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PATNA SERIES

CONTAINING

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

S. P. Jamuar, M.A., B.L. (Reporter)
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PATNA

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Where a suit is filed for eviction of the tenant on the ground that there has been default in payment of rent and also that the tenant has sublet the premises and the landlord makes an application under section 13 for a direction to the tenant to deposit the arrears of rent at a particular rate and the tenant denied the liability to deposit the rent at the rate on the ground that the authority under the Act had determined the fair rent;

Held, that even in cases where fair rent is fixed, the tenant will have to deposit the rent at rate at which, as matter of fact, it was last paid.

Smt. Bidhotama Devi v. Shri Deoki Sao and another (1985), ILR, 64, Pat.

Bihar Consolidation of Holdings and Prevention of Fragmentation Act, *1956 Section 3(1) and 4(c)—Scope and applicability of—suit in respect of declaration of rights or interest in any land—partial abatement of—whether and when can be ordered.*

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If in a composite suit, the suit relating to relief unconnected with the declaration and determination of title to a land does not abate in relation to such controversy, there is no reason why in a suit of this nature, the suit in relation to the properties in respect of which there is no notification under section 3(1) of the Act, shall abate. A suit or a proceeding can partially abate. It will abate in respect of the lands lying in the area in respect of which the Government has declared its intention to make a scheme for consolidation of holdings by a notification in official Gazette under section 3(i) of the Act. It will not abate in respect of any land for which there is no such notification.

Held, therefore, that in the instant case the suit shall stand abated in respect of the land situate in the district of Vaishali in respect of which there is a notification under section 3 of the Act and the consolidation operations are going on. The suit as regards the lands situate in the district of Muzaffarpur and Patna which are not covered by any consolidation scheme shall not abate and shall proceed.

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

1. Section 16(3)—deed of gift, whether excluded from the purview of section 16(3)—deed of gift challenged as sham and farzi transaction—effect of—Second transfer not a sham and farzi transaction—second transferee added as a party beyond period of limiation neither an adjacent raiyat nor co-sharer—question of limitation, whether relevant to decide as to whether decision can be given in favour of pre-emptor—when entitled to succeed.

A deed of gift is excluded from the purview of section 16(3) of the Act. If, however, such a deed of gift is challenged as a sham and farzi transaction and the authority under the Act finds the allegation to be correct, then for all practical purposes the said deed of gift would be a document non est in the eye of law and the pre-emption application would in such a case proceed against the original purchaser. In the instant case unfortunately for the pre-emptor he has not alleged sham and farzi nature of the

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deed of gift. It has, therefore, to be taken as a fact that the said document if executed and registered in conformity with law would be a valid document and for such a document the legislature has mandated exclusion of the applicability of section 16(3) of Act.

Held, therefore, that in the instant case the order of the Land Reforms Deputy Collector allowing the application for pre-emption filed under section 16(3) and the appellate and revisional order dismissing the appeal and revision respectively are all illegal and liable to be set aside.

Where the second transfer is found to be not a sham and farzi transaction and the second transferee, who has been added as a party beyond the period of limitation counted from the date of registration of the second transfer deed, is found to be not an adjacent raiyat or co-sharer, but the pre-emptor establishes that he is an adjacent raiyat and entitled to be pre-empted;

Held further, that it is in such a case that the question of limitation may be relevant to decide as to whether a decision can be given in favour of the

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pre-emptor or that the application for pre-emption would not succeed because of the bar of limitation. The pre-emptor in such a case would be entitled to succeed only when the second transferee has been added in the proceeding within the prescribed period of limiation counted from the date of registration of the second transfer deed and the application for pre-emption having fulfilled all the conditions laid down in the Act and the Rules made thereunder in relation to the second transfer-deed.

Smt. Priyambada Devi and another v. The Additional Member, Board of Revenue, Bihar, Patna & others. (1985) ILR 64, Pat. 1015

2. Section 16(3)-issue of benami ownership, whether can be raised and decided in a preemption proceeding-whether it is obligatory for the court or pre-emptor to implead the real owner-order or decree against the ostensible owner would be equally binding on the real owner.

Benami purchase with reference to the ceiling law in section 16(3) of the Bihar Land Reforms *(Fixation of Ceiling Area and Acquisition of Surplus Land) Act, 1961, hereinafter called the Act,* can be

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made where neither the original owner's land nor the ostensible owner's land when tagged separately with the purchased land, would exceed the ceiling limit. If, however, it exceeds the ceiling limit then the penal provision of section 17 of the Act will at once the attracted.

It is well established that a provision is not be construed on the presumption that it would necessarily be abused. In a case of benami transaction, where the real owner remains wholly within the ceiling limit, the same would be within the four corners of the law. There is no reason as to why in such a situation, the provision should not be given its plain meaning. Where the same is sought to be misused to circumvent or transgress the ceiling law, the statute gives more than ample and stringent power under section 17 of the Act to curb the same.

Held, that the well established concept of benami transaction is not ousted or abolished for the purposes of section 16 of the Act. The issue of benami ownership can be raised and investigated in a pre-emption proceeding under section 16(3) of the Act.

Held, further, that the bench decision

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tenant subsequently dispossessed by some one—further enquiry, whether called for.

Sections 8(5) and 8(6) of the Act contemplates a situation when after a person having been declared as privileged tenant has been dispossessed by some one. The purcha is granted under the Act after due enquiry and notice to the parties concerned and if after the grant of purcha and confirming possession of a privileged tenant over certain land some one dispossesses a privileged tenant from the land then in that situation no further enquiry is called for. In the case the only thing which has to be found is about illegal possession by third person after dispossessing the privileged tenant. It is in that situation that Rules 3, 4 and 5 do not mention about any application made under sections 8(5) and (6) of the Act. So far as the present case is concerned position appears to be that a purcha was granted to respondent no. 6 in the year 1970 after due enquiry and after giving notice and petitioner no. 1 seems to have purchased a litigation some times in 1979.

Held, therefore, that the alleged possession of petitioner no. 1 is clearly illegal. The law provides that in such a

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court, but the general power is circumscribed by the subsequent addition that those powers will be confined only for the purpose of taking evidence and for enforcing the attendance of witnesses and compelling production of documents. The general provision of the Code of Civil Procedure as such have not been made applicable.

Held, therefore, that in the absence of any specific provision in the Special Act for dismissing an appeal for default as contained in rule 17 of order XLI of the Code of Civil Procedure when the party concerned is absent the appeal should not be dismissed for default. The Legislature has not intended for dismissal of the appeal for default and the appeal of the petitioner in the instant case should have been disposed on merits.

Baidya Nath Prasad Sah v. Presiding Officer, Industrial Tribunal, Patna and others (1985), ILR 64, Pat. 1024

CODE OF CIVIL PROCEDURE, 1908

Order XLI rule 17, See Bihar Shops and Establishments Act, 1953.

1. Code of Criminal Procedure,

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1973—Section 144—order passed by Magistrate against petitioner restraining him from holding Mela on his raiyati land—earlier order by High Court in a writ case in presence of Respondent no. 4 holding that the petitioner has a right to hold Mela on his raiyati land—legality of.

It is clear that repeated attempts were made on behalf of Respondent no.4 to put obstacles so that the petitioner may not hold Mela during Chhath festival on his land bearing plot no. 1977, a raiyati land which is popularly known as Madhopur Sultanpur cattle fair, and the benefits may go to respondent no. 4. The petitioner had to move the High Court on a number of occasions. The High Court by its order passed in Civil Writ Jurisdiction case no. 4620 of 1982 Annexure 4, in which this petitioner and Respondent no. 4 were parties, made the legal position clear that the petitioner had a right to hold Mela on his raiyati land.

Held, that the order of the Subdivisional Magistrate restraining the petitioner from holding Mela during Chhath festival is in the nature of prohibitory order, could, which not be passed under section 144 of the Code of Criminal Procedure, 1973. The Magistrate has

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shown gross carelessness in the discharge of his duty and completely ignored the previous order passed by the High Court.

Held, further, that the order of the Magistrate passed under section 144 of the Code of Criminal Procedure is palpably erroneous, illegal and unjustified and is fit to be quashed.

The object of section 144 of the Code of Criminal Procedure is to preserve public peace and tranquillity and this section does not confer any power on the Executive Magistrate to adjudicate question of title to properties or entitlements to the rights thereof. In cases where all such disputes or titles or entitlements to rights have already been adjudicated and have become the subject matter of judicial pronouncement or of a decree of the Civil Court of competent jurisdiction then in the exercise of such power the Magistrate must have due regard to such established rights and subject of course to the paramount consideration of maintenance of public peace and tranquillity. The exercise of power must be in aid of those rights and against those who interfere with the lawful exercise thereof and even in cases where

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there are no declared or established right the power should not be exercised in a manner that would give material advantage to one party, to the dispute over the other, but in a fair manner ordinarily in defence of legal rights, if there be such an the lawful exercise thereof rather in suppressing them.

Ramashrey Sharan v. The State of Bihar & Others (1985) ILR 64, Pat. 933

2. Section 438-provisions of-application for anticipatory bail rejected by Sessions Judge-accused whether could move High Court for the same relief-Interpretation of Statute-principles of.

In absence of any provision in section 438 of the Code of Criminal Procedure, 1973, debarring a person from moving the High Court for anticipatory bail, when he has moved the Sessions Judge, it will be adding something in the statute which is not there. By any known canon of construction, words of width and amplitude ought not generally to be cut down so as to read into the language of the statute restraints and conditions which the legislature itself did not think it proper or necessary to impose. This is specially true when the statutory provision which

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falls for consideration is designed to secure a valuable right like the right to personal freedom and involves the application of a presumption as salutary or deep-grained in our Criminal jurisprudence as the presumption of innocence. It is the duty of the court to determine in what particular meaning and particular shape of meaning the word or expression are used by the law makers and in discharging the duty the court has to take into account the context in which it occurs, the object to serve which it used, and to give harmonious construction to the various provisions of the Code of Criminal Procedure, 1973 in order to achieve the object.

Held, that a person whose application for anticipatory bail has been rejected by the Court of Sessions, has the liberty to move the High Court for the same relief.

Kusheshwar Prasad Singh v. The State of Bihar (1985) ILR 64, Pat. 943

3. Chapter XXXVI sections 468 to 473 and 482—*Employees Provident Funds and Miscellaneous Provisions Act, 1952—Section 14 and Employees Provident Funds Scheme, 1952—paragraphs 38 and*

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76- failure of employer to deposit contributions in contravention of Paragraphs 38 and 76 of the Scheme read with section 14 of the Act—whether would amount to continuing offence as envisaged in section 472 of the Code so as to make the bar of limitation under section 468 applicable—disputed issues of limitation under section 468 to 473 of the Code—whether can be raised directly in the High Court for the quashing of proceedings under section 482 of the Code—petition of complaint—whether each and every relevant fact and precise number of employees of the establishment must be pleaded—failure to do so, whether would vitiate the proceedings on that score alone.

Held, that, the failure of the employers to deposit the contributions in contravention of paragraphs 38 and 76 of the Employees Provident Funds Scheme, 1952, read with section 14 of the Employees Provident Fund and Miscellaneous Provisions Act, 1952, would be a continuing offence. No question of limitation, therefore, can possibly arise in the context of a continuing offence in view of section 472 of the Code of Criminal Procedure and consequently on account of the delay in launching the prosecution the

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bar of limitation prescribed by section 468 of the Code cannot be invoked.

Held, further, that the disputed issue of limitation under sections 468 to 473 of the Code of Criminal Procedure cannot be appropriately raised directly in the High Court for the quashing of proceedings under section 482 of the Code.

The Concept of limitation under chapter XXXVI of the Code of Criminal Procedure does not present an inflexible or blanket legal bar to the prosecution which may warrant it being raised initially in the High Court itself for quashing the proceedings at the threshold. Indeed it is a question which needs first to be raised and then to be computed and thereafter determined at the earlier stage by the trial court on the basis of a proper explanation of delay or overriding the default if necessary in the interests of justice as envisaged in the provisions of section 473 of the Code.

Held, also, that a petition of complaint for offences under section 14 of the Employees Provident Funds and Miscellaneous Provisions Act, 1952, need not in terms plead each and every minuscule relevant fact nor the precrise

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CIVIL WRIT JURISDICTION

1984/November, 28.

Before Ramchandra Prasad Sinha, J.

*Md. Zainul Abdin**

v.

The Additional Member, Board of Revenue and others.

Bihar Land Reforms (Fixation of Ceiling Area and Acquisition of Surplus Land) *Act, 1961 (Act 12 of 1962), Section 16(3)—Scope and applicability of—lands purchased by two brothers by two different sale deeds and for different consideration money—purchasers also claiming to be adjoining raiyats on the basis of their father holding adjoining land to the lands purchased by them—single application under section 16(3) in respect of both the sale deeds—maintainability of—both the sale deeds taken together, whether constitute only one transaction—no case made out that the two were members of joint family and the purchases in their names were in fact made on behalf of the joint family—Onus to prove that the two sale deeds constituted only one transaction, whether lies on the pre-emptor.*

Where no case has been made out in the application filed under section 16(3) that the two

* Civil Writ Jurisdiction Case No. 2078 of 1979. In the matter of an application under Articles 226 and 227 of the Constitution of India.

brothers in whose names the two different sale deeds were executed are members of the joint family and the purchase in their names were, in fact, made on behalf of the joint family and not their separate acquisition and no evidence was adduced to that effect;

Held, that the onus of proving that the two sale deeds constituted only one transaction was on the pre-emptor which he neither pleaded nor proved and that being the state of affairs, no finding can be given that there is only one transaction in respect of which only one application is maintainable.

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 Ramchandra Prasad Sinha, J.

Mr. L.N.Mishra for the petitioner

M/s. B.P.Pandey, A.K.Jha & Hari Shanker for the respondents.

Ramchandra Prasad Sinha, J. In this writ application under Articles 226 and 227 of the Constitution of India, the pre-emptor-petitioner has prayed for quashing the order dated 21.3.1979 passed by the Additional Member, Board of Revenue (annexure-5) as well as the order dated 28.6.1975 passed by the Subdivisional Officer, Banka (annexure-3) dismissing the application filed by the petitioner under section 16(3) of the Bihar Land Reforms (Fixation of Ceiling Area & Acquisition of Surplus Land) Act (hereinafter referred to as the 'Act').

2. Md. Rafiq Ansari executed two sale-deeds on 26.2.1974; one in favour of Sudin Sah (respondent no. 4) in respect of 81 3/4 decimals of land and the other in favour of Chhabo Sah

(respondent no. 5) in respect of 27 1/4 decimal of land out of plot no. 1344 of khata no. 143 lying in village Ahiro, police station Dhorahia district Bhagalpur. The consideration money mentioned in the aforesaid two deeds is Rs. 3500/- and 1000/- respectively. The registration of both the sale-deeds was completed on 11.3.1974. The petitioner deposited a sum of Rs. 4500/- together with ten per cent thereon as required under the Act in the treasury in favour of respondent nos. 4 and 5 and filed one application respect of both the sale-deeds on 7.5.1974 under section 16(3) of the Act, claiming himself to be adjoining raiyat of the portions of the aforesaid plot conveyed to respondents 4 and 5.

3. Respondents 4 and 5 appeared and filed rejoinder to the application filed under section 16(3) of the Act. In their joint rejoinder petition it was alleged, inter alia, that as there were two separate sale-ddeds with separate and different area and consideration money in favour of two different persons one application for pre-emption is not at all maintainable. It was also alleged that said Chaman Sah father of respondents 4 and 5 holds in the boundary of the aforesaid transferred lands, they also become adjoining raiyats and the petitioner cannot claim pre-emption.

4. The learned Subdivisional Magistrate dismissed the application under section 16(3) of the Act on the ground that one application was not maintainable in respect of two transactions and also on the ground that the father of the respondents 4 and 5 is in the boundary of the lands transferred to them. On appeal by the petitioner his claim for pre-emption was allowed on the ground that the application under section 16(3) filed by the petitioner is maintainable and that the petitioner is the adjoining raiyat, whereas respondents 4 and 5

are not the adjoining raiyats of the lands transferred to them. Respondents 4 and 5 filed revision application under section 32 of the Act before the Member, Board of Revenue, which was heard by Mr. K.M. Zuberi, Additional Member, Board of Revenue, and he rejected the claim of the petitioner for pre-emption mainly on the ground that there being two separate sale-deeds one application for pre-emption is not maintainable.

5. The learned counsel appearing on behalf of the petitioner has contended that since the aforesaid two purchasers are sons of Chaman Sah and they claim to be adjoining raiyats of the lands transferred to them on the basis of the fact that their father holds land in the boundary of the transferred lands, the transaction is one and the application is maintainable. On the other hand, it has been contended by the learned counsel appearing on behalf of respondents 4 and 5 that since there are two different sale-deeds in favour of two different persons, the transactions are two different transactions and therefore a single application under section 16(3) of the Act is not maintainable at all. It has also been contended on their behalf that it has not been pleaded in the application under section 16(3) of the Act that respondents 4 and 5 are members of a joint family and the purchases made in their names were made by their joint family and that they are not their self acquisitions and exclusive properties. No evidence has been adduced on behalf of the petitioner to show that the respondent 4 and 5 are members of a joint family and the purchases made by them under the aforesaid-sale deeds were not their separate acquisition or exclusive properties, rather they were of the joint family.

6. In view of the submissions made on behalf

of the petitioner and the respondents 4 and 5 the main question to be decided is as to whether in the facts and circumstances of the case mentioned above, both the sale-deeds taken together will be a single transaction and a single application under section 16(3) of the Act will be maintainable.

7. In order to appreciate the point involved in this case the relevant provision of section 16(3)(i) is quoted herein below:-

> "16(3)(i) When any transfer of land is made after the commencement of this Act to any person other than a co-sharer or a raiyat of adjoining land, any co-sharer of the transferor or any raiyat holding land adjoining the land transferred, shall be entitled, within three months of the date of registration of the document of the transfer, to make an application before the Collector in the prescribed manner for the transfer of the land to him on the terms and conditions contained in the said deed;
>
> Provided that no such application shall be entertained by the Collector unless the purchase money together with a sum equal to ten percent thereof is deposited in the prescribed manner within the said period."

Rule 19 of the Bihar Land Ceiling Rules which prescribes the manner in which the purchase money together with a sum of ten percent thereof should deposited is quoted herein below:-

> "19. Application by a co-sherer or a raiyat of adjoining land for transfer of land under section 16(3)(i). Application by a co-sherer or raiyat of adjoining land for transfer of land under section 16(3) shall be in Form L.C. 13 and the purchase money together with a

sum equal to ten percent thereof shall be deposited in the Treasury/Sub-Treasury of the district within which the land transferred is situated.

(2) A copy of the challan, showing deposit of the amount under sub-rule (1) together with a copy of the registered deed, shall be filed along with the applications in which also a statement to this effect shall be made."

From a perusal of the section 16(3)(i) of the Act it appears that an adjoining raiyat or a co-sharer is entitled to pre-emption on the same term and conditions as contained in the deed of transfer. The terms and conditions of the sale-deed will include purchase money which is the actual consideration for the sale- deed.

7. As it has been mentioned above, in the present case one sale-deed has been executed by Rafiq Ansari in favour of respondent no. 4 in respect of 81 3/4 decimals of land for a sum of Rs. 3500/- and the other sale-deed has been executed in respect of 27 1/2 decimals of land for a sum of Rs. 1000/- in favour of respondent no. 5. The clause referred to above contemplates only one transaction and the purchase money is also intended to be one unit.

8. In this case total consideration money of both the sale-deeds referred to above together with ten percent thereof has been deposited by the petitioner in the treasury by challans and he filed a single application.

9. The learned counsel appearing on behalf of the petitioner submitted that since opposite party nos. 4 and 5 are brothers and claim to be adjoining raiyats on the basis of the fact that their father holds

adjoining land to the lands purchased by them, one application for the both transactions is maintainable. There is no substance in the aforesaid submission, as from the aforesaid circumstances it cannot be said that both the sale-deeds taken together constitute only one transaction. Further, as mentioned above, no case has been made out in the application filed under section 16(3) of the Act on behalf of the petitioner that the two brothers i.e. respondents 4 and 5 are members of the joint family and the purchase in their names were, in fact, made on behalf of the joint family, though the sale-deeds stand in their name separately. No case has also been made out by the petitioner that purchase made by respondents 4 and 5 were not their separate acquisition. No evidence has been adduced on the points mentioned above. The onus of proving that the two sale-deeds constituted only one transaction was on the pre-emptor which he neither pleaded nor proved and that being the state of affairs, no finding can be given that there is only one transaction in respect of which only one application is maintainable.

10. In view of the facts and circumstances mentioned above, it appears that the two sale-deeds are different transactions. One of the terms of the sale-deed executed in favour of respondent no. 4 is that the land was transferred in his favour for a consideration of Rs. 3500/- and other sale deed is that the purchase has been made for a consideration of Rs. 1000/- only. However, there may be cases in which though purchase has been made under two sale-deeds but both the sale-dees may constitute one transaction and the consideration money may form one unit and in that case one single application under section 16(3) of the Act may be filed.

11. Further it is not the case of the applicant that he deposited the consideration money of each of the sale-deeds together with ten percent thereof separately under two challans, one in the name of respondent 4 in respect of the sale deed standing in his name and the other in the name of respondent no. 5 in respect of the sale- deed standing in his name. Had that been case of the applicant, the question of applicability of doctrine of election would have been considered, but this point has not been raised at all on behalf of the petitioner.

12. For the reasons stated above, I find no merit in the application and it is accordingly dismissed. But in the circumstances of the case, there will be no order as to costs.

M.K.C. Application dismissed.

CRIMINAL WRIT JURISDICTION

1984/November, 28

Before Prem Shanker Sahay and Ram Chandra Prasad Sinha, JJ.

*Ramashrey Sharan.**

v.

The State of Bihar & Others.

Code of Criminal Procedure, 1973 *(Central Act No. II of 1974) section 144—order passed by Magistrate against petitioner restraining him from holding Mela on his raiyati land—earlier order by High Court in a writ case in presence of Respondent no. 4 holding that the petitioner had a right to hold Mela on his raiyati land—legality of.*

It is clear that repeated attempts were made on behalf of Respondent no. 4 to put obstacles so that the petitioner may not hold Mela during Chhath festival on his land bearing plot no. 1977, a raiyati land which is popularly known as Madhopur Sultanpur cattle fair, and the benefits may go to respondent no.4. The petitioner had to move the High Court on a number of occasions. The High Court by its order passed in Civil Writ Jurisdiction case no. 4620 of 1982 Annexure 4, in which this petitioner and Respondent no.4 were parties, made

* Criminal Writ Jurisdiction No. 194 of 1984. In the matter of an application under Articles 226 and 227 of the Constitution of India.

the legal position clear that the petitioner had a right to hold Mela on his raiyati land.

Held, that the order of the Subdivisional Magistrate restraining the petitioner from holding Mela during Chhath festival is in the nature of prohibitory order, could not be passed under section 144 of the Code of Criminal Procedure, 1973. The Magistrate has shown gross carelessness in the discharge of his duty and completely ignored the previous order passed by the High Court.

Held, further, that the order of the Magistrate passed under under section 144 of the Code of Criminal Procedure is palpably erroneous, illegal and unjustified and is fit to be quashed.

