REGISTERED NO. PT. 44

VOLUME - LXIV Part - [illegible]

THE INDIAN LAW REPORTS

December 1985
(Pages 1454 – 1607)

PATNA SERIES

CONTAINING

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

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PATNA

PRINTED AT RAKESH PRINTING PRESS, PATNA 4 ON BEHALF OF THE SUPERINTENDENT, SECRETARIAT PRESS BIHAR, PATNA AND PUBLISHED AT THE GOVT. BOOK DEPOT UNDER THE AUTHORITY OF THE GOVERNMENT OF BIHAR.

[Price – Rs. 7.50] (Subsidised Rate)

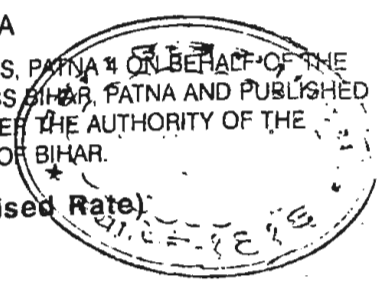

TABLE OF CASES REPORTED

FULL BENCH

APPELLATE CIVIL

REVISIONAL CIVIL

APPELLATE CRIMINAL

CIVIL WRIT JURISDICTION

CRIMINAL WRIT JURISDICTION

TABLE OF CASES REFERRED TO

INDEX

INDEX

Page.

Held, that the deity being a juristic person, the suit by a trustee being the Manager or the person involved with the state of affairs will be a competent person to maintain the suit alone.

Vishwakarma Mandir Trust through its President Baldeo Prasad Vishwakarma v. Most. Munu Devi & Ors. (1985) I.L.R. 64, Pat. 1573

Bihar Cinema (Regulation) Act, 1954—*Section 5, sub-section (2) and Bihar Cinema (Regulation) Rules, 1974— rule 3(5)(iv)—licensing authority—power vested in him to grant licence, whether subject to the Control of State Government—application filed for grant of licence—objection invited after consideration by the committee-no objection filed—licensing authority on the basis of the findings of the committee recommending for grant of permission—approval by the State Government—permission granted by the licensing authority whether suffer from infirmity.*

It is true that under the provision of the Act and the Rules, the power has been vested in the licensing authority to grant a licence, but such a power is to be exercised subject to the control of the

State Government in view of sub-section (2) of section 5 of the Act. Even rule 3(5)(iv) requires the licensing authority to send the findings of the committee to the State Government with his recommendation regarding the suitability of the site and desirability of granting permission for construction of a permanent cinema house thereupon. It further says that the decision of the State Government shall be final. In the instant case after receipt of the application of the respondent, the matter was considered by the committee, and then objection was invited asking any person interested or public in general to file objection within 15 days from the date of publication of the notice. Thereafter, when no objection was received within that period the Deputy Commissioner on the basis of the findings of the committee, recommended for grant of permission to the said respondent. When the State Government approved the proposal, only thereafter the permission was granted.

Held, therefore, that under the circumstances of the case, it cannot be said that the Deputy Commissioner, who is the licensing authority, has not applied his independent mind along with the committee to the question of grant of

Page.

permission and the permission has not been granted in a mechanical manner on the direction of the State Government. The order of the Deputy Commissioner granting the permission for construction of the building does not suffer from the infirmity pointed by the Supreme Court in the cases of *Commissioner of Police, Bombay v. Gordhandas Bhamii and the State of Punjab and anr. v. Hari Kishun Sharma.*

Ram Sundar Prasad and others v. The State of Bihar and others (1985) I.L.R. 64 Pat. 1530

Bihar Control of Crimes Act, 1981—*Section 12 sub-section (2)—order of detention under—detaining authority not filing counter—affidavit—counter affidavit filed by a Deputy Collector not in accordance with order 19 rule 3 of the Code of Civil Procedure—effect of—incidents set out in the order, of detention not of the kind which would jeopardise maintenance of public order—detention—validity of.*

Where the District Magistrate, Ranchi, the detaining authority who ordered detention of writ-petitioner under section 12 sub-section (2) of the Bihar

Page.

The individual income of the co-plaintiffs of a suit cannot be clubbed together to deny them the benefit of exemption of court fee admissible under Government notification no. S.O.1207 dated 19th August, 1981 for grant of legal aid.

The plain object of the framers of the Bihar State Legal Aid Scheme, 1981, is that the person belonging to the class of financially weaker section irrespective of caste or religion should have the benefit of legal aid and consequent exemption from the payment of court fee for the basic right of access to justice. Once a person comes within the said ambit there seems to be no reason to deny him the benefit because of the fortuitous circumstance that he may have a joint cause of action with other co-plaintiffs with the consequential result that the total of the income of all of them may swell above Rs. 4000/-. It is to be conceded that because of the proviso to paragraph 21 of the Scheme even though a hundred persons belonging to the Scheduled caste or the Scheduled tribes or the class of landless persons were to join together as co-plaintiffs, they would not be denied the benefit of the exemption irrespective of the total income of all the

Page.

co-plaintiffs. No, rationale could be pointed out which, on the other hand, would justify that in the identical situation such a denial should take place with regard to the class of economically weaker persons having an income of less than Rs. 4000/- merely because they happen to be co-plaintiffs.

There seems to be no reason that for merely bringing a joint suit for a joint cause of action within the spirit of the rule of avoiding multiplicity of proceedings, the co-plaintiffs should be penalised and denied the right to claim exemption from court fee liberally extended to them by a beneficient piece of legislation to advance the direction principles of providing legal aid to the citizens. The provisions of the notification along with paragraph 21 of the Scheme must be read in a manner which advances the larger purpose and does not frustrate the same.

Sk. Mohammad Osaid and others v. Sk. Abdul Wahid and others (1985) I.L.R. 64, Pat. 1486

Chotanagpur Tenancy Act, 1908—*Section 71A—provisions of—Surrender by a Scheduled Tribe raiyat, whether would amount to transfer—surrender by*

Page.

Scheduled Tribe raiyat coupled with subsequent settlement of the land by the landlord, whether a transfer within the ambit of the section.

It is plain from the history of the promulgation of the Chotanagpur Tenancy Act, 1908, the language employed therein and the tenor of the amendments made that larger purpose is to protect the transfer of the statutory rights by raiyat in general and those belonging to the Scheduled Tribes in particular. Consequently, a liberal construction to section 71A of the Act and in particular to the word 'transfer' employed therein has to be given to aid and advance the purpose of the Act.

Held, that looking at the wider Scheme of the Act a surrender of land by a raiyat would by itself amount to a transfer and if done without previous sanction of the Deputy Commissioner in writing, it would obviously be in contravention of section 72 of the Act.

Held, further that a surrender by a Scheduled Tribe raiyat directly coupled with the subsequent settlement of such land by the landlord would be a transfer within the ambit of section 71A of the Act.

Page.

Held, also that the appreciation of evidence is normally beyond the scope of the writ court and there is no reasons to depart from the said rule.

Smt. Bina Rani Ghosh v. Commissioner, South Chotanagpur Division; and others (1985) I.L.R. 64, Pat. 1549

Code of Civil Procedure, 1908— *Order32 Rule 15, scope and applicability of-persons not adjudged to be of unsound mind-a party to the suit, whether has right to challenge the soundness of mind or the mental capacity of the other party and claim an enquiry therefor-issue of unsoundness of mind of the parties, whether betwlxt the court and the party and not between the parties themselves-power, whether wholly vested in the court and discretionary.*

In a case where there is no adjudgement of unsoundness of mind, a party to the suit has no right or locus standi to challenge the soundness of mind or the mental capacity of the other party and claim an enquiry therefor under Order 32 Rule 15 of the Code of Civil Procedure.

An analysis of Order 32, Rule 15 of the Code of Civil Procedure would plainly indicate that it deals with two distinct

Page.

classes of persons. Firstly it is applicable in its strictness to persons who have been adjudged to be of unsound mind. The second category is that of persons who are not so adjudged but those whom the court may find as unable to protect their interest because of any mental infirmity. In the second category of cases the issue of unsoundness of mind of the parties is primarily betwixt the court and the party and is certainly not a *lis* betwixt the parties themselves. The legislature has conferred a larger and paternal power on the court to see that each party has the capacity to safeguard its legal necessity and is in no way handicapped by reason of any mental infirmity. It is equally significant to notice that this broad based power extends in cases of any mental infirmity and not necessarily in a case of person being of unsound mind altogether. This beneficial and, indeed, paternal power is wholly vested in the court and it is in its discretion alone, where it finds that any one of the parties is suffering from a weakness of mind, to proceed for taking steps to safeguard the interest of such a party.

Shrimati Godawari Devi v. Shrimati Radha Pyari Devi and others (1985) I.L.R. 64, Pat. 1498

Page.

Code of Criminal Procedure, 1973—*Section 145 and Penal Code, 1860—Section 188—proceeding under section 145—final order passed under—dispossession of the second party in whose favour possession was declared on the basis of purchase after the said order-order for starting proceeding under section 188 of the Penal Code, legality of—order of Magistrate directing the Police to restore possession in favour of the second party, whether sustainable in law.*

Where, in a proceeding under section 145 of the Code of Criminal Procedure, decision was given on 19.5.1979 in favour of the members of the second party and their possession was declared over the disputed property and thereafter on the basis of purchase through a sale-deed dated 24.5.1979 from Renuka Das, widow of one Man Mohan Das, who was brother of Sarad Chandra Das, the first party, the petitioners took forcible possession of the property in question from the members of the second party who filed a petition before the Executive Magistrate for taking suitable action and the Executive Magistrate ordered for starting proceeding under section 188 of the Indian Penal Code against the petitioners and also

directed for restoring possession of the disputed property to the members of the second party;

Held, that the petitioners will be deemed to be 'parties to the previous proceeding' by fiction of law and, therefore, they are equally bound by the final order passed in the proceeding under section 145 of the Code of Criminal Procedure which prohibited the members of the first party from disturbing possession of the members of the second party.

Held, further, that the right to order for restoring possession can be exercised only where it is found that the party had been forcibly and wrongfully dispossessed within two months next before the date of the preliminary order, and now, in view of the changes made in the proviso to sub-section (4) of section 145 of the new code within a period of two months from the date of the Police report or other information received by the Magistrate or in between that date and before the date of his order under sub- section (1). In such cases also the Magistrate has to treat that party who is dispossessed as if he had been in possession on such date, and while making the final order in his

Page.

favour, direct for restoring his possession. The order of the Executive Magistrate, therefore, directing the Police to restore the status quo ante with respect to the disputed property in favour of the members of the second party, is unsustainable in law and, therefore, must be set aside. The action of the petitioners may amount in law to a trespass and disobedience to the order under section 145 and therefore the order for starting a proceeding under section 188 of the Indian Penal Code was quite legal and valid.

Abdul Aziz and ors. v. Shri P. Jha, Executive Magistrate, Kodarma and ors. (1985) I.L.R. 64, Pat. 1595

Constitution—*Article 229—roster framed for promotion of the employees in the Ministerial Cadre of the High Court—promotion, whether to be made in accordance with the roster.*

Where a roster under Article 229 of the Constitution for promotion of the employees in the Ministerial Cadre of the High Court was framed wherein it has been determined as to which vacancy will be open and which will go to a member of the Scheduled Caste or to a member of

Page.

Page.

Page.

Page.

APPELLATE CIVIL

1984/January, 9.

Before S.K.Choudhuri & B.S.Sinha, JJ.

*Messrs Apar Private Limited & others**

v.

Bihar State Electricity Board, Patna.

Arbitration Act, 1940 (Central Act No. X of 1940) *section 34—ingredients for stay of suit, whether fulfilled by defendants—trial court, whether justified in rejecting the application under section 34.*

Held, that all the four ingredients have been satisfied by the defendants for obtaining stay of a suit under section 34 of the Arbitration Act, 1940.

Held, further, that the conclusion of the trial court that "sufficient forensic scrutiny is necessary to find out the conduct of the defendants" is based on no material, and therefore, it was not justified on that ground to reject the application under section 34 of the Arbitration Act.

Case laws discussed.

Appeal by the defendants

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

Messrs Binod Kumar Kantha, I.R. Joshi, and

Appeal From Original Order No. 27 of 1980. Against an order of Shri A.S.Lal, Subordinate Judge, 1st, Patna dated 16th November, 1979.

Shyam Kishore Sharma for the appellant.

Messrs Brajeshwar Mallick and Chandrika Prasad Sinha for the respondents.

S.K.Choudhuri, J. - This miscellaneous appeal by the defendants under Section 39(1)(v) of the Arbitration Act, 1940 (hereinafter called 'the Act') is directed against the judgment and order dated 16th November, 1979 passed in Money Suit No. 226 of 1976 rejecting an application filed under Section 34 of the Act.

2. The application under Section 34 of the Act was filed by the defendants under the following circumstances:-

A money suit has been filed by the Bihar Electricity Board in the court of the Subordinate Judge I, Patna with a prayer to decree the suit for a sum of Rs. 65,49,555.42 paise, as per details given in the plaint. After service of notice of the suit the defendants appeared and filed an application under Section 34 of the Act to refer the suit to arbitration and to stay the proceedings of the suit. The suit was filed by the plaintiff on 22.7.1976. The defendants appeared on 25.9.1978 and filed the present application under Section 34 of the Act. It is not disputed that before any step was taken in the suit, the defendants at the first opportunity filed the said application.

3. In the application under section 34 of the Act it is stated that the subject matter of the suit arises out of two purchase orders; one bearing no. 10 dated 30.6.1973 and another bearing no. 16 dated 12.7.1973. The terms and conditions incorporated in the said orders contained similar arbitration clause, namely, clause 21 which reads as follows:-

"21.1. In the event of any question or

dispute arising under these conditions or any special conditions of contract or in connection with this contract (except as to any materials the decision of which is specially provided for by these or the special conditions) the same shall be referred to the Arbitrators, one to be nominated by the purchaser and other to be nominated by the supplier, and in the case of the said Arbitrators not agreeing, then to an Umpire be appointed by the said arbitrators, and the decision of the Arbitrators or in the event of their not agreeing, of the Umpire appointed by them, shall be final and conclusive and the provision of the Indian Arbitration Act, 1940 and the rules thereunder and any statutory modification thereof shall be deemed to apply to and incorporated in the contract.

21.2. Work under the contract shall if reasonably possible continue during the arbitration proceeding and dues if any payable by the purchaser to the Contract with respect to the work not in dispute shall not ordinarily be withheld on account of such proceedings unless it becomes necessary to withhold the same."

It has further been submitted in the application that the subject matter of the suit under which damages have been claimed by the plaintiff on the alleged breach of contract by the first defendant is fully covered by the arbitration clause and so the plaintiff was bound to refer the said dispute to arbitration instead of filing the suit. According to the defendants, as stated in that application, the plaintiff has filed the aforesaid suit for breach of the arbitration agreement, and therefore, the defendants are entitled to pray for stay of the said

suit under the provisions of Section 34 of the Act. The further averment was that the defendants have not filed any written statement nor they have taken any step in the proceeding and they were always ready and willing to do all things necessary for proper conduct of the arbitration and there is no sufficient reason why the matter should not be referred to arbitration in accordance with the arbitration agreement, which was valid in law.

This application under Section 34 of the Act was supported by affidavit sworn by Sri N.D.Desai, Managing Director of the Company-first defendant (defendant no. 4). Defendant no. 2 the Chairman of the Company re-sworn the contents of the application filed under Section 34 of the Act by way of abundant caution as an objection was raised in the rejoinder petition filed by the plaintiff that the affidavit was not proper.

4. A rejoinder was filed by the plaintiff to the said application. In that rejoinder it has been denied that the arbitration clause as contained in the arbitration agreement was attracted as the dispute raised in the suit, according to the plaintiff, was not covered by the said arbitration clause. As the defendants did not express their willingness and readyness to go to arbitration in reply to the plaintiff's notice, it would amount to waiver on the part of the defendants by their conduct to get the matter referred to arbitration. A further averment was made that the points involved in the suit are very complicated and fit to be decided by competent court of law. The object of the defendants in filing the petition under Section 34 of the Act was to delay the hearing of the suit. The affidavit affixed to the application under Section 34 of the Act was not proper.

5. The defendants filed a reply to the said rejoinder re-iterating the stand taken in the application under Section 34 of the Act. It has also been alleged therein that the defendants were not legally bound to express their willingness and readiness in their reply to the plaintiff's notice. Allegation of waiver on the part of the defendants has also been denied. It further alleged that the points involved in the suit were not complicated.

6. The court below after hearing the parties passed the impugned order. It found (1) that the dispute in the suit is connected with the agreement and the unilateral cancellation of the delivery of the items of goods may amount to putting an end to the contract, but the arbitration clause cannot be held to have been repudiated; (2) the breach of contract is hinged upon the cunning conduct of the defendants which cannot be left to be decided by the arbitrators, which fact is also evident from the filing of piecemeal affidavits although technically there may not be much against such affidavits; and (3) it appears that shrewdly visualising imminent price rise in immediate future, the defendants tactfully delayed the delivery of the goods and thereafter cancelled the contract. After recording the aforesaid conclusions, the trial court rejected the application under Section 34 of the Act.

7. We were taken by learned Counsel for the parties through the impugned order carefully. Learned Counsel for the appellants pointed out that the real discussion by the learned Subordinate Judge has been made in paragraph 10 and he has arrived at the conclusion in paragraphs 12, 13, and 14 of the judgment. Before paragraph 10 have been given the contents of the application under Section 34 of the Act, the rejoinder and the reply thereto and some portions of the plaint including the claim made

in the suit.

8. Paragraph 10 of the judgment refers to the various decisions of different High Courts and after discussion, the learned Subordinate Judge has recorded that the dispute in the suit was connected with the agreement.

The grievance of learned Counsel for the appellants regarding the conclusions recorded in paragraphs 11 and 12 and the final conclusion in paragraph 14 is that they are not supported by materials on record and, therefore, they stand vitiated in law. Learned Counsel, therefore, challenges the aforesaid findings (2) and (3) already noted by me above.

It will be apposite here to mention about the discussions made in paragraph 9 of the impugned judgment in pursuance of which the aforesaid findings (2) & (3) have been recorded. Paragraph 9 mentions about Annexures A to E of the plaint and states that they are correspondences in the forms of cables and letters written by the plaintiff to the defendants. The court below has noticed that the filing of the stay application on 25.9.1978 and several affidavits. The rejoinder by the plaintiff was filed on 20.12.1978 and thereafter the defendants nos. 2 and 3 filed power on 2.11.1979, on objection being raised by the plaintiff on 26.9.1979 that those defendants had not filed any power. The court below therefore noticed that taking advantage of the adjournment of the arguments, defendants nos. 2 and 3 filed power and thus filled up the lacuna.

After referring to several decisions in paragraph 10 of the judgment, which neither party has challenged, the court below recorded in paragraph 12 that the conduct of the defendants was cunning, and, therefore, it was worthwhile to

scrutinise the facts and law by a competent court of law. It further noticed that the amount claimed in the suit is heavy and should not be left to arbitrators for decision as they were not fully competent to 'look into the conduct of the defendants with sufficient forensic scrutiny'. After referring to a decision of the Supreme Court in the *Printers (Mysore) Private Ltd. v. Tothan Joseph (1)*, the court below was further of the view that it was discretionary upon the court to stay or not to stay the suit, though that discretion is to be exercised judicially, such as in cases of fraud, dishonesty, judicial vindiction of character, complex law etc. It, therefore, refused to stay the suit.

9. It will be apposite to point out that the conclusion of the trial court is that the dispute raised in the suit would be considered to attract the phrase 'in connection with this contract' as used in Clause 21.1 of the agreement. I will, therefore cursorily refer to the claim made in the suit. The relevant paragraphs of the plaint are paragraphs 28 and 32 to 38. In paragraph 28, the averment is that the defendant all on a sudden by its letter dated 6th February 1974 cancelled the contract without any rhyme and reason and consent of the plaintiff. Paragraph 32 states that the defendants agreed to supply the required materials of control cables to the plaintiff at a total cost of Rs. 45,32,582.00 but they failed to honour the contract and, therefore, liable to compensate to the plaintiff for the loss it has suffered in procuring the similar quantity and quality of the control cables from their suppliers after going through the formalities of readvertising acceptance of the tender etc., at a cost of Rs. 88,95,071.85 P. Thus on account of non-supply of the control cables by the defendants, the plaintiff

(1) (1960) AIR (SC) 1156.

has suffered a lost of Rs. 43,62,489.85 paise, besides damages of Rs. 5,00,000.00. In paragraph 33 of the plaint the plaintiff has claimed a loss of Rs. 14,87,045.57 P., on account of non-supply of L.T. power cables, besides damages of rupees two lakhs. Thus the total claim made in the suit is Rs. 65,49,535.42 Paise. As it is recorded by the court below that the dispute in the suit is covered by the arbitration c ause, it is not necessary to go into that controversy.

10. Mr. Binod Kumar Kantha, learned Counsel for the appellants contended that the court below has not exercised the discretion judicially in disposing of the application under Section 34 of the Act, and on surmises and conjecture has come to the conclusion that the defendants by their cunning conduct, visualising immediate rise in prices in near future delayed the delivery of the goods and thereafter cancelled the contract. According to the learned Counsel, there is no material for coming to such a conclusion and, therefore, the court below has acted illegally and with material irregularity in rejecting the application under Section 34 of the Act. According to learned Counsel, it is a fit case where the dispute being covered by the arbitration clause should have been referred to arbitrators and the suit should have been stayed because the defendants have fulfilled all the requirements of law as were necessary for making an application under Section 34 of the Act for stay of the suit.

Mr. Brajeshwar Mallik, learned Counsel for the plaintiff- respondent, on the other hand, supported the impugned order and contended that the discretion exercised by the court below in the facts and circumstances of the case was proper and when once such a discretion has been exercised against the defendants and in favour of the plaintiff-

respondent, refusing to stay the suit, no interference is possible by this Court, in view of the principles laid down in the case of *Union of India v. Birla Cotton Spinning & Weaving Mills Ltd. (1).*

11. It has not been disputed at the Bar that for stay of a suit under Section 34 of the Act following conditions are necessary to be fulfilled:-

"(1) The proceeding must have been commenced by a party to arbitration agreement against any other party to the agreement;

(2) the legal proceedings which is sought to be stayed must be in respect of a matter agreed to be referred;

(3) the applicant for stay must be a party to the legal proceedings and he must have taken no steps in the proceedings after appearance;

(4) it is also necessary that he should satisfy the court that he was also at the commencement of the proceedings ready and willing to do everything necessary for the proper conduct of the arbitration; and

(5) the court must be satisfied that there is no sufficient reason why the matter should not be referred to arbitration in accordance with the arbitration agreement."

(*See Anderson Weight Ltd. v. Moran & Co.(2)*

The only question canvassed by learned Counsel for the respondent was that condition no.

(1) (1967) AIR (SC) 688

(2) (1955) AIR (SC) 53.

(4) has not been fulfilled, inasmuch as the defendants were not ready and willing to do everything necessary for the proper conduct of the arbitration, as the said desire was not expressed by the defendants in the reply to the plaintiff's notice before the filing of the suit.

12. Learned Counsel for the appllants met this argument by citing a decision of the Supreme Court in *State of Punjab v. Geeta Iron & Brass Works Ltd. (1)*. In that case it has been stated that mere silence on the part of the defendant after receipt of a notice under Section 80 of the Code of Civil Procedure did not disentitle the defendant to apply for stay of the suit under Section 34 of the Act. Learned Counsel, therefore, was right in his contention that the readiness and willingness to refer the dispute to arbitration and to do everything necessary for proper conduct of the arbitration would arise only after the filing of the suit. If, however, it can be shown that after the suit the defendant did not fulfil condition no. (4), then it would operate as a bar on the part of the defendant to pray for stay of the suit.

It is, therefore, now necessary to see as to whether condition no. 4 aforesaid has been fulfilled by the appellants or not. It has already been stated that the appellants have shown in their application filed under Section 34 of the Act that the defendants were willing and ready to do all things necessary for the proper conduct of the arbitration. This pleading was in consonance with the language of Section 34 of the Act. Nothing has been shown by the plaintiff which may be said to adversely affect the conduct of the defendants showing their unwillingness to assist and help in the conduct of the arbitration

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

proceedings. This condition no.4 in absence of such material, which the plaintiff failed to show from the records of the case, stands fulfilled.

