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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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CODE OF CRIMINAL PROCEDURE, 1973—*Contd.*

Code, whether to be established as a condition for acting under section 95(1)— *jurisdiction of the High Court under section* 96(4)—*Penal Code,* 1860 (*Act XLV of* 1860) *section* 295-*A.*

Per Curiam.—What section 95(1) of the Code of Criminal Procedure, 1973, commands is that the State Government has to arrive at an opinion that the publications come within the mischief of the offences specified therein and as a procedural safeguard it requires that the grounds of its opinion must be stated as well. The declaration of forfeiture is consequently not required to be an exhaustive or self-contained document incorporating all the offending material as also each and every fact on which it is based. Any such detailed recitals or contents in a notification are neither mandated by statute nor precedent and would perhaps be incongruous in the nature of the notification envisaged by the statute;

Held, therefore. that section 95(1) of the Code of Criminal Procedure, 1973, does not oblige or mandate that the offending portion of the publications must be quoted varbatim in the declaration of forfeiture or that an exhaustive gist thereof must be incorporated therein. As to the notifications in question, it is plain therefrom that the opinion of the Government that both the publications contained materials which would be an offence under section 295-A of the Indian Penal Code is clear and categoric. Equally the grounds of its opinion are spelt therein as well.

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CODE OF CRIMINAL PROCEDURE, 1973—*Contd.*

The grounds of opinion stated therein show a clear application of mind by the Government pertaining to the objectionable matter, the nature of the derogatory references, the result flowing therefrom with regard to the feelings of the muslim community and the fact that the same amount to an offence under section 295-A of the Penal Code;

Held, further, that all that section 95(1) of the Code of Criminal Procedure, 1973, requires is that the ingredients of the offence should "appear" to the Government as complied with and not that they should be "proved" at the threshold or that the Government should be inflexibly "satisfied" about them. Therefore, the *prima facie* opinion of the Government that the offending publication would come within the relevant section of the Indian Penal Code with its requirements of intent would be adequate hereto enable it to act under section 95(1) of the Code. Herein the general rule that a man is presumed to intend the natural consequences of his act would be attracted and such intention has to be gathered primarily from the language and import of the offending publication and not necessarily by extrinsic evidence;

Held, also, that the jurisdiction of the High Court under section 96(4) of the Code of Criminal Procedure, 1973, is not merely confined to judging the opinion of the Government and whether it could be reasonably arrived at but is much wider in weighing for itself and arriving at its own conclusion (on the basis of the factual statement of the grounds) with regard to the offending

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CODE OF CRIMINAL PROCEDURE, 1973—*Contd.*

publication is to be viewed as a whole and the intent of the author has to be gathered from a broader perspective and not merely from a few solitary lines or quotations. The solitary five line paragraph in 'Vishwa Itihas' in its true context cannot possibly be said to contain matter which would be punishable under the stringent requirements of section 295-A of the Penal Code. The order of forfeiture, therefore, cannot be sustained and was liable to be set aside.

Nana Kishore Singh and another v. *The State of Bihar and another* (1985) I.L.R. 64, Pat. 165

[—2—*section* 164 *sub-section* (1) *and* (2)—*confessional statement of the appellant recorded by the Magistrate—Magistrate not warning the appellant as envisaged under section* 164 *sub-section* (2)—*whether acceptable—Evidence Act*, 1872 (*Central Act no I of* 1872) *section* 27—whether applicable.

Where the Magistrate who recorded the confessional statement of the appellant did not give the warning as envisaged under section 164 sub-section (2) of the Code of Criminal Procedure, 1973 hereinafter called the Code;

Held, that it was incumbent upon the Magistrate under section 164 (2) of the code that before recording the statement of the appellant, under section 164 (1) of the Code ought to have made known to her that the statement made by her may be used against her in support of the guilt. In absence of such warning, the confessional statement by the appellant cannot be said to be clean and readily acceptable.

Where the appellant has shown to the Police some place where trampling of grass and sugar cane plant were found by the Investigating Officer;

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CIVIL WRIT JURISDICTION

Before Lalit Mohan Sharma and *Anand Prasad Sinha, JJ.*

1984,

June, 6.

KAPILDEO NARAIN SINGH*.

v.

DEPUTY COLLECTOR LAND REFORMS AND OTHERS.

Bihar Money Lender's Act, 1975 *(Bihar Act XXII of* 1975) *section* 12—*applicability of—petitioner in possession even after completion of due date in the mortgage deed —effect of—on completion of seven years, whether the mortgage stood redeemed.*

From an Examination of the deed of mortgage it appears that the petitioners entered into possession of the lands in question and appropriated the procedure "in lieu of the mortgage amounts" and even after *Jeth*, 1385 *fasli*, the due date in the mortgage, the petitioners possession continued as mortgagee. The promise to pay the debt is not an unconditional promise on the basis of which the petitioner could have sued for the mortgage money;

Held, that section 12 of the Bihar Money Lender's Act, 1975 shall apply to all cases of mortgages where the creditors are put in possession for appropriating the income of the property in lieu of the debt;

Held, further, that in the present case, on completion of period of seven years in May, 1980, the entire loan got automatically satisfied and the mortgages stood redeemed.

Application under Articles 226 and 227 of the Constitution.

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*Civil Writ Jurisdiction Case no. 2948 of 1983. In the matter of an application under Articles 226 and 227 of the Constitution of India.

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

M/s. Shreenath Singh and *Kalika Nandan*, for the petitioner.

Mr. J. N. Thakur, J. C. to G. P. II, for the State.

Mr. Hari Narayan Singh, for the respondent nos. 3 and 4.

LALIT MOHAN SHARMA, J.—The point involved in this case relates to the interpretation of section 12 of the Bihar Money Lenders Act, 1974. The section deals with the automatic satisfaction of the dues in respect of a usufructuary mortagage after expiry of a period of seven years from the date of execution of the mortgage bond.

2. Each of the respondents 3 and 4 executed a mortgage deed in favour of the petitioner on 29th May, 1973 in respect of certain agricultural lands. The respondents filed separate applications before the respondent no. 2 (Collector within the Act) for evicting the petitioner from the lands. A single case registered as Redemption Suit no. 26 of 1982 was started on their basis. The petitioner objected, but the respondent no. 2 allowed the prayer of the respondents 3 and 4 by order in Annexure 1 to the writ petition. The petitioner appealed before the Land Reforms Deputy Collector, respondent no. 1, but without waiting for its disposal, filed this writ application on 14th July, 1983. The case was admitted on 19th July, 1983. Subsequently, the appeal before the respondent no. 1 was dismissed for default in absence of the parties. The petitioner prays for quashing the entire redemption proceeding.

3. In the original writ petition, several grounds were mentioned in paragraph 2 which are apparently not happily worded. The points urged at the time of hearing of the case, do not appear to have been taken therein. The petitioner later filed an application for amendment of the writ petition and prayed for the grounds mentioned therein to be allowed to be taken.

4. Mr. Shreenath Singh, appearing in support of the writ petition pressed the following points :—

(*i*) Section 12 is *ultra vires* of Article 14 of the Constitution;

(*ii*) The section applies only in case of a usufructuary mortgage as defined by section 58 (*d*) of the Transfer of Property Act and not to any other mortgage merely by reason of the mortgagee being in possession of the mortgaged land and since the mortgages in the present case are anomalous mortgages as defined in section 58 (*g*) of the Transfer of Property Act, the section has no application; and

(*iii*) The application of the respondents should have been dismissed in view of the exemption granted under section 3 by the State Government under notification no. S. O. 207, dated 13th February, 1981.

5. The Act was passed in 1975 with the object to consolidate and amend the law relating to regulation of money lending transactions and to grant relief to the debtors. The relevant portion of section 12 is in the following terms :—

"12. Usufructuary mortgages and their redemption—notwithstanding anything to the contrary contained in any law or anything having the force of law or in any agreement, the principal amount and all dues in respect of a usufructuary mortgage in relation to any agricultural land, whether executed before or after the commencement of this Act, *shall be deemed to have been fully satisfied and mortgage shall be deemed to have been wholly redeemed* on xpiry of a period of seven years from the date of the execution of the mortgage bond in respect of such land and the mortgagor shall be entitled to recover possession of the mortgaged land in the manner prescribed under the rules." (emphasis added).

The State Government has been empowered by section 3 to exempt any class of money lenders from the operation of the provisions of the Act. Section 47 deals with the rule making power of the State Government for carrying out the purpose of the Act.

On the question of vires of the section, Mr. Singh contended that the provision suffers from discrimination in the reverse by ignoring the length of different periods, for which individual mortgagees have in the past remained in possession of the mortgaged lands and the vary-

ing quality of the lands and thus treating all usufructuary mortgages similarly in respect of the quantum of profits realised by the creditor. The validity of the section was examined by five Judges of the Full Bench of this Court in *Madho Singh* vs. *State of Bihar*(1) and it was held that the section was *intre vires*. I, therefore, do not consider it necessary to mention the argument addressed on behalf of the petitioner in any detail. The point having been authoritatively decided by this Court against the petitioner must be over-ruled.

7. Mr. Singh next urged that in view of a prmoise by the respondents to pay off the loan, as included in the mortgage deeds, the transactions must be interpreted as anomalous mortgages and not usufructuary mortgages as defind in the Transfer of Property Act. The expression 'usufructuary mortgage' should be understood in the same sense, because it has not been given a different meaning by the Money Lenders Act. On the interpretation of the mortgage deeds, reliance was placed on the decision in *kangay Gurukkal* v. *Kalimuthu Annavi*(2), *Sheikh Akbar Ali* v. *Sheikh Mafiuddin*(3) *and Rahimuddin Choudhary* v. *Nayan Chand Das*(4).

8. There is no dispute in this case that the petitioner has been in possession of the land since 1973 (there is a statement in the writ application about some Bataidar being in possession, but this plea has not been relied upon on behalf of the petitioner during the argument). The point pressed on behalf of the petitioner is that since there is a statement in the mortagage deeds by the mortgagors that the loan would be paid off, the transactions cannot be held to be usufructuary mortgages.

9. Mr. Shreenath Singh laid great stress on the following recitals in the mortgage deeds which (translated by the Translation Department of this Court) read as follows :—

> (*i*) "Hence, I..... let out in rehan the aforesaid land with possession to this claimant mentioned in column no. 2 of this deed for a consideration of Rs. 13,000 half of which is Rs. 6,500 in Government coins for a period of five

(1) (1978) B.B.C.J. 86 (F. B.).
(2) 27 Mad. 526 (F. B.).
(3) (1942) A.I.R. (Cal.) 55.
(4) (1950) A.I.R. (Assam) 19.

years beginning from the month of Jeth 1380 fasli to the month of Jeth 1385 fasli and mortgage the same....." (emphasis added).

(*ii*) "I shall pay the entire rehan money to the rehandar in one lump sum and I shall enter into seer (exclusive) possession of the rehan property."

It has been urged that in view of the promise to repay the mortgage money and in view of the period of the mortgages having been confined to a term of five years, the transactions are not strictly of usufructuary mortgage as defined in the Transfer of Property Act. Before proceeding further three other terms which also appear relevant in this regard may be considered. The documents stated that the mortgagee should maintain his direct possession of the lands and not permit others to enter into possession and appropriate the produce thereof in the following terms:—

(*iii*) "The rehandar should himself enter into possession and occupation of the said rehan property, cultivate it or get it cultivated by others *and appropriate the entire produce* of the mortgaged property after payment of rent as per laggit of the Zamindar *in lieu of the rehan money* and he should not allow others to enter into possession thereof."

(Emphasis added).

The statement quoted in clause (*ii*) above is immediately followed by the sentence as quoted below:—

(*iv*) "In case of non-payment of the rehan money, these vary writings of this deed shall remain in force exactly in the same way. Whenever after expiry of the due date I shall pay the rehan money, I shall do so at the end of the month of Jeth or any year".

Further,

(*v*) "If due to action of me the executant or of my heirs and on account of diluvion and alluvion by the Ganges the aforesaid rehandar be dispossessed from the rehan property, in that case, rehandar is and shall be competent to realise the entire consideration money....."

10. On an examination of the documents in their entirety, it appears that the petitioner entered into possession of the lands in question and appropriated the produce "in lieu of the mortgage amounts" and even after Jeth 1385 fasli (equivalent to May-June, 1978 A.D.) the petitioner's possession continued as mortgagee. The promise to pay the debt, which has been emphasised by Mr. Singh is not an unconditional promise on the basis of which the petitioner could have sued for the mortgage moneys. This is clear from the statement quoted in clause (*iv*) above. The statement regarding payment is mentioned in the sense in which every debtor including an usufructuary mortgager is liable to discharge his debt. In case of non-payment, the usufructuary nature of the transactions were to continue. I, therefore, do not agree with the petitioner's contention that anomalous mortgages were created in the present case.

11. Assuming in favour of the petitioner that in view of the statement in relation to payment of debt made by mortgagors, the resultant transactions were not usufructuary mortgages within the meaning of the Transfer of Property Act, still it is not possible to exclude the application of Section 12 to them. The Money Lenders Act does not state that a 'usufructuary mortgage' shall be given the same meaning as in the Transfer of Property Act nor does it define the expression in any other manner. The meaning of the word 'usufruct' from which the expression 'usufructuary mortgage' has been derived is stated in the Random House Dictionary thus: The right of enjoying all the advantage deriable from the use of something which belongs to another, as far as is compatible with the substance of the thing not being destroyed or injured. The Shorter Oxford English Dictionary also has given a similar meaning. The question arises as to in which sense the Money Lenders Act has used the expression in section 12. By enacting the section, the legislature has assumed that a creditor in possession of a mortgaged property repays himself the loan along with interest calculated on a reasonable rate by remaining in possession for seven years, and it is therefore unjust and inequitable to deprive the debtor the possession of the mortgaged property after this period. This aspect applies with same force to a case of usufructuary mortgage strictly construed in accordance with the Transfer of Property Act and another mortgage where the creditor is in

possession of the mortgaged property—A recital stating the liability of the debtor for payment of the loan to the creditor does not put the creditor under any disadvantage and does not suggest any ground for differentiating the case from a usufructuary mortgage within the strict terms of the Transfer of Property Act. The object of the Section covers the two classes of cases in the same manner and if the Section is interpreted, as suggested on behalf of the petitioner, it may be rendered *ultra vires* on the ground of illegal discrimination. It is well established that in such a case, the Statute must be interpreted, if that is permissible by its language, in a manner which will uphold its validity. I, therefore, hold that the Section 12 shall apply to all cases of mortgages where the creditors are put in possession for appropriating the income of the property in lieu of the debt.

12. The last point pressed on behalf of the petitioner is based on the notification dated 13th February 1981 exempting under section 3 of the Act such small land holder mortgagees from the operation of section 12 who hold land not more than a particular area. The petitioner claimed to be covered by the notification. It was contended that since the applications in the present case were filed by the respondents in 1982, that is, after coming inoperation of the notification, the applications were not maintainable. In the impugned order, the Circle Officer wrongly assumed that the limitation of the area applied to the mortgagor and not to the mortgagee and on that basis rejected the plea. The argument has, therefore, to be considered on merits.

13. The procedure for resumption of mortgaged property is dealt with in rules 9 and 10 of the Money Lenders Rules, 1977 which became effective on 6th September 1977. The sub-rule (1) of Rules 9 and 10, which are relevant in this regard, are as follows:—

> "9. Procedure in case of resumption of mortgaged property by a mortgagor from the mortgagee under section 12 of the Act.-(1) On the expiry of the period of mortgage as mentioned in section 12 of the Act, the mortgagor shall send a notice in Form M.L. 4 by registered post with acknowledgment due requiring the mortgagee to deliver possession of the mortgaged property within thirty days from the date of notice."

"10. Filing of application by mortgagor to eject the mortgagee in case of the latter's failure to put the mortgagor in possession—(1) If, on the expiry of the period of notice in Form M.L. 4, the mortgagee fails or refuses to deliver possession of the mortgaged property to the mortgagor, the mortgagor shall file an application in Form M.L. 5 to the Collector within whose jurisdiction the mortgaged property or any part thereof is situated, to eject the mortgagee from the mortgaged property."

Mr. Singh contended that the right of the mortgagor is dependant on sending a formal notice under Rule 9 and since this was not done before the notification under section 3 dated 13th February 1981, the petitioner became entitled to the benefit of the exemption. The applications under section 12 filed in 1982 must, therefore, be dismissed. I do not find any merit in this argument. The claim of a mortgagee gets determined by virtue of section 12 of the Act. Without the aid of the rules or notice referred to therein, the right of the mortgagee is completely extinguished by reason of the words in the section quoted in paragraph 5 above and underlined by me. The Rules 9 and 10 merely deal with the procedure for enforcing the right. The proceeding is similar to an execution proceedings. In the present case, on completion of a period of 7 years in May 1980, the entire loans got automatically satisfied and the mortgages stood redeemed. The possession of the petitioner, therefore, was not in pursuance of any lawful claim. Of course, he was not liable to eviction before the service of a formal notice in accordance with the Rules. But that does not clothe him with any right. The notification under section 3 issued in 1981 was not and could not be retrospective in operation. It did not, therefore, unsettle the settled position in regard to the rights and liabilities of the petitioner and the respondent. It follows that the petitioner cannot get any benefit out of the same.

14. For the reasons mentioned above, the writ application fails and is dismissed; but, in the circumstances of the case without cost.

Anand Prasad Sinha, J.—I agree.

R.D. *Application dismissed.*

APPELLATE CRIMINAL

Before Anand Prasad Sinha and Ram Naresh Thakur, JJ.

1984

August, 7

SUGANTI KUMARI*

v.

THE STATE OF BIHAR

Code of Criminal Procedure, 1973 (Central Act no. II of 1974) section 164 sub-sections (1) and (2)—confessional statement of the appellant recorded by the Magistrate—Magistrate not warning the appellant as envisaged under section 164 sub-section (2)—whether acceptable—Evidence Act, 1872 (Central Act no. I of 1872) section 27—whether applicable.

Where the Magistrate who recorded the confessional statement of the appellant did not give the warning as envisaged under section 164 sub-section (2) of the Code of Criminal Procedure, 1973, hereinafter called the Code;

Held, that it was incumbent upon the Magistrate under section 164(2) of the Code that before recording the statement of the appellant, under section 164(1) of the Code ought to have made known to her that the statement made by her may be used against her in support of the guilt. In absence of such warning, the confessional statement by the appellant cannot be said to be clean and readily acceptable.

*Criminal Appeal no. 208 of 1978. From a decision of Shri Akhauri Anjani Kumar Sinha, 1st Additional Sessions Judge, West Champaran, Bettiah, dated 8th August, 1978.

Where the appellant has shown to the Police some place where trampling of grass and sugarcane plant were found by the Investigating Officer;

Held, that this is a type of statement by the accused to the police. Section 27 of the Evidence Act, 1872, is confined to the discovery of material thing and such discovery cannot be said to be within the knowledge of the police but exposed from the information given by the accused. Tramping of plants is such a fact which can be said to be existing within the knowledge of the police while making the inspection of the place of occurrence by way of objective findings.

Appeal by the accused.

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

Mr. Mangal Prasad Mishra, for the appellant.

Mr. Vinod Chandra, for the State.

ANAND PRASAD SINHA, J.—The appellant has been found guilty for the offence punishable under section 302 read with section 34 of the Indian Penal Code and has been sentenced to undergo rigorous imprisonment for life. One Baban Chaudhary had also been put on trial along with the appellant for the same offence, and in the same case, but he has been acquitted.

2. The prosecution case, briefly stated, is that Deopati Kumari, daughter of informant Paras Chaudhary (P. W. 1) had gone to Bahiar for scrapping grass. The appellant was also then in the Bahiar and was scrapping grass. When Deopati Kumari did not return even by 7 P. M., the informant became anxious and he questioned the appellant with regard to the whereabouts of Deopati Kumari. The appellant pleaded complete ignorance. On 3rd September, 1976 the informant had gone to village

Barba, Dhumnagar and Pipra, probably, in search of his daughter but she could not be traced. On 4th September, 1976 one Bansi Nonia had disclosed that some foul smell was coming from a cane field and when the informant with Jagarnath Chaudhary (P. W. 6) Lutaban Nonia and Kishori went there, the dead body of Deopati had been recovered. Necessary information had been given to the concerned police-station on 5th September, 1976. The Sub-Inspector of Police arrived in the village and took up the investigation.

3. Some notable development in the case took place. According to the prosecution, Baban Chaudhary had confessed before Debi Raut, Ghanshyam Pandey and Baldeo Raut accepting his guilt that he along with the appellant had killed Deopati Kumari. Further it appears that on pointing out of the appellant, a sickle had been found from the *Bhansar* of her house.

4. The confessional statement of Baban Chaudhary and the appellant had been recorded by Shri Binodanand Mishra (P. W. 17).

5 Learned Counsel for the appellant has mainly confined his argument on the appreciation of evidence.

6. There is no eye witness of the occurrence. Further it would appear that absolutely no such connecting link is existing indicating close association of the appellant with the deceased whatsoever. The complicity of Baban Chaudhary as claimed by the prosecution is not based upon cogent or reliable material. The only factor which has been picked up for establishing the charge against the appellant being the confessional statement (Ext. 3/1), is too feable to establish the charge. The Magistrate who has recorded the statement had not given the warning which is a legal obligation based upon the principles of justice equity and good conscience. In the instant case, it was incumbent upon the Magistrate that before recording the statement of the appellant, the Magistrate ought to have made known to

her that the statement made by her may be used against her in support of the guilt. In absence of such warning, the alleged confessional statement by the appellant cannot be said to be clean and readily acceptable. In addition, there is another factor worth consideration and that is that the appellant had been produced by the police before the Magistrate and after her statement had been recorded she had been handed over to the police. This is the evidence of the Magistrate. That being so, under this situation the appellant had not been free from police influence and it is necessary that the appellant ought to have been separated from the influence of the police for such period which may be termed reasonable to get free from such influence. In the instant case, it appears that the appellant was not wholly free from the influence of the police and that will make her statement infirm. It is because when an accused apparently is under the influence of the police and there being no material or evidence to indicate before making confessional statement to any Magistrate that precaution had been taken to break the link such confessional statement suffered from such infirmity rendering it suspicious and thus unacceptable.

7 It appears that the appellant had taken the police and had shown some place where trampling of grass and sugarcane plant could be found by the Investigating Officer but this cannot be said to be either discovery or recovery. This is a type of statement by the accused to the police. Section 27 of the Evidence Act is confined to the discovery of maternal thing and such discovery cannot be said to be within the knowledge of the police but exposed from the information given by the accused. Trampling of plants is such a fact which can be said to be existing within the knowledge of the police while making the inspection of the place of occurrence by way of objective findings. The pointing out of place without any material discovery but simply finding of trampling of the plant, is a fact mixed with the statement of the accused. That being so as discussed above, that will not be a part of evidence against the appellant.

8. The claim of the prosecution that a sickle had been recovered from the *Bhansar* of the house of the appellant cannot be said to be a conclusive element or piece of evidence because it appears that in her statement under section 313 of the Code of Criminal Procedure she had stated that, as a matter of fact, she had been coerced and forced by the police to make such statements. However, independent in itself, the finding of the sickle in absence of connecting chains and links cannot be said to be sufficient to fasten the guilt upon the appellant conclusively at all.