The object of section 144 of the Code of Criminal Procedure is to preserve public peace and tranquillity and this section does not confer any power on the Executive Magistrate to adjudicate question of title to properties or entitlement to the rights thereof. In cases where all such disputes or titles or entitlements to rights have already been adjudicated and have become the subject matter of judicial pronouncement of a decree of the Civil Court of competent jurisdiction then in the exercise of such power the Magistrate must have due regard to such established rights and subject of course to the paramount consideration of maintenance of public peace and tranquillity. The exercise of power must be in aid of these rights and against those who interfere with the lawful exercise thereof and even in cases where there are no declared or established right the power should not be exercised in a manner that would give material advantage to one party, to the dispute over the other, but in a fair manner ordinarily in defence of legal rights, if there be such and the lawful exercise thereof rather in suppressing them.

Md. Ghulam Abbas v. Md. Ibrahim and ors. (1) followed.

Ghulam Abbas and ors. v. State of U.P.(2) referred to.

Application under Articles 226 and 227 of the Constitution.

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

M/s. Yogendra Mishra, Mithlesh Kumar Khare & Raghunath Kumar for the petitioner

M/s K.N.Keshav, G.P. 5 & Lala Kailash Behari Prasad for the State

Mr. Jayanandan Singh for the opposite party no. 4.

P.S.Sahay,J. - The petitioner has moved this Court against the order dated 4.1.1984 passed in a proceeding under section 144 of the Code of Criminal Procedure (hereinafter to be referred as the Code). Ordinarily this Court does not interfere with such orders but it is a glaring case which will be clear from the facts mentioned hereunder.

2. The petitioner is the owner of a plot of land bearing plot no. 1977 which is raiyati land and cattle hat is held every year during Chhath festival which is popularly known as Madhopur Sultanpur Cattle Fair in the district of Sitamarhi. The Mela is generally held from 22nd Kartik to 30th Kartik every year. According to the practice permission was sought for from the Subdivisional Officer, respondent no. 3, for holding the Mela on 16.10.1979 but objection was filed by Shyam Bihari Prasad Sahi, a resident of Rajkhand in the district of Muzaffarpur and the same was rejected and it may be mentioned that the Mela

(1) (1978) BBCJ 21 (SC)

(2) (1981) AIR (SC) 2198.

was held which was known as Rajkhand Mela. Similar application was filed for holding the Mela in subsequent year and again objection was filed by respondent no. 4 and the said objection was rejected. Thereafter respondent no. 4 filed Title Suit no. 146 of 1977 in which injunction was granted on 28.8.1978. The State of Bihar preferred an appeal which gave rise to Miscellaneous Appeal no. 65 of 1978. Thereafter the Pattidars of respondent no.4 sought for permission to hold Rajkhand Mela during Chhath festival which was rejected and, thereafter, they moved the Minister of State of Revenue who ordered that respondent no.4 and another should hold Mela on the eve of Chhath and the petitioner will hold the Mela fifteen days thereafter. A copy of the letter has been filed and marked Annexure-1. The petitioner moved this Court in CWJC No. 3866 of 1981 which was admitted and the operation of the order was stayed with the result that the petitioner held the Mela during Chhath festival. A counter affidavit was filed in CWJC No. 3866 of 1981 on behalf of the State in which it was stated that the letter issued by the State Government was withdrawn and in that view of the matter, the writ application became infructuous and it was disposed of accordingly on 10.11.1982. The petitioner again filed an application for permission to deposit the amount for holding the Mela during Chhath festival for that year and a sum of Rs. 700/- was deposited. But respondent no. 4 again put obstacles and got an order from the Collector directing the Subdivisional Officer to withdraw the order which was granted in favour of the petitioner and the petitioner was directed not to hold Mela during the Chhath which was to commence from 21.11.1982. A copy of the order has been marked as Annexure-3. The petitioner moved in CWJC No. 4620 of 1982 which

was admitted and stay was granted and at the time of final hearing, the respondent no. 4 also appeared and it was held that the petitioner had a right to hold his Mela on the raiyati land and the authorities were directed not to prevent him from doing so. This observation was made in order to clarify the legal position because the period of holding the Mela had expired. A copy of the order has been filed and marked as Annexure-4. In the mean time a proceeding under section 144 of the Code was started which was challenged in this Court in CWJC No. 456 of 1982 which was admitted and the proceedings were stayed. A copy of the order has been filed and marked Annexure-5. Again a fresh proceeding was drawn up on 7.11.1983 and the petitioner moved the Sessions Judge in Cr. Revision No. 288 of 1983 and the proceeding was stayed. A copy of the order of the Subdivisional Officer has been filed and marked Annexure-6. Since the Mela had already been held due to the stay order, the petitioner was advised to withdraw the revision petition and it was permitted to be withdrawn by the Sessions Judge. A copy of the order has been filed and marked Annexure-7. Inspite of all these a fresh proceeding under section 144 of the Code was started and final order has been passed on 4.1.1984 by which the petitioner has been restrained from holding the Mela during Chhath festival and the S.D.O. further directed that the Rajkhand Mela will not be held during that period until further orders. A copy of the order has been filed and marked Annexure-8. The petitioner has moved this Court against the aforesaid order.

3. No counter affidavit has been filed on behalf of the State but at the time of final hearing respondent no. 4 appeared through his counsel and he was added as a party. Learned counsel,

appearing on behalf of the petitioner, has contended that the order contained in Annexure-8 is wholly illegal and unjustified and has been made in clear violation of the order passed by this Court only with a view to help respondent no.4. He has submitted that the petitioner has the absolute right to hold Mela on his raiyati land and the impugned order violates his fundamental right and his right having been established in the earlier writ application the order is bad on the very face of it and is fit to be quashed. It is true that if there is an apprehension of bearch of peace it is open to a Magistrate to take action under section 144 of the Code but he has to act in accordance with law and not arbitrarily or capriciously in order to deprive a person from exercising the legal rights over the property. It is the subjective satisfaction of the Magistrate. But he, at the same time, has to consider and determine what is reasonably expedient and necessary in the situation. If the public peace and tranquillity or other objects mentioned there are not in danger the Magistrate cannot act under section 144 of the Code and he can only direct them to go to the proper forum. But, if, on the other hand, the public peace, safety or tranquillity are in danger it is left open to the Magistrate to take action under section 144 of the Code. Therefore, before exercising such powers the Magistrate must apply his mind to the facts of the case and also try to ascertain whether the rights of the party have been determined earlier or not. I am supported in my view by decision of the Supreme Court in the case of *Md. Ghulam Abbas vrs. Md. Ibrahim & ors. (1).* In the case of *Ghulam Abbas and ors. vrs. State of U.P. (2)* it has been held that under

(1)(1978) BBCJ 21 (SC)

(2)(1981) AIR (SC) 2198.

the new Code of Criminal Procedure the order passed by the District Magistrate, Subdivision Magistrate or any other Executive Magistrate under section 144 of the Code is not a judicial order or a quasi-judicial order, the function thereunder is essentially an executive (Police) function and these functions have been assigned keeping in mind the concept of separating Executive Magistrates from Judicial Magistrates. It has further been held that an order under section 144 is amenable to writ jurisdiction if it violates or infringes any fundamental right. The object of this section is to preserve public peace and tranquillity and this section does not confer any power on the Executive Magistrate to adjudicate or dispose of similar nature or questions of title to properties or entitlements to rights. But, at the same time, in cases where all such disputes or titles or entitlements to rights have already been adjudicated and have become the subject matter of judicial pronouncement or decree of the Civil Court of competent jurisdiction then in the exercise of such power the Magistrate must have due regard to such established rights and subject of course to the paramount consideration of maintenance of public peace and tranquillity. The exercise of power must be in aid of those rights and against those who interfere with the lawful exercise thereof and even in cases where there are no declared or established rights the power should not be exercised in a manner that would give material advantage to one party to the dispute over the other. But, in a fair manner ordinarily in defence of legal rights, if there be such and the lawful exercise thereof rather in suppressing them. In other words, the Magistrate's action should be directed against the wrong doers than the wronged. Legal rights should be regulated and not prohibited altogether for avoiding breach of

peace or disturbance of public tranquillity. Similarly, in the case of *Acharya Jagdishwaranand Avadhuta vs. Commissioner of Police, Calcutta (1)* it has been held that the order under section 144 of the Code is intended to meet an emergency, it cannot be permanent or semi-permanent in character.

4. Now applying the aforesaid test in the instant case, I am constrained to hold that the Magistrate has wrongly exercised his power; may be due to ignorance of law or to help respondent no. 4. From the facts, mentioned above, it is absolutely clear that repeated attempts were made on behalf of respondent no. 4 to put obstacles so that the petitioner may not hold Mela during Chhath festival and that benefit may go to him. The petitioner had to rush to this Court on a number of occasions. By Annexure-4 the legal position was made clear and it may be mentioned that respondent no.4 was also a party in that proceeding and his counsel was present at the time when the order was passed. It will be useful to quote the observation of their lordships which is as follows:

> "The right to hold Mela cannot, therefore, be doubted and has not been challenged in this case by the State. It would, therefore, be sufficient to observe that the petitioner has a right to hold Mela on his raiyati land and the authorities will not prevent him from holding the Mela or ask him to hold Mela on a date fixed by them."

Inspite of this the impugned order was passed against the petitioner. Surprisingly, inspite of the aforesaid direction of the High Court it is mentioned in the order that the two Additional Collectors of Muzaffarpur and Sitamarhi have decided that

(1) (1984) AIR (SC) 51.

Rajkhand Mela will be held during Chhath festival and Madhopur Sultanpur Cattle Fair of the petitioner will be held in Baisakh. This is in clear violation of the order passed by this Court. No doubt, reference is made about this order but it has been wrongly interpreted for the reasons best known to the officer concerned. The order of the Subdivisional Magistrate restraining the petitioner from holding Mela during Chhath festival is in the nature of prohibitory order which could not be passed under section 144 of the Code.

5. Mr. Lala Kailash Bihar Prasad, learned counsel appearing on behalf of the State, has submitted that it is the subjective satisfaction of the Magistrate who is incharge of the law and order and this Court should not interfere. He has, further submitted that from the order, a law and order problem had been created on previous occasions due to the holding of Cattle Fair by the petitioner and in that view of the matter, the authorities were justified in passing the order. This argument, in my opinion, is wholly without any substance and is fit to be rejected. Such arguments should not have been made on behalf of the State when the right to hold Mela had already been determined; rather the authorities should have given all protection to the petitioner while holding the Mela and preventive action should have been taken against the wrong doers. Mr. Jainandan Singh, appearing on behalf of respondent no.4, has also supported the order of the learned Magistrate and has submitted that the order has been passed after taking into consideration all aspects. Suffice to say that the order has been passed only to help respondent no. 4 because he was also party in the earlier writ application when the right of the petitioner was determined and the direction of the Subdivisional

Magistrate allowing respondent no.4 to hold. Mela during Chhath festival, inspite of the previous order of this Court, is not only bad but is contempt of this Court. But, I do not propose to take any action against the officer concerned because he is technically guilty of contempt of this Court. He has shown gross carelessness in the discharge of his duty and completely ignored the previous order passed by this Court. That shows his ignorance of law and if the Magistrate is unaware of the fact that if a right of the party has already been determined and he has to protect the same which has been consistently observed by this Court on a number of occasions, all I can say is that his qualification to be a Magistrate is a very poor one.

6. Thus, on a careful consideration I find that the order, as contained in Annexure-8, is pulpably erroneous, illegal and unjustified and is fit to be quashed. By order dated 19.10.1984 we had directed that the petitioner will hold Mela during Chhath festival and the authorities were to extend all co-operation to him. It is further made clear that if respondent no.4 or any person want to create disturbance in holding Mela during Chhath festival, preventive action in the nature of the proceeding under section 107 of the Code or any other appropriate action should be taken in accordance with law in order to safeguard the interest of the petitioner. The application is, accordingly, allowed. Let a copy of the judgment be sent to the State Government for information.

R.C.P.Sinha, J. I agree.

R.D. Application allowed.

MISCELLANEOUS CRIMINAL

1984/November, 30.

Before Prem Shanker Sahay and Ram Chandra Prasad Sinha, JJ.

*Kusheshwar Prasad Singh**

v.

The State of Bihar.

Code of Criminal Procedure, 1973 *(Central Act No.II of 1974) section 438—provisions of—application for anticipatory bail rejected by Sessions Judge—accused whether could move High Court for the same relief—Interpretation of Statute—principles of.*

In absence of any provision in section 438 of the Code of Criminal Procedure, 1973, debarring a person from moving the High Court for anticipatory bail, when he has moved the Sessions Judge, will be adding in the statute which is not there. By any known canon of construction, words of widthf and amplitude ought not generally to be cut down so as to read into the language of the statute restraints and conditions which the legislature itself did not think it proper or necessary to impose. This is specially true when the statutory provision which falls for consideration is designed to secure a valuable right like the right to personal freedom and

* Criminal Miscellaneous No. 9514 of 1984. In the matter of an application under section 438 of the Code of Criminal Procedure.

involves the application of a presumption as salutary or deep-grained in our Criminal jurisprudence as the presumption of innocence. It is duty of the court to determine in what particular meaning and particular shape of meaning the word or expression are used by the law makers and in discharging the duty the court has to take into account the context in which it occurs, the object to serve which it is used, and to give harmonious construction to the various provisions of the Code of Criminal Procedure, 1973 in order to achieve the

Held, a person whose application for anticipatory bail has been rejected by the Court of Sessions, has the liberty to move the High court for the same relief.

Jagnnath v. State of Maharashtra (1) - referred to.

Amiya Kumar Sen v. State of West Bengal (2)-dissented from.

Application by the accused.

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

M/s. Rana Pratap Singh No. 2 & Vivekanand Singh for the petitioner

Mr. Ganesh Prasad Jaiswal for the State.

P.S. Sahay, J. - The short point, which has to be answered in this case, is:

> "If any person moves initially to the court of sessions for anticipatory bail under section 438(1) of the Code of Criminal Procedure, 1973, and the court of Sessions rejects that application on merit, is the second application

(1) (1981) Cr.L.J. 1808

(2) (1979) Cr.L.J. 288.

by the same person for anticipatory bail under section 438(1) of the Code of Criminal Procedure maintainable in the High Court?"

The learned Single Judge, while hearing this case at the time of admission, had his doubt and, therefore, he has referred the matter to a Division Bench at the stage of admission itself by his order dated, 31.7.1984. In view of the importance of the point involved, the case was admitted on 22.10.1984 and a direction was given that the petitioner shall not be arrested during the pendency of this application.

2. The petitioner is an accused in a case under section 420 of the Indian Penal Code and a copy of the first information report has been filed which is Annexure-1. The petitioner had apprehension that he may be arrested and, therefore, he moved the Sessions Judge on 12.6.1984 and the learned Judge, after hearing the parties, rejected the application by his order dated 10.7.1984. Thereafter, the petitioner moved this Court on 25.7.1984 for the same relief and that is how the matter has come to us.

3. Learned counsel appearing on behalf of the parties have submitted that this point has not been decided by this Court up-till-now and, therefore, it will be our earnest endeavour to do so, considering the importance of the point involved and the question posed to us. Mr. Rana Pratap Singh No. 2, learned counsel appearing on behalf of the petitioner, has submitted that the power to grant anticipatory bail has been given to the High Court and also to the court of sessions and the power, being concurrent, can be exercised by both. He has, further, submitted that even if an application has been rejected by the Sessions Judge it is open to

this Court to entertain the application and grant relief and, in this connection, he has referred to some of the provisions of the Code of Criminal Procedure (hereinafter referred to as the Code) which I shall deal with separately. Learned counsel appearing on behalf of the State has submitted that the power to grant anticipatory bail is extraordinary power and a person having taken a chance before a Sessions Judge he cannot move this Court again for the same relief. In other words, according to the learned counsel, such application will be barred. Now, I propose to consider their submission in detail.

4. The power to grant anticipatory bail was not under the old Code and has been introduced for the first time in the statute book by the New Code of 1973 (Act II of 1974). The Law Commission of India, in its 41st report dated 24.9.1969, made the following recommendation:

> "The suggestion for directing the release of a person on bail prior to his arrest (commonly known as 'anticipatory bail') was carefully considered by us. Though there is a conflict of judicial opinion about the power of a Court to grant anticipatory bail, the majority view is that there is no such power under the existing provisions of the Code. The necessity for granting anticipatory bail arises mainly because sometimes influential persons try to implicate their rivals in false cases for the purpose of disgracing them or for other purposes by getting them detained in jail for some days. In recent times, with the accentuation of political rivalry, this tendency is showing signs of steady increase. Apart from false cases, where there are reasonable grounds for holding that a person accused of

an offence is not likely to abscond, or otherwise misuse his liberty while on bail, there seems no justification to require him first to submit to custody, remain in prison for some days and then apply for bail."

Anticipatory bails are granted under section 438 of the Code and the relevant portion for the purpose of the application may be usefully quoted:

"Direction for grant of bail to person apprehending arrest:- (1) When any person has reason to believe that he may be arrested on an accussation of having committed a non-bailable offence, he may apply to the High Court or the Court of Session for a direction under this section; and that Court may, if it thinks fit, direct that in the event of such arrest, he shall be released on bail.

(2) When the High Court or the Court of Session make a direction under sub-section (1), it may include such conditions in such directions in the light of the facts of the particular case, as it may think fit.....".

Thus, from the aforesaid provision it is clear that if any person apprehends his arrest for having committed a non-bailable offence he may apply to the High Court or the Court of Session who are competent to give necessary directions in the matter. The Supreme Court had the occasion to decide the question of grant of the anticipatory bail in the case of *Gurbaksh Singh Sibbia vs. State of Punjab (1)* in which principles were enunciated but the point which has been specifically raised in this application was not the subject matter for consideration. Their lordships, after considering the

(1) (1980) AIR (SC) 1632.

various provisions of the Code, held that a person, who had a reasonable belief, can move the High Court or the Court of Session which had to apply its mind and then give necessary direction but could not abdicate its function and leave it to the Magistrate himself as and when occasion would arise. Such applications could only be entertained before a person is arrested and a court could not pass any blanket order which would amount to passing an order in a vacuum.

5. Now, I will consider the cases, which have been cited by the learned counsel appearing on behalf of the petitioner, starting from the case of *Mohan Lal and Others vs. Prem Chandra and Others(1)*. The point referred to the Full Bench was whether it was incumbent upon an applicant to approach the Court of Session before moving the High Court and their lordships, after considering the relevant provisions, held that the option lies with the person concerned and a person cannot be forced to move the Sessions Judge first. He can move the High Court straight-away without moving the Sessions Judge and such application will be maintainable. Their lordships have further held that the power given under section 438 of the Code to the Sessions Judge and the High Court is concurrent and can be exercised by both the courts in proper cases. Their lordships have also observed, differing from decisions of the same Court in the cases of *Bijay Nand vs. State of Himachal Pradesh (2) and Yogendra Singh vs. State of Himachal Pradesh (3)*, that the order refusing anticipatory bail was not interlocutory in character and the person,

(1) (1980) AIR (HP) 36 (FB)

(2) (1975) ILR (HP) 556

(3) (1975) ILR (HP) 181

whose application was dismissed by the Sessions Judge, was at liberty to move the High Court for the same relief. A Full Bench of the Allahabad High Court in the case of *Onkar Nath Agrawal and others vs. State (1)* was considering the question whether the application for anticipatory bail could be moved in the High Court without taking recourse to the Court of Session and it has been held that the Courts have an unfettered discretion in the matter of bail under section 438 of the Code to be exercised according to the exigency of each case and, therefore, an application in the High Court without moving the Sessions Judge was maintainable. In the case of *Chhaju Ram Godara vs. State of Haryana (2)* a learned single Judge observed that section 438 of the Code gives concurrent powers to the High Court and the Court of Session and a person should normally move the Court of Session first before approaching the High Court. But, his lordship has himself expressed that there cannot be an un-inflexible rule.

6. The point involved in this case has been considered and decided by a Bench of the Calcutta High Court in the case of *Amiya Kumar Sen vrs. State of West Bengal (3)*. Their lordships, after considering the various provisions 438, 439, 397 and 399 of the Code held that once the application having been rejected by the Sessions Judge the second petition for anticipatory bail by the same person before the High Court was not maintainable. While considering section 438 of the Code, their lordships extracted the words from the section 'may apply to the High Court or the Court of Session',

(1) (1976) 2 Cr.L.J. 1142

(2) (1978) Cr.L.J. 608

(3) (1979) Cr.L.J. 288.

and held that there is a word 'or' a conjunction in between the High Court and the Court of Session and according to their lordships it was in the nature of an alternative, meaning thereby that if a person choses the forum of the Sessions Judge then he will not be entitled to move the High Court. With great respect, I am unable to accept the interpretation and reasonings given by their lordships. Similar language has also been used in different provisions viz. sections 397, 437, 438 and 399, a bar has been put under sub-clause (3) and the order becomes final and the aggrieved party cannot move the other Court. The observation of their lordships that the conjunction 'or' has been used in non-alternative sense equivalence to 'and' and, therefore, by alternative is meant choice offered between one and another and in this case 'or' will mean 'alternative' that is to say a person can move either the Court of Sessions or the High Court does not seem to be correct. In the case of *Jagannath vs. State of Maharashtra (1)* the learned single Judge also did not subscribe to the views of Calcutta High Court. His lordship, while interpreting section 438 and other provisions, has held that the power to grant bail under section 498 of the old Code were concurrent and exercisable by the Court of Session and the High Court. Though, as a matter of practice and propriety it was formerly insisted that the lower of the two courts should be approached first. In the new Code the power of the revision has not been made concurrent and, therefore, under section 397(3) it has been laid down that if one Court was moved in its revisional jurisdiction, the other shall not entertain similar application. Similar bar has been put under section 399 sub-clause (3) of the

(1) (1981) Cr.L.J. 1808.

Code. In my considered opinion, therefore, differing from the Division Bench of the Calcutta High Court and accepting the view of the learned single Judge of the Bombay High Court, I come to the conclusion that in absence of any bar put under section 438 of the Code, by no stretch of imagination, it can be said that the power once exercised by the Sessions Judge becomes final and the person aggrieved cannot move this Court. Nothing prevented the Parliament from putting a similar bar in the provisions relating to bail - either pre- arrest or post-arrest - and this clearly indicates what was intended by the law makers. I may also refer to section 439 of the Code which deals with the special powers of the High Court or the Court of Session regarding bail. That power has been given to the High Court and a Court of Session. Under this provision if a bail is rejected by the court of session then everyday we find the persons aggrieved, move the High Court for relief. In this provision also, like section 438 of the Code, there is no specific provision that if a bail is rejected by the Sessions Judge then the aggrieved person can move the High Court. On the same analogy it must be held that if a prayer for anticipatory bail is rejected by the Sessions Judge the aggrieved person has also the right to move the High Court.

7. In the case of *Gurbaksh Singh Sibbia (supra)* it has been observed that there is no risk involved in entrusting a wide discretion to the Court of Sessions and the High Court in granting anticipatory bail because, firstly, these are higher Courts manned by experienced persons, secondly, their orders are not final but are open to appeal or revisional scrutiny and above all because, discretion has always to be exercised by the courts judicially and not according to whim, caprice or fancy. In

absence of any provision in section 438 of the Code debarring a person from moving the High Court when he has moved the Sessions Judge, it will be adding something in the Statute which is not there. By any known canon of construction, words of width and amplitude ought not generally to be cut down so as to read into the language of the Statute restraints and conditions which the legislature itself did not think it proper or necessary to impose. This is specially true when the statutory provision which falls for consideration is designed to secure a valuable right like the rights to personal freedom and involves the application of a presumption as salutary and deep-grained in our Criminal Jurisprudence as the presumption of innocence. It is duty of the Court to determine in what particular meaning and particular shape of meaning the word or expression are used by the law makers and in discharging the duty the Court has to take into account the context in which it occurs, the object to serve which it used, and to give harmonious construction to the various provisions of the Code in order to achieve the object. In my considered opinion, therefore, for the reasons, mentioned above, my answer to the question, which has been referred to the Bench' is that a person whose application for anticipatory bail has been rejected by the court of session has the liberty to move the High Court for the same relief.

