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against such affiliated colleges is to recommend the State Government for withdrawal of affiliation of the college."

4. From the aforesaid decision of the examination board of the university it is quite clear that the Regulation in question has in fact have been violated by the authorities of the college and for the said mistake of the college authorities, the petitioner is being subjected to punishment by withholding of her result. In my opinion, it is contrary to all canons of justice and equity. The provision under the Regulation is with respect to taking of admission in the Honours course. The regulation in question does not anywhere provide that if a student has been admitted to a particular course contrary to the Regulation, then even if he is allowed to appear at the examination his/her result cannot be published. No regulation has been placed before us to show that a student securing less than 45% marks in pass course cannot appear at the examination of Honours course.

5. My above view is also substantiated from section 39(b) of the Bihar Universities Act, 1976 which reads as under :

"Section 39 subject to the provisions of this act the statutes and the ordinance, the regulations may be made to provide for all or any of the following matters, namely -

(a) ,

(b) The conditions under which students shall be admitted to the degree or diploma courses and to the examinations of the university and shall be eligible for such degrees and diplomas."

Therefore, the conditions laid down for admitting to different courses and the conditions subject to which the students can be admitted to the examinations of the university and shall be eligible for the degree or diploma may differ. If a student not fulfilling the condition for admission is admitted to a degree course but if he otherwise fulfills the conditions for admitting him to the examination is found eligible for the degrees diplomas, then, in my opinion, the result of the examination and grant of degrees or diploma to such a student cannot be denied only because there was some infirmity at the time he was admitted to degree or diploma course.

If a student is allowed to appear at the Bachelor Examination though he does not hold the minimum qualification for appearing at such examination because of some mistake at some stage, the University will be justified in not publishing its results, but then if he was eligible for appearing at the Examination but he was admitted to the course in violation of some directive of the university touching upon the admission like reservation policy or in absence of minimum eligible marks even above the pass marks then grant of admission of the students in the course by the appropriate authorities may not justify the withholding of result which such students become entitled to on completion of course and appearance at the University Examination.

6. The learned counsel appearing for the respon-

Jents have placed reliance on an unreported Bench decision of this court in the case of *Mridula Prasad vs. The Vice Chancellor* in C.W.J.C. No.8292 of 1992 disposed of on 30th September, 1992. But in my opinion the said decision has no bearing on the facts of the present case because there was no provision under the Regulation by which the marks obtained by the petitioner in eight papers in pass course in North Bengal University could have been added by any mode of averaging in five papers in Honours course for the publication of the result of the petitioner of that case and therefore it was said that no relief can be granted to her even on equitable considerations. It has taken note of the fact that the result of B.Sc. Honours can be declared only by adding the marks obtained by the candidates in three papers of Botany while passing B.Sc.Pass course in the University of Bihar but the same was not done in the said case.

7. At this stage, I may observe that if the University feels that the affiliated colleges like one in the present case are deliberately engaged in flouting the Regulations of the University which is detrimental to the educational atmosphere and University discipline, then it is high time that they should resort to their statutory powers of canceling/withdrawing the affiliation granted to such colleges after giving due notice in this regard to the colleges concerned and take effective steps for seeking approval of the Government as per the provisions of the Bihar

Universities Act. It is no use just putting the careers of the students at peril without taking stern punitive measures against the erring institutions and their officials.

8. In the present case the petitioner, who is a college going student, is sought to be penalised by non-publication of her result on a presumption that she knew about the provisions contained in the Regulations noted above. Nothing has been published and made known to all concerned persons by any recognised mode of publication. Moreover, it is fallacious to presume that every person knows the law. In this connection I may refer to the decision of the Supreme Court in the case of *M/S Motilal Padampat Sugar Mills Co.Ltd. Vs. The State of Uttar Pradesh*, reported in AIR 1979, S.C.,621, wherein it has been held that,

"Moreover, it must be remembered that there is no presumption that every person knows the law. It is often said that every one is presumed to know the law, but that is not a correct statement: there is no such maxim known to the law. Over a hundred and thirty years ago, *Maule J., pointed out in Martindale v. Falkner*, (1846) 2 CB 706 "There is no presumption in this country that every person knows the law : it would be contrary common sense and reason it is were so." Scrutton, L.J., also once said : "It is impossible to know all the statutory law, and not very possible to know all the common law." But it was *Lord Atkin who*, as in so many

other spheres, put the point in its proper context when he said in *Evans. V.Bartlam*, 1937 AC 472"... the fact is that there is not and never has been a presumption that every one knows the law.

There is the rule that ignorance of the law does not excuse, a maxim of very different scope and application."

Moreover, application of any such presumption to the detriment of the students will be unjustified particularly when they are expected to take the words of the teachers and the principal of the institution as the last words regarding the rules and regulations pertaining to admission and examination or other institutional matters. If the students act on the representation of the authorities of the college then unless the violation is of a nature, which cannot be ignored by exercise of permissible discretion, the careers of innocent students should not be put to hazard.

9. Keeping in view the aforesaid facts and circumstances of the case, I allow this writ application with a direction to the Respondents to publish the result of the petitioner forthwith. Anyhow there will be no order as to costs.

Narayan Roy.J.

I agree.

R.D.

Application allowed.



APPELLATE CRIMINAL

Before L.P.N.Shahdeo & Om Prakash , JJ.*

1991

November, 29

Ramesh Dhobi & Ors.¹

V.

The State of Bihar.

Criminal trial -- non-examination of a witness by the Investigating officer -- witness filing belated application before Senior Superintendent of Police claiming to be an eye witness -- no explanation for such belated claim -- evidence of such witness in court -- reliance, whether to be placed.

Where a witness presented an application before the senior Superintendent of Police not before the 13th day of the occurrence claiming to be an eye witness of the occurrence and complaining that the Investigating Officer was not recording his statement without any explanation

* Sitting at Ranchi

1 Criminal Appeal No.159 of 1990(R) with Criminal Appeal No.181 of 1990 (R) with Criminal Appeal No.192 of 1990 (R) Against the judgment dated 21/8/90 passed by 7th Additional Judicial Commissioner, Ranchi, in Sessions Trial No.8/90. (1971) A.I.R. S.C.804. (1976) A.I.R.S.C. 2488.

1 In Cri.App No.181/90(R)... Sanjay Kedia Appellant...

In Cri.App No.181/90(R)... Sanjay Ram Verma, Appellant...

as to why he did not claim to be an eye witness before the Senior Superintendent of Police soon after the occurrence when his statement was not recorded and why he wasted 12 or 13 intervening days in making such a complaint;

Held, that no reliance can safely and reasonably be placed on his evidence on this ground alone.

Balakrushna v. State of Orissa (1) and

State of Orissa v. Brahmand Nanda. A.I.R.(2) ---
referred to

Appeal by the accused persons.

The facts of the cases material to this report are set out in the judgment of Om Prakash, J.

M/s P. S. Dayal, V.P. Singh, B.K. Nag,
A.N. Singh And Praveen Shanker Praveen
Shanker Dayal for the appellants for.

Mr. D.K. Sarkar, A.P.P. for the respondents.

Om Prakash, J: — The three appellants have preferred these appeals against their conviction for the offence punishable under section 302/34 I.P.C. and sentence to undergo imprisonment for life and to pay fine of Rs.2.000/- each, in default, to undergo simple imprisonment for six months.

2. According to the prosecution, on 18th July, 1989,

at about 6 p.m., informant *Ashok Kumar Choubey*(p.w.1) alongwith Raju Sharma (the deceased), *Papu Kumar Gupta* (P.W.2), Raju Ranjan Singh (P.W.3), and Raman Singh visited tea shop of one Madan Chaiwala (P.W.10) situated on Radium Road, Ranchi. After having tea all the five left and reached near Mahabir Hotel. It was 6.15 p.m. At that very time appellants Sanjay Kedia and Ramesh Dhobi alongwith an unknown person arrived there on a scooter. Stopping the scooter, they called Raju Sharma near Madan Hotel. As soon as Raju Sharma reached near them appellant Sanjay Kedia abused him and ordered for killing him. On his such order his unknown associate took out a pistol and shot at Raju Sharma, who fell down injured. The informant and his companions rushed to rescue the injured. In the meantime, those three fled away loading another cartridge in the pistol and leaving behind their scooter. Injured Raju Sharma was removed on a tempo to Bariyatu Hospital. But he never regained consciousness. Fardbeyan of Ashok Kumar Choubey was recorded by Assistant sub Inspector of Police, Mumtaj Ali (P.W.11) at 10.30 p.m. on the same date in the hospital. Injured Raju Sharma succumbed to his injury at 2 a.m. on the same night.

3. According to the fardbeyan the occurrence took place because two days before the occurrence on 16.7.1989, Raju Sharma had kept the key of the scooter of *Lakshmi Kedia*, a brother of appellant Sanjay Kedia, as Lakshmi Kedia had refused to take Raju Sharma on

his scooter to latter's house.

4. After completing the investigation police submitted chargesheet against the three appellants.

5. The learned Additional Judicial Commissioner ,Ranchi, framed charges u/s 302 read with section 34, I.P.C. against all the three appellants. Sanjay Ram Verma appellant in Criminal Appeal No.192/90(R) was further charged u/s 27 of the Arms Act.

6. Relying on evidence of four eye witnesses, namely P.Ws.1 to 3 and P.W.7, the learned Additional Judicial Commissioner has convicted appellant Sanjay Kedia for the offence punishable u/s 302/34 I.P.C. and sentenced him, as a above. She has relied on the sole testimony of P.W.7 to convict appellants Ramesh Dhobi and Sanjay Ram Verma for the offence punishable u/s 302/34 I.P.C. and has convicted them also, as above. But she has not given any finding with regard to charge u/s 27 of the Arms Act framed against appellant Sanjay Ram Verma.

7. In their statements u/s 313 Cr.P.C. each of the appellants has denied the allegation against him. The defence is that P.W.7 was out of Ranchi on the date of occurrence. Father of the deceased has been examined in this connection as a defence witness.

8. Evidence of P.w.1 Ashok Kumar Choubey is that on 18th July,1989, at about 6.15 p.m. he alongwith p.w.2 Papu Gupta, p.w.3-Raju Ranjan Sinha, one Raman Singh

and deceased Raju Sharma visited Madan's Hotel situated on Radium Road. After having their tea all the five moved to Mahabir Hotel situated 10-15 steps ahead. In the meantime, three persons arrived thereon a scooter driven by Sanjay Kedia. Ramesh Dhobi was behind him on the scooter. The third person on the scooter was an unknown one. Sanjay Kedia called Raju Sharma and as soon as Raju Sharma reached near him, Sanjay Kedia caught hold of his collar and ordered for shooting him whereupon the unknown rider of the scooter took out a pistol and shot at Raju Sharma, who fell down injured. P.W.1 adds that he and his companions rushed to catch hold of the assailants but the shooter loaded his revolver and all the three fled away towards Kutchari Chowk leaving behind the scooter. Thereafter Raju Sharma was removed to R.M.C.H. (Ranchi Medical College Hospital) where he succumbed to his injury at 2 a.m. on the same night.

9. Further evidence of p.w.1 is that two days before the date of occurrence, at about 8 p.m. Lakshmi Kedia, a brother of appellant Sanjay Kedia, did not agree to take Raju Sharma to latter's residence on his scooter whereupon Raju Sharma had taken key of the scooter from Lakshmi Kedia. The shooting took place on account of such snatching of the key of the scooter.

10. P.W.1 has identified appellant Sanjay Kedia in the dock. But looking at the other two appellants, namely,

Sanjay Ram Verma and Ramesh Dhobi, P.W.1 has said that they are not those persons who had arrived with Sanjay Kedia on the scooter at the place of the occurrence. Further evidence of p.w.1 is that he does not identify Ramesh Dhobi. He learnt name of Ramesh Dhobi from the persons assembled at the place of occurrence. He was never called upon to identify any body at any T.I.parade.

11. Evidence of p.w.2 Papu Gupta and p.w.3 Raju Ranjan both named in the F.I.R. is substantially similar to that of p.w.1 . They have corroborated p.w.1 in material particulars. Both the name and identify appellant Sanjay Kedia. But none of them names or identifies appellants Ramesh Dhobi and Sanjay Ram Verma as the associates of Sanjay Kedia who arrived at the place of occurrence on his scooter. Their evidence is that the two associates of Sanjay Kedia were unknown to them.

12. P.W.7, Keshav Prasad Sharma, a junior engineer in P.W.D. Ranchi claims to have seen the occurrence while going for a walk. He claims to have seen Sanjay Kedia catching hold of the collar of Raju Sharma and ordering for shooting him. He says that upon such order by Sanjay Kedia, Sanjay Ram Verma fired at Raj Kumar Sharma by revolver. Rameshwar Dhobi was holding hand of Raj Kumar Sharma at that time. Receiving the fire arm injury Raj Kumar Sharma fell down. He alongwith others removed the injured to the R.M.C.H. where he suc-

cumbed to his injury. He identifies each of Sanjay Kedia, Sanjay Ram Verma and Rameshwar Dhobi standing in the dock as the culprits. But p.w.1 Ashok Kumar Choubey, the informant, having a look at Ramesh Dhobi and Sanjay Ram standing in the dock has said in plain words that they are not the persons who had arrived at the place of occurrence with Sanjay Kedia on the scooter. Thus p.w.7 stands contradicted by the informant himself on such a vital point of identification.

13. It is significant to note that neither p.w.7 Keshav Prasad Sharma has been named in the fardbeyan Ext.4 nor any of p.ws.1 to 3 has named him in his evidence in any connection. None of them says that p.w.7 Keshav Prasad Sharma was also one of those who removed the injured to hospital on a tempo or he accompanied them on the tempo to hospital. Had p.w.7 Keshav Prasad Sharma been present at the place of occurrence or removed the injured to hospital in company of p.ws.1 to 3 on the tempo in all probabilities some one of them at least would have named p.w.7 Keshav Prasad Sharma.

14. Further evidence of p.w.7 is that the police i.e., Investigating officer arrived in the hospital and recorded fardbeyan of p.w.1, Ashok Kumar Choubey. The investigating officer made inquiries from him also in the hospital. But his statement was not recorded there. Later on, the investigating officer visited Katchari Chowk and searched for him, but he could not meet the investigating

officer. He visited police station and met the Investigating Officer, who told him that he would record his statement at his residence. But evidence of the Investigating Officer p.w.11 Mumtaj Ali is that he saw p.w.7 Keshav Prasad Sharma on 1.8.89 for the first time.

15. Further evidence of p.w.7 shows that even on 1.8.89 when he produced shirt of the deceased at the police station, his statement was not recorded by the investigating officer. Then he filed an application before the Senior Superintendent of Police saying that he is an eye witness but the Investigating Officer was not recording his statement. Evidence of investigating officer is that he never examined p.w.7 *Keshav Prasad Sharma*. He simply copied the application which he had filed before the Senior Superintendent of Police.

16. From the above it appears, that p.w.7 was never examined by the Investigating Officer. He presented an application not before the 13th day of the occurrence before the Senior Superintendent of Police claiming to be an eye witness of the occurrence and complaining that the Investigating officer was not recording his statement. There is no explanation as to why he did not claim to be an eye witness before the Senior Superintendent of Police soon after the occurrence when his statement was not recorded and why he wasted 12 or 13 intervening days in making such a complaint before the Senior Superintendent of Police.

17. In view of the above, I am of considered opinion that no reliance can safely and reasonably be placed on his evidence on the above ground alone.

In the case of case of *Balakrushna Vs. State of Orissa*, A.I.R.1971, S.C. 804, p.w.5 was not examined till after 10 or 11 days of the incident for no reason. Then it was held that unjustified and unexplained long delay on the part of the Investigating Officer, in recording statement of material eye witness during investigation of murder case will render evidence of such evidence unreliable.

18. There is no reliable evidence on record to show that p.w.7 ever disclosed the name of any of the appellants before any body as a murderer of Raju Sharma. Had he seen any of the three appellants committing murder of an employee of his department Raju Sharma, as an average person of ordinary prudence, p.w.7 would have surely named them before any of his colleagues, officers or employees of his department. But he never did so. It strongly suggests that he did not see the appellants committing murder of Raju Sharma infurtherance of their common intention to do so. It seriously effects his credibility.

19. It has been held in the case of *State of Orissa vs. Brahmand Nanda*, A.I.R. 1976, S.C.2488, that where a person claiming to be an eye witness did not disclose the name of the assailants for a day and half after the

incident and the explanation offered for non disclosure was unbelievable such non disclosure was a serious infirmity which destroys the credibility of the evidence of such witness.

20. Evidence of p.w.1, Mohanlal Uniyal, father of the deceased and an employee of P.W.D. i.e. a co-worker of p.w.7 is that he visited hospital on 18.7.89, p.w.7 Keshav Prasad Sharma did not visit the hospital on such date. He (p.w.7) had gone to his native village one month before the occurrence. It was he (P.W.1) who had sent information to him. He arrived in Ranchi several days after the occurrence.

21. In view of the above discussion, I am of the opinion that it is not reasonably safe to consider p.w.7 to be a reliable and trustworthy. He is the sole p.w. on whom the learned trial court has relied upon to find Ramesh Dhobi and Sanjay Ram Verma guilty. Undoubtedly, conviction can be based on the sole testimony of a single prosecution witness. In that case, he must be a wholly reliable witness. But in the instant case., p.w.7 is not at all a wholly reliable witness. He is not even a partly reliable witness. I reject his evidence for the reason recorded above. I am, therefore, of the opinion that none of Ramesh Dhobi and Sanjay Ram Verma can reasonably and safely be found guilty on the evidence of p.w.7.

22. Evidence of p.w.13, Dr. Niranjana Minj, who held post mortem examination on the dead body of Raju

Sharma shows that he found antimortem fire arm injury on the chest of the dead body which was sufficient to cause death in the ordinary course of nature. Time since death was within 6 to 24 hours. His post mortem examination report , ext. 10, is to the same effect. Thus the objective findings of the medical expert corroborated p.w.s 1 to 3 on the point.

23. Evidence of p.w.11 , *Mumtaj Ali* , the investigating officer shows that the place of occurrence is on the eastern plank of the Radium Road in front of the tea shop of Madan Singh at a distance of about 200 yards from Katchari Chowk. There he seized one empty cartridge of 315 bore produced by one R.S.Choubey at 11.15 hours on 19.7.89. He also seized blood stained mud from the place of occurrence and prepared seizure list ext.7. He also seized a green coloured Bajaj Super Scooter No. BPY 5956 from the place of occurrence and prepared seizure list ext.8. Further evidence of the investigating officer shows that 315 cartridges are used by criminal in country made revolver.

24. From the above discussion, I came to the conclusion that it is satisfactorily proved by cogent and reliable evidence beyond reasonable doubt that appellant Sanjay Kedia alongwith two others unknown persons arrived at the place of occurrence on his scooter and on his order such two unknown associates opened fire at Raju Sharma injuring him and the injured died on account

of such fire arm injury in the small hours of the following date. P.Ws. 1 to 3 are natural and competent witnesses worthy of trust. But the identity of any of those two unknown persons has not been firmly established by cogent and reliable evidence.

25. True, evidence of p.ws.1 to 3 shows that before ordering for killing Raju Sharma, Sanjay Kedia had caught Raju's collar and such a fact is not mentioned in the F.I.R. This appears to be an improvement made in course of evidence to tightly fasten liability on Sanjay Kedia for the offence u/s 302/34 I.P.C. Hence I overlook and reject such part of their evidence. But it does not absolve Sanjay Kedia of such liability. Evidence on record satisfactorily proves that it was he who had brought the unknown shooter (with another unknown person) on his scooter at the place of occurrence and it was he who ordered for killing of Raju Sharma before he was shot by one of his unknown associates. It satisfactorily proves prior meeting of their minds, their common purpose.

26. As it is satisfactorily proved and established firmly beyond reasonable doubt that the murder of Raju Sharma was committed by an unknown associates of Sanjay Kedia in furtherance of their common intention to murder Raju Sharma, I am of the opinion that Sanjay Kedia has committed offence punishable u/s 302/34 I.P.C. and he has been rightly convicted for such offence. Failure of charge against Ramesh Dhobi and Sanjay Ram

Verma does not affect such conviction of Sanjay Kedia because it is firmly established by cogent and reliable evidence beyond reasonable doubt that three persons Sanjay Kedia and his two unknown Associates arrived on a scooter to commit murder, acted in furtherance of their common intention to do so and committed the murder. When it is firmly established that two or more persons have participated in the murder in furtherance of their common intention to do so, even one of them can reasonably and legally be convicted for the offence punishable u/s 302 read with section 34 I.P.C. even though his unknown associates are acquitted because their identity could not be fully and firmly established.

27. In the case of *H.P.Thakore vs. State of Gujarat* 1977 Supreme Court Cases (Criminal) 26, it has been held that even if some out of several accused are acquitted but the participating presence of plurality of assailants is proved the conjoint culpability for the crime is inescapable. Not that the story of more than one person having attacked the victim is false, but that the identity of the absolved accused is not firmly fixed as criminal participants. Therefore, it follows that such of them, even if the number dwindled to one, as are shown by sure evidence to have knifed the deceased, deserve to be convicted for the principal offence read with the constructive provision.

28. In the result, Criminal Appeal No.181 of 1990

(R) preferred by Sanjay Kedia is dismissed and the order of his conviction and sentence passed against him is affirmed and upheld. He appears to be in custody. However, if he is not in custody he must surrender immediately, failing which the trial court shall take all coercive measures for his arrest.

29. Criminal Appeal No.159 of 1990 (R) preferred by Ramesh Dhobi and Criminal Appeal No.192 of 1990(R) preferred by Sanjay Ram Verma are allowed. The order of their conviction and sentences is hereby set aside and both of them are hereby acquitted. Both are in custody. They be set at liberty forthwith if not required in any other case.

L.P.N.Shahdeo,J.

I agree

M.K.C.

Order accordingly



CIVIL WRIT JURISDICTION**Before S.B.Sinha &****Radha Mohan Prasad, JJ.****1993****February, 25****Ram Briksh Yadav & others *****v.****The State of Bihar & others.**

Bihar Land Reforms (Fixation of Ceiling Area and Acquisition of Surplus Land) Act, 1961 Bihar Act XII of 1962), Section 16 (13) scope of -- right of pre-emption --- nature of --- transferee transferring his right, title and interest in favour of third party prior to filing of application for pre-emption --- in respect of second sale, whether and when to be claimed --- precedence-- conflict between two Division Bench -- which to prevail.

An application for pre-emption in terms of section 16(3) of the Act should be filed by a person claiming himself to be adjacent raiyat or co-sharer of the vendor upon complying with the condition precedent therefore. Such an application has to be filed within three months from the date of registration of the deed in relation whereof the right of pre-emption is claimed. However, if

* Civil writ Jurisdiction Case No. 8095 of 1992 & Civil Writ Jurisdiction Case No. 8736 of 1992. In the matter of applications under Articles 226 & 227 of the constitution of India.

prior to filing of the application for preemption, the transferee transfers his right, title and interest in favour of third party, the preemption in respect of the second sale deed has also to be claimed unless the subsequent transaction is held to be a sham and farzi one or is hit by the doctrine of lis pendens. The right of preemption is a very weak right which can also be defeated by a subsequent transfer unless the same is hit by the doctrine of lis pendens or the second transfer is held to be a sham and farzi one.

Held, therefore, that in the instant case as respondent nos 9 and 10 had executed the two deeds of sale in favour of the petitioners on 9.1.1974 i.e. prior to the date of filing of the pre-emption application which took place on 15.1.1974, the subsequent sale would not be hit by doctrine of lis pendens.

Held, further, that when there is a conflict between the two Division Bench Decisions, the earlier shall prevail.

Case laws reviewed.

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

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

M/s Tara kant Jha, Jaya Nandan,
Shailendra Kumar and Kalpana Rastogi for
the petitioner

M/s Harindra Prasad Sinha for the State

M/s Umesh Prasad Sinha, Rajeev Ranjan
and Rajendra Kumar for the respondent
no 5.

S.B.Sinha, J. — These two applications involving common question of fact and law are taken up for hearing together and are being disposed of by this common judgment.

2.These applications are directed against an order dated 8.8.1985 passed by Respondent no. 4, order dated 9.8.1991 by Respondent no.3 and the resolution dated 27.7.1992 passed by the Respondent no. 2 as contained in annexures-1,2 and 4 respectively whereby and whereunder an application for preemption filed by Respondent no. 5, Sita Ram Yadav was allowed.

3.The fact of the matter lies in a very narrow compass.

4.Respondent nos. 9 & 10 purchased the land in question from Respondent nos. 6 to 8 by reason of a registered deed of sale dated 16.10.1973. Registration of the said document was completed in terms of section 61 of the Indian Registration Act on 22.11.1973. On 9.1.1974 Respondents nos. 9 & 10 executed a deed of sale in favour of petitioners by virtue of two registered deed of sale for a consideration of Rs. 5,000/-. The said deeds of sale were presented for registration on

15.1.1974. On 15.1.1974 an application for preemption was filed by Respondent no. 5 in terms of section 16(3) of the Bihar Land Reforms (Fixation of Ceiling Area and Acquisition of Surplus Land) Act, 1961 (hereinafter to be referred as 'the said Act' for the sake of brevity). In respect of first deed of sale dated 16.10.1973 on 11.2.1974 the registration of the aforementioned two documents were completed. In the aforementioned proceedings under section 16(3) of the said Act, Respondent nos. 6 to 8 filed their show cause on 25.2.1974 wherein it was stated that they had sold the lands in favour of the petitioners. The said application for preemption was allowed by an order dated 19.11.1974 by the Land Reforms Deputy Collector. An appeal was preferred as against the said order the said order being Appeal no.63 of 1974-75. One of the points taken before the Appellate Authority was the subsequent purchaser, namely, the petitioners of C.W.J.C.No. 8095 of 1992 had not been impleaded as a party therein.

5. The Appellate Authority thereafter set aside the aforementioned order dated 19.11.1974 and remanded the matter back to the Land Reforms Deputy Collector with a direction that the subsequent transferee should also be impleaded as party. The Land Reforms Deputy Collector by an order dated 8.8.1985 allowed the said preemption application holding, inter alia, therein that the deeds of sale executed by Respondent nos. 9 & 10 in favour of the petitioners was a sham and farzi transaction

and has been made to defeat the provisions of the Act.

6. Admittedly the petitioners did not prefer any appeal or revision as against the said order. However, Respondent nos. 8 to 10 filed an appeal which was dismissed on 7.10.1985. Thereafter, the first purchaser filed a revision application impleading the writ petitioners as a party and the Member, Board of Revenue remanded the matter back to the Collector. The Collector again decided the application on merits and allowed the preemption application against which two revision applications were filed, one by the subsequent purchasers and another by the first purchasers. Both revision applications have also been dismissed. These two writ applications are directed against the aforementioned orders. C.W.J.C. No. 8095 of 1992 by the subsequent purchasers and C.W.J.C 8736 of 1992 by the first purchasers.

7. Mr. Tara Kant Jha, learned counsel appearing on behalf of the petitioners has raised a short question in support of these applications. Learned counsel submitted that in view of the fact that Respondent nos. 9 & 10 executed sale deeds in favour of the petitioners on 9.1.1974, although the said deeds were presented for registration on 15.1.1974, by reason of the provisions contained in section 47 of the Indian Registration Act, the title would pass on to the petitioners with effect from 9.1.1974 and terms the application for preemption under section 16(3) of the said Act filed by the Respondent

no.5 in respect of the deed of sale dated 16.10.1973 was not maintainable. It has further been submitted that although at a subsequent stage, the petitioners were impleaded as a party, no preemption has been claimed in respect of the deed of sale dated 9.1.1974 nor the consideration amount has also the other amount as contemplated under the provisions of section 16(3) of the Act as also Rule 19 of the Rules having not been complied in relation to the second sale, the impugned orders cannot be sustained.

8. Learned counsel in support of his contentions relied upon the decision in the case of Smt. Sudama Devi & others versus Rajendra Singh & others¹ Sarjug Prasad Singh versus Saryu Singh & others² Jamuna Prasad versus Bhuneshwar Thakur & others³.

9. Sri Umesh Prasad Singh, learned counsel appearing on behalf of Respondent no.5 (pre-emptor), on the other hand, submitted that as the second purchasers did not prefer any appeal or revision against the order dated 19.11.1974, wherein it has been held that the subsequent deeds of sale were sham and farzi transactions; the said findings would operate of *res judicata*. Learned counsel submitted that the principles of *res judicata* would apply even at two different stages of the same proceedings. It

1. (1973) A.I.R.(Pat) 199.

2. (1986) B.B.C.T. 581,

3. (1987) P.L.J.R. 251.

was further submitted that in any event as the subsequent transferees had also been impleaded as parties at subsequent stage, no prejudice has been caused to them and as such the application for pre-emption has rightly been allowed.

10. Learned counsel in support of these contentions relied upon Division Bench decision of this Court in *Ganesh Prasad & others versus State of Bihar & others*¹ and *Fauzdari Choudhary versus Additional Member, Board of Revenue & others*².

11. It has further been submitted that in any event as a finding of fact has been arrived as to the effect that the subsequent sales are sham and farzi transactions, the said finding of fact cannot be disturbed by this Court in exercise of its jurisdiction under Article 226 of the Constitution of India. It has been submitted that the original vendors are still fighting out the case and they claim to be in possessions of the lands in question as would be evident from the extracts of memo of appeal which have been quoted in paragraph 12 of the counter affidavit and on this ground too this Court should not exercise its discretion under Article 226 of the Constitution of India.

12. Mr. Tara Kant Jha, learned counsel appearing on behalf of the petitioners in reply submitted that in view

1. 1985) A.I.R.(Pat) 309

2. (1992) B.B.C.J. 679.

of rule 49 of the Bihar Land Reforms (Fixation of Ceiling Area and Acquisition of Surplus Land) Rules Order XLI of the Code of Civil Procedure is applicable and in that view of the matter the appellate and revisional court could have exercised its power under Order XLI Rule 33 thereof. It has further been submitted that even a subsequent transfer in favour of son has been recognised by the Courts Of law and in support of this submission learned counsel has relied upon a decision in Kuteshwar Choubey versus State of Bihar & others.¹

13.It has further been submitted that the findings of benami transactions arrived at by the concerned Respondents must be held to be bad in law in as much as the benami transactions are governed by the provisions of the Benami Transaction (Prohibition) Act, 1988. Learned counsel in support of this contention has relied upon a decision in the case of Bechan Chamar & others versus State of Bihar & others².

14.An application for pre-emption in terms of section 16(3) of the Act should be filed by a person claiming himself to be adjacent raiyat or co-sharer of the vendor upon complying with the condition precedent therefore. Such an application has to be filed within three months from the date of registration of the deed in relation whereof the right pre-emption is claimed. However, if prior

1. (1979) B.L.J. 91.

2. (1991)n I.B.L.J. 708

to filing of the application for pre-emption the transferee transfers his right, title and in favour of third party, the pre-emption in respect of the second sale has also to be claimed unless the said subsequent transaction is held to be a sham and farzi one or is hit by the doctrine of lis pendens. .

15. This aspect of the matter has been considered by Division Bench of this court in Smt. Sudama Devi versus Rajendra Singh ¹ The Division Bench held that in terms of section 47 of the Registration Act the subsequent transferee acquires title of the property from the date of execution of the document. The said subsequent transfer, however, would be subject to the doctrine of lis pendens.

16. The Bench, however, held as follows:

" I held following *Hiralal Agarwal's* case that the latter was the date which the starting point of the period of three months for the filing of the application under section 16(3). But to apply the doctrine of lis pendens is a different thing. Here, cases have consistently taken the view to which reference has been made earlier by me, that if a sale deed is executed before the filing of the suit but is registered later then such a transfer is not pendente lite, the transferee became the owner of the property, in view of the provisions of law contained in

1. (1973) A.I.R. (Pat.) 199.

Section 47 of the Registration Act, prior to the filing of the suit. No case taking a contrary view for the application of the doctrine of *lis pendens* was brought to our notice by learned counsel for respondents 1 to 7."

17. This aspect of the matter was again considered in *Sarjug Prasad Singh versus Saryu Singh & others*¹ as also *Parmeshwar Singh versus Sukhdeo Mahto and others*²

18. In *Jamuna Prasad versus Bhuneshwar Thakur & others*³ the Division Bench following the decision of the Supreme Court in the case of *Ram Saran versus Domini Kuer*⁴ held that once a registration is complete, in view of section 47 of the Act, the registered documents operates from the date of its execution.

19. It is, therefore, clear that in this case, subsequent sale would not be hit by doctrine of *lis pendens* as Respondent nos. 9 & 10 had executed there two deeds of sale in favour of the petitioners on 9.1.1974 i.e. prior to the date of filing of the pre-emption application which took place on 15.1.1974. It may be reiterated that on 15.1.1974 itself aforementioned deeds have been presented for registration. The petitioners of C.W.J.C. 8095 of 1992 were subsequently added as party in terms

1. (1986) B.B.C.J.581.

2. (1985) B.B.C.T.346.

3. (1987) P.L.J.R.251,

4. (1961) A.I.R. (S.C.) 1747

of the appellate order passed in Appeal No. 63' of 1974-75. The effect of such addition of party has now to be considered.

20. As noticed herein before Sri Umesh Prasad Singh has relied upon a Division Bench decision in Ganesh Prasad and others versus State of Bihar & others¹ In that case it was held :

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

21. It is, therefore, clear that in that case the Authorities had held that the subsequent sale deed was a sham transaction. Apart from that fact in that case the

1. (1985) A.I.R. (Pat.) 309.

earlier Division Bench decision in *Sudama Devi's* case has not been taken into consideration at all. It is now well known that when there is a conflict between the two Division Bench decisions, the earlier shall prevail.

22. In *Fauzdari Choudhary versus Additional Member, Board of Revenue*, reported in 1992 B.B.C.J. 679. again a learned Single Judge of this court did not consider the earlier Division Bench decisions in *Sudama Devi's* case (supra). The learned Single Judge in that case found himself bound by the decisions of the Division Bench in *Ganesh Prasad* case (supra) as also the decision of another Division Bench decision in *Ram Chandra Yadav versus Anutha Yadav & others*¹ Ram Chandra Yadav's case (supra) had been taken note of in *Sudama Devi's* case and the same had been distinguished in the following terms :

" If the application is allowed then under clause (iii) the Collector has to make an order directing the transferee to convey the land in favour of the applicant by executing and registering a document of transfer within a period to be specified in the order and if he neglects or refuses to comply with the direction, the order has to be executed in the same manner provided in Order 21, Rule 34 of the Code of Civil Procedure, which is a procedure for execution of a decree for specific performance of contract to sell. In a suit for specific performance of a contract of sale a decree for specific performance can be passed against the subsequent transferee expect when he is a bonafide

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

transferee for value without notice of the original contract (vide section 27 of the Specific Relief Act, 1877, which corresponds to section 19 of the Specific Relief Act, 1963.) In section 16(3), however, there is absolutely no provision made for making an order of pre-emption against a subsequent transferee on an application filed for pre-emption against the first transferee.

If the subsequent transferee is, in fact and in law, a transferee of the property in respect of which claim for pre-emption has been made a question of his being a transferee with notice of the pre-emption application is not relevant in view of what I have said in my judgment in *Ramchandra Yadav v. Anutha Yadav*¹ (Supra) I have pointed out three situations there. If the transferee of the property transfers it to a second purchaser by a document executed and registered before the filing of the application, the second transferee gets a good title to the property and there is no question of his right being defeated by a subsequent application filed by the pre-emptor, as he could not be presumed to have any knowledge of the application which may be filed in future. On the other side of the picture, the clear example is where the second sale deed is executed and registered after the filing of the application for pre-emption. In such a case the second transfer would be clearly hit by the doctrine of *lis pendens* engrafted in Section 52 of the Transfer of Property Act."

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

23. *Sudama Devi's Case*, therefore, has taken into consideration all aspects of the matter including the provisions of Indian Registration Act. The right of pre-emption is a very weak which can be defeated by a subsequent transfer unless the same is hit by the doctrine of *lis pendens* or the second transfer is held to be a sham and farzi one.

24. The question now which arises for consideration in this application is as to whether the second sale was a sham and farzi transaction or not.

25. By an order dated 8.5.1988 the Land Reforms Deputy collector held that the transaction is a a sham and farzi one and has been made in order to defeat the provisions of the Act.

26.As indicated hereinbefore Mr. Umesh Prasad Singh has relied upon paragraph nos. 7 and 11 of the revision application filed by the first purchaser which are as follows :

" That the purchasers from the petitioners are in possession of the lands and the alleged delivery of possession is on paper only.

That the document states from that on 25.3.1974 the petitioners filed application before L.R.D.C. that they have constructed a house over the land purchased and they are still living in the same house. In the petition it was no where stated by the petitioners that they have trans-

ferred the land in favour of respondent no.9 and 10. From the above quoted statements of the petitioners the conflict are apparent but it is admitted by the petitioners that the sale deed was during the pendency of pre-emption case and, therefore, they are bound under law to defend the subsequent purchaser."

27. It is, therefore, clear that it was not the case of the revision petitioners who are petitioners in C.W.J.C.No. 8736 of 1992 that they were themselves in possession of the lands in question but according to terms their vendors were in possession.

The said statements had been made only for the purpose of contradicting the statements that in fact the pre-emptors were in possession of the lands in question. The Member, Board of Revenue, however, did not consider the materials on records for the purpose of affirming the finding as to whether the transaction in question was sham or fraudulent or not. He merely held :

"The pre-emption application was filed on 15.1.74. The subsequent transactions by the petitioners were executed on 9.1.74 but they were registered on 11.2.74. Obviously, during the pendency of the pre-emption application. The two sale deeds have found to have been executed with a view to defeating the provision of the Act. They also been found to be sham transactions . Therefore, the decision of the Collector and L.R.D.C. that O.P.no.1 has valid claim of pre-emption is justified and

sustainable in the eyes of law, specially in view of the fact that the subsequent transactions which registered during the pendency of pre-emption application have been found to be sham and farzi transactions."

28. It is, therefore, clear that the Member, Board of Revenue has not taken into consideration the materials on records at all. The Additional Member, Board of Revenue has also not assigned any reason in support of his order. He merely affirmed the decisions of the courts-below without discussing and / or analysing the materials of records. Such a finding without considering the materials on records and without assigning any reason cannot be sustained in law.

29. It is true that the petitioners of C.W.J.C. No. 8095 of 1992 did not prefer any appeal against the order dated 8.8.1985, but, admittedly the petitioners of C.W.J.C.No. 8736 of 1992 had preferred such an appeal. The said appeal having been allowed, the effect of the order dated 8.8.1985 was wiped off. Further in terms of the order XLI Rule 33 of the Code of Civil Procedure which becomes applicable by reason of Rule 49 of the said Rules, the Appellate Authority could pass such orders which would do complete justice to the parties.

Reference in this connection may be made to the case of *Jai Prakash Jalan* reported in 1991(2) P.L.J.R. 224, *Chunni Singh versus Chanda Chandu Orann & others*, reported in 1993(1) Bihar Law Judgment 60.

30. In *Chunni Singh's* case (supra) it has been held as follows :

" In *Mt. Parwati Kuer v. Manna Lal Khetan* reported in AIR1956 Patna 414, a full Bench of this Court has held that if a suit is decreed as against various defendants, an appeal is maintainable only at the instance of one or more of the defendants and the appellate court in exercise of its power conferred upon it under Order XLI Rule 33 of the Code of Civil Procedure would be entitled to grant relief in favour of a party who has not been impleaded in the appeal. This aspect of the matter has also been considered in *Sudama Pd. Keshri v. Tapeswar Sao* reported in 1989 P.L.J.R. 819. It is true that such course of action has to be taken in exceptional cases, but the said principle has to be kept in mind for the purpose of consideration as to whether in such a case the entire appeal should be directed to be dismissed as having wanted in its entirety. If may be found that as an exceptional measure, the Court may be in a position to exercise its discretion under Order XLI Rule 4 read with order XLI Rule 33 of the Code of Civil Procedure to set aside the entire judgment and even in relation to those persons who had not preferred an appeal.

In *Jai Prakash Jalan v. M.S. Ram Bilash Paswan* reported in 1991(2) P.L.J.R.224, a Division Bench of this Court has held that the scope, object and purport of the provisions of Order XLI Rule 33 is to do complete

justice to the parties and the scope and whereof has been expanded by reason of Code of Civil Procedure (Amendment) Act, 1976."

31.In that view of the matter, in my opinion, the principle of res judicata cannot have any application whatsoever in the facts and circumstances of the present case.

32. For the reasons aforementioned, these applications are allowed in part, and the matter is remitted to the Member, Board of Revenue for a Fresh decision in accordance with law, Before the Member, Board of Revenue, the petitioners must produce the original deed of sale dated 9.1.1974. The Member, Board of Revenue shall consider the documents as also the others inter alia for the purpose of coming to the conclusion as to whether the said deed of sale are sham and farzi transactions or not.

33.In the facts and circumstances of the case, there would be no order as to costs.

R.M.Prasad, J. I agree

M.K.C.

Application Allowed in Part



CIVIL WRIT JURISDICTION**Before S.B.Sinha, J.****1993****March 2.****K.N.Farms Industries (Pvt.) Ltd.*****v.****The State of Bihar & others**

Bihar Land Reforms (Fixation of Ceiling Area and Acquisition of Surplus Land) Act, 1961 (Bihar Act No. XII of 1962), Section 2 (f), scope of ---- tanks used for agricultural purposes, whether come within purview of the definition of 'land'--- whether 'a pond or a ditch' is also included in the definition of land. -

Held that, there cannot be any doubt that a tank which is used for agricultural purposes, would come within the purview of the definition of the land as contained in section 2 (f) of the Bihar Land Reforms (Fixation of Ceiling area and Acquisition of Surplus Land) Act, 1961.

Within the inclusive definition of the 'land' is Orchard, Kharhur, Pasturage or Forest Land, and even land perennially submerged under water or the homestead of a land-holder. The word 'even' was not used as an adject-

* Civil Writ Jurisdiction Case No. 995 of 1984 in the matter of an application under Articles 226 and 227 of the Constitution of India.

tive to the word 'land; but is used for laying down emphasis to the word 'land' so as to convert the meaning of 'also'. Even ness of land perennially submerged under water has no relevance at all in the context of the interpretation of the word 'land' or the object or purport of the Act. Even a hilly, rocky, sandy or forest lands come within the purview of section 2(f) or the Act.

Held, further, that the intention of the legislature is clear inasmuch as in terms of the definition of land the lands perennially submerged under water would not only bring within its purview 'a tank' but also a 'pond or a ditch'.

Application by the petitioner.

The facts of the case material tie this report are set out in the judgment of S.B.Sinha, J.

Mr.K.D. Chatterjee, Senior Advocate and
Mr. Anish Chandra Singh.

M/S. Raghib Ahsan, S.C.(Revenue) and Md.
Abu Haidar J.C. to the Standing Counsel.

S.B.Sinha, J :— Whether a tank is 'land' within the meaning of section 2 (f) of the Bihar Land Reforms (Fixation of Ceiling Area and Acquisition of Surplus Land) Act, 1961 (hereinafter referred to as the said Act) is the principal question involved in this application.

2.The petitioner is a land-holder. It filed a return

alleging that it is in possession of 443.90 acres of land.

3. A draft publication was made whereafter an objection was filed by the petitioner under Section 10(2) of the said Act on 9.7.1975 inter-alia alleging therein that certain tanks and ridges have wrongly been included in the said draft publication.

4. By an order dated 9.10.1982 passed in Ceiling case no.250 of 1973, the additional Collector held that the tanks in question come within the purview of the definition of 'land'. In terms of the said finding a notification under section 11 of the Act was issued. A Gazette notification dated 16.3.1983 thereafter was published in terms of the provisions of Sub-section 1 of Section 15 of the Act.

5. The petitioner preferred an appeal against the said order which was dismissed. A revision application filed by the petitioner was also dismissed.

6. Mr. K.D.Chatterjee, learned counsel appearing on behalf of the petitioner has raised a short question in support of this application.

The learned counsel submitted that from the definition of the land as contained in Section 2(f) of the Act, it would appear that only 'even land' perennially submerged under water comes within purview thereof, in other words the submission of Mr. Chatterjee is that the lands perennially submerged under water which is even only would come within the purview of Section 2(f)

of the Act.

7. Section 2(f) of the Act reads thus :-

"Land" means land which is used or capable of being used for agriculture or horticulture and includes land which is an orchard, khurhur, or pasturage or forest land or *even land perennially submerged under water or homestead of a land-holder.*"

8. It is now well known that where the legislature in defining a word uses both the words 'means' and 'includes' the same is exhaustive.

9. Within the aforementioned inclusive definition of the 'land', is Orchard, Kharhur, Pasturage or Forest land, and even land perennially submerged under water or the homestead of a land-holder.

10. The word 'even' thus was not used as an adjective to the word 'land' but it is used for laying down emphasis to the word 'land' so as to convey the meaning of 'also'.

Evenness of land perennially submerged under water, in my opinion, has no relevance at all in the context of the interpretation of the word 'land' or the object or purport of the Act. Even a hilly, rocky, sandy or forest lands come within purview of Section 2(f) of the Act.

A forest land, an orchard and khurhur, pasturage, land as also submerged under water or homestead of a

land-holder may not be used or capable of being used for agriculture and horticulture purposes, but even such land have been brought within purview of the definition of the 'land' which clearly bear out the intention of the legislature to bring more types of lands within the purview of the interpretation clause contained in Section 2(f) of the Act.

12. Section 2(f) of the Act was amended by Act No. 55 of 1982, By reason of the said Amending Act, itself even hilly, sandy or forest land, even land perennially sub-merged under water or other kind of land none of which yield paddy crops have been brought within the purview of Section 4 of the said Act by inserting Clause (f) therein.

13. Hilly lands or sandy lands for instance are not arable lands but still the same have been included in the definitions of the land, It is in that context only the word 'even land' has been used so as lay on the expanded meaning of the land perennially submerged under water'.

14. In this connection, it must be noticed that explanation appended to Section 2(f) of the said Act, provides that the land perennially submerged under water does not include lands submerged in the bed of a river. In terms of the aforementioned explanation, thus land submerged in the bed go river has been excluded, but not others.

15. It is now well known that a dictionary meaning of

a word may not be looked where the same has been statutorily defined or judicially interpreted. The court has to select the meaning which is relevant to the definitions in which it has interpreted the word (see *State of Orissa Vs. Titagarh Paper Mills Company* ¹ ; .

16. The intention of the legislature, in my opinion is clear in as much as in terms of the aforementioned definition the lands perennially submerged under water would not only bring within its purview 'a tank' but also a 'pond or a ditch'.

17. It is not the case of the petitioner that tanks in question are not used for agriculture purpose. It is now well known that a tank with its ridges and agriculture lands surrounding the same, can be taken settlement of land used for agriculture purposes.

Reference in this connection may be made to *Sardamoni Debi, vs. the State of Bihar and others*, reported in AIR 1979 Patna 106.

18. Mr.Chatterjee has placed a strong reliance upon a decision of a learned Single Judge in *Mohan Prasad Mahto & anr. VS. State of Bihar & ors.* reported in 1990 (2) BLJR 953. The decision has been rendered in the peculiar fact of that case and has no bearing to the facts of the present case.

In that case it was admitted that the pond in question

1. (1985) AIR 1985 (S.C.)1293).

was treated as a 'sairat' and which had been put on yearly auction as Sairat interest of the Government in which the petitioner also participated.

In that context it was held :-

"There is no averment this pond is connected with the agriculture purpose. In that event, it could not have been acquired as surplus land and then declare it as Sairat and settled with others, and not to landless people to whom the acquired land is required to be distributed. As I have pointed out, the main aim of the legislature in passing the Act was to facilitate the personal cultivation of land by certain classes of raiyat and follow the under raiyats as the status of raiyat. The definition of the land is that it must be a land which is either used or capable of being used for agriculture purpose and such homestead land which is concerned with agriculture operation. The Act, has, therefore, no application to such lands, which are used purely for non -agricultural purpose see *K.Goswami v.Bash*, 1971 BLJR 974. The pond in question is neither arable nor agriculture land nor it is connected with any persons who may or may not be raiyats or under-raiyats, but are successful bidders in an auction irrespective of the fact whether he is a landless person or Harijan etc. on yearly basis. This does not fall within the scheme of Section 27 of the Act, as would be evident from Chapter I dealing with the disposal of surplus land. Further, year settlement of a pond cannot be heritable

and transferable as is required under section 27(3) of the Act."

19. The decision of this court in *Mohan Prasad Mahto vs. State of Bihar*, (Supra) therefore , instead of helping the petitioner goes against his contention.

20. Thus, there cannot be any doubt that a tank which is used for agriculture purposes, would come within the purview of the definition of the land as contained in section 2(f) of the Act.

21. Thus, there is no merit in this application, which is accordingly dismissed.

22. In the facts and circumstances of the case, there will be no order as to costs.

S.P.J

Application dismissed.



CIVIL WRIT JURISDICTION

Before S.B.Sinha, J.

1993

March 5,

Smt.Rita Kumari & ors.*

v.

The State of Bihar & others.

Service -- names recommended by the Board to the State Government but no appointment made -- fresh advertisement -- issued -- writ can be issued only when action of the state is violative of Articles 14 and 16 of the Constitution of India -- life of the panel to be one year -- executive decision regarding the life of the panel, whether has the force of law -- action of the State, whether barred by the principles of Promissory Estoppel.

Where an advertisement was issued by the Vidyalaya Seva Board on 26.1.1987 for appointment of teachers in various Govt. Schools in pursuance of a policy decision of the State in terms whereof various posts were created for imparting education in 10 + 2 courses and the names of the petitioners had been recommended by the Board to the State in March 1990 but their appointments could

*. Civil Writ Jurisdiction Case No.8792 of 1992. With Civil writ Jurisdiction case Nos.2296, 3771, 3766 of 1991 and 889 of 1992. In the matter of an application under Articles 226 and 227 of the Constitution of India.

not be made in view of lapse of time and a fresh advertisement for filling up the posts had been issued but the persons who had already applied for and whose names had been recommended by the Board were not required to apply for the said posts again and it was contended on behalf of the petitioners that the appointments could be made from the panel already validly prepared;

Held, that, it is true that the State even in the matter of appointment is bound to act reasonably. The state's action must conform to the provisions of Articles 14 and 16 of the Constitution of India. It is now well known that a person does not have any right to be appointed but has merely a right to be considered for appointment. In this view of the matter, there cannot be any doubt that an empanelled candidate has no legal right to be appointed and thus it logically follows that no writ of mandamus can be issued unless the court comes to a conclusion that the selectee has been discriminated against and the action of the Government is violation of Articles 14 and 16 of the Constitution of India.

Held, further, that in absence of any statute or rules, the executive decision in terms of the circular letter dated 5th April, 1955 issued by the Appointment Department of the Govt. of Bihar, must be held to have force of law. It is therefore clear that the life of the panel is only one year.

He J, also, that the action of the State is also not barred under the principles of Promissory Estoppel in as much as when an advertisement is issued only an offer for appointment is invited from the eligible candidates and it is only when their names find place in the select list that they merely got a right to be considered for appointment as contradistinguished from the right to be appointed. Thus no promise either in fact or in law is made which binds the State.

Case Laws reviewed.

Application by the petitioners.

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

Mr.Chandrashekhar & Mr.Surendra Prasad Singh
No.II (In CWJC 8792/92)

Mr Manindra Kumar (in CWJC Nos.

Mr.Madan Mohan Pd.,3771,2296,3766/91)

Mr.Madhusudan Kumar

Mr.Akhilesh Kumar Pandey

& Mr.Rajesh Kumar Pandey (in CWJC 889/92) the petitioners

Mr.R B Mahto, Advocate General,

Mrs.Seema Ali Khan, S.C. VII &

Mr.Rao Kundan Kumar Karmabir J.C. to S.C.VII for the State in CWJC.8792/92

Mr.R B Mahto,A.G. Mr.R N P Yadav,G.A. & Mr.Úday Shankar Sharan Singh in the State (in CWJC Nos.3771,2296,3766/91)

Mr.Chitragupt Prasad, Mr.Kapileshwari Nath Verma & Mr.Om Prakash Sinha for respondents 3 and 4 in CWJC 889/92.

S.B.Sinha,J. — These writ applications involving common question of law and fact were taken for hearing together and are being disposed of by this common judgment.

2. The fact involved in these writ applications in short is as follows:

An advertisement was issued by Vidyalaya Seva Board on 26.1.1987, in terms whereof applications were invited from eligible candidates for filling up of the posts of lecturers in various Govt. Schools. As the petitioners fulfilled the requirements mentioned in the said advertisement, they applied for appointment in the said posts. On

our about 28.12.1989 interview letters were issued and pursuant thereto the petitioners appeared before the Interview Board.

It is also admitted that the names of the petitioners had been recommended by the Vidyalyaya Seva Board. The petitioners have contended that the state has adopted a policy decision in terms whereof various posts were created for imparting education in 10+2 courses and for that purpose the aforementioned advertisement had been issued.

The petitioners' further contention is that the requirement of the state is 160 (One hundred and sixty) candidates for each subject mentioned in the aforementioned advertisement dated 26.1.1987.

3. In C.W.J.C. No.2296 of 1991, a counter affidavit as also supplementary counter affidavit have been filed on behalf of the state. In the said counter affidavit, it has inter alia been contended that no appointment could be made owing to the fact that the state had not accorded sanction in respect of the aforementioned posts.

4. It has further been contended that the Vidyalyaya Seva Board had recommended names for filling up posts in four subjects and the state having sanctioned four posts in each school without naming a particular subject, teachers had been appointed from the said panels. It has also been submitted that the recommendations for appointment in the posts of Mathematics, Physics, etc.

were received by the State between the period 1987-89. So far as panel of t teachers who were to be appointed against the vacancies for Home Science and other subjects are concerned, the same were received in March, 1990.

5. It has further been submitted that in view of the fact that there had been paucity of fund, the appointments could not be made. It has further been contended therein that the panel has outlived its life and in this view of the matter, this court should not issue any writ mandamus.

6. It is, however, admitted at the Bar that a fresh advertisement has been issued for filling up the said posts which according to the petitioners is wholly illegal; whereas according to the state, the same became necessary in view of lapse of time. It is, however, admitted that the persons who had already applied for and whose names had been recommended by the Board are not required to apply for the said posts again.

7. The main argument was advanced by Sri Madan Mohan Prasad who appeared for the petitioners in C.W.J.C. No.2296/91,3771/91 and 3766/91.

8. Mr Prasad inter alia has raised the following contentions :-

(A) A panel validly prepared cannot be cancelled unless the same is exhausted.

Reliance in this connection has been placed upon *Harish Chandra and ors. vs. State of U.P. and ors.*, reported in 1992 Labour and Industrial Cases, 2200.

(B) Even assuming that the Govt. has right to cancel the appointment, the said purported order has been made without complying with the principles of natural justice and without existence of any sufficient cause and without assigning cogent reasons therefor.

The learned counsel submitted that the decision of the State must be informed by reason and cannot be arbitrary.

Reliance has been placed in this connection upon AIR 1967 S.C., 1427, *S.G. Jaisinghani vs. Union of India and ors* and 1986(2) Service Law Reporter, 326: *S. Govindaraju vs. K.S.R.T.C. and ors.*

(C) In view of the fact that the names of the petitioners have been recommended by Vidyalaya Seva Board, they have acquired a right which is enforceable in a court of law and thus, this court should issue a writ of mandamus as prayed for.

Reliance in support of this contention is made on AIR, 1984 SC, 1831 at 1837 : *Prem Prakash v. Union of India*, 1991, Labour & Industrial cases 1904 : *P K Bhasis vs. Union of India and ors.*, 1992(2) PLJR, 105 : *The Secretariat Assistant Successful examined Union and ors. vs. State of Bihar & Ors.*, 1991(1) PLJR, 16 at page 18 :

Suresh Narayan Sharma and ors. vs. State of Bihar & ors. and an unreported decision of the Supreme Court in SLP (Civil) No.1650/90.

(D) The State cannot take the plea of paucity of fund in as much as a fresh advertisement has been directed to be issued and further action of the state is malafide in as much as whereas the state has revalidated out her panels, it has failed to do so in this case.

Reliance in this connection has been placed on AIR 1981 SC, 1041 : State of U.P. and anr. vs. Ram Gopal Shukla.

9. Mr. Sharma appearing for the petitioners in C.W.J.C.No.889/92 submitted that the action of the state is discriminatory and arbitrary in so far as the panels of the subjects in which the petitioners are interested have not been revalidated nor any reason has been assigned therefore.

Learned counsel in this connection has relied upon *Narsingh Das Achint vs. State of Haryana & ors.* reported in 1987(2) Service Law Journal 51 at page 54 and AIR 1979 SC, 1628 : reported in *International Airport Authority of India, vs. Union of India.*

It has further been submitted that the action of the state is barred under the principles of Promissory Estoppel in as much as the petitioners have altered their position pursuant to the recommendations made by

Vidyalaya Seva Board. It has been submitted that the appointment of teachers in different subjects was of executive necessity.

Learned counsel in this connection relied on AIR 1987 SC 1794 - 1987(3) SCC,66 (*M/S D Navinchandra and Co & anr. vs. Union of India and ors.*

10. Mr.Chandra Shekhar learned counsel appearing for the writ petitioner in C.W.J.C. No.8792/92, submitted that it is not a fact that the state has not accorded any sanction as has been stated in the advertisement as according to the learned counsel, the sanction accorded by the state becomes evident in view of the posts created in the concerned schools and thus it must be presumed that sanction had been granted by the state for the said posts in the schools which had been select for imparting 10+2 education, subject wise and number of teachers as would be evident from Annexure 4 to the writ application.

It was further submitted that although the petitioners do not have an absolute right to be appointed, but such a right can be denied only on cogent reasons and not upon the ipse dixit of the of the state.

11. *Mr. Ram Balak Mahto, the learned Advocate General* appearing for the respondents however, has taken me through the supplementary counter affidavit and submitted that in the facts of the case, the state's action must be held to be reasonable as the advertise-

ment was made subject to accord of sanction by the State. It was submitted that subsequently the state accorded sanction in respect of only four posts in each school and in view of the fact that panels for four subjects had been received, all the sanctioned posts have been filled up from those panels. It was further contended that in view of the fact that panel of Home Science was received in March 1990, the said panel could not be acted upon in absence of any vacancy as no sanction therefor was granted by the State. It has also been contended that a fresh advertisement has been directed to be issued in anticipation of the sanction of the state of Bihar.

It has been pointed out that so far as C.W.J.C. nos. 3766/91 and 3771/91 are concerned, the same involve the cases where the application for appointment of teachers were invited for secondary education and in all the rest cases ;viz.C.W.J.C.2296/91, 889/92 and 8792/92 advertisement was issued for appoint in the schools imparting 10+2 education. According to the learned counsel so far as matters relating to appointments in secondary schools are concerned, the same is covered by a judgment of a Division Bench of this court in Arvind Kumar Sharma Vs.State of Bihar, C.W.J.C.933 of 1991, where in this court following the decision of the Supreme Court in Shankarasan Dash Vs. Union of India reported in AIR 1991 SC,1612, has held that no mandamus can be issued to exhaust a panel.

12. Learned Advocate General further submitted that a mere recommendation does not create any right for appointment. Reliance in this connection has been placed upon AIR 1962, SC 1210 : *Dr. Rai Shivendra Bahadur Vs. Governing Body of Nalanda College*, AIR, 1973 S.C.2216 : *The State of Haryana vs. Subash Chandra Marwaha* and 1986 (4) SCC, 268 : *Miss Neelima Shangla vs. State of Haryana* and others.

