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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)

PATNA

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TABLE OF CASES REPORTED

FULL BENCH

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The word 'direct' in section 45 B of the Act implies a twin direction by the State Government of the authorised collector to a subservient authority to first re-open the case and the reafter to dispose it of afresh in accordance with the provisions of the Act.

Held, therefore, that section 45 B of the Bihar Land Reforms (Fixation of ceiling Area and Acquisition of Surpuls Land) Act, 1961 does not necessarily mandate that the deciation afresh of a proceeding disposed of by a collector under the Act must inflexibly be made by the state government or by the authorised collector of the district alone and as such the matter could be decided at a level below the collector of the district.

Mahanth Siyaram Das and another v. The State of Bihar and ors. (1985). I.L.R. 64, Pat. 792

Code of Criminal Procedure, 1973

Section 116 (6) provisions of — Magistrate extending the period of six months, prescribed under the subsection, by another six months — validity of — order of the Magistrate that extention of enquiry by six months excludes any further limitation, whether beyond jurisdiction.

Legislature in inserting sub section (6) in section 116 of the code of criminal procedure, 1973, hereinafter called the code has virtually prescribed the limit of the inquiry as six mohths and only as a matter of abundant caution, vested discretion in the Magistrate to extend the same in exceptional circumstances. Special reasons must exist and there should be expressly recorded in writing for any extension beyond the prescribed period of six

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by the authorities below it must be held, that the institution at Bodh Gaya is a Hindu religious Math and consequently all its properties are impressed and burdened with a trust of the said religious and charitable nature. This issue has not to be considered in the writ jurisdiction as if it was a matter of trial in a suit. Nor can it be examined as if it was an appeal against the forums under the ceiling law. It necessarily has to be considered within the parameters of the writ jurisdiction. The present case cannot be said to be a case of no evidence where perhaps the writ court may be inclined to disturb the findings of fact. Equally wellsettled it is that sufficiency or oredibility of evidence is not an issue in this forum. Consequently, the consistent and concurrent findings of the authorities below must be treated as sacrosanct in the writ jurisdiction and there is no warrant at all for taking any contrary view within the writ jurisdiction.

Held, further, that the well-known concept of a lost grant can arise only if the original document of endowment is lost in antiquity and is not forth coming. In the previous title suit the true origin of the endowments and the proof of title was not only forthcoming but was actually and designedly produced on the record to convincingly prove the nature of the grant. That being so, the plea that the origin of the endowment is lost in antiquity has no legs to stand upon the consequently the principles governing the case of a lost grant are not even remotely attracted.

Held, also, that section 2 (ee) of the Bihar Land Reforms (Fixation of Ceiling Area and

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Acquisition of Surplus Land) Act, 1961, does not, in any way suffer from the vice of unconsti tutionality and conquently the Act is applicable to agricultural lands. Owned by Hindu religious Maths. In a series of cases before the Final court, every conceivable argument agianst similar or identical provisions have been considered by the Supreme Court and repelled.

Mahanth Dhansukh Giri and ors. v. The State of Bihar and ors. (1985). I.L.R. 64, Pat. 844

Income Tax Act, 1961

Section 271 (1XC) as amended by Finance Act no. 5 of 1964 — deletion of the word 'deliberately' and addition of the Explanation — Anwar Ali's Case (76 I.T.R. 696) whether still holds the field despite the amendment — the Explanation spelling out a categoric rule of evidence — three rebuttable presumptions raised against the assessee — burden of discharging the onus of rebuttal on the assessee — burden can be discharged by preponderance of evidence — presumption can be rebutted on existing material itself — courts of fact to arrive at a clear conclusion whether the assessee has discharged the onus — nature of the explanation to be rendered by the assessee.

Held, that the patent intent of the Legislature in amending section 271 (1) (c) of the Income Tax Act, 1961, and omitting the word 'deliberately' therefrom and inserting the Explanation there to by the Finance Act of 1964 was to bring about a change in the existing law. Consequently the ratio of Commissioner of Income Tax. West Bengal. v.

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Anwar Ali (76 I.T.R. 696), which had considered the earlier provisions of section 28 (1) (c) (1922 Act) is no longer attracted to the situation, The principal logical import of the Explanation is to shift the burden of proof from the Revenue on to the shouders of the assessee in the class of cases where the returned income was less than 80 percent of the income assessed by the Department. In this category of cases the Explanation raises three rubuttable presumptions against the assessee. These may be formulated as under :

(i) that the amount of the assessed income is the correct income and it is in fact the income of the assessee himself ;

(ii) that the failure of the assessee to return the aforesaid correct income was due to concealment of the particulars of his income of his part ; or

(iii) that such failure of the assessee was due to furnishing inaccurate particulars of such income.

The onus of proof for rebutting the presumptions lies squarely on the assessee. This burden, however, can be discharged (as in civil cases) by preponderance of evidence. Equally it may not be inflexibly necessary to lead fresh evidence and it would be permissible in the penalty proceedings for the assessee to show and prove that on the existing material itself, the presumptions raise by the Explanation stand rebutted.

Held, therefore, that once the Explanation to section 271 (1) (c) of the Income-tax Act, 1961, is attracted subsequent to its amendment, no burden

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lay on the Revenue to establish found or wilful neglect on the part of the assessee and indeed it was squarely on the shoulders of the assessee which had remained undischarged and thus the Tribunal's setting aside of the penalty order was plainly unwarranted.

Held, further, that it is for the courts of fact alone to either accept or reject the explanation set out by the assessee or the evidence in support there of. They must record a clear and categoric finding whether the explanation of the assessee has been accepted and there by he has discharged the onus laid upon him by law.

It is not the law that any and every explanation by the assessee must be accepted. The explanation of the assessee for the purpose of avoidance of penalty must be an acceptable explanation. He may not prove what he asserts to the hilt positively but as a matter of fact materials must be bought on the record to show that what he says is reasonably valid.

Commissioner of Income-tax, Bihar Patna v. M/s Nathulal Agarwala & Sons (1985) I.L.R. 64, Pat. 870

Industrial Disputes Act, 1947,

Sections 10, 25-B and 25-F — writ application filed claiming relief under section 25-F reference of a dispute under section 10, whether an adequate, efficacious and alternative remedy — whether such an alternative remedy and similar remedies under the Act to be exhausted before seeking relief in the writ jurisdiction of High Court — Constitution Article 226, scope of.

Held, that the statutory reference of an

industrial dispute under section 10 of the industrial disputes Act 1947, is an adequate and efficacious legal remedy for the enforcement of the rights created under the Act.

The industrial disputes act, 1947, lays dows detailed procedure and methodology for claiming new industrial rights for the workmen and provides a hierarchy of forums and Tribunals for their adjudication and ultimate enforcement. Therefore, on the well established uno flatu rule the right and remedy are irrevocably married and are not to be divorced from each other. In other words, if a statute confers a rights and in the same breath provides for a remedy for enforcement of such right the remedy provided by the statute must be resorted to. The remedies provided under the Act, are not only alternative but, indeed, wider and more specific.

Held, further, that the suitor must exhaust the remedies under the industrial disputes Act, 1947, before seekiing relief in the writ jurisdiction, unless the monstrosity of the situation of other exceptional circumstances cry out for interference by the writ court at the very threshold.

As a settled rule of judicial policy, convenience and discretion a writ court would refuse to interfere under article 226 of the constitution where an alternative remedy exists unless peculiar and exceptional grounds are established therefor.

Held, therefore, that in order to claim relief under section 25-F of the Industrial Disputes Act 1947, the writ petitioner must be relegated to the

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CIVIL WRIT JURISDICTION

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

1984

September, 27

Ganesh Prasad and Others.

v.

The State of Bihar and others.

Bihar Land Reforms (Fixation of ceiling Area and Acqiustion of Surplus Land) Act, 1961 (Bihar Act no XII of 1962) Section 16 (3) — fresh application for pre-emption, whether necessary to be filed in respect of subsequent sale deed not registered on the date of filing of the application for pre-emption.

Sale deed was registered on 30th December, 1976 and an application was filed by the preempton on 9th February, 1977 under section 16 (3) of the Bihar Land Reforms (Fixation of ceiling Area and Acquistion of surplus Land) Act, 1961, on the ground that he is an adjoining raiyat or a co-sharer. The purchasers sold the land in the meantime by subsequent sale deed dated 22nd January, 1977 but the Second sale deed was not registered till 9th Feburary, 1977, that is, the date on which the pre-emption application was filed.

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*Civil writ Jurisdiction case no. 72 of 1979. In the matter of application under Articles 226 and 227 of the Constitution of India. C.W.J.C. 73/79 .. Ashok Kumar Singh and another Petitioners.

Held, that it is not necessary to file a pre-emption application in respect of the subsequent sale deed which was not registered on the date of filing of an application for pre-emption. It is also not necessary to file a pre-emption application against the subsequent sale deed as the authorities have held that the subsequent sale deed is a sham transaction.

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 B.P. Jha. J.

Mr. Basant Kumar Singh for the petitioners

Mr. T. Dayal, Government Pleader No.2 for the respondents.

B.P. Jha, J. I shall dispose of these two writ petitions by a common judgment as they arise out of common orders.

2. In both these writ petitions, the petitioners challenge the validity of Annexures-1, 2 and 3. Annexures 1, 2 and 3 are common in both the cases.

3. These writ petitions arise cut of a pre-emption application filed by Lallan Singh. In C.W.J.C. No. 72 of 1979 the petitioners are the subsequent purchasers. In C.W.J.C. No. 73 of 1979, the petitioners are the original purchasers.

4. Respondent Lallan Singh filed an application under action 16 (3) of the Bihar Land Reforms (Fixation of Ceiling Area and Acquisition of Surplus Land) Act, 1961 (hereinafter referred to as the Acts) in respect of a sale deed which was executed by Shrimati Shanti Devi in favour of Ashok Kumar Singh minor son of Baijnath Singh and Madan Kumar Singh minor sonof Ramadhar Singh. The sale deed was registered on 30th Decemper, 1976. On 9th February 1977, respondent Lallan Singh filed a pre-emption

application on the ground that he is an adjoining raiyat or a co-sharer. The concurrent findings of the authorities are that Lallan Singh is a co-sharer or an adjoining raiyat of the disputed plot.

5. The case of Ashok Kumar Singh and Madan Kumar Singh was that they had already sold the land by means of a sale deed dated 22nd January, 1977 The subsequent sale deed was not registered till 9th February, 1977, that is, the date on which the pre-emption application was filed.

6. The grievance of the learned counsel of the petitioners in both the cases is that the pre-emption application ought to have been filed against the subsequent sale deed dated 22nd January, 1977. According to section 16(3) of the Act, an application under action 16(3) of the Act can be filed within three months from the date of the registration. In view of the fact that the second sale deed was not registered till 9th Fenurary, 1977, as such the court below was right in holding that no pre-emption application can be filed against the subsequent sale deed dated 22nd January, 1977 as the same was not registered till 9th Feburary, 1977. It is therefore, clear that the pre-emption application was maintainable so far as the first sale deed is concerned.

7. A pre-emption application is required to be filed against the first sale deed. The only thing which is required is that the vendee of the second sale deed ought to be added as a party in the pre-emption application. It is an admitted position that the petitioners in C.W.J.C. No. 72 of 1979 who are the subsequent purchasers have been added as parties in the pre-emption case. Therefore, in the present case, no prejudice will be caused to the subsequent purchasers. Hence, I hold that in a case of this type, it is not necessary to file a pre-emption application in respect of the subsequent sale deed which was not registered on the date of filing an application for pre-emption. It is also not necessary to file a

pre-emption application against the subsequent sale deed as all the autheorities have concurrently held that subsequent sale deed is a sham transaction.

8. I, therefore uphold the concurrent finding of all the authorities and hold that it is not necessary to file a pre-emption application against the subsequent sale deed dated 22nd January, 1977 as the same has been found to be a sham transaction.

9. In these circumstances, I dismiss both the writ petitions but without any costs.

S.S. Sandhawalia, C.J. I agree

R. D. Petitions dismissed.

CIVIL WRIT JURISDICTION

Before S.K. Choudhuri, J.

1984

September, 28

*Parmeshwar Singh & another.**

v.

Sukhdeo Mahton and others.

Bihar Land Reforms (Fixation of Ceiling Area and Acquisition of Surplus Land) Act, 1961 (Bihar Act no. XII of 1962) section 16 (3) — application for pre-emption filed after completion of second sale deed creating title in the second transferee — pre-emptor, whether debarred from challenging the second sale deed as sham and farzi — second purchaser, whether could be added as a party after the period of limitation expired.

When a second sale deed is complete in all respects and title passed upon the second transfers before the application under section 16 (3) of the Bihar Land Reforms (Fixation of Ceiling Area and Acquisition of Surplus Land) Act, 1961 for pre-emption was filed, then the allegation for

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*Civil Writ Jurisdiction case No. 2627 & 2631 of 1979. In the matter of application under articles 226 and 227 of the constitution of India.

C.W.J.C. No. 2631/79. Kamaleshwari Singh ... petitioners v. Ramakant Mahto and ors.

C.W.J.C. No. 2627/79 : Parmeshwar Singh-petr. v. Mahabir Mahto and ors. respdts.

sham and farzi nature of the transaction can only be investigated by filing a pre-emption application, which must be within the period of Limitation. If that is not done, then the pre-emptor is debarred from challenging the second sale-deed as sham and farzi and attempting after a long lapse of limitation period to add the second purchaser as a party in the proceeding.

Smt. Sudama Devi and ors. v. Rajendra Singh and ors. (1) — distinguished.

Applications under articles 226 and 227 of the constitution.

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

Messrs L.S. Sinha. R.K. Sharma, S.B.P. Sinha. for the petitioners.

Mr. Surya Bhushan Prasad Singh. for the Respondents.

S.K. Choudhuri, J. These three writ application have been heard together as they raise a common question for decision. The petitioner in the first two writ applications is one Parmeshwar Singh and the petitoner in the third writ application is one Kamleshwari Singh. The purchasers in all the three writ applications are different persons and the vendors are the same. In the first two writ applications the subsequent purchaser is Mehi Lal Mahto (respondent No. 2); whereas in the third writ application the subsequent purchaser is Ramkhelawan Mahto (respondent No.6).

2. In all these three writ applications filed under articles 226 and 227 of the Constitution of India, the petitioners who are the pre-emptors prayed for quashing the orders of the Land Reforms Deputy Collector, Begusarai dated 16th May 1977 contained in Annexure-3 the

(1) (1973) Pat L.J. 534.

appellate order passed by the Additional Collector, Begusarai dated 24th November 1978 contained in Annexure-2 and the revisional order passed by the Additional Member, Board of Revenue, dated 30th July, 1979 as contained in Annexure-1.

3. It will suffice to give relevant facts of C.W.J.C. No. 2625 of 1979, as the dates for different sale-deeds, which occasioned by the petitioners and the date of the subsequent sale-deed are the same and the order dismissing all the three pre-emption application are common as also the appellate order and the revisional order.

4. The sale deed in question was executed on 7th May, 1975 by the vendors in favour of the purchaser and was registered on 16.6.1975. The transferee under the first sale-deed executed a second sale-deed on 2.6.1975 which was registered on 25.7.1975 in favour of the subsequent purchaser. Pre-emption application, it appears was filed on 15th September, 1975 in relation to the three sale-deeds, which gave rise to three cases. They were heard together and disposed of by a common judgment as contained in Annexure-3 aforesaid. After the filing of the aforesaid pre-emption applications, the first purchaser appeared and filled his show cause stating that he has already transferred the land to the second purchaser (subsequent purchaser). According to the petitioner, he came to know for the first time about the second transfer after the first purchaser filed his show cause and, accordingly, on 25th February, 1976, the pre-emptor, namely, the writ petitioner filed an application to add the subsequent purchaser as a party to the proceeding. The pre-emption application was heard and rajected by the order (Annexure-3). Three appeals were filed by the pre-emptors before the Additional Collector, but they were all dismissed by a common order as contained in Annexure-2. Thereafter, the Additional Member, Board of Revenue also dismissed the three revision applications

preferred by the pre-emptors by the common order as contained in Annexure-1.

5. Mr. Lakshuman Sharan Sinha, learned Counsel appearing on behalf of the writ petitoner in all the three writ applications strongly contended that when the writ petitioner had no knowledge of the second transfer, he was well within time from the date of the first sale-deed to file an application under section 16(3) of the Bihar Land Reforms (Fixation of Ceiling Area & Acquisition of surplus Land) Act, 1961 (Bihar Act 12 of 1962) here after called the Act. The said application could not be defeated by the sale-deed executed and registered within the limitation period for filing pre-emption application. His further contention was that when there was a specific assertion in the application for adding the subsequent purchaser as a party, and that the second transaction was sham farzi and created only to defeat the purpose of the Act, the subsequent purchaser should have been allowed to be added as a party and the courts below should have investigated into the allegations regarding sham and farzi nature of the transaction. He, therefore, contended that none of the authorities below having entered into that question, the impugned Annexures are liable to be set aside and it is a fit case for sending back the matter to the original authority, namely, the Land Reforms Deputy Collector, Begusarai for hearing afresh and disposal in accodance with law.

6. In support of his argument, learned counsel drew my attention to Annexure-4, which is a copy of the application filed before the original authority for adding the subsequent transferee as a party. That application has alleged in paragraph 2 that the second sale was entirely sham and farzi created to defeat the purpose of the Act. The passing of consideration under the second sale-deed was also challenged and it was stated that he was not a bonafide purchaser. The further allegation in that application was that

the petitoner had no knowledge of the second sale-deed as the subsequent purchaser was never in possession; rather it was the first purchaser who was in possession.

In view of the these assertions in the application for addition of the subsequent purchaser as party, learned counsel for the writ petitioner contended that it was the bounden duty of the authorities below to add the subsequent purchaser as party in the proceeding and determine the aforesaid question as to whether the subsequent sale-deed was a genuine document or it was farzi in nature. In support of his contention he has placed strong reliance upon decision of this court in Smt. Sudama Devi & others vs. Rajendra Singh & others(1). He has placed reliance only upon a sentences appearing in paragraph 15 which reads thus :-

> "... The purchasers transferred the property to Shyam Narain Singh, which transfer, if not farzi and sham, is not hit by the doctrine of lis pendens, it would be good transfer and no order of pre-emption under clause (iii) of section 16(3) can be made against the original purchasers, as the order would be futile and infructuous."

Relying on the sentence the contention of learned counsel was that if the second transaction would be found to be farzi and sham, then the pre-emption application filed as against the first sale-deed would be competent and would not become infructuous though the registration of the second sale-deed was completed before the filing of the pre-emption application under section 16(3) of the Act. Acceptence of this submission would amount to stretching too far if the meaning of the sentence relied upon by the learned counsel from the aforesaid decision in Smt. Sudama Devi's case is accepted. In that case while discussing the relevent point Justice Untwalia, as he then was, has

(1) (1973) Pat L.J. 534.

expressly stated while referring the case Ramchandra Yadav vs. Anutha Yadav (1) as follows:-

> "... In section 16(3), however, there is absolutely no provision made for making an order of pre-emption against a subsequent transferee on an application filed for pre-emption against the first transferee. If the subsequent transferee is, in fact and in law a transferee of the property in respect of which claim for pre-emption has been made then a question of his being a transferee with notice of the pre-emption application is not relevant in view of what I have said in my judgment in Ramchandra Yadav v. Anutha Yadav (1971 B.L.J.R. 994). I have pointed out three situations there. If the transferee of the property transfers it to a second purchaser by a document executed and registered before the filing of the application, the second transferee gets a good title to the property and there is no question of his right being defeated by a subsequent application filed by the pre-emptor, as he could not be presumed to have any knowledge of the application which may be filed in future. On the other side of the picture, the clear example is where the second sale-deed is executed and registered after the filing of the application for pre-emption. In such a case, the second transfer would be clearly hit by the doctrine of lis pendens engrafted in section 52 of the Transfer of Property Act. But the difficulty arises when a document of sale is executed before the filing of the application for pre-emption, but is registered after its filing. ..."

In the reported case their lordships were dealing with a case where a second sale-deed was executed prior to the

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

filing of the pre-emption application, but registered thereafter. The effect of registration of such a second sale-deed was the question for decision in that case. It has been pointed out that in such a situation the second sale-deed which was registered after the pre-emption application was filed would relate back to the date of execution under section 47 of the Indian Registration Act as the second sale-deed conferred title upon the second purchaser under that section from the date of execution of the second sale-deed. It has been held in the said reported case that such transaction would not be hit by lis pendens, as the second transferee becomes the owner from the date of execution of the sale-deed. Their Lordships, therefore, thought it fit in such a situation to allow the writ petitioner (pre-emptor of that case) to add the second purchaser as a party to the proceeding and remanded the case to the lowest authority for a fresh decision in accordence with law. It was under those circumstances that one sentence from paragraph 15 of the above reported decision which has been strongly relied upon by Mr. Sinha, has been used.

7. Mr. Surya Bhushan Prasad Sinha for the second purchaser, however, supported the impugned orders and contended that in the facts and circumstances of the case, the impugned orders do not call for any interference, as the pre-emption application was not directed against the second purchase which was complete in all respects before the filing of the pre-emption application by the writ petitioner. According to the learned counsel merely by making an allegation of sham and farzi nature of the transaction and ignoring the second sale-deed on that ground would not give the pre-emptor a right to file an application for pre-emption against the first sale-deed. Learned counsel for the subsequent purchaser has argued that in such a situation, the pre-emptor ought to have filed the pre-emption application as against both the sale-deeds and alleging

sham and farzi nature of the transaction about the second sale-deed. This not having been done on a date when the application for addition of the second purchaser was filed, the application for pre-emption against the second sale-deed was prima facie barred and the subsequent transferee was rightly not allowed to be added as a party to the proceeding by the authorities below. In my view this submission of learned counsel for the second purchaser appears to have substance. It cannot be argued that the pre-emptor had no knowledge of registration of the second sale-deed on the date when the pre-emption application was filed. True it is that the pre-emption application was filed within time from the date of the registration of the first sale-deed. If, according to him, the second purchased was a sham and forged transaction and was created in order to defeat the pre-emption application and the second sale-deed having been registered before the pre-emption application, he should have added both the first purchaser as also the second purchaser as party in the proceeding and it was then that the allegation of sham and farzi transaction regarding the second sale-deed would have been considered and decided in presence of all the parties. It is not permissible in law to file an application subsequently ignoring the period of limitation for filing a pre-emption application to allow the pre-emptor at any time to add the subsequent purchaser as a party on the allegation of sham and farzi nature of the transaction and on the allegation that he had no knowledge about the second sale-deed. The sentence relied upon from the decision in Smt. Sudama Devi's case (supra) does not help at all the pre-emptor. The said sentence has been used in the context of that case and cannot be stretched far. If the argument of Mr. Sinha is accepted then the position of the subsequent purchaser under the second sale-deed would remain precarious, and merely on allegation of sham and farzi nature of the transaction, the second purchaser though not a party in the

pre-emption case and if such application is allowed, he would be bound by the sale-deed which may be executed by the first purchaser in favour of the pre-emptor in pursuance of the decision.

8. In my cinsidered opinion, it appears to me that when the second sale-deed is complete in all respects and title passed upon the second transferee before the pre-emption application was filed, then, the allegation of sham and farzi nature of the transaction can only be investigated by filing a pre-emption application, which must be within the limitation period. If that is not done, then the pre-emptor is debarred from challenging the second sale-deed as sham and farzi and attempting after a long lapse of the limitation period to add the second purchaser as a party in the proceeding.

9. For the reasons stated above, these three writ applications have got no merit and they are accordingly dismissed. In the circumstances of the case there will be no order as to costs.

R.D. Petitions Dismissed.

CIVIL WRIT JURISDICTION

Before B.P. Jha and S.K. Choudhuri, JJ.

1984

November, 8

Gobardhan Pandit and others

v.

Subdivisional Officer, Jamtara and Others.

Santhal Parganas Tenancy (Supplementary Provision) Act, 1949, (Bihar Act no. XIV of 1949) section 67 (2) — provisions of — imposition of penalty by subdivisional officer for not removing encroachmet, validity of.

It is clear from perusal of the standing order issued by the Deputy Commissioner Santhal Parganas under section 62 of the Santhal Parganas Tenancy (Supplementary Provision) Act, 1949, hereinafter called the Act, that the Deputy Commissioner can only impose penalty under section 67 (2) of the Act for not removing encroachment.

Held, that the imposition of penalty by the Subdivisional officer for not removing the encroachment is illegal and invalid as he was not vested with such power under the Act.

Application under Articles 226 and 227 of the Constitution.

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*Civil Writ Jurisdiction case no. 2059 of 1979. In the matter of an application under Articles 226 and 227 of the constitution of India.

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

Mr. S.K. Mishra for the petitioners

Messrs. Daman Kant Jha (Government Advocate), Kamlapati Singh (Government Pleader no. 5) and Ishwari Singh (Junior Counsel to Government Pleade no.5) for the State.

Messrs. Mangal Prasad Mishra and Akhileshwar Pandey for respondents 7 to 11.

B.P. Jha & S.K. Choudhuri, J.J. In this petition, these petitioners pray for quashing Annexures-1, 2, 3 and 5 but at the time of hearing, they press for quashing Annexure-5, only.

2. By Annexure-5, the subdivisional officer directed these five petitioners to pay a fine of Rs. 25/- each and to pay a fine of Rs. 5/- each per day till the continuance of the encroachment.

3. It is a said that these five petitioners had encroached upon a public land and they were directed by the subdivisional officer to remove the encroachment. A complaint was made that the encroachment was not removed by the petitioners. Hence the fine was imposed by Annexure-5.

4. It is stated by the learned counsel for the petitioners that the total fine imposed comes to Rs. 46,300/- on calculation. It is stated in paragraph no.3 of the Supplementary affidavit that they had removed the encroachment on 19th December, 1979.

5. The moot question for decision is : whether the Subdivisional officer had jurisdiction to impose penalty for not removing the encroachmement ?

6. An ejectment order is required to be passed under section 42 of the Santal Parganas Tenancy

(Supplementary Provisions) Act, 1949 (hereinafter referred to as the Act). If anyone does not remove the encroachment as ordered under section 42 of the Act, then the Deputy Commissioner is authorised to impose penalty under section 67 (2) of the Act for not removing the encroachment. Under section 2 (vii) of the Act, the Subdivisional officer is authorised to exercise all the functions of the Deputy Commissioner. In order to clarify the position, the Deputy Commissioner had issued Standing Order (see page 163 of the Santal Parganas Manual, 1911). It is relevant to quote the standing order which runs as follows :

"1. In exercise of the power conferred on me by section 62 of the Santhal Parganas Tenency (Supplementary Provision) Act, 1949 (Bihar Act XIV of 1949) I order that in pursuence of the Government notification no. II t-245/50-2344, dated the 26 th March 1951 the functions under the sections of the said Act as specified below in col. I of the schedule shall be exercised by the deputy commissioner throughout the district and those under col. II of the said schedule by the subdivisional officers within their respective

1	2
Deputy Commissioner I	Subdivisional Officers II
Sec. 5, 14, 20(5), 43, 47 (4) and (5), 50 58 21(1)and 67(2).	16, 19(2) (3) (a) and (b), (4), (5) and (6), 20(1), (iv) (a) (4) and (6), 23 (1) and (2), 24 (3), 25 (2), 26, 27, 29, 31, 32(1) (2) (a) and (b), 33, 34, 35, 38(2), 39, 42 and 52.

