of the lands to the respondents. This was affirmed by the learned Commissioner by Annexure '3' in which he clearly stated that the transfer was in violation of section 42 of the Santhal Parganas Tenancy (Supplementary Provisions) Act, 1949, read with clause 18 of the Record of Rights.

5. From what I have stated above it is obvious that whatever might have been the label of the original petition filed by respondent no. 9 and seven others, it was held on facts that the transfer had to be set aside because it violated section 42 of the Santhal Parganas (Supplementary Provisions) Act, 1949, read with clause 18 of the Records of Right. The aforesaid enactment distinguishes a raiyat which is defined in clause (*xiii*) of section 4 and clause (*xiii*) of section 4 which defines a village headman.

6. Now it would be convenient to refer to two sections of the aforesaid Act. Relevant portion of section 20 of the Act has already been extracted in the judgment of the Hon'ble Chief Justice. Sec-

tion 42 may also be conveniently extracted here which at present reads as follows:—

> "Ejectment of a person in unauthorised possession of agricultural land—The Deputy Commissioner may at any time either of his own motion or on an application made to him pass an order for ejectment of any person who has encroached upon, reclaimed, acquired or come into possession of agricultural land in contravention of the provisions of this Act or any law or anything having the force of law in the Santhal Parganas."

By reference to the two provisions of the Act it is obvious that the scope of section 42 is larger than that of section 20(5). While section 20(5) is applicable when the conditions provided therein are fulfilled, section 42 comes into play whenever there is any encroachment, reclamation, acquisition or possession of agricultural land in contravention of the provisions of this Act or any law or anything having the force of law in the Santhal Parganas. Therefore, while section 42 is general, section 20(5) applies in specific cases, when the conditions stated therein are fulfilled. From what I have stated above, it is clear that in this case the ejectment has been ordered not on the ground of the violation of section 20(5) but because of the violation as contained in section 42 of the Act.

7. Another distinction between section 20(5) and section 42 is that while under section 20(5), after ejectment, the competent authority can restore the land to the original raiyat, no such power is given in section 42. Probably bearing this distinction in mind it has been held by the learned Additional Deputy Commissioner that the alienation being contrary to the provisions of law, ejectment must be ordered and it should be settled with a duly qualified raiyat of the village or otherwise the lands be disposed of according to the circumstances of the case and the learned Commissioner specifically held that the ejectment had to be upheld because of the violation of section 42 of the Act. I am, therefore, constrained to hold that while the ejectment has got to be upheld, the authorities below erred in law in settling the lands with the original holder by the impugned order. That could not have been done. The lands, after ejectment have got to be settled with a duly qualified raiyat of the village or otherwise disposed of according to the circumstances of the case.

8. I would, therefore, hold that the writ application must be allowed to the extent that the order of the learned Commissioner and the Additional Deputy Commissioner directing settlement of the lands with respondent no. 9 and others must be set aside and I order accordingly. There shall, however, be no order as to costs.

S. ALI AHMAD, J.—I entirely agree with my Lord the Chief Justice that the period subsequent to 31st October, 1949 cannot be taken into consideration for perfecting the title by adverse possession which had already started to run. I cannot usefully add on that point. But I regret my inability to agree that the application has no merit and it should be dismissed. In my view, the order to restore possession over the land in question to respondent nos. 4 to 15 cannot be sustained for the reasons mentioned in the judgment prepared by my learned brother B. S. Sinha, J. I agree with him and direct that the application be allowed to the extent indicated in the judgment of B. S. Sinha, J.

Order of the Court

It is held unanimously that the prescriptive period of twelve years for perfecting the title by adverse possession (the original transfer being in contravention of section 27 of Regulation 3 of 1872) would stop running from the 1st of November, 1949 being the date of the enforcement of the Santhal Parganas Tenancy (Supplementary Provisions) Act, 1949.

It is held by majority that the writ application must be allowed to the extent that the orders of the learned Commissioner and the Additional Commissioner directing settlement of land with respondent no. 10 must be set aside, and it is ordered accordingly. There shall however, be no order as to costs.

(Sd.) S. S. Sandhawalia,
(Sd.) S. Ali Ahmad,
(Sd.) Brishketu Saran Sinha
Application allowed.

R.B.

APPELLATE CIVIL

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

1984

August, 10

GANGAJAL TEWARI.*

v.

BRIJNANDAN TEWARI

Second Appellate Jurisdiction—Division Bench of High Court, whether can examine the correctness of the earlier decision passed by a Single Judge—Division Bench, whether exercising co-ordinate jurisdiction.

Suit for specific performance of contract of sale by plaintiff was dismissed by the trial court but was affirmed on appeal by the First Appellate Court. On a Second Appeal to the High Court, a single Judge of the High Court remanded the case to the lower appellate court for fresh decision after reconsideration of evidence. The First Appellate Court after hearing allowed the appeal and decreed the suit on a second appeal by the defendant a single Judge hearing the appeal, referred it to a Division Bench.

Held, the Second Appeal is being heard by the High Court in exercise of its second appellate jurisdiction and can not, therefore, examine the correctness of its earlier decision given in exercise of similar jurisdiction. This Bench is not exercising its Letters Patent jurisdiction and it must, therefore, be held as exercising co-ordinate jurisdiction.

*Appeal from Appellate Decree no. 203 of 1978. Against the judgment of Shri Mohan Prasad, 6th Additional District Judge, Arrah, dated the 15th February 1978, reversing the judgment of Shri Sahdeo Singh, 3rd Additional Subordinate Judge, Arrah, dated the 28th July 1977.

State of Tamil Nadu v. *S. Kumaraswami*(1), *Kshitish Chandra Bose* v. *Commissioner of Ranchi*(2) *and Prabhu Halwai* v. *Fulchand Khandelwal*(3)—distinguished.

Appeal by defendant.

The facts of the case material to this report are set out in the judgment of L. M. Sharma, J.

M/s. R. S. Chatterji, Prabhu Deyal and *Mahesh Prasad no.* 2, for the appellant.

M/s. S. C. Ghose, G. P. Sanyal and *Ashok Kumar Sinha no.* 3, for the respondent.

LALIT MOHAN SHARMA, J.—The defendant no. 2 in the suit filed by the sole respondant has preferred this appeal. The plaintiff prayed for a decree for specific performance of a contract of sale between himself and the defendant no. 1, since dead. According to his case, the defendant no. 1 on 3rd October, 1965 agreed to execute a sale deed with respect to the suit land for a sum of Rs. 5,000, out of which a sum of Rs. 3,900 was paid and a document of agreement, Ext. 2, was executed. The remaining amount of Rs. 1,100 was to be paid at the time of exchange of the equivalents after registration of the sale deed. The plaintiff and the defendant no. 2 are close agnatic relations of defendant no. 1 and, according to the further case of the plaintiff, with a view to defeat the agreement, the defendant no. 2 got a deed of gift executed by the defendant no. 1 in his favour on 3rd January, 1966. When the plaintiff learnt about it, he asked both the defendants to execute the sale deed in his favour and on their refusal to do so, the suit was filed.

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(1) (1977) A.I.R. (S.C.) 202.
(2) (1981) A.I.R. (S.C.) 707.
(3) (1969) A.I.R. (Pat.) 16.

