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CONTAINING

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

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

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TABLE OF CASES REPORTED

CIVIL REFERENCE

REVISIONAL CIVIL

CIVIL WRIT JURISDICTION

CRIMINAL WRIT JURISDICTION

TAX CASE

TABLE OF CASES REFERRED TO

INDEX

INDEX

Page.

Where the partnership firm granted lease of the business of the colliery to the Managing Contractor and all that was left with the proprietors was the guaranteed income and royalty on raisings and despatches of coal, the assessee having neither control over the business nor stake in the liability or profit;

Held, that the transaction did not involved lease of only commercial assets, but it was a lease of entire business.

Held, further, that the income of the assessee must be assessed as income from "other sources" and not income from 'business'.

Held, also, that there can not be a partnership without business. There being no partnership, the registration of the firm could not have been continued.

Commissioner of Income-tax, Bihar, Patna v. M/s. Kuya and Khas Kuya Colliery Co., Jharia (1985) ILR 64, Pat. 1167

Bihar Consolidation of Holdings and Prevention of Fragmentation Act, 1956—*Section 10(2)—Objection filed-authorities under the Act—duty of—failure on the part of the Consolidation Officer to apply his*

Page.

mind and decide the dispute between the parties—order passed—nature of.

The authorities under the Act, who have been vested with powers to settle the questions regarding title and other disputes and who have replaced the Civil Courts are judicial authorities and must record reasons in support of a decision on any disputed claim. Where from the order passed by the Consolidation Officer it will appear that he has not acted in the manner in which a judicial authority is required to act and has not decided the dispute between the parties and has failed to apply his mind;

Held, that the order is most perfunctory. The order being subject to appeal the necessity to record reasons was greater and as such the order has got to be set aside.

The appellate authority in the instant case after having found that there was no partition in the family in the year 1930 as claimed by respondent no. 6, there could be no reason for holding that the partition might have taken place between the year 1954 and 1969 in as much as it was no body's case. In any event he was not only to partition the joint holdings as envisaged

Page.

under section 8A of the Act but was also required to decide the question regarding the respective title of the parties in respect of the holdings recorded in separate names. In a case of this nature the consolidation authorities are required to decide whether there was an earlier partition and if the conclusion is that there was no earlier partition and the family remained joint then to decide whether any holding recorded in the name of an individual member of the family was joint property or a separate acquisition of that person.

Held, therefore, that in the instant case as neither the appellate nor the revisional authority have tried to decide the present dispute in this manner, the appellate and revisional order contained in Annexure 2 and 3 are fit to be quashed and set aside.

Sheojoti Devi and another v. The State of Bihar and others (1985) ILR 64, Pat. 1135

Bihar Control of Crimes Act, 1981—*Section 2(d) Clause (i) and (ii)-provisions of—mention of only one case against the petitioner in the ground served on him for his detention—effect*

Page.

of—section 12(2)— detention of petitioner under—validity of.

Where in the ground served on the petitioner for his detention under section 12(2) of the Bihar Control of Crimes Act, 1981, here in after called the Act, there is mention of only one case against him;

Held, that a single act or commission falling under clauses (i) and (ii) of section 2(d) of the Act cannot be characterised as an habitual act or commission referred to under the aforesaid two clauses. Idea of habit involves the element of persistence and repetition of similar act or commission of the same class of offences or the kind, If the act or commission are not of the same kind, it can not be characterised as habitual.

Held, further, that as it can not be said that the petitioner is an anti-social element, the order of detention is bad and is fit to be quashed.

Surendra Yadav v. The State of Bihar and others (1985) ILR 64, Pat. 1071

Bihar Land Reforms Act, 1950— *Section 6 and 8 read with Bihar Land Reforms Rules, 1951, rule 8-Scope and applicability of—section 8 and rule 8,*

Page.

whether contemplated a second apeal from the appellate order—proceeding under section 6—nature of.

The proceeding under section 6 of the Act is judicial in nature in which rival claims of the litigating parties are determined and unless the law vested in the authority to interfere with the order passed in the proceeding the power in this regard cannot be assumed merely for the reason that a particular authority is an officer subordinate to him. Both section 8 of the Act and rule 8 of the Rules deal with one appeal directed against the original order under section 6. They do not contemplate a second appeal from the appellate order.

Held, therefore, that in the instant case having regard to the provisions of the Act and the Rules the commissioner has no jurisdiction either revisional or otherwise to interfere with an order passed in appeal under section 8 of the Act.

Shaikh Gajar v. The State of Bihar and others (1985), ILR 64, Pat. 1157

Bihar Land Reforms (Fixation of Ceiling Area and Acquisition of Surplus Land) Act, 1961—*Section 16(3)—application under—by heirs of third donee*

Page.

claiming to be adjoining Raiyat, with respect to entire lands sold by other two donees by registered sale deed on deposit of Rs. 18,000/-, the sale price—heirs of third donee also executing deed of Bazidawa with respect to their share and accepting Rs. 5,000/--deed of Bazidawa, whether operated as deed of conveyance—transfer validity of— application, whether maintainable.

Three plots were given in gift to three Bhaginwans and only two of them sold all the three plots claiming their exclusive possession by six Registered sale deeds for a consideration of Rs. 18,000/- but the vendees subsequently got executed a Bazidawa deed on payment of Rs. 5,000/- by the heir of the third donee. The heirs of the third donee filed a single application under section 16(3) of the Bihar Land Reforms (Fixation of Ceiling Area and Acquisition of Surplus Land) Act, 1961 hereinafter called the Act, for reconveyance of those lands in their favour claiming their title and possession over the plot which is adjoining to the above mentioned three plots.

The vendees took an objection to the maintainability of the application as the pre-emptors has deposited only Rs.

Page.

18,000/- and as such the deposit was short by Rs. 5,000/-.

Held, that the intention to convey the property for valuable consideration was clearly expressed by the real owners of the property by execution of the deed of Bazidawa. In such a situation the deed of Bazidawa did not remain a mere admission but operated as a deed of conveyance.

Held, further, that it is clear that there, could be no valid transfer in respect of the 1/3rd property belonging to the heirs of the third Donee and, therefore, no order of pre-emption can be made under section 16(3) of the Act. In this view of the matter even if it is assumed that the deed of relinquishment did not operate as a deed of transfer the pre-emption application was bound to be dismissed on the ground that there was no valid transfer in the eye of law.

Ram Jag Kunwar & others v. Member, Board of Revenue & others (1985) ILR 64, Pat. 1185

Central Excises and Salt Act, 1954—*Tariff Item 11E—electricity Included by the Finance Act 19 of 1978, section 36—generation of electric energy, whether can be subjected to payment of excise*

Page.

duty—amendment, whether ultra vires—Constitution of India, Schedule 7, List I, Entry 84.

The Entry 84 in List I of Schedule 7 of the Constitution uses not only the word "manufacture" but also "produce". The expression "produce" is of a very wide connotation and the generation of electric energy is included in the term "production." So far the expression "good's" used in the said Entry is concerned there is again no reason to give it a narrow meaning. Electricity is perfectly capable of being felt and sometimes in a big way to the great discomfort of a person.

Held, therefore, that the expression "goods" used in the 84th Entry in List I of Schedule 7 to the Constitution of India covers electric energy for the purpose of excise law.

Held, further, that the amendment by inclusion of Tariff item 11E of the Central Excises and Salt Act, 1954, is not ultra vires of the powers of the Union Government as it is possible to measure the production by reference to the consumption. It is not possible to hold that merely because kilowatt hour has been used as unit of measure in the disputed item, the tax

Page.

Page.

decree is passed. An execution proceeding will not abate as the declaration sought for in respect of title and interest in the suit land has already been declared in the judgment and decree of the suit.

Held, therefore, that section 4(c) of the Consolidation Act does not apply to an execution proceeding nor to a proceeding initiated under Order 21, rule 58 of the Code of Civil Procedure.

Ramdhari Lath and another v. Kishan Lal Agrawal and ors. (1985) ILR 64, Pat. 1067

3—*section 113 and Rule 1 of Order 46, provisions of—scope and applicability of—reference to the High Court made by the trial court—reference, when can be made—decree subject to appeal-no reference can be made unless it is covered by the Proviso in section 113—Proviso, in the instant case whether applicable—reference, whether competent.*

In view of the language of Rule 1 of Order 46 of the Code of Civil Procedure, it must be held that no reference to the High Court can be made in a suit in which the decree passed is subject to appeal unless it is covered by the Proviso in section 113 of the Code.

Page.

The Proviso in section 113 of the Code of Civil Procedure will apply only to a case which involves a question as to validity of any (i) Act, (ii) Ordinance (iii) Regulation, or (iv) any provision contained in an Act, Ordinance or Regulation. The trial court is not empowered to make a reference in a case where the validity of any other provision e.g. a rule, by law, order under enactment et cetera is involved.

Held, that in the instant case, an appeal under section 96 of the Code of Civil Procedure is clearly maintainable against the decree of the Court below and the impugned orders, Ext. 6(a) and Ext. A are certainly not parts of any Act or Ordinance nor covered by the definition 'Regulation within the meaning of section 113 of the Code and as such the reference to the High Court made by the court below was incompetent.'

Shashi Bhushan Prasad v. State of Bihar and others (1985) ILR 64, Pat. 1115

Code of Civil Procedure, 1908 as—*section 115(2)—High* amended in 1976—*Courts Jurisdiction under section 115 whether barred in cases in which the appeal lies to the High Court or to the* subordinate court.

Page.

Held, that in view of the provisions of sub-section 2 of section 115 of the Code of Civil Procedure having been added by the ammendment of 1976, there is no manner of doubt that the High Courts Jurisdiction under section 115 of the Code of Civil Procedure is barred in cases in which the appeal lies whether to this court or to the court of District Judge, which is subordinate court.

Ram Swarup Chaudhary v. Maujalal Rai (1985) ILR 64, Pat. 1154

Constitution—*Article 226—writ jurisdiction of High Court-prior dismissal in limine of identical cause of action by Supreme Court under Article 136, whether could be ignored by High Court.*

Held, that in its discretionary writ jurisdiction, the High Court can not altogether ignore and override the prior dismissal in *limine* of the identical cause of action by their Lordships of the Supreme Court under Article 136 of the Constitution.

Indian Oil Corporation Limited v. The State of Bihar and others (1985) ILR 64, Pat. 1081

Customs Act, 1962—*Section 114*—

Page.

Page.

more than ten years for correction of age of writ petitioner—delay not explained—principles of natural justice violation of—applicationwhethemaintainable.

On the representation of the writ petitioner her date of birth was corrected from 25.8.1925 as mentioned in her matriculation certificate, 25.8.1927 by the government notification dated 13.2.1971. Subsequently Government took a policy decision dated 10.9.1973 that the date of birth shall be in accordance with the date of birth recorded in the matriculation certificate. The writ-petitioner filed a writ application in 1983 for a writ of mandamus to be issued on the Government to correct her date of birth in Civil List of the Appointment Department in accordance with the Government notification dated 13.2.1971.

It is wholly untenable to hold that merely because the principles of natural justice have been violated, the writ-petitioner would be entitled to approach the High Court after inordinate and unexplained delay of more than ten years.

Dr. Mrs. Malti Rohatgi v. The State of Bihar & ors. (1985), ILR 64, Pat. 1121

REVISIONAL CIVIL

1984/September, 27.

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

*Jagdish Rai and others.**

v.

Shrimati Madhurilata Sinha and others.

Suit for redemption—*a point of law not raised before the trial court and consequently no such finding by it—whether can be raised in Civil Revision petition.*

Where, in a suit for redemption, the point that the application for preparation of final decree was filed beyond three years from the date of deposit of the mortgage money and was barred by limitation, was not raised before the trial court and there was no such finding by it;

Held, that in a Civil Revision petition, a point of law can be raised on the basis of the findings arrived by the trial court, otherwise not.

Application by the defendant.

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

Mr. Baidyanath Prasad No. 2 for the petitioners

Messrs Ganesh Prasad Sinha and Sudhir Chandra Ghose for the opposite party.

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* Civil Revision No. 1085 of 1979. Against an order of Mr. Krishna Kumar Shrivastava, Munsif, Muzaffarpur, dated 31st March, 1979.

B.P.Jha, J. - This civil revision petition arises out of an order dated 31st March, 1979 passed by the Court below on an application filed by the plaintiffs-opposite party under Order 34, rule 8 of the Code of Civil Procedure (hereinafter referred to as 'the Code') for passing a final decree on the basis of a preliminary decree in a redemption suit.

2. The preliminary decree for redemption was passed on 6th November, 1965, and the same was affirmed by the High Court by its judgment dated 20th July, 1977, in Second Appeal No. 204 of 1971. In this circumstance, the decree-holders filed the application under Order 34, rule 8 of the Code for the preparation of the final decree on 21st September, 1978. An objection was also filed by the petitioners.

3. Learned Counsel for the petitioners contends, firstly, that the mortgage amount was not paid within the time fixed by the preliminary decree and, as such, the final decree cannot be prepared, and, secondly, that the application for the preparation of the final decree was filed beyond three years from the date of the deposit and, as such, such an application is barred by limitation.

4. In order to appreciate these contentions, it is necessary to quote the operative portion of the judgment of the trial court which is as follows:

> "Let a preliminary decree be prepared, declaring the amount due to the defendants after making calculation as indicated in the judgment and mentioned above. The respondent must deposit the amount so declared due within the period of three months from the date of the preliminary decree, failing which the right of redemption would be lost."

5. On a perusal of the operative portion of the

judgment, it is clear that the decree-holders were required to deposit the mortgage amount within three months from the date of the preliminary decree. In the present case, the preliminary decree was passed on 17th August, 1971. The decree-holders deposited the mortgage amount under a challan dated 29th October, 1971. The preliminary decree disclosed that the decree-holders were required to deposit the amount within a period of three months from the date of the preliminary decree. In my opinion, the decree-holders were required to deposit the mortgage amount within three months from the date of the preliminary decree, that is, from 17th August, 1971. If it is so, the decree-holders deposited the amount within three months on 29th October, 1971. Therefore, in my opinion, the deposit was within time.

6. So far as point no. 2 is concerned, this point was not raised before the court below and there is no such finding to that effect. It does not appear from the order that point no. 2 was raised before the court below. Hence, this Court will not allow these petitioners to raise this point of law for the first time in a civil revision petition. In a civil revision petition, a point of law can be raised on the basis of the findings arrived at by the court below, otherwise not.

7. Learned Counsel for the petitioners did not raise any question of jurisdictional error committed by the court below. In these circumstances, the petition is dismissed, but without any costs.

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

R.D. Application dismissed.

REVISIONAL CIVIL

1984/November, 28.

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

*Ramdhari Lath and another.**

v.

Kishan Lal Agrawal and others.

Code of Civil Procedure, 1908 (Act V of 1908), *section 26 and Order 21, rule 58 and Bihar Consolidation of Holdings and Prevention of Fragmentation Act, 1956 (Act XXII of 1956), section 4(c)—Scope and applicability of—execution case—application under Order 21, rule 58 filed for releasing the subject matter of the execution proceeding from attachment—provisions of section 4(c) of the Consolidation Act, whether attracted.*

Where the only question required to be decided is whether the property is liable to attachment and sale or not under Order 21, rule 58 of the Code of Civil Procedure, the consolidation authority is not entitled in law to decide this question. A suit is instituted under section 26 of the Code of Civil Procedure on presentation of plaint and the suit comes to an end when a decree is passed. An execution proceeding will not abate as the declaration sought for in respect of title and interest in the suit land has already been declared in

* Civil Revision No. 1237 of 1979. Against an order of Mr. L. Narayan, Second Additional Sub-Judge, Purnea, dated 22nd May, 1979.

the judgment and decree of the suit.

Held, therefore, that section 4(c) of the Consolidation Act does not apply to an execution proceeding nor to a proceeding initiated under Order 21, rule 58 of the Code of Cvil Procedure.

Ram Bharosa Lal v. Sukhdei and others (1)-relied on.

Application by the petitioner.

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

Messrs Parmeshwar Prasad Sinha and Hare Krishna Kumar for the petitioners

Mr. Birendra Singh for the opposite party.

B.P.Jha, J. - The point for decision in the present case is: Whether the provisions of section 4(c) of the Bihar Consolidation of Holdings and Prevention of Fragmentation Act, 1956 (hereinafter referred to as 'the Act') apply to an execution proceeding ?

2. The answer must be given in the negative. In Money Execution No. 1 of 1973, an application under Order 21, rule 58 of the Code of Civil Procedure (hereinafter referred to as 'the Code') was filed for releasing the subject-matter of the execution proceeding from attachment. The court below was of opinion that the provisions of section 4(c) of the Act will apply to the execution proceeding. The court was also of opinion that as the court will have to adjudicate in respect of the right, title and interest in the properties sought to be released from attachment, and, as such, the execution proceeding will also abate under section 4(c) of the Act.

(1) (1975) AIR (All.) 90.

3. In this connection, learned Counsel for the petitioners has relied on a decision of the Allahabad High Court in *Ram Bharosa Lal v. Sukhdei and others (1)*. In that decision, the Allahabad High Court has held that the Consolidation authorities have no authority to decide as to whether a particular plot is liable to attachment and sale in execution of a decree or not. It is only the Civil Court which can decide such a matter. In my opinion, since no relief can be granted to the petitioner by the consolidation authorities, as such, such a proceeding is not hit by section 4(c) of the Act.

4. The only question required to be decided is: Whether the property is liable to attachment and sale or not under Order 21, rule 58 of the Code of Civil Procedure ? The consolidation authority is not entitled in law to decide this question. Hence, the proceeding under order 21, rule 58 of the Code will not abate under section 4(c) of the Act.

5. A suit is instituted under section 26 of the Code on presentation of plaint and the suit comes to an end when a decree is passed. An execution proceeding will not abate as the declaration sought for in respect of title and interest in the suit land has already been declared in the judgment and decree of the suit. Hence, a suit or a proceeding in respect of declaration of right, title and interest or a proceeding for correction of record of rights will abate.

6. Section 4 deals with the effect of the notification under section 3(1) of the Act. Section 4(c) deals with abatement of a proceeding or a suit.

7. I am, therefore, of the opinion that section

(1) (1975) AIR (All.) 90.

4(c) of the Act does not apply to an execution proceeding, nor to a proceeding initiated under Order 21, rule 58 of the Code.

8. In this view of the matter, I hold that the court below erred in law in holding that the proceeding under Order 21, rule 58 of the Code abated under section 4(c) of the Act. Hence, I set aside the impugned order and direct the executing court to decide the proceeding under Order 21, rule 58 of the Code in accordance with law.

9. In this circumstance, I allow the petition and set aside the impugned order dated 22nd May, 1979, passed by the learned Additional Sub-Judge. The parties shall bear their own costs.

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

M.K.C. Petition allowed.

CRIMINAL WRIT JURISDICTION

1984/December 5.

Before P.S.Sahay and Ram Chandra Prasad Sinha, JJ.

*Surendra Yadav.**

v.

The State of Bihar and others.

Bihar Control of Crimes Act, 1981 (Bihar Act no. VII of 1981) *section 2(d) and (ii)—provisions of—mention of only one case against the petitioner in the ground served on him for his detention—effect of—section 12(2)—detention of petitioner under- Validity of.*

Where in the ground served on the petitioner for his detention under section 12(2) of the Bihar Control of Crimes Act, 1981, hereinafter called the Act, there is mention of only one case against him;

Held, that a single act or commission falling under clauses (i) and (ii) of section 2(d) of the Act can not be characterised as an habitual act or commission referred to under the aforesaid two clauses. Idea of habit involves the element of persistence and the repetition of similar act or commission of the same class of offences or the kind. If the act or commission are not of the same

* Criminal Writ Jurisdiction Case No. 176 of 1984. In the matter of an application under Articles 226 and 227 of the Constitution of India.

kind, it can not be characterised as habitual.

Held, further that as it can not be said that the petitioner is an anti-social element, the order of detention is bad and is fit to be quashed.

Vijay Narain Singh v. The State of Bihar (1)-followed.

Application under Articles 226 and 227 of the Constitution.

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

Messrs Ram Suresh Roy and Raj Ballabh Prasad Yadav for the petitioners

Messrs Kamlapati Singh (G.P. V) and Ishwar Singh (J.C. to G.P. V) for the respondents.

Ram Chandra Prasad Sinha, J - In this application under Articles 226 and 227 of the Constitution of India the petitioner has prayed for issuance of a writ of habeas corpus for releasing him from detention by quashing the order of detention dated 28.8.1983 passed under section 12(2) of the Bihar Control of Crimes Act, 1981 (hereinafter to be referred to as 'the Act') by respondent no. 2 and subsequently approved by respondent no. 1 by order dated 6.9.1983 and confirmed by it after receipt of the opinion of the Advisory Board by order dated 3.8.1984, true copies whereof are Annexures 1, 2 and 5 respectively.

2. The order of detention dated 28.8.1983 and the order of approval dated 6.9.1983 along with the ground of detention were served on the petitioner in Gaya Central Jail on 4.7.1984. Thereafter the petitioner filed representation through the Superintendent of Gaya Central Jail on 13.7.1984

(1)(1984) AIR (SC) 1334.

but the petitioner did not receive any reply regarding consideration of his representation. The order contained in Annexure 5 was served on the petitioner in the first week of August, 1984. The petitioner was arrested on 14.3.1984 in a criminal case and was sent to jail and he is still in custody.