9. In the result, there is no legal evidence in support of the charge against the appellant and thus the appeal is allowed, the judgment and order of conviction and sentence passed against the appellant by the trial court is hereby set aside and the appellant is acquitted of the charge. She shall be discharged from the liability of bail bond forthwith.

RAM NARESH THAKUR, J.—I agree.

R. D.

Appeal allowed.

APPELLATE CRIMINAL

Before Anand Prasad Sinha and Ram Naresh Thakur, JJ.

1984

August, 13

GEETA YADAV AND ANOTHER.*

v.

THE STATE OF BIHAR

Penal Code, 1860 (*Act XLV of* 1860), *sections* 302 *and* 304 *Part II—criminal prosecution—intention—element of—mental condition of a criminal, whether relevant and important before and after commission of any crime—sections* 302 *and* 304 *Part II—distinction between.*

Intention is an element which is perceivable by physical conduct of a wrong doer, including, utterances, postures, gestures and the manner of assault. The manner of assault will include the intensity of assault and the type of weapon used. Although striker must know the result of the strike but simply that conduct cannot be conclusive to reflect the intention of the striker. Human mind simplicitor is not an indication of intention as human mind is most unpredictable, neither certain nor specific like the laws of Science. Utterances either by the assailant or the abattor concentrating towards taking life runs parallel to an element of intention. Posture and gesture is not less important. Immediately before the commission of an offence or at the time, either of the two or any one of them reflects abnormal mind (used in the sense that forgets

*Criminal Appeal no. 201 of 1978 from a decision of Shri Radhey Shayam Prasad, Sessions Judge, Samaitstipur, dated the 20th June 1978.

legal obligation and regulation of conduct according to law). Hard and stiff conscience, irresistable impulses and extremely cruel hands expose gesture and posture at the time of commission of a crime. This phenomenon is distinguishable from normal mind. The mental condition of a criminal is extremely relevant and important before and after the commission of any crime. Mental condition and psychology invariably is quite different than what has been at the time of commission of the offence. A wrong doer at the time of commission of a serious offence having been committed in a most dreadful manner armed with deadliest weapon either alone or in company with several such others having a determined intention to commit such crime must exhibit that intention in the shape of utterances, posture and gestures;

Held, therefore, that in the instant case as there was no utterances by either of the appellant, the strike on the head being not respeated, subsequent assault not on the vital part of the body and the weapon used being not very dangerous, the element of intention is lacking. On the contrary, if there would have been any intention to kill there ought to have been such utterances and repetition of the blows on the head thus implementing the intention into physical act.

The sharp distinction between an offence under sections 302 and 304 Part II of the Indian Penal Code is that dividing line which separates an intention not to kill than to take life;

Held, further, that in the facts and circumstances of the present case and on the evidence, it can safely be concluded that Geeta Yadav had no intention to kill although she might be having knowledge that the weapon used and the injuries inflicted might take life. Thus the offence having been committed by Geeta Yadav will be punishable under section 304 Part II and not under section 302 of the Indian Penal Code.

Appeal by the accused persons.

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

M/s. Rajeshwar Dayal and *Rakeshwar Dayal*, for the appellant.

Mr. Vinod Chandra, for the State.

ANAND PRASAD SINHA, J.—Appellant no. 1 Geeta Yadav has been found guilty for the offence punishable under section 302 of the Indian Penal Code and has been sentenced to undergo imprisonment for life. Appellant no. 2 Baleshwar Yadav has been found guilty for the offence punishable under section 302 read with section 109 of the Indian Penal Code and has been sentenced to undergo rigorous imprisonment for life.

2. The prosecution case, briefly stated, is that on 18th March, 1975 at about 8.00 A.M. it was discovered that Sita Yadav P.W. 1 had raised alarm that Khesari crops was being uprooted by the appellant Baleshwar Yadav. On hearing this, Ramawtar Yadav (P.W. 8) and his son Sita Ram who is the deceased arrived at the place of occurrence and the deceased tried to restrain the appellants from uprooting the Khesari crops by catching hold of the *Khesari*. Appellant Baleshwar Yadav had called appellant Geeta Yadav and thereafter Geeta Yadav had assaulted Sita Ram with a *Banda* on his head, upon which Sita Ram Yadav fell down. Thereafter he gave 2-3 *Banda* blows on the leg and back of Sita Ram Yadav. He died thereafter.

3. Necessary information was given to Hassanpur police station at 3.30 P. M. and the Fardbeyan (Ext. 6) of Ram Awtar (P. W. 8) was recorded.

4. It appears that Ram Gulam had two sons Ram Awtar (P.W. 8) and Geeta Yadav (appellant). Ram Awtar Yadav had two sons Sitaram (deceased) and one another. Appellant Baleshwar Yadav is the son of Geeta Yadav.

5. Mr. Rajeshwar Dayal, learned counsel appearing on behalf of the appellants has submitted that the appellants had no intention to kill and the assault was without any such intention. That being so, in the facts and circumstances of the case, appellant Geeta Yadav cannot be said to be guilty under section 302 of the Indian Penal Code, but utmost for the offence under section 304 Part II of the Indian Penal Code. Appellant Baleshwar Yadav had not committed any offence whatsoever at all.

6. Before taking up the discussions of the evidence on the points raised, it will be necessary to indicate the injuries found by Doctor Nashib Lal Jha (P.W. 7). The antemortem injuries found on the body of Sitaram Yadav (deceased) are as follows:—

I. Lacaration 1" × ½" × scalp deep in the middle of the vault.

II. Transverse fracture involving left parietal and left temporal bones in its middle.

III. There is clotted blood in the left temporal ancle.

IV. Rupture of left middle meninjial artery in the cranial cavity resulting with huge accumulation of clotted blood in the extra dural space and pressing on the brain. The brain is pushed towards right side.

V. Crazings on elbows and knees.

VI. Penetrating wound ¼" × ½" × bone deep on the left leg.

From the Doctor's evidence, it appears that injury no. VI had been caused by pointed glass. That injury has been said to be penetrating. Injury nos. I to IV are as a result of injury no. I. The injuries on the leg and thigh are no stated to be such which were responsible for the death.

7. The evidence indicates that only one injury had been given on the head. Although there is an allegation that Geeta Yadav had repeated the blows, but it appears that the injuries were on the leg and thigh. Although injury no. VI has been caused by pointed glass, but there is no evidence that any such weapon had been used by the appellants. The injury on the head had not been repeated. The subsequent injuries, as claimed by the prosecution, were not on the vital parts of the body.

8. Therefore, from the evidence it appears that appellant Baleshwar Yadav had simply called Geeta Yadav. He did not utter any word indicating that Geeta should come with any particular type of weapon. Further Baleshwar had not spoken a single word indicating that he had asked Geeta Yadav to assault. Baleshwar Yadav did not show any physical act even immediately before or during the assault indicating that either he himself or he had asked Geeta to indulge into such overt act or conduct which may bring him under the purview of penal consequences. Even after the assault on the head, Baleshwar had not asked Geeta Yadav to inflict more injury or repeat the injury on the head and even the injuries inflicted on the non-vital part of the body was not at the instance of Baleshwar Yadav. The means of assault was not sharp cutting or sharp pointed weapon like *Bhala*, *Garansa*, *Dagger* and the like, generally used for killing. Injury no. VI is neither consistent with the manner of assault nor weapon used by Geeta Yadav. Geeta had not uttered such word which might have reflected his mind that he had intention to kill.

9. Intention is an element which is perceivable by physical conduct of a wrong doer, including, utterances, postures, gestures and the manner of assault. The manner of assault will include the intensity of assault and the type of weapon used. Although striker must know the result of the strike but simply that conduct cannot be conclusive to reflect the intention of the striker. Human mind simpliciter is not an indication of intention as human mind is most un-predictable, neither cer-

tain nor specific like the laws of Science. Utterances either by the assailant or the abettor concentrating towards taking life runs parallel to an element of intention. Posture and gesture is not less important. Immediately before the commission of an offence or at the time, either of the two or any one of them reflects abnormal mind (used in the sense that forgets legal obligation and regulation of conduct according to law). Hard and stiff conscience, irresistable impulses and extremely cruel hands expose gesture and posture at the time of commission of a crime. This phenomenon is distinguishable from normal mind.

10. The mental condition of a criminal is extremely relevant and important before and after the commission of any crime. Mental condition and psychology invariably is quite different than what has been at the time of commission of the offence. A wrong doer at the time of commission of a serious offence having been committed in a most dreadful manner armed with deadliest weapon either alone or in company with several such others having a determined intention to commit such crime must exhibit that intention in the shape of utterances, postures and gestures.

11. In the instant case the element of intention is lacking. No utterances by either of the appellant, the strike on the head being not repeated, subsequent assault not on the vital part of the body and the weapon used being not very dangerous are relevant facts to indicate that there was no intention to take life. On the contrary, if there would have been any intention to kill there ought to have been such utterances and repetition of the blows on the head thus implementing the intention into physical act.

12. The sharp distinction between an offence under section 302 of the Indian Penal Code and 304 Part II of the Indian Penal Code is that dividing line which separates an intention not to kill than that to take life. On due consideration, I have no hesitation in saying that in the facts and circumstances of the case and on the evidence, it can safely be concluded that Geeta Yadav had no intention to kill although he might be having knowledge that the weapon used and the injuries inflic-

ted might take life. Thus the offence having been committed by Geeta Yadav will be punishable under section 304 Part II and not under section 302 of the Indian Penal Code.

13. Appellant Baleshwar Yadav had not participated in the assault. Baleshwar had not come along with Geeta out of the house which would have indicated a common mind. He had not even asked Geeta to assault. There is nothing to suggest that he had abetted the offence. There is no utterance and physical posture and gesture to suggest that he had intended that the deceased be killed by Geeta Yadav. Under the circumstances, he cannot be said to be guilty of the charge attributed against him.

14. With regard to the sentence, it appears that a sudden quarrel had taken place arising out of a land dispute and that too in between the close relations. The weapon used was neither sharp cutting nor pointed one of very dangerous nature. The occurrence took place in the year 1975 and thus appellant Gita Yadav had to undergo rigorous of criminal prosecution for about nine years as the appeal is being disposed of today. He has already remained in jail for about six years and 4 months. Under all these circumstances, in my opinion, the ends of justice will be sufficiently met if he is sentenced to the period of imprisonment already undergone by him. Accordingly, he is sentenced to the period of imprisonment already undergone by him under section 304 Part II of the Indian Penal Code. He shall be released from the jail custody forthwith, if not required in any other case.

15. In the result, the appeal of Baleshwar Yadav is allowed and the judgment and order of conviction and sentence passed against him by the trial court is hereby set aside and he is acquitted. He will be discharged from the liability of bail bond forthwith. The appeal of appellant Geeta Yadav is hereby dismissed with the modification in the order of conviction and sentenced as indicated above.

I agree.

RAM NARESH THAKUR, J.—I agree.

M. K. C. *Appeal allowed in part.*

CIVIL WRIT JURISDICTION

Before S. Sarwar Ali and Prabha Shanker Mishra, JJ.

1984.

August, 21.

OM PRAKASH CHOUBEY.*

v.

THE DIRECTOR (SECONDARY EDUCATION)-CUM-ADDITIONAL SECRETARY, GOVERNMENT OF BIHAR AND ANOTHER.

Bihar High School (Condition of Service) Rules, 1972—*framed under section* 8(1) *of Bihar High School (Control and Regulation of Administration) Act*, 1960 (*Bihar Act no. XIII of* 1960)—*providing for minimum qualification of teachers—whether survives the repeal by Bihar Secondary Education Board Ordinance*, 1974 (*Bihar Ordinance no.* 112 *of* 1974) *and Bihar Secondary Education Board Act*, 1976 (*Bihar Act no. XXV of* 1976)—*Statutory provision as to minimum qualification of teachers. whether could be altered by executive acts of state—issuance of instructions by executive authorities to regularise recruitment of unqualified teachers—legality of—writ of mandamus, whether could be issued to grant judicial sanction to different circulars regularising appointment of unqualified teachers.*

A persual of the provisions of Bihar Secondary Education Board Ordinance, 1974 repealing the Bihar High Schools (Control and Regulation) Act, 1960 and its successive Ordinances as also Bihar Secondary Education Board Act, 1976 will show that in regard to such matters as appointment including the service conditions of the teachers

*Civil Writ Jurisdiction Case No. 3634 of 1983 and Civil Writ Jurisdiction Case No. 2426 of 1983. In the matter of applications under Articles 226 and 227 of the Constitution of India. C.W.J.C No. 2426 of 1983 Smt. Vimla Pandey—Petr.

of the Non-Government High School which were not specifically provided under such provisions, rule making power was vested in the Board of Secondary Education and the State Government. It is well settled that a rule validly made, becomes a part of the parent Act, and survives the repeal of the Act under which it was framed, if it is not inconsistent with the provisions of the repealing Act and if such a rule can be framed under it;

Held, that Bihar High School (Condition of Service) Rules, 1972 which were framed under section 8(1) of Bihar High Schools (Control and Regulation) Act, of 1960 to the extent they provided for the minimum qualification of the teachers, evidently survive repeal by the Bihar Secondary Board Ordinance, 1974 and by Bihar Secondary Education Board Act, 1976, because no. rules or statutory provisions otherwise created, ever existed causing or creating repugnancy of any kind. Such statutory provisions as to the minimum qualification of the teachers could not be altered by the executive act of the state. The Director of Secondary Education-*cum*-Additional Secretary to the Government in Education Department acted in gross violation of the statutory provisions as contained in Bihar High School (Condition of service) Rules, 1972 by issuing instructions to regularise recruitments of unqualified teachers;

Held, further, that no mandamus can issue to grant judicial sanction to such administrative drifts as shown by respondents in the different circulars issued by them from time to time in regularising appointments of unqualified teachers in the Schools of the State.

Applications under Articles 226 and 227 of the Constitution.

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

Mr. Ashok Kumar Verma, for the petitioner in C.W.J.C. 3634 of 1983.

Mr. S. Hoda S. C. III and *Mr. M. K. Jha, J. C. to S. C. III*, for the respondents in C.W.J.C. 3634 of 1983.

M/s. R. K. Ranjan & U. Prasad, for the petitioner in C.W.J.C. 2426 of 1983.

M/s. R. Prasad and *B. B. Sinha*, for the respondents in C.W.J.C. No. 2426 of 1983.

P. S. MISHRA, J.—These two applications involve a common question whether services of untrained teachers appointed by the sponsors of a High School should be approved by the Secondary Education Board and accordingly taken over by the State Government or not. C.W.J.C. No. 3634 of 1983 relates to a teacher in a High School recognised by the Secondary Education Board on 15th January, 1979. C.W.J.C. No. 2426 of 1983 relates to a teacher of a High School established on 1st January, 1979 and before it could be affiliated/recognised by the Board, Bihar Secondary School (taking over of management and control) ordinance, succeeded by the Bihar Secondary School (taking over of management and control) Act, 1981 came in force.

2. One is required to travel through a jungle of the executive instructions, circulars and orders and the successive Acts, Ordinances, Rules and Regulations to know the methods of recruitment and service conditions of the teachers of the High Schools which were called non-government High Schools until taken over by the State Government, by the Ordinance published on 11th August, 1980. Uncertainties about the services and service conditions of the teachers of such schools still continue. Before I actually deal with the facts of the cases of the two teachers, which are heard by us, I propose to venture to the laws that appear to be relevant. There were no statutory provisions to control and regulate the administration of non-government High/Higher Secondary Schools in the State of Bihar until the Bihar High Schools (control and regulations) Act, 1960. Although there has been a Board of Secondary Education extending recognition to the non-government High Schools, there has been circulars and orders prescribing minimum standard of teaching, conditions of service of the teachers and other category of employees etc. first statutory recognition to the Board, its powers and functions and the rules concerning the service conditions of the teachers came under various provisions of this Act. Section 8 of this Act said that the State Government could, after previous publication and subject to the provisions of Articles 29, 30 and 337 of the Constitution of India make rules not inconsistent with the Act for carrying out the purposes of the Act, sub-section (2) thereof provided that until the State Government made rules the provisions contained in the Bihar Education Code, 7th Edition, as amended

from time to time, and all resolutions and orders of the State Government or of the Director of the Public Instruction, Bihar, a collection of which order was published in the extraordinary issue of the Bihar Gazette of the 23rd March, 1959 and which were enforced on the date of commencement of the Act, would, in so far as they were not inconsistent with the provisions of the Act and the provisions of the Constitution of India relating to schools established and administered by anglo Indians and minorities based on religion and language, be deemed to be the rules made under the Act. The State Government, however, exercised its statutory power to frame service condition rules of the teachers of the schools only in October, 1972 and until its publication in the Bihar Gazette on the 25th of October, 1972 the rules contained in the Bihar Education Code, 7th Edition and published in the Extraordinary issue of the Bihar Gazette of the 23rd March, 1959 held the field. The Act, however, was repealed by an ordinance published on 21st May, 1974 which introduced substantial changes in the powers and functions of the Board, created a service commission for the teachers and made substantial changes in the mode and procedure of recruitment. After a series of successive Ordinance came the Bihar Secondary Education Board Act, 1976. Before however, matters could establise and take shape under its provisions its repeal also came by the Bihar non-government High Schools (Bihar Schools taking over of management and control) Ordinance, 1980. This Ordinance has been succeeded by the Bihar Secondary Education Board (taking over the management and control) Act, 1981.

A Government order bearing No. 5172, dated 7th September, 1955 which had been published in the Bihar Gazette dated 23rd March, 1959 contained the service condition rules including the rules regarding recruitment of the teachers. Rule 2 in the said notification provided that only graduates who were trained and who possessed 5 years teaching experience, or untrained graduates of approved merit with 10 years teaching experience could be considered for appointments as Headmaster and all appointments to the teaching staff would be on probation for a year. This rule also contained:

> "The Headmaster shall be confirmed only when he has passed the departmental examination as laid down in article 285 (5) (*ii*) of the Bihar Education Code. If the Headmaster is untrained, he will have to undergo a short

training course for atleast 6 weeks before confirmation and Assistant teacher shall be confirmed only when he has passed Half Yearly examination or has attended a short training course in teaching for atleast 6 weeks. Graduates qualifications who have passed an examination in English of B.A. standard, may also be considered for appointments as Headmasters provided what otherwise qualify as laid down in this paragraph."

Under various other rules in this notification the power to appoint was given to the Managing Committee, which was required in all cases to give due weight to the qualifications, teaching experience and efficiency of the candidates and required approval of the appointments made by the Managing Committees by the District Education Officer in the case of appointments of Headmasters and by the Subdivisional Education Officer in the case of appointments of Assistant teachers. This notification, however, allowed the Managing committee to appoint as teachers, persons possessing lesser qualifications than graduates and training (Teachers training) was not an essential qualification. Scheme envisaged under this circular held the field until rules framed under section 8(1) of the Bihar High School Act, 1960 known as Bihar High School (condition of service) Rules, 1972 were notified on 18th September, 1972 and published in the Bihar Gazette extraordinary dated 25th October, 1972. Rule 4 of the 1972 rules for the first time, prescribed in some details, the procedure of recruitment of the teachers including the Headmaster and the Assistant Headmaster of a non-government High School. Sub-rules 11, 12 and 13 of rule 4 prescribed, *inter alia*, that the minimum qualification for the post of the Headmaster of a non-government High School would be a trained graduate with 10 years teaching experience, that of the Assistant Headmaster would be a trained graduate with 5 years teaching experience and that of the Assistant teacher would be trained graduate except teachers of the subjects like classies, music and like specialities.

3. The 1960 Act, however, was repealed by the Bihar Secondary Education Board Ordinance, 1974 published on 21st May, 1974 and successive Ordinances and finally by the Bihar Secondary Education

Board Act, 1976. Chapter VI of the Ordinances and the 1976 Act made provisions for the service conditions of the teachers and the non-teaching staff of the Secondary Schools. It contemplated establishment of a teacher's service commission and stated that appointments would be made in accordance with the provisions contained therein but nowhere provided for the minimum qualifications of the teachers. Chapter IX of the Ordinances and the Act contained provisions empowering the State Government to issue directions, and the Board to frame rules and regulations. The rules framed under section 8(1) of the 1960 Act, to the extent they were not inconsistent with the provisions of the Ordinance and the Act, continued to hold the field. I shall deal with this aspect of the law more while discussing the cases in hand, but it appears obvious to me that the recruitments made until the 1972 rules came in force, were required to confirm to the provisions contained in the notification dated 7th September, 1955 and after the enforcement of the 1972 rules in accordance with the provisions contained therein. Untrained teachers including persons having lesser qualifications than graduates could be appointed in the High Schools/Secondary Schools/Higher Secondary Schools so long the rules contained in the notification dated 7th September, 1955 were in force. Since the 1972 rules prescribed a minimum qualification as that of a trained graduate after 25th October, 1972, that is to say the date when the 1972 rules came in force, only trained graduates could be appointed as Assistant teachers except for teaching subjects like classics, music, craft, etc.