2. The parties led evidence and the trial court dismissed the suit. The plaintiff filed an appeal before the District Judge which was transferred to the court of the 6th Additional District Judge, Arrah, and was registered as T.A. 178 of 1979 and was dismissed on 6th Septembtr, 1973. The appellant came to this Court in S. A. 52 of 1974, whicn was allowed on 7th December, 1976 and the case was remitted to the lower appellate court for fresh decision after reconsideration of the evidence. By the impugned judgment, the learned Additional District Judge allowed the appeal and decreed the suit. The defendant no. 2 who is the surviving defendant now. has preferred the present second appeal, which was referred to by a learned single Judge to be heard by a Division Bench.

3. Mr. R. S. Chatterji, the learned counsel for the appellant, contended that the decision in S. A. 52 of 1974 was illegal inasmuch as the findings of fact recorded by the lower appellate court which concluded the matter in the defendant's favour were binding on the High Court and the learned Judge had no jurisdiction to interfere with the same. The learned counsel strenuously urged that the earlier decision of the High Court must, therefore, be set aside or ignored and the decision of the lower appellate court dated the 6th September, 1973 be restored. Reliance was placed on the decisions in *State of Tamil Nadu* v. *S. Kumaraswami*(1), *Kshitish Chandra Bose* v. *Commissioner of Ranchi*(2) and *Prabhu Halwai* v. *Fulchand Khandelwal*(3).

4. It has been argued that since the present second appeal is being heard by two Judges constituting the Division Bench, the Bench has got full jurisdiction to examine the correctness of the judgment of the learned single Judge allowing S.A. 52 of 1974. I do not find myself in a position to accept

(1) (1977) A.I.R. (S.C.) 2026.
(2) (1981) A.I.R. (S.C.) 707.
(3) (1969) A.I.R. (Pat.) 16.

the contention. The present second appeal is being heard by this Court in exercise of its second appellate jurisdiction and cannot, therefore, examine the correctness of its earlier decision given in exercise of a similar jurisdiction. It has to be remembered that this Bench is not exercising its Letters Patent jurisdiction and must therefore, be held as exercising co-ordinate jurisdiction. None of the decisions cited by Mr. Chatterji is of any help. The case of the State of Tamil Nadu was by way of a direct appeal to the Supreme Court from the High Court judgment and does not deal with the High Court's power to set aside its own earlier decision. In *Kshitish Chandra Bose* v. *Commissioner of Ranchi* (Supra), again it was the Supreme Court which was interfering with the High Court's judgment, of course in an appeal from a subsequent decision. The case of *Prabhu Halwai* v. *Fulchand Khandelwal* (supra) also clearly distinguishable inasmuch as the question of maintainability of the claim for eviction of the tenant in that case had not been decided by the remand order of the High Court and, consequently, it was held that when the case came on the second occasion, the High Court could examine the question. I; therefore, over-rule the argument of the appellant and hold that the judgment in S. A. 52 of 1974 is not open to scrutiny in the present appeal.

5. Mr. Chatterji next urged that in view of the decision in *Bishwanath Mahto* v. *Smt. Janki Devi*(1), the plaintiff is not entitled to a decree for specific performance of the contract of sale as he has not pleaded and proved that he was ready and willing to perform his part of the contract continuously between the contract and the date of hearing of the suit. Mr. S. C. Ghose pointed out that necessary assertions in this regard were included in the plaint in express term. The question as to whether the plaintiff led reliable evidence on this plea cannot now be examined at this stage as the point was not pressed by the dependant in either of the two courts nor was it taken in the memorandum of this appeal.

(1) (1978) A.I.R. (Pat.) 190.

6. Mr. Chatterji next urged that a reading of the agreement, Ext. 2, leads to the conclusion that the parties to it were under a mistake in regard to the payment of the consideration money which renders the agreement void by reason of section 20 of the Indian Contract Act. The learned counsel referred to the endorsement portion signed by the defendant no. 1 on the top of the agreement and the recievals in the body of the deed for the purpose of applying section 20 of the Act. It is true that there is some discrepancy in the endorsement of the document, referred to by the learned counsel, but the deed read as a whole does not leave any scope of controversy that a sum of Rs. 3,900 was paid and the remaining amount of Rs. 1,100 was to be paid at the time of exchange of the equivalents. This aspect has been considered at some length by the court below and I fully agree with the findings. The question was debated by the defendant in the court below as a circumstance for disbelieving the plaintiff's case and it was not suggested, and according to me rightly, that the parties were under any mistake as to the consideration money. The attempt on the part of the appellant to place section 20 of the Act in service is, therefore, completely futile.

7. Lastly, it was urged that since an area of about 8 acres of land was under the agreement in question to be sold for a sum of Rs. 5,000 only, the contract most be held to be inequitable and the Court should in its discretion refuse the relief claimed in the suit. Reliance was placed on clause (*a*) of section 20(2) of the Specific Relief Act, 1963, which is in the following terms:—

"20. Discretion as to decreeing specific performance.

(2) The following are cases in which the Court may properly exercise discretion not to decree specific performance—

(*a*) Where the terms of the contract or the conduct of the parties at the time of entering into the contract or the other circumstances under which the contract was entered into are such that the contract, though not voidable, gives the plaintiff an unfair advantage over the defendant;"

This point again was not taken in the two courts below nor in the memorandum of appeal in this Court and was urged for the first time at the hearing of this appeal. It is true that the Court is not bound to grant a decree for specific performance merely because it is lawful to do so and the jurisdiction in this regard is discertionary, but the discretion of the Court is not arbitrary, as has been clarified in section 20(1). It is not simply a question of what an individual thinks is fair and reasonable. Ordinarly if a contract is valid in form and has been made betwten competent parties and is unobjectionable in its nature and circumstances, relief is granted as a matter of couse. A mere bad bargain or inadequancy of price. all by itself does not necessarily disentitle the plaintiff from obtaining specific performance. The Explanation I to section 20(2) is relevant in this connection. In the present case, there is no suggestion that the plaintiff gained an unfair advantage or that there existed any circumstance which could lead the Court to refuse its discretion for dismissing the suit. Even the plea of inadequate consideration was not raised and the learned Counsel could not point out any material on the records indicating that the true value of the land in 1965 was higher. The argument, therefore, cannot be entertained at this late stage.

8. In the result, none of the points raised on behalf of the appellant has any merit. The appeal is, therefore, dismissed: but in the circumstances without costs.

S. S. SANDHAWALIA, *C. J.*—I agree.

R. D. *Appeal dismissed.*

CIVIL WRIT JURISDICTION

Before Hari Lal Agrawal and Ram Chandra Prasad Sinha, JJ.

1984

August, 10

KESHO PODDAR AND ANOTHER.*

v.

THE STATE OF BIHAR AND OTHERS.

Bihar Money Lenders Act, 1974 (*Act XXII of* 1975) *section* 23, *explanation—Construction and meaning of—admitted existence of the relationship of debtor and creditor—whether essential for referring the dispute to conciliation Board under section* 23*—legislation—intention of.*

The explanation to section 23 of the Bihar Money Lenders Act does not indicate, much less means that there must be admitted existence of the relationship of debtor and creditor (money lender) between the parties so as to refer any dispute of difference regarding loan. Putting such a construction would amount to defeating the very purpose and intention of the legislation. Obviously, the intention of the legislation is to give advantage to the weaker section of the society and in case the construction as propounded is given effect to, it would act in derrogation of their interest and they would be subjected to a protracted Court trial.