It has been submitted that creation of posts depends upon the policy of the state and as the same involves financial liability of the State, no writ of mandamus can be issued by applying the doctrine of Promissory Estoppel or otherwise. Learned Advocate General in this connection has relied upon in *Jitendra Kr. Vs. State of Punjab* reported in 1985(1) SCC,122.

It has further been submitted that in view of the fact that posts are to be created in 1993, no writ of mandamus can be issued for appointment from old panels in as much as creation of posts cannot be directed by this court by issuing a writ of a mandamus.

According to the learned Advocate General, even now the posts have not been sanctioned by the State. However, it has been clarified by the State that those persons who are eligible to be considered therefore need not apply a fresh and their cases shall also be taken into consideration and this action of the State being in consonance with law as also in consonance with the prin-

ciples contained in Article 16 of the Constitution of India, the same cannot be termed to be either arbitrary or unreasonable.

13. In terms of the advertisement dated 26.9.1987 applications were invited for appointment in the posts of teachers for teaching in various subjects in Govt. schools which includes the school taken over under the provisions of Bihar Non-Government Secondary Schools (Taking over of Management and Control) Act, 1980 (Act 72 of 1981). So far as appointment in the post of teachers of such schools are concerned, the same is governed by the provisions of section 10 of the said Act and the Rules framed under section 15 of the Act known as Bihar Nationalised Schools (Conditions of Service) Rules, 1983.

14. So far as other schools are concerned, procedure for appointment and the conditions of service of teachers are different being governed by various circulars, rules issued by the State from time to time.

15. However, both under the provisions of 1981 Act as also the policy decisions of the State in order to fill up the vacant posts of teachers, the recommendations of Vidyalaya Seva Board is mandatory. It is not and cannot be disputed that the selections made by Vidyalaya Seva Board are recommendary in nature.

16. It, however, does not appeal to any reason as to why Vidyalaya Seva Board took more than 3 years' time in sending the panel of Home Science and other sub-

jects; whereas it had sent the panel in respect of teachers of other subjects much earlier.

17. It is true that the state even in the matter of appointment is bound to act reasonably. The State's action must conform to the provisions of Articles 14 and 16 of the Constitution of India.

18. It is now well known that a person does not have any right to be appointed but has merely a right to be considered for appointment.

19. In *Shankarsan Dash Vs. Union of India* reported in AIR 1991 SC 1612, the Constitution Bench was considering the question as to whether the candidate whose names appear in the merit list on the basis of competitive examination acquire indifeassible right to appointment as a Govt.servant. if a vacancy exists.

L.M.Sharma J (as His Lordship then was) speaking for the Constitution Bench upon taking into consideration the earlier decision of the Supreme Court reported in AIR 1973 SC 2216 : *The State of Haryana vs. Subash Chandra Marwaha & ors*, 1986(4) SCC, 268 : *Miss Neelima Shangla vs. State of Haryana & Ors.* , AIR 1984 SC, 1850 : *Jatinder Kr. & ors. vs. State of Punjab & ors.* and AIR 1987, SC, 1697 : held as follows :

"Ordinarily the notification amounts to an invitation for qualified candidates to apply for recruitment and on their selection they do not acquire any right to the post.

Unless the relevant recruitment rules so indicate, the State is under no legal duty to fill up all or any of the vacancies. However, it does not mean that the State has the license of acting in an arbitrary manner. The decision not to fill up a vacancy is to be taken bonafide for appropriate reasons and if the vacancies or any of them are filled up, the state is bound to respect the comparative merit of candidates as reflected at the recruitment test and no discrimination can be permitted."

20. In that case, the Supreme Court observed :-

" From the materials produced before us, it is fully established that there has not been any arbitrariness whatsoever on the part of the respondents in filling up the vacancy in question or the other vacancies referred to by the learned counsel for the appellants. The process of final selection had to be closed at some stage as was actually done. A decision in this regard was accordingly taken and the process for further allotment to any vacancy arising later was closed."

The Supreme Court further observed :-

"It is not material if in pursuance of decision already taken before closing the process of final selection, the formal appointments were concluded. What is relevant is to see as to when the process of final selection was closed, Mere completing the formalities cannot be of any help to the appellant."

21. A Division Bench of this Court in *Ashok Kumar Sharma vs. State of Bihar* being C.W.J.C. No. 933/91 disposed of an identical case.

Another Division Bench of this Court of which I was a member in *Afshan Yasmin vs. The State of Bihar* and others has taken an identical view. The said Division Bench decision being related to the same advertisement which is the subject matter of the present writ petition, I am bound thereby.

22. In *Dr. K.P. Jaiswal vs. Debi Mukherjee and ors.* reported in 1992(2) SCC, 148, the Supreme Court held that the selection by the Commission is recommendatory in nature and a final authority for appointment is the Government and if the Government declines to accept the recommendation, the Constitution enjoins the Govt. to reasons for so doing. The Supreme Court held :-

"although thereby the Government is answerable to the elected representative, the same does not clothe the selectee with any right for appointment, that is to say that he cannot force the Government to accept the recommendation of the Commission. But the Government to make the appointment strictly in accordance with the recruitment rules and merits as determined by the Commission and it can not disturb the list at its sweet will."

It was observed :-

"It is obvious from the ratio of these two decisions to which our attention was pointedly drawn that if a Commission issues an Advertisement at the behest of the Government and pursuant thereto calls a candidate for interview, the candidate has a right to be considered for selection but not right to be selected or appointed to the post in question."

23. In this view of the matter, there cannot be any doubt that an empanelled candidate has no legal right to be appointed and thus logically follows that no writ of mandamus can be issued unless the Court comes to a conclusion that the selectee has been discriminated against and the action of the Government is violative of Articles 14 and 16 of the Constitution of India.

24. In *Prem Prakash vs. Union of India* reported in AIR 1984 sc 1831 upon which strong reliance has been placed by Mr. Prasad, the Supreme Court was considering a policy decision of the State in the matter of appointment in Delhi Judicial Service as incorporated in a notification dated 8th February, 1982 and in the context of Article 233 of the Constitution it was held :-

" It is clear from this notification that if selected candidates are available from the previous list there should either or no further recruitment until those candidates are absorbed or in the alternative vacancies which are declared for the subsequent years take into account the number of persons who are already in the

list of selected candidates who are still awaiting appointment. The notification further shows that there should be no limit on the period of validity of the list of selected candidates prepared to the extent of declared vacancies . Once a person is declared successful according to the merit list t of selected Candidates the appointing authority has the responsibility to appoint him even if the number of vacancies undergoes a change after his name is included in the list of selected candidates."

25. In *P.K.Bhasin vs. Union of India* reported in 1991 Labour & Industrial Cases 1904 Delhi High Court was again considering a matter to the post of Delhi Higher Judicial Service and in that context distinguishing the decision if the Supreme Court in Prem Prakash's case (supra) as also the subsequent decisions on the ground that therein the policy of reservation was involved, it was held :-

"This only affects evaluation of the policy by the concerned Department to show that Constitutional provisions of reservation of Scheduled Castes and Scheduled Tribe does not become meaningless by the convenient mode of reservation as has been hitherto done."

These two decisions, therefore, have no application to the facts of the present case.

26. In *Harish Chandra & ors. vs. State of U.P.* and others reported in 1992 LIC,2200 a learned Single Judge

of the Allahabad High Court held as follows :-

"As regards the contention that the select list did not survive after 3.7.1988, in my opinion there is no force in this submission of the respondents in view of the judgment of this court in *Ram Naresh vs. State of U.P.*(writ petition no. 15243 of 1984) decided on 5.4.1985, followed in *Rajesh Kumar Kesharvani vs. State of U.P.*(writ petition No. 6332 of 1989) decided on 28.1.88 and *Kapil Asthana v. State of U.P.*(writ petition No. 5003 of 198(sic) decided on 23.2.87. In these decisions it has been stated that the select list will not lapse on the expiry of one year of the declaration of the result."

However, ratio from the said decisions can be deciphered from the reported judgment in as much as the same was based on earlier decision of the said Court which are unreported.

27. The decision of this Court in *Syed Md. Shafique Ahmad & ano. Vs. State of Bihar & ors.* reported in 1991(2) PLJR, 54 is not relevant inasmuch as in that case this Court merely held that the Govt.order dated 11.1.1991 was not applicable to the case of the petitioners thereof.

28. In *Madan Mohan Singh & ano. Vs. The State of Bihar* and ors. reported in 1992(1) PLJR 547, Division Bench of this Court was again considering a matter relating to appointment in Bihar Superior Judicial Service pursuant to a selection made by a Full Court of this High

Court. The Division Bench in that case itself distinguished the decision of the Supreme Court in *Sankarasan Dash Vs. Union of India* reported in AIR 1991 SC 1612 holding that the decision of the State in not making appointments from the panel prepared by the High Court was not bonafide. The Division Bench observed :-

"The present one is not such a case where the merit list continued for a longer period so as to deny equal opportunity."

The Division Bench then observed:-

"It is true that a candidate does not get any right to the post by merely making an application for this, but the right is created in his favour for being considered for the post in accordance with the terms and conditions of the advertisement and the existing recruitment rules."

The Division Bench passed the said judgment *inter alia*, on the ground that prior to taking a policy decision, the High Court was not consulted which was in the teeth of Article 233(2) of the Constitution. The Bench held that when no appointment has been made pursuant to a panel prepared after compliance with all the procedures, in the following terms:- "As early as on 24.11.90, the Full Court had unanimously adopted a resolution that any further vacancy in the quota of the direct recruits from the Bar is required to be filled up within a period of one year from that date. The same would be filled by recommending candidates in order of merit from amongst the

remaining candidates in the merit list."

Such is not the position here. In this case a fresh advertisement has been directed to be issued after a long lapse of six years.

29. Similarly, the decision of the Punjab and Haryana High Court in *Nar Singh Das Achint Vs. The State of Haryana & ors* reported in 1987(2) S.L.J., 51 has no application in the facts and circumstances of this case, which again relied upon *Prem Prakash's* case 1986(4) SCC(268) while considering a matter of appointment as would evident from the following:- "The ~~petitioner's~~ appointment, contended the learned counsel for the petitioner, cannot be denied by the respondents on the ground that since lesser number of candidates from the general category were being appointed, so the quota of backward classes category would not be filled up even though qualified persons were available in that category. In our opinion, there is merit in the contention advanced on behalf of the petitioner. The petitioner is duly qualified. The number of posts available in his quota, admittedly, comes to 5, on the basis of the 52 vacancies that were required to be filled up, as observed by their Lordships in *Miss Neelima Shangla's* case (Supra). In view of the above, we dispose of the petition with the direction that the petitioner be appointed in the same terms as ordered by their Lordships in *Miss Neelima Sangia's* case (Supra). There would, however, be no order as to costs

30. Reliance placed by *Mr. Prasad in S. Govindraju Vs. Karnataka S.R.T.C. and ano.* reported in 1986(3) SCC 276 is also misplaced. In that case not only the name of the petitioner thereof was included in the select list but he was in fact appointed. Thereafter his name was removed from the select list as a result whereof he forfeited his right of employment in future. In that situation, it was held that principles of natural justice would be attracted.

31. Such is not the position here in as much as in this case the petitioners have neither been appointed nor their names have been removed from the select list as a consequence whereof they have forfeited the right of their appointment in future.

In fact, as noticed here in before, it has categorically been stated in the supplementary counter affidavit that the persons who had applied earlier, which included the petitioners, need not apply again.

Even in that decision, it has been held:- "Once a candidate is selected and his name is included in the select list in accordance with the regulations, he gets a right to be considered for appointment as and when vacancies arise. Thus a person whose name has not been included in the select list does not derive a right to be considered therefore if and when vacancy arises."

32. Such a right for consideration for appointment can only, however, be claimed during which the panel

remains valid. The submission of learned counsel for the petitioners to the effect that a discrimination has been committed by the State in so far as on other occasions, the life of the expired panel had been revalidated, has no force.

The matter relating to revalidation of panel depends on the policy decision of the State. Such policy decision depends on various facts and circumstances.

33. On the other hand, the Supreme Court in A.I.R.1962 S.C.1210(Supra) has held that nobody has a right of appointment in any post. Similar views have been taken in AIR 1973,SC,2216,AIR1987 SC,1697 equivalent to 1986 Vol(4) SCC, 268 and AIR 1984 SC 1831(Supra).

This matter has again recently been considered by the Supreme Court in *Union Territory of Chandigarh Vs. Dilbagh Singh* and ors. reported in 1993(1) SCC, 154 wherein the Supreme Court after taking into consideration a large number of cases including Miss Neelima Sangla's case and Shankarasan Dash's case(Supra) held as follows:-

" If we have regard to the above enunciation that a candidate who finds a place in the select list as a candidate selected for appointment to a civil post, does not acquire an indefeasible right to be appointed in such post in the absence of any specific rule entitling him for such appointment and he could be aggrieved by his non-appointment only when the Administration does so

either arbitrarily or for no bonafide reasons, it follows as a necessary concomitant that such candidate even if has a legitimate expectation of being appointed in such posts due to his name finding a place in the select list of candidates, cannot claim to have a right to be heard before such select list is canceled for bonafide and valid reasons and not arbitrarily."

34. Another aspect of the matter can also not be lost sight of. Evidently, the advertisement was made in the year 1987. The panel was sent by the Vidyalaya Seva Board to the State in March, 1990.

In terms of the Circular letter dated 5th April, 1955 issued by the Appointment Department of the Govt. of Bihar, it has been laid down as follows:-

,"(1) Where posts fall vacant, or are likely to fall vacant, at intervals throughout the year and have to be filled as soon as they fall vacant, appointment may be made from a list of approved candidates prepared after consultation with the public Service Commission, which may be considered valid up to a date not exceeding one year from the date on which the recommendation was made by the Commission, (ii) Where recruitment is made to a service at one time during the year. The public service Commission will be consulted once a year. If during the year an unforeseen vacancy occurs in such a service, and it has to be filled immediately, the latest list of candidates approved by the Commission may be

used for filling the vacancy."

In absence of any statute or rules, the aforementioned executive decision must be held to have force of law. It is therefore, clear that the life of the panel is only one year. In *Rakesh Ranjan Verma & ors. vs. The State of Bihar & ors.* reported in AIR 1992,SC,1348, the Supreme Court has held as follows :-

"It is not in dispute that the life of the panel was one year which came to an end on 13.9.1985 and that being so, no right can be claimed by the appellant after 13.9.1985 on the basis of inclusion of their names in the panel list of 1984 for the post of Junior Electrical Engineers."

35. In this case, as noticed herein before, the State has categorically stated that no sanction had been accorded for the appointment in the said post and a requisition was issued by the Vidyalaya Seva Board in anticipation of sanction by the State.

36. The submission of learned counsel appearing on behalf of the petitioners to the effect that the action on the part of the State is arbitrary and discriminatory cannot also be accepted for the simple reason that if appointment is to be made now in terms of the advertisement which has been issued in the year 1987, the persons who have become eligible by now would be left out. Consideration of cases of all eligible candidates will more reasonable than to make appointments on the posts for

which advertisement had been issued six years back. Further for filling up the posts which have been created or which may be created henceforth, no writ of mandamus can be issued for which advertisement was issued six years back unless there exists a policy decision to the effect that even future vacancies would be filled up from the existing panel. Such is not the case of the petitioners.

37. Learned counsel appearing in behalf of the petitioners, however, have submitted that the State was bound to appoint the petitioners in terms of the doctrine of promissory estoppel.

In my opinion, the said submission has no force. The doctrine of promissory estoppel may be made applicable only in a case where a person alters his position pursuant to any promise made by the State. Promise made by the State can also be terminated either by way of notice. The Court may also refuse to enforce a promise on equitable grounds. When an advertisement is issued, only an offer for appointments invited from the eligible candidates and only when their names find place in the select list and if they come within the purview of zone of consideration keeping in view the existing number of vacancies, they merely get a right to be considered for appointment as contradistinguished from the right to be appointed. No legal right as such is thus created by issuing an advertisement and by including the name of the candidates in the select list. Thus, no promise either in fact or in law

made which binds the State. It is State's legal right to make appointment or not to make appointment.

38.It is true that the State's action must conform to the doctrine of 'Equality before law and Equal protection of Law' as enshrined under Article 14 of the constitution of India.

But for that, the doctrine of promissory estoppel cannot be made applicable.

39.In *Jatinder Kumar and others vs. State of Punjab* and others reported in (1985) 1 SCC, 122 it has been held as follows :-

"An argument of desperation was further advanced about promissory estoppel stopping the State Government from acting in the manner it did in not appointing the appellants although their names had been recommended. The notification issued by the Board in this case was only an invitation to candidates possessing specified qualifications to apply for selection for recruitment for certain posts. It did not hold out any promise that the selection would be made or if it was made the selected candidates would be appointed. The candidates did not acquire any right merely by applying for selection or for appointment after selection. When the proposal for disbandment of the Punjab Armed Police Battalion and instead creation of additional posts for the district police was turned down by the State Government, the appellants were duly informed of the situation and there was

no question of any promissory estoppel against the State."

40. For the reasons aforementioned, there is no merit in these applications which are accordingly dismissed. However, in the facts and circumstances of the case, there will be no order as to costs.

S.P.J

Application dismisses.



MISCELLANEOUS CRIMINAL**Before Om Prakash, J.****1993****March,18****Upendra Singh.*****v.****The State Of Bihar & anr.**

Code of Criminal Procedure, 1973 (central Act II of 1974), section 439, sub-section (2) --- application for cancellation of bail by the first informant --- Session Judge, whether to be moved at the first before moving the High Court.

Where the Sessions Judge as well as the High Court have concurrent jurisdiction under sub-section (2) of section 439 of the Code of Criminal Procedure for cancellation of bail but the petitioner moved the High Court for cancellation of bail;

Held, that the petitioner should move the Sessions Judge for cancellation of bail at the first instance and he may move the High Court after exhausting his remedy in the courts below. When under the law of the land, remedy is available in a lower court the petitioners should seek his remedy in such lower court before

*. Criminal Miscellaneous No.5806 of 1992, in the matter of an application under section 439(2) of the Code of Criminal Procedure.

moving the higher courts.

Application by the first informant.

The facts of the material to this report are set out in the judgment of Om Prakash, J.

Mr. Angal Ojha for the petitioner.

Mr. Ashwani Kumar Sinha for the state.

Mr. G.N. Chaubey for the apposite party.

Om Prakash, J. — Heard Learned Counsel for petitioner Upendra Singh and learned counsel for opposite party no.2 Suresh Singh. Also heard learned A.P.P. for the opposite party no, 1 i.e.the State of Bihar.

2.Opposite party no.2 Suresh Singh was granted provisional bail by Sub-divisional Judicial Magistrate, Patna city on 7.3.92 in Didarganj P.S.Case No.16 of 1992 under sections 326 and 307 I.P.C. and 27 of the Arms Act. (It was confirmed on 23.5.92). Informant Upendra Singh filed this Cr. Misc. No.5806/92 on 22.5.92 for cancellation of bail on the ground that opposite party no.2 Suresh Singh has misused the privilege of bail.

3. In a supplementary affidavit filed on 15.9.92 informant Upendra has stated that opposite party Suresh Singh, a constable in Bihar Military Police, put pressures on informant to file an affidavit to the effect that the gun shot injuries sustained by him and his daughter were caused by gun shot fired by the dacoits, but he does

not yield to such pressure, Lastly, on 26.3.93 Suresh Singh armed with a gun arrived at his door, abused him and asked him to file an affidavit as above saying that it was the last warning to him failing which he would murder his (informant's) entire family. On 27.3.93 the petitioner filed an application before the Subdivisional Officer, Patna City about such threat (Annexure 3).

4. Learned counsel for opposite party Suresh Singh has raised a preliminary objection with regard to the maintainability of this application to this effect. The informant has neither moved the Subdivisional Judicial Magistrate, who granted the bail, under sub section (5) of Section 437 Cr.P.C. nor the Sessions Judge Sub section (2) of Section 439 Cr.P.C.

5. Submission of the learned counsel for the petitioner is that the Subdivisional Judicial Magistrate could have been moved under sub section (5) of Section 437 Cr.P.C. if he would have granted bail under Sub section (1) or sub section (2) of section 487 Cr.P.C. But in this case of attempting murder in which gun shot injuries have been sustained by the petitioner and his daughter punishment may extend to imprisonment for life and as such the above provision has no application. There is no rule or practice or convention that the petitioner should move the Sessions Judge for cancellation of bail before moving this court, Sessions Judge as well as this concurrent jurisdiction under sub section (2) of section 439

Cr.P.C.

6.Learned counsel for opposite party Suresh Singh has submitted that in case of anticipatory bail under section 438 Cr.P.C., both the court of Sessions and the High Court have concurrent jurisdiction, But a practice has developed in this Court that the petitioner who seeks anticipatory bail, has to move the Court of Sessions before moving this Court, On analogy, the petitioner should have moved Sessions Judge before moving this Court for cancellation of bail. In this connection he has invited Court's attention to an order dated 23.2.93 passed in Cr.Misc.No.15783/92 (Gauri Sahani versus - State of Bihar & anr) wherein while dealing with a case of cancellation of anticipatory bail granted by Sessions Judge, Motihari, a single Judge Bench of this Court has observed that the petitioners may file an application for cancellation of bail at the first instance before the Sessions Judge concerned, with such observation, the application for cancellation of anticipatory bail was permitted to be withdrawn.

7.Learned counsel for the petitioner has invited Court's attention to Annexure 3 to petitioner's supplementary affidavit to submit that opposite party Suresh has prima facie misused the privilege of bail by threatening the informant and asking him to file an affidavit to exonerate him from the allegation made by him in the F.I.R.

8.Learned counsel for opposite party Suresh has submitted that even as per version of the petitioner the solitary specific incident occurred on 26.3.92 and nothing has happened since than during last one year. Learned counsel for the petitioner has submitted that the pendency of this application before this Court differed the opposite party Suresh Singh from committing any further act of tempering with the evidence.

9.Further argument of the learned counsel for the petitioner is that the privilege of bail in this case of attempt to murder causing gun shot injuries has been granted by the learned Subdivisional Judicial Magistrate without having jurisdiction.

10.But there appears nothing on the record to show the grant of bail by the Subdivisional Judicial Magistrate has been challenged before this Court either in its writ jurisdiction or by an application u/s 482 Cr.P.C. Thus the order granting bail has become final.

11. In my view, when under the law of the land, remedy is available in a lower Court the petitioner should seek his remedy in such lower Court before moving the higher Courts.

12. I, therefore, uphold the preliminary objection. The petitioner may move this court after exhausting his remedy in the Courts below.

13.In case the petitioner moves any of the courts

below for cancellation of bail, such court shall expedite the hearing of his such application and dispose of the same in accordance with law as expeditiously as possible.

14. The application is disposed of, as above.

S.P.J.

Order Accordingly



CRIMINAL WRIT JURISDICTION

**Before Bisheshwar Prasad Singh & Gopi Chand
Bharuka, JJ.**

Brahmdeo Paswan & ors.*

v.

The State of Bihar.

Code of Criminal Procedure 1973 (Central Act II of 1974) section 207, scope and applicability of -- duty of the Magistrate to furnish police papers to the accused without delay -- case committed to the court of sessions for trial -- charges framed against the accused after a lapse of about five years and nine months -- delay, whether depicts failure of the persons who run the system.

Section 207 of the Code of Criminal Procedure, 1973 enjoins upon the Magistrate the duty to furnish without delay to the accused, free of cost, a copy of documents mentioned therein, commonly referred to as the police papers. These include the police report, the first information report and also the statements reported under sub-section (3) of section 161 Cr.P.C. The Court cannot absolve itself of the responsibility cast upon it by section 207 Cr.P.C., by blaming the police for not supplying the documents to it, The duty enjoined on the judicial officers by section 207 of the Code is not a mere formality, but a duty cast with a purpose.

* Cr. W.J.C.No.140 of 1987. In the matter of an application under Article 226 of Constitution of India.

Held, therefore, that, in the instant case, after cognizance was taken, there was a delay of seven years and seven months in supply of police papers. This was solely on account of the court's failure to perform the duty cast upon it by section 207 of the code.

Held, further, that the subsequent delay of about five years and nine months in framing of the charges after the case had been committed to the court of session for trial shows that the delay really is not so much due to failure of the system as the persons who run the system.

Application by the accused.

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

Mr. Naveen Singh Advocate for the petitioner.

Shri Brahmanand Singh Addl Advocate General No.2

Mrs. Nily Agrawal J.C. To A.A. C-II for the Applicant.

B.P.Singh with G.C.Bharuka, JJ. — Heard counsel for the parties.

2. It is unfortunate that a case in which the first information report was lodged as early as on 15.10.1972 for a serious offence of murder, is still pending disposal before the trial court. It appears that there are eight accused persons named in the report, and out of them

seven surrendered before the court below on 31st of October 1972. It is also apparent that the trial was not delayed on account of the eighth accused absconding. The police acted with promptness and the charge sheet was submitted on 7th of march 1973. This was followed by an order taking cognizance of offence under sections 147, 148 149 and 302 of the penal Code on the 3rd of April 1973. The seven accused persons who had surrendered were granted bail on different dates in the year 1974. The matter remained pending and the police documents were not supplied to the accused till November 24, 1980 i.e.seven years and seven months after the order taking cognizance. We may notice that section 207 of the Code of Criminal Procedure 1973 enjoins upon the Magistrate upon the Magistrate the duty to furnish without delay to the accused, free of cost, a copy of documents mentioned therein, commonly referred to as the police papers. These include the police report, the first information report and also statements recorded under subsection (3) of section 161 Cr.P.C. The court cannot absolve itself of the responsibility cast upon it by section 207 Cr.P.C. blaming the police for not supplying the documents to it. We will presume that once cognizance has been taken, the necessary papers referred to in section 207 Cr.P.C. are before the Magistrate. He has, therefore, to get copies made and supplied to the accused persons. If any court takes cognizance of an offence without the police papers being made available

to it, it would be an irregular act inviting objection to the taking of cognizance by the Magistrate. If it is shown in a given case that cognizance has been taken without the prosecution placing before the Magistrate all the documents referred to in section 207 Cr.P.C. it must be held that cognizance has been taken in a mechanical manner and without application of mind. This would be a serious charge against Magistrate concerned in the discharge of judicial functions. Since we have come across such instances in a large number of cases, we wish to bring to the notice of all judicial officers concerned, that the duty enjoined on them by section 207 Cr.P.C. is not a mere formality, but a duty cast with a purpose. Unnecessary adjournments granted for the supply of police papers, reflect on the functioning of the court, and the Magistrate must be held responsible, if the trial is delayed for non supply of police papers.

3. Coming to the facts of the instant case an order of commitment was made on 5.6.1981. The charges were framed thereafter on 3rd of March 1987 i.e. after a lapse of about five years and nine months, which again depicts the failure of the system. We fail to understand why the court took five years and nine months in framing of the charges after the case committed to the court of sessions for trial. The instant writ application was filed on 28.1.1987 and further proceeding was stayed by order dated 13.3.1987.

4. We find from the facts placed before us that the delay is not on account of any fault of the prosecution, nor is it in account of any fault of the defence. The system has failed to dispense justice, and to a great extent the failure is not so much of the system as of the persons who run the system. We find from the order sheet that on 24.6.1981 the record of the case was received by the sessions Judge incharge, who directed the registration of a session case and case being put up for orders. Thereafter by order dated 16.8.1981 the case was transferred to the file of Additional Session Judge Sri A.K.Sinha. The record was received by the transferee court on 3.10.1981, but we find that again by order dated 9.9.1982 the case was transferred to the file of Shri L.N.K.Sinha, Additional Session Judge, Patna for disposal. The record was received by the 4th Additional Sessions Judge, Patna on 26.9.1982. Thereafter three years and seven months later an order was passed on 27.4.1986 summoning the accused.

5. We cannot fail to notice the delay of about three years and seven months at this stage solely on account of the fault of the officer of the court concerned. We have noticed that in a large number of cases from the district of Patna, after the record is received by the court, it is not placed before the court concerned for further directions some times for six or seven years. Obviously the officer of the court concerned fails to act promptly, and some one in the office must be held responsible for such

delay. In the instant case therefore, we are of the view that after cognizance was taken on 3rd April 1973, there was a delay of seven years and seven months in supply of police papers. This was solely on account of the court's failure to perform the duty cast upon it by section 207 Cr.P.C. The subsequent delay in the proceeding is also on account of failure of the officer concerned in placing the matter before the concerned Additional Sessions Judge for further directions. The delay, therefore, can not be attributed to the prosecution, but really is on account of the delay inherent in the system itself. We further direct the Sessions Judge, Patna to hold an inquiry into the matter and report to this court within two months as to why the court could not supply the police papers to the accused for such a long period. He will further make a report to this court fixing responsibility for the delay in putting up the record before the court concerned for orders after commitment. After fixing responsibility, he will take appropriate disciplinary proceeding against the person found guilty of dereliction of duty or negligence etc. as the case may be.

5 A. Let a copy of this order be placed before the inspecting judge of the district of Patna.

6 Adverting to the facts of the instant case we find that murder was committed in broad day light, and if the accused is acquitted even without a trial, it will have a demoralising effect on the law abiding citizen, and their

faith in the justice system will be completely shaken. We do not wish to give that impression to the people, and therefore, we direct the trial court to proceed with the trial and conclude the same within four months from the date on which a copy of this order is communicated to the trial court. The office will communicate this judgment to the trial court within one week from today.

7. We also direct that a copy of this judgment be circulated to all the district court in Bihar so that the concerned district judges may bring this judgment to the notice of all concerned magistrates and courts who are required to discharge their duties under section 207 Cr.P.C. We may also sound a note of caution to the courts concerned that if we find that the trials are delayed on account of non supply of police papers to the accused, we shall hold the court responsible for the delay, and the officer concerned guilty of dereliction of duty enjoined by the Code of Criminal Procedure.

8. This application is disposed of accordingly.

S.P.J.

Order accordingly.

CIVIL WRIT JURISDICTION**Before S.B.Sinha and R.M.Prasad, JJ.****1993,****April 27****Sheo Nandan Singh *****v.****The State of Bihar & others.**

Bihar Consolidation of Holdings and Prevention of Fragmentation Act, 1956, (Bihar Act XXII of 1956), sections 26A and 35, scope and applicability of — suo-motu exercise of revisional jurisdiction under section 35 — whether a discretionary jurisdiction — whether to be exercised within a reasonable time — notification closing the Consolidation proceedings under section 26A not issued for a long time — suo-motu revisional jurisdiction, whether could be exercised.

Held, that in a case where the revisional authority considers it fit to exercise his suo-motu jurisdiction although no statutory period of limitation has been prescribed therefor, the remedy must be held to be a discretionary one and thus the same should not be made available in case of great unexplained delay. Such a discretionary jurisdiction under section 35 of the Bihar Consolidation of Holdings and Prevention of Fragmentation Act, 1956, must be exercised reasonably which in turn embraces within its fold, exercise of jurisdiction

* Civil writ Jurisdiction case No. 9160 of 1991. In the matter of an application under Articles 226 & 227 of the constitution of India

within a reasonable time.

Held, further , that where Consolidation proceedings came to an end in 1976 there does not appear to be any justifiable reason as to why notification under section 26A of the Bihar Consolidation of Holdings and Prevention of Fragmentation Act,1956, closing the consolidation operations in the unit had not been issued for such a long time. The persons who have acquired title in respect of Chak made in their favour cannot be divested of their title only because of laches and negligence on the part of the State of Bihar nor such a situation, authorises the director, consolidation, to exercise his suo-motu revisional jurisdiction.

Held, therefore that in such circumstances the discretionary jurisdiction of the Director , Consolidation, under section 35 of the Bihar Consolidation of Holdings and Prevention of Fragmentation Act,1956, cannot be said to have reasonably been exercised.

Application by the petitioner.

The facts of the same material to this report are set out in the judgment of S.B.Sinha,J.

Mr.Girja Nandan Singh for the petitioner.

Mrs.S A Khan,Standing counsel No.7 for the petitioner.

Mr. Keshav Srivastava for respondent no. 3

to 13.

S.B.Sinha,J: — This application is directed against an order dated 22.11.1991 passed by the Respondent No.14, whereby and whereunder he allowed a revision application filed by the respondent Nos.3 to 17.

2. The fact of the matter lies in a very narrow compass. Consolidation operation in terms of the provisions of the Bihar Consolidation of Holdings and Prevention of Fragmentation Act, 1956, (hereinafter referred to as the said Act) commenced in village Bhera Sabalpur in the district of Bhojpur in January, 1972.

3. At the time of preparation of chak, respondent Nos.3 to 11 and Mahadeo Singh, father of respondent No.3 filed objection with regard to allotment of chak against the petitioner and respondent No.12 in the year 1974-75.

4. The said objection was heard under section 12A of the said Act in the year 1975 but despite the same, the consolidation officer upheld the draft publication. The respondent Nos.3 to 11 and Mahadeo Singh thereafter preferred an appeal before the Deputy Director Consolidation who allowed the said appeal and passed an order for allotment of the chak of plot No.241 in terms whereof notification was issued. No revision was filed against the said order.

5. The scheme of consolidation was confirmed under

section 13 of the Act in the year 1976.

6. Delivery of possession was also given to the petitioner and other raiyats including the respondent nos. 3 to 11 pursuant to the said scheme. The Consolidation Officer also granted certificates to all raiyats including Respondent nos. 3 to 11 in the terms of section 15 of the Act.

7. The petitioners have contended that they have acquired right of occupancy in relation to the lands in question as the certificates of transfer have been issued and delivery of possession has also been effected in their favour.

8. The respondent nos. 3 to 11 however, filed an application under section 35 of the said act before the Director, Consolidation in the year 1991 which was registered as revision no. 489 of 1991.

9. The Director, Consolidation, evidently did not exercise his suo-motu jurisdiction but entertained the revision application filed by the respondent nos. 3 to 11.

10. By reason of the impugned order the said court while admitting the application accepted the suggestion made by the Consolidation officer and directed amendments in the chak allotted to the parties. He directed that the chak map should be corrected accordingly and the boundaries of the two chaks should also be corrected according to their changed location.

11. The respondents in this case has filed a counter affidavit wherein it has been stated that at the time of publication of the chak Mahadeo Singh who was the karta of the family, died on 30.9.1972.

12. According to the respondent no.3, the only other member of the family who was literate was away from the village being in service and thus he could not file any objection. It was submitted that respondent no.3 ultimately came across the chak map and realised that chak no.216 was kept away both from the canal as well as the National High Way and thus an application was filed under section 35 of the Act directly before the respondent No.4.

In this said counter affidavit it has been denied that any objection for preparation of the chak or any appeal was preferred by the respondents.

14. A supplementary affidavit has been filed on behalf of the petitioner wherein it has been contended that the petitioners were allotted chak nos.215 and 199 consisting of 84 decimals of land but the respondents filed objection only against chak no.199 which was registered as case no.17 of 1973-74. The said objection was allowed and the petitioner was allowed chak no.199 consisting of plot nos.334,332 and 335 measuring 60 decimals.

15. A reply to the counter affidavit has also been filed by the petitioner wherein the allegations made in the counter affidavits have been denied.

It has also been stated that the respondent no.3 was in service of the Consolidation Department and he has been attending his duties from his village home. Thus it has been submitted that the plea raised by the respondent for filing a revision application directly before the Director, Consolidation, was wholly incorrect.

16. Mr.Girja Nandan Singh, the learned counsel appearing on behalf of the petitioner has raised a short question in support of this application.

The learned counsel submitted that the provisions of section 35 of the said Act cannot be exercised after final publication of Khatian and the map and in any event the impugned order suffers from the vice of total non application of mind in as much as the Director Consolidation could not have exercised his purported jurisdiction after a period of 17 years.

17. It was further submitted that from a perusal of the provisions of section 35 of the said act it would appear that revision application lies only against an order passed by the authorities under the said act and in view of the fact that no order had been passed against the respondents, the said revision application was not maintainable.

18. Mr.Keshav Srivastava, the learned counsel appearing on behalf of the respondents nos.3 to 13, on the

other hand, submitted that the power of the Revisional Authority under section 35 of the said act is of wide amplitude and in a given case the Director Consolidation can exercise his suo-motu jurisdiction directly in respect whereof no period of limitation is prescribed.

The learned counsel in support of his contention has relied upon *Shyam Bihari Upadhaya vs. State of Bihar* reported in 1985 PLJR 43, *Jagarnath Thakur vs. State of Bihar* reported in 1984 PLJR 310, *Shiv Kumar Thakur vs. State of Bihar* reported in 1986 PLJR 986 and *Gauri Shankar Singh vs. State of Bihar* reported in 1989 PLJR 673.

19. The only, question, which therefore arises for consideration is the scope and purport of section 35 of the said act.

20. Section 35 of the said Act reads thus :-

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

21. In terms of the aforementioned provisions, therefore, the Director Consolidation has been empowered to call for an examine the record of the case decided or proceedings taken by any authority for the purpose of satisfying himself as to the regularity of the proceedings or as to the correctness, legality or propriety of any order passed by the authority in the case of proceedings, as the case may be either of his own motion or on the application of any party or on reference being made by any subordinate authority.

Rule 28 of the Bihar Consolidation of Holdings Rules 1959 provides that such application should be presented within 30 days of the order against which the application is directed.

22. A power of revision is a creature of statute. The power of revision has been conferred upon the Director Consolidation in order to enable him to see that the subordinate courts had not been acting arbitrarily in exercise of their jurisdiction.

23. There cannot be any doubt that power under section 35 of the act is vary wide (See *Jagarnath Thakur Vs.State of Bihar* reported in 1984 PLJR 310). The said provisions also prevails over the provisions of section 10A of the Act(see *Shiv Kumar Thakur vs.the State of Bihar*: 1985 PLJR 985).

Rule 28 of the Rules provide for a period of limitation of 30 days only, if an application has to be filed. However,

no period of limitation has been required to be prescribed in the matter of exercise of his suo-motu revisional jurisdiction by the Director Consolidation.

24. Where a revision application is maintainable on an application, the same confers a right upon the party to the proceedings to file the same. In a case however, where the revisional authority considers it fit to exercise his suo-motu jurisdiction, although no statutory period of limitation has been prescribed therefor, the remedy must be held to be a discretionary one and thus the same should not be made available in case of great unexplained delay. Such a discretionary jurisdiction under section 35 must be exercised reasonably which in turn embraces within its fold , exercise of jurisdiction within a reasonable time.

Further in the case where the revisional authority intends to exercise his suo-motu jurisdiction, the same must be made known to the party to the proceedings (see *M/S.D N Roy v s. State of Bihar* reported in 1971 S.C.1045).

25. The decisions of this court in *Shyam Bihari Upadhyay vs. State of Bihar* reported in 1985 PLJR 43 and *Gauri Shankar Singh vs. State of Bihar* reported in 1989 PLJR 673 upon which strong reliance has been placed by *Mr.Srivastava* are not of much assistance. In these cases, this court was concerned with the exercise of revisional power of the Director under section 35 of

the act vis-a-vis the bar to filing of an objection as contemplated under section 10A thereof.

26. However, in this case the situation is completely different. Admittedly a final publication of Khatian and map had already been made.

Section 13 provides for submission of scheme to the Director.

Section 14 of the Act provides for delivery of possession with effect from the date fixed for the purpose notifying as to when the final consolidation scheme shall come into force whereupon a raiyat and under raiyat would be entitled to the plots allotted to him.

Section 15 of the Act provides for grant of certificate of transfer. Such certificate of transfer is conclusive proof of the title of such raiyat to such holding and the same also makes the raiyat liable for payment of rent as specified therein.

27. Section 16 provides that a confirmed scheme is to be treated as finally published record of rights. Section 16 thus creates a legal fiction in terms whereof the records of right would be deemed to be prepared and finally published under the respective tenancy laws applicable in the respective areas in the state of Bihar.

28. However, it is not known as to whether a notification under section 26A has been issued or not.

Section 26A provides that after fresh maps and records have been prepared and certificates of transfer have been issued to the raiyats under the scheme, the state government shall, thereafter, as soon as, may be, issue a notification in the official gazette stating that the consolidation operations shall be closed in the unit.

Although a consolidation proceeding do not come to an end only upon final issuance of a chak and issuance of transfer certificate to the raiyat and delivery of possession, but evidently the power under section 35 of the said Act should not normally be exercised upon final issuance of chak, issuance of transfer certificate to the raiyats and delivery of possession only because no notification had been issued in terms of section 26A of the Act because of the negligence on the part of the state of Bihar in issuing such notification or otherwise.

29. In this case consolidation proceedings have come to an end in the year 1976. There does not appear to be any justiable reason as to why a notification under section 26A had not been issued for such a long time. The persons who have acquired title in respect of a chak made in their favour cannot be divested of their title only because of laches and negligence on the part of the state of Bihar nor such a situation, in my opinion, authorises the Director Consolidation to exercise his suo-motu revisional jurisdiction.

30. Sub section 2 of the section 26A of the Act is a

pointer to the fact that such a notification declaring closure of the consolidation operation should immediately be published, which however, shall be subject to any order that may be passed in a writ application of any other proceeding which were pending at that time.

It was only for those limited purposes, the consolidation operation would be deemed to have not been closed.

31. It is true that a time limit fixed by a statute directing statutory functionary to perform any statutory duties is directory and not mandatory but even in relation to such a directory provision, there must be a substantial compliance of the provisions of statute.

32. In this case, the Director, Consolidation has not assigned any reason whatsoever as to why he thought it fit to exercise his revisional jurisdiction. He even did not take into consideration the effect of final publication of chak and map and issuance of certificate under section 15 of the Act.

33. In this situation, we have no other option but to hold that even assuming that technically the discretionary jurisdiction of the Director Consolidation could be exercised in absence of any notification under section 26A of the Act, such a discretionary jurisdiction cannot be said to have reasonably been exercised.

34. This application is , therefore, allowed and the

impugned order as contained in Annexure 1 to the writ application is set aside.

35. However, in the facts and circumstances of the case, there will be no order as to costs.

R.M.Prasad, J:

. I agree

S.P.J.

Application allowed.



CIVIL WRIT JURISDICTION**Before B.P.Singh & G.C.Bharuka, JJ.****1993****April 20.****Yasoda Devi Jha*****v.****The State of Bihar & others.**

Constitution of India, Article 226 -- writ application challenging the action of the principal filed -- interim order passed allowing the petitioner to attend classes -- writ application subsequently withdrawn -- interim order, whether stands vacated -- petitioner, whether relegated to the same position as prior to the filing of the writ application -- subsequent writ application filed for issue of direction to the Principal to allow the petitioner to take the examination -- relief, whether can be granted.

Where the petitioner was debarred from taking up the course by the Principal of the Teachers' Training College and she filed a writ application against the said order of the Principal and in that writ application an interim order was passed by the High Court permitting her to attend her classes and thereafter the said writ application was withdrawn by the petitioner and the present writ application has been filed again for issuance

* Order no.4 dated 20.4.1993 passed in C.W.J.C. No. 109 of 1993

of a direction to the Principal to allow the petitioner to fill up the form for taking the examination to be conducted by Bihar Vidyalaya Pariksha Samiti for the session 1989-91;

Held, that any interim order that may have been passed by the High Court was subject to the ultimate result of the writ application. When the writ application was itself withdrawn; the interim order stood vacated and consequently the petitioner was relegated to the same position in which she was immediately prior to the filing of the writ application. It would be erroneous to contend on behalf of the petitioner that the writ petition become infructuous and so it was withdrawn. Therefore, the disability which she may have incurred, continued thereby disentitling her to continue the course, and consequently the right to appear at the examination.

Application by the petitioner.

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

B P Singh and G.C.Bharuka, JJ: — The petitioner had filed a writ application, being C.W.J.C.no.2681 of 1991 challenging the action of the Principal in not permitting her to continue with the course. This was done, as explained by the counsel for the state, in view of the order made by this court in C.W.J.C. No.4710 of 1990 filed by one Babita Kumari. The aforesaid Babita Kumari was permitted to attend classes in the institution and

consequently the principal of the institution discontinued the petitioner from pursuing her further studies. In these circumstances, the petitioner approached this court by filing a writ application, being C.W.J.C.No.2681 of 1991. In that writ application notice was issued and respondent no.4 of that writ application was directed to allow the petitioner to attend her classes. The net result was that pursuant to an interim order passed by this court, the petitioner was permitted to attend her classes. Thereafter, C.W.J.C.No.2681 of 1991 was withdrawn by the petitioner. It, therefore, follows that when the writ application was withdrawn, the interim order also stood vacated.

2. The instant writ application has been filed again for issuance of a direction to the principal of the Teachers' Training College to allow the petitioner to fill up the form for taking the examination to be conducted by Bihar Vidyalaya Pariksha Samiti for the session 1989-91.

3. It was contended before us by counsel for the petitioner that the writ petition filed by her earlier was withdrawn because there was an interim order directing respondent no.4 to allow the petitioner to attend her classes. According to the petitioner, since the writ petition became infructuous, because it was directed by the interim order that the petitioner may be allowed to attend classes, the writ petition was withdrawn. It also appears that in similar circumstances Babita Kumari also withdrew

the writ application preferred by her.

4. The facts of this case disclose the purpose for which interim orders are obtained and misused. Any interim order that may have been passed by this court was subject to the ultimate result of the writ application. When the writ application was itself withdrawn, the interim order stood vacated and consequently she was relegated to the same position in which she was immediately prior to the filing of the writ application.

The disability which she may have incurred, continued thereby disentitling her to continue the course, and consequently the right to appear at the examination. No equity can be pleaded in such cases to undo the consequences that follow on account of her non actions. It would be erroneous to contend that the writ petition became infructuous, because even if the petitioner was permitted to attend her classes by an interim order, and ultimately the writ petition was dismissed on a finding that she was not entitled to claim admission and to attend classes, no relief could be granted to the petitioner. Her case cannot stand on a higher footing if the writ petition was withdrawn.

5. There is, therefore, no merit in this application. The writ petition is dismissed.

S.P.J.

Application dismissed.

CIVIL WRIT JURISDICTION**Before S.B.Sinha & R.M.Prasad,JJ.****1993****April 27,****Awadh Kishore Tewary *****v.****The State of Bihar & others.**

Bihar Consolidation of Holdings and Prevention of Fragmentation Act, 1956 (Bihar act XXII of 1956) -- Consolidation authorities, whether have jurisdiction to enquire into the matter whether the document is void -- consolidation courts, whether will have jurisdiction in relation to voidable transaction.

Held, that , if on the basis of the pleadings and reliefs claimed, a document may be held to be void one, evidently such a question can be adjudicated upon by the Consolidation Courts and for that purpose, they being 'courts' within the meaning of section 3 of the Evidence Act, must be held to have the necessary jurisdiction to take evidence which may be adduced by the parties in support of their respective pleas. It is for the court to accept the case of one party and reject the case of other. A 'court' has the power to take evidence to decide an issue provided the same falls within his juris-

* Civil Writ Jurisdiction case No.3501 of 1992. In the matter of an application under articles 226 and 227 of the Constitution of India.

diction. When an issue is triable by a court he has also the power to decide the jurisdictional fact a fortiori; the same can be done only on the basis of the materials brought on records by the parties to the lis.

Thus in the instant case, if the deed of gift executed by Radhika Tewary was invalid in law either on the ground that he did not have any authority to execute the same or the same is a manufactured document or on the ground that the same was violative of sections 122 and 123 of the Transfer to Property Act, the matter could fall within the jurisdiction of the Consolidation Courts. It is not a case where the document has actually to be set aside before it can cease to have any legal effect. In other words, only in relation to a voidable transaction the Consolidation Courts will have no jurisdiction.

Application by the petitioner.

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

*Gorakh Nath v. Hari Narain Singh*¹ relied on

*Dhanbir Singh v. Chandra Shekhar*² overruled

Ram Krit Singh and ors vs. The State of

1 (1973) A.I.R.(S.C.)2451.

2 (1983) A.I.R. (Pat.) 335.

Bihar and ors.¹ -- referred to .

M/S. Sunil Kumar Singh & Manoj Kumar
Ambastha for the petitioners

G.P6 for the State Mr.Jaiprakash Verma &
Bipin Bihari Singh for respondent no.3.

S.B.Sinha, J: — This application is directed against an order dated 30th September, 1991 passed by the respondent No.2 and as contained in Annexure-1 to the writ application whereby and whereunde: he has set aside the order dated 31.3.1989 passed by the Deputy Director of Consolidation , Muzaffarpur in Appeal no.9 of 1989.

2. Shortly put the fact of the matter is as follows :-

The lands in question which have been described in paragraph 3 of the writ application were entered in the name of Radhika Tewary and Ramashray Tewary sons of Suraj Tewary, and Bikram Tewary. The petitioner and the respondent no.3 are sons of Radhika Tewary.

3. According to the petitioner there had been a partition amongst Radhika Tewary and his brother in the year 1974 wherein the disputed land was allotted in the share of Radhika Tewary. Radhika Tewary executed a deed of gift dated 26.4.1986 in favour of the petitioner. Allegedly before execution of the said deed, permission

1 (1979) B.B.C.J.259 F.B.

was obtained from the authorities under the Bihar Consolidation of Holdings and Prevention of Fragmentation Act, 1956 (hereinafter referred to for the sake of brevity as the said Act) in case no. 347/86 wherein the respondent no. 3 although noticed, did not file any objection.

4. The petitioner filed an application for getting his name entered in the register of lands in respect of the said lands, in pursuance whereof a case being case no. 211/86 was instituted. In that proceeding also notice was issued to respondent no. 3 but he did not raise any objection and the consolidation officer passed an order in favour of the petitioner on 16.12.1987.

5. The respondent no. 3, thereafter, preferred an appeal before the Deputy Director of Consolidation alleging therein that he was entitled to 1/3rd share in the said property. It was contended that the said deed of gift was a forged and fabricated document. The said appeal was dismissed by an order dated 31.3.1989.

6. The respondent no. 3 filed a revised application before the Director, Consolidation, who by reason of the impugned order (Annexure - 1) allowed the same.

7. Mr. Sunil Kumar Singh, learned counsel appearing on behalf of the petitioner submitted that the Director, Consolidation, misdirected himself as he has failed to take into consideration the fact that partition of the joint family properties amongst Radhika Tewary and his brothers having been admitted, Radhika Tewary acquired

an absolute right to execute a deed of gift of the properties which were allotted in his share.

The learned counsel submitted that the plea raised by the respondent no.3 to the effect that the deed of gift was forged and fabricated could not have been enquired into by the Consolidation Authorities in as much as , in order to adjudicate upon the said question, evidences were required to be led before the said authorities , which is impossible.

8. The learned counsel in support of this contention relied upon decisions of this court in the case of *Dhanbir Singh vs. Chandra Shekhar* reported in 1983 Patna, 335, *Chhote Gope and others vs. Kali Gope* reported in 1983 PLJR 357 and *Smt.Surajmani Devi vs. Smt.Shanti Devi*, and another reported in 1981 Patna 244.

9. Mr.Verma , the learned counsel appearing on behalf of the respondent no.3 on the other hand, submitted that as the deed of gift was a manufactured document, the petitioner did not derive any title in terms thereof and thus the lands covered under the said deed of gift could not have been entered in the name of the petitioner alone.

10. It was further submitted that there had been no partition of the joint family properties. It was also submitted that in fact no notice was issued to the respondent No.3 in case No.347 of 1986.

11. In the counter affidavit filed on behalf of the respondent No.3, a submission was also made that the petitioner be directed to produce the original deed of gift.

12. The question which have been raised before us as also before the Consolidation authorities are essentially pure questions of fact. There is nothing to show from the records except the statements made by the petitioners that there had been a partition amongst Radhika Tewary and his co-sharers.

13. The deed of gift must fulfill the requirements laid down under sections 122 and 123 of the Transfer of Property Act. If the deed of gift was a forged and fabricated document, there cannot be any doubt that the same would be void one and thereby no title passed to the donee. Similarly, if the deed of gift did not fulfill the requirements of law as contained in sections 122 and 123 of the Transfer of Property Act, the same would be void.

14. It is now well settled by various decisions of this court that when the transactions are void, the consolidation authorities have jurisdiction to adjudicate, whereas in case of a voidable document they will have no such jurisdiction.

15. It is now well known that a coparcener cannot alienate a specific portion of the coparcenary property without the consent of the other coparceners.

16. It is also well known that a member of a Hindu Joint Mitikshra Family cannot execute a deed of gift without the consent of other coparceners. Thus, in the event, if it be held that there had been no partition, Radhika Tewary could not have executed any deed of gift in relation to a specific portion of the coparcenery properties.

In *Gorakh Nath vs. Hari Narain Singh* reported in AIR 1973 S.C.2451 it has been held as follows :

"There is distinction between cases where a document is wholly or partially invalid so that it can be disregarded by any court or authority and one where it has to be actually set aside before it can cease to have legal effect. An alienation made in excess of power to transfer would be to the extent to the excess power, invalid. An adjudication on the effect of such purported alienation would be necessarily implied in the decision of a dispute involving conflicting claims to rights or interest in land which are the subject matter of consolidation proceedings. But where there is a document the legal effect of which can only be taken away by setting it aside or its cancellation, it can be said that the consolidation authorities have no power to cancel the deed and therefore it must be held to be binding on them so long as it is not cancelled by a court having the power to cancel it."

17. This aspect of the matter has also been con-

sidered by a full bench of this court in *Ram Krit Singh and others vs. The State of Bihar and others* reported in 1979 BLCJ 259, wherein it has been held as follows:-

"It would be appropriate here to clarify that there are certain class of cases which are not covered by section 4(c) of the Act. An illustration is provided by the observations in the case of *Gorakh Nath Dubey vs. Hari Narain Singh and others*. There the claim of the plaintiff was that the sale of his half share by his uncle was invalid, inoperative and void. In the suit the plaintiff had prayed for cancellation of the sale deed executed by his uncle to the extent of his half share. It was held that the suit was covered by the relevant provisions of the U.P. Consolidation of Holdings Act, and the claim had to be adjudicated upon by the Consolidation Courts. It was, however, pointed out that there is a distinction between cases where a document is wholly or partially invalid so that it can be disregarded by any court or authority and one where it has to be actually set aside before it can cease to have legal effect. The latter class of cases were held to be outside the scope of the provision relating to abatement of suits."

18. Thus, if the deed of gift executed by Radhika Tewary was invalid in law either on the ground that he did not have any authority to execute the same or the same is a manufactured document or on the ground that the same was violative of sections 122 and 123 of the

Transfer of Property Act, the matter could fall within the jurisdiction of the Consolidation Courts as has been held by the apex court in *Gorakh Nath's* case(Supra). It is not a case where the document has actually to be set aside before it can cease to have any legal effect. In other words, only in relation to a voidable transaction the consolidation courts will have no jurisdiction.

In *Ramsinghashan Pathak vs. K.P. Singh* reported in AIR 1989 Patna 39 it has been held that the Consolidation authorities are 'Courts' and the proceedings before them are judicial proceedings. In view of section 37A of the said Act, the authorities are deemed to be the courts of competent jurisdiction and in terms of section 37B of the said Act they have the power and privileges as are vested in a civil court with regard to the matters enumerated therein.

19. In *Dhanbir Singh vs. Chandra Shekhar* reported in AIR 1983 Patna 335, the learned Judge failed to take into consideration the decision of the full Bench in *Ram Krit Singh's* case and with utmost respect, His Lordship does not appear to have considered the ratio of the *Gorakh Nath's* case in its proper perspective.

20. It is not relevant as to how the question as to whether a document is void or voidable can be adjudicated upon. Such a question has to be decided on the basis of the pleadings of the parties and reliefs claimed in the suit or other proceedings. If on the basis of the

pleadings and reliefs claimed, a document may be held to be void one, evidently such a question can be adjudicated upon by the Consolidation court's and for that purpose, they being 'courts' within the meaning of section 3 of the Evidence Act, must be held to have the necessary jurisdiction to take evidences which may be adduced by the parties in support of their respective pleas. It is for the court to accept the case of one party and reject the case of other. A 'Court' has the powder to take evidence to decide an issue, provided the same, falls within his jurisdiction. When an issue is triable by a court he has also the power to decide the jurisdictional fact a fortiori the same can be done only on the basis of the materials brought on records by the parties to the lis.

The decision in *Dhanbir Singh's case* (Supra), therefore, does not lay down a good law and must be over-ruled.

21. The *Chhote Gope and others Vs Kali Gope* reported in 1983 PLJR 357 it has been held that a suit for cancellation of deed of gift is triable by the Civil Court. This judgment appears to be contrary to a decision of S. Narayan, J, in the case of *Tarkeshwar Upadhyay Vs. Mahes Khar* reported in 1982 PLJR 155.

22. However, that decision appears to have been rendered in the facts of that case as the pleadings of the parties and the reliefs claimed in the said proceeding

cannot be deciphered from the said judgment.

23. In *Smt. Surajmani Devi Vs. Smt.Shanti Devi and another* reported in AIR 1981 Patna 244, a prayer was made for cancellation of the document on the ground of fraud and thus it had rightly been held in that case that the document being not void abinitio and being a voidable document, the same has to be set aside and only thereafter it will cease to have any legal effect. In that case, therefore, the transaction in question was held to be a voidable one and not a void one.

24. In this view of the matter, the submission of the learned counsel appearing on behalf of the petitioner has to be rejected.

25. However, from a perusal of the impugned order, it does not appear that the Joint Director, Consolidation has taken into consideration all these aspects of the matter in his order. Interest of justice, therefore, demands that the impugned order be set aside and the matter remitted back to the Joint Director, Consolidation for a fresh decision in accordance with law upon taking into consideration the observations made herein before.

26. The Director Consolidation may exercise his Suo-motu power of revision and allow the parties to lead their respective evidence on all the issues which may be raised or may remand the matter to the Consolidation Officer for the said purpose.

27. The application is, thus disposed of with the aforementioned directions.

28. However, in the facts and circumstances of the case, there will be no order as to costs.

R.M.Prasad, J:-

I agree

S.P.J.

Order Accordingly



CIVIL WRIT JURISDICTION**Before B.P.Singh & G.C.Bharuka, JJ.****1993****May, 4**

**Sri Ram Kishore Pandey Sanskrit Prathmik
Sah Madhyamik Balika Vidyalaya, Fatehpur,
Shivahar, Sitamarhi, and others.***

V.**The State of Bihar and others.**

Bihar Sanskrit Education Board Act, 1981 (Bihar Act

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- * C.W.J.C.Nos.12125,11771 & 11742 of 1992 and 43211,4238,4190, 2223, 2121,2865, 2864, 2863, 2807, 2494,3302, 3258, 3185, 2956, 2955, 3431, 3358, 3808, 3985, 3936, 3927, 3926, 3842, 3620, 3584, 3559, 3557, 3532, 4256, 4080, 3993, 4293, 4259, 4258, 4257, 4165, and 3844 of 1993. C.W.J.C. No. 11742/92 ... Mi Mishra Prathmik Sah Madhyama Vidyalaya, Anand Nagar, Bikramgang, ... Petitioner. C.W.J.C. 11771/ 92 ...Purushotam Narayan Pathak & another... Petitioner. C.W.J.C No. 4311/93 Hari Narain Yadav Petitioner C.W.J.C.No. 4238/93 ... Ram Prasad Sah ... Petitioner. C.W.J.C.No. 4190/93 ... Jai Narayan Yadav... Petitioner. C.W.J.C.No. 2223/93 ... Maheshwar Prasad Sinha... Petitioner C.W.J.C.No 2121/93 ... Shiv Sanker Dwivedi ... Petitioner C.W.J.C.No. 2865/93 ... The Managing Committee of Durga Prathmik- Sah-Madhyamik Vidyalaya, Tintolia and another... Petitioner. with other cases.