8. Now coming to the facts of this case as I have stated earlier that interim order had been passed in favour of the petitioner. It is stated by the learned counsel that charge sheet has already been submitted. In these circumstance and considering the facts of this case I direct that the petitioner, on appearance before the court concerned, will be enlarged on bail on furnishing a bond of Rs.2,000/-

(Rupees two thousand) with two sureties of the like amount each to the satisfaction of the Chief Judicial Magistrate, Khagaria, in Beldaur P.S. Case No. 63 dated 29.5.1984, subject to the conditions laid down in section 438(2) of the Code. The application is, accordingly, allowed.

R.C.P.Sinha, J. I agree.

R.D. Application allowed.

FULL BENCH

1985/January, 7.

Before S.S.Sandhawali, C.J., Nagendra Prasad Singh, and Brishketu Sharan Sinha, JJ.

*Ram Kripal Prasad and others**

v.

The State of Bihar and others.

Code of Criminal Procedure, 1973 (Act II of 1974), *Chapter XXXVI sections 468 to 473 and 482—Employees Provident Funds and Miscellaneous Provisions Act, 1952 (Act XIX of 1952) section 14 and Employees Provident Funds Scheme, 1952, paragraphs 38 and 76—failure of employer to deposit contributions in contravention of Paragraphs 38 and 76 of the Scheme read with section 14 of the Act—whether would amount to continuing offence as envisaged in section 472 of the Code so as to make the bar of limitation under section 468 applicable—disputed issues of limitation under section 468 to 473 of the*

* Criminal Miscellaneous Cases Nos. 1195, 1252, 1253, 1254 and 1258 to 1268 of 1977, 26 of 1979, 4435, 4794, 4795, 4851 and 4856 of 1979. In the matter of applications under section 482 of the Code of Criminal Procedure, 1973.
Cr. Misc. Case No. 26 of 1979: Messrs M.R.T., Gaya and others v. D.K. Bhattacharya, Provident Fund Inspector.
Cr. Misc. Cases Nos. 4435, 4794, 4795, 4851 and 4856 of 1979: Messrs Kailash Talkies, Barauni, and others v. The State of Bihar and another.

Code—whether can be raised directly in the High Court for the quashing of proceedings under section 482 of the Code—petition of complaint—whether each and every relevant fact and precise number of employees of the establishment must be pleaded—failure to do so, whether would vitiate the proceedings on that score alone.

Held, that, the failure of the employers to deposit the contributions in contravention of paragraphs 38 and 76 of the Employees Provident Funds Scheme, 1952, read with section 14 of the Employees Provident Funds and Miscellaneous Provisions Act, 1952, would be a continuing offence. No question of limitation, therefore, can possibly arise in the context of a continuing offence in view of section 472 of the Code of Criminal Procedure and consequently on account of the delay in launching the prosecution the bar of limitation prescribed by section 468 of the Code cannot be invoked.

Bhagirath Kanoria and others v. The State of Madhya Pradesh (1), relied on.

Held, further, that the disputed issues of limitation under sections 468 to 473 of the Code of Criminal Procedure cannot be appropriately raised directly in the High Court for the quashing of proceedings under section 482 of the Code.

The concept of limitation under Chapter XXXVI of the Code of Criminal Procedure does not present an inflexible or blanket legal bar to the prosecution which may warrant it being raised initially in the High Court itself for quashing the proceedings at the threshold. Indeed it is a question which needs first

(1) (1984) AIR (SC) 1688.

to be raised and then to be computed and thereafter determined at the earliest stage by the trial court on the basis of a proper explanation of delay or overriding the default if necessary in the interests of justice an envisaged in the provisions of section 473 of the Code.

Held, also, that a petition of complaint for offences under section 14 of the Employees Provident Funds and Miscellaneous Provisions Act, 1952, need not in terms plead each and every minuscule relevant fact nor the precise number of employees of the prosecuted establishment. In any event, the failure to do so does not vitiate the proceedings on such technical ground alone.

Messrs United Sports Works and others v. The State of Bihar and another (1) overruled.

M/s. Anantharamaiah Woolen Factory v. The State (2) distinguished

M/s. Shanker Brothers v. The State (3) distinguished.

Applications by the petitioners.

The facts of the cases material to this report are not out in the judgment of S.S. Sandhawali, C.J.

Mr. Basudeva Prasad, Mr. Radha Mohan Prasad, Mr. Anil Kumar, Mr. Sunil Kumar, Mr. Shailendra Kumar Sinha, Mr. Sudhir Kumar Katriar for the petitioners.

Mr. Tarkeshwar Dayal, and Mr. Rama Shankar Pradhan for the respondents.

(1) (1977) Cr. Misc. Case No. 102 of 1977 and analogous cases: decided on the 26th April, 1977

(2) (1981) Labour and Industrial Cases 538

(3) (1978) BBCJ 337

S.S.Sandhawali, C.J. : The three primarily significant issues, which have come to the fore in this reference to the Full Bench, may well be formulated in the terms following:-

(i) Whether the failure of the employer to deposit the contributions in contravention of Paragraphs 38 and 76 of the Employees Provident Funds Scheme, 1952, read with Section 14 of the Employees Provident Funds and Miscellaneous Provisions Act, 1952, would be a continuing offence?

(ii) Whether the disputed issues of limitation under Section 468 to 473 of the Code of Criminal Procedure can appropriately be raised directly in the High Court for the quashing of proceedings under Section 482 of the said Code?

(iii) Whether a petition of complaint for offences punishable under Section 14 of the Employees Provident Funds and Miscellaneous Provisions Act, 1952, must in terms plead each and every relevant fact and, in particular, the precise number of employees of the prosecuted establishment?

Whether in the event of its failure to do so, the proceedings would be vitiated on that score alone?

2. Equally at issue is the correctness of the view of the learned Single Judge in *Messrs United Sports Works and others vs. The State of Bihar and another.(1)* Inevitably some ancillary question which arise would be dealt with in their related context.

(1) (Criminal Miscellaneous Case No. 102 of 1977 and analogous cases decided on 26.4.1977.

3. Learned Counsel for the parties are agreed that the issues of fact and law are common and identical in this act of 21 criminal miscellaneous cases and this judgment would govern all of them. The representative matrix of facts may, therefore, be conveniently noticed from *Messrs Kailash Talkies, Barauni, and others vs. The State of Bihar and another* (Criminal Miscellaneous Case No. 4435 of 1979).

4. The petitioner firm and its partners and Manager seek the quashing at the very threshold of the complaint filed against them under Section 14A of the Employees Provident Funds and Miscellaneous Provisions Act, 1952 (hereinafter referred to as the Act), pending in the court of the Judicial Magistrate, Second Class, Begusarai. Messrs Kailash Talkies is a cinema house, located at Barauni, and it is claimed that the persons employed therein, have been below 20 and consequently, the petitioner is not an 'establishment' within the meaning of the Act. It is averred that for the first time on the 16th of September, 1975, the Regional Provident Fund Commissioner, Bihar, issued a notice (Annexure'1') calling upon petitioner no. 1 to pay the dues mentioned therein for the period October, 1969, to June, 1975, and to submit the requisite returns immediately; Thereafter, a similar notice (Annexure'2') and other similar notices under the Act were admittedly issued to the petitioners for different periods. Subsequently, the petitioners came to know that vide order dated the 26th June, 1976 (Annexure '4'), Respondent No. 2 had assessed provident fund dues against the firm ex parte without expressly finding that the establishment employed 20 or more persons. Further, a criminal prosecution had also been launched against the petitioners, vide the petition of complaint

(Annexure'3') dated the 18th July 1977). Later, the Provident Fund Inspector submitted an inspection report of the checking of the accounts of the petitioner firm upto October, 1977, vide Annexure '5'.

5. On the petitioners' own showing, they filed returns from time to time, up to June, 1976, though it is their stand that this was done under compulsion. Thereafter, vide Annexure '6', the Provident Fund Inspector issued a letter to the firm requesting them to comply with the inspection report within a fortnight, and, subsequently, the Accounts Officer of the Employees Provident Fund, Bihar, issued a letter dated, the 11th July, 1978 (Annexure'7'). On the 15th of September, 1978, Respondent No. 2 directed the verification of the provident fund records from January, 1969 to June, 1975, and on the 7th of May, 1976, the petitioner firm made payment of the provident fund contributions from the period 1st July, 1975, to 31st May, 1976, from time to time, allegedly under compulsion and threats. It is also the case that certificate proceedings for the recovery of Rs. 9,747.70 paise, as dues under the Act was also started by Respondent No. 2 (vide Annexure '9' and '9/1'). Later, on the 30th October, 1978, the management of petitioner no. 1 informed respondent no. 2 that the concerned dues had been paid and requested for the dropping of the certificate proceedings. Subsequently, because of the demands having been satisfied, respondent no. 2 informed the Collector of Patna that the recovery proceedings need not be proceeded further (vide Annexure'11'). Later, proceedings for imposing penal damages under Section 14B were, however, initiated by the respondents against the petitioners. In paragraph 10 of the petition it is admitted that some of the

employees of the management went on acting and corresponding with the authorities on the wrong assumption that the Act and the Employees Provident Funds Scheme, 1952 (hereinafter referred to as the Scheme), applied to the petitioners, and, it is the stand that this was done in ignorance of the legal positition and without instructions from petitioners nos. 2 to 5.

6. In the criminal proceedings the petitioners preferred an application under sections 245 and 258 of the Code of Criminal Procedure, (hereinafter referred to as the Code) before the trial court, praying that the case was not maintainable and the accused petitioners be discharged. However, the said application was rejected. It is the firm stand that the petition of complaint does not disclose any offence at all and consequently the criminal proceedings should be quashed.

7. In the counter affidavit filed by the Provident Fund Commissioner most of the factual allegations raised by the petitioners have been categorically controverted. It is pointed out that Messrs Kailash Talkies comes under the schedule head of 'cinema' and is clearly within the purview of the Act. In specific terms, it is averred that from the 19th of September, 1969, the management had employed 21 persons and that it was totally false that the number of such employees was below 20. It is the case that there had been proper physical verification by the Inspector of the Department, who, in fact, found more than 20 persons there on the day of inspection and it was thereafter that he submitted his inspection report. It is repeatedly reiterated that the establishment employed 21 persons and the petitioners' assertion that in

fact only 15 or 16 persons were on the roll was false. Consequently, it is the firm case that the establishment is clearly covered by the Act. It is averred that repeated notices were issued to the petitioners and it was only after patent non-compliance therewith that the prosecution was launched for being in gross default of the payment of dues under the Act as also for non-submission of returns. It is denied that any pressure was put on the petitioners for the filing of returns under the Act, which had been filed from time to time voluntarily up to June, 1976. There had never been any complaint preferred by the petitioners with regard to any such threat or compulsion. It is equally the case that the certificate proceedings were rightly started against the petitioners for realisation of the dues recoverable from them and the notice for levy of penal damages under Section 14B was issued in accordance with law. It is denied that the prosecution has been launched with any mala fide motive, and, indeed, the case is that this was ultimately resorted to because of the petitioners' recalcitrance to comply with the statutory provisions.

8. At the very outset it must be noticed that on behalf of the petitioners the star argument originally advanced was that a failure of the employer to deposit the contributions in contravention of paragraphs 38 and 76 of the Scheme, read with Section 14 of the Act, was not at all a continuing offence. Consequently, the bar of limitation prescribed by Section 468 of the Code was sought to be invoked, because the petitions of complaint were filed in court after considerable delay from the date of the comission of the said offence. This submission was pressed before us with vehemence, on principle and by reliance on a catena of

authorities in *The State of Bihar vs. Deokaran Nanshi (1)*, *Messrs Wire Machinery Manufacturing Corporation Limited vs. The State and another (2)*, *Provident Funds Inspector vs. N.S. Dayanand (3)*, and, *S.V. Lachwani vs. Kanchanlal C. Pariksh and others (4)*.

9. On behalf of the respondents, reliance was equally sought to be placed on the *State of Bihar vs. Deokaran Nanshi (supra)* and on observations in *The State vs. Kunja Behari Chandra and others (5)* and, directly on the Division Bench judgment of the Madras High Court in *Premier Studs and Chaplets Company and others vs. The State (6)*, and *Akbarbhai Nazarali vs. Mohammad Hussain Bhai (7)*.

10. Fortunately, however, all controversy on this specific point has been now set at rest by the unequivocal view expressed in *Bhagirath Kanoria and others vs. The State of Madhya Pradesh (8)*. Therein, this very issue had arisen directly for consideration, and, after distinguishing the *State of Bihar vs. Deokaran Nanshi (supra)* and confining the same to cases of failure to furnish returns only, it was concluded as follows:-

> "For these reasons, we are of the opinion that, the offence of which the appellants are charged, namely, non-payment of the

(1) (1973) AIR (SC) 908
(2) (1978) Cr.LJ 839
(3) (1980) Cr.LJ 161
(4) (1978) Lib. and Industrial cases 868
(5) (1954) AIR (Pat.) 371
(6) 56 Factory LJ 611
(7) (1961) AIR (MP) 37
(8) (1984) AIR (SC) 1688.

employer's contribution to the Provident Fund before the due date, is a continuing offence, and, therefore, the period of limitation prescribed by Section 468 of the Code cannot have any application. The offence, which is alleged against the appellants, will be governed by Section 472 of the Code, according to which, a fresh period of limitation begins to run at every moment of the time during which the offence continues."

11. In view of the aforesaid authoritative enunciation, it is now wholly unnecessary and indeed wasteful to examine the rival submissions on principle or to individually advert to the authorities aforesaid, which were cited at the Bar. It is plain that the High Court judgments taking a contrary view to what has been categorically laid above in *Bharirath Kanoria's case (supra)* are not any longer good law. The submission on behalf of the petitioners on this score must fail as no question of limitation can possibly arise in the context of a continuing offence in view of section 472 of the Code.

12. Inevitably, the answer to the first question posed at the very outset is rendered in the affirmative and it is held that the failure of the employers to deposit the contributions in contravention of paragraphs 38 and 76 of the Scheme, read with section 14 of the Act, would be a continuing offence.

13. However, undeterred by the ratio of *Bhagirath Kanoria's case (supra),* Mr. Basudeva Prasad, learned counsel for the petitioners, still streneously pressed the issue of limitation with regard to the offence of non-submission of returns on the prescribed date. Relying on *Deokaran Nanshi's case (supra)* and its limited affirmance and

confinement to the cases of failure to furnish returns in *Bhagirath Kanoria's case (supra)* it was contended that at least so far as this offence was concerned, it was not a continuing one and consequently the delay in launching the Prosecution was fatal. Because of the alleged bar of limitation in this set of cases it was claimed that the same can be raised directly in the High Court for quashing of the whole proceedings at the very threshold.

14. However, the learned counsel for the respondents frontally assailed the stand of the writ petitioners that a criminal proceeding should be quashed at the very threshold on the ground of limitation under Chapter XXXVI of the Code. The larger submission herein was that the issues of limitations when raised would not pose an inflexible or blanket legal bar against the continuance of the proceeding nor does it remotely denude or affect the inherent jurisdiction of the trial court. Indeed the question of limitation is a matter for consideration, computation and adjudication by it alone. Consequently it was submitted that in view of the provisions of sections 467 to 473 of the Code the question of limitation must be squarely raised and urged at the very threshold either at the stage of taking cognizance by the Court, or, in the alternative, as a preliminary question thereafter when the accused makes his appearance. The justiciability of this issue has necessarily to be within the parameters of the provisions of Chapter XXXVI of the Code.

15. There appears to be patent merit in the lucid and forthright stand taken on behalf of the respondents. Viewed in the retrospect against the backdrop of its legislative history, it has to be borne in mind that prior to the enforcement of the present Code in 1974 there was no concept of limitation qua

criminal offence under the earlier Code. The Joint Select Committee of the Parliament in this context had observed as under in its report:

> "These are now clauses prescribing periods of limitation on a graded scale for launching a criminal prosecution in certain cases. At present, there is no period of limitation for criminal prosecution and a Court cannot throw out a complaint or a police report solely on the ground of delay although inordinate delay may be a good ground for entertaining doubts about the truth of the prosecution story. Periods of limitation have been prescribed for criminal prosecution in the laws of many countries and the Committee feels that it will be desirable to prescribe such periods in the Code as recommended by the Law Commission."

It was in pursuance of the aforesaid particular object that Chapter XXXVI was inserted in the Code to effectuate the same. The larger purpose of sections 467 to 473 contained therein would plainly indicate that the question of limitation is not only justiciable but has to be adjudicated within the parameters of those sections by the Court taking cognizance of the offence. The broad scheme of the Chapter is that section 468 prescribes the period of limitation for taking cognizance of offences punishable with imprisonment for less than three years and classified according to the quantum of sentence imposable in each category. Section 469 then spells out the point of commencement of the period of limitation in the three categories specified in the earlier section whilst the succeeding sections 470 and 471 in detail provide for the exclusion of time in certain cases and of the date on which the Court is closed. With regard to

continuing offences, section 472 spells out the rule that a fresh period of limitation shall begin to run at every moment of the time during which the offence continues. But the material provision that follows is that of section 473 pertaining to the extension of the period of limitation in certain cases and even overriding the bar of limitation. This calls for notice in extenso:

> "473. Extension of period of limitation in certain cases. - Notwithstanding anything contained in the foregoing provisions of this Chapter, any Court may take cognizance of an offence after the expiry of the period of limitation, if it is satisfied on the facts and in the circumstances of the case that the delay has been properly explained or that it is necessary so to do in the interests of justice."

16. Now the particular provisions on which the issue would turn in the present case are sections 468 and 473 and a new dimension and approach given thereto by the final Court in *Bhagirath Kanoria's case (supra).* It would be manifest from the aforementioned scheme of Chapter XXXVI that the issue of limitation, because of the varying periods provided therefor in section 469, would first turn on the nature of the offence disclosed from the allegations of the prosecutor. It has to be borne in mind that if the offence disclosed be punishable with imprisonment exceeding three years no question of limitation would arise. Equally if the offence be a continuing one, the issue of limitation is rendered irrelevant by virtue of section 472. Further depending on the quantum of sentence the period of limitation may itself vary from six months, one year and three years. Again as to the *terminus a quo* for determining the period of limitation, the provisions of section 469 have to be applied and equally

sections 470 and 471 are attracted for determining the *terminus ad quem.*

17. Apart from the above, it is evident from the aforequoted provisions of section 473 that though a prosecution may be prima facie barred by limitation, the said section expressly provides for an explanation of such delay. It begins with a non-obstante clause and in terms it provides for condonation of the delay if properly explained to the satisfaction of the Court. Therefore, that is a matter which has to be raised and gone into. What, however, is more significant is that even though it is established that the prosecution is beyond the period of limitation and further that the delay therein has not been satisfactorily explained yet the Court is given the power to override the bar of limitation if the interests of justice necessitate the same. It were these patent considerations which have impelled the final Court to make the under-mentioned observation in *Bhagirath Kanoria's case (supra):*

> "Before we close, we consider it necessary to draw attention to the provisions of section 473 of the Code which we have extracted above. That section is in the nature of an overriding provision according to which, notwithstanding anything contained in the provisions of Chapter XXXVI of the Code, any Court may take cognizance of an offence after the expiry of the period of limitation if, inter alia, it is satisfied that it is necessary to do so in the interest of justice. The hair-splitting argument as to whether the offence alleged against the appellants is of a continuing or non-continuing nature, could have been averted by holding that, considering the object and purpose of the Act, the learned Magistrate ought to take cognizance of the offence after

the expiry of the period of limitation, if any such period is applicable, because the interest of justice so requires. We believe that in cases of this nature, Courts which are confronted with provisions which lay down a rule of limitation, governing prosecution, will give due weight and consideration to the provisions contained in section 473 of the Code."

It is plain that even though in the aforesaid case the question had been raised in the trial court itself and was thereafter sought to be reagitated in revision before the High Court, their Lordships disapproved of hair-splitting arguments in the context. Consequently viewed in the background of statutory provisions and the precedent of the final Court, it seems manifest that the issue of limitation is not a blanket bar to the prosecution which may warrant it being raised initially in the High Court itself for quashing the proceedings at the threshold. Indeed it is a question which needs to be raised and determined at the earlier stage before the trial court. This is so because even after the raising of the issue of limitation, computation and its determination that the same is beyond the prescribed period, the delay may still be properly explained and consequently condoned and above all dehors such explanation it may still be overriden in the paramount interests of justice.

18. In fairness to learned counsel for the writ petitioners, an argument of somewhat superficial plausibility raised on their behalf must be noticed. Relying apparently on the authoritative observation in *R.P. Kapur v. State of Punjab (1)* that lack of sanction being a legal bar can provide a ground for quashing criminal proceedings, learned counsel had

(1) (1960) AIR (SC) 866.

sought to contend that limitation was also an identical bar entitling the petitioners to claim the quashing of proceedings before the High Court in the first instance.

19. The aforesaid submission though it may bring some credit to the ingenuity of counsel is nevertheless fallacious in the light of what has been considered and held in the earlier part of this judgment. It is plain that lack of sanction where it is provided as the pre-requisite for taking cognizance would present an inflexible and blanket legal bar to the prosecution till the same is obtained. Either the requisite sanction is forthcoming or it is not, no issue of computation, condoning or overriding the same can at all arise. The concept of limitation on the other hand under Chapter XXXVI of the Code presents no such blanket bar at all. As pointed out above, the issue of limitation is first a matter to be raised and then to be computed and thereafter determined by the Court on the basis of a proper explanation of delay or overriding the default if necessary in the interests of justice. Whilst the lack of sanction, as for example, under section 197 of the Code cannot be condoned, the expiry of limitation can be both explained and condoned by the Court. Equally whilst absence of sanction can not be overriden or ignored by the Court, section 473 empowers it that despite the expiry of limitation if the paramount interests of justice so require the prosecution would continue and that is a matter first in the judicial discretion of the Court taking cognizance. Therefore, in the limited field of quashing a proceeding the total absence of sanction is on an entirely different footing from the question of limitation under Chapter XXXVI of the Code.

20. Equally somewhat hypertechnical pleas were also sought to be raised on behalf of the

petitioners. It was contended that cognizance having once been taken by the trial court it would not be open to the accused to raise the issue of limitation thereafter nor was it permissible for the Court to determine the same. Neither principle nor precedent warrants any such specious assumption. It is well settled and has been reiterated in *Smt. Nagawwa v. Veeranna Shivalingappa Konjalgi and others (1)* that an accused person has no locus stand in the matter till process has been issued against him. His right to praise the issue of limitation thus can arise only after he puts in appearance subsequent to process issued after taking cognizance. I see no bar to the accused person raising the issue of limitation and indeed as observed earlier the same should be done at the earliest and if raised ought to be adjudicated upon as a preliminary issue.