Held, that, in the instant case the reference of the dispute to the Concilation Board on its being notified in the official Gazette is not bad but since sufficient time has elapsed since the earlier Conciliation Board was constituted, it is advisable that a fresh Board should be constituted.

*Civil Writ Jurisdiction Case no. 4682 of 1978. 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 of India.

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

Messrs Parmeshwar Prasad Sinha, A. B. Mathur and *Vijayeshwar Narain Sinha,* for the petitioner.

Messrs Bishwanath Agrawal and *T. N. Maitin,* for the respondent no. 5.

Mr. Rameshwar Prasad (Government Pleader no. 6) and *Mr. B. B. Sinha,* for other respondents.

HARI LAL AGRAWAL, J.—By this writ application the petitioners challenge the order of the Additional Collector, Purnea, dated the 26th July, 1978, (Annexure '6') passed under the provisions of section 23 of the Bihar Money Lenders Act, 1974, (in short, 'the Act') referring the dispute to the Conciliation Board on its being notified in the official gazette.

2. Before I proceed to state the facts in brief I may indicate the point of challenge of this order. This order has been challenged on the ground of denial of relationship of the debtor and creditor between the parties itself which according to the agreement, must be subsisting before the dispute can be referred to the conciliation board.

3 Undisputedly respondent no. 5 executed a simple mortgage bond on 24th September, 1968 in favour of the plaintiffs-petitioners to secure a loan of Rs. 15,000. For recovery of the said loan Title Suit no. 15 of 1976 was filed in the Court of the Subordinate Judge, Purnea, claiming a decree for Rs. 24,895 besides pendente lite and future interest. In the written statement filed by respondent no. 5 in the suit he took the plea that the transaction in question was not a real

transaction as the document was executed "to ward off all dangers from the side of any one which may have covetous eye on it" as the relationship between the parties was very close and cordial. The mortgage bond was executed without any consideration and thus the transaction itself was termed as 'fake' to remain as a paper transaction.

4. It is in view of this stand of the defendant-respondent no. 5, *i.e.*, complete denial of the transaction of loan, that an argument has been advanced that there could be no reference to the Conciliation Board.

5. Section 23 of the Act empowers the State Government or its delegatee by notification in the official gazette to refer *any dispute* whether any suit or proceeding be or be not pending in a court with regard to the whole or part of the subject of such dispute to a Conciliation Board to be constituted by the State Government for each district.....for the purpose of bringing about an amicable settlement of such dispute and if no such settlement can be brought about, for deciding the same in such manner as it appears to the Board to be reasonable. An explanation has been appended to section 23 defining the expression 'dispute' in the following words:—

> " 'Dispute' for the purpose of this chapter shall mean a dispute of difference regarding loan or loans the amount of which singly or in aggregate exceeds one hundred rupees (excluding interest) between a debtor and his money-lender."

6. It was argued with some emphasis that the dispute of difference must be between a debtor and his money-lender and in a case where the debtor disputes the transaction itself, as in the present case, then he ceases to be a debtor and the alleged creditor, a money lender, and, therefore, the condition precedent for referring the dispute becomes *non est* and the power to make a reference under section 23 of the Act could not be exercised.

7. The argument of Mr. Sinha, although attractive, is far fetched and cannot be accepted. It is common knowledge that in almost all the cases the useful plea of a debtor is a denial of the transaction either on the basis of a hand-note or a registered bond. If the argument is accepted than practically no case will be covered by section 23 of the Act and the intention of the Legislature that the parties should be directed to a Conciliation Board instead of litigating in a court of law or before any other authority will be frustrated. In that case only those cases will be amenable to the jurisdiction of the Board under section 23 where the debtor admits the loan and sets up a plea of either payment or in correctness of the amount of the loan or something like that. On a question put by the Court Mr. Sinha ventured to argue that whenever any such denial of the present nature is made by a defendant, than the entire suit would be tried outside the purview of the Act itself. It is a very bold submission and must be rejected.

8. The issue relating to the denial by a debtor that he had borrowed money and does not terminate the jurisdiction of the Court for the purpose of trial of the suit and that issue has to be tried by the Court. This kind of dispute will in my view come within the category of a dispute between the parties regarding the loan itself. Under the very Scheme of the Conciliation proceeding it has been provided under section 23 of the Act that in case of the failure of the Conciliation Board in bringing about an amicable settlement of the dispute between the parties, it has to make an enquiry into the same, receive such evidence as it considers necessary and decide the amount, if any, payable to the money lender. Under the very nature of enquiry, which is enjoined upon the Board, the Board in a case could come to the conclusion that no amount was payable. For example, under sub-section (2) of section 27 of the Act it is provided that in case it is decided that nothing is due from the debtor, the Board may award costs, if any, to the debtor.

9. In my considered opinion, therefore, the explanation to section 23 of the Act does not indicate, much less means, that there must be admitted existence of the relationship of debtor and creditor (money lender) between the parties so as to refer any dispute of difference regarding loan. Putting such a construction would amount to defeating the very purpose and intention of the legislation. Obviously, the intention of the legislation is to give advantage to the weaker section of the society and in case the construction as propounded by the learned Counsel for the petitioner is given effect to, it would act in derrogation of their interest and they would be subjected to a protracted court trial.

10. The writ application, therefore, has got no substance and it must fail. It is, accordingly, dismissed. In the circumstances of the case, I make no order as to costs.

11. Since, however, sufficient time has elapsed since the earlier Conciliation Board was constituted, I feel that it is advisable that a fresh Board should be constituted. Let a fresh Board be constituted accordingly as prescribed under the Act.

RAM CHANDRA PRASAD SINHA, J.—I agree.

M. K. C.

Application dismissed.

FULL BENCH

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

1984

August, 13

UPENDRA KUMAR JOSHI*
v.
M/S. NEW VICTORIS MILLS COMPANY LIMITED AND ANOTHER.

Companies Act, 1956 *(Central Act no. I of* 1956) *section* 155 *sub-section* (4) *clause* (*b*)—*provisions of—whether has relevance to number of Judges to constitute the Bench to hear appeal—appeal to lie before a Division Bench—provision, whether Constitutionaly valid—whether rests on reasonable classification.*

It seems plain that the phrase "consisting of three or more Judges", in clause (*b*) of sub-section (4) of section 155 of the Companies Act, 1956, is obviously descriptive of the High Court in which the appeal arises. The said phrase follows the words "High Court" and qualifies the same. It has no relevance to the number of Judges who are to Constitute the Bench but merely draws a line betwixt the larger High Courts having there or more Judges and the smaller ones composed of two or less;

Held, that an appeal under this provision would lie before a Division Bench and not before a Bench consisting of thret or more Judges.

*Order no. 6, dated 13th August, 1984 in Company Appeal no. 1983 out of which Letters Patent Appeal no. 88 of 1984 arose.

It is manifest that whenever the minimum number of Judges for composing a Bench of the High Court is to be mandated then, the terminology employed is entirely different from the one used in section 155 sub-section (4) clause (*b*) of the Act.