XXXI of 1982), section 6, 11(4) and 22, scope and applicability of - absence of rules framed by the State Government and regulations framed by the Board -- examination, whether can be conducted by the Board -- Chairman of the Board, whether has power to frame regulations under section 6.

Where an Advertisement was issued by the Bihar Sanskrit Education Board for holding examination for the Madhyama course in the year 1993 as per the programme published in the advertisement and writ application were filed grant of permission to the students to take the examination and for directing the State Government to decide the matter regarding recognition of the institution;

Held, that, in absence of rules framed by the State Government, and the regulations framed by the Board, it was not possible to conduct the examination by the Board and only after the rules and regulations are framed and notified, the Board shall proceed to hold examination, which, it is required to held in accordance with the provisions of the Bihar Sanskrit Education Board Act, 1981, rules and regulations.

Held further that the Chairman of the Bihar Sanskrit Education Board is not authorised to frame regulations under section 6 of the Bihar Sanskrit Education Board Act, 1981, in exercise of his power under section 11(4) of the Act. Framing of the regulation by the Chairman of

the Board is clearly impermissible and illegal because though he may pass necessary orders in exercise of the powers vested in the Board, such powers must be necessarily exercised in the discharge of executive functions and not in the discharge of powers which are legislative in character. Neither the Board has power to delegate such functions to any manner of the Board, nor the Chairman has a right to exercise those powers by himself.

Application by the petitioners.

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

B.P.Singh and G.C.Bharuka, JJ.—In all these writ applications the petitioners have prayed that the students of the petitioner-school may be permitted to take the examination for the Madhyama course, which is to be held in the year 1993, as per the programme published in Advertisement No.1/93, which is Annexure-4 in C.W.J.C.No.3358/93. In most of the writ petitions a prayer has been made that the students of the institution, though unrecognized, may be permitted to take the said examination. In some of the writ applications it is prayed in addition that the matter regarding recognition of the institution may be decided by the State Government, and the students of the institution should, in the meantime be permitted to appear at the examination. In a few writ applications there are other problems made but

we are not dealing with those aspects of the matter, and they shall be dealt with separately in those writ applications.

The Governor of Bihar was pleased to promulgate an ordinance known as the Sanskrit Education Board Second Ordinance, (Bihar Ordinance No. 73, 1981), which was replaced by Bihar Act 31 of 1982, namely, Bihar Sanskrit Education Board Act, 1981. Under the provisions of the Act a Board was established, namely, Bihar Sanskrit Education Board. The aforesaid Board consists of Chairman, a Secretary and a Managing Committee. The powers and functions of the Board have been enumerated in section 6 of the Act. One of the duties entrusted to the Board is to advise the State government on all matters relating to Sanskrit Education upto Madhyama standard. Apart from that, subject to the provision of the Act, the regulations and rules made thereunder, the Board has also been entrusted with the power to direct, supervise and control Sanskrit Education upto Madhyama standard in the State and shall have the following powers :-

(a) To grant recognition to Sanskrit Schools and Tols up to madhyama Standard, with the approval of the State Government and within the number fixed by the State Government, in accordance with such rules as may be made in this behalf;

(b) To withdraw recognition of recognised Sanskrit

institutions in accordance with such rules made in this behalf ;

(c) To maintain a register of recognised Sanskrit Schools and Tols;

(d) To provide by regulation the syllabus, the courses of studies and the books to be studied in recognised Sanskrit Schools and Tols for Examinations instituted by the Board up to Madhyama Standard;

(e) To undertake, if necessary, with the prior approval of the State Government, the preparation, publication, or sale of text books and other books for use in Sanskrit Schools and Tols;

(f) To maintain and publish from time to time list of books approved for use in sanskrit schools and tols for examination instituted by the Board and to remove the name of any such books from any such list;

(g) to institute and conduct different Sanskrit examinations up to Madhyama Standard and such other examination as it may think fit and make regulations in this behalf;

(h) To publish results of the examination instituted by the Board and to award certificates, prizes and scholarships in this behalf;

(i) to provide by regulation the rates of remuneration to be paid to the paper-setters, moderators, tabulators,

examiners, invigilators, centre Superintendent, Supervisors and others employed in connection with the fees to be paid by candidates for such examinations;

(j) To grant permission to candidate to appear at an examination up to Madhyama Standard instituted by the Board and to refuse or withdraw such permission in accordance with such regulation as may be made in this behalf;

(k) To administer the Sanskrit Education Fund;

(l) To institute and administer such provident funds as may be prescribed;

(m) To prepare regulations regarding service conditions of the employees of the Board

(n) Subject to the rules made under this Act to constitute, and dissolve the managing committee of the Sanskrit Schools and tols;

(o) To perform such other functions as may be entrusted to it by the State Government.

Under section 22 of the Act, the State Government has been authorised to make rules for carrying out the purpose of the Act.

These rules are required to be notified. These rules may provide for all or any of the following matters, namely :-

(a) The acquisition, possession and disposal of

property by the Board, the condition of such acquisition, possession and disposals;

(b) The manner of the nomination of the members of the Board specified in section 4;

(c) The composition, powers and functions of managing committees of Sanskrit Schools and tols;

(d) The terms and conditions of appointments, the scale of pay and the rules of discipline and other conditions of service relating to the officers and servants of the Board;

(e) The form of Budget preparation of the Board;

(f) The manner in which all payments to and from the Bihar State Sanskrit Education Fund shall be made;

(g) The manner of re-appropriation under section 14;

(h) The manner and form in which accounts of income and expenditure shall be kept;

(i) The manner in which examination and audit of the accounts of the Board shall be made;

(j) The reports, returns and statements to be furnished by the Board and the form of such reports, returns and statements;

(k) The service conditions and appointments of the teachers and other staff of the recognised Sanskrit Schools and tols;

(l) The procedures and conditions of recognition of Sanskrit Schools; and

(m) Any other matter which is required to be prescribed by this Act.

Sub-section (3) of section 22 of the Act further provides that all rules made under this Act shall be laid for not less than fourteen days before the State Legislature as soon as possible after they are made and shall be subject to such modifications as the State Legislature may make during the session in which they are so laid.

3. It is, therefore, apparent that the State Government has been empowered to frame rules providing the procedures and conditions of recognition of Sanskrit schools. Similarly, the Board has been empowered to grant recognition to Sanskrit schools and tols upto Madhyama Standard with the prior approval of the State Government and within the number fixed by the State Government, in accordance with such rules as may be made in this behalf. Obviously, therefore, unless the rules are first framed by the State Government, it will not be possible for the Board to grant recognition to any Sanskrit school, as contemplated by the Act. The second requirement is that such recognition should be granted only after obtaining the prior approval of the State Government.

For the conduct of examination as well as for imparting education in recognised Sanskrit schools and tols it

is imperative that Board must first frame the regulations, It is only by regulation that the syllabi, the courses of studies and the books to be studied in recognised Sanskrit Schools and tols for examinations can be provided. Similarly, the Board must provide by regulation the rates of remuneration to be paid to the paper-setters, moderators, tabulators etc. and others employed in connection with the examination conducted by the Board and the fees to be paid by the candidates for such examination. From a reading of sections 6 and 22 of the Act it follows that education can be imparted in the subject of Sanskrit up to Madhyama standard in accordance with the regulations to be framed by the Board and the examinations have also to be conducted in the manner provides under the regulations. Such education must be imparted to any schools recognised under the Act, meaning thereby the schools recognised by the Board with the prior approval of the State Government in accordance with the rules which must necessarily be framed by the State Government under section 22 of the Act.

4. It is indeed shocking that neither the State Government has framed rules under section 22 of the Act nor has the Board framed the regulations, which it is required to frame under section 6 of the Act. Learned Advocate General appearing on behalf of the State as well as Mr. Ramchandra Jha appearing on behalf of the Board frankly admitted that there are no rules framed by the State

Government under section 22 of the Act nor are there any regulations framed by the Board under section 6 of the Act. Mr. Ramchandra Jha faintly submitted that a regulation has recently been issued by the Chairman of the Board in view of the various objections raised in this batch of writ applications. He submits that the Chairman of the Board is empowered under section 11(4) of the Act to take necessary action when he is satisfied that an emergent situation exists in which it is necessary for him to take such action and that a meeting of the Board is not possible and the Board is not in session. It was submitted that such emergency power must include the power to frame regulations under section 6 of the Act.

In our view, neither the said emergency exists nor there are circumstances to justify the exercise of power under section 11(4) of the Act. Apart from any objection, framing of the regulation by the Chairman of the Board is clearly impermissible and illegal because though he may pass necessary orders in exercise of the powers vested in the Board, such powers must be necessarily exercised in the discharge of executive functions and not in the discharge of powers which are legislative in character. Neither the Board has power to delegate such functions to any member of the Board, nor the Chairman has a right to exercise those powers by himself. We, therefore, ignore the regulations framed by the Chairman of the Board, which has been issued recently during the pendency of these writ applications.

5. The advertisement (Annexure-4) states "that in the examination to be conducted by the Board only students of Government Sanskrit High Schools, the students of 429 taken over Sanskrit High Schools, the students of 223 aided Sanskrit High Schools and the students of 3776 Sanskrit High Schools shall be permitted to appear. So far as 3776 Sanskrit High Schools are concerned, we are informed that their applications for recognition are pending. Mr.Jha, counsel for the Board submitted that recognition has already been accorded to the 3776 private schools so far as the board is concerned. He, however, could not produce any material to justify this statement. No order was shown to us granting such recognition, nor is there any thing to show that prior approval of the State Government was taken. Apart from this, we fail to understand how recognition can be granted in the absence of the rules required to be framed by the Government. We, therefore, reject his submission which is merely a face saving plea. Counsel for the petitioners submitted that many other institutions had also applied for recognition to the Board, and though such applications are pending with the Board, the students of such schools have not been permitted to take the examination. In some cases it is said that in the past the students were permitted to appear, but in terms of the advertisement those students have not been allowed to appear.

6. It is difficult to understand how in the absence of

rules framed by the Government, and the regulations framed by the board, examination can be conducted by the board. Neither the syllabi has been prescribed nor the courses for the studies have been prescribed for different courses upto Madhyama standard. Similarly, the State Government has not framed the rules laying down conditions for grant of recognition to Sanskrit schools. It is quite apparent that only students of recognised schools can be permitted to take the examination, apart from the government and nationalised schools and recognised aided schools.

7. Faced with this predicament, learned Advocate General very fairly suggested that the government must frame the rules within a specified period, and that the applications of all institutions, which have applied for recognition, must also be decided in the light of those rules within a specified period. He stated that he has been instructed by Sri N.K.Agarwal, Secretary, and Sri.S.N.Sahay, Additional Secretary, in the Department of Human Resources, to state that the Government shall frame and publish the necessary rules under section 22 of the Act within three months from today, and that the same shall be published within the same period. He further submitted that all applications made by different schools and institutions shall be considered and decided by the Board/Government within a period of six months from today.

8. When we asked the learned Advocate General to make his submissions on the question whether the students of the petitioner institutions before us should be permitted to take the examination even though the institutions were not recognised, he submitted that in view of large number of decisions of the Supreme Court and this court including the decisions reported in 1992(4) S.C.C. 435 and 1992(1) B.L.J. 712 it would not be proper to permit any student of unrecognised institution to take the examination. We also agree with his submission. Mr. Jha appearing on behalf of the Board submitted that in view of these legal impediments, the Board will abide by any order that this Court may pass having regard to the facts of these cases.

9. In the absence of rules and regulations , which are required to be framed under the Act, holding of examination would be a mere farce and may be counter-productive. There are no recognised institutions under the Act. The Board has not prescribed the syllabi etc., for imparting education in Sanskrit in any recognised institution and other institutions. No procedures has been laid down for the conduct of the examination nor the necessary regulations have been framed with regard to remuneration to examiners etc., which is absolutely essential before an examination can be conducted in accordance with the regulations. In the absence of rules and regulations under the Act, no examination can be conducted in accordance with law, and therefore, we are

compelled to make a direction to the Board not to conduct examination upto Madhyama standard unless the rules and regulations have been framed and necessary action taken, as required by law.

10. In the result, we dispose of this batch of writ applications with a direction to the State Government to frame rules, as contemplated under section 22 of the Act within a period of three months from today. We also direct the Board to frame regulations which, it is required to frame under section 6 of the Act within the same period. After the rules and regulations have been framed and notified, all the applications pending before the Board or the State Government, as the case may be, for grant of recognition, shall be considered and disposed of by a reasoned order within a period of six months from today, which means that the State Government and the Board shall have three months time after framing of the rules and regulations to dispose of all the applications. The Board shall thereafter proceed to hold examination, which, it is required to hold in accordance with the provisions of the Act, rules and regulations.

11. These writ applications are disposed of accordingly. Let a copy of this order be given to the Advocate General and Mr. Ramchandra Jha, counsel for the Board, for immediate communication to the authorities concerned and for compliance.

S.P.J.

Order accordingly.

CIVIL WRIT JURISDICTION**Before S.B.Sinha and A.N.Chaturvedi, JJ.****1993,****May, 21,****Bihar Rajya Adhivakta Sangh & Ors.*****V.****The State of Bihar & Ors.**

Bihar Consolidation of Holdings and Prevention of Fragmentation Act, 1956 (Bihar Act No.XXII of 1956) -- sections 3 and 4A -- ambit of -- Deputy Secretary of Revenue and Land Reforms Department by letter dated 16.7.92 informing the Director of Consolidation to postpone the scheme of Consolidation in the entire State -- Section 3 -- power to cancel a notification, whether confined to section 4A -- No notification under section 4A issued a -- direction of State Government contained in letter dated 18.7.1992 -- whether arbitrary and without jurisdiction.

The Deputy Secretary of Revenue and Land Reforms Department by letter dated 16th July, 1992 informed the Director of Consolidation, Bihar directing him to postpone the scheme of consolidation operation in the entire state

* Civil Writ Jurisdiction, Case No.7237 of 1992. In the matter of an application under Articles 226 and 227 of the Constitution of India.

of Bihar purported to be on the basis of a declaration to that effect made by the Chief Minister on the floor of Legislative Assembly.

From the scheme object and purport of the Bihar Consolidation of Holdings and Prevention of Fragmentation Act, 1956, hereinafter referred to as the Act, it has to be held that the Act is a self contained code providing for creation of new rights and obligations of the parties except in certain cases like adjudicative power on a pure question of title, the decision of the Consolidation authorities is final.

The power of State Government to cancel a notification under section 3 of the Act is confined to section 4A of the Act. No notification under section 4A of the Act has been issued. The impugned letter dated 16.7.1992 is not a notification under section 4A of the Act. The impugned letter also does not conform to the provision of Article 162 of the Constitution. The State acting under the provision of the Act as a statutory authority and it has to act within the four corner corners of the statute.

Held, that the state under its executive power has no jurisdiction to suspend the operation of a legislative act. The same can only be done in exercise of its legislative power.

Held, further, that the directive of the state as reflected in the impugned order dated 17.7.1992 is arbitrary and wholly without jurisdiction.

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.B.Sinha,J.

Mr.Kamal Nayan Choubey , Mr.Balajee Pathak

and Akilesh Kumar Pandey for the petitioners.

G.P-6 and Mr.Ram Balak Mahto, Advocate General for the State.

S.B.Sinha , J: —The petitioners in this application have questioned a letter dated 16th July, 1992 addressed by the Deputy Secretary of the Revenue and Land Reforms Department to the Director Consolidation, Bihar, Patna wherein the addressee has been directed to postpone the scheme of consolidation operation in the entire state of Bihar purported to be on the basis of a declaration to that effect by the Chief Minister on the floor of the Legislative Assembly.

2. The petitioner No.1 is an association of Advocates, generally practicing in the Directorate of Consolidation. The petitioner No.2 is the President of the said Association.

3. Admittedly the Consolidation of Holdings and Prevention of Fragmentation Act, 1956 (hereinafter

referred to as the said Act) has been given effect to by the state of Bihar in a large number of villages.

4. The following chart will demonstrate the extent of the Consolidation scheme undertaken by the State :-

T o t a l District 3 of the Act	Total Anchal u/s 3 of the Act.	T o t a l Villages	Villages Notification u/s 3(i) of the Act.	Area u/s 3	Villages w h e r e scheme u/s 3 has been confirmed
1	2	3	4	5	6
25	180	22,258	16,014	56,083 lakh acre Land	14,826

villages where del ivery of possession took place	Total Village of where has Been prepared	Village Khatian according to chak Khatian.	R.R. Proposed villages u/s 26 A of the Act.	Actual Villages in respect of w h i c h notification u/s 26 A have been issued.
7	8	9	10	11
11,904	11,376	4,060	5,390	4,666

5. From the aforementioned table, it is evident that the consolidation operation was started in the State of Bihar in a large number of villages and in many of them has come to a close.

6. The Chief Minister of the State of Bihar, however, made a statement on the floor of the legislative assembly that the consolidation scheme shall not be given any

further effect in the state.

The aforementioned impugned letter dated 16.7.1992 has been issued pursuant to the aforementioned declaration.

7. In this case a counter affidavit was filed by the Respondents at the stage of admission on 18.8.1992 wherein interalia it has been stated that the implementation of the Consolidation scheme has temporarily been suspended till further decision of the State of Bihar and no final decision had been arrived at.

In the said counter affidavit, it has been stated :

'That many short comings of the consolidation scheme have come in to the knowledge of the State Government and therefore, the State Government has taken this temporary decision of suspension of the consolidation operation for the time being, to enable itself to review the whole matter and take appropriate steps.

That, it was felt that inspite of colossal expenditure the scheme has not given the desired result, and therefore, the Government wants to have full consideration of the matter with open mind with view to identify the short comings of the scheme and to find out ways to overcome the same and to take final decision regarding future course of action in this regard."

7. *Mr.Kamal Nayan Choubey*, the learned Senior Counsel appearing on behalf of the petitioner submitted

that as a large number of notifications under section 3 of the said Act having been issued; the State could not pass the impugned order as the notification made under section 3 could not have been canceled only in terms of section 4A thereof.

It was further submitted that a notification under section 4A can only be issued for the reasons enumerated in Rule 3 of the Bihar Consolidation of Holdings and Prevention of Fragmentation Rules and not otherwise.

8. It was also submitted that the impugned letter dated 16.7.1992 as contained in Annexure-1 to the writ application does not even satisfy the requirements of Articles 162 of the Constitution of India.

9: It has further submitted that in view of the suspension of the consolidation scheme all the adjudicative process with regard to the question of title, preparation of chak and other matters have come to complete stand still resulting in creation of a chaotic situation.

10. It has been submitted that in many cases, as would appear from the figures as noticed hereinbefore, even certificates of transfer have been issued and thus the Holders of such certificates have become the owners of the land covered thereby.

11. The learned Advocate General appearing for the Respondents, on the other hand, submitted that the State

has unfettered power to suspend the operation of the consolidation scheme as a new scheme has to be evolved so as to make the consolidation scheme more effective and beneficial to the public at large.

12. The learned Advocate General when questioned however admitted that no notification under section 4A of the said Act has been issued.

13. Sections 3 and 4A of the said Act which are material for the purpose of this case are reproduced herein below :-

"3. Declaration by the State Government of its intention to make scheme for consolidation of holdings. -(i) with the object job effecting consolidation of holdings for the purpose of better cultivation of lands in any area., the state government may, after such enquiries as it may deem fit, by notification in the official gazette, declare its intention to make a scheme for consolidation of holdings in that area.

(2) The substance of the notification shall be announced by beat of drum in the villages comprised in the notified area and copies of the notification shall be hung up at the offices of all the Gram Panchyats. If any, the police station the offices of the Anchal Adhikaries and collection of rent in such area.

4A. Cancellation of notification under section 3-(i) it shall be lawful for State Government at any time to cancel the notification made under section 3 in respect of the whole or part of the area specified therein.

(2) Where a notification has been canceled in respect of any unit under sub-section (1) such area shall, subject to the final orders relating to the correction of land record, if any, passed on or before the date of such cancellation, cease to be under consolidation operations with effect from the date of the cancellation.)."

14. 'The State of Bihar in exercise of its power conferred upon it under section 40 of the Act has made Rules known as 'Bihar Consolidation of Holding Rules 1958'.

Rule 3 of the said Rules reads thus :-

"3. Cancellation of notification under section 4 of the Act.

The notification made under section 3 of the Act may, among other reasons be cancelled in respect of the whole or any part of the area on one or more of the following grounds, namely :-

(a) the area is under a development scheme of such a nature as completed would render the consolidation inequitable to a section of the peasantry;

(b) the holdings of the village are already consolidated for one reason or the other and the raiyats are generally satisfied with the present position;

(c) the village is so torn up by party factions as to render proper consolidation proceedings in the village very difficult; and

(d) a co-operative society has been formed for carrying out cultivation in the area after pooling all the land of the area for this purpose.

15. Before advertising to the questions raised in this application, a bird's eye view of the scheme of the Act may be noticed.

Section 2 to the said Act contains interpretation clauses defining various words used therein.

Section 3 of the Act provides for power of the State Government to declare its intention to make a scheme for consolidation of holdings in the area by issuing a

notification in the official gazette with the object of effecting consolidation of holdings for the purpose of better cultivation of lands in the area.

Section 4 provides for the effect of a notification under Section 3(1) of the Act.

16. Section 4 of the Act provides for the effect of notification under Clause 3.

17. By reason of Section 4(c) of the aforementioned Act any suit or other legal proceeding abates.

The effect of section 4(c) is very far reaching .

Section 5 of the said Act prohibits transfer of any land after the date of publication of preparation of register of lands and statement of principles under sub - section 1 of Section 10 in the notified area by way of sale, gift exchange of partition without the previous sanction of the consolidation Officer.

Section 6 of the Act provides for procedures for grant of sanction.

18. Section 7 provides constitution of village Advisory Committee and in terms of Section 8 up-to-date records of right are required to be prepared before consolidation. A register of land is to be prepared in terms of Section 9.

19. Section 10(2) enables a person to file petition disputing the correctness and nature of the entries in the

records of right in the statement of principles.

Other sub-section occurring in section 10 provide for the manner in which such objections have to be dealt with and also provide for an appeal against an order passed by the Assistant Consolidation Officer or Consolidation Officer.

20. Procedures have been laid down as to how the draft scheme shall be prepared, published and revised; objections be disposed of, revised draft scheme to be prepared and publication of statement of scheme before the Director Consolidation and other matters. In terms of Section 15 of the said Act, the Consolidation Officer has been empowered to grant to every raiyat to whom a holding has been allotted pursuant to the scheme of consolidation a certificate in the prescribed form containing prescribed particulars.

In terms of Section 16 of the Act a confirmed scheme has to be treated as finally published record of rights.

Section 17A of the Act authorises the Collector to allow the raiyat to enter into such possessions of the new holdings allotted to them.

21. Section 18 of the Act provides for transfer of encumbrances. By reason of section 22 of the Act, no provision of any law for the time being in force, imposing restrictions on, or providing for payment of landlords registration fee for the transfer of any land, shall apply

to transfer involved in carrying out any scheme of consolidation in holdings under the Act.

22. Section 26A of the Act provides for close of the Consolidation operations and mandates the State Government to issue notification as soon as may after fresh maps and records have been prepared and certificates of transfer have been issued' to the under the Scheme.

23. Section 32 of the Act provides that transfer of any lands or fragment contrary to the provisions of this act shall be void.

24. Section 34 of the said Act provides for delegation of power.

Section 35 empowers the Director of Consolidation to call for an examine records of any case or proceeding taken by an authority inferior to him.

Section 37 of the Act expressly bars the jurisdiction of the civil courts. Section 37A of the Act, provides that the authority under the Act shall be deemed to be courts.

25. In terms of Section 37B of the Act, the authorities have the powers and privileges vested in the civil courts in certain matters.

26. In terms *Ram Singashan Pathak Vs. K.P.Sinha* reported in AIR 1989 Patna 29 it has been held ;

"From different provisions of the Act and the Rules

as quoted hereinbefore, it is evident that the Act is a self contained code for the purpose of consolidation of agricultural lands within the State. Section 4(c) and S.37 of the said Act indicate the provisions of the Act alone would provides the forum for determination of all issues raised before the Consolidation Officers excluding the jurisdiction of the Civil court or abatement of the suits pending before it in terms of Section 4(c) thereof has been the subject matter of various decisions of this court and, as such, the same not be discussed once over again."

The court held that the authorities under the said Act are courts within the meaning of Section 3 of the said Act.

27. In *Kalika Kuer Vs. State of Bihar* reported in 1989 PLJR 1203 a Full bench of this court of which I was a member has also held that the Consolidation Authorities are deemed to be 'courts of limited jurisdiction' by a fiction of law.

28. From the scheme, object and purport of the Act, as noticed hereinbefore, it has to be, therefore, held that the said Act is a self contained code providing for creation of new rights and obligations of the parties, except in certain cases as for example an adjudicative power on a pure question of title, the decision of the Consolidation authorities is final.

29. In this view of the matter, there cannot be any

doubt that by reason of abrupt suspension of the entire scheme, the machinery for implementing the same had come to a grinding halt resulting in creation of a chaotic situation. In view of the fact that the provisions of the act are still operative, the litigants are not in a position to ventilate their grievance. Person intending to sail his land cannot do so as there is no machinery to obtain previous permission, therefore.

In cases where adjudication with regard to the right title and interest or possession has been made by some authorities but despite the fact that an appeal or revision is pending against such orders, the same may be utilised in other proceedings e.g. a proceeding under Section 144 and 145 of the Cr.P.C. As the entire machinery whether adjudicative or for implementation of the scheme has come to halt by reason of the impugned order the cases which stood abated in terms of section 4(c) of the Act shall also remain pending for indefinite period inasmuch as such proceedings in relation thereto can be revived only upon issuance of a notification under Section 26A of the Act.

30. There cannot be any doubt whatsoever that the power of the State Government to cancel a notification under Section 3 of the Act is confined only to Section 4A there. Admittedly no notification under section 4A of the Act has been issued. The impugned letter dated 16.7.1992 as contained in Annexure-1 to the writ applica-

tion is not a notification under Section.4A.

The said letter also does not conform to the provision of Article 162. of the Constitution of India. The State acting under the provisions of the Act acts as a statutory authority and thus it has to act within the four corners of the statute. It is well known that a statutory authority must follow the procedures laid down under the statute so as to exercise its jurisdiction or not at all.

31. The State under its executive power has no jurisdiction to suspend the operation of a legislative act. The same can only be done in exercise of its legislative power.

In this case, even a valid executive order has not been passed by the State. The directive of the State as reflected in the order dated 16.7.1992 must thus, be held to be arbitrary and wholly without jurisdiction.

32. An order passed without application of mind and in indecent haste cannot but be deprecated being malafide in law.

33. In this view of the matter the impugned order as contained in Annexure-1 dated 16.7.1992 cannot be sustained.

34. Let a writ of mandamus be issued to the respondents commanding upon the State Government to forbear from giving effect to or acting pursuant

to, or in furtherance of the said letter dated 16.7.1992. As a consequence of the order, all the authorities under the Act are directed to act in terms of the provisions of the said Act and the rules framed thereunder.

35. Before parting with this case, however, we must express our anguish over the fact that such a hasty step was taken to suspend the operation of the Act without understanding the implication thereof and that too in any manner not provided for under Law. It is all the more unfortunate as although the State, has in its counter affidavit, stated that the suspension of the scheme has been made by way of a temporary measure so as to come out with a better scheme, but despite the fact that about 10 months have elapsed, thus so-called better scheme has not yet seen the light of the day.

36. It is difficult to comprehend the role of a welfare State in taking such a hasty measure and then sitting tight over the matter for a long time.

37. For the reasons a forementioned, this application is allowed the impugned order is quashed with costs which is quantified at Rs.2,500/-

A.N.Chaturvedi J

I agree

R.D.

Application allowed



CIVIL WRIT JURISDICTION**Before S.B.Sinha & A.N.Chaturvedi,JJ.****1993****May, 21****Ram Kishore Narain Singh and others.*****V.****The State of Bihar and others.**

Bihar Land Reforms (Fixation of Ceiling Area and Acquisition of Surplus Land) Act, 1961 (Bihar Act no.XII of 1962) section 15, sub-section(1) and subsection (3)--- provisions of -- section 15 sub-section(1)--- notification under, during pendency of an appeal or revision, whether can be issued only with respect to surplus land of land-holder with respect to which there is no claim or dispute --- section 15 sub-section(3) --- ambit of.

Held, that a notification under subsection (1) section 15 of the Bihar Land Reforms (Fixation of Ceiling Area and Acquisition of Surplus Land) Act, 1961, hereinafter referred to as the Act, can only be issued during pendency of an appeal or revision in respect of such of the surplus land of the landholder in respect of which there is no claim or dispute or which is admitted by the land

* Civil Writ Jurisdiction Case Nos. 5248 of 1992 & 8308 of 1991. In the matter of an application under Articles 226 & 227 of the Constitution of India.

C W J.C. 8308/91: Srimati Devi and ors. petrs.

holder to be surplus. Once the state Government or the Collector, as the case may be, comes to know of the fact that any appeal or revision is pending no notification under subsection(1) of section 15 of the Act can be published acquiring surplus land of the landholders. Even if in a case where a notification under subsection (1) of Section 15 of the Act has been published owing to ignorance of pendency of any appeal or revision, or possession of the Surplus land taken by the State or the Collector, the same would be subject to any order passed on appeal or revision.

Sub-section (3) of Section 15 of the Act takes within its sweep of all such cases where possession had been taken over in terms of a notification under sub-section(1) of Section 15 of the Act either during pendency of any appeal or revision or otherwise.

Held, further, that the revisional authorities as also the Collector in the instant cases committed a serious illegality in publishing a notification under sub-section(1) of Section 15 of the Act in view of the fact that at the relevant time revision applications were pending disposal before revisional authorities.

Applications under Articles 226 and 227 of the Constitution.

The facts of the cases material to this report are set out in the

judgment of S.B.Sinha,J.

M/s Surendra Kumar Singh Sr. Advocate &
Kamala Prasad for petitioner in CNJC No
5248 of 1992

M/s Ram Balak Mahto A.G. Hemendra
Prasad Singh S.C. Satyendra Kumar Sinha
J.C. to for the state in both applications.

S.B.Sinha,J :— Both these writ applications involving common questions of law were taken up for hearing together and are being disposed of by this common judgment.

2. The petitioners are landholders..

Ceiling proceeding under the Bihar Land Reforms (Fixation of Ceiling Area & Acquisition of Surplus Land) Act, 1961 (Hereinafter referred to as the said Act) were initiated against them.

3. The fact of the matter involved in both the writ applications may however, be noticed separately.

4. CWJC NO. 8308 of 1991

The petitioners objection under section 10(3) of the said Act as also an appeal preferred therefrom having been dismissed, they filed a revision application before the Member Board of Revenue. The said revision application was admitted on 6.3.1991 and an order of status quo was passed. The hearing of the said Revision

application was concluded before Shri Abhik Ghosh Additional Member, Board of Revenue and the order was reserved but as the learned Additional Member Board of Revenue was transferred, no order was passed therein.

5. The revision application was, thereafter placed before Shri Pancham Lal who directed re-hearing of the matter on 26.8.1991. On the aforementioned date Shri Vijay Kumar Bhagat, Advocate, who was appearing on behalf of the petitioner was not in a position to appear and as such an application for time was filed and the same was allowed, but the respondent No.2 directed that the order of status quo passed on 6.3.1990 shall stand vacated.

6. A notification under Section 15(1) of the Act was, thereafter published, in the district Gazette of Aurangabad on 2.11.1991, which is contained in Annexure-3 to the writ application.

7. The petitioners thereafter filed an application before Respondent No.3 on 8.11.1991 praying therein that steps which were being taken under Section 15 of the Act were illegal and without jurisdiction as the Revision petition was pending before the Board of Revenue. The said application dated 8.11.1991 is contained in Annexure-4 to the writ application.

8. The petitioners, however, stated that in the meanwhile, the respondent No.3 obtained the records of the ceiling case from the Board of Revenue and passed

order on 2.11.91 for notification under section 15(1) of the Act.

9. By an order dated 11.11.1991 the petitioners application dated 8.11.1991 was rejected.

10. The petitioner has filed the aforementioned writ application questioning the aforementioned order dated 26.8.91 passed by the Additional Member Board of Revenue, the notification dated 2.11.1991 under Section 15(1) of the Act as also the order dated 11.11.1991 passed by the respondent No.3.

10. CWJC NO. 5248 of 1992

A land ceiling proceeding was initiated against the petitioner No.1. A draft publication was made in the said proceeding and an objection under Section 10(3) of the Act was filed by the petitioner No.1. The said objection was rejected by an order dated 1.4.1985 by the Collector under the Act as contained in Annexure-1 to the writ application.

11.. An appeal was preferred by the petitioners which was also dismissed by the Collector, Gaya district by an order dated 22.9.1991 as contained in Annexure-2 to the writ application.

12. The petitioners thereafter filed a revision application against the said order before the Board of Revenue which was registered as Revision case No. 158 of 1991.

The petitioners in the said case filed an application for stay before the Additional Member Board of Revenue whereupon a report was called for from the Collector as to whether the lands has been distributed or not.

13. On 20.5.1992 as the report was not received, the case was adjourned to 9.7.1992. An oral prayer for stay was made but instead of passing any order thereupon a reminder was sent to the Collector to send his report within 15 days from the date of the receipt thereof.

14. However, the Collector, Gaya, during pendency of the revision application started taking steps for distribution of the lands of the petitioners and for that purpose a notification under Section 15(1) of the said Act which is contained in Annexure-3 was issued.

15. The petitioners again filed an application on 29.5.92 as contained in Annexure-4 to the writ application for stay of the distribution of the lands but the Additional Member Board of Revenue on 1.6.92 instead of granting stay advanced the hearing of the case from 9.7.92 to 10.6.92. The order sheet dated 11.6.1991 is contained in Annexure-5 to the writ application.

16. On 10.6.92 the matter was not taken up. However, a report dated 18th May, 1992 was received to the effect that the lands have not been distributed.

In the meantime, however, the Additional Collector Land Ceiling directed the Anchal Adhikari, Gurua to take

immediate steps for distribution of the lands in terms of the notification dated 22.5.1992 (Annexure-3).

17. The questions, which, therefore arise for consideration in these applications are:-

(i) Whether any notification under Section 15(1) of the Act can be issued during pendency of an appeal or a revision application?

(ii) Whether the authorities under the Act had any jurisdiction to take possession of the land during pendency of the appeal or a revision application?

18. The said Act was enacted to provide the fixation of Ceiling Restriction on sub-letting and resumption by certain Raiyats for personal cultivation of lands acquisition of the status of Raiyat by certain under-raiyats, and acquisition of surplus land by the State in the State of Bihar and matters connected herewith.

19. In order to consider the questions involved in this application, the scheme of the Act may be noticed. The said Act into force with effect from 19th April, 1962.

20. The land-holder under the Act was previously the specified persons but by reason of the Amending Act of 1972 unit for the said purpose now is the 'family' as defined in Section 2(ee) thereof. The ceiling area has to be determined keeping in view the nature of the land possessed of by the family within the meaning of the provisions thereof.

21. By a general notice the landholder is directed to submit his returns and he is required to do so within

30 days therefrom. A notice has also to be issued to the landholder if no return is filed by him.

22. The Collector under the Act is required to obtain information from the Gram Panchyat and other sources and further steps in the proceedings are to be taken irrespective of the fact as to whether any return has been filed by the landhold or not. The return filed by the landholder is required to be verified by the specified Officers. A draft statement is to be prepared in terms of Section 10(2) of the Act wherein the extent of the land to be retained by the landholder and the extent of the lands to be declared surplus by the State upon acquisition and acquired pursuant thereto, is to be specified. An objection to the draft publication may be made by the landholder which is to be disposed of after giving an opportunity of hearing to him. Thereafter a final publication is made under Section 11(1) of the Act and the copy of the said notification is required to be served upon the landholder.

23. The landholder if dissatisfied with the order passed under Section 10(3) of the Act is entitled to prefer an appeal in terms of Section 30 of the Act read with Rule 48 of the Rules the period of limitation wherefore is 30 days.

24. If the landholder is aggrieved by any order passed by the appellate authority, he may prefer a revision application before the Board of Revenue in terms

of Section 32 of the said Act.

25. The question, which, therefore, arises for consideration is as to whether the State of Bihar and/or Collector of the District is entitled to issue a notification under Sub-section 1 of Section 15 of the Act acquiring the surplus land or not?.

Section 15 of the Act reads thus:-

"Acquisition of surplus Land-(1) The State Government or the Collector of the district specially so empowered in this behalf shall after the statement under sub-section (1) of Section 11 has been finally published and subject to appeal or revisions if any, acquire, the surplus land by publishing in the official Gazette of the District, a notification to the effect that such land is required for a public purpose and such publication shall be conclusive evidence of the notice of the acquisition to the person or persons concerned:

Provided that without awaiting the result of appeal or revision the State Government or the Collectors of the district specially so empowered in this behalf may proceed to acquire such of the surplus land of the landholder in respect of which there is no claim or dispute or which is admitted by the landholder to be surplus:

Provided further that a copy of the notification shall also be sent to the landholder concerned by registered post with acknowledgment due.

(2) On the publication of the notification under Sub-section (1), the land specified in the notification, shall, subject to the provisions of this Act, be deemed to have been acquired for the purposes of this Act and vested in the state free from all encumbrances with effect from the date of the notification and all right, title and interest of all persons claiming interest therein shall, with effect from that date, be deemed to have been extinguished.

(3) Subject to any order made on appeal or revision, the Collector may at any time after the publication of the notification under Sub-section (!) take possession of any land specified in the said notification and may for that purposes use such force as may be necessary.

(4) If the mortgager becomes entitled to recover possessions of the mortgaged land under Section 12 of the Bihar Money Lenders Act, 1974, (Bihar Act XXII of 1975) and the area of such mortgaged land, together with the land, if any, held by him anywhere the State. exceed the ceiling Area, then the provisions of section 18 shall apply there to as if such mortgaged lands were an acquisition under that section and thereafter the land which the mortgagor is not entitled to retain shall be deemed to have been acquired for the purpose of this Act and vested in accordance with sub-section (2)."

26.The said Act was amended by Ordinance No.66 of 1981 which came into force with effect 9.4.1981; by reason where of Sections 2,4, 9, 10,11, 15, 18, 27, 30, 32, 32A, 36, 38 and part IV of the schedule were amended and a new Section 5 was substituted in place of old Section 5 and Section 43A, Section 45B, Section 45 and Section 47 were inserted.

27. By reason of Ordinance No. 182 of 1981 which was promulgated on 12.8.1981 Ordinance No. 66 of 1981 was repealed but all the provisions therein were retained, Thereafter ordinance No. 202 of 1981 was promulgated. The Governor of Bihar again promulgated an Ordinance on 24.1.1982 being Ordinance No.22 of 1982 whereby the provisions of two ordinance aforementioned viz. 66 of 1981 and 202 of 1981 were retained except the fact

that section 32A was thereby further amended.

28. By reason of the said Ordinance No.22 of 1982, Ordinance No.66 of 1981 and ordinance No. 202 of 1981 were repealed.

29. On or about 30.4.1982 the legislature of Bihar, enacted Bihar Act No. 55 of 1982 which was given retrospective effect and retrospective operation with effect from 9th April, 1981 in terms whereof all the provisions as in Ordinance No.22 of 1982 were retained.

30. By reason of Act No. 55 of 1982 extensive amendments have been carried out in section 15 of the Act.

Section 15 of the Act as it stood prior to Act No.55 of 1982 reads thus :-

"Section 15, acquisition of Surplus land-

(1) Subject to the provisions of sub-section (5), the State Government shall, after the final publication of the statement under sub-section (1) of section 11, acquire the surplus land by publishing in the official gazette a notification to the effect that such land is required for a public purpose and such publication shall be conclusive evidence of the notice of the acquisition to the person or persons concerned.

(2) On the publication of the notification under ~~s. 11~~ section (1), the land specified in the notification shall, subject to the provisions of this Act, be deemed to have been acquired for the purpose of this Act and vested in the State free from all encumbrances with effect from the date of the notification and all right, title and interest of all persons claiming interest therein shall, with effect from that date, be deemed to have been extinguished.

(3) On the publication of the notification under sub-section (1) any person claiming interest in the land specified in the notification, may within thirty days of such publication, file a claim before the Collector.

(4) On such claim being filed, the Collector shall, after giving the parties a reasonable opportunity of being heard and adducing evidence, decide the matter and record for the decision.

(5) If any portion of the surplus land in possession of mortgage falls within the ceiling area of the mortgagor, the mortgagor shall redeem the mortgaged land and recover possession thereof within six months from the date of publication of the notification under Sub-section, (1) and if the mortgagee falls to accept the dues or if there is a dispute about the mortgage of the mortgagor shall institute a suit for redemption of the mortgage and recovery of the land before a Civil Court of competent jurisdiction within one year from such date.

(ii) If the mortgage is not redeemed or if not suit is filed within the said period of one year, the Collector shall, after giving the parties to the mortgage an opportunity of showing cause, declare the land to be surplus land, and on such declaration being made, the matter shall be dealt with in the manner, so far as may be provided under section 25.

(6) Subject to the provisions of sub-section (4) and (5) and any order made on appeal or revision, the Collector may, at any time after the publication of the notification under sub-section (1), take possession of any land specified in the said notification and for that purpose use such force may be necessary.

31. From a comparison of provisions of section 15 of the Act as it stood prior to amendment with section 15 as it now stands, it would appear that the scheme of the provisions has under gone a substantive charge.

32. Sub-section 3 of section 15 of the unamended

Act contained an enabling provision, in terms whereof any person claiming interest on any land could file a claims within 30 days from the date of notification. Such a claim was required to be decided in terms of sub Section 4 thereof.

33. Sub-section 6 of Section 15 provided that subject to the provisions of sub-section 4 and 5 and any order made on appeal or revision, the collector may at any time after the publication of the notification under Sub-section (1) take possession of any land specified in the said notification and for that purposes use such force as may be necessary .

34. By reason of Act No. 55 of the 1982 sub-sections 3 to 5 of the sections 5 of the Act were deleted and sub-section 6 of Section 15 were amended by deleting one words, to the provisions of sub-section 4 and 5 after the words subject to and the same was remembered as sub-section 3.

35. Interpretation of Section 15 of the Act prior to its amendment fell for considerations before a division bench of this Court in *Mahant Daya Ram Vs. State of Bihar & Ors.* reported in 1975 BBCJ 667.

S.Sarwar Ali, J speaking for the division Bench held that where appeal or revision has actually been filed, the Collector has to wait till the disposal of the appeal or the revision application.

36. The learned Judge, however observed as follows

:-

" I may however, observe that the landholders would be well advised when they file an appeal or revision to apprise the collector of the factum of filing of the appeal or of revision to avoid unnecessary complications. In view of the above discussion it necessarily follows that where the prepared draft statement has been prematurely published it is not a publication in accordance with the provision of section 11 of the Act. Such a publication cannot bar consideration of an appeal or revision by the competent authorities.

37. The learned judge further held that even if a draft publication is made in terms of Section 11(1) (as it then stood) the same would be subjected to the appeal or revisions.

38. The division bench in paragraph 14 of that judgment considered the effect of sub-section 6 of section 15 of the Act (as it then stood) in the following terms :-

" Now only remains to consider sub-section (6) of section 15 of the Act. This sub-section authorises a Collector at any time after publication of notification under sub-section (1) to take possession of any land specified in the said notification. But this power has been made subject to the provision of sub-section (4) and (5) and any order passed on appeal or revision, it, therefore, follows that where a claim has been filed, the Collector should stay his hands in respect of taking possession of land covered by the claim, pending disposal thereof. He has also to wait for the expiry of periods of appeal or revision before taking further steps. Also where appeals or revisions have been filed, the Collector has to wait till the decision in the appeal or revision. Even if some action is taken during the pendency of the appeal or revision, it would be subject to the result thereof and the right of person ultimately succeeding in his claim cannot be defeated by the mere fact

that possession has been taken of the land in question. It may, however, be clarified that the pendency of the claim requires the Collector to stay his hands only in respect of the claimed portion so far as the other lands are concerned, the Collector shall be entitled to take possession, subject to the limitations as has been explained in relation to section 11(1) of the Act."

39. This view was reiterated by another Division Bench in *Farzan Ali Vs. State of Bihar* reported in 1986 BBCJ 819. By a short judgment, Sarwar Ali, J held :-

" The main grievance of the petitioners at this stage is that during the pendency of the appeal filed by the petitioners steps are being taken for distribution of the lands which have been declared surplus.

It is well settled that the distribution cannot take place while the appeal is pending and in case a revision application is filed the same is not disposed of. In that view of the matter, we direct the lands which have been declared as surplus shall not be disturbed till the time for filing revision or if a revision is filed till the disposal of the revision application. This application is accordingly disposed of."

40. However after amendment the provisions of section 15 came up for consideration before a Division Bench of this court in *Ram Chandra Choudhary Vs. State of Bihar* reported in 1993(1) PLJR 66 wherein the learned Judges observed as follows :-

" There are plethoras of decisions of the court interpreting Sections 11(1) and 15 of the Act laying down categorically that land or any land-holder could be acquired and/or distributed during the pendency of his appeal and/or revision."

41. However, no decision was cited in a support of the said statement nor any reasons therefor has been

assigned.

42. After coming into force of the Act No. 66 of 1982, in terms whereof Sections 11 and 15 were amended; an appeal can be preferred only upon final publication of the statement made under Section 11(1) of the Act. Such appeal can be preferred by the landholder or any other persons aggrieved or to whom notices had been issued. Upon publication of the final statement and not prior there to. In this view of the matter, the question of publication of any notification under Section 11 of the Act subject to any appeal or revision does not arise.

43. It is also now not necessary to inform the Collector about the filing of an appeal, as an appeal normally lies before the Collector who is also the authority to issue a notification under section 15(1) of the said Act.

44. It is now well known that the provision appended to a substantive provisions has to be taken into consideration for the purpose of interpretation of the statute.

In *S.Sundaram Pillai Vs. V.R.Pattabiraman* reported in 1985 S.C.582, the Supreme Court held that a proviso may serve four different purpose, Viz :-

"(1) qualifying or excepting certain provision from the main enactment;

(2) It may entirely change the very concept of the intendment of the enactment by insisting on certain mandatory conditions to be fulfilled in order to made the

enactment workable;

(3) it may be embedded in the Act itself as to become an integral part of the enactment and thus acquire the tenor and colour of the substantive enactment itself; and

(4) it may be used merely to act as an optional addenda to the enactment with the sole object of explaining the real intendment of the statutory provisions."

45. As has been noticed hereinbefore Sub-section 1 of Section 15 of the Act authorises publication of a notification thereunder subject to any appeal or revision. The intention of the legislature in using the words 'subject to appeal or revision' is clear inasmuch as, that a notification should not be published during pendency of appeal or a revision and even if such a notification is published, the same shall be subject to any order that may be passed on appeal or revision.

46. The proviso appended to sub-section 1 of section 15 however makes the intention of the legislature absolutely clear in as if qualifies the power of the State or the Collector to acquire lands in terms of sub-section 1 of Section 15 thereof only in respect of which there is no claim of dispute or which is admitted by the landholder to be surplus. Thus any land which is subject matter of appeal or a revision cannot be acquired in terms of Sub-section 1 of Section 15 of the Act.

47. Proviso appended to sub-section of Section 15

of the Act confers a restrictive power upon the State Government of the Collector. Such a restriction imposed by the statute to acquire a land by reason of an exproprietary legislation must be strictly construed and therefore, in my opinion, it is obligatory on the part of the State or the Collector to exercise its jurisdiction within the four corners of the said proviso. In other words the Collector during pendency of the appeal or revision may issue only a notification acquiring only such land which is not the subject matter any appeal or revision.

48. It, therefore, goes without saying that as soon as an appeal or revision is filed and if the same is brought to the notice of the State Government or the Collector, they are precluded from issuing any notification under Section 15(1) of the Act in relation to subject matter of the said appeal or revision. A fortiori, unless an acquisition of the surplus land is made by publication of a notification under Sub-section 1 of section 15 of the Act, the question of taking possession of such land which have been acquired by the State or the Collector does not arise.

In that sense sub-section 3 of section 15 to some extent may appear to be redundant.

(49). Apparently while enacting Act No. 55 of 1982; in terms whereof original sub-sections 3,4 and 5 of section 15 had been deleted, much attention had not been needed to the words of the amended sub-section

6 (which was re-numbered as sub-section 3) of section 15.

50. However, Sub-section 3 of Sections 15 even now as it stands has its own purpose to serve namely that it enable the Collector to take possession of the land after publication of the notification under sub-section 1, but such taking of possession would be subject to any or revision. It, therefore, may reasonably be construed that even if in a case where inadvertently or otherwise a notification under Section 15(1) of the said Act is issued and a possession of the surplus land is taken in terms of the said notification, the landholder or any other party aggrieved thereby would not be remediless; as possession of such land is taken subject to any order passed in any appeal or revision either by the landholder or any other person interested in the subject matter of the ceiling proceeding, and in the event appeal or revision succeeds, he would be entitled to be restoration of possession thereof.

51. To sum up a notification under Section 15(1) of the Act can only be issued during pendency of an appeal or a revision in respect of such of the surplus land of the landholder in respect of which there is no claim or dispute or which is admitted by the landholder to be surplus. Once the State Government or the Collector, as the case may be, comes to know of the fact that any appeal or revision is pending, no notification under sub-section 1 of section 15 of the said Act can be published acquiring surplus land of the landholders. Even if in a case where a notification

under Sub-section 1 of Section 15 of the Act has been published owing to ignorance of pendency for any appeal or revision, or possession of the surplus land taken by the State or the Collector the same would be subject to any order passed on appeal or revision.

Sub-section 3 of Section 15 takes within the sweep of all such cases where possession had been taken over in terms of notification under sub-section 1 of Section 15 either during pendency of any appeal or revision or otherwise.

52. For the reasons aforementioned, there cannot be any doubt that the revisional authorities as also Collector in both the cases committed a serious illegality in publishing a notification under sub-section 1 of section 15 of the Act in view of the fact at the relevant time revision application were disposal before the revisional authority.

53. These applications are, therefore, allowed and the notification under Section 15(1) of the said Act which are contained in annexure-3 to CWJC No. 5248 of 1992 and Annexure-3 also in CWJC No. 8308 of 1991 are quashed.

54. However, in the facts and circumstances of the case, the petitioner shall be entitled to costs which is quantified at Rs.2,500/- in each of the writ applications.

A.N.Chaturvedi, J.

I agree

R.D.

Application allowed



CIVIL WRIT JURISDICTION**Before S.B.Sinha & A.N.Chaturvedi, JJ.****1993****May, 21****Sitaram Choubey & Ors.*****v.****The State of Bihar & ors.**

Constitution --- articles 226 and 227 --- provisions of --- entries in survey published in 1970 --- writ -- petitioner taking no steps questioning the entries therein ---whether can be challenged by a writ application under articles 226 and 227.

Entries in the survey settlement records of right were published in 1970 and the writ - petitioners did not take any step questioning the entries by filing a proper suit or on an application under the provisions of Bihar Tenancy Act, 1985, or by filing a duly constituted suit in the civil Court.

By reason of an entry in Register II, a person merely becomes entitled to deposit rent.

Cancellation of Jamabandi cannot amount to cancellation of settlement. It is well known that neither payment of rent creates title nor non-payment extinguishes any. An

* Civil writ jurisdiction Case No. 8076 of 1991. In the matter of an application under Articles 226 and 227 of the Constitution of India.

administrative order of mutation passed by the Revenue Authorities is not and cannot be a decision on the question of title.

Held, that this is not a case where this court should exercise its jurisdiction under Articles 226 and 227 of the Constitution.

Case laws discussed.

Application under Article 226 and 227 of the Constitution.

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

M/s. Kamal Nayan Choubey Sr. Advocate
Ashok Kumar Dandey & Arbind Nath Pandey for the petitioner.

M/s. Devendra Kumar Sinha S.C. 4 & Nawal
Kishore Prasad Singh J.C. to Sc 4

S.B.Sinha, J. —This application is directed against an order dated 10.10.1991 passed by the Respondent No.2 as contained in Annexure-7 to the writ application whereby and whereunder the jamabandi standing in the name of the petitioners have been directed to be cancelled.

2. Shortly put the fact of the matter is as follows :-

In the year 1944 the ex-tenure holder allegedly granted settlement of the land in question in favour of the petitioners and issued rent receipts in relation thereto.

3. According to the petitioners they being occupancy raiyats of the village acquired occupancy right in relation to the land in question. After vesting of the State of the ex-tenure holder in the State of Bihar the petitioner's name was entered into register II (annexure - 1) and rent receipts had all along been issued by the State of Bihar.

4. Admittedly revisional survey settlement operation took place in the year 1970 wherein the name of the State of Bihar was entered.

5. It is also accepted that the petitioners did not file any suit under the provisions of Bihar Tenancy Act or any civil suit questioning the aforementioned entry in the revisional survey record of rights.

6. The petitioner however, filed an application for correction of Jamabandi which was allowed purported to be on a consideration that the petitioners had been in possession of thereof and by reason of Annexure-3 to the writ application, fresh Jamabandi was created.

7. Allegedly, however by reason of the order dated 15.4.1991 an exparte order was passed canceling the aforementioned jamabandi.

8. The petitioners filed a writ application in this court being CWJC No.3362 of 1991 and during the pendency

of the said writ application the aforementioned order dated 15.4.1991 was recalled and notice was given to one of the petitioner. The said writ petition is said to be pending but according to Mr. Choubey, the learned counsel appearing on behalf of the petitioner, the same has become infructuous. Thereafter upon hearing the parties, the impugned order dated 10.10.1991 as contained in Annexure - 7 has been passed.

9. Mr. Kamal Nayan Chaoubey, the learned counsel appearing on behalf of the petitioner inter alia submitted that the order of cancellation of jama bandi will have the effect of cancellation of settlement which cannot be done in the absence of the proceeding under section 4(h) of the Bihar Land Reforms Act, 1950.

10. The learned counsel in support of his contention relied upon a decision of this Court in *Harihar Singh Vs. Additional Collector and Ors.* reported in 1978 BBCJ 323 and *Khuru Gope v. Land Reforms Deputy Collector, Jamui*, reported in 1983 PLJR 727.

11. The learned counsel next contended that the State of Bihar, in its counter affidavit has wrongly taken the stand that the land in question having been recorded as Gair Majarua Am Land, could not have been given in settlement by the ex-landlord.

12. According to the learned counsel in view of the decision of this court in *Brij Bhukan Kalwar and others vs. S.D.O. Siwan and others* reported in AIR 1955 Patna

1 even the settlement of the Gair Majarua Am Land is permissible in law.

13. The learned counsel further submitted that the impugned order would have the effect to eject the raiyat which could only be done in terms of section 25 of the Bihar Tenancy Act.

14. It was also submitted that in any event, the entry in the record of rights cannot be considered to be a document to tilt. The learned counsel in this connection has relied upon a decision of this court in *Nand Kumar Rai & Ors. vs. The State of Bihar & others* reported in 1974 PLJR 27.

15. Mr.D.K.Sinha, the learned Standing counsel No.4 appearing on behalf of the state, on the other hand, submitted that the entries having been made in the name of the State of Bihar in the revisional survey settlement records of right the petitioners cannot be said to have been prejudiced by reason of the impugned order.

16. In view of the point involved in this case, it is not necessary to go into all the contentions raised by Mr.Choubey.

In terms of the provisions contained in sub-section 3 of Section 103B, of the Bihar Tenancy Act a strong presumption of correctness of the entry made in the survey settlement records of right arises. Such a presumption is however, rebuttable. Bihar Tenancy Act is

a complete code in itself. It provides for filing of suit and/or application before the competent authorities for correction of the entries made in the survey settlement records of right.

17. Section 106 of the Bihar Tenancy Act and section 108A thereof read thus :-

"106. institution of suit before a Revenue Officer - In proceedings under this part, a suit may be instituted before a Revenue Officer at any time within three months from the date of the certificates of the final publication of the record of rights under sub-section (2) of section 103A of this Act, by presenting a plaint on stamped paper, for the decision of any dispute regarding any entry which a Revenue Officer has made in, or any omission which the said officer has made from the record.

Whether such dispute be between landlord and tenant, or between landlord of the same or of neighbouring estates, or between tenant, and tenants, or as to whether the relationship of landlord and tenant exists, or as to whether land held rent free is properly so held, or as to any other matter;

and Revenue officer shall hear and decide the dispute :

Provided(**) that in any suit under this section the Revenue Officer shall not try an issue which has been or is already, directly and substantially in issue between the same parties, or between parties under whom they or any of them claim, in proceedings for the settlement of rents under the part, where such issue has been tried and decided, or is already being tried, by a Revenue officer under section 105A.

108A. Correction by Collector or Revenue Officer of mistakes in record of rights, In case of discovery of bonafide or material error in record of rights within a period of five years from the date of the certificate of its final publication under subsection(2) of section 103A, the Collector or any Revenue Officer specially empowered by the State Government in this behalf, may , on his own motion, or on an application made

to him within the said period, after holding an inquiry in the prescribed manner, by order in writing direct that such error shall be corrected in the manner specified in the order :

Provided that in respect of record-of-rights, final publication of which took place in the year 1957 or 1958 the said period shall extend till the 31st March, 1965:

Provided further that no such correction shall be made-

(i) Until reasonable notice has been given to the parties concerned to appear and be heard in the matter;

(ii) if a proceeding or suit under any of the sections 105 to 108 (both inclusive) or an appeal under section 109A, affecting such an entry is pending.)"

18. Admittedly the entries in the survey settlement records of right had been finally published as far back as in the year 1970. The petitioner did not take any step questioning the correctness of the said entry either by filing a proper suit or an application under the Bihar Tenancy Act or by filing a duly constituted suit in the civil court.

19. The Mutation authorities while exercising their jurisdiction are normally bound by the entries made in the survey settlement records of right.

20. So far as the matter relating to creation of Jamabandi or cancellation thereof is concerned, the same used to be governed by the executive instructions issued by the State from time to time. Creation of Jamabandi or cancellation thereof has not been done in this case under the provisions of any statute.

21. *In Gobri Singh vs. State of Bihar* reported in AIR

1978 NCC page 88 a division bench of this court has held that orders of mutation are administrative orders and not judicial or quasi-judicial orders.

22. The said decision of the division bench which had a vital bearing on the subject was not even noticed by this court in the subsequent division benches namely, in *Harihar Singh vs. Additional Collector & ors.* reported in 1978 BBCJ 323 and *Khuru Gope vs. Land Reforms Dy. Collector*, reported in 1983 PLJR 727.

23. This aspect of this matter has been considered by one of us in *Depta Tewari vs. State of Bihar* reported in 1987 PLJR 1037 and *Sundari D Devi vs. The State of Bihar & ors.* reported in 1993(1) PLJR 231.

24. This aspect of the matter has again recently been considered by a division bench of this court in CWJC No.4130 of 1992 (*Most Panna Kumari and others vs. The State of Bihar and others*) disposed of on 19.3.1993.

25. By reason of an entry in Register II, a person merely becomes entitled to deposit rent. It is therefore, difficult to comprehend as to how cancellation of jamabandi would amount to cancellation of settlement, as it is well known neither payment of rent creates title nor non-payment extinguishes any.

26. An administrative order of mutation passed by the Revenue Authorities is not and cannot be a decision on the question of title. Such a decision can only be taken by a civil court in a duly constituted civil suit. It is, therefore,

not correct to contend that the effect of the impugned order would be cancellation of settlement by itself resulting in extinguishment of the settlement purported to have been made in favour of the petitioners by the ex-landlord.