21. As a corollary to the above submission it was also attempted to be argued that cognizance having originally been taken by the Chief Judicial Magistrate and thereafter the case having been transferred for trial to another Magistrate, the issue of limitation cannot be raised in such a transferee Court. This again has only to be noticed and rejected. It is well settled by virtue of Section 192 that a competent transferee Court exercises all the powers of the Court transferring the same. No hair-splitting distinction can either be drawn or allowed in this context.

22. To conclude on this aspect, the answer to question no. (ii) posed at the outset is rendered in the negative and it is held that the disputed issue of limitation under sections 468 and 473 of the Code of Criminal Procedure cannot be appropriately raised directly in the High Court for the quashing of

(1) (1976) AIR (SC) 1947.

proceedings under Section 482 of the Code.

23. Now, I may advert to the remaining question no. (iii) framed at the outset with regard to the point, whether the petition of complaint herein must plead each and every relevant fact and in particular the precise number of employees of the prosecuted establishment and the consequences in the event of a failure to do so.

24. In elaborating his somewhat vehement stand that the complaint herein did not disclose an offence, Mr. Basudeva Prasad, learned counsel for the petitioners, had first placed reliance on section 2(d) of the Code defining a 'complaint', and, in particular on Section 14AC of the Act, which provides for a report in writing of the facts constituting such an offence for the cognizance thereof. It was argued that the complaint did not disclose and plead the necessary facts constituting the offence, and, in particular, that the prosecuted establishment employed 20 or more persons therein. Placing particular reliance on *Messrs United Sports Works and others v. The State of Bihar and another (supra)*, it was submitted that the absence of the averments with regard to 20 or more employees in each establishment was fatal to the prosecution and the same could not be allowed to be established by evidence, and, therefore, the proceeding should be quashed at the very threshold.

25. The aforesaid contention must be examined on larger principle as also on the anvil of the relevant statutory provisions. It is, therefore, apt to quote section 2(d) of the Code and the relevant parts of Section 1 and 14AC of the Act:

> "(d) 'complaint' means any allegation made orally or in writing to a Magistrate, with a view to his taking action under this Code, that

some person, whether known or unknown, has committed an offence, but it does not include a police report."

"1. SHORT TITLE, EXTENT AND APPLICATION

(1) This Act may be called the Employees' Provident Funds and Miscellaneous Provisions Act, 1952.

(2) It extends to the whole of India, except the State of Jammu and Kashmir.

(3) Subject to the provisions contained in Section 16, it applies -

(a) to every establishment which is a factory engaged in any industry specified in Schedule I and in which twenty or more persons are employed, and,

(b) to any other establishment employing twenty or more persons or class of such establishments which the Central Government may, by notification in the Official Gazette, specify in this behalf;

...

(5) An establishment to which this Act applies shall continue to be governed by this Act notwithstanding that the number of persons employed therein at any time falls below twenty:"

"14AC. COGNIZANCE AND TRIAL OF OFFENCES

(1) No Court shall take cognizance of any offence punishable under this Act, the Scheme or the Family Pension Scheme

or the Insurance Scheme, except on a report in writing of the facts constituting such offence made with the previous sanction of the Central Provident Fund Commissioner or such other officer as may be authorised by the Central Government, by notification in the Official Gazette, in this behalf, by an Inspector appointed under Section 13."

26. Before adverting in some detail to the aforesaid provisions, one must keep in mind the broader perspective that the administration of criminal law is more a matter of substance than of form and should not be allowed to be fogged by hair-splitting technicalities. What has to be largely seen herein is whether on reading the complaint as a whole the same would with relative clarity disclose facts which would constitute an offence under its prescribed definition. The petition of complaint is to be looked at in its totality and not each paragraph thereof as if it were in a water-tight compartment. It is now well settled beyond cavil that a complaint or a first information report in a criminal case is not to be an encyclopedia of all the facts. In *particular with regard to complaints the final Court in Bhimappa Bassappa Bhusannavar v. Laxman Shivarayappa Samagouda and others (1)* has observed as under:-

"The word 'complaint' has a wide meaning since it includes even an oral allegation. It may, therefore, be assumed that no form is prescribed which the complaint must take. It may only be said that there must be an allegation which prima facie discloses the commission of an offence with the necessary facts for the Magistrate to take

(1) (1970) AIR (SC) 1153.

action. Section 190(1)(a) makes it necessary that the alleged facts must disclose the commission of an offence."

27. In the light of the above and equally with reference to Section 14AC(d) of the Act it seems to follow that neither the statute nor precedent requires that the petition of complaint must in detail plead any and every minuscule fact relevant to the offence or the evidence by which it has to be established. Therefore, the complaint is not required to plead the language of the section or its number or to spell out every outline of the facts and evidence that is likely to be adduced. Equally in this context one cannot lose sight of the fact that we are called upon to construe a beneficient social legislation under the Act, which should merit a liberal and substantial approach and not a constricted and technical one. It was, perhaps, this consideration which had impelled their Lordships in *Bhagirath Kanoria's case (supra)*, to frown upon hairsplitting technicalities in this sphere.

28. In the aforesaid background one may now proceed to look at the complaint (Annexure '3') with particular reference to paragraphs 2 and 3 (hereunder quoted in extenso for easy reference), on which the learned Counsel for the petitioners had focused himself:

> "2. That, M/s. Kailash Talkies, Barauni, Begusarai, is an establishment within the meaning of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952. It is hereinafter referred to as "The said establishment". The Employees' Provident Funds and the Miscellaneous Provisions Act, 1952, the Employees' Provident Funds Scheme, 1952, and the Employees' Family

Pension Scheme, 1971, are applicable to the said establishment. It has been allotted Code No. BR/2076. It is situated at Barauni, District Begusarai.

"3. That accused Nos. 2 to 5 are the persons incharge of the said establishment and are responsible to it for the conduct of its business. They are thus required to comply with all the provisions of the said Act and the Scheme and the Family Pension Scheme in respect of the said establishment."

29. Now turning to the petition of complaint as a whole, it is manifest that therein it has been expressly averred that the petitioner firm is an establishment within the definition under the Act and consequently the statutory provisions are applicable to the same. In particular, it has been stated that it has been allotted a Code number administratively labelling each establishment covered by the Act. It then specifies the accused persons who are incharge of the said establishment and are responsible the conduct of its business consequently enjoined by law to comply with the statutory provisions in respect thereto. The relevant paragraphs 30 and 38 of the Employees' Provident Funds Scheme, 1952, which require the employer to make contributions to the provident fund within 15 days of the close of that month, are referred to and it is pointed out that the accused persons, in spite of several requests, have failed to pay the contributions for the relevant months, which are specified. It is then averred that the accused persons, who are incharge of the establishment and were responsible for the conduct of its business, have committed the offences under the relevant statutory provisions. What is of particular significance is the averment in paragraph 14 that

sanction for the prosecution has been granted by the Regional Provident Fund Commissioner, Bihar, by his order dated the 3rd of September, 1976, and the original copy thereof is annexed as an integral part of the complaint. The order requisite formal pleadings have equally been made by the complainant Provident Funds Inspector, duly appointed under Section 13 of the Act.

30. It seems manifest from the above that viewed as a whole the aforesaid petition of complaint clearly and expressly discloses the facts constituting the offences under the Act. The hypertechnical argument that because the complainant does not expressly plead that the petitioner's establishment employs 20 or more persons has only to be noticed and rejected. The rule of incorporation by express reference to another matter or provision is too well known to call for elaboration. Therefore, when the complainant avers that M/s. Kailash Talkies is an establishment within the meaning of the Act and the same is applicable to it and that a code number has been allotted thereto would by patent reference incorporate the applicable part of the definition of 'establishment' to which the Act applies. In the eye of law it would in terms be an express pleading that *M/s. Kailash Talkies* is an establishment employing 20 or more persons as specified in clause (b) of sub-section (2) of section 1 of the Act. In terms it must be deemed to read as the undermentioned averment in the complaint:

> "That M/s. Kailash Talkies is an establishment employing 20 or more persons and is of the class of establishments which the Central Government has by notification in the official gazette specified in their behalf."

31. As I said earlier, it is not necessary and is indeed wasteful to plead the very words of the statute and if express reference is made to it then its contents must be deemed to be incorporated in the complaint, and, therefore, would more than amply specify the requirement that the said establishment satisfies statutory pre- condition of the applicability of the Act thereto, including the employment of 20 or more persons.

32. At this very stage one must also notice the fears that were expressed by the learned counsel for the petitioners, and indeed somewhat eloquently projected, that unless any and every minuscule factor constituting the offence is expressly pleaded in the complaint there would be grave danger of prosecutions being launched indiscriminately at the whimsicality of the ministerial officers of the department resting on stereotyped allegations. Apart from the fact that this submission seems to rest on the untenable basis of an assumption that the departmental officers would act unfairly, it equally loses sight of the statutory safeguards provided by the Act in this context. Section 14AC on which so much emphasis was placed by the learned counsel for the petitioners himself, provides that no Court shall take cognizance of an offence under the Act except on a report in writing of the facts constituting such offence made with the previous sanction of the Central Provident Fund Commissioner or such other officer as may be authorised by the Central Government by notification. It is thus manifest that prior sanction for prosecution is the sine quo non for even taking cognizance of offences under the Act. Indeed the report in writing of the inspector with regard to the facts constituting the offence and the previous sanction are integrally connected herein. It is thus plain that prosecutions under the

Act cannot be indiscriminately ordered by inspectors appointed under section 13 and it can be so done only after a full and detailed consideration of the matter at the highest level. The Provident Fund Commissioner has first to be satisfied that the allegations and facts disclose an offence under the Act and thereafter whether it is expedient to order prosecution before he authorises the filing of a petition of complaint for prosecution. The sanction is in the shape of a speaking order which after referring to the requisites and the requirements of section 14AC authorises the prosecution with reference to the periods for which default is made and specifying the names of persons who are to be prosecuted. Consequently all apprehensions of any indiscriminate prosecutions as a modus of harassment by the inspectors or departmental staff at the lower level are wholly ill-founded. It is indeed plain that all the necessary facts, which would constitute the offence, have first to pass the crucible of sanction by the Provident Fund Commissioner before they emerge in the petition of complaint for prosecution in open Court and to be established by evidence in the course of the trial.

33. It was then sought to be contended that the complaint petitions herein were usually, if not invariably, preferred in stereotyped printed forms which were alleged to be filled in by ministerial inspectors without any application of mind. The stand taken was that mere use of the printed forms etc., was indicative of the fact that the petitions of complaint were preferred without individual attention to the issue whether the facts pleaded constituted an offence or not.

34. The contention aforesaid is plainly untenable because firstly it cannot be said generally that the law either forbids or frowns on forms in the

criminal realm. This is manifest even from section 173(2) of the Code which prescribes that the report of the police officer on completion of investigation shall be forwarded to a Magistrate in the form prescribed by the State Government. The Code otherwise provides a wide variety of forms to be used in the criminal process. Specifically herein even though the petition of complains may be on a printed form it is obvious that the material and substantive parts thereof have to be specified and filled in with a proper application of mind to the broad facts in-hand. There is no such thing as a mechanical prosecution or filling up all the materials columns thereof as if by an automaton. It was not denied that before launching a prosecution repeated notices are given to pay up the dues and submit the returns and only on persistent failure to do so, a prosecution is ordered. It must also be borne in mind that herein one is not dealing with variegated circumstances of ordinary and conventional crime but instead with the infraction of statutory prescriptions which have been made penal to give them the sanction and force of criminal law. It seems to follow that if the prescribed requirements are identical with regard to each establishment the infraction thereof which would constitute the statutory offence would be somewhat similar in nature and the allegations in the consequential prosecution have inevitably to follow a particular conforming pattern or form. In fact the use of a form may well focuss the attention of the authorities below on the material ingredients of the offence with regard to which the facts have to be pointedly specified and pleaded and later established in the course of the trial. I am unable to see how the use of a form by itself would be something of an anathema to the law which would vitiate the

prosecution.

35. Now the sheet-anchor of the petitioner's stand was its reliance on the judgment in *Messrs United Sports Works (supra)*. This undoubtedly supports their case but with the greatest respect the same would not stand the scrutny of a critical analysis. In the said case also the primary ground of challenge was that the complaint in terms did not specify the number of employees of the establishment or alleged that it was more than 20 and, therefore, the same failed to make the material allegation of fact for maintaining the prosecution. The learned single Judge after referring to the facts and quoting a substantial part of the petition of complaint (in all running to seven typed pages) observed somewhat curiously that the whole of the petition of complaint did not mention any fact at all. It is not easy to subscribe to this line of reasoning and to brush away a host of pleaded facts as if they were non-existent. It was then observed that an establishment within the meaning of an Act is only a legal concept but not a fact. It is not easy to see how the existence of a factory or an establishment (satisfying the prescribed requirements of section 1 of the Act) is not a fact at all but merely the statement of a legal concept. It may be noticed that even a legal concept may connote or rest itself squarely on certain foundational facts and is not invariably something which is entirely etherial. The concept of incorporation by reference to a matter is well-known. If instead of pleading every factual requirement for an establishment it is stated that the same comes squarely within the ambit of section 1 of the Act then it is in terms nothing more or less than pleading facts required by the statute. By reference and incorporation the factual matrix actually is and, in my opinion, can be stated briefly

and tersely to the effect that the establishment satisfies the requirements of the statute including the pre- condition of employment of 20 or more persons. In my view it would be only hypertechnical to insist on each and every petty factual requirement for the applicability of the Act to the establishment to be specifically pleaded in terms. As has been said earlier, the petition of complaint is not to be an encyclopedia of every conceivable factor relevant to the prosecution. With great deference I am unable to agree that it is mandatory for the petition of complaint to specify in terms the number of employees of the establishment in each case on the date of complaint which, in fact, may be a fluid one. Once a specific allegation is made in the complaint that the establishment is within the meaning of the Act which is applicable thereto then it would be open and permissible for the prosecution to establish the requisite requirements by evidence and it would be equally open for the accused to rebut and show that he does not come within the ambit of the Act at the threshold. I am unable to subscribe to the view that the mere non-specification of the precise number of employees in the establishment would be fatal despite the categoric averment that the said establishment was within the meaning of the Act and the scheme applicable thereto and that it had been allotted a code number and further averments that the persons in charge of the establishment were liable to furnish returns and pay contributions and despite having been repeatedly pressed to do so had failed to perform the statutory duty. With the deepest deference it seems to me that the observations in *United Sports Works (supra)* rest on a hair-splitting technicality rather on the terra-firma of substantial justice between the prosecution and the accused. With the greatest

respect this case does not lay down the law correctly and is hereby overruled.

36. In fairness to Mr. Basudeva Prasad, reference must also be made to *M/s. Anantharamaiah Woolen Factory v. The State (1)* which was sought to be relied upon. That case is, however, plainly distinguisable. What primarily fell for consideration therein was the scope of the expression 'employer' as defined in section 2(e) of the Act and further whether every partner of a firm necessarily and inflexibly came within its ambit. That indeed is not even remotely the question here. It is significant to recall that therein the complaint far from being quashed was allowed to continue substantially against the establishment itself and the managing partner thereof who was admittedly in the ultimate control of the affairs and business of the said establishment. The general observations in the case also do not in any way advance the stance of the petitioner. *Equally M/s. Shanker Brothers v. The State (2)* is of no aid to the petitioners. Plainly enough, that was not a case of any prosecution at all or the filing of a petition of complaint. It was directed merely against a notice asking the petitioners to pay the amounts of money determined as employer's contributions and the limited relief granted was that since there was no final determination of the question of fact as to whether the petitioners' establishment is one employing 20 or more persons the same was set aside with liberty to respondent no. 2 to proceed in accordance with law by granting fresh opportunity to the petitioners to present their case that they do not regularly employ 20 or more persons. Obviously the said case

(1)(1981) Lab. and Ind. Cases 538

(2)(1978) BBCJ 337.

is wholly distinguishable.

37. That argument ab inconventiae in the context of the stand that the number of employees of an establishment must be specifically pleaded must also be noticed. It may not always be possible for the complainant to ascertain with mathematical precision how many workers or employees are on the roll of a particular establishment on a particular date. It is perhaps for their reason that sub-section (5) of section 1 prescribes that an establishment to which this Act applies shall continue to be governed by this Act notwithstanding that the number of persons employed therein at any time falls below twenty. If there is a specific averment that the establishment is one within the meaning of the Act and it is applicable then it has to be assumed that for the material period the number of persons employed satisfies the statutory requirement. To insist that the said number must be specified with precision on a particular date may well be asking for an impossibility and in any case may raise grave difficulties for the actual applicability of the provisions. An incorporation which may lead to overtly technical consequences has thus to be avoided on sound cannons of construction.

37. To sum up on this aspect, the answer to question no. (iii) formulated at the outset has to be rendered in the negative and it is held that a petition of complaint for offences under section 14 of the Act need not in terms plead each and every minuscule relevant fact nor the precise number of employees of the prosecuted establishment. In any event, the failure to do so does not vitiate the proceedings on such technical ground alone.

38. Since all the three primal questions and their corollaries, which were raised on behalf of the

petitioners, have been answered against them, these criminal miscellaneous cases must, therefore, fail and are hereby dismissed.

39. In view of the grave delay that has already occurred in the trial thereof because of the pendency of the present proceedings, the court below shall expeditiously proceed to dispose of the same.

Nagendra Prasad Singh, J. I agree.

Brishketu Sharan Sinha, J. I agree.

S.P.J. Application dismissed.

FULL BENCH

1985/January 11.

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

*Tatal Iron and Steel Company Ltd.**

v.

The State of Bihar and others.

Bihar Sales Tax Act, 1959 (Bihar Act No. XIX of 1959) *Section 2(f)— provisions of—petitioner—Company obliged to provide and maintain canteen for the use of its workers under section 46 of Factories Act, 1948 and provisions of Mines Act, 1952—whether a dealer.*

Where it was obligatory for the petitioner-Company under section 46 of the Factories Act, 1948 and Bihar Factories Rules framed thereunder to provide and maintain a canteen for the use of its workers employed in its company leaving no option to the petitioner-Company and likewise under the corresponding provisions of the Mines Act, 1952 and the rules framed thereunder it was obligatory on the petitioner compnay to maintain canteen for its mine workers;

Held, that the petitioner-Company is, of course, a dealer in the business of steel and iron, but, it would not become a dealer in business of

* Tax Case No. 146 of 1978. In the matter of an application under section 33 of the Bihar Stales Tax Act, 1959.

purveying foodstuffs, merely because the law enjoins it to run a canteen for its employees and it is complying with statutory provisions. Consequently, on principle and the language of the statute, it seems to follow that the petitioner company is not carrying on the business of running canteen and, therefore, it cannot possibly be a dealer in such a business within the meaning of section 2(f) of the Bihar Sales Tax Act, 1959.

State of Tamil Nadu v. Thirumagal Mills Limited (1) State of Tamil Nadu v. Burmah Shell Oil Storage and Distributing Company of India Ltd, and anr. (2)-followed.

Commissioner of Commercial Taxes Bihar v. M/s. Burn and Company Ltd. (3)-Overruled.

Tata Iron and Steel Co. Ltd. v. The State of Orissa (4)-dissented from.

State of Tamil Nadu v Biny Ltd. Madras (5)-distinguished.

Reference under section 33 of the Bihar State Sales Tax Act, 1959.

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

Mr. K.D.Chatterjee, and Mr. A.B.S. Sinha for the petitioner.

Mr. Rameshwar Prasad (G.P.VI), Mr. Bipin Behari Sinha for the respondents.

S.S.Sandhawalia, C.J.: The two questions of

(1) (1972) 29, STC 290

(2) (1973) 31 STC, 426

(3) (1967) Tax case No. 58 of 1966 disposed of on 20.12.1967

(4) (1975) 35 STC 195

(5) (1980) AIR (SC) 2038.

law, referred by the Commercial Taxes Tribunal, Bihar, Patna, which fall for consideration by the Full Bench, have been formulated in the following terms:-

I. Whether the services rendered at the petitioner's canteen, in compliance of the provisions of the Factories Act and the Mines Act, involved any element of sale?

II. Whether, on the facts and in the circumstances of the case, the petitioner was a dealer in respect of the canteen sale and liable to sales-tax ?

2. Perhaps, at the very outset it may be noticed that this reference to the larger Bench has been necessitated by a pointed doubt about the correctness of the ratio of the Division Bench judgment of this Court in *Commissioner of Commercial Taxes, Bihar, v. Messrs Burn and Company Ltd.(1)* and also in *Tata Iron and Steel Company Limited vs. The State of Orissa. (2)*

3. The Tata Iron and Steel Company Limited was incorporated by its Memorandum and Articles to carry on business in iron and steel and is admittedly engaged in the manufacture of iron and steel products at its works at Jamshedpur, which is registered under the Factories Act. The petitioner Company also owns, amongst others, a mine at Noamundi, which is registered under the Mines Act. In compliance with the statutory obligations under the Factories Act and also under the Mines Act the petitioner company maintains, for the factory at Jamshedpur and for the Noamundi mines, canteens, both at Jamshedpur and Noamundi, for the facility of the concerned employees. These canteens are run

(1) (1967) Tax case No. 58 of 1966 decided on 20.12.1967

(2) (1975) 35 STC 195.

on no profit no loss basis and indeed, with subsidies required to be provided under the law, thus eliminating any chance on consideration of making any profit therefrom.

4. The Assistant Commissioner of Commercial Taxes, Jamshedpur, however, assessed sales-tax on the sale proceeds of the aforesaid canteens for the assessment year 1962-63 by an order dated the 27th of September, 1966. The petitioner company appealed, but the Deputy Commissioner of Commercial Taxes, Bihar, Patna, by his order dated the 29th January, 1975, rejected the petitioner's appeal, with regard to the canteen sales. The petitioner then preferred a revision before the Commercial Taxes Tribunal, Bihar (hereinafter referred to as the Tribunal), which also met the same fate by its order dated the 21st of March, 1978. Thereafter, having failed to secure a reference of certain questions of law from the Tribunal, the petitioner approached this Court for a mandamus to state a case and refer certain questions of law for its decision. The prayer of the assessee-petitioner was accepted by this Court, and the Tribunal was directed to state the case under Section 33 of the Bihar Sales Tax Act, 1959 (hereinafter referred to as the Act), and refer the aforesaid two questions of law for its opinion.

5. This case originally came up before a Division Bench, and the learned Counsel for the assessee-petitioner pointedly challenged the correctness of the ratio in *Commissioner of Commercial Taxes vs. Messrs Burn and Company Limited (supra) and Tata Iron and Steel Company Ltd. vs. The State of Orissa (supra)*, on the basis of a host of authorities taking a contrary view. The learned Judges, constituting the Division Bench, apparently finding merit in the said challenge, have referred the case for consideration by a larger Bench.

6. Before coming to the core of the somewhat controversial issues involved in Question No. II, it seems apt to clear the decks of the relatively simpler problem under the first question. Mr. K.D.Chatterjee, learned Counsel for the petitioner, very fairly did not seriously press this issue at all. It, therefore, suffices to record that earlier there did exist some precedential controversy on the point, whether a compulsory sale mandated by statute adequately involved an element of sale and was consequently excisable to tax or not. This seems to be now finally settled by a seven-*Judge Bench in Messrs Vishnu Agencies (Private) Limited vs. The Commercial Taxes Officer & others (1).* Therein, after an admirably remarkable discussion of principle and precedent, it was concluded as under:-

> "This resume of cases, long as it is, may yet bear highlighting the true principle underlying the decisions of this Court which have taken the view that a transaction which is effected in compliance with the obligatory terms of a statute may nevertheless be a sale in the eye of a law."