It is well settled that an appeal is entirely a creature of the Statute and if the Legislature, in its wisdom, does not wish to provide an appellate forum at all, the provision would not be rendered unconstitutional. Equally it would follow that where limitations on the appellate forum are placed, by they would be squarely within the parameters of constitutionality.

Held, further, that section 155 sub-section (4) clause (*b*) of the Act can be squarely rested on the basis of reasonable classification by Legislature with regard to High Court consisting of three or more Judges and those composed of two or less number of Judges. The line drawn betwixt the two rests on sound rationale.

Upendra Kumar Joshi v. *M/s. Kesho Ram Industries and Cotton Mills Ltd.* (1) and *N. M. Verma* v. *Upendra Narain Singh* (2)—*approved Sri Chand and Ors.* v. *State of Haryana and Ors.* (3)—followed.

Appeal under section 155 (4) of the Companies Act, 1956.

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

Mr. Upendra Kumar Joshi, for the appellant.

Mr. Ram Balak Mahto, Additional Advocate-General, for the respondents.

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(1) (1982) Second Appeal no. 646 of 1980 decided on 8th February, 1982.

(2) (1977) B.B.C. J. 662.

(3) (1979) A.I.R. (Punj. and Haryana) 19.

ORDER

Are the provisions of clause (*b*) of sub-section (4) of section 155 of the Companies Act, 1956, prescriptive of the minimum number of Judges for hearing an appeal or merely descriptive of the High Court in which such an appeal arises—is the somewhat ticklish question which has necessitated this reference to the larger Bench.

2. The issue here is prestinely legal and turns entirely on the larger import and the specific language of section 155 and, thus, could even be considered *dehors* the facts giving rise thereto. Nevertheless a brief reference to them may still be made. The appellant—Shri U. K. Joshi—had preferred an application under section 155 of the Companies Act, 1956 (hereinafter calltd the 'Act') seeking the rectification of the register of members of Messers New Victoria Mills Company Limited by incorporating his name among the share-holders on the basis that he held 50 preference shares and 200 ordinary shares in the said company. The said application came up before a learned single Judge of this Court, before whom a preliminary objection was raised by the Registry that the said application was not maintainable since the registered office of the company was not within the territorial jurisdiction of this Court. Upholding the preliminary objection, the learned single Judge took the view that the application was not entertainable by this Court and dismissed the same by his order dated the 18th of February, 1983.

3. Against the said dismissal, the present Company Appeal under section 155(4) of the Act has been preferred. The appellant raised the controversy that this appeal must be heard by a Bench consisting of three or more Judges, and to resolve the same the matter was first directed to be placed before a Division Bench. Before it also the appellant maintained his stand that the appeal could only be heard by three or more Judges, and the Division Bench, after observing about some obscurity

of draftsmanship in the provision of sub-section (4) of section 155 of the Act and the consequent confusion arising therefrom, has directed the matter to be placed before a larger Bench, and that is how the matter is before us.

4. Now, the threshold question herein is whether the present appeal under section 155(4) (*b*) must be heard only by a Bench consisting of three or more Judges of this High Court Inevitably, the clue to this issue is provided only by the language of the provision around which the controversy revolves and the relevant part of section 155 may, therefore, be read at the very outset—

> "155. *Power of Court to rectify register of members*— —(1) *If*—
>
> (*a*) the name of any person—
>
> (*i*) is without sufficient cause, entered in the register of members of a company, or
>
> (*ii*) after having been entered in the register, is, without sufficient cause, omitted therefrom; or
>
> (*b*) default is made, or unnecessary delay takes place, in entering on the register the fact of any person having become, or ceased to be, a member;
>
> the person aggrieved, or any member of the company, or the company, may apply to the Court for rectification of the register.
>
> (2) X X X
>
> (3) X X X

(4) From any order passed by the Court on the application, or on any issue raised therein and tried separately, an appeal shall lie on the grounds mentioned in section 100 of the Code of Civil Procedure, 1908—

(*a*) if the order be passed by a District Court, to the High Court;

(*b*) if the order be passed by a single Judge of a High Court consisting of three or more Judges, to a Bench of that High Court.

* * *

(5) * * * *

5. Before one turns specifically to the precise language of sub-section (4)(*b*), it seems apt to look at the larger import and purport of section 155 itself. This confers on the Court the power to rectify the register of members of a company. It provides that a person aggrieved by any of the grounds mentioned in sub-section (1) thereof, may apply to the Court for rectification of the register. Sub-section (2) then gives a wide ranging power to the Court to either reject the application or order a rectification of the register and in doing so, sub section (3) empowers the Court to decide, if necessary or expedient, the allied question of title of any other person with regard to the shareholding for the purposes of the rectification or otherwise of the register.

6. It is from such an order that sub-section (4) provides for a forum of appeal. Now, it seems manifest that the power of the rectification of the register is not in any way an exceptional or extraordinary power of great moment or significance. Indeed, it was argued before us with plausibility that it is somewhat of a routine and relatively ordinary power conferred on the Company Court. Where such power is exercised by a District Court, the appeal therefrom is provided to the High

Court and the Statute does not in any way specify the number of Judges who will hear such appeal. It may well be heard by a single Judge and no further appeal therefrom is envisaged under the Act. However, where the original order under section 155(2) has been passed by a single Judge of the High Court, an appeal therefrom is envisaged within the limitations of clause (*b*) of section 155(4). Now, it is trite learning that ordinarily appeal from the order of a single Judge lies to a Division Bench under the Letters Patent Jurisdiction. No reason, even remotely, could be pointed out to us as to why in this particular context an exception may be made to the ordinary rule that an appeal from the order of a single Judge must lie before a Bench of at least three Judges or even more. Indeed, the Companies Act, in the other contexts, provides for appeal against an order of the single Judge of the High Court and no provision could be brought to our notice which requires that such appeals should be heard by a minimum number of three Judges of the High Court or more. In the somewhat limited context of the power of rectification under section 155, no larger rationale is evident for construing section 155(4) (*b*) as a mandate for the hearing of the appeal thereunder by a minimum number of three Judges of the High Court. The larger aspect of section 155, therefore, clearly militates against the tenuous stand taken on behalf of the appellant.

7. Again, the nature of the appeal under sub-section (4) and the limits in which it is sought to be confined then calls for notice. It is plain that this provision does not envisage a re-appraisal of evidence and facts as in a first appeal but seeks to limit the appeal to substantial questions of law. Sub-section (4) clearly provides that such an appeal lies on the ground mentioned in section 100 of the Code of Civil Procedure. Thus, the appeal here is analogous, if not identical, with that of a second appeal provided by the Code aforesaid. The intent of the Legislature to put a limitation on the scope of the appellate forum is, thus, equally evident even in cases where such an appeal is directed against the order of a District Court in the first instance.