27. Mr.Choubey, himself has relied upon a full bench decision of this court in *Nand Kumar Rai & ors. vs. State of Bihar & ors.* reported in 1974 PLJR 27 wherein it has clearly been held that an entry in the records of rights does not create title in favour of any person. If an entry in the records of right is not a document of title, it is, in my opinion, wholly incomprehensible as to how cancellation of jamabandi of the petitioner would amount to creation of title in favour of the State of Bihar and extinguishment thereof so far as the petitioners are concerned.

The question as to whether the petitioners have therefore, derived valid right title in respect of the land in question or not has to be adjudicated upon in a duly constituted civil court.

29. For the reasons aforementioned, in our opinion, this is not a case where this court should exercise its jurisdiction under articles 226 and 227 of the constitution of India.

30. This application is, therefore, dismissed. However, in the facts and circumstances, of the case, there will be no order as to costs.

A.N.Chaturavedi, J:

I Agree.

R.D.

Application dismissed.



CIVIL WRIT JURISDICTION**Before Binod Kumar Roy &****Ram Nandan Prasad, JJ.****1993****June,22.****Umeshwar Prasad Rai and others^{*}****V.****The State of Bihar and others.**

Civil writ Jurisdiction Case No.6929 of 1991 with Civil Writ Jurisdiction Case No.6184 of 1991 with Civil Writ Jurisdiction Case No.6248 of 1991, with Civil Writ Jurisdiction case no.6232 of 1991, with Civil Writ Jurisdiction case No.6254 of 1991, with Civil Writ Jurisdiction Case No.6374 of 1991, with Civil Writ Jurisdiction case No.6344 of 1991 with Civil Writ Jurisdiction case No 6233 of 1991, with Civil Writ Jurisdiction case No 4391 of 1991 with Civil Writ Jurisdiction case No.2710 of 1991. In the matter of applications under Articles 226 and 227 of the Constitution of India.

C.W.J.C.NO.6184/91 .. Manju Kumari And Ors. Petitioners

C.W.J.C.NO.6248/91..Smt.mala Sinha And Another .. Petitioners

C.W.J.C.6232/91 .. Archana Kumari And Ors. Petitioners

C.W.J.C.NO.6254/91 .. Indira Kumari And Others .. Petitioners

C.W.J.C.NO.6374/91.. Ravi Shankar Choudhary And Ors. Petitioners

C.W.J.C. NO.6344/91 ..Shiv Narain Thakur And Ors. Petitioners.

C.W.J.C. NO.6233/91..Sheo Kumar Choudhary And Ors. petitioners

C.W.J.C. NO.4391/92 .. Smt.pratibha Kumari .. PetitionerS

C.W.J.C. NO.8710/92 .. Ravi Shankar Choudhary & Ors.petitioners.

Appointment of Assistant Teachers for Government basic schools -- irregularities found in some of the appointments made on the basis of panel prepared for interview of November, 1989, by a committee, constituted on approval of government, to identify specific irregularities, -- panel of interview of November 1989, canceled -- fresh interview held -- out of 259 candidates appointed earlier only 155 candidates could be appointed in order of merit -- those 155 candidates were entitled to their salary since the date of their first joining and entitled to continuity of service.

On several complaint of irregularities having been committed in appointments made of Assistant Teachers in Government basic schools on the basis of interview held in November, 1989, the special Director Primary Education, Bihar, ordered inquiry to be held by Special Secretary, Department of Human Resources and Development, Govt. of Bihar who held departmental enquiry and found that irregularities had been committed on a large scale. Thereafter notices were served on the writ petitioners and persons similarly situated but only one of them filed show cause. It was found that irregularities had been committed on a large scale which should be identified only after holding reinterview. Consequently, on approval of the Government a committee was constituted to identify specific irregularities in the matter of appointment on whose report the panel prepared on the basis of the interview held in

November 1989, was cancelled and candidates were called upon to appear at fresh interview and out of 259 candidates appointed earlier only 155 had come up in order of merit who were entitled to salary from the date they were appointed.

Held, that the government is competent to pass an order to rectify the irregularity committed in the matter of appointment.

The action of the Government is reasonable and in the interest of the public. If the appointment made on the basis of the interview held in November 1989, is allowed to continue, it would amount to perpetuating the illegality committed in the matter of appointment and would cause injustice to the candidates of superior merit besides other irregularities committed in the matter of appointment. Preparation of panel is a natural consequence of the scrutiny made by the committee, as the committee had identified the irregularity in the preparation of the panel.

Held, further, that the persons who were appointed from the panel prepared on the basis of the interview held in November, 1989 and their names have also been included in the panel on the basis of reinterview shall be entitled for salary from the state of their first joining and their continuity in service shall be maintained.

Case laws discussed.

Applications by the petitioners.

The facts of the cases material to this report are set out in the judgment of R.N.Prasad,J.

M/s.Rajendra Prasad Singh , Sr.Adv.,
Ravindra Kumar, Ram Chandra Bhrati,
Bishun Kant Dubey, Narendra Nath Jha and
M.P.Shukla, Advocate for the petitioner in
C.W.J.C.6029 of 1991.

M/S.Dr.Awadhesh Sharma and Nawal
Kishore Sharma in the petitioners in CWJC
No.6184/91 and 6233 of 1991.

Mr.Pancha Nand Pandit for the petitioner in
C.W.J.C.6248 of 1991.

M/S Dr.Awadhesh Sharma Nawal Kishore
Sharma and Awaheshwar Prasad for the
petitioners in CWJC 6232 of 1991.

M/S Vinod Kumar Sinha and Arun Kumar
Arun for the petitioner in CWJC 6254 of
1991.

Mr.Vinod Kumar Sinha for the petitioner in
CWJC 6344 of 1991.

Mr.Murari Narain Chaudhary for the
petitioner in CWJC 4391 of 1992.

M/S Anisur Rahman, Bishun Kant Dubey

and Mithilesh Kumar Rai for the petitioners in CWJC 8710 of 1992.

Mr.S A Khan, S.C.VII; Mr.Binod Kumar Ambastha and Mr.Subodh Kumar,J.C.to S.C.VII for the state in CWJC 6029 of 1991.

Mr. B.N. Singh, A.A.G. II For The State in CWJC 6184 of 1991, 6232 of 1991 and 6374 of 1991.

Mr.D.N.Yadav,G.P.II for the state in CWJC 6248 of 1991, 6233 of 1991 and 8710 of 1992.

Mr.S R Alam,S.C.VI for the state in CWJC 6254 of 1991 and 6344 of 1991.

Mr.D N.Yadav, G.P.II and I.P.Mandal J.C :
G.P.II for the state in CWJC 4391 of 1992

R.N.Prasad,J. -- As the common question of facts and law are involved in these cases they have been heard together and are being disposed of by this judgment.

2. In all the cases except C.W.J.C.Nos.4391/92 and 8710 of 1992, prayer has been made for quashing the order contained in memo no.709 dated 30th August, 1991, issued under the signature of Director,Primary Education canceling the panel prepared on the basis of interview held in the month of November,1989 for ap-

pointment, and staying the appointments made on the basis of the aforesaid panel after approval of the government and also for quashing the consequential advertisement published in the different daily news papers including daily news paper, name 'Hindustan' dated 5.9.1991 calling upon the candidates, who appeared at the interview held in the month of November 1989 to appear afresh at the interview scheduled to be held from 16.9.1991 to 20.9.1991. Initially in C.W.J.C. no.6029 of 1991 prayer was made for issuance of a direction to the respondents to regularise their services but subsequently prayer was made for quashing the aforesaid order and the advertisement as stated above. In C.W.J.C. No.4391 of 1992 prayer has been made for issuance of a direction to the respondents to publish the result of the interview held in the month of September 1991 and to appoint the petitioner on the post of Assistant Teacher in the government basic schools and during the pendency of the writ application the appointment on the basis of previous panel be kept in abeyance. In CWJC No.8710/92 prayer has been made for issuance of a direction to the respondents to pay arrears of salary for the period they have worked as well as the current salary as has been paid to other similarly situated persons.

3. The case of the petitioners is that the advertisement was published in the different daily news papers including the daily newspaper 'Aaj' dated 7.8.1989 inviting applications for appointment on the post of Assistant

Teacher in the government basic schools from the persons holding minimum qualification of matric trained. The petitioners filed their applications in the prescribed form. They were called for interview and they appeared at the interview held on different dates in the month of November, 1989. After the interview was over a panel was prepared which was approved by the Special Director, Primary Education by letter dated 30.1.1990. The appointment letters were issued to the petitioners in the month of February 1990 and in pursuance thereof they joined their posts in different government basic schools and were paid salary for some time. The payment of their salary was stopped vide letter No. 230 dated 13.5.90 by the Special Director, Primary Education till the completion of the enquiry. Against the aforesaid order of stopping the payment of salary, some of the petitioners filed writ applications including CWJC NO. 855 of 1991 before this court which was disposed of on 9.5.1991 with an observation that the petitioners should file representation before the Director, Primary Education and if such a representation is filed the same shall be disposed of by a reasoned order within a period of three months. In pursuance of the aforesaid order representations were filed and while the matter was pending, the order contained in memo no. 709 dated 30.8.1991 was passed canceling the panel and staying the appointments made on the basis of the aforesaid panel. Consequent to the aforesaid order the advertisement was published in the

different daily newspapers including daily newspapers name 'Hindustan' on 5.9.1991 calling upon the candidates who appeared at the interview held in the month of November, 1989 to appear afresh at the interview. The aforesaid orders and the advertisement are under challenge here.

4. The case of the respondents as disclosed in the counter affidavit is that a large number of complaints of serious irregularities committed in the appointment of Assistant Teachers in the government basic schools were received by the respondents. On receipt of the complaints, as stated above, the special Director, Primary Education issued a direction to stay payment of salary to the newly appointed teachers till the completion of the enquiry vide letter no.230 dated 13.5.1990. The matter was inquired by the Special Secretary, Department of Human Resources and Development under the orders of the government and on enquiry it was found that (1) there were persons having more marks were deprived from being appointed and the persons having lesser marks were appointed (ii) there were persons who had original certificates were not appointed on the pretext that they did not produce the original certificates (iii) the persons who had no requisite qualification even for applying for the post have been appointed and (iv) in the panel there was over writing and manipulation.

5. After enquiry, notices were served to the

petitioners and other similarly situated persons vide letter no.668 dated 6.8.1991 and enquiry report was also given at the time of hearing but only one person , namely, Kabita Kumari filed her show cause stating therein that there is no irregularity in the matter of appointment. On consideration of the entire matters including the show cause and the report of the Regional Deputy director, Darbhanga, it has been found that irregularity has been committed in a large scale in the matter of appointment which could be identified only after holding reinterview and on approval of the government the panel prepared on the basis of the interview held in the month of November 1989 was cancelled and the appointments made on the basis of the aforesaid panel were stayed vide letter no.709 dated 30th August, 1991.

6. To scrutinise and to identify the irregularity in preparation of the panel and appointment, a committee was constituted with the approval of the government and subsequent upon the aforesaid order, advertisement was published in the different daily news papers including the daily news paper "The Hindustan" dated 5.9.1991 calling upon the candidates who appeared at the interview held in the Month of November 1989, to appear afresh at the interview which was to be held from 16.9.1991 to 20.9.1991. The petitioners in C.W.J.C. no. 6029 of 1991 moved this court for stay of the interview as has been published in the daily news paper dated 5.9.1991. The court after hearing the parties refused to stay the reinter-

view scheduled to be held from 16.9.1991 to 20.9.1991 by order dated 13.9.1991 and directed that the committee shall examine only those irregularities which have been mentioned in the order contained in memo no.709 dated 30th August,1991 and shall not evaluate marks afresh and after scrutiny the results shall be kept in abeyance and if fresh panel is prepared no person shall be appointed out of such a panel until further order by this court. The respondents in compliance with the aforesaid order had completed the scrutiny after holding reinterview, as stated above, and panel has also been prepared in order of merit and in accordance with law but the same has not been published as per direction of this court. It has also been pointed out that out of 259 candidates, already appointed, only 155 candidates had come up in order of merit and shall receive payment of salary from the date of their joining. Out of 259 candidates appointed many candidates who were found inferior in merit were appointed and candidates with superior merit were left out. The candidates who did not possess minimum qualification for the post of Assistant Teachers in the government basic schools on the last date of submission of the application form were appointed and 30 candidates did not turn up at the reinterview. In the counter affidavit it has also been stated that there is no illegality in canceling the panel and staying the appointment made vide letter no.709 dated 30 th August of 1991 and the consequential advertisement published for reinterview.

7. Learned counsel for the petitioners submitted that the order contained in memo no.709 dated 30th August,1991 cancelling the panel prepared on the basis of the interview held in the month of November 1989 and staying the appointment made on the basis of the aforesaid panel is illegal and violative of principle of natural justice as they have not been given opportunity of hearing at the time of enquiry made by the special Secretary Human Resources, Development department, government of Bihar and also before passing the order under challenge, on the other hand learned counsel appearing for the respondents submitted that the submission of the counsel for the petitioners is without any substance. According to the learned counsel there was no need of giving opportunity to the petitioners as enquiry by special secretary was an internal enquiry on receipt of several complaints, and the petitioners were given notice to show cause before passing the order under memo no.709 dated 30.8.1991 but they did not choose to file their show cause.

8. The case of the petitioners is that they were given notice to show cause but they could not file their show cause in absence of some papers. The respondents have also asseerted that show cause notice was given to the petitioners and other similarly situated persons vide memo no. 668 dated 6.8.1991 but they did not file any show cause. Only one candidate filed the show cause and after considering the entire matters the order con-

tained in memo no.709 dated 30.8.1991 was passed. It is another thing that the petitioners did not file their show cause but in fact notices were given to them and other similarly situated persons. Their non filing of show cause cannot be said that no notice to show cause was given. It is true that the enquiry by special secretary was made in absence of the petitioners on receipt of serious type of complaints in the matter of appointment but the final order was passed after giving notice to show cause to the petitioners and others. However, learned counsel for the petitioners relied upon a decision in *Kal.Shephard and others vs. Union of India* and others reported in AIR 1988 S.C.686 and in *H.L.Trehan and others vs. Union of India* and others reported in AIR 1989 SC 568 in which it has been held that affected persons should be given predecisional hearing and the post decisional hearing will not cure the defects of not affording pre-decisional hearing. From the facts discussed above, it is obvious that the petitioners and other similarly situated persons were given opportunity to show cause prior to taking decision of canceling the panel and staying the appointments and thus the decisions relied upon by the counsel for the petitioners have no bearing on the facts of the case. Learned counsel also relied upon a decision in *Sharawan Kumar jha vs. State of Bihar* reported in AIR 1991 SC 309 in which it has been held that the notice should be given prior to cancelling the appointment. The aforesaid decision also does not help the petitioners as

the notices were given prior to taking decision of canceling the panel and staying the appointments and thus I am of the view that there is no substance in the submission of the counsel for the petitioners.

9. Learned counsel for the petitioners next submitted that the petitioners appeared at the interview, panel was prepared which was approved by the Special Director, Primary Education and thereafter the petitioners were appointed. They were paid salary for some time and thus the respondents are stopped by principle of promissory estoppel and they cannot cancel the panel and stay the appointments made.

10. The principle of promissory estoppel is an equitable doctrine and does not apply in such cases. The advertisement are published inviting application for appointment and process of selection are made only with a view to select persons of better merit so as to achieve efficiency of work. The law the land does not permit that the persons of inferior merit be appointed and the persons of superior merit ; should be left out. It has been brought to our notice that the persons of inferior merit have been appointed and the persons having superior merit have been left out. The persons who had no requisite qualification even for applying for the post as per the advertisement were also appointed. Some of the persons were deprived of their appointment on the pretext that they did not produce the original certificates

and there was over writing and manipulation in the panel. Equity does not demand that persons of inferior merit should be allowed to continue in service and persons of superior merit should be left out. However, the counsel for the petitioners relied upon a decision in *M/S Motilal Padampat Sugar Mills Co. Ltd. vs. The State of Bihar Pradesh and others* reported in AIR 1979 S.C. in which it has been held that principle job promissory estoppel is an equitable doctrine and if it is shown by the government that, having regard to the facts as they have subsequently transpired, it would be inequitable to hold the Government to keep the promise made by it, the court would not raise equity in favour of the promisee and enforce the promise against the government. It is settled principle that the action of the government should be reasonable and in the interest of public. The action of the Government contrary to the principle cannot be upheld.

11. In the present case if the appointments made are allowed to continue it would result in injustice to the candidates having better merit as they would be deprived of being appointed besides the other irregularities committed in the appointment in a large scale and thus I am of the view that equity is not in favour of the petitioners and there was no promise to appoint the persons of inferior merit. The decision relied upon by the counsel for the petitioners does not come to rescue the petitioner in any manner. Learned counsel also relied a

a decision in *Shri Krishna v. The Kurukshetra University*, Kurukshetra reported in A.I.R. 1976 S.C. in which it has been held that once a candidate allowed to appear at the examination his candidature cannot be withdrawn by the University authorities. The aforesaid decision has no bearing on the service cases. Nothing was brought to our notice that there is any statute which prohibits the government to rectify the illegality/ irregularity committed in the matter of appointment rather it is well established law that government has power to rectify its mistake in the interest of justice. The Government cannot be allowed to act in manner so as to perpetuate the illegality/irregularity. In *C. Channabasavaih and other Vs. State of Mysore and others* reported in A.I.R. 1965 S. C. 1293 relied upon by the counsel for the respondents it has been held that selection of candidate for appointment who had obtained less marks cannot be allowed to sustain. In the present case it has been shown to us that the persons of inferior merit were selected for appointment and the persons having better merits have been left out besides the other irregularities committed in a large scale, as stated above, and thus I am of the view that the decision relied upon by the counsel for the petitioners does not help the petitioners.

12. Learned counsel for the petitioners further submitted that some of the petitioners later on acquired requisite qualification for appointment and subsequently they were allowed to appear at the interview and were

appointed and thus cancellation of their appointment is bad in law on the ground that they had no requisite qualification on the day of filling application. In support of the submission learned counsel for the petitioners relied upon a decision in *Municipal Corporation of Greater Bombay and Others Vs. Dr. Sushil V. Patkar and others* reported in A.I.R. 1991 S. C. 1733 in which it has been held that the candidates who did not possess the requisite qualification on the date of application and was allowed to appear at the interview to show requisite qualification but the candidate failed to produce the certificate even at the time of interview such candidate cannot be allowed to upset the selection made by the Board and his candidature has to be ignored. The aforesaid decision does not lay down the law that application of such persons who had no requisite qualification shall also be entertained or such persons shall have right to be appointed. In the case in hand it appears from the advertisement that applications were invited from those having minimum requisite qualification of matric trained. There is nothing in the advertisement to indicate that application of such persons who had no requisite qualification or had appeared at the training examination shall also be entertained. If that would have been the intention of the respondents to entertain such applications it must have been indicated in the advertisement so as to other candidates who had no requisite qualification/ or had appeared at the training examina

tion could have applied for the post. In this connection reference may be made to a decision in *Birendra Prasad Singh and others vs The State of Bihar and others* reported in 1993 (1) PLJR 206 in which Division Bench of this Court has held that entertaining applications of those persons who had no requisite qualification or had appeared at the training examination is violative of Articles 14 and 16 of the Constitution of India and thus I am the view that the submission of the counsel has no force and the decision relied upon by the petitioners does not help them.

13. Learned counsel for the petitioners also submitted that the Director of Primary Education has no power to cancel the panel and to stay the appointments made on the basis of the interview held in the year 1989. It was also pointed out that the committee constituted by the Director, Primary Education under memo no. 709 dated 30.8.1991 for holding re-interview is not in accordance with the rule.

14. The order contained in memo no. 709 dated 30th August, 1991 no doubt has been issued under the signature of Director, Primary Education but the counsel for the petitioners has over looked the contents of the order. It is apparent from the aforesaid memo that the order canceling the panel, staying the appointments and constituting a committee for re-interview of the candidates who had appeared at the interview held in the

month of november, 1989 was passed only after approval of the government thus it cannot be said that order was passed by the Director, Primary Education. learned counsel for the petitioners, however, did not dispute the authority of the State Government in this regard. Learned Counsel for the respondents also submitted that the aforesaid order has been passed with approval of the government and thus there is no illegality in it. It was also pointed out by the counsel for the respondents that committee has been constituted with approval of the government to scrutinise and identify the specific irregularity committed in the matter of preparation of the panel and appointment in respect of each candidate. There is no violation of any rule in constituting such committee to scrutinise and identify the irregularity in the matter of appointment. The government is competent to pass such an order to rectify the irregularity committed in the matter of appointment. The action of the government is reasonable and in the interest of public. If the appointment made on the basis of interview held in the month of November, 1989 is allowed to continue would amount to perpetuating the illegality committed in the matter of appointment and would cause injustice to the candidates of Superior merits besides the other irregularities committed in the matter of appointment. Preparation of panel is the natural consequences of the scrutiny made by the committee as the committee has not identified the irregularity in preparation panel. It would

be consequential process to prepare a fresh panel in order of merit and in accordance with law. On consideration of the submissions made by the parties it is thus obvious that there is no substance in the submission of the counsel for the petitioners.

15. In view of the findings recorded above I do not find any merit in the writ applications and thus the respondents are directed to publish the panel prepared on the basis of the re-interview held in the month of September, 1991. The respondents are also directed to complete all the process of appointment within a period of five weeks from the date of receipt production of a copy of this judgment.

16. However, it is made clear that the persons, who were appointed from the panel prepared on the basis of the interview held in the month of November, 1989 and their names have also been included in the panel prepared on the basis of the re-interview held in the month of September, 1991 shall be entitled for salary from the date of their first joining and they shall be paid their salary without any delay and their continuity in service shall be maintained.

The petitioners whose names have not been included in the panel prepared on the basis of re-interview and the petitioners whose appointments were not found in accordance with law are not entitled to any relief.

17. In the result, the writ applications are dismissed. However, in the facts and circumstances of the case, there shall be no order as to costs.

Binod Kumar Roy, J.

I agree

R.D.

Application dismissed

CRIMINAL WRIT JURISDICTION**Before Om Prakash, J.****1993****June, 29****Upender Choudhary.*****V.****The State of Bihar & ors.**

Bihar Trade Articles (License Unification) Order, 1984
--- fixing storage limit for cement ---- no notification issued
by the State Government --- prosecution for violation of
the order - -- legality of.

Where no notification was issued by the State
Government fixing storage limit for cement by the 10th
March, 1989;

Held, that the Unification order was not workable and
the prosecution of the petitioner for violation of the
provision of the Unification Order is illegal and bad in the
eye of law as he did not violate any provision of the
unification order.

Thakur Ajay Kumar Singh V. State of Bihar ¹

----- referred

* Criminal writ jurisdiction case No. 119 of 1989. In the matter
of an application under Articles 226 and 227 of the Constitution
of India.

1 (1991) (2)P.L.J.R. 327.

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

**The facts of the case material to this report are
set out the judgment of Om Prakash, J.**

M/s. N.K. Agrawal and A.K.Jain for the
petitioner.

Miss. Shashi Bala Verma, A.P.P. Mr. Prem
Nath Singh A.P.P. for the respondent.

Om Prakash, J. —This is an application under Article 226 and 227 of the Constitution of India for quashing of the criminal proceeding against the petitioner in Tajpur (Pusa) P.S.Case No. 58/89 pending in the Court of Special Judge, Essential Commodities Act, Samastipur.

2. It appears that on 10th March, 1989, Marketing Officer, Samastipur, raided the residential house of petitioner Upendra Choudhary and recovered 220 bags of cement. The petitioner could not produce any licence or any other paper in this connection. Consequently, the entire quantity of cement was seized and F.I.R. was lodged alleging violation of Bihar Trade Articles (Licence Unification) Order, 1984.

Such F.I.R. has given rise to the above criminal case.

3. Learned counsel for the petitioner has submitted that the petitioner has committed no violation of any provision of Bihar Trade Articles (License Unification)

Order, 1984, because no storage limit was fixed by the State Government for cement by the date of occurrence i.e.10th March, 1989.

4. Learned counsel for the State has produced no notification by the State Government showing that any storage or stock limit for cement was fixed on or before the 10th March, 1989. In fact she has not disputed before the court that no storage limit for cement was fixed by the State Government on the date of seizure of the cement from the petitioner's house.

5. In *Thakur Ajay Kumar Singh -v- State of Bihar*, 1991(2) P.L.J.R. 327, 20 bags of cement were found short in the stock by the Marketing Inspector who held inspection of Business premises of Thakur Ajay Kumar Singh. In due course a criminal case was launched against him alleging violation of the terms and conditions of Bihar Trade Articles (License Unification) Order, 1984. Then it was held by a Bench of this Court that when no notification fixing storage limit for cement under Bihar Trade Articles (License Unification) Order, 1984 was fixed on the date of occurrence, prosecution of the cement dealer was not valid.

6. Thus it is clear that no notification was issued by the State Government fixing storage limit for cement by the 10th March, 1989, and the Unification Order was not workable. Hence, in my view, it cannot be held that the petitioner violated any provision of the unification Order.

Apparently, this prosecution for violation of the provision of the Unification Order is illegal and bad in the eye of law.

7. In the result, this application is allowed and the criminal proceeding in Tajpur (Pusa) P.S. Case No. 58/89 pending in the Court of Special Judge, E.C.Act, Samastipur, is hereby quashed.

M.K.C.

Application Allowed



CRIMINAL WRIT JURISDICTION**Before Om Prakash, J.****M/S. Paswan Carrying Corporation.*****V.****The State of Bihar & ors.**

Essential Commodities Act, 1955 (Central Act X of 1955) (as amended by Bihar Act 9 of 1978), Section 6A and Bihar Trade Articles (License Unification Order, 1984 clause 30 --- confiscation proceeding --- when to be initiated --- order initiating confiscation proceeding not showing Collector's satisfaction regarding contravention of order made under section 3 --- effect of --- Commercial Tax Officer --- competency of, to make seizure.

Where the order initiating confiscation proceeding does not show that the essential commodity was seized in pursuance of any order made under section 3 and that the Collector was satisfied that there has been a contravention of the order made under section 3, rather the order shows that the Collector was satisfied that provisions of Bihar Finance Act have been violated which is an offence under the Bihar Finance Act;

Held, that the initiation of confiscation proceeding was illegal an without jurisdiction and as such cannot

* Criminal Writ Jurisdiction Case no.98 of 1989. In the matter of an application under Articles 226 and 227 of the Constitution of India.

legally be sustained.

Where the edible oil was seized by the Commercial Tax Officer, who was not competent to seize the same under the provisions for Bihar Trade Article (License Unification), Order 1984 as Clause 38 of the order containing a list of officer's competent to make search and seizure does not include any officer of the Commercial Tax Department;

Held, further that when the seizure itself is illegal and without jurisdiction no confiscation proceeding can be initiated on the basis of such seizure.

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 Om Prakash, J.

Mr. S.D. Sanjay, Advocate for Petitioner.

Mr. Prem Nath Singh, Addl. P.P.

Om Prakash, J. — This is an application under Articles 226 and 227 of the Constitution of India for quashing initiation of confiscation proceeding in E.C. case no.24 of 1988-89 under section 6A of the Essential Commodities Act (besides a few other reliefs which have not been pressed by the learned counsel for the petitioner before me at the time of hearing)

2. It appears that on 7th December, 1988 a truck of

the petitioner, public carrier, was carrying some edible oils, besides some non-essential commodities, from Ranchi to Patna City. The truck was intercepted by an officer of Commercial Tax Department at Nagla within Malsalami police station, district Patna who detected violation of different provisions of Bihar Finance Act punishable under the said Act. The edible oil in question was seized and ordered to be sold as it was perishable commodity. The Collector, Patna, initiated confiscation proceeding exercising power under section 6A of the Essential Commodities Act.

3. Section 6A of the essential Commodities Act as amended by Bihar Act 9 of 1978 as under :-

6A confiscation of foodgrains, edible oilseeds, edible oils, etc -

(1) "Where any essential commodity is seized in pursuance of an Order made under section 3 in relation thereto, it shall be reported without any reasonable delay to the Collector of the district in which such essential commodity is seized and the Collector may, if he thinks expedient so to do, inspect or cause to be inspected such essential commodity, whether or not the prosecution is instituted for the contravention of such order and the Collector, if satisfied that there has been a contravention of the Order, may Order confiscation of

- (a) the essential commodity so seized;
- (b) any package, covering or receptacle in which such essential commodity is found; and
- (c) any animal, vehicle vessel or other conveyance used in carrying such essential commodity;

Provided that, without prejudice to any action which may

be taken under any other provision of this Act, no foodgrains or edible oilseeds seized in pursuance of an Order made under section 3 in relation thereto from shall, if the seized foodgrains or edible oilseeds have been produced by him, be confiscated under this section."

4. Inviting Court's attention to the above provision of law, learned counsel for the petitioner has submitted that nowhere in his order of initiation confiscation, (Annexure-2), the Collector has stated that the edible oils, the essential commodities, have been seized in pursuance of any order made under section 3 in relation thereto of the Essential Commodities Act nor does such order shows that the Collector was satisfied that there has been a contravention of the order made under section 3 of the Essential Commodities Act. What the impugned order shows is that the Collector was satisfied that provisions of Bihar Finance Act have been violated which is an offence under the Bihar Finance Act.

5. I have looked into the above order with the aid of learned counsel for the State. But it does not appear to contain any statement stating that any order issued under section 3 of the Essential Commodities Act has been violated or he (the Collector) is satisfied that there has been a contravention of any such order.

6. As the learned counsel for the State also has straight forwardly admitted (i) confiscation proceeding under section 6A of the Essential Commodities Act can be initiated only in respect of essential commodities seized in pursuance of an order made under section 3

of the Essential Commodities Act and (ii) the Collector is satisfied that there has been a contravention of any such order.

7. From the above it is quite clear that the confiscation proceeding in question has been initiated illegally and without jurisdiction. I am therefore of opinion that the order of the Collector dated 27.12.88 can not legally be sustained.

8. Learned counsel for the petitioner has further submitted that even if any provision of Bihar Trade Articles (License Unification) Order, 1984, is presumed to have been violated, it cuts notice because on the date of seizure i.e. 7.12.1988 the said unification order was not workable as the State Government had not notified as to which of the cities of the state fall under which of the classes A,B, and C, though the storage limit for the edible oil had been fixed for different classes of cities.

9. Learned counsel for the State has not been shown any notification issued by the State Government classifying different cities of the State into classes A, B and C. In fact, he has frankly submitted that the State Government has not issued any notification as yet classifying the different cities of the State into classes A,B & C. In this view of the matter, when the State Government by a notification has not classified different cities of the State into classes A,B & C, one can not ascertain as to what is the permissible limit of edible oils which he can store

without a licence, Apparently, the above unification order was not workable in respect of edible oils on the date of seizure i.e.7.12.1988.

10. Learned counsel for the petitioner has further submitted that the commercial Tax Officer who seized the edible oils, was not competent to seize the edible oil, under the provisions of Bihar Trade Article (licenses Unification) Order, 1984, or any other order. Clause 30 of the order contains a list of officers competent to make search and seizure, but no officer of the Commercial Tax Department finds place in such list. Learned counsel for the State too frankly submits that no officer of the Commercial Tax Department was empowered to make such seizure on 7.12.1988 in view of clause 30 of the Licenses Unification Order. Apparently, seizure of the edible oils by an officer of the Commercial Tax Department was illegal and without jurisdiction .

11. When the seizure is illegal and without jurisdiction no confiscation proceeding can be initiated on the basis of such seizure. Apparently, the confiscation proceeding initiated by the Collector, Patna, on the basis of Seizure made by an officer of Commercial Tax Department on 7.12.1988 is unsustainable and bad in the eye of law.

12. In view of the above, the writ petition is allowed. The order dated 27 th December, 1988, passed by the Collector, Patna, In E.C. case no.24 of 1988-89 initiating confiscation proceedings exercising power under section

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6A of the Essential Commodities Act (Annexure-2) is hereby quashed.

M.K.C.

Application allowed



APPELLATE CRIMINAL

1993.

July, 6.

S.H.S. Abidi & Lok Nath Prasad, JJ.

Pramod Kumar Kataruka & ors.*

V.

The State of Bihar.

Criminal Trial -- minor accused, tried and convicted under section 396 of the Penal Code along with adult accused ---at the time of order of Sessions Judge, they were below 16 years of age --- at the time of decision of appeal they are more then 21 years and are undergo in imprisonment --- Juvenile Justice Act, 1986, (Central Act LIII of 1986) section 22(2) whether applicable appellants sentenced to fine - section 21(1)(e).

The appellants S and R were convicted under section 396 Penal Code, were minors aged about 13 and 12 years respectively at the time of the occurrence according to the Session Judge who tried these appellants

* Criminal Appeal No. 491 of 1984 with Criminal Appeal No 570 of 1984 With Criminal Appeal No. 584 of 1984, Appeal against the judgment and order passed by the 3rd Additional Sessions Judge, Bhagalpur in Sessions Trial.

Shyam Lal Bhakkar - Appellant in Cr.App. 570/84

Ram Bilas Mandal alias Doman Mandal - Appellant in Cr. App. 584/84

along with other adult accused persons who have been acquitted.

At the time the Session Judge passed the order of conviction and sentence they were below sixteen years of age but at the time of the decision of this appeal they have become major.

Now they have attained the age of more than 21 years. Since this is a case of delinquents undergoing imprisonment which shall be suspended by order granting them bail, they have to be dealt with under section 22(2) of the juvenile Justice Act, herein referred to as the Act.

Held, in the circumstances, in the instant case as Section 21(1)(C) of the Act provides for an order to the juvenile to pay fine if he is over fourteen years of age earns money and since these appellants have faced the ordeal of trial and prosecution and have been in jail, each of them are sentenced to pay a fine of Rs.4000/= which would be recovered and paid to the informant or his successor.

Case laws discussed.

Appeal by the accused.

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

Mr. Hare Krishna Kumar. Mr. Shiya Ram Shahi, Advocate for the applicant.

Mr. Kamta Prasad Gupta, A.P.P. for the second.

S.H.S.Abidi, J. — Appellant, Pramod Kumar Kataruka has been convicted under section 412 of the Indian Penal Code (for short 'IPC') and sentenced to under go rigorous imprisonment for ten years and a fine of Rs.1000/- and in default of payment of fine, sentenced to undergo rigorous imprisonment for one year. Appellants, Shyam Lal Bhakkar and Ram Bilas Mandal alias Doman Mandal have been convicted under section 396 of the IPC and sentenced to undergo rigorous imprisonment for life and a fine of Rs. 1000/- and in default of payment of fine, sentenced to undergo rigorous imprisonment for on year. The other three accused persons (not appellants here) have already been acquitted.

2. On the night between 2/3rd January, 1974, in village Pipranti P.S. Piprainti, district Bhagalpur, a dacoity with murder is said to have been committed in the house of one Kanhaiya Lal Chaumal alias Joshijee who is said to have been murdered. In the morning on 3.1.1974, Jhabarmal, p.w.2 went to the house of Kanhaiya Lal Chaumal alias Joshijee to call him and knocked at the door of his room in which he was sleeping. P.w.2 on getting no response, went to the house of Matadin Khetan, p.w.1 and said to him that Kanhaiya Lal Chaumal alias Joshijee was not opening the door despite the repeated calls and knocks, Upon which, Matadin Khetan

and Jhabarmal p.w.s 1 and 2 also came to the house of Kanhaiyalal Chaumal alias Joshijee and knocked but there was no response. Appellant, Ram Bilas Mandal, a boy servant of Kanhaiya Lal Chaumal alias Joshijee brought a chimta and with its help, the bilias with which the door planks were closed from inside, was removed. They called him several times and shook the body but he was found dead. When the news about his death spread, persons of nearby came and the dead body alongwith the bedding on which he was sleeping, were brought in the verandah of the house. Hazari Lal Cham-mul, the only son of the deceased, was living in Calcutta who on getting news about the death of his father on 3.1.1974 at 2 p.m. got confused on lightning call, the news about the death on 4.1.1974 between 10 and 11 a.m. The dead body of the deceased was taken to Kahalgaon where it was burnt. When Hazarimal Chaumal returned to his house after cremation, he found keys of the iron chest and cellar missing and on enquiries, he came to know that the same had been carried with the dead body and bedding to the cremation ghat. The Dom who had received the bedding at the time of the cremation of the dead body of Kanhaiyalal Chaumal alias Joshijee, however, returned the keys which he handed over to the messenger and then Hazarilal Chaumal, got the keys. After staying for some days and performing shradh etc., when Hazari Lal Chaumal opened the iron chest and cellar, he found that the valuables which were

kept therein, were missing. He checked the locker at Bhagalpur where also, he found nothing. Hazari Lal Chaumul then went away to Calcutta.

3. Appellant, Shyam Lal Bahadur went to Damodar Lal Khetan on 14.2.1974 and told him that in the night of 2/3 of January, 1974 when Kanhaiyalal Chaumul, the deceased, went to sleep in his room and his insane daughter also fell asleep in the adjoining room, then at about 8.30 p.m. appellant Ram Bilas Nandan alias Doman Mandal, accused Pawan Kumar Kataruka (since acquitted and another accused, name, Dinesh (since acquitted and two other acquitted accused Baleshwar Roy and Ashok Kumar and he himself were sitting. Appellant Ram Bilas Mandal informed them that Kanhaiyalal Chaumul had gone to sleep and the accused persons had entered into his house, opened the bilias of the door with the help of chimta provided by appellant Ram Bilas Mandal and caught hold of Kanhaiya Lal Chaumul who was sleeping. Appellant, Pawan Kumar (Acquitted accused and Dinesh (since deceased) sat on his chest and demanded the keys of the iron chest and cellar from him and when he tried to raise alarm, Dinesh threatened him saying that he will be strangulated if he raised alarm. Then the deceased parted with the keys. Since the deceased had identified the appellants, they thought that he should not be left alive so, they decided to kill him. Ram Bilas Mandal brought a rope and Pawan Kumar Sharma put the rope on his neck and strangulated

him to death. At the time of his strangulation, Kanhaiya Lal Chaumul was caught hold by Ashok Kumar Kataruka by legs and Baleshwar Roy by hands. With the help of the keys, Pawan Kumar Sharma opened the iron chest and cellar took articles and then the accused persons escaped. In order to give it the colour of death in sleep, appellants Ram Bilas Mandal removed the bedding on which he was sleeping and strangled him to death and placed the same by fresh one. The accused persons removed all the traces of oozing of blood from nose and mouth and thereafter, the room was relocked by using bilias with chimta. Damodar Lal Khetan, p.w.11 took appellant Shyam Lal Bhakkar to gaddi of Ramdeo Lal Tulsian, the Mukhiya of local gram Panchayat, where besides him, Matadin Khetan, Madan Lal Khetan, Shankar Lal Khetan, Jhabarmal Kannodia(p.ws.1,6,10 and 2) respectively) and one Sree Lal Khetan, were also present. Damodar Lal Khetan said to them that in fact, Kanhaiya Lal Chaumul did not die of natural death rather, he was killed and asked them to hear the entire story from the mouth of appellant, Shyam Lal Bhakkar who narrated the entire occurrence as to how Ram Bilas Mandal had come and told about the details of the occurrence as said above. People assembled there at the gaddi of Ramdeo Lal Tulsian where Shyam Lal Bhakkar was asked to gave details of the occurrence which he wrote in his own pen and put his signature thereon. This extra judicial confession was heard by the persons

present at the gaddi on coming to know about the participation of the other accused persons, Ramdeo Lal Tulsian and others went in search of other accused persons, Pramod Kumar Kataruka and one Sk Israil. When confronted to the truth, Tulsian and others had gone to Shyam Lal Bhakkar and Pramod Kumar who disclosed that he had taken the golden ganpatia and a sum of Rs.110/- after some time before Ramdeo Lal Tulsian and P.w.s6, 11 and other persons at the Gaddi. Upon this, Tulsian took charge of the golden ganpatia and cash of Rs.110/- produced by Pramod Kumar Kataruka and it was given to p.w.s Madan Lal Khetan for safe custody. Then Tulsian and others decided to inform Hazari Lal Chaumul at Calcutta and sent one Jai Kumar Khetan to inform. Hazari Lal Chaumul confronted his servant who had gone to Calcutta with Hazarilal and was living there, Ram Bilas Mandal with the facts. Appellant Ram Bilas Mandal expressed his repent and confirmed that Kanhaiya Lal Chaumul alias Joshijee has been murdered and the valuables have been stolen away. It was on 17.2.1974 that Hazari Lal Chaumul p.w.4 returned to Piprainti alongwith Shankar Lal Khetan , p.w.5 and Jai Kumar Khetan and identified the golden ganpatia belonging to him which was presented to his wife by his father at the time of his marriage. Accused Pramod Kumar Sharma was a relation and so, Hazarilal Chaumul contacted his (Pramod's) father, Jagdish Kumar Khetan about his son but he could not contact either Jagdish or

his son at Bhagalpur. Hazarilal Chaumul then returned to Piprainti Bazar where on 17.2.1974, he gave a written report(ext.14) about 11 in the night and handed over the golden ganpatia and cash of Rs.110/- to the officer-in-charge of Piprainti Police station who then registered the first information report.

4. The learned Sessions Judge, after considering the entire materials on record, convicted and sentenced the three appellants and acquitted three other accused persons as said above.

5.The three appeals were heard by a bench of this court consisting of brother P.S.Mishra, J and myself and found the appellants Ram Bilas Mandal Shyam Lal Bhakkar guilty of the offence and also appellant, Pramod Kumar Kataruka was found entitled to get benefit of doubt. The bench, however, as regards the sentence of the said two appellants, Shyam Lal Bhakkar and Ram Bilas Mandal,referred the matter to a larger bench as to how far the provisions of the Juvenile Justice Act are applicable to the case of the two appellants who claimed to juvenile at the time of trial.

6. A full bench of this court, in the case of *Krishna Bhagwan V. State of Bihar*, reported in 1989 PLJR 507, has held that the trials and appeals pending before enforcement of this Act are to be determined in accordance with the Code of Criminal Procedure till the determination of the guilt and that the claim of being juvenile

at the time of occurrence can be raised for the first time at the appellate stage before the High Court and the High Court shall proceed with the hearing if the order of the lower court is affirmed and a finding on section 32 should be called from the court below and further for the determination of the age if in dispute, the courts should get the accused examined by a medical board and determine the age on the basis of the material on record including the opinion of the medical board. After the decision of the Full Bench, these appeals have come for hearing before us.

7. The learned counsel for the appellants has not disputed the findings of the Division Bench recorded earlier holding the appellants guilty of the offenses but he has raised the following points saying that the whole trial of the juvenile is vitiated in law as the juvenile has been tried with the adults. He has referred to a decision in the case of *Gopinath Ghosh v. the State of West Bengal*.¹ The next contention was that if the appellate court comes to the conclusion that the juvenile is guilty of the offences committed, then the entire matter should be remitted to the Juvenile Justice Court for recording the sentence in view of sections 21 and 22 of the Juvenile Justice Act (hereinafter to be referred as J.J.Act).

8. This J.J. Act has come into force on 1.12.1986 vide notification dated 12.8.1986 Before this Act, some

¹ (1984) A.I.R.(S.C.)237

States have got their own Children Act, and here was Bihar Children Act. In the case of *Gopinath Ghosh vs. State of West Bengal*, (Supra) which arose under the provisions of West Bengal Children Act, it was observed at pages 240 and 241 (in paragraphs 9,11,12,13 and 14) as follows:-

9." It clearly transpires from a combined reading of the sections hereinbefore extracted that where a juvenile delinquent is arrested, he/she has to be produced before a juvenile court and if no juvenile court is established for the area, amongst others, the court of session will have powers of a juvenile court. Such a juvenile delinquent ordinarily has to be released on bail irrespective of the nature of the offence alleged to have been committed unless it is shown that there appears a reasonable grounds for believing that the release is likely to bring him under the influence of any criminal or expose him to moral danger or defeat the ends of justice. Section 25 forbids any trial of a juvenile delinquent and only an inquiry can be held in accordance with the provisions of the code of Criminal Procedure for the trial of a summons case and the bar of section 24 which he been given overriding effect as it opens with the non obstinate clause takes away the power of the court to impose a sentence of imprisonment unless the case falls under the provisio."

11. "The report of the learned Additional Sessions Judge is self evident. It is unquestionably established on

unassailable evidence that on August 19, 1974, the date of the offence, appellant was aged 16 and 17 years. He was, therefore, a juvenile delinquent. Obviously, the learned Magistrate could not have committed his case to the court of sessions. Only an enquiry could have been held against him as provided in section 25 of the Act and unless the case of the appellant falls within the proviso to section 24(2), he could not be sentenced to suffer imprisonment. Therefore, the entire trial of the appellant is without jurisdiction and is vitiated. Therefore, the conviction of the appellant for having committed an offence under section 302 I.P.C. and sentence for imprisonment for life imposed by the learned Additional Sessions Judge and confirmed by the High Court are unsustainable and they must be set aside."

12. "The next question is : what should be the sequel to our decision : The appellant has been in prison for some years. But neither his antecedents nor the background of his family are before us. It is difficult for us to gauge how the juvenile court would have dealt with him. Therefore, we direct that the appellant be released on bail forthwith by the learned Additional Sessions Judge, Nadia. The case is remitted to the learned Magistrate for proceeding further in accordance with law keeping in view the provisions of the Act."

13 : " xx We are of the opinion that whenever a case is brought before the Magistrate and the accused ap-

appears to be aged 21 years or below before proceeding with the trial or undertaking an enquiry, an inquiry must be made about the age of the accused on the date of occurrence. This ought to be more so where special Acts dealing with Juvenile delinquent are in force, If necessary, The Magistrate may refer the accused to the Medical Board or the Civil Surgeon, as the case may be, for obtaining credit worthy evidence about age. The Magistrate may as well call upon accused also to lead evidence about his age. Therefore, the learned Magistrate may proceed in accordance with law. This procedure, if properly followed, would avoid a journey up to the Apex Court and the return journey to the grass-root court. If necessary and found expedient, the High Court may on its administrative side issue necessary instructions to cope with the situation here in indicated ."

14: "The appeal for the reason herein indicated is allowed and the conviction of the appellant for an offence under Sec.302 IPC and sentence of imprisonment for life imposed by the learned Additional Sessions Judge and confirmed by the High Court are set aside and the case is remitted to learned Magistrate for disposal according in law."

9. After the enforcement of J.J Act. of 1986, all the children Acts stood repealed as said by Section 63 of the J.J. Act which reads as under :

63: " Repeal and savings - If, immediately before the date

on which this Act comes into force in any State, there is in force in that State, any law corresponding to this Act, that law shall stand repealed on the said date :

Provided that the repeal shall not effect -

(a) the previous operation of any law so repealed or any thing duly done or suffered thereunder; or

(b) any right, privilege, obligation or liability acquired accrued or incurred under any law so repealed; or

(c) any penalty for failure or punishment incurred in respect of any offence committed against any law so repealed or

(d) any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, penalty forfeiture or punishment as aforesaid ;

and any such investigation, legal proceeding or remedy may be instituted, continued or enforced and any such penalty forfeiture or punishment may be imposed, as if this Act had not been passed."

Now, the J.J. Act is in force Section 3 of the J.J. Act reads as follows : " Continuation of inquiry in respect of juvenile who has ceased to be a juvenile. "Where an inquiry has been initiated against a juvenile and during the course of such inquiry the juvenile ceases to be such, then, notwithstanding any thing contained in this Act or in any other laws for the time being in force, inquiry may be continued and orders may be made in respect of such person as if such person had continued to be a juvenile" Section 7 of the Juvenile Justice Act provides about power of Board and Juvenile Court and sub-section (3) of Section 7 says that the powers conferred on the Board or juvenile Court by or under this Act may

also be exercised by the High Court and the court of Sessions, when the proceeding come before them in appeal, revision or otherwise." Thus when conviction has already been recorded after due trial in accordance with law and the matter is pending in the High Court or Sessions Court, then High Court or the court of Sessions will exercise same powers as a Juvenile Court. Section 26 of the JJ Act makes provision in respect of pending cases in the following words: "Notwithstanding anything contained in this Act, all proceedings in respect of a juvenile pending in any court in any area on the date on which this Act comes into force in that area, shall be continued in that court as if this Act had not been passed and if the court finds that the Juvenile has committed an offence, it shall record such finding and instead of passing any sentence in respect of the juvenile, forward the juvenile to the juvenile court which shall pass orders in respect of that juvenile in accordance with the provisions of this Act as if it had been satisfied on inquiry under this Act that the juvenile has committed the offence." The full bench, in the case of *Krishna Bhagwan v. State of Bihar* (Supra) has dealt with the aspect of section 26 at page 517 (paras 13 and 14) in the following word :

13." xxx The expression 'Court' in section 26 of the Juvenile Act has to be read to mean courts other than Juvenile Courts otherwise the very purpose of saying that proceedings in respect of a juvenile pending in any court

on the date of the Act came in force shall be continued in that court as if this Act had not been passed shall be frustrated. The result will be that on the date the juvenile Act came in force all proceedings pending before Magistrate, Court of Sessions as well as this court have to proceed as if the Act has not been passed. But as the second part of that very section again makes the provisions of that Act applicable no sooner the finding is recorded in respect of a juvenile that he has committed the offence for which he has been charged and requires such courts to forward the delinquent juveniles to the Juvenile Courts which shall pass orders in accordance with the provisions of the Juvenile Act, such courts have to forward the delinquent juvenile to juvenile Courts after recording finding of guilt."

14: "It was pointed out that the proviso to section 63 of the Juvenile Act says that inspite of repeal of the different corresponding Acts framed by the different states, any right, privilege, obligation or liability acquired can be enforced in spite of such appeal and as such the privilege provided to the children under the Children Act for offences committed by them being enquired into by the Children's Court can be enforced even after coming into force of the Juvenile Act. It need not be pointed out that when first part of section 26 says that notwithstanding anything contained in that Act, all court shall be continued in that court as if that Act had not been passed, as a necessary corollary it has to be held that

even section 63 of the Juvenile Act shall be deemed to be not in force so far the pending proceedings are concerned upto the stage of determination of the guilt of such juvenile. All such provisions shall become applicable in different proceedings only after the courts concerned record findings in respect of the charges levelled against juveniles in question. In such a situation, it has to be held that trials including appeals which were pending on the date of the Juvenile Act came in force upto determination of the guilt of the juvenile concerned, have to proceed in accordance with the Code of Criminal Procedure."

10. As regards the question of plea of being a juvenile being raised for the first time in the High Court and so, the whole trial becoming illegal and without jurisdiction, the said Full Bench of this Court has dealt with this aspects at page 518 (para 15) in the following words :

"The next question is ask to what procedure should be followed where a child within the meaning of Children Act has been tried and convicted by ordinary Criminal Court and the plea regarding bar of his trial by the ordinary Criminal Court is taken for the first time at the appellate stage. The normal rule is that a plea unless it goes to the very root of the jurisdiction should not be allowed to be taken at the appellate stage especially when it requires the investigation of fact. But the Supreme

Court in the case of *Gopinath Ghosh Vs. The state of West Bengal* (AIR 1984 Supreme Court 237), while allowing the plea that the accused in question was a child and as such he should not have been tried and convicted by ordinary Criminal Court, being taken before the Supreme Court for the first time, observed as follows :

"Unfortunately, in this case, appellant Gopinath Ghosh never questioned the jurisdiction of the sessions court, which tried him for the offence of murder, even the appellant had given his age as 20 years when questioned by the learned Additional Sessions Judge. Neither the appellant nor his learned counsel appearing before the learned Additional Sessions Judge as well as at the hearing of his appeal in the High Court ever questioned the jurisdiction of the trial court ever contended that he was a juvenile delinquent within the meaning of the Act, and, therefore, the court had no jurisdiction to try him, as well as to suffer imprisonment for life. It was for the first time that this contention was raised before this court. However, in view of the underlying intendment and beneficial provision of the Act read with clause (f) of Article 39 of the Constitution which provides that the State shall direct its policy towards securing that children are given opportunities and facilities to develop in a healthy manner and in condition of freedom and dignity and that childhood and youth are protected against exploitation and against the moral and material abandonment, we consider it proper not to allow a technical

contention that this contention is being raised in this court for the first time to toward benefit of the provisions being extended to the appellant, if he was otherwise entitled to it."

Thereafter the conviction under section 302 of the Penal Code and sentence of imprisonment for life imposed against the accused in question was set aside and the case was remitted to the learned Magistrate for disposal in accordance with law i.e. in accordance with the West Bengal Children Act. As such it has to be held that a plea that the accused in question was a child within the meaning of the Act can be entertained at the appellate stage."

(10-A) Section 22 of the Act says that notwithstanding anything to the contrary contained in any other law for the time being in force, no delinquent juvenile shall be sentenced to death or imprisonment or committed to prison in default of payment of fine or in default of furnishing security. So sentence of imprisonment for life cannot be passed upon a juvenile. After the inquiry of Juvenile Courts recording the juvenile delinquents, the court has to pass orders in respect of a juvenile as it may deem fit as contained in section 21 of the Act.

11. Thus in respect of the cases pending from before enforcement of the Act as provided under section 26 of the Act, the court will proceed in accordance with law as if the Act has not been passed and it shall record only

a finding but will not pass any sentence in respect of a juvenile and then will forward the juvenile to the juvenile court who will pass orders in respect of that juvenile in accordance with this Act as it has been satisfied on inquiry under this act that the juvenile had committed the offence. So it is clear that those cases which were pending from before the enforcement of the Act in the trial Court, sessions court or in the High Court, they will be dealt with in accordance with the Code of Criminal Procedure and as if the Act has not come into force. They will record a finding about the guilt of the accused but no sentence will be passed and the delinquent will be forwarded to the Juvenile Court for being dealt with under the Juvenile Act. The Full Bench in the case of *Krishna Bhagwan V. State of Bihar* (Supra) has observed at page 517 (para 13) as follows :

"The effect of a section having a non-obstinate clause on the other provisions of the same Act is 'of setting at naught and of obliterating' such other provisions. As such to give the first part of section 26 of the Juvenile Act its full effect it has to be held that provisions of the children Act of Juvenile Act in respect of enquiry into the charges leveled against a child/juvenile shall be deemed to have been obliterated so far the trials which were pending on the date of Juvenile Act came in force. Such provisions shall revive and become applicable only after the finding regarding the guilt of such delinquent child/juvenile is recorded by the Court which shall also

include the High Court."

12. Thus, in this case, the trial court and also the Sessions Court could record a finding about the guilt of the accused which has been done and appellants , Shyam Lal Bhakkar and Ram Bilas Mandal alias Doman Mandal. have been found guilty of the offence under section 396 IPC and appellant, Pramod Kumar Kataruka has been given benefit of doubt and three accused persons (not appellants here) have been acquitted by the learned Sessions Judge. It has been said that the two appellants were juveniles on 2/3.1.1974 when the occurrence took place and at the relevant time, they are said to be the juveniles on 3.7.1980, appellants Shyam Lal Bhakkar and Ram Bilas Mandal alias Doman Mandal had been examined under section 313 of the Code of Criminal Procedure and their ages had been given as 22/23 years and 20/22 years respectively. The learned trial court, in the judgment dated 23.6.1984, has given out their ages as 22-23 years. So , at the time of the occurrence on 2/3.1.1974, they were minors aged about 13 and 12 years respectively according to the learned Sessions Judge. So, from these too, it appears that they were minors. These ages have not been disputed at any time. Section 32 of the Act runs as under :"(1) where it appears to a competent authority that a person brought before it under any of the provisions of this (otherwise than for the purpose of giving evidence) is a juvenile, the competent authority shall make due inquiry as to the age

of that person and for that purpose shall take such evidences as may be necessary and shall record a finding whether the person is a juvenile or not, stating his age as nearly as may be and (2) No order of a competent authority shall be deemed to have become invalid merely by any subsequent proof that the person in respect of whom the order has been made is not a juvenile, and the age recorded by the competent authority to be the age of the person so brought before it shall, for the purpose of this Act, be deemed to be the true age of that person."The Full Bench of this Court, in the case of *Krishna Bhagwan V. State of Bihar*(*Supra*), in which the conviction and sentence was passed against the appellant when the juvenile act was not enforced, has said on this aspect of the matter at page 520 (para 16) as follows :

"So far the present appeal is concerned when the conviction and sentence was passed against the appellant, the Juvenile Act was not in force but during the pendency of the appeal before this Court, Section 26 of the Act has become applicable. In view of section 26, this Court has to examine the findings recorded by the court below regarding the guilt of the appellant. If the findings recorded by the Court below that the charges leveled against the appellant have been established is affirmed by this Court, then it has to consider whether a prima facie case has been made out that appellant was a child within the meaning of the Children Act. If this

Court is not satisfied, on the materials on record, the appeal has to be dismissed. However, if this Court is of the opinion that the accused concerned may be a child on the date of the commission of the offence, it has to direct enquiry in accordance with section 32 of the Act. If the finding of the Juvenile Court is in favour of the accused and this Court accepts that finding, it has no option but to forward the records to the Juvenile Court for passing orders in terms of sections 21 and 22 of the Act. As the applicability of the provisions of the two acts are dependent on the age of the accused on the date of the commission of the offence, this Court as well as the Juvenile Court have to be cautious while recording the finding on that question, so that persons found guilty of committing offenses which are shocking to the conscience of the Court do not escape punishment by getting themselves declared as children/juveniles on the basis of certificates. It need not be pointed out that when the framers of the Act thought of extending special privilege and protection to delinquent juveniles who are of immature mind and misguided, it was never intended that benefits of such provisions should be derived by other accused persons through procured medical or school certificates. As such, in my view, enquiry under section 32 must be held in its real spirit.'

So, if the matter about the age had been in dispute then the case could have been referred to the Medical Board for further enquiry which in this case does not

appear to be necessitated and it is held that the two appellants were juveniles at the relevant time.

13. Now, the question arose that how these two appellants should be dealt with. Sections 21 and 22 of the JJ Act deals about the orders that may be passed regarding delinquent juveniles and the orders that cannot be passed against delinquent juveniles. Sub- clause (a) of section 21 of the Act allows the juvenile to go home after advice or admonition, (b) direct the juvenile to be released on probation of good conduct and placed under the care of any parent, guardian or other fit person, or such parent, guardian or other fit person executing a bond, with or without surety as that court may require, for the good behaviour and well-being of the juvenile for any period not exceeding three years, (d) make an order directing the juvenile to be sent to a special home for a boy or girl of 14 or 16 years for a period of three years and in case of other juvenile for the period until he ceases to be a juvenile and for that period the juvenile court has got power to reduce the period of stay and to extend the period of such stay. But no extension till the boy attains the age of 18 and girl 20 years, (e) order the juvenile to pay a fine if he is over fourteen years of age and earns money. Sub-section (2) of section 22 of the Act says that an order under section 21 clauses (b), (c) and (e) may be passed for keeping the delinquent under the supervision of probation officer for a period not exceeding three years and under such supervision may

also impose such conditions as it thinks fit and such order can be withdrawn if the delinquent has not been of good behaviour or the institution to which he was sent who was not prepared to keep him and so, he may be sent to a special home. Section 22 of the Act prohibits the award of sentence of death imprisonment to a delinquent but where a juvenile has attained the age of 14 years and the court is satisfied of the offence or the conduct or behaviour was such that he should not be kept in special home and no other measure provided under the Act are suitable, then juvenile court may order the delinquent to be kept in safe custody in such place and manner as it thinks fit and proper and the State Government may, in its turn, make such arrangements in respect of the juvenile as it may think proper and may order such delinquent to be detained at such place and on such conditions as it thinks fit. But the period of imprisonment to which the juvenile could have been sentenced for the offence committed.

