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THE INDIAN LAW REPORTS

April 1985
(Pages 363 – 493)

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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PATNA

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TABLE OF CASES REPORTED

FULL BENCH

	Page
Mosommat Bibi Sayeeda and Ors. v. The State of Bihar & Ors.	442

APPELLATE CIVIL

National Insurance Company Limited v. Lachminiya Devi and Ors.	379
Smt. Jyotsna Mehta v. M/s. Ram Bahadur Thakur & Co. and another.	363
State Trading Corporation and another v. M/s. Vaishali Shoe Company Ltd.	371

APPELLATE CRIMINAL

Udai Ho v. The State of Bihar.	483

REVISIONAL CRIMINAL

Sheojee Roy and another v. The State of Bihar and anr.	436

MISCELLANEOUS CRIMINAL

	Page
Bihar State Small Industries Corporation v. The State of Bihar and Anr.	420

CIVIL WRIT JURISDICTION

Ishaque Hajam and Others v. The Additional Member Board of Revenue and Ors.	406
Ram Bachan Singh v. The State of Bihar and Ors.	390
Shyam Bihari Upadhyay and Ors. v. The State of Bihar and Ors.	412
Sri Ram Sagar Prasad and Ors. v. The Agriculture Produce Market Committee Barh and Ors.	399
Thakur Girja Nandan Singh v. The State of Bihar and Ors.	478

CRIMINAL WRIT JURISDICTION

Mohan Singh v. The State of Bihar and Others.	463

TAX CASE

Additional Commissioner of Income Tax, Bihar, Patna v. M/s Indian Copper Corporation Ltd., Ghatsila, Bihar.	384

Volume = 67 (1985)
Month = April
INDEX = IV (Page) missing

TABLE OF CASES REFERRED TO.

	Page.
Bimal Singh and Ors. v. State of Bihar (1965) B.L.J.R. 661, held to be per incuriam.	436
C. Narayanan v. Madras State Palm Gur Sammelan and anr. (1974) A.C.J., 479, followed.	379
Food Corporation of India v. Thakur Shipping Co. (1975) A.I.R. (S.C.) 460, relied on.	371
Pardi Zankhri Nes Karanj Group Dudh and Sakbhaji Sahkari Mandli Limited v. Govindji Bhagwanji and anr. (1977) A.C.J. 270, distinguished.	379
Sardar Mohan Singh Bedi v. Mano Maya Thappa and Ors. (1972) A.C.J., 174, followed.	379
State of Punjab v. Gosta Iron and Brass Works (1978) A.I.R.(S.C.) 1608, distinguished.	371
Talib Hussain v. State of Jammu and Kashmir (1971) A.I.R. (S.C.) 62, followed.	463
The State v. Verappan and ors. (1980) A.I.R. (Mad.), 260, F.B. followed.	420

INDEX

ACTS:

Of the State of Bihar

1948 - IV - *See.* Privileged Persons Homestead Tenancy Act, 1947

1948 - VII - *See.* Bihar Panchayat Raj Act, 1947

1950 - XXX - *See.* Bihar Land Reforms Act, 1950

1952 - XXIII - *See.* Privileged Persons Homestead Tenancy (Amendment) Act, 1952.

1956 - XXII - *See.* Bihar Consolidation of Holdings and Prevention of Fragmentation Act, 1956.

1962 - XII - *See.* Bihar Land Reforms (Fixation of Ceiling Area and Acquisition of Surplus Land) Act, 1961.

Of the Union of India

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

1939 - IV - *See.* Motor Vehicles Act, 1939

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

1947 - XIV - *See.* Industrial Disputes Act, 1947

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

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

1974 - LII - *See*. Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974

1976 - CIV - *See*. Code of Civil Procedure (Amendment) Act, 1976.

INDEX

Page.

Arbitration Act, 1940—Section 34—*contract containing arbitration clause for reference of dispute to arbitrator — failure of defendant to respond to plaintiffs letter and notice under section 80 C.P.C.—plaintiff filing suit for realisation of money—defendant filing application under section 34 for stay of the proceeding—action of the defendant, whether a mere inaction—application under section 34, whether to be dismissed.*

In the present case the plaintiffs were requesting the defendants for the disposal of the goods and for making the payment as the interest was growing up to their detriment and they were receiving threats from the Bank. The plaintiffs made specific request to the defendants by their letter dated 4.11.82 for the appointment of a receiver. The authorities did not wake. When the notice under section 80 C.P.C. was sent the defendants received it but slept over it. Thus they allowed the suit to be filed and they waited for another three months to file an application under section 34 of the Arbitration Act for staying the proceeding. This amply signifies the gross indifference on the part of the authorities and not only mere silence.

Held, therefore, that in the facts and

Page.

circumstances of the case the Court below rightly took the view that this was not a case of mere inaction on the part of the defendants. The application under section 34 was rightly dismissed and does not require any interference by this court.

State Trading Corporation and another v. M/s Vaishali Shoe Company Ltd. (1985) I.L.R. 64, Pat. 371

Bihar Agricultural Produce Market Rules, 1975—*Rules 3 and 5—Market Committee—election of members from agriculturists constituency publication of provisional voter list inviting objection—notice under rule 3, issued after the date fixed for filing objection dividing the market area—neither publication of the voter list in accordance with rule 5 nor any objection invited after division of the market area—effect of.*

The provisional voter list was published on 29.1.82 directing that objection, if any, should be filed in accordance with rule 5. 27.2.82 was the last date for filing objection. On 22.3.1982 suddenly notice was issued under rule 3 dividing the market area into 7 agriculturists constituencies. On the admitted facts after division of the market

Page.

area, neither the voter list in accordance with rule 5 has been published nor any objection invited.

Held, therefore, that that having not been done, no election could have been held without complying with the requirements of rule 5.

Sri Ram Sagar Prasad and Ors. v. The Agriculture Produce Market Committee, Barh and Others (1985) I.L.R. 64, Pat. 399

Bihar Consolidation of Holdings and Prevention of Fragmentation Act, 1956—Section 10A and 35—Section 10A—provisions of—whether operate as bar on the revisional power of Director of Consolidation under section 35.

Held, that section 10A of the Consolidation of Holdings and Prevention of Fragmentation Act, 1956, hereinafter called the Act, does not operate as bar on the power of the Director of Consolidation. The Director of Consolidation with the limitation prescribed for exercise of supervisory jurisdiction, can exercise his power under section 35 of the Act for rectifying the mistake in the order passed or proceedings taken for the ends of justice.

Page.

Shyam Bihari Upadhyay and Others v. The State of Bihar and Others, (1985) I.L.R. 64, Pat. 412

Bihar Land Reforms Act, 1950—*Sections 3,4,5 and 7A—Section 4—expression 'Bazar', whether would include within its sweep 'Market'—section 7A—writ petioners holding Bazar on the lands in question—proprietor, whether could retain possession—section 5—homestead, whether also vested in state—whether homestead to be settled back with the proprietor on certain terms—section 3—writ-petitioners Bazars, whether vested in state of Bihar consequent to the issuance of notification under section 3.*

The expression 'Bazar' is synonymous with 'Market'. The expression 'Bazar' used in section 4 of the Bihar Land Reforms Act, 1950, hereinafter called the Act, must, therefore, be equated with Market.

Held, that the writ-petitioners were owners of market which must be held to be equivalent to Bazar.

The writ-petitioners were holding Bazar on the land in question in terms of section 7A of the Act, therefore, the proprietors were not entitled to retain

Page.

possession. Section 5 of the Act gives clear indication that homesteads also vested but it would be deemed to be settled back with the proprietor on terms.

Held, that the Shops of the writ-petitioners constituted Bazars. They were not mere buildings. At no point of time were they homesteads. So far as Patna Market is concerned it may have been homestead earlier, but it lost its character of a homestead when Bazar was set up after demolishing the homes. The Bazars covered by the writ-petitioners vested in the state of Bihar consequent upon the issuance of the notification under section 3 of the Act.

Mosommat Bibi Sayeeda and Others v. The State of Bihar & Ors. (1985) I.L.R. 64, Pat. 442

Bihar Land Reforms (Fixation of Ceiling Area and Acquisition of Surplus Land) *Act, 1961—Section 16(3)—preemption—right of—owner of a contiguous plot, whether entitled to preempt if he solds his property to another person after institution of the case.*

The preempter must hold the land until the preemption matter is finally

Page.

decided by the ultimate Court i.e., the Board of Revenue and that shall be the crucial date and not the date on which the order was passed by the Land Reforms Deputy Collector. Since the decree stood suspended after filing of the appeals the ultimate date was the date on which the resolution was passed by the Additional Member, Board of Revenue as contained in Annexure-1.

Held, therefore, that in the instant case the Member, Board of Revenue was right in holding that the preemptor ceased to have any interest in the land held by him in the boundary much before the final order was passed by the Member of Revenue.

Ishaque Hajam and Others v. The Additional Member, Board of Revenue & Ors. (1985) I.L.R. 64, Pat. 406

Bihar Panchayat Raj Act, 1947—section 62—provision of—whether criminal jurisdiction of Gram Panchayat enhanced to try cases upto the value of Rs. 200/-.

Where it was asserted that as the value of the property stolen was Rs. 150/-, the case was exclusively triable by a Gram Cutcherry of milepakari Gram Panchayat under the provisions of section

Page.

62 of Bihar Panchayat Raj Act, 1947, as the criminal jurisdiction of Gram Panchayat has been enhanced to try cases upto the value of Rs. 200/- as was observed in Bimal Singh's case.

Held, that it is manifest that the observation made in Bimal Singh's case is per incuriam and has been patently occasioned by some in advertance or some typographical error. The observation therein in this context is not factually correct and is an apparent misreading of the statutory provision contained in section 62 of the Act.

Sheojee Roy and another v. The State of Bihar and anr. (1985), I.L.R. 64, Pat. 436

Code of Civil Procedure, 1908—*Order 21, Rules 58(4) and 63 and Code of Civil Procedure (Amendment) Act, 1976 (Act 104 of 1976), section 72—Scope and applicability of—attachment made and objection filed before coming into force of the Amending Act—Order passed after coming into force of the Amending Act—appeal by objector-maintainability of.*

Where the attachment was made in 1964, it was subsisting from before the commencement of section 72 of the

Page.

Amendment Act. It is obvious that the old law which existed at the time of the attachment would hold the field. There can be, therefore, no doubt that even though the order was passed after the amending Act came into force, an appeal filed under order 21, Rule 58(4) of the code is not competent. Where a claim petition was made before the Amending Act and was dismissed after the Act came into force, the remedy was to file a suit under Order 21, Rule 63 and not to file an appeal under the new amended Rule 58 C.P.C.

Held, therefore, that the present appeal filed under the amended provision of order 21 Rule 58(4) of the Code is not maintainable.

Smt. Jyotsna Mehta v. M/s Ram Bahadur Thakur & Co. and anr. (1985), I.L.R. 64, Pat. 363

Code of Criminal Procedure, 1973—*Section 242(2) and 248—section 242(2)—, processes for attendance of witnesses issued by the Magistrate—due to pronounced negligence of prosecution, witnesses not produced for prolonged period of time—section248—Magistrate acquitting the accused, legality of.*

Held, that in a case instituted in a

Page.

Police report if a proper application is made by the prosecution under section 242 of the Code of Criminal Procedure 1973, hereinafter called the Code, it is ordinarily the duty of the Magistrate to issue process and secure the presence of witnesses by exercising the power given to him under the Code for compelling their attendance. However, if despite the issuance of compulsive process and the performance of the duty aforesaid the prosecution, on account of pronounced negligence or recalcitrance, fails to execute such process and does not produce the witnesses over a prolonged period of time then the court would be entitled to acquit the accused under section 248 of the Code for want of evidence to prove the prosecution case.

Bihar State Small Industries Corporation v. The State of Bihar and anr. (1985), I.L.R. 64, Pat. 420

Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974—*sections 3(1) and 5A—section 3(1)—detention order under—for prevention of smuggling activities—ground of detention clearly mentioned that writ-petitioner connected with smuggling activities and was not traceable—*

Page.

substantive case or order of detention—detaining authority best judge—section 5A—ambit of-validity of detention where some grounds non- existent or irrelevant-legality of detention to be considered on the date of hearing of writ petition.

The grounds of detention clearly mentions that the writ- petitioner was connected with smuggling activities and inspite of best efforts could not be traced and in order to prevent such smuggling the detention order was passed which is quite in consonance with the provisions of section 3(1) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974, hereinafter called the Act.

The question whether a substantive case will serve the purpose or an order of detention will be necessary is within the domain of detaining authority who is the best judge for the same.

The broad features relating to the acts connected with smuggling have been given in the grounds and the High Court cannot sit on appeal to scrutinise the same and come to a different conclusion.

Held, that, even if some grounds are

Page.

non-existent or irrelevant that will not invalidate the order of detention in view of section 5A of the Act; according to which if there are two or more grounds then such order shall not be invalid or inoperative because some of the grounds are vague, non-existent, not relevant, not connected or proximately connected with such person or invalid for any other reason whatsoever.

Where the writ-petitioner challenged his detention from 23.6.1984 to 29.6.1984 as it was in violation of section 8(C) of the Act as he was arrested on 23.6.1984, but the detention order was served on him on 30.6.1984 and eleven weeks from date of his arrest expired on 8.9.1984 and the opinion of the Advisory Board was not given by them;

Held, that, in such cases the court has to consider the legality of detention on the date of hearing and no writ can be issued if detention on that date is lawful.

Mohan Singh v. The State of Bihar and others (1985), I.L.R. 64, Pat. 463

Criminal trial— evidence of child witness—*veracity of—trial court noting on the deposition form regarding putting a few questions to the witness—also noted*

Page.

that from the answers given he was satisfied regarding understanding of the witness-but did not record the questions put and answers given-effect of.

Where the Additional Session Judge, before whom sessions trial went on, made its noting on the deposition forms that a few questions were put to Prosecution Witness No.4, who was minor, and also noted that on answer that that the witness give, he felt satisfied regarding the understanding of the witness;

Held, that normally court should have recorded the questions put to and answers given by the child witness, but non-recording of the same does not make his evidence inadmissible. Such opinion regarding the understanding of the witness can very well be gathered from the entire deposition itself and from the circumstances of the whole case regarding which a witness deposes.

Udai Ho v. The State of Bihar (1985) I.L.R. 64, Pat. 483

Income Tax Act, 1961—*Section 32(1) (IV)-word 'erection', whether relates only to the completion of the process of erection or to the date of commencement too-claim of initial depreciation for a*

Page.

building completed after 31.2.1961-date of commencement of the building relevancy of.

Erection in section 32(1)(IV) of the Income Tax Act, 1961 must relate only to the completion of the process of erection without any reference to the date of commencement. The only relevant date for the purpose of grant of initial depreciation in terms of section 32(1)(IV) is the date of completion of the building.

Held, therefore, that in the instant case the Tribunal was fully justified in taking the view that the commencement of the building of the assessee was entirely irrelevant.

Additional Commissioner of Income Tax, Bihar, Patna v. M/s. Indian Copper Corporation Limited, Ghatsila, Bihar (1985), I.L.R., 64, Pat. 384

Industrial Disputes Act, 1947—*Section 33A-provisions of-no dispute pending before Labour Court when the impugned order was passed-proceeding under, maintainability of.*

Rohtas Industries Ltd., Dalmianagar, the employer, served the order contained in annexure '2' on the workmen on

Page.

27.8.1973 whereby he was asked to retire on 28.11.1973 as he would attain the age of sixty years i.e., the age of superannuation. The workmen raised grievance and Government of Bihar made a reference under Section 10 of the Industrial Disputes Act, 1947 to Labour Court on 23.10.1973. The workmen asserted that he was forced to retire on the basis of annexure '2' during the pendency of reference proceeding and consequently filed application under section 33A of the Act as the employer transgressed the limitation circumscribed under section 33 of the Act.

Held, that the order contained in annexure '2' served on the petitioner was passed much before the date of reference of the dispute to the Labour Court. There was no pending dispute when the order in question was passed and as such no right accrued to the petitioner to come up before the Labour Court under Section 33A of the Act.

Ram Bachan Singh v. The State of Bihar and Ors. (1985), I.L.R., 64, Pat. . . 390

Motor Vehicles Act, 1939—*Section 95 subsection (1) proviso (1)—and Bihar Motor Vehicles Rules, 1940—Rule*

Page.

87-provisions of- deceased an illegal occupant, dying in accident of the truck-whether entitled to compensation.

There was no assertion in the claim application that the deceased, who was travelling on the truck which met with accident in which he died, was a hirer of the vehicle, rather he was an illegal occupant of the vehicle. No compensation could be awarded to the claimants for the accident as he was an illegal occupant of the vehicle in view of section 95 subsection (1) proviso (1) of the Motor Vehicles Act, 1939 and Rule 87 of the Bihar Motor Vehicles Rules, 1940.

National Insurance Company Limited v. Lachminiya Devi and others (1985), I.L.R., 64, Pat. 379

Privileged Persons Homestead Tenancy Act, 1947 *as amended by Privileged Persons Homestead Tenancy (Amendment) Act, 1952—section 5 (1)—provisions of—whether applicable to persons ejected after 7.12.1952 and, filing application for restoration of possession in 1974.*

Where applications for restoration of possession over the homestead were filed by the respondent 5 in each of the

Page.

applications claiming themselves to be privileged tenants, sometimes in the year 1974;

Held, that, it is manifest that section 5(1) of the Privileged Persons Homestead Tenancy Act, 1947 as amended by Privileged Persons Homestead Tenancy (Amendment) Act, 1952, hereinafter called the Act, shall be applicable only in a case where a privileged tenant has been ejected by his landlord from homestead or any part thereof within one year before the date of the commencement of the Act, Section 5(1) of the Act was amended by Bihar Act No. 23 of 1952, which came into force on 7th December, 1952. It is not contemplated by the Act, that any such application under section 5(1) of the Act shall be filed even if a person was ejected after 7th December, 1952.

Held, therefore, that the applications were not maintainable.

Thakur Girja Nandan Singh v. The State of Bihar & Ors. (1985), I.L.R., 64, Pat. 478

APPELLATE CIVIL

1984/March

Before Birendra Prasad Sinha & Bageshwari Prasad Griyaghey, JJ.

*Smt. Jyotsna Mehta**

v.

M/s. Ram Bahadur Thakur & Co. and another.

Code of Civil Procedure, 1908 (Act V of 1908), *Order 21, Rules 58(4) and 63 and the Code of Civil Procedure (Amendment) Act, 1976 (Act 104 of 1976), Section 72—Scope and applicability of-attachment made and objection filed before coming into force of the Amending Act—Order passed after coming into force of the Amending Act—appeal by objector—maintainability of.*

,Where the attachment was made in 1964, it was subsisting from before the commencement of section 72 of the Amendment Act. It is obvious that the old law which existed at the time of the attachment would held the field. There can be, therefore, no doubt that even though the order was passed after the amending Act came into force, an appeal filed under order 21, Rule 58(4) of the Code

* Appeal from Original Order No. 245 of 1979. Against the judgment and order dated 23rd June 1979 passed in Miscellaneous Case No. 87 of 1965/44 of 1976 by Shri Shambhu Nath Singh, Subordinate Judge, 2nd Court Muzaffarpur.

is not competent. Where a claim petition was made before the Amending Act and was dismissed after the Act came into force, the remedy was to file a suit under the Order 21, Rule 63 and not to file an appeal under the new amended Rule 58 C.P.C.

Held, therefore, that the present appeal filed under the amended provision of order 21 Rule 58(4) of the Code is not maintainable.

Syndicate Bank v. Rallies India Ltd. (1) and N. Tati Reddi v. Syed Meera Hussain (2)-referred to.

Appeal by the objector.

M/s K.K. Sharan, A.K. Sharan and Braj Kishare Gaur for the appellats.

M/s Madhusudan Singh and Shree Nath Singh for the respondents.

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

Birendra Prasad Sinha,J. This appeal by Smt. Jyotsna Mehta, wife of the judgment debtor has been filed under Order 22 Rule 58(4) of the Code of Civil Procedure (in short the 'Code') against an order dated 23rd June 1979 passed in Miscellaneous Case No. 87 of 1965/44 of 1976 by the Subordinate Judge 2nd Court, Muzaffarpur.

2. The short facts leading to this appeal are these: The respondent no. 1 M/s Ram Bahadur Thakur and Company obtained a decree against the respondent no. 2 Pashupati Nath Mehta and some others on 29.6.63. On 3.10.63 the decree holder filed execution case no. 84 of 1963 and put certain

(1) (1970) AIR (Delhi) 40

(2) (1979) AIR, A.P. 70.

properties belonging to the judgment debtor under execution. Some times in the year 1964 the properties were attached. Thereafter, it appears, some applications were filed under Order 21 Rule 58 of the Code by the judgment debtor and some others which were dismissed. The present appellant Smt. Jyotsna Mehta filed an application under Order 21 Rule 58 of the Code on 16.9.65 which was registered as Miscellaneous case no. 87 of 1965. She claimed that in a partition suit she was allotted 1/3rd share in some properties by a compromise and she was in possession thereof. As she was not a party to the decree under execution the decree could not be executed against her or her properties. The plea was negatived and the Miscellaneous case filed by her was dismissed by the learned Subordinate Judge by the impugned order.

3. Mr. Shree Nath Singh learned counsel appearing on behalf of the respondents-decree holder, at the very out set, submitted that the appeal filed by the appellant in this Court under Order 21 Rule 58(4) of the Code as amended in 1976 is not maintainable. He further submitted that the remedy of the appellant, if any, was to file a suit under Order 21 Rule 63 of the old Code.

4. The question for consideration, therefore, is whether the appeal as filed under the provisions of order 21 Rule 58(4) of the Code as amended is maintainable.