8. Coming now to the specific language of clause (*b*), it seems plain that the phrase "consisting of three or more Judges" is obviously descriptive of the High Court in which the appeal arises. The said phrase follows the words 'High Court' and qualifies the same. It has no relevance to the number of Judges who are to constitute the Bench but merely draws a line betwixt the larger High Courts having three or more Judges and the smaller ones composed of two or less. An example which readily comes to one's mind, is the High Court of Sikkim which, when originally constituted, was comprised of a solitary Judge being its Chief Justice. For a considerable time it continued as such and later it was composed of only two Judges till the year 1984 when, recently, it has been enlarged to three Judges. It would be wasteful to advert to the other earlier smaller High Courts which were composed of less than three Judges. Equally it has to be recalled that jurisdictions which were earlier covered by the Court of Judicial Commissioners were deemed to be a High Court in the eye of law for many purposes. Consequently there was no dearth of jurisdictions either by legal fiction. One or two Judicial Commissioners exercised jurisdiction in an area or of smaller High Courts composed of less than three Judges. Section 155(4) (*b*) was thus clearly intended to distinguish and describe a High Court consisting of three or more Judges as against the smaller ones.

9. Now, once it is held that the phrase "consisting of three or more Judges" is descriptive of size of the High Court, the rest of the provision falls nealty into a correct perspective. The closing part of clause (*b*) provides that appeal would lie to a Bench of that High Court. Now, in plain and ordinary parlance, a Bench of High Court, when we talk with regard to an appeal from a judgment or order of a single Judge, means necessarily a Division Bench. A Bench of the Court does not mean a Full Bench or the Full Court or a Bench of three or more Judges. Even at the cost of repetition, it may be noticed that the phrase "consisting of three or more Judges" follows

the words "High Court" and does not in any way qualify or specify the Bench which is to hear the appeal. I have, therefore, little hesitation in holding that an appeal under this provision would lie before a Division Bench and not before a Bench consisting of three or more Judges.

10. In the aforesaid context, it seems somewhat obvious that the Legislature here was squarely faced with the problem of providing a forum of appeal where the number of Judges of the High Court may be less than three. Now it needs no great erudition to see that by the very nature of things no appeal against the order of a single Judge of the Court would be possible within the same High Court where it is composed of less than three Judges. Plainly enough if it is a Court of a single Judge Judicial Commissioner or a High Court of two or less Judges, there would not remain even the minimum number of two other Judges in the same High Court to hear the appeal against the order rendered by a single Judge. It is in this light and in plain recognition of realities that the legislature spelt out that a further appeal against an order of a single Judge would arise only where the High Court is composed of not less than three Judges. As was noticed earlier, where the order is passed by a District Court, an appeal lies to the High Court, which may well be heard by a single Judge and no further appeal therefrom is provided by the Act. In the smaller High Courts consisting of two or lesser number of Judges the order passed by a single Judge in the original jurisdiction was apparently given finality within that Court.

11. Viewed from another angle, it is equally significant to notice that the Legislature is more than well aware of the terminology to be employed when the minimum number of Judges for constituting a Bench of the High Court is to be mandated. Referenre in this connection may be made to one of the oldest

Statutes, namely, section 17 of the Indian Divorce Act, 1969 which is in the following terms:—

> "17. Every decree for a dissolution of marriage made by a District Judge shall be subject to confirmation by the High Court.
>
> Cases for confirmation of a decree for dissolution of marriage shall be heard (*where the number of the Judges of the High Court is three or upwards*) by a Court composed of *three such Judges*, and in case of difference the opinion of the majority shall prevail, or (where the number of the Judges of the High Court is two) *by a Court composed of such two* Judges, and in case of difference the opinion of the Senior Judge shall prevail.
>
> • • •

From the above, it is plain that where the Legislature envisages the minimum number of Judges for constituting a Bench, it knows and employs categoric language for doing so. A similar provision exists in the following form in the Code of Criminal Procedure:—

> "369. Confirmation or new sentences to be signed by two Judges.—In every case so submitted, the confirmation of the sentence, or any new sentence or order passed by the High Court, shall, when such Court consists of two or more Judges, be made, passed and signed by at least two of them".

It is unnecessary to refer to numerous other Statutes and it seems to be manifest that whenever the minimum number of Judges for composing a Bench of the High Court is to be mandated then the terminology employed is entirely different from the one used in section 155(4) (*b*).

12. What appears to me as an argument of desperation was then raised by the appellant more vociferously but less logically in, contending that section 155(4) (*b*) would be arbitrary and it is unconstitutional because of the fact that in a High Court composed of less than three Judges no appeal would be competent from an order of a single Judge whereas in the larger High Court an appeal against such order would be so. This submission stems from the patently fallacious misapprehension that the right of appeal is either a fundamental or an inherent right. It is by now well settled that an appeal is entirely a creature of the Statute and if the Legislature, in its wisdom, does not wish to provide an appellate forum at all the provision would not be rendered unconstitutional. Equally it would follow that where limitations on the appellate forum are placed, they would be squarely within the parameters of constitutionality. If authority was needed for what appears to be a somewhat plain proposition, it exists in the exhaustive judgment of the Punjab and Haryana High Court in the case of *Sri Chand and others, Petitioners* v. *State of Haryana and others, Respondents*(1), in the following words:—

> "Despite the vehemence with which the proposition aforesaid was advanced and pressed it appears to me that the same stems from a basic fallacy with regard to the very nature and the content of the right of appeal if at all it may be so termed. It is manifest that the right of appeal is not a guaranteed or a constitutional right. There is nothing whatsoever in the constitution which may even remotely vest any such inalienable right in the citizens. Indeed learned counsel for the petitioners were compelled to concede that the right of appeal was not a fundamental right nor a constitutional one. That being so, it is equally evident that there is no inherent

(1) (1989) A.I.R. (Punj. and Haryana) 19.

claim or right to appeal from an original forum. It is, therefore, that tt has been repeatedly asserted that the right of appeal is a mere creature of the statute. If that be so, it is plain that the creator who confers such rights, namely, the legislature can equally take the same away. It inevitably follows that if the whole right can be thus taken away it can equally be impaired, regulated or burdened with conditions onerous or otheswist".

13. Even otherwise, stction 155(4) (*b*) can be squarely rested on the basis of reasonable classification by the Legislature with regard to High Courts consisting of three or more Judges and those composed of two or less number of Judges. The line drawn betwixt the two rests on sound rationale. As has been demonstrated earlier, in the smaller High Courts consisting of two or less number of Judges an intra-Court appeal from the order of a single Judge is a virtual impossibility. Consequently, within this inherent limitation the Legislature Provided for a forum of appeal against the order of a single Judge in the larger High Courts and gave finality to the order of the single Judge in the smaller ones. Consequently, section 155(4) (*b*), far from being arbitrary or unconstitutional, is a recognition of patent reality and rests on a reasonable classification. In the coantext of our Constitution it has to be remembered that there is always a wide ranging residuary power of the final Court under Article 136 to correct any blatant injustice if it occurs from order of the single Judge against which no intra-Court appeal may be possible.