14. The Full Bench of this Court has dealt with the aspect of the matter at page 514 (para 12) and following the provisions of section 5 of the Children Act referring to proviso to subsection (2) of section 22 of the Act, it has been held :

"The period of detention so ordered shall not exceed the maximum period of imprisonment to which the child could have been sentenced for the offence committed."

"However, no period of detention has been prescribed in any of the sections of the Children Act/Juvenile Act. Proviso to subsection(2) of section 22 of both Acts simply put an outer limit saying that maximum period of detention shall not exceed the maximum period of imprisonment to which the child/juvenile, could have been sentenced for the offence committed. In view of the aforesaid proviso it can be urged that the framers of the Act have put an out limit for the period of imprisonment provided in any enactment including the Indian Penal Code. In other words, a children's court /Juvenile Court can order detention at a place to be fixed by the state Government for any period like ten to fourteen years, as the case may be, with reference to the nature of the offence committed by the child/juvenile in question. But the difficulty is, in view of section 5 of the children Act/Juvenile Act."

15. The learned counsel for the State urged that section 22 of the JJ Act is self contained provision and the incorporation of section 5(2) and then referring to the power of Magistrate of 1st class under section 29(2) of the Code of Criminal Procedure for a period of three years, is not at all mentioned in the section. He has also contended that sub-section (2) of section 22 of the Act gives others the power of being detained in respect of the delinquent on conditions to the State Government and on receipt of a report from a Juvenile Court and so, it is only the State Government and not the juvenile court

who is to pass an order. Further , it was contended that if the matter in a case in which order is to be passed by the Sessions Judge or the High Court as Juvenile Court, then they have got part of detention of more than three years and their power can not be restricted to that of the Magistrate. The Full Bench has made observations in respect of section 22 of the Act at page 510 (para 6) in the following words :

"In view of section 22 aforesaid, no delinquent child even if he has committed an offence punishable with sentence of death or imprisonment shall be so sentenced or committed to prison. But where a child has attained the age of 14 years and has committed an offence about which the children's court is satisfied that it is of such a serious nature or his conduct and behaviour has been such that it would not be in his interest or in the interest of other children to send him to such special school and other measures provided under the Act are not suitable or sufficient then such children's court shall direct the delinquent child to be kept in safe custody in such place and manner as it thinks fit. The State Government has to make arrangement for the safe custody of such a delinquent child. The proviso to sub-section (2) does not prescribe the period for which such delinquent child can be detained but only prescribes the limit of the detention by saying that the period of imprisonment provided under any law."

Further, learned counsel for the State contended that section 56 of the Act deals with delinquent juvenile undergoing sentence at the commencement of the Act which run as follows :

"In any area which this Act is brought into force, the State Government may direct that a delinquent juvenile, who is undergoing any sentence of imprisonment at the commencement of this Act shall, in lieu of undergoing such sentence, be sent to a special home or be kept in safe custody in such place and manner as the State Government thinks fit for the remainder of the period of the sentence; and the provisions of this Act shall apply to the juvenile as if he had been ordered by a Juvenile Court to be sent to such special home or as the case may be, ordered to be detained under sub-section (2) of the sec.22."

In this case, at the time when learned sessions judge passed the order, they were below sixteen years of age but when these appeals are being decided, appellants are above 21 years of age and they have become major. But for the purpose of this case, under the J.J.Act, they are still being treated as delinquent. Since they have attained the age of more than 21 years, and since this case is in respect of delinquent undergoing imprisonment which shall be suspended by the order granting them bail, they have to be dealt with under section 22(2) of the Act. Learned counsel for the state was granted time to find out if the State Government has established a place for safe custody as provided under section 22(2) of the Act. But no such place is said to have been given out by the learned counsel for the state.

16. However, subsection (1) of section 21 of the Act reads as follows : "Where a Juvenile Court is satisfied on inquiry that a juvenile has committed an offence, then, notwithstanding any thing to the contrary contained in any law for the time being in force, the Juvenile Court may, if it so thinks fit." Clause (e) of the said section says about order to the juvenile to pay a fine if he is over fourteen years of age and earns money." In the instant case, definitely the appellants are of 14 years of age rather 21 of age now. The appellants have also suffered the ordeal of the criminal prosecutions as juvenile in the trial court as well as in the High Court and they had been in jail also. So, the interest of Justice requires that they should not suffer any further and resort to this provision can be made for imposing a fine. In the case of *Bhoop Ram v. State of U.P.* (1) the Supreme Court has observed at page 1330 (paras 7 and 8) as follows :

7: "Trial Judge had thought it fit to award the lesser sentence of imprisonment for life to the appellant instead of capital punishment when he delivered judgment on 12.9.1977 on the ground the appellant was a boy of 17 years of age. The observation of the Trial Judge would lend credence to the appellant's case that he was less than 10(16) years of age on 3.10.1975 when the offenses were committed. The third factor is that though the doctor has certified that the appellant appeared to be 30 years of age as on 30.4.1987, his opinion is based only on an estimate and the possibility cannot be ruled out.

As regards the opinion of the Sessions Judge, it is mainly based upon the report of the Chief Medical Officer and not on any independent material. On account of all these factors, we are of the view that that appellant would not have completed 16 years of age on the date the offenses were committed. It therefore follows that the appellant should have been dealt with under the U.P.Children Act instead of being sentenced to imprisonment when he was convicted by the Sessions Judge under various courts."

8: "Since the appellant is now aged more than 28 years of age, there is no question of the appellant now being sent to an approved school under the U.P.Children Act for being detained there. In a somewhat similar situation, this Court held in *Jayendra v. State of U.P.* (1981)4 SCC 149: (AIR 1982 SC 685) that where an accused had been wrongly sentenced to imprisonment instead of being treated as a 'child' under s.2(4) of the U.P.Children Act and sent to an approved school and the accused had crossed the maximum age of detention in an approved school viz. 18 years, the course to be followed is to sustain the conviction but however quash the sentence imposed on the accused and direct his release forthwith. Accordingly, in this case also, the charges framed against him but however, quash the sentence awarded to him and direct his release forthwith. The appeal is therefore partly allowed in so far as the sentence imposed upon the appellant are quashed. "

Further , in the case of *Sri Krishna Alias Pandit v. State of Uttar Pradesh*, (2), where the accused had been found guilty of the offence under the section 302 IPC and was sentenced to undergo rigorous imprisonment for life though he was about 14 years, their lordships referred to section 27 and 33 of the U.P.Children Act of 1952 which are as follows :

S.27."Sentence that may not be passed on child: Notwithstanding anything to the contrary contained in any law no court shall sentence a child to death or transportation or imprisonment for any term or commit him to prison in default of payment of fine."

S.33: "Where a child charged with any offence is tried by any Court , and the Court is satisfied of his guilt the Court shall, before passing orders, take into consideration the manner in which , under the provisions of this or any other act enabling the Court to deal with the case, the case should be dealt with, namely whether -

(a) by discharging the offender after due admonition; or

(e) by releasing the offender on probation of good conduct; or

(g) by ordering the offender to pay a fine."

their lordships observed at page 44 (paras 4,5,6 and 7) as follows :

4:" The accused in this case is a child as defined under S.2(4) and he cannot/ought not to have been sentenced to transportation or imprisonment for life as per S.27 and he could, however, be dealt with under s.33 of U.P.Children Act 1952 (Act No.1 of 1952).

5."The question of application sub-section (a) to S.33 does to arise since the accused has already been con-

victed. He cannot now be discharged with admonition. He could be dealt with either under sub-section(e) or (g). Similar view was taken by this Court in Bhoop Ram v. State of U.P.(1989 (3) SCC 1) where conviction was sustained, but sentence, was quashed."

6."In the instant case, we are of the opinion that the accused may be given the benefit of the probation of good conducting. We, accordingly, direct that the conviction be sustained and the accused be released on good conduct upon executing a bond to the satisfaction of the Sessions Judge, Jaunpur."

7. "Having considered the gravity of the offence, we also direct that the accused shall pay a fine of Rs.2,000/- which shall be recovered and paid to the members of ceased family."

The provisions of section 33(g) are virtually similar to those contained in section 21(1)(c) of the Juvenile Justice Act and since the appellants have faced this ordeal and prosecution and had been in jail, we order that appellant Shyam Lal Bhakkar and Ram Bilas Mandal alias Doman Mandal should pay a fine of Rs.4,000/- each which should be recovered and paid to the informant, Hazari Lal Chaumul or his successor. With these observations, these two appeals (Cr.Appeal No.570 of 1984 and 584 of 1984) are disposed of. Since in Cr.Appeal No.401 of 1984 , appellant, Pramod Kumar Kataruka have been given benefit of doubt by the Division Bench hearing the

appeal vide order dated 11.2.1987, he is discharged from the liability of the bail bonds.

Lok Nath Prasad, J. I agree.

R.D.

Order accordingly.



CIVIL WRIT JURISDICTION**Before S.B.Sinha & I.P.Singh, JJ.****1992****July 17.****Smt. Chinta Kumari *****v. *****The State of Bihar and others.**

Service -- transfer of employee from one cadre to another on deputation -- legality of -- Assistant teacher of a school - locus standi to question order of deputation of Headmaster.

Held, that although an employee cannot be transferred from one cadre to another cadre without his consent, but can be posted in a different cadre with his consent and in any event posting on deputation from one cadre to another cadre cannot be said to be illegal.

Held, further that, an Assistant Teacher has no locus standi to question the order of deputation of the Head Master.

Case laws discussed.

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

* Civil Writ Jurisdiction Case No.139 of 1991. In the matter of an application under Articles 226 and 227 of the Constitution of India.

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

M/S.Ganesh Prasad Singh for the petitioners.

Mr.B N.Singh, Tej Bahadur Singh for the State.

S.B.Sinha, J: — In this application the petitioner questions the order of transfer dated 6.12.1990 passed by the respondent no.2 and as contained in Annexure-3 to the writ application whereby the respondent no.3 had been posted for a period of one year in the school in question on deputation as else for quashing of an order dated 5.12.1989 as contained in Annexure- to the writ application whereby her representation for being recognised as a Founder Headmistress of the school has been rejected.

2. The petitioner challenged the said orders principally on two grounds :

(a) She being a founder Headmistress, the respondent No.4 could not have been posted on deputation as Headmistress.

(b) The cadre of the respondent No.4 being that of the Project School, she could not have been transferred to a nationalised school, whose cadre is different.

3. According to the petitioner she was appointed as

Founder Headmistress of the school on 29.9.1978. The state while considering the matter of grant of permission to establish the said school called for a report from the District Education Officer who by his report dated 2.12.1981 recognised the status of the petitioner as Founder Headmistress. The permission to establish the school was granted on 23.1.1982. The petitioner thereafter was allegedly reverted to the post of Assistant Teacher by the Managing Committee of the said school and in her place appointed one Narendra Kumar Singh as the Headmaster of the school on 1.4.1982. The petitioner allegedly filed a representation on the same day which is contained in the Annexure-I to the writ application.

4. According to the petitioner her case had been recommended from time to time but she was not communicated with any decision.

5. In the meanwhile, the order of the deputation of respondent No.4 to the said school (Annexure-3) was issued and upon enquiry, she came to learn that her representation had been rejected by an order dated 5.6.1989(Annexure - 2).

6. It appears that the aforementioned Narendra Kumar Singh was appointed as founder Headmaster. The said Narendra Kumar Singh filed a writ petition being CWJC NO.3395 of 1983 in this court for a direction for treating him as Headmaster of the school and in the said

writ petition was allowed. The said decision is reported in 1985 PLJR page 1128.

The State filed a Letter Patent Appeal against the said judgment being LPA No.53 of 1985 which was disposed of in terms of the observations of the Supreme Court made in (Civil)No.4828- 30/1986 which arose out of a full Bench decision of this court in *Ram Bilash Singh vs. State of Bihar* reported in 1986 PLJR 73. In the light of the decision of this court in the aforementioned L.P.A., the case of the Narendra Kumar Singh was thereafter considered by the special Board and he was appointed as founder Headmaster by an order dated 21.8.1989.

7. It is not in dispute that when a school is treated as an unit, the services of only one headmaster can be recognised. The name of the petitioner was mentioned by the Special Board at serial No.3 in the list of teaching staff as an Assistant Teacher.

8. Narendra Kumar Singh was transferred from the said school whereas one Hardeo Singh was appointed as Headmaster and upon his retirement the petitioner had been permitted to work only as acting Headmaster of the school.

9. Mr.Ganesh Prasad Singh, learned counsel appearing on behalf of the petitioner submitted that although the respondent No.4 was deputed for one year only but her period of deputation had been extended subsequently by an order dated 16.3.92. However, the

petitioner has not filed any application for amendment of the writ petition nor has questioned the said purported subsequent order dated 16.3.1992.

10. It was further submitted by Mr.Singh, that in the writ petition filed by Narendra Kumar Singh, the petitioner was not a party and consequently any decision taken in favour of N.K.Singh, pursuant to the decision of this court is not binding upon her.

11. According to the learned counsel the petitioner had filed a representation on 1st April,1992*Annexure-1) itself when N.K.Singh was posted as founder Headmaster and the petitioner was reverted to the post of an Assistant Teacher and recommendations were made in his favour by the District Education Officer, Gaya in his letter dated 5.8.1988 addressed to the Director Secondary Education (Annexure-1).

12. It is true that the petitioner was to a party in the writ petition filed by Sri Narendra Kumar Singh.However, we have no doubt in our mind that the petitioner had knowledge about the said writ petition. The Letter Patent Appeal preferred by the petitioner being L.P.A.No.53/85 was dismissed by this court on 4.2.1988. Earlier similar question was considered by the Supreme Court in the aforementioned Special Leave Application and the Supreme Court held that persons who claimed themselves to be a founder Headmaster should be screened by the Board. The State Government made certain direc-

tions pursuant to the direction of the Supreme Court which covered the case of N.K.Singh also. The said Letters Patent Appeal has also been disposed of in view of the decision of the Supreme Court aforementioned.

13. Admittedly the Special Board, thereafter considered the cases of all persons and by an order dated 21.2.1988 the said Narendra Kumar Singh was appointed as founder Headmaster.

14. It is hard to believe that when an enquiry had been made by the Special Board constituted for that purpose by the State of Bihar, the petitioner did not put forth her claim nor was she aware of the orders of the Special Board. As noticed hereinbefore, the Special Board in its report stated that Narendra Kumar Singh was the Headmaster and the petitioner's name appeared at serial No.3 as an Assistant Teacher. As indicated hereinbefore, thereafter Narendra Kumar Singh was transferred and one Hardeo Singh was appointed as Headmaster of the said school.

The petitioner did not question either the order of the State Government dated 21.8.1988 appointing Sri N.K.Singh as a Founder Headmaster. Thereafter, Hardeo Singh was appointed as Headmaster whose posting was not questioned by the petitioner. It is also difficult for us to believe that the petitioner was not aware of the decision of the State Govt. dated 5.6.1989 as contained in Annexure-4 to the writ application.

15. We have, therefore, no option but to hold that the petitioner was merely an Assistant Teacher and not the founder headmaster of the school. In any event as he never questioned the report of the Special Board, she is estopped and precluded from advancing her claim at this belated stage.

16. The respondent No.4 had been deputed in the said school only for a period of one year. According to Mr. Ganesh Prasad Singh, the learned counsel appearing on behalf of the petitioner, as the respondent No.4 belongs to a different cadre name the cadre of the Headmaster of Project Schools which is different from the cadre of Headmasters of Nationalised school, she could not have been posted in the school in question which is the nationalised school.

17. This submission made on behalf of the petitioner is devoid of merits. As an assistant teacher the petitioner has no locus standi to question the order of deputation of respondent No.4. The Supreme Court in *R.N. Singh vs. State of Bihar*¹ read as follows :

"Ram Nandan Singh in civil Appeal No.2520/1989 was a headmaster in the Kamla Devi High School. He apprehended danger to his life in view of surrounding naxalite movement. He made a request for his transfer. The District Education Officer recommended his case to

1. (1984) civil appeal No.2520 & 2694 of 1989 disposed of on 14.12.1989.

the Director who transferred him from Kamla Devi High School to Rajarsha Vidya Mandir Aurangabad. It was a vacant post. Respondent No.3 who is teacher in the said school challenged that transfer before the High Court. The High Court accepted the petition and quashed the transfer. It was observed that the Director himself did not apply his mind but he was guided by the instruction from the Hon'ble Minister.

The High Court in our opinion ought not to have entertained the petition at the instance of respondent who has no locus standi to challenge the transfer. The respondent was neither displaced by the order nor affected by any other means. The High Court was entirely in error in interfering with the transfer.

We, therefore, allow the appeal and reverse the order of the High Court. In the view that we have taken, the connected SLPs are also allowed setting aside the respective impugned orders thereunder."

No.Costs."

18. In this view of the matter , it has to be held that the petitioner has no locus standi to question the order of deputation passed by the state in favour of the respondents no.4.

19. Further, it is well known that although an employee cannot be transferred from one cadre to another cadre without his consent, but can be posted in

a different cadre with the consent and in any event posting on deputation from one cadre to another cadre cannot be said to be illegal. It may be that the period of deputation of the petitioner has been extended as has been submitted by Mr. Ganesh Prasad Singh, but apart from the fact that the said order has not been questioned before us, we are of the view that by reason of the extension of the period of deputation of respondent No. 4 in the school in question, the petitioner's legal right has not been affected, inasmuch as she being an Assistant Teacher would be entitled for being considered for her promotion to the post of Headmaster along with all other eligible candidates in accordance with law, when the matter relating to filling up the vacant post of Headmaster in the nationalised school by promotion is taken up by the authorities of the state of Bihar.

20. For the reasons aforementioned, we do not find any merit in this application which is accordingly dismissed.

I.P. Singh, J. I agree

M.K.C.

Application dismissed.

question of fact.

The writ-petitioners can not be allowed to question a notification which was issued in the year 1952. The write petitioners did not question the Government notification dated 29.12.1952 even after purchas had been issued in their favour by the Bhoodan Yagna Committee.

Bhuneshwar Pandit V. The State of Bihar & ors.
(1993), I.L.R. 72.Pat.

..... 1148



CRIMINAL WRIT JURISDICTION

Before Chodhary S.N. Mishra, J,*

1992

May, 15

Santosh Kumar Singh **

V.

The State of Bihar & ors.

Constitution of India, Articles 14, 21 and 226 — High Court, whether can entertain and examine the question whether the allegations made in the First Information Report constitute an offence under the Terrorist and Disruptive Activities (Prevention) Act, 1987 — — , such question whether can be determined only by the designated court — reference to violation of provisions of section 3(1) of the Act in the written report, — whether unwarranted and uncalled for.

Held, that, the High Court, under Article 226 of the Constitution of India, can certainly entertain and examine the question whether the facts alleged in the first information report constitute the offence and the Terrorist and Disruptive Activities. (Prevention) Act, 1987, or not and, particularly, when there is a real threat to the infringement

* Sitting of Ranchi

** Criminal Writ Jurisdiction Case No. 74 of 1992 (R). In the matter of an application under Articles 226 & 227 of the Constitution of India.

of fundamental rights under Articles 14 and 21 of the Constitution of India. Such question cannot be determined only by the designated court.

Held, further, that from a bare reading of the allegations made in the written report, it can safely be said that absolutely no allegation has been made so as to constitute the offence under the provisions of the Terrorist and Disruptive Activities (Prevention) Act, 1987, and as such the Investigating Officer is directed to treat mentioning of violation of section 3(1) of the Act as unwarranted and uncalled for.

Case laws reviewed.

Application by the petitioner.

The facts of the case material to this report are set out in the judgment of Choudhary S.N. Mishra, J.

Mr. A.K. Kashyap for the petitioner.

M/s. M.M.Pal, S. C. I. & Prakash Chandra
for the State.

Choudhary S.N. Mishra, J. — The petitioner, in this criminal writ application under Articles 226 and 227 of the constitution of India, has prayed for issuance of a writ in the nature of mandamus or any other order or direction commanding the respondents to treat as cancelled the reference to violation of provisions of section 3(1) of the Terrorist and Disruptive Activities (Preven-

tion) Act, 1987 (hereinafter referred to as the Act) as mentioned in the first information report registered as Patna P.S. Case No. 114 of 1991 under section 395 of the Indian Penal Code (hereinafter referred to as the code) and section 3(1) of the Act, as contained in Annexure-1. It has been further prayed for quashing of the said part of the first information report made under the Act against the petitioner, which is pending in the court of respondent no.3.

2. According to the petitioner, a first information report was lodged by one Lalit Kishore Bux Rai on 8.12.1991 alleging therein that on 7.12.1991 at about 7.30 P.M., a mob of 50-60 persons surrounded the house of the informant and they asked the informant to hand over his licensee gun, whereupon the informant, due to fear, gave them his two licensee D.B.B.L. gun along with ten live cartridges. It has further been alleged that the extremists belonging to M.C.C. Party often came and held meetings in the area. The informant claims to have identified some of the persons of the mob, who are named in the first information report and further claimed to identify other extremists after seeing them. It was also alleged, that while going away, they raised slogans as 'M.C.C. ' Zindabad ' On the basis of the aforesaid allegation, the second respondent, registered the case being Patna P.S. Case No. 114 of 1991, dated 8.12.1991, under section 395 of the code and section 3(1) of the Act, as contained in Annexure-1.

3. Apart from taking several grounds of attack, the petitioner has stated in this writ application that there is no allegation in the first information report, as contained in Annexure-1, that the petitioner has committed any offence under section 3(1) of the Act and the action of the second respondent, who is the officer-in-charge of the Patna Police station, in implicating the petitioner for the offence under the Act is wholly arbitrary, malafide and the same has been added for collateral purposes.

4. It is further stated that the action of the second respondent in involving the petitioner in absence of the allegation in the first information report with regard to the required ingredients of the offence under section 3(1) of the Act, is violative of the petitioner's right under Articles 14, 21 and 22 of the Constitution of India.

5. It is further stated that due to the impugned action of second respondent, the petitioner has been put to a great harassment and torture in as much as section 3(1) of the Act has been added by the second respondent with an ulterior motive and in order to snatch away the remedy available to the petitioner under the general law of the land.

6. It has also been stated that the action of second respondent is further falsified by the fact that the informant himself has voluntarily sworn in an affidavit before the learned Chief Judicial Magistrate, Daltonganj, stating therein that the petitioner was neither involved in the

alleged occurrence nor has he alleged anything in the first information report against him. A copy of the said affidavit is Annexure-2 to the writ application. Lastly, the petitioner has stated that there was no notification by which the district of Palamu has been declared as terrorists affected area nor has it been declared by any notification, as a prohibited or protected place and/or protected area.

7. No counter-affidavit has been filed by any of the respondents in this writ application.

8. On the basis of the aforesaid averments in the writ petition, it has been submitted by the learned counsel that the action of the second respondent by the learned counsel that the action of the second respondent in involving the petitioner for the offence under the Act is in complete disregard of the law of the land and in violation of the petitioner's right under Articles 14 and 21 of the Constitution of India.

9. It has next been submitted that even if the allegation made in the first information report is taken on its face value, it cannot be said that the petitioner has committed any offence in terms of section 3(1) of the Act.

10. In support of his submission, learned counsel appearing for the petitioner has placed reliance upon the decisions in the cases of *Usmanbhai Dawoodbhai, Memon and others, etc. v. State of Gujarat* reported in

A.I.R. 1988 Supreme Court 922 and *Ayubkhan Kalandarkhan Pathan v. State of Gurarat* and others reported in 1991 criminal law journal 1085.

11. In substance, the learned counsel has submitted that the second respondent maliciously added section 3(1) of the Act in absence of the essential ingredients to constitute the offence under the Act for the purpose of depriving the petitioner of the statutory right to approach the court under the general and common laws of the land.

12. Mrs. Pal, learned standing counsel No. 1, appearing on behalf of the respondent-State, has submitted that the questions whether, on the basis of the allegations made in the first information report, any offence under the Act is made out or not, can be determined only by the designated court and, that too, not only on the basis of the first information report, but also the other police papers including the statement of the witnesses.

13. Mrs. Pal has also submitted that whether on the allegations made in the written report, the offence under the Act is made out or not should be entirely left for determination by the designated court.

14. In support of her submission, she relied upon a decision of *Hiren Brahma versus State of Assam and another* reported in Eastern India Criminal Cases 132.

15. In reply to the submission made by the learned

Standing Counsel, the learned counsel appearing for the petitioner submitted that reading the provisions of the Act as a whole, it cannot be said that the act has taken away the constitutional remedy available to the citizen to invoke the jurisdiction of the High Court or the apex court under Articles 226 and 227 and Article 32 of the Constitution of India, respectively.

16. In substance, the submission of the learned counsel for the petitioner is that the citizen can always approach the High Court under Articles 226 and 227 of the Constitution of India challenging the constitutional validity of the Act on the ground that its provisions offend Articles 14, 21 and 22 of the Constitution.

17. In order to test the validity of the rival contentions of the learned counsel appearing for the parties, it is necessary, right now, to refer to section 3(1) of the Act, which reads as follows:

Punishment for terrorist acts. (1) whoever with intent to overawe the Government as by law established or to strike terror in the people or any section of the people or to alienate any section of the people or to adversely affect the harmony amongst different sections of the people does any act or thing by using bombs, dynamite or other explosive substances or inflammable substances or fire-arms or other lethal weapons or poisons or noxious gases or other chemicals or by any other substances (whether biological or otherwise) of a hazardous nature in such a manner as to cause, or as is likely to cause, death of, or injuries to, any person or persons or loss of, or damage to, or destruction of, property or disruption of any supplies of services essential to the life of the community, or detains any person and threatens to kill or injure such

person in order to compel the Government or any other person to do or abstain from doing any act, commits a terrorist act.

(2) Whoever commits a terrorist act, shall, (i) if such act has resulted in the death of any person, be punishable with death or imprisonment, for life and shall also be liable to fine;

(ii) in any other case, be punishable with imprisonment for a term which shall not be less than five years but which may extend to imprisonment for the life and shall also be liable to fine.

(3) Whoever conspires or attempts to commit or advocates, abets, advises or incites or knowingly facilitates the commission of, a terrorist act or any act preparatory to a term which shall not be less than five years but which may extend to imprisonment for life and shall also be liable to fine.

(4) Whoever harbours or conceals, or attempts to harbour or conceal, any terrorist shall be punishable with imprisonment for a term which shall not be less than five years but which may extend to imprisonment for life and shall also be liable to fine.

18. In this context, section 21 of the Act is also relevant in order to decide the issue in hand, which is quoted in extended :

" 21. Presumption as to offences under Sec. 3.- In a prosecution for an offence under sub-section(1) of sec. 3 if it is proved-

(a) that the arms or explosives or any other substances specified in Sec.3 were recovered from the possession of the accused and there is reason to believe that such arms or explosives or other substances of a similar nature, were used in the commission of such offence; or

(b) that by the evidence of an expert the finger-prints of the accused were found at the site of the offence or on anything including arms and vehicles used in connection with the commission of such offence ; or

(c) that a confession has been made by a co-accused that the accused had committed the offence ;or

(d) that the accused had made a confession of the offence to any person other than a police officer, the Designated Court shall presume, unless the contrary is proved, that the accused had committed such offences.

(2) In a prosecution for an offence under sub-section(3) of Sec.3, if it is proved that the accused rendered any financial assistance to a person accused of or reasonably suspected of, an offence under that section, the Designated Court shall presume, unless the contrary is proved, that such person has committed the offence under that sub-section."

19. In view of the provisions, aforesaid, now I proceed to consider the submissions of the learned counsel appearing for the petitioner. The facts, which have been stated in the petition, have neither been disputed nor controverted by the learned counsel appearing on behalf of the State and, therefore, the said facts stand admitted. As regards, the submission on the question whether, in the facts and circumstances of this case, the provisions of the Act, are at all, attracted in order to constitute the offence under the Act, allegations must be in terms of the requirement under the provisions quoted above.

20. Firstly, I have to answer the submission advanced by the standing counsel No.1, regarding maintainability of this writ application under Articles 226 and 227 of the constitution of India. According to the learned counsel, the question involved in this writ application can be examined by the designated court alone and not by this

court even under its writ jurisdiction.

21. Reliance has been placed on behalf of the learned standing Counsel No.1 on the Single Bench decision reported in Hiren Brahma's case (*supra*). The question for decision in that case was whether the High Court can interfere with the order passed by the designated court refusing the prayer for bail on the ground of its being premature. It has been held, relying upon the decision reported in A.I.R. 1988 Supreme Court 922 (*supra*) that the High Court has no jurisdiction to interfere with the order passed by the designated court and on this finding the learned, single judge rejected the prayer for bail. However, it has been held in that case that the High Court can definitely issue a direction to the designated court in exercise of its power under Article 227 of the Constitution to observe the law laid down by the apex court.

22. In my view, the ratio of the case reported in Hiren Brahma's case (*supra*) is not applicable to the facts and circumstances of this case. Coming to the decision in *Usmanbhai Dawoodbhai Menon's* case (*supra*), their Lordships have observed in paragraph 26 of the judgment

:" The other category of cases have arisen out of communal riots. Normally such cases have to be dealt with under the ordinary procedure prescribed by the Code, unless offences under Ss. 3 and 4 of the Act are

made out."

23. Their Lordships further observed in paragraph 15 of the judgment:

" 15 Before dealing with the contention advanced, it is well to remember that the legislation is limited in its scope and effect. The act is an extreme measure to be resorted to when the police cannot tackle the situation under the ordinary penal law. The intendment is to provide special machinery to combat the growing menace of terrorism in different parts of the country. Since, however the Act is a drastic measure, it should not ordinarily be resorted to unless the Government's law enforcing machinery fails".

24. The question before the lordship was when the High Court can entertain an application for bail under section 439 or even quashing application under section 482 of the Code of Criminal Procedure (hereinafter referred to as the code). Their Lordships, in the facts and circumstances of that case, answered the question in negative, but this much can be easily inferred from the ratio of the *Usmanbhai's* case (supra) that the provisions of the Act do not take away the constitutional remedy available to the citizen to invoke the jurisdiction of the High Court under Articles 226 and 227 and/or the Supreme Court under Article 32 of the Constitution. In this connection, the observations of their Lordships in paragraph 12 of the judgment is relevant, which read as

follows:

" 12 At the very outset, Shri Poti, learned counsel appearing for the State Government with his usual fairness, unequivocally accepted that the provisions of the Act do not take away the constitutional remedies available to a citizen to approach the High Court under Act. 226 or Act. 227 or move this court by a petition under Act. 32 for the grant of an appropriate writ, direction or order. It must necessarily follow that a citizen can always move the High Court under Art. 226 or Art. 227, or this Court under Act. 32 challenging the constitutional validity of the Act or its provisions on the ground that they offend against Arts. 14, 21 and 22 or on the ground that a notification issued by the Central Government or the State Government under S.9(1) of the Act constituting a Designated Court for any area or areas or for such case or class or group of cases as specified in the notification was a fraud on powers and thus constitutionally invalid.

25. Thus, from the aforesaid observations made in the *Usmanbhai's* case (supra), it necessarily follows that the High Court, under Article 226 of the Constitution, can certainly entertain and examine the question involved and, particularly, when there is a real threat to the infringement of fundamental rights.

26. The next citation on the issue in question, relied upon is a Division Bench decision reported in 1991 Criminal Law Journal 1085 (supra) wherein the question

similar to the one involved in the instant case, came up before their Lordships for consideration. In the aforesaid case, the argument was that the High Court has no jurisdiction to examine whether the facts stated in the written report constitute the offence under the provisions of the Act.

27. Relying upon the rate of the decisions reported in 1988 Supreme Court 922(supra) it has been submitted on behalf of the respondent State in that case that whether the offence will come under the purview of the Act can only be determined by the designated court on the basis of the evidence adduced as well as other materials including the police papers. In substance, the argument of the learned counsel appearing on behalf of the State was that the moment reference to section 3(1) of the Act is made by the Investigating Officer, the jurisdiction of the High Court cases and, accordingly, the learned counsel has submitted that the High Court has no jurisdiction to examine whether the facts alleged in the written report constitute the offence under the Act or not.

28. Repelling the argument of the learned counsel for the state in that case, it has been submitted on behalf of the petitioner relying upon a decision of the Supreme Court in the case of *S.M.D. Kiran Pasha v. Govt. of Andhra Pradesh* reported in (1989) 4 JT 356 wherein, their Lordships of the Supreme Court has held that Article

226 of the Constitution of India powers the High Court to issue to any person or authority, including, in appropriate cases, any Government, directions, orders or write, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, or any of them for the enforcement of any of the rights conferred by Part-III and for any other purpose : Their Lordships of the Supreme Court, in the said case, have also held as under :

" .. The question is at what state the right can be enforced ? Does a citizen have to wait till the right is infringed ? Is there no way of enforcement of the right before it is actually infringed ? Can the obligation or compulsion on the part of the State to observe the right be made effective only after the right is violated or in other words can there unenforcement of a right to life and personal before it is actually infringed ? What remedy will be left to a person when his right to life is violated ? When a right is yet-to be violated, but is threatened with violation can the citizen move the court for protection of the right. The protection of the right is to be distinguished from its restoration or remedy after violation. When right to personal liberty is guaranteed and the rest of the society, including the State, is compelled or obligated not to violate that right, and if some one has threatened to violate it or its violation is imminent, and the person whose right is so threatened or its violation so imminent resorts to Art. 226 of the Constitution, could not the court protect observance of his right by restraining those who threatened to violate it until the court examines the legality of the action. Post-Violation

resort to Art.226 is for remedy against violation and for restoration of the right, while pre-violation protection is by compelling observance of the obligation or compulsion under law not to infringe the right by all those who are so obligated for compelled... Law surely can act only after overt acts. If overt acts towards violation have already been done and the same has come to the knowledge of the person threatened with that violation and he approaches the court under Art. 226 giving sufficient particulars of proximate actions as would Emminently lead to violation of right, should not the court call upon those alleged to have taken those steps to appear and show cause why they should not be restrained from violating that right ? Instead of doing so would it be the proper course to be adopted to tell the petitioner that the court cannot take any action towards preventive justice until his right is actually violated whereafter alone he could petition for a writ of habeas corpus ? If a threatened invasion of a right is removed by restraining the potential violator from taking any steps towards violation, the rights remain protected and the compulsion against its violation is enforced. If the right has already been violated, what is left is the remedy against such violation and for restoration of the right"

29. The Division Bench in 1991 Criminal Law Journal 1085, after considering various decisions of the High Courts including that of the Supreme Court, has held while concluding paragraph 16 of the judgment, as under:

" 16 The aforesaid observations are made with a view to see that there is no misuse of the powers under

the TADA Act by the Police. Under the circumstances we are of the opinion that this court has power to examine the questions to whether the provisions of the TADA Act apply or not when writ petition under Art. 226 of the Constitution is maintainable, to protect the fundamental rights guaranteed under Arts. 14 and 21 of the Constitution of India."

30. After having so held, their Lordships, in the facts and circumstances of that case, has held that no case has been made out in the written report so as to attract the provisions of the Act and, accordingly, held paragraph 22 of the Judgment, as under/:

The result of the above finding would be that the petitioner cannot be arrested by the respondents for the alleged commission of offences u/s.3 and 4 of the TADA Act as the investigation stands today and, therefore, we direct the second respondent to treat mentioning of violation of Sl. 3 and 4 of the TADA Act in column-6 of the FIR. However, it is clarified that the second respondent would be at liberty to further investigate the matter and on getting further material if he is satisfied that it is necessary to proceed against the petitioner under the provisions of the TADA Act taking into consideration the observations made by the Supreme Court in the case of *Usmanbhai* (1988) Cri LJ 938) (Supra), he would be at liberty to do so and thereafter he should proceed in accordance with law in making report to the Designated Court, if necessary. Accordingly, to the aforesaid extent we allow this petition. is made absolute to the aforesaid extent."

31. Now in the light of the decision, aforementioned, here proceed to consider the allegations, mentioned in

the written report (Annexure-1). From a bare reading of the allegations made in the written report (Annexure-1), it can safely be said that absolutely no allegation has been made so as to constitute the offence under the provisions of the Act. Merely asking the informant to part with the gun without using the same cannot be said to constitute an offence under the Act.

32. It further appears from the statement made in the written report that no over act has been alleged against the petitioner. On the contrary, an affidavit has been sworn in before the Chief Judicial Magistrate by the informant himself to the effect that the petitioner is neither, in any way, involved in the instant case nor has he named the petitioner in the first information report. It is really surprising as to how the name of the petitioner has been dragged in when the written report submitted by the informant is the basis of initiating the instant proceeding.

33. It is admitted position that no notification either by the Central Government or by the State Government has been issued declaring the district of Palamau as Terrorists affected area nor has there been any notification issued declaring the said district of Palamau as Terrorists affected area nor has there been any notification issued declaring the said district as prohibited place or protected place/protected area.

34. Having regard to the facts and circumstances of this case and after having considered the submissions advanced on behalf of the counsel appearing for the parties as well as relying upon the ratio of the aforesaid decisions, I am definitely of the view that the allegation, as it stands in the written report (Annexure-1) does not con-

stitute any offence under the Act.

35. In view of the aforesaid finding, the ultimate result is that the alleged commission of offence under section 3(1) of the Act has not been made out. I, therefore, direct the second respondent, namely, the Investigating officer, to treat mentioning of violation of Section 3(1) of the Act as un- warranted and un-called for. However, it is made clear that the second respondent will be at liberty to investigate into the matter and if he finds further material to proceed against the petitioner under the Act, he can do so but in accordance with law as and when the situation so demanded.

36. It is further made clear that any finding and observation made in this order not, in any way, affect the case of the either party, so far the substantive case recorded against the petitioner under section 395 of the Code is concerned.

37. This writ application is, accordingly, allowed to the extent indicated above.

S.P.J.

Order Accordingly

CIVIL WRIT JURISDICTION

**Before Bisheshwar Prasad Singh &
Sanat Kumar Chattopadhyaya, JJ.**

1993.

Ferbruary,11

Sada Shiva Pandey and anr.*

V.

State Bank of India & ors.

Service — appellate authority dismissing the appeals of writ — petitioners without any discussion — legality of .

The disciplinary authority of the State Bank agreeing with the finding of negligence recorded by the enquiry officer called upon the writ— petitioner, officer of the Bank , to show cause as to why they should not be punished, and on cause being shown, punished them. The writ — petitioner filed appeal to the Deputy General Manager, State Bank of India, the appellate authority, who dismissed the appeals without any discussion. The appellate orders do not disclose the reasonings of the appellate authority.

Held , that , while the appellate authority is not

* Civil Writ jurisdiction Case No. 676 of 1992.. With Civil Writ Jurisdiction Case No. 727 of 1992 . In the matter of applications under Articles 226 & 227 of the Constitution of India.

expected to write a detailed judgement, it is at least expected to record its reasons, even if briefly to satisfy that it had considered the relevant aspects to the matter before reaching its conclusion.

The appellate order must be quashed and the appellate authority be directed to reconsider the appeals and pass orders in accordance with law.

Case laws discussed.

Applications under Articles 226 and 227 of the Constitution.

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

M/s Ashim Jah, Harish Chandra Mishra & Naresh Dikshit for the petitioners.

M/s Shailesh Kumar Sinha & K.K. Sinha for the respondents

B.P.Singh, J. — These two writ petitions have been heard at length at the admission stage and after hearing the parties they are being disposed of by this common order.

2. Sada Shiva Pandey is the petitioner in C.W.J.C.No. 676 of 1992. He has prayed for issuance of a writ in the nature of certiorari quashing the order dated 12-7-1991 (Annexure-8) where by huge disciplinary authority inflicted punishment of stoppage of one increment with cumulative effect against the petitioner. The petitioner has also prayed for setting aside the appellate order dated 25-10-1991 (Annexure-11) rejecting the appeal preferred by the petitioner. The other reliefs prayed for in the writ petition are consequential.

Similar reliefs have been prayed for by Jainath Prasad Sinha, petitioner in C.W.J.C. No. 727 of 1992 . In his case the disciplinary authority has inflicted punishment of reduction in the basic pay to the next lower stage for a period of one year. Since the facts are somewhat similar, I shall take the facts from C.W.J.C.No. 676 of 1992.

3. The petitioner in C.W.J.C.No. 676/92 is an employee of the State Bank of India. While he was working at Bihta Branch of the Bank a memorandum was issued to him on 7-8-1986 by the Regional Manager stating that the petitioner has committed several irregularities while officiating as Passing Officer in the Savings Bank Section in October and December 1981 at the Arrah Branch, and that he had passed three withdrawal forms paid across the teller counter without insisting for production of pass books with a view to verify them with the ledger. On account of such action the Bank had been defrauded. The particulars regarding the dates, account numbers, name of the persons and the amount were also detailed in the memorandum. It was also alleged that while the petitioner was working as a teller at the Arrah Branch in June and September 1985 he had made payments to two unauthorised persons. He was, therefore, called upon to furnish his explanation. The petitioner requested his Branch Manager to grant leave etc. for going to Arrah to inspect and verify the documents to enable him to explain the matter. However,

ultimately when the petitioner went to Arrah Branch of the Bank, he was not able to see the necessary documents, as he was informed that the documents had been seized by the Central Bureau of Investigation. However, the petitioner furnished his explanation on 20th February, 1987 mentioning therein that since the matter related to events which took place long ago, it was very difficult for the petitioner to recollect as to what actually transpired. He therefore, requested that he should be allowed to verify/peruse the vouchers and documents to enable him to give a reply. Subsequently, charge sheet was issued against the petitioner on 12-11-1987 calling upon him to show cause why disciplinary action be not taken against him for the lapses indicated therein. The aforesaid chargesheet has been annexed as Annexure-3 to the writ petition. the petitioner addressed a representation to the Regional Manager on 2nd December, 1987, and stated that it was not possible to recollect the matter as it related to events which had taken place long ago. He therefore, claimed that 14 documents mentioned by him may be made available to him for perusal. however, the documents asked for by the petitioner were not made available to him .

4. An enquiry officer was appointed and the petitioner participated in the said proceeding which culminated in the report of the enquiry officer dated 19-4-1991. The said enquiry report is Annexure-5 to the writ application. It appears from the enquiry report that whereas in the

chargesheet an allegation was made against the petitioner that he had connived with one B.M.Mishra in defrauding the Bank, the negligent in the performance of his duties, in as much as he did not follow the relevant rules and did not insist upon production of the pass books while passing payment or making payment. The master-mind behind the fraud was the aforesaid B.M. Mishra, But if the petitioner had not been negligent, the fraud would have been detected. He also observed that in the Arrah Branch of the Bank the established practice and procedure were not being followed by anyone.

5. In view of the order which I ultimately propose to pass in this writ petition, I am not referring to other facts else it may prejudice the case of the parties.

6. The disciplinary authority agreeing with the finding of negligence recorded by the enquiry officer called upon the petitioner to show cause why he should not be punished and in the case of the petitioner the proposed punishment was stoppage of one increment the cumulative effect. The petitioner submitted his show cause, but the disciplinary authority passed the impugned order (Annexure-8) inflicting punishment of stoppage of one increment with cumulative effect.

7. The petitioner thereafter preferred an appeal to the appellate authority, namely, the Deputy General Manager, State Bank of India, Zonal Office, Patna (respondent no. 1 herein). The appeal was disposed of by the appellate

authority in the following terms:

1. " With reference to your appeal dated 17.09.1991 against the order passed by the concerned Disciplinary Authority, I have examined all the related papers of the case and the arguments which you placed before me in the personal hearing on 22-10-1991.

2. Since no new and extenuating factors have been brought out by you in the personal hearing, I am not inclined to review the order of the Disciplinary Authority. I find no merit in Your appeal and reject the same."

8. Similar are the facts in C.W.J.C.No. 727 of 1992, and in that case as well the enquiry officer did not find that the petitioner acted in connivance with B.M.Mishra, who master-minded the fraud, but was negligent in the discharge of his duties. The disciplinary authority agreeing with the finding of the enquiry officer imposed punishment of reduction in his basic pay to the next lower stage for a period of one year. The appellate authority in the following terms:

" With reference to Your appeal dated 06.09.1991 against the order passed by the concerned Disciplinary Authority, I have examined all the related papers of the case and the arguments which you placed before me in the personal hearing on 22.10.1991.

2. Since no new and extenuating factors have been brought out by you in the personal hearing I am not

inclined to review the order of the Disciplinary Authority. I find no merit in your appeal and reject the same."

9. Counsel for the petitioner in C.W.J.C.No. 676/92 submitted that after submission of chargesheet he had requested the Bank to permit him to peruse 14 documents listed by him in his representation dated 2-12-1987. Those documents were not made available to him and, therefore, it was submitted that the enquiry proceeding was vitiated on account of breach of principles of natural justice. It is not the case of the petitioner that the documents asked for by him were the documents upon which the Bank relied in support of the charges enumerated in the chargesheet. It is not the case of the petitioner that any document referred to in the chargesheet was not supplied. When it was pointed out to the learned counsel for the petitioner that the Bank was obliged to supply to the petitioner copies of only those documents upon which reliance was placed in the charge sheet and not other documents which the petitioner required for preparing his defence, counsel for the petitioner did not press the point any further. Moreover, It appears from the record that the petitioner participated in the enquiry proceeding. If he really required those documents, at the stage of enquiry he could have requested the enquiry officer to direct the Bank to produce those documents which would enable him to justify his defence. No such request appears to have been made. I therefore, find that no irregularity was

committed in the conduct of the enquiry proceeding which could have vitiated ~~the~~ proceeding.

10. It was then submitted that the enquiry officer has not recorded a finding against the petitioners on the basis of evidence on record and that the finding of negligence was a mere *ipse dixit* of the enquiry officer. It is difficult for me to uphold this contention. When the chargesheet was submitted, it was the case of the Bank that the petitioner had acted in a particular manner with a view to aid B.M.Mishra in the perpetration of fraud. The enquiry officer has found that though B.M.Mishra master-minded the fraud, the petitioner fell an easy victim to his designs and made payments without following the established procedure. He was, therefore, Not guilty of connivance with B.M.Mishra, but was guilty of negligence in the performance of his duties. In this context I may refer to the plea of the petitioner before the enquiry officer. It was submitted on his behalf before the enquiry officer that the petitioner had passed the Saving Bank withdrawal for Rs. 1700/- without insisting on the pass book, because of the prevalent practice at the Arrah Branch at the material time. He similarly passed the voucher for Rs. 2000/- paid by the teller. The usages and practice of the Branch were such that all withdrawals and cheques received and paid at the teller counter were mostly without pass book which were best known to the authorities of the Bank. It will thus appear that even the petitioner did not deny that before passing payment

or making payment he had made any verification from the pass book of the person concerned. He made the payment or passed payment without insisting upon production of the pass book and for this his justification was that in that Branch the practice was not to insist upon production of pass book. The petitioner, therefore, virtually admitted that he did not follow the established practice of insisting upon production of pass book before authorising or making payment. His only explanation appears to be that none else was doing so. In these Circumstances, If the enquiry officer has recorded a finding against the petitioner that he was negligent in the discharge of his duties, I cannot say that the finding is not based on material on record.

11. Reliance was placed upon a decision of the supreme Court reported in A.I.R. 1978 S.C. 1277 (Nand Kishore Prasad Vs. State of Bihar). Counsel referred to paragraph no. 18 of the decision. In my opinion The principle laid down by the Supreme Court in the aforesaid judgment do not support the case of the petitioner because I have come to the conclusion that the enquiry officer reached his conclusion on the basis of material on record which pointed to the guilt of the petitioner in respect of the charge against him. Counsel then relied upon another decision of the Supreme Court, reported in A.I.R. 1984 S.C.1361 (*A.L.Kalra Vs. P&E. Corporation of India Ltd.*). He pointedly referred to paragraph nos. 9,10,11 and 29 of the decision. In my view, that decision

also does not support his case in the facts and circumstances of this case. In that case it was found by the supreme Court that the report of the enquiry officer was defective and appeared to be merely the record of enquiry and recapitulation of allegation and explanation. The finding recorded by him separately in Annexure-M was not satisfactory, as that was a bald document of two paragraphs in which the enquiry officer recorded that the appellant had contravened certain rules. By process this conclusion was reached or what events appealed to him was left to speculation. The reasons in support of the conclusion were conspicuous by their absence. The findings were, therefore, held to be the *ipse dixit* of the enquiry officer. The same mistake was committed by the disciplinary authority and appellate authority. The principle laid down by the Supreme Court is not applicable to the facts of this case, because I have already held that the finding of the enquiry officer was based on material on record and it was not possible to contend that the findings recorded by him were mere *ipse dixit*.

12. It was then submitted that the appellate authority did not apply its mind to the facts and circumstances of the case and in mechanical manner rejected the appeal. I have earlier reproduced the two appellate orders passed in these two writ petitions. They are virtually in the same terms. There is no discussion, howsoever brief, to satisfy the Court that the appellate authority had applied its mind to the facts and circumstances of the case. One

cannot lose sight of the fact that the appellate authority had applied its mind to the facts and circumstances of the case. One cannot lose sight of the fact that the appellate authority has authority to go into questions of act as also questions of law. It is open to consider the legality and propriety of the order passed by the disciplinary authority, when an appeal is preferred before the appellate authority and the appellate authority is expected to apply its mind to the representations made by the appellant and in the light of those representations consider the legality and propriety of the order passed by the disciplinary authority it was indeed contended on behalf of the petitioner that in large number of other cases the appellate authority has passed its order in indetical terms, which supports the contention that the appellate authority has acted in a mechanical manner and passed its order without applying its mind to the facts and circumstances of the case. The submission cannot be brushed aside. The appellate orders are in indetical terms. They do not disclose the reasonings of the appellate authority. While the appellate authority is not expected to write a detailed judgment, it is at least expected to record its reasons, even if briefly, to satisfy court that it had considered the relevant aspects of the matter before reaching its conclusion. I cannot say that the appellate orders in these writ petitions satisfy that test. I am, therefore, of the view that the appellate orders must be quashed and the appellate authority be directed

to reconsider the appeals and pass orders in accordance with law.

13. I may hasten to add that I have deliberately not dealt with the facts of the case in detail but I have only referred to those facts which were necessary to consider the submission urged before us that the report of the enquiry officer was not based on evidence on record. I have come to the conclusion that the finding recorded by the enquiry officer is based on evidence on record, but I should not be understood to have recorded any concluded finding that the view taken by the disciplinary authority is necessarily the correct view or that any better view of the evidence is not possible. Nothing said in this judgment should prejudice the mind of the appellate authority, and it must independently apply its mind to the facts of the case and dispose of the appeals in accordance with law.

14. In the result, these writ petitions are partly allowed. Annexure -11 in both writ petitions are quashed, and the appellate authority is directed to dispose of the appeals in accordance with law having regard to the observations made in this judgment as to manner in which the appeals should be considered and disposed of. There will be no order as to costs.

S.K. Chattopadhyaya.J. I agree

R.D.

Petition allowed in part.

CIVIL WRIT JURISDICTION**Narbdeshwar Pandey &****Radha Mohan Prasad, JJ.****1993****March, 19****Sudhir Prasad Singh and others.*****V.****State of Bihar and others.**

Bihar Municipal Accounts Rules, 1928, — — — Rule 116
(a) — — — provisions of — — — not properly followed
by Executive officer of the Municipality property of huge
amount of Money spent in construction and repair of
roads and drains by private contractors who were allotted
work order in not proper compliance of the rule— were
order which could be quashed.

Where the Executive Officer of Rosera Municipality
allotted work orders for construction and repairs of roads
and drains worth Rs. 25,00,000/- with private contractors
without proper publication of tender notices in local
newspapers and even notice in vernacular in public
places in terms of Rule 116 (a) of the Bihar Municipal
Accounts Rules, 1928 hereinafter referred to as the

* Civil Writ Jurisdiction Case No. 2008 of 1992. In the matter
of an application under Articles 226 and 227 of the Constitution

Rules, was not done widely.

Held that in the instant case, the action of the authorities in making allotment cannot be said to be fair. It was proper for the municipal authorities to have published the tender notice in local newspaper and / or by widely giving notice in vernacular in public places in terms of the Rules specially taking into consideration the best of construction and repair of huge amount namely Rs. 25,00,000/-

Held, further, that the writ-petitioners cannot get any relief at this stage as there has been huge investment and construction work by the private contractors has already progressed so much that the said private contractors have also received advance of a good amount from the Municipality. Hence the writ-application, so far as it relates to the prayer for quashing of the work order given to private contractors, cannot be allowed as it would be against the public interest inasmuch as by inviting fresh tender for the same work the Municipality will have to spend much more as there has been steep rise in the prices of materials and cost of Labour.

Case laws discussed.

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 N. Pandey. J.

Mr. Ajit Kumar Singh, Advocate. for the petitioners.

M/s Y.V. Giri, Sr. Advocate, H.S. Himker and Shivajit Pandey, Advocates for the respondents

Mr. S. Azeem, J.C. to G.A. With Mr. R.N. Yadav, G.A. for the State.

N. Pandey, J. — The Petitioners in this writ application have challenged the mode and manner in which the tender notices were published as also the allotment of work with the private respondents by the Executive officer, Rosera Municipality.

2. The grievance of the petitioners is that respondent nos. 5 and 6, without publication of the tender notice, have allotted the work for construction and repairs of roads and drain worth Rs. 25,00,000/- (twenty five lakhs) with the private respondents. According to the petitioners, as notices were not published in the daily newspaper nor they were affixed at conspicuous places in the municipal area, several persons including the petitioners were excluded from filling up tenders and participating in the action. The allegation of malafide and favouritism against the official respondents in allotting the works to the private respondents has also been alleged. It has been urged that different government circulars which are binding over the municipal authorities have not been followed. It has been further stated that at the time of the alleged publication of notice, there was general

strike .Therefore even assuming that notices were displayed on the notice board of the Municipality, it was not expected for general public to have knowledge with respect but such publication.

As per the circular, only those persons who had submitted sales Tax and Income Tax clearance certificate were entitled to deposit tenders for allotment of work . Admittedly, the private respondent nos. 5 and 6 should not have allotted the work to them.

3. The respondents have entered appearance and filed counter affidavits. According to them, all the prescribed procedures for allotment of work followed. written notices were given to the District Magistrate, Samastipur, District Engineer, Samastipur, Executive Officer, Subdivisional Officer, Rosera, Secretary, Agricultural Produce Market, Block Development Officer and Circle Officer Rosera for publication on their respective notice boards in their offices. Notices were also published on the notice board of the Municipality. It is wrong to say that the construction work was allotted to the private respondents without inviting tenders. It has been stated that as per rule 115 of the Bihar Municipal Accounts Rules, 1928 (hereinafter called Rules) the Municipality has two options to publish tender notices, that is, advertisement in the local newspapers or by notices in the vernacular in public places. it is stated that since the work was of urgent nature as also located in the

municipal area, the second mode of publication, that is, pasting of notices at public places was adopted. it has been further stated that most of the work had already been completed for which contractors have also been paid.

4. Learned counsel for the petitioners contended that in view of the admitted position that there was no publication of notices in the daily newspapers as also private respondents did not fulfil the criteria for allotment of work, this is a fit case in which this court should quash the work order and the agreement pursuant thereto executed by respondent nos. 5 and 6 a direction be issued for allotment of fresh work order by inviting fresh tender notices. In support of his contention, he has placed reliance over the decisions in the case of *Girija Nandan Singh V. The State of Bihar and others*¹ and *Syed Hasan Rasul Numa and others V. Union of India and others*²

5. Before considering the claim and rival claim of the parties, it would be appropriate to notice the relevant rules for publication of tender notice and execution of agreement by the municipal authorities in inviting tenders for allotment of work in the local limit of municipal area Rule 116 of the Rules is as follows:-

" 116 (a) In the case of all works executed by contract tenders shall ordinarily be invited in the most open and public manner possible whether by advertisement in the local

1 (1987) P.L.J.R 95

2 (1991) A.I.R. (S.C) 711.

newspapers by notices in the vernacular in public places. "

6. From reading of the aforementioned Rule it is true that the tenders are to be invited in either of the two manners mentioned therein but at the same time there cannot be any doubt that the same has to be done in open and public manner. the object thus, is quite clear that there should be a wide publicity so that no person can make grievance that he was deprived of an opportunity to offer the tender .in the present case ,it is alleged that the tender notices were invited by the respondents by passing of the notices at public places. Admittedly, the first manner regarding publication of the advertisement in the local newspapers was not followed.

7. In the case of *Ramana Dayaram Shetty v. The International Airport Authority of India*¹ in respect of the duty imposed on a Government while entering into contracts or issuing licences, is all the more applicable to the public utility service and public service it was observed as follows:-

" It must, therefore be taken to be the law that where the Government is dealing with the public, whether by way of giving jobs or entering into contracts or issuing quotas or licences or granting other forms of largesse, the Government cannot act arbitrarily at its sweet will and, like a private individual deal with any person it pleases, but its action must be in conformity with stand-

¹ (1979) A.I.R. (S.C.) 1628

ard or norms which in not arbitrary irrational or irrelevant. The power or discretion of the Government in the matter of largesse including award of jobs, contracts quota licences etc must be confined and structured by rational relevant and non-discriminatory standard or norms and if the Government departs far from such standard or norm in any particular case or cases the action of the government would be liable to be struck down unless it can be shown by the Government that the departure was not arbitrary, but was based on some valid principle which in itself was not irrational unreasonable or discriminatory. "

In an another case reported in A I.R. 1980 S .C. 1992 (Kasturi Lal Lakshmi Reddy vs. State of Jammu and Kashmir) the Supreme Court while emphasising that the government must act in public interest while giving a contract or sell or lease out the property with the sole object being to raise the highest revenue held as follows.

Where any government action fails to satisfy the test of reasonableness and public interest discussed above and is found to be wanting in the quality of reasonableness or lacking in the element of public interest, it would be liable to be struck down as invalid. It must follow as a necessary corollary from this proposition that the Government cannot act in a manner which would benefit a private party at the cost of the state such an action would be both unreasonable and contrary to public

interest. the government therefore cannot for example give a contract or sell or lease out its property for a consideration less than the highest that can be obtained for it, unless of course there are other considerations which render it reasonable in public interest to so".

The said mandate equally applies while awarding a contract for construction and repairs with private individuals. the object behind it is that the public authority must act fairly and without discrimination and without unfair procedure. In the case of *Ram and Shyam Co.V. State of Haryana* the Supreme Court pointed out as follows.

The law is now well settled that the government need not deal with anyone, but if it does so it must do so fairly and without discrimination and without unfair procedure an unilateral offer secretly made not correlated to any reserved price made by the fourth respondent after making false statement in the letter was accepted without giving any opportunity to the appellant either to raise the bid or to point out the falsity of the allegations made by the fourth respondent in the letter as also the inadequacy of his bids -- how an uncontrolled exercise of executive power to deal with socialist property in which entire community's interest was sacrificed so as to cause huge loss to the public exchequer would have gone unnoticed but for the vigilance of the appellant acceptance of an offer made and sought

1. (1985) A.I.R. (SC) 1147

to be substantiated. The allegation without the verification of their truth which undertaken would certainly amount action in the matter of distribution of state which by the decisions of this Court is impermissible.

8. This court in the case of *Ganesh Bhandar and another V. The State of Bihar and other*¹ while considering the of the sugar mills of the sugar corporation in disposing of the sugar manufactured by them by public held follows.

The act of government instrumentality must act only be fair but it also must appear to be fair. The publication of advertisement in amrit barsa which appear to have some local circulation is only a formal compliance of publication of The auction and cannot be held to be a proper publication. The advertisement in order to attract buyers from The different regions of The country. The publication of advertisement therefore must be in The papers of All India, circulation both in Hindi and English english and there must be a margin of at least one week between The date of advertisement and The date of auction.