4. This scheme posed a problem as to the services of the untrained teachers because there were a number of untrained teachers appointed in the non-government High Schools in ever expanding secondary education in the State and such teachers appointed until 1972 rules came in force, were duly approved by the competent authority as validly appointed teachers by the Managing Committees of the High/ Secondary Schools. Until 1972 rules were enforced, untrained teachers could aspire for appointment as Headmasters, but 1972 rules denied eligibility for appointment as Headmasters to such teachers. Before, however, 1972 rules were enforced a Government resolution bearing no. 2/R 1-01564 E 891, dated 24th March, 1967, stated that no scale of pay for untrained teachers was fixed because the State Government had already decided that no untraintd teacher should be

appointed in High/Secondary Schools. Accordingly the then Director of Public Instructions issued a letter no. 2831, dated 26th July, 1967 stating that services of untrained teachers should not be approved. After 1972 rules were enforced a circular was issued bearing no. 2 B 9-319/73 E 5360, dated 28th September, 1973 which said that when trained teachers were available there was no justification for appointing untrained teachers and no untrained teachers should be appointed in High Schools. It, however, said that in some schools untrained teachers had worked for some years, their scale of pay should be determined on the condition that they would not be confirmed until they would obtain training. Circular issued on 26th July, 1967 by the Director of Public Instructions and the circular issued on 28th September, 1973 by the State Government were inconsonance with the Government's decision not to appoint untrained teachers in High/Secondary schools. Deviation, however, started with a circular issued by the State Government bearing letter No. 2/V 90513/74 E 756, dated 1st February, 1975. It was purportedly issued intending to clarify the Government policy about the approval of the untrained graduate teachers in High/Higher Secondary Schools until 28th September, 1973. This circular said that the services of untrained teachers appointed in recognised High/Secondary Schools until 28th September, 1973 should be approved if prescribed procedure was followed in appointing them. Such teachers, however if they were not within the prescribed number of the sanctioned posts of teachers in a school could be adjusted in the vacancies in other schools. This letter reiterated that services of untrained teachers should not be approved until they become trained. A letter, however, was sent to the Government, Department of Education by the Secretary of the Board of Secondary Education on 16th April, 1975 which stated that the Government had issued order on 28th July, 1973 not to appoint untrained teachers but teachers having qualifications less than that of a graduate, that is to say qualified up to intermediate standard were appointed up to 28th September, 1973 because there was no prohibition on such appointments. This statement in the letter dated 16th April, 1975 was made ignoring the statutory rules which were inforce with effect from 25th October, 1972. The Government's reply to this letter came on 23rd July 1975 stating that teachers appointed up to 28th September, 1973 having qualifications less than graduate would also be governed by the Government letter dated 21st February, 1975. Deviation from the 1972 rules as to the minimum qualification extended up to 28th

September, 1973 was reiterated in a letter bearing no. H/V 90513/74/E 5291, dated 24th November, 1975. In this letter the procedural requirements which were insisted upon in the letter dated 21st February, 1975 were waived. A further deviation came in yet another letter bearing no. H/V 905/74 3213, dated 22nd July, 1976. This letter advocated the cause of teachers appointed in the High /Secondary schools recognised by the Board after 28th September, 1973 but established before 28th September, 1973 and said that untrained teachers appointed in a school which was granted permission of establishment by 28th September, 1973 and recognised by 20th May, 1974 should be approved if they were appointed in sanctioned posts and possessed qualification of a graduate and should be confirmed when they obtain training. This was followed by another Government letter bearing no. H/V 9-513/74 E 1940, dated 18th June, 1977. In this letter even the services of untrained teachers appointed after 28th September, 1973 but before 20th May, 1974 were recognised. It said that although such teachers had no claim yet on humanitarian consideration, their services would be approved subject to the condition that they would become trained within three years of the regularisation of their services. Following the instructions contained in this letter the Board issued a circular on 29th June, 1977 to the same effect. The deadline introduced by the circular dated 18th June, 1977 was transgressed in the case of two teachers appointed in High Schools in Chotanagpur and Santhalparaganas by a letter of the Special Secretary to the Government Department of Education dated 9th January, 1978, but by this letter services of a teacher who possessed I.Sc. qualification was disapproved because the same was contrary to the 1972 rules. Although statutory rules were deviated from, but there was still some attempt to close recruitment of teachers who possessed qualifications less than that of a trained graduate. A circular issued by the State Government bearing letter No. Ex/HV 9-0513/74 E 808, dated 24th February, 1978, however, communicated to all concerned that there were 585 teachers who were working in the schools which were recognised after 21st May, 1974 and the State Government was of the view that their services should be approved on the condition that they would become trained in the year 1978. This was reiterated in yet another letter No. H/V 9-0513/74 E 2814, dated 27th July, 1978 This letter further indicated that the untrained teachers, approved for regularisation of their services were appointed in the schools up to 18th June, 1977.

5. The Government's readiness to accommodate untrained teachers and approve the services of such teachers not possessing the qualification prescribed under the statutory rules, had already leaped into the field in which the statute operated but it received almost complete relaxation in letter no. H/V 90513177 E 944, dated 9th April, 1979 of the State Government. This letter stated that the schools which were granted recognition after 15th October, 1977 were required to give undertaking in writing that they would not be appointing untrained teachers but such ondertakings were not taken from some schools because publication of the said circular took some time. The State Government accordingly decided that services of untrained teachers appointed in such schools should be approved like the services of other untrained teachers. This was followed by yet another circular no. H/90513/742365, dated 24th-25th September, 1979 and circular no. H/V 9-0513—74—757, dated 2nd April, 1980 stating, *inter alia*, that the undergraduates appointed in recognised High/ Secondary schools up to 21st May, 1974 should also be approved if they had graduated by 15th October, 1977 and become trained in 1980-81 session. This was reiterated in the circular of the State Government No. H/V 9-0513/74 E 1081, dated 21st May, 1981.

6. These are only a few of several other circular issued before the nationalisation of the Secondary Education in the State of Bihar. Some circulars have been issued even after the take over of the non-government High Schools. Letter no. 25550—80, dated 19th September, 1981 and letter no. H/V 9-513/74 E-644, dated 9th Septmeber, 1982 are two such letters which, *inter alia*, say that the services of the untrained teachers who were working in the schools which were taken over by the State Government on 2nd October, 1980 would be approved. One is amazed by such flagrant violation of the law. The law on the subject required that a teacher appointed in a High School should posses the minimum qualification of graduation, but undergraduates were appointed and their services were regularised. The law said, only trained teachers should be appointed, but untrained teachers were appointed and the State Government and the Board recognised their services. Law was followed by such deliberate violation, that nothing but expediency mattered. The State and the Board were more than ready to ignore the violation of law by the managing committees of the schools. Manner in which the Department

of Education functioned prompted large number of unqualified teachers to move this Court and some times because the respondents conceded and some times because the law on the subject, was not placed before it, this Court issued directions to regularise their services. Unending stream of cases caused some concern and although school-writs are heard by a Single Judge, these cases have been placed before a Division Bench.

7. Petitioner in C.W.J.C. No. 3634 of 1983 is a graduate. As claimed by him he graduated in the year 1972 and joined as a founder graduate teacher in English in Shri Hanuman High School, Thikhan Bhawanipur (East Champaran) on 2nd March, 1974. He was appointed in the said post by the then Managing Committee of the School. Permission for establishment of the school was granted on 25th January 1974 by the erstwhile Bihar Secondary Education Board. A special Board constituted for examining whether the school fulfilled required conditions or not visited the school and in its report, contained in the letter of the District Education Officer, dated 17th May, 1978, included the name of the petitioner as an Assistant teacher of the school placing him at Sl. No. 10. The School was recognised by the Secondary Education Board by Board's letter No. 1251—57, dated 15th January, 1979. This letter, however, included the names of the trained teachers only numbering 4, as those approved by the Board as teachers appointed in the school. Petitioner and other three untrained teachers of the school filed. Title Suit No. 24 of 1979 on 29th January, 1979 in the court of Munsif at Motihari seeking a declaration that they had a right to continue on their respective posts as Assistant teachers and also praying for injunction. A temporary injunction was granted in their favour by the learned Munsif but the learned Subordinate Judge at Motihari who heard the appeal vacated the order of injunction. The petitioner and other three plaintiffs filed Civil Revision No. 1778 of 1979 in this Court but the same was dismissed on 10th March, 1980. In the meantime, however, the three other untrained teachers who had filed the Title Suit, became trained and the Board approved their services and absorved them as teachers. Petititioner, however, remained untrained and his service had not been recognised by the Board.

8. Petitioner in C.W.J.C. No. 2426 of 1983 was appointed as an Assistant Teacher on 3rd January, 1980 in Girls High School, Hilsa which, as claimed, was established on 1st January, 1979 and applied

for recognition to the erstwhile Bihar Secondary Education Board on 2nd August, 1979. In the meanwhile the Ordinance taking over the management and the control of the school was published in the Official Gazette on 11th August, 1980. The petitioner was I.A. trained having specialised training in cutting and tailoring at Industrial Training Institute, Kanpur. According to her the Managing Committee of the School appointed her as a teacher in the said speciality and confirmed as a permanent teacher with effect from 11th January, 1981. She has claimed that she was appointed against a sanctioned post and worked in the said capacity until she was prevented by the then Secretary of the School from working in the school. The petitioner has also alleged that the respondent no. 9 having qualification of I.A. trained and not appointed against a sanctioned post, has been retained as a teacher but the petitioner has been denied the said appointment.

9. Petitioners in both the cases have prayed for a writ in the nature of mandamus to continue them as duly appointed teachers in their respective schools and pay to them emoluments in accordance with law. Learned counsel appearing on their behalf have contended that the petitioners have been denied their right to continue as teachers and to receive salary in the said capacity in violation of the specific instructions issued in this behalf and submitted that while other teachers similarly appointed, have been acknowledged as duly appointed teachers and continued in their respective posts even after the taking over of the Management of the non-government schools, the respondents have excluded them from the list of the teachers of their respective schools and denied to them equality of opportunity of appointment.

10. I have noted the Circulars and Orders issued from time to time and the Acts and Rules introduced in the field for recruitment of the teachers in non-government schools before and after the taking over of the Managements of such schools by the State Government. Waxing and waning attitude of the respondents in the matter of appointment of the teachers in the non-government High Schools is alone responsible for the petitioner's grievances for they have done everything to avoid any definite course and adherence to law. True, there had been no minimum qualifications prescribed for an Assistant

teacher in a High School under 1955 Rules, but in the rules framed under section 8(1) of the 1960 Act published in the Official Gazette (Extra-Ordinary) on 25th October, 1972 a minimum qualification was prescribed stating in rule 4(13) thereof that except in cases of specialised disciplines like music, craft, classical litrature, etc., minimum qualification of a teacher would be trained graduate. Neither 1960 Act nor rules framed thereunder ever gave to any person power to deviate from the rules as to the minimum qualification of the teachers. The minimum qualification prescribed under 1972 rules, therefore, could not be relaxed either by the State Government or the Board of Secondary Education. Since, however, there have been provisions made as to the appointment of Assistant Headmaster and Headmasters having minimum qualification of trained graduates in the 1972 Rules whereas such appointments could be given even to those who were not trained but simply graduates, before the enforcement of the 1972 Rules some provisions were required to be made for teachers working in the schools so that they could obtain requisite training and qualify themselves for prospective appointments as Assistant Headmasters and Headmasters. When such instructions came to provide to teachers working in the High Schools facilities for training, etc., perhaps, the intentions were obvious and genuine. Attempts not to interfere with the services of the teachers already appointed before 1972 Rules came in force, were/are understandable but in the schools formally coming to exist after the enforcement of 1972 rules, when the question of regularising services of the teachers appointed by the sponsors came up before the Board of Secondary Education and State Government. They issued instructions as if only to accommodate those who were recruited by persons not legally empowered to appoint and of those who were not qualified for such appointments. Once they started doing it those who could not obtain their favour came to the courts in a large number. Some times noticing that persons similarly situate were given regular appointments and invariably because the respondent-State in such cases conceded that the petitioners also were entitled to get their services regularised, this Court in a number of cases issued necessary directions. To mention only a few of such cases which were decided by this Court I may refer to judgments in C.W.J.C. Nos. 413 of 1978 disposed of on 6th September, 1979 by L. M. Sharma, J. 3430 of 1978 disposed of on 7th August 1979 by S. Ali Ahmad, J, 2613 of 1980 disposed of on 6th May, 1983 by R. P. Sinha, J. 159 of 1981 and 160 of 1981 disposed of by B. P. Sinha, J. on 3rd

September, 1983 and 10th September, 1983 respectively and the cases of *Chandra Kumar Chakravarty* Vs. *The Deputy Director of School Education*, *Krishna Prasad* Vs. *The State of Bihar*, *Yogendra Khan and others* Vs. *The State of Bihar and others* (1979 BBCJ 378, 1981 BBCJ 387, 1983 BBCJ 139 respectively). In all these cases the facts noticed are that the petitioners were appointed by the Management of the School on the post of teacher before its recognition by the Board. Circulars prevailing at the relevant time provided that their services were to be recognised if they satisfied the condition that they were appointed as teachers before the recognition and were willing to get themselves trained and the respondents gave to other teachers similarly situate opportunity to continue as teachers subject to their obtaining necessary training/trainings or improving their qualifications. Unfortunately, for this Court at no time relevant rules were brought to its notice and since the respondents extended their favour to some, this Court always thought it proper to give to other complaining of discrimination at the hands of the respondents same benefits. By extending helping hands to those who were recruited in violation of the rules the respondents not only perpetuated and encouraged recourse to appointments in violation of the rules but provided opportunity to those having right links to sponsor such schools, appoint their unqualified favourites and get their services regularised leaving a number of qualified persons on the streets running from department to department and from one employment exchange to another employment exchange for getting their names registered in the list of the unemployed persons. A mere glance to the contents of the Circulars and instructions would convince that a Constitutionally responsible Government of the State and the Board created under a legislative sanction, gave no thought to the rule of law and acted as if their authority accepted no discipline of law. A censor of their conduct, however, is of no help to this Court and the question raised on behalf of the petitioners have to be decided in accordance with law. I have already noted that the cases decided on the point and brought to our notice provide no guidance and perhaps now abstract ligalisim also shall give no help to this Court. It is plain and clear that the petitioners who are not trained graduates, do not possess minimum qualifications for appointment as teachers. Learned counsel appearing for the petitioner in C.W.J.C. No. 3634 of 1983 has, however, submitted that with the repeal of the 1960 Act by the Ordinance published on 21st May, 1974, the rules published in the Bihar Gazette on 25th October, 1972 were also repealed. No rules were

framed either under the Ordinance repealing the 1960 Act and/or its successive Ordinance and the successor Act, namely, the Bihar Secondary Education Board Act, 1976. No such law, therefore, existed which could inhibit the powers of the sponsors/managements of the schools seeking recognition from the Board of Secondary Education to make appointments of persons who were not trained graduates as teachers in the Schools. This argument, however, in my opinion, is not acceptable. A perusal of the provisions of the 1974 Ordinance repealing the 1960 Act and its successor Ordinances as also the 1976 Act will show that in regard to such matters including the service conditions of the teachers of the non-government High Schools which were/are not specifically provided under such provisions, rule making power was/is vested in the Board of Secondary Education and/or the State Government. It is well settled that a rule validly made, becomes a part of the parent Act, and survives the repeal of the Act under which it is framed, if it is not inconsistent with the provisions of the repealing Act and if such a rule can be framed under it. Section 27 of the Bihar and Orissa General Clauses Act provides : where any enactment is repealed and re-enacted by a Bihar Act with or without modification then, unless it is otherwise expressly provided, any appointment, notification, order, scheme, rule, by-law or form made or issued under the repealed enactment shall so far as it is not inconsistent with the provisions re-enacted, continue in force and be deemed to have been made or issued under the provisions or re-enacted unless and until it is superseded by any appointment, notification order, scheme, rule, by-law or form made or issued under the provisions so re-enacted. 1972 Rules which were framed under section 8(1) of the 1960 Act to the extent they provided for the minimum qualification of the teachers, evidently survived the repeal by the Ordinance in the year 1974 and by the Act in the year 1976, because no rules and/ or statutory provisions otherwise created, ever existed causing or creating repugnancy of any kind. Such statutory provisions as to the minimum qualification of the teachers could not be altered by the executive Act of the State. The respondents acted in gross violation of the statutory provisions as contained in the 1972 rules by issuing instructions to regularise recruitments of unqualified teachers. The manner in which the respondents have issued instructions, creates an impression that for them there was no law, managements of non-government High Schools functioned as Jagirdars and distributed appointments in such school like alms.

11. In quite a few Circulars referred to above the reckoning date is mentioned as 28th September, 1973. Although the rules laying down the minimum qualifications had come in force w.e.f. 23rd October, 1972, yet the respondent-State introduced 28th September, 1973 as the date until which appointments of untrained graduates or persons possessing lesser qualifications were acknowledged as valid. However, even this date (28th September, 1973) could not be retained for long and appointments made up to 18th June, 1977 and even thereafter were/have been regularised. It has been contended on behalf of the petitioners that as the respondents have regularised appointments of other teachers who were similarly appointed and possessed lesser qualifications than prescribed, they cannot deny to the petitioners recognition and regularisation of their appointments as well. Force of this argument is acknowledged almost in every case decided until now, as noticed above by me. It shall in no way lie in the mouth of the respondents to say that they cannot give to the petitioners the same treatment which they have given to others similarly situate. Perhaps on this a mandamus should issue. But can a mandamus be issued? In my view, no.

12. A mandamus is issued to enforce performance of a legal duty. In my opinion, the only duty which the respondents were/are required to discharge is to strictly adhere to the provisions of the rules. A Government constitutionally created to exercise executive powers is obliged to act only in accordance with law. It has no authority of its own beyond what is given to it by law. The respondents have failed to perform their duty to act in accordance with law and they have done so by regularising appointments of unqualified teachers and by not insisting to enforce the law. If a mandamus has to be issued, it has to be issued only to ask them to refrain from acting in violation of the law. No mandamus can issue to grant judicial sanction to such administrative drifts as shown by the respondents in the Circulars referred to above and in regularising appointments of unqualified teachers in the schools of the State. Petitioner in C.W.J.C. No. 3634 of 1983 is not qualified for appointment as a teacher. No mandamus, therefore, in my opinion, can issue at his instance. Petitioner in C.W.J.C. No. 2426 of 1983 is also not qualified for appointment as a teacher. There has been some controversy before us, whether on account of her training in cutting and tailoring she quali-

qualified for appointment even under the 1972 rules or not. There is some confusion whether a post of a teacher in Crafts (cutting and tailoring) was in existence in the school in question when the petitioner was appointed or not. If such a post had existed at that time, a question undoubtedly would arise whether the petitioners service was required to be regularised by the respondents or not. On the facts stated before us, the petitioner's appointment in the school is covered by sub-section (3) of section 3 of the Bihar Non-Government High Schools (take over of the management) Act. The petitioner may qualify as a Craft teacher as under 1972 Rules also there has been a provision of such a teacher. Such provisions have been made even under the new rules recently introduced under the Take Over Act of 1981. It is difficult, however, on the facts scantly stated to hold that she was/is qualified for such appointment. In her case, therefore, it is necessary that the respondents should examine whether she is qualified or not and if she is found qualified, her appointment should be regularised in accordance with law.

13. Although no case for issuing a direction to the respondents not to regularise appointments made in violation of rules has been brought before us, I propose to say some words in regard to the legal duty, the respondents are required to perform. Rules relating to the establishment of the High Schools do require conditions to be fulfilled before the schools are recognised and now taken over by the State Government. These rules do prescribe conditions of eligibility, procedure for selection and appointment of teachers in the High Schools. Whatever the variations and changes in the law, conditions of eligibility have been more or less unchanged after the enforcement of the 1972 rules. Should the respondents allow founders or orgnisers of the institutions to impart secondary education without insisting upon their adhering to the minimum conditions of eligibility of the teachers for their appointment to teach different subjects in the

schools ? To answer this question in the affirmative will mean sanctioning a course which shall give to the management of the schools freedom to ignore the law and show in their records appointments of their favourites even though not qualified. Existence of caprice always destroys the rule of law. Merit and standared always suffer when extreneous considerations intervene. It will not be possible for this Court to close its eyes to many violations that the respondents are committing by regularising illegal appointments. It will be sensible for them to refrain from regularising such illegitimate acts which are likely to destroy the very purpose for which the rule of law is established.

14. In the result both the applications that is to say C.W.J.C. No. 3634 of 1983 and C.W.J.C. No. 2426 of 1983 are dismissed but without costs.

S. SARWAR ALI, J.—I agree.

R. D. *Applications dismissed.*

APPELLATE CIVIL

Before S. S. Sandhawalia, C. J. and Syed Shamsul Hasan, J.

1984.

August, 28.

SMT. BABA DAI.*

v.

MUNESHWAR JHA AND OTHERS.

Suits Valuation Act, 1887 (*Act VII of* 1887), *section* 11—*case heard by court lacking in pecuniary jurisdiction—no objection raised—party taking risk of obtaining successful result, whether can raise lack of pecuniary jurisdiction of the court after having lost.*

Once a case is heard by a Court lacking in pecuniary jurisdiction that by itself would not render the decree a nullity unless prejudice is caused in the light of the suits valuation Act;

Held, therefore, that in the instant case having failed to raise any objection to the District Judge hearing the appeal and having ventured to take the risk of obtaining a successful result, it is not open to the appellant now to raise the lack of pecuniary jurisdiction of the appellate court as a point of law without being able to show that they suffered prejudice as required by section 11 of the suits valuation Act.

Case laws discussed.

Appeal by the defendant.

*Appeal from Appellate Decree No. 9 of 1976. Arising out of a decision dated 26th of September, 1975 passed by Shri Jaleshwar Nath, 1st Additional District Judge Saharsa passed in T. A. No. 8 of 1974.

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

Mr. Narayan Singh for the appellant.

M/s. Daman Kant Jha, Nirmal Kr. Sinha and Ashok Kumar Sinha for the respondents.

S. S. HASAN, *J.*—This is an appeal by the defendant in a suit for partition of the joint properties consisting of lands and for an allotment of separate areas on the basis of half share in the family properties. The lands are situated in village Chandol Barahi in the district of Saharsa. The suit was dismissed but the appeal by the plaintiffs was allowed leading to the present second appeal.

2. A very short question was raised in this appeal. It was contended by the appellant that the first appellate court had no jurisdiction to hear and dispose of the appeal because the admitted value of the property involved in the suit was Rs. 10,000 and that was the value given in the plaint and the grounds of appeal in the lower appellate court.

3. The matter was referred to a division Bench by me in view of the fact that two decisions of this Court reported in A.I.R. 1949 Patna, page 278 and A.I.R. 1918 Patna, page 71 needed a deeper examination in the light of the submission of the learned counsel for the appellant that Section 11A of the Suit Valuation Act does not apply as the valuation of the property in the suit was not increased. Learned counsel for the appellant placed reliance on A.I.R. 1918 Patna, page 71 to submit that if the value of the property in the suit and the appeal is beyond the pecuniary jurisdiction of the court concerned, the decree so passed, shall be void and no amount of consent or acquiescence will save the decree from the vice of nullity. The passage relied upon is as follows:—

> "Where there is an inherent want of jurisdiction, the consent of parties cannot confer jurisdiction and objection can be taken any time. Where a court

has no inherent jurisdiction to try a case it cannot pronounce any decree and if it does pronounce a decree that decree is null and void".

In reply however a full Bench decision of this court reported in 1949 Patna, page 278 is cited by the learned counsel for the respondents. After an elaborate discussion of all the aspects involved the Hon'ble Sinha, J as he then was, comes to the following conclusions:—

"In view of these considerations, I have come to the following conclusions: (1) That the judgment of the trial court in this case was not vitiated by any error of jurisdiction as a result of the under valuation. (2) That the judgment of the lower appellate court are not wholly void but only viodable on the appellants showing that they are erroneous in fact or in law, and that thus the appellants have been prejudiced in the disposal of the appeal on merits. (3) That simply because the lower appellate court had no pecuniary jurisdiction over the appeal, which should have been heard as a first appeal, in this court, would not by itself amount to prejudice in the disposal of the case on merits. (4) That the established practice of this court to treat such a second appeal as the present as a first appeal for all purposes, including those of court fees, is not in accordance with the provisions of the Suits Valuation Act or the Court-fees Act. I would, therefore, answer the question under reference in the negative".