3. In the counter-affidavit filed on behalf of the respondents it has been stated, inter alia, that the representation filed by the petitioner was forwarded to Home (Police) Department vide letter dated 19.7.1984 of the Superintendent of Central Jail, Gaya, which was received on 21.7.1984. It was duly considered by the appropriate authority and was finally rejected on 1.8.1984. The order dated 28.8.1983 passed by the District Magistrate, Gaya, was sent to the State Government for approval under section 12(3) of the Act which was approved on 6.9.1983. Copy of the detention order in triplicate was sent to the Superintendent, Central Jail, Gaya, for service on the petitioner but he by his letter dated 7.9.1983 (wrongly typed as 7.9.1984) informed that the petitioner was not in jail custody and the detention order was returned to the State Government. Thereafter the order was sent to the District Magistrate, Gaya, for service on the petitioner, vide Home (Police) Department letter No. 10082 dated 17.9.1983. Again a wireless message was sent to the District Magistrate, Gaya, on 11.10.1983 to enquire as to whether the petitioner was detained or not and a reply thereto was received on 24.10.1983 that the petitioner was not yet detained and was absconding. Thereafter respondent no.2, the District Magistrate, by teleprinter message dated 24.3.1984 informed the Home (Police) Department that the petitioner was confined in Phulwarisharif jail at Patna in another case. He was approached by S.I. Aziz Khan on

21.3.1984 for service of detention order but he refused to receive the same. Thereafter the Superintendent of Biharsharif jail was requested to send the petitioner to Central Jail, Gaya, but by letter dated 27.3.1984 he informed that on the advice of Jail Doctor, the petitioner was sent to P.M.C.H., Patna on 23.3.1984 and on his discharge from the hospital steps would be taken for transferring him to Central Jail, Gaya. On enquiry again by respondent no. 2, the Superintendent of Phulwarisharif Jai, vide his letter dated 11.4.1984 informed that the petitioner was already transferred to Gaya Central Jail on 9.4.1984. On 4.7.1984 the detention order along with the ground of detention were served on the petitioner. The petitioner was produced before the Advisory Baord on 23.7.1984 and the detention order was confirmed. With a view to prevent him from acting in any manner prejudicial to the maintenance of public order the petitioner has been detained and there is sufficient ground for his detention.

4. Learned counsel appearing on behalf of the petitioner has challenged the detention order on various grounds. He has, however, submitted that the order of detention dated 28.8.1983 (Annexure 1) was served on the petitioner in Central Jail, Gaya, on 4.7.1984. There has been delay of about 11 months in service of the detention order and, according to the submission, this shows that the detention of the petitioner was not at all essential. It has also been submitted that after the passing of the aforesaid order no sincere effort was made by respondent no. 2 to take steps for the service of the order and to arrest the petitioner. From the facts stated above, it is clear that at the time of the passing of the detention order by respondent no.2 the petitioner was not in jail and he was arrested on

14.3.1984. Sections 13 and 16 of the Act lay down the procedure for execution and service of the order of detention. According to section 13, a detention order is to be executed at any place in India in the manner provided for the execution of warrants of arrest under the Code of Criminal Procedure Sub-section (1) of section 16 of the Act says that if the State Government or the District Magistrate mentioned in sub-section (2) of section 12 has reason to believe that a person in respect of whom a detention order has been made, has absconded or is concealing himself so that the order cannot be executed, the Government or the District Magistrate may make a report in writing of the fact to a Chief Judicial Magistrate or a Judicial Magistrate of the first class having jurisdiction in the place where the said person ordinarily resides and also by order notified in the official gazette direct the said person to appear before such officer, at such place and within such period as may be specified in the order. Sub-section (2) says that upon making of the report under clause (a) of sub-section (1), the provisions of sections 82, 83, 84 and 85 of the Code of Criminal Procedure, 1973 shall apply in respect of such person and his property as if the detention order against him were a warrant issued by the Magistrate. Sub-section (3) further says that if such person fails to comply with an order issued under clause (b) of sub- section (1), he shall, unless he proves that it was not possible for him to comply therewith and that he had, within the period specified in the order, informed the officer mentioned in the order of the reason which rendered its compliance impossible and of his whereabouts, be punishable with imprisonment for a term which may extend to one year, or with fine, or with both. From the counter-affidavit filed on behalf of the

respondents it does not appear that any step was taken against the petitioner as provided for in the aforesaid sections. From the facts stated above it further appears that though the petitioner was arrested on 14.3.1984 the order was served on him on 4.7.1984. This delay has also not been explained by the respondents, and the explanation given for delay in execution of the detention order is quite unsatisfactory. It can very well be said that there is no explanation at all coming from the side of the respondents in respect of the delay in execution of the detention order. There has been unreasonable delay between the date of the order of detention and its execution which has not at all been explained and this throws doubt on the genuiness of the subjective satisfaction of the District Magistrate and its legitimate inference will be that he was not really and genuinely satisfied about the necessity of detaining the petitioner as held in the case of *Suresh Nath v. District Magistrate, Burdwan (AIR 1975 SC 728).*

5. It has next been contended by learned counsel appearing on behalf of the petitioner that from the ground served on the petitioner it appears that he was detained on the ground that on 12.8.1983 at 10 A.M.he committed the murder of Vijay Kahar by firing at him on the road in front of Ram Chandra Bhavan as alleged in Civil Line P.S. Case No. 158 dated 12.8.1983 under section 302/34 of the Indian Penal Code and section 27 of the Arms Act, a copy whereof was also served along with the ground. The learned counsel has further submitted that a single instance of such accusation made against the petitioner is not sufficient to make him anti-social element and to pass an order of detention under section 12(2) of the Act. It has also been submitted that there is no finding given by the

detaining authority that the petitioner is an anti-social element. The aforesaid act alleged against the petitioner cannot be said to be in any manner prejudicial to the maintenance of public order and according to him, this may be a matter of law and order but not of public order.

6. The relevant provision of section 12 of the Act reads as follows:-

> "12(i) The State Government may if satisfied with respect to any person that with a view to preventing him from acting in any manner prejudicial to the maintenance of public order and there is reason to fear that the activities of anti-social elements cannot be prevented otherwise than by the immediate arrest of such person, make an order directing that such anti-social element be detained.
>
> (2) If, having regard to the circumstances prevailing or likely to prevail in any area within the local limits of the jurisdiction of a District Magistrate, the State Government is satisfied that it is necessary so to do, it may by an order in writing direct, that during such period as may be specified in the order, such District Magistrate may also, if satisfied as provided in sub-section (1) exercise the powers conferred upon by the said sub-section:

Provided that the period specified in an order made by the State Government under this sub-section shall not, in the first instance exceed three months, but the State Government may, if satisfied as aforesaid that it is necessary so to do, amend such order to extend such period from time to time by any period not exceeding three months at any one time.

xxx xxx xxx

7. Three conditions must exist for passing an order under sub- section (1) and (2) of section 12 of the Act, viz., (i) that a person against whom the order is to be passed must be an anti- social element, (ii) that his activities cannot be prevented otherwise than by immediate arrest, and (iii) that the State Government or the District Magistrate must be satisfied that the detention of an anti-social element is required in order to prevent him from acting in any manner prejudicial to the maintenance of public order, and in absence of any of the aforesaid conditions, the order of detention will be bad. Anti-social element has been defined in section 2(d) of the Act as follows:

" 'Anti-social element' means a person who -

(i) either by himself or as a member of or leader of a gang, habitually commits, or attempts to commit or abets the commission of offences, punishable under Chapter XVI or Chapter XVII of the Indian Penal code; or

(ii) habitually commits or abets the commission of offences, under the Suppression of Immoral Traffic in Women and Girls Act, 1956; or

(iii) who by words or otherwise promotes or attempts to promote, on grounds of religion, race, language, caste or community or any other grounds whatsoever, feeling of enemity or hatred between different religions, racial or language groups or castes or communities; or

(iv) has been found habitually passing indecent remarks to, or teaching women

or girls; or

(v) who has been convicted of an offence under section 25, 26, 27, 28 or 29 of the Arms Act of 1959."

In the ground served on the petitioner, there is mention of only one case details of which have been given above. One such allegation is not sufficient for holding that one habitually commits offences or attempts to commit or abets the commission of offences punishable under Chapter XVI or XVII of the Indian Penal Code, though involvement of the petitioner in some other cases has been given as background and not as a ground for detention. A single act or commission falling under sub-section (i) or (iii) of section 2(d) cannot be characterised as habitual act or commission referred to under the aforesaid two clauses. Idea of habit involves the element of persistence and repetition of similar acts or commission of the same class of offences or the kind. If the acts or commissions are not of the same kind, one cannot be characterised as habitual. This view is fully supported by the decision in the case of *Vijay Narain Singh v. State of Bihar (AIR 1984 SC 1334)*. From the discussions made above as it cannot be said that the petitioner is an anti-social element, the order of detention is bad and fit to be quashed.

8. In view of the fact that the orders of detention are fit to be quashed on the aforesaid grounds, it is not necessary to examine the other submissions that the case does not involve public order and that there has been delay in sending and disposal of representation which have not been explained making the detention of the petitioner illegal.

9. For the reasons stated above, the

application is allowed and the orders contained in Annexures 1, 2 and 5 are quashed. Let a writ of habeas corpus be issued to the respondents directing them to release the petitioner forthwith and he be released atonce if not required in any other case.

P.S. Sahay, J. I agree.

R.D. Application allowed.

CIVIL WRIT JURISDICTION

1985/January, 24.

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

*Indian Oil Corporation Limited.**

v.

The State of Bihar and others.

Constitution—*Article 226—Writ jurisdiction of High Court-prior dismissal in limine of identical cause of action by Supreme Court under Article 136, whether could be ignored by High Court.*

Held, that in its discretionary writ jurisdiction, the High Court can not altogether ignore and override the prior dismissal in limine of the identical cause of action by their Lordships of the Supreme Court under Article 136 of the Constitution.

Case law discussed.

Application under Articles 226 and 227 of the Constitution.

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

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* Civil Writ Jurisdiction Case No. 5877 of 1983. With Civil Writ Jurisdiction Case No. 4377 of 1984. In the matter of applications under Articles 226 and 227 of the Constitution of India.
CWJC No. 4377/84 Indian Oil Employees Union and another - petitioners v. The Presiding Officer, Labour Court, Patna and Ors.

Mr. K.D.Chatterji, Mr. Chunni Lal, and Mr. Kali Das Chatterji for the petitioner in CWJC 5877 of 1983 and Respondent No. 2 and 3 in CWJC 4377 of 1984.

Mr. Ranen Roy, Mr. J. Krishna, and, Mr. Shivajee Pandey for the respondents no. 3 & 4 in CWJC No. 5877 of 1983 and petitioners in CWJC No. 4377 of 1984.

S.S.Sandhawalia, C.J. - Can the High Court in its discretionary writ jurisdiction altogether ignore and thus override the prior dismissal in limine of the identical lis by their Lordships of the Supreme Court under Article 136 of the Constitution, has come to be the spinal issue at the very threshold in this set of two connected civil writ jurisdiction cases.

2. Because of the view I am inclined to take on the aforesaid issue, it is wholly unnecessary to recount the facts in any great detail. Equally irrelevant it is now to advert to the long and chequered history of the dispute between the petitioner management of the Indian Oil Corporation and its employee (respondent no. 3) Shri C.D.Singh, Assistant Manager, Suffice it to mention that a reference under section 10(1)(c) of the Industrial Disputes Act was made by the State of Bihar on the 26th of September, 1980 for the adjudication of the following question:

> "Whether in view of the order of Labour Court, Ranchi, in B.S.E. Case No. 23 of 1969 Sri C.D. Singh should be allowed the scale of 1025-1625 from the date his juniors were promoted to this scale of pay ? If so, what consequential benefits in scale of pay should be given to him from that date onward ?"

The Presiding Officer, Labour Court, Patna, in an exhaustive award dated the 11th of March, 1983

(Annexure 1) running into 38 typed pages held that respondent Shri C.D. Singh should be allowed the pay scale of Rs. 1025-1625 from the date his juniors were promoted to that scale of pay i.e., with effect from the 30th of December, 1970. He further directed that Shri C.D.Singh should be promoted from grade 'B' to grade 'C' and should also be given the benefit of revision in the pay scales of those grades.

3. Against the aforesaid award the petitioner management directly moved their Lordships of the Supreme Court under Article 136 of the Constitution of India. Petition for Special Leave to Appeal (Civil) No. 9147 of 1983 were preferred on its behalf on the 14th of July, 1983. It is common ground that respondent no. 3 had earlier filed a caveat before the Hon'ble Supreme Court after the impugned award of the Labour Court, Patna, was rendered. Consequently a copy of the special leave petition was served on the counsel of respondent no. 3. It is the case of respondent no. 3 that identical points were raised in the exhaustive special leave petition (Annexure 'A' to the counter-affidavit) running into 28 typed pages as are now sought to be raised in the present writ petition. A detailed counter-affidavit to this special leave petition was filed on behalf of respondent no.3 on the 5th of September, 1983. Thereafter the special leave petition came up for hearing before their Lordships of the Supreme Court on the 9th of September, 1983. After hearing counsel of both the parties on the merits of the case, their Lordships dismissed the same in limine and the relevant part of the order (Annexure 'B' to the counter-affidavit) is as under:

"Indian Oil Corporation Ltd. .....Petitioner

Versus

The State of Bihar & others
(With appln. for ex-parte stay)..... Respondents
Date: 9.9.83 - This petition was called on for hearing today.
CORAM : Hon'ble Mr. Justice O. Chinnappa Reddy
Hon'ble Mr. Justice A. Varadarajan.
For the petitioner(s) : Mr. S.S.Ray, Sr. Adv.
M/s. B. Gupta, Sr. Adv. with
Mr. D. Mondal &
Mr. Rathin Das, Ad vs.
For the respondent(s): Mr. S.N.Mishra, Mr. R.C. Bhatia & Mr. P.C.Kapur, Advs.

UPON hearing counsels the Court made the following ORDER

The special leave petition is dismissed.

Sd. M.M.P.Sinha
Court Master."

It is in terms averred on behalf of the respondents that the special leave petition was not dismissed for any laches, limitation or any other technical ground.

4. On the aforesaid facts, the threshold preliminary objection, forcefully and ably projected by Mr. Ranen Roy, on behalf of the respondents, is that the dismissal of the special leave petition to appeal by the Supreme Court under Article 136 of the Constitution is a vital factor that ought to be given great weight in the exercise of the discretionary jurisdiction by the High Court under Article 226. It is pointed out that the special leave petition was directed against the same award of the Industrial Tribunal and was challenged on virtually identical grounds as in the writ petition. After notice and hearing counsel of either of the parties on merits, the special leave petition was dismissed on

the identical cause of action and not on any technical plea of laches limitation or alternative remedy. It was contended that the overrriding by the High Court of such dismissal by the Supreme Court, apart from any illegality, would be an improper and erroneous exercise of a discretionary jurisdiction. On the other hand, Mr. K.D.Chatterjee, learned Counsel for the petitioners, in attempting to meet this challenge, had taken the stand that the dismissal of the special leave petition was wholly irrelevant to the issue and, in any case, was no bar to the exercise of the power under Article 226. Basic reliance was placed by him on the observations in *The Workmen of Cochin Port Trust vs. The Board of Trustees of the Cochin Port Trust and another (1).*

5. Since great emphasis was sought to be laid on the ratio in the Workmen of *C.P.Trust vs. The Board of Trustees of the C.P. Trust (supra)* it seems apt, at the threshold, to clear the deck about the application or otherwise of the said authority to the issue before us. Therein also the employers had preferred a special leave petition against the award of the Industrial Tribunal, which was dismissed in limine and, thereafter, they preferred the writ petition to challenge the award. The specific objection raised and pressed on behalf of the workmen was that the dismissal of the special leave petition by the Supreme Court operated as *res judicata* on the issues raised in the writ petition. The High Court rejected the objection holding that the limine dismissal of the special leave petition did not give rise to any issue of either *res judicata* or constructive *res judicata.* This very question was then pointedly pressed in the final Court and was rejected, whilst affirming the view of the High Court

(1) (1978) AIR (SC) 1283.

and observing that it would not be safe to stretch the technical rule of *res judicata* to the dismissal in *limine* by a wholly non- speaking order of a special leave petition under Article 136 by the Supreme Court.

6. Now, a perusal of the judgment would make it plain that the primal point of adjudication before their Lordships was one of the applicability or otherwise of the principles of *res judicata* or constructive *res judicata* and the ratio therein cannot and does not travel beyond this limited point. The Court was at pains to point out that a limine dismissal under Article 136 may well be on technical grounds like those of gross or unexplained laches or on limitation, or on the existence of alternative remedy. Clearly enough, a dismissal on these grounds could not amount to *res judicata* on the merits of other issues which were not either explicitly or implicitly even remotely adjudicated upon. It seems thus plain that on this point the ratio dicedendi in the *Workmen of C.P.Trust v. The Board of Trustees of C.P.Trust (supra)* is patently and narrowly confined to holding that dismissal in limine by a non-speaking order under Article 136 does not attract the principles of *res judicata* or of constructive *res judicata*.

7. Herein it is common ground that no issue of res judicata arises and indeed Mr. Roy, learned counsel for the respondents was at pains to highlight that he was not even remotely raising any objection on grounds of constructive res judicata. That being so, and the alleged hurdle of *the workmen of C.P. Trust (supra)* being clearly crossed, the matter has to be examined on the parameter of four basic principles, which may be separately enunciated for reason of clarity.

(i) The doctrine of election in the context of two alternative remedies being available to the suitor and he, in terms, electing the remedy in the superior forum;

(ii) The writ jurisdiction being admittedly discretionary whether it would be a sound exercise of such discretion to entertain an identical cause of action, which has been agitated before and rejected by a superior court;

(iii) The larger rule of public policy to avoid multiplicity of litigation; and

(iv) The anomalous results flowing from the High Court entertaining and allowing a writ on an identical cause of action, which was dismissed in limine by the Supreme Court under Article 136 of the Constitution.

8. Mr. Roy, learned counsel for the respondents, plausibly projected the doctrine of election of alternative remedies by a suitor. It is common ground that the lis in the present writ petitions and that in the special leave petition before their Lordships of the Supreme Court was wholly identical. In the final forum, it was equally sought to be projected on closely similar, if not identical, ground. No technical issues of limitation, laches or alternative remedy, etc., could at all be pointed out on behalf of the writ petitioners. Not only was the cause of action identical, but the relief sought was equally so, namely, the quashing of the impugned award of the Industrial Tribunal, supposedly for jurisdictional errors. Undisputedly, the remedy under Article 136 of the Constitution was available to the petitioners and was deliberately and designedly so exercised. It is not in dispute that the jurisdiction

under Article 136 of the final Court is wide and unfettered. It is not constricted within the constraints of the writ jurisdiction of the High Court under Article 226. It is unnecessary to multiply precedent on this issue, because in *the workmen of C.P. Trust (supra)* itself it was observed as follows:-

> "Mr. Krishnan rightly pointed out that the lines extracted above indicate that the scope of the proceeding under Article 136 was wider than that of a writ petition."

9. In the light of the above, the writ petitioners herein deliberately and advisedly elected a wider and unfettered remedy in a superior Court. Having done so, they cannot now appropriately resort afresh to a remedy in the relatively limited writ jurisdiction at a lower level of the hierarchy in the High Court. That a suitor having once elected one remedy or relief out of the two alternatives available to him, cannot thereafter resort to the other and more so to the one in the inferior jurisdiction, seems to flow directly from a long line of precedent. Reference may first be made to *Nagubai Ammal and others vs. B. Shama Rao and others (1)*, wherein relying on the observations of Lord Justice Scrutton, in *Verschures Creameries Ltd. vs. Hull and Netherlands Streamship Company Limited (2)*

> "The ground of the decision is that when on the same facts, a person has the right to claim one of two reliefs and with full knowledge he elects to claim one and obtains it, it is not open to him thereafter to go back on the election and claim the alternative relief."

In *Shankar Ramchandra Abhyankar v. Krishnaji*

(1) (1956) AIR (SC) 593.

(2) (1921) 2 KB 608.

Dattatraya Bapat (1), it was observed in the context of the resort to either the remedy under Section 115 of the Code of Civil Procedure or that under Articles 226 and 227 of the Constitution, as under:-

> "If there are two modes of invoking the jurisdiction of the High Court and one of those modes has been chosen and exhausted, it would not be a proper and sound exercise of discretion to great relief in the other set of proceedings in respect of the same order of the subordinate court. The refusal to grant relief in such circumstances would be in consonance with the anxiety of the Court to prevent abuse of process as also to respect and accord finality to its own decisions.