5. Some provisions of the Civil Procedure Code, 1908, were amended by the Code of Civil Procedure (Amendment) Act 1976 (No. 104 of 1976). The relevant provisions came into force on 1st of February 1977. The provisions contained in

Order 21 Rule 58 of the Code before the amendment provided for investigation of claims and objections. According to it where any claim was preferred to or any objection was made to the attachment of any property attached in execution of a decree on the ground that such property was not liable to such attachment the court was required to proceed to investigate the claim or objection with a like power as regards the examination of claimant or objector and in all other respect as if he was a party to the suit. Order 21 Rule 63 of the Code prior to amendment provided that where a claim or an objection was preferred, the party against whom an order was made could institute a suit to establish the right which he claimed to the property in dispute, but subject to the result of such suit, if any, the order was conclusive. Such orders were not appealable under the provisions of section 104 of the Code.

6. The provisions contained in Order 21 Rule 58 (old) had a limited scope. After the adjudication of claims and objection is the execution proceeding the matter could be further agitated in a regular suit. This unnecessarily led to protracted litigation. It was though desirable to have all questions including the question of title settled finally in the execution proceeding itself. Rules 58 to 63 were, therefore, substituted by the amending Act which now provides for an appeal from an order determining the claim or objection under Order 21 Rule 58 of the Code. Order 21 Rule 58, as amended, reads as under:-

> 58(1) Where any claim is preferred to, or any objection is made to the attachment of any property attached in execution of a

decree on the ground that such property is not liable to such attachment, the Court shall proceeed to adjudicate upon the claim or objection in accordance with the provisions herein contained:

Provided that no such claim or objection shall be entertained -

(a) Where, before the claim is preferred or objection is made, the property attached has already been sold; or

(b) where the Court considers that the claim or objection was designedly or unnecessarily delayed.

(2) All questions (including questions relating to right, title or interest in the property attached) arising between the parties to a proceeding or their representatives under this rule and relevant to the adjudication of the claim or objection, shall be determined by the Court dealing with the claim or objection and not by a separate suit.

(3) Upon the determination of the questions referred to in sub- rule (2), the Court shall, in accordance with such determination,-

(a) allow the claim or objection and release the property from attachment either wholly or to such extent as it thinks fit; or

(b) disallow the claim or objection; or

(c) continue the attachment subject to any mortgage, charge or other interest in favour of any person; or

(d) pass such order as in the circumstances of the case it deems fit.

(4) Where any claim or objection has been adjudicated upon under this rule, the order made thereon shall have the same force and be subject to the same conditions as to appeal or otherwise as if it were a decree.

(5) Where a claim or any objection is preferred and the Court, under the proviso to sub-rule (1), refuses to entertain it, the party against whom such order is made may institute a suit to establish the right which he claims to the property in dispute but, subject to the result of such suit, if any, an order so refusing to entertain the claim or objection shall be conclusive.

7. It is significant to note that the word 'investigation' has been substituted by the word 'adjudication'. The executing Court can now gc into even the question of title and settle the matter once for all in the execution proceeding itself. Subrule 4 of Rule 58 now provides that where any claim has been adjudicated upon under this Rule, the Order made therein shall have the same force and be subject to the same conditions as to appeal or otherwise as if it were in decree. Rule 63 of the old Code now stands repealed. The effect is that now a suit as contemplated by Rule 63 cannot be filed and the remedy is only by way of an appeal under sub-rule 4.

8. In the present case, as stated above, the decree was passed on 29.6.63 and the attachment was made some times in the year 1964. The present appellant filed her objection under Order 21

Rule 58 of the Code on 16.9.65 which has been decided on 23.6.79. The learned counsel appearing on behalf of the appellant submitted that since the order was passed after the Code of Civil Procedure (Amendment) Act 1976 came into force his remedy is only by way of an appeal under the provisions of the existing Code i.e. Order 21 Rule 58(4) of the Code. This argument cannot be accepted in the face of section 97(2)(q) of the Amendment Act 1976, Section 97(2)(q) of the Amendment Act reads as under:-

(q) the provisions of rule 31, 32, 48A, 57 to 59, 90 and 97 to 103 of Order XXI of the First Schedule as amended or, as the case may be, substituted or inserted by section 72 of this Act shall not apply to or affect -

(i) any attachment subsisting immediately before the commencement of the said section 72, or

(ii) any suit instituted before such commencement under rule 63 aforesaid to establish right to attached property or under rule 103 aforesaid to establish possession, or

(iii) any proceeding to set aside the sale of any immovable property,

and every such attachment, suit or proceeding shall be continued as if the said section 72 and not come into force;

9. As stated earlier section 72 of the Amendment Act came into force on 1st of February 1977. The attachment in the present case was made in 1964 and was, therefore, subsisting from before the commencement of section 72 of the Amendment

Act. It is obvious that the old law which existed at the time of the attachment would hold the field. There can be, therefore, no doubt that in the present case, even though the order was passed after the Amending Act came into force, an appeal filed under Order 21 Rule 58(4) of the Code is not competent. In case of *Syndicate Bank v. Rallies India Ltd.) (1)* on almost similar facts it was held that section 97 of the Act 104 of 1976 makes it clear that as far as the vested rights pertaining to attachments are concerned and which came into existence prior to 1st of February 1977, the old law would hold the field. Where a claim petition was made before the Amending Act and was dismissed after the Act came into force, the remedy was to file a suit under order 21 Rule 63 and not to file an appeal under the new amended Rule 58 C.P.C. In the case of *N. Tati Reddi v. Syed Heera Hussaini (2)* a similar view was taken and it was held that in view of section 97 of the Amendment Act of 1976 with regard to attachment subsisting before the enforcement of the amended provisions, the old provisions of Order 21 Rule 58 C.P.C. would continue to apply.

10. I, therefore, held that the present appeal filed under the amended provision of Order 21 Rule 58(4) of the Code is not maintainable. This appeal must be dismissed on this ground alone.

11. The result is that this appeal is dismissed, but without costs.

Bageshwari Prasad Griyaghey, J. I agree.

M.K.C. Appeal Dismissed.

(1) (1970) AIR (Del.) 40

(2) (1979) AIR (AP) 70.

APPELLATE CIVIL

1984/April, 4

Before Birendra Prasad Sinha and M.P.Varma, JJ.

*State Trading Corporation and another**

v.

M/s Vaishali Shoe Company Ltd.

Arbitration Act, 1940 (Act X of 1940), *Section 34—contract containing arbitration clause for reference of dispute to arbitrator—failure of defendant to respond to plaintiffs letter and notice under section 80 CPC—plaintiff filing suit for realisation of money—defendant filing application under section 34 for stay of the proceeding—action of the defendant, whether a mere inaction—application under section 34, whether to be dismissed.*

In the present case the plaintiffs were requesting the defendants for the disposal of the goods and for making the payment as the interest was growing up to their deteriment and they were receiving threats from the Bank. The plaintiffs made specific request to the defendants by their letter dated 4.11.82 for the appointment of a receiver. The authorities did not wake up. When the notice under

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* Appeal from Original Order No. 199 of 1983. Against an order dated 20.7.83 passed by Shri M.M.Verma, Ist Subordinate Judge, Muzaffarpur in M.S. no. 8/1983.

section 80 CPC was sent the defendants received it but slept over it. Thus they allowed the suit to be filed and they waited for another three months to file an application under section 34 of the Arbitration Act for staying the proceeding. This amply signifies the gross indifference on the part of the authorities and not only mere silence.

Held, therefore, that in the facts and circumstances of the case the Court below rightly took the view that this was not a case of mere inaction on the part of the defendants. The application under section 34 was rightly dismissed and does not require any interference by this Court.

State of Punjab v. Gosta Iron and Brass Works (1)-distinguished.

Food Corporation of India v. Thakur Shipping Co. (2)-relied.

Appeal by the defendants.

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

Mrs. Sheema Ali Khan and Aftab Alam for the appellants

M/s Kaushal Kumar Sinha, Awadhesh Kumar Singh and Shree Nath Singh for the respondent.

Birendra Prasad Sinha, J. This is an appeal by the defendants against an order passed by the 1st Subordinate Judge, Muzaffarpur, in a money suit.

2. The plaintiff has filed the suit claiming Rs. 5,90,052/- (five lakhs ninety thousand fifty two). It appears that the plaintiff- respondent entered into a

(1) (1978) AIR (SC) 1608

(2) (1975) AIR (SC) 460.

contract with the defendants-appellants Corporation for the supply of sixty thousand industrial Gloves to be sold and supplied to a firm of Australia. Clause 13 of the contract contained an arbitration clause which, inter alia, stipulated that all disputes or differences arising under the contract would be referred to its arbitration of an officer of the appellant corporation. The agreement was entered into on 31.1.80. The suit was filed by the plaintiff on 17.1.83. On 7.4.83 a petition was filed on behalf of the defendants- appellants under section 34 of the Arbitration Act (in short the 'Act') in which it was stated that the defendants-appellants were willing when they received a letter dated 4.11.82 from the plaintiff and were still willing to do all thing necessary within the ambit of the corporation for the proper enforcement of the arbitration clause. It was prayed that the suit should be stayed as provided under section 34 of the Act. Learned Subordinate Judge, after hearing the parties, dismissed the application under section 34 of the Act. On a finding that the defendants-appellants were not willing and were not ready to appoint an arbitrator to decide the dispute. The defendant-corporation has, therefore, filed this appeal against the impugned order dated 30th July, 1983.

3. Mr. Aftab Alam, learned counsel for the appellants, submitted that the learned Subordinate Judge should not have dismissed the petition under section 34 of the Act for mere inaction on the part of the defendants. He submitted that there must be something more i.e. some positive act on the part of the defendants signifying their unwillingness of want of readiness to go to the arbitration.

4. The question, therefore, is whether in the facts and circumstances of this case it can be said that the defendants- appellants were willing for the appointment of an arbitrator prior to the filing of the suit.

5. From the facts of the present case it will appear that the plaintiff respondent was required to supply the Gloves latest by March 1980 and on the basis of a certificate of the defendants had secured a packing credit advance for the purchase of materials. Twenty five thousand Gloves were manufactured and on 31.3.80 the plaintiff informed the defendants to inspect and lift the goods. The goods were inspected and approved and the plaintiff was informed by a telegram dated 7.4.80 from the defendants to stop further production. Since June 1980 the plaintiffs were requesting the defendants to arrange early disposal of the goods as the Bank loan was everyday multiplying, but the defendants did not take any action. Ultimately having awaited for quite sometime the plaintiff wrote a letter on 4.11.82 to the defendants to appoint an arbitrator which letter was received by the defendants on 8.11.82. The defendants did not take any action. Therefore, the plaintiff sent a notice under section 80 of the Code of Civil Procedure (in short the 'Code') to the defendants on 10.12.82 which was served on them on 13.12.82. Even then the defendants did not take any action. The suit was thereupon filed on 17.1.83. The plaintiffs in their rejoinder in the court below stated that the Bank had given them a threat for filing a suit and the period of limitation of the plaintiffs' claim was also near. They had no option but to file a suit. It was, therefore, not only inaction on the

part of the defendants but they purposely avoided to appoint any arbitrator with the ulterior motive to see that the claim of the plaintiff was barred.

6. Section 34 of the Act provides that when any party to the arbitration agreement commences any legal proceeding against any other party to the agreement, any party to such legal proceeding may, at any time before filing a written statement or taking any other steps in the proceeding, apply to the judicial authority to stay the proceeding and if satisfied that there was no sufficient reason why the matter should not be referred in accordance with arbitration agreement and that the applicant was at the time when the proceedings were commenced and still remains ready and willing to do all things necessary to the proper conduct of arbitration, such authority may make an order staying the proceedings. The question is whether the defendants were ready and willing for the arbitration at the time when the proceedings were commenced and were still ready for the same when the application was filed. Relying upon a decision of the Supreme Court in case of *State of Punjba vs. Gosta Iron & Brass Works (1).* Mr. Aftab Alam submitted that mere silence on the part of the defendants was not enough to disentitle them to move under section 34 of the Act and seek stay. In that case also the Subordinate Judge and the High Court had declined to stay the suit. What had happened was that the defendants kept silent on receiving a notice under section 80 of the Code. It was observed by the Supreme Court that as a matter of law mere silence on the part of the defendants when a notice under section 80 of the

(1) (1978) AIR (SC) 1608.

Code was sent to him, may not, without mere disentitle him to move under section 34 of the Act and seek stay. The appeal was dismissed by the Supreme Court as other circumstances were also there for dismissal of the application under section 34 of the Act as the suit was filed and when notices were sent the summons were refused; and when an exparte proceeding was taken the Government woke up.

7. In the present case it would appear that the plaintiffs were requesting the defendants for the disposal of the goods and for making the payment since June 1980 as the interest was growing up to their detriment and they were receiving threats from the Bank. The plaintiffs made specific request to the defendants by their letter dated 4.11.82 for the appointment of a receiver. The authorities did not wake up. When the notice under section 80 of the Code was sent the defendants received it but slept over it. Thus they allowed the suit to be filed. On 17.1.83 they waited for another three months to file an application under section 34 of the Act for staying the proceedings. This amply signifies the gross indifference on the part of the authorities and not only mere silence. The appellant corporation is a Government Undertaking. It was only expected that with large resources at their command they would be deligant in all such matters. But if the authorities become lethargic they had to think themselves. I shall do better by quoting a passage from the judgment of *Krishna Aiyer, J in the State of Punjab vs. Gosta Iron & Brass Works Ltd. (supra).*

"We like to emphasize that Governments must be made accountable by Parliamentary Social audit for wasteful litigative expenditure inflicted on the

community by inaction. A statutory notice of the proposed action under S. 80, CPC is intended to alert the State to negotiate a just settlement or at least have the courtesy to tell the potential outsider why the claim is being resisted. How S. 80 has become a ritual because the administration is often unresponsive and hardly lives up to the Parliament's expectation in continuing S. 80 in the Code despite the Central Law Commission's recommendations for its deletion. An opportunity for settling the dispute through arbitration was thrown away by sheer inaction. A litigative policy for the State involves settlement of governmental disputes with citizens in a sense of conciliation rather than in a fighting mood. Indeed, it should be a directive on the part of the State to empower its law officer to take steps to compose disputes rather than continue them in court. We are constrained to make these observations because much of the litigation in which Governments are involved adds to the case load accumulation in courts for which there is public criticism. We hope that a mere responsive spirit will be brought to bear upon governmental litigation so as to avoid waste of public money and promote expeditious work in courts of cases which deserve to be attended to.

8. In the case of *Food Corporation of India vs. Thakur Shipping Co. (1)* it was observed that where a party to the arbitration agreement chooses to maintain silence in the face of repeated requests by the other party to take steps for arbitration, the case is not one of the 'mere inaction'. Failing to act when a party is called upon to do so is a positive

(1) (1975) AIR (SC)469.

gesture signifying unwillingness or want of readiness to go to arbitration. In the instant case the plaintiff-respondent had not only requested the defendants for the appointment of an arbitrator, but had also sent a legal notice thereafter and the defendants did not even choose to send a reply. It cannot, therefore, be said that it was merely inaction or silence on the part of the defendants. They failed to act when they were called upon to do so. This was a positive act on their part signifying their unwillingness to go to arbitration.

9. The learned Subordinate Judge has taken into consideration all these facts and circumstances and has rightly held that this was not a case of mere inaction on the part of the defendants. The application under section 34 was rightly dismissed and does not require any interference by this Court.

10. In the result this appeal fails and is dismissed, but without costs.

M.P. Varma, J. I agree.

M.K.C. Appeal dismissed.

APPELLATE CIVIL

1984/May, 22

Before Hari Lal Agrawal and Abhiram Singh, JJ.

*National Insurance Company Limited.**

v.

Lachminiya Devi and others.

Motor Vehicles Act, 1939 (Central Act no. IV of 1939), *section 95 subsection (1) proviso (1)—and Bihar Motor Vehicles Rules, 1940—Rule 87— provisions of—deceased an illegal occupant, dying in accident of the truck—whether entitled to compensation.*

There was no assertion in the claim application that the deceased, who was travelling on the truck which met with accident in which he died, was a hirer of the vehicle. No compensation could be awarded to the claimants for the accident as he was an illegal occupant of the vehicle in view of section 95 subsection (1) proviso (1) of the Motor Vehicles Act, 1939 and Rule 87 of the Bihar Motor Vehicles Rules, 1940:

C. Narayanan v. Madras State Palm Gur Sammelan and anr. (1), and Sardar Mohan Singh

* Appeal Against the Original Order No. 128 of 1977 (R). Against an award of Shri Anand Prasad Sinha, Judicial Commissioner of Chotanagpur, Ranchi and Motor Accident Claims Tribunal Ranchi, dated 18.2.1977.

(1) (1974) ACJ 479.

Bedi v. Mano Maya Thappa and ors. (1)- followed.

Pardi Zankhari Nes Karanj Group Dudh and Sakbhaji Sahkari Mandli Limited v. Govindji Bhagwanji and anr. (2)-distinguished.

Appeal by Insurance Company.

M/s B.K. Dey & P.C. Roy for the appellants.

M/s A. Sahay & Miss Indrani Choudhari for the respondents.

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

Hari Lal Agrawal & Abhiram Singh, JJ. This appeal arises out of an Award of the Motor Vehicles Accident Claims Tribunal, Ranchi, dated 18.2.1977 by which a sum of Rs. 36,000/- has been awarded to the respondents on account of the death of one Ram Chandra Sahu aged about 34 years who was travelling on truck No. B.R.V. 4219 and died on 6.9.1973 when the said truck met with an accident.

2. For the point that has been raised on behalf of the appellant, it is not necessary to state the other facts which have been indicated in the Award for giving the amount of compensation. The point is as to whether the claimants are entitled to any compensation at all in view of the provisions contained in the proviso (1) to sub-section (1) of section 95 of the Motor Vehicles Act (shortly the Act) and rule 87 of the Bihar Vehicles Rules. The proviso covers the liability in respect of the death, arising out of and in the course of his employment, of the employee of a person insured by the policy or in respect of bodily injury sustained by him in

(1) (1972) ACJ 174

(2) (1977) ACJ 270.

that course. On this basis it was contended that the liability for the death or the bodily injury of a third person i.e. an outsider is not permitted under the terms of the Statute. To be more specific under rule 87 of the Rules which are framed under section 41 of the Act, no person is to be carried in a vehicle other than a bonafide employee of an owner or a hirer of the vehicle. It has not been stated in the claim application that the deceased was a hirer of the vehicle; rather according to the finding of the Tribunal the deceased was an earner of monthly income of about Rs. 300/- per month. It was, therefore, rightly contended that no compensation should have been awarded to the claimants for the accident in question as the deceased was an illegal occupant of the vehicle in question. We find full support for the above proposition from a Bench decision of Madras High Court in the case of *C. Narayanan vs. Madras State Palm Gur Sammelan and another (1)* where it was held that a passenger carried by a lorry will not be covered by an insurance policy, unless he is proved to be a passenger travelling by reason of or in pursuance of contract of employment. There is no provision in the Act to protect such a person. It appears that in the State of Madra, rules similar to that obtaining in this State were framed under the Act prohibiting travel by any person as a passenger in a goods vehicle. On behalf of the claimants, however, reliance was placed upon the case of *Pardi Zankhri Nes Karanj Group Dudh and Sakbhaji Sahkari Mandli Limited vs. Govindji Bhagwanji and another (2)* which is a case of the Gujrat High Court;

(1) (1974) ACJ, 479

(2) (1977) ACJ, 270.

wherein the learned Single Judge while dealing with the case of an accident of a passenger travelling in a truck of the Co-operative Society who had sustained injuries due to accident, held the Insurance Company liable to pay the compensation. We find from this report that the deceased was travelling in the truck as he was going with his milk for the purposes of having laboratory test at a diary for the purpose of ascertaining the fat contents thereof and respondent No.1 was a member of the appellant Co-operative Society and he was supplying the milk to the Society. The deceased, therefore, was not completely an outsider in the prohibited category but was an authorised occupant. Apart from this fact, the contentions which have been raised before us were not advanced there and, perhaps, rightly in view of the fact that the deceased was an authorised traveller. In view of these facts, this authority is quite distinguishable and will have no application with the facts of the present case. It is not necessary to travel for and wide as the point is squarely covered by a Bench decision of our own High Court in the case of *Sardar Mohan Singh Bedi vs. Mano Maya Thappa and others (1)* where a passenger travelling in a goods vehicle was killed in an accident and the Insurance Company was held not liable to pay the compensation.

3. Although this point was taken by the appellant in the written statement, but for some reason or the other it does not appear to have been noticed by the Tribunal in its Award. On that account, however, this legal question cannot be shut out from being pressed in this Court.

(1) (1972) ACJ 174.

4. In the result, for the above reasons, this appeal must succeed and it is accordingly allowed.

The Awards of the claims tribunal is hereby set aside. However, in the facts and circumstances of the case, we shall leave the parties to bear their own cost.

R.D. Appeal allowed.

TAX CASE

Before Uday Sinha and Nazir Ahmad, JJ.

1984/August, 30.

Additional Commissioner of Income Tax,

*Bihar, Patna.**

v.

M/s. Indian Copper Corporation Limited,

Ghatsila, Bihar.

Income Tax Act, 1961 (Act XLIII of 1961), *Section 32(1) (IV)—word 'erection', whether relates only to the completion of the process of erection or to the date of commencement too—claim of initial depreciation for a building completed after 31.2.1961—date of commencement of the building—relevancy of.*

Erection in section 32(1)(IV) of the Income Tax Act, 1961 must relate only to the completion of the process of erection without any reference to the date of commencement. The only relevant date for the purpose of grant of initial depreciation in terms

* Taxation case Nos. 43 & 44 of 1972. In the matter of Statement of the case by the Income Tax Appellate Tribunal 'A' Bench, Calcutta in the matter of assessment of Income Tax on M/s. Indian Copper Corporation Limited, Ghatsila, Bihar for the assessment year 1963-64.

of section 32(1) (IV) is the date of completion of the building.