4. The second third conclusions are relevant for the purpose of this application. Undoubtedly in view of these conclusion, A.I.R. 1918 Patna page 71 stands impliedly overruled. Learned counsel for

the appellant submitted that the aforesaid decision has no application to the facts of this case because in the instant case there is no doubt that the court hearing the appeal was not in doubt with the pecuniary jurisdiction in view of the admitted valuation of the property in suit. But in the case of *Ramdeo Singh and Others*-versus-*Raj Narain Singh and another*(1) the court trying the suit had jurisdiction to try the matter on the basis of the valuation given by the parties which was found later to be inadequate and had to be increased. In my view this distinction on facts does not affect the conclusions on law arrived at in the Full Bench decision of this Court reported in 1949 Patna page 278. I have no manner of doubt that the Full Bench has laid down the law in this regard and has held that once a case is heard by a court lacking in pecuniary jurisdiction that by itself would not render the decree a nullity unless prejudice is caused in the light of section 11 of the Suits Valuation Act. I may also quote another passage from the aforesaid Full Bench decision which reads as follows:—

> "Those observations of their Lordships of the Calcutta High Court, in my opinion, do not apply to the facts of the present case, inasmuch as those observations were made in relation to a litigant who was not a party to the decree which was impugned as void for want of pecuniary jurisdiction. In the present case the appellants were defendants to the suit, and could and should have raised, at the earliest opportunity, an objection to the under valuation. They have taken a judgment against themselves. Is it open to them to ignore that judgment as a mere nullity? In my opinion, it is not".

Another decision intimately related to the question in hand is A.I.R. 1954 S.C. page 340. Succinctly stated it has held that although the fundamental law is that the court cannot be endowed with jurisdiction by consent of parties and such point could be raised at any stage of the proceeding, yet considering this aspect along with section 11 of the Suits Valuation Act, the lack of pecuniary jurisdiction cannot be raised as a point unless prejudice is caused. Paras 6 and 7 of the decision are cited below:—

> "The answer to these contentions must depend on what the position in law in when a court entertains a suit or an appeal over which it has no jurisdiction, and what the

(1) (1949) A.I.R. (Pat.) 278.

effect of section 11 of the Suits Valuation Act is on that position. It is a fundamental principle well established that a decree passed by a court without jurisdiction is a nullity, and that its invalidity could be set up whenever and wherever it is sought to be enforced or relied upon, even at the stage of execution and even in collateral proceedings. A defect of jurisdiction whether it is pecuniary or territorial, or whether it is in respect of the subject matter of the action, strikes at the very authority of the Court to pass any decree and such a defect can not be cured even by consent of parties. If the question now under consideration is to be determined only on the application of general principles governing the matter, there can be no doubt that the District Court of Monghyr was 'coram non judice', and that its judgment and decree would be nullities. The question is what is the effect of section 11 of the Suits Valuation Act on this position".

"Section 11 enacts that notwithstanding anything in section 578 of the Code of Civil Procedure an objection that a court which had no jurisdiction over a suit or appeal had exercised it by reason of over valuation or under valuation, should not be entertained by an appellate court, except as provided in the section. Then follow provisions as to when the objections could be entertained, and how they are to be dealt with. The drafting of the section has come in—and deservedly—for considerable criticism; but amidst much that is obscure and confused, there is one principle which stands out clear and conspicuous. It is that a decree passed by a court, which would have had no jurisdiction to hear a suit or appeal but for over-valuation or under-valuation, is not to be treated as, what it would be put for the section, null and void, and that an objection to jurisdiction based on over valuation or under-valuation, should be dealt with under that section and not otherwise."

The reference to section 578, now section 99, C.P.C., in the opening words of the section is significant. That section, while providing that no decree shall be reversed or varied

in appeal on account of the defects mentioned therein when they do not affect the merits of the case, excepts from its operation defects of jurisdiction. Section 99 therefore gives no protection to decrees passed on merits, when the Courts which passed them lacked jurisdiction as a result of over valuation or under-valuation. It in with a view to avoid this result that section 11 was enacted. It provides that objections to the jurisdiction of a court based on over valuation or under-valuation shall not be entertained by an appellate court except in the manner and to the extent mentioned in the section. It is a self contained provision complete in itself, and no objection to jurisdiction based on over valuation or under valuation can be raised otherwise than in accordance with it.

With reference to objections relating to territorial jurisdiction section 21 of the Civil Procedure Code enacts that no objection to the place of suing should be allowed by an appellate or revisional Court, unless there was a consequent failure of justice. It is the same principle that has been adopted in section 11 of the Suits Valuation Act with reference to pecuniary jurisdiction. The policy underlying sections 21 and 99, C.P.C. and section 11 of the Suits Valuation Act is the same, namely, that when a case had been tried by a Court on the merits and judgment rendered, it should not be liable to be reversed purely on technical grounds, unless it had resulted in failure of justice, and the policy of the legislature has been to treat objections to jurisdiction both territorial and pecuniary as technical and not open to consideration by an appellate court, unless there has been a prejudice on the merits. The contention of the appellants, therefore, that the decree and judgment of the District Court, Monghyr, should be treated as a nullity cannot be sustained under section 11 of the Suits Valuation Act".

Examining once again the decision reported in 1918 Patna page 71 in the light of the aforesaid Supreme Court decision, I have no hesitation in holding that the Patna case merely states the fundamental aspect without considering the effect of section 11 of the Suits Valuation Act.

5. I have, therefore, no hesitation in holding that having failed to raise any objection to the District Judge hearing the appeal and having ventured to take the risk of obtaining a successful result, it is not open to the appellant now to raise the lack of pecuniary jurisdiction of the appellate court as a point of law without being able to show that they suffered any prejudice as required by section 11 of the Suits Valuation Act. I may also state that the judgment of the appellate court was not assailed on merit within the scope required by sections 100 and 103 of the Code of Civil Procedure. No other error of law was pointed out nor was anything brought to our notice which would indicate to show that the appellant suffered any prejudice on merit.

6. In the result, the aforesaid appeal is dismissed with cost.

S. S. SANDHAWALIA, C. J.—I agree.

M. K. G. *Appeal dismissed.*

SPECIAL BENCH

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

1984

September, 4.

NAND KISHORE SINGH AND ANOTHER*

v.

THE STATE OF BIHAR AND ANOTHER

Code of Criminal Procedure, 1973 (Act II of 1974) sections 95(1) and 96(4) scope and applicability of—grounds of opinion of the Government in the notifications, whether necessary—notifications, whether must bear a verbatim record of the forfeited materials or give a detailed gist thereof—mens rea of both malicious and deliberate intent within the ambit of section 295-A of the Penal Code, whether to be established as a condition for acting under section 95(1)—jurisdiction of the High Court under section 96(4)—Penal Code, 1860 (Act XLV of 1860) section 295-A.

Per Curiam.—What section 95(1) of the Code of Criminal Procedure, 1973, commands is that the State Government has to arrive at an opinion that the publications come within the mischief of the offences specified therein and as a procedural safeguard it requires that the grounds of its opinion must be

*Criminal Miscellaneous nos. 10502 and 11851 of 1983. In the matter of applications under section 96 of the Code of Criminal Procedure.

Cr. Misc. 11851/1983 Suresh Kumar—Petitioner.

stated as well. The declaration of forfeiture is consequently not required to be an exhaustive or self-contained document incorporating all the offending material as also each and every fact on which it is based. Any such detailed recitals or contents in a notification are neither mandated by statute nor precedent and would perhaps be incongruous in the nature of the notification envisaged by the statute.

Held, therefore, that section 95(1) of the Code of Criminal Procedure, 1973, does not oblige or mandate that the offending portion of the publications must be quoted verbatim in the declaration of forfeiture or that an exhaustive gist thereof must be incorporated therein. As to the notifications in question, it is plain therefrom that the opinion of the Government that both the publications contained materials which would be an offence under section 295-A of the Indian Penal Code is clear and categoric. Equally the grounds of its opinion are spelt therein as well. The grounds of opinion stated therein show a clear application of mind by the Government pertaining to the objectionable matter, the nature of the derogatory references, the result flowing therefrom with regard to the feelings of the muslim community and the fact that the same amounts to an offence under section 295-A of the Penal Code.

Harnam Das v. *State of Uttar Pradesh*(1),

State of Uttar Pradesh v. *Lalai Singh Yadav*(2), relied on.

Held, further, that all that section 95(1) of the Code of Criminal Procedure, 1973, requires is that the ingredients of the offence should "appear" to the Government as complied with and not that they should be "proved" at the threshold or that the Government should be inflexibly "satisfied" about

(1) (1961) A. I. R. (S.C.) 1662.
(2) (1977) A. I. R. (S.C.) 202.

them. Therefore, the *prima facie* opinion of the Government that the offending publication would come within the relevant section of the Indian Penal Code with its requirements of intent would be adequate here to enable it to act under section 95(1) of the Code. Herein the general rule that a man is presumed to intend the natural consequences of his act would be attracted and such intention has to be gathered primarily from the language and import of the offending publication and not necessarily by extrinsic evidence.

Wallace-Johnson v. *The King*(1), *Kali Charan Sharma* v. *Emperor*(2), relied on.

Held, also, that the jurisdiction of the High Court under section 96(4) of the Code of Criminal Procedure, 1973, is not merely confined to judging the opinion of the Government and whether it could be reasonably arrived at but is much wider in weighing for itself and arriving at its own conclusion (on the basis of the factual statement of the grounds) with regard to the offending publication, and whether the same comes within the ambit of punishability under the relevant section. Therefore, in the *ultimo ratio* it is the satisfaction of the High Court alone whether the offending publication is one which comes within the ambit of the relevant punitive section of the Penal Code which would be conclusive.

Applying the above and testing the two cases (Criminal Miscellaneous nos. 11851 and 10502 of 1983) on their anvil;

Per Curiam.—Held, in relation to the relevant writing in the book entitled "Madhyakalin Arab" in Criminal Miscellaneous no. 10502 of 1983, that, though marginally some shelter is sought to be taken under the opinion of foreign historians,

(1) (1940) Appeal Cases 231 at 241.
(2) (1927) A.I.R. (All.) 649.

the author herein in his own personal assessment has categorically projected the personal and private life of the Prophet in terms patently derogatory and denigratory and the offending passages would squarely come within the punitive ambit of section 295-A of the Indian Penal Code and consequently the Governmental action in the declaration of forfeiture was more than amply satisfied.

Per Majority (S. Sarwar Ali, J., Contra).—*Held*, in relation to the relevant offending paragraph in the book entitled "Vishwa Itihas" in Criminal Miscellaneous No. 11851 of 1983 that a reference to this paragraph would indicate that apparently this passage was sought to be viewed isolately and as if completely torn from its context. It is well settled that the offending publication is to be viewed as a whole and the intent of the author has to be gathered from a broader perspective and not merely from a few solitary lines or quotations. The solitary five line paragraph in 'Vishwa Itihas' in its true context cannot possibly be said to contain matter which would be punishable under the stringent requirements of section 295 A of the Penal Code. The order of forefeiture, therefore, cannot be sustained and was liable to be set aside.

Applications by the publishers of the concerned books.

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

Messers Nagendra Roy, A. K. Thakur and *P. K. Shahi*, for the petitioners.

Mr. Daman Kant Jha, Government Advocate, with Mr. Lala Kailash Bihari Prasad in Cr. Misc. no. 11851/83 and *with Mr. G. P. Jaiswal* in *Cr. Misc. no.* 10502/83, for the opposite party.

S. S. SANDHAWALIA, C. J.—What are the acid tests for the satisfaction of the High Court under section 96(4) of the Code of Criminal Procedure, 1973 for either upholding or setting aside the declaration of forfeiture made by the Government under section 95(1) of the Code has come to be the core question in these two closely connected cases before this Special Bench.

2. The foundational facts may be noticed from Criminal Miscellaneous no. 11851 of 1983 (Suresh Kumar *v.* State of Bihar and another). The petitioner Suresh Kumar herein is the publisher of a book "Vishwa Itihas" in Hindi authored by Sri Dhanpati Pandey, Reader, Post Graduate Department of History, Bhagalpur University, Bhagalpur. It has been averred that Sri Dhanpati Pandey is an author of considerable repute having a large number of books and publications to his credit. Earlier in 1972 he had written a book named "Vishwa Itihas Darshan (Pratham Bhag)" in Hindi as a Text Book for Intermediate of Arts students of the Bhagalpur University, which was in accord with the Syllabus of the University at the relevant time. In Chapter VIII he had written about the Islamic History. A revised edition of the said book "Vishwa Itihas (Pratham Bhag)" was later written again by the aforesaid author in accord with the Syllabus of the Intermediate Board and was published by the petitioner in the year 1982. It is the case that the author in writing about Islam religion had relied on the authoritative historical works like the "Outline of History" by H. G. Wells, the "Mohammed at Madina" by W. M. G. Watt and the Middle East by S. N. Fisher, etc. In discussing the Muhammadan religion he had used his dispassionate expertise as a teacher of history and in fact had praised Prophet Hazrat Mohammad when there was occassion to do so. On the 29th of October, 1983, the opposite party State of Bihar issued a notification under section 95(1) of the Code of Criminal Procedure (hereinafter referred to as "the Code") forfeiting every copy of the aforesaid book on the ground that it contained objectionable matters and derogatory references about Prophet Hazrat Mohammad

which outraged the religious feelings of the muslim community and was an offence punishable under section 295A of the Indian Penal Code. This declaration of forfeiture is sought to be challenged on a variety of grounds to which a reference will be made hereafter.

3. In the counter-affidavit on behalf of the respondent State it has been specifically averred that the Government is satisfied that the impugned publication contained objectionable matters and derogatory references against Prophet Hazrat Mohammad which outraged the religious feelings of the muslim community and which is an offence under section 295A of the Penal Code and consequently the requirements of section 95(1) of the Code are amply satisfied. Their stand is that the references made against Prophet Hazrat Mohammad specifically and pointedly at page 174 of the said book are grossly offensive and provocative and deliberately intended to outrage the feelings of the muslim community. An English rendering of the relevant portion of the aforesaid book is Annexure 'A' to the counter-affidavit. It is then the case that despite the author's reliance on eminent foreign historians, the fact remains that his comments about Prophet Hazrat Mohammad in the book have hurt the beliefs and sentiments of the muslim community and even a teacher can have no licence to wound such religious susceptibilities. Lastly, it is alleged that the muslim community all over the country had shown resentment by chalking out agitational programme which had all potentialities of vitiating the communal atmosphere in the State and even posing a serious threat to public peace and tranquility. The legal grounds raised on behalf of the writ petitioner are strongly controverted.

4. In the connected Criminal Miscellaneous no. 10502 of 1983 the petitioner is again the publisher of the offending publication "Madhyakalin Arab" in Hindi which is also authored by Sri Dhanpati Pandey aforesaid. The said book was declared forfeited by the Government by the notification dated the 15th of September, 1983, on the ground that it contained

objectionable matters and derogatory references about Prophet Hazrat Mohammad which outraged the religious feelings of the muslim community and was otherwise punishable under section 295A of the Indian Penal Code.

5. The stand of the State herein is identical with the earlier case and it is specifically pointed out that the references made against Prophet Hazrat Mohammad at pages 55—57 of the book "Madhyakalin Arab" are grossly offensive and provocative and deliberately intended to outrage the feelings of the muslim community.

6. Now it seems to be plain from the aforesaid resume that herein there is the closest similarity of facts in both the petitions and equally a virtual identity of the issues of law arising therefrom. Mr. Nagendra Roy, learned counsel appearing for the petitioners, and Mr. Daman Kant Jha, the learned Government Advocate appearing for the State, who are representing the parties in both the cases, are, therefore, agreed that this judgment would govern them.

7. Since the primal issues herein turn on the language and import of sections 95 and 96 of the Code of Criminal Procedure, 1973, it becomes necessary to advert to their legislative history for the correct perspective for their interpretation. This is more so because the applicability of precedent under the earlier law would be a threshold question. Now the Code of Criminal Pricedure, 1898 as originally enacted, did not apparently contain any corresponding provision for a declaration of forfeiture of prescribed publications. However, by Act 14 of 1922, sections 99A, 99B, 99C, 99D, 99E, 99F and 99G were inserted in the Code of Criminal Procedure, 1898 (hereinafter refeured to as 'the old Code). These empowered the State Government to declare certain publications forfeited and to issue

search warrants for the same and the consequential procedural requirements of an application to the High Court to set aside the order of forfeiture, the evidence to be led in such a proceeding as also the mode and manner of hearing of such an application which was statutorily prescribed to be heard by a Special Bench of three Judges of the High Court. When the old Code was sub-planted by the Code of Criminal Procedure, 1973 (hereinafter referred to as "the Code"), the provisions of sections 99A to 99G were not retained in their original form but substituted by sections 95 and 96 of the Code. A comparison of these provisions would indicate that though the language is not literally in *pari materia*, yet in effect the sum and substance of the earlier law has been reincorporated with necessary changes with an eye to better draftsmanship. Thus section 95(1) and (2) correspond to section 99(1) and (2) of the old Code and section 95(3) is in *pari materia* with the earlier section 99G. Similarly, sub-sections (1), (2) and (3) of section 96 of the Code are either in *pari materia* or in the closest similarity to sections 99B, 99C and 99E of the old Code respectively. Lastly, sub-sections (4) and (5) of section 96 correspond to sections 99D(1) and 99D(2) of the old Code. It, therefore, seems to follow inexorably that barring marginal consequential changes and structural recasting of the provisions, the earlier law under the old Code has been maintained intact. Therefore, the precedents of the final Court with regard to the corresponding provisions of the old Code are not only attracted but wherever they cover the issue on all fours, they have to be treated as binding under the Code as well. The legal issue arising herein has, therefore, to be determined in the light of and within the parameter of the earlier precedent wherever it governs the same.

8. Having thus noticed the historical legal backdrop, one may now turn to the impugned declaration of forfeiture in the present cases. Since a considerable amount of the submissions of the Learned Counsel turn around the

very language of the notifications, these may be quoted at the outset:

"The 29th October, 1983"

S. O. 1324.—Whereas it appears to the State Government that the book entitled "Vishwa Itihas" (Pratham Bhag) written by Shri Dhanpati Pandey, Reader, Post-Graduate Department of History, Bhagalpur University, Bhagalpur, printed by Shri Shyam Bihari Press, Patna-4 and Published by Ganga Pustakalay, Patna-4, *contains objectionable matters and derogatory references about Prophet Hazrat Mohammad which outrage the religious feelings of the Muslim Community and is an offence punishable under section 295A of the Indian Penal Code.*

Now, therefore, in exercise of the powers conferred by sub-section (1) of section 95 of the Code of Criminal Procedure, 1973, the State Government is pleased to declare every copy of the aforesaid book 'Vishwa Itihas' to be forfeited to the Government."

"The 15th September, 1983"

S. O. 1129.—Whereas it appears to the State Government that the book entitled 'Madhyakalin Arab' written by Shri Dhanpati Pandey, Reader, Post-Graduate Department of History, Bhagalpur University, Bhagalpur, printed by Suryoday Press Chak-musallahpur, Patna and published by Janki Prakashan, Ashok Raj Path, Patna/1979 Ganjmirkhan, Dariyaganj, New Delhi, its Chief distributor being Janki Prakashan, Ashok Raj Path, Patna, *contains objectionable matters and derogatory references about Prophet Hazrat Mohammad which outrage the religious feelings of the Muslim Community and is an offence punishable under section 295A of the Indian Penal Code.*

Now, therefore, in exercise of the powers conferred by sub-section(1) of section 95 of the Code of Criminal Procedure, 1973, the State Government is pleased to declare every copy of the aforesaid book "Madhyakalin Arab" to be forfeited to the Government."

9. Now the frontal challenge raised at the outset by learned counsel for the petitioners, Mr. Nagendra Roy, resting as it does on the language of section 95 (1), ("the State Government may by notification state the grounds of its opinion") was that the aforesaid notifications did not contain the grounds of opinion of the Government but in fact recorded only the bare opinion itself. On this premise it was contended with persistence that a failure to state the grounds of its opinion by tht State Government would *per se* vitiate the said action and equally the notifications. Elaborating his submission, the learned counsel sought to highlight the fact that neither the offending portion of the forfeited publications had been quoted in the notification nor, in the alternative, a detailed gist thereof had been given therein and that even specific references to pages and paragraphs had not been made in order to identify the relevant passages. Primary reliance was placed on the case of *Harnam Das* v. *State of Uttar Prasad* (1) and on the case of Narayan Das Indurkhya v. *The State of Madhya Pradesh*(2).

10. As stands already noticed, the submission aforesaid rests primarily on the very language of the statute and it is therefore, apt to quote the relevant parts of sections 95 and 96 of the Code for facility of reference:

"95. Power to declare certain publications forefeited and to issue search-warrants for the same.—(1) Where—

(*a*) any newspaper, or book, or

(*b*) any document,

(1) (1961) A.I.R. (S.C.) 1662.
(2) (1972) A.I.R. (S.C.) 2086.

Wherever printed, appears to the State Government to contain any matter the publication of which is punishable under section 124-A or section 153-A or section 153-B or section 292 or section 293 or section 295-A of the Indian Penal Code (45 of 1860) the State Government may, by *notification stating the grounds of its opinion*, declare every copy of the issue of the newspaper containing such matter, and every copy of such book or other document to be forfeited to Government, and thereupon any police officer may seize the same wherever found in India and any Magistrate may by warrant authorise any police officer not below the rank of sub-inspector to enter upon and search for the same in any premises where any copy of such issue or any such book or other document may be or may be reasonably suspected to be.

"96. Application to High Court to set aside declaration of forfeiure.—(1) Any person having any interest in any newspaper, book or other document, in respect of which a declaration of forfeiture has been made under section 95, may, within two months from the date of publication in the official Gazette of such declaration, apply to the High Court *to set aside such declaration on the ground that the issue of the newspaper, or the book or other document, in respect of which the declaration was made, did not contain any such matter as is* referred *to in sub-section* (1) *of section* 95.

(2) .....

(3) .....

(4) The High Court shall, if it is not satisfied that the issue of the newspaper, or the book or other document, in respect of which the application has

been made, *contained any such matter as is referred to in sub-section* (1) *of section* 95, *set aside the declaration of forfeiture.*"

11. Before appraising and evaluating the aforesaid contention of the learned counsel for the petitioners, it seems incumbent to first determine in a way its very maintainability. A reference to sub-sections (1) and (4) of section 96 would indicate that the ground for setting aside the order in the application and the satisfaction of the High Court is to be directed to the issue whether the offending publications did contain any such matter as is referred to in sub-section (1) of section 95 and thus comes within the mischief of one or other of the sections of the Penal Code specified therein. Earlier there had existed a considerable body of judicial opinion that both the nature of the challenge in the application against the declaration of forfeiture as also the satisfaction of the High Court were limited only to the ground that such publications did not in fact contain any such matter which may be an offence under the relevant section of the Penal Code. This seems manifest from the powerful dissenting opinion of Das Gupta, J. in *Harnam Das's case* (*supra*). However, the controversy on this point it set at rest by the majority opinion of Sarkar, J. in the said case wherein it was held as under:

> "What then is to happen when the Government did not state the grounds of its opinion? In such a case if the High Court upheld the order, it may be that it would have done so for reasons which the Government did not have in contemplation at all. If the High Court did that, it would really have made an order of forfeiture itself and not upheld such an order made by the Government. This, as already stated, the High Court has no power to do under section 99-D. It seems clear to us, therefore, that in such a case the High Court must set aside the order under section 99-D, for it cannot then be satisfied that the grounds

given by the Government justified the order. You cannot be satisfied about a thing which you do not know. This is the view that was taken in *Arun Ranjan Ghose* v. *State of West Bengal*, 59 Cal. W. N. 495 and we are in complete agreement with it. The present is a case of this kind. We think that it was the duty of the High Court under section 99-D to set aside the order of forfeiture made in this case."