14. It seems unnecessary to elaborate further because the issue before us has been earlier the subject-matter of consideration in an unreported decision by a Bench of three Judges, though at the order stage, in *Upendra Kumar Joshi* v. *M/s. Keso Ram Industries and Cotton Mills Ltd.* (Second Appeal oo. 646 of 1980—vide order no. 19, dated the 8th of

February, 1982, converted into and numbered as Misc. Appeal no. 263 of 1982. I am somewhat surprised that this judgment was not brought to notice when the matter was before the Division Bench earlier. Mr. Joshi, who was party to the earlier judgment, sought to explain this by contending that the said judgment was not good law in view of the earlier judgment of a larger Bench in *N. M. Verma* v. *Upendra Narain Singh* (1977 BBCJ 662). On a close perusal of the same, I find that the general principles of construction spelt out in the aforesaid case can, in no way, detract from the view expressed in *Upendra Kumar Joshi* v. *M/s. Keso Ram Industries and Cotton Mills Ltd.* (supra) and the submission on this score is not at as well conceived. We would wish to record our unhesitating concurrence with the view in Second Appeal no. 646 of 1982 (supra).

15. To finally conrlude, it is held that section 155(4) (*b*) of the Act, in no way, prescribes a Bench of three or more Judges for hearing an appeal thereunder but merely describes the High Court in which an appeal may arise. Consequently, the present appeal can lie before a Division Bench and not a Full Bench of three or more Judges.

16. In the light of the above, it is directed that this appeal would now go back before a Division Bench for its decision on merits.

(Sd.) S. S. Sandhawalia.

(Sd.) S. Sarwar Ali.

(Sd.) B. P. Jha.

R. D.

Order accordingly.

CIVIL WRIT JURISDICTION

Before S. Sarwar Ali and B. P. Jha, JJ.

1984.

August, 30.

RURAL ENTITLEMENTS AND LEGAL SUPPORT CENTRE, BIHAR, AND ANR.*

v.

THE STATE OF BIHAR AND OTHERS

Industrial Disputes Act, 1947 (*Act XIV of* 1947), *section* 25 *F, scope and applicability of—payment of wages and compensation after the retrenchment order was given effect to—provisions of section* 25*F, whether complied with—retrenchment order, whether illegal and liable to be quashed.*

Where the workmen were directed to collect their wages and compensation after their retrenchment;

Held, that such payment of wages was contrary to the provisions of section 25F of the Industrial Disputes Act, 1947. If the workmen were asked to go forthwith, they had to be paid wages and compensation at the time of retrenchment and they could not be directed to collect wages and compensation afterwards. Hence, the provisions of section 25F were not complied with and as such the retrenchment orders were illegal and liable to be quashed.

Messrs. Chandra Shekhar, J. P. Karan and *Rajeev Sharma*, for the petitioners.

Messrs. K. P. Verma, Advocate General, and *R. P. Sinha 'Rajesh', Junior Counsel to the Advocate General*, for the State.

*Civil Writ Jurisdiction Case no. 1439 of 1984. In the matter of an application under Articles 226 and 227 of the Constitution of India.

B. P. JHA, J.—In a writ petition, these petitioners as representatives of the workmen of Durgawati Jalasay Pariyojna, Karmohat, have prayed for quashing a retrenchment order as contained in Annexure-1.

2. The point for decision in the present case is: Whether the workmen had been paid wages at the time when they were retrenched ?

3. The point raised is covered by a decision of the Supreme Court in *M/s National Iron and Steel Co. Ltd. and others* v. *The State of West Bengal and another*(1). It is contended on behalf of the State that the workmen have been retrenched by an order as contained in Annexure-G (attached to the counter-affidavit on behalf of the State). Learned Counsel for the petitioners contends that the workmen have been retrenched *vide* Annexure-1.

4. Both Annexures-G and 1 are dated 30th January, 1984. In Annexure-G, it is stated that their services have been retrenched on the ground that their appointment has been found to be irregular. It was for this reason, the workmen were directed to collect their wages and compensation as required under section 25-F of the Industrial Disputes Act, 1947 (hereinafter referred to as 'the Act') between 1st and 7th February, 1984. The retrenchment order will be given effect from the afternoon of 31st January, 1984. It was, therefore, clear that the workmen were directed to collect their wages and compensation afer they were retrenched from service.

5. By Annexure-1, the services of the workmen were terminated from the afternoon of 22nd February, 1984 and they were directed to collect their wages and compensation between 23rd and 25th February, 1984.

6. On a perusal of Annexures-1 and G, it is clear that the workmen were directed to collect their wages and compensation after their retrenchment. In my opinion, such payment of wages is contrary to the provisions of section 25F of the Act.

7. It was contended on behalf of the respondents on the basis of paragraph no. 2 of Annexure-G that the payment of wages and compensation was to be made at the time of retrenchment. In other

(1) (1967) A.I.R. (S.C.) 1206.

words, the respondents contended that the provisions of section 25F had been complied with. It is clear from the supplementary counter-affidavit on behalf of the State that payments could not be made on 31st January, 1984 because of the absence of the workmen and, as such, individual notices were sent by registered post. It is mentioned in paragraph no. 2 of the supplementary counter-affidavit as follows:

> "Since the payment under section 25F was set apart because of the absence of the concerned workmen, they were informed to collect it from 1st February, 1984 to 7th February, 1984."

On the basis of the averment made in the supplementary counter-affidavit on behalf of the State, it is manifest that wages and compensation were not paid on 31st January, 1984, that is, the date when the retrenchment order took effect. Hence, I hold that the provisions of section 25F of the Act were not complied with.

8. It is also clear from Annexure-1 that the workmen were directed to collect their wages and compensation between 23rd and 25th February, 1984. It is, therefore, apparent that the workmen were directed to collect their wages and compensation after the retrenchment order was given effect to. According to section 25F of the Act, the wages and compensation were required to be Paid to the workmen at the time of the retrenchment order or before that. It is clear from Annexure-1 that the payment of wages and compensation as required under section 25F of the Act was made after the retrenchment order (as contained in Annexure-1) was given effect to.

9. In this circumstance, I hold that Annexures-1 and G are illegal as they are contrary to section 25F of the Act. In other words, Annexures-1 and G do not comply with the provisions of section 25F of the Act.

10. Section 25F of the Act provides that a workman should not be retrenched until he has been given one month's notice in writing indicating the reasons for his retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice wages for the period of notice. Section 25F (b) provides for payment of compensation at the time of retrenchment. In other words, the wages

and compensation are required to be paid at the time of retrenchment. In the present case, the workmen were directed *vide* Annexure-1 and Annexure-G to collect their wages and compensation after the retrenchment order. If the workmen were asked to go forthwith, they had to be paid wages and compensation at the time of retrenchment and they could not be directed to collect wages and compensation afterwards. Hence, I hold that the provisions of section 25F have not been complied with.

11. In the circumstances, the petition is allowed and I quash Annexures-1 and G and I issue a writ of certiorari accordingly. The parties shall bear their own costs.

S. SARWAR ALI, J.—I agree. Learned counsel for the State relied on a bench decision of this Court—C.W.J.C. No. 4202 of 1983 (Ganesh Narayan Singh *Vs.* State of Bihar & others) where it was held, on interpretation of the Full Bench of this Court (1983 P.L.J.R. 667) that section 25F of the Industrial Disputes Act has no application where the appointments in question are illegally made, or by an authority who has no power to make the appointment. In my opinion it is not necessary to consider the applicability of this decision on the facts and circumstances of this case because the definite case of the respondents in the counter-affidavit is that it was decided to terminate the services after complying with the provisions of section 25F of the Industrial Disputes Act, 1947.