Held, therefore, that in the instant case the Tribunal was fully justified in taking the view that the commencement of the building of the assessee was entirely irrelevant.

Reference made under section 256 of the Income Tax Act, 1961.

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

Mr. B.P. Rajgarhia & S.K. Sharan for the petitioner

M/s. Kashi Nath Jain, S.K. Mishra & Vinod Kumar Bariar for the opposite party.

Uday Sinha & Nazir Ahmad, JJ.

The question of law referred to this Court in terms of section 256 of the Income Tax Act, 1961 (hereinafter to be referred to as the Act) is as follows:-

> "Whether on the facts and in the circumstances of the case, the claim of the assessee for initial depreciation under section 32(1)(iv) of the Income Tax Act, 1961 in respect of buildings whose construction commenced before 31.3.61 but was completed after 31.3.61 was proper ?"

2. The assessment year in question is 1963-64. The only question which calls for our decision is whether the assessee was entitled to initial depreciation.

3. In order to appreciate the point in controversy the history of the proceeding must be set out. The assessee is a public limited company

The assessee claimed initial depreciation for its buildings completed during the previous year relevant to the assessment year in terms of section 32(1)(iv) of the Act. The Income Tax Officer rejected the claim of the assessee without discussing any aspect of the matter. On appeal by the assessee, the Appellate Assistant Commissioner remanded back the matter to the Income Tax Officer with a direction to examine the claim of the assessee and to find out as to which of the buildings, newly erected during the previous year, fell in the categories mentioned in section 32(1)(iv) of the Act. The Appellate Assistant Commissioner also directed that in regard to those buildings, the Income Tax Officer should allow initial depreciation at the rate of 20% of the actual cost of the buildings without being meticulous about the date of commencement of the construction thereof. In the view of the Appellate Assistant Commissioner the date of commencement of the construction of the building was immaterial. The Revenue, being aggrieved by the view taken by the Appellate Assistant Commissioner and a direction in pursuance thereof, filed an appeal before the Appellate Tribunal. In the appeal, before the Tribunal, the department contended that in order to claim the benefit of section 32(1)(iv) of the Act it was not only essential that the construction/erection must have been completed after 31.3.1961 but it also must have been commenced after 31.3.1961. The Tribunal did not accede to the stand of the department. It accordingly held that the only relevant date for the purpose of grant of initial depreciation in terms of section 32(1)(iv) of the Act was the date of completion of the buildings. It has been completed

after 31.3.1961 an, therefore, the assessee would be entitled to the allowance. The department, being aggrieved by the order of the Tribunal, filed an application under section 256 of the Act. The Tribunal in pursuance thereof has referred to this Court a question of law which we have set out earlier.

4. Section 32(1)(iv) of the Act lays down that an assessee shall be entitled to depreciation of building at a certain percentage, in the case of any building which has been newly erected after the 31st day of March, 1961, where the building is used solely for the purpose of residence of persons employed in the business. The buildings in question were used for the residence of the Officer of the Company. The entire controversy hinges around the expression 'newly erected.' Mr. B.P. Rajgarhia, learned counsel for the Petitioner, has submitted that the word 'erected' takes in its sweep the commencement of the erection as well as the completion thereof and, therefore, the full effect of section 32(1)(iv) of the Act must relate to only those cases where the commencement as well as completion has taken place after the 31st day of March, 1961. We regret, we find no substance in this submission for the reasons which we shall state herein-below.

5. Section 23 of the Act prescribes the manner in which the annual value of the house property has to be calculated. It lays down that the annual value of any property for the purpose of section 22 of the Act shall be as laid down in clauses (a) & (b) of section 23 of the Act. The second proviso thereto reads as follows:-

"Provided further that the annual value

as determined under this sub-section shall -

(a) in the case of a building comprising one or more residential units, the erection of which is begun after the 1st of April, 1961, and completed before the 1st day of April, 1970.

xxx xxx xxx"

6. The expression used in section 23 of the Act read in juxtaposition with that in section 32(1)(iv) of the Act are rather significant. Where the legislature intended to lay down two termini, it did so as in section 23 of the Act. In section 32 of the Act, however, the commencement of the erection of a building work was dropped. An inference, therefore, must be drawn that the law makers did not insist or were not meticulous about the commencement of the construction/erection but the benefit was complete if a building was newly erected after 31.3.1961. The expression used in the statute gives an inkling to the object of the Act. Reading the two provisions together, we have not the least doubt about the import of the expression. Erection in section 32(1)(iv) of the Act must relate only to the completion of the process of erection without any reference to the date of commencement.

7. There is yet another reason for the view that we have taken in regard to the contents of the expression 'newly erected'. The allowance as contemplated by section 32(1)(iv) of the Act found place in the Income Tax Act, 1922 as well. In section 10(2)(iv) of the Old Act it was laid down that in the case of newly erected and where erection of which had begun and completed

between 1.4.1946 and 31.3.1956 (both dates inclusive) 13% of the cost was allowed as initial depreciation to the assessee. It is thus noticeable that where the law makers intended to lay down the commencement as well as completion of new buildings as the test for granting initial depreciation, it was said so specifically. The law makers must be granted the wisdom of the provisions as well as the appropriateness of the expression used. A change in the expressions leave no manner of doubt in our mind that the date of commencement of a new building was given a gobye in the 1961 Act for the purpose of extending initial depreciation allowance. In our view, therefore, the Tribunal was fully justified in taking the view that the commencement of the buildings of the assessee was entirely irrelevant.

8. The answer to the question referred to this Court must be in favour of the assessee and against the Revenue.

M.K.C. Question answered.

CIVIL WRIT JURISDICTION

1984/August, 31.

Before Nagendra Prasad Singh and M.P.Varma, JJ.

*Ram Bachan Singh**

v.

The State of Bihar and others.

Industrial Disputes Act, 1947 (Central Act No. XIV of 1947) *section33A—provisions of—no dispute pending before Labur Court when the impugned order was passed—proceeding under, maintainability of.*

Rohtas Industries Ltd. Dalmianagar the employer, served the order contained in annexure '2' on the workman on 27.8.1973 whereby he was asked to retire on 28.11.1973 as he would attain the age of Sixty years i.e. the age of superannuation. The workman raised grievance and Government of Bihar made a reference under section 10 of the Industrial Disputes Act, 1947 to Labour Court on 23.10.1973. The workman asserted that he was forced to retire on the basis of annexure '2' during the pendency of reference proceeding and consequently filed application

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* Civil Writ Jurisdiction Case No. 3188 of 1979. In the matter of an application under Articles 226 and 227 of the Constitution of India.

under section 33A of the Act as the employer transgressed the limitation circumscribed under section 33 of the Act.

Held, that the order contained in annexure '2' served on the petitioner was passed much before the date of reference of the dispute to the Labour Court. There was no pending dispute when the order in question was passed and as such no right a accrued to the petitioner to come up before the Labour Court under section 33A of the Act.

Application under Articles 226 and 227 of the Constitution..

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

Mr. D.N.Pandey for the Petitioner

M/s. R.P. Katriar and S.K. Katriar for the Respondents

M.P.Varma,J. A short point involved for a decision in this application is whether on the facts of the case Section 33A of the Industrial Disputes Act 1947 (hereinafter referred to as 'the Act') is attracted which confers jurisdiction on a Labour Court or Tribunal to adjudicate and grant consequential relief of reinstatement/payment of compensation like a. back wages or such other benefits during the pendency of the proceedings referred to under section 10 of the Act.

2. Facts giving rise to this application are as follows:

The petitioner was in the employment of Rohtas Industries Ltd., Dalmianagar (respondent no. 2). The service-conditions of the employees in this management is governed by the Rohtas

Industries Ltd. Standing Order framed under the Industrial Employment (Standing Order Act 1946) (hereinafter referred to as 'the Standing Order'). The standing order contains a clause that every workman retires on attaining the age of sixty years. Accordingly respondent no.2, the management served a notice on the petitioner on 27.8.73, whereby he was asked to retire on 2.11.1973 as he would attain the age of sixty years on that date.

3. The petitioner disputed the correctness of the entry recorded in the service-book with regard to his date of birth, and according to him, he did not reach the age of superannuation on 2.11.1973. His claim was that his date of birth being 2.11.1920, he would retire on 2.1.1980 and that the notice intimating of his retirement was quite unjust. The petitioner individually and also collectively through 'Karamchari Sangh' raised his grievance and the Concilliation machinery of the Government of Bihar having failed to resolve dispute made in a reference under section 10 of the Act to the Labour Court under notification no. III/D1- 16026/73 L&E 3564 dated 23rd October, 1973, for adjudication which was registered as reference case no. 16 of 1973. Incidentally it may also be noted that all the workmen including the petitioner made representation for revision of their wages and this was also referred to the Industrial Tribunal to examine if the wage- structure of the workman be revised, being Reference case no. 60 of 1969. The petitioner has pleaded that this second reference was a co-ordinate issue with the earlier one relating to this service conditions, although correctly speaking, we are not concerned with the Reference case no. 60 of 1969 for deciding the issue, raised

in this application.

4. The petitioner has submitted that while the aforesaid Reference case no. 16/73 was pending adjudication, the petitioner was served with another notice, vide annexure '2' dated 27.8.1973 by which he was made to retire on 28.11.1973. The notice issued was a sort of victimisation to him and it amounted to making a change in the service conditions by way of asking him to retire before attaining the age of 60 years in violation of the Rohtas Industries Ltd. Standing Order.

5. So far Reference case no. 16/73 was concerned, it was decided in favour of the petitioner. The Labour court gave its award dated 9.10.1976 (vide annexure 'B' to the counter affidavit, filed by the respondent no.2). It was held therein that the petitioner's date of birth was 2.1.1920 and so, he did not reach the age of superannuation.

6. In the present writ application the petitioner has made out a case that it was before the pendency of the reference proceeding that he was forced to retire on the basis of notice (annexure 2) as referred to above. It is also asserted that such a notice, in fact, affected and caused a change in the service condition prejudicial to the interest of the petitioner, which right the respondent no.2 did not have and the notice was in contravention of the provisions of section 33 of the Act.

7. The petitioner, therefore, sought protection against the alleged victimisation and filed a complaint under section 33 of the Act on 17.1.1975 to the Presiding Officer of the Labour Court for necessary action. The complaint was registered as

a Miscellaneous case no.2 of 1975.

8. The Labour Court by his order, dated 17.7.1979 (the impugned order) held that the proceeding (Misc. case no. 2/75) was not maintainable, as it did not attract the provisions of section 33A of the Act. The Court further held that at best, it was a claim for recovery of money due, if any, from an employer (respondent no.2), for which the petitioner might agitate his claim under section 33C of the Act. A copy of that order of the Labour Court has been attached to the application as annexure '6'. The petitioner has challenged its validity and has prayed for quashing of the same. Further relief has been sought to direct the Labour Court judge, i.e. respondent no. 3 to hear the complaint of the petitioner filed under section 33A for alleged contravention of the provisions laid down under section 33 of the Act.

9. It cannot be disputed that in a case of contravention by an employer relating to the provisions of section 33 of the Act during the pendency of the proceeding, an aggrieved employee may make a complaint in writing for action..

10. A counter affidavit has been filed on behalf of respondent no. 2, the manager of Rohtas Industries Ltd., Dalmianagar. The employer respondent has said that the petitioner was not a workman concerned as defined under section 2(a) of the Act and within the meaning of section 33 of the Act, inasmuch as the order in question (vide annexure '2') for his retirement was passed on 27.8.1973, i.e. prior to the reference notification dated 23.10.1973, which form subject matter of adjudication in reference case no. 16/73, inter alia

it has also been stated that the retirement on account of superannuation reaching the age of sixty years, as per Standing Order, does not amount to any alteration or change in the conditions of service. The petitioner is therefore, not competent to maintain his cause for any relief under the Act.

11. Section 33 of the Act is as follows:

> "Conditions of service etc. to remain unchanged under certain circumstances during the pendency of proceeding (1) during the pendency of any conciliation proceeding before an arbitrator or a conciliation officer or a Board of any proceeding before a Labour Court or Tribunal or National Tribunal in respect of an industrial dispute no employer shall -
>
> (a) in regard to any matter connected with the dispute alter, to the prejudice of the workmen concerned in such a dispute, the conditions of service applicable to them immediately before the commencement of such proceeding; or
>
> (b) for any misconduct connected with the dispute, discharge, or punish, whether by dismissal or otherwise any workman concern in such dispute,
>
> Save with express terms in writing of the authority before which the proceeding is pending."

12. Thus, on reading the section quoted above, I find that the saving clause appended thereto does not prohibit the employer in taking action against his employees but the only limitation imposed against the management employer is that the management may do so with express

permission of the Tribunal or the Labour Court where the proceeding is pending. In other words, any such action of the employer which might be detrimental to the interest of an employee, is subject to the scrutiny of the Labour court. The intent behind the Section is to safeguard and to protect the interest of a workman concerned in a proceeding under industrial dispute. It decidedly prohibits the employer, during the pendency of the dispute, to bring any change in the conditions of service, as such action would bring about fresh disputes and may aggravate the relation between them. But in case of employer transgresses the limitation circumscribed under section 33, the employee may invoke his right for action under section 33A by lodging a written complaint to the authority concerned, where the proceeding is pending. Section 33A of the Act may profitably be quoted as follows. This reads as follows:

> "33A. Special provisions for adjudication as to whether conditions of service etc. changed during the pendency of proceeding -.
>
> Where an employer contravenes the provisions of section 33 during the pendency of the proceeding before a Conciliation Officer, Board, an Arbitrator, a Labour Court, Tribunal or National Tribunal any employee aggrieved by such contravention, may make a complaint in writing in prescribed manner:
>
> (a) to such Conciliation Officer or Board, and the Conciliation Officer or the Board shall take such complaint into account in mediating in, and promoting the settlement of such industrial dispute; and

(b) to such arbitrator, labour court, tribunal and National Tribunal and on receipt of such complaint the arbitrator, Labour court, Tribunal or National Tribunal, as the case may be, such adjudication upon the complaint as if it were dispute referred to are pending before it, in accordance with the provisions of this Act and shall submit his or its award to the appropriate Government and the provisions of this Act shall apply accordingly."

13. A plain reading of the provisions aforesaid indicate that the complainant under this section must be a workman first, and secondly, he must be the person aggrieved, i.e. he should be directly concerned with the dispute pending in the proceeding, and thirdly for maintaining a cause of action under this head, he must allege and show contravention of the terms of section 33A of the Act. This section, in substance is a provision penal in form and action under it can be resorted to on a complaint for the wrong done to the complainant. In answer, to the question referred to and noted above whether action under section 33A of the Act is attracted I say, if there is no contravention of the provisions as laid down under section 33, no award can be given under section 33A of the Act.

14. Testing the case of the petitioner on this anvil of section 33A of the Act I find that the order in annexure '2' served on the petitioner was passed much before the date of reference of the dispute to the Labour court. The order was passed on 27.8.1973, whereas the Government of Bihar in the Department of Labour made the reference to the Labour court on 23.10.73. A simple ssrutiny,

therefore, discloses that there was no pending dispute when the order in question was passed and as such no right accrued to the petitioner to come up before the Labour court under section 33A of the Act.

15. The learned Counsel for the petitioner Sri D.N.Pandey has contended that though the notice in question vide annexure '2' was passed on 27th August, 1973, it was made effective on and from 28.11.1973 when the Reference proceeding no. 16/73 was pending before the Labour Court. In other words, the learned Advocate contended that the notice in terms amounted to a change in the service conditions as it was made effective during the pendency of the proceeding before the Labour Court. Admittedly the order was made before the reference of the dispute. The order was communicated to the petitioner prior to the reference. It may have its effect, when the reference was pending. It was passing prior to the reference and not at a time when the proceeding was pending before the Labour Court and thus, in the eye of law the petitioner could not have asked for an award or any action under section 33A of the Act. The application filed before the Labour Court was ill-advised and the court rightly held that he was not entitled to any relief under section 33A of the Act.

16. Thus, in conclusion, I say that I do not find any merit in the case of the petitioner. The application, therefore, must fail and it is accordingly dismissed. But in the circumstances of the case, I do not pass order for costs.

Nagendra Prasad Singh, J: I agree.

R.D. Application dismissed.

CIVIL WRIT JURISDICTION

Before N.P.Singh and P.B.Prasad, JJ.

1984/October, 31.

*Sri Ram Sagar Prasad and Others.**

v.

The Agriculture Produce Market Committee, Barh and Ors.

Bihar Agricultural Produce Market Rules, 1975—*Rules 3 and 5—Market Committee—election of members from agriculturists constituency-publication of provisional voter list inviting objection—notice under rule 3, issued after the date fixed for filing objection dividing the market area—neither publication of the voter list in accordance with rule 5 nor any objection invited after division of the market area—effect of.*

The provisional voter list was published on 29.1.82 directing that objection, if any, should be filed in accordance with rule 5. 27.2.82 was the last date for filing objection. On 22.3.1982 suddenly notice was issued under rule 3 dividing the market area into 7 agriculturists constituencies. On the admitted facts after division of the market area, neither the voter list in accordance with rule 5 has been published nor any objection invited.

* Civil Writ Jurisdiction Case No. 4586 of 1982. In the matter of an application under Articles 226 and 227 of the Constitution of India.

Held, therefore, that that having not been done, no election could have been held without complying with the requirements of rule 5.

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 N.P.Singh, J.

Messers Shiv Kirti. Singh and Amar Nath Das for the Petitioners

Messers Alakh Raj Pandey and Ramesh Jha for the Respondents no. 1 to 3.

N.P.Singh, J: Petitioners are voters of the Agricultural Produce Market Committee, Barh (hereinafter to be referred to as the Market Committee) and they have questioned the validity of the procedure adopted by the respondent Election Officer for holding election of the members of the said market committee from the agriculturists constituency.

2. According to the petitioners, on 29.1.1982 a provisional voter list was published in viting objections as required by rule 5 of the Bihar Agricultural Produce Market Rules, 1975 (hereinafter to be referred to as 'th Rules'). The last date fixed for filing objectionwas 27.2.1982. On 22.3.1982 a notification was published saying that in partial modification to the notice dated 29.1.1982 aforesaid the area of the different constituencies notified earlier were being altered in exercise of the powers under rules 2(7) and 3(6); any person desiring to file an objection can file objection on or before 11.4.1982 regarding the division of the constituencies. A copy of that notice is Annexure-3 to the writ application. Petitioner no. 8 filed his

objection on 12.4.1982 as 11.4.1982 was a Sunday. The objection was rejected by the Election Officer on 24.5.1982 saying that it had been filed beyond time. On 23.9.1982 an election programme was published giving out the dates for filing nomination papers and holding of election to different constituencies. 28.11.1982 was fixed as the date for holding of the election including from the agriculturists constituency in which the petitioners were interested. Before the election could be held the present writ application was filed making a grievance that after dividing the seven constituencies meant for agriculturists by notification dated 22.3.1982, referred to above, the voter lists for seven agriculturists constituencies were not separately prepared nor any objection was invited as required by rule 5, and, as such, election from agriculturists constituencies could not be held. This Court at the time of admission of the application stayed the holding of the election from the agriculturists constituencies.

3. Rle 3 provides as to how the seats relating to certain interests are to be allocated, Rule 3(i) and (v), which are relevant for the present case are as follows:-

> "3(i) For the purpose of election of seven agriculturists under clause (1) of sub-section (i) of section 9, the market ares shall be divided into seven constituencies, which shall be called agriculturists constituency, in such manner that number of voters does not exceed one-seventh of the total number of voters of the market area in question, so that one agriculturist may be elected from each such constituency."

> "(v) Where it is not possible to divide the market area strictly in the manner specified above, a maximum variation of 15 per cent shall be permissible in case of each constituency."

In view of the aforesaid provisions for the purposes of election of 7 agriculturists, market area has to be divided into 7 constituencies in a manner that number of voters does not exceed 1/7th of the total number of voters of the market area; variation upto 15% being permissible in each constituency. Rule 5 provides the manner in which the voters lists for different constituencies including the agriculturists constituencies are to be prepared. The relevant part of rule 5 is as follows:-

> "5(i) The Election Officer shall cause to be prepared separate lists of voters qualified to vote for each of the agriculturists constituency, traders' constituency, Cooperative Societies Constituency and local authorities' constituency referred to in sub-section (1) of section 9. Every such list shall be revised for each triennial election, at least four months before the date on which the term of market committee is due to expire."

In view of rule 5(iii) and (iv) the voter list prepared under rule 5 has to be published for general information and the Election Officer has to fix a date not later than 30 days from the date of publication of the list before which "any application for inclusion, correction of any entry shall reach him". Sub-rule (iv) further requires the Election Officer to give the objector a reasonable opportunity of being heard and to decide the objection received before the date so fixed. Rule

5(v) enjoins the Election Officer to amend the voter list in accordance with the order passed under rule 5(iv) and then cause the same to be published finally in the manner prescribed under sub-rule (iii). Rule 7 prescribes that soon after the final publication of the list of voters under rule 5(v) the Election Officer shall call upon the constituency to elect their representatives to the Market Committee on a date fixed by him in this behalf.