In view of the categoric declaration of the law it must be held that the learned Counsel for the petitioners is entitled to raise the issue and challenge the notifications on the plea of the alleged total absence of the grounds of opinion of the Government in the notifications.

12. However, coming to the factual aspect of the contention raised, it is first manifest, that neither of sections 95 and 96 oblige or mandate that the offending portion of the publications must be quoted verbatim in the declaration of forfeiture or that an exhaustive gist thereof must be incorporated therein. Even a reference to the authorities relied upon by the learned Counsel for the petitioners would indicate that this is not at all the requirement of law. What section 95(1) commands is that the State Government has to arrive at an opinion that the publications come within the mischief of the offences specified therein and as a procedural safeguard it requires that the grounds of its opinion must be stated as well. The declaration of forfeiture is consequently not required to be an exhaustive or self contained document incorporating all the offending material as also each and every fact on which it is based. Any such detailed recitals or contents in a notification are neither mandated by statute nor precedent and would perhaps be incongruous in the nature of the notification envisaged by the statute.

13. The stand of the learned Counsel for the petitioners may also be tested from another refreshing angle. It is hardly in dispute that the very object of the law herein is to prescribe forthwith and prevent any wide ranging publications of seditious and other offending materials in order to avoid the outraging of the feelings of a particular community or promotion of class hatred betwixt the citizens. The purpose here is preventive and not punitive. In view of the large scale public mischief apprehended, it is sought to be nipped in the bud by straightway forfeiting the publications. To require as a matter of law that the offending portion thereof should be quoted verbatim in a Government notification or to give an exhaustive gist thereof would in effect be giving widest and authentic publicity to the offending material and in fact defeating the larger purpose underlying sections 95 and 96 of the Code. Doing so would enable the malicious, seditious and offending publication to pervade every nook and corner through the media of Government notifications even though the original circulation of the publications may be acutely limited. I am, therefore, of the view that it is neither the requirement of law nor of precedent and prudence that the offending portions of the publications, which may be directly and flagrantly outraging the feelings of a particular community or promoting acid hatred betwixt the two classes of citizens should be either quoted verbatim or have a authenticated gist thereof in the statutory notifications. It is amply sufficient if on the grounds of opinion, that is, the conclusions of fact being duly stated the Government's opinion arrived at therefrom is clearly exhibited that the publications come within the mischief of the law. Therefore, the submission that the notifications must bear a verbatim record of the forfeited materials or give a detailed gist thereof is untenable and must be rejected.

14. Adverting now to the notifications it is plain therefrom that the opinion of the Government that both the publications contained materials which would be an offence under section 295-A of the Indian Penal Code is clear and categoric. Equally the grounds of its opinion are spelt therein as well. In

terms it is first mentioned that these contain objectionable matter. It is true that this is not spelt out in any great detail yet it is evident enough as a fact that the State Government's opinion was that the publications contained matters which are plainly objectionable. However, immediately thereafter more specifically it is stated that these references to Prophet Hazrat Mohammad are derogatory. The conclusion of fact herein is obvious that in the assessment of the State Government the relevant contents of the publications are directed to denigrate the Prophet. Again the conclusion of fact arrived by the State Government as to the result of the said publications is categoric that they would outrage the religious feelings of the muslim community. Lastly though it would not in any way be conclusive, it is clearly concluded that the mischief herein comes within the ambit of section 295-A of the Penal Code. Therefore, the grounds of opinion stated herein show a clear application of mind by the Government pertaining to the objectionable matter, the nature of the derogatory references, the result flowing therefrom with regard to the feelings of the muslim community and the fact that the same amounts to an offence under section 295-A of the Penal Code.

15. Though it is now exiematic after Harnam Das's case (supra) that the notification must contain the grounds of opinion of the State Government and not merely the bare opinion as such yet it is equally well-settled that these grounds do not have to be exhaustive or a self-contained code by itself. In *the State of Uttar Pradesh* v. *Lalai Singh Yadav*(1) it has been succinctly held that though the statement of the grounds of opinion is a must yet these may be reasonably brief in the following words:

> "We do not mean to say that the grounds or reasons linking the primary facts with the forfeiture's opinion must be stated at learned length. That

(1) (1977) A.I.R. (S.C.) 202.

> depends, in some cases, a laconic statement may be enough, in others a longer ratiocination may be proper but never laches to the degree of taciturnity. An order may be brief but not a blank."

In the light of the above it would follow both as a matter of fact as of law that the two notifications herein specify the test of stating the grounds of opinion of the Government concisely yet briefly. Inevitably the submission of the learned Counsel for the petitioners for assailing the notifications on the alleged total absence of the grounds of opinion of the State Government must fail and is hereby rejected.

16. The next contention forcefully urged on behalf of the petitioners was that the offending passages do not contain any matter which would be within the ambit of section 295-A of the Penal Code and, therefore, punishable thereunder. Herein the emphasis is on the fact that to be an offence the publication must be with a deliberate and malicious intention. In sum the contention was that unless the *mens rea* of both malicious and deliberate intent is first established, the mere fact of the material being offensive and outrageous to the religious feelings of a community is by itself insufficient to bring the matter within the mischief of the statute. Particularly if was argued that the author was a Post-Graduate teacher of History and a writer of some standing and, therefore, the charge of deliberate and malicious intent in making the publications would not be easily laid at his door, and the same must be conclusively proved and established.

17. To appraise the aforesaid contention it is first apt to quote the provisions of sectiin 295-A of the Indian Penal Code:

> "295-A. Deliberate and malicious acts intended to outrage religious feelings of any class by insulting its religion or religious beliefs.—Whoever, with deliberate and malicious intention of outraging the

religious feelings of any class of citizens of India, by words, either spoken or written, or by signs or by visible representations or otherwise, insults or attempts to insult the religion or the religious beliefs of that class, shall be punished with imprisonment of either description for a term which may extend to three years or with fine, or with both".

It is manifest that the aforesaid provisions require the *mens rea* of a deliberate and malicious intention of outraging the feelings of a community. However, from this it would be somewhat fallacious to mathematically equate the proceedings under sections 95 and 96 the Code with a trial under section 295-A of the Penal Code with the accused in the dock. The stringent requirements of the *mens rea* to be proved and established are for the purpose of a conviction under this offence which carries a sentence up to three years and fine. As is well-known, criminal intent may be presumed or equally established by evidence. Proceedings under section 95 do not necessarily require leading of any evidence before action is taken under sub-section (1) thereof. Indeed to require that a deliberate and malicious intention must first be proved at the threshold stage before the Government by evidence (including any rebuttal thereof) as a condition for acting under section 95(1). as if an accused person was in the dock, would, in effect, virtually frustrate the preventive purpose of the said section. However, one cannot go to the other extreme as well that for the purposes of section 95(1) the prescribed intent for the offences under the Indian Penal Code would become wholly irrelevant. Indeed, what the law seems to require here is a synthesis betwixt these two extremes. This is evident from the phraseology employed in section 95(1). Therein the requirement is—"appears to the State Government to contain any matter the publication of which is punishable." The statute does not require that it should be "proved" to the State Government, or that it should be "satisfied" that all requirements of the punishing sections including *mens rea* are fully established. It is well-known

in legal terminology that the word "appears" is even narrower than "satisfied" and more so from the word "proved". Therefore, all that section 95(1) requires is that the ingredients of the offence should "appear" to the Government as complied with and not that they should be "proved" at the threshold or that the Government should be inflexibly "satisfied" about them. Therefore, the *prima facie* opinion of the Government that the offending publication would come within the relevant section of the Indian Penal Code with its requirements of intent would be adequate here to enable it to act under section 95(1) of the Code. Herein the general rule that a man is presumed to intend the natural consequences of his act would be attracted and such intention has to be gathered primerily from the language and import of the offending publication and not necessarily by extrinsic evidence. Reference in this connection may first be made to *Wallace-Johnson* v. *The King* (1) at page 241:

> "The submission that there must be some extrinsic evidence of intention, outside the words themselves, before seditious intention can exist, must also fail, and for the same reason. If the words are seditious by reason of their expression of a seditious intention as defined in the section, the seditious intention appears without any extrinsic evidence. The Legislature of the Colony might have defined 'seditious words' by reference to an intention proved by evidence of other words or overt acts. It is sufficient to say they have not done so."

Therefore, the onus to dislodge and rebut the *prima facie* opinion of the Government that the offending publication comes within the ambit of the relevant offence including its requirements of intent is on the applicant and such intention has to be gathered from the language, contents and import

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(1) (1940) A.C. 231, 234.

thereof. This view is buttressed by the decision of the Special Bench. In re: *The Amrita Bazar Patrika Press Limited*(1) in the context of the somewhat analogous provisions of the Press Act and more directly by the under mentioned obcservation of the Special Bench of the Allahabad High Court in *Kali Charan Sharma* v. *Emperor* (2):

> "When the case was opened there was some discussion regarding the onus of proof, it being contended on behalf of the applicant that it lay upon the Government to establish that the order complained of was justified by law. Speaking for myself I feel clear that this argument is not well founded in view of the language of section 99-B. Where an application is made under that section to have an order of forfeiture set aside on the ground that the matter published does not fall within the mischief of section 153-A I.P.C., it is in my opinion for the applicant to convince the Court that for the reasons he gives the order is a wrong order."

And again:

> "If the language is of a nature calculated to produce or to promote feelings of enmity or hatred the writer must be presumed to intend that which his act was likely to produce. This was the principle laid down by Best, J., in *Burdett's case* (4 B. and A. 120), in dealing with a case of seditious libel and the same principle clearly applies to the case of a publication punishable under section 153-A I.P.C."

To conclude on this aspect, the challenge on behalf of the petitioners that the requisite intention had not been proved by extrinsic evidence and further that such intention must be conclusively proved and established before the Government under section 95(*i*) of the Code must fall and is rejected.

(1) (1920) A.I.R. (Cal.) 478.
(2) (1927) A.I.R. (All.) 649.

18. Now what are the acid tests for the satisfaction of the High Court or otherwise that the offending publication contains any such matter as is specified in section 95 (1) ? On behalf of the State Mr. Daman Kant Jha has first projected the aspect that the power here is a preventive one in the larger interest and the maintenance of class harmony within the State. Therefore, it was argued that if the Government *bona fide* and *prima facie* comes to the opinion that the publication would be punishable under section 295-A and in order to prevent the mischief forfeits the publication, the Government's opinion and consequent action should not be lightly interfered with. Indeed, the submission was that the High Court should not substitute its own opinion in place of the State Government. The test advocated was not the unusual one that if the Government's opinion could have been reasonably arrived at then it is not for the High Court to set aside the exercise of power under section 95 (1) merely because its own opinion tinged with judicial liberality may be different. In other words, the State's stand was that even if two opinions could be reasonably arrived at on the factual material then the High Court should not set aside the State Government's action. In sum, the test canvassed was that if on the stated grounds the opinion of the Government could be reasonably arrived at, the same would be immune from interference. In fairness to him one must notice that the learned counsel for the State did not take up the extreme stand that the opinion of the State Government would be conclusive once the procedural requirements of section 95 (1) were satisfied.

19. Despite the plausibility of the aforesaid submission, I am unwilling to enter the thicket of the slippery test as to the conclusion of a reasonable man on the factual material or whether the opinion of the Government would be reasonably arrived at. It appears to me that reading sections 95 and 96 together, the first provision lays down the foundational or jurisdictional data for the exercise of the power conferred under section 95 (1). However, when it comes to testing and upholding the declaration of forfeiture under section 96 (4) then the solitary test prescribed is the satisfaction of the High Court itself with regard to the offending material being punishable or not under the relevant section of the Indian Penal Code specified in the notifications. The jurisdiction of the High Court is not merely confined to judging the opinion of the Government and whether it could be reasonably arrived at but is much wider in weighing for itself and arriving at its own conclusion (on the basis of the factual statement of the grounds)

with regard to the offending publication, and whether the same comes within the ambit of punishability under the relevant section. Thus the primary test is the satisfaction of the High Court itself with regard to the justifiability of the declaration of forfeiture and all other considerations are subservient thereto. It is not that the State Government's opinion alone and its *prima facie* satisfaction is the sole issue but instead the High Court's own assessment and satisfaction about the publication being punishable and coming within the four corners of the mischief of a particular section of the Penal Code is the primary question. Such satisfaction alone is the pitch and substance of the matter and not any tautological gambit whether the State Government could have reasonably arrived at such an opinion or that the test of a reasonable man doing so should be satisfied. Therefore, in the *ultimo ratio* it is the satisfaction of the High Court alone whether the offending publication is one which comes within the ambit of the relevant punitive section of the Penal Code which would be conclusive.

20. To summarise on the legal aspects, it must be held :

(*i*) That the statement of the grounds of its opinion by the State Government is mandatory and a total absence thereof would vitiate the declaration of forfeiture.

(*ii*) That the *mens rea* prescribed by sections 124-A, 153-A, 153-B, 292, 293 and 295-A of the Indian Penal Code is not to be conclusively established by extrinsic evidence before the Government as a pre-condition of forfeiture.

(*iii*) That the intention prescribed by the relevant section of the Indian Penal Code is to be gathered primarily from the language, contents, and import of the offending publication.

(*iv*) That the onus lies on the applicant to dislodge and rebut the *prima facie* opinion of the Government that the offending publication is punishable under one or other of the relevant sections of the Indian Penal Code; and

(*v*) That the satisfaction of the High Court alone that the offending material does not contain any matter which is punishable under one or other of the relevant sections specified in section 95 (1) (*b*) is the conclusive factor in either upholding or quashing the declaration of forfeiture.

21. Now applying the above and testing the first case on its anvil it deserves notice that in 'Vishwa Itihas' the only offending portion relied upon is a short paragraph of five lines at page 174 of a relatively voluminous volume running into 328 pages. A reference to this paragraph would indicate that apparently this passage was sought to be viewed isolatedly and as if completely torn from its context. It is well settled that the offending publication is to be viewed as a whole and the intent of the author has to be gathered from a broader perspective and not merely from a few solitary lines or quotations. Reading the alleged offending paragraph is its context it is manifest that the sub-Chapter beings with the heading "Character of Mohammad Sahib". As is inevitable in worldly affairs, it is pointed out that there are two aspects of appraisal of his variegated personality before us. Reference is then made to the views of foreign historians by way of express reference and quotation from the well known work of H. G. Wells "Outline of History". Equally reference is then made to the opinion of Proefessor Davis as evidenced by his book "History of World Civilisation". Having noticed these the author himself states in unequivocal terms that he does not agree with any such critical assessment. Thereafter what appears to be his own view, which is specified as the second aspect of Prophet Hazarat Mohammad's character, is elucidated in some detail. This immediately follows and is an integral part of the alleged offending paragraph and, therefore, a free translation thereof deserves quotation in extense :

> "The aforesaid view can not be treated as the absolute truth. The works of Mohammad Sahib are as clear as pages of open books before us. If a close study of this is made then it would be manifest that Mohammad Sahib was a far-sighted man and he knew as to how the muslim society could be organised by passing through which course. It was possible for men only like Mohammad Sahib to teach social ideals, lessons of discipline and the ways of removing their differences to the people of Arabia. It is not the less praiseworthy that he played the part of Rasool with dignity after facing thousands of great difficulties and remaining steadfast. Islam which was basically a religion became an expire on account of him Khalifas like Abu Baquar, Umar, Usman, Ali as also Abbasi established a big empire in the name of Mohammad

Sahib which can be counted in the category of big States. Therefore, Mohammad Sahib was not only a reformer but also a statesman."

It could seem manifest from the above that the author's own appraisal and assessment, far from in any way being derogatory, are literally and extremely laudatory of Prophet Hazrat Mohammad. To hold that these can in any way outrage the religious feelings of the muslim community thus appears to me as wholly untenable. It is well to recall that to come within the ambit of section 295-A the intent must be both malicious and deliberate. As was noticed earlier, the author is a man of some standing amongst the text book writers in history and the offending passage when read in its context would show that he was at pains to repel the views of foreign historians. We had repeatedly pressed the learned counsel for the State to pin-point any other objectionable matter in the whole volume of 'Vishwa Itihas', though it would be hardly permissible for him to rely on anything which was not stated in the grounds of opinion and in the specific averments in the counter-affidavit. Nevertheless, he frankely conceded his inability to point to anything more. Nor can one lose sight of the fact that in history text book the references are with regard to historical facts and a narration thereof can not easily be labelled as a deliberate or malicious act to outrage the feelings of a particular community. It is axiomatic that perhaps two opinions are easily possible about historical events and equally of the great world figures who may have dominated the same. As was observed in *Kali Charan Sharma's case* (supra) in countries where there is a certain amount of religious freedom allowed a modicum of criticism would be permissible if it does not stoop down too low. Equally in this context a reference may be made to the recent precedent in *M/s. Varsha Publication Pvt. Ltd.* v. *State of Maharashtra*(1) at page 1454 :

"Different considerations will prevail when we are to consider a scholarly article on history and religion based upon research with the help of a number of reference books. It will be very difficult for the State to contend that a narration of history would promote violence, enmity or hatred. If such a contention is accepted, a day will come

(1) (1983) Cr. L.J. 1446.

when that part of history which is unpalatable to a particular religion will have to be kept in cold storage on the pretext that the publication of such history would constitute an offence punishable under section 153-A of the I. P. C. We do not think that the scope of section 153-A can be enlarged to such an extent with a view to thwart history. For obvious reasons, history and historical events can not be allowed to be looked as a secret on a specious plea that if the history is made known to a person who is interested to know the history, there is likelihood of someone else being hurt. Similarly, an article containing a historical research can not be allowed to be thwarted on such a plea that the publication of such a material would be hit by section 153-A. Otherwise, the position will be very precarious. A nation will have to forget its own history and in due course the nation will have no history at all. This result can not be said to have been intended by the Legislature when section 153-A of the I. P. C. and section 95 of the Cr. P. C. were enacted. If anybody intends to extinguish the history (by prohibiting its publication) of the nation on the pretext of taking action under the above sections, his act will have to be treated as *mala fide* one."

In the light of the above and the reasons earlier recorded, it seems to follow inexorably that the solitary five line paragraph in "Vishwa Itihas" in its true context can not possibly be said to contain matter which would be punishable under the stringent requirements of section 295-A of the Penal Code. The order of forfeiture, therefore, can not be sustained and is hereby set aside. Criminal Miscellaneous No. 11851 of 1983 is allowed.

22. Coming now to the second case, the categoric stand of the respondent State is rested on the offensive paragraphs in pages 55 to 57 of the book "Madhyakalin Arab". A plain reading thereof can leave no manner of doubt that these are offensive in the extreme and particularly so in the context of being made with regard to the founder and head of one of the greatest religions of the world. Though marginally some shelter is sought to be taken under the opinions of foreign historians, the author herein in his own personal assessment has

categorically projected the personal and private life of the Prophet in terms patently derogatory and denigratory. Apart from direct allegations, the passages equally contain innuendoes which leave little doubt the author's intent to put it in a lurid light. As has been noticed earlier, the intention of the author and the relevant *mens rea* for the offence is to be gathered primarily from the language, content and import of the offending passages. Nor can one fail to notice that these offending passages are inserted into a text book of History for young students to affect their young and reailient minds the effect whereot can not but be either deleterious or one of grave moral indignation. Thus, there does not seem to be any doubt that both the specific allegation and the vagu innuendoes would gravely outrage and scaldalise the feelings of a devoted religious community pasaionately attached to its founder Prophet Hazrat Mohammad. Both objectively and subjectively there would thus appear a deliberate and malicious intention to outrage the religious feelings of the muslim community thereby. Taking all these into consideration, I am of the view that the offending passages would squarely come within the punitive ambit of section 295-A of the Indian Penal Code and consequently the governmental action in the declaration of forfeiture was more than amply satisfied.

28. Accordingly, Criminal Miscellaneous No. 10502 of 1983 is without any merit and is dismissed.

S. SARWAR ALLI, J.—24. I entirely agree with the enunciation of law and the summary thereof (paragraph 20) in the judgment of my Lord the Chief Justice. I also agree that Cr. Misc. 10502/1983 be dismissed In my opinion, however, even Cr. Misc. 11851/1983 is fit to be dismissed.

"Vishwa Itihas" is meant as a text book for students of Intermediate in Arts (I. A.), while "Madhyakalin Arab" is meant for students of Master of Arts (M. A.), both being by the same author, the petitioner. The learned Chief Justice has held in relation to the relevant writing in "Madhyakalin Arab" that they project "the personal life of the prophet in terms patently derogatory and denigratory"—a view with which I respectfully agree. The question is: What is the position with respect to the objectionable writing in "Vishwa Itihas". At the outset I must state that in law it matters not whether the objectionable writing constitute the opinion of the author himself or is the opinion of someone else, incorporated

or quoted in his writing or publication. It is the effect of the words used and not as to whose opinion they are, which is the determining factor. All words, whether spoken or writing which "insult or attempt to insult the religion or religious belief" of any class comes within the mischief of S. 295-A of the Indian Penal Code subject to the existence of the necessary intent as mentioned in the said Section. To interpret the Section as requiring that the objectionable matter should project the personal opinion of the author is to read something into Section which is not there.

25. Having stated what I think is the correct legal position, I must state here that so far as to objectionable writing is concerned it can not be said that the author has dissociated himself with the views expressed therein. Dissociation is negative on two grounds. First, the author after mentioning the derogatory matters says "But the aforesaid opinion can not be said *wholly true* "(emphasis added). Clear inference is that according to the author, it is partly correct and partly not. As to what part is correct and what is not is left to the reader to guess. Secondly, what the petitioners own views are is apparent from his other book "Madhyakalin Arab", which has been rightly prescribed under section 95 of the Code of Criminal Procedure.

26. What then is the effect of the objectionable words? Do they "insult or attempt to insult religion or the religious belief of any class of persons", Muslims in this case, is one of the root questions that has to be considered and answered.

27. Writing on the character of the Prophet (Heading of the Chapter being "Mohammad Sahib Ka Chariter"), the author introduces the subject then :

> "Two aspects of the character of Mohammad Sahib are brought to light before us. In one aspect he is brought to light before us as cunning, sexy, and greedy, and in another aspect he is brought to light before us as a social reformer, a founder of religion and a maker of State."

Thus the two aspects mentioned are, one relating to the Prophet's personal life and character as a man, and the other as leader of the people, community and religion. The words used in this introduction relating to the Prophet as a man are, in my judgment, provocative, derogatory and denigratory. They, thus, in my opinion, are insulting to the religious belief of a class of persons the Muslim. So much for the introductory passage.

28. The second paragraphs mentions the opinions of H. C. Wells and Devies who have been called "*eminent* historians" (emphasis added). The objectional words used by them in respect to the character of Prophet and incorporated in this paragraph are also clearly insulting to the religious belief of the Muslim Community.

29. In view of the above finding and in view of the position in law, the petitioner has to satisfy this Court that in writing the offending materials the requisite intent, as mentioned in section 295-A of the Indian Penal Code was not there.

30. Learned counsel for the petitioner placed much reliance on the passage quoted in the judgment of my Lord the Chief Justice. A careful reading of the same would, however, reveal that the petitioner was dealing there with the personality of the Prophet as a leader of the people and community and propegator of a faith or religion. The provocative and deregatory words in the earlier two passages have not been rejected or characterised as wrong or even representing a prejudiced view.