S. P. J. *Application allowed.*

REVISIONAL CIVIL

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

December, 10.

1984

DHARMNATH PANDEY AND OTHERS.*

v.

DHUNMUN MANJHI AND OTHERS.

Bihar Consolidation of Holdings and Prevention of Fragmentation Act, 1956 (*Bihar Act XXII of* 1956), *section* 4 (*c*)—*applicability of—suit or appeal where the document challenged is voidable—whether abates.*

If any of the parties to a suit challenges that the document is a voidable one, then the suit will not abate under section 4(*c*) of the Bihar Consolidation of Holdings and Prevention of Fragmentation Act, 1956, for the simple reason that the parties will be required to lead evidence in respect of the fact that the document is a voidable one and the Consolidation authority will have no jurisdiction to decide the fact as to whether a document is a voidable one or not.

Held, therefore, that in the present case the suit or the appeal will not abate as the defendants had challenged the sale deed on the ground of fraud.

Messrs. Thakur Prasad and *Ram Shankar Prasad*, for the petitioners.

Mr. Subodh Kumar Sinha, for the opposite party.

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*Civil Revision no. 1937 of 1981. Against an order of Mr. Syed Ekbal Ali Imam Raza Khan, IVth Additional District Judge of West Champaran at Bettiah, dated 29th September, 1981.

B. P. JHA, J.—This civil revision petition arises out of an order dated 29th September, 1981.

2. By the impugned order, the lower appellate court held that the appeal abated under section 4(c) of the Bihar Consolidation of Holdings and Prevention of Fragmentation Act, 1956 (hereinafter referred to as 'the Act').

3. The plaintiffs-petitioners have prayed for a declaration of title and recovery of possession in respect of the suit lands purchased by means of a sale deed which was executed by Lakhan Manjhi, ancestor of the defendants, dated 30th January, 1923. The defence of the defendants first party was that the impugned sale deed was a fraudulent one and without any consideration.

4. On these facts, the trial court held that there was no element of fraud and, as such, decreed the suit. The defendants preferred an appeal before the District Judge. The Additional District Judge, Bettiah, while hearing the appeal was of opinion that the appeal abated under section 4 (c) of the Act.

5. Learned Counsel for the petitioners relied on a decision of a learned Single Judge in which the learned Single Judge has held that in a case where the effect of a document can be taken away only by the civil court, then the suit will not abate. It has further been held that if the document is voidable and the parties are required to lead evidence to that effect, then also the suit will proceed before the civil court. In a case of this type, the consolidation authority has no jurisdiction to decide that a document is voidable [*see* the case of *Dhanbir Singh* v. *Chandra Shekhar Tiwary and others* (Civil Revision No. 1149 of 1981) disposed of on 11th April, 1983].

6. It is well-settled that if the plaintiff challenges a document as voidable, then such a suit will not abate [see the case of *Gorakh Nath Dube* v. *Hari Narain Singh and others* (A.I.R. 1973 Supreme Court 2451) and the Full Bench decision in *Sheoratan Chamar and others* v. *Ram Murat Singh alias Kishore Raman Singh and others* (First Appeal No. 84 of 1972) disposed of on 18th August, 1984] In the present case, the plaintiffs have not challenged the validity of the sale deed on the ground that it is a voidable document. The defendants had

challenged the validity of the document on the ground that it is a fraudulent one. If any of the parties challenges that the document is a voidable one, then the suit will not abate under section 4(*c*) of the Act for the simple reason that the parties will be required to lead evidence in respect of the fact that the document is a voidable one. In other words, where a document is challenged as a voidable one by any of the parties, the suit will not abate under section 4(*c*) of the Act for the simple reason that the consolidation authority has no jurisdiction to decide the fact as to whether a document is a voidable one or not.

7. In this circumstance, I hold that the suit or the appeal will not abate as the defendants had challenged the sale deed on the ground of fraud. In this view of the matter, I allow the revision petition and set aside the order dated 29th September, 1981 and direct the lower appellate court to decide the appeal in accordance with law. The parties shall bear their own costs.

S. S. SANDAWALIA, C. J.—I agree.

S. P. J. *Application allowed.*

REVISIONAL CIVIL

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

1984,

December, 11.

BIHAR STATE SHIA WAKF BOARD*.

v.

SHEONANDAN PRASAD AND ANOTHER.

Wakf Act, 1954 (*Act XXIX of* 1954), *sections* 36*A*, 36*B* (1) *and* (2) *and Bihar Wakf Rules*, 1973, *Rule* 3—*scope and applicability of*—*transfer made with previous sanction of the Board*—*requisition by the Board to the Collector and the order of Collector thereon, whether illegal*—*Rule* 3, *whether applies to a sale.*

Held, on the facts and circumstances of the case, that the Bihar State Shia Wakf Board ought not to have sent the requisition under section 36B (1) of the Wakf Act, 1954, to the Collector for the simple reason that the transfer had been made with the prior sanction of the Board. Hence, the requisition sent under section 36B (1) of the Act was illegal and the order of the Collector under section 36B (2) of the Act, was equally illegal;

Held, further, that Rule 3 of the Bihar Wakf Rules, 1973, is limited to three classes of transfers, namely mortage or exchange or lease for more than three years. Rule 3 does not apply to a sale. Hence, it cannot be said that the sale was contrary to rule 3 of the Bihar Wakf Rules, 1973.

Messrs. S. S. Asghar Hussain and *Abdus Salam*, for the petitioner.

None, for the opposite party.

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*Civil Revision nos. 1627, 1640 and 1641 of 1977. Against an ordor of Mr. R.S. Sahi, Third Additional District Judge, Patna, dated the 7th May, 1977.

C. R. 1640/77 :Smt. Parbati Devi and anr.—Opp. party.

C. R. 1641/77 :Rambrichh Prasad and anr.—Opp. party.

B. P. JHA, J.—I shall dispose of these three civil revision petitions by a common judgment as a common point of law arises for consideration in these petitions.

2. These matters relate to a property of the Bihar State Shia Wakf Board (hereinafter referred to as 'the Board'). In the present case, the Board (petitioner) sent a requisition to the Collector for a direction to obtain and deliver possession of the property to it under section 36B (1) of the Wakf Act, 1954 (Act 29 of 1954) (hereinafter referred to as 'the Act'). The Collector under section 36B (2) of the Act directed the opposite party to deliver the property in question to the Board within a period of thirty days.

3. Opposite party no. 1, being aggrieved by the order of the Collector preferred an appeal before the District Judge. The Third Additional District Judge, Patna, set aside the order of the Collector on the ground that the land was transferred to opposite party no. 1 after obtaining prior sanction of the Board.

Section 36A of the Act forbids transfer of any immovable property of a wakf by way of sale, gift, etc. without the prior permission of the Board. It is relevant to quote section 36A of the Act which runs as follows :

> "Notwithstanding anything contained in the wakf deed, no transfer of any immovable property of a wakf by way of—
>
> (*i*) sale, gift, mortgage or exchange; or
>
> (*ii*) lease for a period exceeding three years in the case of agricultural land, or for a period exceeding one year in the case of non-agricultural land or building, shall be valid without the previous sanction of the Board."