Lastly, both directly and by way of analogy the observations in *Premier Automobiles Limited vs. Kamlakar Shantaram Wadke and others (2)* deserve notice. Therein the focal issues pertained to the remedies with regard to an industrial dispute being available under the Industrial Disputes Act, 1947, or, under the general law in the Civil Courts. It was held that whether alternative remedies were available in the Civil Courts or in the forums under the Act, the suitor concerned must elect his remedy for relief and cannot resort to one after the other. It was observed as under:-

> "But where the industrial dispute is for the purpose of enforcing any right, obligation or liability under the general law or the common law and not a right, obligation or liability created under the Act, then alternative forums are there giving an election to the

(1) (1970) AIR (SC) 1

(2) (1975) AIR (SC) 2238.

> suitor to choose his remedy of either moving the machinery under the Act or to approach the Civil Court. *It is plain that he cannot have both. He has to choose the one or the other.*"

Undisputedly, for getting the impugned industrial award quashed the alternative remedy of challenging it in the writ jurisdiction of the High Court or by way of special leave to appeal to the Supreme Court was available. The writ petitioners indeed advisedly elected the remedy in the superior forum. Having failed therein, it is incongruous that they should be easily allowed to now resort to one in the High Court. As was said in the *Premier Automobiles' case (supra),* the writ petitioners cannot have both and have to choose the one or the other. Having made that choice, they are not to be ordinarily permitted to retract therefrom. Consequently, one the doctrine of election betwixt to alternative remedies, the writ petitioners would tend to disentitle themselves to the present relief in the writ jurisdiction.

10. Independently of the doctrine of election altogether, the question of the sound exercise of judicial discretion and entertaining a writ in this context is equally attracted. Herein, it is plain that having chosen the remedy of appeal to the Supreme Court, the petitioners had the benefit of a meaningful hearing of the *lis* therein. Special leave petition (Civil) No. 9147 of 1983 (Annexure 'A' to the counter-affidavit) was exhaustive in its pleading of facts and the jurisdictional challenge on the points of law. Specifically, grounds A to Q assailed the impugned award of March 11, 1983, from every conceivable legal angle. Significantly, it is common ground that a caveat having been already entered, the respondent workman was served through his counsel and a detailed counter-affidavit to the

special leave petition was also filed on his behalf to oppose the same. Our attention could not be drawn to any technical pleas for opposing the special leave petition on grounds of limitation, laches or alternative remedies, etc. On the basis of the aforesaid pleadings, the matter was then heard on the 9th September, 1983, by their Lordships and Counsel for both the parties addressed them on the merits of the case. The dismissal that followed, even though not by a speaking order, was equally a dismissal on merits and it was not even the stand of the learned counsel for the petitioners that it was either wholly or even collaterally rested on any technical ground. That being so, the question is, whether in such a situation it would be a sound or proper exercise of discretion by the High Court in its writ jurisdiction to entertain afresh the same or identical cause of action, which had been earlier heard and dismissed by the final Court itself. I do not think so. One must hearken to the settled law that the writ jurisdiction is discretionary and the High Court, for sound reasons, may decline to grant relief, apart from the merits of the case. Equally, it has to be borne in mind that whatever may be the position in other forums, the orders and judgments of the Supreme Court are law and binding on all courts within the territory of India under Article 141. In specified circumstances, even an *obiter dictum* of the final Court may be binding on this Court and is, in any case, entitled to great respect. Would it, therefore, be a sound or proper exercise of discretion to entertain and grant a writ for the High Court when the Supreme Court itself, on the same cause of action and in an unfettered jurisdiction under Article 136, had rejected the identical challenge to the same industrial award? I do not think so. Perhaps, doing so would in a way be

sitting in judgment on the earlier order of the final Court itself, which, if not totally and technically barred, would, in any case, be patently incongruous.

11. What appears as sound on principle, is equally buttressed by precedent. In The *Management of Western India Match Company Limited, Madras v. The Industrial Tribunal, Madra, and another (1)* whilst even finding that the writ petitioner would have been entitled to relief under Article 226, the Division Bench declined the same with the following observations:-

> "That the Supreme Court declined to exercise its discretion in favour of the petitioner appears to us to be a factor that ought to be taken into account and given due weight, when we are called upon to exercise our discretion in favour of interference with the award of the Tribunal on some of the very grounds specified in the application for leave to appeal that failed. It should be needless to emphasise that had leave been granted - and that was the stage for the exercise of the discretion vested in the Supreme Court - the scope of the appeal could have been much wider than that permissible in proceedings under Article 226 of the Constitution.
>
> Though not without hesitation, we have reached the conclusion, that in the circumstances of this case, it would not be a proper exercise of discretion, despite the findings we have recorded earlier, to set aside the award by the issue of a writ of certiorari, after the Supreme Court had refused the petitioner leave to appeal against that award. It

(1) (1958) AIR (Mad.) 398.

is in these circumstances that we direct that the rule nisi be discharged and that the petition be dismissed but without costs."

12. Following the above, a Division Bench of the Bombay High Court, consisting of N.L. Abhyankar and D.P. Madon, JJ., in *Vasant Vithal Palse and others vs. The Indian Hume Pipe Company Limited and another (1);* observed as follows:-

"We also are unable to hold that we should entertain this petition now and adjudicate it on merits when the Supreme Court has thought fit not to admit the petition for special leave to appeal against the very award which is under challenge in this petition."

13. To the same tenor are the observations in *The Metal Corporation of India Limited and another vs. The Union of India and another (2)* in the context of the earlier dismissal in limine by a non- speaking order of a writ petition under Article 32 by the Supreme Court and the subsequent attempt to resort to the writ jurisdiction under Article 226 in the High Court. Relying on an unreported decision of the Suprem Court in *Khairati Lal vs. Life Insurance Corporation of India (Civil Appeal No. 1 of 1964),* it was observed as under:-

"The absence of a speaking order, in my view, makes no difference in this case, because the dismissal by the Supreme Court must have been on the ground that no fundamental right of the petitioners had been violated. For these reasons, the contention of

(1) (1970) II LLJ 328

(2) (1970) AIR (Cal.) 15.

the learned Attorney General that the present petition is barred by res judicata must be upheld."

14. It deserves mention that the Supreme Court, in the *Workmen of Cochin Port Trust's case (supra)* referred extensively to the judgment of the Madra High Court in *The Management of Western India Match Company Limited (supra)* and, after quoting Paragraph 18 thereof, observed that the law, so broadly stated, is not quite accurate, though substantially it is correct to the extent we have pointed out above. It would follow therefrom that their Lordships intended to constrict the somewhat wide ranging observations in the High Court judgment that the dismissal of the petition for special leave to apeal under Article 136 would not affect the jurisdiction vested in the High Court under Article 226. This seems evident from the earlier observations in the Supreme Court judgment highlighting the fact that dismissal in *limine* by a non-speaking order may also create a bar to a subsequent petition for the same or similar relief. Since much emphasis was sought to be placed on the effect of a non-speaking order of dismissal, it becomes necessary to quote the relevant observations in *The Workmen of the Cochin Port Trust's case (supra):*

> "Similarly, even if one writ petition is dismissed in *limine* by a non-speaking one word order 'dismissed', another writ petition would not be maintainable because even the one word order, as we have indicated above, must necessarily be taken to have decided impliedly that the case is not a fit one for exercise of the writ jurisdiction of the High Court. Another writ petition from the same order or decision will not lie."

Again -

> "We have thought it proper to elucidate this aspect of the matter a bit further, to indicate that dismissal of a writ petition in *limine* by a non-speaking order could certainly create a bar in the entertainment of another writ petition filed by the same party on the same cause of action."

15. In fairness to Mr. K. D. Chatterjee, learned counsel for the petitioners, reference must also be made to his reliance on *Ahmedabad Manufacturing and Calico Printing Company Limited v. The Workmen and another (1).* However, a close perusal of that judgment would indicate that far from helping the writ petitioners, it might go to the aid of the respondents. The primal issue therein was whether an unconditional withdrawal of a special leave petition would amount to its dismissal. On an indepth consideration of this matter, their Lordships concluded that permission to withdraw a leave petition cannot be equated with an order of its dismissal. Consequently, it was opined that the dismissal by the High Court of a writ petition in *limine* on this sole ground will not be sustainable. Plainly, this ratio, in no way aids the case of the writ petitioners, and, on the other hand, would indicate that if an unconditional withdrawal amounted to dismissal, then different results would have ensued, namely, that the subsequent proceedings might well have been barred. Indeed, their Lordships distinguished the *Management of Western India Match Company Limited (supra)* on this very ground that whilst in the former there had been a dismissal of the special leave petition, in the case before them it was only an unconditional withdrawal, duly

(1) (1981) AIR (SC) 960.

permitted by the Court.

16. To sum up on this aspect, it appears to me that it would not be a sound and proper exercise of discretion to entertain a writ petition afresh on an identical cause of action, which has been earlier rejected by the Supreme Court in a special leave petition under Article 136 of the Constitution and where such dismissal is not established to be on any merely technical ground of laches, limitation or alternative remedy, etc.

17. Lastly, the anomalous results and even grave hardship which may ensue from the stand convassed on behalf of the writ petitioners seem to be manifest. They had with open eyes and advisedly resorted to a superior jurisdiction with unfettered powers, and, having failed thereafter hearing, they cannot be allowed afresh to reopen and reagitate the identical matter in the High Court. On behalf of the respondents it was argued with patent plausibility that this would give an unfair edge to afluent litigants with a long purse. It was the case herein that the forum in the Supreme Court was designedly chosen to put the respondent workmen at the handicap of defending himself at an expenditure, which is basically involved in the final Court. As in the present case, he had been duly served had engaged counsel, filed pleadings, and opposed the matter successfully before the final forum. To rob him of that success by an altogether fresh proceeding would both be burdensome to the respondents and otherwise incongruous. This apart, the stand canvassed on behalf of the petitioners, would give a triple remedy, even after a long drawn out proceeding before the Industrial Tribunal. He might first choose to try his luck in the highest forum in the Supreme Court under Article 136. Having failed there, even after notice and hearing to

the opposite party, he may then resort afresh to the writ jurisdiction in the High Court. A failure in that might well give him a remedy of a letters patent within the High Court itself, and yet again, he could prefer a special leave petition a second time, directed as it would be against the judgment of the High Court. It is a sound cannon of public policy that the law frowns on the multiplicity of litigation. For these reasons as well, it is not possible to accede to the stand canvassed on behalf of the writ petitioners.

18. To finally conclude, the answer to the question posed at the very outset is rendered in the negative. It is held that in its discretionary writ jurisdiction, the High Court cannot altogether ignore and override the prior dismissal in limine of the identical cause of action by their Lordships of the Supreme Court under Article 136 of the Constitution. Indeed, this is a factor that must be taken into account and give the due weight it deserves in a sound and proper exercise of the discretion in this context.

19. For the detailed reasons recorded earlier, I would uphold the preliminary objection and in the context of the facts, would decline relief to the petitioners on the threshold ground of the prior dismissal of their special leave petition by the SupremeCourt, which now precludes us from entering the thicket of merits. Both the writ petitions must consequently fail and are dismissed, but without any order as to costs.

Birendra Prasad Sinha, J: I agree.

R.D. Petitions dismissed.

CIVIL WRIT JURISDICTION

1985/February, 5.

Before B.P.Jha, J.

*Balbir Prasad alias Balbir Prasad Agrawal.**

v.

Union of India and others.

Customs Act, 1962 (Act LII of 1962), Sectio.. 114—*Sentence imposed without a finding that the petitioner was carrying hand woven woolen carpets or woolen chain stitched rugs—legality of.*

Where there is no finding to the effect that the petitioner was carrying hand woven woolen carpets or woolen chain stitched rugs.

Held, that the sentence imposed upon him is not in accordance with law.

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

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

Messrs. R.B. Mahto and Harendra Prasad for the petitioner.

Mr. Aftab Alam for the respondents.

B.P.Jha, J. - In this writ petition, the petitioner has challenged the validity of Annexures-1, 2 and 3.

2. Annexure-1 contains an order of the

*Civil Writ Jurisdiction Case No. 3421 of 1979. In the matter of an application under Articles 226 and 227 of the Constitution of India.

Assistant Collector, Custom. Annexur-2 contains an order of the appellate authority, and Annexure-3 contains an order of the revisional authority. These orders have been passed under the provisions of the Customs Act, 1962 (hereinafter referred to as 'the Act').

3. The question for consideration in the present case is:

> Whether the petitioner was exporting the prohibited goods as mentioned in the Export (Central) Order, 1968 (hereinafter referred to as 'the Order;) ?

4. The case of the respondents is that the petitioner omitted to mention 28 pieces of woolen carpets in the declaration under section 50 of the Act, in respect of prohibited goods. In item no. 32(i)(b) of Schedule I of Part A of the Order, it is provided that handwoven woolen carpts and woolen chain stitched rugs are prohibited goods. In other words, prohibited goods cannot be exported or imported unless he is a licensee under the Order. It is an admitted position that the petitioner is not a licensee or a permit holder under the Order for exporting handwoven woolen carpets and woolen chain stitched rugs.

5. The petitioner can be held guilty provided he was exporting handwoven woolen carpets and woolen chain stitched rugs. According to the petitioner's case, he was exporting 28 pieces of woolen wall hangings. The case of the petitioner was rejected by all the authorities. However, the respondents are required to prove that the petitioner was exporting either handwoven woolen carpets or woolen chain stitched rugs.

6. It is contended by the learned counsel of the petitioner that there is no finding that the

petitioner was exporting handwoven woolen carpets or woolen chain stitched rugs. Learned Counsel for the respondents also failed to point out any such finding. In the absence of such a finding the authorities are not entitled to impose a penalty under section 114 of the Act.

7. In the present case, the argument of the learned counsel for the petitioner is that the petitioner violated item no. 32(i)(b) of Schedule I of the Order. Item no. 32(i)(b) mentions the items of prohibited goods. In other words, nobody can export or import the prohibited goods. If anyone does so without a licence or permit, he will be held guilty and a penalty shall be imposed upon him under section 114 of the Act. In the absence of a finding to the effect that the petitioner was carrying handwoven woolen carpets or woolen chain stitched rugs, the sentence imposed upon the petitioner is not in accordance with law. Hence, I quash partly Annexure-1, 2 and 3 only to the extent of imposition of penalty under section 114 of the Act. The remaining portion of Annexure- 1, 2 and 3 is not being interfered by me.

8. In this circumstance, I set aside the imposition of penalty of Rs. 500/- under section 114 of the Act upon the petitioner and the petition is, accordingly, allowed in part. If the fine has been paid by the petitioner, the same shall be refunded to the petitioner. There will, however, be no order for costs.

M.K.C. Petition allowed in part.

CIVIL WRIT JURISDICTION

1985/February, 28.

Before Lalit Mohan Sharma and Binodanand Singh, JJ.

*Bishwanath Nag.**

v.

State of Bihar and others.

Motor Vehicles Act, 1939 (Act IV of 1939) *as amended by the Bihar Act 27 of 1950, section 43A—State Government's direction that a family will not be allowed more than one road permit, whether outside the purview of section 43A—order of the Tribunal based on the impugned State Government's order, whether liable to be quashed.*

Held, that the order of the State Government issued under section 43A of Motor Vehicles Act, 1939 limiting the eligibility of a family to a single road permit is outside the purview of section 43A inasmuch as it purports to give direction in respect of matters which have been entrusted to the Tribunals constituted under the Act and which have to be dealt with by them in a quasi judicial manner and as such the order of the Tribunal entirely based on the impugned State Government's direction in Annexure 3, was liable to be quashed.

Civil Writ Jurisdiction Case no. 4312 of 1981. In the matter of an application under Articles 226 and 227 of the Constitution of India.

B. Rajgopala Naidu v. State Transport Appellate Tribunal, Madras (1)-relied on.

Application by an applicant for grant of a stage permit.

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

M/s Amla Kant Chaudhary, Udayan Chaudhary, Raj Kishore Prasad and Mrs. Swapna Sarkar for the petitioner.

M/s K.P.Verma (A.G.) and Maheshwar Dwivedi for the resondents.

Lalit Mohan Sharma, J. - The petitioner is an applicant for grant of a stage permit and has challenged the validity of the State Government's decision issued under section 43A of the Motor Vehicles Act as contained in Annexure-3. The impugned annexure limits the eligibility of a family to a single road permit.

2. In response to an advertisement by the East Bihar Regional Transport Authority inviting applications for grant of a road permit for the route Dumka to Mihijam, the petitioner made an application. The same was rejected on the ground that the petitioner had already been granted three permits. The petitioner appealed before the State Transport Appellate Tribunal. The Tribunal remanded the matter for reconsideration by the Regional Transport Authority. The petitioner contended before the Authority that he had already surrendered two of the permits and was thus within the permissible limit fixed in regard to the issuance of road permits. The Authority dismissed his application again by the order as contained in Annexure 2. The petitioner appealed to the Tribunal again. The Tribunal did not

(1) (1964) AIR (SC) 153.

agree with the reasonings of the Transport Authority in dismissing the petitioner's application, but refused to remand the matter for a fresh consideration on the ground that the petitioner who had a stage permit from before could not get another permit in view of the State Government's decision, as contained in Annexure 3 to the writ petition. In the impugned annexure, the State Government directed that a family consisting of husband, wife and their minor children will not be allowed more than one stage permit. The Tribunal accordingly dismissed the appeal by its order in Annexure-4. By the present writ application, the petitioner has prayed for holding the Government's direction in Annexure-3 as ultra vires and for quashing the orders in Annexures 2 and 4.

3. Mr. Amla Kant Chaudhary, appearing in support of the application contended that the powers of the Transport Authorities in dealing with the applications for road permits is judicial in nature and the State Government has no jurisdiction to entrench upon the quasi judicial functions of the Transport Authorities and the direction in Annexure 3 is therefore, illegal. Reliance was placed on several decisions of the Supreme Court.

4. In *B. Bajgopala Naidu vs. State Transport Appellate Tribunal, Madras (AIR 1964 SC 1573)* the appellant along with 117 other bus operators including the respondents 2 and 3 before the Supreme Court applied for two stage carriage permits and the State Transport Authority granted the permits to the appellant. A number of appeals were preferred by unsuccessful applicants including the respondents 2 and 3 and the Appellate Tribunal allowed the claims of the respondents 2 and 3 and set aside the order of the State Transport Authority in favour of the appellant. The decision was based

on a direction issued by the State Government under section 43A of the Act laying down criteria for grant of permits. The appellant unsuccessfully moved the Madras High Court under Article 226 of the Constitution and then approached the Supreme Court by an application for special leave. The Supreme Court granted leave and allowed the appeal. After a thorough examination of the relevant provisions of the Motor Vehicles Act, 1939, the Court held that the field covered by section 43A is administrative in nature and does not include the area which is the subject-matter of the exercise of quasi judicial authority by the relevant Tribunals in the matter of grant of road permits. This decision has been followed in numerous decisions of the Supreme Court and the High Courts. The provisions of section 43A introduced by the Bihar Act 27 of 1950 which are in the following terms, are similar to the Section 43A introduced by Madras Amendment Act 20 of 1948 which was under consideration by the Supreme Court:

> "43A - The State Government may issue such orders and directions as it may consider necessary in respect of any matter relating to road transport, to the State Transport Authority or a Regional Transport Authority concerned; and such Transport Authority shall give effect to all such orders and directions."

5. The considerations which weighed with the Supreme Court while deciding the aforementioned case are fully applicable to the present case and, accordingly, I held that the order in Annexure 3 is outside the purview of secton 43A inasmuch as it purports to give direction in respect os matters which have been entrusted to the Tribunals constituted under the Act and which have to be dealt with by them in a quasi judicial manner. Since the

order in Annexure 4 is entirely based on the impugned State Government's direction in Annexure 3, the same is quashed. According to the finding of the appellate Tribunal, the decision of the Transport Authority in Annexure 2 was erroneous and but for Annexure 3 the petitioner's application required a fresh consideration on merits. The prayer for quashing Annexure 2 is also, therefore, allowed and the case is remitted back to the East Bihar State Regional Transport Authority for fresh disposal of the petitioner's application.

6. Mr. Amla Kant Chaudhary also raised several other points which, in the circumstances, do not require consideration.

7. The writ application is allowed, but without cost.

Binodanand Singh, J. I agree.

S.P.J. Application allowed.

CIVIL WRIT JURISDICTION

1985/February, 28.

Befor Lalit Mohan Sharma, J.

*M/s. Tata Yodogawa Ltd.**

v.

Union of India and others.

Central Excises and Salt Act, 1954 (Act XXXIV of 1954) *Tariff Item ii—electricity included by the Finance Act 19 of 1973, section 36—generation of electric energy, whether can be subjected to payment of excise duty—amendment, whether ultra vires—Constitution of India, Schedule 7, List I, Entry 84.*

The Entry 84 in List I of Schedule 7 of the Constitution uses not only the word 'manufacture' but also 'produce'. The expression 'produce' is of a very wide connotation and the generation of electric energy is included in the term 'production'. So far the expression 'goods' used in the said Entry is concerned there is again no reason to give it a narrow meaning. Electricity is perfectly capable of being felt and sometimes in a big may to the great discomfort of a person.

Held, therefore, that the expression 'goods' used in the 84th Entry in List I of Schedule 7 to the Constitution of India covers electric energy for the

* Civil Writ Jurisdiction Case no. 1570 of 1979. In the matter of an application under Articles 226 and 227 of the Constitution of India.

purpose of excise law.