2. I further order that in the matters which are to be dealt with by the Deputy commissioner, the subdivisional officers will receive all petitions and applications, conduct preliminary enquiry and

jurisdictions. then submit the record with reports and observations to this court where final order will be passed after hearing the parties, where necessary.

R.Prasad, 26.5.1951

Deputy Commissioner.

7. Under secton 62 of the Act, the Deputy Commissioner is authorised to issue such an order. On a perusal of the aforesaid standing order, it is clear that the Deputy Commissioner can only impose penalty under section 67(2) of the Act. It is also clear from paragraph no. 2 of the standing order that the complaint can be received about the imposition of the penalty by the Subdivisional Officer and the Subdivisional Officer will forward the same to the Deputy Commissioner for passing the order of imposition of penalty. It is also clear from section 67(3) of the Act that the appeal will lie to the Commissioner against the imposition of penalty by the Deputy Commissioner.

8. In the present case, the Subdivisional Officer impcsed the penalty for not removing the encroachment. Such a penalty can only be imposed under section 87(2) of the Act read with the standing order by the Deputy Commissioner and not by the Subdivisional Officer. In this view of the matter, hold that the imposition of the penalty by the subdivisional officer as contained in Annexure-5 is illegal and invalid in the eye of law. We, therefore, quash the order contained in Annexure-5 and hold that the petitioners will not pay any penalty to the state or to the subdivisional officer or to the Deputy commissioner.

9. In these circumstances, the petition is allowed and Annexure-5 is quashed; but there will be no order for costs.

R.D. Petition Allowed.

FULL BENCH

Before S.S. Sandhawalia, C.J., B.P. Jha & Nagendra Prasad Singh, JJ.

1984

November, 12

*Mahanth Siyaram Das and another.**

v.

The State of Bihar and others.

Bihar Land Reforms (Fixation of Ceiling Area and Acquisition of Surplus Land) Act, 1961 (Bihar Act XII of 1962), section 45 B, provisions of — whether the State Government or the authorised Collector of the district alone has to decide afresh a proceeding disposed of by a Collector under the Act — authorised Collector of the district, whether could refer the matter for disposal to any subordinate authority under section 45 B — power under section 45 B, whether extends to calling for and examining the records of the proceeding disposed of by superior authority.

The power under section 45 B of the Bihar Land Reforms (Fixation of Ceiling Area and Acquisition of Surplus Land) Act, 1961 has been given in very widely couched terms to the State Government or the Collector of the district authorised in this behalf to direct the re-opening and disposal afresh of any proceeding disposed of by a

*Civil Writ Jurisdiction Case No. 2314 of 1984. In the matter of an application under articles 226 and 227 of the constitution of India.

collector under the Act, *if it thinks fit*. Yet this power cannot be construed as altogether unbounded. The language of the section plainly points to one basic limitation of the power of re-opening the earlier proceedings. The power is first given to call for and examine any record of any proceeding. This would indicate that the calling of the record by the state Government or the authorised collector is only from authorities subordinate in rank. There is even a further limitation or qualification with regard to such a proceeding. It is not any and every record that is to be called for but only of a proceeding disposed of by a collector under the Act. It is not the power to call for and examine the records of proceedings disposed of by superior authorities. The word direct in section 45 B of the Act. Implies a twin direction by the State Government or the authorised collector to a subservient authority to first re-open the case and thereafter to dispose it of afresh in accordance with the provisions of the Act.

Held, therefore, that section 45 B of the Bihar Land Reforms (Fixation of Ceiling Area and Acquistion of Surplus Land) Act, 1961 does not necessarily mandate that the decision afresh of a proceeding disposed of by a collector under the Act must inflexibly be made by the State Government or by the authorised collector of the district alone and as such the matter could be decided at a level below the Collector of the district.

Kesara Devi v. State of Bihar (1) — overruled.

Applications by the petitioners.

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

The case in the first instance was placed, foradmission before a Division Bench which referred the case to a larger Bench for decision.

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(1) (1984) P.L.J.R. 209

On this reference.

Messrs B.P. Bhagat and Sheojee Prasad for the petitioners.

Messrs C.K. Sinha, Government Pleader I, and G.S. Prasad and G. Narayan, Junior counsel to Government Pleader I for the respondents

S.S. Sandhawalia, C.J., Whether section 45-B of the Bihar land Reforms (Fixation of Ceiling area and acquosition of surplus Land) Act, 1961 mandates that the decision afresh of a proceeding disposed of by a Collector under the said Act must be done by the State government or by the authorised Collector of the district alone is the significant question necessitating this reference to the Full Bench. Primarily at issue is the correctness of the view in Kesara Devi v. State of Bihar (1).

2. Mahanth Siyaram Das, petitioner no. 1, is the shebait of Bencholha math at Bancholha, which is a public trust registered as such under the provision of the Bihar Hindu Religious Trust Act, 1951. The Math aforesaid owns lands and other agricultural properties for religous purposes. It is the case that during the absence of petitioner no. 1 on pilgrimage in the years 1973 to 1975 one Mahanth Manmohan Das used to look after the affairs of this Math and in the said period nearly 13 acres of the Math property were declared surplus in the ceiling proceedings held under the Bihar Land Reforms (Fixation of Ceiling Area and Acquistion of Surplus Land) Act, 1961 (hereinafter referred to as the Act). The petitioners thereafter preferred a petition under section 45B of the Act before the Collector of Saharsa praying for reopening the case and deciding it in accordance with law, but the same was dismissed in default. The matter was then carried to the Board of Revenue and

(1) (1984) P.L.J.R. 209

vide annexure-3 the Additional Member of the Board set aside the order and directed the Collector of the district to hear the parties on merits. It would appear that on the bifurcation of the district the matter was transferred to the collector of Madhipura who, in turn, sent the petition to the subdivisional officer, Madhipura, for disposal afresh. The latter, after hearing the petitioners, declined to vary the previous order or to reconsider the matter about the classification of the lands in question and the grant of one unit to the deity installed in the math. The petitioners thereupon appealed to the Collector of the district who upheld the order (vide annexure 1). The primary grievance of the petitioners is that under section 45 B of the Act the Collector of the district alone could hear and decide the matter afresh and had no jurisdiction to transfer the same to the subdivisional officer and consequently the orders are void and without jurisdiction.

3. When this case came up for admission before the Division Bench, firm reliance was placed on keshra Devi v. State of Bihar (Supra) for contending that the district collector had no jurisdiction to refer the matter for disposal to any subordinate authority under section 45-B. Expressing some doubts about the correctness of the decistons aforesaid the matter was referred to a larger bench for reconsideration and that is how it is before us.

4. As earlier, learned counsel for the writ petitioners has placed firm reliance on the observations in the case of Kesara Devi v. State of Bihar for pressing his solitary contention that section 45B mandates that the collector of the district alone could hear and dispose of the matter afresh and could not refer the same to any subordinate authority. Apart from precedent, this construction was urged for acceptance on the language of the statute as well.

5. Since the controversy here inevitably centres on the language of section 45-B of the Act, it is at to read the

same at the outset :

> "45 B, State Govrnment to call for and examine records :-
>
> The State Government or the Collector of the Distirct, who may be authorised in this behalf may, at any time, call for and examine any record of any proceeding disposed of by a collector under the Act and may, if it thinks fit, direct that the case be re-opened and disposed of afresh in accordance with the provision of the Act."

6. To appreciate the rival contentions canvassed before us and in view of some intricacy of construction, it is necessary first to construe the provision against the legislative background of section 45B. It seems unnecessary to delve deeply into the enactment and the innumerable changes introduced in the Act at disconcertingly frequent intervals from its enforcement in 1961. It would perhaps suffice to notice that originally the Act did not contain any provision corresponding to section 45B and vesting the state government with the power to re-open cases and direct their disposal afresh. It was only in the wake of the wide ranging structural changes made in the statute by the amending Act 22 of 1976 that this power has now been conferred. Therefore, it seems possible to infer that in view of the very large and substantial changes made by the amending Act of 1976 it was thought necessary to also have the power of re-opening cases disposed of by a collector under the Act and to have them decided afresh in accordance with the provisions of the Act as amended. The larger scope and import of section 45 B has been so well elaborated in the exhaustive judgment of the Division Bench in Shri Thakurji Ram Jankji vs. The State of Bihar and others (1) that it seems

(1) (1983) B.L.J. 33

unnecessary to traverse that ground again. It would suffice to reiterate here that the power here is a quasi-judicial power and can ordinarily be exercised only after giving an adequate opportunity of hearing to the parties.

7. For reasons of terminological exectitude it may be pin-pointed that there is shade of distinction betwixt the " collector under the Act and the collector of the district." The two for the purposes of the statute are distinct and separate. 'Collector' stands defined in section 2 (b) of the Act as under :

> "Collector includes an Additional collector or any other officer not below the rank of a sub deputy collector appointed by the state government to discharge all or any of the functions of a collector under this Act."

It would be plain from the above that for the purposes of the Act the State government can designate any officer as the collector under the act with the limitation that he should not be below the rank of a sub-deputy collector. It was common ground before us that usually if not invariably the exercise of power under the Act and its implementation and determination of ceiling and surplus matters is left in the hands of the collector under the Act. Equally it is not any and every collector of the district who is now conferred jurisdiction by section 45 B but only the one who may be so authorised for the said purpose by the state government. For convenience, hereinafter he is refered to as the 'authorised collector'.

8. It then calls for pointed notice that the power under section 45 B has been given in very widely couched terms to the state government or the collector of the district authorised in this behalf to direct the re-opening and disposal afresh of any proceeding disposed of by a collector under the Act, if it thinks fit. The discretion has thus

been conferred in wide ranging terms. No express or statutory limitations are prescribed. It is plain that though the power here is a quasi-judicial one, it has been conferred with the widest amplitude, yet this power cannot be construed as altogether unbounded. The language of the section plainly points to one basic limitation on the power of re-opening the earlier proceedings. It was argued before us that this power can be exercised dehors the hierarchy of the authority deciding the matter earlier. As an extreme case it was suggested that even if the matter may have been decided by a superior authority like the Board of Revenue or, for that matter, may have gone up to the High Court or the Supreme Court, if would still be possible under section 45 B to re-open the matter by the authorised collector of the district. I am unable to subscribe to this extreme proposition. On principle it self, it appears incongrous, if not absurd, that the authorised collector should have the power to direct re-opening and decision afresh with regard to the matters which may have been finalised by his superior authorities, like the commissioner or the Board of revenue or, for that matter, by the High Court and even when the lis may have been carried to the final court itself. This apart, reading section 45B in sequence would show that the power is first given to call for and examine any record of any proceeding. If one may say so, the use of the phraseology to call for in a way implies the summoning or a direction by a superior authority to an inferior one to produce or forward the record. It is not easy to subscribe to the theory that a subordinate could call for the records from its superior. Consequently, the very use and employment of these words would indicate that the calling of the record by the state government or the authorised collector is only from authorities subordinate in rank. There is even a further limitation or qualification with regard to such a proceeding. It is not any and every record that is to be called for but only of a proceeding disposed of by a collector under the Act.

The power, therefore, to call for and examine and, obviously, the consequential action of reopening and disposal afresh is limited to the records of proceedings disposed of by a collector under the Act only. It is not the power to call for and examinethe records of proceedings disposed of by superior authorities. I am firmly inclined to the view that the wide ranging power under section 45 B to direct reopening and disposal afresh is plainly limited to proceedings disposed of by the authorities up to the level of the collector under the Act and no higher. To hold otherwise would, in a way, be doing violence to the plain language of the statute and also would be contrary to principle.

9. Now it appears to me that the real clue to the somewhat obscure provision of section 45 B is provided by the meaningful use of the words 'direct' and be reopened and disposed of afresh, Though perhaps the employment of any one of these may not have been conclusive but when both are viewed collectively, it would leave little manner of doubt that the disposal afresh is not necesarily to be by the state government or the authorised collector. To my mind, the use of the word 'direct' here is both crucial and in a way conclusive. As was argued plausibly on behalf of the respondents, the word 'direct' by the very nature of things implies at least two persons namely, the one who directs and the other who has been directed. To coin some phraseology, it necessarily implies a 'director' and what may be called a directee. plainly enough one cannot and does not direct one's own self. Consequently, when the statute designedly employs these words and says that the state government and the authorised collector may direct, it is plain that such a direction is to issue inevitably to an authority subservient to it. To repeat, such direction is not to be issued to itself. It is a sound cannon of construction that in a statute every word must be given a meaning and that the legislature does not waste its words. Therefore, the word direct in section 45 B

cannot be ignored as mere surplusage. So construed, section 45 B implies a twin direction by the state government or the authorised collector to a subservient authority to first reopen the case and thereafter to dispose it of afresh in accordance with the provisions of the Act.

10. Negatively, it calls for notice that the Legislature, whenever it desires that the superior authority must inflexibly decide the case itself, employs known and categoric terminology to express its intent. Even *dehors* the word direct, in such cases the language employed is specific that the matter must be decided by the authority itself if it happens to be a superior one. Reference in this conneciton may pointedly be made to sub-section (10) of section 48 E of the Bihar Tenancy Act, 1885, as now amended. There in it is mandated in terms that the collector will *decide the dispute himself*. On behalf of the respondents our attention was similarly drawn to section 46-0 of the Bihar Finance Act, which, by conferring similar power on the commissioner, expressly uses the words which he thinks proper in the context of the matter of the re-decision of the issue, similarly, section 5A(2) of the land Acquisition Act, as amended by the Bihar amendment of 1960, clearly says that the state government may pass such order as it may think fit. By way of analogy, therefore, it is patent that whenever the intent of the Legislature is that the superior authority should inflexibly dispose of the matter itself, then it makes its intent clear by using unequivocal phraseology to that effect.

11. On behalf of the writ petitioners some tenuous reliance was sought to be placed on section 18 of the Bihar Sales Tax Act, 1959. I am unable to see how this, in any way, advances their case. Therein the power to re-assess any escaped assessment or under assessment has been vested in the prescribed authority and in terms it is laid down that such prescribed authority would proceed to assess or

re-assess the amount of tax due from the dealer in respect of such turn over. Obviously, in such cases the prescribed authority alone is vested with the power to re-assess when the other requirements of section 18 are satistied. Similarly, some vain reference was also made to sections 147 and 148 of the Indian Income-tax Act, 1961. It is significant to recall that these provisions do not even remotely employ the phraseology of the word 'direct' or the word 'reopen'. The language employed in the two sections again leaves no lacuna or doubt about the intention that the matter is to be decided by the Income-tax officer himself and that he should assess or re-assess the income escaping assessment. With respect, these provisions far from aiding the stand of the writ petitioners seem to run counter thereto for the aforesaid triple reason.

12. Equally the argument *ab inconventiae* with regard to the construction canvassed on behalf of the writ petitioners calls for notice. As has already been observed earlier, the word collector stands defined under section 2(b) of the Act and is separate and distinct from the collector of the district who alone can be authorised under section 45 B. It was common ground before us that the special provisions of the ceiling laws are normally applied by and the powers through are exercised by the collectors appointed under the Act. This somewhat intricate jurisdiction is within the ken of officers specially appointed by the state. To assume that every case of reopening under section 45 B, the authorised district collector himself would be obliged to dispose of the matter afresh, may first well place an impossible burden on the collector of the district saddled as he is with multifarious duties and unaware as he might be of the intricacies and specialities of the ceiling laws. It is well known that today the collector of the district has become primarily and mainly an executive functionary and it may well be anomalous to thrust a strictly intricate judicial function on him alone to the

exclusion of any other authority. Therefore, the construction canvassed on behalf of the writ petitioners would, in actual practice, lead to anomalies and even hardship to the litigants. What has been said in this context about the authorised district collector applies with even greater force in relation to the state government where it directs to reopen to the proccedings. Admittedly section 45 B does not expressly or impliedly visualise a delegation of this judicial or quasi-judicial power by the state government. Normally the presumption of any such delegation is barred and admittedly no rules have been framed also which authorise any one also to exercise the powers of the state government under section 45 B though it is even doubtful if it could be so done. Therefore, such a power at the highest can be exercised by the state cabinet and at the lowest level say parhaps be exercisable by the minister of the Department concerned. Would the statute envisage that in all matters where the state goverment directs the reopening, the minister concerned should dispose of the matter afresh ? In a wide spread state like that of Bihar that by itself would impose an impossible burden on the minister concerned to dispose of all cases judicially for the whole of the state and even a greater hardship on the parties when such fresh determination could be done only at the level of the Minister concerned at Patna. This apart, it does not seem easy to thrust this primarily a judicial or quasi-judicial power on an authority which is entirely excutive and primarily political. To my mind, the construction, canvassed by the writ petitioners would lead to patently anomalous, if not mischievous, results, and it is a sound rule to avoid a construction which may lead to such consequences.

13. Inevitably a reference must be made to *Kesaria Devi v. State of Bihar (supra)*. A perusal of the very brief judgment would plainly indicate that the matter was not adequately canvassed before the Bench. The issue was

treated primarily as one of first impression, and neither the earlier precedents nor the finer nuances of the language including the use of the words 'direct' and 'be reopened and disposed of afresh' were high lighted. The analogy of sister statutes in this context was not forcefully brought to the notice of the Bench. The resulting anomalies of the construction missed notice. With the greatest respect and deference, therefore, it has to be held that the said case does not lay down the law correctly and is hereby overruled.

14. To conclude the answer to the question posed at the very outset is rendered in the negative, and it is held that section 45B of the Act does not necessarily mandate that the decision afresh must inflexibly be made by the state government or by the authorised collector of the district alone.

15. Once it is held as above, it necessarily follows that the solitary contention raised on behalf of the writ petitioners that the matter could not be decided at a level below the collector of the district must fail. The writ petition has consequently to be dismissed. But in view of the earlier precedent in Kesara Devi's case (supra) I would decline to burden the petitioners with costs.

B.P. Jha, J. I agree.

Nagendra Prasad Singh, J., I agree

S. P. J. Petition dismissed.

FULL BENCH

Before S.S. Sandhawalia, C.J., B.P. Jha & S.B. Sanyal, JJ.

1984

November, 16

*Dinesh Prasad Mandal & others.**

v.

The State of Bihar and others.

Industrial Disputes Act, 1947, (Act XIV of 1947), sections 10, 25-B and 25-F — writ applications filed claiming relief under section 25-F — reference of a dispute under section 10, whether an adequate, efficacious and

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*Civil Writ Jurisdiction cases nos. 5377 to 5385, 5398, 5400 and 5724 of 1983. In the matter of applications under Articles 226 and 227 of the constitution of India.
C.W.J.C. 5378 of 1983 ... Surendra Choudhary ... Petitioner.
C.W.J.C. 5379 of 1983 ... Ashok Kumar Sharma ... Petitioner.
C.W.J.C. 5380 of 1983 ... Birendra Kumar Pandey ... Petitioner.
C.W.J.C. 5381 of 1983 ... Bimal Kishore ... Petitioner.
C.W.J.C. 5382 of 1983 ... Nagendra Pathak ... Petitioner.
C.W.J.C. 5383 of 1983 ... Ram Vijay Pd. Sharma ... Petitioner.
C.W.J.C. 5384 of 1983 ... Nityanand Prasad ... Petitioner.
C.W.J.C. 5385 of 1983 ... Gupteshwar Upadhayay ... Petitioner.
C.W.J.C. 5398 of 1983 ... Surendera Pd. Singh ... Petitioner.
C.W.J.C. 5399 of 1983 ... Chandra Bhushan ... Petitioner.
C.W.J.C. 5400 of 1983 ... Lalit Narain Mishra ... Petitioner.
C.W.J.C. 5724 of 1983 ... Ram Mohan Choudhary ... Petitioner. v. The Chairman, Mithila Kshetriya Gramin Bank, Darbhanga Head office Respdt.

alternative remedy — whether such an alternative remedy and similar remedies under the Act to be exhausted before seeking relief in the writ jurisdiction of High Court — Constitution, Article 226, Scope of.

Held, that the statutory reference of an industrial dispute under section 10 of the Indurstial Disputes Act 1947, is an adequate and efficacious legal remedy for the enforcement of the rights created under the Act.

The Industrial Disputes Act, 1947, lays down detailed procedure and methodology for claiming new industrial rights for the workmen and provides a hierarchy of forums and tribunals for their adjdication and ultimate enforcement. Therefore, on the well established *uno flatu* rule the right and remedy are irrevocably married and are not to be divorced from each other. In others words, if a statute confers a right and in the same breath provides for a remedy for enforcement of such right the remedy provided by the statute must be resorted to. The remedies provided under the Act, are not only alternative but, indeed, wider and more specific.

Premier Atutomobiles Ltd v. Kamlakar Shantaram Wadke and ors. (1), *Rohtas Industries Ltd. and another v. Rohtas Industries Staff Union and others* (2), *Shanker Lal Mali v. State of Rajasthan and others* (3), and *Manohar Lal v. state of Punjab and another* (4), relied on. *Hari Rai and ors v. Union of India* (5), *Haridai Mahto and ors. v The Union of India and anr.* (6) and *Mahabir V.D.K. Mital and anr* (7), overruled

(1) (1975) Labour and Industrial cases. 1651.
(2) (1976) Labour and Industrial cases. 303 = (1976) A.I.R. (S.C.) 425
(3) (1980) Labour and Industrial cases, 964.
(4) (1984) I.L.L.J. 193.
(5) (1978) B.B.C.J. 350.
(6) (1978) B.B.C.J. 459.
(7) (1980) Labour and Industrial cases. 119.

Assistant Personel officer, Southern Railway V. K. Antony (1), dissented from.

Held, further, that the suitor must exhaust fhe remedie under the Industrial Disputes Act, 1947, before seekin relief in the writ Jurisdiction, unless the monstrosity of th situation of other exceptional circumstances cry out fc interference by the writ court at the very threshold.

As a settled rule of judicial policy, convenience an discretion a writ court would refuse to interfere unde Article 226 of the constitution where an alternative remec exists unless peculiar and exceptional grounds ar established therefor.

Basanta Kumar Sarkar and ors. v. The Eagle Rollir Mills Ltd. and ors. (2), relied on.

Held, therefore, that in order to claim relief und section 25-F of the Industrial Disputes Act 1947, the wi petitioner must be relegated to the specific statutory remec under section 10 of the Act in the first instance.

Application by the petitioners.

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

The cases in the first Instance were placed fc admission before a Division Bench, which referred th cases for authoritative decision by a Full Bench.

On this reference.

Mr. Tara Kanta Jha, Mr. Sushil chandra Sinha, Mr. Br Kishore Narain, and, Mr. Deepak Dayal for the petitioners

Mr. Ram Balak Mahto, Addi, A.G. for the State only

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(1) (1978) 2. L.L.J. 254.

(2) (1964) A.I.R. (S.C.) 1260.

Mr. Chandi Prasad, Mr. Kedar Nath Jha, Mr. Jagannath Jha (SCI) and, Mrs. Sangeeta Das Gupta: for the Respondents.

S.S. Sandhawalia, C.J. : . The two meaningful issues that came to the fore in this set of cases referred for an authoritative decision by the Full Bench my well be precisely formulated in the terms following :-

I. Whether the statutory reference of a dispute under section 10 of the Industrial Disputes Act, 1947, is an adequate and efficacious legal remedy for the enforcement of rights created under the said Act ?

II. If so, whether such an alternative remedy and similar remedies under the Act should be exhausted before seeking the relief in the writ jurisdiction under Article 226 of the Constitution ?

2. The relevant facts and issues of law are admittedly common and identical in these 13 writ petitions and, learned counsel for the parties, therefore, are agreed that this judgment will govern all of them. The representative matrix of fact may be taken from civil writ jurisdiction case No. 5724 of 1983 (Ram Mohan Chauthary vs. The Chairman, Mithila Kshetriya Gramin Bank, Darbhanga). The writ petitioner there in claims to have been temporarily appointed as a clerk by the chairman of the respondent Mithila Kshetriya Gramin Bank, Darbhanga, and, thereafter performed his duties from the 17th of July, 1981, till the 5th of October, 1981. His services were apparently terminated thereafter, but, it is claimed that by several subsequent appintment letters the petitioner served in the same capacity for varying periods commencing from the 17th July, 1981, to the 20th of July, 1982. It is sought to be claimed that the petitioner has rendered 335 days of continuous service within the meaning of section 25 B of the Industrial Disputes Act, 1947 (he reinafter referred to as the Act), and, on these premises,

is entitled to the benefit under section 25F of the said Act. Apprehending that the petitioner's services would be terminated, he instituted a title suit, being Title suit No. 65 of 1982, in the court of the first munsif, Darbhanga, and secured a temporary injunction, restraining the defendant bank from terminating the petitoner's services. Against this injunction, the respondent Bank filed a miscellaneous appeal before the district judge of Darbhanga, which was allowed and the injunction granted was vacated. Consequent there to the respondent Bank (vide Annexure '1'), by a wholly nonstigmatic and inoccuous letter, terminated the writ petitoner'services, as these were no longer required. Thereafter, the petitioner chose to withdraw the title suit and he preferred the present writ petition, claiming the relief wholly under section 25F of the Act.

3. At the very threshold stage of admission, the learned counsel for the petitioner had asserted that the remedy under section 10 of the Act was not an adequate remedy and, consequently, the writ petitioner was entitle to invoke the writ jurisdiction straightway, without resorting to or exhausting the statutory remedy admittedly available to him under the Act. In view of the significance of the matter involved, the case was referred for an authoritative decision by a Full Bench.

4. In the counter affidavit filed on behalf of the respondent Mithila Kshetriya Gramin Bank, it has been categorically averred that the writ petitioner has not put in contineous service of 335 days with in twelve calendar months and instead has worked for certain periods with several breaks under several appointment letters, and, as such, his case is not covered by section 25B of the Act. It is further stated that the appointment letters of the petitioner were under an agreement, which in terms specified the date of termination of service, and he was not entitled to even a notice before his termination, in view of the provise to

section 25F(a). It is reiterated that the order of termination of the petitoner was a removal simpliciter without any stigma attached there to. The avenments with regard to the petitoner having preferred a civil suit are admitted. The categoric stand taken by the respondent Bank is that the petitioner is not entitled to come directly to the High Court without first agitating the matter before a hierarchy of tribunals provided under Act which provides an adequate and efficacious remedy to him for the enforcement of his alleged right.