31. The existence of intent has to be inferred primarily from the words, but other relevant materials can be looked into. The occasion on which the objectionable materials have been written, the admitted opinion of the author in some other publication of his, are all matters which may be put in the scales. In my opinion the non-existence of the requisite intent is negatived from the following :

(*a*) In order to magnify the importance of the derogatory opinion mentioned by him, the petitioner has incorrectly described H. G. Wells as an *eminent* historian. No doubt H. G. Wells was a well known author, but the mere fact that his publications included a single popular book in the West styled "Outline of history" does not entitled him to eminance as a historian. The petitioner being himself a teacher of history, the clothing of H. G. Wells with the mantle of an "eminent historian" can not be said to be a *bona fide* mistake.

(*b*) In projecting the character of the Prophet as an individual the petitioner has chosen to mention two of the Christian European authors who have chosen to use offensive words abour the Propbet. As a historian petitioner could not be unaware of the fact that Prophet of Islam has been much maligned by the Christian authors. This has been explained by European historian himself. Professor

W. Montgomery Watt, Professor of Arabic and Islamic Studies in the University of Edinburgh in his book "Mohammad Prophet and Statesman (Paperback Edition 1964 at page 231) has explained thus :—

> "Of all the world's great men none has been so much maligned as Mohammad. We saw above how this has come about. For centuries Islam was the great enemy of Christendom, since Christendom was in direct contact with no other organised States comparable in power to the Muslim. The Byzantive empire, after losing some of its best provinces to the Arabs, was being attacked in Asia Minor, while Western Europe was threatened through Spain and Sicily. Even before the crusades focused attention on the expulsion of the Saraceans from the Holy Land, medieval Europe was building up a conception of the great enemy".

If the petitioner was acting without malice, it was expected that at least he would give even a mild warning against the opinion quoted by him.

(*c*) The occasion on which the 'words' were written is also of importance. The book was being written for the students of I. A. class young impressionable students usually between the age of 16 and 18. They are not expected to examine oritically what is stated in their text books. A young student reading the offending passage could not be form a very poor opinion of the personal character of the Prophet

(*d*) So far as assessment of personal character of the Prophet is concerned the writing in question is far from a balance assessment of the same.

(*e*) The intent is also inforable from petitioner's own writing in "Madhyakalin Arab", a book meant for higher classes. There he has stated "The successes and achievements of the life of Mohammad Sahib" laid a certain on the shortcomings of the personal life of Mohammad Sahib.

32 Learned counsel for the petitioner relying on *Kali Charan Sharma and M/s. Varsha Publication Pvt. Ltd.* (supra) contended that even if the writing may be taken to be criticism, it was permissible in law. But as pointed out in Varsha Publication's case

"Scholarly article on history and religion based upon research with the help of a number of reference books" will be permissible. But the present writing is neither scholarly nor based on research. It only incorporates the ipsi dixit of two prejudiced authors to support the maligning of the image of the Prophet. This is not, in my opinion, permissible in law.

33. In my opinion, therefore, the petitioner has not been able to satisfy that the objectional writing did not contain any such matter as is referred to in section 95 (1) of the Code of Criminal Procedure. I would accordingly dismiss Cr. Misc. 11851/1983.

34. Before concluding I must express my surprise and disappointment at the casual manner in which books are prescribed in the courses of study. Had the Committee which had approved the inclusion of the two books in the courses of study read the same, I have no doubt that at least the majority of the members would have found the books with the offensive words were not fit to be prescribed in the courses of study. Everything appears to have been done in a casual manner. In future the Universities in this State, it is hoped, would be more circumspect and careful.

B. P. JHA J.—I entirely agree with the opinion of the Hon'ble the Chief Justice.

S.P.J.

Criminal Miscillaneous No. 11851 *of* 1983 *allowed.*

Criminal Miscillaneous no. 10502 *of* 1983 *dismissed.*

CIVIL WRIT JURISDICTION

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

26th September,

1984.

SHRINIVAS SAH AND OTHERS.*

v.

THE STATE OF BIHAR AND OTHERS.

Constitution—Articles 27 and 41—Article 41—ambit of—legal right, absence of—High Court, whether could issue mandate for creating work for whole year where none exists—casual and seasonal temporary employee, whether could be saddled on the State as regular and permanent civil servant—Article 27—effect of.

Article 41 of the Constitution, by itself cannot passibly secure the right to work to the petitioner. Article 27 occuring in this chapter, states that the provisions contained therein shall not be enforceable by any Court.

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*Civil Writ Jurisdiction Cases no. 1215. 1220, 1893, 2617, 2651, 2655, 3040 of 1983, and 3136 and 3139 of 1984. In the matter of applications under Articles 226 and 227 of the Constitution of India.

C.W.J.C. No. 1220 of 1983 Jagannath Prasad & Ors.—Petitioners.

C.W.J.C. No. 1893 of 1983 Bishundeo Pandey &Ors.—Petitioners.

C.W.J.C. No. 2617 of 1983 Ramantar Ram and Ors—Petitioners.

C. W. J. C. No. 2651 of 1983 Rajkishore Tiwary & Ors.—Petitioners.

C.W.J.C. No. 2655 of 1983 Prithwinath Choubay & Ors.—Petitioners.

C.W.J.C. No. 3136 of 1984 Samsul Haque and Ors.—Petitioners.

C.W.J.C No.3139 of 1984 Jaishanker Singh & Ors.—Petitioners.

C.W.J.C. No. 8040 of 1983 Abdul Halim & Ors.—Petitioners.

It is plain that in absence of any legal right High Court can not issue mandate for creating work for the whole year for the writ petitioners where non exists nor can it issue a writ creating money for the respondent State for payment to the writ petitioner, if they are to be permanently absorved. It is true that one expects the state to be model employer but that can not be carried to the length of denuding it of the ordinary right of one of the biggest employers to temporarily employ persons as and when the pressure and exigencies of the situaation demands.

Held. that a purely casual and seasonal temporary employee can not be saddled on the State as a regular and permanent civil servant in the absence of any mandatory legal duty to old so.

The State of Madras v. *Champakam Dorairajam* (1)—followed.

Applications under Articles 226 and 227 of the Constitution.

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

Mr. Ras Behari Singh, Mr. Rana Pratap Singh, Mr. Rajeeva Roy, and *Mr. Sultan Muzaffar,* for the petitioners.

Mr K. P. Varma, Advocate General, Mr. S. Hoda, Standing Counsel, Mr. Ratan Prasad Sinha, Mr. J. P. Bhagat, Mr. Mihir Kumar Jha and Mr. Arshad Alam, for the respondents.

S. S. SANDHAWALIA, C. J.—Can a purely seasonal temporary employee be saddled on the State as a regular and permanent civil servant is the somewhat unusual though significant question in this set of 9 connected civil writ petitions.

2. The facts and the issues of law, which are admittedly identical, may be briefly noticed from Civil Writ Jurisdiction Case No. 2617 of 1983 (*Ramautar Ram and others* v. *The State of Bihar and others*). The 58 petitioners, who have jointly preferred the petition, claim to have been appointed, on a purely seasonal and temporary

(1) (1951) A.I.R. (S.C.) 226.

basis, as Rent Collectors in the Revenue Department in the different Tahsheels of the State, on varying dates ranging from the year 1965 to 1976. It is their claim that they have been clamouring for appointment on a permanent basis, and the Chief Minister of Bihar, by his letter dated the 26th of April, 1976, (Annexure '1'), acknowledged the receipt of the letter dated the 21st April, 1976, of the Vice President of the Bihar State Tahsheel Collectors Union, which was placed under consideration the Irrigation Commissioner. Later, at the lower level, by a letter dated the 31st of May, 1977 (Annexure '2'), the Deputy Secretary-*cum*-Special Officer (Irrigation) informed the President of the aforesaid Union with regard to the resume of the discussions betwixt the departmental representatives and certain persons on behalf of the Union. Reference has then been made to Annexure '3', which is an inter-departmental communication from the Director (Revenue Administration)-*cum*-Special Secretary to the Government in the Irrigation and Electricity Department, addressed to the Member-Secretary, Pay-Revision Committee, Bihar. It is also the case that the State Minister of Finance, in the Bihar Legislative Council had extended hopes of regularisation as well. It is averred that in June, 1979, a seniority list of the seasonal Rent Collectors was also completed. However, when no decision by the respondent State Government was taken some seasonal Rent Collectors moved the High Court in Civil Writ Jurisdiction Cases No. 1507 of 1982 (*Baliraj Singh and others* Vs. *The State of Bihar and others*), and No. 3194 of 1982 (*Chunilal Singh and others* v. *The State of Bihar and others*), wherein it was directed that the respondent State should dispose of the matter finally before the petitioners were again appointed on a causal/seasonal basis. The grievance of the writ petitioners is that despite some hopes extended to them at various time their services are not being regularised on a permanent basis and Article 41 of the Constitution is invoked in support of the claim.

3. In the representative counter-affidavit filed on behalf of the respondent State, the tall claim of any inflexible assurance is categorically denied. It is pointed out that Annexure '1', the letter of the Chief Minister, was a mere acknowledgement, and the other communications were only indicative of the consideration of the issue by the Government, and, at no point of time whatsoever, the Government had agreed to make the services of the writ petitioners permanent. However, the true nature of the writ petitioners' work, and, in that context, their claim for permanence, emerges prominently from the

uncontroverted stand of the State in the exhaustive Paragraph No. 2 of the counter-affidavit, wherein it has been highlighted that the work for which the writ petitioners are casually employed temporarily is not only purely seasonal but varies in different geographical regions of a large State like that of Bihar, from place to place. It is a time bound work, which comes at the different levels of urgent seasonal pressure and thereafter vanishes with the same degree of ephimeralness. In this context, some of the Rent Collectors are employed only for a month or two. It is because of the peculiarities of this situation that from very inception of the revenue organisation it has been the practice to employ two types of staff, one being regular and the other purely seasonal. In the latter category are the writ petitioners and Muharrirs, Sangrahaks, patrols, Amins, etc., who are temporarily employed to complete the work within the scheduled time. The Deputy Collector incharge of the revenue division engages such seasonal staff, and, according to the exigencies of work, their services are terminated, with chances of being given an opportunity during the next season. It is pointed out that such seasonal staff number in thousands and it is neither in public interest nor within financial viability to keep them in service for the whole of the year without work, and, any such attempt would involve an expenditure if crores of rupees, without any increase in the efficiency or revenue. It is stated that the difficulties enumerated are only illustrative and not exhaustive. The State's firm stand, therefore, is that by the very nature of things, a purely casual and seasonal employment for temporary work cannot obligate the State to be saddled with regular and permanent employees for whom work can be provided for only a month or two and who may consequently be left to dawdle for the rest of the year. The respondent State, therefore, cannot be burdened with such a financial luxury, while many other major priorities in the State remain unsatisfied because of fiscal constraints.

4. To clear the decks for the examination of the somewhat vehemently pressed claim for regularisation on behalf of the writ Petitioners, one may notice at the very outset that, admittedly, the petitioners' employment is not governed by any Act, statutory Rules or even a binding Government instruction. It would appear that even the label of 'Seasonal Rent Collector', or 'Seasonal Tahsheel (Rate) Collectors', or 'Mausami Sangrahak', is somewhat unofficial and there is no rule or binding instruction with regard to the creation of any such post or

the conditions Governing their services. It is in the admitted absence of these legal conditions that the vehement contention on behalf of the writ petitioners to claim permanence has to be considered.

5. Now, admittedly, and in express terms, the claim herein is for a writ of mandamus, directing the respondent State to make the services of the petitioners permanent. Without labouring the point on the basis of precedent, it is even well-settled on principle that a writ of mandamus can issue only for the enforcement of a clear and unequivocal public duty, and, at the instance of a party who has the right to enforce the same. As noticed above, herein there is not even a semblance of any statutory duty cast upon the State or even a hint of an enforceable right of the nature claimed on behalf of the writ petitioners. To highlight, there is neither any enactment nor any statutory rule or instruction on the point, whose enforcement can be claimed or the performance of the duty be mandated. Even when pointedly pressed, Mr. Ras Behari Singh, learned Counsel for the writ petitioners, could not even remotely point to any provision of law which obligates the State to give permanance to employment which is admittedly casual and seasonal in nature and extends at best to only less than one-third of a year. Consequently, the claim for a mandamus must fail at the very thresbold on this fundamental ground.

6. What appears to be an argument of desperation was then sought to be raised by the learned Counsel on the basis of Article 41, contained in Part IV of the Constitution, in the Chapter of the Directive Principles of State Policy. This is in the following terms:—

> "41. *Right to work, to education and to public assistance in certain cases*—The State shall, within the limits of its economic capacity and development, make effective provision for securing the right to work, to education and to public assistance in cases of unemployment, old age, sickness and disablement and in other cases of undeserved want."

On the aforesaid tenuous basis it was contended that on the Pious wish of securing the right to work to all citizens, the seasonal employees, or, at least, some of them, should be made permanent.

7. The submission has only to be noticed and rejected. One has only to recall Article 27 in this very Chapter, which in terms states that the provisions contained therein shall not be enforceable by any

court. The learned Advocate General in opposing the writ petitioners stand herein was on firm ground in contending that even though the Chapter under directive principles may be the conscience of the Constitution, yet it has been authoritatively held in *The State of Madras* v. *Champakam Dorairajam*(1) that these are in the nature of pious wishes of the farmers and not for specific execution by the court's mandate. Therefore, the claim of a mandamus on the basis of Article 41 simpliciter is in a way constitutionally untenable, since, admittedly, there is no legal duty whatsoever to regularise the services of the writ petitioners. It is elementary that Article 41, standing by itself, cannot possibly secure that right to the petitioners. The Directive Principles of State Policy contained in Part IV may temper and influence the interpretation of other constitutional rights and provisions, but, even by the most liberal interpretation, it cannot be said that the writs of mandamus can issue to enforce each one of the Articles in the said Chapter. Even otherwise on larger principle I am unable to see how the ideal of the right to work for every citizen can be accomplished by the issuance of a writ of mandamus to the State to give such employment as if by an Alladin's lamp. If one could banish the endemic unemployment, which staks our land by writs of mandamus then, perhaps, the Courts, with their liberality and altruism, would have done it long ago. To claim that on the basis of Article 41 a mandamus should issue directing permanent employment even where no regular work is available is, to my mind, a submission which is wholly utopian and in practice utterly farcical.

8. In fairness to the learned Counsel for the petitioners, one must notice the sentimental grounds of hardship and poverty, which were pressed before us with eloquence. It was submitted that many of the petitioners have been seasonally employed for years on end and the very hope of this employment in the following year banish them to endemic under-employment and unredeemed poverty. Herein again it would appear that if one could of face the rising and unredeemed tide of poverty in the country by the fiat of writs of mandamus and certiorari, it would have been long so done. But that is not to be. Mere hardship, in the absence of any legal right, is not a ground to claim and invoke the extraordinary writ jurisdiction. The submission only reminds one of the adage that, hard cases would tend to make bad law.

(1) (1951) A.I.R. (S.C.) 226.

9. It was then said that Annexures '2' and '3' would give the petitioner an unelienable right to claim regularisation. A plain look at Annexure '2' would indicate that this appears to be no more than a resume of the discussions of the problem betwixt the departmental representatives on one siide and certain persons, apparently on behalf of the Union. I am unable to see how this document can be a fountainhead of a right enforceable by a mandamus. This is more so with regard to Annexure '3', which is merely an inter-departmental communication forwarded by the Director (Revenue Administration)-*cum*-Special Secretary to the Government in the Irrigation Department to the Secretary to the Bihar Pay Revision Committee, which probably at that time, was examining the pay-scales of all the employees in the State. It suffice to say that no legal right can flow therefrom.

10. The last arrow to the bow of the writ petitioners were certain observations made by the Division Benches in Annexures '5' and '6'. It is plain from Annexure '5' that the writ petition was withdrawn on the basis that the learned Counsel for the State had fairly stated that the issue was under consideration and the Court observed about the propriety of the matter being decided expeditiously before the next season. Similarly, in Annexure 6, the writ petition was disposed of with a direction that a decision with regard to the absorption of the writ petitioners should be expeditiously taken. Plainly enough no inflexible right flows from these observations. It would appear that out of pure compassion the respondent State was considering the issue to alleviate the hardship, if any, to the class of writ petitioners, if possible. As is inevitable in a situation of this kind, where thousands of varied employees in a large State like Bihar, are involved some delay had occurred and the respondent State may be marginally guilty of some procrastination in this context. However, the learned Advocate General, appearing on behalf of the respondent State, at long last, took a firm and categoric stand, which may well have been taken long ago, on the *terra-firma* of facts, which has now been averred Supplementing the categoric stand in the counter-affidavit, it was stated with equal firmness at the Bar that there was no adequate or available work round the year for the writ petitioners, which can even remotely warrant their permanent absorption. Equally, it was the case that the finances of the respondent State were too overburdened to admit of the luxury of permanent employees for seasonal work, which would

not sometimes extend beyond two months. Therefore, it was stated that in the very nature of things, no permanent employment or regularisation is possible for purely casual seasonal and temporary work. To buttress the stand, the learned Advocate General has now placed on the record the clear decision of the respondent State, authenticated under the signature of the Additional Commissioner in the Department of Irrigation, Mrs. Radha Singh, which in terms states as under:—

> "The Irrigation Department has neither work nor money for the seasonal staff and, therefore, finds itself unable to concede to the demand for their regularisation."

11. In the light of the above, it seems plain that in the absence of any legal right this Court cannot issue a mandate for creating work for the whole year round for the writ petitioners where none exists, nor can it issue a writ creating money for the respondent State for payment to the writ petitioners, if they are to be permanently absorved. It is true that one expects the State to be model employer, but that cannot be carried to the length of denuding it of the ordinary right of one of the biggest employers to temporarily employ persons as and when the pressure and exigencies of the situation demands. To say that the Government, if it employs a person temporarily or seasonally and repeates such employment, then it must give permanent status to such employee, is warranted neither by principle nor by precedent nor by logic. One can also not be oblivious of the stand of the respondent State that apart from the writ petitioners there are thousands of other seasonal employees as well now and there may well be more in future. Therefore, to lay down as a matter of policy that all seasonal employees should be permanently saddled on the State as regular ones cannot but be the precursor of a financial breakdown.

12. To conclude, the answer to the basic question posed at the very outset is rendered in the negative and it is held that a purely casual and seasonal temporary employee cannot be saddled on the State as a regular and permanent civil servant in the absence of any mandatory legal duty to do so.

13. Now, applying the above, even with the utmost liberality, one cannot see how a writ of mandamus of the kind sought on behalf of the writ petitioners can possibly be issued in their favour. All the writ petitions are consequently devoid of merit and must fail and are hereby dismissed, but without any order as to costs.

PREM SHANKER SAHAY, J.—I agree.

R. D. *Applications dismissed*

CIVIL WRIT JURISDICTION

Before Uday Sinha and Nazir Ahmad, JJ.

1984.

17th October,

ASHOK KUMAR DUTTA AND ANOTHER.*

v.

ALLAHABAD BANK.

Service—petitioners appointed as Junior Management Trainees in Bank's service on probation and joining on 2nd January, 1978—confirmation from the date they had completed the probationary, period, i.e., 2nd January, 1980—petitioners, whether appointed as officers on 2nd January, 1978 or 2nd January, 1980—Bank, whether can reckon the appointment as having been done on 2nd January, 1980—petitioners, whether can be held to be officers of the Bank as envisaged in 1976 and 1979 Regulations—promotees adversely effected not made parties—writ petition, whether suffers from non-joinder of necessary parties and whether maintainable.

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 Regulations 1979;

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*Civil Writ Jurisdiction Case no. 3604 of 1983. In the matter of application under Articles 226 and 227 of the Constitution of India.

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 'Officer' as defined in Allahabad Bank (Officers') Service Regulations, 1979. In terms of rule 7 of the 1979 Regulations since the petitioners were engaged as Grade-III Officers, they must be deemed to have been fitted in the Junior Management Grade Scale-I.

High Court of Punjab and Haryana etc. etc., v. *The State of Haryana and Others*(1)—referred to.

Held, further, that the impleading of the Bank is sufficient to maintain the present application and the present application cannot be rejected for non-joinder of other officers of the Bank, who may be affected by issuance of a writ in favour of the petitioners.

General Manager South Central Railway, Secunderabad and another v. *A.V.R. Siddhanti and Others*(2)—relied on.

Application by the employees of Allahabad Bank.

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

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(1) (1975) A.I.R. (S.C.) 613.
(2) (1974) A.I.R. (S.C.) 1755.

Messrs K. D. Chatterji and *A. B. S. Sinha,* for the petitioners.

Messrs K. P. Verma (A. G.), N. K. P. Sinha and *Ajay Kumar Sinha,* for the respondents.

UDAY SINHA, J.—This is an application under Articles 226 and 227 of the Constitution for issuance of a writ or direction requiring the respondent to treat the petitioners as having been appointed Junior Management Grade Scale-I on 2nd January, 1978.

2. The petitioners are employees of Allahabad Bank and are posted within this State. They were appointed Junior Management Trainees by Annexures-1 and 2 dated 7th December, 1977. In pursuance thereof they joined the Bank service at Regional Office, Patna on 2nd January, 1978. The letters of appointment stipulated that the petitioners were to undergo two years training and would be on probation during that period. On successful completion of training they would be confirmed to the permanent establishment. Two years after their joining Allahabad Bank, Annexures 3 and 4 dated 28th April, 1980 were issued. By these letters the petitioners were confirmed in the permanent establishment of the Bank in the officer grade with effect from the date they had completed the training/probationary period, *i.e.*, 2nd January, 1980. It was stated in the letters that the petitioners would be paid the scale of Rs. 700—1800 in the Junior Management Grade Scale-I. This was in accordance with the terms of Allahabad Bank (Officers') Service Regulations, 1979. The Bank thus reckons their appointment as having been done in January, 1980. The petitioners claim that they were appointed officers in Junior Management Grade Scale-I with the only scale of Rs. 700—1800. The acceptance or rejection of the petitioners' stand will make a world of difference in their fortunes. At the time the petitioners were appointed Junior Management Trainees. different regulations were applicable and not the one framed in 1979. Matters came to a head on 30th July, 1983 when the Bank issued a Circular (Annexure-6) in regard to promotion of officers from Junior Management Grade Scale-I to Middle Management Grade Scale-II. This Circular lays down the eligibility norms for promotion. That was laid down as follows:

> "5. *Eligibility Norms.*—In order to appraise candidates three times the number of vacancies, it has been decided to lower the prescribed norm of seven years' length of

service to consider Officers promoted/appointed in JMG Scale-I upto 31st January, 1978, as provided in Rule 6.6 of the promotion Policy. The exact number of vacancies will, however, be declared subsequently but before the final announcement of the Merit List of the selected Officers."