13. Now coming to the condition no. 5, it has been argued that there is no material on the record to show that the defendants were cunning in their conduct in terminating the contract and that they did so after visualising that there will be immediate rise in the prices. It has been pointed out by learned Counsel for the defendant-appellants that one of the purchase orders was handed over to the defendants on 30.6.1973 and the other one on 12th July 1973 and in pursuance of those purchase orders, the defendants did supply on 12.12.1973, 8132 K.M. of L.T. power cables worth Rs. 1,21,642.04 P. After receipt of the aforesaid two purchase orders, according to the plaint itself, as recited in the impugned order, the defendants wrote a letter to the plaintiffs on 28.7.1973 signifying their acceptance after suggesting certain amendments regarding the delivery time and price etc., and the defendants also demanded that the plaintiff should reimburse the defendants for the increase in the price of the copper since 7th March, 1973 based upon London Metal Exchange & Minerals and Metal Trading Corporation. The defendants further stated that they would consent to supply with whatever stock of copper they held. The plaintiff, however, it appears, did not acquiesce to the suggestion of the defendants regarding increase in the price and the delivery time etc. The defendants also prayed for extension of the delivery time. The plaintiff in its reply asserted that the issue of the purchase orders was delayed because there was delay in finalising the terms and conditions and details on the part of the defendants and that the

time limit for supply of materials was to be completed by the end of February, 1974. The plaintiff did not also agree to any re-imbursement on account of rise in the price of copper. It has been pleaded in paragraph 21 of the plaint that the defendants through their letter dated 10th September, 1973 intimated the plaintiff to complete the delivery of the control cables by 10th June, 1974 instead of 28th April, 1974, and requested for confirmation of the said offer. The further pleading was that the allegation of delay in sending the Bank guarantee proforma by the plaintiff was not correct, as the defendants asked for it only on 16th August, 1973. The plaintiff stated that in case the defendants did not take requisite steps for the supply, the Board may adopt alternative measures for procurement of the cables and the defendants would be liable to reimbursement to the plaintiff the extra cost that may be incurred. It appears from the plaint that thereafer the defendants sent several telegrams informing the plaintiff to assist the defendants in obtaining the copper so that the schedule of the delivery time may be confirmed. According to the plaintiff, it took steps to provide assistance to the defendants to get the permit for copper and wrote letters to the department concerned at New Delhi and Calcutta. It is further pleaded that the defendants only partly complied with the supply of the goods as per the purchase orders and thereafter they did not continue to supply and suddenly cancelled the contract. These are in substance the averments made in the plaint, and it is on these allegations that the present suit has been filed for recovery of the amount mentioned in the plaint, as according to the plaintiff, it has got the work done through another agency.

14. I have already indicated above, that all the

four ingredients have been satisfied by the defendants for obtaining the stay order.

15. In my view the trial court was not correct in stating that the conduct of the defendants was cunning. There is no material to prove the same. In other words, through tenders were floated on 27th December, 1971 and acceptance of the tender filed by the defendants was made on 21st March, 1973; the two purchase orders, under which the defendants were to make supply, were given by the plaintiff on two dates viz, one on 30th June, 1973 and the other on 12th July, 1973. The original tender notice under which the goods as per the purchase orders were to be made, was February, 1974, as stated in paragraph 7 of the impugned order. It appears that the defendants intended to complete the delivery of the control cables by 10th June, 1976 instead of 28th April, 1974, and requested confirmation of this offer by 30th September, 1973 (see paragraph 21 of the plaint).

The copper, which was required for manufacture of the materials as per purchase orders was a control comodity, and could be obtained only under permit. It is not the case of the plaintiff that the defendants with the assistance of the plaintiff could obtain permit of the copper and still did not comply with the purchase orders; rather it is the admitted position that with whatever copper the defendants held, the first instalment of supply was made with the help of the said copper on 12.12.1973. Therefore, in the circumstances of the case, it cannot be said that the defendants were cunning in their conduct and such an inference by the trial court was based purely on surmises and conjectures. Thus in my view, the defendants fulfilled all the conditions that

were necessary for praying for stay of the suit under Section 34 of the Act.

16. It has been rightly contended by learned Counsel for the appellants that the dispute in the suit does not involve any complicated point of law, and the trial court was not correct in stating otherwise.

In the decision relied upon by learned Counsel for the respondent in the case of the *Printers (Mysore) Private Ltd. v. Pothan Joseph (supra)*, it has been stated in paragraph 8:-

> ".... It may not always be reasonable or proper to refuse to stay legal proceedings merely because some questions of law would arise in resolving the dispute between the parties. ..."

In the present appeal, as the pleadings stand, it cannot be said, as stated by the trial court that "sufficient forensic scrutiny is necessary to find out the conduct of the defendants". In my view this conclusion is based on no material and, therefore, the court below was not justified on that ground to reject the application under Section 34 of the Act.

17. I may refer to the two decisions relied upon by learned Counsel for the appellants and one decision relied upon by learned Counsel for the respondents.

The first case relied upon is the case of *Heyman v. Darwin Ltd. (1)*. The dictum laid down in this case, in my view, fully supports the arguments of learned Counsel for the appellants. I may briefly refer that case here. That was a case where an American Firm was appointed selling agent by an English Firm, which was a manufacturer of steel and

(1) (1942) AC 356.

Sheffield. A dispute arose between the parties and the American Firm filed an action claiming a declaration that the English Firm had repudiated the agreement and for damages on various counts. There was an arbitration clause in the agreement in the following language:-

> "If any dispute shall arise between the parties hereto in respect of this agreement or any of the provisions therein contained or anything arising hereout the same shall be referred to arbitration."

The English Firm filed an application for stay of the action and for reference of the matter in dispute to the arbitrator. The contention of the American Firm was that the English Firm had repudiated the contract as a whole and the same being accepted by the American Firm, the contract ceased to exist for all purposes and the arbitration clause shall be of no effect. This contention was not accepted. It was held in that case that the dispute between the parties in the action was within the arbitration clause, and the suit was, therefore, stayed. It laid down that where there is a total breach of contract by one party so as to release the other of its obligation under it, the arbitration clause for its wide terms still remains effective. This is so even where the aggrieved party has accepted the repudiation and in such case either party may rely on the arbitration clause. It further held that the determination of repudiation or validity of a contract for the purpose of measuring claim arising out of breach is necessary to grant stay. Lord Porter in this case at page 343 has pointed out as follows:-

> "... this does not mean that in every instance in which it is claimed that the arbitrator has no jurisdiction the court will

refuse to stay an action. If this were the case such a claim would always defeat an agreement to submit disputes to arbitration, at any rate until the question of jurisdiction had been decided. The court to which an application for stay is made is put in possession of the facts and arguments and must in such a case make up its mind whether the arbitrator has jurisdiction or not as best it can on the evidence before it. Indeed, the application for stay gives an opportunity for putting these and other considerations before the court that it may determine whether the action shall be stayed or not."

Viscount Simon L.C. at page 366 observed in that case as follows:-

"An arbitration clause is a written submission agreed to by the parties to the contract, and, like other written submissions to arbitration, must be construed according to its language and in the light of the circumstances in which it is made. If the dispute is whether the contract which contains the clause has ever been entered into at all, that issue cannot go to arbitration under the clause, for the party who denies that he has ever entered into the contract is thereby denying that he has ever joined in the submission. Similarly, if one party to the alleged contract is contending that it is void ab initio (because, for example, the making of such a contract is illegal), the arbitration clause cannot operate, for on this view the clause itself also is void. But, in a situation where the parties are at one in asserting that they entered into a binding contract, but a difference has arisen between them whether there has been a breach by one

side or the other, or whether circumstances have arisen which have discharged one or both parties from further performance, such differences should be regarded as differences which have arisen "in respect of" or "with regard to", or "under the contract", and arbitration clause which uses these, or similar expressions should be construed accordingly".

This English decision has been followed and noticed in several decisions of the Supreme Court. By way of instance I may refer to one of them, namely the case of *Union of India vs. Birla Cotton Spinning and Weaving Mills Ltd. (supra)*. Therefore, this case fully supports the contention of learned Counsel for the appellants. The other case relied upon is *Naihati Jute Mills Ltd. v. Khyali Ram Jaga Nath (1)*. Only paragraph 12 was referred to in which it has been stated that "even in cases of frustration it is the performance of the contract which comes to an end, but the contract will still be in existence for the purposes, such as resolution of disputes arising under or in connection with the contract".

18. I may now refer to the decision strongly relied upon by Mr. Brajeshwar Mallik learned Counsel appearing for the respondent. He contended that the case of the *Printers (Mysore) Private Ltd. v. Pothan Joseph (supra)* fully supports him, wherein it has been said that the power of stay of legal proceedings under Section 34 of the Act is discretionary and the party cannot claim such stay as of right. This proposition has not been disputed by learned Counsel for the appellants. He, however, contended that this decision instead of going to

(1) (1968) AIR (SC) 522.

support the contention of the respondent, supports the appellants. He relied upon portions from paragraphs 8 and 9 of the judgment. He pointed out that in paragraph 8 some guiding principles for grant or refusing stay has been stated. Therein it has been stated, inter alia as under:-

> "... It may not always be reasonable or proper to refuse to stay legal proceedings merely because some questions of law would arise in resolving the dispute between the parties. On the other hand, if fraud or dishonesty is alleged against a party it may be open to the party whose character is impeached to claim that it should be given an opportunity to vindicate its character in an open trial before the court rather than before the domestic tribunal, and in a proper case the court may consider that fact as relevant for deciding whether stay should be granted or not. If there has been a long delay in making an application for stay and the said delay may reasonably be attributed to the fact that the parties may have abandoned the arbitration agreement to court may consider the delay as a relevant fact for deciding whether stay should be granted or not. Similarly, if complicated questions of law or constitutional issues arise in the decision of the dispute and the court is satisfied that it would be expedient to leave the decision of such complex issues to the arbitrator, it may, in a proper case, refuse to grant stay on that ground; indeed, in such cases the arbitrator can and may state a special case for the opinion of the court under Section 13(b) of the Act."

In paragraph 9 it has been inter alia stated as under:-

> "... As is often, said, it is ordinarily not open to the appellate court to substitute its own exercise of discretion for that of the trial judge; but if it appears to the appellate court that in exercising its discretion the trial court has acted unreasonably or capriciously or has ignored relevant facts and has adopted an unjustified approach then it would certainly be open to the appellate court - to interfere with the trial court's exercise of discretion. In cases falling under this class the exercise of discretion by the trial court is in law wrongful and improper and that would certainly justify and call for interference from the appellate court..."

In view of what has been stated aforesaid, I do not find anything there which stands in the way of the defendants to refuse the prayer for stay under Section 34 of the Act, which was made before the trial court. The present case does not come within any of the exceptions laid down in AIR 1960 SC 1156.

19. Learned Counsel for the respondent also attacked the affidavits which were filed on behalf of the defendants in the trial court. It appears that the affidavits which were filed by the respondent were also similar and in major portions of those affidavits of defendants statements were made by way of submissions. The trial court, therefore, was right in stating, after perusal of those affidavits, that technically there was not much which can be said against such affidavits. In my opinion, this point attacking the affadavits has no substance.

20. In the result, and for the conclusions arrived at above, the appeal succeeds, the impugned order is hereby set aside and the

application under Section 34 of the Act filed by the defendants- appellants in the trial court stands allowed. Under the circumstnces, there will be no order as to costs.

B.S.Sinha, J. - I agree.

R.D. Appeal allowed.

FULL BENCH

1985/January, 10.

Before Uday Sinha, S.Ali Ahmad & Brishketu Sharan Sinha, JJ.

*Sheodhar Singh and others**

v.

The State of Bihar and others.

Constitution—*Article 229—roster framed for promotion of the employees in the Ministerial Cadre of the High Court—promotion, whether to be made in accordance with the roster.*

Where a roster under Article 229 of the Constitution for promotion of the employees in the Ministerial Cadre of the High Court was framed wherein it has been determined as to which vacancy will be open and which will go to a member of the Scheduled Caste or to a member of the Scheduled Tribe;

Held, that the promotion of the employees of the High Court will be made in accordance with that roster. The very idea of drawing up of a roster is to depart from the general principle that seniority in the lower cadre must be reflected on promotion also.

Case laws discussed.

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* Civil Writ Jurisdiction Case No. 626 of 1979. In the matter of an application under Articles 226 and 227 of the Constitution of India.

Application under Articles 226 and 227 of the Constitution.

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

Mr. Ganesh Prasad Singh, Senior Advocate with Mr. Santosh Kumar Sinha for the petitioners

Mr. Rameshwar Prasad, Govt. Pleader no. VI with Mr. Upendra Prasad and Mr. B.P. Gupta, Junior counsel to Govt. Pleader no. VI and Mr. R.B.Mahto, Addl.Advocate General with Mr. Mahesh Pd. no. 3, Junior Counsel to Addl. Advocate General for the respondent.

S. Ali Ahmad, J. - This is an application under Articles 226 and 227 of the Constitution of India. Out of the 43 petitioners, petitioners nos. 1 to 39 are holding the selection grade appointments in the Ministerial cadre of the Patna High Court. The remaining petitioners, namely, petitioner nos. 40 to 43 are serving as Assistants in the Patna High Court. Their prayer is to quash the order of promotion of respondent nos. 5 to 7 as contained in Annexure 5, the gradation list of the selection grade of Assistants as contained in Annexure 5/a and the order as contained in Annexure 7 informing petitioner no. 1 that the representation dated 17.1.1978 filed by him and other Assistants has been rejected.

2. This case came up for hearing on 17.9.1984. Mr. Ganesh Prasad Singh, learned counsel for the petitioners argued the following three points for consideration:-

i. The High Court adopted the roster of 1971 and gave promotion to respondent nos. 5 to 7 in the year 1978 when the roster had become obsolete in the year 1975.

ii. Posts reserved for respondent nos. 5 to 7 in the roster have also been taken to be the position in the gradation list irrespective of the inter se seniority in the lower cadre.

iii. Clause (4) of Article 16 of the Constitution of India does not permit reservation at different grade of service; it only prescribes reservation in the service.

When learned counsel for the petitioners concluded his argument, we called upon learned counsel for the respondents to give his reply. It then transpired that the counter-affidavit filed by the respondents was most casual, formal and unhelpful. The case was, accordingly, adjourned to enable the respondents to file an affidavit bringing necessary facts on record. The case was then listed on 22nd October, 1984. But on that day also it had to be adjourned because the respondents had not supplied the required information. A supplementary counter-affidavit on behalf of respondent nos. 2 to 4 was thereafter filed annexing, inter alia, copies of entire minutes relating to the promotion of respondent nos. 5 to 7. When the case was taken up on 3.1.1985, Mr. Ganesh Prasad Singh, lerned counsel for the petitioners very fairly told us that in view of the facts brought on record by the supplementary counter-affidavit he withdrew his earlier submissions. Learned counsel, however, said that on the basis of the facts the following points need consideration:-

The selection grade is not a promotion in service or in the cadre and, therefore, reservation as postulated under Clause (4) of Article 16 of the Constitution of India is not

attracted. Learned counsel alternatively urged that since promotion to selection grade was based entirely on seniority-cum-fitness, there was no element of selection and, as such, the provision of Clause (4) of Article 16 of the Constitution of India is not attracted.

The next point urged by learned counsel is that assignment in the gradation list of seniority, according to the reservation of posts in the roster, is neither within the scope of Article 16(4) of the Constitution nor according to the Rules framed by this Court. According to learned counsel, therefore, the gradation list should be declared not to indicate the seniority of petitioner nos. 1 to 39 and respondent nos. 5 to 7, inter se.

3. In view of the argument advanced by learned counsel for the parties, it is necessary to mention all the facts which have been brought on record by the parties. I propose to mention only such facts whichf are necessary for consideration of the points in issue and I must say that such facts are very few which are as follows:

All the petitioners entered into the services of this Court as Lower Division Assistants. They were duly confirmed in the said cadre and were later promoted as Upper Division Assistants. Respondent nos. 5 to 7 also joined as Lower Division Assistants in the High Court and were confirmed in that capacity. They also, in due course, were promoted to the cadre of Upper Division Assistants on different dates. According to the petitioners, respondent nos. 5 to 7 were juniors to them, both as Lower Division Assistants and Upper Division Assistants. It may be mentioned here that these respondents, namely, respondent nos 5 to 7, are members of the Scheduled Caste and, accordingly,

they are entitled to the benefit of reservation introduced in their favour by the State Government and adopted by the High Court. With that end in view, the High Court office suggested that a roster of vacancies be drawn up so that the vacancies by promotion may be filled up according to the rotation prescribed in the roster. The roster as suggested by the office is as follows:-

"Roster

1.	Scheduled Caste
2.	Unreserved
3.	Scheduled Tribe
4-7.	Unreserved
8.	Scheduled Caste
9-12.	Unreserved
13.	Scheduled Tribe
14.	Unreserved
15.	Scheduled Caste
16-21.	Unreserved
22.	Scheduled Caste
23.	Scheduled Tribe
24-28.	Unreserved
29.	Scheduled Caste
30-32.	Unreserved
33.	Scheduled Tribes
34-35.	Unreserved
36.	Scheduled Caste
37-42.	Unreserved
43.	Scheduled Tribe
44.	Scheduled Caste
45-50.	Unreserved."

The suggestion regarding the roster was placed

before the Hon'ble the Chief Justice along with the notes of the Registrar which reads as follows:-

> "Coming to the roster of vacancies, I agree with the views of the office as at 'K' of the notes at page 25-26/n, at 'L' of the notes at page 26/n as also at 'M' of the notes at page 26/n."

Mr. Justice Untwalia, who was then the Chief Justice approved the suggestion by writing "as at 'X' to '25'" on 20.11.1973. The effect of this was that the vacancies on promotion in the High Court had to be filled up according to the roster.

4. Admittedly 21 vacancies were filled up in the manner indicated by the roster without any controversy. Also admittedly there was unification of the Lower Division and Upper Division cadre and a new cadre of Assistants was created as a result of which 50 vacancies became available in the selection grade. These vacancies were filled up according to the roster quoted above and the office - vide its office order dated 5.1.1978 issued under the signature of the Deputy Registrar of the High Court under Memo No. 95-152 dated 9.1.1978 (Annexure 5) and modified by the office order no. 19 dated 7.4.1978 under the signature of the Deputy Registrar under Memo No. 4489-4527 (Acctts.) dated 21.4.1978 (Annexure 5/1) promoted petitioner nos. 1 to 37 and respondent nos. 5 to 7 to the selection grade. It will be convenient to quote here Annexure 5/1. It reads as follows:

> "IN THE HIGH COURT OF JUDICATURE AT PATNA
>
> Office Order No. 19 dated 7.4.1978.
>
> (A) In continuation of Court's memo No. 96-152 Accounts dated 9.1.78 the following assistants are also promoted to the posts of

selection grade assistant in the scale of pay of Rs. 505-15-565- 20-665 with effect from the dates mentioned against their names.

1. Sri Sarjug Paswan .. 1.3.77
2. Sri Prem Chand Lal .. 1.3.77
3. Sri Ramanand Prasad .. 19.1.78
4. Sri Mahendra Pratap Mishra .. 3.4.78

(B) Sri Sarjug Paswan will get the first post of the 47 vavancies besides the first three already promoted earlier from and after 1.3.77 against the Scheduled caste quota. His position in the gradation list of selection grade assistants will be just below Sri Barun Kumar Bhattacharjee and just above Sri Sheo Muni Ram. Sri Prem Chand Lal will get the 8th of the 47 vacancies besides the first three already promoted earlier from and after 1.3.77in his position in the gradation list will be just below Sri Bindeshwari Pd. Sinha and just above Sri Shyam Nandan Thakur; Shri Ramanand Prasad and Sri Mahendra Pratap Mishra will lose their respective positions by the persons below them already promoted under office order no. 1 dated 5.1.78 and so their position in the gradation list of selection grade assistant after promotion under this order will be just below Sri Janardan Pandey in the order as aforesaid i.e. Sri Ramanand Prasad and Sri Mahendra Pratap Mishra."

A perusal of this annexure will show that respondent no. 5 was promoted to the first post of the 47 vacancies; besides the first three already promoted earlier and his position in the gradation list of the selection grade assistants was fixed just below Barun Kumar Bhattacharjee and just above Shri Sheo Muni Ram, respondent no. 6. Shri Prem

Chand Lal (respondent no. 7) was to get the 8th post of the 47 vacancies; besides the first three already promoted earlier from and after 1.3.77 and his position in the gradation list was fixed just below Shri Bindeshwari Pd. Singh and just above Shri Shyam Nandan Thakur. The result of fixation of the position of respondent nos. 5 to 7 in the gradation list was that petitioner nos. 1 to 37 were adversely affected. A representation dated 17.1.1978 was, therefore, filed by petitioner no. 1 and others. That representation, it appears, was rejected and the petitioners were informed of this by the order as contained in Annexure 7 to this application.

5. The argument of Mr. Ganesh Pd. Singh that selection grade is not a promotion in service as it is in the same cadre and as such, Article 16(4) of the Constitution of India is not attracted and the alternative argument that since promotion to the selection grade was based entirely on seniority-cum-fitness, there was no element of selection and as such, the provision of Article 16(4) of the Constitution is not attracted, is closely connected and can conveniently be disposed of together. In support of his argument, learned counsel referred to paragraph 26 of the decision in the case of *General Manager, Southern Railway v. Rangachari (1).* This paragraph no. 26 says: "the advancement of the socially and educationally backward classes requires not only that they should have adequate representation in the lowest rung of services but that they should aspire to secure adequate representation in selection posts in the services as well." Learned counsel submitted that the Supreme Court has approved promotion to the

(1) (1962) AIR (SC) 36.

selection post in the service and not selection grade In the service. According to him, since selection grade is not a service, therefore, the promotion of respondent nos. 5 to 7 in preference to his seniors was invalid and as such, should be struck down. Learned counsel also referred to the decision in the case of *State of Punjab v. Hira Lal (1)* and urged that in this case the Supreme Court only followed *Rangachari's case (supra)* without giving any reason. That may be so but the position is that the Supreme Court approved the promotion as Superintendent on the basis of reservation. Mr. Additional Advocate General in reply has said that reservation on non-selection post can also be made and in support of his submission, he has referred to the decision in the case of *Akhil Bharatiya Soshit Kramchari Singh (Railway) v. Union of India (2)*. This decision completely demolishes the argument of Mr. Ganesh Prasad Singh, Mr. Justice Krishna Iyer speaking for the Court in paragraph 91 of his judgment has said "it was urged that Rangachari (supra) did not cover non-selection posts, and, therefore, could not be an authority to sustain its validity. There is no force in this submission." The promotion to the non-selection post which was on the basis of seniority-cum-suitability was upheld. Learned counsel also referred to the decision in the case of *State of Kerala v. N.M. Thomas (3)* in support of the plea that Article 16(4) of the Constitution does not cover cases of promotion, as, according to him, it applies only in cases of initial appointment. He referred to paragraph 118 at page 426 of the report. It reads as follows:

(1) (1971) AIR (SC) 1777

(2) (1981) AIR (SC) 298

(3) (1976) AIR (SC) 490.

"When citizens are already employed in a particular grade, as Government servants, considerations relating to the sources from which they are drawn loose much of their importance. As public servants of that grade they could, quite reasonably and logically, be said to belong to one class, at least for purposes of promotion in public service for which there ought to be a real 'equality of opportunity', if we are to avoid heart burning or a sense of injustice or frustration in this class. Neither as members of this single class nor for purposes of the equality of opportunity which is to be afforded to this class does the fact that some of them are also members of an economically and socially backward class continue to be material, or, strictly speaking, even relevant. Their entry into the same relevant class as others must be deemed to indicate that they no longer suffer from the handicaps of a backward class. For purposes of Government service the source from which they are drawn should cease to matter. As Government servants they would, strictly speaking, form only one class for purposes of promotion."

This passage really does not help the petitioners as it was the view of Mr. Justice Beg alone and not a majority view. For these reasons, I do not find any merit in the argument of Mr. Singh.

6. The next argument advanced by learned counsel for the petitioners is that respondent nos. 5 to 7 were juniors to the petitioners and on promotion to the selection grade they have been made seniors to the petitioners. According to him, this was against the general principle that if a number of persons are promoted in one transaction then their

seniority in the lower cadre is carried on promotion. Learned counsel also referred to a Government Circular, which substantially supports him. But it is significant to mention that this Circular has not been adopted by the High Court under Article 229 of the Constitution of India, rather a roster has been drawn up and in that roster it has been determined as to which vacancy will be open and which will go to a member of the Scheduled Caste or to a member of the Scheduled Tribe. That roster has been framed under Article 229 of the Constitution of India and, therefore, the promotion of the employees of the High Court will be made in accordance with that roster. The very idea of drawing up of a roster is to depart from the general principle that seniority in the lower cadre must be reflected on promotion also. Therefore, the argument of Mr. Ganesh Prasad Singh that the gradation list in the selection grade does not determine the seniority of respondent nos. 5 to 7 cannot be accepted. Mr. Ganesh Prasad Singh, while arguing on the logic of roster said that in certain cases the roster may lead to absurd results. According to him, therefore, the system of promotion by roster should be given a go by. In that connection, learned counsel posed a problem (which does not arise on the facts of this case), which I am discussing as learned counsel insisted. He said that if in a given case there are five vacancies and according to the roster, the first post is reserved for a member of the Scheduled caste and in the gradation list from which promotions have to be made, the 1st, 2nd, 4th, 5th, 6th and 7th are not members of Scheduled caste; whereas the 3rd and the 8th are the members of the Scheduled caste, then according to him, the 8th candidate, who is a member of the Scheduled caste will be promoted to the first post and then the first, second, third and

fourth persons will be promoted after him. According to learned counsel, therefore, the person occupying the 8th position in the gradation list will become senior to the other member of the schedule caste, who was occupying the third position and was promoted on the basis of seniority and not on the basis of reservation. I do not think, learned counsel is correct. If the first post, according to the roster, is reserved for a member of the Scheduled caste then the member of the Scheduled caste, who was occupying third position in the gradation list will be promoted first and then the remaining four promotions will go to non-scheduled caste persons, who were occupying serial nos. 1, 2, 4 and 5. The member of the Scheduled caste who was occupying 8th position in the gradation list will not be promoted at all.

7. For the reasons discussed above, I do not find any merit in the application which is dismissed, but without costs.

Uday Sinha, J. - I agree.

Brishketu Saran Sinha, J. - I agree.

R.D. Application dismissed.

REVISIONAL CIVIL

1985/April, 9.

Before S.S.Sandhawalia, C.J. and A.K.Sinha, J.

*Sk. Mohammad Osaid and others**

v.