5. On the aforesaid resume of respresentative facts, two significant issues noticed at the outset arose for consideration, Yet before coming to grips with question no. 1 aforesaid, it is necessary for the purpose of terminological exactitude to clarify as to what is said to be indicated by a legal remedy therein. Now in order to be labelled as a remedy in the eye of law, it must be capable of providing adequate redress to the claimant and to rectify the wrong of which he is aggrieved. It is new well settled that any purported remedy, which is illusory in its nature and is unable to provide adequate relief with reasonable efficacy, is in strictitude no remedy at all. this has been so held authoritatively even during the emergency when by the Forty second amendment a constitutional bar was sought to be erected against the exercise of the writ jurisdiction, where any other remedy was available, by section 58(2) of the constitution (Forty second amendment) clause (3) had been inserted in Article 226, which read as follows :

> "No petition for the redress of any injury referred to in sub-clause (b) or sub-clause (c) of clause (1) shall be entertained, *if any other remedy for such redress* is provided for by or under any other law for the time being in force."

The question and true import of the words "any other remedy", which posed a constitutional bar to the exercise of the writ jurisdiction, had come up for pointed consideration

before many of the High Courts. Full Bench of five Judges in *Ahmadabad Cotton Manufacturing Company Limited v. The Union of India* (1) took the view that the constitutional fetter on the jurisdiction of the court has to be construed very strictly and 'any other remedy' would mean not merely an illusory remedy but one which is in essence real and capable of redressing the injury effectively. The same conclusion was arrived at by the Full Bench in *Wahidi Begum v. The Union of India and others* (2) in the following words;

> "Thus as a result of the aforesaid discussion, I held that the words 'any other remedy' occurring in Article 226 (3) would mean a real remedy capable of affording relief for the injury envisaged in sub-clauses (b) and (c) of clause (1) of Article 226."

To the same tenor are the observations of the Full Bench in *Government of India v. The National Tobacco co. of India Ltd.* (3) and Division Bench of our own Court in *Ranchi Club Limited v. The State of Bihar and others* (4) consequently at the very threshold it must be made clear that hereinafter whenever a reference is made to a remedy what is intended is a legal remedy capable of affording adequate and efficacious redress to the suiter and not merely one which is illusory in nature.

6. Having cleared the ground as above, one may proceed to notice the representative attack on behalf of the writ petitioners spearheaded by their counsel Mr. T.K. Jha. He submitted with his usual vehemence that the statutory reference under section 10 of the Act is no remedy in the eye of law because it is dependant on the opinion of the

(1) (1974) A.I.R. (Guj) 113
(2) (1980) A.I.R. (Punj.) 291
(3) (1977) A.I.R. (A.P.) 250
(4) (1978) A.I.R. (Pat.) 32

Government to refer or not to refer the industrial dispute to a Board, a Labour Court or a Tribunal. In essence the argument is that the statutory reference suffers from the serious handicap and is hedged in by the discretion of the Government in making a reference or otherwise, and, therefore, it cannot be classified as a legal remedy at all. In sum, it was submitted that it is a misnomer to construe section 10 as providing a remedy at all, far from the same being adequate or efficacious. Firm reliance was placed on *Hari Rai and others v. The Union of India* (1) which, in turn has been followed in *Haridai Mahto and others v. The Union of India and another* (2) and *Mahabir v. D.K. Mittal and another* (3).

7. As would be manifest hereinafter, I am inclined to take the view that the issues herein are concluded by the binding precedent in the *Premier Automobiles Limited v. Kamalakar Santaram Wadke* (4) which in turn stands reiterated forcefully in *Rohtas Industries Limited and another v. The Rohtas Industries Staff Union and others* (5). However since a vigorous attempt has been made to distinguish the aforesaid cases and considerable support is given to this stand by the aforementioned three Division Bench judgments of this Court, it becomes necessary and somewhat refreshing to examine the matter on principle and the larger intent of the statute.

8. The Industrial Disputes Act was enacted way back in 1947. The predecessor statute there to was the Trade Disputes Act of 1929. As is manifest from the larger scheme of the Act itself and particularly so from the statement of

(1) (1978) B.B.C.J. 350
(2) (1978) B.B.C.J. 459
(3) (1980) Lab. and Ind. cases 119.
(4) (1975) A.I.R. (S.C.) 2238
(5) (1976) A.I.R. (S.C.) 425

objects and reasons, for its enactment, it had come up for pointed notice that the Trade Disputes Act had made no provision for the proceedings thereunder for the settlement of an industrial dispute either by reference to a Board of Conciliation or to a court of Inquiry or a Labour Court or Industrial Tribunal. This defect was sought to be remedied during the last world war by the enactment of Rule 81A of the Defence of India Rules, empowering the Central Government to refer Industrial disputes to adjudication and to enforce the award. The said rule having been found to have provided a useful remedy, the Industrial Disputes Act, 1947 was in turn enacted to provide for remedies and forums for the enforcement of the statutory rights created therein. A reference to the exhaustive definitive section 2 would indicate that the Lagislature has with meticulous care defined the concepts and the relevant terms pertaining to industrial law and the disputes arising thereunder. They include such basic definitions as those of industry, workman, appropriate Government, award, conciliation proceeding, lay off, strike, retrenchment, settlement, trade union, etc. Chapter II of the Act then provides for the requisite forums under the statute, namely, works commitee, conciliation officer, Board of Conciliation, Court of Inquiry, Labour Court, Industrial Tribunal, National Tribunal and also the qualifications or disqualifications for the personnel manning the same.

9. Of particular interest is Chapter III, which contains section 10 pertaining to the reference of Industrial disputes to Boards, Courts or Tribuals. Its Exhaustive provisions have been supplemented by the insertion of section 10A with regard to the voluntary reference of disputes to Arbitrators as well. Chapter IV of the Act in details lays down the procedure, powers and duties of the various authorities thereunder, like conciliation officer, Board, Labour Court, Tribunal and the National Tribunal. Equally it provides for

the forum of the report or the award of these tribunals and the publication of those reports and awards, and the persons on whom the same would be binding. Whilst chapter V provides for strikes and lock-outs, of particular interest is chapter VA, which was added by Act 43 of 1953, with regard to lay off and retrenchment. There in section 25B in great detail provides the definition of continuous service, whilst section 25F confers the right that any workman, who has been in such continuous service for not less than one year, shall be retrencned only on the conditions specified therein. Vide Chapter VB, inserted by Act 32 of 1976, special provision relating to lay off, retrenchment and closure in certain establishments were made. Chapter VII contains miscellaneous provision, including Section 33C which provides for recovery of money due from the employer etc., whilst section 38 confers the power to frame rules under the Act. Appended to the Act are as many as five Schedules and, in exercise of the powers under the aforesaid section 38, the Industrial Disputes (Central) Rules, 1957, containing as many as 80 detailed rules, along with schedules containing forms etc., required under the law have been framed. In *Babu Ram Upadhyay's case* (1) it has been categorically held that the rules validly framed under an Act, in effect, become a part and parcel there of.

10. Even a bird's eye view of the provisions of the Act and the Rules framed thereunder can leave little manner of doubt that this statute fashions new industrial rights for the workmen and spells out specific remedies for the enforcement thereof. It envisages a hierarchy of forums, and Tribunals, providing in detail the procedure for approaching them and the publication of their awards and their enforcement, as also their binding nature. It is manifest that

(1) (1961) A.I.R. (S.C.) 751

these rights under the Act are by and large the creatures of the statute and granted by the mandate of the Legislature. To put it precisely, most, if not all, of these rights spring from that statute and coterminously it is a fountain head also for the remedies for their enforcement, which are provided in great and sometimes meticulous detail. It seems unnecessary to elaborate the matter, but broad vista of the Act make it manifest that it is a self-contained Code unto itself, creating and conferring the industrial rights thereunder and fashioning forums and the remedies for their enforcement as an integrated whole.

11. Now, It could not be disputed before us that if not all, yet most of the industrial rights conferred on the workmen were pure creatures of the statute not necessarily having any foundation or root in the general or, if one may say so, in the common law. Indeed some of these rights are in derogation of and in essence an overriding of the ordinary law. The learned Additional Advocat General, Mr. Ram Balak Mahto, was on the firm ground in pin-pointing particularly section 25F as being wholly a freshly fashioned industrial right in the context of retrenchment. It was pointed out that the workmen were sought to be brought within the ambit of that right only by a legal fiction of the definition of continuous service under section 25 B. There by, what in fact is not continuous or uninterrupted service, in common and ordinary parlance, is, by the mandate of law deemed to be a continuous service by a workman qua his employer. Learned counsel then referred to section 16 of the Specific Relief Act to highlight his point that the general law disapproves of and frowns of the specific only the remedy of damages for wrongful termination. It is in direct opposition to the general law and as an exception there to, the Act carves out the right of a workman to claim continuance in service, and, in fact, secure specific enforcement of a contract of personal service against the will of the

employer, if retrenchment compensation had not been paid in accordance with section 25F of the Act. It was, therefore, contended, rightly and plausibly, on behalf of the respondents that many and most of these rights flow from the Act, and, if one takes away the particular provision or repeals the Act, all these rights would evaporate into this air. Therefore, when a right stems from a statute, even in derogation of the general law, the remedy of its enforcement, if expressly provided, must also be sought for within the same statute. It was common ground before us that the Act lays down detailed procedure and methodology for claiming these rights and provides a hierarchy of forums and Tribunals for their adjudication and ultimate enforcement. Therefore, on the well established *uno flatu* rule the right and remedy are irrevocably married and are not to be divorced from each other. In other words, if a statute confers a right and in the same breath provides for a remedy for enforcement of such right the remedy provided by the statute must be resorted to. This hallowed principle was enunciated by Lord Tenterden, chief justice, in Dos v. Bridges (1831-1 B & Ad 847 at page 859) as under :

> "Where an Act creates an obligation and enforces the performance in a specified manner, we take it to be a general rule that performance cannot be enforced in any other manner."

The aforesaid enunciation has been unreservedly quoted thereafter and reiterated by Lord Watson in Barraclough v. Brown (1897 A.C. 615).

> "The right and the remedy are given *uno flatu* and one cannot be dissociated from the other."

The aforesaid principle has received unstinted approval of our final court as well. Therefore, it seems to follow that where both right and remedy stem from the same statute it is inevitable that the right conferred is itself within

the confines and parameters of the modus of its enforcement. Therefore to say that because the statutory remedy provided is hedged down by a precondition it would lose the label of being a legal remedy at all, seems to be plainly untenable on principle. That a legal remedy may be limited or confined by pre-conditions or post conditions for its enforcement is not at all unknown to the realm of law, and indeed in many cases it seems to be the rule rather than the exception.

13. One might also have a closer look at section 10 which provides for the reference of disputes to Boards, Courts or Tribunals. The provision itself is exhaustive having as many as eight sub-sections which are comprehensive in nature it must also be noticed that the same is not to be read in isolation but along with section 12 and 13 cotaining the duties of the conciliation officers and the Board. Looking at the provision it is plain that the aggrieved party has a right under section 10 of the Act because where an industrial dispute exists or is even apprehended a reference can be claimed on showing the relevent facts in that respect and on a considereation of the entire material if it is found that an industrial dispute does exit, the appropriate Government would be bound to refer the dispute for adjudication, Even when the Government comes to a contrary conclusion it is not left to its own whimsicality. While declining the reference the Government is required to apply its mind and act reasonably and not capriciouly or arbitrarily. It would be pertinent to observe that under section 12 one of the duties of the conciliation officer is that wherever an industrial dispute exists or is apprehended he shall hold conciliation proceedings in the prescribed manner. In the event of their failure and no settlement being arrived at, sub-section (4) obliges him to send a full report setting forth the steps taken by him and the reasons on account of which, in his opinion, the settlement could not be arrived at. Sub-section (6) then

obliges that such a report must be submitted within fourteen days of the commencement of the conciliation proceedings or within such shorter period as may be fixed by the appropriate government. Under sub-section (5) the appropriate government is obliged to consider this report and thereafter it may make a reference but where it does not do so, it has to record its reasons and not only that it is obliged to communicate the same to the parties concerned. Analogous provision then exist under section 13 with regard to the Board, which is also obligated to make a report which must be considered under section 13(4) by the appropriate Government and in the event of its decision not to make a reference, the appropriate Government must first record its reasons and then communicate the same to the parties concerned. On behalf of the respondents it was forcefully stated that in the climate of industrial liberality prevailing today, reference of an industrial dispute is the rule whilst its refusal is the exception. Yet again the aggrieved party is entitled to approach the High Court by may of writ jurisdiction to show that the action of the Government in declining the reference is not legally sustainable or there has not been any adequate application of mind. In this broader context to say that the statutory remedy of a reference is a misnomer appears to me as a misnomer in itself.

14. Consequently the stand of the writ petitioners in this context has to be rejected on principle. on the larger scheme of the Act, and the language of its specific provisions.

15. However, as I said earlier, to my mind the case of *The Premier Automobiles Ltd. v. Kamlakar Shantaram Wadke and others* (1) completely covers the point by binding precedent and is not open to challenge within this jurisdiction. There in also an indentical submission, as is sought to he raised before us, had been agitated by eminent

counsel and precisely noticed by their Lordships in the following terms :

> "Mr. Sorabjee endeavoured to take his case out of the well established and succinctly enunciated principles of law by the English courts on two grounds :-
>
> (1) That the remedy provided under the Act is no remedy in the eye of law. It is a misnomer. Reference to the Labour Court or an Industrial Tribunal for adjudication of the industrial dispute was dependent upon the exercise of the power of the Government under section 10(1). It did not confer any right on the suiter."

Indeed, it is the aforesaid argument which was pointedly considered in all its aspects and categorically rejected by their Lordships. The answer was rendered in categoric terms in paragraph 14 of the report in the following terms :

> "We do not find much force in either of the contentions. It is no doubt true that the remedy provided under theAct under section 33C, on the facts and in the circumstances of this case involving disputes in relation to the two settlements arrived at between the management and the workmen, was not the appropriate remedy. It is also true that it was not open to the workmen concerned to approach the Labour Court or the Tribunal directly for adjudication of the dispute. It is further well established on the authorities of this court that the government under certain circumestances even on the ground of expediency (vide State of Bombay v. K.P. Krishnan, (1961) 1 SCR 227 = (AIR 1960 SC 1223) and Bombay Union of Journalists v. The State of Bombay, (1964) 6 SCR 22 = (AIR

1963 SC 1617) can refuse to make a reference. If the refusal is not sustainable in law, appropriate directions can be issued by the High Court in exercise of its writ jurisdiction. But it does not follow from all this that the remedy provided under the Act is a misnomer. Reference of industrial disputes for adjudication in exercise of the power of the Government under section 10(1) is so common that it is difficult to call the remedy a misnomer or insufficient or inadequate for the purpose of enforcement of the right or liability created under the Act. The remedy suffers from some handicap but is well compensated on the making of the reference by the wide powers of the Labour court or the Tribunal. The handicap leads only to this conclusion that for adjudication of an industrial dispute in connection with a right or obligation under the general or common law and not created under the Act, the remedy is not exclusive. It is alternative. But surely for the enforcement of a right or an obligation under the Act the remedy provided *uno flatu* in it is the exclusive remedy. The legislature in its wisdom did not think it fit and proper to provide a very easy and smooth remedy for enforcement of the rights and obligations created under the Act. Persons wishing the enjoyment of such rights and wanting its enforcement must rest content to secure the remedy provided by the Act. The possibility that the Government may not ultimately refer an industrial dispute under section 10 on the ground of expediency is not a relevant consideration in this regard."

It is manifest from the above that the final Court was expressly considering the remedy of a statutory reference under section 10(1) of the Act within its limitation of

governmental opinion. It has been held in terms :

(i) That despite the handicap of the Governmental discretion to refer or not to refer an industrial dispute, the right to claim reference was nevertheless a legal remedy.

(ii) That this handicap was more than compensated by the wider powers conferred on the Labour Courts and the Tribunals under the Act.

(iii) That the said remedy was both sufficient and adequate.

(iv) That in terms it was an alternative remedy.

It is apt to notice at this very stage that the aforesaid enunciation has been reiterated in no uncertain terms by a co-equal Bench in *Rohtas Industries Ltd. and another v Rohtas Industries Staff Unon and others* (1) with the added observation :

> "The Industrial Disputes Act is a comprehensive and self-contained Code so far as it speaks and the enforcement of rights created there by can only be through the procedure laid down there in. Neither the civil court nor any other Tribunal or body can award relief."

And again :

> "Since the Act which creates rights and remedies has to be considered as one homogenous whole, it has to be regarded uno flatu, in one breath, as it were, On this doctrinal basis, the remedy for the illegal strike (a concept which is the creature not of the common law but of section 24 of the Act) has to be sought exclusively in section 26 of the Act."

(1) (1976) Lab. and Ind. cases 303

I believe that in view of the conclusive answers rendered by their Lordships of the Supreme Court to these questions, no further argument remains which can possibly avail the petitioners. It seems to be plain that a statutory reference under section 10 of the Act is an adequate, efficacious and alternative remedy.

16. In fairness to learned counsel for the writ petitioners, one must, however, notice, what appears to me as a hyper-technical argument, that even though a statutory reference under section 10 may be an adequte and efficacious remedy yet it was not an alternative one. Perhaps this submission has only to be noticed and rejected. There is no definition of the words "alternative remedy" provided in any statute. However, what it would mean in the realm of law seems to be well-known. Where the similar or identical relief can be granted in another forum of law then it must necessarily be held that it provides an alternative remedy to the suiter. To put it in other words, if qualitatively and quantitatively the same relief would be given for redress of the injury to the petitioner as elsewhere then there is choice but to name the same as an alternative remedy. Now it seems beyond cavil that what is sought here in the form of the writ jurisdiction can equally be secured in the forums under the Act ranging from the Conciliation Officer and the Labour Court at the bottom to the National Industrial Tribunal at the top. Indeed as their Lordships observed in the *Premier Automobiles case* (supra) the powers of the Labour Courts and the Tribunals under the Act are much wider in nature. It is well-known that a writ court will not easily travel into issues of fact and would otherwise interfere only the qustion of jurisdiction and errors patent in law whilst the authority under the Act is more than amply entitled to resolve the disputes on facts hedged in by no constitutional limitations and indeed can interfere by substituting its own discration for that of the employer whose action may be

impugned, consequently it seems to follow that the remedies provided under the Act are not only alternative but, indeed, wider and more specific. Finally, it must be recalled that in the Premier Automobiles case (supra) their lordships in terms said that the remedies under the Act were alternative remedies. The tenuous submission in this context must, therefore, be rejected.

16A. I would, however, like to deal specifically with Mr. Tara Kant Jha's ingenious argument to distinguish the case of *Premier Automobiles* (supra) and his vehement contention that the said case is no authority for the proposition canvassed in this case. According to learned counsel, their Lordships of the Supreme Court were considering the jurisdiction of Civil Court to adjudicate an industrial dispute. In other words, the Supreme Court was concerned whether jurisdiction of Civil Court is impliedly barred in view of the provisions of the Industrial Disputes Act. Learned counsel drew our attention to paragraphs 7, 15 and 31 of the judgment reported in A.I.R. 1975 S.C. 2238 (supra). It is true that Untwalia; j., speaking for the court, observed :

> "The foremost and perhaps the only point.... which calls for our determination is whether on the facts and circumstances of this case, the Civil Court had jurisdiction to entertain the suit filed by respondents 1 and 2 against the appellant.."

While referring to section 9 of Civil Procedure code, the learned judge further observed in paragraph 15 :

> "In India under section 9 of the Code, the Courts have subject to certain restrictions, jurisdiction to try suits of civil nature excepting suits of which their cognizance is either expressly or impliedly barred... In the instant case taking cognizance of a suit in relation to an industrial

> dispute for the enforcement of any kind of right is not expressly barred. But if it relatesto the enforcement of a right created under the jurisdiction of Civil Court is barred."

According to learned counsel, the Supreme Court after discussing various citations answered the point formulated by it in concluding paragraph of the judgement as under :

> "It is clear that the termination of the agreement in this case was not accepted by the union. sought to challenge it by the institution of a suit. It is clear that the suit was in relation to the enforcement of a right created under the Act. The remedy in Civil Court is barred. The only remedy available to the workman concerned was raising of an industrial dispute. It was actually raised and as a matter of fact, shortly after the institution of the suit, the dispute were referred by the government to the industrial Tribunal."

It is, therefore, strenuously urged that the principle decided in the said case does not at all apply to a person's right of invoking the jurisdiction of writ court even in respect of an industrial dispute, provided the petitioner is a government servant and/or an employee of the instrumentality of the government.

16B. It however, appears that while deciding the said question the supreme court referred to, with approval, the judgment of *Passmore v. Oswald & whistle* (1898 AC 387) refered by House of Lords affirming the decision of court of Appeal in *Peables v. Oswald Twistle Urban District Councel* reported in (1897) 1 Q B 625, where it was pointed out that "the duty of local authority under section 15 of the Public Health Act, 1875, to make such sewers as may be necessary... cannot be enforced by action for a mandamus

the only remedy for neglect of the duty being that given by section 299 or the Act by complaint to the Local Government Board." The answer ot the question raised by Mr. Tara Kant Jha is not too far to seek, as the Supreme Court has rightly pointed out that "It is one thing to affirm the jurisdiction, another to authorise its free exercise like a bull in a china shop."

17. In the last bid attempt to distinguish the *Premier Automobiles case* (supra), it was sought to be contended that in the said case their Lordships were considering the question in the context of the remedy being alternative to the one by way of suit. Somewhat tenuously it was submitted that even if the remedies under the Act may be alternative remedies to one by way of suit they would not be so as against the remedy by any of a writ petition. Herein again the fallacy of the submission seems to be patent. What was at issue in the *Premier Automobiles case* was the question whether under the Act the same or similar relief could be provided which was sought by way of a suit. Consequently it was the nature of the remedy under the Act which was the primary point for consideration and it was held in no uncertain terms that the same was an alternative one. Indeed there can be little doubt that the plenary and unlimited remedy by way of a suit, which is untrammelled by any limitation, is a wider remedy. Therefore, even if qua this remedy it was held that the remedies provided under the Act were alternative there to it would be more so in the context of the writ jurisdiction with its limitation of being confined to admitted facts or jurisdictional errors and patent issues of law alone. Therefore, the distinction sought to be drawn to evade the ratio of the *Premier Automobiles case* (supra) is wholly untenable and the contention must fail.

18. It remains to advert to the three decisions of this court which were strenuously relied upon and other judgments taking a some what similar view. In *Hari Rai and*

others v. Union of India (1978 BBCJ 350) the issue was being considered in the context of the emergency provisions of the constitution inserted in Article 226 by sec. 58 of the 42nd Amendment. A reference to the judgment would show that on this point considerable attention was paid to this aspect which after the repeal of the relevent provisions of the 42nd amendment is some what academic. The discussion of the issue now before us would indicate that this matter was not adequately canvassed before the Bench. The larger prospect that the Industrial Disputes Act creates the industrial right and provides remedies there of *uno flatu* seems to have been neither presented nor adjudicated upon. The wide spectrum of the various provisions of the Act went unnoticed. It is true that a passing reference was made to the *Premier Automobiles* case but the specific paragraphs 13 and 14 of the report, which were focussed on the point, appear to have been neither considered nor quoted. In distinguishing the *Premier Automobiles case* the Bench noticed that there in their Lordships were considering the question of alternative remedy vis-a-vis a suit in the Civil Court but as I have attempted to show earlier this line of reasoning is not tenable. Further the Bench was considering the matter in the context of the railway employees and it was noticed that the provisions and principles of the Industrial Distutes Act had been adopted by the Railway Administration in its Manual and, therefore, it was not correct to contend that the objections taken by the petitioners were exclusively within the four corners of the Indistrial Disputes Act. The Bench also seems to have been influenced by the human consideration that the writ petitioners were poor khalasis and it might involve hardship now to relegate them to the alternative remedy under the Act after a passage of the two years from the admission of the writ petition. Further at that stage apparently the subsequent forceful reiteration of the *Premier Automobiles case in Rohtas Industries case* (supra) with its added

reasoning could not be noticed. With the greatest deference, therefore, it must be held that on this point Hari Rai's case does not lay down the law cerrectly and is hereby overruled. For identical reasons the case of *Hridai Matho and others v. The Union of India and another* (1) and the case of *Mahabir v. D.K. Mital and another* (2) which merely followed the decision in *Hari Rai's case* (supra), have also to be necessarily overruled. In *Assistant Personnel officer. Southern Railway v. K.T. Antony* (1978 (2) L.L.J. 254) the matter does not seem to have been adequately canvassed at all before the Division Bench of the Kerala High Court which disposed it of in a solitary short paragraph as if it was one of first impression and without reference to principle or precedent. With the greatest respect I would record my dissent thereform.

19. On the other hand, it deserves notice that the view I am inclined to take stands accepted in the judgment of the Rajasthan High Court in *Shankar Lal Mali v. State of Rajasthan and others* (3) wherein after dissenting from the view of the Kerala High Court it has been held that a reference under section 10 provides an efficacious and adequate alternative remedy for the alleged violation of section 25-F of the Act. What, however, deserves more pointed notice is that the Full Bench of the Punjab and Haryana High Court in the recent judgment in *Manohar Lal v. State of Punjab and another* (4) has taken an identical view.

19A. It bears recalling that these writ applications were referred to a Full Bench at the threshold stage of

(1) (1978) B.B.C.J. 459

(2) (1980) Lab. and Ind. cases 119

(3) (1980) Lab. and Ind. cases 964

(4) (1984) I.L.L.J. 193

admission to consider the question whether the remedy under the Industrial Disputes Act is not an adequate remedy and, therefore, the petitioners are entitled to invoke the writ jurisdiction straightway. Herein I would refrain from expressing any opinion on two allied questions. Firstly, as to what would happen to those writ petitions which have been admitted on merits and parties have filed their affidavit and counter affidavit and the matter has remained pending in this court for some time. Secondly, as to when a person will be said to have exhausted his remedy under the Industrial Disputes Act and thus entitles him to approach the writ court for the grant of the main relief. I may notice that none of the counsel appearing in this case addressed us on these questions. Probably they thought that these are not relevant and do not arise for the decision of the cases in hand.

20. To conclude on this aspect, the answer to question I framed at the outset is rendered in the affirmative and it is held that the statutory reference of an industrial dispute under section 10 is an adequate and efficacious legal remedy for the enforcement of the rights created under the Act.