9. However in The instant case there is a rule prescribing the modes inviting tenders as aforementioned. But it cannot be disputed that the act of The municipal authorities in tenders for allotment of works must not only be fair but it also must appear to be fair. Therefore I am of the view that though alternative modes are prescribed still the authorities should have acted in a more fair instead of going in for mere compl-

lance of the rule. By issuing notice and getting it pasted or Rosera Municipal Board as claimed by them in paragraph 11 of the counter affidavit filed on behalf of Municipality was not sufficient and cannot be held to be proper publication of the advertisement in order to attract the tenderers in a most open and public manner. in my opinion it was proper for the municipal authorities to have followed necessarily the first manner and or both specially taking into consideration the cost of construction and repair work of huge amount, namely Rs.25,00,000/- [Twenty five lacs].

10. However in the present case there is no statement even to the effect that the notices in the vernacular were made in open and public manner by pasting it in public places .The only statement in this regard has been made in paragraph 11 of the counter affidavit filed on behalf of Rosera Municipality that the tenders were invited by written notice under Memo. no 620 dated 18.12.1991 to the various authorities mentioned therein for getting it published on their respective notice boards in their offices and that it was also pasted for publication of Rosera Municipal Board for the said purpose. On this basis a presumption is sought to be drawn that there was a wide publication of notice. Later in paragraph 12 however it has been stated that tender notices were displayed to the knowledge of the people in the office of the District Magistrate, District Engineer and other offices from the block to the district level and it was widely circulated and

known to the local people. The said affidavit has been sworn by the Executive Officer of the Municipality, who is claimed to have made this statement on the basis of his personal knowledge.

11. It is difficult to accept the aforesaid statement in view of the earlier statement in paragraph 11 of the counter affidavit wherein it has been stated that by sending the aforementioned memo dated 18.12.1991 to various 'authorities' there is presumption that there was wide publication of the notice. Moreover, the fact of this case also is such that the aforesaid statement of the Executive Officer cannot be accepted in as much as had there been wide publication, as claimed by the executive officer, three persons who were allotted contract would not have been the only tenders. It is not in dispute that only three tenders were submitted in response to the alleged notice and none else. Not only that even in absence of income - tax certificate and contract labour certificate, the work has been allotted to all the contractors. It may be mentioned here that in the counter affidavit filed on behalf of the respondent nos. 8 to 11 an attempt has been made to show that notices were published at various other offices also by annexing the letters issued by different authorities to the executive officer of the Municipality. It is difficult to place reliance on all these letters as all of them have been issued much after filing of the writ application.

12. I am, therefore, of the view that from the facts and circumstances of the present case the action of the authorities in making allotment cannot be held to be fair. But in any view of the matter, in this writ application the petitioners cannot get any relief at this stage as I have already noticed above that there has been a huge investment and construction work has already progressed so much so that respondents have also received advance of a good amount from the Municipality. Thus, in my view, this writ application, so far as it relates to the prayer for quashing of the work order given to the private respondents, now at this cannot be allowed as it would be against the public interest inasmuch by inviting fresh tender for the same work the Municipality will have to spend much more as there has been steep rise in the prices of materials as well as the cost of labour.

13. It is well settled that the writ court which is the discretionary remedy available to a party should restrain from quashing an order which would not be in public interest. The Court may decline to grant relief to a party or mould the relief which it considers just and equitable depending on the existency of each case. This, in my opinion, in the peculiar facts and circumstances of this case, it is in the public interest to allow the private respondents to carry out the contracted job pursuant to the work order issued to them.

14. In the facts and circumstances of the case, while parting with the judgment, I would like to observe that in future while making allotment of such work, sufficient care should be taken in publication of tender notices so that no body can raise any grievance that action of the authorities was not fair. In that view of the matter, in my opinion, the Municipality should adopt both the procedures in the matter of inviting tenders, namely, issuing advertisement in the local newspapers as well as by issuing notices in the vernacular in public places.

15. In the result, the application is dismissed but in the facts and circumstances of the case, there shall, however, be no order as to costs.

Radha Mohan Prasad, J. I agree.

R.D.

Application dismissed

CIVIL WRIT JURISDICTION

**Before Bisheshwar Prasad Singh &
Gopi Chand Bharuka, JJ.**

1993

April, 21

Ram Babu Singh and anr.*

V.

The Bihar School Examination Board.

Bihar School Examination Board's Regulations --- Regulation 1. of Chapter IV -- provisions of --school whether bound to maintain and produce the records of student sent up by the school for appearing at Secondary Examination before the Bihar School Examination Board-- non-production of records before the Bihar School Examination Board-- effect of.

The Headmaster of Sri Siyaram Singh Yadav High School Shahpur Daudpur sent application along with registration fee for registration of 773 students sent up by the school to the Bihar School Examination Board, hereinafter referred to as the Examination Board, but the Examination Board issued registration numbers to only 211 students. The board had called upon the Headmaster to produce the necessary records before the

* Civil Writ Jurisdiction Case No. 3935 of 1993. In the matter of an application under Articles 226 and 227 of the Constitution of India.

examination board so that the Board could satisfy itself about the number of regular student of the school but the records were not produced before it despite reminders. Sub Divisional Officer Education had reported that there were only 149 regular students in the School. Consequently the Examination Board refused to grant registration numbers to all students.

Held, that while performing its duty, the Examination Board can insist upon the School to maintain records in terms of Regulation 1 of Chapter IV of Bihar School Examination Board. Regulations and produce them before the Examination Board whenever required. The School is bound to produce such records before the Examination Board.

As the school did not furnish the necessary information and produce the necessary records before the Examination Board, consequently the examination Board was not satisfied that all the candidates were qualified in terms of Regulation 2 of Bihar School Examination Boards Regulations.

Application under Articles 226 and 227 of the Constitution.

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

M/s. Amaresh Kumar Singh, Anil Kumar
Upadhayay and Sanjay Kumar Singh for

the petitioner

Mr. Y.V. Giri. for the respondents

B.P. Singh & G.C. Bharuka, JJ. — We have heard the counsel for the parties.

2. It is unfortunate that we have large number of cases of this type before this court, and most of them are unnecessary and frivolous. In the instant case the petitioners are the Head Master of Sri Siyaram Singh Yadav High School Shahpur Daudpur and one of its students. The grievance of the petitioners is that the respondent Board has acted contrary to the provisions of the Rules and Regulations by not issuing registration numbers of 775 students of the School in question after accepting registration fee. They contend that the aforesaid school is a nationalised school and as such under the Regulation it is authorised to send up such candidates for taking the secondary School Examination who have completed their courses of study in the School.

3. In the instant case it is brought to our notice that the Board has issued registration numbers only to 211 students and not to all the students who had applied for registration numbers.

4. A counter affidavit has been filed on behalf of the Bihar School Examination Board. The stand of the respondent Board is that according to the information available to it, there were only 149 regular students in

the school. Consequently as early as in the month of September, 1992, the Principal of the School was called upon to produce the necessary records before the Board so that the Board could satisfy itself about the number of regular students of the school. The case of the Board is that those records were not produced before it despite reminders, but there was a report from the S.D.O. (Education) that there were only 149 regular students in the said school. Consequently when such large number of applications were sent to the Board, the Board refused to grant registration numbers to all the students, because no information was furnished to it pursuant to the request made by the Board to produce the record before it.

5. It was contended before us by counsel for the petitioner that the respondent Board has no power to call for such records, and, therefore, the demand was unauthorised.

6. Having regard to the provisions of chapter 4 of the Bihar School Examination Board's Regulations, it is difficult to uphold the contention. Regulation 1 in Chapter IV in clear provides that

"Every Secondary School shall supply to the Board on or before such dates as may be fixed by the Board such returns and information as may be required by the Board from time to time.

It further provides that

"Every Secondary School shall maintain such registers and records of the students sent up by the School as be required by the Board from time to time."

7. We have, therefore, no manner of doubt that while performing its duty, the Examination Board can insist upon the school to maintain such records and produce them before it whenever required. The school is bound to produce such records before the Examination Board.

8. In the instant case it is not in dispute that the school did not furnish the necessary information and produce the necessary records before the Examination Board. Consequently, the Board was not satisfied that all the candidates were qualified in terms of the Regulation 2. On the basis of the report of the S.D.O. lesser number of regular students were admitted in the School. It is question of fact as to how many students have been regularly admitted by the School who have completed their courses of study in the school. In the absence of any material produced by the school, despite reminders, the Board has taken a decision on the basis of material available to it.

9. We, therefore, find no merit in this application.

10. This application is, accordingly, dismissed.

11. We may only observe that the Secondary School Examination Board is the controlling authority in such matters. If an account of inaction of obstinate attitude acquired by petitioner no. 1 unfortunate consequences have resulted, he is solely responsible for the same. We, therefore, direct that the Board should make an enquiry into this matter and in particular the conduct of the

Principal/Headmaster, petitioner no. 1 and take appropriate action. We may take judicial notice of the notorious fact that large number of names of non-genuine students are being sent up by unscrupulous head masters on monetary considerations.

Let a copy of this order be communicated to the Director, Secondary Education. The copy should be communicated through G.P. No.6, Mr. Keshri.

G.C. Bharuka, I agree

R.D.

Application dismissed

CIVIL WRIT JURISDICTION**Before Aftab Alam, J.****Smt. Lilawati Kumari. *****1993****May, 10.****V.****National Co-operative Union of India & anr.**

Constitution of India, Article 12, applicability of —
National Co-operative Union of India—whether a State within the meaning of Article 12 — whether subject to writ jurisdiction.

Held, that, the National Co-operative Union of India is neither a State nor an instrumentality or an agency, of the State, or an authority within the meaning of Article 12 of the Constitution of India and is, therefore, not subject to writ jurisdiction of the High Court.

The National co-operative Union of India functions under its own bye-laws through the Governing Council and Executive Committee constituted under the bye-laws. The functions of the Co-operative Union are independent and it does not have any association with the Government function or with the business of the Government.

* Civil Writ Jurisdiction case No. 539 of 1992. In the matter of an application under Articles 226 and 227 of the Constitution of India.

Application by an employee of the National Cooperative Union of India.

The facts of the Case material to this report are set out in the judgment of A Aftab Alam, J.

Dr. S.N.Jha & Mr. Janardan Pd. No. 2 for the petitioner

.. .. M/s Jai Krishna, Shivajee Panday for the respondents

Aftab Alam, J. — The only relief claimed in this application is a writ in the nature of certiorari quashing the office order, dated 12.12.1991 issued by the Director (Education), National Co-operative Union of India whereby the petitioner's services as Lady Mobiliser were terminated with immediate effect. The impugned order, a photo copy whereof is at Annexure 11 to the writ petition assigns two reasons for the termination of service; one, that the selection of the petitioner was based on an improper procedure and two, that her contract employment came to an end on 26.11.1991 on the expiry of the one year period fixed under the contract. The allegation relating to improper procedure of selection has, however, been completely given up before this Court and the termination of service is sought to be justified only on the plea of the contract having come to an end by efflux of time.

2. The petitioner was an employee of the National

Co-operative Union of India (hereinafter referred to as the Co-operative Union). I shall have occasion to examine the nature and character of the Co-operative Union in some detail later on in this judgment. At this stage, while narrating the bare facts it is suffice to note that the Co-operative Union was in need of Lady Mobilizers in several states including Bihar for one of the projects undertaken by it, namely, Co-operative Education Field Project. Having failed to get, on deputation, any suitable persons to work as Lady Mobilizers the Co-operative Union made a request (vide letters dated 23.7.1990 and 10.8.1990; Annexure-1) to the Bihar State Co-operative Federation Ltd. to take steps for selection of suitable candidates to be directly recruited to the post of Lady Mobilizer on purely temporary and contractual basis for the period of one year to begin with'. Following the request made by the Co-operative Union for appointment to the post of Lady Mobilizer on contractual basis. By letter dated 18.9.1990 (copy at Annexure3), the Bihar Federation appears to have forwarded two applications, including that of the petitioner, with the recommendations made by it and finally the appointment letter was issued to the petitioner vide memorandum dated 9.11.1990, a copy whereof has been enclosed with the writ petition as Annexure 4. The memorandum offered the post of Lady Mobilizer, *NCUI* Co-operative Education Field Project, Patna to the petitioner, on contractual basis for a period of one year to begin with'. Of the various terms

and conditions of the appointment those contained serials 2 and 4 are re-produced below

(1) ...

(2) Her appointment is on contractual basis for a period of one year to begin with. The post is purely temporary and terminable without any notice.

(3) ...

(4) Her appointment is specially for the post being offered to her and in case of winding up of the project, her services shall stand terminated.

(5) ...

(6)"

Following the appointment, the petitioner joined her services on 27.11.1990. She was sent to Hyderabad for a ten days training course(vide Annexures 6 and 7). It is also stated in the writ petition that the petitioner was asked to give her option for the pension scheme introduced for the staff to give her option for the pension scheme introduced for the staff of the Co-operative Union, including the Project Personnel and she duly gave her option vide her letter dated 20.12.1990 (copy at Annexure 10).

3. Commencing from 27.11.1990, the period of one year came to an end on 26.11.1991. However, as noted above, the impugned order of termination of service was

issued on 12.12.1991.

4. Dr. S.N. Jha, learned counsel appearing on behalf of the petitioner first sought to attack the very premise that the petitioner's appointment was contract appointment for one year. He pointed out that the memorandum of appointment did not say that the appointment was for a definite period of one year but said that it has on contractual basis for a period of one year to begin with. According to him, it was implicit therein that the appointment was likely to be extended indefinitely. Coupled with this, he relied upon the circumstance that the services of the petitioner were not terminated on 26.11.1991 but were allowed to extend beyond that date. In this regard he also relied upon two communications dated 25.11.1991 and 28.11.1991 addressed to the petitioner; copies of the aforesaid two communications have been brought on record as Annexures 20 and 21 along with petitioner's reply to the counter affidavit. The communication dated 25.11.1991 contained comments on the petitioner's activities for the month of October, 1991 and the communication dated 28.11.1991 was on the subject of the tour programmes for the months of November and December 1991 and advised the petitioner to hold at least two meetings every day in course of her tour programme. Dr. Jha contended that it was evident from these two letters that till 28.11.1991 (i.e., two days after the expiry of the one year period) the authorities did not have in mind the termination of service of the petitioner

and while issuing the impugned order on 12.12.1991 the pretext of one year contract was cited only as an after thought.

5. I am unable to attach much significance to the circumstances relied upon by Dr. Jha. Of the two letters, the one dated 25.11.1991 contains comments on the petitioner's activities for the month of October, 1991 when she was admittedly in employment. The other letter dated 28.11.1991 is in the nature of a general circular which would have been sent to all Mobilizers. It was simply an over sight that it was also addressed to the petitioner as such circulars and general instructions were being addressed to her during past months. At best it was a very minor lapse in the functioning of the office and on the basis of the two letters, I am unable to hold that her appointment vide memorandum dated 9.11.1990 was not in the nature of contract appointment for one year. Also revealing in this regard is the statement made in the rejoinder affidavit on behalf of the respondents that the petitioner illegally and without any authority continued to work for a few days beyond the period specified in the terms of contract with the connivance of the then Project Officer, Shri N.P. Sinha, who is her husband.

6. Dr. Jha then submitted that even assuming that the petitioner's appointment was under a contract for one year, the termination of her service without notice or an opportunity of being heard did not merely infringe the

principles of natural justice but also offended the judicial notion of fair play. Dr. Jha sought to develop his submissions based on the denial of notice/an opportunity to be heard in several ways. He argued that the principles of natural justice and the idea of fair play were distinctly separate and independent judicial concepts (reliance placed upon 1990 B.R.L.J, 176 S.C.) and even in cases where the principles of natural justice may not have any application, a proper hearing was still the requirement of 'fair play'. He also cited a very brief para (no. 112) from *Charan Lal Sahu vs. Union of India*,¹

" All civilized countries accepts the right to be heard as part of the due process of law where questions affecting their rights, privileges or claims are considered or adjudicted."

Dr. Jha next contended that even assuming that the petitioner had no enforceable right after the expiry of her contract of service for one year, still a prior hearing was required by the principles of natural justice in as much as the impugned termination order would deprive her of the advantages and benefits of employment. Reliance was placed on the case of *H.L. Trehan Vs. Union of India*,¹

7. I am unimpressed by any of these submissions. The rights and obligations of the parties had crystallised in the memorandum of appointment which stipulated that

1. (1990) A.I.R. (S.C.) 1480

2. (1989) A.I.R. (SC) 568

The appointment was for a period of one year. Hence, it was well known to the petitioner what was offered to her and that her appointment, without anything else, would automatically come to an end after one year from the date of her joining. I do not see any application of the principles of natural justice and I am also of the view that the respondent Co-operative Union has not acted either in an unfair or an unreasonable manner.

8. Dr Jha then submitted that the impugned termination of service was in violation of the provisions contained in section 25F of the Industrial Disputes Act, 1947 as the petitioner's services were terminated without fulfilling the mandatory pre conditions as envisaged in that section. When it was brought to his notice that termination of service on the expiry of contract has been specifically excluded from the definition of retrenchment as contained in section 2(00) of the Industrial Disputes Act. Dr. Jha fairly stated that he would not press this point.

9. He next contended that the respondents had acted arbitrarily and discriminately in singling out the petitioner for termination of service on the plea that the contract of her appointment was over. He submitted that on reading together the terms at serial nos. 2 and 4 of the memorandum of appointment, it was apparent that the post of Mobilizer was available as long as the project was in operation. He also stated that the project in question, namely, Co-operative Education Field Project

had been under taken by the Co-operative Union in several states including Bihar and a number of Mobilizer/Lady Mobilizers were appointed on exactly the same terms and conditions as the petitioner. In the state of Bihar itself another Lady Mobilizer was appointed for Ranchi on the same terms and conditions as the petitioner. It was also asserted that among several Mobilizers/Field Mobilizers appointed for the same project in similar manner and exactly on the same terms and conditions it was the petitioner alone whose services were terminated. It was also stated in the writ petition that the project in question was still under way and a Lady Mobilizer was still required for Patna and steps had already been taken to make a fresh appointment to the post. Dr. Jha also referred to some allegations of malafide made in the writ petition to the effect that the petitioner had been removed to make room for one Smt. Kanti Tapya in whose appointment respondent no. 2 was interested Dr. Jha also pointed out that the respondents in their affidavit had persistently refused to disclose the reason even to the Court for singling out the petitioner for terminating her services. Relying upon the case of the *Manager, Government Branch Press & Another Vs. D.B. Belliappa*,¹ Dr. Jha argued that the respondents were bound to disclose the reason to the Court for terminating the services of the petitioner alone amongst several similarly situated persons and in view of their

1. (1979) A.I.R. (S.C.) 429

refusal to do so, their action in terminating the services of the petitioner must be characterised as arbitrary and discriminatory.

10. I am prima facie attracted by this submission and should have felt persuaded to examine it in more detail but for the fact that the main hurdle before the petitioner relates to the maintainability of this application. I may at this stage record that I have merely enumerated the submissions advanced by Dr. Jha on the merits of the case and have not examined those submissions in greater detail on purpose as I am of the view that this application has to fail on the question of maintainability.

11. As regards the maintain ability of this application, it is to be noted that the two respondents are the National Co-operative Union of India and one of its officials. One of the preliminary objections raised on behalf of the respondents is that the Co- operative Union is not a State or an instrumentality thereof and is, thus, not subject to the writ jurisdiction of this Court.

12. The pleadings on this point have come in stages. The writ petition was initially filed taking it for granted that the respondents were covered by the definition of State within the meaning of Article 12 of the Constitution. It was stated in para 4 of the writ petition that the Co-operative Union was a society registered with the Central Registrar

Co-operative Societies under the Multi-State Co-op. Societies Act, 1984 and Rules, 1985 and as such was a State within the definition of the Article of the Constitution. This statement was simply begging the question. In paras 24 and 2 (vii) while making statements in a different context, it was also stated that the project in question undertaken by the Co-operative Union was 100% financed by the Ministry of Agriculture and Co-operation, Government of India. It is to be noted here that the statement was not that the entire finances of the Co-operative Union came from the Government of India by only that the finances relating to the project in question were furnished by the Government of India. Nothing more than this was stated in the writ petition on this aspect of the matter. The denial in the counter affidavit was as bald as the assertions made in the writ petition. In para 3(a) of the counter affidavit, it was stated that the Co-operative Union was neither a state nor authority nor instrumentality or agency within the meaning of Article 12 of the Constitution. It was further stated that the functions of the society were independent and were in no way connected with the Government functions or with the business of the Government. It was further stated in para 7 of the counter affidavit that it was correct to say that the Co-operative union was registered with the Central Registrar under the Multi-State Co-operative Society Act but it was neither a State nor authority or instrumentality within the meaning of Article 12 of the Constitution. In

para 27, it was stated that though the project in question was financed by the Central Government, its management and administration was in the hands of the Co-operative Union which was obliged to act in accordance with its own rules and regulations. It was also said that on matters of appointment and termination the Co-operative Union was the sole authority to take a decision and the Government had no role to play in these matters.

13. In her reply to the counter affidavit, the petitioner contended that the entire activities of the Co-operative Union were guided and controlled by different directions, orders and policy decisions of the Government of Bihar (sic) and that the Co-operative Union was a corporate body founded by the Central Government. In support of this contention four documents have been brought on record marked as Annexures 16 to 19. Annexure 16 is an office order dated 15.3.88 issued for general information by the Joint Director, personnel that following the directions of the Agriculture Ministry of the Central Government it was being made known that the employees of the Co-operative Union also came within the ambit of the Central Vigilance Commission. Annexure 17 is a communication dated 6.11.87 issued by the Deputy Director (Finance) to all the Project Officers. This makes a reference to a letter from the Finance Advisor, Department of Agriculture & Co-op., Ministry of Agriculture Government of India (copy of which is annexure 18) and states that the Government had decided to minimise

expenditure on account of drought and necessary instruction had been issued to all departments. The latter accordingly advised the Project Officers to comply with the above decision of the Government. Annexure 19 is another communication dated 29.10.1982 from the Ministry of Agriculture giving sanction for creation of 15 part time posts of typist-cum-clerk and 15 part time posts of Peons on consolidated wages for the Central Sector Scheme for Co-operative Education and Training & Special Scheme for Intensification of Co-operative Education. The Co-operative Union in its turn communicated the sanction for the posts to all Project Officers.

14. I am of the opinion that these documents do not cut much ice in support of the plea that the Co-operative Union functioned under the administrative control of the Central Government. This will become more apparent in view of the assertions made in the rejoinder affidavit filed on behalf of the respondents. It is stated in the rejoinder that the Co-operative Union is not 100% funded by the Government and the fact is that the fund of the Co-operative union is very largely self generated. It is further pointed out that Annexure 19 related only to posts in some projects undertaken by the Co-operative Union with the aid of the Government, otherwise the posts of the Co-operative Union were created by its own Governing Council. It is further denied that the Co-operative Union was guided and controlled by the policy and decision of the Government. It was stated that the Co-

operative Union functioned under its own bye-laws through the Governing Council and Executive Committee constituted under the bye-laws. The functions of the Co-operative Union were independent and were in no way connected with the Governmental function or with the business of the Government.

15. What is of utmost importance in this regard are the bye laws of the Co-operative Union, a copy whereof has been marked as Annexure 'A' to the rejoinder affidavit. Clause 3 of the bye laws incorporates the objects of the Co-operative Union which are as follows :

3. Objects

The objects of the Union shall be to promote and to develop the cooperative movement in India, to educate, guide and assist the people in their efforts to build up and expand the co-operative sector and to serve as an exponent of co-operative opinion in accordance with co-operative principles as enunciated in the first schedule to the act.

In furtherance of these objects, the Union may either by itself or in collaboration with other co-operative institutions :

(i) organise cooperative education and training programmes and popularise the principles and practices of co-operation;

(ii) develop inter-corporative relations and help the co-ordinated functioning of the cooperative movement in various sectors;

(iii) organise, conduct, collaborate and assist in carrying out research, in vestigation of co-operative problems and formulation of projects for co-operative development;

(iv) arrange for the production and publication of literature and audio-visual and other aids including films, filmstrips

on cooperation and allied subjects ;

(v) give publicity to the achievements of cooperative through periodicals, journals, newspapers, pamphlets brochures, books, films, broadcasts, T.V. and the like for creating favourable atmosphere for the development of the cooperative movements;

(vi) maintain an information bureau and a library;

(vii) express opinion on matters of cooperative policy and act as the accredited representative of the Indian cooperative Movement in the national and international spheres;

(viii) convene and hold the National Cooperative Congress and Cooperative seminars, meetings, conference, exhibitions etc;

(ix) select delegates, representatives and observers on behalf of the Union for participation in the international, national and state conference;

(x) facilitate the promotion of cooperative institutions and assist the member societies in resolving their problems and difficulties and formulation of programmes and their implementation and formulation and safeguard the democratic character of the cooperative movement in the country;

(xi) to confer honour on the eminent cooperators;

(xii) acquire, hire, purchase, own or dispose of immovable property by way of sale, lease or otherwise for the furtherance of the objects of the Union;

(xiii) promote international cooperative relations through active collaboration with ICA, UNO, FAO, ILO, UNIP, UNID and other international agencies involved in cooperative developments;

(xiv) establish effective liason and relations with ICA member- organisations and national cooperative organisations of other countries;

(xv) help, promote international marketing on cooperative to cooperative basis by documenting necessary information

and to act as nodal agency for the benefit of Indian Cooperative Movement;

(xvi) to provide consultancy services to Co-operative

(xvii) to maintain the following funds :

(a) Cooperative Education Fund,

(b) National Cooperative Training Fund,

(c) any other fund as decided by the governing council from time to time.

(xviii) generally undertake such activities or functions as are considered incidental or conducive to the attainment of the objects of the Union."

Clause 4 provides that the member-ship of the Union shall be open to the following :

" 4 Membership

The membership of the Union shall be open to :

(i) State Cooperative Unions or by whatever names they are called;

(ii) National Cooperative Societies/Federations ;

(iii) Cooperative unions of union territories;

(iv) Cooperative business and non-business federation/apex societies of State and Union territories ;

(v) State Tribal Development Cooperative Corporations registered under the cooperative law;

(vi) Multi-State Cooperative societies not included in (ii) above

(xii) Ex-Presidents of the Union who have served their full term of office and other individuals not exceeding 15 in number with the knowledge and experience in the field of cooperation and their term of membership will be conterminus with the term of the governing council.

(viii) National Cooperative Development Corporation, National Bank of Agriculture and Rural Development, National Dairy Development Board, and Rural Electrification Corpora-

tion."

Clause 8 deals with the funds of the cooperative union and the sources of the fund are the following

"8. Funds

The funds of the Union may be raised from the following:

- (i) Annual membership subscription;
- (ii) Contribution or donations;
- (iii) Grants from Government;
- (iv) Moneys/income from the cooperative education fund created as per Act and rules and maintained by the Union.
- (v) Sale proceeds of publications, journals, text books, films
- (vi) Loans and advances; and
- (vii) Income from exhibitions, projects, consultancy services or any other activities undertaken by the Union as per its bye-laws."

From clause 9 it appears that the Cooperative Union would be raising considerable funds from the annual subscription from members. Clauses 10 to 13 relates to the general body or the Cooperative Union and clause 13 provides that the authorities of the Union shall vest in the general body which shall perform the functions enumerated in that clause. Clauses 14 and 15 relate to governing council. Clause 16 provides for formation of committees and clause 17 deals with the powers and functions of the Executive Committee. Powers of the President, Vice President and the Chief Executive are dealt within clauses 18, 19 and 20 respectively. Clause 22 provides that the cooperative Union shall have service rules for regulating the service conditions of its

employees as formulated and amended by the competent authority from time to time. Clause 26 stipulates

that all questions at the meetings shall be decided by a majority of votes. The only clause in the bye laws where there is a reference to the Government of India is clause 16 A which states that National council for Cooperative Training shall be constituted by the cooperative Union in consultation with the Government of India.

16. In view of what has been found above it is plain that the Cooperative Union does not satisfy any of the six tests as spelt out in the case of *Ajay Hasia vs. Khalid Mojib Sehravardi and others*.¹ and cannot be held to be an instrumentality or an agency of the State or an authority within the meaning of Article 12 of the Constitution.

17. Faced with this position, Dr. Jha fell back upon the case of *Shri Anandi Mukta Sadguru S.M.V.S.J.M.S. Trust vs. V. R.Rudani*.² Dr. Jha particularly relied upon paras 15,16,18 and 21 of this decision and submitted that the powers of this court to issue writs under Article 226 of the Constitution went beyond the confines of Article 12. I am of the opinion that the decision relied upon by

1 (1981) A.I.R. (S.C.) 487

2 (1989) A.I.R. (S.C.) 1607.

Dr. Jha is not applicable in the facts and circumstances of this case. The point of distinction, to my mind, is to be found in para 13 of that decision wherein. Their Lordships while explaining and distinguishing two earlier decisions of the Supreme Court (A.I.R. 1976 S.C. 888 and 1987 (2) S.C.C. 252) observed as follows :

"but here the facts are quite different and, therefore, we need not go thus far. There is no plea for specific performance of contractual service. The respondents are not seeking a declaration that they be continued in service. They are not asking for mandamus to put them back into college. They are claiming only the terminal benefits and arrears of salary payable to them. The question is whether the trust can be compelled to pay by a writ of mandamus."

In my opinion, the facts of the case in hand are fully covered by two division Bench decisions of this Court as also a decision of the Supreme Court. I propose first to examine the two decisions of this Court. In the case of *Harendra Narain Banker vs. State of Bihar and others*¹ the question for consideration before a division Bench of this court was whether Bihar State Co-operative Marketing Union Limited (for short the Bisco-maun') a society

¹ (1985)P.L.J.R. (1078)

registered under the Bihar & Orissa Cooperative Societies Act, 1935 was an instrumentality or agency of the State and consequently, amenable to the writ jurisdiction. The assertions made in support of the contention that Biscomaun was as instrumentality of the State were much more formidable than what has been pleaded in this case. In the case of Biscomaun, it was stated that all the employees of Biscomaun were governed by the provisions contained in the Bihar Service Code and their pay scales and emoluments were at par with those of the Government servants. Further, the replacement scale of salary as per the Government resolution on the recommendation of the 4th pay revision committee had also been made applicable to the employees of Biscomaun. It was also stated that the share of the State Government in Biscomaun was 99% and bearing the shares held by the Cooperative Societies and others the remaining share capital was held by the State. It was also stated that the Biscomaun was run and managed by 35 Government servants and among them one was an I.A.S. officer and four persons were in the rank of Additional District Magistrate. In the face of these assertions a Bench of this Court on a detailed consideration of a number of

Supreme Court decisions came to the conclusion that Biscomaun was not an instrumentality or agency of the State Government and was accordingly outside the purview of the writ jurisdiction.

18. It is true that after the aforesaid decision whole sale and radical amendments were brought about in the Bihar & Orissa Cooperative societies Act, 1935 whereby the status and character of Biscomaun was fundamentally changed and after those amendments this Court has on a number of occasions issued writs and directions to Biscomaun. But recently in the case of *Bihar State Cooperative Marketing Union Limited vs. State and others*.¹ the question regarding the status and character of Biscomaun before the amendments in Cooperative Societies Act once again cropped up and a Bench of this Court reiterating the earlier decision in the case of *Harendra Narain Banker (supra)* reiterated that before the amendments Biscomaun was a cooperative society registered under the Bihar & Orissa Co-operative Societies Act, 1935 and as such was not amendable to the writ jurisdiction under Article 226 of the constitution.

19. Very similar on facts is the case of *Chandra Mohan Khanna vs. National Council of Educational Research and Training and others*.¹ In that case, an employee of the N.C.E.R.T. whose services were terminated challenged the termination in the Delhi High Court under Article 226 of the Constitution. The challenge failed on the objection that the N.C.E.R.T. was not amenable to the writ jurisdiction of the High Court as it was not an 'instrumentality or other authority' within the meaning of Article 12 of the Constitution. In appeal the Supreme Court upheld the High Court's decision and found that N.C.E.R.T. did not satisfy the requirements of State under Article 12 of the Constitution. Following observation was made in para 5 of the judgment:

" 5. The object of the N.C.E.R.T. as seen from the above analysis is to assist and advice the Ministry of Education and Social Welfare in the implementation of the Governmental policies and major education. The N.C.E.R.T. undertakes several kinds of programmes and activities connected with the coordinating, dissemination of improved educational techniques, collaboration in the educational programmes. It also undertakes preparation and publication of books, materials, periodicals and other literature. These activities are not wholly related to governmental functions. The affairs of the N.C.E.R.T. are conducted by the Executive Committee comprising of Government servants and educationists. The Executive committee would enter into arrangements with Government, public or private organisations or individuals in furtherance of the objectives for implementation of

1. (1990) A.I.R. 2(S.C.) 76 .

programmes. The funds of the N.C.E.R.T. consist of (i) grants made by the Government, (ii) contribution from other sources, and (iii) income from its own asserts. It is free to apply its income and property towards the promotion of its objectives and implementation of the programmes. The Government control is confined only to the proper utilisation of the grant. The N.C.E.R.T. is thus largely an autonomous body."

The Cooperative Union in this case does not have any association with the Government even on the level of N.C.E.R.T. as observed by the Supreme Court in the afore-quoted passage.

20. I have, therefore, not the slightest hesitation in holding that the cooperative Union (respondent no.1) is neither a State nor an instrumentality or agency, or authority within the meaning of Article 12 of the Constitution and is, therefore, not subject to writ jurisdiction of this Court.

21. This writ petition is, therefore, not maintainable. To hold this is not to say that the petitioner is without her remedy. The petitioner may seek her remedy, if available, under the Industrial Disputes Act of the Bihar Shops and Establishment Act in accordance with law.

22. In the result, this writ application is dismissed as not maintainable but in the facts and circumstances of this case, there shall be no order as to costs.

S.P.J.

Application dismissed



CIVIL WRIT JURISDICTION**Before S.B. Sinha, J.****1993****May, 18.****Deoraj Thakur.*****V.****The state of Bihar & ors.**

Bihar Privileged Persons Homestead Tenancy Act, 1947, (Bihar Act IV of 1948), and Rules framed thereunder -- conditions precedent for grant of Basgit parcha -- whether have to be fulfilled -- procedures laid down under the rules whether to be followed -- trespasser or squatter, whether can become a privileged tenant.

Held, that, not only the conditions present prescribed for grant of Basgit parcha have to be fulfilled but also the procedures laid down therein under the rules and in particular Rule of the Bihar Privileged Tenancy Rules are required to be followed.

Held, further, that a trespasser or squatter cannot become a privileged tenant.

*Bishwanath Singh. v. The State of Bihar and ors.*¹

..... referred to.

* Civil Writ Jurisdiction Case No. 3271 of 1987. In the matter of an application under Articles 226 and 227 of the Constitution of India.

¹ (1981) A.I.R. 145 (Pat)

Application by the petitioner.

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

Mr. Manan Kumar Mishra, Advocate for the petitioner

Mr. S.N. Roy, S.C. - III for the State

Mr. Binay Kant Tripathi, Advocate &

Mr. K.N. Tiwari, Advocate for the respondent no. 3

S.B. Sinha, J. — This application is directed against the orders dated 27.11.1976 and 11.1.1977 as also the parcha granted in favour of the respondent no.3 by respondent no.2 purported to be in exercise of power conferred upon him under the Bihar Privileged Persons Homestead Tenancy Act, 1947 (hereinafter to be referred to as 'the said Act') as contained in Annexures-4 and 4/A respectively to the writ application.

2. Shortly put the fact of the matter is as follows.

3. The lands in question being plot no. 3480 appertaining to Khata No. 489 of village Hasapur measuring 3 decimals was recorded in the name of Sri Saral Bania in Survey Settlement records of right.

4. Respondent no. 3 filed an application for grant of Basgit parcha in respect of the said land. The said application was put up before respondent no.2 who is

Collector under the said Act on 27.11.1976 alongwith the recommendations of the Halka Karmachari through the Circle Inspector in Form No. XXVI. The Anchal Amin had also made recommendations in favour of the applicants.

5. The raiyat concerned allegedly was given notice. On the next date fixed i.e. 11.1.1977 the respondent no. 2 allowed the said application purported to be on the ground that in terms of Section 16 of the said Act and land can be settled in favour of a privileged person. He, therefore, considered the aforementioned report of the Halka Karmachari who had not only recommended for settlement but also recommended for fixation of fair rent.

6. On the basis of the said report of the Halka Karmachari, the impugned orders have been passed.

7. Mr. Manan Kumar Mishra, learned counsel for the petitioner inter-alia submitted that from a perusal of the impugned order it would appear that respondent no.3 was merely a tres-passer

8. A tres -passer or squatter can not become a privileged tenant. See *Bishwanath Singh Vs. The State of Bihar and others* reported in A.I.R., 1981 Patna, 145.

9. Respondent No.2 in his impugned order did not record any finding that the respondent no.3 was a privileged tenant

10. Respondent No.2 did not also come to any finding that there exists any relationship of land-lord and

the tenant by and between respondent no.3 and any other person.

11. Mr. S.N. Roy, learned Standing Counsel-III for the State and Mr. K.N. Tiwary, learned counsel appearing on behalf of respondent no.3, however, submitted that, although, the parcha was granted in the year 1977, the application for mutation was filed by the petitioner in the year 1986.

12. The learned counsel, therefore, submitted that in this view of the matter, this Court should not interfere with the impugned order.

13. It was further submitted that an order under Section 145 of the Code of Criminal Procedure was also passed as against the petitioner. The learned counsel has further drawn my attention to the statements made in Paragraph-12 of the counter-affidavit which reads as follows :

"That with regard to the statement made in paragraph nos.12 and 13 to the writ petition, it is stated that the respondent no.3 is a issueless divorced lady. Her husband has also performed his second marriage and has got sons from his second wife. Her husband had already executed a registered deed of Gift with regard to his all immovables property vide deed of Gift No. 4594 dated 20.6.1968. Nothing has been given to the respondent no.3 by her husband. Allegation contrary to this is completely false."

14. It may be that the condition of the respondent no.3 is pitiable. However, pitiable condition of a lady can not be a ground for grant of a basgit parcha under the provision of the said Act.

15. By reason of such a grant, a valuable right of a land-lord is lost. Not only the conditions precedent prescribed for grant of such basgit parcha have to be fulfilled but also the procedures laid down therein under the rules and in particular Rule 5 of the Bihar Privileged Tenancy Rules are required to be followed.

16. A bare perusal of the impugned orders dated 27.11.1976 and 11.1.1977 indicate that the respondent no.3 prior to filing of the application before the Collector must have approached the Halka Karmachari, as otherwise, there can not be any earthly reason as to why the petition for grant of basgit parcha was accompanied by the recommendations of the Halka Karmachari.

17. It is, thus, obvious that no recommendations was called for by the Collector under the said Act. Further, in terms of Rule 5 of the Rules, the Collector under the said Act is required to conduct the enquiry himself or to get the same enquired by an officer not below the rank of Circle Inspector.

18. There is also nothing on the record to show that the land- lord was at any point of time was served with any notice.

19. From a perusal of the impugned order (A-4), it is also evident that no finding has been arrived at by the respondent no.2 that the respondent no.3 is a privileged person far less a privileged tenant. It is also evident from the impugned order that recommendations have been made for fixation of fair rent which was not the stage therefore as the question of fixation of fair rent arises only after grant of basgit parcha.

20. For the aforementioned reasons, the application is allowed and the impugned orders dated 27.11.1976 and 11.1.1977 as also parcha granted in favour of respondent no.3 by respondent no.2 as contained in Annexures-4 and 4/A respectively to the writ application are set aside.

21. In the facts and circumstances of the case, there will be no order as to costs.

R.D.

Application allowed

CIVIL WRIT JURISDICTION**Before S.B. Sinha & A.N. Chaturvedi, JJ.****1993****May,20****Sukhdeo Paswan and others.*****V.****The State of Bihar & others.**

Constitution----- Articles 226 and 227 ----- applications under--whether can consider the sufficiency of reasons assigned by the Collector under Section 48(E) of Bihar Tenancy Act, 1885 (Bihar Act no.VIII of 1885) -----Section 48E (1) ----- provisions of.

The Collector in applications under 48E(1) of Bihar Tenancy Act, 1885 hereinafter referred to as the Act, while considering large number of cases on similar point gave opportunity to the landlord also before arriving at its finding as to whether the applications should be entertained or not.

Held, that the High Court while exercising its jurisdiction under Article 227 of the Constitution, cannot consider the sufficiency of reasons assigned by Collector under the Act.

* Civil Writ Jurisdiction Case No. 354 of 1992 . In the matter of an application under Articles 226 and 227 of the Constitution of India.

In passing the impugned order under Section 48E(1) of the Act, the Collector has neither committed any illegality, irregularity or irrationality.

Case laws discussed.

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.B. Sinha, J.

Mr. Binod kumar Ambastha for the petitioner

Mrs. Seema Ali khan S.C. 7 for the State.

S.B. Sinha, J: — This application is directed against an order dated 8.10.1991 passed in Bataidari case no. 100 of 1991 and other analogous cases whereby the Deputy Collector Land Reforms, Manjhaul had dismissed the application of all the petitioners by a common order.

2. The petitioner's claimed themselves to be the agricultural Labourers. According to them they are bataidars of the landlord for the last 13 years. The petitioners having been threatened with unlawful ejectment filed applications for a declaration that they are bataidars of the respondent no. 3.

3. The petitioners themselves have contended that 114 such applications has been filed resulting in initiation of 114 different cases. The respondent no. 2 issued

notice to the respondent No.3 and allowed him to file documents.

4. By reason of the impugned order dated 8.10.1991, the Respondent No.2 has come to the conclusion that the petitioners have failed to make out a case that they are bataidars of Respondent No.3 and their claim is thus unfounded.

5. Mr. Binod Kumar Ambastha, the learned counsel appearing on behalf of the petitioner submitted that at the stage of entertaining the application under Section 48E(1) of the Bihar Tenancy Act a detailed enquiry was wholly unwarranted.

6. He further submitted that the respondent No.3 is a big land holder and the proceedings under Bihar Land Reforms(Fixation of Ceiling Area and Acquisition of Surplus Land) Act is pending against him.

7. Section 48(E) of the Bihar Tenancy Act reads as follows :-

"Prevention of threatened ejectment of under-raiyat and restoration to possession under-raiyat unlawfully ejected. (1) If an under-raiyat is threatened with unlawful ejectment from his tenancy or any portion thereof by his landlord or if there is a dispute between them over the possession of land, crop or produce thereof either on the ground of non-existence of relationship of landlord and tenant between them or otherwise or if an under-raiyat is or has been ejected from his tenancy or any portion thereof within twelve years before the commencement of proceedings under this Section in contravention of the provisions of Section 89 the Collector may, of his own motion or application made in this behalf by the under-raiyat, initiate a proceeding for preventing the landlord

from ejecting the under-raiyat or for settlement of the said dispute or for restoration to possession under-raiyat unlawfully ejected from his tenancy or portion thereof."

From a bare perusal of the aforementioned provision there cannot be any doubt that a proceeding thereunder can be initiated if there exists a bonafide dispute.

8. The contentions raised in this application are no longer res- intergra.

9. In *Dhanji Singh Vs. State* reported in AIR 1979 Patna 259:1979 BBCJ 521, it has been held that if is for the Collector under the Act to satisfy himself on the basis of the information received by him or on the materials brought on records for arriving at a finding as to whether the dispute is bonafide one so as to warrant, initiation of a proceedings under Section 48E(1) of the said Act.

10. This aspect of the matter had again been considered in *Bhaddo Uraon Vs. State of Bihar* reported in 1988 BBCJ 711 wherein the aforementioned full Bench judgment in *Dhanji's case* (Supra) was analysed in the following terms :-

"It was stated in the judgment of B.P. Sinha, J in the same case viz *Dhan Singh* (Supra) that the Collector had to be find out whether a prima facie case existed for initiation of proceeding under the said section 48E and as such the Collector could not prevent the opposite party from appearing before him to establish that such a prima facie case did not exist in favour of the applicant.

It was observed in the judgment of P.S.Sahay,J also in the same case, that it should not be held that the opposite party had a right to appear before the Collector in all cases as a matter of right, though no hard and fast rule could be laid down in this regard. It was observed further that at the initiation stage all that the Collector had to see was whether the three requisite conditions enumerated in Sub-section (1) of Section 48E had been satisfied or not.

Constructing the observations in the three judgment of the learned Judges in the said Full Bench decision it appears to me that the Collector at the stage of initiating proceeding under Section 48E is only required to be satisfied that a prima facie case has been made out by the applicant. In the absence of a prima facie case no proceeding under Section 48E should be initiated even if the opposite party did not appear. The examples given in the judgment of N.P. Singh, J, in the said case may be noted. If it was the allegation of the under-raiyat that he had been dispossessed by the landlord 12 years prior to the date of filing of the application of that the under-raiyat had been dispossessed by a third party obviously his application under section 48E would not be maintainable ex facie and no proceeding should be initiated."

11. This aspect of the matter has also recently been considered again by me in CWJC No. 2119 & 455 of 1985 disposed of on 30.4.1993 wherein upon taking into

consideration various decisions it was held that it is for the court concerned to arrive at a satisfaction as to whether a *prima facie* case for entertaining the application under Section 48E(1) existed or not.

12. From a perusal of the impugned order, it appears that as the Collector under the Act was required to consider a large number of cases involving similar points. He was, thus entitled to give an opportunity of hearing to the landlord also before arriving at a finding as to whether the said applications should be entertained or not.

13. The Collector under the Act has clearly held that the petitioners had not possessed the lands in question and the said applications were *malafide*.

14. It was further held that in the village in question a Load of applications are being filed in a planned manner so as to usurp the lands of the landholders. The Collector under the Act came to the finding that most of the applicants were even not aware of the details of lands of which are said to be *bataidars*.

15. This court while exercising its jurisdiction under article 227 of the Constitution of India, cannot consider the sufficiency of reasons assigned by the Collector. If the findings arrived at by the Collector under the Act are reasonable, this court cannot exercise its jurisdiction under Articles 226 and 227 of the Constitution of India.

16. It has not been contended that the order passed by the Collector under the Act was malafide, or if he misdirected himself in law in passing the said order. It is now well known that illegality, irregularity and irrationality are the main grounds upon which this court may exercise its discretion under Articles 226 & 227 of the Constitution of India.

17. In our opinion, the Collector under the Act in passing the impugned order has neither committed any illegality, irregularity or irrationality.

18. There is, thus, no merit in this application, which is accordingly dismissed, but without any order as to costs.

A.N.Chaturvedi, J: I agree

S.P.J.

Application dismissed

CIVIL WRIT JURISDICTION**Before S.B. Sinha & R.N. Prasad, JJ.****1993****June, 30****Bihar State Non Gazetted Employees****Federation Siwanjali.²****V.****The State of Bihar and others.**

Service--transfer and posting--circular letter issued by the State Government directing the Heads of Department to follow the guidelines contained therein 'as far as possible'--policy decision, whether directory in nature--High Court, whether should issue a writ of or in the nature of mandamus.

Where the circular letter issued by the Bihar Cabinet Secretariat and Co-ordination Department to all heads of the Department stipulates of the guidelines laid down therein should be followed as far as possible in the matter of transfer and posting of the employees of the concerned Department;

Held, that, the policy decision is directory in nature and as such the petitioner is not entitled to issuance of

* Civil Writ Jurisdiction Case No. 3465 of 1992. In the matter of an application under Articles 226 and 227 of the Constitution of India.

a writ of or in the nature of mandamus from the High Court commanding upon the Stock to strictly enforce the same.

*Shanti Kumari v. Regional Dy Director, Health Services Patna.*¹ referred to.

Application by the petitioner.

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

Mr. Rajiv Kumar Singh for the petitioner

Mr. J.N. Jha G.P.I. for the State.

S.B. Sinha, J. — The petitioner which is a Federation of the Bihar Non-Gazetted Employees had filed this application *inter alia* for issuance of a writ of or in the nature of mandamus commanding upon the respondents to maintain gradation list of the Secretary Private Secretaries, Senior Personal Assistants and Personal Assistants in the matter of their transfer and posting by the respondents and for a further direction to abide by the circular letter contained in letter No. 9/PR-108/91 dated 17th July, 1991 which is contained in Annexure-1 to the writ application and the Circular letter dated 9.4.1967 as contained in Annexure-2 thereto.

2. The petitioner has contended that the Bihar Cabinet Secretariat and Co-ordination Department has

1 . (1981) A.I.R. (S.C.) 1577.

issued a policy decision whereby an whereunder it was directed to all heads of the department that the Establishment Committee should be constituted for making recommendations of transfer and posting of the employees of the concerned Department in terms of the guidelines contained in the aforementioned letter dated 17th July, 1991.

3. According to the petitioner several glaring instances had come to its notice wherefrom it appears that the constructions contained in the aforementioned letter have been violated.

4. The petitioner in paragraphs 11 of the writ petition as also in paragraph 7 of the reply/rejoinder to the counter affidavit has given some such instances.

5. The state, on the other hand, in its counter affidavit interalia has stated as follows :-

"That the statement made in paragraph 7 of the writ application is not acceptable. The fact is that the transfer and posting of the personnel of the Personal Assistant (P.A) Cadre under the administrative control of the Department of Personnel & Administrative Reforms is not similar to other cadres. These Personnel are at times returned back by the Officers under whom they work, to the department of Personnel & Administrative Reforms and some times the P.A.'s report themselves in the leave reserve pool. Thereafter, according to demand already received in the Department from officers of different

departments, these Secretaries/private Secretaries Senior Personal Assistant/P.A.'s are deputed to work with them.

It is also note-worthy that Ministers/Chairman of Public Sector Undertakings holding the rank of Ministers send requisition for deputation of a particular person, which are generally to be complied with, and also in the interest of work and in such postings seniority cannot be taken as the basis of deputation.

As stated earlier, services of Personal Assistants are at times returned on the ground of inefficiency, disobedience. But due to dearth of suitable hands, non available in the leave reserve pool at a given point of time, persons have to be deputed urgently to fill the vacancy in the interest of Government work. In such circumstances consideration of appropriate seniority cannot be adhered to."

6. The learned counsel appearing on behalf of the petitioner has submitted that the State is bound by its policy decision and any violation thereof would amount to arbitrary exercise of power.

7. The question, which, thus, arises for consideration in this application is as to whether the petitioners are entitled to obtain a writ of or in the nature of mandamus as prayed for.

8. From a bare persual of the circular letter dated 17th July, 1991 as contained in Annexure-1 to the writ

application it would appear that a directive had been issued therein that postings of the Personal Assistants, Senior Personal Assistants Secretaries and Private Secretaries are to be made, keeping in view their seniority and the guidelines contained therein, as far as possible.

9. It is true that when a policy decision is adopted by the state, it is bound by the mandatory provisions contained therein.

10. However, in a case where guidelines only have been issued by the State, the same are normally directory in nature. In view of the fact that the circular letter as contained in Annexure-1 to the writ application stipulates of the guidelines laid down therein should be followed 'as far as possible' is a clearly suggestive of the fact that the same are directory in nature.

11. This aspect of the matter has been considered by a division Bench of this court in *Man Singh vs. State of Bihar* reported in 1982 BBCJ & 392 wherein it has been held that executive instructions issued laying down the procedures for transfer of the Government servants in absence of any rule framed under Article 309. of the Constitution of India, are directory in nature.

12. In view of the fact that the policy decision is directory in nature, in our opinion the petitioner Federation is not entitled to issuance of a writ of or in the nature of mandamus from this court commanding upon the

State to strictly enforce the same.

13. Further it is now well known that a transfer is an incidence of service.

In *Shanti Kumari Vs. Regional Dy. Director Health Services Patna* reported in 1981 S.C. 1577 it has been held that even if there has been a violation of any guidelines contained in any executive instruction, the remedy of the person aggrieved would be to file a representation before the authorities, but the High Court, in absence of any allegation of malafide or violation of the statutory provision, should not interfere with an order of transfer.

14. This aspect of the matter has been considered by the Supreme Court in *B. Varadha Rao V. State of Karnataka* reported in 1986 S.C. 1955, *Gujarat Electricity Board Vs. Atmaram* reported in 1989 S.C. 1433, *Rajendra Roy Vs. Union of India* reported in 1993(1) S.C.C. 148 and *M. Sankaranarayanan Vs. State of Karnataka* reported in 1993(1) SCC 54.

15. Recently in *Union of India and ors. Vs. S.L. Abbas* reported in 1993(2) Scale page 718 the Supreme Court held as follows :-

“ All he says is that he should not be transferred because his wife is working at Shillong, his children are studying there and also because his health had suffered a set-back some time ago. He relies upon certain execu-

tive instructions issued by the Government in that behalf. Those instructions are in the nature of guidelines. They do not have statutory force.

Who should be transferred where, is a matter for the appropriate authority to decide. Unless the order of transfer is vitiated or by malafides or is made in violation of any statutory provisions, the court cannot interfere with it. While ordering the transfer, there is no doubt, the authority must keep in mind the guidelines issued by the Government on the subject. Similarly if a person makes any representation with respect to his transfer, the appropriate authority must consider the same having regard to the exigencies of administration. *The guidelines say that as far as possible, husband and wife must be posted at the same place. The said guideline however does not confer upon the Government employee as a legally enforceable right.*

The jurisdiction of the Central Administrative Tribunal is a kin to the jurisdiction of the High Court under Article 226 of the Constitution of India in service matters. This is evident from a perusal of Article 323-A of the Constitution. The constraints and norms which the High Court observes while exercising the said jurisdiction apply equally to the Tribunal created under Article 323-A. (We find it all the more surprising that the learned single member who passed the impugned order is a former Judge of the High Court and is thus aware of the norms and constraints of the writ jurisdiction). The Administrative

Tribunal is not an Appellate Authority sitting in judgment over the ^{Orders} of transfer. *It cannot substitute its own judgment for that of the authority competent to transfer. In this case the Tribunal has clearly exceeded its jurisdiction in interfering with the order of transfer.* The order of the tribunal reads as if it were sitting in appeal over the order of transfer made by the Senior Administrative Officer (Competent authority)."

(Underlining is mine for emphasis)

16. This aspect of the matter has also been considered by the division Bench of this court in *Radhika Mohan Sharan Vs. State of Bihar* reported in 1991(1) PLJR 500 and *Mrs. Shilpi Bose Vs. State of Bihar* reported in 1991(1) PLJR 61(S.C.).

17. However, before parting with this case, we may observe that it is well known that even directory provisions are required to be substantially complied with.

18. Mr. J.N. Jha, the learned Government Pleader No.1 has assured us that in fact the State intends to carry out the guidelines in their letter and spirit but in view of the fact the particular Ministers and other officers requisition the services of particular stenographers and for similar reasons it may not always be possible to follow the said guidelines.

19. We hope and trust that the State in future shall act fairly and without any fear or favour in any manner

whatsoever in following the guideline as contained in Annexure-1 and 2 to the writ application subject of course, to the administrative exigencies and other unforeseen situation.

20. This application is, therefore, dismissed but in the facts and circumstances of the case, there will be no order as to costs.

R.N. Prasad J./ I agree

S.P.J.

Application dismissed



CIVIL WRIT JURISDICTION**Before S.B. Sinha & R.N. Prasad, JJ.****1993****June, 20****Bhuneshwar Pandit.*****v.****The State of Bihar & ors.**

Writ application --disputed question of fact--High Court in its writ jurisdiction, whether can enter into disputed questions of fact--Indian Forest Act, 1927 (Central Act no.XVI of 1927) section 29 ----- notification issued on 29.12.1952 declaring the lands as forest, and waste lands therein as protected forest-- whether could be challenged belatedly.

The writ-petitioner questioned the Government notification dated 29.12.1952 issued under section 29 of the Indian Forest Act 1927 on the ground that the lands in question had been recorded as Garmazarua Am land and were in the nature of 'raiya.' The said lands belonged to Land-lord of Rohani Ghatwali Estate and therefore it did not vest in the State of Bihar. The lands were given by deed of gift dated 6.4.1964 & 19.4.1964

* Civil Writ Jurisdiction Case Nos. 10150, 10136 and 10140/1992. In the matter of an application under Articles.226 and 227 of the Constitution of India.
Mahadeo Mandal & Ors..... Petitioners (In C.W.J.C. 10136/92.).
and (In C.W.J.C. 10140/92.)

to Bhoodan Yagna Committee, Deoghar by the land-lord and in several cases it was confirmed by revenue authorities. Some lands had been settled by Bhoodan Yagna Committee, Deoghar, by issuance of Purchas.

Held, that in a writ application it is not possible to enter into the Ticket of disputed question of fact as to whether prior to the issuance of the Government notification dated 29.12.1952, all legal requirements were complied with-or not. Under the provisions of section 114 of the Evidence Act, 1872 in presumption arises to the effect that an official act is presumed have been done in regular course of business.

Held, further, that question raised by the writ-petitioners requires investigation of disputed question of fact.

The High Court in its writ-jurisdiction can not act as a Civil Court and thus cannot decide a serious disputed question of title. Even the question as to whether the estate of the ex-land lord had vested in the State of Bihar or not is essentially a question of fact.

The writ-petitioners can not be allowed to question a notification which was issued in the year 1952. The question writ-petitioners did not question the Government notification dated 29.12.1952 even after purchas had been issued in their favour by the Bhoodan Yagna Committee.

Case laws discussed.

Applications under Articles 226 and 227 of the Constitution.

The facts of the cases material to the report are set out in the judgment of S.B. Sinha, J.

M/s Radhey Shyam Prasad and Mithlesh Kumar Mandal for the petitioners in all the petitions

None of the State.

S.B. Sinha, J. — All these three writ applications involving common question of fact and law were taken up for hearing together and are disposed of by this common judgment.

2. The petitioners in these writ applications questioned a notification dated 29th December, 1952 issued under Section 29 of the Indian Forest Act which is contained in Annexure-1 to all the writ applications inter alia on the ground that the lands in question had been recorded as Gairmazarua Am Land and were in the nature of 'raiya' and thus the same could not have been a subject matter thereof.

3. The petitioners have contended that the said lands belonged to one *Thakur Man Mohan Deo* who was the landlord of the Rohani Ghatwali Estate and it, therefore, did not vest in the State of Bihar. In the year 1952, it was

further submitted that the lands in question were neither forest lands nor waste lands and thus the notification dated 29th December, 1952 could not have been issued by the State in exercise of its power conferred upon it under section 29 of the Indian Forest Act.

4. The petitioners have contended that the aforementioned Thakur Man Mohan Deo executed two deed of gift dated 6.4.1964 and 17.4.1964 to Bhoodan Yagna Committeed, Deoghar, which was sent for confirmation before the revenue authorities but the records of confirmation had been missing. However, confirmation was given in case No.2 of 1983-84 which is contained in Annexure-3Xto the writ application.

5. The petitioners have contended that some lands have been settled by te Bhoodan Yagna Committee, Deoghar, by issuance of purchas which is contained in Annexure-4 to the writ application. The said settlements were allegedly confirmed.

6. The petitioners have further contended that Thakur Man Mohan Deo had not surrendered the Rohani estate to the Forest Department and if there exists any such document, the same must be bogus, manufactured and forged documents.

7. Mr. Radhey Shyam Prasad, the learned counsel appearing on behalf of the petitioner has contended that as the notification as contained in Annexure-1 to the writ application does not fulfill the requirements of Section 29

of the Indian Forest Act, the same must be held to be wholly illegal and the criminal cases pending against the petitioners on the basis thereof are liable to be quashed.

8. Mr. Prasad, when questioned, with regard to the laches on the part of the petitioners strongly relied upon a decision of the Supreme Court in *Motor General Traders and another V. State of Andhra Pradesh and Ors.* reported in AIR 1984 SC 121 and submitted on the basis thereof that the writ petition cannot be dismissed only on that ground.