5. On a perusal of this section, it is clear that no transfer of any immovable property of a wakf by way of sale or gift or mortgage or exchange or lease for a period exceeding three years in the case of agricultural land or for a period exceeding one year in the case of non-agricultural land or building shall be valid without the previous sanction of the Board.

6. In the present case, it is an admitted position that the property belongs to the Board. Section 36B (1) provides that if any transfer has been made without the previous sanction of the Board, the Board will send a requisition to the Collector for taking necessary action under section 36B (2) of the Act. On receipt of a requisition under section 36B (1) of the Act, the Collector shall direct the person in possession of the property to deliver the property to the Board within a period of thirty days from the date of the service of the order. In the present case, the Collector issued such a direction as envisaged under section 36B (2) of the Act. Opposite party no. 1, being aggrieved by the order of the Collector, preferred an appeal to the district court under sub-section (4) of section 36B of the Act. The district court set aside the order of the Collector. Hence, the Board has moved these civil revision petitions against the appellate court's order.

7. On a perusal of the appellate court's order, it is clear that opposite party no. 2 (Mutawalli) sought permission of the Board to sell the immovable property in question. The Board considered the letter of the Mutawalli and granted permission to sell the immovable property by resolution no. 27 (*v*), dated 24th February, 1974. The Board also communicated the resolution to the Mutawalli (opposite party no. 2). It is also clear from the finding of the appellate court that a notice of the intended sale was published in the Gazette by the Mutawalli. It is also clear from the finding of the appellate court that a letter dated 20th January, 1975 was sent by the Mutawalli to the Board stating therein that all the directions given by the Board had been complied with by the Mutawalli. In view of these findings, the appellate court set aside the order of the Collector issued under section 36B (2) of the Act.

8. In my opinion, the Board ought not to have sent the requisition under section 36B (1) of the Act to the Collector for the simple reason that the transfer had been made with the prior sanction of the Board. Hence, the requisition sent under section 36B (1) of the Act was illegal and the order of the Collector under section 36B (2) of the Act was equally illegal.

9. Learned counsel for the petitioner also contends that the sale was contrary to rule 3 of the Bihar Wakf Rules, 1973 (hereinafter referred to as 'the Rules'). It is relevant at this stage to quote rule 3 (1) which runs as follows :

> "The Board shall not accord sanction to any mortgage or exchange of Wakf property or to any lease thereof for more than three years unless such mortgage, exchange or lease is for an evident advantage of the Wakf concerned or is extremely unavoidable."

10. Under rule 3 (1) of the Rules, the Board shall not grant sanction to any mortgage or exchange or to any lease of the Wakf property for more than three years unless such mortgage, exchange or lease is for the benefit of the Wakf concerned or is extremely unvoidable. Rule 3 is limited to three classes of transfers, namely, mortgage or exchange or lease for more than three years. Rule 3 does not apply to a sale. Hence, I reject the contention of the learned Counsel for the petitioner.

11. In my opinion, the appellate court has not committed any jurisdictional error and, as such, I am unable to interfere with the order in question for the reasons mentioned above.

12. In these circumstances, I uphold the order passed by the appellate court. These three petitions are dismissed, but without any cost.

S. S. Sandhawalia, C. J.—*I agree.*

S. P. J. *Applications dismissed.*

REVISIONAL CIVIL

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

1984

December, 12

BALGOVIND RAUT*

v.

JAGDISH RAUT AND OTHERS

Res judicata—*principle of—judgment-debtor filing an application to pay the decretal amount by instalments on the day auction sale was held—Court allowing the prayer of the judgment-debtor—decree-holders thereafter filing a petition to recall the order—Court recalling the order—application of the decree-holders, whether barred by the principle of* res judicata—*exercise of jurisdiction, whether illegal or occasioning failure of justice.*

Where auction sale took place on 2nd December, 1980, and on the same day the judgment-debtor filed an application to pay the decretal amount by instalments which was allowed by an order dated 10th December, 1980, and thereafter on 10th March, 1981, the decree-holders filed a petition to recall the order dated 10th December, 1980, and the Court below by order dated 14th April, 1981, recalled the same;

Held, that, the Court below erred in recalling the order dated 10th December, 1980, as the application of the decree-holders for recalling the order was barred by the principle of *res judicata*. The order dated 10th December, 1980, was passed after hearing both the parties and the decree-holders did not

*Civil Revision nos. 741, 1099, 1100 and 1103 of 1981. Agrainst order of Mr. M. K. Mishra, Munsif 2nd, Chapra, dated 14th April, 1981.

file any rejoinder to the application filed by the judgment-debtor for fixing the instalments. As the decree-holders did not file any revision petition either against the order dated 10th December, 1980, or against the order dated 11th February, 1981, when the Court below had refused to confirm the sale and to recall the order, the order passed in respect of the instalments had become final between the parties. Hence the court below by its order dated 14th April, 1981, erred in law in exercising the jurisdiction vested in it by law. Apart from this, the order has occasioned a failure of justice and as such, it is fit to be set aside.

Messrs Jagdish Pandey and Shashidhar Prasad Yadav, for the petitioner.

Mr. Ramjee Prasad, for the opposite party.

B. P. JHA, J.—I shall dispose of these four petitions by a common judgment as they arise out of a common order passed by the court below.

2. The simple point for consideration is:

Whether the court below could have recalled the order dated 10th December, 1980?

3. In the present case, auction sale took place on 2nd December, 1980. On the same day, the judgment-debtor-filed an application with a prayer that he may be directed to pay the decretal amount by instalments. The prayer of the judgment-debtor (petitioner) was allowed by an order dated 10th December, 1980

4. On 10th March, 1981, the decree-holders filed a petition to recall the order dated 10th December, 1980, on the ground that there were no decretal dues after the sale had taken place. By the impugned order, the court below recalled the order dated 10th December, 1980.

5. It was contended on behalf of the petitioner that the court below had no jurisdiction to recall the order. It was also contended that the impugned order dated 14th April, 1981, was barred by the principle of *res judicata.*

6 In the present case, the court below refused to confirm the sale by order dated 11th February, 1981 and also refused to recall the order dated 10th December, 1980. In the order dated 11th February, 1981, it was specifically stated that the order dated 10th December, 1980 was passed after hearing both the parties. It has been stated therein that the decree-holders did not file any rejoinder to the application filed by the judgment-debtor for fixing the instalments.

7 In my opinion, the court below erred in recalling the order dated 10th December, 1980 as the application of the decree-holder for recalling the order is barred by the principle of *res judicata*. As the decree-holders did not file any revision petition either against the order dated 10th December, 1980 or against the order dated 11th February, 1981, the order passed in respect of the instalments had become final between the parties. Hence, the court below by its order dated 14th April, 1981 erred in law in exercising the jurisdiction vested in it by law. Apart from this, the order dated 14th April, 1981 has occasioned a failure of justice and, as such, it is fit to be set aside.

8. In this circumstance, I set aside the order dated 14th April, 1981 and affirm the order dated 10th December, 1980. As such, the petitions are allowed and the orders passed in all these petitions are set aside. The parties shall bear their own costs.

S. S SANDHAWALIA, C. J.—I agree.

S. P. J.

Application allowed.

B.S.P. (I.L.R.) 12—Lino—450—

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BSP (I.L.R.) 12—Lino—450