In accordance with the above norms only such officers as had been appointed in Junior Management Grade (hereinafter referred as 'JMG') Scale-I, who had been promoted upto 31st January, 1978. The petitioners were not permitted to take the qualifying examination for promotion, as they were treated as having been appointed in January, 1980. The petitioners could not wait any longer for the Bank to take a decision in regard to their grievance. Hence the present application for (*i*) treating the petitioners as having been appointed on 2nd January, 1978, (*ii*) correction of the date in column 7 in Annexure-5 as 2nd January, 1978 in place of 2nd January, 1980 and (*iii*) to permit the petitioners to take the qualifying examination for promotion to Middle Managemet Grade Scale-II.

3. The core point is whether the petitioners had been appointed as officers on 2nd January, 1978 or 2nd January, 1980.

4. In 1979 the Bank formulated Allahabad Bank (Officers') Service Regulations, 1979. Since that time the petitioners are governed by this Regulation. In order to appreciate the contention of the parties, some of the provisions in this Regulation must be looked into Rule 3 (*j*) defines 'Officer' as follows:

"(j) 'Officer' means a person fitted into or promoted to or appointed to any of the grades specified in Regulation 4 and any other person, *who immediately prior to the appointed date, was an officer of the Bank,* and shall also include any specialist or technical person as fitted or promoted or appointed and any other employee to whom any of these regulations has been made applicable under regulation 2;"

'Appointed date' in terms of rule 3 (*a*) means the 1st of July, 1979 Rule 4(1) in Chapter-II of the Regulation sets out the various grades of officers with scales which are set out below:

"(*a*) Top Executive Grade	Scale VII Rs. 3,000—125—3,500 Scale VI Rs. 2,750—125—3,250
(*b*) Senior Management Grade	Scale V Rs. 2,500—100—2,700 Scale IV Rs. 2,000—100—2,400
(*c*) Middle Management Grade	Scale III Rs. 1,800—75—2,250 Scale II Rs. 1,200—70—1,550—75—2,000.
(*d*) Junior Management Grade	Scale I Rs. 700—40—900—50—1,100—E B—1,200—60—1,800.

Since there were officers in the Bank from before the appointed date, namely, 1st of July, 1979 it was essential to equate officers prior to 1979 and fit them into grades mentioned in rule 4(1) of the Regulation. The fitment was spelt out in rule 7, Chapter III in the following terms:

7. "Subject to the provisions of regulation 6, the various posts of officers in the Bank on the appointed date shall be categorised as specified in the Table below:—

Table

Posts	*Grade in which placed.*
General Managers	Top Executive Grade Scale VII
Deputy General Managers	Top Executive Grade Scale VI
Assistant General Managers	Senior Management Grade Scale V
Regional Managers/Chief Managers/Functional Heads at Head/Central Office Area Managers/Grade I	Senior Management Grade Scale IV Middle Management Grade Scale III
Grade II	Middle Management Grade Scale II
Grade III	Junior Management Grade Scale I

Provided that any difficulties and anomalies arising out of the above categorisation shall be referred to a Committee consisting of the Managing Director and such other persons as may be appointed by the Government for this purpose for its decision."

In terms of rule 15 an officer directly appointed to the Junior Management grade has to be on probation for a period of two years. An employee of the Bank promoted as an officer in the Junior Management grade has, however, to serve on probation for only one year. Rule 16 provides for confirmation of officers. Rule 16 (1) lays down that an officer shall be *confirmed in the service of the Bank,* if in the opinion of the competent authority, the officer has satisfactorily completed the training in any institution to which the officer may have been deputed for training, and the in-service training in the Bank. The contentions rule is rule 18. Sub-rules 1 and 2 which are relevant—read as follows:—

"18 (1) Each year, the Bank shall prepare a list of officers in its service showing their names in the order of their seniority on an all India basis and containing such other particulars as the Bank may determine. A copy of such list shall be kept at every branch or office of the Bank.

(2) Seniority of an officer in a grade or scale shall be reckoned with reference to the date of his appointment in that grade or scale. Where there are two or more officers of the same length of service in that grade or scale, their inter-seniority shall be reckoned with reference to their seniority in the immediately preceding grade or scale or the previous cadre to which they belonged in the Bank's service. Where two or more officers have the same length of service in such preceding grade or scale or such previous grade, their seniority shall be determined with reference to their seniority in the immediately preceding grade or scale or cadre, as the case may be."

5. As we are called upon to decide whether the petitioners had been appointed officers of the Bank and whether they had worked as such for two years, it would be appropriate to take note of the relevant contents of their letters of appointment. In Annexures-1 and 2

it was stated that we are pleased to offer you *an appointment as a Management Trainee* on the following terms and conditions. The relevant terms and conditions for the appointment mentioned in Annexures-1 and 2 were as follows: —

"(1) You will be paid a consolidated remuneration of Rs. 700.00 per month during the first year and Rs. 750.00 per month during the second year of your training.

(2) You will be required to report at Regional Office, Patna on 2nd January, 1978 for joining the Bank's service on your being found fit for service in the Bank by the Bank's Doctor at your cost.

(3) During the period of your training of two years (which may be varied or altered at the direction of the Management) you will be on probation and will be required to prove your suitability for the Bank's Service. On successful completion of your training, your confirmation to the permanent establishment of the Bank will be considered on the basis of your work, conduct and overall suitability for the position of an officer.

* * *

(5) Your service may be terminated during the period of your Training/Probation without assigning any reason and on payment of one month's salary in lieu of notice. Similarly, you may leave the Bank's Service on giving one month's notice in writing or on payment of one month's salary in lieu of Notice.

(6) On confirmation in service—

(a) You will be placed in the Bank's Officer Grade III on a starting basic salary of Rs. 400 per mensum in the scale of Rs. 375—25—500—30—560—35—770—40—1,050 with Dearness Allowance and other allowances as applicable to Officers of your Grade from time to time.

(*b*) You will be eligible for membership of the Bank's Provident Fund, the rate of Contribution being 8.1/3 per cent of the Basic Pay, along with a similar contribution from the Bank.

(*c*) You will also be entitled to other perquisites *as applicable to the Officers* of the Grade, and to the terminal benefits as per the Rates of the Bank.

(7) You will be governed by the general rules of service, conduct for the officers, written and customary, in force for the time being, in addition to the following specific service conditions."

The first important thing to be taken note of is, that during the first year the petitioners were to receive Rs. 700 per month and Rs. 750 per month during the second year. It is true that the letter of appointment does not mention any scale of pay whereas under the 1979 Regulations the scale of pay for Junior Management Grade was set out as Rs. 700—40—900—50—1,100—EB—1,200—60—1,800. Although the petitioners were not appointed to a scale but in terms of their original appointment they became losers under the 1979 Regulation. Under the new Regulation whereas a Junior Management Grade Officer gets only Rs. 740 per month on the completion of one year, the petitioners were given Rs. 750 per month. The second note worthy aspect is that in terms of paragraph 2 the petitioners were required to report at Regional Office, Patna on 2nd January, 1978 *for joining the Bank's service*. The petitioners did join on 2nd January, 1978. In terms of paragraph 2 it is absolutely clear that the petitioners joined the Bank's service on 2nd January, 1978. Their appointment on the face of it commenced from 2nd January, 1978. Their engagement was not postponed to a future date. The Bank did not state at any place that the petitioners were being taken in only as Management Trainees without any promise of appointment. It is possible to conceive of a situation where an employer may take any Management Trainee without any obligation on either side to employ or to get employment. But this is not that situation. The petitioners were out right obserbed in Bank's service subject to their being found physically fit. It is not the Bank's case that the petitioners were not found fit. In fact, they were confirmed two years later.

6. The third significant aspect is that the petitioners were put *on probation* during the period of training for two years. The petitioners' appointment was thus of a Junior Management Grade Officer on probation. The provision for probationary period is implicit in most appointments. That must be so in order to ascertain that the employer has picked up the appropriate staff. The Bank, therefore, stipulated in paragraph 3 of Annexure 1 that on successful completion of the training, the question of confirmation of the petitioners to the permanent establishment of the Bank would be considered on the basis of work, conduct etc. In terms of paragraph 3, the Bank issued Annexures 3 and 4 for the two petitioners confirming them in the permanent establishment of the Bank in the Officers grade. The first paragraph of Annexure-3 is rather important which is as follows: —

> "As per Regional Office letter M.RO/Admn./515 of 28th instant, we are pleased to inform you that *you have been confirmed in the permanent establishment of the Bank in the Officer Grade* with effect from the date you have completed the training/probationary period i.e. 2nd January, 1980. You will be paid a starting basic salary of Rs. 780 per mensem in the scale of Rs. 700—40—940—50—1100—EB—1200—60—1800 in the Junior Management Grade Scale-I in terms of Allahabad Bank (Officers's) Service Regulations, 1979 with dearness allowance, CCA and HRA as applicable."

The confirmation of the petitioners meant descalation in their emoluments. In terms of the scale of pay set out in 1979 Regulation the petitioners were given the benefit of two years service. They were, therefore, paid starting basic salary of Rs. 780 per month in the scale prescribed for Junior Management Grade Scale. 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 by Annexures 1 and 2. There can be no question of confirming an employee who is not in employment. Confirmation necessarily implies that a man is in employment from before. The Confirmation of the petitioners was in the Officers' Grade. The confirmation, therefore, must relate back to 2nd January, 1978 when the petitioners were appointed by Annexures 1 and 2. Any other interpretation in regard to their status prior to 2nd January, 1980 would be unfair, to say the least.

7. Paragraph 7 of Annexure 1 is again rather significant. It enjoined that the petitioners would be governed by the general rules of service, conduct *for the officers*. If the petitioners were not officers of the Bank, the use of the word 'Officers' in paragraph 7 would be redundant. The fact that they were to be governed by service conditions of officers implies that the petitioners also were appointed as officers of the Bank. The petitioners were extended the same privileges in regard to leave and travel as were available to Grade III officers of the Bank.

8. Learned Advocate General appearing on behalf of the Bank contended that the petitioners' engagement in January, 1978 was anomalous in character. He submitted that the letter of appointment (Annexure-1) clearly stipulated that the petitioners would be placed in Bank's Officers Grade III on confirmation in service and, therefore, the petitioners were not in Grade III of officers prior to 2nd January, 1980. He also submitted that the petitioners were not appointed to a scale of pay and, therefore, they were not entitled to the benefit of rule 18, as seniority of an officer in a grade or scale will be reckoned with reference to the date of his appointment in that grade or scale-I regret I have some difficulty in accepting the submission advanced by learned Advocate General. At the moment, I am not concerned about the seniority of the petitioners. Their position in the seniority list is a different question. The only question before us is from what date the petitioners must be held to be employed in the officers Grade of the Bank. It is not disputed that the lowest level of officers was Junior Management Trainee. The petitioners have averred that during the two years probationary period, they were accorded the rights and obligations of officers of the Bank. Prior to 1976 all officers were promoted from clerks. In 1976 for the first time 25 per cent of the officers grade III posts were filled up by direct recruitment. The petitioners were two of them. They thus came by competition. To fill the vacancy in officers cadre the bottom wrung was that of Grade III officers. The petitioners must be deemed to have been appointed to that Wrung. In this context, the definition of the expression "Officer employee" in Officer Employees' (Conduct) Regulations and Discipline and Appeal Regulations is rather significant. This was issued sometime in July, 1977 In terms of rule 2(*i*) "Officer employee" means as follows:—

> "(*i*) 'Officer employee' means a person who holds a supervisory, administrative or managerial post in the bank *or any other*

person who has been appointed and is functioning as an officer of the bank, by whatever designation called and includes a person whose services are temporarily placed at the disposal of the Central Government or a State Government or any other Government undertaking or any other public sector bank or the Reserve Bank of India or any other organisation but shall not include casual, work charged or contingent staff or the award staff;"

In terms of the above, the designation of the petitioners as Trainee in Annexures-1 and 2 was inconsequential. They had been appointed as an officer of the Bank and were functioning as such. In paragraphs 9 to 12 of the petition the petitioners have averred the nature and the responsibilities shouldered by them and the way they were treated. Their names were included in the Pay Sheet under officers category of the Bank. They discharged the functions of officers of the Bank. The assertion of the petitioners in this behalf has not been challenged or denied. They were given the starting salaries of officers in the grade of Junior Management Grade-III which were later fitted in the 1979 Regulations in the pay-scale of Rs. 700—1800. The very fact that the petitioners were confirmed in the permanent establishment of the Bank in the officers Grade shows that they were in the service of the Bank from before the date of their confirmation. The fact that their confirmation was made effective from 2nd January 1980 was inconsequential. That was only recognition of the fact that the petitioners had completed their probationary/training period and were not such as to be thrown out. It is not the Bank's case that the petitioners were appointed in the cadre of assistants or clerks. The pay given to them was commensurate with the pay of officers Grade-III. There is no other cadre in between. I have, therefore, no hesitation in holding that the petitioners were appointed as officers of the Bank on 2nd January 1978. No rule or regulation has been brought to our notice by the respondent indicating that an officer would be deemed to have been appointed on and from the date of completion of the probationary period and not earlier. Rule 15 of the 1979 Regulations which I have quoted earlier shows that an officer directly appointed to the Junior Management grade shall be on probation for a period of two years. It is clear, therefore, that a person appointed to the Junior Management grade shall be on probation—as the petitioners were appointed—they must, therefore, be held to be an officer. There is no stipulation in rule 15 that the officer shall be deemed to have been appointed on the day he successfully completes

the probationary period. It is well known that confirmation is not appointment. In the *High Court of Punjab and Haryana etc. etc.* versus *The State of Haryana and others*(1) in regard to appointment of District Judge, the Supreme Court observed as follows: —

> "The confirmation of persons appointed to be or promoted to be District Judge is clearly within the control of the High Court. When persons are appointed to be District Judge or persons are promoted to be District Judges the act of appointment as well as the act of promotion is complete and nothing more remains to be done. Confirmation of an officer on successful completion of his period of probation is neither a fresh appointment nor completion of appointment."

In absence of any legal provision, the contention of the Bank that the petitioners were not employees of the Bank or were not officers of the Bank seems rather untenable. The petitioners had been appointed to the cadre of officers by direct appointment in terms of the policy of the Bank and Government that 25 *per cent of the Officers* should be direct recruits. The petitioners were appointed in terms of that scheme. Annexures 8, 9, 10 and 11 to the petition are rather significant. Annexure 8 shows that petitioner No. 1 was an officer of the Bank and was included in the list of *officers* in Basic Statistical Return No. II from June, 1978 to December, 1980 to Head Office. Annexure 9 shows that petitioner No. 1, an *officer* of the Bank, was disbursed salary "from the pay sheet of the Branch under column officer from February 1978 to December 1980". Annexure 10 shows that he was paid medical reimbursement during 1978 and 1979 as applicable to Grade-III officers of the Bank. Annexure 11 shows that he as an *officer of the Bank* was paid bonus for the years 1978 and 1979. The same is the position in regard to petitioner No. 2. These materials show unmistakably that the petitioners were employees and were working as officers of the Bank since 1978 whatever may have been their designations. They would thus undoubtedly fall within the ambit of the expression 'Officer employee' as contained in the Bank's Officer Employees' (Conduct) Regulations 1976.

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(1) (1975) A.I.R. (S.C) 613.

9. In view of my finding above that the petitioners were 'Officer employee' on the Bank since 1978, it must be held that the petitioners were officers of the Bank in terms of rule 2(*j*) of the 1979 Allahabad Bank (Officers') Service Regulations. Wherein it has been laid down that an officer means a person—besides other categories—who immediately prior to the appointed date, i.e. 1st July 1979 was an officer of the Bank.

10. In view of my conclusion that the petitioners must be held to be officers of the Bank in terms of 1979 Regulations and in view of the fact that they were drawing salary of Rs. 750 per month, the petitioners must be deemed to be in the Junior Management Grade Scale-I on 1st July 1979. In terms of rule 7 of the 1979 Regulations, since the petitioners were engaged as Grade-III officers, they must be deemed to have been fitted in the Junior Management Grade Scale-I.

11. Learned Advocate General appearing for the Bank submitted that in the garb of declaration in regard to the date of appointment the petitioners were really trying to enforce their seniority in terms of rule 18 of the 1979 Regulations. His stand was that the seniority of an officer in a *grade or scale* shall be reckoned with reference to the date of his appointment in that grade or scale. Learned Advocate General had some difficulty in contending that the petitioners were not appointed to a grade. He, therefore, submitted that it was not enough that an officer must be appointed to a grade, but must also have been appointed to a scale. The word 'or' in rule 18(2) must be read as 'and'. Thus read in order to claim seniority, the petitioners having been confirmed on 2nd January 1980 in the grade and scale of Management of Junior Management Grade Scale-I, they must reckon their seniority from 2nd January 1980. The submission is entirely untenable. The submission urged on behalf of the Advocate General goes off at a tangent. Every officer is entitled to have a definite edict about his date of appointment. His superiority or seniority will follow accordingly. I have shown earlier that the petitioners were 'Officer employee' in terms of 1976 Regulations. They must, therefore, be considered to be 'officer employee' in terms of 1976 Regulations and 'officer' of the Bank on the formulation of 1979 Regulations. That being so, 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.

12. It was then submitted on behalf of the Bank that some of the officers of the Bank like the petitioners had filed a Writ application before the Calcutta High Court claiming seniority over officers promoted between 2nd January 1978 and 2nd January 1980 and, therefore, we should stay our hands until the disposal of the matters before the Calcutta High Court. Learned Advocate General did not contend and rightly that this Court had no jurisdiction to decide the matter raised in this application. The petitioners are posted in Bihar. Their cause of action has arisen in Bihar. They are, therefore, entitled to have their grievance remedied within the jurisdiction of this Court. What the Calcutta High Court will do is their business. The prayer in this application is different from what before the Calcutta High Court. The petition filed before the Calcutta High Court was not produced before us. We, therefore, do not know how the prayer is framed in the Writ application filed before that Court. The matter falls for consideration before us squarely and we see no reason why we should stay our hands. If the matters falling for consideration before this Court and Calcutta High Court are identical, it will be for the Calcutta High Court to give the respect that is due to this High Court. We entertain no doubt in this regard.

13. Learned Advocate General lastly submitted on behalf of the Bank that by getting their appointment dates of appointment mentioned in column 7 of the gradation list altered from 2nd January 1980 to 2nd January 1978, the petitioners were really trying to steel a march over all those placed above them in the seniority list. Petitioner No. 1 is mentioned at serial No. 1620 and petitioner No. 2 at serial No. 1615 in the seniority list. He submitted that if the date mentioned in column 7 as against the petitioners is corrected as 2nd January 1978 they will be above roughly about 500 persons in the seniority list. Thus in the garb of correction of date of appointment, the petitioners were really trying to establish that they were senior to several others shown above them in the seniority list. It was, therefore, incumbent upon the petitioners to have impleaded those above them in the seniority list. In the absence of those persons, the petitioners cannot be granted their prayer. Thus submitted learned Advocate General. The submission is rather unsound. The petitioners have not prayed for correction of the seniority list. They have prayed for correction of their date of appointment. They are entitled to assert and claim that they were really appointed on 2nd January 1978 and not on 2nd January 1980. All those shown above them in the seniority list can have no

say in the matter. That is a matter between the Bank and the petitioners. The petitioners are entitled to contend that they had been appointed as officers on 2nd January 1978, worked as such, albeit in a probationary capacity, completed the probationary period in flying colours and, therefore, they were really appointed on 2nd January, 1978. It is another matter that if their date of appointment is reckoned as 2nd January 1978 they would become entitled to certain advantages. The petitioners like several others came as direct recruits in pursuance of the policy decision of Government of India in 1978. Their probationary period showed that they were fit to be retained in service. The Bank, however, treated them as having been appointed on the date of confirmation. In the absence of any rule or stipulation that the date of confirmation would be deemed to be the date of appointment, the petitioners challenge the policy of the Bank to give the treatment that is due to the petitioners. When the stand of the Bank on principle is challenged other employees have no *locus standi*. May be, if the prayer of the petitioners is allowed other promotees, who have been benefited by the step-motherly treatment given to the petitioners, may be adversely affected. But for that reason it is idle to contend that the petitioners' petition suffers from the vice of non-joinder of necessary parties. In the *General Manager, South Central Railway, Secunderabad and another versus A. V. R. Siddhanti and others*(1) employees in Railway service challenged their seniority on the basis of certain policy decisions of the Government. A contention similar to the one raised before us was urged in that case also. The Supreme Court took the view that it was not necessary to implead all persons likely to be affected by the decision of the Court in the following words:

> "As regards the second objection, it is to be noted that the decisions of the Railway Board impugned in the writ petition contain administrative rules of general application, regulating absorption in permanent departments, fixation of seniority, pay etc. of the employees of the erstwhile Grain-Shop departments. The Reespondents—petitioners are impeaching the validity of those policy decisions on the ground of their being violative of Arts 14 and 16 of the Constitution. The proceedings are analogous to those in which the constitutionality of a Statutory rule regulating seniority of Government servant is assailed. In such

(1) (1974) A.I.R. (S.C.) 1755.

proceedings the necessary parties to be impleaded are those against whom the relief is sought, and in whose absence no effective decision can be rendered by the Court. In the present case, the relief is claimed only against the Railway which has been impleaded through its representative. No list or order fixing seniority of the petitioners vis-a-vis particular individuals, pursuant to the impugned decisions, is being challenged. The employees who were likely to be affected as a result of the re-adjustment of the petitioner's seniority in accordance with the principles laid down in the Board's decision of October 16, 1952, were, at the most, proper parties and not necessary parties, and their non-joinder could not be fatal to the writ petition."

On a parity of reasoning in the instant case, the impleading of the Bank is sufficient to maintain the present application. The Supreme Court have not deviated up till now from the law laid down in AIR 1974 Supreme Court 1755 (Supra). I am, therefore, unable to hold that the present application should be rejected for non-joinder of other officers of the Bank, who may be affected by issuance of a writ in favour of the petitioners.

14. Having given my most anxious consideration to the respective stand of the parties, I am of the view that the petitioners have a case to agitate and have legitimate grievance against the policy decision of the Bank treating them as having been appointed on 2nd January 1980.

15. The application must, therefore, be allowed with costs. Let a Writ issue treating the petitioners as having been appointed in Junior Management Grade Scale-I on 2nd January 1978. Column 7 in Annexure 5 must be corrected accordingly. The Competitive Promotion Examination which was to be held on 28th August 1983 is already over. For future occasions, however, the petitioners will not be denied the right to which they are entitled consequent upon the correction of their date of appointment. Hearing fee Rs. 250 payable by the respondent to each of the petitioners.

NAZIR AHMAD, J.—I agree.

S. P. J. *Application allowed.*

TAX CASE

Before Uday Sinha and Nazir Ahmad, JJ.

1984.

October, 17.

COMMISSIONER OF INCOME TAX, BIHAR I, PATNA*

v.