4. From a plain reading the rules 3 and 5 aforesaid it is apparent that first the market area is to be divided into 7 constituencies for election of 7 agriculturists taking into consideration the number of voters in the market area. Thereafter, the Election Officer has to prepare 'separate lists of voters qualified to vote for each of the agriculturists constituency".. In other words, before the date for election is fixed separate lists of voters qualified to vote for each agriculturists constituency have to be prepared by the Election Officer and objection has to be invited after publication of the provisional voters list within the time fixed by the Election Officer. After disposal of objection, if any, under rule 7 the constituencies have to be called upon to elect their representatives on the date fixed by the Election Officer.

5. In the present case, it is an admitted position that provisional voter list was published under rule 5 on 29.1.1982 and the notice invited objection by 27.2.1982. Thereafter, on 22.3.1982 the market area was divided into 7 agriculturists constituencies and objection was invited as required by rule 3. There is no dispute that after de-limitation of the market area into 7 constituencies no separate voter list for each of the

7 agriculturists constituencies has been prepared as required by rule 5(i).

6. Mr. Alakh Raj Pandey, learned counsel appearing for the respondent Market Committee submitted that the market area could have been divided into 7 constituencies only after finalisation of the voters lists as required by rule 5. According to Mr. Pandey, when rule 3 requires the market area to be divided into 7 constituencies on basis of the voter it is not possible to do so unless first the voter list is finalised. In my opinion, this contention is not supported by the scheme of the Rules. When rule 5 speaks of preparation of "separate lists of voters qualified to vote for each of the agriculturiests constituencies have already been created under rule 3. Similarly, when rule 3 speaks of dividing the market area into 7 agriculturists constituencies it requires the Election Officer to divide the same on basis of the draft/tentative voter list. Perhaps, that is the reason why under rule 3(v) a variation upto 13% has been allowed keeping in view the revision of the said voter list on basis of the objection filed under rule 5 of the Rules.

7. In the instant case provisional voter list was published on 29.1.1982 directing that objection, if any, should be filed in accordance with rule 5. 27.2.1982 was the last date for filing objection. On 22.3.1982 suddenly notice was issued under rule 4 dividing the market area into 7 agriculturists constituencies. On the admitted facts it is apparent that after division of the market area into 7 agriculturists constituencies, neither the voter list in accordance with rule 5 has been published nor any objection invited. That having not been done, in my opinion, no election could have

been held without complying with the requirements of rule 5. In such a situation, I am left with no option but to direct the respondents to follow the procedure prescribed under rule 5 again in view of the fact that the respondents themselves have re-divided the market area by notice dated 22.3.1982 after finalisation of the voter list.

8. In the result, this writ application is allowed with the direction and observations given above. In the circumstances of the case, there shall be no order as to costs.

P.B. Prasad,J: I agree.

M.K.C. Application allowed.

CIVIL WRIT JURISDICTION

1984/November, 6.

Before Birendra Prasad Sinha, J.

*Ishaque Hajam and Others**

v.

The Additional Member Board of Revenue and Others.

Bihar Land Reforms (Fixation of Ceiling Area and Acquisition of Surplus Land) Act, 1961 *(Act XII of 1962), Section 16(3)—preemption—right of—owner of a contiguous plot, whether entitled to preempt if he solds his property to another person after institution of the case.*

The preemptor must hold the land until the preemption matter is finally decided by the ultimate Court i.e., the Board of Revenue and that shall be the crucial date and not the date on which the order was passed by the Land Reforms Deputy Collector. Since the decree stood suspended after filing of the appeals the ultimate date was the date on which the resolution was passed by the Additional Member, Board of Revenue as contained in Annexure-1.

Held, therefore, that in the instant case the

* Civil Writ Jurisdiction Case Nos. 2107 and 2108 of 1979. In the matter of applications under Articles 226 & 227 of the Constitution of India.

Member, Board of Revenue was right in holding that the preemptor ceased to have any interest in the land held by him in the boundary much before the final order was passed by the Member Board of Revenue.

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

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

Messers Janardan Prasad Singh, Susheel Chandra Sinha and Ashok Kumar Choudhary for the petitioners in both cases.

Messers Binod Kumar Roy and P.K. Choudhary for the respondents.

Birendra Prasad Sinha, J. These two applications have been heard together and are being disposed of by a common judgment. Two sale deeds were executed by Rahman Hajam and Mahabali Hajam in favour of Radha Krishna Mishra father of respondent nos. 4 and 5 on 6.7.1965, one in respect of 6 kathas of land of plot no. 531 and another in respect of 15 kathas 6 1/2 dhurs of the same plot. The petitioners filed two applications under section 16(3) of the Bihar Land Reforms (Fixation of Ceiling Area and Acquisition of Surplus Land) Act, 1961, stating, inter alia, that they were co- sharers holding a portion of the same plot no. 631. The cases were numbered as Ceiling Case No. 54 of 1965-66 and Ceiling Case No. 55 of 1965-66. The two cases were decided in favour of the preempter. The petitioners filed appeals before the learned Additional Collector who ultimately set aside the order passed by the Land Reforms Deputy

Collector and held that since the preemptors had transferred their interest in the holding the application could not be maintained. The matter was taken by the preemptor to the Board of Revenue, where it appears that he filed only one revision application which was numbered as Case No. 202 of 1978. The Additional Member, Board of Revenue by a resolution dated 28.3.1979 dismissed the revision application and held that the preemptors were no longer boundary raiyats as they had sold their interest in plot no. 631 by two sale deeds dated 30.4.1970 and 8.5.1970. The revision application was, accordingly, dismissed. The petitioners have filed two writ applications being CWJC Nos. 2107 and 2108 of 1979. In both of them the order passed by the Additional Member, Board of Revenue in Case No. 202 of 1978 (Annexure-1) as also the order passed by the Additional Collector in Appeal Nos. 845 of 1977-78 and 853 of 1977-78 have been challenged. It appears that only one revision application was filed before the Member, Board of Revenue against the common order passed by the Additional Collector in the two ceiling appeals. In fact, two revision applications should have been filed. It is now admitted by learned counsel for the petitioners that this writ application is confined only to Ceiling Case No. 55 of 1965-66 which was in respect of 15 kathas 6 1/2 dhurs of land of plot no. 631. There is no application against the order passed in respect of sale deed of 6 kathas of plot no. 631. Learned counsel, therefore, confines himself to the case in respect of 15 kathas 6 1/2 dhurs of land of plot no. 631. Since both these writ applications are against the same order the one i.e., CWJC No. 2108 of

1979 is, in fact, has become infructuous and is not being pressed.

2. Mr. Susheel Chandra Singh learned counself appearing on behalf of the petitioners has submitted that original order was passed by the Land Reforms Deputy Collector on 6.10.1969 by which he allowed both the applications for preemption. He submitted that on that day i.e. the date on which the order was passed in the two cases, the sale deeds had not been executed by the preemptors transferring their interest in plot no. 631. In other words, learned counsel submitted that on the date of the order passed by the first court the preemptors were the boundary raiyats and, therefore, they had a right to preempt.

3. The question for consideration is as to whether the owner of a contiguous plot is entitled to preempt, if he has sold his property to another person after institution of the case. Learned counsel for the petitioners has relied upon section 233 of Mulla's Mohammedan Law 17th Edition where it has been observed that the right in which preemption is claimed whether it be co-ownership or participation in appendages or vicinage must exist not only at the time of sale, but on the date of the suit for preemption and it must continue upto the time the decree is passed. It was submitted by the learned counself that the decree was passed in the case on 6.10.1960 and until then the sale deed had not been executed by the preemptor that is to say, that he was having interest in plot no. 631. Learned counsel has put much emphasis on the date of decree. It will be relevant to state here that the orders passed by

the Land Reforms Deputy Collector on 6.10.1969 in both the ceiling cases were challenged in appeal by the vendees and the appeals were pending on the date when the two sale deeds dated 30.4.1970 were executed. Needless to say that once the appeals were filed the orders passed by the Land Reforms Deputy Collector on 6.10.1969 stood suspended. It has been stated by Mulla at page 343 of the book (section 233) that if a plaintiff, who claims preemption as owner of a contiguous property sells his property to any person after the institution of the suit, he will not be entitled to a decree, for he does not then belong to any of the three classes of persons to whom the right of preemption is given by law. Learned counsel also relied upon two decisions in *Jagat Singh vs. Achhaibar Singh (1)* and in *Umrao vs. Lachhman and others (2)*. In both these cases it has been observed that in order to maintain a suit for preemption the plaintiff preemptor must establish that he had a right to preempt on the date of the sale and at the time when the suit was brought and on the date of the decree of the trial court. I am unable to hold that the ultimate date will be the date when the trial court passes its order. In my opinion, any order passed by a trial court will be subject to the decision in appeal and revision which have been provided by the statute. The preemptor must hold the land until the preemption matter is finally decided by the ultimate court i.e., the Board of Revenue and that shall be the crucial date and not the date on which the order has been passed by the Land Reforms Deputy

(1) (77 Indian Cases 694)

(2) (79 Indian Cases 287).

Collector. In *Bhagwan Das vs. Chet Ram (1)* also it was held that the preemptor in order to succeed must have a right to preempt not only at the time of sale of the land by the landlord but also at the time of institution of the suit for preemption and also at the time of passing of the decree in the suit by the trial court. In other words his tenancy must remain intact and he must hold the land in his capacity as tenant till the date of the decree. Since according to me the decree stood suspended after filing of the appeals the ultimate date was the date on which the resolution was passed by the Additional Member, Board of Revenue as contained in Annexure-1. I agree with the Member, Board of Revenue that the preemptor ceased to have any interest in the land held by him in the boundary much before the final order was passed by the Member, Board of Revenue. The application, therefore, fails and is dismissed but without costs.

M.K.C. Application dismissed.

(1) (1971) AIR (SC) 369.

CIVIL WRIT JURISDICTION

1984/November, 9.

Before N.P.Singh and M.P.Varma, JJ.

*Shyam Bihari Upadhyay and Others**

v.

The State of Bihar and Others.

Bihar Consolidation of Holdings and Prevention of Fragmentation Act, 1956 *(Bihar Act No. XXII of 1956) section 10A and 35—section 10A—provisions of—whether operate as bar on the revisional power of Director of Consolidation under section 35.*

Held, that section 10A of the Consolidation of Holdings and Prevention of Fragmentation Act, 1956, hereinafter called the Act, does not operate as bar on the power of the Director of Consolidation. The Director of Consolidation with the limitation prescribed for exercise of supervisory jurisdiction, can exercise his power under section 35 of the Act for rectifying the mistake in the order passed or proceedings taken for the ends of justice.

Case laws discussed.

Application under Articles 226 and 227 of the Constitution.

* Civil Writ Jurisdiction Case No. 3729 of 1984. In the matter of an application under Articles 226 and 227 of the Constitution of India.

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

Messers Chandra Shekhar Prasad Singh and Santosh Kumar Ojha for the Petitioners.

Messers Ram Balak Mahto (Addl. A.G.) and M.K. Sinha (J.C.to Addl. A.G.) for the State.

Messers Angad Ojha, N.K.Singh and K.K.Srivastava for the Respondents.

N.P.Singh, J: The writ application has been filed on behalf of the petitioners for quashing different orders passed by the consolidation authorities.

2. Registers of lands of the village in question were prepared in accordance with section 9 of the Bihar Consolidation of Holdings and Prevention of Fragmentation Act, 1956 (hereinafter to be referred to as 'the Act'). The registers so prepared along with the statement of 'Principles were published under section 10(1) of the Act. The plots in question were shown to be in possession of Mosst. Bhagjogna. Mosst. Bhagjogna had died in the year 1972.

3. Before the Assistant Consolidation Officer objection was filed under sub-section (2) of section 10 of the Act by the petitioners. The objection of the petitioners was allowed by an order dated 13.1.1981. Thereafter, respondents 6 to 8, who had not filed any objection under section 10(2) of the Act filed objection before the Consolidation Officer under section 12(2) of the Act. By order dated 12.2.1983 that objection was allowed. The petitioners filed an appeal before the Deputy Director, Consolidation which was dismissed on 31.3.1983. Even the revision filed before the

Director, Consolidation was dismissed on 5.3.1984.

4. On behalf of the petitioners it was submitted that respondents 6 to 8 having not filed any objection under section 10(2) of the Act could not have challenged any entry made in the map or register prepared under section 9 or the Statement of Principles prepared under Section 9A of the Act in view of section 10A. Section 10A is as follows:-

> "No question in respect of any entry made in the map or registers prepared under section 9 or the statement of principles prepared under section 9A relating to the consolidation area, which might or ought to have been raised under section 10 but has not been raised, shall not be raised or heard at any subsequent stage of the Consolidation proceeding."

On behalf of the petitioners it was urged that the Director, Consolidation should have held that as no objection was filed on behalf of respondents 6 to 8 under section 10(2) of the Act, section 10A operated as a bar and respondent Consolidation Officer could not have allowed the objection of respondents 6 to 8 by his order dated 12.2.1983.

5. The scope of section 10A has been considered by a Bench of this Court in the case of *Jagarnath Thakur and another v. The State of Bihar and others (1)* where it was pointed out that if a person does not file an objection under section 10(2), he cannot raise any objection in respect of the entry at any subsequent stage of consolidation proceeding because the bar of section 10A operates in such cases. The question whether the

(1) (1984) BBCJ 140.

bar of section 10A also operates on the power of the Director, Consolidation under section 35 of the Act, however, was left open as it did not arise for consideration in the facts and circumstances of that case.

6. Section 10A applies the bar to the "subsequent stage of consolidation proceedings", the object being that a person, who has not availed of the opportunity of filing an objection within the time prescribed, should not be allowed to raise any such objection, as it is likely to delay the different stages of the consolidation proceedings. Section 10D, however, vests power in the Deputy Director of Consolidation if he is satisfied that the register of lands published under sub-section (1) or corrected under sub- sections (3), (4), (5), (6) of section 10 a substantial number of raiyats could not avail of the opportunity to place their claim under sub-section (2) of section 10, to direct re-publication of the register of lands or statement of principles in the manner prescribed. If any such order is passed the persons concerned within 30 days of such re-publication, may file objection before the Assistant Consolidation Officer disputing the correctness and nature of entries in the register of land, notwithstanding the provisions of section 10A.

7. On behalf of the respondents it was urged that section 10A cannot be held to be bar on the power of the Director, Consolidation under section 35 of the Act, because section 35 vests supervisory power in the Director for rectifying a wrong committed by the consolidation authorities. Section 35 as inserted by Bihar Act 27 of 1975 as follows:-

> "The Director of Consolidation may of his own motion or on the application of any

party or on reference being made by any subordinate authority, call for and examine the record of any case decided or proceedings taken by such authority for the purpose of satisfying himself as to the regularity of the proceedings; or as to the correctness, legality or propriety of any order passed by such authority in the case or proceedings, and may after allowing the parties concerned an opportunity of being heard, make such order in the case or proceedings as he thinks fit."

On a plain reading this section vests a very wide power in the Director of Consolidation which can be exercised by him suo motu or on an application of any party. While exercising the power under that section the Director of Consolidation can examine the record of any case decided or proceedings taken by the consolidation authorities for the purpose of satisfying himself as to correctness, legality or propriety of orders passed in any case or proceedings.

8. Learned Additional Advocate General, who appeared for the respondent-State, pointed out that when section 10A says "which might or ought to have been raised under section 10 but has not been raised, shall not be raised or heard at any subsequent stage of the consolidation proceeding", it means that the bar will operate at subsequent stage of consolidation proceeding and not on the revisional power of the Director, Consolidation. In other words when the Director of Consolidation exercises the revisional power suo motu or on the application of a party, it is not a subsequent stage of the consolidation proceeding. In my opinion, there is substance in this contention Director of

Consolidation under section 35 has to satisfy "himself as to the regularity of the proceedings; or as to the correctness, legality or propriety of any order passed by such authorities in the case or proceedings". In appropriate cases he may be satisfied that petitioner before him could not file objection under section 10(2) for the reasons beyond the control of such petitioner. It is well known that in many cases for some reasons entries in respect of plots are made in favour of persons who have neither title nor possession over such plots, and the rightful owner, who is in possession might not have filed objection within the time prescribed due to some unfortunate and compelling reasons. In such cases, if it is held that the Director cannot interfere, it will amount to perpetuating a wrong done to a person. This interpretation is consistent with the interpretation given on different occasions in respect of supervisory powers vested in different authorities under different enactments. A Full Bench of Allahabad High Court in the case of *Ramakant Singh v. Deputy Director of Consolidation, U.P. and others (1)*, while construing the scope of section 48 of the U.P. Consolidation of Holdings Act, which is a parallel provision to section 35 of the Act, pointed out that under that section the Director can examine, the record to decide whether it was a fit case for the exercise of the revisional jurisdiction suo motu, and it was observed that such opinion shall have to be formed even in a case where the application in revision moved by a party is defective having been made beyond the prescribed period of limitation or where all the necessary parties have

(1) (1975) AIR (All) 126.

not been impleaded. However, in cases where all the necessary parties have not been impleaded, it was said that the Director of Consolidation should give notice to all the necessary parties irrespective of the fact whether they were or were not impleaded in the application.

9. Learned Additional Advocate General pointed out that in case of Gafoors and another vs. Deputy Director of Consolidation Meerut and others (AIR 1975 SC 1716) while holding that section 11A of the U.P. Consolidation of Holdings Act, which is a similar provision to section 10A of the Act, and bars all objections at later stage of the proceeding, did not hold that the said bar of section 11A operates even on the power of the Director under section 48 of that Act. It may also be pointed out that there is no "non obstante clause" in section 10A so that it can be inferred that framers of the Act purported to give it an overriding effect even on section 35 of the Act. In my opinion, section 10A does not operate as bar on the power of the Director, Consolidation. The Director, Consolidation within the limitation prescribed for exercise of supervisory jurisdiction, can exercise his power, under section 36 for rectifying any mistake in the order passed or proceedings taken for ends of justice.

10. Coming to the facts of the present case, it is an admitted position that respondents 6 to 8 did not file any objection under section 10(2) of the Act. As such, the bar prescribed under section 10A operated against them. They could not have taken an objection in respect of the entry under section 12(2) because sub-section (2) of section 12 opens with the words "subject to the provisions contained

in Section 10A". The Consolidation Officer, while allowing that objection by his order dated 12.2.1983, overlooked the bar imposed by section 10A of the Act. As such, that order cannot be sustained. The Director of Consolidation did not notice this aspect of the matter while dismissing the application of the petitioners. The matter would have been different if in exercise of his revisional jurisdiction he had come to the conclusion that in the facts and circumstances of the case it was only just and proper that respondents 6 to 8 should have been allowed to file an objection for the ends of justice. But, as none of the aforesaid questions has been considered by the learned Director, Consolidation, I am left with no option but to allow this application and to set aside the order dated 5.3.1984 passed by him. The application is, accordingly, allowed. The revision application shall be heard afresh and shall be disposed of in accordance with law in light of the observations made above.

11. As respondents 6 to 8 have entered appearance I direct the petitioners as well as respondents 6 to 8 to appear before the Director, Consolidation on or before 29th November, 1984 in order to avoid delay in service of notice on the parties concerned. On that day, a date for hearing of the revision application shall be fixed and it shall be disposed of in accordinace with law.

M.P.Varma, J. I agree.

R.D. Application allowed.

MISCELLANEOUS CRIMINAL

1984/November, 12.

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

S. Shamsul Hasan, J.

*Bihar State Small Industries Corporation.**

v.

The State of Bihar and Anr.

Code of Criminal Procedure, 1973 (Central Act No. II of 1974) *sections 242(2) and 248—section 242(2)—processes for attendance of witnesses issued by the Magistrate—due to pronounced negligence of prosecution, witnesses not produced for prolonged period of time—section 248—Magistrate acquitting the accused, legality of.*

Held, that in a case instituted in a Police report if a proper application is made by the prosecution under section 242 of the Code of Criminal Procedure 1973, hereinafter called the Code, it is ordinarily the duty of the Magistrate to issue process and secure the presence of witnesses by exercising the power given to him under the Code for compelling their attendance. However, if despite the issuance of compulsive process and the performance of the duty aforesaid

* Criminal Miscellaneous Nos. 1479 of 1983. In the matter of an application under section 482 of the Code of Criminal Procedure, 1973.

the prosecution, on account of pronounced negligence or recalcitrance, fails to execute such process and does not produce the witnesses over a prolonged period of time then the court would be entitled to acquit the accused under section 248 of the Code for want of evidence to prove the prosecution case.

The State v. Veerappan and Ors. (1) followed

Application by the prosecution.

M/s Balabhadra Prasad Singh, R.P. Singh, Sheojee Prasad and P.K. Verma for the petitioner.

Mr. G.P. Jaiswal for the State.

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

S.S.Sandhawalia; C.J., What is the duty of the trying Magistrate for compelling the attendance of prosecution witnesses in a warrant case instituted on police report? What is his role in the event of their non-production by the prosecution (despite the issuance of coercive process) on account of its pronounced negligence or recalcitrance over a long period of time? This is the twin question which has come to the fore in this reference to the Division Bench.

2. The petitioner herein is the Bihar State Small Industries Corporation, and it is averred on its behalf that more than fifteen years age - on the 16th of May, 1969 - Shri B.K. Banerjee, Controller of Accounts of the petitioner corporation, made a surprise check of one of its establishments being the Industrial Estate situated in Digha, Patna.

(1) (1980) AIR (Mad.) 260 FB.