21. Having dealt with the first question and now adverting to the second one, it seems vital for the sake of clarity of precedent to highlight at the very outset that today there is no manner of doubt that even the existence of an adequate and efficacious alternative remedy is not and indeed cannot be any inflexible legal bar to the entertainment of a writ petition. The constitutional power of the High Court under Article 226 is untramelled by any unsurmountable limitation on its exercise. In this context it is apt to recall that during the emergency, by the Forty second Amendment to the constitution, a legal bar was sought to be imposed on the exercise of the writ jurisdiction where an alternative remedy existed. That, however, is now a matter of history because the relevant provision was

expressly repealed by the Forty Fourth Amendment. T herefore, the remedy by way of a writ under Article 226 has regained its pristine and original wide ranging force and which, in the circumstances indicated herein after, may well be exercised by the High Court in its discretion even in face of the existance of an alternative remedy. Therefore, the central issue herein is not the jurisdiction (or the power of the writ court), which, as already noticed, is a constitutional power untramelled by any limitation, but the self-denying ordinance or the self-disciplined restraint of the judges in exercising such a power as a matter of policy and judicial discretion. The real issue herein only is as to what course of action is open to the suitor who is aggrieved by the wrong and what is the more appropriate forum in the first instance to which he must be directed. To repeat, the question is not at all with regard to the power of the writ court itself which admittedly is plenary.

22. Having thus cleared the deck for the consideration of the question, it seems apt to examine it in its two aspects, nemely, the larger principle of judicial restraint and discretion where efficacious and adequate alternative remedy exists and the particuler application of the said rule under the Act which, as noticed, provides *uno flatu* both the right and the remedies thereunder. Adverting to the first aspect it is now well settled on principle and hallowed by precedent that the remedy by way of a writ is an extraordinary remedy. It necessarily flows from this basic proposition that where ordinary remedies exist resort to the extraordinary remedy would be permissible only upon their failure or exhaustion. If that were not to be so, the distinction between the ordinary and the extraordinary remedy is obliterated and the principle merely becomes tautologous. Therefore, the salutary rule is that the writ court would entertain the matter only if the adequate and efficacious remedies have been first resorted to and

exhausted. The failure to observe that rule can only be at the peril of crushing the extraordinary jurisdiction itself and ultimately rendering it inefficacious because it is and was never intended to raplace or substitute the ordinary legal remedies expressly provided by the legislature. Therefore, on principle itself resort to the extraordinary jurisdiction is permissible only after resorting to the alternative remedy where available.

23. It is unnecessary to launch on any exhaustive dissertation on principle in this context because the issue is conclusively covered by binding precedent. It is unnecesary to go back to the English authorities since to my mind our final court has itself clinched the matter. Way back in the well-known case of Union of India -vs- T.R. Verma (1) the Constitution Bench unequivocally observed as under:

> "It is well settled that when an alternative and equally efficacious remedy is open to a litigant, he should be required to preserve that remedy and not invoke the special jurisdiction of the Hign Court to issue a prerogative writ. It is true that the existence of another remedy does not affect the jurisdiction of the Court to issue a writ; but, as observed by this court in *Rashid Ahmad vs. Municipal Board*, Kairana, 1950 SCR 566 : (AIR 1950 SC 163), the existence of an adequate legal remedy is a thing to be taken into consideration in the matter of granting writes. Vide also K.S. Rashid and son -vs-. "The Income-tax Investigation Commission : 1954 SCR 738 atp 747 : (AIR 1954 SC 207 at p.210). And where such remedy exists, it will be a sound exercise of discretion to refuse to interfere in a petition under Article 226, unless there are good grounds therefor. None such appears in the present case."

The aforesaid authoritative enunciation has then been

(1) (1957) A.I.R. (S.C.) 882.

reiterated by another constitution Bench in *A.V. Venkataswaran Vs. Ramchand sobraj Wadwani and another* (1) and has held the field. It could not be even remotely argued before us that the final court has in any way deviated from the same later. It is therefore, unnecessary to multiply authorities on the point. consequently, it emerges both from principle and precedant that as a settled rule of judicial policy, convenience and discretion a writ court would refuse to interfere under article 226 where an alternative remedy exists unless pecucier and excepticnal grounds are established therefor.

24. The aforesaid larger rule appears to me as one of particular application in the context of resort to the writ jurisdiction in the first instance for remedies expressly provided under the Industrial Disputes Act. It deserves reiteration that on a consideration of the Act it has been held in the *Premier Automobiles case* that the rights and remedies under the Act are provided *uno flatu*, and therefore , one cannot be diverced from the other. It appears to me some what unnecessary to examine the issue on principle because it is pointedly covered by unequivocal and binding precedent. Within this jurisdiction, what, perhaps, calls for pointed notice is the fact that the very question arose in this High Court in *Basanta Kumar Sarkar and others v. The Eagle Rolling Mills Ltd. and others* (2) and chief Justice Ramaswami, speaking for the Division Bench, categorically observed as under :-

> "Even assuming that the orders of the chief executive officer, which are Annexures A and D, constitute an illegal curtailment of the benefits already enjoyed by the workmen, the Hign Court cannot grant a writ under Article 226 of the Constitution for the purpose of quashing those orders of the Chief Executive officer

(1) (1961) A.I.R. (S.C.) 1506

(2) I.L.R. XL Pat. 193

of respondent no.1. The proper remedy in such a case is for the petitioners to raise an industrial dispute under the provisions of the Industrial disputes Act or to take recourse to the machinery provided by sections 74 and 75 of Act 34 of 1948."

It was on appeal from the aforesaid judgment that their Lordships not only affirmed, but reiterated the rule in stronger terms. In *Basanta Kumar Sarkar and others v. The Eagle Rolling Mills Ltd. and others* (1) Chief Justice Gajendragadkar, Speaking for the Bench, concluded as under :-

"It was urged by the appellants before the High Court that these notices were invalid and should be struck down. The argument which was urged in support of this contention was that Respondents No. 1 in all the three appeals were not entitled to curtail the benefits provided to the appellants by them and that the said benefits were not similar either qualitatively or quantitatively to the benefits under the scheme which had been brought into force under the Act. The High Court has held that the question as to whether the notices and circulars issued by Respondents No.1 were invalid, could not be considered under Article 226 of the constitution; that is a matter which can be appropriately raised in the form of a dispute by the appellants under section 10 of the Industrial Disputes Act. It is true that the powers conferred on the High Courts under Article 226 are very wide, but it is not suggested by Mr. Chatterjee that even these powers can take in within their sweep industrial disputes of the kind which this contention seeks to raise. Therefore, without expressing any opinion on the merits of the contention, we would confirm the finding of the High Court that the proper remedy which is available to the appellants to ventilate their grievances

(1) (1964) A.I.R. (S.C.) 1260.

in respect of the said notices and circulars is to take recourse to section 10 of the Industrial Disputes Act, or seek relief, if possible, under Section 74 and 75 of the Act."

25. It is plain that the aforequoted observations clinch the issue and this view has ever since held the field and, as I would presently show, has been recently reiterated afresh. However, it is not on precedent alone that the matter herein seems to rest and larger considerations equally come in to support its rationale. As representative example, learned counsel for the respondents rightly pointed out that in the context of section 25-F of the Act, a necessary factual base is always a pre-condition for its application, and, ordinarily, if not invariably, if is controverted, and, therefore, it is a wholly inappropriate lis for the writ jurisdiction in the first instance. In order to claim relief under section 25-F, it must first be factually established that the workman had been in continuous employment for one year, which, for statutory purpose, would mean 240 days of continuous service, as defined in section 25-B with regard to the deeming provision of uninterrupted service thereunder. Equally where there has been a works contract or what as a term of art is called, a closure of a project, then again the provisions of section 25-F would not be attracted. All these factors are necessarily in issue for relief under section 25-F and for the writ court to rush into the thicket of controverted and tangled facts would be plainly unwarranted both on principle, policy, convenience and discretion.

26. Yet again, it must be noticed that if the contention of the petitioners were to be accepted that the writ court itself must intervene in the first instance for any infraction of the rights under the Act, this in essence would render nugatory the extenesive machinary for settlement and adjudication of industrial disputes provided under the Act. It needs no great erudition to see that if a suitor can secure

and get the same relief from the highest court in the state in the first instance then it would be futile to expect him to seek it at the levels of the labour courts and the industrial Tribunals, which in turn would be subject to interference by the High court later. In essence the by-passing of the rule of alternative remedy in the context of the Act would not only reduce the High court to the levels of the Labour courts and Industrial Tribunals, but virtually frustrate the intention of the legislature to provide an adequate hierarchy of forums for enforcing the remedies under the Act.

27. Parhaps, as we reach out to the mid-eighties a postscript to the rule of alternative remedy is called for. As the Utopian euphoria at the dawn of the indepedence, and the promulgation of the consitution in the early fifties, faces the cold judicial realities of three decades and a half thereafter, the true rationale of the concept of the alternative remedy comes into a entirely sharper focus. As the final court and the High courts get choiced within the land, the meaningful distinction betwixt the ordinary and the extraordinary remedies highlights its significance. Unless the extraordinary remedy of the writ jurisdiction is to be hamstrung and indeed rendered nugatory by making it a substitute for the ordinary statutory remedy, the distinction betwixt the two has to be firmly maintained. The writ jurisdiction is not the remedy of the first instance, where others exist. It is the remedy of the last resort. it the Legislature, in its wisdom, provides a statutory remedy it is not for the High court to override and nullify the mandate.

28. It remains to recall the memorable and yet picturesque words of Krishna Iyer, J., speaking for the court, in the specific context of the Industrial Disputes Act in *Rohtas Industries Limited and another v. Rohtas Industries Staff Union and others* (1). That was yet again a case from this very High Court and affiming its judgment it was observed;

(1) (1976) A.I.R. (S.C.) 425

> *"But it is one thing to affirm the jurisdiction, another to authorise its free exercise like a bull in a china shop. The court has spelt out wise and clear restraints on the use of this extraordinary remedy and High Courts will not go beyond those wholesome inhibitions except where the monstrosity of the situation or other exceptional circumstances cry for timely judicial interdict or mandate.* The mentor of law is justice and a potent drug should be judiciously administered."

29. In consonance with the above, the answer to question II must be rendered in the affirmative, and it is held that the suitor must exhaust the remedies under the Act before seeking relief in the writ jurisdiction, unless the monstrosity of the situation or other exceptional circumstances cry out for interference by the writ court at the very threshold.

30. Now, applying the above, learned counsel for the writ petitioners have been wholly unable to show any exceptional circumastance, from any monstrous situation imperatively warranting the overriding of the well settled rule that where an alternative reomedy exists the suiter must be directed there to in the first instance. Consequently abiding by that principle I relegate the writ petitioners to the specific statutory remedy under the Industrial Disputes Act in the first instance. Needless to say that the doors of this court are wide open once they have exhausted those remedies.'

31. All the writ petitions are consequently dismissed but in view of the significant legal questions involved, I leave the parties to bear their own costs.

B.P. Jha, J. I agree.
S.B. Sanyal, J. I agree.

S.P.J.

Petitions dismissed

MISCELLANEOUS CRIMINAL

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

1984

November, 21

*Krishnadeo Singh & Others.**

v.

The State of Bihar and seven others.

Code of Criminal Procedure, 1973 (Central Act no II of 1974) section 116(6) provisions of —Magistrate extending the period of six months, prescribed under the subsection, by another six months— validity of —order of the Magistrate that extention of enquiry by six months excludes any further limitation, whether beyond jurisdiction.

Legislature in inserting sub section (6) in section 116 of the Code of Criminal Procedure, 1973, hereinafter called the code has virtually prescribed the limit of the inquiry as six months and only as a matter of abundant caution, vested discretion in the Magistrate to extend the same in exceptional circumstances. Special reasons must exist and these should be expressly recorded in writing for any extension beyond the prescribed period of six months.

Held, that the period of six months ordinarily prescribed under sub-section (6) of section 116 of the Code cannot be extended beyond another six months by the order

*Criminal Miscellaneous No. 6295 of 1981. In the matter of an application under section 482 of the Code of Criminal Procedure, 1973.

of the Magistrate.

The view of the Magistrate in his order dated 11th August 1981 that since the period of enquiry had once been extended by six months on 15th January, 1981, there was no further limitation of time thereon, can-not be substained.

Held, that the order dated 11th Aughust, 1981 being plainly beyond jurisdiction has to be quashed.

Application under section 482 of the Code of Criminal Procedure, 1973.

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

The case in the first instance was placed before Nazir Ahmad, J., who referred it to a Division Bench.

On this reference.

Mr. Madan Prasad Singh, for the petitioners.

Messrs Lala Kailash Bihari (A.P.P.) and Sabir Ahmad for the State.

S.S.Sandhawalia, C.J., Can the period of six months ordinarily prescribed for an inquiry under sub-section (6) of section 116 of the code of Criminal Procedure, 1973 be further extended beyond another six months or more, by an order of the Magistrate, is the somewhat ticklish question for an authoritative decision by the Division Bench in this criminal miscellaneous petition.

2. The facts are not in dispute and lie in a narrow compass. Proceedings under section 107 of the code of Criminal Procedure, 1973 (hereinafter to be referred to as the 'Code') were started against the eight petitioners and the private respondents way back on the 4th of June, 1980. It is averred on behalf of the petitioners that in the police report no specific overt act was alleged but a general apprehension of the breach of peace was expressed. In

pursuance to the notices issued, the petitioners appeared in the court of the Magistrate on the 16th of June, 1980. Despite the mandate of section 116(6), the proceedings were not completed within six months and thereupon the petitioners preferred an application for dropping the same, whilst another application by respondent no.2 was made for extending its life. It is averred that though no fresh material had come on the record, the learned Magistrate extended the period of inquiry by an order dated the *15th of January, 1981*. It would appear that when the proceedings still continued to drag on , the petitioners preferred an application dated the 8th of July, 1981 alleging that since a further period of six months had expired, the same must necessarily be dropped. This application was opposed by the private respondents and ultimately, by the impugned order (annexure 1) dated the 11th of August, 1981, the learned Magistrate rejected the application on the ground that since the period of inquiry had been once ordered to be extended, there was no further limitation of time thereon under the Code. Aggrieved thereby, the present criminal miscellaneous petition under section 482 has been preferred,

3. This case had originally come up before my learned Brother, Nazir Ahmad,J., sitting singly. Before him, the issue sternuosly pressed was that the extension of the period of inquiry could not go beyond a further period of six months in the light of the provisions of sub-section (6) of section 116.Noticing the significance of the issue and the paucity of precedent on the point, the matter was referred for an authoritative decision by the Division Bench and that is how it is before us now.

4. As before the learned single Judge, so before us, the main plank of the counsel for the petitioners is that the extended period of inquiry is equally governed by the original limitation of six months and cannot travel beyond the same. It was contended that any other construction would

be anomalous and tending to frustrate the very purpose of the provision. for imposing a limitation of time.

4(a). For appraising the aforesaid submission and construing the provisions of section 116(6) and (7), it is first apt to notice the larger purpose of Chapter VIII of the Code in which these are contained. It must be pointedly recalled that the object of the Legislature herein is not any conviction or punishment for any offence. It is primarily and pristinely a preventive jurisdiction. Indeed, in the old code part IV was expressly labelled as the "Prevention of offences". In particular, as regards section 107 the same is directed to the maintenance of public peace and tranquillity. It is axiomatic that the obligation to keep the peace is even otherwise the duty of the citizen and only to enforce the same power is conferred on the likelihood of its breach. It is with that end in view that the Legislature has now mandated the completion of these preventive proceedings within six months and an automatic termination thereafter unless they are extended for special resons to be recorded in writing by the Magistrate.

5. For a proper interpretation of sub-section (6) of section 116,it seems necessary to first view the same in the context of its, legislative history and the rule in celebrated Huydon's case. Herein one must first look at the state of the pre-existing law and as to whether mischief or the defect which was sought to be remedied by the parliament by way of amendment or addition and the reasons therefor. It is worth recalling that section 117 of the old Code (which is the equivalent of the present section 116 of the code) did not contain any provisions corresponding to sub-sections (6) and (7) of section 116 of the present code. Consequently, no limitation of time at all was provided for the inquiries under the preventive sections. The actual working of the old Code disclosed that the preventive provision there of at times became the subject matter of gross procedural abuse. what

in law was intended to be a summary and expeditious procedure for preventing a breach of public peace and tranquillity was not unoften converted into a long drawn out inquiry, proceedings hanging over the parties like the proverbial sword of Democle. These inquiries were inordinately protracted with their poor victims who were not guilty of commission of any offence being required to attend the proceedings continuously over long periods. The power to demand security and to set the same at a high figure and in the event of either failure or refusal to accept the sureties to detain the person during the pendency of the inquiry was also an abuse or a misuse which was not of a rare occurrence. This was, in terms, noticed in the report of the Joint Committee of the Houses of Parliament. One cannot do better than quote the relevant observations on extenso:

"The committee notes with concern that in some Stated proceedings under chapter VIII of the existing code particularly those under Sec. 107 drag onfor as long as one year or even more and in many of these cases the person concerned, particularly if he happens to be poor, is kept under detention all the time. Obviously, the provisions are not intended to be used for keeping persons in detention without trial for such long periods. The object of the provisions is to prevent breach of the peace and unless the proceedings are completed within a reasonable time, recourse to drastiic powers under these provisions would not be jusitifled.Similar consideration would apply also to proceeding relating to bonds for good behaviour. After a careful consideration of the various aspects of the matter, the Committee feele that a time-limit should be prescribed for completing the procoedings under the section (sec.116, new Code)

The first part of the newly added sub- clause (6), (sub-section (6) of new Sec.116) accordingly provides that if the inquiry under the section is not completed within a

pariod of six months form the date of the commencement thereof, such inquiry should stand terminated on the expiry of that period. A special power has been retained with the Magistrate to extend this period where there are special reasons to do so. The provision would apply to all procedings whether or not the person concerned is in detention. Where the person is in detention, a further provision has been made to the effect that the proceedings shall stand terminatd on the expiry of a period of six months of detention. This is an absolute limit and the Magistrate will have no power to extend the period of It was for the aforesaid reasons that sub-sections (6)and (7) of section 116 were inserted in the Code to remedy the evil. Since the whole controversy turns around their language,it is necessary to quote them for facility of reference:

> "116. *Inquiry as to truth of information.*
>
> (6) The inquiry under this section shall be completed within a period of six months from thedate of its commencement, and if such inquiry is not so completed, the proceedings under this Chapter shall, on the expiry of the said period, stand terminated unless, for special reasons to be recorded in writing, the Magistrate otherwise directs:
>
> Provided that where any person has been kept in detention pending such inquiry, the proceeding against that person, unless terminated earlier, shall stand terminated on the expiry of a period of six months of such detention.
>
> (7) Where any direction is made under sub-section (6) permitting the continuance of proceedings, the Sessions Judge may, on the application made to him by the aggrieved party, vacate such direction if he is satisfied that it was

not based on any special reason or was perverse."

6. Now, a plain reading of sub-section (6) aforesaid, would indicate that the Legislature, in express terms, has mandated that the inquiry must be completed within a period of six months from the date of its commencement. The word employed is 'shall'. Not only that, it is further directed that if such inquiry is not so completed within the time prescribed then it shall automatically stand terminated on its expiry. It would thus appear that the Legislature, in inserting sub-section (6) virtually provided the limit of the inquiry as six months and only, as a matter of abundant caution, vested a discretion in the Magistrate to extend the same in exceptional circumstances. Herein again it was spelt out that special reasons must exist and these should be expressly recorded in writing for any extension beyond the prescribed period of six months. Yet another safeguard was provided by sub-section (7) and the aggrieved party was given the express right of making the application to the Sessions judge on the ground that no special reason existed for such extension or the same was perverse. The Sessions Judge was given the power to set aside the extension if he was satisfied that the same was not based on any special reasons or otherwise did not satisfy the test of reasonableness.

7. The proviso to sub-section (6) is indicative of the Legislature's solicitude that the inquiry proceedings must ordinarily be completed within the prescribed period of six months. In all those cases where any person had been kept in detention during the inquiry it would stand automatically terminated on the expiry of the period of six months and could not thereafter be extended for any reason whatsoever. In such cases, the power of the Magistrate to extend even for special reason is absolutely barred.

8. All the aforesaid factors, to my mind, are the clearest pointer to the Legislature's categoric intent of a

speedy culmination of these inquiry proceedings. A virtual outer limit of six months herein was preserved by the legislature which could only be deviated from in exceptional circumstance for special reason recorded in writing. Could it possibly be the intent of the Legislature that what was meant as an exception should override and travel beyond the period of original six months without any limitation of time thereafter ? In my view, it would be incongruous and anomalous to hold that once such extension was made, it could continue *ad infinitum* without any further bar on its length. To test an argument, it is sometimes apt to carry it to its logical length. Could it possibly be said that though expressly the original completion is limited to six months, its extension thereafter may continue for six years ? The answer would seem to be obviously in the negative, and by the very nature of things, the parameter of the time prescribed for the inquiry would equally govern and limit the extension thereof.

9. The view I am inclined to take receives support from the observation of the Full Bench in *Sitaram Singh and others v. State of Bihar and another* (1) Therein, whilst holding that the commencement of the inquiry under section 107 would begin when a party appears in thecourt of the Magistrate, it was further observed as under:

> "The law desired the inquiry to be a short affair and not to be dragging its feet for years, Even endeavour should be made by Magistrates to complete the inquiry as soon as possible. That can be done only by limiting the number of adjournments. Magistrates would be well advised to call upon the party at whose instance the proceeding has been initiated to be present with his witnesses on the date fixed for appearance of

(1) (1980) A.I.R. (pat.) 257.

the opposite party."

10. To finally conclude, the answer to the question posed at the outset is rendered in negative, and it is held that the period of six months ordinarily prescribed under sub-section (6) cannot be extended beyond another six months by the order of the Magistrarte.

11. Now applying the above, it is common ground before us that the period of more than six months had elapsed from the order of the Magistrate extending the inquiry on the 15th of January, 1981. This would thus be beyond the limitation imposed by section 116(6). The view of th Magistrate that since the period of inquiry had once been extended, there was no further limitation of time thereon cannot be sustained. The impugned order (annexure 1) dated the 11th August, 1981 being thus plainly beyond jurisdiction has to be quashed. As a necessary result thereof, the proceeding against the petitioners would stand terminated. The criminal miscellaneous petition is allowed in the terms aforesaid.

Nazir Ahmad,J. I agree

R. D. Petition allowed.

FULL BENCH

Before S.S.Sandhawalia, C.J., Hari Lal Agrawal and Sushil Kumar Jha, JJ.

1984

November, 11

*Mahanth Dhansukh Giri and others.**

v.

The State of Bihar and others.

Constitution of India, Article 226—concurrent findings of fact, whether to be treated as sacrosanct in the writ jurisdiction — sufficiency or credibility of evidence, whether to be taken into consideration by the writ court —findings of fact, whether can be disturbed in a case of no evidence— concept of a lost grant— when can arise—cancept, when not attracted—Bihar Land Reforms (Fixation of Ceiling Area and Acquisition of Surplus Land) Act, 1961 (Bihar Act XII of 1962), section 2(ee),whether constitutionally valid — Act, whether applies to agricultural lands owned by Hindu religious Maths.

Held, that , there are inherent limitations in the writ jurisdiction to enter into or disturb the concurrent findings of fact by authorities having jurisdiction to adjudicate thereon. In the instant case, on the concurrent findings of fact arrived at by the authorities below it must be held. That the

*Civil Writ Jurisdiction Case No. 319 of 1977. In the matter of an application under Articles 226 and 227 of the Constitution of India.

institution at Bodh Gaya is a Hindu religious Math and consequently all its properties are impressed and burdened with a trust of the said religious and charitable nature. This issue has not to be considered in the writ jurisdication as if it was a matter of trial in a suit. Nor can it be examined as if it was an appeal against the forums under the ceiling law. It necessarily has to be considered within the parameters of the writ jurisdiction. The present case cannot be said to be a case of no evidence where perhaps the writ court may be inclined to disturb the findings of fact. Equally well-settled it is that sufficiency or credibility of evidence is not an issue in this forum. Conseqently, the consistent and concurrent findings of the authorities below must be treated as sacrosanct inthe writ jurisdiction and ther is no warrant at all for taking any contrary view within the writ jurisdiction.

Hari Vishnu Kamath v. Ahmad Ishaque and Ors. (1), relied on.

Union of India V. T.R. Varma (2),

Syed Yakoob v. K.S. Radhakrishnan (3), and

The State of Madras v. G. Sundaram (4)—referred to.

Held, further, that the well-known concept of a lost grant can arise only if theoriginal document or endcument is lost in antiquity and is not forthcoming. In the previous title suit true origin of the endocuments and the proof of title was not only forthcoming but was actually and designedly produced on the record to convincingly prove the nature of the grant. That being so, the plea that the origin of the endowment is lost in antiquity has no legs to stand upon and consequently the principles governing the case of a lost

(1) (1955) A.I.R. (S.C.) 233.
(2) (1957) A.I.R. (S.C.) 882.
(3) (1964) A.I.R. (S.C.) 477
(4) (1965) A.I.R. (S.C.) 1103.

grant are not even remotely attracted.

Held, also, that section 2 (ee) of the Bihar Land Reforms (Fixation of Ceiling Area and Acquisition of Surplus Land) Act, 1961, does not, in any way suffer from the vice of unconsti tutionality and consquently theAct is applicable to agricultural lands owned by Hindu religiousMaths. In a series of cases before the Final Court, every conceivable argument againstsimilar or identia\eal provisions have been consideredby the Supreme Court and repelled.

Begulla Bapi Raju and Ors v. The State of Andhra Pradesh (1), *Sanska Shekhar Moity and ors. v. The Union of India* (2), *Madhusudan Singh and ors. v. The Union of India and ors.*(3), *Dattatraya Govind Mahajan and ors. v. The State of Maharashtra and another* (4), and *Hasmukhlal Dahvabhai and ors. V. The State of Gujarat and ors.*(5)—referred to.

Application by the Mahanth of the Bodh Gaya Math.

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

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

On this reference.

Mr. K.D. Chatterjee, Mr. Awadh Kishore Prasad,' and, Mr. Binod Kumar Singh for the petitioners.

Mr. Ram Balak Mahto (Addl. A. G.), Mr. S. Rafat Alam for

(1) (1983) A.I.R. (S.C.) 1073
(2) (1981) A.I.R. (S.C.) 522.
(3) (1984) A.I.R. (S.C.) 374.
(4) (1977) A.I.R. (S.C.) 915.
(5) (1976) A.I.R. (S.C.) 2316.

the Respondents.

S. S. Sandhawalia, C.J.: The inherent limitations of the writ Court to enter into the thicket of concurrent findings of fact is yet again the salient issue which has come to the fore in this case, referred for decision to the Full Bench. Equally at issue is the applicability or otherwise of the Bihar Land Reforms (Fixation of Ceiling Area and Acquisition of Surplus Land) Act, 1961, to agricultural land, owned by Hindu religious Maths.