9. From the facts as narrated hereinbefore, it is evident that the impugned notification was issued by the State of Bihar in exercise of its power conferred upon it under Section 29 of the Indian Forest Act. It has been stated in the said notification that the lands in question are forest lands and waste lands comprised therein would be treated to be protected forest.

In the notification the lands had been shown to be belonging to the State of Bihar.

11. In this writ application it is not possible for this court to enter into the thicket of disputed question of fact as to whether prior to issuance of the said notification dated 29th December, 1952, all the legal requirements were complied with or not. Under the provisions of Section 114 of the Indian Evidence Act a presumption arises to the effect that an official Act is presumed to have been done in regular course of business.

12. Further the question as to whether the lands in

fact were saved from vesting under the provisions of the Bihar Land Reforms Act or not would essentially be a question of fact, which have to be determined on the basis of the evidences brought on records by the parties to the the lis. Prima-facie the lands had been recorded as Gair-Mazura Am and not even Gair-mazura khas. Thus this court in exercise of its jurisdiction under Article 226 of the Constitution of India cannot determine the question as to whether the lands were in Khas cultivating possession of the landholder so as to come within the purview of the section 6 of the Bihar Land Reforms Act or not.

The petitioners themselves have suggested that the possibility of the document having been executed by the ex-landlord in favour of the Forest Department cannot also be ruled out. But they have contended that such a documents are forge and fabricated ones. The said question again cannot be decided by this court in this writ application.

13. Further the petitioners cannot be permitted to question any notification which was published in the Gazette as far back as in the year 1952. If the petitioner's predecessor-in-interest namely the ex-landlord had any raiyati interest in the said land, he could have filed the appropriate claim application, before the authorities concerned in terms of the provisions of the Indian Forest Act itself. Such a claim could have been adjudicated upon by the statutory authorities.

14. It is true as has been held by the Supreme Court

in *Motor General Traders V. State of A.P.* reported in AIR 1984 S.C. 121 that a writ petition should not be dismissed only on the ground of laches wherein it is contended that the provisions of the statute is question is ultravires.

However such is not the position here.

The contention raised by the petitioner requires investigation of a disputed question of fact. A writ court can neither act as a civil court and thus cannot decide a serious disputed question of title. As indicated hereinbefore, even the question as to whether the estate of the ex-landlord had vested in the State of Bihar or not is essentially a question of fact.

15. In *Bhoop Singh V. Union of India* reported in AIR 1992 S.C. 1414 it has been held as follows :-

"There is another aspect of the matter. Inordinate and unexplained delay or laches is by itself a ground to refuse relief to the petitioner, irrespective of the merit of this claim. If a person entitled to a relief chooses to remain silent for long, he thereby given rise to a reasonable belief in the mind of others that he is not interested in claiming that relief. Others are then justified in acting on that behalf. This is more so in service matters where vacancies are required to be filled promptly. A person cannot be permitted to challenge the termination of his service after a period of twenty two years, without any cogent explanation for the inordinate delay, merely because others similarly dismissed had been reinstated as

a result of their earlier petitions being allowed. Accepting the petitioner's contention would upset the entire service jurisprudence and we are unable to construe Dharampal in the manner suggested by the petitioner. Article 14 of the principle of non-discrimination is an equitable principle and, therefore, any relief claimed on that basis must itself be founded on equity and be alien to that concept. *In our opinion, grant of the relief to the petitioner, in the present case, would be inequitable instead of its refusal being discriminatory as asserted by learned counsel for the petitioner.*" (Underlining is mine for emphasis)

16. In *Sahdeo Jha Vs. P.K. Naberia* reported in 1992(1) PLJR 125(SC) the Supreme Court again dismissed the writ application on the ground of laches and delay on the part of the petitioner.

17. In *Ram Naresh Singh Vs. State of Bihar* reported in 1992(1) PLJR 400 I had the occasion to consider a similar question and upon considering a large number of case it was held as follows:

"It is now well known that this Court in exercise of its writ jurisdiction may refuse to grant a relief, if the petitioner approached the court after an unreasonable delay. Conduct of the petitioner is also relevant.

(See :- *H.R.Club, V. The State of Bihar and Ors*)

(1986 PLJR 116)

Reference in this connection may also be made to a recent decision of the Supreme Court in *B.M. Bharti V. L.M. Sud and ors.* (1991(62) FLR 227).

In *Vimla Sharma v. State of Uttar Pradesh* (1990 (Supp) S.C.C. 770), the Supreme Court granted relief to the appellant on the ground that although she was recommended for regular appointment on 10th November, 1975, but work has been extracted from her although the management did not make any order in her favour and she had been made to continue in Junior High School all through.

In the facts and circumstances of that case, it was held that it would be discriminatory and unjust to deny her the post and regular appointment.

Thus in that case also, the question of any person acquiring any right to hold a post did not arise.

In *Sarju Sharma V. State of Bihar* and ors. (1988 BLJ 494; 1988 PLJR 469), I have held as follows :-

"From the aforementioned facts it would be evident that the petitioner has not seriously tried to explain the delay. The very fact only one such representation has been annexed which also made on 1.10.1980, it is a clear proof of laches on the part of the petitioner. I am, therefore, of the opinion that the petitioner is guilty of serious delay and laches and on that ground he is not entitled to any relief.

In *K.V. Rajlakshmi Setty and another V. State of*

Mysore and ors. reported in 1967 S.C. 993 a writ petition was dismissed on the ground of delay alone. In the aforementioned decision the Supreme Court held as follows :-

"There is also a good deal of force behind the contention that the appellants are guilty of laches. After the passing of the order of May, 17, 1950 they should have made an application within a reasonable time thereafter. Merely because the Chief Engineer had espoused their cause and was writing letters from time to time to the State Government to do something for them did not mean that they could rest upon their oars if they were really being discriminated against."

Recently the Supreme Court again in *State of M.P. and Ors. V. Nandlal Jaiswal and Ors.* held as follows :-

"Now, it is well settled that the power of the High Court to issue an appropriate writ under Article 226 of the Constitution is discretionary and the High Court in exercise of its discretion does not ordinarily assist the tardy and the indolent or the acquiescent and the lethargic. If there is inordinate delay on the part of the petitioner in filing a writ petition and such delay is not satisfactorily explained, the High Court may decline to intervene and grant relief in the exercise of its writ jurisdiction."

Recently this court also in *Dr. (Mrs) Rohtagi Vs. The State of Bihar* reported in 1986 PLJR page 1160 after taking into consideration various decisions of the Supreme Court in 1970 S.C. 470; 1970 SC 470 : 1970

SC 1343 and 1973 S.C. 1168 held tht a writ petition should be dismissed if the petitioner aproaches the High Court after long and unexplained delay. The same view has also been adopted by the division Bench of this court in 1985 pat, 70 and 1985 PLJR 1148."

In Dr. Amar Nath Singh and ors. Vs. The State of Bihar and Ors (1991 (2) PLJR 609), a Division Bench of this court while considering the matter of appointment of the Additional District Judges by this court refused to grant relief to those petitoners as they appeared in the written examination but did not qualify, on the ground that the same would cause hardship to the candidates called for interview standing:-

"Further, there is along delay in assailing the advertisements i.e. in October, 1990, whereas the advertisements are dated 8.2.1985 and 20.9.1989. In CWJC No. 6582 of 1990 the petitioners are candidates, who have not been called for interview, though participated in the written test. They allowed the examination to be held without protest pursuant to the advertisements. It, is, therefore, too late for them to turn round and assail the advertisements . (See AIR 1936 S.C. 1043) Om Prakash Shukla Vs. Akhilesh Kumar Shukla. It is true that in CWJC 6700 of 1990 the petitioner did not participate in the examination, but even in a public interest litigation delay will not be allowed when parties have changed their espective position and more than two thousand can-

didates have participated in the examination. This would cause hardship to the candidates called for interview."

In *S.S. Rathore Vs. State of Madhya Pradesh* (AIR 1990 S.C.10), the Supreme Court while considering the question of limitation for filing a suit held that limitation cannot be saved on the ground that representations had been filed which are not statutory in nature nor would the same save limitation if futile representation are made by the petitioners."

18. In this case, therefore, we cannot allow the petitioner to question a notification which was issued in the year 1952. The petitioner did not question the said notification even after purchase have been issued in their favour by the Bhoodan Yagna Committee.

19. In any event, the petitioners in the criminal cases can always show that their purview is bonafide and raise all contentions which may be relevant for disposal.

20. Thus, in any view of the matter, the petitioner can be said to be entitled to issuance or a writ which is discretionary in nature.

21. In the result, this writ appliation is dismissed but without any order as to costs.

R.N. Prasad J. I agree

R.D.

Applications dismissed

A P P E L A T E C R I M I N A L**Before S. Haider Shaukat Abidi &****R.N. Prasad, JJ.****1993****July.13****Babulal Das and ors.*****V.****The state of Bihar**

Penal Code, 1860 (Central Act No. XLV of 1860), section 34 — provisions of — evidence of individual role of five accused in administering poison to the deceased — absence of charge under section 34 — effect of — — conviction whether can be made with the aid of section 34 — — Investigating Officer not examined as he had died — — no Prajudic alleged — non examination of Investigating Officer — effect of.

Where the accused entered the house of the deceased and assaulted the inmates and thereafter there was administration of poison by one accused P. (Since died) to the deceased while other four appellants caught hold of him.

Held, that since overt act and individual role of the

* Criminal Appeal No. 174 of 1985 (D.B.) From the judgment of Mr. K.D. Sharma, Addl. Session Judge, Munger, dated 26 th July, 1985 .

appellants were there, by catching hold of the victim it goes to show that they had participated in the offence by catching hold of and assaulting and so they have been convicted individually. The evidence had been brought on record and opportunity was there to the accused to rebut the same.

Held, further that even if charge under section 149 Penal Code, was there and evidence makes out a case under section 34 Penal Code, and individual role is found out, then the conviction can be made with the aid of section 34 Penal Code, and omission of charge will have no adverse effect.

Held, also, that since no prejudice has been alleged to the non- examination of the Investigating Officer, who had died, it has got no adverse effect on the prosecution case.

Case laws discussed.

Appeal by the accused.

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

Mr. Braj Kishor Prasad, Sr. Adv, Mrs. Anjana
Prakash & Mr.Sunil Kumar

Mandal for the appellants.

Mr. Kamta Prasad Gupta for the respondent.

S.H.S. Abidi, J. Babulal Das, Nuneshwar Das, Sah-

deo Das and Ajodhi Das have been convicted under section 302 read with 149, section 302 read with section 34 and section 328 and 452 of the Indian Penal Code (for short I.P.C.) and have been sentenced rigorous imprisonment for life under the both first count and seven years and two years under the last two counts respectively Babulal Das has further been convicted u/s 323 I.P.C. and sentenced to one month rigorous imprisonment. All sentences have been ordered to run concurrently out of the accused one Panchhu Das had died before the trial. The other six accused, namely, Harkhu das, Jagu Das, Pritam Das, Bhunesar Das, Mithoo Das, and Birbal Das have been acquitted by the learned trial court.

2. The case of the prosecution is that on 25.6.1976 at about 10 A.M. in village Telba Tolla Tharihi, P.S. Chandramadih District Munger, the informant Karu Das (P.W.1) had gone to tend his goats and other members of his family were at his house. The eleven accused including the appellants came to his house hurling abuses and pelting stones and on entering the house of the informant they started assaulting the informant Hulash Das with fists and slaps. Some accused caught hold of his father and accused Panchhu Das poured poison in the mouth of his father. Some of the accused assaulted Badamia Devi (Sister of the informant) and Lilbatiya Devi (wife of the brother of the informant). Then the accused ran away. Appellant Sahdeo Das and Babulal Das fled

on a cycle. P.W.4 Sita Das son of the chased them. On his alarm Culzar Mian (P.W. 5) and Siddique Mian (P.W.7) stopped running of the accused Sahdeo Das and Babulal Das but they accused left the cycle and ran away. A phial of poison was found tagged with the cycle. The cycle along with the poison phial was kept at the place of Kolha Main Sita Das and Kishan Das (P.Ws.4 & 2) took Hulas Das to the place of Jagdish Singh Mukhiya, of the village where Hulas Das made his dying declaration to the Mukhiya. A doctor was called but was not available and so Hulas Das died. His dead body was kept under a Mahua tree. Karu Das (P.W.1) went to the police-station and lodged the report (Ext.2) on 25.6.1976 at 1 P.M.

2. After registration of the first information report the investigation was taken up by Bishwanath Jha, who is said to have not been examined. After investigation chargesheet has been submitted against the accused persons.

3. The accused persons., in defence, denied the prosecution case and alleged that they have been falsely implicated in this case., Two witnesses in defence have been examined, namely, Soghan Das and Jageshwar Das, both Co-villagers saying that the death had taken place in different manner and caused by different persons.

4. The prosecution in support of its case examined sixteen witness.P.Ws. 2,3,4 and 6, namely, Kishun Das,

Badamia Devi, Sito Das and Lalbatia Devi are the eye-witnesses. P.Ws. 5 & 7, namely, Guljar Mian and Md. Sadiq and also P.W. 8-Manger Das are said to have come on alarm but they turned hostile. P.W.9-Ram Parikshan Singh has proved the first information report (Ext.2) P.W.10 Jagdish Pd. singh is Mukhiya at whose door Hulas Das has come and made dying declaration. P.W.11- Bhola Singh, Advocate's clerk has proved the rent receipts (Ext.4 series). P.W.12. - Dhram Nath Ojha is a constable who has proved the signature (Ext. 1/2) of the officer incharge on the first information report (Ext.2) .P.W.13- Ram Krishna Sharma is Assistant Sub Inspector of Police who has proved the command certificate (Ext.6). P.14.- Dr. Banke Bihari singh has conducted the postmortem examination. P. W. 15- Bhagwan Prasad is Advocate's clerk who has proved the injury reports (Exts.9 and 91 1/4 given by the doctor who has not been examined as witness. P.W.16. Sachindra Nath Sinha is Advocate's clerk who has proved the report of Bishwanath Sharma (Exr. 10) about the death of Prabhunath Singh Officer-in-charge.

5. The learned trial court has convicted and sentenced the appellants as said above.

6,. Learned counsel for appellants has raised several contentions against the order of conviction and sentence. His first contention is that after the close of the prosecution case recording the statement of the accused and

examination of the two defence witnesses and also the close of the prosecution argument (Ext.1) and also to Ext. 12 viscera report of the Forensic Laboratory report had been brought on the record and so after the examination u/s 313 Cr.P.C. admission of these two exts. Was not warranted under law. Next it was contended that no charge has been framed u/s 34 and 149.I.P.C. and so conviction read with these sections is not in accordance with law. There was no motive to the accused to commit the offence. The evidence has been fabricated so much so that dying declaration was introduced which was not accepted by the trial court. Seizure list of the cycle and the old clothes, plastic and dibid doubtful. On account of the non-examination of the I.O. the defence has been very much prejudice. To appreciate these contentions the evidence of the witnesses will have to be scrutinised with care and caution.

7. In this case the informant is not an eye witness but he is hearsay and he is said to have reached his house on alarm. In his evidence in court he has said that on 25.6.1976 when he had been tending his she-goats, then on hearing alarm he went running towards his house. When he was to reach his house, he saw accused Babulal Das, Ajodhi Das, Panchhu Das, Nuneshar Das and Sahdeo Das of the same village coming out of his house and running towards their houses. He saw brother Sita Das and his cousin going towards the house of Mukhiya and when he reached

there he found his father senseless and he came to know from his brother Sito Das that the accused had come armed with lathis, bhalas and stones and abuses and pelted stones at his house and on entering into the house. they forcibly poured the poison in the mouth of his father and also assaulted Hulas and family members of his house. The informant went to call the doctor who was not available and when he returned he found his father dead and so he went to lodge report. Motive for the occurrence was that the accused had been forcibly occupying the land of the deceased which he was insisting on the accused to leave and so this occurrence had taken place. He has also said about the cycle and the bottle and poison being recovered.

8. About this occurrence, the eye witness account has been given by Kishun Das (P.W.2) the nephew of the deceased has said that at the relevant time he was at his house and his uncle Hulas Das, aunt, sister, his wife and brother were in the house. The accused came armed with weapons and on entering the house they began to assault, his uncle and ladies. Other accused persons caught hold of his uncle, Panchhu Das poured poison in his mouth. He went to his house raising alarm which attracted the villagers including Manager Das (P.W.8). Thereafter the accused ran away P.W.4 chased appellants Babulal Das and Sahdeo Das who were running away on a cycle. They were also charged by Gulzar Mian and Sadique Mian (P.W.5 and 7). The said two appellants could run away leaving the cycle. On the cycle there was bottle of medicine. Perhaps it is called endrin. The cycle

was kept by Guljar Mian and Sadique Mian at the house Kolha Mian. This witness and Sito Das carried Hulas Das to the Mukhiya's place where Hulas Das said to him that the accused had beaten him and administered poison. The Mukhia asked him to go to doctor. Karu Das (P.W.1) was sent to Doctor. Hulas Das was taken near the school where he died. After keeping his dead body near the Mahua tree Karu Das was sent to the police station for first information report. Accused Panchu Das had died. But he knew other accused. He (witness) got his wife and sister treated by doctor. This occurrence had taken place on account of land dispute. In cross-examination Panchhu Das has said that he had got four brothers, Out of whom Phucho Das has died and Harsukh Das is alive. This witness gave relationship between the accused. There was land dispute about the half share. There was no marriage earlier. Witnesses Gulzar Mian and Sadique Mian had colluded with the accused. When he caught the cycle, he saw that eldrin was kept in two packess There were eight round bottles of green colour which were given to the police by Aziz Mian Kolah Main. On the alarm raised by the Sito Das Manger Das. Gilzar Main and Sadique Mian (P. Ws. 8,5 and 7) had come. They got the victim administered poison so the persons of cycle were chased. The poison was administered by Panchu Das. Accused Babu Lal Das and Sahdeo Das as well as other accused together caught hold of his uncle and Panchhu Das had administered poison. When his uncle went to the Mukhiya, he made dying declaration to Mukhia and while talking he became unconscious and within 2-3 minutes thereafter he died. When the statement was being given by his uncle to

the Mukhiya there were

3-4 other persons whom he did not recognise and other was nothing in writing. What was said by his uncle to the Mukhiya was not heard by him. His uncle had vomited in a front of the door of the Mukhiya but he had not shown the same to the investigating officer.

9. Other eye witness is P.W. 3 Badamia Devi who is the sister of Kishun Das and daughter of the deceased. She claimed to have been assaulted by the accused. She has also said about 11 accused coming, assaulting to the deceased, to her, other ladies and the administration of poison to the deceased by the accused while appellants sahdeo and Babulal were running away with the left over poison on the cycle; then Muslims of the village had chased. She had got herself treated at Chakai and so her mother was treated. She was told all this by her brother. In cross-examination she has said that the poison was administered which was kept in a bottle wrapped in old clothes and the container was of green colour.

10. P.W. 4 Sita Das son of the deceased is also an eye witness. He has supported the prosecution version about 11 accused coming, assaulting by fists and slaps and administering the poison by Panchhu Das when other accused had caught hold the victim and the poison was in the container kept on cycle and the cycle and bottle were given to the police and treatment of the injured sister and aunt in Chakai. He has said that Kolha

Mian and Aziz Mian have died. He has given about the taking possession of the cycle and the poison container to his family members as well as to the villagers and also to the police. In cross-examination he has said that when his father was giving oral dying declaration to the Mukhiya his cousin Kishun Das had gone to bring water from nearby and besides Mukhiyaji there were some other persons whom he did not recognise.

11. P.W.6 Lalbatia Devi the injured wife of Kishun Das (P.W. 2) has also said about the accused entering into the house armed with weapons and assaulting the deceased as well as women and administering poison. She claimed to have been beaten by Jaggu and Pritam by lathi at the hands. It is also said that her injuries were bleeding.

12. Besides these witnesses, Gulzar Mian, Sadiq Mian and Manger Das (P.W. 5,7 and 8) have been examined who have not support P.W. 5 Guljar Mian has said that they were there. Having seen Sahdeo Das and Babulal Das going on the cycle on the road and Sito Das and Karu Das were chasing them, this witness and others were standing by the side of the road and when the chasers reached near Sahdeo and Babulal then they ran away leaving the cycle. When three persons were bringing the cycle then on enquiry by this witness they did not say anything. These persons got the cycle deposited with the witness's father Kolha Mian. He was

not examined by The police. Then this witness was declared hostile and cross examined by the prosecution.

13. P.W.7 Sadique Mian is another hostile witness who claimed to be living near the house of Babulal and Sito Das. He said that Babulal had sown paddy which was grazed by she-goat of Sito Das. Upon this Babulal said that it would not be settled here and let us go to the police-station. Upon this Babulal and Sahdeo Das were going to the police-station on cycle and they were chased by Sito Das and Kishun Das and others and so he (witness) and others were going and seeing it. The two persons left the cycle and ran away. The cycle was deposited with Kolha Mian. He did not know anything.

14. P.W.8 is Manager Das who has also been declared hostile and he has said that the occurrence is of forenoon when he was scrapping grass and on hearing alarm he went near the house of Sito Das. He did not see anything. Sito Das said that Panchhu Das assaulted Hulas and administered poison. He went to Hulas Das after long time. He was declared hostile and cross examined.

15. Since *Kolha Mian and Aziz Mian* are said to have died so they could not be examined. But Jagdish Singh, Mukhiya has been examined as P.W. 10 who has said that on the date of occurrence he was at his house at about 10 A.M. He heard hulla from the house of Hulas

Das where he did not go. But after sometime Sito Das and Kishun Das brought Hulas Das at his door and Hulas Das said to him Panchu Das, Harakh Das, Pritam Das, Babulal Das, Bhuneshwar Das, Sahdeo Das and in all 11 persons on entering his house assaulted. They had got lathis, bhalas and stones and Panchhu Das administered Him (Hulas Das) poison forcibly. After saying so he Hulas Das died. Then said Hulas Das also said to him that these persons assaulted the women of his house who were raising alarm while poison was being administered. After that Sahdeo Das and Babu Lal Das were running away on cycle who were chased by Sito Das and Saddque Mian and Gulzar Mian had also surrounded them from the front whereupon Babulal and Sahdeo ran away leaving behind the cycle. The eldrin was tied with the cycle. Thereafter Kolha Mian took away the cycle and the eldrin to his House and when the police came the same was handed over to them. The police seized the cycle and the eldrin tin in his presence from the house of Kolha Mian and prepared seizure list (Ext.2) which was signed by him (witness) and Aziz Mian and also by Kolha Mian. Aziz Mian and Kolha Mian have died. Inquest was prepared on the dead body of Hulas. In cross-examination, he has said that he had got enmity with the accused as well as deceased Hulas Das since 1969 but now he has got no enmity. The eldrin container was of tin having eldrin. Hulas Das had not vomited in his presence. The first information report was written by Prabhu Nath Singh

who is said to have died.

16. Besides these evidence is the medical evidence of Dr. Banke Bihari Singh (P.W.14) who conducted postmortem examination on 26.6.1976 at about 11 A.M. and he found scratches on the left side of the pajara achymosis with bleeding. In his opinion the death was due to excessive haemorrhage inside the abdominal cavity resulting into shock and death. Viscera was preserved for chemical examination. In cross-examination he has said that excessive haemorrhage in inside abdominal cavity may be caused by inducting highly poisonous substance like eldrin. The stomach was empty and only full of with gas and liquid and there was no vomiting mark. He did not find any mark of congestion in the mouth. Time during which a person will die or will become senseless depends upon the quantity and quelling of the poisonous substance.

17. P.W. 15- Bhagwan Pd. is Advocate's clerk who has proved the injury reports Exts. 9 and 9/1 which are said to have been prepared in 1976 by Dr. P.V. Sharma, Medical Officer, Chakai Dispensary. In cross-examination he said that he did not know English and did not know full name of the doctor and the reports have not been written in his presence.

18. From all these evidence consisting of the eye-witness including the two injured and the postmortem report as well as the injury reports produced vide Exts.

9 and 9/1 that on the date of occurrence the accused persons entering into the house of the deceased assaulted the women and also the deceased and then Panchhu Das had administered poison to Hulas Das while other accused were catching hold of the victim. Thereafter the victim was taken to the house of Mukhia (P.W.10) where he gave his oral statement giving out the facts and then he died and then the informant Karu Das lodged the report; Babulal Das and Shadeo Das were running away on a cycle with eldrin they were chased by Kishun Das and Sito Das and they were also helped even by the hostile witnesses in catching hold then the eldrin tin containing poisonous matter was recovered which was seized by the investigating officer. The medical evidence fully corroborates about giving out poison to the deceased.

19. As regards the contention about the reports (Exts. 11 and 12) being the Forensic Science Laboratory as well as the Viscera Report being filed in the court in the last stage, it appears that the prosecution case was closed on 16.2.1985; the statement of the accused was recorded and on 22.4.1985 two D.Ws were examined and on 13.6.85 the prosecution closed its arguments. It was on 13.6.1985 the report about tin was brought on record as Ext. 11 and it was on 26.6.85 that the defence argument was heard in part and on 28.6.85 Viscera report was exhibited and argument of both sides were heard on 19.7.85 and the judgment was delivered on

26.7.85, It cannot be denied that u/s 313 Cr. P.C. nothing was put to the accused in respect of Exts. 11 and 12 which were not on the reocrd. But Exts. 11 and 12 are the reports of the Viscera which can be brought on record at any stage under section 294(3) Cr.P.C. A full Bench of Allhabad High Court in the case of *Saddiq and ors v. State* ¹ has observed at page 381 in para 9 :-

"... Section 294, Cr. P.C. is a new section as it had no equivalent in the Code of Criminal Procedure, 1898 . It is based on the rule of evidence that facts admitted need not be proved contained in Section 58, Evidence Act. The object of enacting this section appears to be to avoid the time of the Court being wasted by examining the signatory of the document filled by the prosecution of the accused under sub - section (1) of Section 294 Cr. P.C. to prove his signature and the correctness of its contents if its genuineness is not disputed by the opposite part. If the signature and the correctness of the contents of a document filed by the prosecution of the accused under sub- section (1) of Section 294, Cr.P.C. whose genuineness is not disputed by the opposite party are still required to be proved by examining the signaory of the document, the very object of enactment Section 294, C.r.p.c. will be defeated. We are, therefore, of the opinion that all documents filed by the prosecution or the accused under sub - section (1) of section 294,

¹ (1981) Cr. L.J. 379

Cr.P.C. whose genuineness is not disputed by the opposite - section (3) of section (3) of Section 294, Cr.P.C."

Similarly another Full Bench of *Bombay High Court* in the case of *shaikh Fhrid Hussinab. v. The State of Maharastra*¹ has observed at page 489 in para 8 :-

"The preceding Sec. 293 of the Code also dispenses with the proof of certain documents. It corresponds with Sec. 510 of the repealed Code of Criminal Procedure. It enumerates the category of documents, proof of which is not necessary unless the court itself thinks it necessary. Section 294 makes dispensation of formal proof dependent on the accused or the prosecutor, not disputing the genuineness of the documents sought to be used against them. Such contemplated dispensation is not restricted to any class or category of documents as under Sec. 293 in which ordinarily authenticity is dependent more on the mechanical process involved than on the knowledge, observation or the skill of the author, rendering oral evidence just formal. Nor it is made dependent on the relative importance of the document or probative value thereof. The documents being primary or secondary or substantive or corroborative, is not relevant for attracting Sec. 294 of the Code. Not disputing its genuineness is the only solitary test therefor."

These documents have been admitted after hearing the learned counsel for the parties. The appellants did not claim any right to reply the same. Purpose of section 313 Cr. P. C. is that the accused should not be taken unaware. Moreover these very documents (Exts. 11 and 12) are the opinion of the expert and u/s 293

1. (1983)Cr. L.J 487.

Cr.P.C. they can be filed at any time and they do not require any proof and u/s 293 (2) the court can summon a person giving the report. In the case of *Himachal Pradesh Administration v. Om Prakash* ¹, it has been observed at page 1987 in para 16:-

" .. As long as the report shows that the opinion was based on observations which lead to a conclusion that ~~opinion~~ can be accepted, but should there be any doubt it can always be decided by the calling of the person making the report. When once the report is proved, neither the prosecution nor yet the accused nor the Court thought it necessary to require the person making the report to be examined.

Again in the case of *Bhupinder Singh v. State of Punjab* ²

It has been said at page 1015 in para 13:-

No hard and fast rule can be laid down as regards the value to be attached to the report of the chemical examiner. Section 293 of the Code of Criminal Procedure provides that the report of scientific experts may be used as evidence in any inquiry, trial or other proceedings of the Court. The chemical examiner does not, as a rule, give an opinion as to the cause of death but merely gives report of the chemical examination of the substance sent to him. The report by itself is not crucial. It is a piece of

1 (1992) A.I.R. (H.P.) 975

2. (1988) A.I.R. (SC) 1011

evidence. The only protection to it is that it does not require any formal proof. It is, however, open to the court if it thinks fit to call the chemical examiner and examine him as to the subject matter of the report. The report should normally be forwarded to the Doctor who conducted the autopsy. In the instant that was done. The Doctor who conducted the autopsy was given a copy of the report of the chemical examiner. The Doctor in the light of the report gave his opinion that the death of Gian Kaur was by poisoning i.e. organo phosphorus compound. The report of the chemical examiner coupled with the opinion of the Doctor is, therefore, sufficient to hold that it was a death by poisoning."

20. As regards not putting the report to the accused u/s 313 Cr. P.C. it can be seen that the accused was asked to reply as to whether the administered poison which he refused. So the question is specifically about the container and therefore it will have no adverse effect on the case of the prosecution:

21. In cases involving the administration of poison the Court is to see three things : (1) as to whether the accused was in possession of the poison; (2) whether the poison was administered to the deceased? and (3) whether the deceased died of poisoning? As regards the first question as to whether the accused was in possession of the poison P.W.2 in para 2 of his deposition has said that when he went out of his house and raised alarm then

villagers including Manger Das (P.W.8) came and then the accused ran away. Sito Das chased Babulal and Sahdeo Das who were running on a cycle by the time Gulzar Mian and Diddiq Mian (P.W. 5 and 7) surrounded them then the accused ran away leaving the cycle and on the cycle bottles of medicine which is, perhaps, called eldrin. In para 14 he has said that when the cycle was found he saw that only bottle of eltrin was kept in two packets about 8 inch in length and 1 $\frac{1}{2}$ inch round green and the same was handed over to the S.I. by *Ajim Mian* and *Kilha Mian*. P.W.3 has said that Sahdeo Das and Babulal Das were running away carrying remaining poison which was caught by the Muslims of the village. In para. 19 he has further said that in plastic tin it was wrapped in old clothe and it was of green colour and the same was administered She has seen that five dibbas were snatched from the cycle. Similarly P.W.4 has said about the possession of the eldrin in green colour bottle tied with cycle of the accused and it was given over to the police and the police seized the same. P.W. 10 also deposed in para 2 about the cyce and the container being recovered and seized by the police and seizure memo (Ext.3) was prepared before Kolha Mian and Aziz Mian who are said to have died.

22. Besides this possession of remaining eldrin the witnesses are uniform in saying that the poison was administered by the Panchhu Das (since deceased) while other accused catching hold of Hulas Das. This ad-

ministration of the poison has been deposed by the eye witnesses Pws. 2,3,4 and 6. There is nothing to show that their evidence suffers from infirmity or further these persons had got no opportunity to see P.W. 3 is the daughter of the deceased. She could be in the house at the relevant time and she was most natural witness. Not only she but other Pws. 2,4 and 6 are uniform about administration of poison by Panchhu Das with the help of Babulal, Nuneshwar, Sahdeo and Ajodhi. So administration of poison is made out from the evidence. It is also made out from the evidence that Hulas Das died of poisoning. P.W. 14 Dr. Bake Bihari Singh had conducted the postmortem examination and has said about the death and Viscera to be preserved for chemical examination. He thus definitely said in para 5 that it was highly poisonous substance like eldrin had been administered. This medical evidence fully corroborates the evidence of P.W. 2,3 and 6 who had seen the administration of the poison by Panchhu Das with the help of the appellants. There is no other cause of death of Hulas Das. The viscera report (Ext. 12) is opinion of an expert can be looked into and its being filed at the last stage will not have any adverse effect when other material in respect of the administration of poison and direct question to the accused u/s 313 Cr.P.C. is there.

23. Thus from it appears that the victim had been administered eldrin by Panchhu Das with the help four appellants who had entered into the house and assaulted

Badamia Devi, Libatiya Devi and also the deceased.

24. As regards the contention that other accused had been acquitted and so the case of the prosecution against the appellants is affected is not at all tenable because the specific role has been given to the appellants and the role of others has not been found to be made out. So acquittal of the other accused will not have any adverse effect on the prosecution case specially when evidence against the appellants is cogent and convincing.

25. As regards contention that there was no charge u/s 34 I.P.C. and so conviction cannot be made in another section. It appears that the accused entered the house of the deceased and assaulted the inmates and thereafter administration of poison by Panchu Das (deceased) including the appellant shows that there were five persons. Since overt act and individual role of the appellants are there by catching hold of the victim it goes to show that they had participated in the offence by catching hold of and assaulting and so they have been convicted individually. The evidence has been brought on record an opportunity was there to the accused to rebut the same. Even if charge u/s 149 is there and evidence makes out a case u/s 34 I.P.C. and individual role is found out then the conviction can be made with the said of section 34 I.P.C. and omission of charge will have no adverse effect.

26. As to the contention about non-examination of

the investigating officer in this case, it appears that the I.O. Bishwanath Jha has not been examined. It appears that he has died. Ext. 10 report of Shri B.N. Srivastava S.I. Belaur is to the effect that the investigating officer has died about five or six months before his joining at Lakhisarai police-station. So non-examination of the I.O. was beyond the control of the prosecution. The evidence on the record has been brought which prove the case of the prosecution the case of the occurrence has also not been disputed. No suggestion had been made about any prejudice to have been caused to the accused nor material has been brought out. Since there is no prejudice or any demonstrable prejudice as such non-examination of the I.O., who has died has got no adverse effect.

27. In the result, the conviction and sentence passed by the learned trial court against the appellants on the basis of evidence on record are affirmed and the appeal is accordingly dismissed.

R.N. Prasad , J. I agree

R.D. ..

Appeal dismissed

CIVIL WRIT JURISDICTION**S.B., Sinha & R.N. Prasad, JJ. :****1993****Sept, 21****Messrs. Trident Tubes Ltd.*****V.****The Bihar State Electricity Board & Ors.**

Indian Electricity Act, 1910 (Central Act No. IX of 1910) clause VI sub-clause (3)-- provisions of-- whether applicable to requisition made for the first time by the consumer--the clause does not apply to matters covered by tariff--dispute referred to Electrical Inspector, whether Covered by sub clause (3) of clause VI of the schedule-- Electricity Board can raise bill on High Tension basis after installation of transformer, capacitor etc.

Clause VI of the Schedule appended to the Indian Electricity Act, hereinafter referred to as the Act, deals with requisition of supply to owners or occupiers in vicinity which necessarily implies that the said clause would apply with regard to supply of electrical energy to persons requisitioning the same for the first time. This clause, therefore, cannot have any application in relation to the matter which is covered by the tariff. Further

* Civil writ Jurisdiction Case No. 10006 1996. In the matter of an application under Articles 226 and 227 of the Constitution of India.

sub-clause (3) of the said clause is required to be construed in the light of other provisions contained therein. Sub-clause (3) of clause VI of the Act applies only in respect of requisition made for the first time by the consumer is also apparent from a conjoint reading of clauses 4 and 5 thereof.

Held, that it is evident that the dispute referred to the Electrical Inspector was not covered by sub-clause 3 of Clause VI of the Schedule appended to the Act.

Held, further, that the Bihar State Electricity Board can raise bills of the petitioner on High Tension basis only upon fulfilment of conditions precedent namely installation of transformer capacitor etc. The Bihar State Electricity Board, therefore, may in terms of the application filed by the petitioner for conversion of energy from Low tension to High Tension take necessary steps for conversion from Low Tension to High Tension of energy and raise bills in terms of High Tension from the date of its conversion.

It is upto the Bihar State Electricity Board to raise fresh bill on basis of supply of Low Tension energy to the petitioner in terms of installed load in the factory premises of the petitioner.

*Bihar State Electricity Board and ors. v. The State of Bihar and ors.*¹

¹ (1993) 1P.L.J.R. 344

Jaiswal Ceramics Ltd. v. Electricity Bord (2)-- referred to

Application under Articles 226 and 227 of the Constitution of India

*The facts of the case material to this report are set out in the judgment of S.B. Sinha, J.*¹

M/s.L.K.Bajla and Raj Kumar Sahay for the petitioner.

Mr. R.N.P. Yadav for the respondents

S.B. Sinha, J. — In this application the petitioner has sought for issuance of a writ in the nature of mandamus directing the respondents to implement the order of the Senior Electrical Inspector in the dispute raised by the petitioner in respect of a bill issued by the respondent-Bihar State Electricity Board treating the Low Tension Connection as a High Tension one and raising bill on the basis of the tariff applicable to High Tension supply of electrical energy from 23.12.1983.

2. The petitioner runs a small scale industry or manufacturing H.D.P.E. and PVC pipes. The petitioner has applied for supply of 79 H.P. electrical energy which was sanctioned. The supply of electrical energy to the petitioner's units commenced from 24.12.1983.

3. According to the petitioner, the installation in its in

¹ (1980) B.B.C.J 179

factory have regularly been checked up by various officers of the Bihar State Electricity Board including the Executive Engineer and on all such occasions it was found that the petitioners has been using 79 H.P. electrical energy.

4. The petitioner has, however, filed an application on 11.10.1984 for supply of High Tension electrical energy and for that purpose the petitioner was asked to install a transformer of 300 KVA. The petitioner also sent various reminders.

On 5.4.1988 the petitioner's factory was inspected by an inspection team of Special Cell of the Board and it was found that the petitioner has been using the electrical energy at 88 H.P. The team also found that some extra machines which had not been installed earlier were also found to have been installed in the petitioner's factory. The petitioner has also admitted that on 8.7.1988 the Supreintending Engineer sanctioned the covnersion of the petitioner's electrical connection from low tension 79 H.P. to High tension, and also granted permission for installation of transformer of 315 KVA, subject to the conditions mentioned therein. A copy of the said letter dated 8.7.1988 is at annexure 5/1 to the writ petition.

5. The petitioner has disputed the contents of the said report in this application with regard to the capacity of the motors installed therein. The petitioner has contended that despite the aforesaid inspection report dated

5.4.1988, bills were used to be raised on the basis of 79 H.P. on Low Tension tariff, but in March, 1989 the respondents stopped the raising of the bills. The petitioner had, however, been offering jump sum payments towards the dues, but such payments were not being accepted by the respondents. The petitioner then was informed by a letter dated 7.7.1989 which is contained in annexure 7 to the writ application that the petitioner would be billed as per the High Tension tariff.

6. The petitioner has further contended that as the meter has become defective on 11.6.1989 and the same was brought to the notice of the Assistant Electrical Engineer by a letter dated 13.6.1989, on which date Assistant Engineer came to the factory premises and upon breaking open the seal found that the complaint of the petitioner was correct. A new meter was replaced in June, 1989 and in September, 1989 the petitioner had been billed on High tension tariff. The petitioner by a letter dated 16.9.89 protested against the said bill and thereafter the dispute was referred to the Senior Electrical Inspector by the petitioner by its letter dated 27.11.1989. The dispute between the parties was allegedly decided by the Senior Electrical Inspector on 12.4.1991 and, inter alia, it was held that the petitioner had not used electricity on High tension side and directed the officers of the Board that the petitioner should be allowed to install transformer for obtaining High tension electrical energy. A copy of the said report is contained in annexure '14' to

the writ application.

7. Mr. L.K. Bajla, learned counsel appearing for the petitioner, has raised a short question in support of the application. Learned counsel submitted that in view of the fact that the dispute had been referred to the senior electrical inspector, who is the statutory authority under the Act, the only remedy of the Bihar State Electricity Board against the order was to prefer an appeal in terms section 36 of the Indian Electricity Act. It has further been stated that a writ petition being C.W.J.C. No. 1072 of 1991 is already pending before this court. It was further submitted that in any event unless all arrangements are done for supply of electrical energy on high tension side no bill could be raised on that basis.

8. Learned counsel, however, submitted that all along inspections had been made with regard to the load installed in the factory of the petitioner and on all such occasions, it was found that the petitioner had been utilising the load much less than 80 KVA. He further submitted that from a perusal of the order passed by the Senior Electrical Inspector as contained in Annexure 14 to the writ application, it would appear that the respondents did not make necessary arrangement for conversion of low tension line to high tension line. Learned counsel further submitted that whereas in relation to low tension supply of energy, one tier tariff is applicable, in relation to high tension energy two tier tariff is applicable.

Learned counsel further drew our attention to clause VI (3) of the First Schedule appended to the Indian Electricity Act and submitted that even in terms thereof, the matter can be referred to the electrical Inspector. The said clause reads as follows :-

VI(3). Where any different or dispute arises as to the amount of energy to be taken or guaranteed as aforesaid, or as to the cost of any service line or as to the sufficiency of the security offered by any owner or occupier, or as to the position of the meter board, or as to the improper use of energy, or as to any alleged defect in any wires, fittings, works or apparatus, or as to the amount of the expenses incurred under the third proviso to sub-clause (1), the matter shall be referred to an Electrical Inspector and decided by him."

9. Learned counsel further submitted that the petitioner is ready and willing for conversion of the electrical connection provided the Bihar State Electricity Board raises bill on that basis on and from the date of conversion.

10. So far as the first relief prayed for by the petitioner is concerned, the same cannot be granted by this Court. The Electrical Inspector is the statutory authority under the Indian Electricity Act. He has been made statutory arbitrator only in relation to the disputes specifically mentioned in the Indian Electricity Act. This aspect of the matter has been considered by a Division Bench of this Court in the *Bihar State Electricity Board and others Vrs. The State of Bihar and others*.¹ It was held therein that

¹ (1993) P.L.J.R. 344

the question of reduction in contract demand of electricity is essentially a matter of contract and thus the Electrical Inspector had no jurisdiction in relation thereto. Similarly, the question of increase of load and the question as to from which date the petitioner had been consuming electrical energy as a load more than the sanctioned load, namely, High Tension, is essentially a matter of contract as also relates to investigation of facts, and, thus, no dispute within the meaning of the provision of the *Electricity Act* and the *Electricity Supply Act, 1946* arose which could be referred to the Electrical Inspector. From a plain reading of clause VI(3) of the First schedule of the Act, it would be evident that the dispute purported to have been referred to the Electrical Inspector does not come within the purview thereof.

11. In my opinion, sub clause (3) of clause VI of the First Schedule appended to the Indian Electricity Act cannot be said to have any application in the facts and circumstances of the case. Clause VI of the Schedule appended to the Indian Electricity Act deals with requisition of supply to owners or occupiers in vicinity which necessarily implies that the said clause would apply with regard to supply of electrical energy to the persons requisitioning the same for the first time. The said clause therefore cannot have any application in relation to the matter which is covered by the tariff. Further clause VI of the Schedule to the Act has to be read as a whole and sub-clause (3) thereof is required to be constructed

in the light of other provisions contained therein. Sub-clause (3) of clause VI of the Act applies only in respect of requisition made for the first time by the consumer would also be apparent from a conjoint reading of clauses 4 and 5 thereof.

12. Further from a plain reading of sub-clause (3) of Clause VI of the First Schedule to the Act, it would appear that the same provides for arbitration in the following disputes and differences between licensee and the owner or occupier (a requisitioner) regarding:

(a) amount of energy to be taken or guaranteed under clause (a) of the first proviso to sub-section (1) of this clause;

(b) cost of any service line as may be necessary for the purpose of supplying energy to a requisitioner under clause (b) of the proviso to sub-clause (1) of this clause;

(c) sufficiency of security offered by the requisitioner under clause (a) of the first proviso to sub-clause (1) of this clause;

(d) position of any meter board to be installed in the premises of any requisitioner;

(e) improper use of energy, defect in any wires, fittings, works or apparatus;

(f) expenses incurred by the licensee for changes made by him in the service line or any apparatus

provided on the electrified premises as a result of increased supply load."

It is, therefore, evident that the dispute referred to the Electrical Inspector was not covered by the aforesaid provisions.

13. The Bihar State Electricity Board has made a tariff in exercise of its power conferred upon it under Sections 46 and 49 of the Electricity Supply Act. The power of the Board to make such a tariff is indisputable. It is true, as has been contended by Mr. Bajla, that there exists a difference between the supply of high tension and low tension electrical energy. However, the tariff may provide for supply of a particular quality of electrical energy up to a particular load. Mr. Bajla does not dispute this jurisdiction in the Bihar State Electricity Board to make such a provision. He, however, submits that as, in fact, no transformer has yet been installed and other facilities have also not been provided, the question of raising any bill on the basis of high tension does not arise.

14. So far as the second question raised by Mr. Bajla is concerned, the matter is no longer *res intègra* in view of a Division Bench decision of this Court in *Jaiswal Ceramics Ltd. Vrs. Electricity Board* reported in 1980 BBCJ 179, wherein it was held as follows :-

" .. It is accepted that the petitioner is not a licensee as provided for in the aforesaid provision. It is manifest, therefore, that it is for the Board, and Board alone to

determine the terms and conditions for the supply of electric energy to the petitioner. The Board having taken over the Ranchi Electric Supply Company by virtue of the Ordinance mentioned above on 17th July] 1975 it was for the Board unilaterally to decide the terms and conditions on which electricity would be supplied to the petitioner. If the petitioner was not satisfied with those terms and conditions what the petitioner could do was not to take energy from the Board. But in any event, there was no question of any bargaining between the petitioner i.e. the consumer and the Board i.e. the supplier. It is also not the case of the petitioner that under sub-section (3) of section 49 any special contract was made between the petitioner and the Board. It follows, therefore, that in terms of section 49(1) of the Supply Act it was for the Board alone to determine the terms and conditions under which the supply of energy to the petitioner could be made subject to the condition that it has to be on the basis of uniform tariff framed by the Board itself."

The court thereafter took into consideration various provisions of the tariff, with regard to the question as to tariff applicable to HT energy and held that the same applied only in the event the installed load exceeds 100 BHP under the old tariff (which is now 80 B.H.P. under the new tariff).

In Jaishri Ceramic (supra), the division Bench further

held:-

18 while there ----- might be some force in the submission of the learned counsel that if the installed load is more than 100 BHP, it is not low tension. I am unable to accept his submission that whatever is not low tension supply is high tension supply. there is nothing in the tariff rules, at least pointed out to us, which would show that every supply of an installed load above 100 BHP is high tension. In fact, on the contrary, it might be urged on behalf of the petitioner that energy supply which does to have the three phases at 33K.V, 11K.v, 6.6 K.V. or 3.3 K.V. is low tension supply. Even for the general high tension service the applicability states that these rates of tariff apply to installation with a minimum contract "demands of 75 " K.V.A. for 3.3 K.V., 6.6 K.V. and 11 K.V. supply demand and a minimum contract demand of 1500 K.V.A. for 33 K.V. supply. There is no material before us to show that at present any of the applicabilities, as stated above, fit in with the supply to the petitioner.

19. It may further be pointed that it is indeed very strange that if the supply to the petitioner is in the nature of high tension how a minimum guarantee charge was levied against it. There is no provision for minimum guarantee charge for high tension supply. However, this contradictory stand seems to have been taken by the Board in annexure 1 itself where it is said that they were being billed on the basis of minimum guarantee of 144

Horse Power but would be filled for high tension tariff if the subsequently authorities were so certain that it was high tension supply there was no occasion for them to bill the petitioner under the provisions for low tension supply."

20. For all these reasons, I am inclined take the view, that things, as they stand there is nothing to show that the Board is entitled to bill the petitioner on the basis of high tension supply In annexure '1' it has been stated that the petitioner will be billed from 18th July, 1976 up to date according to high tension tariff. Having held that there is nothing to show that the respondents are entitled to bill under high tension tariff, annexure '1' even to that extent has got to be quashed."

15. In this view of the matter, there cannot be any doubt that the Bihar State Electricity Board can raise bills on H.T. basis only upon fulfilment of conditions precedent thereafter namely installation of transformer, capacitor, etc. The Bihar State Electricity Board therefore may in terms of the application filed by the petitioner for conversion of energy from Low tension to High Tension take necessary steps for conversion from Low Tension to High Tension of energy and raise bills in terms of high tension from the date of its conversion. It is, however, made clear that it is up to the Bihar State Electricity Board to raise fresh bill on the basis of supply of low tension energy to the petitioner in terms of installed load in the factory premises of the petitioner.

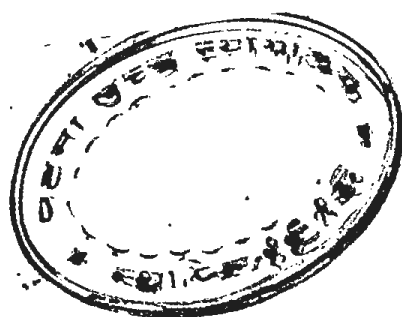
16. With the aforementioned directions, this application is disposed of .

R.N Prasad, J.

R.D.

Order Accordingly





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victed and sentenced under sections 302 and 326 of Penal Code -- omission in the order whether sentences shall run concurrently -- effect of -- High Court, whether can direct sentences to run concurrently -- Code of Criminal Procedure, 1973, (Act 2 of 1974), section 31 (1).

Where the accused has been convicted and sentenced under sections 302 and 326 to Life imprisonment and 7 years imprisonment respectively but there was no specific direction of the court that the two sentences shall run concurrently.

Held, that the Criminal law treats punishment more as a reformative or corrective than as a deterrent or punitive measure. The order of the High Court, therefore, deserves to be clarified for the ends of justice in exercise of inherent power and the two sentences are directed to run concurrently to make the form of sentences harmonious.

Sumitra Devi. v. The State of Bihar(1993),
I.L.R.,72, Pat. 1314



CIVIL WRIT JURISDICTION**Before S.B.Sinha , J.****1991****January,4,****Managing Director, Bihar State Industrial
Development Corporation Ltd. and Anr.*****v.****The State of Bihar, & Ors.**

Bihar Shops and Establishments, Act, 1953 (Bihar Act VIII of 1954), sections 2(4) and 26(2). Factories Act, 1948 (Act LXIII of 1948), section 2 (1) and Constitution of India, Articles 226 and 227 -- scope and applicability of -- words 'worker' and 'employee' as contained in section 2(1) of the Factories Act and 2 (4) of the Bihar Shops and Establishments Act respectively -- meaning of -- an employee having no concern with the performance of any duty which a worker under the Factories Act is required to perform -- complaint filed under section 26 (2) of the Shops and Establishments Act -- maintainability of -- question whether a person is a worker within the meaning of the Factories Act -- nature of -- exercise of supervisory jurisdiction under Articles 226 and 227 of the Constitution of India -- High Court -- interference by.

1 C.W.J.C. No. 303 of 1987 (R) . In the matter of an application under Articles 226 and 227 of the Constitution of India.

Where an employee had nothing to do with the handling of raw materials being the subject matter of manufacturing process in any capacity thereof, he is not the worker within the meaning of section 2 (1) of the Factories Act and thus he is not excluded from the provisions of definition of 'employee' as contained in section 2 (4) of the Shops and Establishments Act. Thus, any person who is not a 'worker' within the meaning of the Factories Act, although employed in a factory would squarely fall within the purview of definition of employee contained in section 2 (4) of the Shops and Establishments Act.

Held, therefore, that in the instant case taking into consideration the nature of the duties performed by respondent no.3, the respondent no.2 must be said to have rightly held that he is an employee within the meaning of the provisions of the Bihar Shops and Establishments Act and thus his complaint petition was maintainable.

Held, further, that the question as to whether a person is a worker within the meaning of the Factories Act or not is essentially a question of fact.

The High Court in exercise of its supervisory jurisdiction under Articles 226 and 227 of the Constitution of India is not concerned with the correctness or otherwise of the decision itself, but is concerned with the correctness of the decision making process. Further sufficiency

of material is not a ground for interference of the High Court with the finding of fact arrived at by a statutory authority in exercise of its jurisdiction in absence of any case that the said finding is either perverse or contains errors apparent on the face of the record.

Such findings of fact cannot be interfered with by the High Court in exercise of its extraordinary jurisdiction under Article 227 of the Constitution of India.

Case laws reviewed.

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

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

M/S.Kameshwar Prasad, Dr.Ayodhya Prasad, Pradeep Kumar and S.K.Sinha for the petitioners.

M/S.T. K Das, P.K.Sinha and S.N.Das, for the respondents.

S.B.Sinha, J. —This writ application is directed against an order dated 23.9.1986 passed by the Presiding Officer, Labour Court, Ranchi in B.S.Case No.9 of 1984, whereby and whereunder the said learned court allowed a complaint petition filed on behalf of the respondent No.3 under section 26(2) of the Bihar Shops and Establishments Act, 1953 (hereinafter called for the sake

of brevity as the 'said Act') and directed him to be reinstated in service to the post which he held before his termination.

2. The fact of the matter lies in a very narrow compass.

3. The respondent No.3 at all material times had been working under the petitioners of the Accounts Department. The said respondent was charge sheeted inter alia for committing defalcation of an amount of Rs.2,21,832/-. The said chargesheet is contained in Annexure - 1 to the writ application. On receipt of the said chargesheet, a show cause was filed by the respondent no.3, which is contained in Annexure - 2 to the writ application.

4. The respondent no.3 was allegedly found guilty by the enquiry officer in terms of his report, as contained in Annexure - 3 to the writ application and he thereafter was dismissed from his services by an order dated 25.10.1983 passed by the Managing Director of the petitioners authority.

5. The respondent No.3, thereafter, filed an application before the respondent No.2 purported to be under section 26 (2) of the said Act on 10.7.1984 together with an application for condonation of delay in filing the said application.

6. As noticed hereinbefore, by reason of the im-

pugned order, as contained in Annexure- 8 to the writ petition the said application was allowed.

7. Mr. Kameshwar Prasad, the learned counsel appearing on behalf of the petitioners principally raised three contentions in support of this application.

8. Firstly, the learned counsel contended that the respondent no.3 being a 'worker' within the meaning of section 2(4) of the Factories Act, the provisions of the said Act were not applicable in this case.

The learned counsel, in this connection has relied upon *The Management of Government Soap Factory, Bangalore-12 vs. The Presiding Officer, Labour Court, Bangalore and Ors.*¹ Works Manager, Central Rly. workshop, Jhansi vs. Vishwanath and ors.², *M/S Rohtas Industries Ltd. avs. Ramlakhan Singh and ors.*³ and an unreported decision of this court in *Tata Iron & Steel Company Ltd. Vs. The Presiding Officer, Labour Court, being CWJC No.330 and 939 of 1989 (R)* disposed of on 4th August, 1990.

9. The learned counsel next contended that in any event the respondent No.2 misdirected himself in passing of the impugned order in sofar as he did not at all take into consideration the findings arrived at by the Inquiry Officer with regard to the charges framed as against the

1 (1970) A.I.R.(Ilys) 225

2 (1970)A.I.R.(S.C.)488

3 (1978)A I.R.(S.C.)849

respondent No.3.

10. According to the learned counsel, even if there were some defects in the domestic enquiry, the respondent NO.2 misdirected himself in allowing the complaint petition filed by the respondent No.3, as by reason of the purported defects in the departmental proceeding, he was not at all prejudiced.

In this connection, the learned counsel has relied upon *S.C.Das, Chairman, Hindustan Steel Employees Consumer Cooperative Stores, vs. The State of Bihar and ors.*¹ and *Sri.Sao Vs. Presiding Officer, Labour Court, Ranchi and anr.*²

11. The learned counsel lastly contended that in any event, in view of the fact that a criminal case is still pending as against the respondent no.3 and in view of the fact that he was charged with a serious misconduct of defalcation of a heavy amount, the Management must be deemed to have lost confidence in him and as such respondent no.2 should not have directed his reinstatement in service.

The learned counsel, in this connection has relied upon a decision of the Supreme Court in the *The Binny Ltd. vs. Their Workmen*

12. Mr. T.K.Das , the learned counsel appearing on

1 (1988) P.L.J.R. (Noc)15

2 (1989)P.L.J.R 880

behalf of the respondent no.3, on the other hand, submitted that in view of the charge in definition of 'employee' as contained in section 2 (4) of the said Act, a person working in the Accounts Department cannot be said to be a worker within the meaning of provisions of section 2 (L) of the Factories Act and thus the respondent no.3 must be held to be an employee.

13. The learned counsel pointed out that the respondent no.3 at no point of time was concerned with the manufacturing process or in cleaning any part of the machinery or premises used for a manufacturing process or any other kind of work incidental to, or connected with, the manufacturing process, or the subject of the manufacturing process.

In this connection, my attention has been drawn to the deposition of respondent no.3 in the court of respondent no.2 which is Annexure - 7 to the writ application.

14. The learned counsel, in this connection has relied upon an unreported decision of mine in *M/S Bharat Refractories Ltd. and Anr. vs. Ram Nath Sharma and ors* (C.W.J.C. No.211 of 1985(R), disposed of on 1.8.1989).

15. The learned counsel further drew to my notice that a Letters Patent Appeal preferred from that decision being L.P.A. No.110 of 1989(R), was summarily dismissed by a Division Bench of this court by an order dated 29.9.1989.

16. The learned counsel in reply to the second contention of Mr.Prasad, submitted that the respondent no.2, in his impugned order clearly found that the domestic enquiry held as against the respondent no.3 was violative of the principles of natural justice and thus the same was not enquiry in the eye of law.

17. The learned counsel further submitted that in this case, even the enquiry officer did not find the respondent no.3 guilty of commission of a misconduct for defalcating the aforementioned amount of Rs.2,21,832/-, but merely found him guilty of negligence in performance of his duties.

18. It was further pointed out that the respondent no.2, in his impugned order clearly arrived at a finding of fact that the Management even could not prove the charges of defalcation as against the respondent no.3, on the basis of evidence adduced before it.

19. In reply to the third contention raised on behalf to the petitioner, Mr.Das submitted that in this case, the Management never raised any contention of loss of confidence in the respondent no.3 nor any charge in that regards was framed.

20. According to Mr.Das, the Management in their written statement before the respondent no.2 or even before this court has not contended that they had lost confidence in the respondent no.3, and thus the respondent no.2 cannot be said to have misdirected himself in

passing and/or granting the relief of reinstatement in favour of the respondent no.3.

21. *Re-contention - I*

'Employee' has been defined in section 2 (4) of the said Act in the following terms -

"'Employee' means a person wholly or partially employed for hire , wages including salary, reward, or commission in, and in connection with any establishment and includes 'apprentice' but does not include member of the employer's family. It also includes persons employed in a factory who are not workers within the meaning of the Factories Act,1948 (63 of 1948), and proceeding under this Act, includes an employee, who has been dismissed, discharged or retrenched for any reason whatsoever."

22. From a plain reading of the aforementioned provisions, it is evident that it includes such employees employed in a factory who are not workers within the meaning of the Factories Act,1948.

Section 2(1) of the Factories Act,1948, reads as follows :-

" 'Worker' means a person employed, directly or by or through any agency (including a contractor) with or without the knowledge of the principal employer, whether for remuneration or not) in any manufacturing process, or in cleaning any part of the machinery or premises used for a manufacturing process, or in any other kind of work incidental to, or connected with, the manufacturing process (but does

not include any member of the armed forces of the union).

23. There cannot be any doubt that the term 'worker' as defined in section 2 (1) of the Factories Act is very wide. However, the term 'worker' can be divided in three groups :

(a) Persons engaged in any manufacturing process.