Respondent no. 2, Srideo Jha, at the relevant time, was posted as the Head Clerk-cum-Accountant there at and the Controller of Accounts detected a defalcation of more than a lac of rupees and made a report (Annexure 1) to the Officer-in-charge of the Digha Police Station, whoc registered a case under sections 409, 420, 467, 468 and 471 of the Indian Penal Code against respondent no. 2. It is then the case that the Police proceeded in a lackadaisical manner in relation to the investigation of the case, and it was not till more than five years later that it submitted a charge sheet dated the 9th of September, 1974 against the accused Srideo Jha, respondent no. 2, and the Magistrate took cognizance of the offence on the 17th of July, 1975. It is specifically averred in paragraph 3 of the petition that thereafter the case was transferred to the files of different Magistrates and in spite of summons and even warrant of arrest having been issued to ensure the attendance of witnesses named in the charge sheet the trying Magistrates found themselves unable to procure their presence in court in the absence of any report from the police regarding the service of the process. Ultimately, on the 19th of September, 1979 Shri A.K. Sinha, Judicial Magistrate, 1st Class, Patna, passed an order directing the prosecution to produce witnesses on the 29th of October, 1979. No witness, however, appeared on the said date and even on the next date of 21 of November, 1979. Thereupon, he directed summons as to issue on witness nos. 1 and 3 for the 18th of December, 1979 and having not received any service report adjourned the matter to the 19th of January, 1980 and again on the non-appearance of witnesses directed the

summons to reissue against witnesses no. 1 to 3 for the 13th of February, 1980. It is unnecessary to advert to the tortuous process of the attempts of the courts to compel attendance of the witnesses and ultimately on the 4th October, 1980, the learned Magistrate issued a direction to the Assistant Public Prosecutor to ensure the attendance of witnesses on the next date of the 14th of October, 1980 with a warning that on their non-appearance the prosecution case may be closed. However, on the 14th of October, 1980 as well no witness appeared and the learned Magistrate observed that the prosecution was not interested in the case and, accordingly, for the ends of justice it was necessary that the prosecution be closed and the statement of the accused be recorded. Numerous adjournments followed thereafter till 2nd of July, 1981 when after hearing arguments in the case he passed the impugned order (annexure 3), the operative part whereof is as follows:

> "3. The prosecution did not examine a single witness in support of the charge. On perusal of the record it appears that the charge was framed long back on 17.11.78 and since then the prosecution was given opportunity to produce the witnesses but he failed to do so. In the result the case was closed.
>
> 4. The accused denied the commission of the alleged occurrence in his statement.
>
> 5. I do not find on record any evidence or material against the accused. This is actually a case of no evidence and the accused deserves acquittal. He is acquitted under section 251-A-II Cr.P.C.

and discharged from the bail bonds executed by him."

3. It is the case of the petitioner corporation that no notice was served on it with regard to the progress of the aforesaid prosecution case and in despair on the 13th of December, 1978 a petition of complaint was filed in the court of the Chief Judicial Magistrate, Patna, on which the Magistrate called for a report about the investigation and the stage of the police case, since no further information was forthcoming. On the 26th of May, 1982, when the complainant was absent, the case was dismissed for default of non-compliance with the court's order. It would appear that a revision was carried to the court of the Sessions Judge, Patna, against the said order which was ultimately withdrawn by the petitioner on the 26th of August, 1982.

4. It is, however, averred that thereafter the petitioner obtained copies of the relevant documents including the impugned order of acquittal dated the 3rd of July, 1981 and preferred the present petition challenging the same on 10th of February, 1983.

5. In the counter affidavit filed on behalf of respondent no. 2 it is first pointed out that the impugned order of acquittal was passed way back on the 3rd of July, 1981 but the present petition has been preferred on 10th of February, 1983 - nearly 2 years thereafter - and thus, suffers from gross laches and delay and, consequently, deserves dismissal on that score alone. It is categorically averred that the petitioner was fully aware of the case and the dates fixed by the learned Magistrate and in order to deliberately harass and oppress the answering respondent it

failed to produce witnesses and to diligently prosecute the case. It is state that the case being palpably false and fabricated, not a single witness was willing to come forward to support the same, despite the issuance of process. Further the petitioner was fully aware of the proceeding and having withdrawn the revision petition before the Sessions Judge, Patna, is not now entitled to press the present proceedings. Lastly it is high-lighted that the respondent has been oblited to undergo a harrowing period of investigation and trial for over 12 years extending from 1969 to 1981 and if the order of acquittal is now upset, it would be virtually asking the respondents to face this proceeding till he is alive.

5. When this case came up for admission before my learned Brother, S.S. Hasan, J., sitting singly, he noticed that there was a lot of controversy as to what steps a trial court should take for ensuring the attendance of prosecution witnesses and inter alia adverted to The *State of Bihar vs. Polo Mistry and others (1).* Consider the significance of the question, the case was referred to a Division Bench for an authoritative decision and that is how it is before us now.

6. Though the principles which are attracted for consideration of the larger question posed at the onset are of general application, yet it would be apt to confine the issue to the trial of warrant cases by Magistrates instituted on a police report, as is the case here. Chapter XIX of the Code of Criminal Procedure, 1973 (hereinafter to be referred to as the 'Code') spells out the procedure for the trial of

(1) (1964) AIR (Pat.) 351.

warrant cases by Magistrates in precise detail. In term it provides for the issuance of compulsive process to witnesses directing thm to attend or to produce any document or other thing at the instance of the prosecution or the defence. Herein three distinct situations may well arise and deserve to be categorised and dealt with individually for the sake of clarity -

(i) where the prosecution undertakes to produce its evidence on its own or in any case does not seek the assistance of the court for the issuance of summons or warrant for compelling the attendance of its witnesses;

(ii) where the prosecution applies for, and seeks the aid of the court for, the issuance of process either wholly or partially for the production of its evidence; and

(iii) where despite the issuance of summonses or warrants of arrest by the court the same are not executed by the prosecution agency and consequent upon such negligence or recalcitrance the witnesses do not appear over a prolonged period of time.

To my mind, the answer to the three situations aforesaid appears to be plain enough though inevitably there might appear a little confusion in the penumbral regions. As regards the first case, it necessarily follows that where the prosecution either expressly undertakes to produce the evidence on its own or in any case does not at any stage seek the aid of the court for the issuance of

process then inevitably the duty of producing its evidence in court is saddled entirely on itself. On a failure to discharge its duty, the inevitable consequences therefrom must follow. In my view, the Magistrate would be under no duty or obligation to barge in on his own in the event of the refusal or failure of the prosecution to seek his assistance to issue any compulsive process. In such a situation it would be plain that if the prosecution fails to produce its witnesses altogether or does so insufficiently within a reasonable period of time granted by the court, the matter would have to be decided on the materials existing on the record. Total non-production of evidence by the prosecution would inevitably lead to the acquittal of the accused which is not only warranted by larger principle but equally by the express terms of the Code.

6. In the second case, where the court's assistance is sought for securing the attendance of prosecution witnesses, it is plain that ordinarily the same would be provided by the issuance of process. On a proper application for summons to witnesses and in the event of non-compliance therewith for warrants, it would be the function of the court to compel attendance. This is not to say that the court has no discretion in the matter, but ordinarily in such a situation it would be in error in declining its aid or its power to compel attendance when express resort is made to it. Therefore, if the non-appearance of the prosecution witnesses is due to the court's failure, refusal or negligence to issue the requisite process for compelling the attendance of its witnesses then the prosecution cannot possibly be saddled with the blame of the non-attendance. In such a situation if the court

proceeds to discharge or acquite an accused, it may well be that such an order resulting from the non-production of evidence because of the court's default in compelling attandance may not be well founded.

7. Coming now to the third situation which, indeed, is the case here, it must first be noticed that the court must give its aid of the compulsive process to secure the attendance of prosecution witnesses. However, having done so and issued the summons or warrant, as the case may be, does its duty extend even further in case of the non-execution of the said process by the prosecuting agency over prolonged period of time ? Herein it is the petitioner's own case in paragraph 3 that despite the issuance of summonses and even warrants of arrest against some of the prosecution witnesses named in the charge sheet, not one of them could be produced in court for a period of six years from the date of the taking of cognizance by the Chief Judicial Magistrate on the 17th of July, 1975 to the 3rd of July, 1981 when the impugned order of acquittal was recorded. Faced with this uphill factual position, Mr. Balabhadra Prasad Singh, the learned counsel for the petitioner had taken the extreme stand that it was the duty of the court alone to secure the attendance of the prosecution witnesses and if they did not choose to appear despite the issuance of process then it is the failure of the court itself and no acquittal or discharge can follow on the ground. Reliance was sought to be placed on *AIR 1964 Patna 351 (supra) and K. Madhusudanan Namboollver v. Unni Navl and others (1).* Counsel then went to the length of

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(1) (1975) Cr.LJ 751.

contending that in case the prosecuting agency (which, in a case instituted on police report, is, in essence, the police) fails to execute even the non-bailable warrant, the duty would still remain on the shoulders of the court to secure their attendance one way or the other. It was the stand that the Magistrate in this context should initiate proceeding for contempt of court to be taken up by the High Court against the recalcitrant police agency.

8. With respect I am unable to subscribe to this extreme and what appears to me as a virtually doctrinnaire stance. As would be noticed in detail hereinafter, the court's obligation is to issue ultimately non-bailable warrants of arrest for the attendance of witnesses, where so warranted. Undoubtedly, it will give a reasonable time for their execution. However, the total burden of the production of witnesses and the execution of process cannot be saddled on the court's shoulders but, to my mind rests substantially on the prosecuting and the police agency. This is the more so in cases instituted on a police report. The claim that on the failure of its duty by the prosecution or the police agency to execute the warrants of arrest or other compulsive process and to produce its own witnesses in court, the Magistrate is bound to resort to the ultimate weapon of the proceeding by way of contempt of court for compelling attendance of prosecution witnesses appears to me as somewhat far-fetched. It is significant to recall that the lower judiciary has no power to punish for contempt of court in such a situation. To suggest that as a matter of routine whenever the prosecution fails to discharge the burden of

executing compulsive process, the subordinate court should move the High Court for contempt of court proceeding against the recalcitrant official appears, in practical terms, to be a somewhat farcical proposition. There seems no option but to reject this submission of the learned counsel for the petitioner.

9. Equally reliance on Polo Mistry's case (supra) is not well placed. Therein the Magistrate on application had issued summonses for the appearance of 15 witnesses on 17th, 18th and 19th of July, 1961 inequal batches. However, despite the fact that summonses had been, served, no prosecution witness appeared on those dates and the Assistant Public Prosecutor made a prayer for the issue of warrant of arrest against them but this was rejected. Thereafter, on the 19th of July, 1961, the learned Magistrate proceeded to acquit the respondents under section 251A (11) of the Code on the ground of want of evidence against them and on some queer reasoning which the High Court found patently untenable. It is plain that this case is of no aid to the petitioner because in such a situation the Magistrate would be obliged to grant again of compulsive process by way of warrant against the prosecution witnesses and having unreasonably declined to do so, it could not punish the prosecution for its own default. The High Court was thus right in setting aside the order of acquittal. This case is wholly distinguishable and, indeed, hardly relevant to the issue. Similarly, reliance on *K. Madhusudan's Nemboodiri's case (supra)* is wholly irrelevant because it merely holds that it was the duty of the Magistrate under section 256 to recall a witness for further cross-examination

and not for the complainant to produce the said witness after a charge has been framed.

10. Now, examining the matter dispassionately, it would appear without pretending to be exhaustive in this context that the two compulsive processes for securing the attendance of witnesses are those of the issuance of summons and of warrant, the latter being further divisible into bailable and non-bailable one. In the event of a witness's recalcitrance to appear in response to a summons after being duly served, the court is not powerless and thereafter can, if need be, in the first instance, resort to the issuance of bailable or non-bailable warrants. The most stringent in this field is, of course, the latter. It could not be seriously disputed before us that a non-bailable warrant, by the nature of things, is usually directed to the police agency for execution. The execution of such a warrant may well involve the use of force for arresting or keeping the delinquent in custody, and inevitably the police is the primary agency for its execution.

11. Now, how far does the duty of the court extend in compelling attendance of witnesses by virtually this last sanction of a non- bailable warrant of arrest. ? As has been noticed above, the execution or carrying out this command of the court is with the police agency. The function of the court is to grant the sanction of such a warrant giving a reasonable period of time for its execution, which would inevitably depend on the facts and circumstances of each case. However, the mandatory duty of the court, to my mind, would not extend much further. If the police agency on account of pronounced negligence or recalcitrance

fails to execute the warrants of arrest for compelling the attendance of its own witnesses, it is not for the court either to carry them out itself or to fild its hands in helplessness and wait till eternity for the execution of the same. In cases instituted on police report the arm of the investigating agency itself is long enough to secure the attendance of its witnesses. However, when need be, on a proper application filed by it, adequate assistance through the process of court would be given to the prosecution agency. However, the duty to execute the ultimate compulsive process of non-bailable warrant of arrest can, by very nature of thing, lie on the police and the prosecuting agency. If they would fail to perform this duty, it does not get transferred to the shoulder of the court itself. Indeed, in our adversary system of justice, the court cannot inordinately take side with either of the parties and turn itself into a prosecutor or a defence counsel. It must keep the scale of justice even betwixt the prosecution and the accused. It has been said authoritatively that the rule of the court herein is to keep to the rules of game and act as a referee and not become centre forward in the match. It cannot keep the sword of Democles hanging over the head of the accused merely because of the pronounced recalcitrance of the prosecuting agency to secure attendance of its witnesses even after the aid of warrant has been granted by the court. In a recent Division Bench judgment in *State of Bihar v. Ramdaras Ahir (1)* of this Court it has now been held that the right of a speedy public trial is now a constitutional right of

(1) (1984) Govl Appeal no. 35 1976 on 6.8.1984.

the citizen and he cannot be made to wait indefinitely at the portals of the court at the mercy of a negligent or even a callous prosecutor.

12. The view I am inclined to take is well buttressed by the conclusion arrived at by the Full Bench in The *State V. Veerappan and others (1).* Therein, after an exhaustive discussion and reference to a plethora of relevant case law on the point (some of which is conflicting) it has been observed:

> "After carefully considering all the aforesaid decisions and the views expressed therein, we are of the view that if the prosecution has made an application for the issue of summons to its witnesses either under section 242(2) or 254(2) of the Criminal Procedure Code it is the duty of the court to issue summons to the Prosecution witnesses and to secure the witnesses by exercising all the powers given to it under the Criminal Procedure Code, as already indicated by us and if untill the presence of the witnesses could not secured and the prosecution also either on account of pronounced negligence or recalcitrance does not produce the witnesses after the Court had given it sufficient time and opportunities to do so, then the Court, being left with no other alternative would be justified in acquitting the accused for want of evidence to prove the prosecution case, under section 248, Cr.P.C., in the case of warrant cases instituted on a police report and under section 255(1) Cr.P.C.

(1) (1980) AIR (Mad.) 260.

> in summons cases, and we answer the two questions referred to us in the above terms."
> Faced with the above, Mr. Balabhadra Prasad Singh, the learned counsel for the petitioner, had vainly attempted to distinguish the aforesaid conclusion on the ground that the same was not in line with some reasoning and reference to authorities in the earlier part of the judgment. I am unable to appreciate this stance because the Full Bench had expressly formulated the two questions before it and in specific terms and answered the same in the aforesaid paragraph 24 of the Report which inevitably is the ratio in the case.

13. To conclude, in answer to the question posed at the outset, it is held that in a case instituted on a police report if a proper application is made by the prosecution, it is ordinarily the duty of the Magistrate to issue process and secure the presence of witnesses by exercising the powers given to him under the Code for compelling their attendance. However, if despite the issuance of compulsive process and the performance of the duty aforesaid the prosecution, on account of pronounced negligence or recalcitrance, fails to execute such process and does not produce the witnesses over a prolonged period of time then the court would be entitled to acquit the accused for want of evidence to prove the prosecution case.

14. Now applying the above, it is common ground that the case against respondent Srideo Jha was registered in January, 1969 and after a protracted investigation cognizance of the offence was taken by the learned Chief Judicial Magistrate on the 17th of July, 1975. Despite the issuance of

summons and even warrants against the prosecution witnesses, not a single prosecution witness was examined for well-sigh six years. The learned Magistrate was, therefore, eminently justified and, indeed, in the circumstance of the present case, was virtually duty bound to acquit the accused. Consequently, no infirmity against the impugned order of acquittal can be found and the same must be upheld. The criminal Miscellaneous petition is without merit and is, accordingly, dismissed.

S. Shamsul Hasan, J., I agree.

R.D. Application dismissed.

REVISIONAL CRIMINAL

1984/September, 4.

Before S.S. Sandhawalia, CJ and P.S. Sahay, J.

*Sheojee Roy and another**

v.

The State of Bihar and another.

Bihar Panchayat Raj Act, 1947 *(Bihar Act No. VII of 1948) section 62—provision of—whether criminal jurisdiction of Gram Panchayat enhanced to try cases upto the value of Rs. 200/-.*

Where it was asserted that as the value of the property stolen was Rs. 150/-, the case was exclusively triable by a Gram cutcherry of Milepakari Gram Panchayat under the provisions of section 62 of Bihar Panchayat Raj Act, 1947, as the criminal jurisdiction of Gram Panchayat has been enhanced to try cases up to the value of Rs. 200/- as was observed in Bimal Singh's case (1);

Held, that it is manifest that the observation made in Bimal Singh's case is per incuriam and has been patently occasioned by some inadvertance or some typographical error. The observation therein

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* Criminal Revision No. 549 of 1982. Against a decision of Shri Bhagirathi Rai, Ist Additional Sessions Judge, Hajipur, dated the 10th of April, 1982, arising out of a decision of Shri B.N.P.Singh, Subdivisional Judicial Magistrate, Hajipur, dated the 30th of June, 1979.

in this context is not factually correct and is an apparent misreading of the statutory provision contained in section 62 of the Act.

Bimal Singh and Ors. v. State of Bihar (1)-held to be per incuriam.

Application by the accused.

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

Mr. Bhupendra Narain Yadav for the Petitioner

Mr. G.P. Jaiswal, Public Prosecutor for the State.

S.S. Sandhawalia, C.J. Doubts about the supposed enhancement of the criminal jurisdiction of the Gram Cutcherry to take cognizance of offences under sections 379, 380, 381 and 411 of the Indian Penal Code under section 62 of the Bihar Panchayat Raj Act have necessitated this reference to the larger Bench.

2. The facts need recounting with relative brevity. On a complaint preferred by opposite party no. 2 the two petitioners along with three co-accused were brought to trial before the Subdivisional Judicial Magistrate of Hajipur. The gravamen of the offence alleged against the accused persons was that they had removed 21 ghauds of banana fruits worth Rs. 150/- from the orchard of the complainant. In an exhaustive judgment, the trial court accepted the prosecution case and rejecting the defence version convicted the two petitioners under sections 144 and 379 IPC, and sentenced them to simple imprisonment of two

(1) (1965) B.L.J.R. 661.

months under the former section and of four months under the latter. There the three co-accused were acquitted of all charges. On appeal, the 1st Additional Sessions Judge, Vaishali, in a considered judgment, upheld the findings of the trial court and affirming the conviction, reduced the sentences.

3. It is significant to note that neither before the trial court nor before the appellate one was any objection, even remotely, raised with regard to the jurisdiction of the criminal courts to take cognizance. However, in the present revision petition it was alleged that the value of the property stolen being Rs. 150/-, the case was exclusively triably by the Gram Cutcherry of Milepakari Gram Panchayat. Reliance was apparently sought to be placed on *Bimal Singh and others v. State of Bihar (1).* When this case originally came up for hearing before S.S. Hasan, J., the submission was raised on the basis of the observation in Bimal Singh's case that the jurisdiction of the Gram Cutcherry to try cases under section 379 IPC, extends to cases where the value of the property is two hundred rupees, which, had been raised from Rs. 100. However, finding no adequate factual basis for the said observation, the matter was referred to a Division Bench.

4. As before the single Bench, so before us, the primary question sought to be urged was that the criminal jurisdiction of the Gram Cutcherry has been enhanced to try cases of theft up to the value of Rs. 200/- and, therefore, the offence herein was exclusively triable by the said Gram Cutcherry and

(1) (1965) B.L.J.R. 661.

not by the Subdivisional Judicial Magistrate of Hajipur.

5. As the controversy herein would turn on the language of section 62 of the Bihar Panchayat Raj Act, 1947 (hereinafter referred to as the 'Act'), it is apt to quote the relevant part of section 62:

> "62. Criminal Jurisdiction. - Notwithstanding anything contained in the Code of Criminal Procedure, 1898 (5 of 1898) and subject to the provision of this Act, a bench of the Gram Cutcherry shall have jurisdiction concurrent with that of the Criminal Court within the local limits of whose jurisdiction the bench is situate for the trial of the following offences as well as abetment of and attempts to commit of its jurisdiction namely:-
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> (a) offences under the Indian Penal Code (45 of 1960) sections.... 379, 380, 381...411...;
>
> (b)...
>
> (c)...
>
> (d)...
>
> (e)...
>
> Provided that the bench shall not take cognizance of any offence under section 379, 380, 381 or 411 of the Indian Penal Code (45 of 1860) in which the value of the property alleged to be stolen exceeds one hundred rupees of...
>
> ...
>
> Provided further...
>
> ...."

6. There is no doubt that some handle or support to the contention raised on behalf of the petitioners herein is provided by a solitary passing observation in Bimal Singh's case (supra) which has raised this cloud of doubt. Therein, after referring to section 62 of the Act, it has been observed as follows:

> "The proviso says that the bench of the Gram Cutcherry 'shall not take cognizance of any offence under sec. 379, 380, 381 or 411 of the Indian Penal Code, in which the value of the property alleged to have been stolen exceeds one hundred rupees (now it has been raised to two hundred rupees)...."