Commissioner of Sales Tax, Madhya Pradesh v. Madhya Pradesh Electric Board (1)-referred to.

Held, further, that the amendment by inclusion of Tariff item 11E of the Central Excises and Salt Act, 1954, is not ultra vires of the powers of the Union Government as it is possible to measure the production by reference to the consumption. It is not possible to hold that merely because kilowatt hour has been used an unit of measure in the disputed Item, the tax must be assumed to be not included in the excise duty.

Application by a public limited company.

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

M/s K.D.Chatterjee and N.C.Ganguli for the petitioner

M/s Aftab Alam (Addl. S.C., Central Govt.) and N.A. Shamsi (J.C.) for Respondent no. 1

M/s. K.P.Verma (A.G.) and P.K.Verma (J.C.) for respondent no.2

Lalit Mohan Sharma, J. - The main question in this case is whether generation of electric energy can be subjected to payment of excise duty. Electricity has been included in the Tariff Item 11E of the Central Excises and Salt Act, 1954 (hereinafter referred to as 'the Excise Act') by the Finance Act 19 of 1978. The petitioner has challenged the amendment as ultra vires and has prayed for quashing of the imposition of the additional burden placed on the consumers by the notification, Annexure 1, issued by the Bihar State Electricity Board, respondent no. 2.

(1) (1970) AIR (SC) 732.

2. The petitioner is a public limited company running a small factory engaged in the production of steel ingots from steel scraps with the help of electric arch furnace. The energy is supplied by the respondent-Electricity Board. Prior to the passing of the Finance Act, 1978, no excise duty was payable for electricity. By section 36 of the Finance Act, the Excise Act was amended by inclusion of Tariff Item 11E, which reads as follows:-

"11E. Electricity 2 paise for per kilowatt hour."

Pursuant to the amendment, the resondent Electricity Board issue a notification dated 13th May, 1978 as contained in the impugned Annexure 1 stating about imposition of the excise duty and levying a surcharge at the rate of 3 paise per unit on electricity consumption by all categories of services except agricultural services with effect from 1.3.78.

3. Mr. K.D.Chatterjee, for the petitioner, pressed three grounds in support of the writ petition, namely.

(i) the imposition of excise duty on electricity is illegal and without jurisdiction;

(ii) the Electricity Board is not authorised to make any demand with retrospective effect; and

(iii) The Board has no power to realise the surcharge at the rate of 3 paise per unit when the rate of the excise duty has been fixed at 2 paise per unit only.

4. It has been streneously contended that excise duty can be levied only on such goods which are 'manufactured' and no duty can be imposed on such articles in respect to which process of

'manufacture' is not applicable. It is asserted that electricity is not 'manufactured'. The term 'manufacture' implies conversion of one commodity into another and is generally referable where raw materials are converted into finished goods. Mr. Chatterjee therefore argued that although coal is used for generation of electricity, it is not a transformation of coal into electric energy. Referring to the 84th Entry in List I of Schedule 7 to the Constitution of India, using the word 'goods' and Article 366(12) defining goods as including all materials, commodities and articles, Mr. Chatterjee argued that the necessity of inserting a separate Entry no. 53 in List II of the Seventh Schedule indicates the 'electricity' is not included in the expression 'goods', for, otherwise Entry no. 54 by itself would have served the purpose. Reliance was placed on the observations in paragraphs 16 to 18 of the judgment in Union of *India v. Delhi Cloth & General Mills Co. Ltd. (1)*. Mr. Aftab Alam, Standing Counsel, Central Government, representing the Union of India and Mr. Advocate General, the learned counsel for the Electricity Board, defended the validity of the impugned Tariff Item and Annexure 1.

5. The Entry 84 in List I of Schedule 7 of the Constitution uses not only the word 'manufacture' but also 'produce'. The expression 'produce' is of a very wide connection and, to my mind, it is not possible to suggest that the generation of electric energy is not included in the term 'production'. So far the expression 'goods' is concerned, there is again no reason to give it a narrow meaning. The article 366(12) does not attempt to define the word exhaustively - the definition in inclusive in nature. It

(1) (1963) AIR (SC) 791.

is well established that the language used in the entries in the schedule of the Constitution should be interpreted in a broad way so as to give widest amplitude of power to the Legislature to legislate and not in a narrow or pedantic sense. The argument of Mr. Chatterjee that only such things can be considered to be 'goods' which can be felt by senses, does not help him, for, this category is not confined to such articles which can be seen or heard or smelt. Electricity is perfectly capable of being felt and sometimes in a big way to the great discomfort of a person. A similar argument was addressed in the *Commissioner of Sales Tax, Madhya Pradesh vs. Madhya Pradesh Electric Board (1)* in which the interpretation of Madhya Pradesh General Sales Tax Act was in dispute and the Supreme Court observed that merely because electric energy is not tangible or cannot be moved or touched, like, for instance, a piece of mood or a book it cannot cease to be moveable property, when it has all the attributes of such property. I do not mean to suggest that the decision of the Supreme Court in the said case interpreting 'goods' as covering electricity concludes the question in the present case as the same was given in relation to another Act but the observations made therein are certainly relevant for testing the general argument addressed before us. The argument of Mr. Chatterjee based on Entries 53 and 54 of the 2nd List sanctioned above was also pressed before the Madhya Pradesh High Court and was accepted but the Supreme Court rejected it in the following terms (see para 9 of the judgment):

> "The reasoning which prevailed with the High Court was that a well defined distinction

(1) (1970) AIR (SC) 732.

existed between the sale or purchase of goods and consumption or sale of electricity, otherwise there was no necessity of having Entry no. 53, but under entry 53 tax can be levied not only on sale of electricty but also on its consumption which could not probably have been done under entry 54. It is difficult to derive such assistance from the aforesaid entries. What has essentially to be seen is whether electric energy is 'goods' within the meaning of the relevant provisions of the two Acts."

6. I do not find any reason to give the expression 'goods' a limited and restricted meaning, as suggested on behalf of the petitioner and I hold that it covers electric energy for the purpose of excise law.

7. It was next urged that since excise duty is related to production of goods, the additional burden which is under challenge being in the nature of a tax on consumption, that is, sale of electricity is not covered by the Entry 84 and is, therefore, ultra vires of the powers of the Union Government. Reliance was placed on Tariff Item 11E fixing the rate by reference to kilowatt hour. Mr. Chatterjee contended that this measure cannot be applied to production. The parties filed further affidavits during the course of hearing of the case on this aspect. The Executive Officer of the petitioner-company, who is a graduate in Electrical Engineering, pledged his oath in support of the argument. He stated that electrical energy is measured in terms of kilowatt hours and this is the unit represented by consumption of thousand watts during the period of one hour. He further said that the writ of kilowatt can only be reckoned with reference to use or consumption of electricity and unless electricity is

used or consumed for one hour, a unit of kilowatt hour cannot be reckoned.

8. The learned Standing Counsel, Central Government, challenged the proposition by relying on statements extracted from the books.

(i) The Electrical Engineers Reference Book

(ii) Electrical Technology by H. Cotton

(iii) Standard Hand Book for Electrical Engineers as contained in Annexure A, B and C respectively to the supplementary counter affidavit of the respondent no. 2. A counter affidavit on behalf of the Electricity Board was also filed in which it was asserted that the kilowatt hour is unit of measurement of technical energy whether it is generated or consumed. The three affidavits have attempted to discuss the question from a scientific point of view. I do not consider it necessary to go into the highly technical aspect of the matter, as in my view, it is not possible to hold in favour of the petitioner that merely because kilowatt nour has been used as unit of measure in the disputed Item, the tax must be assumed to be not included in the excise duty. Assuming what has been stated on behalf of the petitioner to be correct in this regard still it is possible to measure the production by reference to the consumption.

9. On the question whether surcharge is invalid on the ground of its retrospective nature, it was said that the assent of the President to the introduction of Tariff Item 11E by amendment by section 36 of the Finance Act, 1978 was given on 12.5.78 and since this section has not made the provision retrospective in nature, the additional duty was not payable before this date and as the demand has been made with effect from the Ist March, 1978, the same must be partially struck down. The argument

overlooks the provisions of section 3 of the Provisional Collection of Taxes Act (Act XVI of 1931) which reads as follows:-

> "3. *Power to make declaration under this Act* - Where a bill to be introduced in Parliament on behalf of Government provides for the imposition or increase of a duty of customs of excise, the Central Government may cause to be inserted in the bill a declaration that it is expedient in the public interest that any provision of the bill relating to such imposition or increase shall have immediate effect under the Act."

The section 4 of the Act further directs that 'a declared provision shall have the force of law immediately on the expiry of the day on which the Bill containing it is introduced.' In the last counter affidavit of the respondent no. 2, it has been stated that the necessary notification containing the required declaration had been made at the appropriate time so as to bring the new provisions in force with effect from 1.3.78. In view of this counter affidavit, Mr. Chatterjee did not persue the point.

10. Lastly, it was urged that since the additional burden of the Electricity Board was raised by only 2 paise per unit, it cannot be permitted to raise the charges by 3 paise per unit. The Electricity Board is authorised to realise the electric charges from the consumers at the rates which are included in the Tariff by virtue of the provisions of section 46 and 49 of the Electricity (Supply) Act, 1948. As has been stated in the counter affidavit of the Electricity Board, the relevant Tariff has been modified by raising the rate by 3 paise per unit. The reason for enhancement of the charges by the Board is not,

solely the inclusion of Excise Tariff Item 11E. The Electricity Board is not a mere agent of the Central Government to collect the excise duty on its behalf. It has changed its Tariff in its authority under the Electric (Supply) Act, 1948. The justification for raising the rate by 3 paise has been successfully explained in the counter affidavit. It has been stated that the increase in the excise duty payable on coal and oil which are basic fuel for power generation has caused a rise in the costs of electricity generation. It is also said that certain amount of electricity is lost in transmission, transformation and distribution system before it reaches the consumer and the Board has to pay excise duty on generation which includes those units whichf are lost in transit. As a matter of policy, the electricity consumed for agricultural purposes has been exempted and the burden in this regard also has to be borne by other consumers. For all these reasons, the Board had to impose further surcharge of 3 paise per unit. The stand taken by the respondent in this regard appears to be well founded. The last point pressed on behalf of the petitioner must also, therefore, be rejected.

11. Accordingly, this writ application is dismissed but without costs.

S.P.J. Application dismissed.

CIVIL REFERENCE

1985/February, 28.

Before Lalit Mohan Sharma and Binodanand Singh, JJ.

*Shashi Bhushan Prasad**

v.

State of Bihar and others.

Code of Civil Procedure, 1908, (Act V of 1908), *section 113 and Rule 1 of Order 46, provisions of—scope and applicability of—reference to the High Court made by the trial court—reference, when can be made—decree subject to appeal—no reference can be made unless it is covered by the Proviso in section 113—Proviso, in the instant case, whether applicable—reference, whether competent.*

In view of the language of Rule 1 of Order 46 of the Code of Civil Procedure, it must be held that no reference to the High Court can be made in a suit in which the decree passed is subject to appeal unless it is covered by the Proviso in section 113 of the Code.

The Proviso in section 113 of the Code of Civil Procedure will apply only to a case which involves a question as to validity of any (i) Act, (ii) Ordinance

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* Civil Reference No. 1 of 1980. Reference made in the judgment of Shri Iqbal Singh, 3rd Additional Munsif, Gaya, dated 1.1.80 passed in T.S. 142 of 1978.

(iii) Regulation or (iv) any provision contained in an Act, Ordinance or Regulation. The trial court is not empowered to make a reference in a case where the validity of any other provision e.g. a rule, by law, order under enactment et cetera is involved.

Held, that, in the instant case, an appeal under section 96 of the Code of Civil Procedure is clearly maintainable against the decree of the Court below and the impugned orders, Ext. 6(a) and Ext. A are certainly not parts of any Act or Ordinance nor covered by the definition 'Regulation viwhin the meaning of section 113 of the Code and as such the reference to the High Court made by the court below was incompetent.

Reference made under section 113 of the Code of Civil Procedure, 1908, by the trial court.

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

M/s Chitra Gupt Prasad, Advocate and Shashi Bhushan Prasad (in person) for the petitioner.

M/s. K.P.Verma, Advocate General and Rajesh Prasad Sinha 'Rajesh', J.C. to A.G. for the State.

Lalit Mohan Sharma, J. - The plaintiff Shashi Bhushan Prasad filed a suit in the court of Munsif, Gaya, for a declaration that he should be deemed to be posted as Assistant Public Prosecutor, Group 2 Senior Service, with effect from 1.4.1974 and for certain other reliefs. His case is that he was appointed as the Assistant District Public Prosecutor in 1961 and continued as such till 31.3.74. With effect from 1.4.74, a single cadre of Public Prosecutors was formed under the provisions of the Code of Criminal Procedure, 1973 and he automatically became a member of this cadre. By a decision as contained in memo no. 3217 (marked Ext. 6(a) at the trial of the suit) dated 30.3.1974

(Home Police), the State of Bihar divided the cadre in three groups being Grades I, II and III, and by the notification no. 3253 (marked as Ext.A) dated 30.3.74, the plaintiff was appointed in the Third Grade. Subsequently, a Board constituted for this purpose recommended the plaintiff's name for promotion to Grade II. The plaintiff has challenged the memo no. 3217, Ext. 6(a), the notification no. 3253, Ext. A, and the Board's reference, mentioned above, as illegal on the ground that any attempt of classification and division of the cadre of the Assistant Public Prosecutor is invalid.

2. The State of Bihar challenged the plaintiff's case by filing a written statement.

3. The case was heard and the learned Munsif decreed the suit holding that Ext. 6(a) is illegal and void. The Court further held that in view of the provisions of section 113 and Rules 1 to 4A of Order 46, Code of Civil Procedure, a reference to the High Court was called for. The learned Munsif directed the stay of further proceeding pending the decision of this Court on the reference.

4. A preliminary objection has been taken on behalf of the State that the reference is not maintainable. The section 113 reads as follows:-

> "113. Subject to such conditions and limitations as may be prescribed, any Court may state a case and refer the same for the opinion of the High Court and High Court may make such order therein as it thinks fit;
>
> Provided that where the Court is satisfied that a case pending before it involves a question as to the validity of any Act, Ordinance or Regulation or of any provision contained in an Act, Ordinance or Regulation, the determination of which is necessary for the

> disposal of the case and is of opinion that such Act, Ordinance, Regulation or provision is invalid or inoperative, but has not been so declared by the High Court to which that Court is subordinate or by the Supreme Court, the Court shall state a case setting out the opinion and the reasons therefor, and refer the same for the opinion of the High Court.
>
> Explanation - In this section, 'Regulation' means any regulation of the Bengal, Bombay or Madras Code or regulation as defined in the General Clauses Act, 1897, or in the General Clauses Act of a State."

A reference in a case which is covered by the Proviso is mandatory. In view of the opening words of the Section, it must be held to be subject to the provisions of Rule 1 of Order 46 which is in the following terms:-

> "Where, before or on the hearing of a suit or an appeal in which the decree is not subject to appeal, or where, in the execution of any such decree, any question of law or usage having the force of law arises on which the Court trying the suit or appeal, or executing the decree, entertains reasonable doubt, the Court may, either of its own motion or on the application of any of the parties, draw up a statement of the facts of the case and the point on which doubt is entertained, and refer such statement with the own opinion on the point for the decision of the High Court."

The second rule permits the Court to pass a final decree in the suit but directs that the decree would not be executed until the receipt of a copy of the judgment of the High Court. This rule is made applicable by Rule 4A to a reference under the

Proviso in section 113.

5. In view of the language of Rule 1, it must be held that no reference can be made in a suit in which the decree passed is subject to appeal unless it is covered by the Proviso in Section 113. An appeal under section 96 of the Code is clearly maintainable against the decree of the court below in the present case. The question, therefore, remains as to whether the Proviso is applicable in the present case.

6. The Proviso in section 113 will apply only to a case which involves a question as to validity of any (i) Act, (ii) Ordinance, (iii) Regulation or (iv) any provision contained in an Act, Ordinance or Regulation. The trial court is not empowered to make a reference in a case where the validity of any other provision e.g. a rule, by-law, order under enactment, et cetra is involved. The impugned orders, Ext. 6(a) and Ext. A, are certainly not parts of any Act or Ordinance. The court below has observed that they are 'Regulations' within the meaning of the section. I am afraid, there is no warrant for such an assumption. The Explanation to the section, quoted above, indicate that the word 'Regulation' means a Regulation of the Bengal, Bombay or Madras Code which admittedly it is not, or as explained in the General Clauses Act, 1917 or the Bihar and Orissa General Clauses Act, 1917. The expression has been defined in the two Acts as referring to a regulation made by the President under Article 240 or 243 (now repealed) of the Constitution, or a regulation made by the Governor under paragraph (5)(2) of the Fifth Schedule to the Constitution, as also a regulation made by the Central Government under the Government of India Act, 1917, or Government of India Act, 1950, or Government of India Act, 1935. A mere reference of

these provisions will show that none of the Ext.6(a) and Ext. A is covered by the definition 'Regulation' within the meaning of section 113 of the Code. I, therefore, hold that the reference made by the court below is incompetent.

7. It was jointly stated that an appeal by the State of Bihar was filed against the decree of the Munsif awaiting the decision of this Court in the present case. The parties should now appear before the lower appellate court and argue the appeal so that it may be disposed of expeditiously.

8. The Civil Reference case is disposed of, as indicated above. There will be no order as to costs of this Court. The order of stay passed by the learned Munsif pending decision of this Court now no longer continues to operate.

Binodanand Singh, J. I agree.

S.P.J. Order accordingly.

CIVIL WRIT JURISDICTION

1985/March, 13.

Before S.S.Sandhawalia, C.J.

*Dr. Mrs. Malti Rohatgi**

v.

The State of Bihar & others.

Writ application—*filed after a more than ten years for correction of age of writ petitioner—delay not explained—principles of natural justice violation of—application, whether maintainable.*

On the representation of the writ petitioner her date of birth was corrected from 25.8.1925 as mentioned in her Matriculation certificate, to 25.8.1927 by the government notification dated 13.2.1971. Subsequently Government took a policy decision dated 10.9.1973 that the date of birth shall be in accordance with the date of birth recorded in the matriculation certificate. The writ-petitioner filed a writ application in 1983 for a writ of mandamus to be issued on the Government to correct her date of birth in Civil List of the Appointment Department in accordance with the Government notification dated 13.2.1971.

It is wholly untenable to hold that merely because the principles of natural justice have been violated, the writ-petitioner would be entitled to

* Civil Writ Jurisdiction case No. 3668 of 1983. In the matter of an application under Articles 226 and 227 of the Constitution of India.

approach the High Court after inordinate and unexplained delay of more than ten years.

Ravindra Nath Bose and others v. Union of India and Ors. (1), Tilokchand Motichand v. H.B. Munshi (2) Jagdish Narain Maltiar v. The State of Bihar and Ors. (3) and M.K. Krishnaswamy and others v. The Union of India & ors. (4) - followed.

Kiran Singh & ors. v. Chaman Paswan and ors. (5) and Nawabkhan Abbaskhan v. State of Gujarat (6)-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 S.S.Sandhawalia, C.J.

The case in the first instance came up before Uday Sinha & S.B. Sanyal, JJ. who differred in their judgment and the case was referred to another Judge on this reference.

Messrs Basudeo Prasad, Anil Kumar, Navin Sinha and Sunil Kumar for the petitioner.

Messrs K.P.Verma, Advocate General and Banwari Sharma, Junior Counsel to Advocate General for the State.

S.S.Sandhawalia, C.J. A difference of opinion betwixt the learned Judges constituting the Division Bench has necessitated this reference. Since the divergence of views extended to all points of fact

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(1) (1970) AIR (SC) 470
(2) (1970) AIR (SC) 498
(3) (1973) AIR (SC) 1343
(4) (1973) AIR (SC) 1167
(5) (1954) AIR (SC) 340
(6) (1974) AIR (SC) 1471.

and law (as stands noticed by them in their order no. 13 dated the 20th of February, 1984), the Hon'ble Judges did not deem it necessary to formulate the difference specifically.