Sk. Abdul Wahid and others

Bihar State Legal Aid Scheme, 1981—*paragraph 21 of chapter VII, scope and applicability of—benefit of exemption from court fee to economically weaker persons having an income of less than Rs. 4000/- under Government notification no. S.O. 1207 dated 19th August, 1981—whether can be defeated by clubbing together of the individual incomes of the co-plaintiffs of a suit.*

The individual income of the co-plaintiffs of a suit cannot be clubbed together to deny them the benefit of exemption of court fee admissible under Government notification no. S.O. 1207 dated 19th August, 1981 for grant of legal aid.

The plain object of the framers of the Bihar State Legal Aid Scheme, 1981, is that the person belonging to the class of financially weaker section irrespective of caste or, religion should have the benefit of legal aid and consequent exemption from

* Civil Revision Nos. 380 and 381 of 1983. Against orders of Shri S.N.P. Sundarka, Subordinate Judge, East Champaran, Motiharl, dated 5th February, 1983.
C.R. 381/83: Sk. Md. Ali and ors. ... Opp. Party.

the payment of court fee for the basic right of access to justice. Once a person comes within the said ambit there seems to be no reason to deny him the benefit because of the fortuitous circumstance that he may have a joint cause of action with other co- plaintiffs with the consequential result that the total of the income of all of them may swell above Rs. 4000/-. It is to be conceded that because of the proviso to paragraph 21 of the Scheme even though a hundred persons belonging to the Scheduled caste or the Scheduled Tribes or the class of landless persons were to join together as co-plaintiffs, they would not be denied the benefit of the exemption irrespective of the total income of all the co-plaintiffs. No rationale could be pointed out which, on the other hand, would justify that in the identical situation such a denial should take place with regard to the class of economically weaker persons having an income of less than Rs. 4000/- merely because they happen to be co-plaintiffs.

There seems to be no reason that for merely bringing a joint suit on a joint cause of action within the spirit of the rule of avoiding multiplicity of proceedings, the co-plaintiffs should be penalised and denied the right to claim exemption from court fee liberally extended to them by a beneficient piece of legislation to advance the directive principles of providing legal aid to the citizens. The provisions of the notification along with paragraph 21 of the Scheme must be read in a manner which advances the larger purpose and does not frustrate the same.

Applications by the co-plaintiffs-petitioners.

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

The case in the first instance was placed

before A.K. Sinha, J. sitting singly who referred it to a Division Bench.

On this reference.

Messrs Md. Wasi Akhtar, Sirajul Hoda and Farooque Moazzam for the petitioners.

Messrs C.K.Sinha, G.P. I, with Ram Krishna Prasad in C.R. 380/83 and Anjani Kumar Sinha in C.R. 381/83 for the Opposite Party.

S.S.Sandhawalia, C.J. - Whether the benefit of exemption from court-fee (to the financially weaker section of litigants) as a step in the legal aid admissible under Government notification no. S.O. 1207 dated 19th August, 1981 can be defeated by clubbing together of the individual incomes of the co-plaintiffs of a suit, is the significant question which has necessitated the reference of these two connected civil revisions to the Division Bench.

2. The facts are not in dispute and may be briefly noticed from *S.K. Mohammad Omaid and others v. Sk. Abdul Wahid and others (C.R. 380/83).* The three petitioners had preferred a title suit for a decree of possession seeking the eviction of the defendants and for mesne profits pendents lite and other ancillary reliefs. Therein they filed a petition in the trial court seeking exemption for the payment of court-fee in the suit on the ground that the individual income of each of the co-plaintiffs did not exceed Rs. 4000/- only and they were, therefore, entitled to the benefit of the exemption under Notification no. S.O. 1207 dated the 19th August, 1981. They also filed certificates of their income granted by the Anchal Adhikari, Dhaka, in support of their claim. These certificates indicated that the incomes of petitioners no. 1, 2 and 3 were Rs. 2700/-, Rs. 2600/- and Rs. 2500/- only respectively. This application was, however, rejected by the learned

Subordinate Judge (vide order dated 5th of February, 1983) wherein he patently took the view that the incomes of all the three petitioners were to be clubbed together and since the total would come to more than Rs. 4000/-, they would not be entitled to the benefit of exemption. He accordingly directed the petitioners to file the court-fee by the 16th February, 1983.

3. Aggrieved thereby, the petitioners have come up by way of these civil revisions. They came up originally before my learned Brother, A.K. Sinha, J., sitting singly. Noticing that the point involved was one of great public importance, which needed an authoritative decision, the matter has been referred to the Division Bench.

4. The learned counsel for the petitioners forcefully projected his submission that the statutory provisions applicable do not warrant the clubbing of the income of all the co-plaintiffs for the purpose of giving the benefit of exemption from court-fee. It was contended that the income of the individual plaintiff alone has to be considered and the mere fact that because of the jointness of the cause of action the suit has been brought together, is irrelevant for the grant or refusal of the benefit to such exemption.

5. Herein the issue has to be inevitably examined against the back-drop of the recent development of social consciousness for providing legal aid to the traditionally weaker as also financially poorer sections of the society in order to ensure that they are not denied access to justice. The larger concept of legal aid has now come to be so well accepted that it would be unnecessary to elaborate the same. For our purpose it would suffice to mention that within this jurisdiction a statutory

scheme for providing legal aid was promulgated as 'Bihar State Legal Aid Scheme, 1981' (hereinafter to be referred to as the 'Scheme'). Paragraph 21 Chapter VII of the Scheme in terms provides as follows:-

Persons eligible for aid -

"Legal aid or advice may be given to all persons who are bonafide residents of the State of Bihar and whose total annual income from all sources, whether in cash or in kind or partly in cash and partly in kind, does not exceed rupees 4,000:

Provided that the limitations as to annual income shall not apply to persons belonging to Scheduled Castes and Scheduled Tribes and landless persons."

6. It would appear that the provision aforesaid and the Scheme were given formal legal shape by the promulgation of the Ordinance in 1982. Later on the same has been given final legislative sanction by the Bihar State Weaker Section Legal Aid Act, 1983 (hereinafter to be referred to as the 'Act'). Therein section 17 which corresponds to the earlier paragraph 21 of the Scheme is enacted in the terms following:

Persons eligible for aid:

"Legal aid or advice may be given to persons who are bonafide residents of the State of Bihar and whose total annual income from all sources, whether in cash or in kind, does not exceed rupees 5,000/-:

Provided that the limitation as to annual income shall not apply to infirm persons or persons belonging to Scheduled Caste and Scheduled Tribe and landless persons."

7. It was common ground before us that the notification which calls for construction was issued prior to the Ordinance and the Act. Reference therein to persons eligible for aid has obvious and patent connection with paragraph 21 of the Scheme. Since the whole controversy turns on the language of the notification, and Paragraph 21 of the Scheme it becomes necessary to notice the same in extenso:

"Notification under Court Fees Act

The 19th August, 1981

S.O. 1207 - In exercise of the power conferred by section 35 of the Court Fees Act, 1970 (VII of 1970) in its application for the State of Bihar, the Governor of Bihar is pleased to make the remissions hereinafter set-forth namely:

(1) To remit the Court fee, Process Fee and Vakalatnama fee for persons belonging to Scheduled Castes, Scheduled Tribes, Landless Persons and such other persons whose annual income does not exceed Rs. 4,000/- (Rupees four thousand) who are eligible for legal aid in the entire State in accordance with section 3 of Bihar Act 20 of 1977, the Court Fee (Bihar Amendment) Act, 1977.

By Order of the Governor of Bihar,

B.K.Singh, Spl. Secy."

8. In view of the somewhat plain language of the notification and the mosaic of the statutory provisions granting legal aid in which it stands embedded, we had called upon the respondent-State to clarify its stand with regard to the basic issue which falls for adjudication, namely, whether the income of the co-plaintiffs is to be clubbed for the purpose of the exemption of court-fee therein or

whether the benefit should accrue to them on the basis of their individual income. Somewhat surprisingly a constricted stance was sought to be taken on behalf of the State by its learned counsel to the effect that the income of the co- plaintiffs must be clubbed and not to be considered separately. To buttress this stand Mr. C.K.Sinha learned counsel for the respondent-State attempted to contend that the court fees being a matter affecting the revenue of the State, must be construed strictly and in cases of doubt where two constructions are possible; one in favour of the State should be adopted. This submission, apart from being unacceptable, seems to be directly contrary to the binding observations of their Lordships of the Supreme Court. This matter seems to have been amply set at rest in the case of *Diwan Brothers v. Central Bank of India, Bombay & others (1)* with the following observations:-

> "Even apart from these considerations, it is well settled that in case of a fiscal statute the provisions must be strictly interpreted giving every benefit of doubt to the subject and lightening as far as possible the burden of court-fees on the litigant. Thus where an adjudication given by a Tribunal could fall within two provisions of the Court Fees Act, one of which was onerous for the litigant and the other more liberal, the Court would apply that provision which was beneficial to the litigant."

9. Now as a necessary corollary to his main submission Mr. C.K.Sinha had also contended that wherever exemption from court fee was granted by the State in its largesse, the same must again be

(1) (1976) AIR (SC) 1503.

narrowly construed and be tilted in favour of the State. Once the binding observations above are noticed, this corrollary must also fall along with the main theorem. This, apart, the submission is also rebutted by direct precedent in the case of *Mohanlal Gangully and others v. the State of West Bengal & others (1)* wherein it has been observed as under:-

> "Beneficial construction in the present context is sought to be made by putting a curb on the fiscal statute and in favour of exemption. It is an accepted proposition that where an exemption is conferred by a statute by an exemption clause, that clause is to be interpreted liberally and in favour of the assessee but of course, it must always be without involving any variance to the language used."

10. In fairness to Mr. C.K.Sinha it must also be noticed that he repeatedly harped on his fears that the claim of exemption must be a bonafide one and the provision should not be abused by litigants for the purpose of evading court fee and depriving the State of its fair revenue. Now it is axiomatic that the factual basis of the claim for exemption must be well established. But herein there is no doubt which is even remotely raised with regard to the income duly certified for each individual co- plaintiffs. The court below was not even remotely sceptical of the individual income of the co-plaintiffs, but having accepted the same has proceeded on the basis of arithmetically adding them up for holding that the income of all the three co-plaintiffs would exceed the sum of Rs. 4000/- prescribed by law. I may observe that in the revisional jurisdiction it is hardly apt and there appears not the least ground to enter

(1) (1978) AIR (Cal.) 12.

in the thicket of controversy with regard to the factual aspect of the income of each co-plaintiffs as assessed. Equally, I may notice the well known cannon of construction that the mere fact that a provision may be capable of abuse is no ground for deviating from its plain language and the basic norms of interpretation therefor. Indeed, as has been often said, there can hardly be a provision which is not capable of misuse in cleverly manipulating hands. But that is a factor irrelevant to the issue of the construction of a statute.

11. With the aforesaid background one may now proceed to analyse paragraph 21 of the Scheme, along with the notification issued thereunder to effectuate the said purpose. It is plain that the benefit sought to be given herein is to four distinct classes;

(i) Members of Scheduled Castes,

(ii) Members of Scheduled Tribes,

(iii) Landless persons &

(iv) Persons whose total income from all sources does not exceed Rs. 4000/-.

From the proviso to paragraph 21 it is plain that as regards the first three clauses the income qualification is irrelevant; that is to say that even though a specific person belonging to Schedule Castes, or the Scheduled Tribes or landless persons is having an income above Rs. 4000/- per annum he is nevertheless entitled to the benefit of exemption. This is apprently on the ground of the traditional backwardness of these castes and classes. The somewhat modernistic concept of affording similar benefit to the financially weaker persons who live below the poverty line is effected by the newly added class IV with the income qualification of Rs.4000/-. The plain object of the framers herein is

that the person belonging to this class of financially weaker section, irrespective of caste or religion should have an identical benefit of legal aid and consequent exemption from the payment of court-fee for the basic right of access to justice. Once a person comes within the said ambit there seems to be no reason to deny him the benefits because of the fortuitous circumstance that he may have a joint cause of action with other co-plaintiffs with the consequential result and the total of the income of all of them may swell above Rs. 4000/-. It has to be conceded before us that because of the proviso to paragraph 21 even though a hundred persons belonging to the Scheduled Castes or the Scheduled Tribe or the class of landless persons were to join together as co- plaintiffs, they would not be denied the benefit of the exemption irrespective of the total income of all of the co-plaintiffs. No rationale could be pointed out which, on the other hand, would justify that in the identical situation such a denial should take place with regard to the IVth class of economically weaker persons having an income of less than Rs. 4000/- merely because they happen to be co-plaintiffs.

12. The issue deserves examination from another angle as well. It is plain that if one of the co-plaintiffs was to bring the suit individually and his income is below the prescribed limit, he would be obviously entitled to the benefit of exemption. The end result would be that if all the three co-plaintiffs herein were to bring their respective suits separately, each would be within the qualification for exemption. It is wellknown that the law wishes to frown on multiplicity of proceedings and, in terms provides for, and permits, joinder of causes of action.. There seems no reason that for merely bringing a joint suit on a joint cause of action within

the spirit of the rule of avoiding multiplicity of proceedings, the co-plaintiffs should be penalised and denied the right to claim exemption from court-fee liberally extended to them by a beneficient piece of legislation to advance the directive principles of providing legal aid to the citizens.

13. Lastly, reference to the preamble of the Act is also not less instructive. This is in the following terms:-

> "AN
> ACT
> TO EXECUTE DIRECTIVE PRINCIPLES OF THE CONSTITUTION OF INDIA, TO EXTEND FREE LEGAL AID THE WEAKER SECTION OF SOCIETY AND TO SAVE THEM FROM BEING DEPRIVED OF THE OPPORTUNITY OF GETTING JUSTICE OWING TO THEIR *ECONOMICAL*, SOCIAL AND OTHER INEQUALITIES."

It is plain from the above that the whole object is to advance the avowed purpose of providing legal aid to the weaker section of the society with specific reference to the economic inequalities, apart from the ethnic and social ones. Therefore the provisions of the notification along with paragraph 21 of the Scheme (which again closely corresponds to section 17 of the Act) must be read in a manner which advances the larger purpose and does not frustrate the same. It would be evident that if a somewhat hypertechnical stand sought to be taken on behalf of the State were to be accepted then the very purpose of the liberal grant of legal aid and exemption of court-fee to the economically weaker section of the litigant would be defeated by the mere accident of such person having a joint cause of action and his suing jointly. In consequence, it is

well settled that such an interpretation is not to be easily acceded to.

14. To conclude: the answer to the question posed at the outset is rendered in the negative and it is held that the individual income of the co-plaintiffs cannot be clubbed together to deny them the benefit of exemption of court fee under the relevant statutory provisions for the grant of legal aid.

15. Now applying the above, it is plain that the court below did not remotely doubt the certificates of income granted by the Anchal Adhikari with regard to the individual income of the petitioners. It merely added up the income of the three co-plaintiffs to hold that the same was more than the limit of Rs. 4000/- only. This it was not entitled to do. The order under revision is, therefore, plainly not sustainable and is hereby set aside and the revision petition no. 380 of 1983 is allowed with costs.

16. For identical reasons, Civil Revision No. 381 of 1983, is allowed, with costs.

A.K. Sinha, J. - I agree.

S.P.J. Application allowed.

REVISIONAL CIVIL

1985/April, 23.

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

*Shrimati Godawari Devi**

v.

Shrimati Radha Pyari Devi and others.

Code of Civil Procedure, 1908 (Act V of 1908)— *Order 32 Rule 15, scope and applicability of—persons not adjudged to be of unsound mind—a party to the suit, whether has right to challenge the soundness of mind or the mental capacity of the other party and claim an enquiry therefor—issue of unsoundness of mind of the parties, whether betwixt the court and the party and not between the parties themselves—power, whether wholly vested in the court and discretionary.*

In a case where there is no adjudgement of unsoundness of mind, a party to the suit has no right or *locus standi* to challenge the soundness of mind or the mental capacity of the other party and claim an enquiry therefor under Order 32 Rule 15 of the Code of Civil Procedure.

An analysis of Order 32 Rule 15 of the Code of Civil Procedure would plainly indicate that it deals with the two distinct classes of persons. Firstly, it is applicable in its strictness to persons who have

* Civil Revision No. 673 of 1982. Against an order of Shri K.N. Singh, Subordinate Judge, 1st Court, Muzaffarpur, dated the 16th April, 1982.

been adjudged to be of unsound mind. The second category is that of persons who are not so adjudged but those whom the court may find as unable to protect their interest because of any mental infirmity. In the second category of cases the issue of unsoundness of mind of the parties is prifmarily betwixt the court and the party and is certainly not a *lis* betwixt the parties themselves. The legislature has conferred a larger and paternal power on the court to see that each party has the capacity to safeguard its legal necessity and is in no way handicapped by reason of any mental infirmity. It is equally significant to notice that this broad based power extends in cases of any mental infirmity and not necessarily in a case of person being of unsound mind altogether. This beneficial and, indeed, paternal power is wholly vested in the court and it is in its discretion alone, where it finds that any one of the parties is suffering from a weakness of mind, to proceed for taking steps to safeguard the interest of such a party.

A.S. Mohammad Ibrahim Ummal alias Shahul Hameed Ummal v. Shaik Mohammad Marakayar and another (1)-relied on.

Devvuri Rami Reddi v. Duvvudu Papi Reddi and others (2), Duvvuri Pap Reddi and others v. Duvvuri Rami Reddi (3), and Ramgobind Singh v. Sital Singh (4)-distinguished. Kilambi Venkate Rangacharyulu v. Kilambi Gopalakrishnamacharyulu and others (5)-referred to.

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(1) (1949) AIR (Mad.) 292

(2) (1963) AIR (Andhra Pradesh) 160

(3) (1969) AIR (Andhra Pradesh) 362

(4) (1926) AIR (Pat.) 489

(5) (1962) AIR (Andhra Pradesh) 110.

Application by the defendant.

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

The case in the first instance was placed before B.P.Jha, J, sitting singly who referred it to a Division Bench.

On this reference.

S.S.Sandhawalia, C.J. - Whether a party to the suit has the right to put the soundness of mind of the opposite party (not already adjudged to be of unsound mind) in issue and claim an enquiry therefor under Order 32 Rule 15 of the Code of Civil Procedure, is the somewhat ticklish question arising in this civil revision, which has necessitated this reference to the Division Bench.

2. The facts are not in serious dispute. The plaintiff opposite party had instituted the title suit for partition of her one- fourth share in the suit properties, wherein she later brought an application for an injunction. It would appear that a detailed show cause was filed on behalf of the defendant petitioner against the said application and in paragraphs 33, 34 and 35 thereof a stand was sought to be taken that the plaintiff had lost her mental powers and was unable of protecting her legal interests and, therefore, the suit should have been brought by her next friend. Later a cryptic application purporting to be under Order 32 Rule 15 of the Code of Civil Procedure was brought on behalf of the defendant petitioner claiming that unless an enquiry is made with regard to the mental capacity of the plaintiff the suit could not proceed any further.

3. The matter came up before the learned Subordinate Judge below on the 16th of April, 1982 when the sole plaintiff Shrimati Radha Pyari Devi was present. The court apparently questioned her to

test her mental capacity and found her to be of wholly sound mind and in no way incapable, by reason of any mental infirmity, of protecting her legal interest. Consequently he rejected the application and proceeded to try the injunction matter. Aggrieved by the said order, the present civil revision petition has been preferred, which originally came up before my learned Brother B.P.Jha sitting singly. Noticing the significance of the issue involved, the matter was referred to the Division Bench.

4. Mr. Ghose appearing for the petitioner first claimed that there was an inherent right in a party to the suit to question the soundness of mind of the other party. It was the claim that unless it is so done, the party will be at the risk of losing the fruit of litigation if later on it was discovered that one of the parties was of unsound mind. Consequently the stand was that the issue of the soundness of a party's mind, if raised, must be tried s a preliminary issue before proceeding further. In any case the stand was that there must be a regular enquiry under Order 32 Rule 15 which would envisage the right of the parties to the suit to lead evidence and the examination of expert witnesses etc. According to the learned counsel, the application preferred by the petitioner could not be summarily disposed of by the trial court on the question of the mental capacity of the plaintiff opposite party. Reliance was placed on *Devvuri Rami Reddi v. Duvvudu Papi Reddi and others (1)*, *Ramgobind Singh v. Sital Singh (2)*, and *Duvvuri Pap Reddi and others v. Duvvuri Rami Reddi (3)*.

(1) (1963) AIR (AP) 160

(2) (1926) AIR (Pat.) 489

(3) (1969) AIR (AP) 362.

5. The true import of rule 5 can be best arrived at after noticing the broad scheme of Order 32. This deals compositely with the suits by or against minors and persons of unsound mind. The preceding rules 1 to 4 are by and large couched in language pertaining primarily to the case of minors. However, rule 15 makes the preceding rules 1 to 14 barring rule 2A apply to persons of unsound mind *mutatis mutandis*. It must be borne in mind that rules 1 to 14 do not necessarily become applicable in their full strictitude to the cases of persons of unsound mind because of the express language employed in rule 15 to the effect that they would apply in so far as may be. Since the issue herein must primarily turn on the language of rule 15, the same may be first read:

> "15. Rule 1 to 14 (except rule 2A) shall, so far as may be, apply to persons adjudged, before or during the pendency of the suit, to be of unsound mind and shall also apply to persons who, though not so adjudged, are found by the Court on enquiry to be incapable, by reason of any mental infirmity, of protecting their interest when suing or being sued."

An analysis of the rule would plaintly indicate that it deals with two distinct classes of persons. Firstly, it is applicable in its strictness to persons who have been adjudged to be of unsound mind. This, *inter alia*, has obvious reference to the provisions of the Indian Lunacy Act. Such adjudgement may be either before or during the pendency of the suit. Therefore, persons adjudged to be of unsound mind are a class by themselves. The second category is that of persons who are not so adjudged but those whom the court may find as unable to protect their interest because of any mental infirmity. This plain classification is indeed patent from the provision

and has been presidentially so held in *A.S. Mohammad Ibrahim Ummal alias Shahul Hameed Ummal v. Shaik Mohammad Marakayar and another (1).*

> "That is to say, this rule (Order 16 Rule 17) also, as does R. 15 of 0.32, draws a distinction between the two classes of persons, persons who were already adjudged of unsound mind and persons who were not so adjudged."

6. It is common ground that herein we are not dealing with the category of persons adjudged to be of unsound mind. That different considerations would be attracted in their case is patent and, therefore, this category may, for all purposes, be left altogether apart. Adverting now to the second category, it seems plain that the issue of unsoundness of mind of the parties in this class is primarily betwixt the court and the party and is certainly not a *lis* betwixt the parties themselves. The legislature in its wisdom has conferred a larger and paternal power on the court to see that each party has the capacity to safeguard its legal necessity and is in no way handicapped by reason of any mental infirmity. It is equally significant to notice that this broad based power extends in cases of any mental infirmity and is not necessarily governed by the extreme situation of a person being of unsound mind altogether. To my mind, this beneficial and, indeed, paternal power is wholly vested in the court and it is in its discretion alone, where it finds that any one of the parties is suffering from a weakness of mind, to proceed for taking steps to safeguard the interest of such a party. To use the language of another jurisdiction, namely,

(1) (1949) AIR (Mad.) 292.

that of contempt, the *lis* herein is betwixt the court and such a party and not betwixt the opposite parties as such. As has been said in that jurisdiction, the issue of contempt is primarily between the court and the contemner and even more so under Order 32 Rule 15 in its second category. It is a matter entirely between the court and the party alone and nobody else has any vested interest or right to agitate the unsoundness of mind of his opponent in this class. To put it tersely, it is not an issue betwixt the parties and neither the plaintiff nor the defendant has the *locus standi* to challenge or question the soundness of mind of the opposite side and claim an adjudication thereon at the very threshold. If this were to be so permitted in this field, there would, perhaps, be no end to allegations and counter allegations in this regard and its misuse would be capable of working grave public mischief.

7. The cases relied upon by Mr. Ghose are plainly distinguishable. In both AIR 1963 Andhra Pradesh 160 and AIR 1969 Andhra Pradesh 362 (supra) the suit had been brought by the plaintiff by his next friend on the obvious allegation that the plaintiff, because of reasons of mental infirmity, would not sue directly himself. Obviously in such a situation the issue of the mental infirmity of the party is thus brought into the field on behalf of the party himself and, if contested, must be gone into. Therefore, these cases by plaintiff through his next friend are on altogether different footing and have no relevance to the pointed second category of cases under Order 32 Rule 15 to which alone we are confined in the present case. *AIR 1926 Patna 489 (supra)* is a case not under Order 32 Rule 15 at all and pertains to the issue of minority under Rule 3 of Order 32. This indeed has little or no relevance to the point which calls for consideration.

8. In fairness to the learned counsel for the opposite party, it must be noticed that he sought to place reliance on *Kilamb Venkata Rangacharyulu v. Kilambi Gopalakrishnamacharyulu and others (1).* This case, however, is not directly attracted because it arose under the Lunacy Act. Under section 62 of the Lunacy Act with regard to the court's power of directing inquisition, it was held that the District Judge would be justified in dismissing an application for a claim of inquisition if he is otherwise satisfied that the allegation made therein are baseless. The observations tend to help the stand of the opposite party only by way of analogy.

9. To conclude, the answer to the question posed at the outset is rendered in the negative and it is held that in the second category of cases under Order 32 Rule 15 where there is no adjudgement of unsoundness of mind a party has no right or *locus standi* to challenge the soundness of mind or the mental capacity of the other party and claim an enquiry therefor.