7. Now a close perusal of the judgment in Bimal Singh's case (supra) does not even remotely disclose as to how and when any amendment was made in section 62 or the value of property mentioned therein had been raised to two hundred rupees. Since the observation has fallen from a Division Bench, we have carefully looked up the original Act and the subsequent amendments but were unable to find any provision indicating any such enhancement. Indeed, we adjourned the case to give time to the learned counsel for the petitioners to buttress his submission on a firm foundation in their enacting or indicating the enhancement to Rs. 200. It was, however, conceded by him that he could lay his hand upon nothing which could warrant the observation of the Division Bench in Bimal Singh's case. Learned counsel for the opposite party State was equally categoric that, in fact no enhancement or consequential amendment in section 62 has at all been made. It, thus, seems manifest that the observation made in

Bimal Singh's case (supra) is per incuriam, and has been patently occasioned by some inadvertence or some typographical error. With the greatest deference, we are constrained to hold that the observation therein in this context is not factually correct and is an apparent misreading of the statutory provision.

8. Once it is held as above, it is plain that the wind is taken out of the sails of the virtually solitary argument raised on behalf of the petitioners which must be rejected. It further suffices to notice that an attempt was sought to be made on behalf of the petitioners to claim a re-appraisal of the evidence for the third time for claiming on acquittal. However, I find no infirmity in the concurrent findings of the courts below which can possibly merit any interference in the criminal revisional jurisdiction. The conviction is consequently affirmed.

9. However, on the very peculiar circumstances of this case, the submission of the learned counsel for the petitioners on the point of sentence is not wholly without merit. Considering the nature and manner of the offence, it would seem that an adequate find would now meet the ends of justice. We, accordingly, set aside the sentences of imprisonment and impose a fine of Rs. 300/- (Rs. three hundred) on each of the two petitioners. In default thereof, they would undergo an imprisonment of two months each. The fine, if realised, would be paid to the complainant as compensation. With this modification in the sentence, the revision petition is dismissed.

P.S. Sahay, J., I agree.

R.D. Application dismissed.

FULL BENCH

1984/November, 16.

Before S.K. Jha, S.K. Choudhuri & Uday Sinha, JJ.

*Mosommat Bibi Sayeeda and Ors.**

v.

The State of Bihar and Ors.

Bihar Land Reforms Act, 1950 (Bihar Act No. XXX of 1950) *sections 3,4,5 and 71—section 4—expression 'Bazar', whether would include within its sweep 'Market'—section 7A—writ—petitioners holding Bazar on the lands in question—proprietor, whether could retain possession—section 5—homestead, whether also vested in state—whether homestead to be settled back with the proprietor on certain terms—section 3—writ—petitioners Bazars, whether vested in state*

* Civil Writ Jurisdiction Case Nos. 45, 330, 387 and 613 of 1968. In the matter of application under Articles 226 and 227 of the Constitution of India.
CWJC No. 330/1968.. Samaidhari Lall & Ors.
... Petitioners.
CWJC No. 387/1968.. Syed Askari Hadi Ali Angustine Imam
... Petitioner.
CWJC No. 613/1968.. Syed Sadique Imam and another (Substituted in palce of Late Syed Haider Imam
... Petitioners.

of Bihar consequent to the issuance of notification under section 3.

The expression 'Bazar' is synonymous with 'Market'. The expression 'Bazar' used in section 4 of the Bihar Land Reform's Act 1950, hereinafter called the Act, must, therefore, be equated with Market.

Held, that the wwrit-petitioners were owners of market which must be held to be equivalent to Bazar.

The writ-petitioners were holding Bazar on the land in question in terms of section 7A of the Act, therefore, the proprietors were not entitled to retain possession. Section 5 of the Act gives clear indication that homesteads also vested but it would be deemed to be settled back with the proprietor on terms.

Held, that the shops of the writ-petitioners constituted Bazars. They were not mere buildings. At no point of time were they homesteads. So far as Patna Market is concerned it may have been homestead earlier, but it losts its character of a homestead when Bazar was set up after demolishing the homes. The Bazars covered by the writ-petitioners vested in the State of Bihar consequent upon the issuance of the notification under section 3 of the Act.

Application under Articles 226 and 227 of the Constitution.

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

Messrs K.D. Chatterjee, Asghar Hussain and Imam Ali for the Petitioner in CWJC No. 45 of 1986

Messrs Lal Narayan Sinha, R.B.Mahto (Addl. A.G.) and Rafat Alam (J.C. to Addl. A.G.) for the Respondents in CWJC No. 45 of 1968.

Messrs Balbhadra Prasad Singh and Parmeshwar Prasad for the Petitioner in CWJC No. 330 of 1968

Messrs Lal Narayan Sinha, R.B.Mahto (Addl. A.G.) and S.K.P.Sinha (J.C. to Addl. A.G.) for the Respondents in CWJC No. 330 of 1968.

Messrs K.D. Chatterjee and Baleshwar Prasad Gupta for the Petitioner in CWJC No. 387 of 1968

Messrs Lal Narayan Sinha, R.B.Mahto (Addl. A.G.) and S.K.P.Sinha (J.C. to Addl. A.G.) for the Respondents in CWJC No. 387 of 1968.

Messrs K.D.Chatterjee, Asghar Hussain and Imam Ali for the Petitioners in CWJC No. 613 of 1968

Messrs Lal Narayan Sinha, R.B.Mahto (Addl. A.G.) and Harendra Prasad (J.C. to Addl. A.G.) for the Respondents in CWJC No. 613 of 1968.

Uday Sinha, J. The common question of law falling for consideration in these four applications under Articles 226 and 227 of the Constitution is whether the markets of the petitioners located at Patna, Arrah, Bhagalpur and Piro vested in the State of Bihar consequent upon the vesting of estates in terms of notifications issued under section 3 of the Bihar Land Reforms Act CWJC No. 613 of 1968 related to Patna Market at Patna, CWJC No. 45 of 1968 relates to Gudari Bazar in the twon of Arrah, CWJC No. 387 of 1968 relates to Hassan Bazar at Piro and CWJC No. 330 of 1968 relates to Bazar known as 'Tilak Babu Ka Hat' in the town of Bhagalpur.

2. The markets mentioned above are the main marketing centres in the towns where they are located. By separate notices the proprietors were called upon to hand over possession of the markets. The four writ applications will be disposed of by this common judgment. The vires of any provision of the Bihar Land Reforms Act (hereinafter referred to as 'the Act') has not been questioned. The contention urged on behalf of the petitioners shortly put is that the properties of which possession is sought to be taken over by the State are buildings and not Bazar and buildings did not vest. It is not disputed that Hat and Bazar vested upon the issuance of notification under section 3 of the Act. But since there is no Bazar, but only buildings let out to several tenants, they did not vest. In CWJC No. 613 of 1968 which relates to Patna Market, the further plea is that it was a homestead at one point of time prior to the abolition of zamindari and, therefore, it was homestead on the day of issuance of notification. The submission is that being homestead, the properties must be deemed to have been settled back with the Ex-proprietor in terms of section 5 of the Act.

3. Before embarking upon consideration of the submissions urged at the Bar, it would be appropriate to set out the relevant provisions of the Statute. The long title of the Act reads as follows:

> "An Act to provide for the transference to the State of the interests of proprietors and tenure-holders in land and of the mortgagees and lessees of such interests including interests in trees, forests, fisheries, jalkars, ferries, hats, bazars, mines and minerals and

> to provide for the constitution of a Land Commission for the State of Bihar with powers to advise the State Government on the agrarian policy to be pursued by the State Government consequent upon such transference and for other matters connected therewith.
>
> Whereas it is expedient to provide for the transference to the State of the interests of proprietors and tenure-holders in land and of the mortgagees and lessees of such interests including interests in trees, forests, fisheries, jalkars, ferries, hats, bazars, mines and minerals and to provide for the constitution of a Land Commission for the State of Bihar with powers to advise the State Government on the agrarian policy to be pursued by the State Government consequent upon such transference and for other matters connected therewith;"

Section 3 of the Act lays down that the State Government may issue notification vesting estates or tenures in the State. Section 3(1) reads as follows:

> "(1) The State Government may, from time to time, by notification, declare that the estates or tenures of a proprietor or tenure-holder, specified in the notification, have passed to and become vested in the State."

Section 4 lays down the consequences of the vesting of an estate or tenure in the State. The consequences are enumerated in sub- sections (2) and (3). Sub-sections (2) and (3) of Section 4 read as follows:

> "(a)(2) Such estate or tenure including the interests of the proprietor or tenure-holder in any building or part of a building comprised in such estate or tenure and used primarily as office or cutchery for the collection of rent of such estate or tenure, and his interests in trees, forests, fisheries, jalkars, hats, bazars, mela and ferries and all other sairati interests as also his interest in all sub-soil including any rights in mines and minerals, whether discovered or undiscovered, or whether being worked or not, inclusive of such rights of a lessee of mines and minerals, comprised in such estate or tenure other than the interests of raiyats or under-raiyats shall, with effect from the date of vesting, vest absolutely in the State free from all incumbrances and such proprietor or tenure-holder shall cease to have any interests in such estate or tenure, other than the interests expressly saved by or under the provisions of this Act."

The other parts of section 4 have no bearing on the question which falls for consideration before us. Section 5 of the Act lays down that all homesteads comprised in an estate or tenure of an intermediary and in his possession on the date of vesting shall be deemed to be settled by the State with the ex-intermediary subject of course to the provisions of Sections 7A and 7B. Section 5(1) of the Act reads as follows:

> "(1) With effect from the date of vesting, all homesteads comprised in an estate or tenure, and being in the possession of an intermediary on the date of such vesting shall, subject to the provisions of section 7A and 7B

> be deemed to be settled by the State with such intermediary and he shall be entitled to retain possession of the land comprised in such homesteads and to hold it as a tenant under the State free of rent;
>
> Provided that such homesteads as are used by the intermediary for purposes of letting out or rent shall be subjects to the payment of such fair and suitable ground-rent as may be determined by the Collector in the prescribed manner."

Section 6 of the Act gives some succour to the ex-proprietors by providing that lands used for agricultural or horticultural purposes, which were in khas possession of an intermediary on date of such vesting, the intermediary shall, subject to the provisions of section 7A and 7B, be deemed to be settled by the State with such intermediary and he shall be entitled to retain possession thereof and hold them as a raiyat subject to the payment of fair and suitable rent. In terms of section 7 buildings which were in possession of intermediaries and used as golas, factories or mills shall be retained by them on payment of rent. Section 7A of the Act which reads as follows cuts down some of the privileges extended to ex-proprietors by section 5.

> "7A. Lands on which hat or bazar was held not deemed to be settled with the intermediary - Nothing in section 5, section 6 or section 7 shall be deemed to confer any right on the intermediary in respect of any land on which at any time within one year prior to the date of vesting to the estate or tenure the intermediary was holding a hat a bazar."

4. In order to appreciate the contention urged on behalf of the petitioners, it is also necessary to set out the definition of two other expressions, viz, 'estate' and 'homestead' defined in sections 2(i) and (j) respectively. They read as follows:

> "(i) 'estate' means any land included under one entry in any of the general registers of revenue-paying lands and revenue-free lands, prepared and maintained under the law for the time being in force by the Collector of a district, and includes revenue- free land not entered in any register and a share in or of an estate."
>
> (j) 'homestead' means a dwelling house used by the proprietor or tenure-holder for the purpose of his own residence or for the purpose of letting out on rent together with any courtyard, compound, attached garden, orchard and out-buildings and includes any out-buildings used for purposes connected with agriculture or horticulture and any tank, library and place of worship appertaining to such dwelling house.
>
> Explanation.- In this clause, the expression 'dwelling house' or 'out-building' shall include any land on which there stood such dwelling house or out-building at any time before the date of vesting."

We have now to consider the rival claims of the parties in the background of the provisions, quoted above.

5. To repeat, the stand of the State is that the properties are Bazars and vested as such consequent upon issuance of notification under

section 3 of the Act. The consequences of vesting, I have already quoted earlier. The provisions of section 4(2) lay down that the estate including the interest of the proprietor in any building or part of a building, comprised in such estate or tenure as office or cutchery for the collection of rent of such estate or tenure and his interest in trees, forests, fisheries, jalkars, hats, bazars, melas and ferries and *all other saraiti* interests shall vest absolutely in the State free from all incumbrances. It is not in controversy that Bazars vest in State of Bihar in terms of section 4 of the Act. The only question is whether the properties are Bazars. According to the petitioners, they are not Bazars but are only buildings let out on rent to individuals.

6. It is not the stand of the petitioners that the Bihar Legislature was not competent to legislate in regard to Bazars. Item 28 in List II of the 7th Schedule reads as 'Markets and Fairs'. It is now well established that the items in the 7th Schedule must be liberally construed to cover every conceivable legislation having a bearing on the subject. I have no reason to think that the expression 'market' does not include 'Bazar'. The expression 'Bazar' used in section 4 of the Bihar Land Reforms Act must, therefore, be equated with market. Section 4 of the Act takes in its sweep hats, bazars and melas. There can be no doubt that hats and melas are prima-facie somewhat distinct from bazars. A hat generally is congregation of buyers and sellers on specific days of the week. A 'mela' on the other hand, is held on special occasions in the year. They are usually associated with some religious festivals. For example, melas are held on Mondays in the month of Srawan(July)

in the State of Bihar or on the occasion of Ura and so on. A 'bazar' on the other hand, is a daily feature and is held day after day.

7. I have equated bazar with market. The expression 'Bazar' is synonymous with 'Market' and is so well known that it has been adopted in English Dictionary as well. The Chambers Dictionary 1941 (Reprint) gives the meaning f 'Bazar' as "an Estern market- place etc." Webster's New World Dictionary states it as "In oriental countries as market or street of shops etc." The glossary prepared and published by Ministry of Law, Government of India on the recommendation of Official Law Languages Commission gives the meaning of 'Bazar' as "a market". In Aiyer's Law Lexicon of British India a Bazar is 'market, a daily market, a market place as opposed to a Bazar where a hat is held only on certain days'. In Shorter Oxford English Dictionary, a Bazar is an oriental market place or market usually consisting of ranges of shops or stalls; a ferry, fair for the sale of useful and ornamented articles and a 'Market' is "the meeting together of People for the Purchase and sale of provisions or live-stock, publicly exposed, at fixed time and place, an open space or *covered building* in which cattle, provisions etc. are exposed for sale; a market place, market house; a place or seat of trade". In Webster's Seventh New Collegiate Dictionary 'Market' is stated as follows; "(i) a meeting together of people for the purpose of trading by private purchase and sale and usually not by auction; a public place where a market is held; a place where provisions are sold at wholesale or retain". There can, therefore, be no manner of doubt that Bazar is

synonymous with Market.

8. The petitioners in all the applications are exclusive owners of places where merchants congregate or have congregated for buying and selling. In the Patna Market, subject matter of CWJC No. 613 of 1968, there are rows and rows of shops and nothing but shops. There can, therefore, be no difficulty in holding that 'Patna Market' is a Bazzar. In fact, it is the most important marketing centre in this town of Patna. Similarly complex of shops of Bhaalpur which is subject matter of CWJC No. 330 of 1968 is famous as 'Tilak Babu Hatia'. A Hatia is nothing but a Bazzar. It is another matter that there is a restaurant too in that row of shops, but that does not and cannot conceal the essential character of the complex. The complex of shops which is subject matter of CWJC No. 387 of 1968 is known as 'Hassan Bazzar". It was established by Late Hassan Imam, Bar-at-Law in village Piro. The names themselves are suggestive of their essential character. The entire complex consists of 180 shops, some of which are brick-built and some are Kacha. It is not the petitioners' case that the buildings are Golas. Undoubtedly, there is averment in paragraph 6 in CWJC No. 387 of 1968 that there is no incidence of any Hat or Bazzar on the lands or building. But there is no denial by the petitioners that all tenements are shops. Similarly the complex at Arrah (subject matter of CWJC No. 45 of 1968) is famous as "Gudari Katra Bazzar". The names in each case are rather suggestive of their essential character. All of them are famous as Bazzar or Market. In all of them the whole complex is row of shops. There may be a tenement or two which may be an office but that does not alter the essential

character of the complex. Buying and selling operation is the main rather only operation. It is thus obvious that the complexes which the petitioners are claiming as buildings or Homesteads are nothing but Bazzars. It is not the case of any of the petitioners that buying and selling activity does not take place at the places described as Bazzar. I ha, therefore, no hesitation in holding that the petitioners were owners of a market which must be held to be equivalent to a Bazar.

9. Mr. K.D. Chatterji contended that a Bazzar is not just a place where buying and selling activity is carried on, but it is a place where besides buying and selling activity, toll is realised by the persons holding the Bazzar. According to him, exaction or levy of some kind or the other by the persons holding the Bazzar is an essential feature of a Bazzar. It was submitted that it is no body's case that toll is levied from the dealers. Therefore, it is not a Bazzar or Market. I regret, there is nothing to support the submission or Mr. Chatterji that realisation of toll is an essential feature to constitute Bazzar. Toll may or may not be realised, but if buyer and sellers congregate, the place must be held to be a market or Bazzar. The realisation of toll is nothing but the consideration for the right to sell at a place where buying and selling activity is carried on. That right may be granted on payment of toll, or in the form of rent. The rent may be per day, per week, or per month. I am, therefore, unable to hold that just because toll is not realised, the complexes are not Bazzars. In order to constitute Bazzar all that is necessary is a place where buyers and sellers congregate to sell and buy. It will be difficult for me to accept that the

complexes are not Bazzars within the meaning of section 4(1)(a) of the Bihar Land Reforms Act. They being Bazzars of a proprietor or ex-intermediary, they must be held to have vested consequent upon issuance of the notification under section 3 of the Act. Counsel for the petitioners were at pains to show that the complexes in question were not Bazzars, but were merely buildings consisting sometimes of pucca buildings and, therefore, they did not vest. I regret, I have considerable difficulty in accepting this submission. I have mentioned earlier, the various meanings given to a 'Bazzar' in various dictionaries. According to those well known meanings the nature of the structure is entirely irrelevant. In fact, the Shorter Oxford English Dictionary includes 'covered buildings' also within the meaning of the expression 'Market'. A big chain store may also be described as 'Market'. The fact that the structures in the complexes in question are pucca structures cannot lead me to hold that they are not Bazzars. They are certainly Bazzars in my view.

10. Counsel for the petitioners were at pains to establish that the complexes are buildings and buildings did not vest consequent upon the issuance of the notification under section 3 of the Act. I regret, upon the concluded finding that the complexes in question are Market or Bazzar, the question of buildings vesting or not vesting does not arise. Further, if I may say so with respect, it is difficult for me to accept that complexes are mere buildings. Some one might also describe them not even as buildings but just bricks and still some others as mere earth. That will not be right approach. It cannot be denied that these are

buildings. But if there are rows and rows of shops and nothing but shops and the only operation carried on there is of buying and selling, they cease to be mere buildings. The building becomes bazar. Just as a man has hands, feet, ears etc. But a man is not merely those limbs, but something different from those limbs. A man is a man not limbs alone. Similarly the buildings in question took the character of Bazzar. The entire submission advanced before us with great labour that buildings do not vest can be of no avail. They are not mere buildings. They are Bazzar (Market).

11. On the basis of my concluded finding that the subject matter of the writ applications are Bazzars, it would not have been necessary to consider other aspects of the matter streneously advanced before us, but out of difference to learned counsel, I must cover that pitch as well. Mr. Balbhadra Prasad Singh, learned counsel for the petitioners in CWJC No. 330 of 1968 contended that all that vest is the estate of the proprietor and nothing more. It was submitted that in terms of section 4(1)(a) the estate of tenure of the proprietor vests free from all incumbrances. 'Estate' is defined as any land included under one entry in any of the general registers of revenue-paying lands and revenue-free lands. Buildings of the proprietor are not lands. Therefore, they did not vest. Section 4(1)(a) lays down that besides the estate or tenure of the proprietor buildings used primarily as office or cutchery for the collection of rent of such estate shall vest absolutely in the State. On the basis of this it was submitted that it is only building of one kind which vests, i.e. buildings used as cutchery for collection of rent.

Buildings which were homesteads of the intermediary would be entitled to retain possession. Section 7 also deals with right of ex-intermediary in regard to buildings of certain categories, but all the benefits conferred on the ex-intermediary will be subject to the provisions of section 7A of the Act. That section, therefore, gives the underlying pattern that buildings apart from cutchery also vest in the State but in terms of that section the proprietor will be entitled to retain them as tenant. In terms of section 7A nothing in sections 5,6 or 7 would be deemed to convey any right on the intermediary in respect of any land on which at any time within one year prior to the date of vesting of the estate the intermediary was holding a hat or bazzar. As I have already held earlier, the complexes are Bazzars. Sections 5 and 7 are, therefore, set at nought by section 7A. In my view, therefore, buildings of the category mentioned in sections 5 and 7 would also vest, but the proprietor would be entitled to retain possession thereof subject to payment of mere rent, in some cases, and without payment in some cases. In my view, therefore, buildings of the proprietor also vested in the State of Bihar.

12. The homesteads do vest, but the proprietor is permitted to retain them in his possession as lessee of the State. Cutchery, mills and golas also vest, but the proprietor is permitted by the Statute to retain their possession on payment of rent. It is a process of lease-back to the proprietor. For the present, it is not necessary to consider whether hospitals, schools, cinemas and private temples vested in the State of Bihar or not. The buildings with which we are concerned do not fall in any of those categories.