2. The facts stand already recounted in considerable detail in both of the exhaustive separately recorded judgments. Nevertheless, to maintain the homogeneity of this judgment, it becomes necessary to give the factual matrix thereof. These have been marshalled in so admirable a manner by Uday Sinha, J., that the recapitulation thereof can not be improved upon. Even at some risk of plagiarism I would wish to virtually quote them verbatim:

> "The petitioner has moved this Court for issuance of a writ of mandamus commanding the respondents to correct the date of birth of the petitioner in the civil list of the Appointment Department so as to accord with the correction in the date of birth of the petitioner corrected by Health Department Notification No. 701(2) 2M 3-20386/69 dated 13.2.1971 and from disturbing the services of the petitioner. The petitioner has spent her whole life in metropolitan cities. She is not a rustic illiterate Indian woman who may not know her age. According to her own averments, she started her schooling from Girls' Junior High School, Kanpur. Thereafter, she shifted her studies to Delhi where she joined Indraprastha Hindu Girls' High School, declaring her date of birth as 25.8.1925. She passed matriculation examination from the aforesaid High School. Later she joined Lady Hardinge Medical College, New Delhi. There also her date of birth remained 25.8.1925. She obtained M.B.B.S. degree in 1949 from that

College. Thereafter she joined Bihar State Medical Service in 1952. Her own declaration at the time of her appointment was that her date of birth was 25.8.1925. In 1962 she obtained M.S. (Obstetrics and Gynaecology) degree from Bihar University. In 1969 it dawned upon her that 25.8.1925 as her date of birth recorded in the matriculation certificate and subsequent similar declarations in her own hand and pen were wrong. The petitioner has not enlightened us how she realised that the date of birth mentioned in the matriculation certificate was wrong. Thus in 1969 she filed a representation that the date of birth recorded in her service book be corrected as 25.8.1927 instead of 25.8.1925. The petitioner has not enlightened us the grounds and materials on which she filed the representation for correction of her date of birth nor have we been told in what circumstances how and for what reasons the application was entertained more than ten years after her appointment. That has been withheld from us. I have great difficulty in accepting that the petitioner is not possessed of a copy of the representation filed by her in 1971. It is, however, useless to probe into those aspects because the files relating to her date of birth in the Secretariat have disappeared. To out matters short, her representation was accepted and her date of birth was corrected from 25.8.1925 to 25.8.1927 by Notification No. 701(2)/2M3-20386/69 dated 13.2.1971 addressed to Accountant General, Bihar. The petitioner thus got two years extra lease of tenure on the teaching staff of Patna Medical College.

The aforesaid extra lease in her tenure

probably trod on the toes of Dr. D.Singh and Dr. Anmola Sinha, teachers in the College. They also, therefore, moved the State Government for the same favour by correction/alteration of their date of birth as well by two years. Government probably found that the malady of correction of date of birth was getting contagious/infectious and, therefore, took a policy decision by Annexure-A dated 10.9.1973 addressed to Accountant General, Bihar that the date of birth shall be in accordance with the date of birth recorded in matriculation certificate. In terms of this policy decision the correction of date of birth of the petitioner done previously was cancelled. Her date of birth was again restored to 25.8.1925. Curiously this file has also become traceless from the Secretariat. The representations of Dr. D. Singh and Dr. Anmola Sinha were thus rejected. According to the State, the second alteration in the age of the petitioner, i.e. back to 1925 was communicated to her and matters stood there. No step was taken by the petitioner to agitate the question of her date of birth after 1973 till 1983 nor did she ever challenge the correctness or pripriety of Government decision contained in Annexure-1.

The issue of the petitioner's date of birth again became a live issue in 1982. By letter dated 8.12.82 (Annexure 3) Deputy Director, Health Services called upon the petitioner to affirm her date of birth and to file matriculation certificate. In reply thereto the petitioner wrote to the Deputy Director informing that her date of birth had been corrected in 1971 from 25.8.1925 to 25.8.1927. Annexure-A was probably sent to the Health Department on

14:12.1982. In reply thereto the Deputy Secretary Health by Annexure-6 dated 24.2.1983 again called upon the petitioner to file matriculation certificate along with Photostat copy of the matriculation certificate. By Annexure-6(i) the petitioner expressed her inability to produce any photostat copy of her matriculation certificate, but again sent a copy thereof. By Annexure-7 dated 2.6.1983 the petitioner pressed her claim for entry of 25.8.1927 as her date of birth in her service book. The State Government considered the question of correct date of birth of the petitioner and by order contained in Annexure B referred to Accountant General, Bihar, the State Government decided that the petitioner's date of birth shall be in accordance with the matriculation certificate and there was no reason to alter it and on that basis she would superannuate on 31.8.1983. A copy of this letter was sent to the petitioner as well. That led to the filing of the present application. No prayer has been made for quashing Annexure A or B. In accordance with Government decision contained in Annexure A and B the petitioner superannuated on 31.8.83."

3. Pre one comes to other issues, the threshold question forcibly pressed before the Division Bench on behalf of the respondent State was one of gross and unexplained laches of more than a decade in approaching the writ Court and thus going to the very root of the matter of entertaining the same in its discretionary jurisdiction. On behalf of the respondent State the learned Advocate General on the basis of categoric pleadings on the point had taken the stand that the petitioner had been squarely and personally communicated the Government's order (Annexure A) of the year 1973 through a peon and in token of the receipt of the letter she had herself signed the Peon

Book. Equally she had been served by the Department of Health with the same. Thus she had the clearest knowledge of the adverse order against her but she slept over the matter for more than a decade. On this preliminary ground she would be disentitled to the grant of relief in the writ jurisdiction apart from merits. Faced with this stand the writ petitioner had hesitatingly and evasively sought to deny the categoric claim of the respondent State with regard to the service and receipt of the communication (Annexure A) by her. The parties squarely joined issue on this crucial question.

4. Sanyal, J. did not accept the stand of the petitioner that she had no notice of the impugned order. Indeed upon the state of the pleadings it was impossible to arrive at such a conclusion. However, he recorded a somewhat hesitant finding in these terms:

> "For these reasons it will be unsafe to hold that the respondents have been able to establish beyond doubt that Annexure 'A', the decision of the year 1973, was communicated to the petitioner."

However, Uday Sinha, J., examined the matter in greater detail and with incisive depth. He accepted the sworn testimony of Bhola Paswan, a peon in the Health Department, who swore the affidavit that he duly delivered the impugned order to the writ petitioner in the premises of P.M.C.H. and she herself received the letter addressed to her and in token thereof she put her signature in the peon book in his presence. He also accepted the statement of Hari Narain Ram, the routine clerk (despatcher) in the Department of Health, who stated on oath that Annexure-A was sent to the

petitioner which was received personally by her and in token of the receipt she put her signature with date. He found that these employees had no axe of their own to grind nor any animus against the petitioner, whilst she herself was deeply interested to deny the receipt thereof. He summed up as under:

> " In my concluded view, the letter mentioned at serial 23 bearing her name was sent to her and was received by her. Her denial in this behalf is rather unfortunate. This gives on inkling into the petitioner's metal."

5. Before me the learned Advocate General more than amply buttressed the aforesaid finding, if indeed it was at all necessary, by pin- pointing the unequivocal and categorical pleadings filed on behalf of the respondent State. Though the pleadings categorically stated that the signature in the peon book was in the writ petitioner's own handwriting, she in her affidavit in reply tried to evade the issue by refusing to over a specific denial. In her affidavit there is a plain attempt to skirt the issue of her signature in the peon book and she rested herself content with vague denials that letter no. 5999(2) had no bearing on the petitioner's date of birth etc. Along with the mass of other evidence on the point Uday Sinha, J. had further reassured himself by comparing the signature of the writ petitioner on the vakalatnama with the disputed signatures in the despatch register and the peon book. He found that her characteristic style of writing 'R' in 'Rohatgi' is exactly similar therein.

6. Mr. Basudeo Prasad had attempted to vainly assail this pressurance by the learned Judge along with other basic testimony on the ground that this could not be done except by calling a handwriting

expert as a witness. It is well settled that in conjunction with other testimony there is no legal bar to the Judge using his own eyes to compare a disputed signature with admitted signatures. Reference in this connection may be instructively made to the Division Bench judgment in *Biseshwar Poddar v. Nabadwin Chandra Poddar and another (1) and Bhupendra Narain Mandal v. Ek Narain Lal Das (2).*

7. The learned Advocate General then highlighted the fact that consequent to the impugned decision of the Government the Civil list was duly amended and the matter given the fullest publicity by being published in the Official Gazette. In the totality of the circumstances to hold that the petitioner was unaware of the order (annexure A) in 1973 seems wholly untenable. I would, therefore, unhesitatingly agree entirely with the conclusion arrived at on this aspect by Uday Sinha, J.

8. However, even assuming that the writ petitioner had been duly communicated with the State's decision way back in 1973, Sanyal, J., opined that because the principles of natural justice were alleged to be violated, the delay of more than a decade in approaching the writ Court was irrelevant to the issue. With the greatest respect to him, I am unable to subscribe to this line of reasoning because it seems to run against the very grist of a long line of decisions of the final court with regard to the gross and unexplained laches in approaching the writ Court and the impropriety of its entertaining patently stale causes. With respect to Sanyal, J., herein also I am inclined to agree entirely with the forthright enunciation of his view by Uday Sinha, J.

(1) (1961) AIR (Cal.) 300

(2) (1965) AIR (Pat.) 332.

9. In a field so well trodden, it seems unnecessary to multiply authorities and it suffices to refer to only a few basic judgments of the final Court. In *Ravindra Nath Bose and others v. Union of India and others (1)* it was held in unequivocal terms that no relief can be given to a petition who, without any reasonable explanation, approaches the Writ Court after inordinate delay. A reconsideration of this case was later sought but the ratio was resoundingly affirmed in *Trilokchand Motichand v. H.B. Munshi (2)*. Again in *Jagdish Narain Maltiar v. The State of Bihar and others (3)* their Lordships upheld the judgment of the Patna High Court which had dismissed the petitioner's application on the primal ground that he had approached the Writ Court after a delay of 3 years. Equally categoric are the observations in *M.K. Krishnaswamy and other v. The Union of India and others (4)*. The aforesaid view has thereafter been consistently adhered to by the Supreme Court.

10. In fairness to Mr. Basudeva Prasad, the learned counsel for the petitioner, one must notice his reliance on *Ramchandra Shankar Deodhar and others v. The State of Maharashtra and others (5)*. However, I amunable to read that judgment in any way deviating from the consistent line of precedent noticed above. In fact, express reference to Trilokchand Motichand's and Ravindra Nath Bose's cases was made approvingly therein. It was in terms held that the petitioners therein did not lose any

(1) (1970) AIR (SC) 470
(2) (1970) AIR (SC) 898
(3) (1973) AIR (SC) 1343
(4) (1973) AIR (SC) 1167
(5) (1974) AIR (SC) 259.

time in filing the petition when they were adversely affected and the cause of action across qua them. It was further noticed that the aforesaid challenge therein was to the validity of the procedure for making promotion which was not a thing of the past but was still being continued and followed by the State Government, the constitutionality of which was under challenge. It was on these grounds that it was held that there was no delay or laches in the particular case.

11. In order to buttress his alleged stand that the impugned order was a nullity because of the alleged violation of the principles of natural justice, Mr. Basudeva Prasad placed reliance on *Kiran Singh and others v. Chaman Paswan and others (1) and Nawabkhan Abbaskhan v. State of Gujarat (2)*. Both the judgments, however, are distinguishable. In Kiran Singh's case the issues raised were with regard to the territorial or the pecuniary jurisdiction of a court and its effect on the decree. Consequently, the observations made in this context, to my mind, have hardly any relevance in the present situation. Similarly, in Nawabkhan Abbaskhan's case was a criminal matter where the order of externment and the consequential prosecution were put in issue. It is plain that the examination of the issue in the context of the criminal law would not, strictu sensu, be attracted in the present case. In fact, the judgment far from helping the writ petitioner seems to run counter to her stand that the violation of the principles of natural justice would make the order void and thus a nullity. It has been observed therein as under:

"In other cases, the order in violation of

(1) (1954) AIR (SC) 340

(2) (1974) AIR (SC) 1471.

natural justice is void in the limited sense of being liable to be avoided by court with tetroactive force."

12. In the light of the long line of binding precedent noticed earlier, it seems to me as wholly untenable to hold that merely because the principles of natural justice have been violated, the writ petitioner would be entitled to approach the Court after an inordinate and unexplained delay of more than ten years. With the deepest deference, therefore, I am unable to agree on this aspect with S.B. Sanyal, J., and would wholly endorse the stand of Uday Sinha, J. Once that is so, on this ground of gross laches alone all further considerations of merits would indeed be precluded.

13. However, since the learned Judges constituting the Division Bench have opined on the merits of the controversy as well, I would wish to endorse and affirm the findings of Uday Sinha, J., which have been admirably summarised by him as under:

"46. My concluded findings are that the order of alteration of the petitioner's age in 1971 was patently unjust and improper. The State Government had the powers to take a policy decision and clear the cob-web in regard to the age of the petitioner accordingly. The order passed in 1973 was communicated to her. There are adequate materials to show that she knew in 1973 and certainly in 1980 much before her date of superannuation that Government had cancelled Annexure-1 and that her date of birth had been restored as 25.8.1925. The petitioner has moved this Court with inordinate delay, ten years after the passing of Annexure-A. This by itself is

sufficient to throw out her application. The technical defect, if any, in re-correcting her date of birth was removed by issuance of Annexure-3 by which she was called upon to produce all materials in support of her stand that her real date of birth was 25.8.1927 and not 25.8.1925. Rules of natural justice even if not complied in 1973 were complied in 1982 by issuance of Annexure-3. It is idle to contend that Government had no jurisdiction in 1982 to issue notice in regard to the correct age of the petitioner. The petitioner, therefore, has no case for issuance of a writ as prayed for. There was no contravention of Articles 14 and 16 of the Constitution."

14. Before parting with this judgment, it must be noticed that Mr. Basudeva Prasad had also assailed the ancillary finding of Uday Sinha, J. (in paragraph 47) that the writ petition must be rejected on the added ground that no prayer for specifically quashing annexures A and B had been made. Learned counsel pointed out that annexure B had comes into existence during the pendency of the writ petition and, therefore, there could be no question of assailing the same at the original stage of the filing of the writ petition. My attention was drawn to the rejoider to the counter affidavit of the respondents filed by the petitioner on the 30th of August, 1983 where in paragraphs 8 and 9 a specific prayer for quashing both annexures A and B had been made. It would appear that these pleadings were not pointedly brought to the notice of the Division Bench. With respect, therefore, Uday Sinha, J's. observation for the rejection of the writ petition on this added but technical ground is, perhaps, not sustainable. However, in view of the failure of the writ petition even on the basic and primal grounds

on which it was rested, this issue would no longer affect the result and is thus rendered academic.

15. In the result, I find no merit in this application and it is hereby dismissed with costs.

R.D. Application dismissed.

CIVIL WRIT JURISDICTION

1985/March, 19.

Before Birendra Prasad Sinha, J.

*Sheojoti Devi and another**

v.

The State of Bihar and others.

Bihar Consolidation of Holdings and Prevention of Fragmentation Act, *1956 (Act XXII of 1956) section 10(2)—Objection filed—authorities under the Act—duty of—failure on the part of the Consolidation Officer to apply his mind and decide the dispute between the parties—order passed mind and decide the dispute between the parties—order passed—nature of.*

The authorities under the Act, who have been vested with powers to settle the questions regarding title and other disputes and who have replaced the Civil Courts are judicial authorities and must record reasons in support of a decision on any disputed claim. Where from the order passed by the Consolidation Officer it will appear that he has not acted in the manner in which a judicial authority is required to act and has not decided the dispute between the parties and has failed to apply his mind;

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* Civil Writ Jurisdiction Case No. 688 of 1980. In the matter of an application under Articles 226 and 227 of the Constitution of India.

Held, that the order is most ferfunctory. The order being subject to appeal the necessity to record reasons was greater and as such the order has got to be set aside.

The appellate authority in the instant case after having found that there was no partition in the family in the year 1930 as claimed by respondent no. 6, there could be no reason for holding that the partition might have taken place between the year 1954 and 1969 in as much as it was no body's case. In any event he was not only to partition the joint holdings as envisaged under section 8A of the Act but was also required to decide the question regarding the respective title of the parties in respect of the holdings recorded in separate names. In a case of this nature the consolidation authorities are required to decide whether there was an earlier partition and if the conclusion is that there was no earlier partition and the family remained joint then to decide whether any holding recorded in the name of an individual member of the family was joint property or a separate acquisition of that person.

Held, therefore, that in the instant case as neither the appellate nor the revisional authority have tried to decide the present dispute in this manner, the appellate and revisional order contained in Annexures 2 and 3 are fit to be quashed and set aside.

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 Prasad Sinha, J.

Messrs Balbhadra Prasad Singh, Senior Advocate with Shiva Kriti Singh for the petitioners.

Messrs Kamlapati Singh, Govt. Pleader V with Binod Bihari Singh, Jr. counsel to Govt. Pleader V for the State.

Messrs Ram Janam Ojha, Senior counsel with Abhimanyu Sharma for the respondent no. 6.

Birendra Prasad Sinha, J. In this application under Articles 226 and 227 of the Constitution of India, the petitioners have prayed for issuance of a writ of certiorary quashing the order dated 3.9.1978 passed by the Deputy Director Consolidation, Muzaffarpur in Annexure-2 and the order dated 24.12.1979 passed by the Director, Consolidation, Bihar, in Annexure-3 rejecting their objection filed under section 10(2) of the Bihar Consolidation of Holdings and Prevention of Fragmentation Act, 1956 (hereinafter referred to as the Act).

2. In order to appreciate the questions involved in this case it will be necessary to state some relevant facts. The petitioners claim that they and respondent no. 6 Krishna Kumar Sahi are members of a joint Mitakashra family. According to them their common ancestor Surendra Sahi had two sons, namely, Ram Sreshtha Sahi, who died in the year 1969 and Daroga Sahi who died in the year 1947. Surendra Sahi had also died in the year 1954. Ram Sreshtha Sahi had a son named Ramasish Sahi, whose widow is petitioner no.1 and his son is petitioner no. 2. Daroga Sahi had only one son Krishna Kumar Sahi who is respondent no.6. The petitioners claim that they and respondent no. 6 own some lands in village Rampur, police station Aurai in the district of Muzaffarpur besides other lands in different villages. According to them the lands were jointly recorded in the cadestral survey. They alleged that during revisional survey respondent no. 6 in collusion with the survey authorities got the survey records of some of the joint family lands incorrectly prepared. Lands of R.S. khata no. 21 were wrongly recorded in the name of respondent no. 6. In some other khatas lands of the family

remained jointly recorded in the names of Ram Srestha Sahi and Krishna Kumar Sahi. After the death of Ram Sreshtha Sahi on enquiry the petitioners came to know that respondent no. 6 had got his name exclusively entered in respect of more than half of the lands of the joint family. They filed a partition suit claiming half share in the joint family properties and also for the correction of the revisional survey entries. But in the meanwhile a notification under section 3 of the Act was published and the suit abated under the provisions of section 4(c) of the Act. The petitioners thereupon filed an objection under section 10(2) of the Act before the Consolidation Officer for correcting the wrong entries in the chak register in respect of original khata no. 21, 22, 264 and 265 of village Rampur in the joint names of the petitioners and respondent no. 6 to the extent of half each. It is claimed that certain documents were filed to show that the family was joint and still the family owns the entire lands jointly and, therefore, petitioners are entitled to get their names recorded in the chak register over the lands of the family to the extent of half. The Consolidation Officer rejected their objection by an order passed on 3.9.1976 (Annexure-1). The petitioners thereupon preferred on appeal before the Deputy Director, Consolidation and AAppeal No. 288 of 1976 was also dismissed on 15.7.1978 (Annexure-2). The petitioners then filed a revision application which too was dismissed by the Director, Consolidation on 24.12.1979 (Annexure-3).

3. The case of respondent no. 6, inter alia, was that the family was not joint and that a partition had taken place in the year 1930 and the properties in dispute were self acquired properties of Daroga Sahi, father of respondent no. 6.

4. Mr. Balbhadra Prasad Singh learned counsel appearing on behalf of the petitioners submitted that the order passed by the Consolidation Officer in Annexure-1 is not a decision at all and he has completely failed to exercise the jurisdiction vested in him. As regards the order passed by the Deputy Director, Consolidation in Annexure-2, the contention of the learned counsel is that the learned Deputy Director, Consolidation was absolutely wrong in saying that he could only partition only the joint holdings under section 8A of the Act and had no power to decide any disputed question of title. It was also submitted that after having found that there was no partition of the family properties in the year 1930 the learned Deputy Director, Consolidation, had no material to hold that partition might have taken place in between 1954 and 1969, thus making out a third case.

5. The Consolication Officer, respondent no. 2 passed the following order on 3.9.1976 which is Annexure-1.

"३-९-७६ श्री विपिन बिहारी शाही एवं श्रीकृण कुमार शाही आपसी बटबारा हो चुका है।

बटबारा के बाद केवाला के आधार उपर जमीन की खरीदं अलग-अलग कर अलग-अलग नाम से खाता खूल चुका है।

अतः ऐसी परिस्थिति में जमीन को दोनों फरीकों के बीच बराबर हिस्से में बांटना सम्भव नहीं है। अतः आवेदन पत्र से सम्बन्धित कारवाई स्थगित कर दी जाती है।"

In appeal the Deputy Director, Consolidation, respondent no. 3 after stating the case of parties framed four issues for consideration, namely, (i) Whether there was a partition in the family in the year 1930; (ii) what were the properties which

Daroga Sahi purchased after 1930; (iii) whether Daroga Sahi was the karta of the family and his income went to the family fund; and (iv) whether the family was still joint ? On a consideration of the materials placed before him he came to the conclusion that there was no partition in the family between 1930 and 1975. But again he stated that it appeared that Batwara had taken place between 1954 when Surendra Sahi died end 1969 when Ram Sreshtha Sahi died. Ultimately the Deputy Director, Consolidation held that he had the authority to partition only the joint holdings according to section 8A of the Act and that he was not to decide whether a particular holding was a joint family property or was a separate property because there was no provision for such a consideration in the Act. Accordingly, he directed that records be prepared in the name of that person in whose name the land has been entered in the survey records. In revision the Director, Consolidation respondent no.4 agreed with the Deputy Director, Consolidation and dismissed the revision.