10. Once it is held as above, it is obvious that the petitioner cannot claim any preliminary issue or an enquiry about the soundness of mind or otherwise of the plaintiff. Equally she has no vested right to have an enquiry made in this context and to lead evidence generally or of experts for the said purpose. As noticed earlier, in the second category it is a paternal jurisdiction vested in the court and it may in its discretion choose to determine it in a manner it is best advised. The petitioner has no locus standi to make any grievance with regard thereto. Even otherwise the court took the elementary precaution of examining the plaintiff and questioning her and thereafter has come to the

(1) (1962) AIR (AP) 110

conclusion that she suffers from no mental infirmity which may incapacitate her from safeguarding her legal interest. The revision petition, therefore, without merit and is hereby dismissed with costs.

B.P.Jha, J. - I agree.

S.P.J. Application dismissed.

CIVIL WRIT JURISDICTION

1985/April, 23.

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

*Dhanik Lal Mahto and others**

v.

The Additional Member, Board of Revenue and others.

Bihar Land Reforms (Fixation of Ceiling Area and Acquisition of Surplus Land) Act, 1961—*(Bihar Act XII of 1962), sections 16(1) and 16(3) scope and applicability of—valid bonafide gift made by the original transferee before the filing of application for pre-emption—right of pre-emption, whether can be defeated.*

The tenuous right of statutory pre-emption under section 16(3) of the Bihar Land Reforms (Fixation of Ceiling Area and Acquisition of Surplus Land) Act, 1961, can be defeated by a valid bonafide gift by the original transferee prior to the filing of the application for pre-emption.

The explanation to sub-section (1) of section 16 in terms excludes inheritance, bequest or gift from the ambit of transfer under the said section. Therefore if a valid and genuine deed of gift is made, the same is obviously not pre-emptable under

* Civil Writ Jurisdiction Case No. 2630 of 1980. In the matter of an application under Articles 226 and 227 of the Constitution.

the statute. Consequently, a bonafide transaction of gift can legitimately affect and deny a tenous claim to pre-emption.

Application by the pre-emptors.

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

The case in the first instance was placed before a learned Single Judge who referred it to a Division Bench.

On this reference.

Messrs Balabhadra Prasad Singh and Shyameshwar Dayal for the petitioners

Messrs R.C. Sinha and Santosh Singh for the respondents

S.S.Sandhawalia, C.J. - Whether the tenous right of statutory pre-emption under section 16(3) of the Bihar Land Reforms (Fixation of Ceiling Area and Acquisition of Surplus Land) Act, 1961 would be defeated by a valid gift by the original transferee even before it matures by the registration of the document of transfer, is the significant question arising in this reference to the Division Bench.

2. The facts lie in a narrow compass. The land in dispute was jointly sold by Srimati Laxmi Devi and Sri Ramakant Jha respectively by the sale deed dated 25th of May, 1974 in favour of Mansukh Das, respondent no. 4. It is common ground that this sale deed was completed by the entry in the registration book on the 17th of July, 1974. However, meanwhile after five days of the execution of the sale deed the said respondent executed a deed of gift in favour of his two sons - Bhuvaneshwar Das alias Bhonu Das and Bethu Das - on the 30th of May, 1974. This gift deed was duly reigstered and thus completed on the 27th of July, 1974. It was after nearly six weeks

therefrom that on the 9th of September, 1974 the petitioners presented the application for re-emption under section 16(3) of the Act. It was their claim that the gift by the original transferee was not a genuine transaction and was only intended to defeat their right of pre-emption. The question of the genuineness of the gift deed was squarely put in issue before the Deputy Collector, Land Reforms. There as many as fourteen witnesses were examined apart from the documentary evidence adduced on the record. On a full appraisal thereof, it was held that the gift deed was a *bona fide* transaction and the property having already been conveyed to the transferee, the petitioners' claim for pre-emption stood nullified. Aggrieved thereby, the petitioners preferred an appeal and after consideration of the finding of the trial court, it was affirmed to the effect that the transaction of gift was a genuine one and the appeal was rejected. The matter was then carried before the Board of Revenue in revision and the issue of validity of the gift deed was pointedly raised. The learned Additional Member, Board of Revenue, in a considered order, concluded as under:

> "There is nothing before this court on the basis of which this deed of gift could be considered illegal, invalid or fraudulent and once the deed of gift has been executed and disputed land had been transferred to O.P. and 3, no claim of pre-emption u/s 16(3) of the Act can lie against the original purchaser O.P.A o.1."

3. Mr. Balbhadra Prasad Singh, learned counsel for the petitioners, in an able argument, first attempted the uphill task of challenging the concurrent findings of the three forums below about the genuineness of the gift deed. The contention

raised was that the transaction was a sham and an eye-wash, and we were invited to construe the document and peruse the evidence to reverse the view taken by the three courts.

4. The submission though forcefully pressed is plainly untenable in the writ jurisdiction. It is neither desirable nor perhaps possible to construe evidence and go behind the concurrent findings arrived on question of fact after appraisal of evidence by as many as three authorities below. As has already been noticed, the Deputy Collector, Land Reforms, apart from documents brought on the record, examined a mass of evidence including the testimony of fourteen witnesses for arriving at the conclusion that he did. Those conclusions were assailed and re-appraised by the appellate court and duly affirmed. The learned Additional Member of the Board of Revenue also considered the issue and arrived at the finding of affirmance quoted above. To my mind, it is hardly possible to go behind the said finding without a fourth re-appraisal of the evidence and, undoubtedly, that is a scope foreign to the writ jurisdiction. The first contention, therefore, must fail.

5. In fairness to the learned counsel for the petitioners I must notice his reliance on *Snook v. London & West Riding Investment Ltd. (1)* in the observations of Lord Justice Diplock with regard to what constitutes a sham transaction. There can possibly be no quarrel with the larger enunciation therein; but, as already stands stated, three forum adverted to this aspect and were categoric that the gift deed herein was genuine. The case is thus plainly distinguishable. *Similarly, the reliance on Secy. of State v. Dadi Reddi Nagiah & another (2)* is

(1) (1967) 1 All ER 518

(2) (1919) AIR (Mad.) 467.

not well placed. It was held therein that a nominal or a *benami* deed of sale executed by a person with intent to defeat or delay creditors is within the mischief of section 4(b) of the Provincial Insolvency Act. This case again does not in any way advance the stance on behalf of the petitioners. Equally the general principles of law enunciated in *Anisminic Ltd. v. Foreign Compensation (1)* cannot in any way aid or advance the case of the writ petitioners herein.

6. Lastly the contention raised on behalf of the petitioners was that the right of pre-emption under section 16(3) having once arisen cannot be defeated even by a valid subsequent gift prior to its maturity by the registration of the original sale deed. It was pointed out that under the Act this right matures from the date of the registration of the document of transfer and the pre-emptor is entitled to bring his application within three months thereof. Counsel submitted that herein the petitioners came well within time, namely, less than two months from the date of the registration of the original sale deed. On these premises, the submission was that the statutory right having once matured cannot be out-flanked by the methodology of even a valid transfer of the property prior to the filing of the application.

7. The contention aforesaid takes one to the very root of the nature of the right of pre-emption generally and in particular under section 16(3) of the Act. It is common ground before us that sec. 16(3) is only a very limited statutory recognition of otherwise well known customary right of pre-emption. It has been held in a long line of precedent having the stamp of approval of the Final

(1) (1969) 2 P.C. 147.

Court that the right of pre-emption is indeed a piratical right which may well be defeated by all legitimate means. Now, the explanation to sub-section (1) of section 16 in terms excludes inheritance, bequest or gift from the ambit of transfer under the said section. Therefore, if a valid and genuine deed of gift is made, the same is obviously not pre-emptable under the statute. Consequently, a *bona fide* transaction of gift can legitimately affect and deny a tenous claim to pre-emption. It has been authoritatively so held in *Bishan Singh and others v. Khazan Singh and another (1)* in terms following:

> "Courts have not looked upon this right with great favour, presumably, for the reason that it operates as a clog on the right of the owner to alienate his property. The vendor and the vendee are, therefore, permitted to avoid accural of the right of pre- emption by all lawful means. The vendee may defeat the right by selling the property to a rival pre-emptor with preferential or equal right."

Within the scope, the matter has been equally well elaborated with regard to the statutory right of pre-emption under section 16(3) in a Division Bench decision in *Smt. Sudama Devi and others v. Parmeshwar Narain Singh and another (2)*. Therein it has been observed as follows:

> "But the law of pre-emption engrafted in Section 16(3) of the Act, to my mind, is of weaker nature than the customary law of pre-emption..... If under the customary law of pre-emption a preferential right to acquire land

(1) (1958) AIR (SC) 838

(2) (1973) PLJR 534.

is not a right to, or a right in, that land, I fail to understand how under section 16(3) a person who becomes entitled, to file an application under the said provision of law acquires any kind of right to, or right in, the land transferred. No order of pre-emption can be made against the original transferee if he has transferred the land to another person before the filing of the application for pre-emption."

8. Both on principle and precedent, the answer to the question posed at the outset must be rendered in the affirmative and it is held that the tenuous right of statutory pre-emption under section 16(3) of the Act can be defeated by a valid *bona fide* gift by the original transferee prior to the filing of the application for pre-emption.

9. Both the contention raised on behalf of the writ petitioners having been rejected, the writ petition must fail and is hereby dismissed. There would, however, be no order as to cost.

B.P.Jha, J. - I agree.

S.P.J. Application dismissed.

APPELLATE CIVIL

1985/May, 8.

Before S.S. Sandhawalia, C.J. and N.P.Singh, J.

*Mahajan Mahto alias Mahajan Yadav & ors.**

v.

Sri Gopi Nath Jee and others.

Suit—*filed by a Pujari of the deity challenging the alienations made by the Shebait—when and whether maintainable.*

Held, that a suit filed by a *Pujari* of the deity challenging the alienations made by the Shebait on the ground that it was not in the interest of the deity is maintainable.

Bishwanath and another v. Sri Thakur Radha Ballabhji and others (1), and Vemareddi Ramaraghava Reddy and others v. Konduru Seshu Reddy and others (2)-relied on.

Held, further, when the court of appeal below decreed the suit for recovery of possession of the lands in question which belonged to the deity and was given in exchange to the defendants, it should

* Appeal from Appellate Decree No. 132 of 1977. From a decision of Sri Yogendra Nath Bhatt, Additional District Judge of Gaya, dated the 21st December, 1976 reversing a decision of Sri D.P.S. Chaudhary, Munsif of Gaya, dated the 14th August, 1975.

(1) (1967) AIR (SC) 1044

(2) (1967) AIR (SC) 436.

have also directed the plaintiffs to restore possession of the lands taken in exchange to the defendants.

Bishwanath and another v. Sri Thakur Radha Ballabhji and others (1)-relied on.

Appeal by the defendants.

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

Messrs S.C.Ghosh and Kalyan Kumar Ghose for the petitioners

Mr. Kumar Bahadur for the respondents

N.P.Singh, J : Defendants are appellants in this second appeal. The plaintiff-respondents filed the suit in question for declaration of their title and recovery of possession of the suit lands on the ground that the shebait had no authority to exchange the lands which belonged to the plaintiff-deity, with the lands belonging to the defendant-appellants.

2. According to the plaintiffs one Mukund Lal had dedicated the lands, which are the subject matter of controversy, along with other lands to the deity Shri Gopi Nath Jee, plaintiff no. 1. Said Mukund Lal used to look after the management of Shri Gopi Nath Jee's properties. After his death, according to the plaintiffs, plaintiff no. 2 was looking after the management of the properties. It is the case of the plaintiffs that one Ramdeo Singh, claiming to be the Shebait, executed deeds of exchange in favour of the defendants on 9.9.1960 and 6.10.1960 transferring the lands in question to the defendants in exchange of lands conveyed by them in favour of the deity, which, according to the plaintiffs, are sham, collusive and illegal.

3. The defendants contested the said suit.

According to them, after the death of Mukund Lal, Ramdeo Singh aforesaid became the Shebait of the Thakurbari and he had exchanged the lands in question taking the interest of the deity into consideration. The claim of plaintiff no. 2 being the Shebait was also resisted saying that he was a mere Pujari of the temple.

4. The suit was dismissed by the trial court holding that plaintiff no. 2 was a Pujari of the deity and not a Shebait, and, as such, a suit at his instance was not maintainable. It was also held that the transfer was for the benefit of the deity, and, as such, there was no occasion to declare it null and void.

5. On appeal, the suit of the plaintiffs has been decreed on the finding that the transfer was not for the benefit of the deity and, as such not binding upon it. The finding that plaintiff no. 2 was the Pujari of the temple and not the Shebait was, however, affirmed. It was held by the court of appeal below that a suit at the instance of Pujari was maintainable. On the aforesaid findings, the plaintiffs' title to the suit land has been declared and recovery of possession of the suit lands has been ordered.

6. Learned counsel appearing for the defendant-appellants submitted that the court of appeal below having affirmed the finding of the trial court that plaintiff no. 2 was a mere Pujari and not the Shebait of the deity, should have dismissed the suit filed at his instance. It was submitted that the deity can be represented only through the Shebait who can file a suit on behalf of the deity before any court of law; this power cannot be extended to a stranger. In this connection reference was made to Mukherjee's Hindu Law of Religious and Charitable

Trusts where it has been pointed that "the idol is the owner of Debuttar property only in an ideal sense; this ideal personality is always linked up with the natural personality of the Shebait". Reliance was also placed on the following observation of the Privy Council in the case of *Maharaja Jagadindra Nath Roy v. Rani Hemanta Kumari (1):*

> "The possession and management of the dedicated property belong to the Shebait; and this carries with it the right to bring whatever suits are necessary for the protection of the property. Every such right of suit is vested in the Shebait and not in the idol."

It is well known that idol is a juristic person, and, as such, it can hold property and can sue or be sued in respect thereof, but it has to act through the Shebait. Justice Mukherjee in the Mukherjee's Hindu Law of Religious and Charitable Trusts, has pointed out while referring to the case of *Maharaja Jagadindra Nath Roy (supra)* that the view underlying the aforesaid decision seems to be that "as an idol suffers from perpetual incapacity to engage itself in juridical acts, the natural personality of the Shebait supplies this legal deficiency in the idol. For all juridical purposes, it is the Shebait and Shebait alone that has the right to represent the idol and this creetes what may be said to be a personality right in the Shebait to institute a suit in respect of the idol's property".

7. But when a Shebait declines to bring a suit or by his conduct places himself in such a position that he could not be expected to bring a suit, a question arises whether any other person or persons can file a suit to protect the interest of the

(1) 31 I.A. 203.

deities. The present case is obviously one of such cases where an alienation made by the Shebait in favour of the defendants is being questioned by the Pujari of the deity. Whether the suit at the instance of the Pujari for the reliefs sought for is maintainable? In the case of *Sri Veerabhadraswami at Samayawallur through Subramania Ayyar and another v. Mayshone and others* (1) it was observed that a suit by certain persons on behalf of all the villagers for a declaration that the suits property belongs to the temple and that the alienations thereof were void and not binding on the institution was maintainable apart from the provisions of section 92 of the Code of Civil Procedure. A Full Bench of the Madras High Court in the case of *Venkataramana Ayyangar v. Kasturi Ranga Ayyangar* (2) and Privy Council in the case of *Abdur Rahim v. Abu Muhamed Barkat Ali* (3) held that suits filed by villagers or worshippers in their representative capacity challenging the alienations made by the Shebait were maintainable. Recently, in the case of *Veerbasavaradhya and others v. Devotees of Lingadagudi Mutt and others* (4) same view was reiterated that a suit by some of the devotees in representative capacity for possession of the properties belonging to the deities against the transferee was maintainable.

On behalf of the appellants it was pointed out that in the cases referred to above, suits had been filed in representative capacity under Order 1 Rule 8 of the Code of Civil Procedure after necessary permission from the court which is not

(1) (1940) AIR (Mad.) 81.
(2) ILR 40 Mad. 212.
(3) 55 IA 96 = 1928 P.C. 16.
(4) (1973) AIR (Mys.) 280.

the position in the instant case. Here, plaintiff no. 2 filed the suit claiming himself to be the Shebait, but has been found to be just the Pujari of the deity, and, as such, a suit in his individual capacity is not maintainable. In the case of *Bishwanath and another v. Sri Thakur Radha Ballabhji and others (1)* where the plaintiff was a worshipper and was assisting in the management of the temple, a question arose; can such a person represent the idol when the Shebait acts adversely to its interest and fails to take action to safeguard the interest. It was observed:-

> "On principle we do not see any justification for denying such a right to the worshipper. An idol is in the position of a minor and when the person representing it leaves it in a lurch, a person interested in the worship of the idol can certainly be clothed with an ad hoc power of representation to protect its interest. It is a pragmatic, yet a legal solution to a difficult situation. Should it be held that a Shebait, who transferred the property, can only bring a suit for recovery, in most of the cases it will be an indirect approval of the dereliction of the Shebait's duty, for more often than not he will not admit his default and take steps to recover the property, apart from other technical pleas that may be open to the transferee in a suit. Should it be held that a worshipper can file only a suit for the removal of a Shebait and for the appointment of another in order to enable him to tke steps to recover the property, such a procedure will be rather a prolonged and a complicated one and the interest of the idol

(1) (1967) A.I.R. (S.C.) 1044.

> may irreparably suffer. That is why decisions have permitted a worshipper in such circumstances to represent the idol and to recover the property for the idol. It has been held in a number of decisions that worshippers may file a suit praying for possession of a property on behalf of an endowment."

The decree passed by the trial court for recovery of possession in a suit filed through worshipper of an idol was held to be maintainable. In the case of *Vemareddi Ramaraghava Reddy and others v. Konduru Seshu Reddy and others (1)*, it was observed:-

> "The legal position is also well established that the worshipper of a Hindu temple is entitled, in certain circumstances, to bring a suit for declaration that the alienation of the temple properties by the de jure Shebait is invalid and not binding upon the temple."

In my opinion there should not be any difficulty in holding that a suit filed by the Pujari challenging the alienations made by the Shebait on the ground that it was not in the interest of the deity is maintainable.

9. Learned counsel for the appellant could not challenge the finding of the court of appeal below that the transfer by way of exchange was not in the interest of the deity. He, however, submitted that in case the decree of the court of appeal below is affirmed then there should be also a direction to the plaintiffs to restore possession of the land to the defendants which had been given to the deity by way of exchange. It was pointed out that the court of appeal below has only passed a decree for recovery

(1) (1967) A.I.R. (S.C.) 436.

of possession of the land which belonged to the deity and was given in exchange to the defendants, but has given no direction to the plaintiffs to restore the land which had been given in exchange by the defendants. In my opinion, when the court of appeal below decreed the suit for recovery of possession of the lands in question it should have also directed the plaintiffs to restore possessions of the lands taken in exchange to the defendants. Even in the case of *Bishwanath and another v. Sri Thakur Radha Ballabhji and others (supra)* the trial court while passing a decree for recovery of possession and mesne profits had directed the plaintiffs of that suit to refund Rs. 10,000/- to the defendant which the defendant had paid as consideration for the alienation made in his favour. Accordingly, while affirming the judgment and decree passed by the court of appeal below, I further direct the plaintiff-respondents that after they get possession of the land which had been transferred to the defendants by way of exchange, to restore possession of the lands which had been given in exchange to the plaintiff no. 1 deity, to the defendants.

10. The appeal is, accordingly, allowed in part to the extent indicated above, but without costs.

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

S.P.J. Appeal allowed in part.

CIVIL WRIT JURISDICTION

1985/May, 9

Before S.S.Sandhawalia, C.J. and N.P. Singh, J.

*Jalil Ahmad**

The State of Bihar through the Commissioner, Department of Urban Development and others.

Land Acquisition Act, 1894 (Act I of 1894)—land acquired under the provisions of the Act for public purpose, namely, for construction of market and park—portion of the lands acquired leased out by the Municipality for construction of a cinema hall—whether amounts to utilising a part of the lands acquired for a private purpose—grant of lease, whether illegal.

Where the acquisition has been made for construction of the 'market and park which was the public purpose mentioned in the notification for the acquisition and later the Municipality decided to construct a cinema hall on a portion of the lands acquired for which lease was granted,

Held, that in such a situation decision to construct a cinema hall does not amount to utilising a part of the lands acquired for a private purpose. The construction of a cinema hall in a market is a

* Civil Writ Jurisdiction Case No. 5986 of 1983 in the matter of an application under Articles 226 and 227 of the Constitution of India.

part of market complex and, therefore, the Municipality was wholly within its jurisdiction in leasing out a part of the lands acquired for construction of a cinema hall.

Mangal Oram and others v. State of Orissa and another (1)- referred to.

Application by the convenor of Welfare and Development Committee.

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

Messrs Basudeva Prasad, Narendra Prasad and Kishore Kumar Sinha for the petitioners.

Mr. Ram Balak Mahto, Advocate-General with Mr. S.K.P. Sinha, J.C. to Advocate-General (For the State of Bihar).

Messrs Balbhadra Prasad Singh and Raghunandan Prasad Sinha (For the Municipal Corporation)

Messrs Tara Kant Jha, Suresh Chandra Prasad Sinha, Bireshwar Prasad Sinha and Mrs. Sabita Gupta (For Respondent No. 6).

Messrs Ajoy Kumar and Ashok Kumar Keshri (For the Intervenors).

N.P.Singh, J: The petitioner as Convenor of Welfare and Development Committee, Gaya has filed this writ application for a writ of mandamus directing the respondents to use 2.40 acres of land which have been acquired in the town of Gaya under the provisions of the Land Acquisition Act, only for construction of market and park and for no other purpose.

2. According to the petitioner, the lands in question had been recorded as Gairmazarua Aam

(1) (1977) A.I.R. (S.C.) 1456.

Pokhar in the records of the Gaya Municipality. On 20.6.1970, the then Special Officer of Gaya Municipality (hereinafter to be referred to as 'the Municipality') requested the Collector of Gaya for acquisition of the said 2.40 acres of land for construction of market and park. On that request, a land acquisition proceeding was started and the lands were ultimately acquired and transferred to the Municipality. The Municipality came in possession of the lands on 24.8.1978. The Commissioners of the Municipality at a meeting held on 16.2.1979 decided that a cinema hall be also constructed on a portion of the lands aforesaid. On 8.9.1979 they decided to lease out a portion of the lands acquired for construction of a cinema hall. Notice inviting applications for grant of the lesse for the cinema hall was published in an issue of the 'Indian Nation' dated 30.8.1983. At the auction held, respondent no. 6 offered the highest bid and his tender was accepted and lease was executed in his favour on 17.9.1983. This decision of the Municipality to lease out a part of the acquired lands for construction of a cinema hall to respondent no. 6 is the main subject matter of challenge in the present writ application. According to the petitioner, as the lands had been acquired for construction of market and park, later it was not open to the Municipality to lease out a part thereof for construction of a cinema hall, which cannot be held to be public purpose.

3. It appears that when the State Government learnt about the aforesaid decision of the Municipality, a telex message was issued in November, 1983 by the Commissioner and Secretary of the Urban Development and Housing Department, Bihar, addressed to the District Magistrate, Gaya asking him not to permit any construction work on

the land leased to respondent no. 6 because no cinema licence had yet been issued by the Department. This was followed by a letter dated 25.11.1983 issued by the aforesaid Department to the District Magistrate saying that for the time being the construction of the boundary wall and the shops should be stopped in view of the law and order problem. It was also mentioned in that letter that the State Government had already restrained the construction of the cinema hall and as such no cinema hall should be constructed.

4. Mr. Basudeva Prasad, learned counsel for the petitioner, submitted that the resolution of the Commissioner of the Municipality for grant of the lease for construction of cinema hall was per se illegal in view of the fact that it was not open to the Municipality to lease out the lands acquired for public purpose for use of private individuals. Learned counsel pointed out that in the different notifications issued in connection with the acquisition of the lands, the public purpose mentioned is 'market and park'. Municipality to lease out a part of the acquired land for the purpose mentioned in the notifications is not in accordance with the Land Acquisition Act. The expression 'public purpose' has been defined under section 2(f) but the definition is inclusive and not a comprehensive one. As such it has to be decided by courts whenever a challenge is made as to whether the acquisition has been made for a public purpose. In the case of *Smt. Somawanti and others v. The State of Punjab and others (1)* it was pointed out:

"Broadly speaking the expression 'public purpose' would, however, include a purpose in which the general interest of the community, as opposed to the particular interest of individuals is directly and vitally concerned."

(1) (1963) A.I.R. (S.C.) 151

asking him not to permit any construction work on

But the public purpose is bound to vary with times and the prevailing conditions in the locality. As such, perhaps, it was not possible for the legislature to give a comprehensive definition of public purpose and so it was left to the Government or any other competent authority to say what is a public purpose in the context of the acquisition in question. It was further pointed out in the case of *Smt. Somawanti and others (supra)*:

"The Act has empowered the Government to determine the question of the need for land for a public purpose or for a company and the jurisdiction conferred upon it to do so is not made conditional upon the existence of a collateral or extraneous fact. It is the existence of the need for a public purpose which gives jurisdiction to the Government to make a declaration under S. 6(1) and makes it the sole judge whether there is in fact a need and whether the purpose for which there is that need is a public purpose. The provisions of sub-section (3) preclude a court from ascertaining whether either of these ingredients of the declaration exists."

It was observed that only in exceptional cases where declaration of acquisition is found to be merely a colourable exercise of the power conferred by the Act, courts can interfere.