2. The writ petitioner, Mahanth Dhansukh Giri, is the Mahanth of the Bodh Gaya Math, and it is averred that he is the common shebait of the seventeen deities on whose behalf this application is made.Admittedly, the Bodh Gaya Math is an old and renowned institution in the region, owning more than 2000 acres of agricultural land in the district of Gaya. On the petitioner's own showing, the then Mahanth, Shree Krishna Dayal Giri, executed a deed of trust dated the 13th of February, 1932 (vide Annexure 11). This deed did not, admittedly, mention any of the deities at all. There by the Mahanth divested himself of the management and set up a Board of Trustees for the management of the trust properties. It is, however,sought to be denied that this deed created any trust. It is averred that the said deed (Annexure 11) was subsequently cancelled by a registered deed dated the 19th of September, 1935, and, it was the Mahanth aforesaid who continued to mange all the properties and the trust deed was not given effect to. Later, the then Mahanth Harihar Giri of the Math instituted Title Suit No. 129 of 1953, claiming the entire properties as his personal properties, which, as an extremely exceptional case, was transferred to, and, tried by, this High Court itself. By its judgment dated the 12th of March, 1955, the Court dismissed the suit holding that the properties were impressed with a public trust. Against the said decision of this High Court, Mahanth Harihar Giri filed civil Appeal No. 484 of 1957 before the Supreme Court of India, which was later

settled by a compromise decree granted by their Lordships on the 9th of Septmebr, 1957. thereby the properties mentioned in Schedule I to the said compromise petition were held to be endowed properties of the Math, Bodh Gaya, of which the appellant was the Mahanth and were burdened with a trust of the religious and charitable nature whilst the properties mentioned in schdule II thereto were held to be the personal properties of the appellant.

3. It is then averred that since the 17 deities were under the management of a common shebait, namely, original petitioner and his predecessor Mahanths, there was no division of the properties betwixt them till the year 1970. However, in the said year the permission of the Board of Religious Trusts was sought for the proposed arrangement of the division of the properties which was legitimately benficial to the deities and sanction to execute a deed was obtained. Accordingly, a deed of arrangement dated the 20th of January, 1970 (annexure 12) was executed by the original petitioner the then Mahanth Shri Shatanand Giri (since deceased), and the properties were carved out in seventeen schedules respectively allotted to the seventeen deities. It is the case that each of the 17 deities being a juristic person could hold land within the ceiling area prescribed even though the properties were not divided between them. It is averred that in making such arrangemnt there was no intention of defeating any provision of law including the ceiling laws.

4. The original writ petitioner, in his capacity as shebait of the aforesaid 17 deities, thereafter filed 17 returns under the Bihar Land Reforms (Fixation of deiling Area and Acquisition of Surplus Land) Act, 1961 (hereinafter called the 'Act'). On the 3rd of August, 1971 Shri A.K.Banerjee, the then Additional Collectior, Gaya, passed order finding that the deities were not left with any surplus land and proceeded to make a recommendation to the Government to grant exemption from the operation of section 5 of the Act (vide

annexure 1). However, the Government (vide annexure 2) conveyed its decision to the collector to the effect that the alleged deed of arrangement (annexure 12) dated the 20th of January, 1970 being neither a gift nor a deed of transfer must be ignored and Shri Mahanth Krishna Dayal Giri's trust was the sole owner of the properties in question and was, there fore, entitled to only one unit under the ceiling law. In accordance with the said decision, the matter went back to the Collector for the purpose of an enquiry under rule 9 of the rules framed under theAct in relation to the proposal for exemption under section 29, Shri B. B. Lal, the then Collector of Gaya, passed the order (annexure3) holding that the trust deed of 1932 created a single trust and did not even mention the 17 'deities' and that the properties were owned by the K.D.G. (Krishna Dayal Giri) trust, which was the single land-holder under section 2(g) of the Act. On or about the 23rd of July, 1975, the original petitioner (since deceased) receieved a draft statement under section 10(2) of the Act showing the entire lands as being held by the said petitioner as a trustee and also showing the land exempted by the Government under section 29 under two notifications dated the 7th of July, 1975 exempted where by 75 acres of land were under section 29(2)(ii) and section 29 (1)(b)(v)exempted from the operation of section 5 of the Act. The writ petitioner, Shri Mahanth Shatanand Giri (since deceased was further allowed to retain 25 acres of land, and thus the draft publication permitted 100 acres of land to be retained and declared about 1896.66 1/4 acres as surplus.

5. The original petitioner then filed objections under section 10(3) of the Act which, in substance was rejected by the Collector of gaya (vide annexure 6) by his order dated 15th of Janurary, 1976. Aggrieved thereby the said writ petitioner filed Ceiling Appeal no. 40 of 1976 befor the Commissioner, Patna which was also rejected by his order dated the 9th of July, 1976 (annexure 7). Against the said

order, the petitioner filed Revision no. 1117 of 1976 before the Board of Revenue but the learned Additional Member, Board of Revenue, disposed of the revision petiton by his order dated the 12th of January, 1977 (annexure 8), rejecting the writ petitioner's stand that the agricultural lands belonged to 17 deities but merely remanded the matter on the incidental question of the exemption of more land and exercise of option to select land to be retained, etc.

6. The primary grievance of the writ petitioners is that all the authorities below have erred in concluding that the properties belonged to the trust and not to the 17 idols. The case now sought to be set up is that the properties in question were endowed by charitably disposed persons centuries ago and the origin of these endowments is lost in antiquity, though admittedly no document creating any of these ancient endowments was available. It is averred that Annexure 9, which is a document in Urdu executed by the then Mahanth in the year 1853, provides some evidence of these endowments.. Reliance is also sought to be placed on another old document (annexure 10) to indicate that the properties mentioned therein covering about 276 bighas were granted to the deities. It is also averred that these documents have been wrongly discarded and rejected by the concurrent orders of the authorities below. The writ petitioners, consequently, seek the quashing of annexures 6,7 and 8 containing orders concurrently passed by the ceiling authorities.

7. In the counter affidavit filed by Ram Swarath Singh, Executive Magistrate, Gaya, the stand of the writ petitioners has been stoutly contro-verted. It is reiterated that the properties belong to a single trust and it is high-lighted that the trust deed dated the 13th February, 1932 (annexure 11) executed by the Mahanth himself did not even remotely make any mention of the alleged 17 deities. The factum of the orders passed by the ceiling authorities is admitted, but the

alleged infirmities therein are stoutly denied. It is pointed out that no such document being the registered deed of the 19th September, 1935 cancelling the earlier deed has been produced and further that according to the terms and conditions of anhexure 11 the Mahanth was not authorised to cancel the original deed of 1932 at all. The filing of Title suit No. 23 of 1951 by the then Mahanth Harihar Giri and its trial and dismissal by the High Court are admitted as also the subsequent compromise in the appeal preferred against the same before the Supreme Court. It is high-lighted therefrom that the entire landed properties belonging to the Bodh Gaya Math fell into two categoreies - (1) consisting of the endowed properties of the trust alone and (ii) the personal properties of the Mahanth Harihar Giri.It is the firm stand that the present case relates to the endowed properties of the trust. It is then the firm stance that the deed of arrangement of 20th of Jannuary, 1970 (Annexure 12) is neither a gift nor a deed of transfer for valuable consideration and had been executed only with a view to defeat the prpvisions of the ceiling Act. It is pointed out that the revenue entry procured after the 9th of Septemher, 1970 or the rent receipts etc., later secured cannot confer any title in favour of the deities. It is highlighted that there is not the least mention of any deity in the compromise petition filed before the supreme court in Civil Appeal No.484 of 1957 and the said compromise petition recognised only one trust which was created by the registered deed of 13th of February, 1932. It is the firm stand that the ceiling Act is applicable to trusts. Lastly, it is averred that if the petitioners consider that the area allowed to be exempted under section 29 is inadequate then it is open to them to approach the Government for exemption of more lands and the extension of the period of exemption.

8. It is manifest from the rival pleadings and equally from the substratum of the arguments of the learned counsel

of the parties that the core question herein is as to what is the true nature of the well-known institution of the Bodh Gaya Math- whether it is a Hindu religious math and consequently all its properties are impressed with a trust of that nature ? That being so, the primal stand of the learned Additional Advocate General Mr. Ram Balak Mahto on behalf of the respondent State is that this issue stands concluded by the concurrent findings of fact which are sacrosanct in the writ jurisdiction. On the other hand, Mr. K.D. Chatterji, learned counsel for the petitioners was equally forceful in assailing the consistent findings of the authorities below and even seeking re-approaial of the evidence and consideration fo additional evidence as well.

9. Now the bedrock of the respondents' stand herein is first on the High Court's judgment in Title Suit No.129 of 1953 *(Mahanth Harihar Giri v. State of Bihar and another)* decided on the 12th of March, 1955. It is the admitted position before us that the disputed properties herein along with all other prperties of the Bodh Gaya Math were the subject matter of the said title suit wherein the plaintiff Mahanth Harihar Giri had claimed them as his personal and separate properties. There is no dispute that the basic *lis* in the said title suit betwixt Mahanth Harihar Giri on one side and the respondent State and the Religious Trust Board on the other was as to what was the nature of the property of the institution known as Bodh Gaya Math. That the issue was considered to be of great significance is evident from the fact that this was one of the rarest of the rare cases which was transrerred for trial by the High Court on the original side though it does not ordinarily exercise such jurisdiction. The matter was fought tooth and nail betwixt the parties and squarely put in issue. Massive evidence was led on either side under the stewardship of eminent counsel late Mr. P.R.Das representing the plaintiff and equally the eminent Advocate General representing the defendants. The

exhaustive judgment of the High Court running into nearly seventy pages rendered by Mr. Justice Ramaswami (as the learned Chief Justice then was)indeed is the *locus classicus* on the matter. tracing the labyrinth of the history of this institution it was noticed that the original grant to it went as far back as the year 1615 when the Mogul Emperor granted Badsahi Sanad to the Math. This was followed later by two Zamindari Sanads by the East India Company which were again granted to the said Math. On the basis of these perimal documents and the surrounding circumstances and after consideration of the mass of evidence the High Court unreservedly held that the nucleus of the property was originally furnished by the said sanads. (being Exhibits 4,4(a),4(c) and 4(d), on the said record) and all subsequent acquisitions to the math property were merelyaccretions to the said nucleus. Equally categoric finding arrived at was that the nature of the property was a math or a monastrery with a *Mahanth* in terms managing the same in trust. Though this was held to be conclusive it was further found that even if this were to be wrong, the subsequent document of turst deed exeouted in 1932 by the incumbent Mahanth himself would leave no manner of doubt that the institution was in every sense a Hindu math or a monastery with all the legal incidents therof in sharp contrast to any other institution. The relevant findigs of the High Court cannot but be noticed in extenso:

> "I think that as a matter of construction the two padashi sanads shoud be taken to be grants of land to Lal Gir Sanyasi impressed with a charitable trust. This conclusion is supported by an examination of two zamindari sanads (Ext.4/c) printed at page 6 of Exhibit 1.
>
> In the present case I am satisfied that the grants of land to Lal Gir Sanyasi were made for the object of Sadabarat or feeding itinerant faqirs

and it is not correct to say that there was a mere expectation or motive on the part of the donor.

The trust deed, therefore, shows almost in a conclusive manner that the villages covered by the original sanads were treated as properties belonging to the math and that they were impressed with a charitable trust.

I have now reviewed the evidence as regards the subsequent conduct of the parties and the usage of the properties. The evidence proves beyond any shadow of doubt that the properties conveyed by the Badshahi and the zamindari sanads were treated as the properties of the Math by Mahanth Sheo Gir and by Mahanth Krishna Dayal Gir. The evidence also shows that the British Authorities treated the villages in question as properties granted to the Bodh Gaya Math and as properties impressed with religious and charitable turst. There is also unimpeachable evidence that all the mahanths from Lal Gir right down to the present day appropriated the usufruct of the land in Sadabarat, in distribution of alms to way farers and feeding the Gossains and for other benevolent purposes. In my opinion, the evidence of subsequent usage given on behalf of the defendants and hold that the subsequent conduct of the parties and the usage of the institution support the view that the Badshahi and the Zamindari Sanads were grants made to Lal Gir Sanyasi as head of the monastery for charitable purposes. Upon the analysis of the oral and documentary evidence produced by both the parties I have reached the conclusion that Mahanth Harihar Gir was installed and the *chadar ceremony* was performed on the 13th of February

1932 and not on the 11th Ferbruary 1932. I also find that the trust deed Ext.23 executed by Mahanth Krishna Dayal Gir is a Valid document and that it was acted upon. I have already held that Badshahi and Zamindari sanads when construed in the light of the usage and the conduct of the parties are really grants of properties to the monastery of Both Gaya and that a charitable trust was stamped upon the properties. It is clear that the case of the plaintiff must fam upon this finding alone. If, however, I am wrong in my view as to the construction of the sanads the plaintiff must also fail on the alternative case set up by the defendants. The plaintiff must fail because Mahanth Krishadayal Gir executed a valid trúst deed on the 13th of February 1934 on which date Mahanth Harihar Gir was installed. The deed of trust (Ext.22) executed by Mahanth Krishna Dayal Gir is an irrevocable document and the deed of cancellation (Ext.24) executed on the 19th of September, 1935, has, therefore, no legal effect."

It was on the aforesaid categoric findings that the suit of the plaintiff Mahanth Harihar Giri was dismissed with costs.

10. It is further significant that the matter was then carried to the supreme court in Civil Appeal No.484 of 1957 by the plaintiff appellant aforesaid.However before their Lordships an amicable compromise was arrived at broadly in line with the judgment of the High Court and a decree was passed in accordance therewith. The order again deserves notice in extenso:

"Where as upon Counsel for the appellant filing in the registry of this Court on the 24th April, 1957, a compromise petition duly signed by Counsel for the appellant and Counsel for the

respondents, the matter was placed for orders before the Court on the 6th day of May, 1957 when the Court adjourned the matter *sine die* and also directed the advocte for the appellant to file the petition of appeal and upon Counsel for the appellant filing the said petition of appeal in the registry of this Court on the 6th May, 1957, and the matter being called on for recording compromise before this Court on the 9th day of September, 1957. Upon perusing the said memorandum of compromise *AND UPON* hearing Counsel on both sides this Court doth order that the said compromise appended here to as Annexure 'A' be and the same is hereby recorded *AND THIS COURT* (torn) terms therefore and in substitution of the judgment and decree dated the 12th March 1955 passed by the Patna High Court in Title Suit No.129 of 1953 by and with the consent of the parties *DOTH DECLARE ORDER AND DECREE:-*

(1) that the properties mentioned in Schedule I to the said compromise petition appended hereto as Annexure *'A' are endowed properties of Math Bodh Gaya of which the appellant herein is the Mahanth and are burdend with a trust of religious and charitable nature."*

Now it is the common and indeed the admitted ground before us that the properties mentioned in Schedule I of the said compromise decree are identical with the subject matter of the later land ceiling proceedings and what is now before us. Thus the land which is the subject matter in the present writ petition is the same land which has been finally held to be the endowed property of the Bodh Gaya Math and is burdened with a trust of religious and charitable nature. It is equally the admitted position before us that nothing has

happened subsequent to the decree of the Supreme Court on the 9th September, 1957, which could possibly alter the nature of the hallowed institutionof the Math or the properties endowed thereto.. In a way the seal of the final Court on the matter is conclusive.

11. However, the matter does not merely rest there and with the advent of land ceiling legislation it was sought to be raked up and reagitated in the formums under the BiharLand Reforms (Fixation of Ceiling Area and Acquisition of Surplus Land) Act, 1961. This had a somewhat chekered history, every detail whereof is not necessary to be referred to laboriously. It suffices to mention that after the preliminary proceedings the matter was first decided by Shri B. B. Lal, the Collector of Gaya, vide Annexure '3'. By an exhaustive and lucid order running into 20 pages, in which he appraised all relevant evidence produced and dealt with every conceivable argument raised on behalf of the petitioner, he concluded asunder:

> "My findings are as follows:
>
> (a) The original trust deed executed in 1932 does not make any mention of the 17 deities and mentions only one and single trust. The argument that the 17 deities have separate establishment and separate managemnet does not hold good.
>
> Thus in accordance with section 4 and 5 the trust is entitled to only one ceiling and not 17 as claimed by the respondent."

An appeal against the order of the Collector was then taken to the Commissioner. In an equally detailed order the learned commissioner considered the matter in depth with particular reference to the main issue

raised before him that the alleged 17 deities were individual land - holders and thus entitled to their permissible area accordingiy. In no uncertain terms the Commissioner agreed and affirmed the findings of the Collector. Aggrieved thereby the petitioners preferred a revision before the Board of Revenue. The learned Additional Member, with meticulous detail, dealt with the 4 issues reised before him exhaustively. On the main point he concluded as under:

> "The first point to be determined is whether the properties belong to the Trust or to the Idols. I have perused the documents referred to on behallf of the petitioners in support of their contention that the properties belong to the deities. The document of 1853 is in Urdu but from the Hindi rendering of the Deed reproduced in the Paper Book submitted before this Court, it would appear that this document contained some instructions to the chela by the then Mahanth who was going on pilgrimage regarding arrangemnts to he made for the temples etc., in his absence. In this document there is a passing mention that whether property existed then belonged to the deities mentioned in the document from the letter of 1881 (1288 Fasli)it appears that a little more than 276 bighas of land were given by Raja of Tekari for Ragbhog etc. of the 17 deities. Whatever might have been the position in 1853 or even in 1881, one fact is clear that a Trust known as Mahanth Shri Krishna Dayal Giri Trust was created on 13.2.1932 in terms of which all prpperties were vested in the Board of the Trustees after divesting the Mahanth of his authority over these. According to this deed, neither the Trustees nor even the Board of

Trustees was authorised to transfer any property except on Thika up to a maximum period of nine years. The Trust Deed executed in 1932 does not make any mention of the separate entity of the 17 deities but mentions only one single Trust. This Trust Deed has continued to be acted upon and has not been challenged by anybody and must be held to be in operation even now in spite of the Deed of Arrangement of 20.1.1970 which is admittedly an internal arrangement for the upkekp of the separate deities. It is also significant to note that this Deed of Arrangement has been signed by Mahanth Satanand Giri as Executant (and not by the Trustees) and again by himself on behalf of the deities.It is also significant that no authorisation for executing even this Deed of Arrangement appears to have been given by the Board of Trustees. The contention of the learned State Counsel that this arrangement was made with a view to escaping the provisions of the ceiling law cannot be easily dismissed. In view of what has been mentioned above, the Trust and not the 17 idols must be held to be the owners of the property and must be held to be the land-holders for the purposes of the Act. Considering the above facts, the contention of the petitioner on this point must fail. The simple fact of mutation of their names and that also after 9.9.1970 does not create any title in favour of the deities because the Deed of Arrangement could not and did not transfer any property in favour of these deities."

12. To sum up on this aspect it seems manifest that way back in 1955 this High Court in Title Suit No.

129 of 1953 *(Mahanth Harihar Giri v. State of Bihar and another)* held in unequivocal terms that the institution at Bodh Gaya was a math or a monastery with a Mahanth in terms managing the same and the properties there of were burdened with a trust of religious and charitable nature. That finding received the seal of approval of the final court in the compromise decree granted by their Lordships of the Supreme Court. Thereafter the Collector of the District on an appraisal of all the relevant evidence had come to the conclusion that the Bodh Gaya Math was a trust and thus entitled to only one ceiling and the claim that there were 17 deities all individually entitled to hold permissible area was said to be one to avoid the ceiling laws. Those findings were affirmed by the Commissioner in a considered order. This in terms was upheld by the Board of Revenue, which even in the revisional jurisdiction examined the matter in great depth. It must, therefore, inevitably be held that the institution at Bodh Gaya is a Hindu religious Math and consequently all its properties are impressed and burdened with a trust of the said religious and charitable nature.

13. In the light of the above what deserves high lighting is the fact that the issue herein has not to be considered as if it was a matter of trial in a suit. Nor can it be examined as if it was an appeal against the forums under the ceiling law. It necessarily has to be considered within the parameters of the writ jurisdiction. It was pointed out by learned counsel for the respondents and in my view rightly that the issue as to what is the true nature of a particular institution is in ultimate essence a finding of fact to be arrived at on the basis of the relevant evidence adduced. That being so, it was virtually the admitted position that the present case cannot even remotely be suggested as a case

of no evidence where perhaps the writ court may be inclined to disturb the findings of fact. Equally well-settled it is that the defficiency or credibility of evidence is not an issue in this forum. consequently the consistent and concurrent findings of the collectory, the commissioner and ultimately of the Board of Revenue must be treated as sacrosanct. This is now so well-settled that it seems unnecessary to multiply authorities on the point. In the celebrated case of *Hari Vishnu Kamath v. Ahmad Ishaque and others (1)* the law was ennuciated in the following categoric terms by Venkatarama Ayyar, J.:

> "One consequence of this is that the Court will not review findings of fact reached by the inferior Court or Tribunal, even if they be erroneous. This on the principle that a Court which has jurisdiction over a subject-matter has jurisdiction to decide wrong as well as right, and, when the Legislature does not choose to confer a right of appeal against that decison, it would be defeating its purpose and policy, if a superior Court were to re-hear the case on the evidence, and substitute its own findings in 'certiorari.' These propositions are well settled and are not in dispute."

The aforesaid enunciation has beenadhered to unreservedly in *Union of India vs. T.R. Varma* (2) *Syed Yakoob vs. K. S. Radhakrishna* (3) and *The State of Madras vs. G. Sundaram* (4).

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(1) (1955) A.I.R (S.C.) 233

(1) (1957) A.I.R.(S.C.)882

(2) (1964) A.I.R. (S.C) 477

(3) (1965) A.I.R.(S.C.)1103

14. Respectfully following the binding mandate aforesaid, it is manifest that the factual aspect herein thus stands concluded by the consistent and concurrent findings of as many as four forum and within the writ jurisdiction there is no warrant at all for taking any contrary view.

15. In view of the above, hardly any other argument survives in this specific context. However, as a one time exception, and, in fairness to Mr. K. D.Chatterjee, the learned Counsel for the petitioner, one must briefly notice his ingenious attempt to set up an altogether new case to bring it within the well known concept of a lost grant. Relying on Annexures 10 and 11, it was suggested that the origin of the endowment in favour of the deities was lost in antiquity, but the aforesaid doccuments could be a pointer that the properties of the Math were vested inthe deities. Particular reference was made to the recitals in Annexure 9, which purports to be of the year 1853, and those in Annexxure 10 which is allegedly of the year 1883, to say that the properties belonged to separate deities. It was argued that if the deities or idols were originally endowed with properties in the hoary past, then the Shebait or the Mahanth could not change the character of the said properties by either creating trust deed or any other mode. It was the stance that properties once vested in the deities cannot be divested by the act of the Shebait or of the Mahanth, because the same would plainly be an act of bad management.

16. The aforesaid contention might bring some credit to the ingenuity of the learned counsel for the petitioner, but the same is neverthelesss wholly untenable on the present record. The finding of this HighCourt in the earlier title suit and the compromise decrees of the Supreme Court establish couclusively that the properties in question belong to a Math, namely, the Bodh Gaya Math, and not to any deity or deities. The true origin of the endowments and the proof of title was not only forthcoming but was actually

and designedly producad on the record to convincingly prove the nature of the grant. That being so, the petitioner's plea that the origin of the endowment is lost in antiquity has no legs to stand upon. Consequently, the principles governing the case of a lost grant are not even remotely attracted. The High court in the title suit had come to the firm finding that the origin of the endowment and the proof of title was rested on two *Badshahi Sanads* and the two *Zamindari Sanads*, expressly granted to the Bodh Gaya Math. These four Sanads are of the years 1717, 1737, 1733 and 1762. The High Court had unequivocally held that all acquisitions made thereafter were from the nucleus of the said properties,and, therefore, the properties in question either formed part of the aforesaid two *Badshahi* grants and the two *Zamindari sanads* or made through the nucleus of the properties covered by the original *Sanads*. On the petitioner's own showing, Annexure 9 is of the year 1853, and the Sanads are plainly anterior thereto by a century or more. Consequently, the properties having been conclusive held as the properties of the Math or the monastery of Bode Gaya even in the 18th century could not in the yaer 1853 become the properties endowed or dedicated to the deities. Secondly, annexure 9, which purports to contain the desire of the then Mahanth, actually describes him to be the Mahanth of Bodh Gaya Math. Thus, admittedly he is the mahanth and the institution is a Math, of which he has the vested right to manage for the purposes for which the Math was created or dedicated. The mere mentioning of deities therein is thus of no consequence. No evidence whatsoever has admittedly been led with regard to any dedication of properties to any one of the 17 deities individually. Equally, there is no evidence of the usage and the conduct of the parties that the alleged deed (Annexure 9) was ever acted upon. On the contrary, there is voluminous evidence which was duly considered by the High Court in Title Suit No.129 of 1953, and, in consideration of all those materials and also of the

conduct of the parties and usages relating to the properties, it has been conclusively held that the properties were originally endowed and dedicated to the Math.

17. I must also notice that in assailing the freshly floated theory of a lost grant, Mr. Ram Balak Mahato, learned Additional Advocate General, has rightly pointed out that this could arise only if the original document or endowment is lost in antiquity and is not forthcoming. It is pointed out that herein the pesition indeed is in the reverse. The four Sanads (Exhibits 4,4(a), 4(c) and 4(d)) in the title suit were not only available to the *Mahanth*, but were, in fact,produced, proved and relied upon, and these documents are anterior in time to the year 1853, to which Annexure 9 purports to belong. It was argued with plausibility that the writ petitioner cannot launch on a theory of the lost grant by suppressing either the earlier documents or the alleged endowments and now take the advantage of his own wrong.

18. Now specifically assailing Annexure 9,it was pointed out that this document does not provide the least evidenc of any consecration of private property to the deities. It was highlighted that in fact far from any property being specified, indeed none had even been referred to therein. Consequently, the very basic ingredients of a valid consecration of a private property to a deity were altogether lacking. There was no owner, who had divested himself of the property and vested it by consecration to a specific idol. In Annexure 9 the deity in whose favour the same is expressly consecrated is not even named. No line of succession to the property had been laid out. It does not even remotely appear as to who is the donor. In such a situation, therefore, the will of the original donor will prevail and the fiduciary relationship of the Mahanths to the properties of the Math cannot be unilaterally altered by any such pruported declaration. The language of Annexure 9 was itself totally equivocal and therein no reference whatsoever exists that the property was already consecrated to the alleged deity

from times immemorial or by a document lost in antiquity. In fact, the tenor of the document was that the Mahanth was establishing and building the temples and it seems to be no better than a self-laudatory reocrd of his accomplishments. Equally emphasis was placed on the fact that Annexure 9 was merely a passing desire of a Mahanth going on a pilgrimage, and, perhaps, ensuring that in his absence the properties were not usurped by persons entrusted with their temporary management. Such a document could not possibly change the hoary nature of the properties, endowed to and vested in the institution at Bodh Gaya, which was undoubtedly a Math. Equally, there was not the least evidence that any such document had been acted upon.