And, finally -

> "The conclusion which, therefore, emerges is that the transactions between the appellant, Messrs. Vishnu Agencies (Private) Ltd. and the allottees are sales within the meaning of Section 2(g) of the Bengal Finance (Sales Tax) Act, 1941. For the same reasons, transactions between the growers and procuring agents as also those between the rice-millers on one hand and the wholesalers or retailers on the other are sales within the meaning of Section 2(n) of the Andhra Pradesh

(1)(1978) AIR (SC) 449.

General Sales Tax Act, 1957. The turnover is accordingly exigible to sales tax or purchase tax as the case may be."

7. In view of the above, the answer to question no. I must now be rendered in the affirmative, i.e., in favour of the Revenue and against the assessee.

8. This however, does not in any way resolve the main issue, because the battle lines were joined primarily around question no. II. Mr. Chatterjee had contended with force and ability that despite the answer to question no. I, in order to come within the ambit of a dealer, there must first be a business, and, yet again one that is run with the profit motive or at least have an element of commercial character. It was contended on behalf of the petitioner company that both these basic elements being lacking, the liability of sales-tax could not be foisted under the statute, as it stood at the time of the assessment. On behalf of the respondents, this stand was sought to be repulsed on every flank.

9. In order to appraise the rival stand and contentions, it must be noticed at the very threshold that the issue herein has to be examined in the light of the definition in Section 2(f) of the Act, as it stood unamended in the year 1962-63. It is common ground that subsequently, the Legislature made amendments in the statute, in order to effectuate its purpose of fixtionally extending the concept of business irrespective of the profit motive. Different consideration would obviously apply in the light of the aforesaid amendments, but, as I have already pointed out, we are called upon to consider the matter at the pre-amendment stage and dehors the subsequent changes in the law. Since some argument was also raised before us on the basis of the definition of 'dealer' under Section 2(c) of the

Bihar Sales Tax Act, 1947, it is apt to quote the relevant provisions of Section 2(f) of 1959 Act and Section 2(c) of the 1947 Act for facility of comparison:

1959 Act	1947 Act
"(f) 'dealer' means any person who sells any goods whether for commission, remuneration or otherwise and includes any undivided Hindu family, firm, company or corporation, any department of Government, and any society, club or association which sells goods to its members:	"(c) 'dealer' means any person who carries on the business of selling or supplying goods in Bihar, whether for commission, remuneration or otherwise and includes any firm or a Hindu joint family, and any society, club or association which sells or supplies goods to its members;
Explanation : (i) A factor, a broker, a commission agent, a del credere agent, an auctioneer or any other mercantile agent, by whatever name called and whether of the same description as hereinbefore mentioned or not, who sells goods, as aforesaid, shall be deemed to be a dealer for the purposes of this Act.	Explanation - The manager or agent of a dealer who resides outside Bihar and who carries on the business of selling or supplying goods in Bihar shall, in respect of such business, be deemed to be a dealer for the purposes of this Act."
(ii) The manager or agent of a dealer who resides outside Bihar and who sells goods in Bihar shall, in respect of such business, be deemed to be a dealer for the purpose of this Act."	

10. Now it seems to follow from the ordinary dictionary meaning of the word 'dealer' as also from the plain language of Section 2(f) of the Act that there must be some sustained business activity in which such a seller engages himself. Plainly enough, a person does not become a dealer by an isolated transaction of sale, barring of course the exception, where, by a legal fiction, the statute may declare him to be so. On larger principle, the concept of being a dealer cannot be divorced from a course of business, trade or some commercial activity or some activity of a commercial character. In this context one must notice the plausible submission of Mr. Chatterjee, when he pointed out that the law in this field now does not make any sharp distinction between levy of sale and purchase tax. If, therefore, an isolated transaction (in the absence of any sustained business activity) was to bring one within the ambit of a 'dealer' then every ordinary purchaser of goods, even for home consumption like food, clothings, etc., would come within the ambit of a dealer and thus exigible to purchase tax. This would obviously lead to anomalous and absurd results and any construction which tends to such a result must, therefore, be avoided. Therefore, on principle and the language of Section 2(f), it seems to follow that in order to be a 'dealer' the person must be engaged in a business or a sustained commercial activity. This view seems to be equally well supported by authoritative precedent. In *Director of Supplies and Disposals, Calcutta vs. Member, Board of Revenue, West Bengal (1)* it was assumed to be exiomatic in the following words:-

"As pointed out by this Court in *State of Andhra Pradesh vs. M/s. Abdul Bakshi and*

(1) (1967) 20 STC 398.

Bros. [(1964) 15 STC 644] a person to be a dealer must be engaged in the business of buying or selling or supplying goods."

Later, in *The Joint Director of Food, Visakhapatnam vs. The State of Andhra Pradesh(1)* Krishna Iyer, J., speaking for the Court, observed:

> "We may hasten to mention that the ordinary concept of business has the element of gain or profit, whose absence negatives the character of the activity as business in Section 2(b) of the Central Act. A person becomes a dealer only if he carries on business and the Central Government can be designated as 'dealer' only if there is profit-motive."

11. Once it is held that to be a 'dealer' one must be engaged in a business or sustained commercial activity, what next falls for consideration is the true premise which underlies a business or commercial activity. It seems well settled that barring statutory exceptions or a legal fiction, any business necessarily connotes a profit-motive. That one may not achieve that purpose and object and may actually run into loss is not the determining factor. But the profit-motive and activity for gain seems to lie at the heart of the concept of business itself. The course of business must be a sustained activity, like a trade, or must have an element commercial in character. Though this is manifest on principle, it seems equally well settled by binding authority. In *The State of Gujarat vs. Raipur Manufacturing Company Ltd.(2),* J.C. Shah, J., speaking for the Court, observed:-

> "The expression 'business' though extensively used in taxing statutes, is a word

(1) (1976) 38 STC 329

(2) (1967) 19 STC 1.

of indefinite import. In taxing statutes, it is used in the sense of an occupation, or profession which occupies the time, attention and labour of a person, normally with the object of making profit. To regard an activity as business there must be a course of dealings, either actually continued or contemplated to be continued with a profit-motive, and not for sport or pleasure. Whether a person carries on business in a particular commodity and regularity of transactions of purchase and sale in a class of goods and the transactions must ordinarily be entered into with a profit-motive. By the use of the expression 'profit-motive' it is not intended that profit must in fact be earned. Nor does the expression cover a mere desire to make some monetary gain out of a transaction or even a series of transactions. It predicates a motive which pervades the whole series of transactions effected by the person in the course of his activity. In actual practice, the profit-motive may be easily discernible in some transactions; in others it would have to be inferred from a review of the circumstances attendant upon the transaction."

The aforesaid enunciation, which derives its source from earlier authorities, has been subsequently consistently followed and has not been departed from.

12. Now, once the basic concepts are settled that in order to be a 'dealer' the person must be engaged in a business and such business must be for a profit-motive, the core question is, whether the Tata Iron and Steel Company is a dealer in the business of running canteens as a seller or purveyor of foodstuffs ?

13. In order to answer the aforesaid question, three basically admitted premises call for pointed notice. Firstly Section 46 of the Factories Act, 1948, and the Bihar Factories Rules framed thereunder make it obligatory for the petitioner company (which, admittedly, employs more than 250 workers) to provide and maintain a canteen for the use of its workers. The statute does not leave any option to the petitioner company to run the canteens and indeed there are penal provisions for enforcing this obligation. Similarly, under the corresponding provisions of the Mines Act, 1952, and the rules framed thereunder, with regard to the mines run by the petitioner Company, it is similarly obligatory to maintain a canteen for the mine workers. It is thus plain that the company is not voluntarily and of its own volition, engaging in the business of sale of foodstuffs to its workers, but is doing so by the strict mandate of the law.

14. Secondly, it is the common case that these canteens are not being run with any profit-motive or gain. Indeed, the statutory provisions make it obligatory that such canteens must be provided on a non-profit basis. Far from making a profit, the law further requires the subsidising of those canteens and the firm averments on this point are that consequently, in the end, the canteens are and would inevitably run on a loss. The profit-motive herein is thus to totally absent.

15. Thirdly, it calls for somewhat pointed notice that the Memorandum and Articles of Association of the company do not even remotely authorise it to indulge in the business of running canteens or to be a purveyor of foodstuffs. That being so, it is plain that in a way, the company is prohibited and barred from carrying on this activity as its business. It is well settled ever since The

Ashbury Railway Carriage and Iron Company (Limited) vs. Riche (1) that if the purpose and object does not find a place in the Memorandum and Articles of Association of a company, then, even the consent of the share-holders cannot legitimise the carrying on of a business not authorised by its charter.

The Tribunal in its revisional order itself categorically rejected the far-fetched stand of the respondent State that the Memorandum and Articles of Association authorised or enjoined such a business in the following words:-

> "In putting such a construction on this provision of the Memorandum of Association, I am inclined to think, he is trying to stretch its scope a little too wide. The Memorandum, read as a whole, can hardly admit of such interpretation on this point. So, on the facts as they stand, their running of the canteens has to be taken as being in compliance of the aforesaid statutory requirements."

Once it is so held, it is incongruous to say that a business, in terms prohibited by the Memorandum and Articles and in any case not authorised by it, would become the business of a company for the purpose of making it a dealer therefor. To discharge a statutory obligation or a binding mandate of the law is not a business. It is only a compliance with the law in deferrence to the sanction provided for its infraction. Therefore, conforming to the statutory obligation does not make the subject or the complier, as if he is voluntarily entering or carrying on such a business. Indeed, he is merely bowing down to the dictates of the law.

(1) 33 Law Times Rep. 450.

16. On the aforesaid three premises what would call for notice is that to come within the ambit of Section 2(f) of the Act, one must be obviously a dealer in that particular field of business. Merely because of the compulsion or mandate of the law, a limited company is obliged to undertake an activity admittedly on a non- profit basis (and on a loss) and, indeed even beyond the scope of the authorisation under its Memorandum and Articles of Association, would not make such a company a dealer in such compelled activity. To give a homely example in the present case, the Tata Iron and Steel Company is, of course, a dealer in the business of steel and iron, but, it would not become a dealer in the business of purveying foodstuffs, merely because the law enjoins it to run a canteen for its employees and it is complying with the statutory provisions. Consequently, on principle and the language of the statute, it seems to follow that the petitioner company is not carrying on the business of running canteens and, therefore, it cannot possibly be a dealer in such a business within the meaning of Section 2(f) of the Act.

17. Now, as this issue appears to me as covered by the binding precedent of the final Court, it seems unnecessary to advert to the numerous judgments of other High Courts. Specifically, it may be noticed that with regard to canteen's case there are two decisions of their *Lordships of the Supreme Court. In State of Tamil Nadu v. Thirumagal Mills Limited (1)*, a spinning mill had utilised amounts by sale of articles of food in its canteen, which was run for its employees as also of foodgrains and groceries sold in the fair-price shop. The High Court found that the assessee company was not carrying

(1) (1972) 29 STC 290.

on business of running canteens or fair-price shops, and, on appeal by the State of Tamil Nadu, their Lordships affirmed the judgment of the High Court on the basis of the unamended provisions of Section 2(d) and 2(g) of the Madras General Sales Tax Act, to hold that the assessees were not liable to sales-tax. Again, in *State of Tamil Nadu vs. Burmah Shell Oil Storage and Distributing Company of India Limited and another (1)*, the question was the levy of sales-tax with regard to the supply of tea and edibles to the workmen of the company for a canteen established by it under the Factories Act. The Supreme Court affirmed the High Court's view that such tax was not levyable on the unamended provisions of the Madras General Sales Tax Act. It is plain that these cases are on all fours with regard to the issues before us. By way of very close analogy, a reference may also be instructively made to *The State of Gujrat vs. Vivekanand Mills (2), The State of Gujarat vs. Raipur Manufacturing Company Ltd. (3), and Director of Supplies and Disposals v. Member, Board of Revenue, West Bengal (4) (supra).*

18. One must now turn to the Division Bench judgment of this Court in Commissioner of Commercial *Taxes, Bihar v. Messrs Burn and Company Limited (supra)*, which had necessitated this reference to the full Bench. A perusal of the brief judgment makes it plain that the issue before us was not at all presented from its various angles before the Bench. Though the question, undoubtedly, was with regard to the canteen sales maintained by Messrs. Burn and Company Limited,

(1) (1973) 31, STC 426

(2)(1967) STC 103

(3) (1967) 19 STC 1

(4) (1967) 20 STC 398.

the only question raised and considered was, whether a compulsory sale is exigible to tax. It bears repetition that at that stage, in 1987, there seemed to be some controversy on this aspect. Relying on the then recent judgment in *Indian Steel and Wing Products Ltd. vs. State of Madras (1)*, it was held that the compulsory sale amounted to sale and thereafter it was summarily concluded that canteen sales would be exigible to tax. Though, in fairness, it must be noticed that the real ratio of the case that compulsory sales have an element of sale is unexceptionable, in view of the *Vishnu Agencies (Private) Limited's case (supra)*. The conclusion that canteen sales run under the obligations of Section 46 of the Factories Act are necessarily taxable is plainly untenable. For the detailed reasons above, if *Messrs Burn and Company's case (supra)* is construed as a warrant for its consequential result, and, as an authority for the proposition that sales in running of compulsory canteens are liable to sales-tax on the unamended provisions of section 2(f) of the Act, then the same is not good law and the judgment is hereby overruled.

19. In fairness to Mr. Rameshwar Prasad, one must notice his pointed reliance on *Tata Iron & Steel Company Limited vs. State of Orissa (supra)*. That judgment undoubtedly goes to his aid and, as the name of the case indicates, pertains to the present petitioner company itself. However, with the greatest respects to the learned Judges, I am unable to subscribe to the view they have arrived at and, with deference, record a note of dissent therefrom. It is evident from paragraph 12 of the report itself that their view runs counter to the weight of precedent within the country and they chose to dissent from as

(1) (1968) AIR (SC) 478.

many as 9 judgments of the Madras, Mysore and Calcutta High Courts. The judgment of the Supreme Court in State of Tamil Nadu vs. Thirumagal Mills Limited (supra) was sought to be distinguished, but apparently, judgments in *State of Tamil Nadu vs. Burmah Shell Oil Storage and Distributing Company Limited (supra), The State of Gujrat vs. Vivekanand Mills (supra) and Director of Supplies and Disposals vs. Member, Board of Revenue, West Bengal (supra),* were not brought to their Lordships' notice. The view thus seems to run counter to those binding precedents of the Supreme Court.

20. This apart, with respect, I am unable to agree with what has been said more or less as a dictum without detailed reasonings that the running of canteen is an integral part of the business of mining and quarrying. It deserves recalling that Rule 64 of the Mines Rules requires the running of a canteen in a mine only wherein more than 250 persons are ordinarily employed and that also if the Chief Inspector of Factories or an Inspector of Factories so requires. It is thus plain that in mines employing less than 250 persons, and, even in cases where the Chief Inspector or an Inspector of Factories does not so require, there is no obligation to provide a canteen. Can it be said that in such a case, the business of mining and quarrying cannot be carried on without a canteen provided by the employer ? It is elementary that an integral part is one, which, if taken away, would jeopardise the whole. Could it possibly be said that the running of a canteen installed for mining workers or for those of a steel mill, if stopped entirely would halt the working of the steel mill or the mining operations ? The answer would be plainly in the negative. It is common ground that canteens are being run under a statutory mandate and obligation and not as an

integral part of the business. If it was so, there would, perhaps, be no need for any statutory mandate. With deep deference I am unable to agree that running of canteen is an integral part of the steel mill process or of mining and quarrying. Apart from principle, the view of the Orissa High Court would tend to run counter to the basic grist of the long line of precedent of the final Court, which have held that the mere beneficient amenity of a canteen or a fair-price shop is not an integral part of the business of the concern which is obliged to run them under the statute, and, therefore, they are not 'dealers' with regard to such sales in canteens and fair-price shops, and consequently, not exigible to sales-tax.

21. The argument of Mr. Prasad, rested on the Orissa judgment, that herein also the canteens be treated as the integral part of the business of running the steel mill as also of the mines, must, therefore, fail and is hereby rejected.

22. In this very context, the reliance of *Mr. Prasad on Shri Narakeshari Prakashan Limited and others vs. Employees' State Insurance Corporation, etc.(1)* seems to be equally vain. Therein, an observation appears that the editorial and administrative staff of a printing press, publishing a newspaper, virtually constituted an integral part of the newspaper press and they were employed in connection with the work done at the printing press. Clearly enough, the relationship of the editorial and administrative staff of a newspaper organisation and its printing press has not the remotest analogy to maintaining of a canteen for the workers of a steel mill or a mine.

23. Somewhat vainly, Mr. Prasad, appearing for

(1) (1984) AIR (SC) 1916.

the respondents, has attempted to place reliance on *State of Tamil Nadu vs. Binny Limited, Madras (1)*. This is obviously distinguishable, because the issue therein turns specifically on the language of Section 2(d)(i) of the Tamil Nadu General Sales Tax Act after its amendment in 1964. This provision expressly introduced the concept of any transaction in connection with or incidental or ancillary to such trade, commerce, manufacture, adventure or concern. Admittedly, there is no such provision at all in our Act, even remotely analogous to such a provision, and, no question of any ancillary or incidental transactions arises herein.

24. In vain and virtually in a desperate attempt to distinguish and escape the observations in *State of Tamil Nadu vs. Thirumagal Mills Limited (supra), Director of Supplies and Disposal v. Member, Board of Revenue, West Bengal (supra), The State of Gujrat v. Raipur Manufacturing Company Limited (supra), and The State of Gujrat vs. Vivekanand Mills (supra)*, Mr. Prasad had contended that in all these cases the definition of 'dealer' in terms referred to a person, who 'carries on the business' of selling or buying, etc. It was his stand that Section 2(f) of the Act does not now employ the terminology 'carries on the business' any longer. it was submitted that this change was designedly brought about by the Legislature to omit the words 'carries on the business', which formed part of Section 2(c) of the earlier 1947 Act, and, now defining 'dealer' under Section 2(f) of the Act as any person who sells any goods. The substance of the submission herein was that Section 2(f) deliberately excluded the concept of the carrying on of the business with regard to a dealer.

(1) (1980) AIR (SC) 2038.

25. The aforesaid submission, whilst it may bring some credit to the ingenuity of the learned Counsel, is nevertheless fallacious and untenable. I am unable to accept the stand that the absence of the words 'carries on the business' from the definition of the word 'dealer' in Section 2(f) was intended to introduce any radical concept of a person being a dealer without a business as such. The true scope and object of this amendment and the answer to the learned Counsel's stand is exhaustively rendered in the Division Bench judgment of this Court in *Commissioner of Sales Tax, Bihar vs. Basta Colla Colliery Company Limited (1)*. Therein it was observed -

> "An amending Act is a new but a partial legislation. The main scheme of the original enactment will ordinarily control the meaning of the amending provisions. Any repugnancy in the amending statute will yield to the essential and central stream in the original Act."

And again the conclusion -

> "For all these reasons, I am of the view that the amended definition of 'dealer' means any person who sells or supplies any goods in connection with his business. Any casual sale of another kind of goods will not make the seller a 'dealer'. In the present case the sale of machineries was not in the course of the assessee's business. Admittedly they were casual sales. The assessee was not liable to pay sales tax in that respect. This disposes of the reference in favour of the assessee."

26. It is unnecessary to say more than that I would unhesitatingly agree with the aforesaid line of

(1) (1968) 21 STC 454.

reasoning. Indeed, to say that there is a dealer without a business is in essence a contradiction in terms, and such a result can only be achieved by a clear statutory mandate or legal fiction expressly created. That the Act of 1959 did not divorce the concept of a 'dealer' from 'business' is evident by reference to Section 24, 26, 27 and 37, which repeatedly refer to a dealer and his business. There is thus a statutory association of the business and the dealer which seems to pervade the Act as a twin concept.

27. That, without the statutory amendment of the definition of 'business', by excluding the profit-motive, the earlier basic concept of a dealer having a business with a view to gain must hold the field seems to be evident from *State of Tamil Nadu vs. Burmah Shell Oil Storage and Distributing Company of India Limited and another (supra)*. As already noticed, it was a case, inter alia, of sales in canteens and expressly dealt with two assessments, one before the amendment in the Madras General Sales Tax Act and the other after the amendment in the relevant Act. Whilst the Government's appeal before the amendment was summarily rejected in favour of the assessee, holding that they were not liable to sales-tax, the same succeeded with regard to the assessment subsequent to the amendment. It is thus patent that the statutory amendment was the water shed and it was vain to argue that these amendments were merely clarificatory or declaratory of the existing law. Similarly, in *State of Tamil Nadu vs. Thirumagal Mills Limited (supra)* it has been held that under the pre-amendment law in Madras, the running of a fair-price shop and a canteen business were not exigible to tax. *The strongest case is The State of Gujrat vs. Vivekanand Mills (supra)*, where, even the sale of a consignment of Californian cotton

purchased for use in the textile mill, which had been rendered surplus, was held to be not exigible to sales tax, because the textile mill could not be held to be a dealer for carrying on a business in the sale of cotton. This was under the unamended provisions of the *Bombay Sales Tax Act. Similarly, in The State of Gujrat vs. Raipur Manufacturing Company Limited (supra)*, the sale of surplus coal by a textile factory and 21 items of discarded and unserviceable goods were held to be not done in course of the business, and, therefore, not liable to sales-tax. As I have said earlier, it is unnecessary to multiply authorities, because there is a host of High Court judgments taking a similar view.

28. To finally conclude, the answer to Question No. II is rendered in the negative, i.e., in favour of the assessee and against the Revenue, whilst holding that the petitioner was not a dealer under Section 2(f) of the Act in respect of the canteen sales, and consequently not liable to sales tax.

Uday Sinha, J: I agree.

Nazir Ahmad, J: I agree.

R.D. Question answered.

CIVIL WRIT JURISDICTION

1985/January, 21.

Before Birendra Prasad Sinha, J.

*Sone Lal Sahni and another**

v.

The State of Bihar and others.

Bihar Privileged Persons Homestead Tenancy Act, 1947 *(Act IV of 1948), section 8(5) and (6) and Bihar Privileged Persons Homestead Tenancy Rules, 1948, Rule 3, 4 and 5—person declared as privileged tenant—purcha granted after due enquiry and notice to parties concerned]privileged tenant subsequently dispossessed by some one]further enquiry, whether called for.*

Sections 8(5) and 8(6) of the Act contemplates a situation when after a person having been declared as privileged tenant has been dispossessed by some one. The purcha is granted under the Act after due enquiry and notice to the parties concerned and if after the grant of purcha and confirming possession of a privileged tenant over certain land some one dispossesses a privileged tenant from the land then in that situation no further enquiry is called for. In the case the only thing which has to be found is about illegal

* In the High Court of Judicature at Patna. Civil Writ Jurisdiction Case No. 553 of 1980. In the matter of an application under Articles 226 and 227 of the Constitution of India.

possession by third person after dispossesing the privileged tenant. It is in that situation that Rules 3,4 and 5 do not mention about any application made under sections 8(5) and (6) of the Act. So far as the present case is concerned position appears to be that a purcha was granted to respondent no. 6 in the year 1970 after due enquiry and after giving notice and petitioner no. 1 seems to have purchased a litigation some times in 1979.

Held, therefore, that the alleged possession of petitioner no. 1 is clearly illegal. The law provides that in such a case the District Magistrate may order for eviction of the person illegally occupying the land of the privileged tenant either on his own motion or on an application made in that behalf after making such enquiry as he deems fit.