In the present case there is no dispute that the lands acquired, market and parking are being constructed by the Patna Municipal Corporation for the public purpose mentioned in the notification for the acquisition. In a situation as the present case, for which lease has been granted to respondent no. 6 and such a situation can it be said that the decision to construct

a cinema hall amounts to utilising a part of the lands acquired, for a private purpose ? In my opinion, whatever could have been said in olden days, under the present set up a cinema hall is a part and parcel of a market complex. In most of the market development schemes undertaken by the municipalities, corporations and Regional Development Authorities, there is a plan for construction of cinema hall. This is not only for the benefit of the individual to whom the lease is granted, but also for the benefit of the public in general for whom cinema has become a source of entertainment. This aspect of the matter has been taken note of even by the Supreme Court in the case of *Mangal Oram and others v. State of Orissa and another (1)* where it was observed as follows:-

> "It is then argued by Mr. Gobind Das that part of the lands which were acquired for the purpose of steel plant and ancillary industries are being used as civil township. It is contended that the acquired land could only be used for the steel plant and ancillary industries and not for a civil township. This contention is equally devoid of force. The establishment of a steel plant necessarily postulates the construction of residential quarters for the workmen to be employed in the plant. In addition to that, lands would be needed for shopping areas, for schools for the children of the employees, for play grounds, for hospitals and for residential quarters of persons opening their shops catering to the needs of the employees of the steel plant. Lands would likewise be needed for post offices, banks, clubs, parks, cinemas, roads, police stations

(1) (1977) A.I.R. (S.C.) 1456.

as also for cremation and bburial of the dead. Land would also be needed for a variety of other purposes and civic amenities."

In my opinion, it is difficult to hold that when the acquisition had been made for construction of the market and park, later a cinema hall cannot be constructed over such land because that shall amount to utilising the land for a private purpose.

7. On behalf of the respondent-Municipality it was submitted that once the acquisition is held to be valid and the lands acquired have vested in the Municipality, it is always open to the Municipality to divert it to any other public purpose other than one stated in the declaration. In this connection reference was made to the case of *Gulam Mustafa and others v. The State of Maharashtra and others,* (1) where it was observed as follows:-

"At this stage Shri Deshpande complained that actually the Municipal Committee had sold away the excess land marking them out into separate plots for a housing colony. Apart from the fact that a houlsing colony is a public necessity, once the original acquisition is valid and title has vested in the Municipality, how it uses the excess land is no concern of the original owner and cannot be the basis for invalidating the acquisition. There is no principle of law by which a valid compulsory acquisition stands voided because long later the requiring authority diverts it to a public purpose other than the one stated in section 5(3) declaration."

In my view, once it is held that the construction of a cinema hall is a market is a part of market

(1) (1977) A.I.R. (S.C.) 448.

complex, there is no escape from the conclusion that the Municipality was wholly within its jurisdiction in leasing out a part of the lands acquired for construction of a cinema hall.

8. On behalf of the respondent-Municipality it was pointed out that the two communications, a telex message and letter dated 25.1.1983 issued by the State Government directing the District Magistrate not to allow the construction of the cinema hall had been issued under misapprehension and wrong assumption of actual existing conditions, because a cinema hall cannot be constructed unless a licence is granted and other formalities are completed in accordance with the Cinematograph Act and the Rules framed thereunder. In this connection our attention was drawn to the different rules which provide for recommendation for grant of a cinema licence by a Committee headed by the District Magistrate concerned. Any such recommendation has to be approved by the State Government and then only the licensee can start the construction of the cinema hall. In the instant case, admittedly, that stage has not reached. However, so far as the decision to grant a lease of the site for construction of a cinema hall to respondent no. 3 cannot be held to be illegal or void.

9. Accordingly, I hold that this writ application is without any merit and it is dismissed. But without costs.

S.P.J. Application dismissed.

CIVIL WRIT JURISDICTION

1984/May, 18.

Before S.S. Sandhawalia, C.J. and Nagendra Prasad Singh, J.*

*Ram Sunder Prasad and others***

v.

The State of Bihar and others.

Bihar Cinema (Regulation) Act, 1954 (Act XV of 1954)—section 5, sub-section (2), and Bihar Cinema (Regulation Rules, 1974, rule 3(5)(iv)—licensing authority—power vested in him to grant licence, whether subject to the control of State Government-application filed for grant of licence—objection filed—licensing authority on the basis of the findings of the committee recommending for grant of permission—approval by the State Government—permissions granted by the licensing authority—whether suffer from infirmity.

It is true that under the provisions of the Act and the Rules, the power has been vested in the licensing authority to grant a licence, but such a power is to be exercised subject to the control of the State Government in view of sub-section (2) of section 5 of the Act. Even rule 3(5)(iv) requires the licensing authority to send the finding of the

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* Sitting at Ranchi.

** Civil Writ Jurisdiction Case No. 474 of 1980 (R): In the matter of an application under Articles 226 and 227 of the Constitution of India.

committee to the State Government with his recommendation regarding the suitability of the site and desirability of granting permission for construction of a permanent cinema house thereupon. It further says that the decision of the State Government shall be final. In the instant case after receipt of the application of the respondant, the matter was considered by the committee, and then objection was invited asking any person interested or public in general to file objection within 15 days from the date of the publication of the notice. Thereafter, when no objection was received within that period the Deputy Commissioner on the basis of the findings of the committee, recommended for grant of permission to the said respondent. When the State Government approved the proposal, only thereafter the permission was granted.

Held, therefore, that under the circumstances of the case, it cannot be said that the Deputy Commissioner, who is the licensing authority, has not applied his independent mind along with the committee to the question of grant of permission and the permission has not been granted in a mechanical manner on the direction of the State Government. The order of the Deputy Commissioner granting the permission for construction of the building does not suffer from the infirmity pointed by the Supreme Court in the case of *Commissioner of Police, Bombay v. Gordhandas Bhamji (1) and the State of Punjab and anr. v. Hari Kishun Sharma (2).*

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

The facts of the case material to this report are

(1) (1952) A.I.R. (S.C.) 16

(2) (1966) A.I.R. (S.C.) 1081.

set out in the judgment of Nagendra Prasad Singh, J.

Messrs S.B.Sinha and B.P.Jaiswal for the petitioners

Mr. N.K.Prasad (G.P.I) and Messrs B.C. Ghosh, P.K.Sinha, Sachinandan Das, D.K.Sarkar and P.Ghose for the respondents.

Nagendra Prasad Singh, J: The petitioners have questioned the validity of order dated 26.3.1980 passed by the Deputy Commissioner of Ranchi in purported exercise of the powers conferred on him by the Bihar Cinema (Regulation) Act, 1954 (hereinafter to be referred to as 'th Act') granting licence in favour of respondent no. 4(hereinafter referred to as 'th respondent') for exhibition of cinematographs at Lohardaga. A copy of that order is Annexure-5 to the writ application.

2. The petitioners are residents of Lohardaga. According to them there has been contravention of the provisions of the Act and of the Bihar Cinema (Regulation) Rules, 1974 (hereinafter to be referred to as 'the Rules') while granting licence to the respondent.

3. Because of section 3 of the Act no person can give an exhibition by means of cinematograph elsewhere than in a place licensed under the said Act and in accordance with the conditions and restrictions imposed by such licence. Section 4 vests power in the District Magistrate, who is the licensing authority, to grant licence. Section 5 says that the licensing authority shall not grant a licence under the said Act unless he is satisfied that the Rules made under the said Act have been substantially complied with and adequate precautions have been taken to provide for safety of persons attending the exhibition therein. The Rules

have been framed under section 9 of the Act. Rule 3 contains provision prescribing the procedure for grant of licence. It requires any person desirous of constructing a permanent building to be used for cinematograph exhibition to submit an application in writing to the District Magistrate, who is the licensing authority. Rule 3(5)(iii) provides that on receipt of the application the licensing authority shall cause a notice to be pasted in criminal and civil court of local jurisdiction, office of the local Municipal Body, or any other conspicuous place in the locality, specifying therein the name, address of the applicant, and the building site plans with plot numbers, inviting objections from the persons interested or the general public within 15 days of the date of the notice regarding suitability of site for a permanent cinema house. Such applications have to be considered at a meeting of the Cinema Advisory Committee (hereinafter to be referred to as 'the Committee') consisting of the District Magistrate, who is the licensing authority, the Superintendent of Police, the Civil Surgeon, the Executive Engineer, P.W.D. (Buildings), the Chairman of the Municipal Board, if there be one in the town, and Officer incharge of the Town Planning Organisation. Rule 3(5)(iv) requires the Committee to submit its findings in writing to the Licensing Authority who shall send to the State Government his recommendations regarding the suitability of the site and the desirability of granting permission for construction of a permanent cinema house thereupon. Rule 4 enumerates the restrictions in regard to location of cinema. In view of rule 6 on completion of permanent cinema house to the satisfaction of the licensing authority, the licensing authority may grant a licence for a permanent cinema. However, the said grant of licence shall be

subject to the approval of the State Government.

4. From the statements made in the writ application and the counter-affidavit filed on behalf of the respondents it appears that on 17.8.1978 an application was filed for grant of cinematograph exhibition licence for Lohardaga town by the respondent. That application was considered at a meeting of the Committee on 12.1.1979 when it was resolved that the plot on which the cinema building was to be constructed was suitable, but a public notice should be issued according to rules inviting objections from public in general and after receipt of the objection action should be taken in accordance with the rules. A copy of that resolution is Annexure-B to the counter-affidavit filed on behalf of the Deputy Commissioner. On 28.2.1979 the Deputy Commissioner, the licensing authority, got a notice published inviting objection from general public or any person interested within 15 days of the date of the publication of the said notice. A copy of that notice is Annexure-C to the counter-affidavit filed on behalf of the Deputy Commissioner. It is an admitted position that no objection was filed within the period of 15 days from the date of the publication of the notice aforesaid. On 3.4.1979 the Committee recommended the case of the respondent to the State Government for the grant of permission for construction of a permanent cinema house giving the details of the circumstances under which the recommendation was being made. A copy of that letter is Annexure-5 to the supplementary affidavit filed on behalf of the petitioners. On 22.3.1980 the State Government approved the proposal. A copy of the said approval is Annexure-4 to the writ application. On 26.7.1980 the licence was granted to the respondent by the Deputy Commissioner. A copy of that order is Annexure-5 to the writ application.

5. Mr. S.B.Sinha, learned counsel appearing for the petitioners submitted that the order dated 26.7.1980 granting permission to the respondent is invalid on the ground that it has been granted on the direction of the State Government and not by the licensing authority who has been vested with the power to grant licences to the applicants. This argument has been advanced on the basis that in the order dated 26.7.1980 it has been mentioned that permission was being granted as per the direction of the State Government. In support of the contention that such grant shall be illegal and beyond the scope of section 5 of the Act and Rule 3 of the Rules, reliance was placed on the judgments of the Supreme Court in the cases of *Commissioner of Police, Bombay v. Gordhandas Bhamji (1) and the State of Punjab and another v. Hari Kishan Sharma (2)*. The Supreme Court in the former case, after construing the provisions of the City of Bombay Police Act, pointed out that the only person vested with authority to grant or refuse a licence for the erection of a building to be used for the purpose of public amusement was the Commissioner of Police. It was observed, "the power to do so is vested in him and not in the State Government and can only be exercised by him at his discretion. No other person or authority can do it."

6. It is true that under the provisions of the Act and the Rules, the power has been vested in the licensing authority to grant a licence, but such a power is to be exercised subject to the control of the State Government in view of sub-section (2) of section 5 of the Act. Sub-section (2) of section 5 of the Act is as follows:

(1) (1952) A.I.R. (S.C.) 16

(2) (1966) A.I.R. (S.C.) 1081.

"Subject to the foregoing provisions of this section and to the control of the State Government, the licensing authority may grant licence under this Act to such persons as that authority thinks fit and on such terms and conditions and subject to such restrictions as it may determine and on payment of such licence fee as may be prescribed in the rule framed under the said Act subject to a maximum of Rs. 5,000."

Even rule 3(5)(iv) requires the licensing authority to send the findings of the Committee to the State Government with his recommendations regarding the suitability of the site and desirability of granting permission for construction of a permanent cinema house thereupon. It further says that the decision of the State Government shall be final. I have already pointed out that after receipt of the application of the respondent, the matter was considered by the Committee, and then objection was invited asking any person interested or public in general to file objection within 15 days from the date of the publication of the notice. Thereafter, when no objection was received within that period the Deputy Commissioner on the basis of the findings of the Committee, recommended for grant of permission to the said respondent. When the State Government approved the proposal, only, thereafter, the permission was granted. Under the circumstances mentioned above, it cannot be held that the Deputy Commissioner, who is the licensing authority, has not applied his independent mind along with the Committee to the question of grant of permission and the permission has been granted in a mechanical manner on the direction of the State Government. In my opinion, the order of the Deputy Commissioner granting the permission for

construction of the building does not suffer from the infirmity pointed out by the Supreme Court in the aforesaid cases.

7. It was then submitted that the petitioners had no information about the publication of the notice dated 28.2.1979 inviting objections and because of that no objection could be filed. In the counter-affidavit, which has been filed on behalf of the State, it has been stated that after the application was filed by the respondent, the licensing authority called for a report from the Subdivisional Oficer, Lohardaga on 11.9.1978 as to whether any objectionable thing exists near the plot in question. The Subdivisional Officer made a thorough enquiry and submitted a report that there was nothing objectionable near the plot in question. A copy of that report has been annexed to the counter- affidavit. It has been then stated that after the receipt of the enquiry report the Committee considered the question and recommended that objection be invited from public. Then on 28.2.1978 public objection was invited, as already stated above. It is an admitted position that within the period aforesaid no objection was filed. In view of the categorical statement made in the counter-affidavit it is difficult to accept the assertion made on behalf of the petitioners that in fact no notice was published inviting objections from public in general.

8. It was also urged that from the resolution aforesaid dated 12.1.1979 of the Committee it appears that the meeting was held on 12.1.1979 when decision was taken to recommend for grant of licence to the respondent before any objection was invited from public. From a bare reference to the aforesaid resolution dated 12.1.1979 (Annexure-B to the counter-affidavit filed on behalf of the State) it

shall appear that the Committee while approving the site of the cinema house also resolved that a public notice be issued in accordance with the rules inviting objections and after receipt of the objections further action be taken. I may mention that in the copy of the same resolution which has been annexed by the petitioners to the supplementary affidavit and marked as Annexure-4, the last five lines are different from the last five lines of the copy annexed to the counter-affidavit of the State which has been marked as Annexure-B. The aforesaid argument has been advanced on basis of the copy annexed to the supplementary affidavit filed on behalf of the petitioners. As the resolution dated 12.1.1979 was passed during an official meeting of the Committee which was presided over by the Deputy Commissioner, I have to accept the copy annexed to the counter-affidavit of the State as correct copy. As such, it cannot be held that the Committee made a final recommendation in favour of the respondent before inviting objection as required by rule 3(5)(iii).

9. In my opinion, there is no merit in this application and it is, accordingly, dismissed. In the circumstances of the case, there shall be no order as to costs.

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

M.K.C. Application dismissed.

APPELLATE CRIMINAL

1985/May, 30.

Before M.P.Varma and R.C.P.Sinha, JJ*

*Sheo Mahto and ors***

v.

The State of Bihar.

Criminal trial—*First Information Report drawn up on 16.6.81 reaching court on 21.6.81—lapses on the part of the officials in not putting the document in court in time—effect of.*

When the F.I.R. was written without loss of time in presence of a senior Police Officer and if there is no flaw in it, then the lapses on the part of the officials in not putting the document in court in time cannot invariably be a ground to hold the entire case as falsehood.

Held, therefore, that in the instant case the delay of the F.I.R. in reaching the court would not defeat the case.

Appeal by the accused persons.

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

M/S. P.S.Dayal and A.S.Dayal for the appellant.

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* Sitting at Ranchi

** Criminal Appeal No. 178 of 1984(R). Against the judgment dated 23.6.1984, passed by Sri D.P.Sinha, 3rd Additional Judicial Commissioner Ranchi.

Mr. Pradeep Kumar for the State

M.P.Varma, J. This is an appeal against the judgment of conviction. All the appellants have been found guilty of the charges under section 302/149 of the Indian Penal Code (hereinafter referred to as "the Code"). Each one of them have been sentenced to imprisonment for life. Besides this, appellant nos. 3,4 and 10 (Sitaram Singh Munda, Bhola Mahto and Rajan Mahto respectively) have been convicted further of the charge under section 148 and rest of the appellants under section 147 of the Code. All of them have been again sentenced to suffer further term of two years' rigorous imprisonment.

2. The case was registered on the report of PW2 Dukhi Mahto. His Fardbeyan was recorded by the Police officer (PW 11), on which First Information Report was drawn up. PW11 conducted investigation of the case. The case narrated by the prosecution is as follows:

3. It was some time late in the evening at about 7 P.M. on 15.6.1981 when the occurrence took place. PW2 was in his Sahan, lying in front of his house on a cot. His cousin Karam Mahto was also there. An accused named Ludru Mahto (acquitted by the trial court) suddenly came there. He engaged Karam Mahto in some talk speaking about missing of his goat. Soon after, all other accused named above, came over. One of the accused Kantu Mahto (appellant no. 9) was firing a gun in the air, obviously to terrorise the villagers. Two of them, Sukan Mahto (appellant no. 2) and Budhan Mahto (appellant no. 5) caught hold of Karam Mahto, pulled him on the ground and a third accused Bhola Mahto (appellant no. 4) assaulted him on the back of the neck cutting the spinal chord on the scapular area with a Farsa. Karam Mahto was further

assaulted on other parts of the body, causing complete amputation of the left hand. Karam Mahto's son Dhaneshwar Mahto ran, but accused Bhim Mahto (appellant no. 6) and Prahlad Mahto (appellant no. 8) caught hold of Dhaneshwar Mahto and third accused Sitaram Singh Munda (appellant no. 3) similarly hit on his neck from behind with a Dawli (an instrument of cutting). His spinal chord was also cut. The wife of Karam Mahto, named Etwaria Mahtain also came running to her husband, but she too met the same fate. Accused Sheo Mahto (appellant no. 1) and accused Dayal Mahto (appellant no. 7) caught hold of her and accused Ranjan Mahto (appellant no. 10) assaulted her with a Farsa in the same manner on the back of the neck cutting the spinal chord.

4. The informant Dukhit Mahto being very much frightened, ran to his house. He was chased and some accused assaulted his wife and some other female inmates were also beaten up.

5. Further story is that some of the accused entered the house of Karam Mahto and took out some documents and also cash of Rs. 200/-.

6. Old enmity is said to be the cause behind the murder. There was long dispute and litigation between the members of the prosecution party and accused Bhola Mahto and Prahlad Mahto. Even in the recent past, some dispute had arisen between the parties over the cutting of a tree and it is said that brother of accused Bhola Mahto was killed in a dispute. The informant (PW2) Dukhit Mahto and a few other members of his family were made accused in that murder case.

7. It is alleged that all the afore-mentioned accused forming an unlawful assembly in a mob came determined with revengeful mood and in

prosectuion of their common design and object, they committed the murder of those three in the manner as narrated above.

8. It is said that the Chaukidar (PW 4/A) of the village came. Since night had set in, he took Dukhit Mahto to the police station Sonahatu on the day following the incident. There was no officer available at the police station. They, therefore, left some message (that murder had been committed) and got back. The message of murder was transmitted to the officer incharge at Police station Bundu. He came to the village Bela, the place of occurrence along with Police Inspector, who was at Bundu and recorded the Fardbeyan at 14.30 hrs. It was on 16.6.1981 and on its basis F.I.R. was drawn up. The police station Sonahatu is about 20 kilometer away from the village Bela.

9. All the accused, except appellant no. 10 Ranjan Mahto are named in the F.I.R. They all were charged under section 302/149, 452, 149, 380 and 323 of the Code and also under section 27 of the Arms Act. But all have been acquitted on all those charges (except on the charge under section 302/149 of the Code) on technical ground and one of the accused Ludru Mahto was acquitted, as the court could not get evidence of his complicity, except that he had come earlier at the place of occurrence and had engaged Dukhi Mahto in some idle talk and had never shared the common object of the accused-rioters in causing the murder of three persons. In the trial court it was pleaded on behalf of the accused in their defence (and the same argument had been advanced by Shri Prem Shankar Dayal, the senior counsel for the appellants before us as well) that in fact, there was a dacoity in the house of the informant Dukhi Mahto, in course of which the bandits killed three of the inmates. None

could identified the accused. It was only after a long deliberation, the informant thought of implicating all these accused and that the F.I.R. was drawn up at a later stage making out a false case.

10. In the light of the defence-plea, the first and the foremost point taken up by Mr. Dayal, Advocate for the appellants is that the F.I.R., drawn up on16.10.1981 had reached the court on 21.6.1981. There is signature of the Chief Judicial Magistrate on the top of the right corner of the F.I.R. This shows that though the document was sent through special messenger, it reached the court on 21.6.1981 and the prosecution does not speak where the document was detained. It does not assign reasons for the long delay. In this context it has been argued that the informant hatched up a false case to implicate the accused, with whom he is on litigating term. This was done in collusion with the police. It has been repeatedly submitted that things were manipulated long after the commission of the dacoity and the F.I.R. was not sent to court in time.

11. The trial court has outright rejected the defence-contention of any dacoity. No doubt, the villagers, on hearing the firing of guns felt like that and on getting horrified they took to their hides. Some of the witnesses have said in court that they heard the cry that the dacoits had come. In that situation, learned Counsel for the State-respondent has said that anybody in the village would take it like that.

12. We have been taken through the entire evidence. I too feel no hesitation in taking the view that there was no dacoity. The accused, in retaliation of the act of killing the brother of accused Bhola Mahto (appellant no. 4) came and picked up

Karam Mahto as their target. Accused Ludru Mahto (since acquitted) might not be a party to the common act committed by the accused. But it appears that he was sent ahead to detain Karam Mahto in some gossip, so that he might not get away. Karam Mahto was killed. His wife and son, who came on the way to the accused, were also done to death. Allegation is that it was only thereafter that they entered the house looking for the document of litigation and pilfered the document and most casually took out a sum of Rs. 200/- which they found there. Thus, prime motive was to commit murder. They did not ransck the house, nor looted away any property. It was not a case of dacoity and therefore, probablity of false implication appears to be quite remote. Once this probability is ruled out, the trial court rightly held that the F.I.R. contained the true version of the prosecution story and there are many other good reasons to hold such, which will be discussed hereafter.

13. The case of the informant is that he went to the police station with Chaukidar (PW 4/A). The Chaukidar has also said so. There being no police officer at the police station, the message was left there. The Investigating Officer (PW11) also supports this fact. He came to the place of occurrence with his senior officer, the Police Inspector. We are not getting apparent reasons to hold that the police went in partision to concoct a false story. Had unknown dacoits raided the house, it could have been very well said that some dacoits along with these accused came, committed dacoity and in course of commission of the dacoity they killed the inmates. But the story leads us to hold that the accused were after the life of Karam Mahto and they were in the look out of only the document. They came and killed him and also his wife and son.

Removal of cash is a sporadic act and not dacoity. When it is so held and when I do not find it to be a case of false implication, on the simple ground of enmity between the parties, the delay of the F.I.R. in reaching the court would not defeat the case. It is of no consequence unless there is some material suggesting that it was prepared deliberately at a later stage for the purpose of fastening these accused in the crime. The trial court has given its own reason in accepting the F.I.R. as a genuine document stating that the Mukhia (PW7) is one of the attesting witnesses to the Fardbeyan. The trial court has further said that the order sheet of the court of Chief Judicial Magistrate does not show when the F.I.R. was registered in court and that it was most likely that the F.I.R. was placed before the court by the staff on 21.6.1981 and not earlier, which does not necessarily mean that the document was not sent to the court in time. The main question is regarding the trustworthiness of the document and when the F.I.R. was written without loss of time in presence of a senior police officer and if there is no flaw in it, then the lapses on the part of the officials in not putting the document in court in time cannot invariably be a ground to hold the entire case as fabrication of falsehood.

14. The learned Counsel for the State Respondent has further, in reply to the contention raised by the defence Counsel has submitted that one of the accused was arrested and forwarded on 21.6.1981 and it was probably then that the records were placed before the Court for remanding the accused to custody when the Subdivisional Judicial Magistrate took notice of the F.I.R. and put his signature on the top of it. This does not defeat the case at all.

15. It was only in the aforesaid back-ground

that the learned Advocate had questioned the credibility of the eye-witnesses and further argued that non-production of the independent witnesses must be viewed with great suspicion. Reasons for non-examination of independent villagers are not far to seek. It has already been discussed above that on hearing the gun-firing and sensing that dacoits had come, the villagers had hid themselves behind the doors. PW2, 3 and 10 are the eye-witnesses of the occurrence. In all twelve witnesses have been examined. P.W.4 Barua Mahtain is the wife of the informant P.W.2 Dukhit Mahto. She has narrated the incident, but on account of some contradiction in her statement made before the police, the trial court did not consider it wise to rely on her version. PW5 is a formal witness, who took the dead-body to the Ranchi Medical College Hospital for post mortem. PWs. 6 to 8 are also formal witnesses. PW9 had examined some incriminating instruments, like Gun-pipe, two live cartridges two empty cartridges of rifle besides a but, which were sent to him for examination-report. According to PW9, the live cartridges were misfired. These articles were seized at the place of occurrence by the Investigating Officer PW11, PW1, Dr. Renu Bala had held post mortem examination over the dead-bodies of all the three deceased Karam Mahto, his son Dhaneshwar Mahto and his wife Etwari Mahtain. She found multiple injuries on Karam Mahto and one of them was incised wound 16" x 6" x cm. on the back of the head situated transversely cutting the bone and brain and one on the back of the neck cutting the spine and the spinal cord. There was other incised wounds on the right scapular region through which a portion of the right lung was protruding out. Left hand of the deceased was found amputed at the level of wrist behind lying separately. All were ante

mortem injuries. She found four or five incised wounds on the body of deceased Dhaneshwar and one of the injuries was on the back of the head 6" x 3" x 11 cm. situated transversely cutting the bone and the gray matter, and another incised wound was 6" x 2" x 5 cm. on the back of the head cutting the spine and the spinal chord and the third incised wound was on the scapular region cutting the right fourth and fifth ribs. Further incised wounds were noticed on the left shoulder joint and on the left arm.