19. In the light of the above, it is plain that the concept of a lost grant is not even remoteley applicable herein.

20. It is, perhaps, apt to notice as well that the learned Counsel for the petitioner had attempted to assiduously assail the concurrent findings of fact in the case as well. The correctness and the reasoning of the High Court's judgment in title Suit No.129 of 1953 was sought to be challenged. It was argued that part of the findings therein were rested on the concession of Mr. P.R. Das, the distinguished learned Counsel for the plaintiff in the said suit. This right concession was now sought to be assailed before us. It was equally suggested that the findings in the title suit were not binding upon the petitioner *stricto sensu* as the deities themselves were not parties thereto. It was argued that had the document (Annexure 9) been proved on the record, it could not be predicted as to which way the judgment of the High Court might have turned.

21. Lastly, it was the case that the specific contents of the cmpromise decree in the supreme court that Schedule 'A' pertained to the endowed properties of the Bodh Gaya Math, of which the appellant was the Mahanth and these were

burdened with a trust of such a religious and charitable nature, was irrelevant to the issue. Similar challenges were also made to the findings arrived at by the Collector, the Commissioner and the Board of Revenue. It suffices to notice that for the reasons recorded in the earlier part of the judgement, any challenge to the basic issues of fact and the credibility, quantum, and sufficiency, of evidence does not arise for consideration in the writ jurisdiction.

22. I may also notice that ancillary submissions on the premise that the properties herein belonged to the 17 deities,separately and individually, were also sought to be addressed, including the claim that each one of the deities would be thus entitled to a separate unit for the porpose of the ceiling law. Since I have come to the categoric finding, in affirming the consistent and concurrent view of the authorities below, that the institution at Bodh Gaya is a Hindu religious Math and consequently, all its properties are impressed and burdend with a trust of such religious and charitable nature, it seems not only unnecessary but wasteful to advert to those submissions. It is well settled that the High Court does not ordinarily adjudicate upon mere a cademic issues. Having rejected the premise of the properties belonging to the 17 deities, it is unnecessary to examine the contentions resting on that assumption.

23. It was also argued that considering the antiquity and the importance of the institution of the Bodh Gaya Math, the area of land exempted under section 29 of the Act is totally inadequate. The ancillary submission was that the exemption under the same section, limited to a period of 5 years, is illegal. A reference to the scheme and language of section 29, and, in particular sub-section (3) thereof, would indicate that the quantum and the period of exemption is primarily for the government to determine. The same is vested in the reasonable discretion of the state Government and nothing has been brought on this record to indicate that

such discrestion has either been perversely or arbitrarily exercised. Neverthless, it is to be hoped that the authorities would examine the claim of the Math under section 29 with the care and consideration which it may deserve.

24. One must now proceed to examine the pristinely legal issues which were sought to be canvassed on behalf of the petitioner. It was submitted that an idol or consecrated deity is outside the purview of the Bihar land Reforms (Fixation of Ceiling area and Acquisition of Surplue Land) Act since I have already come to the conclusion that the properties herein do not belong to or are vested in any deity, the issue does not call for any examination or adjudication.

25. In the alternative it was submitted that if religious endowments or trusts are within the purview of the Act, the same must be held to be violative of Articles 14 and 26 of the Constitution. Specific attack was focussed on section 2 (ee) of the Act, which defines 'family' and Explanations I and II thereunder. It was the case that the Act, in so far as it violates Articles 14 and 26, would not be saved by its inclusion in the Ninth Schedule to the Constitution.

26. I am afraid, it is somewhat too late in the day to raise a challenge to the constitutionality of the ceiling laws in general and the Act in particular. In a series of cases before the Final Court, every conceivable argument against similar or identical provisions have been considered by the supreme court and repelled. Recently, in *Begulla Bapi Raju and others v. The State of Andhra Pradesh* (1) a specific challenge to the definition of 'family unit' in the Andhra Pradesh Land Reforms (Ceiling in Agricultural holdings) Act, on the ground of the same being violative of Article 14 of the Constitution was, inter alia,raised and, on an

(1) (1983) A.I.R. (S.C.)1073

exhaustive consideration, rejected by the Bench. In *Sasanka Shekhar Moity and ohters v. The Union of India* (1) the concept of family and clubbing together of land holdings of each member of the family under the West Bengal Land Reforms Act, 1956, was held to be not violative of any constitutional provision. Equally the applicability of the ceiling law to a trust was upheld. Again, in *Madhusudan singh and others v. The Union of India and others* (2) the amending provisions of the West Bengal Land Reforms Act were also held as immune from constitutional challenge. Equally well it is to recall that in *Dattatraya Govind Mahajan and others v. The State of Maharashtra and another* (3) closely similar provisions of the Maharashtra Agricultural Lands (Ceiling on Holdings) Act, 1961, of the Punjab Land Reforms Act, 1973, and the Uttar Pradesh Imposition of Ceilingon Land Holdinge Act, 1971, were upheld. Earliter, in *Hasmukhlal Dahyabhai and others v. The State of Gujrat and others* (4) similar provisions of the Gujrat Agricultural Land ceiling Act, 1961, were found to be protected within the umbrella of Article 31B of the Constitution. the chellenge to the constitutionalityof the provisions, therefore, must necessarily fail.

27. To conclude, it must be held that there are inherent limitations in the writ jurisdiction to enter into or disturb the concurrent findinge of fact by authorities having jurisdiction to adjudicate thereon, and that section 2(ee) of the Bihar Land Reforme (Fixation of Ceiling area and Acquisition of Surplus land) Act, 1961, does not, in any eay suffer from the vice of uncnstitutionality and, consequently,

(1) (1981)A.I.R. (S.C.)522,

(2) (1984)A.I.R. (S.C.)374

(3) (1977) A.I.R.(S.C.) 915

(4) (1976) A.I.R.(S.C.) 2316

the Act is applicable to agricultural lands owned by Hindu religious Maths.

28. In view of the above and in the light of the detailed discussion and rejection of the verious contentions raised on behalf of the petitioner, this writ petition must fail and is hereby dismissed. The parties will bear their own costs.

Hari Lal Agrawal, J. I entirely agree

Sushil Kumar Jha, J. I entirely concur in the judgment

S. P. J. Petition dismissed.

FULL BENCH

Before S.S.Sandhawalia, C.J., Uday Sinha and Nazir Ahmad, JJ.

1985

March, 12

Commissioner of Income-tax, Bihar, Patna.

v.

M/s Nathulal Agarwala & Sons.

Income Tax Act, 1961 (Act XLIII of 1961), section 271 (1) (c) as ameded by Finance Act no.5 of 1964– deletion of the word 'deliberately' and addition of the Explanation— *Anwar Ali's case* (76 I.T.R. 696) whether still holds the field despite the amendment — the *Explanation* spelling out a categoric rule of evidence — three rebuttable presumptions raised against the assessee — burden of discharging the onus of rebuttal on the assessee— burden can be discharged by preponderance of evidence — presumption can be rebutted on existing material itself — courts of fact to arrive at a clear conclusion whether the assessee has discharged the onus — nature of the explanation to be rendered by the assessee.

* Tax Case No.65 1974. Re: Statement of Case under section 256 (1) of the Income Tax Act by the Income Tax Appellate Tribunal, Patna Bench, 'A' Patna, in the matter of assessment of Income Tax on M/s Nathunlal Agarwala & Sons., Hazaribagh, for the assessment year 1964-65.

Held, that, the patent intent of the Legislature in amending section 271 (1)(c) of the Income Tax Act, 1961, and omitting the word 'deliberately' therefrom and inserting the Explanation thereto by the Finance Act of 1964 was to bring about a change in the existing law. Consequently the ratio of *Commissioner of Income Tax, West Bengal V. Anwar Ali* (76 I.T.R. 696), which had considered the earlier provisions of section 28(1)(c) (1922 Act) is no longer attracted to the situation. The principal logical import of the *Explanation* is to shift the burden of proof the Revenue on the the shoulders of the assessee in the class of cases where the returned income was less than 80 percent of the income assessed by the Department. In this category of cases the Explanation raises three rebuttable presumptions against the assessee. These may be formulated as under:-

(i) that the amount of the assessed income is the correct income and it is in fact the income of the assessee himself;

(ii) that the failure of the assessee to return the aforesaid correct incoem was due to concealment of the particulars of his income on his part;

or (iii) that such failure of the assessee was due to furnishing inaccurate particulars of such income. The onus of proof for rebutting the presumptions lies squarely on the assessee. This burden, however, can be discharged (as in Civil Cases) by preponderance of evidence. Equally it may not be inflexibly necessary to lead fresh evidence and it would be permissible in the penalty proceedings for the assessee to show and prove that on the existing material itself, the presumptions raised by the *Explanations* stand

rebutted..

Held , therefore, that once the Explanation to section 271(1)(c) of the Income-tax Act, 1961, is attracted subsequent to its amendment, no burden lay on the Revenue to establish fraud or wilful neglect on the part of the assessee and indeed it was squarely on the shoulders of the assess which had remained undischarged and thus the Tribunal's setting aside of the penalty order was plainly unwarranted.

Commissioner of Income-tax, Bihar v. Parmanand Advani (1), Additional.

Commissioners of Income-tax , Bihar v. South Gobindpur colliery Co. (2)

and *Commissioner of Income-tax,v. M/s Central Kooridih Colliery Company* (3), affirmed.

Additional Commissioner of Income-tax, Bihar v. Kashiram Mathura Prasad (4),

Commissioner of Income-tax, Bihar v. Gopal Vastralaya (5),

Commissioner of Income-tax, Bihar v. Binod company (6),

and *Commissioner of Income-tax, Bihar v. Chotanagour Glass Works* (7), overruled.

Held, further, that it is forthe courts of fact aloneto either accept or reject the explanation set

(1) 119 I.T.R. 464. (2) 119 I.T.R. 472.

(3) 59 Taxation 65. (4) 119 I.T.R. 497

(5) 122 I.T.R. 527. (6) 122 I.T.R. 832..

(7) 145 I.T.R. 22[illegible]

out by the assessee or the evidence in support thereof. They must record a clear and categoric finding whether the explanation of the assessee has been accepted and thereby he has discharged the onus laid upon him by law.

It is not the law that any and every explanationby the assessee must be accepted. The explanation of the assessee for the purpose of avoidance of penalty must be an acceptable explanation. He may not prove what he asserts to the hilt positively but as a matter of fact materials must be brought on the record to show that what he says is reasonably valid.

Application by the Commissioner of Income - tax, Bihar.

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

The case in the first instance was placed for hearing before a Division Bench consisting of Uday Sinha and Nazir Ahmad,JJ., who referred the case to a Full Bench.

On this reference.

Messrs B. P. Rajgarhia and S. K. Sharan for the petitioners.

Mr. K. N. Jain for the opposite party.

S.S.Sandhawalia, C.J., Whether the ratio of *Commissioner of Income Tax, West Bengal, v. Anwar Ali* (1) still holds the field despite the designed deletion of the word "deliberately" from section 271(1)(c) of the Income Tax Act 1961 and the pointed insertion

(1) 76 I.T.R.696.

of an exhastive Explanation thereto by the Finance Act No. 5 of 1964 has come to be the focal question in this reference to the Full Bench. Equally at issue is the correctness of either one of the two strands of parallel Judicial thought within this Court itself.

2. Somewhat regretfully it must be noticed that the issues aforesaid arise from an assessment made may back in the year 1964-65. The assessee M/s Nathulal Agrawala & Sons, Hazaribagh, had declared its income at merely Rs.22,116/-. The Income Tax Officer, however, completed the assessment at a nearly four-fold figure of Rs.82,378/-. He included in this assessment a sum of Rs.26,000/- purporting to be in the names of the wives of three of the partners of the assessee firm. Admittedly the Income Tax Officer had required the assessee to explain the nature and sources of these alleged cash credits. This was said to be furnished by the assessee but the same was categorically rejected and an amount of Rs.26,000/- was added to the income as accruing from undisclosed sources. On appeal to the Appellate Assistant Commissioner this addition was in terms challenged, inter alia, but he also rejected the explanation of the assessee and upheld the addition. On further appeal by the assessee the matter came up before the Tribunal which categorically held that the explanation offered by the assessee was rightly rejected by the taxing authorities. However, it acorded a relief of Rs.7,500/- in this account.

3. After the completion of the assessment, the Income Tax officer initiated penalty proceedings. Since the amount of penalty leviable exceeded Rs 1,000/-, he forwarded the matter to the Inspectiong Assistant Commissioner. The latter issued a show cause notice to the assessee to which certain explanations were offered including a written reply dated the 11th of May, 1970. The

assessee's representative was also heard in the matter. Thereafter the Inspecting Assistant Commissioner rejected the explanation and held that in view of the amended provisions of the finance Act of 1964 the added Explanation to section 271(1)(c) of the Income Tax Act 1961 was clearly attracted. He consequently imposed a penalty of Rs.12000/-. The assessee came up in appeal to the Tribunal against the aforesaid penalty order. The Tribunal observed that undoubtedly the case was one where there was a difference of over twenty per cent in the income assessed and the income returned and this had been done after rejecting the assessee's explanation offered by it with regard to the cash credits mentioned above. Never theless, it concluded as follows:

> "The assessee has maintained the books of account in the ordinary course of the business but the same were not accepted and some estimate of sales and rate made. No specific item of omission of sales or parchases was pointed out by the authorities below either in the assesament order or in the penalty order. In our opinion, the authorities below were not rieght in levying the penalty which is deleted. The amount if paid is directed to be refunded."

On the aforesaid facts the following question of law has now been refered to this Court by the Tribunal at the instance of the Commissioner of Income tax, Bihar.

> "Whether on the facts and in the circumstances of the case the Tribunal was legally correct in deleting the penalty of Rs.12,000/- levied by the Inspecting Assistant Commissioner under section 271(1)(c) read with Explanation to that section".

4. This case originally came up for hearing before a Division Bench consisting of my learned Brothers Uday Sinha and Nazir Ahmad,JJ. It was forcefully urged before them that even within this Court there appeared to be two strands of thought with regard to the scope and ambit of the Explanation to section 27(1)(c) of the Income-tax act, 1961 (hereinafter referred to as "the Act") after the amendment by the Finance Act of 1964 and equally about the applicability of the ratio in *Anwar All's case* (supra). In the very Inoid reference order it was noticed that even though *Anwar Ali's case* may no longer be applicable in the context where the Explaination was directly attracted yet its ghost seems to permeate several decisions within this Court as also in some other High Courts. In order to resolve the cleavage of judicial opinion and also to lay down the nature and content of the explanation which must be rendered by the assessee to rebut the satatutory presumption now raised against it, the case has been referred to the Full Bench for an authoritative decision.

5. Mr. Rajgarhia, the learned counsel for the Commissioner of IncomeTax, has plausibly and forcefully assailed the ambivalent stand of the Tribunal in deleting the penalty imposed. It was highlighted that it is common ground that in view of the wide divergerce betwixt the Income dclared by the assessee and the correct income assessed under the Act, the Explanation to section 271(1)(c) of the Act was admittedly attracted in this case. The presumption against, to be mandatorily and statutorily in the assessee in the said explanetion had therefore raised against the assessee. The purported explanation by the assessee stood categorically rejected in the assessement proceedings concurrently by the

Income Tax officer, the Appellate Assistant Commissioner and the Tribunal itself. Equally in the penalty proceedings the Appellate Assistant Commissioner rejected the explanation out of hand and the Tribunal had again in no way deviated from that conclusion. Nevertheless, for wholly unwarranted reasons the penalty had been directed to be deleted. Counsel submitted with force and plausibility that despite the clear legislative intendment in Finance Act No.5 of 1964; the ghost of *Anwar Ali's* case (supra) and the earlier precedents prior to the amendment still straddled the field.The judgments of this court either expressly or impliedly applying the ratio of *Anwar Ali's case* to this post amendment law after 1964 were frontally assailed as patently erroneous.

6. It is manifest from the a bove that the crucial issue herein is the true legislative intent in deleting the word "deliberatly" from section 271(1)(c) and the addition of the Explanation thereto and the resultant coustruction to to placed on these amendments. Equally it is plain that there already exists a vast volume of legal literature on the import and scope of the added Explanation. It may, therefore, be unnecessary to launch an exhaustive dissertation on first principles in this context. Nevertheless, in view of the sharp cleavage of judicial opinion in other HighCourts and, in particular, within our Court itself, which has necessitated this reference, the question has to be examined both against the backdrop of its legislative histroy as also on the language of the statutory Explanation itself.

7. Inevitably one must first advert to the legislative background. Though it is well known. it calls for a pointed notice that the corresponding provision of the present section 271 of the Act was section 28 of the Indian Income Tax Act 1922. When the earlier

statute was replaced by the present Act of 1961, section 271 thereof retained the provisions of the earlier section 28, virtually in pari materia therewith. It deserves highlighting that in construing the provisions of section 28 of the 1928 Act and the unamended section 271(1)(c) of the present Act (that is prior to 1964), there came to the fore two distinct schools of judicial thought. One was represented by the judgment of the Allahabad High Court in *Lal Chand Gopaldas v. Commissioner of Income Tax* (1) Ranged on the other side was the view of the Bombay High Court in *Commissioner of Income Tax v. Gokuldas Harivallabhdas* (2) and the judgments of the Gujarat High Court and our Court taking a similar view. The latter view was tilted heavily in favour of the assessee.

8. Apparently faced with this conflict of judicial opinion and the almost impossible burden of proof, which was laid on the Income Tax Department by the Bombay and Gujarat views, the legislature envisaged, inter alia, an amendment of section271(1)(c) in order to shift the burden of proof in certain cases from the shoulders of the department to clearly those of the assessee, provided specific conditions were satisfied. The underlying purpose for doing so is evident from the following paragraph 17 of the memo explaining the provisions of the Finance Bill of 1964:

> "(17) Concealment of income.- It is proposed to provide that where the income declared by an assessee in the return furnished by him is less than 80 percent of the assessed income (reduced by expenditure incurred bona fide

(1) (1963)48 I.T.R. 324.

(2) (1958)34 I.T.R. 98,

for earning the income but disallowed), the assessee shall be deemed to have concealed his income or furnished inacurate particulars there of and be liable to penalty accordingly unless he produces proof to establish his bona fides in the matter."

The objects and purpose of the legislature in doing so seem to be manifest from the following note on clause 40 of the amending Bill, which latter came to be enacted as the finance Act (No.5 of 1964):

"Clause 40 seeks to amend section 271 of the Income-tax Act to proivide that where the income returned by an assessee is less than 80 per cent of the assessed income, the assessee shall be deemed to have concealed the income or furnished inaccurate particulars thereof and be liable to penalty accordingly, unless he furnishes evidence to prove his bona fides in the matter."

9. It was to effectuate statutorily the aforesaid purpose that the first meaningful change made was by omitting the word "deliberately" from clause (c) of section 271(1) which had earlier existed both in section 28 of the 1922 Act as also in the unamended section 271 of the present Act. Thereafter, an elaborate change was made by the insertion of an exhaustive *Explanation* to clause (c), which is now the primary subject-matter of interpretation. To precisely appropriate the language of the change which was designedly brought by the legislature in this cotext, it becomes necessary to juxtapose the earlier provisions of section 28 of the 1922 Act and section 271(1)(c) of the present Act as it stood prior to the amendment and subsequent thereto:-

Section 28 of 1922 Act	Section 271(1)(c) of 1961 Act: Before Amendment	After amendment
(1)	(2)	(3)
(1) If the Income tax officer, the Appellate Assistant Commissioner or the Appellate Tribunal, in the course of any proceedings under this Act, is satisfied that any person:- (c) has concealed the particulars of his income or deliberately furnished inaccurate particulars of such income, he or it may direct that such person shall pay by way of penalty in the case referred to in clause (a), in addition to the amount of the incometax and super-tax, if any, payable by him, a sum not exceeding one and a half times that amount and in the cases referred to in clauses (b) and (c), in addition to any tax payable by him, a sum not exceeding one and a half times the amount of income-tax and super-tax, if any,if any, which would have been avoided if the income as returned by such person had been accepted as the correct income;	(1) If the Income -tax officer or the Appela\late Assistant Commissioner in the course of any proceedings under thisAct, is satisfied that any person:-.... (c) has concealed the partioulars of his income or deliberately furnished inaccurate particulars of such income, he may direct that such person shall pay by way of penalty, -..(iii) in the cases referred to in clause (c), in addition to any tax payable by him, a sum which shall not be less than twenty per cent. but which shall not exceed one and a half times the amount of the tax, if any, which would have been avoided if the income as returned by such person had been accepted as the correct income. (2) ....."	(1) If the Income-tax Officer the Appellate Assistant Commissioner, or the Commissioner (Appeals) in the Course of any proceeding under this Act, is satisfied that any person:-.....(c) has concealed the particulars of his income or furnished inaccurate particulars of such income— he may direct that such person shall pay by way of penalty,...-(iii) in the cases referred to in clause (c), in addition to any tax payable by him, a sum which shall not be less than but which shall not exceed twice, the amount of the income in respect of which the particulars have been concealed or inaccurate particulars have been furnished. Explanation: Wlhere the total income returned by any person is less than eighty percent of the total income (hereinafter in this Explanation referred to as the correct income) as assessed under section 143 or section 144 or section 147 (reduced by the expenditure incurred

(1)	(2)	(3)
		bonafide by him for the purposes of making or earning any income included in the total but which has been disallowed as a deduction), such person shall, unless he proves that the failure to return the correct income did not arise from any fraud or any gross or wilful neglect on his part, be deemed to have concealed the particulars of his income or furnished inaccurate particulars of such income for the purposes of clause (c) of this sub-section."

10. Now confining oneself first to the change made in clause (c) ofsection 271(1) alone, the significant thing that meets the eye is the designed omission of the word "deliberatly" therefrom. It bears reiteration that this word had equally found place in the earlier section 28 of the 1922 Act. With the extinction of the word "deliberately", The requirment of a designed furnishing of inacurate particulars of income was obliterated. when the legislature pointedly deleted this word, it seems that it clearly did so in order to bring it in harmony and in consonance with the intent and purposes of the *Explanation* which was added thereto. As long as the word "deliberately" existed in clause (c), a conscious mental element would have to be required to be established thereunder and inevitably the burden of proving thereof would have to be on the department. When the legislature contemplated a reversal, or in any case a change in this burden of proof by the addition of the *Explanation* there to, it necessarily first neutralised the provisions of clause (c) by taking out therefrom the word "deliberately" with the express intention of excluding a designed mental element. This aspect has to be permanently kept in mind in construing the Explanation, which was added to clause (c) thereof.

11. Before adverting to the language of the inserted *Explanation*, certain broad characteristics in this context call for particular notice with regard to its nature and scope. It seems plain that the statute visualised the assessent proceedings and penalty proceedings as wholly distinct and independent of each other, at least so far as the applicability of the *Explanation* is concerned. The assessment proceedings necessarily precede and herein are the very foundation of the subsequent penalty proceedings if any. In true essence until the assessment proceedings in the shape of the final determination of the assessed income are completed, the provisions of the *Explanation* could hardly come into play. This is so because

the objective and indeed virtually the arithmetical test (which would be elaborated hereafter) is raised basically on the income assessed which has been designated as correct income for this purpose. It is only when this correct income has been determined, that, by comparing it with the returned income of the assessee, the test of the same being less than eighty per cent of the former can be applied. Again, it is only when this test is satisfied and the case squarely falls within the ambit of the higher levels of concealment that the latter part of the *Explanation* would come into play. Therefore, the assessment proceedings and the penalty proceedings must be kept sharply distinct and independent from each other. Equally axiomatic it is that penalty would follow assessment or, in the reverse, assessment of income by the department must precede the penalty there-after, if any, to attract the provisions of the *Explanation*. It is no doubt true that sometimes, even during the assessment proceedings itself, a notice to show cause why the penalty be not imposed is issued when the disparity in the returned income and the likely assessed income is glaringly patent. However, to apply the *Explanation* in its full rigour and the raising of the demand against the assessee in a case where the returned income is less than eighty per cent of the assessed income, penalty proceedings can truly be taken only if the correct income is less than eight per cent of the assessed income, penalty proceedings can truly be taken only if the correct income has been finalised. However, as the point is not directly before us (and, therefore, has not at all been debated) do not in any way wish to opine about the validity of a penalty notice issued prior to the determination of the assessed income.

12. Adverting now to the language of the *Explanation*, an analysis thereof would indicate that for the purposes of the levying of penalty the legislature has made two clearcut divisions. This has been done by providing an objective and,

if one may say so, an almost mathematical test. The touchstone therefor is the income returned by the assessee as against the income assessed by the department and designated as correct income.A case where the returned income is less than eighty per cent of the assessed income can be squarely placed in one category. Where, however, such a variation is below 20 per cent that would fall in the second category. To the first category , where there is a larger concealment of income, the provisions of the newly added *Explanation* become at once applicable with the resultant attraction of the presumptions against such an assessee. However, those falling in the second category, where the variation between the returned income and the assessed income is less or relatively marginal, that would be out of the net of the *Explanation* and continue to be governed by the law as it existed prior to the amendment and the insertion of the *Explanation.*

13. It would necessarily follow from the above that in order to determine the applicability of the *Explanation*, the first exercise is to see as to in which of the two categories the assessee would fall. As noticed earlier, the criterion here is purely arithmetical. If the difference between the returned income and the assessed income varies between 20 per cent or more, then the assessee straightaway falls within the net of the newly added *Explanation*. Once this is so, the *Explanation* is attracted at once and what remains thereafter is to determine the consequences of its application.

14. A close reading of the later part of the *Explanation* would indicate that once it is held that it is applicable to the case of an assessee, it straight away raises three legal presumptions against him. for clarity's sake, these may be formulated as under:-

(i) that the amount of the assessed income is the correct income and it is in fact the income of the assessee

himself:

(ii) that the failure of the assessee to return the aforesaid correct income was due to concealment of the particulars of his income on his part; or

(iii) that such failure of the assessee was due to furnishing inaccurate particulars of such income.

15. Now, it would follow from the above and the factum of the presumptions spelled out therein that in essence the *Explanation* is a rule of evidence. This indeed appears to be well established both on the language and the principle of the *Explanation* as also by a mass of precedent holding to the same effect which does not need to be referred to. Further, it must at once be pointed out that the presumptions raised by the *Explanation* are not conclusive presumptions. These are only rebuttable presumptions. As is the rule under the civil law, the initial burden of discharging the onus of rebuttal is on the assessee. However, once he does so, he would be out of the mischief of the *Explanation* until and unless the department is able to establish afresh that the assessee infact had concealed the particulars of his income or furnished inaccurate particularls thereof. The nature of the initial onus placed on the assessee herein under the *Explanation* is not unlike the ordinary burden of proof placed on either party in judicial proceedings. The basic rule of evidence is that if the person on whom the onus to prove lies is unable to discharge the same, his cause would fail. It must further be reiterated that the presumption raised herein is only an initial presumption, which is rebuttable by evidence. The burden of discharging an onus to prove thereunder would again be like the one in ordinary civil proceedings, i.e., it can be so discharged by preponderance of evidence. Again, it must not be insisted upon that there is any necessary or mandatory requirment of leading evidence by one of the parties. Such a burden can be discharged by existing material on the record in a specific case. As was

pointed out earlier, the assessment proceedings and the penalty proceedings are distinct and separate. It would be permissible for an assessee under the penalty proccedings to show and prove that on the existing material itself the prsusmption raised by the *Explanation* would stand rebutted.