6. The Act provides for consolidation of holdings and prevents fragmentation of land. It appears that lethargic legal procedures involving inordinate delay which could not meet the challenges of the social order are tried to be replaced by quick acting procedure. Section 3 empowers the State Government to declare by a notification in the Official Gazette its intention to make a scheme for consolidation of holdings. Section 4 deals with the effect of the said notification and provides that in the event of a notification under section 3 of the Act every proceeding for correction of records and every suit and proceeding in respect of declaration of rights or interest in any land lying in the area shall on an

order being passed in that behalf by the Court or authority before whom such suit or proceeding is pending shall stand abated. Section 7 envisages constitution of village advisory committee and section 8 requires preparation of up-to-date record of rights before consolidation. Section 8A to which a reference has been made by the Deputy Director, Consolidation provides for partition of joint holdings of the Consolidation Officer either on an application made in that behalf or on his own motion. Such a partition of joint holdings has to be affected on the basis of shares. Section 9 of the Act relates to preparation of register of lands. Then section 9A deals with preparation of settlement of principles. Section 10 envisages publication of registers of lands and statement of principles and objections thereon. The relevant portion of section 10 is reproduced hereunder:-

"(1) The registers prepared under sub-section (2) of section 9 and the statement of principles prepared under section 9A shall be published in the manner prescribed and shall remain published for less than 30 days.

(2) Any person may, within 45 days of the date of publication of the register under sub-section (1) file before the Assistant Consolidation Officer, objection in respect thereof, disputing the correctness and nature of entries in the records or in the statement of Principles.

(3) The Assistant Consolidation Officer shall, after hearing the persons interested and after such enquiries as may be necessary, decide the objection, settle the disputes or correct the mistakes, as

far as may be, by way of compromise between the parties appearing before him and pass orders on the basis of such compromise.

(4) All cases which are not disposed of by the Assistant Consolidation Officer under sub-section (3), all cases relating to valuation of plots and all cases relating to valuation of structures, tree, bamboo-clumps, well as or other improvements for calculating, the amount thereof, and its apportionment amongst co-owners, if there be more owners then one, shall be forwarded by the Assistant Consolidation Officer to the Consolidation Officer who shall dispose of the same in the matter prescribed.

(5) Where objections have been filed against the statement of principles under sub-section (3) of section 10, the Assistant Consolidation Officer, after affording opportunity of being heard to the parties concerned and after taking into consideration the view of the village Advisory Committee, shall dispose of the objections in the manner prescribed."

Section 11 provides for preparation of draft scheme. A draft scheme for consolidation of holdings has to be prepared as soon as may be, after the objections, if any, under section 10(2) have been disposed of. Section 12 requires publication of draft scheme and section 12A relates to disposal of objections. According to section 17A a raiyat shall have the same rights in the lands allotted to him in pursuance of the scheme of consolidation as he had in his original holding.

Ultimately the consolidation operations come to a close as provided under section 26A which provides that as soon as may be, after fresh maps and records have been prepared and certificates of transfer have been issued to the raiyats under the scheme, the State Government shall issue notification in the Official Gazette stating that the consolidation operations have been closed in the unit. Section 36 provides that except as provided in this Act, no appeal or revision shall lie from any order passed under this Act. Section 37 bars the Civil Courts to entertain any suit or application to vary or set aside any decision or order given or passed under this Act with respect to any other matter for which a proceeding could or ought to have been taken under this Act. Section 37A provides that notwithstanding anything to the contrary contained in any other law for the time being in force the officers acting under the provisions of this Act shall be deemed to be courts of competent jurisdiction while hearing objections or appeals or deciding disputes under this Act. They are vested with powers, rights and privileges while hearing any matter in dispute as are vested in the Civil Courts in respect of certain matters.

7. I have extracted some of the relevant provisions of this Act only with the purpose to show that this law has only brought about change in the procedure from a lethargic to a quick acting one. But the question regarding determination of title have been left to the consolidation courts. There is no dispute over this. In fact, in the case of *Ram Krit Singh v. The State of Bihar (1)* it was urged before a Special Bench that the Consolidation Officers had no judicial training and were ill equipped to decide

(1) (1979) BBCJ 259.

the question of title, which requires consideration of intricate questions of facts and law. On this ground the vires of the Act was challenged. But the Special Bench held that the law did not suffer from vice of discrimination merely because a special forum had been created to determine the rights of the parties. It was held that in order to achieve the objects of the legislation the Legislature in its wisdom and experience though that even the question of title should be decided by the authorities under the Act. From the provisions contained in Section 10, it is very clear that the Consolidation Officer "after hearing the persons interested and after such enquiries as may be necessary, decide the objection, settle the disputes or correct the mistakes", first by way of compromise between the parties. Where objections have been filed against the statement of principles under section 10(2) of the Act the Consolidation Officer after affording opportunity of being heard to the parties concerned and after taking into consideration the view of the Village Advisory Committee, shall submit his report to the Consolidation Officer who shall dispose of the objection in the manner prescribed.

8. Learned counsel appearing on behalf of the petitioners submitted that in the present case the Consolidation Officer has not decided the dispute at all. From the order passed by the Consolidation Officer in Annexure-1, which has been quoted above, it is apparent that the Consolidation Officer has failed to exercise his jurisdiction and has not made any effort to settle the dispute between the parties.

9. According to the Oxford English Dictionary Vol. III the word 'decision' means (1) the action of deciding (a contest, controversy, question); settlement, determination (b) the final and definite

result of examining a question; a conclusion, judgmentL one formally pronounced in a court of law. (2) The making up of one's mind on any point or on a course of action; a resolution, determination. In the case of *M/s Mahabir Prasad Santosh Kumar v. State of U.P. and others (1)* it was observed by Shail, J. as follows:-

> "Opportunity to a party interested in the dispute to present his case on questions of law as well as fact, ascertainiment of facts from materials before the Tribunal after disclosing the materials to the party against whom it is intended to use them, and adjudication by a reasoned judgment upon a finding of the facts in controversy and application of the law to the facts found, are attributes of even a quasi-judicial determination. It must appear not merely that the authority entrusted with quasi-judicial authority has reached a conclusion on the problem before him : it must appear that he has reached a conclusion which is according to law and just, and for ensuring that end he must record the ultimate mental process leading from the dispute to its solution. Satisfactory decision of a disputed claim may reached only if it be supported by the most cogent reasons that appeal to the authority. Recording of reasons in support of a decision on a disputed claim by a quasi-judicial authority ensures that the decision is reached according to law and is not the result of caprice, whim or fancy or reached on grounds of policy or expedience. A party to the dispute is ordinarily entitled to know the grounds on which the authority has rejected

(1) (1970) AIR (SC) 1302.

his claim. If the order is subject to appeal, the necessity to record reason the appellate authority has no material on which it may determine whether the facts were properly ascertained, the relevant law was correctly applied and the decision was just."

The authorities under the Act, who have been vested with powers to settle the questions regarding title and other disputes and who have replaced the Civil Courts are judicial authorities and must record reasons in support of a decision on any disputed claim. From the order passed by the Consolidation Officer in Annexure-1 it will appear that he has not acted in the manner in which a judicial authority is required to act. He has not decided the dispute between the parties and has failed to apply his mind. The order is most perfunctory. The order being subject to appeal the necessity to record reasons was greater. The said order has got to be set aside.

10. So far the order passed by the appellate authority in Annexure-2 is concerned it must be said that the appellate authority has also failed to decide the issues involved in the case. After having found that there was no partition in the family in the year 1930., which was the case of respondent no. 6, there could be no reason for holding that the partition might have taken place between the year 1954 and 1969 inasmuch as it was nobody's case. In any event he was not only to partition the joint holdings as envisaged under section 8A of the Act but was also required to decide the question regarding the respective title of the parties in respect of the other holdings recorded in separate names. In a case of this nature the Consolidation authorities are required to decide whether there was an earlier partition and if the conclusion is that there

was no earlier partition and the family remained joint then to decide whether any holding recorded in the name of an individual member of the family was a joint family property or a separate acquisition of that person. Neither the appellate nor the revisional authority have tried to decide the present dispute in this manner. The appellate and the revisional orders contained in Annexures 2 and 3 are, therefore, fit to be quashed and set aside.

11. The result is that this application succeeds and the orders contained in Annexures-1, 2 and 3 are quashed. The matter is sent back to the Consolidation Officer, respondent no.2 to consider the entire matter afresh after hearing the parties and affording them reasonable opportunities to lead further evidence, if necessary, in the light of the observations made above. There shall be no order as to costs.

M.K.C. Application allowed.

REVISIONAL CIVIL

1985/March, 25.

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

*Dr. Kedar Nath Sinha**

v.

Shri Dwarika Nath Sinha and others.

Code of Civil Procedure, 1908 (Act V of 1908)—*Scheme of—preliminary decree passed in a partition suit—preceding for final decree—pendency of—parties entering into compromise—final decree passed on the basis of compromise—party, whether debarred from executing final compromise decree.*

On the basis of a compromise final decree a party is entitled to execute the final decree for the purpose of getting delivery of possession. If delivery of possession is not effected, then the final decree remains inexecutable. It is the scheme of the Code of Civil Procedure that the final decree passed in a partition suit must be executed. In the present case, a preliminary decree was passed. During the pendency of the proceeding of the final decree, the parties had entered into a compromise. A final decree was passed on the basis of the compromise. Thereafter the final decree was put into execution.

Held, therefore, that a party is entitled to get delivery of possession on the basis of the final

* Civil Revision No. 582 of 1981. Against the order of Mr. Moti Ram, Subordinate Judge, Siwan, dated 9th April, 1981.

decree. Merely because the parties had entered into a compromise during the pendency of the preparation of the final decree, it will not debar a party from executing the final compromise decree and as such the court below erred in law in holding that the final decree is inexecutable.

Meghraj Sah v. Rajbansi Lal and others (1)-distinguished.

Application by the petitioner.

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

Messrs K.D. Chatterji, Ajit Kumar and Naresh Chandra Verma for the petitioner

Messrs Gyan Sudha Mishra, Mridula Mishra and Prem Kumar Jha for the opposite party no. 1

Mr. Lala Sachindra Kumar for opposite party nos. 2 and 6.

B.P.Jha, J. In this civil revision petition, the petitioner has challenged the latter portion of the order dated 9th April, 1981, passed by the Subordinate Judge, Siwan, in Execution Case No. 12 of 1979.

2. By the latter portion of the impugned order, the Court below is of opinion that the decree is inexecutable. The Court below is of the view that as the parties have compromised the suit, the decree can not be executed.

3. This matter arises out of a final decree passed in a partition suit. By virtue of the preliminary decree, the petitioner was given one-third share in the suit properties. Partition suit No. 524 of 1972 was filed by the plaintiff-opposite party no. 1 for partition of the joint family properties

(1) (1958) AIR (Pat.) 546.

between the three sons of Braj Kumar Sahay. The three sons are Dr. Ayodhya Nath Sinha, Dwarika Nath Sinha (the plaintiff opposite party no. 1) and Dr. Kedar Nath Sinha (the petitioner). Therefore, each brother got one-third share in the suit properties. After the passing of the preliminary decree and during the pendency of the preparation for final decree, the parties entered into a compromise and the final decree was passed in terms of the compromise. The parties could not get delivery of possession according to the terms of the compromise and as such the petitioner levied Execution Case No. 12 of 1979 in the Court of the Subordinate Judge, Siwan, and prayed for delivery of possession. The partitioner deposited Rs.200/- as commissioner's fee for effecting delivery of possession in pursuance of the direction of the Court on 12.2.1981. By the impugned order, the Court below refused to recall the order dated 12.2.1981. Later on, by the impugned order, the Court below held that the decree was inexecutable on the ground that the parties had entered into compromise. It is against this part of the order that this civil revision petition has been filed by the petitioner before this Court.

4. In this case, a preliminary decree was passed granting one- third share to each of the three brothers, including the petitioner. Even if a compromise is entered into between the parties during the pendency of the proceeding for the preparation of the final decree, the parties are entitled to get delivery of possession over one-third share as mentioned in the final decree. The Court below was right in appointing a pleader commissioner by an order dated 12.2.1981 to provide separate share to each party. This order has not been recalled by the impugned order. Even if a

compromise is entered into between the parties, the parties are entitled to get delivery of possession over the suit properties. Even if a preliminary decree is passed in a suit on the basis of a compromise, the parties are entitled to execute a final decree. On the basis of a compromise final decree, a party is entitled to execute the final decree for the purose of getting delivery of posession. If delivery of possession is not effected, then the final decree remains inexecutable. It is the scheme of the Code of Civil Procedure that a final decree passed in a partition suit must be executed. In this view of the matter, I hold that the Court below erred in law in holding that the final decree is inexecutable. By entering into a compromise, the parties are not debarred from executing the final decree and in getting delivery of possession over the suit properties.

5. In this connection the Court below relied on a decision in *Meghraj Sah v. Rajbansi Lal and others(1)*. In that case it has been held that a declaratory decree, which merely declares the rights of the parties and does not direct any act to be done, is incapable of execution. So far as the present case is concerned, it is distinguishable and the decision in the case of *Meghraj Sah v. Rajbansi Lal and others (supra)* does not apply to the present case. In the present case, a preliminary decree was passed by which one-third share was allotted to each of the three brothers. On the basis of a preliminary decree, final decree is prepared. Thereafter the final decree is put into execution. In execution a pleader commissioner is appointed for allotment of separate share to each party.

(1) (1958) AIR (Pat.) 546.

Thereafter delivery of possession in given to each party by the Court. In the present case, a preliminary decree was passed. During the pendency of he proceeding of the final decree, the parties had entered into a compromise. A final decree was passed on the basis of the compromise. Thereafter the final decree was put into execution. A party is entitled to get delivery of possession on the basis of the final decree. Merely because the parties had entered into a compromise during the pendency of the preparation of the final decree, it will not debar a party from executing the final compromise decree.

6. By an order dated 12.2.1981, the Court below had appointed a pleader commissioner. The pleader commissioner should prepare separte share of each party on the basis of the final decree.

7. In *Meghraj Sah v. Rajbansi Lal and others(1)* there was a compromise decree and the parties merely agreed to a declaration of the right, title and interest of the plaintiff in the disputed land. The decree did not mention about the execution of the decree. That being so, it was held that the compromise decree was not executable at all and a regular suit was the only method of enforcement of such rights. That is not the position in the present case. In the present case, a final decree was passed on the basis of a compromise and hence the final decree must be executed under the Code of Civil Procedure. I, therefore, hold that the decision made in Meghraj Sah v Rajbansi Lal and others (1) does not apply to the present case and, therefore, the Court below erred in law in relying on that decision.

8. In my opinion, the Court below failed to

(1) (1958) AIR (Pat.) 546.

exercise the jurisdiction which was vested in it by law. Hence I set aside the latter portion of the order dated 9.4.1981 passed in Execution Case No. 12 of 1981 and remand the matter for proceeding with the Execution case on the basis of the directions given above. The parties shall bear their own costs.

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

M.K.C. Case remanded.

REVISIONAL CIVIL

1985/March, 26.

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

*Ram Swarup Chaudhary**

v.

Maujalal Rai.

Code of Civil Procedure, 1908 (Act V of 1908) *as amended in 1976, section 115(2)—High Court's Jurisdiction under section 115 whether barred in cases in which the appeal lies to the High Court or to the subordinate court.*

Held, that in view of the provisions of sub-section 2 of section 115 of the Code of Civil Procedure having been added by the amendment of 1976, there is no manner of doubt that the High Court's Jurisdiction under section 115 of the Code of Civil Procedure is barred in cases in which the appeal lies whether to this court or to the court of District Judge, which is subordinate court.

Application by the plaintiff.

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

Mr. Ram Janam Maharaj for the petitioner

No one for the opposite party.

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* Civil Revision No. 231 of 1980. Against the order dated 19.11.1979 passed by Shri E.Raza, Subordinate Judge, Darbhanga.

Lalit Mohan Sharma, J. The plaintiff-petitioner filed a suit for a money decree for Rs. 5440/- against the defendant-opposite party on the allegation that the plaintiff had advanced a sum of Rs. 4000/- to the defendant in 1973 on the basis of a promissory note. The trial court has accepted the plaintiff's case, but dismissed the suit on the ground of non-compliance of the provisions of section 7(5) of the Bihar Money Lenders Act, 1974 (hereinafter referred to as 'the Act').

2. The petitioner has filed this revision application on the ground that the provisions of the Act are not applicable to the present case as the Act was not in operation when the loan was advanced. After the suit was dismissed in the trial court, the plaintiff ought to have filed an appeal before the District Judge which he has not done. The question, therefore, arises as to whether this civil revision application is maintainable.

3. Mr. Ram Janam Maharaj, appearing in support of the application, contended that since the appeal did not lie against the impugned judgment before this Court, it is open to this Court to exercise revisional jurisdiction in appropriate cases. The learned counsel also relied on certain decisions which interpreted the section 115 of the Code of Civil Procedure before the amendment of 1976 adding sub-section (2) which reads as follows:-

> "(2) The High Court shall not, under this section, vary or reverse any decree or under against which an appeal lies either to the High Court or to any Court subordinate thereto."

The earlier decisions are, therefore, not helpful to the petitioner. In view of the added provisions quoted above, there is no manner of doubt that the High Court's jurisdiction under section 115 of the

Code of Civil Procedure is barred in cases in which the appeal lies whether to this Court or to the Court of a District Judge, which is a subordinate Court.

4. In the result, this revision application is held to be not maintainable and is dismissed. If so advised, the petitioner may file an appeal before the District Judge with a prayer for condonation of delay.

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

S.P.J. Application dismissed.

CIVIL WRIT JURISDICTION

1985/May, 1.

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

*Shaikh Gajar**

v.

The State of Bihar and others.

Bihar Land Reforms Act, 1950 (Act XXX of 1950), *Sections 6 and 8 read with Bihar Land Reforms Rules, 1951, rule 8—Scope and applicability of—section 8 and rule 8, whether contemplate a second appeal from the appellate order—proceeding under section 6—nature of.*

The proceeding under section 6 of the Act is judicial in nature in which rival claims of the litigating parties are determined and unless the law vested in the authority to interfere with the order passed in the proceeding the power in this regard cannot be assumed merely for the reason that a particular authority is an officer subordinate to him. Both section 8 of the Actand rule 8 of the Rules deal with one appeal directed against the criminal order under section 6. They do not contemplate a second appeal from the appellate order.

Held, therefore, that in the instant case having regard to the provision of the Act and the Rules the commissioner has no jurisdiction either revisional or

* Civil Writ Jurisdiction Case no. 2948 of 1979. In the matter of an application under Articles 226 and 227 of the Constitution of India.

otherwise to interfere with an order passed in appeal under section 8 of the Act.

Baldeo Prasad Sah v. Commissioner of Bhagalpur Division (1)- referred to.

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

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

Mr. Md. Khaleel for the petitioner

M/s. Kamlapati Singh (G.P.V) and Ishwari Singh (J.C.) for the State

Mr. Syed Arshad Alam for the repondent no. 5.

Lalit Mohan Sharma, J. - The petitioner and the respondent no. 5 are rival claimants for a piece of land detailed in this writ application. After the vesting of the zamindari in the State of Bihar under the provisions of the Bihar Land Reforms Act, 1950, the respondent no. 5 made an application before the Anchal Adhikari, the respondent no. 4, under section 6 of the Act for fixation of rent. The prayer was allowed. When the petitioner learnt about it, he moved the Collector, Motihari, in appeal. The impugned order was set aside and the matter was remanded for fresh consideration by the Anchal Adhikari who once more decided the dispute in favour of the respondents. The petitioner then filed another appeal before the Collector which was ultimately heard by the Additional Collector, respondent no. 3, and was allowed in part. The respondent no. 5 filed an appeal before the Collector against the decision of the Additional Collector which was dismissed as not maintainable. Thereafer, he preferred an appeal before the Commissioner, the respondent no. 2 who has by the

(1) (1960) BLJR 19.

impugned order in Annexure 1 set aside the order of the Additional Collector and restored the order of the Anchal Adhikari.

2. Mr. Khalil has contended that in view of the provisions of section 8 of the Act, the second appeal before the Commissioner was not maintainable and the order passed by the Additional Collector in exercise of the appellate power was final and not subject to any notification by the Commissioner.

3. The case of the petitioner is that the disputed land was recorded in the name of his father as Brit Lakheraj and after vesting of the zamindari it must be deemed to have been settled with him under section 6 of the Act as he was in khas possession. The orders were passed by the Anchal Adhikari after an enquiry under section 6(2) of the Act. The section 8 which is in the following terms provided an appeal against the order:

> "8. Appeal against Collector's order under section 5, 6 or 7. An appeal against any order of the Collector under sub-section (2) of section 5, or section 6 or section 7, if preferred within sixty days of such order, shall lie to the prescribed authority not below the rank of an Additional Collector who shall dispose of the appeal according to the prescribed procedure."