16. On examination of the dead-body of Etwaria Mahtain, the Lady doctor found incised wound 3" x 4 cm. on the back of the head situated transversely cutting the spine and the spinal chord. All were ante mortem wounds.

17. The nature of the wounds, as found on the deadbodies of these three deceased is indicative of the fact that the accused had come with full determination and they all acted almost in one and the same manner in killing the three deceased and this can never be an act of persons committing dacoity in a house. The villagers were kept terrified on the gun-point by firing in the air and they committed the offence with Tangi, Farsa and Dawli. These post mortem reports (Exts. 1 to 1/2) and the evidence of the doctor fully corroborate the prosecution version and the evidence of the eye-witnesses PWs 2, 3 and 10, who have stated that the accused came in a mob. Two of them caught hold of Karam Mahto and one started killing with Farsa. Deceased Dhaneshwar Mahto, who had run to the rescue of his father was also caught hold of and was pushed on the ground and was killed with a Dawli. When Etwari Mahtain ran to her husband, she too was treated in the same manner. The evidence of all the three witnesses are quite consistent all

through. It has been taken from the statement of PW2 that the villagers were terrified when the accused had come opening gun-fire and that they getting panicky, had confined themselves in their houses. In such circumstances, and the terror created by killing three in the village, it was not expected that any one would come forward to testify to this case. PW 11 has said that he received message through a constable at Bundu, where he had gone for some official business and that the Chaukidar (PW 4/A) and the informant had no talk and discussion about it and they simply got back after leaving the message at the police station and awaited in the village when the police arrived on the following day. The informant gave his fardbeyan (Ext. 6) in presence of the Mukhia of the village grampanchayat.

18. No other infirmity has been shown in the prosecution version, nor do I find any. The trial court has rightly held the appellants guilty of the charge. The conviction and sentence against each one of them are, therefore, confirmed and the appeal is dismissed.

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

M.K.C. Appeal dismissed.

FULL BENCH

1985/July, 3.

Before S.S.Sandhawalia, C.J., S.Roy and U.P. Singh, JJ.

*Smt. Bina Rani Ghosh**

v.

Commissioner, South Chotanagpur Division, and others.

Chotanagpur Tenancy Act, 1908 (Bengal Act no. VI of 1908)—*section 71A—provisions of—surrender by a Scheduled Tribe raiyat, whether would amount to transfer—surrender by Scheduled Tribe raiyat coupled with subsequent settlement of the land by the landlord, whether a transfer within the ambit of the section.*

It is plain from the history of the promulgation of the Chotanagpur Tenancy Act, 1908, the language employed therein and the tenor of the amendments made that the larger purpose is to protect the transfer of the statutory rights by raiyat in general and those belonging to the Scheduled Tribes in particular. Consequently, a liberal construction to section 71A of the Act and in particular to the word 'transfer' employed therein has to be given to aid and advance the purpose of the Act.

Civil Writ Jurisdiction Case No. 610 of 1984(R). In the matter of an application under Articles 226 and 227 of the Constitution.

Held, that looking at the wider Scheme of the Act a surrender of land by a raiyat would by itself amount to transfer and if done without previous sanction of the Deputy Commissioner in writing, it would obviously be in contravention of section 72 of the Act.

Held, further that a surrender by a Scheduled Tribe raiyat directly coupled with the subsequent settlement of such land by the landlord would be a transfer within the ambit of section 71A of the Act.

Bario Santhal and ors. v. Fakir Santhal (1)-overruled.

Bhagwandas v. Kokapahan (2)-overruled to that extent

Trilochan Panda v. Dinabandhu Panda (3)

Shashibhushan Singh v. Shanker Mahto (4)

Golap Gadi Gowala v. Rampariksha Rewani and Ors. (5) and Lakhia Singh Patra & ors. v. Jyotitilal Adiya Deo and Ors.(6)-referred.

Held, also, that the appreciation of evidence is normally beyond the scope of the writ court and there is no reasons to depart from the said rule.

Mahanth Dhansukh Giri and ors. v. The State of Bihar (7)- followed.

Application under Articles 226 and 227 of the Constitution.

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(1) (1924) AIR (Pat) 793
(2) (1980) BLT 35
(3) (1918) PLJ 89
(4) (1950) AIR (Cal) 252
(5) (1958) AIR (Pat) 553
(6) (1968) AIR (Pat) 160
(7) (1985) AIR (Pat) 129.

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

Messrs S.B.Sinha and V. Shivnath for the petitioners

Messrs T.K. Das, Standing Counsel with D.K. Sarkar, Junior Counsel to Standing Counsel, and A.N. Deo, Y.N. Mishra and A.H. Toppo for the respondents.

S.S. Sandhawalia, C.J. - Whether the surrender by a scheduled tribe *raiyat* of his statutory right to hold land for the purpose of cultivation (as defined in section 6) would amount to a transfer within the meaning of section 71A of the Chota Nagpur Tenancy Act, 1908 ? In the alternative, would such a surrender directly coupled with the subsequent settlement of such land by the landlord be a transfer within the ambit of the said section 71A of the Act ? These are the two significant and inter-related questions which have necessitated this reference to the Full Bench.

2. The facts may be noticed with relative brevity having relevance to the issues aforesaid. On the petitioner's own showing, the land in dispute herein stood recorded in the name of Lalu Oraon, the father of respondent no. 4. The said Lalu Oraon, by a registered deed executed on the 29th of March, 1954, surrendered the said land in favour of his landlord, Mahendra Narayan Tiwari. This was then purported to be allotted to one Jogendra Narayan Tiwari said to be one of the co-sharers, who executed a registered deed of settlement dated the 30th of March, 1954 in favour of Shrimati Mantoran Kumari on an annual rental of Rs. 134/-. The said settlee later transferred the land in favour of her daughter, Shrimati Parbati Debi by a registered deed of gift, dated the 16th of February, 1979. In turn the

said Shrimati Parbati Debi then transferred the land by a registered sale deed dated the 21st of September, 1981 in favour of the petitioner Shrimati Bina Rani Ghosh.

3. Subsequently the petiioner was served with a notice dated the 29th of December, 1981 by respondent no. 3, the Special Officer, Scheduled Area Regulation, Ranchi, to show cause why land should not be restored in favour of Gangaram Oraon, respondent no. 4. In pursuance thereof, the petitioner appeared and showed cause, and after a keen contest, in which evidence was led by the parties, respondent no. 3, by his order (annexure 4) directed the restoration of the land in favour of respondent no. 4 under section 71A of the Chota Nagpur Tenancy Act (hereinafter called the 'Act'). Aggrieved thereby, the petitioner preferred an appeal before the Additional Collector, Ranchi, who, by his considered order (annexure 5) dated the 21st of March, 1984, dismissed the appeal. The petitioner then filed the revision before the Commissioner, which also met the same fate by the latter's detailed order (annexure 6) dated the 9th of April, 1984. The present writ petition seeks to challenge the concurrent orders of the aforesaid three authorities.

4. Now, the core of the argument of Mr. S.B.Sinha, the learned counsel for the petition, is that a mere surrender by a *raiyat* of his right was not a transfer which could possibly attract the provisions of section 71A of the Act. It was contended that the concept of transfer under the said section is identical with that of the transfer of property under section 5 of the Transfer of Property Act. Consequently, according to counsel, a mere surrender by itself or even when coupled with the subsequent settlement of land by the landlord would not amount to a transfer which was hit by section

71A. Reliance was placed on *Trilochan Panda v. Dinabandhu Panda (1) and Bhagwandas v. Koka Pahan and others (2)* for the larger submission was that the whole proceeding by the authorities below was without jurisdiction and vitiated on this score.

5. At the very threshold it seems apt to clear the decks for the examination of the two questions formulated at the outset because some attempt was made on behalf of the petitioner to befog the real issues involved. On the petitioner's own showing (vide annexure 2 which was her show cause in the court of the Deputy Collector, Scheduled Area Regulation) in reply to the notice under section 71A issued to her, the firm stand taken on her behalf was in the terms following:

> "3. That the land under khata No. 11 plot No. 672 area 461 decimals and Khata no. 39 plot no. 674 area 4 decimals situated at village Boreya P.S. Kanke District - Ranchi stand recorded in the name of Lalu Oraon who surrendered to the ex-landlord in the year 1954 by different registered deed of surrenders.
>
> 4. That the ex-landlord took khas possession of the same and thereafter settled the land with Mantoran Kuwari by a registered deed of settlement who built a house over thereafter investing Rs. 25,000/- approximately, and soon after Mantoran Kuwari transferred the land with buildings to her daughters against the deed of sale."

It is manifest from the aforesaid crucial pleading that the petitioner contested the matter on the basis of the surrender of his raiyati right by Lalu Oraon to his landlord and the subsequent settlement thereof by the latter. The whole case was fought

(1) (1918) PLJ 88

(2) (1980) BLT 35.

around the said issue and the parties led evidence on the point. It was on these premises that the Special Officer, Ranchi, arrived at the following findings:

> "The opposite party has stated that Laloo Oraon, father of the petitioner, had surrendered the said land to Kame landlord on 30.3.1954. The landlord settled (unintelligible) the said land again on 30.3.19554 which was purchased by the opposite party under a registered deed. Evidence on behalf of both the parties was adduced. Hence I have come to the conclusion that the petitioner is the son of a schedule tribe raiyat recorded in the khatian. The surrender has been forgedly got executed by the father of the petitioner. The date of the surrender and that of the settlement are the same, which is illegal and the land has been occupied fraudulently by illegal means. The opposite party has purchased the land without obtaining permission from the Deputy Commissioner which contravenes section 46 of the Chotanagpur Tenancy Act. Hence I order that the aforesaid land and house be restored to the petitioner without compensation under section 71A of the Chotanagpur Tenancy Act."

Equally evident it is from the order of the Additional Collector (vide annexure 5) that in the appellate forum also the issue was the validity or otherwise of the alleged surrender and the subsequent settlement of the land. In the revisional forum before the Commissioner (vide annexure 6) too, the issue primarily was the fraudulent nature or otherwise of the alleged surrender and the subsequent settlement. It is thus plain that herein there is a concurrent finding of as many as three forums on the basic point in issue. However, in

fairnes, one must notice - though regretfully - that the learned counsel for the petitioner sought a reappraisal and piece-meal consideration of same evidence in the court below. Even in a situation of a concurrent finding by as many as three authorities below, we were persistently invited to reappraise and assess for ourselves the evidence of AW's 1, 3 and 4 whose isolated statements were placed on record *dehors* what had been adduced by the other side. It is significant to note that despite repeated opportunities given, the petitioner did not dare to produce the registered deeds executed on the 29th or 30th of March, 1954. The courts below were entitled to draw an adverse inference therefrom and which, in our opinion, they rightly did. It perhaps deserves reiteration that it is not within the province of the Writ Court to convert itself into a court of first instance or an appellate forum for appraising and appreciating evidence afresh on findings of fact which stood concluded by forums having jurisdiction over the matter. Learned counsel for the petitioner, however, persisted for examination of what, according to him, were the violations of the procedural provisions of the Code of Civil Procedure by the authorities below and in contending that the findings of fact arrived at were not sustainable and they border on perversity. These submissions have only to be noticed and rejected because it seems settled beyond cavil that the appreciation of evidence is normally beyond the scope of the Writ Court, and we see no reason herein to depart from the said rule. If authority were needed for such a plain proposition, it is there in the recent Full Bench decision in *Mahanth Dhansukh Giri and others v. The State of Bihar and others (1).*

(1) (1985) AIR (Pat) 129 (F.B.)

5A. Equally in this context, we wish to notice that before the referring Division Bench also an argument on the basis of an alleged forcible dispossession was sought to be raised. However, without adverting closely to this aspect, the case was referred to a larger Bench for consideration of the question of the scope and meaning of the word 'transfer' in section 71A of the Act. The indepth examination of the case above discloses that herein no question of forcible dispossession, etc., can now arise and in essence the sole question here as also in the three forums below is with regard to the validity of the surrender of a tenancy and its subsequent settlement with another on the very same day of the single transaction. Learned counsel for the parties ultimately canvassed this very question before us.

6. Inevitably the controversy herein revolves around the language of section 71A which was inserted in the Act by serial no. 3 of the Bihar Scheduled Areas Regulation, 1969, the relevant part whereof may be read at the very outset:

> "71A. Power to restore possession to member of Scheduled Tribes over land unlawfully transferred.-
>
> If at any time it comes to the notice of the Deputy Commissioner that transfer of land belonging to a raiyat who is a member of the Scheduled Tribes has taken place in contravention of Section 46 or any other provision of this Act or by any fraudulent method (including decrees obtained in suit by fraud and collusion) he may, after giving reasonable opportunity to the transferee, who is proposed to be evicted, to show cause and after making necessary enquiry in the matter,

evict the transferee from such land without payment of compensation and restore it to the transferer or his heir, or, in case the transferer or his heir is not available or is not willing to agree to such restoration, re-settle it with another raiyat belonging to the Scheduled Tribes according to the village custom for the disposal of an abandoned holding:'

7. Now, whilst construing the aforesaid provision and in particular the word 'transfer' employed therein, one must recall the settled and, indeed, the hallowed principle that a word or a phrase in a statute takes its hue from the context in which it is inlaid. Section 71A particularly and the Chota Nagpur Tenancy Act, 1908 generally are not statutes which have to be construed in isolation and their interpretation inevitably involves some reference to their legislative history and the purpose and object to which it is directed. The historical retrospect here spans a period of more than a century. Its true perspective is against the back-drop of the primordial backwardness of the Scheduled Tribes interspersed into deeply wooded and semi-tropical forests of Chota Nagpur Division and the adjoining district of Santhal Parganas. The underlying rationale of the regional legislation here including Regulation III of 1872 may well be noticed from the final settlement report in the district of Santhal Parganas by J.F. Gantzer, which is supplemental to the earlier and more celebrated and exhaustive report of Sir Hugh Mc Pherson

> "The question of *transfers* is one of the most important with which this settlement has had to deal, and it is in fact one which affects the very root of the whole Santal Parganas system. Broadly speaking it may be said that *the whole object of the agrarian law of the*

district since 1872, when Regulation III of that was introduced, *is to ensure that the population should be allowed to remain undisturbed in possession of its ancestral property,* and that any reclamation of waste lands which is done in any village shall be done only by the Jamabandi Raiyats of the village. The history of the district plainly shows that the vast majority of the people in its are quite unable to grasp the principle of outsiders taking possession of their land whether legally or illegally, that is to say either by force or by the ordinary means of acquiring land such as sale, mortgage or certain forms of sub-lease."

For these purposes it would perhaps be unnecessary to delve beyond the year 1879 when the Chota Nagpur Landlord and Tenants Procedure Act of the said year was enacted and apart from its subsequent amendment made therein complementary legislation in the shape of Chota Nagpur Commutation Act, 1897, the Chota Nagpur Tenancy (Amendment) Act, 1903 and the Chotanagpur (Amendment) Act, 1905 were also duly promulgated. Because of the necessity to amend and consolidate the law relating to the landlord and tenant and the settlements of lands in Chota Nagpur the Chota Nagpur Tenancy Act, 1908 was promulgated and the statutes mentioned above were then repealed. Patently, to give further protection to raiyats in general and in particular to those who were members of the Scheduled Tribes amendments were made in the Act by substituting section 46 by section 14 of the Chota Nagpur Tenancy (Amendment) Act, 1947 placing restrictions on the transfer of the right by a *raiyat.* To effectuate the same purpose later section 71A, which falls for construction, was inserted by serial

no. 3 of the Bihar Scheduled Areas Regulation, 1969 with specific reference to the raiyats who were members of the Scheduled Tribes. By the same amending Act, in section 72 a further limitation was placed on the surrender of land by a *raiyat* in so far as it could be done only with the previous sanction of the Deputy Commissioner in writing.

8. In the light of the above, it seems plain from the history of the statute, the language employed therein and the tenor of the amendments made that the larger purpose is to protect the transfer of the statutory rights by raiyats in general and those belonging to the Scheduled Tribes in particular. Consequently, a liberal construction to section 71A and in particular to the word 'transfer' employed therein has to be given to aid and advance the purposes of the Act.

9. In the context of the above, the basic stand on behalf of the respondents taken by Mr. Deo (whilst countering the contention advanced on behalf of the petitioner) is that the surrender of land by a raiyat to his landlord is by itself a transfer within the meaning of section 71A and would be affected and hit by its prohibition when the same has been done without the previous sanction of the Deputy Commissioner in writing. The further submission was that in the absence of a specific definition in the Act itself of the word 'transfer' section 71A must be widely and liberally construed in favour the class of Scheduled Tribes which it intends to protect. A frontal challenge was also laid by the respondents to the correctness of *Trilochan Panda v. Dinabandhu Panda (supra)* and *Bhagwandas v. Koka Pahan and others (supra)* which were relied upon by the learned counsel for the petitioner.

10. Now, to appreciate the rival contentions forcefully advanced by either side, it is necessary first to advert to section 6 of the Act and to read the relevant part thereof:-

> "6. Meaning of 'raiyat' - (1) 'Raiyat' means primarily a person who has acquired a right to hold land for the purpose of cultivating it by himself or by members of his family, or by ruled servants or with the aid of partners; and includes the successor-in-interest of persons who have acquired such a right, but does not include a Mundari-khunt-kattidar.
>
> Explanation. - Where a tenant of land has the right to bring it under cultivation, he shall be deemed to have acquired a right to hold it for the purpose of cultivation, notwithstanding that he uses it for the purpose of gathering the produce of it or of grazing cattle on it.
>
> (2) A person shall not be deemed to be a raiyat unless he holds land either under a proprietor or immediately under a tenureholder or immediately under a Mundari-khunt-kattidar.
>
> xx xx xx xx"

It seems plain from the language of the statute that the law in terms recognises the raiyat's right to hold and cultivate the land either by himself or by members of his family or by hired servants, etc. Becuse of this peculiarity, one may coin it into the terminological phrase of a raiyati right. Viewed either from the aspect of a confirment by statute or a recognition of a legally acquired right, the result would indeed be the same. Once it is held, as it must be, that the raiyati right is a statutory legal right, it necessarily follows that either surrendering or in a way passing on the same to the landlord would involve the transfer of such a right.

Reference may next be made to section 46 of the Act which again places stringent restrictions on the transfer of the rights by a raiyat. Particular reference is called for clause (b) of sub-section (1) of the said section which invalidates all such transfers by sale, gift or any other contract or agreement and equally any mortgage or lease which may or tend to go beyond a period of five years. The proviso to sub- section (1) of section 46, within very narrow confines, permits transfer of the rights by the raiyat if the detailed conditions specified therein stand well satisfied. Learned counsel for the respondents had rightly relied on section 47 as highlighting the fact that the restrictions on the sale of a raiyat's right even under the orders of the court were stringently placed by the said section. This would again indicate how zealously the law wished to safeguards raiyats from the inroads of any private depredations.

11. Coming now to section 71A, what first meets the eye is the fact that here exceptional protection has been given to the *raiyati rights* of persons who are members of the Scheduled Tribes. Apparently, the working of the Act had shown that the existing protection generally afforded by the statute were inadequate with regard to the majority of the unsophisticated members of the Scheduled Tribes and, therefore, by serial no. 3 of the Bihar Scheduled Areas Regulation, 1969, this section was specially inserted for their benefits. Again, the protection given here is in wide ranging terms against all unlawful transfers. It embraces in its wide sweep not only the contraventions of section 46 or of any other provisions of the Act but equally transfers by any fraudulent method including decrees obtained in a suit by fraud and collusion. It is plain that the protection has been given in the

widest amplitude. Yet again the power to set aside such illegal transfer is given to the Deputy Commissioner without any limit of time when it comes to his notice. Obviously enough the Deputy Commissioner can here act *suo motu.*

12. Lastly reference may also be made to section 72 with regard to the surrender of a land by a raiyat. By virtue of the amending Act of 1947 such a surrender can only be with the previous sanction of the Deputy Commissioner in writing. The significance, therefore, which the law now attaching to the surrender of land by raiyats is not to be easily lost sight of. When read with section 6, such a surrender is a transfer of the statutory right by the raiyat to both hold the land and cultivate it either by himself or through others. As long as, the raiyati right remains intact, the landlord has merely a right to claim rent from the raiyat and no more. The surrender of the raiyati right, therefore, involves a transfer of statutory rights in property which would convert the mere right to rent into one of entering into khas possession of the land and retaining or cultivating the same to the exclusion of all others. This is expressly recognised and conferred by sub-section (4) of section 72 which provides that when a raiyat surrenders his holding, the landlord may enter on the holding and either let it to another tenant or take it into cultivation himself. It would thus seem that a raiyati right as defined in section 6 and flowing from the other provisions of the Act is valuable right in property which cannot in the eye of law escape the label of a transfer of such property rights. The solicitude with which the law herein stand guard over the raiyati right and more so when these raiyats are members of Scheduled Tribes, seems evident from the wide ranging provision of section 71A. Therefore, it must be held that looking

at the wider scheme of the Act a surrender of land by raiyat would by itself amount to a transfer and if done without the previous sanction of the Deputy Commissioner in writing, it would obviously be in contravention of the said section 72.

13. Another aspect which calls for pointed notice here is the fact that the word 'transfer' employed in section 71A is neither defined in the said section nor anywhere else in the Act. In the context this word is laid in section 71A would leave little manner of doubt that it was intended to cover all transfers actual or implied. Apart from this, in the absence of a definition, the word 'transfer' has to be given its ordinary dictionary meaning and once it is so, it is settled beyond doubt that it is a word of wide import. This seems to be evident on principle. But if authority were needed, it exists in *Sashi Bhusan Singha v. Sanker Mahto (1)*. Therein what fell for consideration was the use of the word 'transfer' in section 26F of the Bengal Tenancy Act, 1885. Their Lordships observed as under:

> "(13) As indicated already in S. 26F of the Act, there is no indication that the word 'transfer' is used in any restricted sense. It is used in the general and ordinary sense, and if any assistance can be obtained from sub-s. (11) the only conclusion that can be drawn is that the intention of the Legislature was not to limit the scope of the word 'transfer' in any particular manner. If without reference to any other section in the Act the interpretation of the word 'transfer' is to be based, we think that it is the wider meaning and not any restricted one which can be put upon the word transfer."

(1) (1950) AIR (Cal) 252.

and

> "(16) The word 'transfer' means the passage of a right from one individual to another. Such transfer may take place in one of three different ways. It may be by virtue of an act done by a transferer with an intention, as in the case of a conveyance or a gift, or, secondly, it may be by operation of law, as in the case of forfeiture, bankruptcy, intestacy, etc. Or thirdly, it may be an involuntary transfer effected through Court, as in execution of a decree for either enforcing a mortgage, or for recovery of money due under a simple money decree. The word 'transfer' in its ordinary sense would include all these different kinds of transfer."

14. In fairness to *Mr. Sinha, one must refer to Trilochan Panda's case (supra)* on which firm reliance was sought to be placed. Therein the Division Bench was considering the use of the word 'transfer' in section 46 of the Central Provinces Tenancy Act. The said section pertaining to the devolution of the occupancy right under the said Act is materially different and has, in no way, any identity with section 46 of our Act or section 71A which we are called upon to consider. Even otherwise the provision and purpose of the Central Provinces Tenancy Act, 1898 is materially different from the Chota Nagpur Tenancy Act, 1908, which we are called upon to construe. None of the considerations which have been adverted to in the earlier part of the judgment would be necessarily applicable to the construction of the provisions of the Central Provinces Tenancy Act. *Trilochan Panda's* case is, therefore, plainly distinguishable. However, if the observation in the context of the Central Provinces Tenancy Act are sought to be

projected as a warrant for the proposition that a surrender of land by a raiyat can never amount to transfer then, with the deepest deference, the judgment does not lay down the law correctly and ha to be overruled on that point. The single Bench judgment in *Bario Santhal and others v. Fakir Santhal (1)* had merely followed Trilochan Panda's case and it missed the distinguishing features of the lanaguage employed in the Central Provinces Tenancy Act and those employed in our Act. It also deserves recalling that *Kanhaiya Singh, J., in Golap Gadi Goala v. Rampariksha Rewani and others (2)*, after expressly referring to this judgment, took a contrary view. Later on, Golap Gadi Goala's case has been expressly approved in *Lakhia Singh Patra and others v. Jotilal Aditya Deo and others (3).* Apparently, *Bario Santhal's case (supra)* can no long as hold the field but even otherwise, for the reasons recorded earlier, I would expressly overrule the same.