16. It is apt to highlight that in the penalty proceedings within the tax field as such, there is no room for bringing in the rules of criminal law and insist on a mens rea or proof beyond all reasonable doubt. In this context it is well to recall the observations of the Full Bench in *Commissioner of Income Tax v. Patram Dass Raja Ram Beri* (1) wherein, after a full discussion of the principle and precedent, it was concluded as follows:

> "In view of the aforesaid authoritative enunciations,, it is unnecessary to elaborate the matter further and it would be evident that generally penalty proceedings in a taxing statute are civil proceedings of remedial or coercive nature imposing an additional tax as a sanction for the speedy collection of revenue. Therefore, the imposition of penalty for a tax delinquency cannot possibly be equated with the conviction and sentence for a criminal offence."

It follows from the above that the penalty proceedings are separate and distinct from any nuances of criminality and it, is, therefore, inapt to use the terminology of criminal law, like an offence, crime, or charge etc., which should be scrupulously avoided.

17. Lastly, in this context it appears that apart form the clear language of the *Explanation* it also has the support of a sound rationale behind it. In case of concealment of

(1) 132 I.T.R. 671.

income and tax evasion (in must be regretfully said that this seems to have, in a way, become a national syndrome) the modus of concealment is obviously within the special knowledge of the assessee. The settled, and virtually the hallowed, rule of evidence in this context is epitomised by section 106 of the Evidence Act :

> "106. When any fact especially within the knowledge of any person, the burden of proving that fact is upon him."

18. It was in the light of the aforesaid rule of evidence and larger principle that Mr. Rajgarhia for the Revenue rightly assailed the trend of reasoning permeating some of the judgments discussed hereinafter to the effect that the assessee herein was required to prove the negative and consequently the burden was almost impossible to discharge. It was pointed out that in most cases, if not in all, this would indeed be very far from the factual position, since inevitably the undisclosed income or concealed sources are themselves within the special knowledge of the assessee himself alone. Since under the Evidence Act itself the burden of proving such facts is on the person having such special knowledge, the Legislature herein has also rightly placed the same on the assessee. Consequently once the presumption of law under section 271(1)(c) of the Act is raised against the assessee, it is for him to prove by adducing material or exhibiting from that already on the record for rebutting or dislodging such a presumption. To whittle down this presumption on the theory that herein the burden has been laid to prove the negative does not appear to me as justifiable.

19. Consequently, in cases of blatant evasion the legislature was compelled to take off the impossible burden of establishing facts which were obviouly within the special knowledge of the assessee alone. The onus was, therefore, rightly placed on the shoulders of the assessee who alone

could reasonably discharge the same. It was apparently the inherent impossibility of discharging such an onerous burden placed on the department (under the unamended provision and the interpretation placed thereon by some of the High Courts) that the legislature was ultimately compelled to bring in the amendment by way of adding the *Explanation* by the Finance Act of 1964. That this was designedly done to effect a change in law appears to be a matter of little doubt. In fact it has been nobody's case that the insertion of the Explanation and the omission of the word "deliberately" from clause (c) of section 271(1) was merely declaratory of the existing law. The changes were obviously brought in to remedy a particular mischief. To say that despite the amendment in clause (c) and the insertion of the Explanation no change was brought about in the law would be rendering the whole of these provisions nugatory and would be violating the settled canon of construction that a meaning must be given to every word in a statute. The rule of interpretation in the celebrated Heydon's case is thus clearly attracted. One must at once look to what was the state of the law before the making of the amendment and what was mischief or defect for which the law did not earlier provide and what remedy had now been provided by the legislature and equally the reasons for that remedy.

20. The stage is for adverting to precedent and inevitably pride of place must be given to *Commissioner of Income-tax, West Bengal I, and another v. Anwar Ali* (1) a perusal of the judgment therein makes it menifest that the question that had arisen was with regard to the assessent year 1947-48 and, expressly, the law applicable was the unamended provision of section 28(1)(c) of the Income-tax Act,1922. The primary question, which seems to have been determined, was whether the imposition of penalty is in the

(1) 76 I.T.R. 699.

nature of a penal provision, which was answered in the affirmative. The ancillary question was with regard to the nature of the burden upon the Department for establishing that the assessee is liable to payment of penalty under the applicable provisions of section 28(1)(c) of the 1922 Act. It was held that the mere fact that the explanation of the assessee is false did not necessarily give rise to the inference that the disputed amount represents his income and he was ipso facto liable to penalty though the same was good evidence for consideration in that context.

21. It is manifest from the above that in the case of *Commissioner of Income-tax, West Bengal I, and another v. Anwar Ali* (supra) no question whatsoever of the interpretation of section 271(1)(c) of the present Act and the specific change sought to tbe wrought therein by amendment had even remotely arisen and in view of the fact that the assessment pertained to the year 1947-48 it could not not possibly arise. As already noticed, the questions, which fell for determination, were altogether ditferent and not even remotely analogous to what we are herein called upon to decide. It would inevitably follow that because of the amendments wrought in section 271(1)(c) by the Finance Act of 1964 and the designed deletion of the word 'deliberately' therefrom and the insertion of the *Explanation* thereto, the ratio and the reasoning of *Anwar Ali's case*, which had construed the earlier and different provisions of section 28 (1)(c) of 1922 Act, cannot even remotely be applicable for the construction of section 271(1)(c) as now amended.

22. Apart from principle, there appears to be a near unanimity of precedent (barring some marginal discordant notes) for the view that the deletion of the word 'deliberately' and the addition of the explanation to section 271(1)(c) introduced by the Finance Act of 1964 were intended to make clear change in the earlier law and have spelt out a categoric rule of evidence raising three rebuttable

presumptions against the assessee in cases where the returned income was less than 80 per cent of the assessed income. In the forefront herein is inconsistent and unbroken line of precedent in the Allahabad High Court, whose earlier view seems to have been expressly accepted by the Legislature in preference to the contrary opinion prevailing in the Bombay High Court the latest exposition thereof is by Satish Chandra, C.J., in Additional *Commissioner of Income-tax v. Ram Prakash* (1) in the following words:-

> "Taking up the last feature first, the position is that cla (c) to s. 271(1) used the word 'deliberate' in connection with the phrase 'furnish inaccurate particulars of such income'. The word 'deliberate' was omitted by the Finance Act of 1964 which came into force on 1st April, 1964. Clause (c) as it stood after the amendment provided that the assessee has concealed the particulars of his income or has furnished inaccurate particulars of such income. It is no longer necessary to establish that those actions weredeliberate on the part of the assessee. The view that it is necessary to establish that the assessee deliberately acted in definance of law, etc., is not tenable after 1st April, 1964.
>
> *The Explanation which was added with effect from 1st April, 1964 completely reversed the burden of proof in cases where the returned income was less than 80 per cent of the assessed income.* In this class of cases the *Explanation* provided that the assesses shall be deemed to have conceale the particulars of income or furnished inaccurate particulars of such income for the purpose of cl.(c) unless he proves that the

(1) 128 I.T.R. 559 (All.)

failure to return the correct income did not arise from any fraud or any gross or wilful neglect on his part. In other words, the presumption is that the assessee has concealed or furnished inacourate particulars. This presumption is rebuttable only if the assessee proves affirmatively that the failure to return the correct income was not due to fraud or any gross or wilful neglect on his part. Thus, the burden is squarely on the assessee, not in relation to concealment either of income or of particulars thereof, but in a very distinct matter. The burden of proof on the assessee is that the failure to return the correct income was not due to either of the three things, fraud or gross or wilful neglect. On this aspect, the burden cannot be shifted on to the department hy merely saying that the explanation offered by the assessee that the amount in question was not his income though not believable acceptable, yet the mere disbelief will not lead to the conclusion that he was guilty of fraud or gross or wilful neglect. By saying so, in substance, the burden is shifted without any material."

Totally, in consonance with the above are the observations of the Division Benches of the Allahabad High Court in *CIT v. Zeekoo Shoe Factory* (1) *Addl. CIT v. Quality Sweet House* (2) *CIT v. Chiranji Lal* (3) and *Mohd. Ibrahim Asimulla v. CIT* (4)

23. In the Orissa High Court, whilst adopting a view in consonance with the above, theDivision Bench, in *CIT v. K.C.Beera* (5) would no longer hold the field inthe contex.t

(1) 127 I.T.R. 837. (2) 130 I.T.R. 309.
(3) 130 I.T.R. 651 (4) 131 I.T.R. 680.
(5) 103 I.T.R. 479

of the amended provision (p.486):-

> "That decision has no application to initiation of penalty proceedings subsequent to April 1, 1964. the *Explanation* brought in radical changes. The object of the *Explanation* was to get over the difficulty created by decisions which placed the burden of proving concealment of the particulars of the income on the revenue as was done in *Anwar Ali's case* (1960) (1) The *Explanation* now places the burden of proving that the tailure to return the correct income did not arise from any frend or anes or wilful "neglect of the assessee. The object of the Explanation is to oreaste a presumption in favour of the revenue in a certain contingency. That is to say, where the total income returned is less than 80 per cent. of the total income assessed, the presumption is a rebuttable one and can be disclosed by the assessee by proving that the failure to return the correct income did not arise from any fraud or gross or wilful neglect on his part."

24. After Division Bench of the Orissa High Court in *CIT v. Puranmal Prabhudhaval* (2) has again conformed to the earlier view.

25. In a recent judgment in *CIT v. Rupabani theatres P. Ltd.* (3)

the Calcutta High Court has exhaustively considered this aspect and taking an identical view has observed as follows

> "In effect, this, in our opinion, makes explicit

(1) 76 ITR 696 (SC).
(2) 106 I.T.R. 675.
(3) 130 I.T.R. 747.

what was implicit in the previous Explanation and in an appropriate case, in our opinion, unless certain presumptions are made, that is to say, presuming it to be an income of the assessee for that year, no question of deeming to have furnished inaccurate particulars or concealed that income would arise. The Tribunal, therefore, in our opnion, was wrong in the legal approach that, after the introduction of the Explanation change was intended which affected the observations of the Supreme Court. Change undoubtedly was intended to be effected, not to nullify the observations of the Supreme Court because those observations were made long after the Explanation had come into effect, but to implement the legislative policy which was felt necessary to ensure implementation of these provisions."

26. The other High Courts also seem to have taken a stand consistent with the above. A Division Bench of the Gujrat High Court in *CIT v. Drapco Electric Corporation* (1) and later followed in *Kantilal Manilal v. CIT* (2) expressed an identical opinion. To the same effect is the judgment of the Madhya Pradesh High Court in *Addl. CIT.v. Bhartiva Bhendar* (3) and that of the Rajasthan High Court in *CIT v. Dr. R.C.Gupta and co.* (4)

27. It remains to pointedly advert to the cleavage of judicial opinion within this Court which necessitated the placing of the case before the Full Bench. As has been pointed out very forcefully by my learned Brother, Uday Sinha, J. in his lucid order of reference. It would seem that

(1) 122 I.T.R. 341
(2) 130 I.T.R. 411
(3) 122 I.T.R. 622.
(4) 122 I.T.R. 567.

the ghost of *Anwar Ali's* case still permeates a number of judgments of this Court despite the legislative mandate and the pointed amendments in section 271(1)(c) by the Finance Act, 1964. This must be finally set at rest and the cob-webs in the penumbral area must be cleansed. Mr. B.P. Rajgarhia, the learned counsel for the Revenue was not far wrong in his assertion that despite the amendment judicial thought has not been wholly able to free itself from the observation in Anwar Ali's case and earlier precedents which had construed the provisions of section 28(1)(c) of 1928 Act or the unamended provisions of section 271(1)(c) of the present Act. There, thus, appear to be two streams of parallel precedent running in this Court even after the amendment-one rightly holding that after the radical change wrought by the amendment of section 271(1)(c) the ratio of *Anwar Ali's* case and earlier precedents it ceased to apply to the situation. The other school of thought still clings in a way to the coat-tails of this ratio, and subjectively re-introduces the same by bringing in afresh the concept of deliberate fraud or concealment by the assessee still to be established by the Department even in cases where the Explanation to section 271(1)(c) is attracted subsequent to its amendment. It would be unnecessary to individually advert to the facts, reasoning and ratio of this line of cases. It perhaps suffices to mention that there was a long era in which section 28(1)(c) of the Income-tax Act, 1922 and the unamended provisions of section 271(1)(c) of the present Act (prior to 1964) had held the field and precedents had interpreted the same. However, it would seem that even after the amendment and the radical change in law the earlier ghost has still continued to permeate judicial thought for a considerable time. Reference inthis context may chronoldgically be made to *Addtional Commissioner of Income-tax, Bihar v.Kashiram Mathura Prasad* (1),

(1) 119 I.T.R. 497

Commissioner of Income-tax, Bihar v, Gopal Vastralaya (1), *Commissioner of Income-tax, Bihar v. Binod Company* (2) and *Commissioner of Income-Tax, Bihar v v Chotanagpur class Works* (3) It calls for pointed notice that in Commissioner of Income-tax, Bihar v. Gopal Vastralaya (supra) the Division Bench approved and followed the decision of the Punjab and Haryana High Court in *Additional commissioner of Income-tax v. Karnail Singh v. Kaleran* (4) which has been subsequently overruled by the Full Bench in its parent Court in *Vishwakarma Industries v. Commissioner of Income-tax, Amritsar* I (5)

28. Categoric view within this Court that the amendment of section 271(1)(c) was intended to bring a radical change and, in fact, to override the line of reasoning of earlier cases and later symbolised by *Anwar Ali's case*. Reference in this context, may be made to *Commissioner of Income-tax, Bihar v. Parmanand Advani* (6) *Additional Commissioner of Income-tax, Bihar v. south Gobindpur Colliery Co.* (7) and the later judgment in *Commissioner of Income-tax v., M/s central Kooridih Colliery Company* (8) wherein it was categorioally observed as under:-

> "After the addition of the explanation, above quoted, with effect from the 1st April, 1964, the position in theis respect has changed and the decision in the cases of Anwar Ali (76 I.T.R. 696) and Hindustan Steel Limited (83 I.T.R. 26) have

(1) 122 I.T.R. 527.
(2) 122 I.T.R. 832.
(3) 145 I.T.R. 225.
(4) 94 I.T.R. 505.
(5) 135 I.T.R. 652
(6)119 I.T.R. 464.
(7) 119 I.T.R. 472
(8) 59 Taxation 65,

no application. Therefore, the question is answered in favour of the Department and against the assessee."

I would unhesitatingly record my agreement with this line of reasoning and affirm the judgments of this Court taking a similar view.

29. For the detailed reasons speltout earlier and for purposes of clarity of precedent, it must be held with the deepest deference that the observations to the contrary-either explicitly or implicitly tending to apply the ratio and the reasoning on *Anwar Ali's* case (even after the amendment of section 271(1)(c) in *Additional Commissioner of Income-tax, Bihar v. Kashiram Mathura Prasad* (1) *Commissioner of Income-tax, Bihar v. Gopal Vestralaya* (2) *Commissioner of Income-tax, Bihar v. Binod Company* (3) and *Commissioner of Income-tax, Bihar v. Chotanagpur Glass Works* (4) do not lay down the law correctly and I hereby overrule them on this point.

30. To conclude on this aspect, it must be held that the patent intent of the Legislature in amending section 271(1)(c) and omitting the word 'deliberately' thereform and inserting the Explanation there to by the Finance Act of 1964 was to bring about a change in the existing law. Consequently, the ratio of Anwar Ali's case, which had considered the earlier provisions of section 28 (1)(c) (1922 Act) is no longer attracted to the situation. The principal logical import of the *Explanation* is to shift the burden of proof from the Revenue on to the shoulders of the assessee in the class of cases where the returned income was less than 80 per cent of the income assessed by the Department.

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(1) 119 I.T.R. 497.
(2) 122 I.T.R. 527.
(3) 122 I.T.R. 832
(4) 145 I.T.R. 225.

In this category of cases the *Explanation* raises three rebuttable presumptions against the assessee as spelt out in detail above in paragraph 14 of this judgment. The onus of proof for rebutting the presumptions lies squarely on the assessee. This burden, however, can be discharged (as in winl log) by preponderance of evidence. Equally it may not be inflexibly necessary to lead fress evidence and it would he permissible in the penalty proceedings for the assessee to show and prove that on the existing material itself. The presnmtpione raised by the Explanation stand rebutted.

31. All that now remains is to consider the question rightly posed in the referring order whether it is enough for the assessee in a penalty proceeding to just set out any sort of explanation and whether the taxing authorities are obliged to accept that explanation without regard to its worth or credibility. It is plain that in the post amendment situation after the Finance Act of 1964 the question is primerily one of fact to be decided by the courts competent to do so rather than one involving any niceities ofthe law. Once the *Explanation* is attracted the law raises a legal presumption that the assessee was guilty of concealing the particulars of his income or of furnishing inaccurate particulers thereof. The onus to dislodge that presumption is thus placed squarely on the assessee and he has to show that this has not arisen from any fraud or wilful neglect on his part. T herefore, it is for the Courts of fact to arrive at a clear conclusion whether theassessee has discharged that onus and rebutted the presumption against him. To put it in other words, it is for them alone to either accept or reject the explanation or the evidence in support thereof. I am afraid that there appears to be some ambivalence on this point by the courts of fact which raises pointless complicantions thereafter. It would, therefore, be necessary and indeed most apt that wherever the Explanation is attracted, the Income-tax Officer or the Appellate Assistant Commissioner

or the Tribunal must record a clear and categoric finding whether the explanation of the assessee has been accepted and thereby he has discharged the onus laid upon him by law. If this were to be consistently done, much avoidable confusion would get out of the way. As to the nature of the Explanation to be rendered by the assessee, it seems plain on principle that it is not the law that the moment any fantastic or unacceptable explanation is given the burden placed upon him would be discharged and the presumption rebutted. It is not the law and perhaps hardly can be that any and every explanation by the assessee must be accepted. In my view, the explanation of the assessee for the purpose of avoidance of penalty must be an acceptable explanation. He may not prove what he asserts to the hilt positively but as a matter of fact materials must be brought on the record to show that what he says is reasonably valid. It bear repetition that the issue is one for the courts of fact whether they will accept or reject the explanation and they should be explicit in recording a finding on the point.

32. Now applying the law laid above, the present case itself appers to be an example of the ambivalence displayed by the Tribunal itself. The Appellate Assistant Commissioner had in no uncertain terms rejected the explanation given by the assessee. In the impugned assess ment proceedings the Tribunal itself (vide Annexure c) had unequivocally held that tthe explanation offered by the assessee was rightly rejected by the taxing authorities. However, in the penalty proceedings the Tribunal, while not in any way deviating from the earlier finding of rejection of the explanation, has proceeded to observe that since the Revenue had not been able to show any specific item or omission of sales or purchase, the penalty imposed could not be sustained. Clearly enough, once the *Explanation* to section 271(1)(c) was attracted, no burden lay on the Revenue and indeed it was squarely on the shoulders of the assessee which had

remained undischarged. The Tribunal's setting aside of the penalty order was thus plainly unwarranted.

33. Accordingly we answer the question of law referred to us (recorded at the end of paragraph 3 above) in the negative, that is, in favour of the Revenue and against the assessee.

Uday Sinha J. I agree

Nazir Ahmad, J. I agree

S. P. J. Question answered.

TAX CASE

Before Uday Sinha and Nazir Ahmad, JJ.

1985

March, 12

*Commissioner of Income-tax, Bihar.**

v.

Motipur Sugar Factory (P) Ltd.

Assessee — not having returned to the dealer the amount of sale-tax refunded to him — whether trading receipt of the assessee liable to Income-tax — Sum realised by assessee for payment to Indian sugar syndicate — not paid — whether trading receipt — whether assessable to tax as income.

Held, that the amount of sales tax refunded to the assessee and not returned by it to the dealers is trading receipt of the assessee and is assessable to tax as income.

Held, further, that the sum realised by the assessee for payment to Indian sugar syndicate and not paid by it till the assessment year in question is also trading receipt of the assessee and is assessable to tax as income.

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*Taxation Case NO. 26 of 1974. Re : Statement of case under section 256 (1) of the Income-tax Act 1961 by the Income-tax appellate Tribunal Patna Bench 'A' in the matter of assessment of Income-tax on Motipur Sugar Factory (P) Ltd. for the assessment year 1964-65.

M/s Chowringhee Sales Bureau (P) Ltd. v C.I.T. West Bengal (1) and *Sinclair Murray and co. P. Ltd. v. Commissioner of Income-tax, Calcutta* (2) followed.

Additional Commissioner of Income-tax v T. Nagireddy and Co. (3) distinguished.

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

The facts of the case material to this report are set out in the judgment of uday sinha. J.

Messrs B.P. Rajgarhia (S.C., ITD), S.K. Sharan and B.N. Agrawal (J.Cs. to S.C, ITD) for the petitioner

Mr. K. N. Jain for the opp. party.

Uday Sinha, J. The core question falling for consideration in this reference is whether sales-tax refunded to the assessee by state government for being refunded to dealers from whom they had been realised and whether sums realised from dealers for payment to Indian sugar syndicate ltd, was trading receipts of the assessee. In this context the following questions have been referred to this court for our opinion :

> "(1) Whether on the facts and in the circumstances of the case the sum of Rs. 66,109/- as sales tax refund lying undisbursed with the assessee did partake of the nature of a trading receipt and was, therefore, income chargeable to tax ?
>
> (2) Whether on the facts and in the circumstances of the case, the amount of Rs. 1,49,945/- under the head Indian sugar syndicate

(1) (1973) 87 I.T.R. 542=(1973) A.I.R. (S.C.) 376

(2) (1974) 97 I.T.R. 615.=(1975) A.I.R. (S.C.) 198

(3) (1976) 105 I.T.R. 669.

Ltd. account did partake of the nature of a trading receipt and hence assessable to tax as income ?"

The assessee is a sugar factory. It had collected Rs. 1,75,548/- from dealers as central sales-tax and deposited them in the government treasury. These collections had been made in accordance with sections 14A and 20A of the Bihar Sales Tax Act. Subsequently the two sections were declared ultra vires by the supreme court. The tax realised on that score was ordered to be refunded. The assessee got a refund of the aforesaid amount in the assessment year 1957-58. This sum was credited to liability account by the assessee, as it had to be refunded to dealers from whom it had been collected. Upto the assessment year 1961-62 the assessee refunded Rs. 61,439/- to dealers. A sum of Rs. 66,109/- remained outstanding with the assessee. This was carried forward under the head liability for other finance". In the assessment year 1964-65, the Income-tax officer treated this amount as income of the assessee.

2. The facts relating to the second question are that the assessee being a member of the Indian sugar syndicate, it had to sell sugar to dealers. The assessee used to charge certain amount payable to the Indian sugar syndicate during 1950-51. These collections amounted to Rs. 1,49,954/-. the syndicate claimed this sum from the assessee, but the assessee also claimed certain amounts as due from the syndicate. The sum thus collected by the assessee remained under dispute and the assessee credited a liability of Rs. 1,49,954/- payable to the Indian sugar syndicate. These sums were carried forward from year to year as liability of the company. During the assessment year 1964-65 this sum was also treated as trading receipt of the company and added as income for the year.

3. The assessment was cofirmed by the Appellate Assistant Commissioner.

4. On further appeal the Tribunal decided in favour of the assessee holding that the refunds to the assessee and the collections on behalf of the Indian sugar syndicate were not trading receipt, but were liability and did not parktake the nature of income. The Department being aggrieved by the order of the tribunal prayed for making a reference to this court which the tribunal did. Hence the present reference.

5. The question referred to us must be held to be finally settled by the decision of the Supreme Court in *M/s Chowringhee Sales Bureau (p) Ltd. versus C.I.T. West Bengal* (1). That was a case where the assessee, was an auctioneer and in that capacity it had realised certain sums as sales-tax. This amount had been credited separately to its books under the (sales collected account). This sum was neither paid over to the state exchequar nor was refunded to the persons from whom it had been collected. For the year in question the Income-tax officer held that the sums collected by the assessee as sales-tax were in reality a portion of the sale price itself, as sales-tax was not the liability of the purchasers of the goods, but was the liability of the sellers. The assessee challenged the view of the Income-tax officer successfully upto the stage of the Appellate Tribunal. The High Court, however, on reference took a different view of the matter and answered the question against the assessee.

The assessee appealed to the Supreme Court and the Supreme Court affirmed the decision of the High court. The Supreme Court held that in selling goods by auction, the assessee, an auctioneer, was a dealer and, therefore, liable to pay sales-tax. The receipt of Rs. 2,71,698/- were therefore, upheld as trading receipts of the assessee. It was contended before the Supreme Court that since the assessee

(1) (1973) A.I.R. (S.C.) 376=(1973) 87 I.T.R. 542.

had credited the amounts received as sales-tax under the head "sales-tax collection account", it would not be a trading receipt. The submission did not find favour with the Supreme Court and was rejected in the following terms;

> "The fact that the appellant credited the amount received as sales-tax under the head sales-tax collection account would not, in our opinion, make any meterial difference. It is the true nature and the quality of the receipt and not the head under which it is entered in the account books as would prove decisive. If a receipt is a trading receipt, the fact that it is not so shown in the account books of the assessee would not prevent the assessing authority from treating it as trading receipt. We may in this context refer to the case of *Punjab Distilling Industries Ltd. v. Commissioner of Income tax*, Simla (1). In that case certain amounts received by the assessee were described as security deposits. This court found that those amounts were an integral part of the commercial transaction of the sale of liquor and were the assessee's trading receipt. In dealing with the contention that those amounts were entered in a separate ledger termed (empty bottles return security deposit account), this court observed;
>
> "So the amount which was called security deposit was actually a part of the consideration for the sale and therefore part of the price of what was sold. Nor does it make any difference that the price of the bottles was entered in the general trading account while the so called deposit was entered it separate ledger termed empty bottles return deposit account for, what was a

(1) (1959) 35 ITR 519 = (AIR 1959 SC 346)

consideration for the sale cannot cease to be so by being written up in the book in a particular manner."

The Supreme Court decision clearly laid down that the amounts realised as sales-tax and lying in the hands of the assessee must be treated as the trading receipts. The same view was taken again by the Supreme Court in the case of *Sinclair Murray and Co. P. Ltd. versus Commissioner of Income-tax, Calcutta* (1).

6. Following the decisions of the Supreme Court the Calcutta High Court in *Commissioner of Income tax, West Bengal III versus Bird & Co. (P) Ltd* (2). held that when a dealer collects sales-tax from his customers, but only pays a portion of it to the sales tax department, the balance of the amount is income in the hands of the dealer is chargeable to tax and the balance amount paid to the government, the dealer can claim the same as allowable income. The amounts collected as sales-tax from the dealer in his custody in excess of the actual liability for sales tax was held to be the income of the dealer.