The Act does not provide for any further appeal or revision and the section 35 bars even a suit. The rule 8 of the Bihar Land Reforms Rules, 1951 made under section 43 of the Act states that an appeal against an order under section 6 shall, if the order is passed by an officer below the rank of an Additional Collector, lie to the Additional Collector if passed by an Additional Collector, then to the Collector of the district, and if passed by the

Collector of a district, to the Commissioner of the division. Both the section 8 and the rule 8 deal with one appeal directed against the original order under section 6. They do not contemplate a second appeal from the appellate order. The Collector, therefore, was right in rejecting the appeal preferred before him against the decision of the Additional Collector (passed in appeal from the decision of the Anchal Adhikari) as not maintainable. For the same reason, it must further be held that the appeal before the Commissioner was also not maintainable.

4. The proceeding under section 6 of the Act is judicial in nature in which rival claims of the litigating parties are determined and unless the law vested in the Commissioner authority to interfere with the orders passed in the proceeding, the power in this regard cannot be assumed merely for the reason that the Collector is an officer subordinate to the Commissioner. Having regard to the provisions of the Land Reforms Act and the rules, it must be held that the Commissioner has no jurisdiction either revisional or otherwise to interfere with an order passed in appeal under section 8 of the Act. In *Baldeo Prasad Sah v. Commissioner of Bhagalpur Division (1)* it was observed tht there is no authority given to the Commissioner either within the frame work of the Bihar Land Reforms Act or under the provisions of any of the rules framed under this Act to revise a judgment of the Collector made under section 6(2) of the Bihar Land Reforms Act. I, therefore, hold that the Commissioner had no jurisdiction to interfere with the order of the Additional Collector. Accordingly, Annexure 1 is quashed and the writ application is allowed, but

(1) (1960) BLJR 19.

without costs.

M.P. Verma, J. - I fully agree with all that has been said by my learned brother. It is very clear that unless the law confers powers on the Commissioner, he is not supposed to interfere on the assumption that the order in dispute was decided by an authority subordinate to him administratively. It was a judicial proceeding and the Anchal Adhikari exercised his jurisdiction under section 6 of the Bihar Land Reforms Act (hereinafter referred to as 'the Act') against which there is provision of appeal, as laid down under section 8 of the Act. It has, therefore, been rightly held that in judicial proceeding under the provisions of the Act, Commissioner has no authority to sit in a second appeal, made before him by the party. Appeal lies to the Commissioner of the Division only in case if the order is passed by the Collector of the district under the said Division and not otherwise. The application has, therefore, been rightly allowed.

M.K.C. Application allowed.

TAX CASE

1985/May,17.

Before Uday Sinha & Nazir Ahmad, JJ.

*Commissioner of Income-tax, Bihar, Patna**

v.

Bishwanath Roy

Assessee—*leasing out his colliery to contractor, whether lease of colliery business itself and not only of Commercial assets—income of the assessee, whether income from other sources.*

There the assessee leased out his colliery to the managing contractor;

Held, that the lease was the lease of colliery business itself and not merely of the commercial assets. The assessee had no concern with the business of colliery.

Held, further, that the income of the assessee under the lease could not, therefore, be treated as income from 'business'. It had to be treated as income from 'other sources'.

New Savan Sugar and Gur Refining Co. Ltd. v.

Tax case Nos. 106 and 107 of 1976. Re : Statement of case under section 256(1) of the Income-tax Act, 1961 by the Income tax Appellate Tribunal, 'B' Bench, Patna in the matter of assessment of income-tax on Bishwanath Roy for the assessment years 1968-69 and 1969-70.

C.I.T., Calcutta, (1) and M/s. Khas Benedih Colliery, Dhanbad v. Commissioner of Income-tax, Bihar, Patna (2)-followed.

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

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

Messrs B.P. Rajgarhia, Sr. S.C., ITD and S.K. Sharan, JC to Sr. S.C. ITD. for the petitioner

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

Uday Sinha, J: The assessee in these two references under section 256(1) of the Income-tax Act, 1961 had been assessed as being individual. The assessment years are 1968-69 and 1969-70. The assessee was owner of Ganeshdih Colliery. It was leased out to Prabhulal Agrawal and Magilal Sharma. The assessee returned an income of Rs. 34,533/- from business. In view of the lease in favour of Managing Contractor, the claim of income from bsiness was rejected by the Income-tax Officer and they were held to be income from "other sources'. His view was affirmed by the Appellate Assistant Commissioner as well - both the authorities relying upon New Savan Sugar and Gur Refining Co. Ltd. V. C.I.T., Calcutta (1). The Appellate Tribunal, however, took a different view of the matter and accepted the claim of the assessee. The Trjbunal recorded its conclusions in one short paragraph which may be re-produced here:

> "6. This issue came before the Tribunal I.T.A. Nos. 529 and 530 (Pat) of 1967-68 in assessee's own case for the assessment years

(1) (1974) ITR, 7

(2) (1974) BBCJ, 440

(3) (1974) ITR 7.

1964-65 and 1965-66 where the Tribunal held that the income of the assessee that was received from the managing contractors was assessable under the head business and not from other sources. The Punjab High Court also in the case of Nauharchan-Chananrama v. C.I.T. (82 ITR 189) has expressed the same view. This being the position we hold that the income of the assessee is assessable under the head business and not from other sources."

The appeal of the assessee was thus allowed by the Tribunal. At the instance of the Commissioner of Income-tax a consolidated reference has been made to this Court. The question of law referred to us reads as under:

"Whether on the facts and in the circumstances of this case the Tribunal were correct in law in holding that the income derived by the assessee was taxable under the head 'Business' and not under the head 'Other sources' ?"

2. The facts, stated above, appear from the statement of the case transmitted to this Court as well as from Annexure-A, B, C, D and E to the statement of the case.

3. I have quoted earlier the preasons for which it was held that the assessee's income had to be treated as income from business. Paragraph 6 itself of the order of the Tribunal quoted above shows that it was so held for two reasons. Firstly, that is the assessment years 1964-65 and 1965-66 the Tribunal had held that the income of the assessees received from managing contractors was assessable as 'business' and not from 'other sources'. The second ground was that the Punjab High Court in Naubar

Chand Chanan Ram v. C.I.T. Punjab : 82 I.T.R. 189 had expressed the view that income from the lease of the kind with which we are concerned must be treated as income from 'business'. The Tribunal thus gave its judgment following the decision of Punjab and Haryana High Court. The short answer is that the decision of the Punjab and Haryana High Court has been disapproved by this Court in *M/s Khas Benedih Colliery, Dhanbad v. Commissioner of Income- tax, Bihar, Patna (1).* The Tribunal, therefore, erred in the view it took relying upon the case of *Nauhar Chand Chanan Ram (supra).*

4. The ground that in earlier assessment years the Tribunal had held such an income as income from business is untenable for the reason that the principle of Res Judicata has no application to tax cases. Both the grounds putforth by the Tribunal are, therefore, unsound. The decision of the Tribunal was thus based upon fallacious grounds.

5. The assessee having granted to a Managing Contractor was entitled only to rent/royalty. I have had the occasion to examine the deed creating lease in favour of Managing Contractors in the case of *M/s Khas Benedih Colliery (supra)* and 102 I.T.R.437: Commissioner of Income-tax, Bihar v. S.K. Sahana and Sons as also in Tax Case Nos. 85 to 90 of 1976 : The *Commissioner of Income- tax, Bihar, Patna versus M/S Kuya and Khan Kuya Colliery Co., Jharia* which have been disposed of today. I have not the least doubt that by executing a lease in favour of Managing Contractor the lessor/contractor/ managing Agent completely disassociates himself, from the business. Nothing was brought on the record in this case to show that the assessee had retained control over the business of the Colliery.

(1) (1974) BBCJ 440.

The Income-tax Officer observed in his order that after handing over the colliery, the assessee ceased to carry on mining business. This finding was not challenged by the assessee in appeal before Appellate Assistant Commissioner nor did the Tribunal hold that the assessee had not disassociated himself from the business. I have, therefore, no difficulty in holding that the lease was the lease of the colloery business itself and not merely of commercial assets. Thus relying upon the cases of *New Savan Sugar and Gur Refining Co. Ltd. (supra) and M/s Khas Benedih Colliery (supra)*, I am definitely of the view that the assessee had no concern with the business of the colliery. The income of the assessee under the lease could not, therefore, be treated as income from business. It had to be treated as income from other sources. The Tribunal grievously erred in the view it took in the matter.

6. For the reasons, stated above, I am definitely of the view that the Tribunal was not correct in holding that the income derived by the assessee was taxable under the head 'business' and not under the head 'other sources'. The question referred to this Court must, therefore, be answered in favour of the Revenue and against the assessee. The reference is thus disposed of with costs. Hearing fee Rs. 250/- payable by the assessee to the Revenue. Nazir Ahmad, J: I agree.

R.D. Question answered.

TAX CASE

1985/May, 17.

Before Uday Sinha and Nazir Ahmad, JJ.

*Commissioner of Income-tax, Bihar, Patna**

v.

M/s Kuya and Khas Kuya Colliery Co., Jharia.

Assessee, a partnership firm—leasing the business of the Colliery to managing contractor—whether lease of the entire business and not only the commercial assets—income of the assessee, whether income from 'other sources'—registration of the partnership firm of the assessee, whether could be continued.

Where the partnership firm granted lease of the business of the colliery to the Managing Contractor and all that was left with the proprietors was the guaranteed income and royalty on raisings and despatches of coal, the assessee having neither control over the business nor stake in the liability or profit;

Held, that the transaction did not involve lease of only commercial assets, but it was a lease of entire business.

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* Tax Case Nos. 85 to 90 of 1976. Re: Statement of the case by the Income-tax Appellate Tribunal, Patna, 'A' Bench, Patna in the matter of assessment of income-tax on M/s Kuya and Khas Kuya Colliery Co., Jharia for the the assessment years 1967-68 to 1969-70, dated 29.4.1975.

Held, further, that the income of the assessee must be assessed as income from 'other sources' and not income from 'business'.

Held, also, that there can not be a partnership without business. There being no partnership, the registration of the firm could not have been continued.

New Savan Sugar and Gur Refining Co. Ltd. v. C.I.T. Calcutta (1) and M/s Khas Benedih Colliery, Dhanbad v. Commissioner of Income-tax, Bihar, Patna (2)-followed.

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

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

Messrs B.P. Rajgarhia (Sr.S.C.I.T.D.) and S.K. Sharan (J.C. to S.S.C.I.T.D.) for the petitioner

Messrs K.N. Jain, Shambhu Saran and V.D. Narayan for the opposite party.

U.Daya Sinha, J: These are six references under section 256(1) of the Income-tax Act, 1961 on the following questions of law:

> "(1) Whether on the facts and in the circumstances of this case the Tribunal were correct in law in holding that the income received from the managing contractor by leasing out the colliery was a business income?
>
> (2) Whether on the facts and in the circumstances of this case the Tribunal were correct in law in allowing continuation of registration to the firm ?

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(1) (1974) I.T.R., 7

(2) (1974) BBCJ 440.

The assessee is a partnership firm, constituted by deed of partnership dated 2.1.1963, consisting of P.K. Agrawal, D.K. Agrawal and J.K. Agrawal as partners. Extraction and winning of coal was the business of the firm. By an agreement dated 26.4.1985 the partners leased out the colliery to M/s Kuya Colliery (P) Ltd., Calcutta with effect from 5.4.1965. Till assessment year 1966-67 the income of the firm was assessed under the head 'business'. For the assessment year 1967-68 also the partnership firm filed return showing income from colliery as income from 'business'. Along with the return the assessee filed an application under section 184(7) of the Income-tax Act. The Income-tax Officer (hereinafter called 'the I.T.O.') held that consequent upon the execution of the agreement of April, 1965, the income of the firm had ceased to be income from 'business' and was assessable under the head 'other sources' and not under the head 'business'. In his view - the agreement of April, 1965 created a sub-lease in favour of the Managing Contractor. The assessee had, therefore, ceased to do business in colliery operations. The stand of the assessee was that its income was liable to be assessed under the head 'income from business' under section 28 of the Income-tax Act. The I.T.O. rejected the application of the assessee under section 184(7) of the Act to be treated as a firm and assessed it as unregistered firm. The assessee filed appeal against the rejection of his appliation for continuation of registration of the firm as also against the assessment orders. The ground common to both sets of appeals was that the partnership was entitled to be registered as firm and its income to be treated as income from business. In the appeal against assessment and the refusal to continue the registration of the firm under section

184(7), the Appellate Assistant Commissioner (hereinafter called 'the A.A.C.') accepted the stnd of the assessee and allowed the appeals. The Department went up in appeal before the Income-tax Appellate Tribunal, Patna against the assessment orders as also against the orders allowing continuation of registration of the firm. The six appeals were disposed of by the Tribunal by a common judgment. The Tribunal concurred with the view of the A.A.C.,and thus dismissed all the appeals. On being asked by the Department to refer a case, the Tribunal has stated it and referred the questions of law, mentioned above, for determination by this Court.

2. The questions referred to us for our opinion have to be answered on the ratio of the decision of the Supreme Court in *New Savan Sugar and Gur Refining Co. Ltd. v. C.I.T., Calcutta (1)*. That decision was followed by Untwalia C.J. (as he then was) and N.P.Singh, J. In *M/s Khas Benedih Colliery, Dhanbad v. Commissioner of Income-tax, Bihar, Patna (2)*. A discordant note was struck by S.K.Jha, J. - to which N.L. Untwalia, C.J. (as he then was) was also a party in *Commissioner of Income-tax, Bihar v. S.K. Sahana and Sons (3)*. In the view of S.K.Jha, J, the *New Savan Sugar and Gur Refining Co. Ltd.'s case (supra)* was decided on facts different from the facts of the case of *S.K. Sahana and Sons' case (supra)*.

3. There can be no doctrinaire approach to the question posed before this Court. The question as to whether an income can be treated as income from business or not will have to be determined in the

(1) 74 ITR 7

(2) (1974) BBCJ 440

(3) 102 ITR 437.

light of the nature of the transaction evidence by the terms of the agreement. The Tribunal was of the view that the continuation of registration had nothing to do with the leasing out of the colliery and, therefore, following a decision of the *Punjab High Court in Nauharchand Chanaanram v. Commissioner of Income-tax, Punjab (2)* it held that despite leasing out the colliery, the firm was carrying on 'business'. The view of the Punjab High Court was not approved by the Division Bench of this Court in the case of *M/s Khas Benedih Colliery, Dhanbad (supra)* in paragraph 5. I can do no better than to quote the observations of Untwalia, C.J. (as he then was). His Lordship observed as follows:

> "5. Learned counsel for the assessee then submitted on the basis of some observations of the Punjab High Court in the case of *Nauharchand Chananram v. Commissioner of Income Tax, Punjab (82 I.T.R. 189)* that it mattered little whether the partnership was for the purpose of earning profit within the meaning of section 10 of the Income Tax Act, 1922 corresponding to section 28 of the Act or whether it was deriving income from some other sources under section 12 of the old Act, corresponding to section 56 of the Act. In my opinion, this argument is in the teeth of the definition of 'partnership' given in section 4 of the Indian Partnership Act, 1932, as also against various forms prescribed for applying for registration or for filing of declarations. It is also against the decision of the Calcutta High Court, which I respectuflly agree in the case of *Sunil Krishna Paul v. Commissioner of Income-tax (69 I.T.R. 457)*".

(1) 82 ITR 189

From the above it is obvious that the reliance placed by the *Tribunal on the case of Nauharchand Chananram (supra)* was misplaced. If a firm is not carrying on business, it cannot be a partnership, for partnership is a relation between persons who have agreed to share profits of a business. The crucial question, therefore, is whether the partnership firm of the assessee was carrying on business even after the colliery had been leased out to a Managing Contractor. On the authority of Supreme Court case in *New Savan Sugar and Gur Refining Co. Ltd. (supra)* and *Commissioner of Excess Profit Tax v. Lakshmi Silk Mills (1)* it must be held that letting out of business as a whole is distinct from letting out commercial assets of the firm. If the business as a whole is let out, the income (i.e. the rent) would not be liable to be assessed as income from business. If only the commercial assets are leased out, the income would continue to be income from business. In the instant case, whether the agreement created a lease of the colliery itself and thereby lease of the business itself or whether it was a lease of only commercial assets has to be decided. The question at issue can be resolved only by looking at the terms of the agreement. The agreement nd the Power of Attorney executed in favour of the lessee were not only the record, but Mr. K.N.Jain for the assessee has filed copies thereof to make out his point that the lease was not of the colliery itself, but was a lease only of commercial assets. Correctness of the deed is not challenged on the basis of the said deed to resolve the point at issue.

4. As I said earlier, Chief Justice Untwalia in the case of *M/s Khas Benedih Colliery (supra)* held

(1) 20 ITR 451.

that the agreement spelt out in sub-lease although in form it was a deed of Agency. The income of the assessee in that case was held to be income from 'other sources' and not from 'business'. The correctness of that decision has not been doubted. It would, therefore, be useful to take note of the similarity of the terms in the agreement in that case with those in the instant case. A copy of the agreement of the *Khas Benedih Colliery case (supra)* was available in the paper book of that case which we called for our perusal. The copy of the agreement of the instant case under consideration before us was not on the record, but learned counsel for the assessee placed it on record. Learned Senior Standing Counsel had no objection to the agreement being placed on record and being treated as part thereof.

5. The salient aspects of the agreement in the Khas Benedih Colliery were the following:

(i) The Proprietor described the Second Party as 'The Agent'.

(ii) The Principals or Proprietor appointed the Agent for carrying on the colliery works and coal business of the Khas Benedih colliery.

(iii) The Agent was authorised to take charge of the colliery, coal land, surface lands, quarries, inclines machinery, colliery sidings, buildings, offices, bungalows, dhowrahs, structures, tools, plants, fixtures, furniture etc. During the terms of the Agency the Agent was to have full charge and control over the mines, quarries, inclines etc. of the colliery as also of its development and work in raising, despatching and selling of coal

and coke *without any hinderance, interference, interruption or objection whatsoever on the part of the principals.*

(iv) The Agent was to carry on the colliery works and the coal business by investing his own finance and the principals were not to be called upon to provide for any finance for the business.

(v) The Agent had full liberty to purchase new machineries and instal the same in the colliery and to electrify the mine. The Agent was empowered to appoint staff and employees and labour including a qualified Mine Manager, the salaries and remuneration for which had to be paid by the Agent and not the Principals. The Agent was given full power and right to discharge and dispense with the services of any employee including the Manager. All liabilities of the colliery of any nature including Provident Fund, Bonus were to be paid by the Agent and not the Principals.

(vi) The *Principals had no right to interfere in any way with the running, management, working raising and despatching of coal by rail or road.*

(vii) The Agent was liable to pay all Government dues and dues of local authorities. *The Principals would incur no liability on those accounts.*

(viii) The Agent had to keep in deposit with the Principals a sum of Rs. 25,000/- by way of security deposit. The deposit would ber no interest and would be adjusted at Rs. 3571.42 annually for

seven years.

(ix) The Agent was enjoined to pay to the Principals *their share of profit and guaranteed* profit of the colliery.

(a) Rs. 1.50 per tonne on all coal raised and despatched from the colliery or sold locally.

(b) Rs. 1.50 per tonne on all soft coke made and despatched from the colliery or sold locally.

Provided always that the aforesaid payments and Rs. 2.50 per tonne on all hard coke manufactured and despatched from the colliery or sold locally was subject to a minimum payment of Rs. 25,200/- per year. In the case of profit on the basis of Rs. 1.50 on coal and soft coke and Rs. 2.50 on hard coke fell short of Rs. 25,200/- in any particular year or years, the Principals would be entitled to get from the Agent Rs. 25,200/- for the year or years in which the profit calculated at the abovementioned rates per tonne of coal or coke despatched fell short of the aforesaid amount. The aforesaid minimum guaranteed amount of Rs. 25,200/- per year was payable in twelve equal instalments by the 15th day of the next following month.

(x) At the end of each calendar year accounting was to be done between the Principals and the Agent for determining the amount of profit and guaranteed profit payable by the Agent to the Principals. If on accounting, it was found

that the share of profit calculated on the above basis exceeded the minimum guaranteed amount, the balance would be paid by the Agent within two months from the date of ccounting. If, on the other hand, it fell short of the minimum guaranteed amount already paid by the Agent to the Principals, the Agent was not required to pay further amount towards the guaranteed profit or profits.

(xi) The Principals or their Representative would be at liberty to stay in the entire portion of the Proprietor's bungalow and the Agent was to provide all facilities including supply of free electricity or water for their stay there.

(xii) The Principals had executed and registered a General Power of Attorney in favour of the Agent.

(xiii) By the Power of Attorney the Agent was authorised to operate the Bank accounts in the name and style of "Khas Benedih Colliery". Any cheque or Pay order of Khas Benedih Colliery received by the Principals had to be forthwith handed over to the Agent.