13. Learned counsel for the petitioners also contended that the buildings now constituting Bazar were homesteads at the time of vesting. The proprietors were, therefore, entitled to retain them in terms of section 5 of the Act. This point has relevance only to Patna Market case. The proprietor has claimed that the proprietor had his homestead on the lands on which Patna Market now exists. I have quoted earlier the definition of the expression 'homestead' in section 2(j) of the Act. the expression 'homestead' means a dwelling house either used by the proprietor or let out on rent. The dominant idea is that it must be for the purpose of dwelling or be capable of being used as a dwelling house and not for any other purpose in order to constitute a building as homestead. A building which was used as dwelling house would be homestead and would include compound, orchard, out-buildings etc. The Supreme Court case *Kanpur Sugar Works Ltd. vs. State of Bihar and others (1)* laid down clearly that not only the dwelling house is homestead, but also the garage, the kitchen, clubs, dispensary, office building, godown, water tank, cattle-shed, way bridge would be also a homestead. The decision of S. Sarwar Ali, J. in CWJC No. 16 of 1973, decided on the 5th May, 1975 is also unacceptable. I shall not for a moment contend that in order to constitute homestead, the ex-intermediary must have been residing personally in all these buildings which may be claimed as homestead. The requirement of law would be fulfilled if the building is of such a character that it may be used for residential purpose, no matter whether the proprietor resided in it all the year

(1) (1970) AIR (SC) 1539.

round or at intervals. A proprietor would thus be, capable of owning any number of buildings. They all may be termed as 'homestead'. But the essential characteristic of residential use must be existent in order to claim the benefit of section 6 of the Act. The central idea of the Statute is brought out explicitly by enactment of section 7A (quoted earlier) that if at any time within one year prior to the vesting the building or the homestead was being used by the intermediary as hat or Bazzar, the intermediary would not be entitled to claim the benefit of section 5 or section 7 of the Act. In the instant applications, there is no dispute that from years prior to the date of vesting the Bazzars had come into existence and were in flourishing state. The buildings in question so far as CWJC Nos. 45, 387 and 330 of 1968 are concerned, they had not been used as dwelling purpose at any point of time. There can be no question of their being claimed as homesteads.

14. So far as Patna Market is concerned (subject matter of CWJC No. 613 of 1968), the Bazzar came into being much before 1950. It was established certainly years prior to issuance of the notification. It is thus obvious that within one year of the vesting none of them were homestead. They were nothing but Bazars.

15. Learned counsel for the petitioners submitted that in terms of the explanation of section 2(j) if a building or house has been used as a dwelling house at any time before the date of vesting, it would constitute homestead which the ex-proprietor would be entitled to retain in payment of rent. I regret, that is not the expanse of the Explanation. It is possible to consider situation

where a parcel of land was homestead, but at the time of vesting dwelling house on those lands had crumbled and were in disuse, even those would constitute homestead. The Explanation does not mean that even if hundred years before the vesting of the zamindari the land was homestead, and its character has changed, yet it would be taken as such in 1955 when the notifications were issued. The properties, therefore, which are subject matter of these writ applications were not homestead on the date of vesting. From homestead it had changed into a Bazzar. The petitioners were holding Bazzars on the lands in question in terms of section 7A, therefore, the proprietors were not entitled to retain possession. Section 5 gives clear indication that homesteads also vested but it would be deemed to be settled back with the proprietor on terms. It is not correct exposition of law that homestead did not vest.

16. Learned counsel for the petitioners submitted that it is not only residential house which is covered by the definition of homestead. It also includes the expression *"for the purpose of letting out on rent"*. In my view, the dominant idea of residence cannot be lost sight of. If a building was used for the purpose of letting out on rent, it would constitute homestead only if the letting out was for the residential purpose and not otherwise. Nothing has been brought to our notice to indicate that the leases were for anything but for holding shops. I am not going into the question whether the leases were registered bilateral leases in terms of the Transfer of Property Act or not, but certainly there is nothing before us to show that they were for residential purposes.

17. Learned counsel for the petitioners submitted that if the tenant of a building used it as a homestead, the use made by the tenant as a shop subsequently will not change the nature of the building and the proprietor would not be deprived of his right under section 5 of the Act. In my view, in every letting out the dwelling purpose will have to be existent, if the provisions of section 2(j) have to be given a meaning. It must be as letting out for residential purpose.

18. *CWJC No. 387 of 1968:*

In this application a special argument advanced at the Bar on behalf of the petitioner was that the proprietor build Golas. No such claim has been made in the writ application. I am, therefore, unable to hold that 'Hasan Bazzar' is a Gola which the proprietor may retain in terms of section 7 of the Act. No such claim having been putforth in the writ application, I am unable to consider the submission seriously. I would, however, leave this matter open for the authorities to decide whether 'Hassan Bazzar' is a Gola or not, if such a claim is made before the Revenue authorities. It was further submitted that the proprietor had built Golas and shops on some lands obtained from Raiyats by exchange. The shops being on raiyati lands, they would not vest. I regret, there is no substance in this submission as well. When the proprietor exchanged these lands with the lands of a raiyat, a merger of interest took place and the possession of the ex- proprietor became qua-proprietor and not as a raiyat. In my view, there is no merit in this contention as well.

19. My conclusions, therefore, are that the shops covered by the various writ applications

constituted Bazzars. They were not mere buildings. They were not homestead. At no point of time were they homestead. So far as Patna Market is concerned, it may have been homestead earlier, but it lost its character of a homestead when Bazzar was set up after demolishing the homes. I am, therefore, constrained to hold that the Bazzars covered by the four writ applications vested in the State of Bihar consequent upon the issuance of the notification under section 3 of the Bihar Land Reforms Act.

20. Before parting with the judgment it must be made clear that the present application CWJC 613 of 1968 in respect of Patna Market is directed against a notice calling upon the petitioner to surrender possession of Patna Market. The State claims vesting in it only of Patna Market. There is another bazar adjacent to it and which falls within the compound of the ex-proprietor Mr. Haider Imam. This is popularly known as Meena Bazar. The notification under section 3 of the Bihar Land Reforms Act will result in vesting of Patna Market only not Meena Bazar. This Meena Bazar was established much after the vesting of the zamindaries in the State of Bihar. Learned Additional Advocate General frankly conceded that Meena Bazar cannot vest and has not vested in State of Bihar. We, therefore, categorically lay down that although Patna Market has vested in State of Bihar, Meena Bazar has not vested.

21. For the reasons, stated above, I find no merit in any of the applications. They are dismissed accordingly. But in the special circumstances of the case, there shall be no order as to costs.

22. Mr. Lal Narayan Sinha conceded that it

would not fair for the State to claim mesne profit for the Bazars in question from 1955 till this day. He assured us that he will advise the State Government not to claim mesne profits. We hope the State Government will honour the advice.

S.K.Jha, J. I agree.

S.K.Choudhuri, J. I agree.

R.D. Application dismissed.

CRIMINAL WRIT JURISDICTION

1984/December, 5.

Before Prem Shanker Sahay and Syed Haider Shaukat Abidi, JJ.

*Mohan Singh.**

v.

The State of Bihar and Others.

Conservation of Foreign Exchange and Prevention of Smuggling Activities *Act, 1974 (Central Act No. LII of 1974) Section 3(1) and 5A—Section 3(1)—detention order under—for prevention of smulling activities—ground of detention clearly mentioned that writ—petitioner connected with smuggling activities and was not traceable—substantive case or order of detention—detaining authority best judge—section 5A—ambit of—validity of detention, where some grounds non-existent or irrelevant—legality of detention to be considered on the date of hearing of writ petition.*

The grounds of detention clearly mentions that the writ-petitioner was connected with smuggling activities and inspite of best efforts could not be traced and in order to prevent such smuggling the

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* Criminal Writ Jurisdiction Case No. 138 of 1984. In the matter of an application under Articles 226 and 227 of the Constitution of India.

detention order was passed which is quite in consonance with the provisions of section 3(1) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974, hereinafter called the Act.

The question whether a substantive case will serve the purpose or an order of detention will be necessary is within the domain of detaining authority who is the best judge for the same.

The broad features relating to the acts connected with smuggling have been given in the grounds and the High Court cannot sit on appeal to scrutinise the same and come to a different conclusion.

Held, that, even if some grounds are non-existent or irrelevant that will not invalidate the order of tetention in view of section 5A of the Act; according to which if there are two or more grounds then such order shall not be invalid or inoperative because some of the grounds are vague, non-existent, not relevant, not connected or proximately connected with such person or invalid for any other reason whatsoever.

Where the writ-petitioner challenged his detention from 23.6.1984 to 29.6.1984 as it was in violation of section 8(C) of the Act as he was arrested on 23.6.1984, but the detention order was served on him on 30.6.1984 and eleven weeks from the date of his arrest expired on 8.9.1984 and the opinion of the Advisory Board was not given by then;

Held, that, in such cases the court has to consider the legality of detention on the date of hearing and no writ can be issued if detention on

that date is lawful.

Talib Hussain v. State of Jammu and Kashmir (1)-followed.

Application under Articles 226 and 227 of the Constitution.

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

M/s. Basudeva Prasad, Janardan Singh and Shanker Dayal Singh for the Petitioner.

M/s Karuna Nidhan Keshava, G.P.IV & Maheshwar Dhar Dwivedi, J.C. to G.P. IV for the State.

Mr. Mahendra Prasad Pandey for the Respondent No. 3 and 4.

P.S. Sahay, J. The petitioner initially had challenged his arrest and remand by the order of the Chief Judicial Magistrate, Patna; and the direction to send him to Delhi for production before the Delhi Administration, but the petitioner now challenges his detention under the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (hereinafter to be referred as COFEPOSA).

2. In order to decide the controversy in this case it will be necessary to refer to certain facts. The petitioner arrived at Patna Airport from Kathmandu by Indian Air Lines flight No. IC 246 on 23.6.1984 and he was apprehended by the Superintendent of Customs, Patna Airport, who is respondent no. 3 in this case. Then he learnt that he was wanted in connection with a detention order issued on 4.1.1980 by the Delhi Administration. The

(1) (1971) AIR (SC) 62.

petitioner was produced before the Chief Judicial Magistrate, Patna, and application was filed for remanding the petitioner for interrogation; a copy of the petition has been filed as Annexure-1. In pursuance of the application the Chief Judicial Magistrate, Patna, ordered the petitioner to be detained at Sachivalaya Police Station by his order dated 24.6.1984; a copy of the same has been filed as Annexure-2. The learned Magistrate had also directed that the Senior Superintendent of Police, Patna, will make necessary arrangements for taking the petitioner to Delhi to be produced before the Collector of Customs, Central Revenue Building, New Delhi. The petitioner moved this Court and by order dated 27.6.1984 an order was passed by this Court that the petitioner shall not be taken away outside the jurisdiction of this Court and the application was kept pending. A counter affidavit was filed by the Customs Department in which it was stated that the petitioner was involved in smuggling of watches worth rupees three lacs and fifty thousand and he was the brain behind the same for bringing them from Hongkong and other foreign places. It has further been stated that a case was registered under the Customs Act and the petitioner was directed to appear before the authorities but he evaded and a notice technically known as Red Alert Notice, was issued on 26.10.1979 to all concerned that he should be arrested whenever he is found; a copy of the notice has been filed and marked as Annexure-A. A similar notification was issued in the Gazette directing him to appear under section 7(i)(b) of the COFEPOSA Act which is Annexure-B. In spite of all these the petitioner did not appear and a fresh Red Alert

Notice was issued which is Annexure-C. The relevant portion may be usefully quoted:

> "When arrested, he should be escorted to the nearest Police Station for his detention under Cofeposa Act, 1974 by Police Authorities and simultaneously Shri Somnath Pal, Dy. Collector of Customs, Central Excise Collectorate, New Delhi should be informed on Telephone no. 273369 (Office). The Directorate Headquarters should also be informed of the results of action in due course."

3. It is further stated that the petitioner alighted from Kathmandu and came to the counter of the customs department and he disclosed his name and the Officer on duty grew suspicious and on checking various kinds of foreign goods worth Rs. 1390/- along with international driving licence, ticket etc. were recovered and inventory was prepared. It is further stated that the petitioner made a voluntary statements accepting his involvement in the smuggling; a copy of the statements have been filed and marked as Annexure-D and D1. In the supplementary affidavit filed on behalf of the Department it has further been stated that the petitioner had violated the provisions of the Customs Act and he was liable for prosecution under section 104 of the Act. The prayer made before the Chief Judicial Magistrate, Patna, for sending the petitioner to Delhi in pursuance of the Red Alert Notice has been justified. It has been further stated in the forwarding note that due to inadvertence it was left out that the petitioner had also violated the provisions of the Customs Act and another petition

was filed; copies thereof have been filed and marked as Annexure-E and E1. The petitioner was served with a detention order passed by the Delhi Administration on 30.6.1984 and this fact has been admitted in the supplementary affidavit filed on behalf of the petitioner and Annexure-3 is the order of detention and along with the same the grounds and the list of documents were also supplied to him. In the counter affidavit it has been denied that the petitioner was connected with the smuggling rather he had been staying in Phillipine since 1978 and the confessional statements is contained in Annexure-D and D1, were ade under threat and coercion. Therefore, a prayer was made to quash the detention order and paragraph 10 runs as follows:

> "That in reply to the statements made in paragraphs 14, 15 and 16, I say and submit that in the facts and circumstances of this case this Hon'ble Court has got jurisdiction to quash the illegal detention order of the petitioner."

The fact that the petitioner had been absconding and evading has been denied and no action was taken under section 7 of the COFEPOSA Act.

4. In another supplementary affidavit filed on behalf of the petitioner, it is stated that a representation was filed and as the petitioner wanted to appear before the advisory Board we, by our order dated 22.8.1984, allowed the petitioner to be taken to Delhi to appear before the advisory Board and to be sent back again at Patna after the work was over. According to the affidavit the petitioner appeared before the Board on 24.8.1984 and point has also been raised, which would be

discussed later, that the recommendation of the Board has not been communicated though eleven weeks had expired from the date of his detention. It may also be mentioned that the Delhi Administration was added as respondent no. 4 and affidavit was also filed on behalf of the Delhi Administration in which the apprehension of the petitioner was justified in pursuance of the Red Alert Notices and his failure to appear before the Customs Authorities. The fact that the petitioner was in Phillipine for a continuous period of four years was denied and in support of that the Passport and confessional statement of the petitioner has been relied upon. It has further been stated that the petitioner was evading and, therefore, the order of detention could not be served upon him. It has further been stated that all the formalities were complied with and the order of detention of the petitioner was justified. Replies to the counter affidavit on behalf of the Customs Department and the Delhi Administration have also been filed which will be discussed at proper place.

5. Mr. Basudeva Prasad, learned counsel appearing on behalf of the petitioner, has raised a number of contentions which I shall deal with separately and I may also mention that other points were also raised in the petition but have not been pressed. Originally the prayer for remand of the petitioner by the Customs Department was made in view of the detention order but now in the counter affidavit it has been stated that the petitioner had committed offences under the Customs Act which was left due to some mistake and, thereafter, another petition was filed before the Chief Judicial Magistrate. Now, in my opinion, this point has

become wholly irrelevant in view of the fact that the petitioner has challenged his detention order. Even if the order of remand passed by the Chief Judicial Magistrate, Patna, is held to be bad and he cannot get an effective relief in view of the order of detention passed by the Delhi Administration. Therefore, the moot point for consideration will be whether the detention of the petitioner by the Delhi Administration is valid or not and now I shall take up the points raised by Mr. Prasad.

6. It has been urged that there has been a delay in passing the order, the order is vague and there is much time lag between the incident, complained of, and the issuance of the order, some of the grounds are stale and irrelevant. All these matters are inter-connected and I propose to consider them together. The order of detention has been passed by the Delhi Administration under section 3(1) of the COFEPOSA Act which may be usefully quoted.

> "Whereas, the Administrator of the Union Territory of Delhi is satisfied with respect to the person known as Shri Mohan Singh s/o Shri Jagat Singh r/o D-10, Rajouri Garden, New Delhi that with a view to preventing him from dealing in smuggled goods viz. watches and watch movements otherwise than by engaging in transporting or concealing or keeping smuggled goods, it is necessary to make the following order."

7. From the grounds the Customs Authorities came to know regarding the smuggling of watches some times in August, 1979 when one Bhupendra Singh was arrested at the Palam Airport and from his possession smuggled watches were recovered.

From his interrogation many things came to light and also the complicity of the petitioner. The Custom Authorities tried their level best to examine the petitioner but he could not be traced. Thereafter, a Red Alert Notice was issued on 26.10.1979, which is Annexure-A, and ultimately detention order was issued on 4.1.1980. Learned counsel for the petitioner submitted that there has also been a delay in passing the order and, therefore, we directed the counsel for the Delhi Administration to produce the orginal records and it was actually produced before us and we have perused the same. The enquiry started in September, 1979 and the last statement was recorded on 26.10.1979. Thereafter proposal for detention was made on 19.11.1979 which was considered by the Screening Committee on 21.11.1979. Meeting was held on 4.12.1979 and minutes were prepared on 10.12.1979. The proposal was sent to the Home Department, Delhi Administration on 13.12.1979 and grounds were prepared and sent to the Law Department on 19.12.1979. The Law Department sent it to the Home Department which was ultimately approved and returned to the Law Department on 22.12.1979. It was placed before the Home Secretary on 26.12.1979 and ultimately before the Lt. Governor, who approved on 29.12.1979, and the order of detention was passed on 4.1.1980. From the aforesaid facts, I am satisfied that there has been no delay and rather the Authorities have acted in a vigilant manner. No doubt, the detention order of 1980 was served upon the petitioner on 1984 but the petitioner himself was not available in this country and according to his own affidavit he was

living in Phillipine. Therefore, he himself was responsible for the same and no grievance can be made regarding this as held in the case of *Bhawarlal Ganeshmalji vs. The State of Tamil Nadu and another (1)*. Regarding proximity, I am tempted to quote the decision of the Supreme Court in the case of *Gora v. State of West Bengal (2)* where it has been held as follows:

> "Thest of proximity is not a rigid or mechanical test to be blindly applied by merely counting the number of months between the offending acts and the order of detenction. It is a subsidiary test evolved by the court for the purpose of determining the main question whether the past activities of the detenu is such that from it a reasonable prognosis can be made as to the future conduct of the detenu and its utility, therefore, lies only in so far as it subserves that purpose and it cannot be allowed to dominate or drown it. The prejudicial act of the detenu may in a given case be of such a character as to suggest that it is a part of an organised operation of a complex of agencies collaborating to clandestinely and secretly carry on such activities and in such a case the detaining authority may reasonably feel satisfied that the prejudicial act of the detenu which has come to light cannot be a solitary or isolated act, but must be part of a course of conduct of such or similar activities clandestinely or secretly carried on by the

(1) (1979) AIR (SC) 541

(2) (1975) AIR (SC) 473.

detenu and it is, therefore, necessary to detain him with a view to preventing him from indulging in such activities in the future."

8. Learned counsel appearing on behalf of the State has relied on the decision in the case of *Ashok Narain vrs. Union of India (1)* and one un-reported judgment of this Court in the case of *Kewal Krishna vrs. Union of India (2)* and in all these case it has been held that each case has to be decided on its own merits and no hard and fast rule can be applied regarding time. Mr. Prasad has, then, urged that the proceeding under the Customs Act had already been initiated and, therefore, it was not necessary to pass an order of detention. He has also submitted that a fresh application of mind was necessary in order to show that the authorities were aware of the fact that the petitioner was also wanted in a case under the Customs Act. This submission is also devoid of any substance. The grounds of detention clearly mentions that the petitioner was connected with smuggling activities and in spite of best efforts could not be traced and in order to prevent such smuggling the detention order was passed which is quite in consonance with the provisions of section 3(1) of the Act. It is not a case where the detenu was in jail and then the order was passed and the case of *Merugu Satyanarayana vrs. State of Andhra Pradesh (3)* has, therefore, no application to the facts of the instant case. The question whether a substantive case will

(1) (1982 Un-reported Judgment cases 484)

(2) Cr. WJC No. 302 of 1983 decided on 16.12.1983

(3) (1982) AIR (SC) 1543.

serve the purpose or an order of detention will be necessary, is within the domain of detaining authority who is the best judge for the same. Further, it has been submitted that the grounds are irrelevant and vague and, therefore, the detention order should be quashed. In support of that reliance has been place in the cases of *Hari Ram vrs. Sheodial Ram* (1); *Md. Ysuf vrs. The State of Jammu and Kashmir* (2); *Sk. Nezamuddin vrs. The State of West Bengal* (3) and *Shiv Prasad Bhatnagar vrs. The State of Madhya Pradesh* (4). Our attention has also been drawn to the various paragraphs of the detention order in which it has been mentioned that the petitioner had been dealing in contraband articles. For the purpose of dealing, according to Mr. Prasad, it was necessary also to mention the names of the persons who were the actual buyers and then only it could be said that the petitioner was dealing in the articles. He has, further, argued that dealing and master-minding the operation are two different concepts and should be separately construed. Mr. Pandey, appearing on behalf of the Customs Department as also the Delhi Administration, has submitted that it is the subjective satisfaction of the detaining authority which is relevant and this Court cannot go into the question of sufficiency or otherwise of the materials. Reliance in this connection, has been

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(1) 16 Indian Appels. 12.

(2) (1979) AIR (SC) 1925

(3) (1974) AIR (SC) 2353

(4) (1981) 1 Cr.LJ 594.

placed in the cases of *Haji Ibrahim vrs. State of Madhya Pradesh (1) and G.S.Sharma vrs. Union of India (2).*

9. After going through the aforesaid decision and after hearing the learned counsel for the parties, in my opinion, the contentions raised on behalf of the respondents have to be accepted. The broad features relating to the acts connected with smuggling have been given in the grounds and this Court cannot sit on appeal to scrutinise the same and come to a different conclusion. In some cases there may not be positive material of smuggling but abeting such offence will also be sufficient to form an opinion as held in the case of *Narendra vrs. B.B. Gujral (3).* Moreover, even if some grounds are non-existent or irrelevant that will not invalidate the order of detention in view of section 5A of the Act; according to which if there are two or more grounds then such order shall not be invalid or inoperative because some of the grounds are vague, non-existent, not relevant, not connected or not proximately connected with such person or invalid for any other reason whatsoever. There is no substance in this contention of the learned counsel.