7. Again in *Pioneer Consolidated Company of India ltd. versus commissioner of Income tax U.P.* (3) a Bench of the Allahabad High court held that sums collected for payment of the customs and other duty and which had not been refunded back to customers were assessable as income of the assessee.

8. The above should have set matters at rest, but learned counsel for the assessee placed reliance upon 1976 105 ITR 669 : *Additional Commissioner of Income tax versus T. Nagireddy & Co.* The reliance is entirely misplaced. That was a case where the assessee maintaining account books in mercantile system had collected sales tax of Rs.

(1) (1974) 97 I.T.R. 615 = (1975) A.I.R. (S.C.) 198
(2) (1981) 128 I.T.R. 600
(3) (1976) 104 I.T.R. 786

17,000/- and odd and got a refund of Rs. 8,000/- and odd from the Sales Tax Department. That was accounted as a trading receipt. In the course of assessment for the assessment year 1968-69 the assessee contended that the entire sales-tax amount is shown as liability in the account books, as it was statutory liability, as the dispute pertaining to it was pending adjudication in the Supreme Court and stay of payment had been granted by it. In those circumstences, it was held that the Tribunal was justified in deducting the amount of sales-tax included in the income of the assessee. This is an entirely different situation from the one with which we are confronted. In the case before us. the controversy before the Supreme Court had been decided in favour of the assessee and taxes paid to the treasury had been refunded to it. The fact that the entire taxes realised had been refunded to the assessee and the assessee had not refunded part of the sum made all the differece from the case of *Additional Commissiner of Income-tax versus T. Nagireddy & Co.* (supra).

9. The decision of the Madras High court in *Commissioner of Income-tax, Tamilnadu-III versus Thrumliswamy Nadu and sons* (1) does seem to support the assessee. The Madras High court in fact similar to ours held that there was no business relationship of any kind between the assessee and the sales-tax Department in the refund granted to the assessee. The sums refunded to the assessee could not, therefore be treated as its income. This decision of the Madras High Court appears to be in the teeth of the two Supreme Court decisions, referred to above, none of which were adverted to by the learned judge of the Madras High Court. I am therefore unable to hold that the Madras decision was correctly decided.

10. The reliance placed by learned counsel for the

(1) (1984) 147 I.L.R. 657

assessee on 1981 130 ITR 238 : *Commissioner of Income-tax, M.P. versus Nathuabhai Desabhai* is equally misplaced. The core question before the Bench of the Madhya Pradesh High court was whether the sales tax refund was taxable in the assessment year 1970-71. The emphasis was on the year in which the sums received by the assessee could be assessed. That is an entirely different matter which need not bother us.

11. Learned counsel for the assessee contended that the assessee having credited the sums in its hand as liability account, it could not be treated as its trading receipts. The submission has only got to be stated to be rejected. The dictum of the Supreme Court in *M/s Chowringhee Sales Bureau (P) Ltd.* (supra) at paragraph 13 is complete answer to this submission.

12. For all the reasons, stated above, I am definitely of the view that sales-tax refunded to the assessee and not returned to the dealers must be held to be trading receipt of the assessee. The same must be the position in regard to sum of Rs. 1,49,954/- realised by the assessee for payment to Indian Sugar Syndicate, but not paid till the assessment year in question. Both items must, therefore, be held to be trading receipts of assessee. Both the questions referred to this court must, therefore, be answered in the affirmative, against the assessee and in favour of the department. The reference is thus disposed of with costs. Hearing fee Rs. 250/- payable by the assessee to the department.

Nazir Ahmad, J. I agree.

R. D. Questions answered.

FULL BENCH

Before S.S.Sandhawalia, C.J., H.L.Agrawal & Uday Sinha, JJ.

1985

May, 9

Kamla Kant Roy & Others.

v.

The State of Bihar & Others.

Rajendra Agricultural University Act, 1971, (Bihar Act, no VII of 1971) section 2 (25)— teacher—definition of — Assistant Research Officers, whether University Teachers within the ambit of the Act and Statutes of the University— whether entitled to University Grant Commissions new revised scales of pay. It is clear that Assistant Research Officers in the Rajendra Agricultural University would be conducting and guiding research or extension education and thus come squarely within the definition of teacher as defined in section 2 (25) of the Rajendra Agricultural University Act, 1971, hereinafter called the Act.In the statutes of the University, they have in terms been equated with Lecturers and Categorised in class III of the teachers. Thus they would come fairly and squarely within the ambit of University teachers.

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* Civil Writ Jurisdiction Case Nos. 3622 and 3674 of 1979 in the matter of applications under Articles 226 and 227 of the constitution of India.

C.W.J.C. No. 3674 of 1979 Upendra Nath Verma and others.

Held, that Assistant Research Officers are University Teachers within the ambit of theAct and the statutes and the authoritative instructions framed thereunder. Consequently they are entitled to the University Grant Commission's new revised scales of pay for such University teachers.

Shree Narayan Roy and Ors v. The State of Bihar. through the Deputy Secretary Agriculture Department, Bihar and Ors. (1)——approved.

Applications under Articles 226 and 227 of the Constitution by the Assistant Reseasch Officer.

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

The cases originally came pu has Ali and S. Narain, JJ and thereafter they were to the Full Bench.

On this reference.

M/s Basdeo Prasad and Hare Krishna Kumar for the petitioners.

M/s S.M. Javed Anwar and Sureshwar Prasad (for Rajendra Agricultural University).

M/s Ram Chandra Jha, J.C. to Government Advocate and Bireshwar Jha "Praveer" (for the State). for the Respondents.

S.S. Sandhawalia, C.J. Whether Assistant Research Officers are University teachers within the ambit of section 2(25) and (26) of the Rajendra Agricultural University Act 1971 and the statutes and authoritative instructions framed and issued thereunder ? If so, whether they are entitled to the University Grant Commission's new revised scales of pay for all University teachers of the Agricultural University? This is the twin question emerging from the difference of opinion betwixt the learned Judges of

(1) (1979) C.W.J.C. no. 4962 of 1978 decided on 9.5.1979.

the Division Bench necessitating its placing for an authoritative judgment by this Full Bench.

2. The matrix of facts, which is broadly common may be noticed somewhat briefly from C.W.J.C. No.3622 of 1979 *(Kamla Kant Roy and others v. The State of Bihar and others)*. Admittedly there are four Faculties inthe Rajendra Agricultural University (hereinafter referred to as "the University"). These are (a) Agriculture, (b) Veter rinary Science, (c)Basic Science and Humanities, and (d) Home Science. Apart from posts sanctioned for these Faculties, a number of posts equivalent to post of Professor and Associate Professor has been sanctioned for the University headquarters. The existing category of posts are these— Deans and Directors, Principals of colleges and Directors of Research Institutes, Professors in colleges and equivalent staff on research and extension side, Assistant Professors in colleges and equivalent staff on research and extension side, and Lecturers/Assistant Lecturers/Assistant Research officers and equivlent staff on extension side.

3. The University Grants Commission formulated a scheme of revised scales of pay for the teachers of Agricultural Colleges and Universities after considering the matter in depth. Thereafter the Indian Council of Agricultural Research agreed to extend the benefit of the University Grants Commission's new revised scales of pay to all the University teachers subject to the conditions as mentioned in Annexure '1' dated the 18th of March, 1975. These include the conditions stipulated in appendix IV thereto. By Annexure 2' dated the 11th of October, 1977, the State Government sanctioned the implementation of the new revised scales of pay in respect of the Rajendra Agricultural University and the Colleges under it. It is significant to notice that though for the first five years the extra financial burden was to be borne in the ratio of eighty per cent by the commission and twenty per cent by the state, the whole of the same

thereafter was to be shifted on the shoulders of the State Government.

4. However, despite the comprehensive decision aforesaid and the broad guidelines issued thereuder, the syndicate of the University in its meeting held on the 7th of November, 1977, took a decision to reorganise the staff pattern and to have only four categories of University teachers. These were (1) Deans/Directors/other equivalent posts,(2) Associate Deans/Professors/other posts of equivalent rank, (3) Associate Professors and othe posts of equivalent rank and (4) Assistant Professors and other posts of equivalent rank. A further sub-division into two was made of the last category also.Though at the time of taking this decision there were admittedly 859 posts of various designations under the category of University teachers as defined in the Act yet it.was decided to reduce the strength of teaching posts substantially from 859 posts of various designations under the category of University teachers as defined inthe Act yet it was decided to reduce the strength of teaching posts substantially from 859 to 560. The remaining nearly 300 posts were decided to be continued till the incumbents thereof were shifted elsewhere whereafter these posts would be treated to have automatically ceased to exist. In relation to this vanishing cadre, the University wrote to the State Government to grant its approval to an altogether new scale of Rs.500-900/-.

5. For the purpose of granting of the upgraded scale of pay recommended by the U.G.C. to persons already holding such or corresponding posts, the Syndicate decided that a Screening Committee be formed to determine afresh the eligibility of such persons on the basis of their academic and service records and the qualifications prescribed by the University. It was decided that the U.G.C. scale should be granted to only such existing teachers including research and extension education workers as were found to be

eligible and fit for the scales on the recommendation made by the Screening Committee and not otherwise. It was further decided that even though a person may have the minimum prescribed academic qualification and was holding the post of a University teacher he would not necessarily be entitled to the U.G.C. scale as a matter of course. If the Scresning Committee found them unsuitable for the grant of U.G.C. scale of pay then they would continue to hold their posts in the old lower scales of pay until they were reverted to the parent department or transferred elsewhere. The posts thus falling vacant would be deemed to have been a bolished with effect from the date they fell vacant.

6. Three of the petitioners, who were Assistant Reserach Officers under the University, filed C.W.J.C No. 4962 of 1978 (*Shree Narayan Roy and others v. The State of Bihar*). In that writ application they prayed for quashing of that part of Annexures 3 and 5 to the writ application by which the University had ordered that they would be given University grants Commission's Scale of pay only after they had been found eligible by the screening Committee to be constituted by the University. The Writ application was allowed in part. Annexure 3 was not quashed. Only that part of Annexure 5 was quashed which affected the petitioners right to receive the University Grants Commission's scale of pay. This decision was given on 9.5.1979. It was thereafter that the two writ petitions have been filed, C.W.J.C. No.3622 of 1979 on 17.12.1979 and C.W.J.C. No.3874 of 1979 on 19.12.1979.

7. There are 15 petitioners in C.W.J.C. No 3822 of 1979 who are Assistant Research officers at various places, as mentioned in the petition. They were, however, either in the sclae of Rs.400-600 or 415-745. They pray for quashing of Annexures 3 and 5. Annexure 3 is the resolution of the Syndicate dated 7.11.77 wherein various declsions were taken including the decision in relation to introduction of

University Grant Commission's scale of pay for the Teachers of Rajendra Agricultural University. As already stated, the benefit of the said scale of pay was allowed to eligible teachers including Research and Extension Education staff of the University with effect from 1.4.75 on terms and conditions as mentioned in Appendix IV. Annexure 5 is the letter dated 29.9.1978 addressed to all the Heads of Institutions. In this letter, it is stated that the screening Committee in its meeting held on 5th and 7th September, 1978, considered the eligibility of the teachers of the University, and their fitness for grant of University Grants Commission's scales of pay. The decision of the Committee is embodied in the enclosed list bearing nos.1 and 1(A) to (E). List 1(E) is the list of teachers (as defined in the Act) who were not found fit for the grant of U.G.C. scales of pay. The petitioners are in this list.

8. These cases originally came up before a Bench composed of Mr. Justice S.Sarwar Ali and Mr. Justice S. Narain. Before it a twin contention was strenuously pressed on behalf of the writ petitioners,namely,(1) that the University Grants Commission's scale of pay is applicable to all the teachers of the University. Assistant Research Officers are teachers within the meaning of the expression as defined in the Act.The petitioners, who are Assistant Research Officers, are therefore entitled to the said scale and (2) that this Court has already held that persons similarly situated as the petitioners are entitled to the aforesaid scale of pay. The decision is binding on this court. The fact that the petitioners were not parties to the writ application does not affect the decision or the benefits which nacessarily accrue on the basis of the said decision.

9. On the first question Sarwar Ali, J.came to the conclusion that the decision of the Syndicate was correct and the petitioners who were Assistant Research Officers, though coming within the ambit of the statutory definition of

University teacher etc., were nevertheless not entitled to the benefit of the new scales of pay available to teachers under the revised proposals of the University Grants Commission. On the second question it was held that the judgment in *Shree Narayan Roy's case* (supra) would not be binding on the parties. It was consequently held that Assistant Research officers cannot be held to be entitled to the U.G.C. scales of pay irrespective of their educational qualifications. Collating his conclusion in paragraph 17, Sarwar Ali, J. dismissed both the writ petitions.

10. However, S. Narain,J. was of the view that the ratio decidendi of *Shree Narayan Roy's case* (supra) would apply and cover the present case as well and the respondents could not, therefore, repel the challenge of discrimination and the contravention of Article 14 of the Constitution. On a further consideration, however, he took the view that the correctness of the Division Bench decision in *Shree Narayan Roy's case* (supra) was itself open to serious doubt. He, therefore, opined that both these cases be referred to a Full Bench for an authoritative decision of the question and that is how the matter is now before us.

11. As noticed at the Very outset, the threshold question herein is whether the Assistant Research Officers are within the ambit of the phrase "University teachers". At the very outset it may be noticed that this question is not to be viewed in the abstract here. It is to be viewed in the inlaid mosaic of the relevant provisions of expert bodies like the Indian Council of Agricultural Research, the University Grants Commission and the Agricultural Universities. Pride of place herein must obviously be given to the Act and the statutes framed therreunder. What calls for notice is the very definition of `teacher' and `University' as spelt out in clauses (25) and (26) of section 2 of the Act in the terms following:

> "2.In this Act, unless the context otherwise requires,—

(25) 'teacher' means a person appointed or recognised by the University for the purpose of imparting instruction or conducting and guiding research or extension education and includes a person who may be declared by the Statutes to be a teacher."

(26) "Uniiversity' means the Rajendra Agricultural University established and in corporated under section 3."

Now plainly enough clause (25) is indicative of the clear legislative design to give an expanded meaning to the word 'teacher' for the purposes of the Act and the things done subservient thereto.The very purpose of defining the word 'teacher in a widely couched language can leave little manner of doubt that the legislative intent here was not to constriot the meaning of the word but indeed to give it a wider and broader concept. It is plain that clause (25) is not envisaging the word 'teacher' in the narrow constricted sense of a person who actually teaches in a class room to his students face toface. the word 'teacher' has been expansively given four distinot connotations here:

(1) A person who imparts instruction.

(ii) A person who conducts and guides research.

(iii) A person who conducts and guides extension education.

(iv) A person who may be declared by the statutes to be a teacher.

I am of the view that because of the aforesaid definition and the wide ranging language employed it is unnecessary to labour the point that the Act has given an enlarged and expanded definition of the word 'teacher'. There appears no reason, therefore, to artificially censtrict it or confine it to the actual teaching in a class room face to face. It includes within its sweep three distinctly other

categeries including a deemed fiction of a declaration by the statutes of any person as a teachereven though he may not be remotely performing any duty even remotely analogous thereto. Therefore, reading clauses (25) and (26) together the phrase "University teacher" is obviously a wide ranging one.

12. Though hardly any doubt would remain from the a foresaid language of the Act itself yet the same view is buttressed by reference to the statutes framed under the powers expressly given by section 35 of the Act. Statute 19.15 deals with the election of teachers to the senate and clsuse 1(b) thereof reads as under:

> "Teachers as defined inthe Act in Class III (Lecturers and Assistant Reserch Officers and Junior Research Officers or equivalent rank) shall be placed in another group."

The above provision would thus make it manifest that the Assistant Research Officers are expressly referred to teachers defined in the Act and further categorised for the purpose of service in class III and are expressly made equivalent to lecturers.

13. Equally reference is called for to Statute 17.1, which is in tabular form showing the qualification, composition of selection committee, appointing authority, etc. for recruitment to technical,non-technical and administrative posts of the University. Reference to serial No. 10 of the said Statute would show that Assistant Research Officers are bracketed as an equivalent and, indeed, identical to Lecturers and Assistant Lecturers. The prescribed qualification for all the categories is again identical being a high second class Master's degree or its equivalent in the subject concerned. Equally the constitution of the selection committee for appointment to all these posts is identical as also the appointing authority,

which is the Vice-Chancellor. this is again a pointer if not a conclusive factor for indicating that the Statutes treat Lecturers, Assistant Lecturers and Assistant Research Officers on an absolutely equal footing.

14. Therefore, viewing the matter within the parameters of the Act and the Statutes, it is clear that the Assistant Research Officers would be conducting and guiding research or extension education and thus come squarely within the definition and in the Statutes they have in terms been equated with Lecturers and categorised in Class III of the teachers. Thus, they would come fairly and squarely within the ambit of University teachers.

15. Now, once it is so held, the consequential question is whether the Assistant Research Officers would be University teachers entitled to the U.G.C's new revised scales of pay. To my mind the answer herein is again in the affirmative and plainly in favour of the writ petitioners. Now apart from the Act and the statutes, reference may be made to Annexure '1' which is the admitted and the authoritative communication of the Indian Council of Agricultural Research addressed to all Agricultural Secretaries and the State Governments declaring the fact that the Council has agreed in principle to extend the benefit of the University Grants Commission's new revised scales of pay for all University teachers subject to the condition mentioned therein. It is clear therefrom that though at the initial stage central assistance would be available from January 1, 1973 to March 1979, the State Government would bear the entire balance of the expenditure and would not pass on the liability of any portion thereof to the Universities or the Management of colleges. Further after April 1, 1979 the State Government would take over the entire responsibility for maintaining revised scales of pay. It is significant that this communication expressly brings within its scope all University teachers without any constriction or further

qualifications. Now a reference to Appendix IV of Annexure 1 would further indicate that a somewhat liberal view was taken on the grant of these grades and it was even provided that the existing lecturers in colleges, who did not at the time of their initial recruitment even possess the minimum qualification prescribed by the University, Should be given a period of five years to attain these qualifications from the date of their place ment in the revised scale, If they were unable to do so during this period they should not be allowed to earn any future increrment. This again seems to make plain the intent that even this class would become entitled to the revised grades forthwith subject to the acquistition of qualification later. Therefore, a true construction of Annexure 1 would indicate that the Indian Council of Agricultural Research had in terms adopted the grant of revised U.G.C scales of pay to all University teachers without restriction or qualifications. What then calls for pointed notice is Annexure 2, the communication of the State Governemtn itself to the Accountant General, Bihar This again in terms stated that posts of staff engaged in research teaching and extension which would included the posts of Assistant Research officers, would the included inthe category of teachers if they have been recognised as posts of teachers in the University statutes. As I have already shown, the Assistant Researesh Officers are "squarely within the ambit of University teacher under the Act and the Statute. In the last sentance of this communication the State has expressly agreed to the condition that up to the period of 31st March 1979 it would bear twenty percent of the financial burden whilst eighty percent would have to be borne by the Indian Council of Agricultural Research but with effect from the 1st of April 1979 the State Government shall bear the whole expenses to be incurred in this regard.

16. It is, therefore, manifest that the University Grants Commission, the Indian Council of Agricultural Research

and the State Government herein were all unaimously of the view that the Assistant Research Officer would be well within the ambit of 'University Teacher's and entitled to the revised grades. It would thus be hardly tenable for this Court to Sadistically exclude them from that benefit.

17. Indeed the matter comes broadly within the larger rule that a construction placed by authrities which have to specifically apply a provision is normally entitled to be given great weight, This is epitomised by a well-known doctrine which has been recognised and affirmed by the final Court in *National and Grindlays Bank Ltd. v. Municipal Corporstion for Greater Bombay* (1) holding in the terms following.

> "The reason is that in a case where the meaning of an enactment is obscure, the Court may resort to contemporary construction, that is the construction which the authorities have put upon it by their usage and conduct for a long period of time. The principle applicable is a optime legum interpres est consuentudo."

18. Turning now to the differing judgments of thelearned Judges which have necessitated this reference, it desrves high-lighting that Sarwar Ali,J., has himself taken the view that the A.R.Os. were within the ambit of' University Teachers' defined n the Act and the reguations. Yet he proceeded to hold that the purposes of the grant of the revised grades the expended meaning expressly given by the statute should be cut down to a narrower constricted import confining University Teachers to those persons who actually imparted instruction in the class rooms only, and in this hierarchy the teachers at the bottom rung would be Assistant lecturers who at the lowest level could possibly claim the benefits of th revised grades. With the deepest deference, I do not find it possible to subscribe to this line of

(1) (1969) A.I.R.(S.C.) 1048

reasoning. As already noticed, if the statutory provisions expressly and the speciallsed bodies in terms include A.R.Os. within the ambit of University Teacher, there appears no reason why they should he excluded from the benefit of revised grade by a process of technical constricted interpretation. To my mind, to do so would be running counter to the terms of the statutory provisions. Herein, it is plain that the language employed by the statute should be paramount and the legislative intent must override any other considerations including those of common parlance with regard to the ordinary meaning of a 'teacher' even if it were so. In my view, it is unjustifiable that even where the statute gives an expanded definition and expressly includes persons conducting or guiding extension education, the Court should ignore the same and confine it only to one branch of persons imparting instruction in class rooms alone. In the present case, I find no compulsive reason as to why the wide ranging concept of 'teacher' under the Act and the statutes should be cut down to the marrow. If at all in a situation where it involves the grant of benefit to a class,it should be construed with liberality rather than with such narrow strictitude as to run counter to the legislative mandate itself.

19. This matter equally deserves examination from a larger and broader angle of vision in the context of agricultural education today. In many fields agricultural research and extension education may be of greater and significant value than the mere imparting of instruction in a clas room. It needs no great erudition to find that it is the result of agricultural research and extension work which have brought about the miracle of the green revolution within the country. Apparently, in recognition of its importance the Act recognises agricultural research and extension education at least as equivalent to teaching if not placing it at a higher pedestal. Therefore, to hold that conducting and

guiding research and extension education cannot come within the ambit of teaching, even when expressly so defined under section 2(25), would be in a way undervaluing the contribution of research and extension education in the agricultural field and degrading it inflexibly in comparison to teaching. I am unable to find any reason which would warrant such a result.

20 In fairness to Mr. Basudeva Prasad, the learned counsel for the writ petitioners, it must be noticed that he contended forcefully - and, in my view, rightly - that the statute did not define 'University Teachers as persons who actually teach and, in fact, had given an expanded meaning to the term and, it was, therefore, unjustifiable to revert to a constricted interpretation. In the flush of the argument, learned counsel had sought to contend that herein only one interpretation alone was possible, namely, that the Assistant Research Officers were squarely within the ambit and entitled to the benefit of the revised grade. Without going to this dogmatic length, Thus if two interpretations were possible, I would still prefer to take the liberal one and in consonance with the statutory provisions and their authentic interpretation by the expert bodies and in favour of the petitioners.

21, In arriving at the conclusion which he did, Sarwar Ali, J., again held that the stand of the State herein would be wholly irrelevant. I am unable to subscribe to this view. As already noticed, the State herein was one of the concerned, if not the most concerned, parties in the sense that after the initial period the whole burden of the revised grade was to be borne by it. Yet the State in terms accepted and included the Assistant Research Officers within the ambit of the University Teachers for the grant of revised grades. Consequently, its stand in this context is not one which can be wholly ignored or given a go-by. Equally it calls for notice that Sarwar Ali,J., had observed that if the

correspondence or stand of the Indian Council of Agricultural Research had supported the case of the petitioner, that would have been relevant and of considerable importance. In the first instance. I am unable to see how any correspondence *inter se* could geatly help in a purely interpretative exercise of determining whether A.R.Os. would he University teachers and thus entitled to consequential benefits. However, even this aspect has been further tilted in favour of the writ petitioners. On their behalf, annexure 20 has been placed on record along with a supplementary affidavit and its authenticity has not been challenged by the opposite party. This document is a communication by the Indian Council of Agricultural Research itself and a perusal of its content would show that it had accepted the inclusion of Assistant Research Officers within the ambit of University Teachers. This adds yet one more string to the bow of the writ petitioners.

22. Again, Sarwar Ali, J., had also taken the view that the failure to implead the Indian Council of Agricultural Research was fatal to the maintainability of the writ application. Somewhat curiously, no such objection was at all raised on behalf of the respondents before us. Even otherwise, I am inclined to accept the argument of the writ petitioners that since no relief whatsoever was claimed against the Indian Council of Agricultural Research, it was not incumbent on the petitioners to implead it. I am of the view that no infirmity whatsoever attaches to the writ petitions on this score.

23. Lastly, Sarwar Ali,J., attempted to distinguish the decision in *Shree Narayan Roy and others v. The State of Bihar, through the Deputy Secretary, Agriculture Department, Bihar and others* (1)

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(1) C.W.J.C. NO. 4962 of 1978 decided on the 9th of May , 1979

and though he obviously took a contrary view, he observed that he did not think that the doctrine of precedent would be violated in this case. S. Narain, J., however, held that the ratio in *Shree Narayan Roy's case* clearly governs the present case also but observed that the correctness of the same was highly doubtful, which, indeed, necessitated this reference to the Full Bench.

24. Before us, learned counsel for the respondents, however, did not lay the least challenge to either the reasoning or the ratio in *Shree Narayan Roy's case* (supra) nor did he make any attempt to meaningfully distinguish the said case. On a close perusal thereof, I am unable to find any warrant for making any departure from the view expressed in the said case, nor is it possible to distinguish the same and, indeed, learned counselfor the writ petitioners . Mr. Basudeva Prasad, was not far wrong in pressing his contention that the ratio of that case squarely governs the present case also and Narain,J., was right in expressly holding so. It seems undeniable that the material facts in the said case were identical and affirming its ratio I would unhesitatingly agree with the undermentioned crucial observation made therin:

> "If certain pay scale is fixed for a particular category of employees, each employee, so long as he continues on that post is entitled to receive the same scale of pay. The employer cannot pick and choose the same scale of pay (sic). The employer cannot pick and choose between the employees in the same category. If he does so, it would be a clear case of discrimination hetween the employees similarly situated. The University's right to screen its employees for the purpose of fixing their pay scale cannot be denied. But if, even after holding a screening test, an employee is permitted to continue on in his old grade, at his

old post, be cannot be denied the pay scale available for that post."

25. To conclude, the answer to the twin question already posed at the outset is rendered in the affirmative. It is held that the Assistant Research Officers are University Teachers within the ambit of the Act and the Statutes and authoritative instructions framed thereunder. Consequently they are entitled to the University Grant commission's new revised scales of pay for such University Teacher.

26. Now in the light of the above, the petitioners are plainly entitled to succeed and this writ petitions are hereby allowed. The offending portions of annexures 3 and 5 are quashed and the respondents are directed to pay to the petitioners the revised scales of pay as sanctioned by the State Government under the direction of the indian Council of Agricultural Research from due date.

H.L. Agrawal, J., I agree.
Udai Sinha, J., I agree

R. D. Petitions allowed.

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