Hiralal Vishwakarma v. Vishwanath Sah and ors.(1)

Bhagsaran Rai v. The State of Bihar and ors.(2)-distinguished.

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 Birendra Pd. Sinha, J.

Mr. Aftab Alam, Senior Advocate for the petitioner

Mr. S. Hoda, Standing counsel III with Mr. M.K.Jha, Jr. counsel to standing Counsel III for the State.

Birendra Prasad Sinha J. - This is an application under Articles 226 and 227 of the Constitution of India in which a prayer has been made for issuance of a writ of certiorary quashing

(1) (1978) BBCJ 623

(2) (1979) BBCJ 136.

Annexure-1 dated 9.11.1979. Annexure-1 is a letter by the District Magistrate, Muzaffarpur to the Block Development Officer, Gaighat directing him to give vacant possession of plot nos. 467 and 468 area 11 decimals with the help of armed force after removing the petitioners who were found illegally occupying 7 decimals of land.

2. These plots originally belonged to one Shambhal Laheri, who was the recorded tenant in the cadestral survey khatian. It is stated in the petition that one Jamuna Singh the ancestor and predecessor-in-interest of petitioner no. 2 purchased the said lands from Shambhal Laheri. Jamuna Singh and Jageshwar Singh, father of petitioner no. 2. It is further stated that by a family partition between the two brother plot no. 467 fell in the share of Jageshwar Singh. On the death of Jageshwar Singh petitioner no. 2 Awadheshwar Singh is said to have come in possession over the said plot. On 18.1.1979 petitioner no. 1 claims to have purchased the said plot from petitioner no. 2 and further claims to have constructed his residential house. The petitioners' case is that they had no knowledge about any proceeding under the Bihar Privileged Persons Homestead Tenancy Act, 1947 (hereinafter referred to as the Act) or under the consolidation proceeding in respect of plot no. 467. It is further stated that respondent no. 5 fraudulantly obtained some order with respect to plot no. 467 and moved the District Magistrate for possession over the same and the District Magistrate without any authority of law passed the impugned order.

3. A counter affidavit has been filed on behalf of respondents 1 to 4, the State of Bihar and its officers. In the counter affidavit statements made in paragraph 1 have been denied. It has been stated in paragraph 4 that respondent no. 4 Sharda Devi wife

of Dilawar Baitha is the owner of plot no. 467 area 7 decimals and plot no. 468 area 4 decimals, who has constructed a house over plot no. 468 and is living there. It is further stated that in plot no. 467 area 7 decimals respondent no. 6 has her Bari Sahan and court-yard etc. Both the plots are amalgamated. It is then stated that 'Purcha was granted in the name of respondent no. 6 in the year 1970. The Block Development Officer made a spot enquiry to verify the possession and possession of respondent no. 6 was confirmed vide enquiry report dated 5.8.1979." In paragraph 6 it has been stated that in the Consolidation proceeding a direction has been given to enter the name of Dilawar Baitha, husband of respondent no. 6 in respect of plot no. 467 as will appear from Annexure-A to the counter-affidavit. In paragraph 7 of the counter affidavit it has been stated that writ petitioner no. 1 Sone Lal Sahni purchased 5 decimals of land from petitioner no.2 without the permission of the consolidation officer and on that ground the purchase was null and void. The petitioner's possession over the plots in question has been denied and it has been further stated that purcha was issued in the name of respondent no. 6 under the Privileged persons Homestead Tenancy Act in respect of the disputed plot after due notice to the persons concerned by the authorities. It is further stated in the counter affidavit that after the purcha was granted the petitioners have illegally occupied some portions of the disputed plots and in such a situation the District Magistrate had to direct the concerned authorities to get the illegal occupation vacated.

4. Learned counsel for the petitioners has submitted that before passing the impugned order and directing the authorities to remove the petitioners from the plots in question, the procedure

laid down in Rule 5 of the Bihar Privileged Persons Homestead Tenancy Rules, 1948 (hereinafter referred to as the Rules) should have been followed. His submission is that no enquiry as contemplated under rule 5 of the Rules was made nor any notice was given to the petitioners before passing the impugned order.

5. Section 5 of the Act provides that if any privileged tenant has been ejected by his landlord from his homestead or any part thereof within one year before the date of commencement of the Act otherwise than in due course of law, the privileged tenant may apply to the collector for restoration of his possession over the homestead or part thereof from which he has been ejected. Admittedly this section does not apply to the facts of this case. Section 8 of the Act enumerates the grounds on which a privileged tenant may be ejected. Sections (1) provides the grounds on which the privileged tenant shall be liable for ejectment. Under sub-section (3) of section 8 the Collector shall make such enquiry as he thinks fit on receipt of an application under the first proviso to sub-section (1) or may reject the application or grant it either unconditionally or subject to condition as may appear to him just and proper. Then comes sections (5) and 8(6) of the Act on which reliance has been placed by the learned counsel for the petitioners. They read as under:

> "8(5) If a privileged tenant has been ejected by his landlord from his homestead or any part thereof, otherwise than in accordance with the provision contained in sub-section (1), then the tenant may apply to the Collector for restoration of his possession over the homestead or part thereof, from which he has been so ejected.

8(6) The Collector may, on receipt of an application under sub- section (5) or on his own motion, after making such enquiry as he deems fit, order that the privileged tenant shall be put in possession of the homestead or part thereof from which he has been so ejected."

These two sub-sections contemplate the situation where a privileged tenant has been ejected by his landlord otherwise than the provisions contained in sub-section (1). In that case a tenant, that is to say, the privileged tenant may apply to the Collector for restoration of his possession over the homestead or part thereof and on receipt of such an application under sub- section(5) the Collector after making such enquiry as he deems fit order that the privileged tenant may be put in possession. It was submitted that in case of an application under sub-section (5) of section 8 of the Act also the procedure laid down under Rule 5 shall have to be followed. It is not possible to accept this argument made by the learned counsel. Rule 3(a) of the Rules provides that an application to be made by a privileged tenant under sub-section (1) of section 5 shall be in Form A. Rule 3(b) provides that an application to be made either by a landlord or by a privileged tenant under sub-section (1) of section 6 for fair and equitable rent for the holding, shall be made in Form B. Rule 3(c) provides that an application to be made by a landlord under the first proviso to sub-section (1) of section 3 for ejectment of the privileged tenant shall be Form C Rule 3(d) provides that an application to be made by a mortgagor under sub- section (1) of section 13 for ejectment of the mortgagee shall be in Form D and Rule 3(e) provides that an application to be made under sub-section (1) of section 15 for ejecting a transferee shall be in Form E. In the present case

Rule 3 has no application inasmuch as no application was made under sections 5(1), 6(1) proviso to sub-section (1) of section 8, section 13(1) or section 15(1) of the Act. If any application is made under the provisions mentioned under Rule 3 then on receipt of such application, it is provided under Rule 3 that on receipt of such application, it is provided under Rule 4, that the Collector shall start a proceeding under the relevant sections to which the application relates and deal with the same in the manner provided for the land revenue cases. It is then that under Rule 5 the Collector shall either himself make local enquiry or have such enquiry made by any responsible officer not below the rank of a circle inspector or Welfare Inspector and satisfy himself as to the correctness or otherwise of the contents of such application. It is further provided that in any such enquiry notice will be issued to all the interested parties. The submission of the learned counsel is that Rule 4 and 5 of the Rules are different and the local enquiry contemplated under Rule 5 is not connected with any application mentioned in Rule 3. The argument is devoid of any substance. Had it been so, Rule 3 would have mentioned about the applications to be made under section 8(5) and 8(6) in Rule 3 is quite logical. Sections 8(5) and 8(6) contemplate a situation when after a person having been declared as privileged tenant has been dispossessed by some one. The purcha is granted under the Act after due enquiry and notice to the parties concerned and if after the grant of Purcha and confirming possession of a privileged tenant over certain land some one dispossesses a privileged tenant from that land then in that situation no further enquiry is called for. In that case the only thing which has to be found is about

illegal possession by a third person after dispossessing the privileged tenant. it is in that situation that Rules 3,4 and 5 do not mention about any application made under sections 8(5) and 8(6) of the Act. So far the present case is concerned position appears to be that a Purcha was granted to respondent no. 6 in the year 1970 after due enquiry and after giving notice to the husband of respondent no. 6. Petitioner no. 1 seems to have purchased a litigation sometimes in the year 1979, therefore, his alleged possession is clearly illegal. The law provides that in such a case District Magistrate may order for eviction of the person illegally occupying the land of the privileged tenant either on his own motion or on an application made in that behalf after making such enquiry as he deems fit. That is what the District Magistrate has done by passing the order in Annexure-1.

6. Learned counsel for the petitioner has relied upon two decisions of this court in *Hiralal Vishwakarma vs. Vishwanath Sah and others (1)* and in the case of *Bhagsaran Rai v. The State of Bihar and others (2).* None of these decision are relevant for the purpose of decision of this case. Facts are entirely different. In the case of *Hiralal Vishwakarma (supra)* the prayer was to quash an order declaring a person to be a privileged tenant. In that it was held that an enquiry should have been made either by the Collector or by a responsible officer before declaring a person to be a privileged tenant. An enquiry made by the Karamchari was not sufficient. This case has absolutely no relevance to the facts of the present case. In the case of *Bhagsaran Rai (supra)* no proceeding seems to have been initiated

(1) (1978) BBCJ 623

(2) (1979) BLJR 136.

under the Act and the parties including the petitioners were not noticed. The order had been passed without initiation of any proceeding. This case has also no application to the facts and circumstances of the present case.

7. I do not find any illegality in the order made in Annexure 1. The District Magistrate was completely justified in ordering the eviction of the petitioners from the plots in question. Petitioner no. 1, in my opinion, has only purchased a bundle of litigation from petitioner no. 2 and his conduct is not bonafide. I do not see any reason to interfere with the impugned order. The result is that this application fails and is dismissed but without costs.

M.K.C. Application dismissed.

CIVIL WRIT JURISDICTION

1985/January, 22.

Before S.S.Sandhwalia, C.J. and S.K.Choudhuri, J.

*Smt. Priyambada Devi and another.**

v.

The Additional Member, Board of Revenue, Bihar, Patna & ors.

Bihar Land Reforms *(Fixation of Ceiling Area and Acquisition of Surplus Land) Act, 1961 (Act 12 of 1962), section 16(3)—deed of gift, whether excluded from the perview of section 16(3)—deed of gift challenged as sham and farzi transaction—effect of—Second transfer not a sham and farzi transaction—second transferee added as a party beyond period of limitation neither an adjacent raiyat nor co-sharer—question of limitation, whether relevant to decide as to whether decision can be given in favour of pre-emptor—pre-emptor when entitled to succeed.*

A deed of gift is excluded from the perview of section 16(3) of the Act. If, however, such a deed of gift is challenged as a sham and farzi transaction and the authority under the Act finds the allegation to be correct, then for all practical purposes the

* Civil Writ Jurisdiction Case No. 3547 of 1979. In the matter of an application under Articles 226 and 227 of the Constitution of India.

said deed of gift would be a document nonest in the eye of law and the pre-emption application would in such a case proceed against the original purchaser. In the instant case unfortunately for the pre-emptor he has not alleged sham and farzi nature of the deed of gift. It has, therefore, to be taken as a fact that the said document if executed and registered in conformity with law would be a valid document and for such a document the legislature has mandated exclusion of the applicability of section 16(3) of Act.

Held, therefore, that in the instant case the order of the Land Reforms Deputy Collector allowing the application for pre-emption filed under section 16(3) and the appellate and revisional order dismissing the appeal and revision respectively are all illegal and liable to be set aside.

Where the second transfer is found to be not a sham and farzi transaction and the second transferee, who has been added as a party beyond the period of limitation counted from the date of registration of the second transfer deed, is found to be not an adjacent raiyat or co-sherer, but the pre-emptor establishes that he is an adjacent raiyat and entitled to be pre-empted;

Held, further, that it is in such a case that the question of limitation may be relevant to decide as to whether a decision can be given in favour of the pre-emptor or that the application for pre-emption would not succeed because of the bar of limitation. The pre-emptor in such a case would be entitled to succeed only when the second transferee has been added in the proceeding within the prescribed period of limitation counted from the date of registration of the second transfer deed and the application for pre-emption having fulfilled all the conditions laid down in the Act and the Rules made

thereunder in relation to the second transfer-deed.

Case laws discussed.

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

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

Mrs. Gyan Sudha Mishra and Mrs. Mridula Mishra for the petitioner

None for the respondent.

S.K.Choudhuri, J. - This writ application has been filed under Articles 226 and 227 of the Constitution of India challenging the orders contained in Annexure, 1, 2 and 3.

Annexure-1 is the order of the Land Reforms Deputy Collector, Bhagalpur (respondent no.3 dated 19th June, 1976 allowing the application for pre-emption filed under Section 16(3) of the Bihar Land Reforms (Fixation of Ceiling Area & Acquisition of Surplus Land) Act, 1961 (hereinafter called the 'Act'), Annexure-2 is the appellate order dated 18.4.1978 passed by the Additional Collector, Bhagalpur (respondent no. 2) dismissing the appeal filed by the petitioners and Annexure-3 is the order of the Additional Member Board of Revenue dated 11.4.1979 dismissing the revision application. Hence, the present writ application has been filed.

2. For proper appreciation of the points raised in this writ application, it is necessary to State here the relevant facts.

Petitioner no. 1 purchased 00.13 decimals of land appertaining to old khata no. 232, khera no. 509 (new khata no. 1013, plot no. 944) of village Gobrain, Police station Shahkund district Bhagalpur under a sale-deed executed on 19th June, 1974 and registered on 16th July 1974. Respondent no. 4

Jagdish Prasad Sukla filed an application for pre-emption under Section 16(3) of the Act on 7th August, 1974 claiming himself to be an adjacent raiyat. Petitioner no. 1 filed objection disclosing that she had ceased to have any interest in the property in question as she has gifted the property to her daughter (petitioner no.2). She also alleged that the pre-emptor was not an adjacent raiyat. It is not disputed that petitioner no. 1 has gifted the property to petitioner no. 2 as disclosed in the objection petition filed by petitioner no. 1. This deed of gift was executed on 26.7.1974 and registered on 12.10.1974.

3. The Land Reforms Deputy Collector dismissed the pre-emption application by his order dated 19th May, 1975 on the ground that the donee had not been made a party and, therefore, the pre-emption application was not maintainable. He, however, observed that the pre-emptor may file a fresh application after impleading the donee as a party. There was an appeal against the said order by respondent no.4 and the Additional Collector remanded the case to the Land Reforms Deputy Collector and directed him to add the donee as a party in the case and thereafter proceed in accordance with law. This order is dated 5.6.1975 as contained in Annexure- 5. Thereafter the Land Reforms Deputy Collector passed a fresh order after hearing the parties on 16.6.1976 (Annexure-1). By the fresh order he allowed the pre-emption application about which I have already stated above and the appellate authority and the revisional authority dismissed the appeal and revision under Annexure 2 and 3, respectively.

4. Mrs. Gyan Sudha Mishra, learned Counsel in support of this application contended that the order contained in Annexure-1 passed by the Land

Reforms Deputy Collector and the appellate and the revisional orders passed by respondents nos. 2 and 1, respectively affirming the same are illegal as Section 16(3) of the Act has no application to a deed of gift executed before the application for pre-emption was filed and though registered during the pendency of the proceeding under the Act. She further contended that there was no allegation that the gift in question executed by petitioner no. 1 in favour of petitioner no. 2 was a sham and farzi transaction and, therefore, also Section 16(3) has no application. Her further contention was that petitioner no. 2 was added in the proceeding after the appeal from the original order was allowed under Annexure-5 dated 5.6.1975 with a direction to respondent no. 3 to add petitioner no.2 as a party to the proceeding and decide the case afresh in accordance with law. Thus the addition, according to the learned Counsel, being much beyond the period of limitation, the application for pre-emption should not have been allowed by the authorities under the Act.

5. In support of her contention learned Counsel cited two Bench decisions of this Court in *Smt. Sudama Devi and others vs. Rajendra Singh and others (1) and Abdullah Mian vs. Jodha Raut & others (2).*

In *Abdullah Mian's case (supra)* the facts were quite distinguishable. it is a case where the second transfer was complete in all respects before an application under Section 16(3) of the Act was filed. Therefore, it is a case which comes within the first category of cases as stated in *Ramchandra Yadav v. Anutha Yadav & others (3)* which is again a Bench.

(1) (1973) AIR (Pat.)199

(2) (1976) BBCJ 649

(3) (1971) BLJR 994.

decision of this Court. This later Bench decision has pointed out three categories of cases while dealing with the applicability of Section 16(3) of the Act. The first category of cases are the cases where the second transfer deed has become complete in all respects before filing the application under Section 16(3) of the Act. In such a case the pre-emptor could not be permitted to ignore the second transfer deed and file an application for pre-emption against the first transfer deed. The second category of cases are the cases where the second transfer deed has been executed and registered after the filing of the application under Section 16(3) of the Act. In that case the second transfer-deed would be hit by the doctrine of lis pendence and the third category of cases are the cases where the execution of the second transfer deed has been made before the filing of an application under Section 16(3) of the Act, but registered thereafter. This decision of *Ramchandra Yadav's case (supra)* was a case of third category, namely, that the second transfer deed was executed before the application was filed under Section 16(3) of the Act, but registered during the pendency of the pre-emption proceeding, and the allegation of the pre-emptor was that the second transfer deed was sham and farzi. It is under these circumstances and, in my opinion, rightly the second transferee was allowed to be made a party as the allegation of sham and farzi nature of the second transfer deed can only be decided in presence of the second transferee whom the High Court while deciding the writ application directed him to be added as a party to the pre- emption proceeding and remanded the case to the lowest authority to decide the same afresh, in accordance with law. I may state here that Ramchandra Yadav's case was noticed in a latter Bench decision of this Court in

Smt. Sudama Devi's case (supra) in which there is elaborate discussion of that case. The two writ applications considered in *Smt. Sudama Devi's case (supra)* were again the cases of the third category as laid down in *Ramchandra Yadav's case* (supra) inasmuch as the second transfer deeds though executed before, but registered after the applications under Section 16(3) of the Act were filed. There also the second sale- deeds were alleged to be farzi and sham. It, however, goes without saying that if the authority concerned under the Act decides the allegations of sham and farzi nature of the second sale-deeds as incorrect, then the pre-emption application would fail, as the title under the second transfer-deeds on registration of the documents would relate back to the date of the execution of these documents.

A question may still arise as to what would happen in a case where the second transfer is found to be not a sham and farzi transaction and the second transferee, who has been added as a party beyond the period of limitation counted from the date of registration of the second transfer deed, is found to be not an adjacent raiyat or co-sharer, but the pre-emptor establishes that he is an adjacent raiyat and entitled to be pre-empted. It is in such a case that the question of limitation may be relevant to decide as to whether a decision can be given in favour of the pre-emptor or that the application for pre-emption would not succeed because of the bar of limitation. The pre-emptor in such a case would, in my opinion, be entitled to succeed only when the second transferee has been added in the proceeding within the prescribed period of limitation counted from the date of registration of the second transfer deed, and the application for pre-emption having fulfilled all the conditions laid down in that Act and

the Rules made thereunder in relation to the second transfer-deed.

6. In view of the discussions made above, it is manifest that the present case under consideration in this writ application is a case of the third category as aforesaid.

7. As already stated above the second transfer deed in the present case is not a sale-deed, but a deed of gift and on its registration it would be an operative document from the date of execution, which is a date prior to the filing of the pre-emption application. That being so, the explanation to Section 16(1) of the Act is attracted. Under it a deed of gift has been excluded and would not amount to 'transfer' for the purpose of Section 16 of the Act. The Explanation to Section 16(1) of the Act reads thus:-

> "For the purposes of this section 'transfer' does not include inheritance, bequest or gift."

In view of this exclusion under the Explanation aforesaid, a deed of gift is excluded from the perview of Section 16(3) of the Act. If, however, such a deed of gift would have been challenged as a sham and farzi transaction and the authority under the Act would have found the allegation to be correct, then for all practical purposes the said deed of gift would be a document nonest in the eye of law and the pre-emption application would in such a case proceed against the original purchaser. But here unfortunately for the pre-emptor he has not alleged the sham and farzi nature of the deed of gift. It has, therefore, to be taken as a fact that the said document if executed and registered in conformity with law would be a valid document and for such a document the legislature has mandated

exclusion of the applicability of Section 16(3) of the Act. This conclusion does not require support of any decision as the section itself is clear and explicit. In view of this exclusion it has to be held that the order of the Land Reforms Deputy Collector and the appellate as also the revisional orders are all illegal and liable to be set aside. Those authorities should have held that the deed of gift not having been challenged as a sham and farzi document, the pre- emption application under Section 16(3) of the Act was not maintainable.

So far as the point of limitation raised by learned Counsel for the petitioners is concerned, it would not arise in the present case in view of the conclusion arrived at above, namely, that Section 16(3) of the Act has no application to the deed of gift under consideration.

8. In the result, the application is allowed and the orders contained in Annexure 1, 2 and 3 are hereby quashed. In the circumstances of the case, there will be no order as to costs.

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

M.K.C. Application allowed.

CIVIL WRIT JURISDICTION

1985/January, 29.

Before Hari Lal Agrawal, J.

*Baidya Nath Prasad Sah.**

v.

Presiding Officer, Industrial Tribunal Patna and ors.

Bihar Shops and Establishments Act, 1953 *(Act VIII of 1954), section 28(7) and (9)—Scope and applicability of—appeal filed under section 28(7), whether can be dismissed for default—authority appointed under section 28(9)—powers conferred upon—general provisions contained in the Code of Civil Procedure—applicability of—Code of Civil Procedure, 1908 (Act V of 1908) order XLI, rule 17.*

Sub-section (9) of section 28 of the Bihar Shops and Establishments Act, while conferring certain powers on the authority appointed under this section prescribes that they have all the powers of the civil court, but the general power is circumscribed by the subsequent addition that those powers will be confined only for the purpose of taking evidence and for enforcing the attendance of witnesses and compelling production of documents. The general provision of the Code of Civil Procedure as such have not been made applicable.

Held, therefore, that in the absence of any

* Civil Writ Jurisdiction Case No. 582 of 1979. In the matter of an application under Articles 226 and 227 of the Constitution of India.

specific provision in the Special Act for dismissing an appeal for default as contained in rule 17 of order XLI of the Code of Civil Procedure when the party concerned is absent the appeal should not be dismissed for default. The Legislature has not intended for dismissal of the appeal for default and the appeal of the petitioner in the instant case should have been disposed on mertis.

Jamait Ram Puraswami and others v. Shri H.G.Shukla & Ors. (1) and Shyam Deo Pandey and Ors. v. The State of Bihar (2)-relied on.

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

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

Mr. Bishwanath Prasad for the petitioner

Mr. Banwari Sharma for the respondent no. 1 to 3.

Mr. Mithlesh Kumar Khare for the respondent no.4.

Hari Lal Agrawal, J. - In this application under Articles 226 and 227 of the Constitution of India, the point involved is as to whether the Industrial Tribunal, Patna, was right in dismissing for default the appeal of the petitioner filed under section 28(7) of the Bihar Shops & Establishments Act, 1953.