15. Lastly reference must also be made to the Division Bench judgment in *Bhagwandas v. Koka Pahan and others (supra).* Therein it was observed that the transfer as envisaged in section 71A must be understood as in the Transfer of Property Act and, therefore, a surrender by a *raiyat* would not a transfer within the meaning of section 71A. Reference to the very brief discussion on that point would indicate that the issue was not adequately and fully canvassed before the Bench. Learned counsel for the parties apparently were remiss in not citing either principle or precedent relevant to the point nor was the attention of the Bench drawn to

* (1) (1924) AIR (Pat.) 793
(2) (1958) AIR (Pat.) 160
(3) (1968) AIR (Pat.) 160.

the history and the purpose of the legislation and the provisions of the connected sections. It seems to have been observed, as a matter of first impression, that the word 'transfer' in section 71A must be given the same meaning as the phrase 'transfer of property' referred to by section 5 of the Transfer of Property Act. With the greatest respect, it seems to me that the error has crept in from the failure to notice that section 71A in a very wide ranging context talks of transfer alone, while section 5 of the Transfer of Property Act employs the composite term of a 'transfer of property' as a special term of art. Equally it has to be borne in mind that the concept of transfer of property is not in the defining section 2 but appears in a later elaboration for the particular purposes of section 5 and peculiar to the said statute. It is in this context that the salient warning in *Leurence Arthur Adamson and others v. Melbourne and Metropolitan Board of Works (1)* has to be recalled that it is unsatisfactory and unsafe to seek a meaning of the word used in an Act in the definition clause of another statute dealing with cognate matter even by the same legislature - much more so by other legislature. That view has been again forcefully reiterated in *Jainarayan Motiram Gangaram (2)*. With the deepest deference, therefore, it must be held that the passing observation on this point in *Bhawan Das v. Koka Pahan and others (supra)* does not lay down the law correctly and is hereby overruled.

16. To conclude on this aspect, it must be held that on the larger purpose of the statute and the language of section 71A that a surrender by a Scheduled Tribe raiyat of his statutory right to hold

(1) (1929) AIR (PC) 181

(2) (1949) AIR (Nag.) 34.

land would amount to a transfer within the meaning of the said section 71A of the Act.

17. The learned counsel for the respondents rightly contended on his alternative ground that such a surrender directly coupled with the subsequent settlement of such land by the landlord would be transfer. He is indeed on a firmer ground. Herein there is a consistent and concurrent finding that the surrender and the subsequent settlement was, indeed, one transaction for the purposes of circumventing the restriction imposed by the Act. As has been noticed earlier, these concurrent findings are unassailable. Once that is so, it seems well settled by a consistent line of precedent in this Court that a surrender coupled with a settlement, which, in essence, is one transaction, would amount to a transfer within the ambit of section 46 or 71A. These judgments make it clear that if the surrender and settlement form one transaction or otherwise then it would be transfer even in an extreme case when the settlement takes place nearly three years after the original surrender. In *Golap Gadi Goala's case (supra)* it was categorically observed as follows:

> "Unsophisticated as the people of that area are, but for the legislation, they would have been wiped out by people with superior intellect and bigger purse. Here also, the main object of the arrangement was to effect a transfer of the disputed land to the plaintiffs in satisfaction of their debts, and since this could not have been done directly because of the prohibition contained in S. 46 of the Act they took recourse to this circuitous arrangement. Their object is too patent to be discussed. In my opinion, such a transaction amounts to a clear circumvention of section 46 of the Chota

Nagpur Tenancy Act and cannot be legally given effect to."

The aforesaid view stands affirmed in *Lakhia Singh Patra and others v. Jotilal Aditya Deo and others (supra). Lastly, in Bhagwandas v. Koka Pahan and others (supra)* it was held to be axiomatic as under within this jurisdiction:

> "There is no dispute about the legal position that if it is proved that the surrender of a raiyati land of a member of the Schedule Tribe was brought about in order to take settlement of the same and in other words surrender and settlement are proved to be one transaction or both are parts of the same transaction. Section 46 of the Act will be attracted consequently the proceeding under Section 71A of the Act will be maintainable."

18. Afrfirming the aforesaid judgments, I would hold that a surrender by a Scheduled Tribe raiyat directly coupled with the subsequent settlement of such land by the landlord would be a transfer within the ambit of section 71A of the Act.

19. Both the meaningful questions formulated at the outset having been answered in the terms above, the present writ petition must fail and is hereby dismissed. However, there will be nor order as to costs.

S.Roy, J. - I agree with learned the Chief Justice that the writ petition should be dismissed without cost. I also agree that the word 'transfer' in Section 71A Chotanagpur Tenancy Act, 1908 (the Act) as interpreted in *Bhagwan Das, v. Koka Pahan and others (supra)* must be overruled. I was a party to that decision and, therefore, recording some reasons for diffrering with what was laid down in that case. I also adopt the reasons given by the

learned Chief Justice.

21. Admittedly Lalu Oraon surrendered the land in question to the exlandlord without the previous sanction of the Deputy Commissioner. This was purported to have been done under section 72 of the Act. The questions to be answered in this case have been formulated by the learned Chief Justice. Relevant portions of section 71A have been quoted in the judgment of Hon'ble the Chief Justice. The relevant portion of section 72 reads as follows:-

> "Section 72(1): Surrender of land by raiyat, - A raiyat not bound by a lease or other agreement for a fixed period may, at the end of any agricultural year, surrender his holding with previous sanction of the Deputy Commissioner in writing."

In sub-section (5) provision has been made for enabling the raiyat to surrender whole or part of holding with the previous sanction of the Deputy Commissioner in writing.

22. It is commong knowledge that some of the provisions of the Act are in the nature of beneficial legislation because provisions have been made therein to protect the interest of raiyats who are members of the Scheduled tribes in their raiyati holdings. Section 71A, therefore, must be construed liberally. I am aware that the Supreme Court in *Regional Director, Employees' State Insurance Corporation v. Ramanuja (1)* put a caution to this by observing that "but where such beneficial legislation has a scheme of its own, there is no warrant for the court to travel beyond the scheme and extend the scope of the statute on the pretext of extending the statutory benefit to those who are not covered by the scheme". We must, therefore, guard ourselves

(1) (1985) AIR (SC) 278.

not to construe the word 'transfer' in section 71A to include such transactions which were not intended to be included by the legislature. Section 71A is based on the principle of distributive justice. This section is intended and meant as an instrument for alleviating oppression, redressing bargaining imbalance, cancelling unfair advantages and generally overseeing and ensuring probity and fair dealing. It seeks to reopen transactions between parties having unequal bargaining power resulting in transfer of title from one to another due to force of circumstances and also seeks to restitute the parties to their original position. [*See Lingappa Pochanna Appelwar v. State of Maharastra and another (1).*

23. In Section 46 of the Act by sub-section (1) transfer by a raiyat of his right in his holding or any portion thereof has been prohibited, except mortgage or lease for a period expressed or implied for a period not exceeding five years and bhugat bandha mortgage to a registered Cooperative Society for a period not exceeding seven years. It provides that an occupancy raiyat who is a member of Scheduled Tribes may transfer with the previous sanction of the Deputy Commissioner, his right in his holding or a portion of his holding by sale, exchange, gift or will to another person who is a member of the Scheduled Tribes and who is a resident within the local limits of the area of the Police Station within which the holding is situate. It will be noticed that in this section not only for transfer intervivos as understood under the Transfer of Property Act viz. sale, exchange and gift, previous sanction of the Deputy Commissioner is required to be obtained, but also for the purpose of

(1) (1985) 1 SCC 479.

will previous sanction of the Deputy Commissioner is necessary. In Section 46 the word 'transfer' is not what is meant under the Transfer of Property Act because will is not a transfer under the Transfer of Property Act. The meaning of the word 'transfer' in section 46 is, therefore, wider than what is under the Transfer of Property Act.

24. If we analyse section 71A we will notice that the Deputy Commissioner has been given power to restore raiyati land of a member of the Scheduled Tribes, if a transfer has taken place:-

(i) in contravention of section 46,

(ii) in contravention of any other provisions of the Act;

(iii) by any fraudulent method including decrees obtained in suit by fraud and collusion.

Decree of a court by which the title of person is declared is not 'transfer' as generally understood; but by clause (iii) it has also been included as a mode of transfer, albeit if the decree was obtained by fraud and collusion. There is no difficulty in understanding clause (i) because what is transfer within the meaning of section 46 have been enumerated in that section. Clause (ii) speaks about transfer in contravention of any other provisions of the Act. In other words, besides section 46, there are sections, transactions under which may amount to transfer. It is well settled that each word of a section must be given effect and so the words in clause (ii) must have full play. Section 72 mandates that a raiyat whose lease is not for a fixed period, may surrender his holding of part thereof with the previous sanction of the Deputy Commissioner in writing. Any surrender made in contravention of section 72 must be held to be bad in law. By

surrender, right to hold land is given up by a raiyat in favour of another, who becomes entitled to hold the same. In effect, by surrender the raiyat looses his title in the land. The Legislature, therefore, provided that surrender may be made only with previous sanction of the Deputy Commissioner in writing. It must, therefore, be held that provisions referred to in clause (ii) is section 72. Surrender of right by a raiyat in his land must be held to be transfer within the meaning of section 71A and statute provides that if it was made in contravention of section 72, the surrender may be annuled.

25. In the proceeding under section 71A, it was also held that there was clear nexus between the surrender and the settlement and they formed one single transaction. Mr. Sinha streneously argued that this finding was perverse as it was not supported by evidence. Apart from what have been stated by the learned Chief Justice, even assuming that there was no evidence on the basis of which that finding can be sustained, in view of the fact that as the surrender was made without the previous sanction in writing of the Deputy Commissioner, there had been contravention of section 72; consequently, it must be held that land so surrendered could have been restored under section 71A of the Act.

U.P.Singh, J. : I agree with the view expressed by my Lord the Chief Justice.

R.D. Application dismissed.

APPELLATE CIVIL

1985/November, 5.

Before Anand Prasad Sinha and Madan Mohan Prasad, JJ.

*Vishwakarma Mandir Trust through its President Baldeo Prasad Vishwakarma**

v.

Most. Munu Devi and others.

Bihar Buildings (Lease, Rent and Eviction) Control Act, 1947 (Act III of 1947)—*section 11(1)(d)—suit for eviction on ground of default—premises belonging to deity—suit by a trustee being the Manager or the person involved with the state of affairs—maintainability of.*

Where the subject matter of the suit is vested in the deity;

Held, that the deity being a juristic person, the suit by a trustee being the Manager or the person involved with the state of affairs will be a competent person to maintain the suit alone.

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* Appeal from Appellate Decree No. 74 of 1978 (R. Against the judgment and decree of Shri Sardar Bhagat Singh Houra, Additional Subordinate Judge VII, Ranchi dated 25.1.1978 reversing those of Shri S. Abdul Qadr, Additional Munsif, Ranchi dated 31.1.1976.

Atmaram Ranchhodbhai v. Gulam Huseln Gulam Mohiyaddin & anr. (1)- distinguished.

Appeal by the plaintiff.

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

Messrs. Debi Prasad, A. Sahay & Miss Indrani Choudhuri for the appellants

M/s. N.K. Prasad & P.C. Roy for the respondents.

Anand Prasad Sinha, J. - This appeal has been placed before us on a reference made by a learned Single Judge. The only question involved in the case is as to whether only one trustee out of several co-trustees can effectively maintain a suit for eviction from the suit premises belonging to Vishwakarma Mandir Trust.

2. The judgment and decree passed in Title Appeal No. 32 of 1976/19 of 1977 dated 25.1.1978 dismissing the plaintiff's suit, earlier decreed by the learned Additional Munsif, Ranchi in Title Suit No. 205/109 of 1973/1975, is under challenge. The plaintiff is the appellant and the defendants are the respondents.

3. The plaintiff had filed a title suit for eviction of the respondents from the suit premises in question and also for realisation of Rs. 216/- being the arrears of rent. The eviction was sought squarely on the ground of default as contemplated under section 11(1)(d) of the Bihar Buildings (Lease, Rent and Eviction) Control Act (hereinafter to be reffered to as the Act).

4. The plaintiff is the Bishwakarma Mandir Trust through its President Baldeo Prasad Vishwakarma. Two rooms are claimed to have been

(1) (1973) AIR (Gujarat) 113.

let out on a monthly rental of Rs. 6/- only. The default had been attributed from October 1969 to May 1973.

5. The tenant respondent had resisted the claim of default as put forwarded by the plaintiff. The relationship of Landlord and tenant has been admitted. The main defence put forward is that the suit is not maintainable.

6. It appears that Baldeo Prasad Vishwakarma happened to be one of the trustees of Bishwakarma Mandir Trust. Further it appears from the evidence that Baldeo Prasad Vishwakarma used to make demands for rent. The rooms had been let out by him and further it appears that he used to look after the affairs of the tenancy involved in this case.

7. As a matter of fact, both in the trial court and also in the lower appellate court; the two issues concerning default and also service of notice under section 106 of the Transfer of Property Act had been adjudicated and further it appears that the concurrent finding of both the courts below is that the tenant respondent had, in fact, defaulted. The findings of fact concerning service of notice under section 106 of the Transfer of Property Act is not relevant now to discuss.

8. On perusal of the evidence and also the findings so far the question of default is concerned, that has been firmly established and there is no occasion to interfere with the same.

9. However, the real issue involved in this appeal is as to whether the suit as framed is maintainable. It is because admittedly all the trustees have not joined as the plaintiffs and also they have not been made proforms defendants. It appears that there is no written instrument in support of the nature of trust and absolutely there is

no evidence or any document to say that Baldeo Prasad Vishwakarma was authorised by all other trustees to file the suit.

10. The learned lower appellate court has found legal impediment in maintaining the suit on the ground that all the trustees being necessary parties are not on the record and in support of this it has mainly relied upon a decision in the case of *Atmaram Ranchhodbhai v. Gulam Husein Gulam Mohiyaddin and another (1).*

11. In my opinion, the learned lower appellate court has ignored to consider the sharp distinction in between the facts of the present case and the aforesaid decision relied upon for giving findings regarding non-maintainability of the suit. The plaintiff has been described to be Bishwakarma Mandir Trust through Baldeo Prasad Bishwakarma. There being a Mandir the concerned property, which is the subject matter of the suit, is definitely vested in the deity. The deity being a juristic person, the suit by a trustee being the Manager or the person involved with the state of affair will be a competent person to maintain the suit alone. It appears from the trend of the evidence that he looks after the realisation of the rent of the property concerned in the suit and he had let out the portion for which eviction had been sought. In addition that he will be termed to be the person who looked after the affairs of certin properties belong to the deity, he has also a legal status as laid down in section 2(f) of the Act. This relates to the definition of a 'landlord' and in a suit for eviction the 'landlord' as defined under the Act is the right person to maintain a suit. However, independent in itself, by virtue of the definition of the landlord if definite impediment comes in on the

(1) (1973) AIR (Guj.) 113.

principle that all the trustees are the necessary parties even in the circumstances of this case the suit will not be maintainable. In view of the discussions stated above, the distinction that the properties have vested in the juristic person, the deity, will make the fact of this case distinguishable.

12. It may be appreciated that in the instant case, it is a private trust. The properties belong to the deity. Baldeo Prasad Vishwakarma who looks after the suit property in the manner that he has let out the premises and had received the rents. Under these circumstances, I am tempted to quote a few lines from the book "B.K. Mukherjee on Hindu Law of Religious and Charitable Trusts," Tagore Law Lectures, 5th Adition by A.C.Sen at page 203:-

> "The exact legal position of a Shebait or manager cannot be said to be altogether beyond the range of controversy, though much of the earlier theories has now been discarded. It is now settled by the pronouncement of the *Judicial Committee in Vidyavarathi v. Balusami (LR 48 IA 302)* that the relation of a Shebait in regard to the Debutter property is not that of a trustee to trust property under the English law. In English law the legal estate in the trust property vests in the trustee who holds it for the benefit of the cestui que trust. In a Hindu religious endowment, the entire ownership of the dedicated property is transferred to the deity or the institution itself as a juristic person, and the Shebait or Mahant is a mere manager." A trust" thus runs the judgment of the Judicial Committee "in the sense in which the expression is used in English law, is unknown in the Hindu system pure and simple. Hindu piety found expression in gifts to idols and images concecrated and installed in

temples, to religious institution of every kind, and for all purposes considered meritorious in the Hindu social and religious system.....Under the Hindu law the image of a deity of the Hindu pantheon is a juristic entity, vested with the capacity of receiving gift and holding property. Religious institutions known under different names are regarded as possessing the same juristic capacity and gifts are made to them eo nomine. In many cases in Southern India, especially where the diffusion of Aryan Brahminism was essential for bringing the Dravidian people under the religious rule of the Hindu system, colleges and monasteries under the name of Math were founded under spiritual teachers of recognised sanctity. When a gift is directly to an idol or temple, the seisin to complete the gift is necessarily effected by human agency. Called by whatever name, he is only the manager and custodian of the idol or the institution. In almost every case he is given right to a part of the usufruct, the mode of enjoyment and the amount of the usufruct depending again on usage and custom. In no case was the property conveyed to or vested in him, nor is he a 'trustee' in the English sense of the term, although in view of the obligations and duties resting on him, he is answerable as a trustee in the general sense for maladministration." Where a testator created an absolute Debutter in favour of his family deity and bequeathed to executors and trustees named in the will his dwelling house containing 84 rooms upon trust to hold and use the premises as debutter property for the service and worship of the family deity located in one of the rooms of the dwelling house

without expressly constituting the trustees as Shebaits held, shebaitship devolved not upon the trustees but upon the heirs of the testator. *(Profullo Chorone v. Satya Chorone, AIR 1979 SC 1682).*"

Another passage appearing at page 260 of the aforesaid book runs as follows:-

"When a Shebait declines to bring a suit or by his conduct places himself in such a position that he could not be expected to bring a suit, the question arises what other persons can file a suit to protect the interests of the deity. The answer to this question depends on whether the endowment is private or public. In the case of a private endowment the members of the family of the founder are persons interested in protecting the interests of the Debutter, and the law is well settled that they can sue to enforce the rights of the deity. In *Manohar Mukherjee v. Rajah Peary Mohan (24 CWN, 478)*, the suit was brought by an heir of the founder upon whom the management of the Debutter would devolve if the actual incumbent was removed for misconduct and it was held that the founder or his heirs could, under the law, 'sue for the enforcement of the trust, for the removal of the old trustees, for the appointment of a new one and may thereby secure the proper administration of the trust and its properties,' and it was further observed that the restriction imposed by section 92 of the Civil Procedure Code as to the mode of institution of such suits applied only to public trusts and that the rights of the founder of a private trust or of his heirs remained un-impaired. In *Girish v. Upendra (35 CWN 768)*, it was laid down by a Division Bench of

the Calcutta High Court that when a private Debutter or family endowment has been created for the worship of a deity, a prospective Shebait or any member of the family of the donor is entitled to maintain a suit for a declaration that certain properties do not belong to the Shebait for the time being but are trust property or that an alienation made by a Shebait was not binding on the deity. The same principle was laid down in *Panchkori v. Amodelal (41 CWN 1349)* An opinion was expressed in the last named decision that even a de facto Shebait will be entitled to bring a suit for such purpose. But, as on the facts of that case, it was held that the plaintiff was not a de facto Shebait at all, the opinion expressed by the learned Judge cannot rank higher than an obiter."

Another relevant passage is at page 272 of the aforesaid book which runs as follows:-

The view that a de facto trustee is entitled to maintain an action on behalf of the trust has since been laid down in a number of decisions. *(Jaganath v. Thirthananda AIR 1952 Orissa, 312; Sri Ram v. Chandeshwar Prasad, ILR 31 Pat. 417; Lalta Prasad v. Brahmanand, AIR 1953 All. 449; Kanakulamada Nadar v. Pichakannu Ariyar, AIR 1954 Trav. Cochin 254; Sapta Koteshwar v. R.V. Kuttur, AIR 1956 Bombay 615). In Sapta Koteshwar v. R.V. Kuttur (AIR 1956 Bombay, 615)*, it was observed that the fact that the de facto trustee was also seeking to advance his own interests was not a ground for non-suiting him but that the court might make appropriate directions for protecting the interests of the deity. The question has since been considered by the

Supreme Court in *Vikramadas v. Daulat Ram (1956 SCR 826)*. Therein it was held that a de facto trustee in possession and management of the asthan and its properties had a right to take proceedings for protecting the rights of the institution."

Another relevant passage is to be found in the book B.K. Mukherjea on the Hindu Law of Religious and Charitable Trusts - Tagore Law Lectures, 4th Edition by P.B. Gajendragadkar and P.M. Bakshi at page No. 259, which runs as follows:-

"When a Shebait declines to bring a suit or by his conduct places himself in such a position that he could not be expected to bring a suit, the question arises what other persons can file a suit to protect the interests of the deity. The answer to this question depends on whether the endowment is private or public. In the case of a private endowment the members of the family of the founder are persons interested in protecting the interests of the Debutter, and the law is well settled that they can sue to enforce the rights of the deity. In *Manohar Mukherjea v. Rajah Peary Mohan (24 CWN 478)*, the suit was brought by an heir of the founder upon whom the management of the Debutter would devolve if the actual incumbent was removed for misconduct and it was held that the founder or his heirs could, under the law, "sue for the enforcement of the trust, for the removal of the old trustees, for the appointment of a new one and may thereby secure the proper administration of the trust and its properties", and it was further observed that the restriction imposed by section 92 of the Civil Procedure Code as to the mode of institution of such suits applied only to public trusts and that the rights

of the founder of a private trust or of his heirs remained un-impaired."

The above mentioned principles find support from a decision in the case of *Vidya Varuthi Thirtha And Balusami Ayyar and others (1)*. The aforesaid decision has dealt with the different aspects of Religious Endownment Math-relation of Heads and Managers of Religious Institutions to a property-alienation by Head of Math- "Trustee". The decision at page 311 says as follows:

> "It is also to be remembered that a 'trust' in the sense in which the expression is used in English law, is unknown in the Hindu system, pure and simple. (J.G.R. Ghose, "Hindu Law", p. 276). Hindu piety found expression in gifts to idols and images consecrated and installed in temples, to religious institutions of every kind, and for all purposes considered meritorious in the Hindu Social and religious system; to brahmans, goswamis, sanyasis etc. When the gift was to a holy person, it carried with it in terms or by usage and custom certain obligations. Under the Hindu law the image of a deity of the Hindu pantheon is, as has been aptly called, a justice entity," vested with the capacity of receiving gifts and holding property. Religious institutions, known under different names, are regarded as possessing the same "juristic" capacity, and gifts are made to them eo nomine. In many cases in Southern India, especially where the diffusion of Aryan Brahmanism was essential for bringing the Dravidian peoples under the religious rule of the Hindu system, colleges and monasteris under the names of math were founded under

(1) 48 IA 302.

spiritual teachers of recognized sanctity. These men had and have ample discretion in the application of the funds of the institution, but always subject to certain obligations and duties, equally governed by custom and usage. When the gift is directly to an idol or a temple, the seisin to complete the gift is necessarily affected by human agency. Called by whatever name, he is only the manager and custodian of the idol or the institution. In almost every case he is given the right to a part of the usufruct, the mode of enjoyment and the amount of the usufruct depending again on usage and custom. In no case was the property conveyed to or vested in him, nor is he a 'trustee' in the English sense of the term, although in view of the obligations and duties resting on him, he is answerable as a trustee in the general sense for mal- administration."

The decision further lays down at page 315 as follows:-

"Neither under the Hindu law nor in the Mohammedan system is any property 'conveyed' to a Shebait or a mutawalli, in the case of a dedication. Nor is any property vested in him; whatever property be holds for the idol or the institution he holds as manager with certain beneficial interests regulated by custom and usage. Under the Mohammedan Law, the moment a wakf is created all rights of property pass out of the Wakf, and vest in God Almighty. The curator, whether called mutawalli or sajjadanishin, or by any other name, is merely a manager. He is certainly not a 'trustee' as understood in the English system."

The decision further lays down at page 319 as

follows:-

> "From the above review of the general law relating to Hindu and Mohommedan pious institution it would prima facie follow that an alienation by a manager or superior by whatever name called cannot be treated as the act of a 'trustee' to whom property has been 'conveyed in trust' and who by virtue thereof has the capacity vested in him which is possessed by 'trustee' in the English law."

Another decision in support of the principles enumerated above is to be found in the case of *Pramatha Nath Mullick And Pradyumna Kumar Mullick and Another (1)*. The following passages at page 250, 251 and 252 are extremely relevant:-

> "One of the questions emerging at this point, is as to the nature of such an idol, and the services due thereto. A Hindu idol is, according to long established authority, founded upon the religious customs of the Hindus, and the recognition thereof by Courts of law, a 'juristic entity'. It has a juridical status with the power of suing and being sued. Its interests are attended to by the person who has the deity in his charge and who is in law its manager with all the powers which would, in such circumstances, on analogy, be given to the manager of the estate of an infant heir. It is unnecessary to quote the authorities; for this doctrine, thus simply stated, is firmly established."
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> xxx xxx xxx
>
> "It must be remembered in regard to this branch of the law that the duties of piety from

(1) 52 IA 245.

the time of consecration of the idol are duties to something existing which, though symbolising the Divinity, has in the eye of the law a status as a separate persons. The position and rights of the deity must, in order to work this out both in regard to its preservation, its maintenance and the services to be performed, be in the charge of a human being. Accordingly he is the shebait custodian of the idol and manager of its estate."

13. Therefore, in my opinion, the suit as framed is maintainable. Accordingly, the judgment and decree of the lower appellate court is hereby set aside. The judgment and decree of the trial court is hereby restored with costs throughout. This appeal is accordingly allowed. Hearing fee Rs. 250/- for this Court.

Madan Mohan Prasad, J. - I agree.

M.K.C. Application allowed.

CRIMINAL WRIT JURISDICTION

1985/September, 6.

Before Madan Mohan Prasad and Udai Pratap Singh, JJ*

*Imroj***

v.