MAHARAJA CHINTAMANI SARAN NATH SAHDEO

Hindu Succession Act, 1956 (*Central Act no. XXX of* 1956) *Section* 4 *sub-section* (1) *clauses* (*a*) *and* (*b*)—*provisions of*—*status of holder of impartible estate governed by customary law of lineal primogeniture whether changed after coming into force of Hindu Succession Act*, 1956—*whether to be assessed as individual of Hindu undivided family*—*Income-tax Act*, 1961 (*Central Act no. XLIII of* 1961)—*section* 27(*ii*)—*applicability of.*

Where the assessee, the Maharaja of Ratu, holder of an impartible estate governed by the customary law of lineal primogeniture was assessed as an individual;

Held, that the impartibility of the estate of the assessee disappeared in September, 1956 after the passing of the Hindu Succession Act, 1956 in view of section 4 sub-section (1) clauses (*a*) and (*b*) of the Act. Thereafter, he became a part of Hindu undivided family. The status of the assessee had, therefore, to be accepted as Hindu undivided family;

Held, further that section 4 of the Hindu Succession Act, 1956, does away only with custom or usage. Thus only such impartible estates disappeared on the enactment of Hindu Succession Act, 1956, as were impartible by custom. There were several estates in 1961,

*Taxation Case nos. 48 to 50 of 1976. Reinstatement of case under section 256(1) of the Income-Tax Act, 1961, by the Income-tax Appellate Tribunal, Patna Benchh Pat in the matter of Assessment of Income-Tax on Maharaja Cintamani Saran Nath Sahdeo for the Assessment years 1967-68 to 1969-70.

at the coming into force of Income Tax Act, 1961, which were impartible by grant and some by covenant. Section 27(*ii*) of Income-tax Act, 1961 would be operative in regard to those estates which were impartible by grant or covenant.

Sundari and Ors. v. *Laxmi and Ors.*(1)—relied on. *C.I.T West Bengal* v. *U.C. Mahatab Maharaja of Burdwan* (2) *and C.I.T. Bihar* v. *Maharaja Chintamani Saran Nath Sahdeo*(3)—not followed.

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

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

Messrs B. P. Rajgarhia (*S. C. I. T. D.*) with *S. K. Sharan* (*J. C. to S. C. I. T. D.*), for the petitioner.

Mr. Rameshwar Prasad, for the opposite party.

UDAY SINHA, J.—This is a reference under section 256 (1) of the Income-Tax Act, at the instance of the Revenue. The question referred for the opinion of this Court is as quoted below:

> "Whether on the facts and in the circumstances of this case the Tribunal were correct in law in determining the status of the assessee as Hindu undivided family ?"

2 In this reference we are concerned with assessment years 1967-68 to 1969-70. The assessee succeeded to the Gaddi of Late Maharaja Pratap Udai Nath Sahdeo of Ratu Raj on 7th March, 1950 on the latter's death. The late Maharaja being holder of an impartible estate and governed by the law of lineal primogeniture was assessed as an individual. The assessee having succeeded to the Gaddi with all the incidents thereto, like his predecessor, was also assessed as an individual. In the assessment years 1965-66 and 1966-67 the assessee

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(1) (1959) A.I.R. (S.C.) 198.
(2) 130 I.T.R. 228.
(3) 133 I.T.R. 658.

claimed the status as that of a Hindu undivided family. The Income-tax Officer rejected his claim. In the years under reference (1967-68 to 1969-70) also the assessee claimed the same status. The contention of the assessee was that in coming into force of Hindu Succession Act in September, 1956 the impatible estate governed by the lineal primogeniture disappeared. Thus all the incidents of a joint Hindu family became operative. The income of the estate became the income of the Hindu undivided family consisting of the assessee, his wife, daughters, widow mother and widow grand-mother.

3. The Income-tax Officer rejected the claim of the assessee. His view was that the assessee had succeeded to the estate in the year 1950 as an individual and, therefore, he would be treated as such till succession opened after his death.

4. The Appellate Assistant Commissioner on appeal held that with the passing of the Hindu Succession Act the customary right of impartibility and lineal primogeniture in the matter of succession disappeared—excepting such estates as were saved by section 5 of the said Act. Other members of the joint family also got a right in the property and its income. He, therefore, held that the property and income of the Hindu undivided family of the assessee did not belong to him in his individual capacity after the passing of the Hindu Succession Act. The Appellate Assistant Commissioner also referred to the fact that in earlier years also the status of the assessee had been held to be that of Hindu undivided family.

5. The Income-tax Appellate Tribunal on appeal by the Department, in agreement with the Appellate Assistant Commissioner held that the status of the assessee was to be taken as that of Hindu undivided family. The Revenue thereafter moved the Tribunal for making a reference to this Court. Thus arises the reference falling for consideration before us. The question referred to us for our opinion has been quoted earlier.

6. It is not in controversy that the assessee succeeded to an impartible estate—impartible by custom governed by law of lineal primogeniture. The property was ancestral and there had been no

partition. The matter in controversy has to be decided on the scope and effect of section 4(1) of the Hindu Succession Act which reads as follows:

> "4 (1) Save as otherwise expressly provided in this Act,—
> (*a*) any text, rule or interpretation of Hindu Law or any custom or usage as part of that law in force immediately before the commencement of this Act shall cease to have effect with respect to any matter for which provision is made in this Act;
>
> (*b*) any other law in force immediately before the commencement of this Act shall cease to apply to Hindu in so far as it is inconsistent with any of the provisions contained in this Act."

By the force of the above provision the custom of impartibility and lineal primogeniture ceased to have effect. The shackles on the joint family thus fell apart. In *Shiva Prasad Singh* versus *Rani Prayag Kumari Devi and others*(1) it has been laid down as follows:

> "Impartibility is essentially a creature of custom. In the case of ordinary joint family property, the members of the family have (1) the right of partition, (2) the right to restrain alienations by the head of the family except for necessity, (3) the right of maintenance, and (4) the right of survivorship. The first of these rights cannot exist in the case of an impartible estate though ancestral, from the very nature of the estate. The second and the third are incompatible with the custom of impartibility. To this extent the general law of the Mitakshara has been superseded by custom and the impartible estate, though ancestral, is clothed with the incidents of self-acquired and separate property. But the right of survivorship is not inconsistent with the custom of impartibility. This right therefore still remains, and to this extent the estate still retains its character of joint family property,

(1) (1992) A.I.R. (P.C.) 216.

and its devolution is governed by the general Mitakshara law applicable to such property. Though the other rights which a coparcener acquires by birth in joint family property no longer exist, the birth right of the senior member to take by survivorship still remains. Nor is this right a mere succession is similar to that of a reversioner succeeding on the death of a Hindu widow to her husband's estate. It is a right which is capable of being renounced and surrendered."

It is plain from the law laid down by Privy Council that the joint family of a Mitakshara Hindu family persisted all along and the estate retained its character of joint family property. Of course, the general law of the Mitakshara in regard to joint family property was superseded by the custom of impartibility and lineal primogeniture. The incident of right of survivorship was, however, never superseded. The eclipse of the rights of the members of a joint family in regard to (1) right of partition, (2) right to restrain alienations by the head of the family except for necessity, and (3) right of maintenance fell apart consequent upon the enactment of section 4(1) of the Hindu Succession Act. The rights of the members of the joint family shined forth in full lustre. Thus, although the status of the assessee was that of an 'Individual' from 1950 till September, 1956, after that period he was entitled to the status of member of a Hindu undivided family He is, therefore, entitled to be treated and assessed as such.

7. Learned counsel for the Revenue submitted that in the situation like the present one, the Hindu Succession Act did not come into play. According to him, the question of effect of section 4 of the said Act would arise when succession would open consequent upon the death of the assessee who had inherited an impartible estate. Reliance was placed for this proposition in *C. T. T. West Bengal* versus *U. C. Mahtab, Maharaja of Burdwan*(1) where Sabyasachi Mukharji, J. observed as follows:

"It is clear, in our opinion, this Hindu Succession Act only dealt with the position at the time of succession after the coming into operation of the Hindu Succession Act,

(1) 130 I.T.R. 223.

1956. It did not affect the position and character of the HUF or of the ingredients of the impartible estate as such of an impartible estate which is in existence from before the coming into operation of the Hindu Succession Act, 1956.

* * *

As we have mentioned before, the Hindu Succession Act, 1956, only regulated and abrogated those portions of the Hindu law which related to succession after the coming into operation of the Hindu Succession Act and did not modify or amend the existence of joint or composite ownership of properties under the Hindu joint family law."

Reliance was placed by the Revenue also upon the observations of N. P. Singh, J in *C. I. T. Bihar* versus *Maharaja Chintamani Saran Nath Sahdeo*(1) where it was observed—"May be that, notwithstanding the enforcement of the said Act (Hindu Succession Act), the assessee having been vested with the property of an impartible estate, he could not be divested of it by passing of the said Act, the incidents attaching to an impartible estate would continue to be enjoyed by him".

8. On the basis of the above two cases, learned Standing Counsel submitted that the holder of an impartible estate cannot be divested of the estate of which he was possessed. According to him, section 4 of the Hindu Succession Act would remain inoperative and in abeyance till the death of the holder of the impartible estate, i.e. the assessee.

9 I regret, I have considerable difficulty in accepting the submission urged on behalf of the Revenue. In *Sundari and others* versus *Laxmi and other*(1) the Supreme Court had the occasion to consider whether the provisions of section 4(1) read with section 7(2) of Hindu Succession Act would remain in abeyance or not. Kailasam, J. speaking

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(1) 133 I.T.R. 658.
(2) (1980) A.I.R. (S.C.) 198.

for the Court after setting out the salient features of Aliyasanthana Kavaru observed in paragraph 9 at page 201 as follows:

> "Section 4 of the Act gives overriding application to the provisions of the Act and lays down that in respect of any of the matter dealt with in the Act all existing laws whether in the shape of enactment or otherwise which are inconsistent with the Act are repealed. Any other law in force immediately before the commencement of this Act ceases to apply to Hindus insofar as it is inconsistent with any of the provisions contained in the Act. It is therefore clear that the provisions of Aliyasanthana law whether customary or statutory will cease to apply, insofar as they are inconsistent with the provisions of the Hindu Succession Act."

The above must be held to be the law of the land. The decision of the Supreme Court was given on 28th August, 1979. On the other hand, the decision of the Calcutta High Court in *West Bengal II* versus *U. C. Mahatab, Maharaja of Burdwan*(1) was given on 29th September, 1980. The Calcutta High Court decision, therefore, must be held to be against the law laid down by the Supreme Court in the case of *Sundari and others* (Supra). The view of the Calcutta High Court that section 4 of the Hindu Succession Act did not affect the position and character of an impartible estate which had come into existence before coming into operation of the Hindu Succession Act, is rather untenable. The effectiveness of the Hindu Succession Act cannot be postponed till the opening of succession on the date of holder of the impartible estate. The same must be held to be true in regard to the Patna decision as well. In the face of the Supreme Court decision, I am unable to subscribe to the view of N. P. Singh, J that the assessee having been vested with the property of an impartible estate he could not be divested of it by enactment of section 4 of the Hindu Succession. Act. The question is not one of divesting of the estate of the holder of the impartible estate, but the question is of the effect of section 4 of the Hindu Succession Act. It is true that the Hindu Succession Act deals with succession, but it is not only that, it

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(1) 180 I.T.R. 228.

lavs down what the law is and what are the rights of a Hindu in regard to property of specified character. Their Lordships' attention was not drawn to the case of the Supreme Court in *Sundari and others* versus *Laxmi and others* (Supra). Their Lordships' observation in that regard may not have been if the Privy Council case of *Shib Prasad Singh* (Supra) and Supreme Court case had been brought to their notice. Even before the Calcutta High Court, the Supreme Court case had not been brought to their Lordships' notice. I am unable to hold that the Colcutta and Patna High Courts' decisions have laid down the correct law in this regard.

10. The position thus is that the assessee was holding an impartible estate with the incident of lineal primogeniture till September, 1956 by custom not by grant. On the enactment of the Hindu Succession Act in September, 1956 the restrains on the members of the joint family disappeared. In terms of the law laid down by the Privy Council in *Shiba Prasad Singh's* case (Supra), there were four incidents of joint family property. Three of them had become eclipsed or were dormant by custom. They fell apart on the enactment of section 4 of the Hindu Succession Act. The shackles cannot persist till the death of the assessee. The Gujarat High Court had to deal with a similar situation in *Pratapsinhji N. Desai* versus *C. I. T. Gujarat-III*(1) Mehta, J with whom Divan, C. J. concurred observed as follows:—

> "The clear effect of section 4 is that if there is any provision made in the Act in respect of any matter governed by the custom or usage of Hindu law previously, then the said provision would prevail and the previous Hindu law to the extent it related to those matters would stand nullified. The question, in the present reference, is whether any provision has been made in the Act with reference to the rule of inheritance by a single heir. If any provision is made contrary to classical Hindu law in that behalf in any of the sections of the Hindu Succession Act, that provision would prevail against the earlier

(1) 130 I T.R. 77.

law as ordained by custom, usage or interpretation of Hindu law as in force immediately before the commencement of the Act."

It was contended before their Lordships of the Gujarat High Court as well that the provisions of section 4 of the Hindu Succession Act would not come into operation until succession re-opened on the death of the holder of the impartible estate. Their Lordships in clear terms rejected it in the following words :—

"Section 4(1) (*a*) prescribes that save as otherwise expressly provided in the Hindu Succession Act, any text, rule or interpretation of Hindu law or any custom or usage as part of that law in force immediately before the commencement of the said Act 'shall cease to have effect with respect to any matter for which provision is made in this Act'. On a plain reading of this sub-section 1(a) we are unable to agree with the contention urged on behalf of the Revenue that the classical Hindu law as contained in the custom or usage would continue to be in operation even though a contrary provision has been made in that behalf in the Hindu Succession Act, till the succession opens after the said Act coming into force."

A similar view was taken by the Punjab High Court in *Smt. Taro* versus *Darshan Singh*(1) and *Hans Raj Basant Ram* versus *Dhanwat Singh Balwant Singh*(2). I am in complete and respectful agreement with the views of their Lordships of the Punjab and Gujarat High Courts.

11. From what has been stated above, I am clearly of the view that the impartibility of the estate of the assessee disappeared in September, 1956. Thereafter, he became a part of Hindu undivided family. The status of the assessee had, therefore, to be accepted as Hindu undivided family.

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(1) (1960 A.I.R. (Punj.) 145.
(2) (1961) A.I.R. (Punj.) 510.

12. The assessment order shows that the assessee had shown income from house property. In regard to this item, learned counsel for the Revenue submitted that in terms of section 27 (*ii*) of the Income-tax Act the house property at least must be treated as individual property of the assessee. His status in regard to that property must be deemed as 'individual'. It was submitted that section 27 of the Income-tax Act lays down who shall be deemed to be the owner of house property. Sub-clause (*ii*) thereof lays down that the holder of impartible estate shall be deemed to be an individual owner of all the properties comprised in the estate. It was submitted that the assessee having inherited the impartible estate of Ratu Raj, he must be deemed to be an individual owner of the properties in the estate including house property. The submission, with respect to learned counsel for the Department, is fallacious. Section 27 (*ii*) deals only with property of the holder of an impartible estate. The assessee did inherit an impartible estate and was assessed accordingly for some years, but the impartible estate towards the end of 1956 evaporated under the impact of the Hindu Succession Act. In the assessment years, therefore, there was no impartible estate. The assessee was not the holder of an impartible estate and, therefore, the properties returned can not be treated as individual property of the assessee. In reply thereto, learned Standing Counsel submitted that if that be the view of the law, as I have enunciated, then section 27 (*ii*) must be held to be dead letter. Mr. Rajgarhia submitted that the Hindu Succession Act came into being in 1956. The Income-tax Act, 1961 was enacted in 1961. The law makers must be deemed to have knowledge of the effect of section 4 of Hindu Succession Act. There could have been, therefore, no sense in enacting section 27 (*ii*). Thus submitted learned Standing Counsel for the Revenue. I regret, I am unable to accede to this submission. Section 27 (*ii*) is not a dead letter. Section 4 of the Hindu Succession Act does away only with custom or usage. Thus only such impartible estates disappeared on the enactment of the Hindu Succession Act as were impartible by custom. There were several estates in the country in 1961 which were impartible by grant and some by covenant. The estates which were impartible by grant or covenant continued. Section 27 (*ii*) would be operative in regard to those estates. The assessee's estate may have disappeared in Bihar, but in whole of the country there were several estates which continued to be impartible. Section 27 (*ii*), therefore, was not a dead letter in 1961 when the Income-tax Act was enacted. Those being my views in regard to scope of section 27, I am unable to accept the submission urged on behalf of the Revenue that the assessee must be treated as

individual owner of all the properties comprised in the estate and returned by the assessee.

13. Another item of income of the assessee was his salary as M. L. C. which has been shown in Part IV of the return. The income on this account certainly can not be treated as income of Hindu undivided family. That is the result of individual act, or acquisition of the the assessee. The income under that head is, however, a different question. If the assessee has any other income as individual above flooring for assessable income, the authorities may consider assessing him as such But that is for them to consider and not for us.

14. For the reasons, stated above, I am of the view that the Tribunal was correct in law in determining the status of the assessee as Hindu undivided family. The reference must, therefore, be answered in the affirmative in favour of the assessee and against the Department. There shall be no order as to costs.

Nazir Ahmad, J.—I agree.

R. D.

Question answered.

APPELLATE CIVIL

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

1984.

December, 20.

KUS GORAIN.*

v.

KHAKU GORAIN AND OTHERS.

Adverse possession—claim of title by adverse possession—sub-lessee or licensee, when can claim such title—party not claiming hostile title but only illegal possession as sub-lessees—whether can claim title by adverse possession.

Held, that neither a sub-lessee nor a licensee can claim title by adverse possession merely because that they are in continuous unauthorised possession for more than twelve years, unless and until they claim some overt acts on their part indicating assertion of hostile title;

Held, therefore, that in the present case the defendant first party respondents only claimed that after they were inducted as sub-lessees, they were in illegal possession for more than twelve years in view of section 27 of Regulation III of 1872 and they have not claimed any hostile title and as such they can not claim title by adverse possession.

Atyam Veerraju & others v. *Pechetti Venkanna & others*—(1) *Gaya Pd. Dikshit* v. *Dr. Nirmal Chander & another*—(2)—referred.

Appeal by the plaintiff.

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*Appeal from Appellate Decree no, 514 of 1974. From a decision of Mr. Florian Paul, Second Additional District Judge of Santhal Parganas at Dumka, dated the 30th March 1974 affirming that of Mr. Hari Dulal Banerjee, 2nd Additional Subordinate Judge, Deoghar at Camp Jamtara dated the 23rd April 1966.

(1) (1966) A.I.R. (S.C.) 629.
(2) (1984) B.B.C.J. (S.C.) 51.

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

Messrs R. S. Chatterjee and *Naresh Kumar Sinha*, for the appellants.

Messrs. S. C. Ghose, N. K. Agrawal and *S. K. Saraf*, for the respondents.

B. P. JHA, J.—The plaintiff-appellant preferred an appeal before this Court against the judgment and decree passed by the Second Additional District Judge, Dumka.

2. The plaintiff-appellant brought a suit for a declaration of title and recovery of possession in respect of the suit lands on the ground that he is the adopted son of Buji Mandlain, the recorded tenant of the lands in suit

3. The case of the plaintiff was that on 3rd April, 1958. Buji Mandlain adopted the plaintiff as her son and she executed a registered deed of adoption (Ext. 1). Buji Mandlain died in Jeth, 1962. After her death, the plaintiff succeeded to the suit properties as her legal heir. According to the plaintiff's case, the defendants first party are cultivating the lands as sub-lessees. In 1369 B. S., the plaintiff asked the defendants first party to give up possession of the suit lands; but, in spite of the plaintiff's direction, the defendants did not give up possession. Hence, the present suit was filed.

4. The claim of the plaintiff was resisted by the defendants first party on two grounds, namely (1) that the plaintiff was not the adopted son of Buji Mandlain, and (2) that the defendants have acquired title

by adverse possession. The defence version is that Buji Mandlain leased out the suit lands in the year 1310 B. S. to defendant Nakul Gorain on payment of a fixed rent of 22 maunds of rice per year.

5. On these facts, the trial court decreed the suit and directed the defendants first party to pay 22 maunds of rice per year to the plaintiff. On appeal, the lower appellate court dismissed the suit. It is against the lower appellate court's order that the plaintiff-appellant has preferred this appeal before this Court.

6. Both the courts have concurrently held that the plaintiff is the adopted son of Buji Mandlain. It is a concurrent finding of fact and as such, I am unable to interfere with such a finding of fact in this appeal. I also hold that the plaintiff-appellant is the adopted son of Buji Mandlain for the simple reason that a registered deed of adoption (Ex. 1) was executed by her in favour of the plaintiff-appellant.

7. The only question for decision is : Whether the respondents first party (defendants first party) have acquired title by adverse possession or not?

8. The concurrent findings of both the courts are that the defendants first party were inducted as sub-lessees in respect of the suit lands. In this connection, a reference was made to a decision of the Supreme Court in *Atyam Veerraju and others* v. *Pechetti Venkanna and others*(1). In that decision, it has been held that during the continuance of the tenancy, the tenant can not acquire by prescription a permanent right of occupancy in derogation of the landlord's title by mere assertion of such a right to the knowledge of the landlord. The case of the

(1) (1966) A.I.R. (S.C.) 629.

defendants-respondents is that since the sub-lease itself was illegal in view of section 27 of Regulation III of 1872, as such the defendants first party were claiming the suit land by adverse possession. In view of the concurrent findings of fact, it is clear that the defendants first party were cultivating the lands as sub-lessees. If it is so, the defendants first party were not claiming hostile title to the suit land. In view of the aforesaid decision of the Supreme Court, the tenants, namely, defendants first party can not acquire by prescription a permanent right of occupancy.

9. The defendants first party are claiming title by adverse possession on the ground that the sub-lease itself was illegal in view of section 27 of Regulation III of 1872. In this connection, learned counsel for the appellant relied on a decision of the Supreme Court in *Gaya Prasad Dikshit* v. *Dr. Nirmal Chander and another*(1). In that decision, it has been held that in the case of a licensee, mere continuance of unauthorised possession even for a period of more than twelve years is not enough. In view of the fact that the sub-lease was illegal, hence the defendants first party could claim themselves to be licensees. In view of the decision of the Supreme Court, a licensee can not claim title by adverse possession merely because he is in unauthorised possession for a period of more than twelve years. Apart from this fact, there must be some overt act on the part of the licensee indicating assertion of hostile title by adverse possession. The defendants first party have not claimed any hostile title. The defendants first party only claimed that after they were inducted as sub-lessees, they were in illegal possession for more than twelve years.

10. On the basis of the aforesaid decision of the Supreme Court, I hold that neither a sub-lessee nor a licensee can claim title by adverse possession merely because that they are in continuous unathorised

(1) (1984) B.B.C.J. (S.C.) 51.

possession for more than twelve years, unless and until they claim some overt acts on their part indicating assertion of hostile title. In any view of the matter, the defendants first party can not claim title by adverse possession for the reasons indicated above. I am, therefore, of opinion that the plaintiff is the adopted son of Buji Mandlain and he is entitled to recovery of possession.

11. In this circumstance, a portion of the judgment and decree of the appellate court is set aside to the extent whereby the defendants first party's claim by adverse possession was allowed. The appeal is, accordingly, allowed, but without costs.

S. S. Sandhawalia, C. J.—I agree.

S. P. J. *Appeal allowed.*

L-III

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