(xiv) The Agent was bound to enter or cause to be entered in proper books of accounts the true and correct statements of raisings and despatches of col and was to offer all such account books and statements to the Principals for inspection during all reasonable hours.

(xv) The agreement could not be terminated within three years from the date of agreement.

(xvi) The Principals were enjoined not to sell, transfer or mortgage or in any manner part with the Colliery or allow or suffer it to be sold in any legal proceedings.

(xvii) The Agent was entitled to construct buildings, etc. *at his own expense.*

(xviii) The Principals or their nominee were entitled to have three tons of steam coal per month at the colliery for their use.

(xix) In cae of any accident in the mining operation carried on by the Agent, the Principals would not in any circumstance be liable for the effects thereof.

(xx) The Agent undertook to forward to the Principals three copies of monthly statements of raisings and despatches of all coal and coke from the colliery each month.

(xxi) The Agent was required to submit to the Principals a clearance certificate quarterly showing clearance and paying up all Government and other dues.

(xxii) Principals had the right to inspect any underground and surface work with a duly qualified Mining Engineer after giving prior information the Agent.

6. From the above it will be seen that although the Second Party was described as 'Agent', yet it was held to be a 'Contractor'. C.J. Untwalia held that the use of the words 'Principal' or 'Agent' throughout the deed was a misnomer. Another aspect worthy of note is that the lessee had to pay to the principals certain sums which were described as profit and guaranteed profit. They were held to be fixed incomes payable by the Agent/Contractor to the Principals and not profits of the business. They

were treated as rent for leasing out the business. The Principal was entitled to reside in the bungalow of the colliery. Second Party was obliged to let him have the benefit of water and electricity. The lessee was required to deliver three tons of steam coal to the Principals every month. The Agent was required to maintain accounts and make it available to the Principals for inspection. The Principals had the right to inspect any underground and surface work and yet Untwalia, C.J. (as he then was) held that the dominant object of the lease was not to grant a lease of the commercial assets, retaining some business activities with the lessor, but grant a sub-lease of the colliery business.

7. Let us now consider how much similar are the nature of the terms of the lease in the instant case to those of *M/s Khas Benedih Colliery case (supra)*.

(i) The assessee has been described as 'Proprietors' and the Second Party to the deed as 'Managing Contractor'.

(ii) The agreement was to last for ten years. Managing Contrctor was given full power and authority to search for, get quarry, win and dig coal by all accepted and recognised mode of coal mining.

(iii) The Managing Contractor was entitled at its *own cost* to instal such machinery and to bring such chattles and utensils at the colliery as he may in his discretion think fit and proper for the purpose of working of the colliery.

(iv) The Managing Contractor was given the right, *but at its own cost* to build on any portion of the surface land of the colliery as he may think fit.

(v) During the term of agreement the business of the colliery had to be carried on by the Managing

Contractor in the name of the said firm M/s Kuya and Khas Kuya Colliery Co. under which name and style it was being worked prior to the agreement.

(vi) All costs, charges and expenses for working of the colliery and for *carrying on the said business* had to be borne and paid by the Managing Contractor. The contractor was bound to indemnify and keep indemnified the Proprietors and their estates.

(vii) All coal raised and coke manufactured at the colliery was to be treated as the property of the Managing Contractor who was entitled to sell or otherwise dispose of the same for its own absolute use and benefit.

(viii) Managing Contractor was entitled to sell and dispose of all coal raised and coke manufactured to such party as the Managing Contractor thought fit. The Contrctor, however, was enjoined that delivery in respect of all sales of coal must be made by Railways and not otherwise.

(ix) The contractor was entitled to endorse or negotiate any cheques that may be drawn in favour of the Proprietors or their firm.

(x) The Proprietors undertook to execute in favour of the Managing Contractor or its nominee an irrevocable Power of Attorney for the purpose of working and managing the colliery and the Managing Contractor undertook to indemnify the Proprietors and the firm against all losses, damages and expenses of suits.

(xi) In the event of the Proprietors receiving any money or cheques drawn in their favour or the firm Kuya and Khas Kuya Colliery Company by any party to whom the Managing Contractor may sell or supply coal, to make over the said money or cheque to the Managing Contractor.

(xii) The Managing Contractor was given full authority to appoint any Manager, Clerks, Workman or any employee for the working of the colliery on terms which the Managing Contractor may think fit and appropriate.

(xiii) The Managing Contrctor had to bear all expenses for working the colliery including salaries and wages of any of the employees of the colliery.

(xiv) In consideration for the transaction the Managing Contractor bound himself to pay to the Proprietors, i.e. the Assessee as guaranteed income or profit from the colliery a sum calculated at the rate of Rs. 1.50 per ton of coal and Rs. 2/4/- per ton of soft coke and Rs. 2/8/- per ton of hard coke raised or manufactured and despatched by them. Besides this the Managing Contractor undertook to pay a *monthly rent* of Rs. 2,500/- for the use of plant, machineries, buildings etc. The Managing Contractor also bound himself to the Proprietors to pay a sum of Rs. 25,000/- per year by way of minimum guaranteed income on profit that may be realised or earned by the Managing Contractor by the sale of the coal or coke. The balance was to be appropriated by the Managing Contractor. 'Proprietors shall have no claim whatsoever thereon or on any portion thereof (i.e. Profit)'.

(xv) The Managing Contractor was bound to keep and maintain proper books and registers showing raisings and despatches of coal and coke. The books and registers were open to inspection of the Proprietors.

(xvi) The Managing Contractor was bound to prepare monthly returns of coal raised and coke manufactured and despatched from the colliery and serve one set thereof to each of the parties for the First Part. The Proprietors were to pay and clear up

liabilities of the firm only till the date of the lease, i.e. 4.4.1965.

8. The above are some of the salient terms of the agreement arrived at between the assessee and the lessee. The terms of the agreement are substantially, if not completely, the same as in the *Khas Benedih Colliary case (supra)*. The lessee was working under a general Power of Attorney in both the cases. In both the cases the lessee was required to keep regular accounts and make it available for inspection to the Proprietors. The Proprietors were entitled only to receive guaranteed income and royalty or commission on extraction and sale of coal and coke. The Proprietors would not gain by the fortune of the Kuya and Khas Kuya Colliery. The entire business was to be controlled by the lessee. The Proprietors were not liable for the dues on account of working of the colliery after the execution of the deed of lease and the lessee or Managing Contractor or Managing Agent was not liable for dues incurred on account of the functioning of the colliery prior to the execution of the deed of lease. The lessee in both the cases was required to transmit monthly statement of accounts to the Partners of the assessee. With all these similarities the nature of the transaction in both the cases are alike. I have, therefore, no hesitation in holding that the assessee in this case as well had granted lease of the business of colliery. The colliery went with the lease of the business to the Managing Contractor. All tht was left with the Proprietors was guaranteed income and royalty on raisings and despatches of coal. The assessee had not control over the business. It neither had stake in the liability nor share in the profit. The Proprietors were not concerned with the waxing and winning of the fortunes of the Managing Contractor. Come weal

come woe the assessee was not afected by the loss or profit of the business. The conclusions is, therefore, inresistible that the transaction did not involve lease of only commercial assets, but it was a lease of the entire business.

9. This judgment cannot be complete without adverting to the case of *New Savan Sugar and Gur Refining Co. Ltd. (supra).* That was a case where the Managing Agent of a Sugar Company leased out the Company as a running concern. The consideration of the lease was royalty payable on the manufacture of sugar and gur at rates specified in the deed subject to a minimum royalty. The lessee was responsible for all the running expenses of the factory and excise duty on sugar etc. In those circumstances, the question arose whether the income which arose to the Proprietor from the lease should be assessed under section 10 or 12 of the Income-tax Act 1922. The Supreme Court held that the intention of the appellant (lessor Company) was to part with the entire machinery of the factory and the premises with the obvious purpose of earning rental income and not to treat the factory and the machinery a commercial assets during the subsistence of the lease. According to their Lordships of the Supreme Court, the intention of the appellant was to go out of the business altogether so far as the factory and machinery was concerned with effect from the date of execution of the lease. The position in the present case is exactly similar. The assessee after executing the deed of lease completely effaced themselves from the control of the colliery and business of coal selling. The minimum guarantee or royalty was nothing but rent. In the present case, therefore, also the assessee must be held to have walked out of the business. Their income under the deed must, therefore, be

assessed as income from 'other sources' and not income from 'business'.

10. Learned counsel for the assessee drew our attention and, in fact, with some vehmence, to another Division Bench decision of this Court in *Commissioner of Income-tax, Bihar v. S.K. Sahana and Sons (supra)*. The case before us falls within the parameters laid down by the Supreme Court in the case of *New Savan Sugar and Gur Refining Co. Ltd. (supra)*. The present case is exactly similar to the case of *Khas Benedih Colliery (supra)*. The law of the land is what the Supreme Court laid down. We are bound to follow it. My views are re-enforced by the decision of Untwalia, C.J. in the case of *Khas Benedih Colliery (supra)*. It is, therefore, not necessary for me to consider whether the case of *S.K. Sahana and Sons (supra)* was correctly decided or not. If the case of the Supreme Court had not been there, I would have been obliged to refer this case to a larger Bench to resolve the apparent conflict between the case of *Khas Benedih Colliery and S.K.Sahana and Sons (supra)*. But as the present case falls within the parameters of the case of *New Savan Sugar and Gur Refining Co. Ltd. (supra)* and I have failed to find any difference between the case of *New Savan Sugar and Gur Refining Co. Ltd. (supra)*, the present case is not the case which should be referred to a larger Bench for our consideration. Suffice it to say, that there was no distinguishing feature in the case of *S.K. Sahana and Sons (supra)* vis-a-vis the case of *Khas Benedih Colliery (supra)*.

11. For all the reasons, indicated above, I have not the least doubt that the assessee had no 'business' to be assessed as such. The income was not income from colliery, but was rent received from the lessee. The Contractor was working on the

authority of Power of Attorney in each case. The restriction on despatches of coal by Railways was only to ensure a calculation of royalty and minimum guarantee. Those conditions are to be found in all the three cases as well. That income must, therefore, be held to be income from 'other sources'. In regard to the first question, referred to us, I am constrained to hold that the Tribunal was not correct in holding that the income received from the Managing Contractor by leasing out the colliery was income from 'business'.

12. The next question, referred to us and stated in paragraph 1 of the judgment concerned the continuation of registration of the firm. Since I have held that the assessee did not have income from business, it must be held as a corollary that there was no partnership. Ther cannot be partnership without business. That is obvious from the provisions of section 4 of the Partnership Act. In my view, therefore, there was no Partnership in law. There being no partnership, the registration of the firm could not have been continued. In my view, therefore, the Tribunal was not right on the second question as well. It was not correct in law in allowing continuation of registration of the firm.

13. Both the questions, referred to us must, therefore, be answered in the negative - in favour of the Revenue and against the assessee. The reference is thus disposed of with costs, Rs. 500/- payable by the assessee to the Department.

Nazir Ahmad, J: I agree.

R.D. Question answered.

CIVIL WRIT JURISDICTION

1985/July, 2.

Before Birendra Prasad Sinha, J.

*Ram Jag Kunwar & Others**

v.

Member, Board of Revenue & others.

Bihar Land Reforms (Fixation of Ceiling Area and Acquisition of Surplus Land) *Act, 1961 (Bihar Act no..... of 1961), section 16(3)-application under—by heirs of third donee claiming to be adjoining Raiyat, with respect to entire lands sold by other two donees by registered sale deed on deposit of Rs. 18,000/-, the sale price—heirs of third donee also executing deed of Bazidawa with respect to their share and accepting Rs. 5,000/-—deed of Bazidawa, whether operated as deed of conveyance—transfer, validity of—application, whether maintainable.*

Three plots were given in gift to three Bhaginwans and only two of them sold all the three plots claiming their exclusive possession by six Registered sale deeds for a consideration of Rs.

Civil Writ Jurisdiction Case Nos. 3309 of 1980 and 1589 of 1981. In the matter of applications under Articles 226 and 227 of the Constitution of India.

In CWJC No. 1589/81... Chandrama Kunwar & others Petitioners

18,000/- but the vendees subsequently got executed a Bazidawa deed on payment of Rs. 5,000/- by the heir of the third donee. The heirs of the third donee filed a single application under section 16(3) of the Bihar Land Reforms (Fixation of Ceiling Area and Acquisition of Surplus Land) Act, 1961, hereinafter called the Act, for reconveyance of those lands in their favour claiming their title and possession over the plot which is adjoining to the above mentioned three plots.

The vendees took an objection to the maintainability of the application as the pre-empters has deposited only Rs. 18,000/- and as such the deposit was short by Rs. 5,000/-.

Held, that the intention to convey the property for valuable consideration was clearly expressed by the real owners of the property by execution of the deed of Bazidawa. In such a situation the deed of Bazidawa did not remain a mere admission but operated as a deed of conveyance.

Held, further, that it is clear that there, could be no valid transfer in respect of the 1/3rd property belonging to the heirs of the third Donee and, therefore, no order of pre-emption can be made under section 16(3) of the Act. In this view of the matter even if it is assumed that the deed of relinquishment did not operate as a deed of transfer the pre-emption application was bound to be dismissed on the ground that there was no valid transfer in the eye of law.

Gudan Yadav & ors. v. Sitaram Chaudhary and ors. (1)-followed.

Application under Articles 226 and 227 of the Constitution.

(1) (1973) BLJR 734.

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

Messrs Birendra Kumar Sinha and Jagdish Prasad for the petitioner in CWJC No. 3309 of 1980.

Mr. Binod Kumar Roy for the respondents in CWJC No. 3309 of 1980

No one for the State in CWJC No. 3309 of 1980.

Mr. Binod Kumar Roy for the petitioner in CWJC No. 1589 of 1981.

Messrs Birendra Kumar Sinha and Jagdish Prasad for the respondents in CWJC No. 1589 of 1981.

No one for the State in CWJC No. 1589 of 1981.

Birendra Prasad Sinha, J. - These two writ applications were heard together and are being disposed of by a common judgment. CWJC No. 1589 of 1981 has been filed by the pre-emptors and CWJC No. 3309 of 1980 has been filed by the vendees. The petitioners (vendees of CWJC No. 3309 of 1980 are respondents 4 to 9 in CWJC No. 1589 of 1981. The petitioners of CWJC No. 1589 of 1981, that is to say, the pre-emptors are respondents 4 to 10 in the other application.

2. The short facts leading to these two applications are these. Cadestral Survey plot nos. 389, 390 and 391 measuring 1.56 acres appeartoining to khata no. 155/1 of village Gaighat, Police Station Barhampur in the district of Bhojpur were recorded in the cadestral survey records in the name of one Churan Kanwar. Churan Kunwar by a registered deed of gift dated 14.3.1953 transferred the said plots to his Bhaginas namely, Prasuram Kunwar, Kapildeo Kunwar, (Respondents 10 and 11

of CWJC No. 1589 of 1981) and Bhabhuti Kunwar father and husband of Bhikhari Kunwar and Mossomat Rambarti Kuer (respondents 12 and 13 of CWJC No. 1589 of 1981. Bhabhuti Kunwar subsequently died. On 20th of May, 1977 Prasuram Kunwar and Kapildeo Kunwar aforementioned transferred the three plots claiming their exclusive possession by six registered sale deeds to respondents 4 to 9 of CWJC No. 1589 of 1981 for a consideration of Rs. 18,000/-. The heirs of Bhabhuti Kunwar the other donees namely, respondents 12 and 13 of CWJC No. 1589 of 1981 filed a single application under section 16(3) of the Bihar Land Reforms (Fixation of Ceiling Area and Acquisition of Surplus Land) Act, 1961 (hereinafter referred to as the Act) for reconveyance of those lands in their favour claiming their title and possession over Cadastral Survey Plot no. 388 of khata no. 155/1 which adjoining to the three plots mentioned above. An objection was taken by the vendees that subsequent to their purchase they also paid a further sum of Rs. 5,000/- to Bhikhari Kunwar and Mossomat Rambarti Kuer heirs of late Bhabhuti Kunwar and got a Bazidawa deed executed by them in respect of their 1/3rd share in the three plots. Since according to them the deposit made by the pre-emptors was short of Rs. 5,000/-, the pre-emption application was not maintainable. This objection found favour with the Land Reforms Deputy Collector, who found that the deed of release by the heirs of late Bhabhuti Kunwar was for a valuation consideration and operated as a conveyance. He also held that in the alternative Prasuram Kunwar and Kapildoe Kunwar, Respondents 10 and 11 of CWJC No. 1589 of 1981 had only 2/3rd interest in the three plots under the gift and had, therefore, no right to transfer the entire

property including the undivided share of Bhikhari Kunwar and Mossomat Rambarti Kuer, heirs of Bhabhuti Kunwar. Since the sale deeds were illegal, there could be no question of pre-emption. The petitioners of CWJC No. 1589 of 1981 filed an appeal before the Collector and lost. Then they filed a revision application before the Member, Board of Revenue which was partly allowed by the learned Member, Board of Revenue. He held that the pre-emptors were entitled toclaim pre-emption to the extent of 2/3rd share in the three plots, the share of Parsuram Kunwar and Kapildeo Kunwar. He held that the Bazidawa deed which was for a valuable consideration was intended to be a deed for the transfer of title but on that ground alone it was not proper to reject the claim of pre-emption also in respect of the other 2/3rd share. It is this part of the judgment which has been challenged by the petitioners of both the writ applications. The petitioners in CWJC No. 1589 of 1981 claim that their pre-emption application should have been allowed as a whole and the petitioners of other writ application contended that the same should have been dismissed in its entirety.

3. Mr. Binod Kumar Roy learned counsel appearing for the petitioners in CWJC No. 1589 of 1981 submitted that the deed of Bazidawa is not relevant for the purpose of pre-emption as no title posses by mere admission. He relied upon a Bench decision of this Court in *Kasri Null v. Sukan Ram (1)* in which it was held that a mere execution of a Bazidawa by a Benamidar which contains an undertaking not to interfere with plaintiff's possession could not itself give or transfer title to the property from the Benamidar to the plaintiff the

(1) (1933) AIR (Pat.) 264

real owner. He also relied upon an earlier single Judge decision of this Court in *Munshi Govind Prasad v. Lala Jagcap Sahi (1)* in which it was held that a deed of relinquishment does not confer a title to the lands, which cannot pass by admission when the statute required a deed. The facts of these two cases were different. *The Bazidawa in the case of Kesri Mull (supra)* contains only an undertaking not to interfere with the possession of the real owner. In the instant case the deed although styled as a deed of release, clearly discloses an intention to convey the property for valuable consideration. In that event it cannot be simply said as deed of release but shall operate as a deed of conveyance. In the Bazidawa deed it was asserted that the executants had 1/3rd share in the three plots on which they were in possession but their share had also been included in the sale deed by Prasuram Kunwar and Kapildeo Kunwar. It was then stated that in order to avoid future trouble and litigation it had been decided that for a valuable consideration of Rs. 5,000/- they also relinquished their 1/3rd share in the properties in favour of the vendees. It will thus be seen that the intention to convey the property for valuable consideration was already expressed by the real owners of the property. In such a situation the deed of Bazidawa did not remain a mere admission but operated as a deed of conveyance. Reference may be made in this connection to a decision of the Supreme Court in *Thayyil Mammo v. Kottiath Ramunui (2).*

4. The pre-emptors were, therefore, required to deposit a sum of Rs. 18,000/- plus Rs. 5,000/- to maintain the application for pre-emption. The

(1) (1924) AIR (Pat.) 185

(2) (1966) AIR (SC) 337.

deposit was short of Rs. 5,000/- and, therefore, in my opinion, the Land Reforms Deputy Collector and the Collector were right in dismissing the application for pre-emption on this ground alone.

5. On behalf of the vendees who are petitioners in CWJC No. 3209 of 1980 it was submitted that on other ground as well the application could not be maintained. They submitted that the transfer deed also conveyed 1/3rd share in the three plots not legally belonging to the vendees, was illegal. According to the learned counsel then must be a valid transfer which may put the transferees in possession of the vended property. If the transferees themselves could not be validly put in possession of the entire 1.56 acres of the three plots how could they convey the entire property in favour of the pre-emptors. There appears to be substance in this argument. In the case of *Gudan Yadav & others v. Sitaram Coudhary & others (1)* it was held that for an effective order under section 16(3) of the Act there must be a valid transfer of the land in the eye of law. It is clear that there could be no valid transfer in respect of 1/3rd property belonging to the heirs of Bhabhuti Kunwar and, therefore, the order of pre-emption can be made under section 16(3) of the Act. In this view of the matter even if it is assumed that the deed of relinquishment did not operate as a deed of transfer the pre-emption application was bound to be dismissed on the ground that there was no valid transfer in the eye of law.

6. In the result CWJC No. 1589 of 1981 fails and is dismissed and CWJC No. 3309 of 1980 succeeds and is allowed. The order passed by the learned Member, Board of Revenue allowing

(1) (1973) B.L.J.R. 734.

pre-emption to the extent of 2/3rd share in the lands is set aside and the pre- emption application is held to be not maintainable. There shall be no order as to costs.

C.W.J.C. No. 1589 of 1981 dismissed.
C.W.J.C. No. 3309 of 1980 allowed.

R.D.

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