The State of Bihar and others.

Bihar Control of Crimes Act, 1981 (Bihar Act No. VII of 1981)—*section 12 sub-section (2)—order of detention under—detaining authority not filing counter—affidavit—counter affidavit filed by a Deputy Collector not in accordance with order 19 rule 3 of the Code of Civil Procedure—effect of—incidents set out in the order of detention not of the kind which would jeopardise maintenance of public order—detention—validity of.*

Where the District Magistrate, Ranchi, the detaining authority, who ordered detention of writ-petitioner under section 12 sub- section (2) of the Bihar Control of Crimes Act, 1981, did not file any counter-affidavit showing his subjective satisfaction and a counter affidavit was filed by a Deputy Collector, Ranchi, but the affidavit was not in accordance with order XIX, rule 3 of the Code of Civil Procedure, 1908 under which it was incumbent

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* Sitting at Ranchi.

** Criminal Writ Jurisdiction Case no. 95 of 1985 (R). In the matter of an application under Articles 226 and 227 of the Constitution of India.

on the deponent to disclose the nature and source of his knowledge with sufficient particularity;

Held, that the order of detention and the approval and confirmation of the order of detention are bad and are quashed.

Held, further, that there is nothing in the incidents set out in the grounds in the instant case to suggest that either of them was of that kind and gravity which would jeopardise the maintenance of public order.

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 U.P.Singh, J.

M/s. P.S. Dayal and A.S.Dayal for the petitioner

None for the respondent

Udai Pratap Singh, J. - By this writ petition, the petitioner has questioned the validity of the order of detention dated 21st February, 1985 (annexure 1) passed by the District Magistrate, Ranchi (respondent no. 2) under sub-section (2) of section 12 of the Bihar Control of Crimes Act, 1981 (in short, the Act). The grounds of detention dated 16th February, 1985, served on the petitioner are contained in annexure 2. The detention order was approved by the State Government under section 12(3) of the Act on 1st March, 1985 (annexure 3). The detention order was further confirmed by the State Government under section 21(1) read with section 22 of the Act on 20th April, 1985 (annexure 5), whereby the petitioner was ordered to remain in detention till 20th February, 1986.

2. The order states that it was made to prevent him from acting in any manner prejudicially to the maintenance of public order. It was further stated

that the petitioner, is presently lodged in the central Jail, Ranchi, who is likely to be released on bail very soon and disturb public order after his release, be detained.

3. The petitioner made his representation in writing to the Joint Secretary, Home (Police) Department, Government of Bihar, Patna, on 5th March, 1985 and urged that while passing the order of detention, detaining authority did not apply its mind to the facts of the case. The order of detention was passed by on non- existent facts. His representation was rejected.

4. It is, however, contended that the grounds of detention which were furnished to the petitioner do not bear upon the maintenance of public order or of his acting prejudicially to maintenance of public order. This is the only point urged in support of the petition by the learned counsel for the petitioner. The details of the activities are mentioned in the grounds which may be summarised as follows:-

(A) On 4.2.1985, the petitioner along with his associates exploded bomb near the house of Jamilur Rahman. He came out of the house and he found 7-8 persons approaching his house. When he stopped them, one of them caused bleeding injuries on his head. The family members were also assaulted. Mohalla people came out and heard that one of the miscreants called, "Imroj, Chhoro, Bhago." This created panicky in the mohalla and disturbed public order. This relates to Lower Bazar P.S. case no. 35 of 1985 under section 452/307/380/511/364 of the Indian Penal Code and also under section 3/4 of the

Explosive Substance Act.

B) On 6,9,1984, while Mohammad Ehtesam was returning after seeing film, he was stopped by the petitioner and his associates and serious injury was caused by Bhujali. The petitioner fired but it missed. This created commotion and caused shivering amongst the shop keepers and the general public. Thus, public order was disturbed. This relates to Kotwali P.S. case no. 620 of 1984 under section 147/148/149/307/326 of the Indian Penal Code and under section 27 of the Arms Act.

C) On 5.9.1984, Md. Shamim was stopped by some miscreants on the Church road and the petitioner and one Munna Khan also reached there. Munna Khan assaulted Shamim by fists and the petitioner fired at him. Thereafter they fled away. This disturbed the public order. This refers to Lower Bazar P.S. case no. 251 of 1984 under sections 341/323/307/326/34 of the Indian Penal Code and 27 of the Arms Act.

D) Ib 2,5,1984, one Somra Oraon was standing near Khalil Hotel when the petitioner along with his associates came there and threatened him to shoot by pistol. He left the place and when he reached at Doma Toli, he was asked to hault, and assaulted with fists, fire was also opened and he was also assaulted by the butt of the pistol. The incident caused shivering amongst common people. This disturbed the public order.

This refers to Lower Bazar P.S. case no. 130 of 1984 under section 342/307 of the Indian Penal Code.

Besides these grounds, a few past incidents of the year 1979, 1981 and 1982 were also taken as background to detain him. The instances are:

i. Hindipiri P.S. case no. 53 of 1979 under section 392 of the Indian Penal Code. It was stated that on 25.2.1979, four persons went to Kamal Stores and looted Rs. 650/- on the point of rivolver. During the course of investigation, involvement of the petitioner came to light and chargesheet was submitted.

ii. Hindipiri P.S. case no. 6 of 1979 under section 394 of the Indian Penal Code. It was alleged that on 2.3.1979, four persons entered Sudarshan Hotel, assaulted the owner of the hotel with butt of the pistol, and looted the hotel and fled away. During the course of investigation, name of the petitioner came to light.

iii. Lower Bazar P.S. case no. 207 of 1981 under section 148 and 307 of the Indian Penal Code and 27 of the Arms Act and section 3/4 of the Explosive Substance Act. It was alleged that on 17.8.1981 the petitioner and his associates shot at one Bari Ahmad Halim, petitioner also threw bomb which fell on. The case was accordingly lodged.

iv) Lower Bazar P.S. case no. 182 of 1982 under sections 148/149/307 of the Indian Penal Code, section 27 of the Arms and Section 2/5 of the Explosive Substance

Act. It was alleged that on 22.6.1982 the petitioner along with his associates went to the house of the Farooque of Kanke Road and threw bombs in his house. His associates also threw bombs and created panick. The petitioner stood on the Metador, opened fire in diferent directions and went away.

5. It was urged by the learned counsel for the petitioner that these incidents are stray acts directed against individuals and are not subversive of public order and, therefore, the detention on the ostensible ground of preventing him from acting in a manner prejudicial to public order was not justified. It was further urged that the petitioner has been granted bail in most of the cases and the trial is pending. The petitioner belonged to a respectable family of the town who carried on business of constructing and repairing of roads, buildings and drains. The petitioner is a handicapped persons having no limb down the right wrists. It was stated that along with his representation, a written representation signed by 68 persons of the locality was sent to the Joint Secretary (Home) Police Department, Government of Bihar, Patna, stating that the petitioner, Imroz, is known to them since long. He is a physically handicapped young boy having only one hand. He does not have the palm of his right hand. He is a well behaved young person who has not indulged in criminal activity to their knowledge. He carries respect for the people. His whole family is known to them and there has been no occasion in the past whereby it could be said that he caused breach of peace or public tranquillity. He is not a person of questionable character.

6. The reasons on the basis of which the order

of detention has been challenged is fully stated in paragraph 10 of the writ petition. It has been mentioned that the grounds were vague, indefinite and not intelligible. The incidents mentioned in the grounds were not adequate to hold that the public order was disturbed in any manner. The allegations in the various first information reports relate to law and order and not public order. Therefore, the detaining authority did not apply its mind and passed a mechanical order.

7. The detaining authority, the District Magistrate, Ranchi, has not filed any counter affidavit before this Court and no reason has been disclosed as to why his affidavit could not be filed. The relevant paragraph 10 of the writ application, wherein the reasons have been stated for challenging the detention order, the only averment made in paragraph 7 of the counter affidavit is that "the order passed against the petitioner is legal and it has been passed after going through the materials placed before the detaining authority." The counter affidavit has been filed by a Deputy Collector, Ranchi, attached to the office of the District Magistrate, Ranchi. Thus, no one has taken the responsibility to place before this court the materials showing subjective satisfaction of the detaining authority while the order of detention was passed. The affidavit of the Deputy Collector is not in accordance with Order XIX, rule 3 of the Code of Civil Procedure, under which it was incumbent upon the deponent to disclose the nature and source of his knowledge with sufficient particularity.

8. Besides, the ground mentioned in annexure 2 do not relate to public order. It may relate to law and order but the two concepts are quite different. Public order embraces more of the community than

law and order. Public Order is the even tempo of the life of the community taking the country as a whole or even a specified locality. Disturbance of public order is to be distinguished from acts directed against individuals which do not disturb the society to the extent of causing a general disturbance of public tranquillity. It is the degree of disturbance and its effect upon the life of the community in a locality which determines whether the disturbance amounts only to a breach of law and order. An act by itself is not determinant of its own gravity. In its quality it may not differ from another but in its potentiality it may be very different. Similar acts in different contexts affect differently law and order on the one hand and public order on the other. It is always a question of degree of the harm and its effect upon the community. The question to ask is: Does it lead to disturbance of the current of life of the community so as to amount a disturbance of the public order or does it affect merely an individual leaving the tranquallity of the society undisturbed ? This question has to be faced in every case on facts. There is no formula by which one case can be distinguished from another. Every assault in a public place like a public road, is likely to cause horror and even panic and terror in those who are the spectators. But that does not mean that all of such incidents do necessarily cause disturbance or dislocation of the community life of the localities in which they are committed. There is nothing in these incidents set out in the grounds in the present case to suggest that either of them, was of that kind and gravity which would jeopardise the maintenance of public order.

9. In the result, this application is allowed. The order of detention (annexure 1) and the order of

approval and confirmation of the order of detention contained in annexures 3 and 5 are quashed. The petitioner is directed to be released forthwith unless required in some other connection.

Madan Mohan Prasad, J. - I agree.

R.D. Application allowed.

CRIMINAL WRIT JURISDICTION

1985/October, 8.

Before Hari Lal Agrawal, J.*

Abdul Aziz and ors. **

v.

Shri P. Jha, Executive Magistrate, Kodarma & ors.

Code of Criminal Procedure, 1973 (Act II of 1974)—*Section 145 and Penal Code, 1860 (Act XLV of 1860) section 188—proceeding under section 145—final order passed under—dispossession of the second party in whose favour possession was declared on the basis of purchase after the said order—order for starting proceeding under section 188 of the Penal Code, legality of—order of Magistrate directing the Police to restore possession in favour of* the second party, whether sustainable in law.

Where, in a proceeding under section 145 of the Code of Criminal Procedure, decision was given on 19.5.1979 in favour of the members of the second party and their possession was declared over the disputed property and thereafter on the basis of purchase through a sale-deed dated 24.5.1979 from Renuka Das, widow of one Man Mohan Das, who was brother of Sarad Chandra Das;

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* Sitting at Ranchi.

** Criminal Writ Jurisdiction Case No. 5 of 1980 (R). In the matter of an application under Articles 226 and 227 of the Constitution of India.

the first party, the petitioners took forcible possession of the property in question from the members of the second party who filed a petition before the Executive Magistrate for taking suitable action and the Executive Magistrate ordered for starting proceeding under section 188 of the Indian Penal Code against the petitioners and also directed for restoring possession of the disputed property to the members of the second party;

Held, that the petitioners will be deemed to be 'parties to the previous proceeding' by fiction of law and, therefore they are equally bound by the final order passed in the proceeding under section 145 of the Code of Criminal Procedure which prohibited the members of the first party from disturbing possession of the members of the second party.

Held, further, that the right to order for restoring possession can be exercised only where it is found that the party had been forcibly and wrongfully dispossessed within two months next before the date of the preliminary order, and now, in view of the changes made in the proviso to sub-section (4) of section 145 of the new code within a period of two months from the date of the Police report or other information received by the Magistrate or in between that date and before the date of his order under sub- section (1). In such cases also the Magistrate has to treat that party who is dispossessed as if he had been in possession on such date, and while making the final order in his favour, direct for restoring his possession. The order of the Executive Magistrate, therefore, directing the Police to restore the status quo ante with respect to the disputed property in favour of the members of the second party, is unsustainable in law and, therefore, must be set aside. The action of the petitioners may amount in law to a trespass and

disobedience to the order under section 145 and therefore the order for starting a proceeding under section 188 of the Indian Penal Code was quite legal and valid.

Case laws discussed.

Application by the petitioners.

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

M/s. P.S. Dayal and A.S. Dayal for the petitioners

M/s. M.S. Chhabra, Anil Kumar Sinha and A. Sahay for the respondents.

Hari Lal Agrawal, J. - The petitioners by this application challenges the order of the Executive Magistrate, Kodarma, dated 13.9.79/12.1.1980 (Annexure 3) in relation to a proceeding under section 145 of the Code of Criminal Procedure (for short 'the Code'). By this order the Executive Magistrate has ordered for starting a proceeding under section 188 of the Indian Penal Code against the petitioners, and has also directed the Officer Incharge, Tilaiya Beat House to restore possession of the disputed house to the members of the second party, respondents 2 to 5.

2. The relevant facts may now be briefly stated. A proceeding under section 145 of the Code was drawn up on 1.3.1975 with respect to a house at the instance of one Sharad Chandra Das, impleading respondents 2 to 6 as second party, which was ultimately decided on 19.5.1979 in favour of the members of the second party whose possession was declared over the disputed property.

3. From the statements made in the counter-affidavit filed on behalf of respondents 2 to 5, it appears that the property in question originally

belonged to one Tilak Chandra Das who had two sons, namely, Sarad Chandra Das, the first party, and late Man Mohan Das.

4. The case of the petitioners is that they purchased the properties under the proceedings from Ranuka Das, widow of the aforesaid Man Mohan Das through a sale deed dated 24.5.1979, i.e., only a week after the said order under section 145 of the Code was passed, and on the basis of the aforesaid purchase the petitioners are said to have taken forcible possession of the house in question from respondent no. 2 on 31.8.1979 respondents 2 to 7 filed a petition before the Executive Magistrate informing him of the above incident with a prayer for taking suitable action against the first party for their illegal act and for restoring back their possession from the petitioners. It was alleged that the petitioners were the creatures of the said Sarad Chandra Das and the sale deed in question was a sham and bogus transaction to give a colour of authority to the petitioners to commit the illegal act. It is on this petition that the Executive Magistrate passed the order mentioned above.

6. The further case of the petitioners is that their vendor being not a party to the proceeding under section 144 of the Code, the order in the said proceeding was not binding on her and the petitioners being bona fide purchasers no action should have been taken against them and the remedy of the respondents was to move a competent court for seeking possession and not the court of the Executive Magistrate and, therefore, impugned order was without jurisdiction.

7. Learned counsel appearing in support of this application pressed the above points and submitted that the impugned order was wholly

without jurisdiction inasmuch as the petitioners and their vendor, being not bound by the prohibitory order under section 145 of the Code, the Magistrate had no authority to take any action against the petitioners.

8. Long line of cases of different High Courts is there on the question whether person not actually parties to a proceeding are bound by an order passed under this section. Speaking generally, it cannot be doubted that no order is binding on a person who is not a party to any proceeding and, therefore, examined plainly from the angle of this legal proposition, the argument may appear to be attractive, but this argument cannot stand, firstly on the basis of the new provision contained in the 1973 Code in clause (b) of sub-section (6) of section 145 requiring the service and publication of the final order as set out in sub-section (3) by affixing a copy of order to some conspicuous place at or near the subject of dispute. This could have effect of giving notice to all the interested persons in the subject of dispute, although they may not be formal parties to the dispute. The other aspect of the matter would be the character and status of the persons who are arrayed as party to the proceeding, and in cases where parties to the proceeding have got a representative capacity, then obviously the order would also bind the persons whom they represent. The clearest case would be the case of a manager of a joint Hindu family.

9. Long back in the case of *Lekhraj Roy v. Court of Wards (1)* it was held that where two rival Zamindars found out their litigation through their leases, the decision would bind them even though they were not expressly made parties.

(1) 14 Suth. WR 395.

Again in Jainath v. Ramlakhan (1) and Satya Charan De v. Emperor (2), it was held that when notice of a proceeding under section 145 of the Code was served at the spot, all persons interested in the dispute must be deemed to have been aware of that proceeding and must be bound by the same even though they did not care to enter appearance before the Magistrate and contest the proceeding.

These cases were followed by Narasimham, C.J. in *Bidyadhar Swain and another v. Padmanath Singh Deo and others (3).*

10. Then I come to the later decisions of this Court. The case of *Pitambar Chaudhury v. Achoki Chaudhury and others (4)* was where a leading member of the family was a party to the proceedings and it was held that he was representing the entire family and all the members of the family were bound by the order of the Magistrate in the proceeding.

In the case of *Radha Kirshna Prasad Sao v Lalgopal Bose and two others (5)* within 18 months of the order under section 145, the successful party sold the property in question after the order in its favour and the unsuccessful party without any decree from the competent civil court started disturbing the possession of the purchasers. It was held by the learned Judge that the purchasers from the unsuccessful party could be deemed to be parties to the previous proceeding, since to hold otherwise would mean that the unsuccessful party could circumvent and ignore an order under section

(1) (1929) AIR (Pat) 505
(2) (1930) AIR (Cal) 63
(3) (1959) AIR (Orissa) 87
(4) (1951) AIR (Pat.) 325
(5) (1968) BLJR 461.

145 of the Code.

A similar view has been taken by another learned Judge of this Court in the case of *Kameshwar Tiwary v. Bishundeo Jha and others (1)* where one of the petitioners had derived title from one of the parties to the proceeding under section 145 of the Code and it was held that she would be deemed to be a party to the earlier proceeding.

11. It is the case of the respondents that *Sarad Chandra Das* was the male member of the family and that there was attachment of the house during the pendency of the proceeding and, there, it cannot be disputed that Renuka Das, the vendor of the petitioners, herself not having been made a party, perhaps being a female member of the family, was not ignorant of the proceeding, apart from the fact that she was a widow of the family of the first party. The final order passed on 19.5.1979 in the proceeding under section 145 of the Code, therefore, must be binding on Renuka Das also.

Once this view is taken, then following the case of *Radha Krishna Prasad Sao (supra)* it must be held that the petitioners will be deemed to be 'parties to the previous proceeding' by fiction of law and, therefore, they are equally bound by the said order which prohibited the members of the first party from disturbing possession of the members of the second party. The act of dispossession of the house in question by the petitioners is a non- issue and, therefore, the order for starting a proceeding under section 188 of the Indian Penal Code is quite legal and valid as the petitioners cannot be permitted to frustrate and circumvent a very reasoned order in favour of the second party.

(1) (1977) BLJR 407.

12. Now remains for consideration of the other part of the order whereby the Executive Magistrate has directed the Police for restoring the status quo ante with respect to the house in question in favour of the members of the second party.

It was submitted on behalf of the petitioners that the final order under section 145 of the Code having been passed under the provisions of sub-section (6) of section 145, no order for restoration of possession could be passed in favour of the second party, particularly when it is the admitted case that the act of dispossession by the petitioners was committed subsequent to the declaration of their possession under the final order. Sub- section (6)(c) of section 145 of the new Code, which contains provision analogous to sub-section (6) of section 145 of the old Code, provides that where a Magistrate decides that one of the parties was or should, under the proviso to sub-section (4), be treated as being in possession of the subject matter, he shall issue an order 'declaring such party to be entitled to possession thereof.....forbidding disturbance of all such possession until evicted in due course of law."

The right to order for restoring possession can be exercised only where it is found that the party had been forcibly and wrongfully dispossessed within two months next before the date of the preliminary order, and now, in view of the change made in the proviso to sub-section (4) of section 145 of the new Code, within a period of two months from the date of the Police report or other information received by the Magistrate, or in between that date and before the date of his order under sub-section (1). In such cases also the Magistrate has to treat that party who is dispossessed as if he had been in possession on

such date, and while making the final order in his favour, direct for restoring his possession.

The Supreme Court in the case of Bhinka and others v. Charan Singh (1) was considering a matter where the appellants before the Supreme Court were claiming to have taken possession of the land by virtue of the order under section 145, and it was held that the party were either in possession or not in possession of lands on the specified dates and, if they were not in possession on that date, their subsequent taking possession thereof could not have been under the provisions of the Code.

Applying the ratio of the above case to the facts of the present case, and for the reason that there is no express provision in section 145 of the Code authorising the court to place the unsuccessful party in possession, except in cases to which the proviso to sub-section (4) applies, I would hold that this part of the order of the Executive Magistrate, directing the Police to restore status quo ante, is unsustainable in law and, therefore, must be set aside. The action of the petitioners may amount in law to a trespass and disobedience to the order under section 145 and thus an offence under section 188 of the Indian Penal Code, empowering the Magistrate to file a complaint against the aggressor.

13. In the result, this application succeeds in part to the extent indicated above and the impugned order, in so far as it directs the Police to restore status quo ante as obtaining on the date of the final order, is hereby quashed.

S.P.J. Application allowed in part.

(1) (1959) AIR (SC) 960.

CIVIL WRIT JURISDICTION

1985/October, 10.

Before Hari Lal Agrawal, J*

*The Tata Iron and Steel Company Limited***

v.

The Union of India and others.

Limitation Act, 1963 (Act 36 of 1963)—*sections 5 and 29(2)—scope and applicability of—section 5, whether applicable to the provisions of Central Excises and Salt Act—Central Excises and Salt Act, 1944.*

In view of the provisions contained in section 29(2), section 5 of the Limitation Act is applicable to all periods of limitation prescribed for any suit, appeal or application etc. by any special or local law. The Central Excises and Salt Act, 1944 is not a local law but it is no doubt a special law enacted for the purpose of consolidating the law relating to Central duties of Excise on goods manufactured or produced in certain parts of India and to Salt.

Held, therefore, that by the mandate of section 5 of the Limitation Act, 1963, it becames automatically applicable to the provisions of the Central Excises and Salt Act, 1944 and once this view is taken, in the instant case the

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* Sitting at Ranchi

** Civil Writ Jurisdiction Case No. 666 of 1979 (R). In the matter of an application under Article 226 and 227 of the Constitution of India.

non-consideration of petition filed by the petitioner for condoning one day's delay has deprived him from a valuable statutory remedy and its appeal being heard on merits.

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

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

M/s. Bishwanath Prasad, B.P.Verma for the petitioners.

M/s. Debi Prasad, A. Sahay for the respondents.

Hari Lal Agrawal, J. - The only grievance mooted by the petitioner by this writ application is that the Appellate Collector, Central Excise, Calcutta (respondent no. 3) while dismissing the petitioner's appeal against the order of the Deputy Collector, Central Excise, Patna (respondent no. 4) dated 2.7.1976 (Annexure-3) on the ground of limitation did not consider the application of the petitioner for condoning one day's delay at all. From perusal of the order of the Appellate Authority (Annexure-8) it appears that the petitioner's appeal was dismissed only on the ground that it was time barred under section 35 of the Central Excises and Salt Act, 1944 (hereinafter to be referred as 'the Act'). Section 35 of the Act, at the relevant time contained provision for a fixed period of three months' limitation for filing appeal without any further power of condoning delay which power has been given to the Appellate Authority by statute by amendment in the year 1980, and in appropriate cases the Appellate Authority may condone the delay in filing the appeal within the statutory period of three months upto a further period of three months.

2. On behalf of the respondents it has been

submitted by Mr. Debi Prasad that in the absence of any such provision at the relevant time the Appellate Authority had no jurisdiction to consider the petitioner's application for condoning the delay in question.

3. I do not find any substance in this submission in view of the provisions contained in section 29(2) of the Limitation Act, 1963 which reads as follows:-

> "29(2). Where any special or local law prescribes for any suit, appeal or application a period of limitation different from the period prescribed by the Schedule, the provisions of section 3 shall apply as if such period were the period prescribed by the Schedule and for the purpose of determining any period of limitation prescribed for any suit, appeal or application by any special or local law, the provisions contained in sections 4 to 24 (inclusive) shall apply only in so far as, and to the extent to which, they are not expressly excluded by such special or local law."

The Central Act, therefore, has made applicable section 5 of the Limitation Act to all periods of limitation prescribed for any suit, appeal or application etc. by any special or local law. The Central Excises and Salt Act, 1944 is not a local law but it is no doubt a special law enacted for the purpose of consolidating the law relating to central duties of excise on goods manufactured or produced in certain parts of India and to salt.

3. I, therefore, have got no doubt in my mind to hold that by the mandate of section 5 of the Limitation Act, 1963 it became automatically applicable to the provisions of the Central Excises Act Salt Act, 1944. Once this view is taken then it

has got to be held that the non-consideration of the petition filed by the petitioner for condoning one day's delay has deprived the petitioner-company from a valuable statutory remedy and its appeal being heard on merits. The delay, as already said above, was only of one day, and I have looked into the reasons for one day's delay committed by the petitioner in presenting its appeal. I feel satisfied that good grounds have been made out by the petitioner for condoning the delay. Since the matter has already remained pending since 1977 and in order to avoid further delay I heard learned Advocates for both the parties on the merits of the limitation matter and as indicated above I would condone the delay in filing the appeal by the petitioner. Accordingly I direct the Appellate Collector (respondent no. 2) to hear the petitioner's appeal on its merits.

4. In the result the application succeeds to the extent that the order as contained in Annexure-8 is hereby quashed and respondent no. 3, where the matter is sent back, is directed to hear the petitioner's appeal on its merits. Let an appropriate writ issue accordingly. In the circumstances of the case there will be no orders to costs.

M.K.C. Application allowed.

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