2. Hazari Lal Gupta, respondent no. 4, filed an application before the Assistant Commissioner of Labour, respondent no.2, claiming a sum of Rs. 2,100/- as arrears of wages from 1.11.65 to 31.5.66 and another sum of Rs. 2,260/- as other benefits, e.g., overtime, wages for leave etc., (vide his claim petition Annexure 1), totalling Rs. 4,360/-. The

(1)(1977) LIC 1499

(2) (1971) SC 1606.

respondent no. 2, however, allowed all the claims except a compensation of Rs. 500/- vide his judgment dated 9.12.77 (Annexure 4).

The petitioner filed an appeal before respondent no. 1. On 27.9.1978 he had filed a petition for adjournment before the appellate authority, but for the reasons stated in his order (Annexure 6) that sufficient time had been allowed to the petitioner and the date for hearing was peremptory, he rejected the said application and dismissed the appeal for default.

3. It has been argued by learned Advocate for the petitioner that in the absence of any provision for dismissing the appeal for default, in the Shops Act, the respondent no. 1 was not justified in dismissing it for default and that he should have disposed of the appeal on merits even in the absence of the petitioner. The provision of appeal is contained in sub-section (7) of section 28 of the Shops Act which reads as follows:

> "An appeal against an order dismissing either wholly or in part an application made under sub-section (1) or against a direction made under sub-section (2) or sub-section (3) may be preferred in such manner, within such time and to such authority as may be prescribed and such authority shall consider and dispose of such appeals in the prescribed manner."

The relevant rule framed under the Act regarding appeal reads as follows:

> "24.(1) The Appellate Authority after hearing the parties and after making such further enquiry, if any, as it may deem necessary, may confirm, vary or set aside the direction from which the appeal is preferred,

and shall record an order accordingly with reasons therefor. The orders so passed shall be communicated to the parties without delay."

No other provision appears to be there either in the Act or in the Rules dealing with appeal.

4. After examining the scheme of the Act and the Rules and giving my anxious consideration to the point raised by the learned Advocate, I find that his contention has got substance and must be accepted. I may usefully refer to a Bench Decision of the Allahabad High Court in the case of *Jamait Ram Puraswami and others v. Shri H.G. Shukla and others (1).* There the appeal was filed under section 17 of the Payment of Wages Act, which was similarly dismissed for default of the appellant by the learned District Judge and then an application under Article 226 of the Constitution was filed before the Lucknow Bench. It was held that there were no specific provisions in the special Act for dismissing an appeal for default like that contained in Order XLI of the Code of Civil Procedure and, therefore, the appeal had to be decided on merits even when the party concerned had failed to appear.

5. I may take support also from the case of *Shyam Deo Pandey and others v. The State of Bihar (2)* in this connection, where the Supreme Court dealing with the dismissal of a criminal appeal, have observed that perusal of record of a particular case and giving indication of such perusal in the order and judgment is a must before dismissing an appeal which has been admitted and notice whereof has been issued on the ground of non-appearance of the appellant and his pleader.

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(1) (1977) LIC 1199

(2) (1971) AIR (SC) 1606.

6. Sub-section (9) of the aforesaid section 28, while conferring certain powers on the authority appointed under this section, prescribes that they have all the powers of the Civil Court, but the general power is circumscribed by the subsequent addition that those powers will be confined only for the purpose of taking evidence and for enforcing the attendance of witnesses and compelling production of documents. The general provisions of the Code of Civil Procedure as such have not been made applicable and, therefore, in the absence of any specific provision in the special Act for dismissing an appeal for default as contained in rule 17 of Order XLI of the Code when the party concerned is absent, the appeal should not be dismissed for default. The Legislature, therefore, has not intended for dismissal of the appeal for default and the appeal of the petitioner should have been disposed of on merits.

7. I would accordingly allow this application, set aside the judgment of respondent no. 1 contained in Annexure 6 and remit the matter back to him for fresh disposal on merits. Since the matter is going back, respondent no.1 will be well advised to give an opportunity to both the parties to appear before him and make their submissions. In order to avoid further delay, I direct both the parties to appear before him on 17.2.85 with a copy of this judgment, who will then fix a date for hearing of the appeal in their presence according to their convenience. In the circumstances, however, I shall make no order as to costs.

M.K.C. Application allowed.

REVISIONAL CIVIL

1985/February, 8.

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

*Smt. Bidhotama Devi.**

v.

Shri Deoki Sao and another.

Bihar Buildings *(Lease, Rent and Eviction) Control Act, 1977 (Act 16 of 1977), Section 13—Scope and applicability of—fixation of fair rent—tenant, whether can be directed to deposit rent under section 13 at a rate at which it was last paid.*

Where a suit is filed for eviction of the tenant on the ground that there has been default in payment of rent and also that the tenant has sublet the premises and the landlord makes an application under section 13 for a direction to the tenant to deposit the arrears of rent at a particular rate and the tenant denied the liability to deposit the rent at that rate on the ground that the authority under the Act had determined the fair rent;

Held, that even in cases where fair rent is fixed, the tenant will have to deposit the rent at rate at which, as matter of fact, it was last paid.

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* Civil Revision No. 1774 of 1980. Against the order dated 3.10.80, passed by Smt. Rekha Kumari, Execution Munsif at Patna.

N.M.Verma v. U.N.Singh (1)-relied on.

Application by the tenant defendant.

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

M/s. R.S.Chatterjee, Suresh Chandra Prasad and Manvendra Roy for the petitioner.

Mr. Ashutosh Jha for the opposite party.

Lalit Mohan Sharma, J. - The point to be decided in this case is whether on the fixation of fair rent of a building under the Bihar Buildings (Lease, Rent and Eviction) Control Act, 1977 the tenant can be directed to deposit rent under section 13 (corresponding to section 15 of the present Act) of the Act in a pending suit at the rate he has been paying or whether the Court has no jurisdiction to order deposit at a rate higher then the fair rent.

2. A portion of a building in Gaya town belonging to the plaintiff- opposite party no.1 was let out to the petitioner. The plaintiff filed the present suit out of which this application in revision arises in May, 1979 for eviction of the defendants on the ground that there was default in payment of rent since November, 1976 and that the petitioner-defendant no. 1 had sublet the promises to the opposite party no. 2. The defendant made an application under section 13 of the Bihar Buildings (Lease, Rent and Eviction) Control Act, 1977 for a direction to the tenant to deposit the arrears of rent at the rate of Rs. 60/- and to go on depositing the future rent by the 15th day of the succeeding month. The petitioner denied the liability to deposit the rent at the rate claimed on the ground that the authority under the Buildings Control Act had determined the fair rent at Rs.9/- per month. Overruling this

(1) (1977) BBCJ 662.

objection, the Court below has allowed the prayer of the plaintiff by the impugned order.

3. The case was earlier listed before me sitting singly when I referred it for hearing before a Division Bench.

4. It has been contended by Mr. R.S.Chatterjee, appearing in support of the application that in view of the fair rent having been fixed in this case at Rs.9/- per month, the petitioner cannot be asked to pay to the plaintiff-landlord the rent at a higher rate. This argument, to my mind, cannot be accepted in face of the decision of the Full Bench in *N.M.Verma vs. U.N.Singh (1).*

5. In *N.M.Verma's* case, the petitioner was inducted as a tenant in the building in question on a monthly rental of Rs. 160/- which was later enhanced to Rs. 200/- per month. Relying on the provisions of section 4 of the Buildings Control Act, the petitioner in that case contended that the enhancement in the rent was illegal and the petitioner, therefore, could not be directed to deposit the higher amount which was not lawfully payable. The argument was overruled and it was held that Section 11A of the earlier Act (corresponding to Section 13 of 1977 Act) required the tenant to deposit the rent at a rate at which it was last paid. If the rent has been actually paid by the tenant and received by the landlord at a particular rate, the same has to be accepted for the limited purpose of the section. It has pointed out that an order to that effect was interim in nature subject to the equities between the parties to be finally settled at the time of disposal of the suit. Deposit of the rent by the tenant in the suit under this section is not tantamount to payment to the

(1) (1977) BBCJ 662.

landlord and the landlord, therefore, has not been given an unqualified right to withdraw the deposited money during the pendency of the litigation. On an application for that purpose, the Court has to pass fresh orders and, for that purpose, the Court may in the discretion allow only partial withdrawal in a case where fair rent is fixed. Although on the facts, the present case is not identical to the Full Bench case, the observation in paragraph 8 of the judgment are fully applicable. It must, therefore, be held that even in cases where fair rent is fixed, the tenant will have to deposit the rent at a rate at which, as a matter of fact, it was last paid. In the present case, the learned Munsif has recorded a finding that the rent was last paid at the rate of Rs. 60/- and not at the rate of Rs. 9/-. In that view, the order under revision appears to have been correctly passed.

6. In the result, this civil revision application is dismissed, but without costs.

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

M.K.C. Application dismissed.

REVISIONAL CIVIL

1985/February 14.

Before S.S.Sandhawalia, C.J. & Birendra Prasad Sinha, J.

*Chaturbhuj Prasad Singh.**

v.

Saryu Prasad Singh & others.

Bihar Consolidation of Holdings and Prevention of Fragmentation Act, *1956 (Act 22 of 1956), sections 3(1) and 4(c)—Scope and applicability of-suit in respect of declaration of rights or interest in any land—partial abatement of—whether and when can be ordered.*

If in a composite suit, the suit relating to reliefs unconnected with the declaration and determination of title to a land does not abate in relation to such controversy, there is no reason why in a suit of this nature, the suit in relation to the properties in respect of which there is no notification under section 3(1) of the Act, shall abate. A suit or a proceeding can partially abate. It will abate in respect of the lands lying in the area in respect of which the Government has declared its intention to make a scheme for Consolidation of holdings by a notification in official Gazette under section 3(1) of the Act. It will not abate in respect of

* Civil Revision No. 1563 of 1978. Against the order of Shri S. Rahman, Additional Subordinate Judge, First Court, Hajipur, District Vaishali, dated 11th July, 1978.

any land for which there is no such notification.

Held, therefore, that in the instant case the suit shall stand abated in respect of the land situate in the district of Vaishali in respect of which there is a notification under section 3(1) of the Act and the consolidation operations are going on. The suit as regards the lands situate in the district of Muzaffarpur and Patna which are not covered by any consolidation scheme shall not abate and shall proceed.

Ram Krit Singh and ors. v. The State of Bihar and ors.(1)

Manji Ram alias Manji Halwai v. State of Bihar (2)-referred to.

Application by the defendant.

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

Mr. Rameshwar Prasad No. II for the petitioner.

Messrs Ram Janam Ojha and 'Abhimanyu, Sharma, Mr. Gopaljee for Minor Opposite Party Nos. 6 & 7.

Birendra Prasad Sinha, J. - Whether or not a suit and a proceeding in respect of declaration of rights or interest in any land shall partially abate under section 4(c) of the Consolidation of Holdings and Prevention of Fragmentation Act, 1956 (hereinafter referred to as the 'Act') is the question which has come up for consideration in this case.

2. The Act provides for consolidation of holdings and prevention of fragmentation of land. Section 3 of the Act provides that with the object of

effecting consolidation of holdings for the purpose of better cultivation of land in any area, the State Government may, declare its intention to make a scheme for consolidation of holdings in that area by a notification in the official Gazette. Section 4 enumerates the consequences that may ensue in the area to which the notification under section 3(1) of the Act relates from the date specified in the notification till the close of consolidation operations. The consolidation operation closes by issue of a notification envisaged in section 26 of the Act. One of the consequences is enumerated in section 4(c) of the Act which reads as under:-

> "Every proceeding for the correction of records and every suit and proceeding in respect of declaration of rights or interest in any land lying in the area or for declaration or adjudication of any other right in regard to which proceedings can or ought to be taken under this Act, pending before any court or authority whether of the first instance or of appeal, reference or revision shall on an order being passed in that behalf by the court or authority before whom such suit or proceeding is pending stand abated."

Section 4(c) came up for consideration before a Special Bench of this Court in *Ram Krit Singh and others vs. The State of Bihar and other (1).* It was held that upon the publication of the notification under section 3(1) of the Act a suit and a proceeding in respect of declaration of rights or interest in any land lying in the area, pending before any court or authority, shall stand abated. However, there may be a composite suit in which a prayer is made for the grant of a relief relating to

(1) (1979) BBCJ 259.

title to land and other quite independent of it regarding which proceedings cannot be taken under this Act. In the case of *Ram Krit Singh (supra)* it was observed that this type of a composite suit will not abate as a whole. In other words the suit relating to the relief or reliefs unconnected with the declaration and determination of title to land shall not abate. In the case of *Manji Ram alias Manji Halwai vs. State of Bihar(1)* a learned Single Judge of this Court passed an order of partial abatement of the suit and held that the partition suit shall proceed in respect of houses, cash money and orchard etc. The suit was for partition of properties including agricultural land, houses, orchard, money etc.

3. A plain reading of section 4 of the Act itself provides the answer to the question posed in this case. The words "any land lying in the area" occurring in section 4 of the Act are significant. Reading it along with section 3(1) of the Act the consequences that follows is that upon publication of a notification under section 3(1) of the Act, a suit in respect of declaration of right or interest in "any land lying in the area" for which the Government has declared its intention to make a scheme for consolidation of holdings shall not proceed and shall abate. It follows that there shall be no abatement of any suit in respect of any land lying outside the area of consolidation operations. If in a composite suit, the suit relating to reliefs unconnected with the declaration and determination of title to a land does not abate in relation to such controversy, there is no reason why in a suit of this nature, the suit in relation to the properties in respect of which there is no notification under

(1) (1979) BLJ 493.

section 3(1) of the Act, shall abate. In my opinion. Therefore, a suit or a proceeding can partially abate. In my opinion, therefore, a suit or proceeding can partially abate. It will abate in respect of the lands lying in the area in respect of which the Government has declared its intention to make a scheme for consolidation of holdings by a notification in official Gazette under section 3(1) of the Act. It will not abate in respect of any land for which there is no such notification.

4. So far the present case is concerned the plaintiff-opposite party has filed a Title Partition Suit No. 30 of 1973 in the court of Subordinate Judge 2nd court, Muzaffarpur. The properties should not be partitioned, as described in various schedules of the plaint, are situate in the districts of Muzaffarpur, Vaishali and Patna. The plaintiff has claimed 2/3rd share in the properties. A notification under section 3(1) of the Act seems to have been published in respect of the agricultural lands situate in villages Bhagwanpur Ratti and Salemput in the district of Vaishali. There is no such notification in respect of 5 1/2 kathas of land situate in Muzaffarpur town and 3 kathas and odd land situate in Mohalla Dhakanpura Anisabad in the district of Patna. The petitioner, a defendant in the suit, filed an application under section 4(c) of the Act in the court below that upon publication of the notification under section 3(1) of the Act the suit had abated and an order to that effect may be passed. The learned court below has held that since there was no notification under section 3(1) of the Act in respect of the lands situate in the towns of Muzaffarpur and Patna, the suit cannot abate, as in his view no order for partial abatement could be recorded under section 4(c) of the Act. The petitioner's application, was, accordingly, dismissed. The learned court below, in

my opinion, is not correct. As discussed above the suit pending in the court below shall partially abate. It shall stand abated in respect of the land situate in the district of Vaishali in respect of which there is a notification under section 3(1) of the Act and the consolidation operations are going on. The suit as regards the lands situate in the districts of Muzaffarpur and Patna which are not covered by any consolidation scheme shall not abate and shall proceed.

5. The result is that this civil revision application succeeds in part as indicated above but without costs. The trial court shall now proceed with the suit in relation to the properties situate in the district of Muzaffarpur and Patna.

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

M.K.C. Application allowed in parts.

FULL BENCH

1985/March, 29.

Before S.S.Sandhawalia, C.J., S.K.Choudhuri & P.S.Mishra, JJ.

*Yugal Kishore Singh 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 16(3)- issue of benami ownership, whether can be raised and decided in a preemption proceeding-whether it is obligatory for the court or pre-emptor to implead the real owner-order or decree against the ostensible owner would be equally binding on the real owner.*

Benami purchase with reference to the ceiling law in section 16(3) of the Bihar Land Reforms (Fixation of Ceiling Area and Acquisition of Surplus Land) Act, 1961, hereinafter called the Act, can be made where neither the original owner's land nor the ostensible owner's land when tagged separately with the purchased land, would exceed the ceiling limit. If, however, it exceeds the ceiling limit then the penal provision of section 17 of the Act will atonce be attracted.

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* Civil Writ Jurisdiction Case No. 3597 of 1983. In the matter of an application under Articles 226 and 227 of the Constitution of India.

It is well established that a provision is not to be construed on the presumption that it would necessarily be abused. In a case of benami transaction, where the real owner remains wholly within the ceiling limit, the same would be within the four corners of the law. There is no reason as to why in such a situation, the provision should not be given its plain meaning. Where the same is sought to be misused to circumvent or transgress the ceiling law, the statute gives more than ample and stringent power under section 17 of the Act to curb the same.

Held, that the well established concept of benami transaction is not ousted or abolished for the purposes of section 16 of the Act. The issue of benami ownership can be raised and investigated into a pre-emption proceeding under section 16(3) of the Act.

Held, further, that the bench decision of this court on this point in *Narendra Kumar Ghose's* case is correctly decided.

Held, that it is not obligatory for the court or the pre-emptor to implead the real owner of the property sought to be pre-empted in the presence of the ostensible owner and the order and decree against the latter would be equally binding up on the former.

Narendra Kumar Ghose alies Phali Ghose and anr. v. Sheodeni Ram and Ors. (1)-held to be correctly decided.

Gur Naraiyan v. Sheolal Singh (2) and S.K. Halaludin and ors. V. Nabi Hasan and ors. (3)

(1) (1972) AIR (Pat.) 1

(2) (1918) AIR (PC) 140

(3) (1982) BBCJ 552.

referred to.

Application under Articles 226 and 227 of the Constitution.

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

Mr. Shrawan Kumar and Mrs. Abha Singh for the petitioner.

Mr. Kamlapati Singh, Government Pleader No. 8 for the respondents.

Mr. Rama Kant Tewary for respondent no. 4.

S.S.Sandhawalia - The significant issues that come to the fore in this civil writ jurisdiction case admitted to hearing by the Full Bench may be conveniently formulated in the terms following:

(1) Can the issue of benami ownership be raised and investigated into in the pre-emption proceedings under section 16(3) of the Bihar Land Reforms (Fixation of Ceiling Area and Acquisition of Surplus Land) Act 1961 ?

(2) Whether the case of *Narendra Kumar Ghose alias Phali Ghose and another v. Sheodeni Ram and others (1)* answering the aforesaid question in the affirmative has been correctly decided ?

(3) Whether it is incumbent for the Court or for the pre-emptor to implead and bring on the record the real owner of the property sought to be pre- empted (despite the presence of the ostensible owner) in a proceeding under section 16(3) of the Act aforesaid ?

2. The facts are not in serious dispute. By a

(1) (1972) AIR (Pat.) 1.

registered deed executed on the 17th of March, 1979, a plot bearing N.B.P. No. 415 situated in village Chainpur was purchased by Debendra Mahto (petitioner no. 2) from the respondent (transferees) nos. 5 to 7. It is the claim of the writ petitioners that this purchase was in fact a benami transaction and the real purchaser was Jugal Kishore Singh (petitioner no. 1) whilst the ostensible purchaser (petitioner no. 2) was merely his domestic servant and employee. Ganesh Mahto (respondent no.4) thereafter preferred an application for pre-emption of the land in which he obviously impleaded only the registered transferee Debendra Mahto (petitioner no.2). In the subsequent proceedings in ceiling Case No. 4 of 1979, Debendra Mahto showed cause and sought to take up the plea that in fact the real purchaser was petitioner no. 1 Jugal Kishore Singh. It is, however, the admitted position that petitioner no. 1 was not formally impleaded as a party in the proceeding. After trial the pre-emption application was allowed by the D.C.L.R., Muzaffarpur West, on the 12th of December, 1979. Against the said order an appeal was then preferred by petitioner no.2 Devendra Mahto in which the petitioner no. 1 was merely arrayed in respondent no. 5. It is common ground that petitioner no. 1, the alleged real owner, did not himself prefer any appeal against the order aforesaid. The said appeal was, however, allowed by the Additional Collector, Muzaffarpur, on the 29th of March, 1982, whereby he set aside the order of pre-emption passed by the learned D.C.L.R. mainly on the ground that the real owner had not been impleaded as a party and, therefore, remanded the case back to the lower court for investigating the issue of the benami transaction and, thereafter, to dispose it of in accordance with law. Aggrieved thereby, the pre-emptor (respondent no. 4) preferred

a revision before the Board of Revenue. By the impugned order of the Board it has been held, inter alia, that unless the real purchaser himself volunteers and becomes a party to the proceeding in the pre-emption case, the ostensible owner has to be treated as a real purchaser and neither the pre-emptor nor the Court has any legal obligation to add the real purchaser as a party and consequently the decree or order against the ostensible owner is wholly binding on the real owner as well. The revision was consequently allowed and the appellate order remanding the matter was set aside. Aggrieved thereby the present writ petition has been preferred by both the ostensible and the real owners.

3. When this case came up for admission before my learned brother P.S.Mishra, J., primary reliance was placed on *Narendra Kumar Ghose's case (supra)* for contending that the issue of benami had to be necessarily investigated into. Opining that this approach may in a way be inconsistent with the larger scheme of the Act and might help unscrupulous transferees to exceed the aggregate of the ceiling area through purchases made by ostensible owners the matter was directed to be placed before a Division Bench. In view of the significance of the issue raised the Division Bench admitted the case for hearing by a Full Bench and that is how it is before us.

4. It seems apt to deal with question nos. 1 and 2 framed at the outset together since they are inextricably connected with each other. With regard thereto the core of the submission ably presented on behalf of the writ petitioners by their counsel Mr. Shrawan Kumar is that the well entrenched concept of benami ownership in Indian law is in no way ousted for the purposes of the Bihar Land Reforms

(Fixation of Ceiling Area and Acquisition of Surplus Land) Act (hereinafter referred to as "the Act") generally or for the particular provisions of section 16 and sub- section (3) thereof, which, according to learned counsel, give statutory sanction to the concept of pre-emption. Apart from principle, reliance was sought to be placed on sections 5(1)(iii), 16(1) and (2) and 17 of the Act and with regard to precedent on the categoric observation in *Narendra Kumar Ghose's case (supra).*

4A. Since the controversy herein centres around section 16 of the Act, it is necessary to quote the relevant parts thereof for facility of reference.

> "16. Restriction on future acquisition by transfer etc. - (1) No person shall, after the commencement of this Act, *either by himself or through any other person,* acquire or possess by transfer, exchange, lease, mortgage agreement or settlement any land which together with the land, if any, already held by him exceeds in the aggregate the ceiling area.
>
> Explanation - For the purpose of this section 'transfer' does not include inheritance, bequest or gift.
>
> (2)(i) After the commencement of this Act, no document incorporating any transaction for acquisition or possession of any land by way of transfer, exchange, lease, mortgage, agreement or settlement shall be registered, unless a declaration in writing duly verified is made and filed by the transferee before the registering authority under the Indian Registration Act 1908 (XVI of 1908), as to the total area of land held by himself or through any other person any where in the State.

* * *

(3)(i) When any transfer of land is made after the commencement of this Act to any person other than a co-sharer or a raiyat of adjoining land, any co-sharer of the transferer or any raiyat holding land adjoining the land transferred, shall be entitled, within three months of the date of registration of the document of the transfer, to make an application before the Collector in the prescribed manner for the transfer of the land to him on the terms and conditions contained in the said deed:

Provided that no such application shall be entertained by the Collector unless the purchase money together with a sum equal to ten percent thereof is deposited in the prescribed manner within the said period.