10. Lastly, it has been submitted that there has been a clear violation of section 8(c) of the Act and on that groung alone the detention should be quashed. Every case of detention has to be placed before the Advisory Board and under section 8(b) it is incumbent upon the Government to place the same within five weeks from the detention and the

(1) (1975) Cr. L.J. 1498

(2) 81 C.W.N. 605

(3) (1979) AIR (SC) 420

Advisory Board has to give its opinion, whether or not there is sufficient cause of detention, within eleven weeks from the date of detention under section 8(c) of the Act. According to the learned counsel, the petitioner was arrested on 23.6.1984 and eleven weeks will expire on 8.9.1984 and, admittedly, the opinion of the Advisory Board was not given and this fact was accepted by the learned counsel appearing for the Delhi Administration. Learned counsel appearing for the respondents has, on the other hand, submitted that time will run not from 23.6.1984, when he was arrested at Patna Airport, but from 30.6.1984. In this connection reliance has been placed in the case of *Nishikant vrs. State of West Bengal (1)* in which it has been clearly held that time of detention will run from the time the detenu is arrested under the Order. No doubt, the petitioner was arrested on 23.6.1984 and Annexure-1 also mentions the fact that he has been arrested in connection with the order of detention issued by the Delhi Administration but, admittedly, the order of detention was served on 30.6.1984 when he was lodged in Patna Jail. His detention in Patna Jail from 23.6.1984 to 29.6.1984 may or may not be valid but that will not give an effective relief to the petitioner unless the detention order is held to be bad. Moreover, in such cases the Court has to consider the legality of detention on the date of hearing and no writ can be issued if detention on that date is lawful as held in the case of *Talib Hussain vrs. State of Jammu and Kashmir (2)*.

11. Thus, all the contentions raised on behalf of the petitioner fails and I find that there is no

(1) (1972) AIR (SC) 1497

(2) (1971) AIR (SC) 62.

merit in this application and it is, accordingly, dismissed. The interim order passed by this Court that the petitioner shall not be taken away outside the jurisdiction of this Court also stands vacated.

Syed Haider Shaukat Abidi, J. I agree.

R.D. Application dismissed.

CIVIL WRIT JURISDICTION

1984/December, 10.

Before Birendra Prasad Sinha, J.

*Thakur Girja Nandan Singh.**

v.

The State of Bihar & ors.

Privileged Persons Homestead Tenancy Act, 1947 *(Bihar Act No. IV of 1948) as amended by Privileged Persons Homestead Tenancy (Amendment) Act, 1952 (Bihar Act No. XXIII of 1952) section 5(1)—provisions of—whether applicable to persons ejected after 7.12.1952 and filing applications for restoration of possession in 1974.*

Where applications for restoration of possession over the homestead were filed by the respondent 5 in each of the applications claiming themselves to be privileged tenants, sometimes in the year 1974;

Held, that, it is manifest that section 5(1) of the Privileged Persons Homestead Tenancy Act, 1947 as amended by Privileged Persons Homestead Tenancy (Amendment) Act, 1952, hereinafter called the Act, shall be applicable only in a case where a privileged tenant has been ejected by his landlord

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* Civil Writ Jurisdiction Case Nos. 1345, 1346, 1347, 1369 and 1387 of 1980. In the matter of applications under Articles 226 and 227 of the Constitution of India.

from homestead or any part thereof within one year before the date of the commencement of the Act. Section 5(1) of the Act was amended by Bihar Act no. 23 of 1952, which came into force on 7th December, 1952. It is not contemplated by the Act, that any such application under section 5(1) of the Act shall be filed even if a person was ejected after 7th December, 1952.

Held, therefore, that the applications were not maintainable.

Applications under Articles 226 and 227 of the Constitution.

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

M/s Mangal Prasad Mishra and Bhupendra Narain Yadav for the Petitioners in all the cases.

Mr. D.K. Jha, Government Advocate with *Mr. Nirmal Kumar (in CWJC 1345/80)* with *Mr. Subhash Kumar Verma* (in CWJC 1346/80) with Mr. *R.K.Ranjan* (in CWJC 1347/80) & 1387/80) and with *Mr. S. Farman Ahmad* (in CWJC 1369/80) for the State.

Mr. T. Dayal & Mrs. Chandrakanta Sinha for the respondent no. 5 in all the cases.

Birendra Prasad Sinha, J. These five writ applications have been heard together and are being decided by a common judgment. The petitioner in all these writ applications is the landlord. Respondent No.5 in each of the writ applications have claimed themselves to be privileged persons under the provisions of the Bihar Privileged Persons Homestead Tenancy Act, 1947 (hereinafter referred to as 'the Act'). The petitioner

in each of these applications has prayed for quashing the orders contained in Annexures 1 and 8 of each of the writ petitions. By order dated 9.6.1975 contained in Annexure-1 of the writ applications the Anchal Adhikari has granted Parchas to respondent no. 5 of each of the writ applications under the provisions of the Act. By Annexure-8 of each of the writ application the Additional Collector has ordered restoration of possession to respondent No. 5 of each of the writ petitions.

2. Respondent No. 5 of each of the petitions filed applications under section 5(1) of the Act for restoration of possession over their homestead. It was, inter alia, stated that they were privileged tenants and were entitled for a permanent tenancy in the homestead held by them. The applications were initially allowed. The Additional Collector affirmed those orders against which the petitioner came to this Court and filed an application under Articles 226 and 227 of the Constitution which was numbered as CWJC 1200 of 1977. On 23.8.1979 a Bench of this Court remanded the case back to the Deputy Collector Land Reforms to hold an inquiry in accordance with Rule 5 of the Privileged Persons Homestead Tenancy Rules. It appears that an inquiry was held and a report was submitted by the Deputy Collector Land Reforms on 12.12.1979. Relying upon that report the Additional Collector has by the order contained in Annexure-8 of each of these writ applications ordered restoration of possession to Respondent no. 5 of each of these petitions, as stated above.

3. Learned counsel appearing on behalf of the petitioner has contended that the applications

having been filed by respondent no. 5 of each of these petitions sometime in the year 1974 could not be one under section 5 of the Act and no order for restoration could therefore be passed. Section 5(1) of the Act reads as under:-

> "5. Privileged tenant ejected from homestead within one year before the date of commencement of the Bihar Privileged Persons Homestead Tenancy (Amdt.) Act, 1952.
>
> If any privileged tenant has been ejected by his landlord from his homestead or any part thereof within one year before the date of the commencement of the Bihar Privileged Persons Homestead Tenancy (Amendment) Act, 1952, (Bihar Act 23 of 1952) otherwise than in due course of law, such tenant shall, for the purposes of section 4, be deemed to have held such homestead or part thereof, as the case may be, continuously for a period of one year before the commencement of the Bihar Privileged Persons Homestead Tenancy (Amendment) Act, 1952, (Bihar Act 23 of 1952) and he may apply to the Collector for the restoration of his possession over the homestead or part thereof from which he has been so ejected.
>
> Bihar Privileged Persons Homestead Tenancy (Amendment) Act, 1952 to be deemed to have held it on such date continuously for a period of one year."

It is manifest that section 5 of the Act shall be applicable only in a case where a privileged tenant has been ejected by his landlord from his

homestead or any part thereof within one year before the date of the commencement of the Act. Section 5(1) of the Act was amended by Bihar Act 23 of 1952, which came into force on 7th of December 1952. Section 5(1), therefore, shall be applicable only in a case if a privileged tenant was ejected by his landlord one year prior to 7th of December, 1952. It is not contemplated by this Act that any such application under section 5(1) of the Act shall be filed even if a person was ejected after the 7th of December, 1952. Mr. Tarkeshwar Dayal, learned counsel appearing for respondent no. 5, with his usual fairness has stated that in the circumstances of these cases applications under section 5(1) of the Act were not maintainable. However, he submits that the applications could be treated as one under section 8(5) of the Act. I do not think that question arises in this case at this stage and I need not go into that question. In the facts and circumstances of this case, I am of the view that the applications filed by respondent no. 5 in each of the writ applications on the basis of which the impugned orders were passed were not maintainable. These applications, therefore, have to be allowed only on that ground.

4. The applications are, accordingly, allowed and the orders contained in Annexure 1 and 2 of each of the writ applications are quashed, but without costs.

R.D. Applications allowed.

APPELLATE CRIMINAL

1985/January, 8.

Before M.P.Verma and B.P. Griyaghey, JJ.

*Udai Ho**

v.

The State of Bihar.

Criminal trial-*evidence of child witness—veracity of—trial court noting on the deposition form regarding putting a few questions to the witness—also noted that from the answers given he was satisfied regarding understanding of the witness—but did not record the questions put and answers given—effect of.*

Where the Additional Session Judge, before whom sessions trial went on, made its noting on the deposition form that a few questions were put to Prosecution Witness No.4, who was minor, and also noted that on answer that the witness gave, he felt satisfied regarding the understanding of the witness;

Held, that normally court should have recorded the questions put to and answers given by the child witness, but non-recording of the same does not make his evidence inadmissible. Such

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* Criminal Appeal. No. 98 of 1982(R) (Ranchi Bench). Against Judgment dated 9th April, 1982, passed by Sri Gopi Nath Chandra, 2nd Additional Sessions Judge, Chaibassa.

opinion regarding the understanding of the witness can very well be gathered from the entire deposition itself and from the circumstances of the whole case regarding which a witness deposes.

Appeal by the accused.

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

Mrs. Jaya Roy for the appellant

Mrs. S.L.Jha for the State.

M.P.Verma, J:- This appeal has no merit. On hearing the counsel for the parties and on consideration of the materials placed before us, the order dismissing the appeal was passed on 5.9.1984. The reasons for the same are assigned hereunder.

2. The sole appellant Udai Ho has been convicted of the charge under section 302 of the Indian Penal Code. He has been sentenced to imprisonment for life. At the trial stage the accused appellant had made a denial of the incident alleged, but did not come out with any concrete defence. The trial court on consideration of the evidence held the appellant guilty of the charge. He has, therefore, preferred this appeal.

3. The accusation against him is that at about 8.30 P.M. he killed a woman, named Sita Kui, wife of Turan Ho. The incident occurred in village Asantalia under P.S. Chakradharpur in the dist. of Singhbhum. Some enmity between them is assigned for the cause of this murder. Prosectuion alleges that only two months prior to this incident, the husband of the deceased woman namely Turan Ho in company with others had killed the brother of the appellant. Turan was then in jail and in order to

retaliate the appellant killed Turan's wife, Sita Kui.

4. The appellant and also the members of the prosecution party are of the Adivasies tribes of this part of the district Singhbhum. They are residents of village Asantalia under police station Chakradharpur. Their houses are in one locality almost clustered together. The story is that this appellant made a fatal attack on Sita Kui with a sword when she was getting back with the child in her lap after fetching Guraku (a kind of Tobacco). The attack was made on her in the lane when she was hardly at a distance of ten years approaching her house. According to the prosecution, another son of Sita Kui namely, Gora Ho (PW 4), who was in the house heard the cries of his mother and the child came out running and saw the appellant assaulting his mother with a sword. Gora ran to the house of his aunt Sumi Kui (PW 2) and told her that appellant Udai Ho was assaulting his mother. The house of his aunt Sumi Kui was very close to his house in the north. He was soon followed by the appellant. Gora Ho, out of fear hid himself inside his aunt's house. PW2 Sumi Kui had stated that appellant threatened her also and asked her not to come out. The appellant moved away and came to Kandra Gope whose house is also there in the neighbourhood and threatned him also that if he came out he would also be killed. According to prosecution, Kandra Gope came out through the back- door and rushed to Chaukidar of the village Shamsher Tanti (PW 1). Then they went together and came to the place of Sita Kui where they saw her dead-body lying in the lane close to her house with pool of blood all round. The child was also found there crying. They noticed cut marks on the

face and neck of the deceased woman and there were marks of injuries on the child as well. An important feature of this case is that Udai Ho himself went running to the police station carrying the blood-stained sword. He produced the sword at the police station and surrendered himself to the custody of the Police. A production list for seizure of the sword was prepared by the Officer Incharge of the Police station in presence of PW 8 namely, Gopal Lal Sharma. This document has been marked as exhibit '8'. The plice recorded the statement of Udai Ho and on getting information came to village Asantalia and there he took the statement of Kandra Gope (described as Fard beyan). The Fardbeyan which has been marked as Ext. 13' was sent to the police station where formal First Information Report (marked Ext. 4) was drawn up and a case was registered. Investigation was conducted by the Police and finally Udai Ho was charged-sheeted for causing death of Sita Kui, which is an offence punishable under section 302 of the Indian Penal Code.

5. The prosecution at the trial stage examined 8 witnesses out of whom only PW4 Gora Ho, son of the deceased is the only eye- witness. The other witnesses are PW1 the Chaukidar who had come to the place of occurrence with the informant Kandra Gope (not examined in court), PW2 Sumi Kui is the aunt, who learnt about the occurrence from Gora. Her evidence is that Gora came running to her, and said that Udai Ho, was assaulting his mother and so is the evidence of PW4 Gora. Sumi Kui (PW2) came to the house of Sita Kui and found her dead body lying in the lane in pool of blood. PW3 is a witness to the inquest conducted on the dead-body

by the police. PW5 is a doctor who conducted the atopse over the dead-body and PW8 is another doctor who examined the child. PW6 proved the fact of production of the incriminating weapon i.e. the sword and he had signed the production list marked exts. His signature has been marked as Ext. 2 on the production list which is ext. 8. PW7 is the Sub Inspector of Police who had conducted investigation. He had stated in court that Udai Ho had come to the police station and deposited the blood-stained sword at about 9.30 P.M. on 28.11.80 and Udai Ho surrendered himself to the police custody.

6. It was PW5 Dr. S.K.Prasad, who conducted post mortem examination on 29.11.1980 and found the following ante mortem injuries on the dead-body of Sita Kui.

i. On left cheek incised wound 1" x 1/2" x 3"

ii. On the left neck incised wound size 3" x 1" x 2"

iii. Angle of the mandible left side size 1" x 1/2" x 2 1/2"

iv. Angle of the mandible 1/2" in front size 1/2" x 1/2" x 1 1/2"

v. On the scalp left side incised wound size 1 1/2" x 1/2" x 1/2".

On dissection he found that the neck muscle congested and first cervical vertebrae fractured & Cranial bone temporal torn, size being 3" x 1" bone deep.

In his opinion "the cause of death was due to shock and haemorrhage..... These

injuries may be caused by any sharp instrument like sword....."

7. The child of the deceased woman namely, Baya Bodra had also received some injuries in the course of assault on Sita Kui. The child was examined by another doctor PW8 Dr. A.K. Mahto. He had noticed the following injuries on his person.

> "One cut incised wound over the face left side extending from infront of left ear to mid zone of upper lip cutting the facial muscles blood vessel and parotid gland 4.2" x 1" deep x bucal cavity."
>
> The injury was grievous and sharp cutting...."

8. Counsel for the appellant Mrs. Jaya Roy, in her opening address to the court submitted that there is a serious shortcoming in the prosecution case as the F.I.R., an important document of the case, could not be duly proved and that the informant Kandra Gope was also not examined. She submitted that on this score an adverse inference must be drawn against the prosecution and the whole case is fit to be rejected. Answer to this argument is there in paragraph 10 and also at paragraph 13 at page 9 of the judgment impugned. It has been stated therein that during the stage of trial the attendance of the informant Kandra Gope could not be obtained as he was reported to be out the village. His present address was not known. The warrant of arrest issued for his production could not be executed, as he was reported to be out of village and his whereabout could not be ascertained. The prosecution, therefore, could not produce him. The trial court has further said that

the informant was not an eye-witness. In this circumstances, non-examination does not discredit the prosecution story. PW2 Sumi Kui is also a witness almost on the same point as could be the informant Kandra Gope. Sumi Kui has said in court that her nephew PW4 Gora came running and told that appellant Udai Ho was assaulting his mother. She further gave out that Gora Ho was followed by Udai Ho who threatned her not to come out of her house.

9. The counsel for the appellant has made another attack on the prosecution story that according to F.I.R. when Kandra Gope had met Gora PW4, he on querry stated that when he came out of the house on the cry of his mother and the child, he saw Udai Ho with a sword in his hand, Ram Ho (father of accused Udai) holding a Tanga and one Sirka Ho (brother of accused Udai) with a lathi near the dead-body of his mother. It has been submitted that PW4 Gora made a similar statement before the Investigating Officer PW7. A criticism has been made by the Counsel for the appellant that the aforesaid version of PW4 being hardly of nine years of age should not be accepted as trustworthy, inasmuch as the above statement falsifies the claim of his being an eye-witness to the actual assault.

10. The learned counsel has vehemently argued that Gora at the time of his examination in court was assessed to be of only 11 years of age and naturally on the date of occurrence he was hardly of 9 years of age and that he being a child witness, it would be dangerous for the court to act on his evidence to find the appellant guilty of the charge. Learned Advocate has submitted that a child witness is prone to tutoring or might even

depose under threat and fear and in the instant case it was suggested to PW4 Gora Ho that he was tutored to depose by his uncle, meaning thereby, by the husband of PW2, Sumi Kui.

11. It has also been argued that the trial court was duty-bound to put the child to test to ascertain his intelligence and that he was capable of understanding questions put to him and to give rational answers. It has been submitted that the deposition of the witness PW4 does not indicate as to what questions were put to the witness to test his understanding to know if he was child competent to depose in court. In advancing the aforesaid criticism the learned counsel has argued that the entire version of PW4 should be rejected, as the same has been obtained on account of tutoring by his uncle. The argument is quite loudable, but is devoid of any substance. The counsel for the State Mrs. Jha has taken us through the deposition of PW4. The trial judge has assessed his age to be of 11 years on the date of his examination on 9th December, 1981. The occurrence took place on 28.11.80. He was, therefore, roughly of 9 years when his mother was killed. There is a note of the trial judge that a few questions were put to the witness and that the judge felt satisfied regarding the witness. No one is incompetent by reason of his age to figure as a witness in a court. If a witness, no matter even if he is a minor may competently depose if he can give rational answer. In this regard the court, who is in the seisin of the case and has the opportunity to see the witness and to test the ability and the understanding of the witness, has got absolute discretion to decide whether the witness is qualified

to depose. In the present case the court has made its noting on the deposition forms that a few questions were put to PW4. The court further noted that on the answer which the witness gave it he felt satisfied regarding the understanding of the witness and he was thus, examined in court.

12. The learned Advocate has argued that the court was duty-bound to put the witness to test and to record the questions and answers given by the witness. To this I say that there is no such legal obligation cast upon a court to hold a witness to test. But at the same time, I am also of the view that the rule of prudence requires that such witness who is minor in age should be put to such test to indicate his understanding and intelligibility and that he was capable of giving rational answers. It is true, as I find from the deposition that the child Gora was put to such test and normally court should have recorded the questions and answers given by the witness. But non-recording of the same does not make his evidence inadmissible. Here again I say that such opinion regarding the understanding of the witness can very well be gathered from the entire deposition itself and from the circumstances from the whole case regarding which a witness deposes. Here I find that a wild suggestion has been given that he was tutored by his uncle. Suffice to mention here that his uncle is not a witness in this case. PW4 stands fully corroborated by the aunt Sumi Kui PW2. Her evidence is that PW4 Gora had come running to her and reported that the appellant was assaulting his mother. Both these witnesses had been examined by the police late in the night. I therefore, do not find any element of tutoring of this child witness

PW4 Gora. His evidence is quite consistent with the entire prosecution version and has fairly stood the test of cross-examination. His attention was drawn that in his statement before police he had added two more names i.e. the name of the brother and father of the appellant Udai Ho which he dropped while deposing in court. To my mind, this omission in making statement in court does not discredit him at all, inasmuch as the addition of two names before the police does not exonerate the appellant of the charge. The witness is specific in this statement and has pointed out that he saw the appellant with a sword, with which his mother was struck, resulting in her death. This aspect of the case gets further corroboration from the doctor PW5 who found many incised wounds and cut injuries on the face, cheek, mandible bone neck and also on the scalp. The doctor has said that the injuries were possible by a sword. It is here in this connection that the conduct of the accused in rushing to the police station carrying the sword in his hand and depositing the same bear testimony to the fact that he taking advantage of the situation, when the woman had gone to fetch Guraku made a fatal assault. killing her on the spot in the lane before she could get inside her house.

13. The depositing of the sword by the appellant cannot be viewed as an isolated act. Rather it is in continuity with the sequence of the event and the chain of circumstances, appearing in the case.

14. The story is that the unfortunate woman had a child in her lap. The child also received cut injuries on account of the sword being struck on her. It was PW8 Dr. A.K.Mahto who had examined

the child on a day following the incident on 28.11.80 and had noticed cut mark in front of the left ear and on the mid zone of the upper lip. The child had started crying. The mother Sita Kui had also cried out and on their cry PW4 Gora Ho had rushed.

15. Thus, I find that the story, as given out by the prosecution fully proves the complicity of this appellant and the court below has rightly accepted the statement as trustworthy. Evidence of PW2 also inspires confidence coupled with fact of immediate conduct of the accused, as discussed above soon after the incident is admissible under section 8 of the Evidence Act. He has, therefore, been rightly held guilty and convicted of the charge. The judgment impugned needs no interference and it is accordingly upheld. The appeal is accordingly dismissed.

B.P. Griyaghy, J. I agree.

R.D. Appeal dismissed.

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