(ii) On such deposit being made the co-sharer or the raiyat shall be entitled to be put in possession of the land irrespective of the fact that the application under clause (1) is pending for decision:

Provided that where the application is rejected, the co-sharer or the raiyat, as the case may be, shall be evicted from land and possession thereof shall be restored to the transferor and the transferes shall be entitled to be paid a sum equal to ten percent of the purchase-money out of the deposit made under clause (i).

(iii) If the application is allowed, the Collector shall by an order direct the transferee to convey the land in favour of the applicant by executing and registering a document of transfer within a period to be

specified in the order and, if he neglects or refuses to comply with the direction, the procedure prescribed in Order 21 rule 34 of the Code of Civil Procedure 1908 (V of 1908) shall be, so far as may be, followed."

Perhaps at the very outset it must be noticed that *benami* transactions have been invoked from time immemorial in India and subsequently have undoubtedly been accorded legal recognition. Indeed it could not be disputed before us and one may fairly proceed on the assumption that the concept of *benami* transaction is by now well entrenched in our land. The basic issue herein, therefore, is whether by express enactment or necessary intendment the *benami* transaction has been ousted and done away with qua the Ceiling Act aforesaid. It would appear that far from doing so, the said Act seems to irresistibly accord statutory recognition to the concept of *benami* ownership, namely, the holding of land either directly or through any other person. Reference in this connection may first be made to section 5(1)(iii), which refers to the retaining of agricultural land either benami or farzi. True it is that herein the reference is that such ownership would not be used to defeat the ceiling laws but within the parameter of the permissible holding the concept of *benami* seems to be not implicitly but expressly recognised by reference to such ownership. If it were to be the intention of the statute to stamp out the very concept of *benami* ownership for the purpose of the ceiling laws then it would obviously have been put in more categoric and express terms. Though by itself the provision of section 5(1)(iii) may not be conclusive the same has to be viewed along with the provisions of section 16. Sub-section (i) thereof whilst placing restrictions on the future acquisition

by transfer etc., expressly states that no person shall after the commencement of the said Act either by himself or through any other person shall acquire or possess by transfer etc., any land which exceeds in the aggregate the ceiling area. Herein also whilst barring the transgression of the prescribed limits of holding, the law seems to visualise and in a way recognises ownership either directly or through any other person. This is again so in sub-section (2) which requires a declaration by the transferee as to the total area of land held by himself or through any other person anywhere in the State. Without labouring the point it seems to follow from these provisions that the ceiling laws though they prohibit the holding of land in excess of the ceiling area (either directly or *benami* or farzi holding) yet they do not seem to oust or abolish the well entrenched concept of benami holding in Indian law where the same is within the limits of the permissible areas.

5. Much argument was then raised before us with regard to the statutory declaration by the transferee mandated by section 16(2)(i). Pointedly the issue herein was whether such a declaration was to be made by the real owner or the ostensible owner and in case it is to be by the latter the same may have a tendency to defeat the ceiling laws. Learned counsel for the writ petitioners after some ambivalence in the beginning took up the firm stand that this declaration under section 16(2)(i) by the very nature of things has to be by the ostensible owner.

6. Now viewing the matter of the statutory declaration under section 16(2)(i) in its correct perspective, it must be noticed that it is intended to generally and primarily govern genuine transactions where the transferee is ordinarily the real owner.

Plainly enough this declaration is required to keep a vigilant eye in the enforcement of ceiling laws and to safeguard that the transferee does not come to acquire land above the prescribed holding. Though the concept of benami ownership now stands recognised by the law yet this is in the nature of exception and ordinarily and generally the ownership vests in the person who is specifically named as such. Section 16(2)(i) has not made separate and distinct provisions for statutory declaration in the case of the genuine transaction and the benami transaction. Therefore, as the law now stands, the statutory declaration herein would have to cover a fourfold situations:

(i) A genuine transaction where the transferee is himself the real owner and is also within the ceiling limit and thus the transaction in no way infracts the ceiling laws.

(ii) Where the transferee is the real owner but either by design or inadvertence the transaction may tend to exceed the prescribed ceiling limits for the transferee.

(iii) Where the transferee is only the ostensible owner but the transaction remains within the ceiling laws.

(iv) Where the transferee is only the ostensible owner but the transaction is intended to or in any case circumvents or transgresses the ceiling law.

Because section 16(2)(i) encompasses all the aforesaid situations, it comes under some strain or anomaly under (iv) above. This is so because the provision is intended to curb the exceeding of real ownership of the land above the ceiling limits

whereas the declaration would pertain to the land of the ostensible owner and not that of the real owner. This, however, is the inevitable result of the recognition of the concept of *benami* ownership with its resultant duality of ownership one ostensible and the other real. As regards the other three situations visualised above, section 16(2)(i) covers the same without any infirmity. Now by the very nature of things in a *benami* transaction the real owner at the initial stage remains behind the curtain. Consequently at that point of the original purchase the declaration will inevitably have to be of the ostensible owner since the real owner is not even known (barring the knowledge of the *benami* holder and the benemidar). Inevitably, therefore, the declaration would at that stage pertain to the ownership of land by the ostensible owner alone. The function of interpretation herein is to iron out the creases in the statute because of the fact that section 16(2)(i) embrances a wide variety of situations. To some, it may not fit in like a glove. This functional exercise can only be done by holding that at the initial stage of the purchase the statutory declaration in a benami transaction by the very nature of things has to be by the ostensible owner with regard to his holding. In any case, in the subsequent proceeding, either when the question of exceeding the ceiling area arises or for the requirement of pre-emption under section 16(3), the issue of the benami transaction is raised it has necessarily to be investigated within the parameters of the statute. The view I am inclined to take receives support from the following observation in *Narendra Kumar Ghose's case (supra):*

> "Here, one may think that the declaration is to be made by the ostensible owner transferee although while making such

declaration he can include in it not only the land held by himself but also the land held by him through any other person anywhere in the State."

7. In view of the aforequoted observation and the discussion proceeding the same, I am inclined to take the view that the benami purchase with reference to the ceiling law can be made where neither the original owner's land nor the ostensible owner's land, when tagged separately with the purchased land, would exceed the ceiling limit. If, however, it exceeds the ceiling limit then the penal provision of section 17 of the Act will at once be attracted. These provide sufficient safeguard against such benami purchases by unscrupulous persons in contravention of the ceiling law.

8. This view would be the correct and over all meaningful interpretation of the provisions and the same would give effect to the words, name, "as to the total areas of the land held by himself or through any other person anywhere in the State" as employed in Section 16(2)(i) of the Act. Thus the observations quoted from Nagendra Ghose's case (supra) stand explained and affirmed. In my view any other interpretation would make the position somewhat incongruous and not easy to explain.

9. Once it is held as above that the statutory declaration has at that stage to be by the ostensible owner, a fear was sought to be expressed that the same may be misused or abused to evade the ceiling laws. However, it is well settled that a provision is not to be construed on the presumption that it would necessarily be abused. As has already been shown, in a case of benami transaction, where the real owner remains wholly within the ceiling limits, the same would be wholly innocuous and within the four corners

of the law. No reason would thus appear as to why in such a situation the provision should not be given its plain meaning. However, where the same is sought to be misused to circumvent or transgress the ceiling law, the statute gives more than ample and indeed stringent powers under section 17 of the Act to curb the same. A reference thereto would show that it provides almost a draconian penalty for the violation of section 16(1). The basic tenet laid in section 16 is to bar the future acquisition of land exceeding the ceiling area where the same is contravened by the misuse of the statutory declaration to cover up the real ownership beyond the ceiling area. The mischief would at once come under section 17. Its provisions take more than ample care of such a situation. Thereafter they provide in terms that no right, title or interest would accrue in favour of a transferee who acquires land in excess of the ceiling area by virtue of any transaction contravening the provisions of section 16. Not only that, as penalty for such transaction the right, title and interest of the transferee in the said land would become void with effect from the date of declaration made by the Collector in this behalf. Again by sub-section (2) of section 17 the Collector is given wide-ranging powers to implement the same and further sub- section (3) provides that if the transaction was one of sale, the land would be liable to be forfeited to the State and if otherwise it shall be restored to the transferor on such terms and conditions as may be prescribed. It, therefore, seems to be plain that the framers of the law have provided for any misuse or abuse of the provisions by section 17 in fairly stringent terms.

10. Therefore, on principle, on the language of the statute and on previous precedent it must be held that the well-established and well entrenched

concept of benami transaction is not ousted or abolished for the purpose of section 16 of the Act. No meaningful challenge could be laid to the observation in *Narendra Kumar Ghose's case (supra)*. As it will be manifest from the above for independent and added reasons, I would concur with that view.

11. One may now advert to the ancillary but equally important question no. 3, namely, whether it is incumbent for the Court or the pre-emptor to implead the real owner despite the presence of the ostensible owner on the record of the proceeding under section 16(3) of the Act. The Board of Revenue for cogent reasons has come to the conclusion that the onus lies on the real owner himself to intervene and become a party to the proceeding and it is neither for the Court not for the pre-emptor to compel him to appear. In case the real owner choses to stay away he must take the consequences and has only himself to blame because the order or decree against the ostensible owner would be wholly binding upon him both on principle as also on settled precedent. This would apply equally to the investigation and the finding with regard to the issue of benami ownership, and it cannot possibly be urged that the absence of the real owner as a party to the proceeding would introduce any infirmity therein. The issue seems to be so well settled on principle that it is unnecessary to labour the point. Way back in *Gur Narayan v. Sheolal Singh (1)* it was authoritatively held as follows:

> "The bulk of judicial opinion in India is in favour of the proposition that in a proceeding by or against the benamidar, the person

(1)(1918) AIR (PC) 140.

beneficially entitled is fully affected by the rules of res judicata. With this view their Lordships concur. It is open to the latter to apply to be joined in the action; but whether he is made a party or not, a proceeding by or against his representative in its ultimate result is fully binding on him. In case of a contest between an alleged benamidar and an alleged real owner, other considerations arise with which their Lordships are not concerned in the present case."

The aforesaid view has been accepted and reiterated by the final Court and was expressly referred to by Untwalia, J. in *Narendra Kumar Ghose's case (supra).*

12. Now once the principle is clearly established whether the real purchaser is a party to the proceeding or not, he is bound by the order or decree against the ostensible owner then it would necessarily follow that no duty can possibly be cast either on the pre-emptor or on the Court to compel the impleading of the real owner. Whatever investigation into the question of the transaction being *benami* has, therefore, to be conducted, it can lawfully be done in the presence of the ostensible owner alone. This is not to say that the Court or the pre-emptor would not have the discretion or the option to implead the real owner but only to hold that the real owner would be bound by any finding given in the proceedings against the ostensible owner despite his absence. Equally it must be noticed that notice to the ostensible owner in the proceeding would in the eye of law be notice to the real owner as well, and, therefore, the decision on the question of *benami* ownership either in the presence of the real owner or in his absence made against the ostensible owner would

undisputebly be binding. An identical view has been taken by a Division Bench of this Court in *Sk. Halaluddin and others v. Nabi Hasan and others (1)* wherein S.K. Choudhuri, J., speaking for the Bench, has observed as follows:

> "I fully agree with the view taken in *Narendra Kumar Ghose's case (supra)*. As it is now settled that the Benami question can be entertained by the revenue authority in the absence of the real owner and the decision would be binding upon the latter, it cannot be argued that the decision of the D.C.L.R. on that score is without jurisdiction."

13. To finally conclude: The answer to question no. 1 is rendered in the affirmative and it is held that the issue of *benami* ownership can be raised and investigated into a pre-emption proceeding under section 16(3) of the Act.

Question no. 2 - *Narendra Kumar Ghose's case (supra)* on this point is correctly decided and its ratio is hereby affirmed.

The answer to question no. 3 is rendered in the negative and it is held that it is not obligatory for the Court or the pre-emptor to implead the real owner of the property sought to be pre-empted in the presence of the ostensible owner and the order and decree against the latter would be equally binding upon the former.

14. Now applying the above it is common ground before us that petitioner no.1 Yugal Kishore Singh, the real owner, did not himself choose to get himself impleaded as a party to the proceedings. There is no dispute that the ostensible owner was

(1)(1962) BBCJ 552.

duly served with notice and had filed show cause and was a party to the proceedings throughout. Even when the issue was decided in favour of the pre-emptor the real owner Yugal Kishore Singh himself did not prefer any appeal against the same and it was done only by the ostensible owner. The Board of Revenue was, therefore, right in its view that the mere absence of the real owner in this context did not in any way vitiate or introduce any infirmity in the finding of the D.C.L.R. and no further remand for the purpose of investigation of the issue of benami ownership was warranted. Affirming the said view, I do not find any merit in this writ petition which is hereby dismissed. The parties are left to bear their own costs.

S.K.Choudhuri, J. I agree.

P.S. Mishra, J - I have the privilege of going through the proposed judgment by C.J., and although I concur with the conclusion and answers to the questions formulated at the hearing of the writ application, I have some reservations in respect of some of the observations made in the judgment.

2. Viewing the matter of the statutory declaration under section 16(2)(i), it has rightly been observed that the statutory declaration, as the law now stands, would have to cover a fourfold situation:

i) A genuine transaction where the transferee is himself the real owner and is also within the ceiling limit and thus the transaction in no way infracts the ceiling laws;

ii) Where the transferee is the real owner but either by design or inadvertence the transaction may tend to exceed the prescribed ceiling limits for the

transferee;

iii) Where the transferee is only the ostensible owner but the transaction remains within the ceiling laws; and

iv) Where the transferee is only the ostensible owner but the transaction is intended to or in any case circumvents or transgresses the ceiling law.

Because section 16(2)(i) encompasses all the aforesaid situations, it comes under some strain or anomally under (iv) above. This is so because the provision is intended to curb the exceeding of real ownership of the land above the ceiling limits whereas the declaration would pertain to the land of the ostensible owner and not that of the real owner. It has been rightly observed that this strain or anomaly is inevitable result of the recognition of the concept of *Benami* ownership, its resultant duality of ownership, the ostensible and the real. As regards the other three situations visualised above, section 16(2)(i) covers them without any infirmity. My reservations, however, compell me to question : Will the duality of ownership, one the ostensible and the other real, give to the latter escape from the requirement of the declaration in writing as such a declaration may be filed by the former, namely, the ostensible owner, although the latter shall own and possess the land purchased under the document executed in favour of the former ? In a Benami transaction the real owner remains behind the curtain. One may think, therefore, that at the point of the original purchase the declaration will inevitably have to be of the ostensible owner since the real owner

is not in know except to the ostensible owner. This declaration by the ostensible owner, as required by sub-section (2)(i) of section 16 of the Act, shall not inform the registering authority about the land held by the real owner and whether the purchase by him shall exceed the ceiling limit in possession of the real owner or not. How then to interpret who, for the purposes of sub-section (2)(i) of section 16 of the Act, the transferee is ? It is well recognised that, when a rule or section is a part of an integral scheme, it should not be considered or construed in isolation. One must have regard to the scheme of the fasciculous of the relevant rules or sections in order to determine the true meaning of any one or more of them. An isolated consideration of a provision leads to the risk of some other inter-related provision becoming otiose or devoid of meaning [*See - O.P.Singla and another v. Union of India and others (1).* If a rule or a section is capable of two constructions, that construction should be preferred which fulfils the policy of the Act, and is more beneficial to the person in whose interest the Act has been passed. When, however, the language is plain and unambiguous, the court must give effect to it whatever may be the consequences, for, in that case, the words of the statutes speak the intention of the legislature. When the language is explicit, the consequences are for the legislature and not for the courts to consider. In their anxiety to advance beneficent purpose of legislation, the court must not yield to the temptation of seeking ambiguity when there is none *[See Jeewanlal Ltd. and others v. Appellate Authority Under the Payment of Gratuity Act and others (2). In Narendra Kumar Ghose and another v.*

(1) (1984) 4 SCC 450

(2) (1984) 4 SCC 356.

Sheodeni Ram and others (supra) speaking for the Court, Untwalia, J. has said:

> "The base is, therefore, on a person who wants to acquire or possess land by transfer within the meaning of that section not to acquire an excess area beyond the ceiling area even benami in the name of or through any person."

Should the court in its anxiety to acknowledge the ostensible owner as the transferee for the purposes of the declaration under section 16(2)(i) ignore the very purpose for which section 16(1) has introduced the restrictions on future acquisition by transfer etc., that no person shall, either by himself or through any other person, acquire or possess by transfer, exchange, lease, mortgage, agreement or settlement any land which together with the land, if any, already held by him exceeds in aggregate the ceiling area ? Section 16(2)(i) says that the transferee shall declare in writing, duly verified and filed by him before the registering authority under the Indian Registration Act, 1908, as to the total area of land held by himself or through any other person anywhere in the State. If the ostensible owner has to make this declaration, he shall speak about the land held by himself and/or possessed by him but acquired in the name of any other person. It contemplates no where that he shall state about the total area of land held by the real owner, although he shall not be owning or possessing the land acquired in his name and the acquisition shall add to the area of the land held and possessed by the real owner.

3. In *Narendra Kumar Ghose's case (supra)* after correctly recognising the base, Untwalia, J. (as he then was) he said:

"... Of course, under sub-section (2) there is an inhibition on the registering authority not to register a document of transfer unless a declaration in writing duly verified is made and filed by the transferee before the registering authority under the Indian Registration Act, 1908 as to the total area of land held by him. Here, one may think that the declaration is to be made by the ostensible transferee although while making such declaration he can include in it not only the land held by himself but also the land held by him through any other person anywhere in the State.....If benami transactions are recognised even after the passing of the Act, one may think that it will give a handle to the real transferee to circumvent the rigour of the law engrafted in sub-section (2) of section 16 of the Act. But such a fraudulent act of the real transferee can be amply checked and controlled by taking recourse to the provision of law contained sec. 17 of the Act. If any person has acquired land in excess of the ceiling area benami in the name of some person, the land can be forfeited to the State under the provision of law contained in Section 17.

4. Section 17 of the Act provides for penal action against any person contravening the provisions of section 16 of the Act. How to know by such a purchase the real owner is contravening the provisions of section 16 of the Act? In *Narendra Kumar Ghose's case (supra),* the court was concerned primarily with the question, whether the revenue authorities considering the cases under section 16(3) of the Act would be competent to go into the Benami transaction or not. Its conclusion in the judgment; that the procedure under sub-rule (4)

of rule 19 of the Bihar Land Reforms (Fixation of Ceiling Area and Acquisition of Surplus Land) Rules, 1963, is comprehensive enough to decide a question of Benami and hence it cannot be contended that there was no procedure in the Act or Rules framed thereunder to decide the question of Benami and also that since the delivery of possession ordered under sub- section (3) of Section 16 of the Act against an ostensible transferee is binding on the real transferee who cannot reclaim the possession from the civil court because of the bar of section 43 of the Act are, if I may say so with respect, correct. There are good reasons to hold that the question of Benami transaction raised before the revenue authorities is one by and under the Act. The revenue authority cannot refuse to go into the question of Benami, while ordering delivery of possession to a pre-emptor and direct the real owner or the Benamidar to get the question of Benami transaction settled in Civil courts. The question as to who should file the declaration, the ostensible owner or the real owner, had not arisen for consideration in *Narendra Kumar Ghose's case (supra). In Sk. Halaluddin and others v. Nabi Hasan and others (1),* a Division Bench of this Court has again considered, whether the question of Benami transaction can be gone into by the revenue authority and endorsed the view taken in *Narendra Kumar Ghose's* case. In *Sk. Halaluddin's case (supra)* it has been further said that Benami transaction can be entered into by the revenue authority in the absence of the real owner and the decision will be liable on the latter. In this case the question who should file the declaration before the registering authority had not arisen.

(1) (1982) BBCJ 552.

5. In my considered view a court of law is bound to proceed upon the assumption that the legislator is an ideal person, that does not make mistakes and that it had informed itself as to the state of the law then existing when it undertook to legislate. The court of law is not authorised to supply a casus omissus or to alter the language of the statute. A constitutional morality has developed to honour and respect the legislature's wisdom. In *O.P. Singla's case (supra)* it has been pointed out by the Supreme Court that a rule or a section is a part of an integral scheme. It should not be considered or construed in isolation. Section 16 of the Act, which has in its sub-section (3) extended statutory recognition to the customary law of pre-emption pre-valent in the State of Bihar, has started with the prohibition say, no person shall, after the commencement of the Act, either by himself or through any other person, acquire or possess any land which together with the land, if any, already held by him exceeds in aggregate, the ceiling area. This is followed by the provision requiring the transferee to make and file a declaration in writing before the registering authority as to the total area of land held by himself or through any other person anywhere in the State. Obviously the ostensible owner's declaration as to the total area of land held by himself or through any other person will not substitute the land held and possesssed by the real owner to show whether the acquisition together with the land already held by the real owner would exceed in the aggregate, ceiling area or not. While the ostensible owner making the declaration and filing it before the registering authority would state about himself not holding or otherwise land in Benami or through any other person, he would say nothing about the Benami transaction in his name.

This requirement of making and filing the declaration by the transferee would be complied in its breach if the ostensible owner's declaration is accepted. The prohibition under section 16(1) of the Act shall not operate at all in that situation and action under section 17 of the Act, in my view, will be no answer to a declaration under section 16(2)(i) by the ostensible owner; a declaration which shall not inform as to the real state of affairs, about the person who wants to acquire or possess land by Benami transfer in the name of the ostensible owner.

6. The view that I have taken shall not oust or abolish the well established and well entrenched concept of Benami transaction. The real owner who, for all purposes, shall remain behind the curtain, shall not remain so for the purposes of making and filing the declaration before the registering authority under the Indian Registration Act, 1908, as to the total area of land held by himself or through any other person anywhere in the State. The cloak or veil of Benami shall still keep the real transferee well concealed in so far as the document of transfer is concerned; the ostensible owner shall figure as the purchaser; the revenue authorities shall know from the declaration by the real purchaser whether by such purchase by him the total land in his possession shall exceed the ceiling area or not and it shall give to them, if such a purchase is granted, option to act under section 17 of the Act including action to nullify the transfer.

7. It is not possible to doubt without casus omissus or something of that kind that the legislature has intended that the real transferee should make the declaration in respect of the lands held and possessed by him before he is allowed to acquire the land.

8. *Narendra Kumar Ghose's case (supra)* give the impression that ostensible owner may make and file the declaration before the registering authority under the Indian Registration Act, 1908. In my judgment, however, that will not be a correct declaration. A declaration by the ostensible owner of the land held by himself and the land held by him through any other person shall itself contravene section 16(2)(i) of the Act and shall make the acquisition invalid attracting action under section 17 of the Act.

9. I have no difference to the conclusions that the answer to question no.1 is in the affirmative and the issue of Benami ownership can be raised and investigated into in a pre-emption proceeding under section 16(3) of the Act and the answer to question no.3 is in the negative that it is not obligatory for the court or the pre-emptor to implead the real owner and the property sought to be pre-empted in the presence of the ostensible owner and the order and the decree against the latter would be equally binding upon the former. But in my view in answer to question no. 2 it should be clarified that *Narendra Kumar Ghose's case (supra)* has correctly decided the points, except to the extent it creates the impression that ostensible owner can make and file the declaration before the registering authority under the Indian Registration Act, 1908. I am in full agreement with the judgment of the C.J., except what I have said above.

10. In the result, the application is dismissed, but without costs.

R.D. Application dismissed.

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