(b) In cleaning any part of the machines or premises used for manufacturing process , or

(c) In any other kind of work incidental to or connected with the manufacturing process or the subject of such process.

The case of complainant-respondent no.3 evidently does not fall within group (1) or group(b) mentioned hereinbefore.

24. The words 'manufacturing process' have been defined in section 2 (k) of the said Act in the following terms :-

(i) Making, altering, repairing, ornamenting, finishing, packing, oiling, washing, cleaning, breaking up, demolishing, or otherwise treating or dispatching any article or substance with a view to its use, sale, transport , delivery of disposal , or

(ii) Pumping oil, water, sewage or any other substance, or

(iii) Generating, transforming or transmitting power, or

(iv) Composing types for printing, printing by letter press, lithography, photographs or other similar process or book binding, (or)

(v) constructing, reconstructing, repairing, refitting, finishing or breaking up ships or vessel (or)

(vi) preserving or storing any article in cold storage;

25. In this case, the Management did not adduce any evidence whatsoever with regard to the duties performed by the respondent no.3 nor had it brought his duty chart on records.

26. From the deposition of the respondent no.3 in the court of respondent no.2 it appears that he categorically stated that he was employed in the High tension Insulator Factory in the post of clerk-cum-typist on 15.1.1973 and he was posted in the dispatch section as chaser on 30th January, 1973. He further stated in his evidence that in the year 1976, he was posted in Accounts Department where he used to maintain the store ledger. He further stated that on 1.1.1980 he was posted in the Dispatch section.

27. According to respondent no.3, during his posting in the Accounts Department, he never used to prepare the wage sheet of the employees.

28. The appointment letter of the respondent no.3 was marked as Ext.'F' before the respondent no.2. The respondent no.2 found on the basis of the said appointment letter that the respondent no.3 was appointed in the post of Typist-cum-Clerk. In view of the fact that the respondent no.3 was charged with defalcation of certain amounts goes to show beyond any shadow of doubt that he was working at the relevant period, namely in July, 1977 to January, 1978 in the Accounts Department.

29. It is, therefore, clear that the respondent no.3 had got nothing to do with the performance of any duties which a worker within the meaning of the provision of section 2(1) of the Factories Act, was required to perform.

30. In *M.K.P.Kadar Moideen, Manager, M.K.P.Rice & Oil Mills Manjokillai, Nagapattam* (AIR 1953 Madras, 406), a learned single judge of the Madras High Court while deciding a Criminal revision application held that the question as to whether a watchman comes within the purview of a definition of worker is a question of fact in each case namely what were the duties performed by the watchman and what was their connection with the subject of the manufacturing process. In *Dharangadhra Chemical Works Ltd. vs. State of Saurashtra, and ors*¹ the Supreme Court held that the irrespective of the fact as to whether a workman while performing his job takes assistance from others or not, if he agrees to work and does work, he is a workman within the meaning of section 2(a) of the Industrial Disputes Act. The aforementioned decision of the Supreme Court in *Dharangadhra Chemical Works Ltd.*, case was followed by the Supreme Court in *U.P.Gopala Rao vs. Public Prosecutor, Andhra Pradesh*,². It was held that whether a person comes within the meaning of section 2(L) of the Factories Act, or not is a question of fact in each case. In works

1 (1957)A.I.R.(S.C.)264

2 (1970)A.I.R.(S.C.)66

Manager Central Railway Work Shop, Jhansi, vs. Vishwanath and ors.(AIR 1970 S.C.456) , it was the time keepers who prepared pay sheet of workers, maintained leave accounts of the staff, disposed of settlement cases, maintained records for statistical performance, maintained attendance of staff, job particulars of the various jobs in operation and time sheets of the staff working on various shops, dealing with the Railway spare parts and repairs etc. and thus were held to be workers within the meaning of section 2(L) of the Factories Act. In M/S.Roh-tas Industries case page - 817 equivalent to AIR 1978 page-849, the concerned workman who was engaged in supervisions and checking quality and weightment of waste papers and rags which are basic raw materials for manufacturing papers and who further used to deal with receipts and maintain records of stocks and pass the bills of the suppliers of waste papers and rags, and used to work in the precincts of the factory and in case of necessities had to work inside the factory was held to be within the purview of definition of 'worker' as his job was connected with the subject of manufacturing process namely the raw materials.

31. The decisions referred to hereinbefore are not directly applicable to the facts and circumstances of the present case and as such not much assistance also can be derived therefrom.

However, in the *Management of Govt.Soap Factory*

vs. 'Presiding Officer, Labour Court, Bangalore' and ors. reported in 1970 Labour and Industrial Act cases 1288. AIR 1970 MYSORE, 225, it was held that a watchman engaged in a factory are not 'workers' within the meaning of the factories Act. .

32. In Motipur Sugar Factory vs. Rikhdeo Prasad reported in 1976 Labour and Industrial Cases Page-335, a Division Bench of this court distinguished that the decision of the Supreme Court in 1970, S.C.Page 488 as also another decision of the Supreme Court reported in AIR 1960 S.C.Page 569 (State of U.P. vs. M.P.Singh) and held that a 'Cane Accountant' is not a worker. In that case another person was accountant of the factory.

33. It is , therefore, clear that the respondent no.3, had nothing to do with the handling of raw materials being the subject matter of manufacturing process in any capacity thereof.

34. In Dikshit case (Supra) a Division Bench of this Court upon taking into consideration the various decisions including the Management of Govt. Soap Factory, Bangalore-12, vs. *The Presiding Officer, Labour Court, Bangalore* and ors. (AIR 1970, Mysore, 225) and in *M/S.Rohtas Industries Ltd. vs. Ramlakhan Singh and ors.* (AIR 1978 S.C.,m,849) held that he was a worker in view of the following finding :-

"On the basis of the evidence of O.P.W.1, respondent no.1 has recorded that the main duty of the Chief

Inspector, as Dikshit was, was overall supervision of the work of the material handling services department (hereinafter called as raw material department). Personnel of this department handle raw material for the steel factory and are primarily concerned with the quantity, quality, management and procurement of all raw materials such as iron ore, coal, coke, lime stone, dolomite, etc. Further function of the department is to prepare programme for distribution of coke and coal to get them loaded in the wagon for sending to consumption point. They also used to entertain complaint regarding the quantity and quality of the raw materials. The Chief Inspector submit report on the basis of reports regarding raw materials received from his subordinates. Iron is produced in blast furnace and melting shops are separate from raw material department. But the raw materials for manufacturing iron and steel are handled by raw materials department of which Dikshit was the Chief Inspector.

35. In that case, the Division Bench, further on the basis of materials on record held :

" That the fact that raw material department in which Dikshit was employed as Chief Inspector was within the precinct of the steel plant stand proved as the same has not been controverted by him. The finding of the fact recorded by respondent no.1 proves the fact that Dikshit was employed in connection with the subject of the

manufacturing process, namely, raw materials."

36. However, in this case, as noticed heretofore, it is clear that the respondent no.3 was not the worker within the meaning of section 2 (1) of the aforementioned Act and thus he is not excluded from the provisions of definition of 'employee' as contained in section 2(4) of the said Act.

37. In CWJC No.211 of 1985 (R) (*M/S Bharat Refractories Ltd. and anr. vs. Ram Nath Sharma and ors.*), I have held that a watchman who has got nothing to do with looking after the raw materials required for manufacturing purpose is not a worker within the provision of section 2(L) of the Factories Act and thus he would be an employee under the purview of section 2(4) of the said Act.

38. However, it is not out of place to mention that the definition of an employee as contained in section 2(4) of the said Act has been amended by Act No.2 of 1975. Prior to enactment of Act No.2 of 1975, all persons employed in a factory were excluded from the provision of the definition of employee.

However, by reason of the said amended Act of 1975, persons employed in a factory other than workers within the meaning of factories act have been included in the said definition.

39. Thus, any person who is not a 'worker' within

the meaning of the Factories Act, although employed in a factory would squarely fall within the purview of definition of employee as contained in section 2 (4) of the said Act.

40. The question as to whether a person is a worker within the meaning of the Factories Act, 1948 or not is essentially a question of fact.

41. Taking thus the nature of the duties performed by the respondent No.3, in my opinion, the respondent no.2 must be held to have rightly held that he is an employee within the meaning of the provision of the said act and thus his complaint petition was maintainable.

Re-Contention-II

42. The respondent No.2, in his impugned order formulated point no.2, which reads as follows :-

"Whether the dismissal of the complainant is proper, valid and justified ?".

43. While deciding the said issue, the respondent no.2, held as follows :

"However, on perusing the proceedings of the domestic enquiry , it appears that on 9.9.1982 of the management were examined and on 10.9.1982 the statement of the complainant was recorded and he was cross examined by the Management but again the order sheet dated 7.10.1982 shows that one more witness of the

management was examined and after that the complainant was not given an opportunity to examine his witness, if any. This procedure of examining the management's witness after examining the complainant in defence and not giving him a chance to rebut the evidence of the witness of the management examined on 7.10.1982 has certainly violated the principles of natural justice. Thus the domestic enquiry can also not be said to have been conducted in a fair and proper way after observing the Rules of natural justice. Moreover, I do not find the statement of the witness of the management examined on 7.10.1982 on record of the domestic enquiry. Further even from the perusal of the findings of the enquiry (Ext.A) it is evident that the complainant was only found careless while doing his duty alongwith the members of who distributed the money and he was held guilty of being indifferent towards his duty and if it does not mention that how much amount was actually defalcated by the complainant."

44. The learned Labour court, thereafter took up the question as to whether the Management had been able to prove the charge of defalcation of a sum of Rs.2,21,832/- against the complainant or not and upon analysis of the evidence adduced on behalf of the parties held

" From the evidence of O.W.1., it can not be said that how the complainant committed the alleged amount

alongwith other employees and how much was the actual amount defalcated by him or in what way and manner he was involved in committing the alleged defalcation. The receiving of the money from courier and distributing it to the employees can not be said a defalcation. The management has not adduced any evidence whatsoever, to show that how much money was received by the complainant, when it was received, how much amount was distributed and in which manner the remaining amount was defalcated by him. In the absence of any such positive evidence it cannot be said and held that the complainant defalcated the amount alleged or he had his hand in the alleged defalcation. The management has filed the internal audit report but from its perusal also it cannot be said that how much amount and in which manner the complainant defalcated the alleged amount. Moreover, neither the auditors who conducted the audit have been examined by the Management, nor any other papers have been filed to prove the alleged defalcation. From the evidence of M.W.1 it appears that since the complainant was found guilty during the domestic enquiry by the enquiry officer and was dismissed on the basis of the findings of the domestic enquiry, he is guilty of committing the alleged defalcation. Four witnesses, namely S.B.Sinha, controller of Accounts, Nageshwar Lal, Internal Auditor, Bindeshwar Thakur Treasury, Sarkar and B.C.Dutta, Accounts Officers were examined during the domestic enquiry to prove the alleged charge against the

complainant but strangely enough none of them has been, examined in this court to prove the alleged defalcation against the complainant. There is no reason, whatsoever, for non-examining them in the court. They all are employees of the same corporation of which the High Tension Insulator Factory, is a unit. In the absence of their evidence the alleged charge leveled against the complainant for defalcation the sum of Rs.2,21,832/- cannot be held to be proved specially when there is no other evidence to prove the charge."

45. As has rightly been contended by Mr.Das that even the enquiry officer in his report which is contained in Annexure-3 to the writ application categorically came to the conclusion that the petitioner was not at all concerned with the preparation of any wage sheet or payment of any salary so far as employees are concerned and he merely had been one of those persons who used to accompany others in distributing the amount.

46. It was held by the enquiry officers that the cash box used to be in the charge of one Mr.Pal. The Enquiry officer, therefore, held that so far as the charges of defalcation is concerned, the same is wholly without substance and the respondent no. 3 could not be found guilty in relation thereto.

47. The enquiry officer, however, purported to have found that the respondent no.3 was guilty of negligence and/or carelessness.

48. Apparently enough, even according to the enquiry officer, the charge of defalcation made as against the respondent no.3 could not have been proved and he was found guilty only of negligence and/or carelessness.

49. Mr. Kameshwar Prasad has not been able to show as to how and in what manner the findings of fact arrived at by the respondent no.2 was perverse.

50. It is now well known that this court in exercise of its supervisory jurisdiction under Articles 226 and 227 of the Constitution of India is not concerned with the correctness or otherwise of the decision itself, but is concerned with the correctness of the decision making process.

Reference, in this connection may be made to *State of U.P. Vs. Maharaja Dharmendra Prasad Singh* (AIR 1989 S.C., page 997).

51. It is also well known that sufficiency of material is not a ground for interference of the High Court with the finding of fact arrived at by a statutory authority in exercise of its jurisdiction in absence of any case that the said finding is either perverse or contains errors apparent on the face of the record. Such findings of fact cannot be interfered with by this court in exercise of its extraordinary jurisdiction under Article 227 of the Constitution of India.

52. In *Sri S.C. Dage's case* (SUPRA), this Court was

concerned with the question that when services of an employee is terminated simplicitor, whether the same can be the subject matter of petition under Section 26 of the said Act.

53. In that case, the learned Single Judge, upon taking into consideration various decisions held that in fact, the services of the concerned employee was terminated in misconduct and it was not a case of termination simplicitor.

54. In *Sri Sao Vs. Presiding officer, Labour Court Ranchi* (1989 PLJR 810), it was held as follows ;-

It may be mentioned here that in terms of section 26(2) of the said Act, the compliance of the sub section (1) thereof is not required where an employee has been found guilty of misconduct in a domestic enquiry as held by the employer. In terms of sub-section (2) of section 26 of the said Act, what is required is a factual enquiry and a factual finding of guilty of misconduct on the part of the concerned employee.

The question as to whether the enquiry was defective or not may itself be a subject matter of the determination in a complaint petition under section 26(2) of the Act but only because, in my opinion, there is some defect in the enquiry itself, the same would not require the conditions laid down under sub-section (1) of section 26 of the said Act fulfilled. Mr. Mitter further submitted that the issues which have been framed by the respondent no.1 do not

fulfill the requirement of sub-section (2) of section 26 of the Act. True, it is, in terms of sub section (2) of section 26 of the Act, the issues which were required to be framed are as to whether there has been a reasonable cause for determination of the services of the employee or not, but in the instant case the employee have not been prejudiced in any manner by reason of non framing of proper issues."

55. The aforementioned decision also, therefore, does not support the contention of Mr. Prasad but really goes against him.

56. In this case, the Management was given an opportunity to adduce all evidences which they did, The respondent no.2 arrived at a finding of fact that the petitioner has not been able to prove the charges of misconduct as against respondent no.3, which cannot be interfered with by this court.

Re-Contention -III

57. The Management has not required any plea of loss of confidence in the respondent no.3 either is its written statement before the respondent no.2. or is this writ application.

58. Section 26 of the said Act read with Rule 20 of the Bihar Shops & Establishment Rules, 1955 are pointer to show that subsection 1 of Section 26 of Act not only embrace within its fold termination simplicitor but all types

of termination which includes a termination for a misconduct even others prescribed under the said Act.

59. In *Dr. N.P. Rao & ors. Vs. Tata Iron & Steel Co. Ltd. & Ors.* (1990 BBCJ, 49), a Division Bench of this Court has held that the words " termination for any reason whatsoever " are of wide and it takes within its fold all kind of termination of services.

It is, therefore, permissible for any employer to show that the concerned employee's services had been terminated owing to its loss in confidence is being.

60. However, for that purpose a specified plea has to be raised and a specific charge therefore to be framed.

61. In *Chandu Lal Vs. The Management of M/S. Pan American World Airways Inc.* (AIR 1985 S.C.,1128) and in *Kamal Kishore Lakshman Vs. The Management of M/s. Pan American world Airways Inc. and Ors.* (1987 (vol.I), S.C.C.page 146), it was held that the loss of confidence is a charge or which a delinquent must be served with a notice containing prior notice in a disciplinary proceeding.

62. In this view of the matter, the decision in the *Binny Ltd. Vs. Their Workman* (AIR 1973 S.C., 1403) upon which reliance has been placed by Mr. Kameshwar Prasad has no application.

63. In this view of the matter, in my opinion, the respondent no. 2 can not be said to have misdirected

himself in granting a relief of reinstatement only to the respondent no.3 without awarding him any compensation whatsoever.

64 In the result, there is no merit in this application which is accordingly dismissed.

However, in the facts and circumstances of the case, there will be no order as to costs.

M.K.C.

Application dismissed



A P P E L L A T E C R I M I N A L

Before Syed Haider Shoukat Abidi

& Amir Das, JJ.

1992

March, 17.

Anjani Kumar Gupta & anr.*

V.

The State Of Bihar

Criminal Trial --- Court, whether an expert or not, to and give its opinion and draw conclusions --- circumstantial evidence.

Held, That a court is no doubt, An expert of experts. But the court cannot give its opinion in place of the experts and draw the conclusion. A doctor who examined the injuries of the person dead or alive is best and competent to give opinion about the nature of the injuries, nature of the weapons of assault and even to the manner of assault. That becomes the positive opinion of the doctor. But if it is found by the court that the opinion of the doctor in respect of the nature of injuries, weapons used, the manner of assault and the like appears to be obscure or oscillating improbable or that there is no

* Criminal Appeal No 33 of 1991 (P) Against the Judgment and order dated 18.1.1991 passed by Sri Jowan Tigga, 2nd Additional Sessions Judge, Singhbhum at Chaibasa in Sessions Trial No.349 of 1987

fairness or impartiality, then the court considering the circumstances and medical evidence, can give its own finding on account of its expertise and being expert of the experts.

Held, further, that in the case of circumstantial evidence, the court may come across with such evidence which create suspicion about the complicity and participation of the accused in the offence. But suspicion how ever strong, cannot take place of proof based on legal evidence to convict an accused. Doubts and suspicion can not be the legal basis of legal proof and foulness of the crime increases the degree of proof of the offence against the accused.

Case laws discussed.

Appeal by the accused.

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

M/s P.S. Dayal & Praveen Shankar Dayal
(Jr) Advocates for appellants

S.K. Dutta, P.P. for the respondene

S.H.S. Abidi, J. — Appellants, Anjani Kumar Gupta (husband) and Bali Prasad Gupta (father-in-law) of Durga Devi alias Manti Devi.have preferred this appeal against their convictions under Section 302 read with 34 and 201 read with 34 of the Indian Penal Code (for short 'IPC)

and sentences to undergo rigorous imprisonment for life and seven years R.I. under the respective courts, ordered to run concurrently, for killing her by burning and throttling on the night between 3/4-7-1987 behind their house in a open orchard, football maidan, Barajamda, P.S. Gua District Singhbhum. Other accused, namely, Man a Kumari, Lalsa Kumari and Ashok Kumar Gupta, Who are said to be minors, were given benefit of doubt, Mother - in - Law of the deceased, one of the accused in this case, is said to have died during the course of trial.

2. A fardbeyan (Ext.4) was given on 4.7.1987 at 7 A.M. by Mewa Lal Gupta (p.w.5), the uncle of deceased Manti Devi, at Barajamda Out-post to S.I. Natwar Singh (p.w.4), the Officer-in-charge, Barajamda Out-post to the effect that he had gone to attend a marriage on 30.7.1987 (Tuesday) at Barbil (Orissa) and after that he returned to Barajamda on 2.7.1987 on (thursday) in the sasural of his brother easing in the house of Kedar Prasad Gupta. On 4.7.1987 he was to return to Jamshedpur. In the morning of 4.7.1987 at 5 A.M. when he was returning after easing he met Anjani Kumar Gupta and his father Bali Prasad Gupta, the appellants near the well at the football ground who gave information to him that his niece Manti has died on account of burns. He immediately went to the house of Bali Prasad Gupta and found his niece Manti Devi burnt and dead on the back side of the house of Bali Prasad Gupta. His niece was married to Anjani Kumar Gupta in July, 1983. After some time of the

marriage to Anjani Kumar Gupta, the persons of her sasural used to ill-treat her. Relations with her sasural people were not good for which she used to write letters to her parents, place. Once, members of in laws family had refused to keep her but on account of intervention by Panchayat people, her sasural people kept her. Some time back his niece had come in connection with the marriage of his own daughter and she wanted to stay here till the month of Sawan but her husband Anjani Kumar Gupta forcibly brought her back to Jamda. On 30.6.1987 (Tuesday) when he met his niece, she wanted to say something but on account of fear, she could not say anything in the presence of her sasural people. In Barajamda, people had informed him that his niece was beaten by her husband, father-in-law, mother-in-law, sister-in-law and brother-in-law and they had made her life a hell. He further said that she has been strangulated and then burnt by her husband, Anjani Kumar Gupta, father-in-law. Ali Prasad Gupta, mother-in-law, Bhagwati Devi, Sister-in-law, Mansa Kumari and brother-in-law, Ashok Kumar Gupta and they have thrown her dead body behind their house. On the basis of this fardbayan, which was sent to P.S. Gua, at a distance of about 11 Kms. from the place of occurrence, the first Information Report (shortly FIR) was registered on the same day at 7.25 P.M. by Chumnu Oraon, P.W.I (Officer-in-charge).P.W.14, Natwar Singh after sending the fardbeyan, to P.S.Gua, went to the place of occurrence

where he found the dead body of Manti Devi of which he prepared the inquest report and then sent it for post-mortem examination. He also examined some of the witnesses and then gave over the charge of investigation on the same day to (P.W.9) Chumnu Oraon. This P.W.9 did the part of the investigation. He examined Kedar Prasad Gupta (P.W.1), Prem Chand Gupta, Jai Shankar Prasad Gupta (P.W.11), Gulab Chand Gupta, P.W.8 who gave him one of her letters (Ext.2) and its photostat copy (Ext.2/1) for which he prepared production seizure list. After completing the investigation, he submitted charge sheets against the appellants and the accused.

3. The accused, in defence, denied the prosecution case and alleged that they have been falsely implicated in this case. Appellant Anjani Kumar Gupta has said that Manti Devi was suffering from hysteria and whenever anybody visited the house, she used to show her madness and that at the time of the occurrence, he was inside the house and when he woke up, he did not find her in the house but later found her in dead condition in the bagicha (orchard, towards latrine. Bali Prasad Gupta while denying the prosecution allegations said that he had met the informant on 4.7.1987, Dr. R.P.Singh (D.W.1) has said that it was a case of suicide, although he admitted that he had never seen the dead body nor conducted the post-mortem nor helped Dr. Jaiswal (P.W.13) who had done the post mortem examination. He has given his opinion that the coroma of Hymeda may

be possible in dead body in transporting through truck or in rough handling at the time of post mortem.

. The prosecution, in support of its case, has examined 14 witnesses P.W.1 Kedar Prasad Gupta, father-in-law of the brother of the informant, has said that when he went he saw the dead body and found the eyes open and tongue protruding. P.W.2 Ramchand Prasad Gupta son of Kedar Prasad Gupta has said that the victim had reported to his wife about the mal-treatment and that panchayati had also been done. P.W. 3 Anupam Kumar Baxi, has said that the applicants had come to him in the morning for torch saying that Manti Devi was not traceable. PW.4 Bijai Kumar Gupta, brother of the deceased has said about the torture by all the accused and once he had gone for bidai of her sister but she was not sent and she was beaten in his presence and she could not give out in his presence before the occurrence on account of fear. P.W5 Mewa Lal Gupta is the informant himself who has said that while he was returning in the morning after easing, he was informed by the appellate that Manti Devi has died of burns and so he went to the place of occurrence and found her dead body. P.W.6 Shiv Murat Ram Gupta, the uncle of the deceased, has also deposed about the ill-treatment, P.W.7 Nand Kishore Gupta who had returned from Orissa with Mewa Lal Gupta and was staying with Kedar Prasad Gupta, was also informed by Mewalal Gupta about the death of Manti Devi. He found her dead body naked and

tongue protruding and eyes open. P.W.8 Gulab Chandra Prasad, the father of the deceased, has also deposed about the ill-treatment to his daughter and about the letter Exts. 2 and 2/1 P.W.9 Chumnu Oraon, the second investigating Officer, after doing part of investigation, submitted the charge sheet, M.K. Bose, P.W.10 is the witness for the inquest report. Jay Shankar Prasad, P.W.11 is also a witness of seizure of papers on 11.8.1987. Baldeo Prasad, P.W.12 has been tendered. Dr. Onkar Nath Jaiswal, P.W.13 conducted the post mortem examination on 5.7.1987 at 10.30 A.M. and submitted the post mortem report being Ext.7. P.W.14, Natwar Singh is the second investigating Officer, who recorded the Fard Beyan of the informant, went to the place of occurrence prepared the inquest report and sent the dead body for post mortem examination also examined some of the witness and then gave the investigation to the Officer-in-charge, Chumnu Oraon, (P.W.9).

5. The learned trial court, after considering the entire material on record, has convicted and sentenced the appellant as said above.

6. The learned counsel for the appellants has contended that (1) the circumstances considered by the trial court were not put to the accused under section 313 of the Code of Criminal Procedure (for short 'the code'), (ii) the circumstances cannot be said to be the circumstances leading to irresistible conclusion that the appellants

had killed and burnt Manti Devi, (iii) taking each circumstances in usual, the court has found that the accused had given information to the relations of Manti Devi as is made out from the evidence of the informant and go, the giving of the information to the relatives being proximate of the occurrence, cannot lead to the opinion of the guilt of the accused, (iv) the first investigation officer, P.V. 14 did not find any ash of burnt clothes anywhere at the spot except the smell of kerosene oil and there is no evidence that the appellants had cleaned the ashes, (v) the prosecution has not explained the circumstances of death inside the house of the appellants as ten bangles of the deceased were found intact and that there was Tikuli on her face, (vii) the letters said to have been written by the victim to her father, are not admissible and cannot be looked into, (viii) the story of panchayati, said to have been done in 1986, is not made out, (ix) on account of false implication and so acquittal of the mother-in-law, sister-in-law, brother-in-law of the deceased, the base of the prosecution case has been found to be unreliable and so the evidence against the appellants has also become doubtful, (X) and that the medical evidence does not make out a case that she had been strangled and the burnt rather it is a case of suicide. To appreciate these contentions of the learned counsel for the appellants, the entire material on record and evidence will have to be scrutinized with care and caution as this case is based on the circumstantial

evidence.

7. P.W.5, Mewa lal Gupta is the informant who has said that he had gone to Orissa in connection with a marriage and while returning to Jamshedpur, he came to Barajamda where on 4.7.1987, in the morning, when he was to go back, he had gone to ease, while After easing, when he was returning, he met both the appellants near the well who told him that Manti Devi his niece, has died of burns. On this information, he went to the house of the appellants and found the dead body of Manti Devi on the back of the house in a bush. Her dead body was burnt, eyes were open, tongue protruding and clothes were also burnt, His niece Manti Devi had been married with appellant Anjani Kumar Gupta in the month of July, 1983 and after her marriage, her sasural people were mal-treating and torturing her as she had not been given *dahez* (dowry) against which she had been sending informations through letters to her father's place. Manti's in-laws did not want to keep her and which there was a panchayati but on the intervention of punchayat people, she was kept at her in-laws house. Manti had come her to naihar (parents place) in connection with the marriage on 8.6.1987 of his daughter where she wanted to stay till Sawan but her husband took her away forcibly. On 2.7.1987, he had gone to the house of Manti Devi who wanted to say something to him but on account of fear and presence of her mother-in-law, brother-in-law, father-in-law and sister-in-law, she did not say anything and

could only say to send her father and mama. Manti Devi had sent a letter 10-15 days earlier than death that Anjani Kumar had beaten her for the sake of two breads and had broken her hands and legs. Her life had become hell in her sasural on account of beatings by her husbands, father-in-law, brother-in-law, mother-in-law and sister-in-law. On seeing her dead body, he understood that she had been killed. He went to Barajamda Out-post and gave his fardbeyan (Ext.4). In cross examination, he has said that Surendra Prasad is maternal uncle (mama) of Manti Devi who is not a witness in this case. He and his three other brothers are still joint though separated in mess. His daughter Bindu, who was married on 8.6.1987, has also died due to burn when she was preparing 'prasad' for chhath. He had come to know about the torture to Manti through her letters. She might have sent 15-16 letters about torture to her parent house. She was issueless and was not suffering from any disease. Her eyes was slanting and she was not suffering from epilepsay. The 15-16 letters, sent by Manti to her father, were shown to him (witness) by his bhabhi (brother's wife) as his brother usually remained out. Some letters were available with him some might have been left at home. In the letters, she had been giving out about the trouble to her about food and poverty of her sasural people. He has also said that the house of Kedar Prasad Gupta was at a distance of 500 yards from the house of Bali Prasad Gupta and on getting information

from Bali Prasad Gupta, while he was returning after easing, he went back to the house of Kedar Prasad Gupta and after changing his clothes, he went to the place of occurrence along with others at about 5.15 A.M. The house of Bali Prasad Gupta is surrounded by shrubs wherein the dead body of Manti was found. Latrine is inside the house of Bali Prasad Gupta. The clothes and body of Manti Devi were burnt and tongue was protruding. One of her eyes was slanting and she could see a little less from it. He had said to the investigating officer that the Manti's eyes were open and tongue was protruding. Whatever was settled as dahez at the time of marriage, was given but besides that, further dahez was being demanded after one year. The tape-recorder given in her marriage to Anjani Kumar Gupta was thrown away after being used for some time; at the house of his brother Gulab Chand Gupta by Anjani Kumar Gupta himself who had also asked her father to keep the girl as the tape recorder which was not working. the people from her side expressed inability to give him television and for that reason, she was ill-treated. He had not been able to give these details to the police as he was upset to see the dead body of Manti Devi whose dead body was looking horrible on account of being burnt and eyes and tongue protruding. The police did not examine him again and it was not correct that the police examined him again and he did not give these details. He later on said that he met Manti on 30.6.1987 but on account of

nervousness, he had given the said date 2.7.1987. He had said to the police that Manti wanted to say something but on account of presence of the inlaws, she could not say anything. He has said that in the meeting of panchayat, his elder brother had gone and he had not gone. He denied the defence suggestions made to him.

8. P.W.1 Kedar Prasad Gupta (father-in-law of the informant's brother), has said that he heard hulla that in the house of Bali Prasad Gupta, his daughter-in-law has died of burning. He went to the house of Bali Prasad Gupta and saw the burnt dead body of Manti kept out-side the house. Her eyes were open and tongue was protruding. Mewa Lal, uncle of the deceased, had come to his house from whom he came to know that Manti was got burnt. He could not say as to how the occurrence took place as it was a matter of the family. The police did not ask him and so he did not say to the police that the eyes were open and tongue was coming out. .

9. P.W.2 Prem Chandra Prasad Gupta son of Kedar Prasad Gupta has said that the occurrence was of about 2 years. There was a panchayati in village Barajamda, wherein there was compromise between the deceased and the appellant Anjani Kumar Gupta who had assured the panchayat that he will keep her properly and will not ill-treat her and so, Manti was given to him. He could not say as to whether Manti had come to his place, as he

does not remain at his house. When he returned from the shop in the night, he was informed by his wife that Manti had come and was saying that her husband and in-laws were mal-treating her. Mewa Lal, her uncle, had come to him on 4.7.1987. In the morning he came to know that Manti died of burn. He saw the dead body of Manti which was burnt. There were 25-30 members of the panchayati in the village. Keshav Prasad Gupta, Uma Shankar Prasad Gupta and Bijay Shankar Prasad Gupta are accepted as Mukhiya by him and others. A panchayat was held 2-3 months earlier and there was nothing in writing in the panchayat sabha. He came to know about the decision of the panchayat. As the elder members were present there and so he returned earlier. Manti had also complained to her mother about the beating to her. He had not said to the police that Manti had come to his house to complain to his mother or that she had said so to his wife also.

10. P.W.3, Anupam Kumar Baxi has said that he was earlier living with his family members in a rented house in front of the house of Bali Prasad Gupta which was called the area of football maidan. On the day of the occurrence, in the early morning, both the appellants came to him. They awakened him and asked for a torch but he could not give as he had left the torch at his shop. Bali Prasad Gupta had told him that his daughter-in-law had gone away from the house and so, she was to be searched. In the morning he saw Bali's bahu was dead

and her eyes were open, tongue was protruding and body was burnt. From before, the occurrence also, he had heard the cries of the bahu of Bali Prasad. He had also heard about the beating to her but he did not go to the house of Bali Prasad Gupta. In cross examination he said that he had heard cries of Manti 15-20 times earlier than the occurrence. He could not say that it was the voice of daughter-in-law or daughter of Bali Pd. crying very loudly. As it was the internal matter of Bali Prasad and so, he did not make any enquiry nor gave any information to anyone. He has said that he had earlier seen suicide of a women by hanging. He had no talking terms with the woman of the house of Bali Prasad Gupta though he used to have talks with the son of Bali Prasad. In the night hour, Bali Prasad had come for a torch and so, there was no other witness for the same.

11. P.W.4, Bijay Kumar Gupta, brother of the deceased, has said that Manti had been married to Anjani Kumar Gupta. On 18.5.1987 he had gone to bring his sister from Barajamda. When he requested Anjani Kumar Gupta to send his sister, Anjani Kumar Gupta abused him very much and gave beating to his sister before him. His brother-in-law had asked him to go by 3 a.m. When he abused him he was drunk. His sister's dead body was sent from Jamda to Tata . He had seen the dead body of his sister whose eyes were open, tongue was coming out and whole body was burnt. Whenever he used to ask his sister, then she used to give out under

fear about the beatings by her in-laws and also trouble by them for eating. She used to give out under fear so that she may not be beaten further. He got information about her death in Tata. The police had enquired from him and he had not said to the police that he had seen the dead body of his sister whose eyes were open, tongue was protruding and body was burnt. He had gone alone to bring his sister on the occasion of the marriage of the daughter of Mewa Lal. In Jamda, is the house of his maternal grand-father, Kedar Babu. He had not gone with any invitation card of marriage of the daughter of Mewa Lal and he had stayed and taken food at the place of Anjani Kumar Gupta and had no talk with other members there except his brother-in-law who abused him as soon as he told him that he had come to take his sister. Abuses were given at about 9-30 p.m. yet he stayed there as amongst the relations everything is tolerated and he was from the girl side. He slept in the verandah and heard the sound of marriage pit to her sister from the room. On account of tiredness, he could not see the injuries on her sister's body. At 3 a.m. his brother-in-law asked him to go away otherwise, he will also be beaten and so he returned by bus at 5 a.m. He had said to the police that Manti had told him that she was beaten by her in-laws and she was given trouble about food.

12. P.W.6, Shiv Murat Ram Gupta, uncle of the deceased and karta of the family, has also said about

the ill-treatment . He has said that after 2-3 months of the marriage with Anjani Kumar Gupta, her sasural people began to mal-treat her. They began to complain that she could not prepare food properly and remained sleeping mostly. First, she was given trouble for food and then was beaten .She was called to her sasural after three months of her marriage. He had come to know that her sasural people had thrown hot water upon her. Getting this information, he alongwith Surendra, the mama of Manti, went to her sasural where her in-laws complained about her that she was illiterate. After seven months of her marriage, there was panchayati in Jamda where on account of maltreatment to her, he demanded for divorce but the panchayati people settled the matter and so, he took her to Tata where she stayed for about one year and 7-8 months. In 1986, Manti was sent with Anjani on the assurance that he will keep her properly. But after 2-3 months, they again began to maltreat her. Anjani also lived in a rented house separately with his wife but returned again to his house. The he (the witness) got information about the mal-treatment. He sent Bijay the brother of Manti too see her but Bijay was also abused and treated badly due to which he returned the same night at 4 a.m. In the house of Anjani, Bijay had also seen that Anjani had beaten her and he was in drunken condition. On 8.6.1987, in connection with the marriage of the niece of this witness, Manti along with her husband had come, but Manti was taken away by

him. She has been burnt to death by her sasural people. On getting this information, he went to Barajamda and saw the dead body of Manti. She was in burnt condition and her face had got blackened by burns, eyes were open, and tongue was protruding. She had been sending him letters from her sasural. He had given the photostat copy of the letter to the police. In cross examination, he said that he is four brothers who are joint but living separately since 1980. He did not know about the behaviour of her sasural people from before her marriage. Manti had been given a very good living and upbringing at her father's place. At the time of her marriage, she was about 22-23 years old. Her physical built up was alright according to her age. She was not suffering from any disease like epilepsy and she was physically and mentally grown-up and had good understanding. She used to send bearing letters to her parents. One of her letters dated 26.6.1987 addressed to him, has been filed. Manti was educated upto upto VIIIth class. On enquiry from police he had said that Manti had sent letters to him. It was wrong to say that ext.2 is a forged one and did not bear the signature of Manti. He had not said to the police that Manti's sasural people had complained to him that she did not prepare food properly and used to sleep all the time. He had told the police that earlier her sasural people used to give trouble about food and then they began beating her also. He had said that to the police that he had gone to Bali Prasad Gupta on her

letter and when he reached there, the children of Bali had abused him for which he complained to the Panchayati. He had said that when he went to Manti after her marriage she was not allowed to speak to him as she was surrounded by her sasural people. On Manti's head, hot was was thrown after September and thereafter, mar-pil was started upon her. In the Panchayati, there was nothing in writing. He did not say to the police that Anjani had been living with Manti separately for 14-15 days. Bindu, daughter of Mewa Lal, had also died after seven months of her marriage at her parent's house while cooking and her post mortem was done and he did not knew if the doctor had given the report about the smell of kerosene oil from the dead body of Bindu. Manti was not suffering from hysteria. She mostly remained at her house and she was too obstinate nature. On getting the news of her death, he had gone to Barajamda with other persons and on a truck her dead body was coming where he had seen her face only which had got blackened. Her eyes were open and tongue was protruding. He has denied the defence suggestions.

13. P.W.7, Nand Kishor Gupta, brother of the deceased, has said that while he returned from Orissa alongwith his uncle, Mewa Lal Gupta, P.W.5, he went to Barbil and stayed with Kedar Nath Gupta, on 4.7.1987, the appellants informed his uncle that Manti had died of burns. On getting this information, he along with his uncle went to the house of Bali Prasad Gupta where they saw

the dead body of Manti which was lying behind the house burnt and naked and her eyes were opened tongue was protruding. He has said that Manti was married with Anjani Kumar Gupta during summer of 1983 at Jamda. Her sasural people had been taunting and giving her trouble for food. All her in-laws used to beat her and were taunting for all things. She had been informing about such tortures through her letters to her father and uncle. Her sasural people did not want to keep her and so, there was a panchayati in Jamda but they did not keep her inspite of persuasion of the panchayat, as a result of which, who was taken back to her parents house. After about $1\frac{1}{2}$ years, her husband took her from her house and after some time, she had come to Tata to attend the marriage of her cousins sister with her husband and inspite of her desire to stay therefor some time more, Anjani took her away. Again she sent letter that again her sasural people were torturing her and had stopped giving her food. On getting this letter, Shiv Murat Ram Gupta and her maternal uncle(mama) went to Jamda. In cross examination, he has said that he went to the house of Bali Prasad at 5 a.m. on 4.7.1987 with his uncle to see the dead body of Manti. He found the dead body of Manti at the spot which is surrounded bagicha and has latrine adjacent to it. He went to Tata to inform there and stayed there and did not give any statement to the police. Manti had sent a letter about the torture after three months of her marriage. He had not

read the letter which was addressed to his elder uncle. He had gone to Jamda several times as there is the house of his maternal uncle grand-mother. She had written 10-12 letters about her torture which may be with Shiv Murat Babu. He had not attended the panchayat with respect to Manti Devi. Manti Devi remained in her sasural for about $1\frac{1}{2}$ years of her marriage. After the panchayat, she remained $1\frac{1}{2}$ years at her father's place. More than half of her tongue was coming out. He has seen 2-3 dead bodies earlier but he had not seen any dead body with eyes open or tongue coming out.

14. P.W.8, Gulab Chandra Gupta, father of ill-fated Manti has said about her marriage with the appellant Anjani Kumar Gupta at Jamda in the month of July, 1983. She began to live at her in-laws house where all the accused persons had been torturing her for which she had been informing her parents through her letters. They had left his daughter for some time for which there was a panchayati on whose intervention he had sent his daughter to Anjani Kumar Gupta. Manti had again come here in the marriage of his niece but Anjani Kumar took her away forcibly inspite of his request and against her wishes. In 1987, Manti had been killed and burnt by her in-laws. He had given the photostat copy of letter (Ext.2) to the police which was sent by Manti to him. In cross examination, he said that the name of her mama is Surendra, who had not come to court to depose. He(the

witness) has four brothers who after the death of their father, are joint, though living separately. Manti used to call him 'Pitaji'. He had said to the police that Shiv Murat Ram Gupta in his guardian also and Manti used to call him 'Pitaji'. He had gone to see the dead body of Manti where the police had examined him. He was informed about all the tortures upon her through her letters in support of which (Ext.2 has been brought on record. Ext.2, sent through post was shown to him by the elder son of Shiv Murat Ram Gupta which was a post card and the same was returned to his elder brother and he might have given it to the police. He denied the suggestion that Ext.2 and 2/1 are forged. She had read in school. He had 10-12 letters of Manti which he had given to his elder brother. The elder brother had deposited the letters with the police. Panchayat was held in 1986, after 15 days of receiving her letter. She was left by the husband and in-laws at his house where she lived for about one year. Panchayat was held in Jamda where not he but his elder brother had gone and he had come to know about the panchayati from his elder brother. After the panchayati, Anjani Kumar Gupta took her to his own house. This witness had not seen her being killed and burnt, as he was in Tata. His elder brother's daughter had also died of burns while cooking for chhath for which there was a police case in which it was not found that she got burnt on account of kerosene oil.

15. P.W.11, Jay Shankar Prasad, is a contractor of

Jamda who has said that a panchayati was held about four years ago in which he was not present though he had heard about it. The investigating officer was given some papers on 11.8.1987 for which seizure memo was prepared being exts. $\frac{1}{5}$ and $\frac{1}{6}$. In cross examination, he has said that he has no knowledge about the panchayati. Papers were given to the police Inspector in front of the shop of Kesho Prasad. He had read the photostat copy of the letter but could not say where the photostat copy had been prepared.

16. P.W.14, Natwar Singh, the first investigating officer has said that he had recorded the fardbeyan (ext.4) of Mewa Lal Gupta on 4.7.1987 at 7 a.m. and sent the same bayan to Gwa Police station. He inspected the place of occurrence the same day which was the house of Bali Prasad Gupta at mohalla Jamda football maidan. He also prepared the site plan. The inquest report (ext.6) of the dead body of Manti was prepared at the spot. He also found Hawai chappal of yellow colour of the deceased, a match box containing the sticks with the smell of kerosene oil, one blouse of red colour, one litre of kerosene oil in a container (galon) for which he prepared seizure memo (Ext.10). He found the deceased's eyes open, tongue protruding, froth coming from the nostrils, head was towards east, hair burnt, teeth opening out and some fossils in the anus, bruises on the left palm, on the middle finger of right hand, on the left elbow and

sole of left leg and also whole body was burnt. The dead body was found in the shrubs behind the house of Bali Prasad Gupta. In the room of the deceased, he found four breads in dekchi and vegetables in a pan. He also found burnt skin of the hand of the deceased on the wooden door frame and smell of kerosene oil at a distance of 3 ft. towards north of the door. The dead body was lying flat. He sent the dead body for post-mortem examination to Sadar hospital, Chaibasa and after the post mortem, the dead body was handed over to Shiv Murai Gupta (PW.6) ; uncle of the deceased. In cross examination, he said that in 1984-85, he had joined the out-post of Barajamda which is at a distance of $\frac{1}{2}$ Kilometers from the football ground. Bali Prasad Gupta has got a licensed ration shop near the bus stand. Anjani Kumar Gupta also has got a motor parts shop. There was no written information at the out-post from before the occurrence in respect of the mal-treatment with the deceased. There was mal-treatment to the deceased Manti by her in-laws as it was known to him on the basis of the statement given by Anupam Kumar Baxi, P.W.3 and the three non-examined and non-charge sheeted witnesses, Krishna Chandra , Pradut Kumar Manna and Udainath. No letter was given to him during investigation which is said to have been written by her to her parents. Panchayati witnesses had not been examined by him nor any paper had been given to him. The informant had told him that he will give letters later on, though not said

so in the fard beyan. He knows about the hysteria disease but no investigation was done by him about the same. In the fard beyan, there is mention about the pressing of the neck and burning was not kept which in consideration by him at the time inquest. In the inquest report (Ext.6), mark of injury on the neck had not been written. He had mentioned about the bruises about not written as to how it was caused. He did not know if any one suffering from hysteria has suicidal tendency. Her elbow was burnt, teeth were out and tongue was protruding. He could not say as to how it was done. He has not seen the post mortem report of Manti during the investigation. There is no separate mention in the diary about the statement of the doctor. He does not know about the statement of Dr.Jaiswal in the case. He found the galon of kerosene oil in the kucha verandah and match box with two sticks on the window of the pucca verandah. The match box and the galon were not sent to the finger print expert as he was not sure about the finger print of the accused on the same. The dead body was in between the latrine and bathroom. He found the smell of kerosene oil near the dead body. He did not find ashes or part of burnt clothes on the spot. The kerosene oil soaked earth was not sent for examination. He found burnt skin hanging on the door frame of the bathroom. But he did not note the size of the same in the diary. It was the skin of left palm. But he did not seize the skin. He saw stool in the anus of the deceased

but did not see whether it was on the ground also or not. He prepared only one seizure memo in respect of the various recoveries from different places in the presence of the seizure witnesses who were already present. The blouse and hawasi chappal of the deceased were not burnt. Bijay Kumar Gupta had told him that Manti had told him (P.W.4) that her in-laws had been beating her and giving trouble for food. Mewa Lal Gupta had not said to him that the eyes of the deceased were bulging out and tongue was protruding and had not said that her sasural people were demanding television. P.W.5 had said that Manti wanted to say something to him but could not say on account of presence of her in-laws but only said to send her mama. .

17. P.W.10, M.K.Bose, a witness to the inquest report, has said that on 4.7.1987 when he was in Jamda, He saw crowd behind his house. He went there and saw that the police had arrived, dead body of daughter-in-law of Bali Prasad was lying and the police was preparing inquest report. He identified his signature on Ext.¹/₂ of the carbon copy. On the same day, from the house of Bali Prasad, Two yellow coloured hawai chappal, a match box with the smell of kerosene oil and one red colour blouse were seized, He also signed the seizure memo of the said article and over which, Bali Babu also signed. In cross examination, he said that a crowd of neighbouring people being 500-1000 were present there. The writing

of inquest etc; was started when he reached the spot. The dead body was in the bagicha (Orchard)

18. P.W.9, Chumnu Oraon, the second investigating Officer, from 4.7.1987, has said that the formal FIR was in his writing and under his signature. On the basis of the fard beyan of Mew Lal Gupta which was written by ASI Natwar Singh P.w.14, he examined Prem Chandra Prasad Gupta (p.w.2,1 and 11). Gulab Chand Gupta had given him a photo stat copy of the letter. He prepared the seizure list (Ext.-2/1). He got the post mortem report of Manti Devi from Sadar Hospital, Chaibasa on 6.7.1987. He proved the inquest report and seizure list (E.T.5 and 6), in the writing of ASI Natwar Singh. He also examined the accused and after completion of the investigation, submitted charge sheet against the accused including the appellants. In cross-examination, he said that he got fardbe yan at about 7.P.m. When he was returning from patrolling. He took statement of three witnesses on 5.7.1987. He met Gulab Chand at Brarajamda on 11.8.1987 in the market where he gave him the photostat copy of the letter. No other letter except the photo stat copy of the letter, was produced before him. He did not enquire about the writing of Manti Devi nor enquired as to how this letter was given after long.

19. The last prosecution witness is Dr. Onkar Nath Jaiswal (p.w.13) who conducted the post mortem examination on the dead body of Manti on 5.4.1987 at

10.30 A.M. and gave his report (Ext. 7) which mentions on dissection-Corona hyoid bone fractured due to throttling. The injury was post mortem epidermis (skin), whole body burnt except both soles, scalp hair singed. Whole body was completely naked but there was very amount of unburnt clothes. below low back from which smell of kerosene oil was coming (faint smell). The burns was of first degree but there was no pugilistic ethohide no line of redness and no restigation caused by dry heat of flame. Time lapsed since death was due to throttling which was sufficient to cause death. In the court, the doctor said that corona of hyoid bone was fractured due to throttling and post mortem injury whole body burnt (epitalmis) except both souls. Scalp have singed but was the first degree caused by dry heat. There was no line of redness, no restigation. He had taken observer who was Dr.B.K.Sinha. Civil surgeon and Chief Medical Officer, Chaibasa. Who had also signed (Ext.7/1). In cross examination, he said that he had not consulted the inquest report before post mortem examination and even till on the date of examination, he had not seen the same. He had found 10 glass bangles in the left forearm and 8 bangles in the right forearm intact and also Tikuli on her forehead. The whole body was burnt and so he could not detect the sign of injuries. He did not find mark of struggles because of the extensive burns of skin. There was slight difference between strangulation and throttling. Throttling is also a part of strangulation. If the marks of

finger or thumb on the neck, it will be throttling. He has mentioned in column 6 about what he had found on the parts of the body. It is not necessary that in cause of throttling, hands are clenched. He did not suspect cal-rulsin in such case. He did not find any eligatum mark in the dead body but found damage of skin due to burn. He had also found that substantive tissues were also burn face congested and lips swollen, and the fracture of corona not displaced. He had not mentioned about the condition of lips. He found the genitals were normal. He did not mention that the tissues were hemorrhage of the fracture. These shall not be post mortem fracture of hyoid bone. He did not agree that the post mortem fracture by hemorrhage is characterized in absence of hemorrhage in the tissues around the fracture because he has not consulted Modi Medical Juriprudence in this concern. There shall not be suicidal throttling in this case. In case of hysterical occurrence self throttling is impossible. There are rare cases of strangulation and burning associated with throttling.

20. Besides this evidence, there is also the letter (Ext. 2) and its photostat copy (Ext.2/1). said to have been written and sent by Manti from Barajamda in which she has said that she was unhappy and that easily she will die on account of the beatings given to her by her husband, that her body has been broken on account of assaults by her father-in-law, mother-in-law, sister-in-law and brother-in-law and so her life had become useless,

that she could not understand as to what crime she had done, that her father had not taken care for her after her bidai and never enquired about her and what mother also done after her bidai and sent her which she was suffering and where her life will go and that if they wanted their daughter, then they should call her, as her conditions had become bad to worst due to assault by her husband, on account of her father and mother, that they should send father and mama who may come and see the conditions as to how she had been assaulted, that she wept when thought about these things, that they will take away her life and why you had spoiled her life and why you had spoiled her life by marrying her.

21. This is the entire evidence, which is produced in extension for evaluation and consideration as to how far it inspire confidence. The Supreme Court has been laying down the principles for the evaluation and consideration of evidence from time to time. In the case of *State of Punjab, v. Jagir Singh*, AIR 1973 SC 2407 = (1973 Cr.LJ.1589), at page 1596, para 23) the Supreme Court at page 2414 has observed as follows :

" A criminal trial is not like a fairy tale wherein one is free to give flight to one's imagination and fantasy. It concerns itself with the question as to whether the accused arraigned at the guilty of the crime with which he is charged. Crime is an event in real life and is the product of interplay of different human emotions. It arriv-

ing at the conclusion about the guilt of the accused charged with the commission of a crime, the court has to judge the evidence by the yardstick of probabilities, its intrinsic worth and the animus of witnesses. Every case in the final analysis would have to depend upon its own facts. Although the benefit of every reasonable doubt should be given to the accused, the courts should not at the same time reject the evidence which is ex facie trustworthy of grounds which are fanciful or in the nature of conjectures."

In the case of Inder Singh and another V. State (Delhi Administration) AIR 1978 SC 1091, The Supreme Court, has observed at page 1092 (para 2) as follows :

"Credibility of testimony, oral or circumstantial, depends considerably on a judicial evaluation of the totality, not isolated scrutiny. While it is necessary that proof beyond reasonable doubt should be adduced in all criminal cases, it is not necessary that it should be perfect. If a case is proved too perfectly, it is urged that it is artificial, if a case has some flaws, inevitably because human beings are prone to err, it is argued that it is too imperfect. One wonders whether in the meticulous.. hypersensitivity to eliminate a fare innocent from being punished, many quality men must be callously allowed to escape. Proof beyond reasonable doubt is a guideline, not a fetish and guilty man cannot get away with it because truth suffers some infirmity when

projected through human processes. Judicial quest for perfect proof often accounts for police presentation of fool-proof concoction. Why fake up ? Because the court asks for manufacture to make truth look true? No, we must to be realistic."

In the case of *State of Rajasthan V. Smt. Kalika and others*, AIR 1981 SC 1390, at page 1392 (para 6), the Supreme Court has held that : "In the depositions of the witnesses there are always normal discrepancies however honest and truthful they may be. These discrepancies are due to normal errors of observation, normal errors of memory due to lapse of time, due to mental disposition such as shock and horror at the time of the occurrence, and the like. Material discrepancies are those which are not normal, and not expected of normal person." In the case of *Krishna Pillai Sree Kumar and another V. State of Kerala*, AIR 1981 SC 1257, at page 1239 (para 11) it has been said; "It is no doubt true that the prosecution evidence does suffer from inconsistencies here and discrepancies there but that is shortcoming from which no criminal case is free. The main thing to be seen is whether those inconsistencies, etc., go to the root of the matter or pertain to insignificant aspects thereof. In the former case, the defence may be justified in seeking advantage of the incongruities obtaining in the evidence." In the case of *Bharwada Bhoginbhai Hirjibhai V. State of Gujrat*, AIR 1983 SC 753, it has been said: "Discrepancies which do not go to the

root of the matter and shake the basic version of the witnesses, therefore, cannot be annexed with undue importance. More so, when all important 'probabilities factor' echoes in favour of the version narrated by the witness, in the case of State of U.P. v. Anthony, AIE 1985 SC-52, at page 54 (para 10) it has been observed as follows:

"While appreciating the evidence of a witness the prejudice must be whether the evidence of the witnesses read as whole appears to have ring of truth. Once that impression is founded it is undoubtedly necessary for the court to scrutinize the evidence more particularly keeping in view the deficiencies drawbacks and infirmities pointed in the evidence as a whole and evaluate them to find out whether it is against the general tenor of the evidence given by the witness and whether the earlier evaluation of the evidence is shaken as to render it unworthy of belief. Minor discrepancies of trivial matters not touching the core of the case, the hypertechnical approach by taking sentences torn out of context here or there from the evidence, attaching importance to some technical error committed by the investigating officer not going to the root of the matter, would not ordinarily permit rejection of the evidence as a whole. If the court before whom the witness gives evidence had the opportunity to form the opinion about the general tenor of evidence given by the witnesses, the appellate court which had not this benefit, will have to attach due weight to the appreciation

of the evidence by the trial court and unless there are reasons weighty and formidable it would not be proper to reject the evidence on the ground of minor variations or infirmities in the matter of trivial details. Even honest and truthful witnesses may be disbelieved in some details unrelated to the main incident because of power of observation, retention and reproduction differs with individuals. Cross-examination is an unequal duel between a rustic and refined lawyer."

In the case of *State of U.P. v. Anil Singh*, AIR 1988 SC 1988, at page ;2002 (para 15), it has been observed by the Supreme Court as follows:

"If there is a ring of truth in the main, the case should not be rejected. It is the duty of the court to call out the nuggets of truth from the evidence ;unless there is reason to believe that the inconsistencies or falsehood are so glaring as utterly to destroy confidence in the witnesses. It is necessary to remember that a judge does not preside over a criminal trial merely to see that no innocent man is punished. A judge also presides to see that a guilty man does not escape. One is as important as the other. Both are public duties which the judge has to perform."

In the case of *Chandran alias Surandaran and another V. State of Kerala*, AIR 1990 SC 2148, it has been observed at page 2152 (Paras 13 and 25 as follows:)

Para: 13: "The fact that these two murders which are

cruel and revolting had been perpetrated in a very shocking nature should not be allowed in any way to influence the mind of the Court while examining the alleged involvement of the appellants. It is worthwhile to recall an observation of this Court in *Datar Singh V. State of Punjab*, (1975) 4 SCC 272: (AIR 1974 SC 1193) articulating that 'Courts of justice cannot be swayed by sentiment or prejudice against a person accused of the very reprehensible crime.'

Para 25: "A moral conviction, however, strong or genuine cannot amount into a legal conviction supportable in law.... It must be realised that the well established rule of criminal justice is that 'fouler the crime higher the proof.'"

In the case of *Dilawar Hussain and others V.State*, 1991 (1) SCC 253, the Supreme Court has observed at page 254 (paras 3 and 4) as follows:

Para - 3: "But sentiments or emotions, howsoever strong, are neither relevant nor have any place in a court of law. Acquittal or conviction depends on proof or otherwise of the criminological chain which invariably comprises of why, where, when, how and who. Each knot of the chain has to be proved beyond shadow of doubt to bringing home the guilt. Any crack or loosening in it weakens the prosecution. Each link should be so consistent that the only conclusion which must follow is that accused is guilty. Although quality should not

escape(sic). But on reliable evidence, truthful witnesses and honest and fair investigation. Not free should be emerged by framing or to assuage feelings as it is fatal to human dignity and destructive of social, ethical and legal norm. Heinousness of the crime or cruelty in its execution however abhorrent and hateful cannot reflect in deciding.

Para - 3:... "Credibility of witnesses has to be measured with the same yardstick, whether it is ordinary crime or a emanating due to communal fregn. Law does not make any distinction either in leading of evidence or in its assessment. Rule is one and only one namely whether depositions are honest and true. Whether the witnesses who claim to have seen the incident in this case, withstand this test."

22. That from these observations, it is clear that the crime is an event of real life and not imagination. It is an interplay of different human emotions. Every offence is to be measured on the yardstick of its own facts and its intrinsic worth and probabilities. The totality of the circumstances are to be looked into. The court should not brush aside *ex facie* trustworthy evidence on fanciful or conjectural or hypertechnical grounds. Discrepancies are bound to be in natural, honest and truthful evidence, on account of lapse of time, error of memory. But if the discrepancy goes to the root of the case, causing damage to the base of the case then benefit of

the same is the benefit lot of the accused. Minor discrepancies should not be over emphasised, and major discrepancies are not to be ignored and brushed aside. If the court finds truth and trustworthiness in the evidence, then it should be basis for believing the version. Minor infirmities or variations should be given due allowance in the evidence of honest and truthful witness. Glaring falsehood and inconsistencies and improbabilities going to the root of the matter, should be the basis of discarding the evidence. The greater and the more heinous crime, the greater is degree of proof and greater scrutiny and caution. Courts sit not merely to convict or acquit, but to do justice. Moral conviction, sentiments, prejudice and the like are beyond the domain of law where proof beyond reasonable doubt is the ruling and guiding principle. Every one is presumed to be innocent unless proved otherwise. The cogent, reliable and trustworthy evidence, direct or circumstantial and the prosecution is to stand on its own legs. Benefit of every reasonable doubt is the share of the accused alone.

23. The Courts have also been giving out from time to time the manner of evaluation and appreciation of circumstantial evidence. The circumstances to bring the accused in the net of prosecution should be so complete as not to leave any way out for the accused and also should not leave any opening for any other person except the accused to come. It should be such other as to make out that it is only the accused who committed

the offence and nose-else. In the case of *Govind Reddy V. State of Mysore*, AIR 1960 SC 29, it has been said that: "circumstances from which the conclusion and guilt is to be drawn should in the first instance be fully established and all the facts so established should be consistent only with the hypothesis of the guilt of the accused." In the case of *Khashaba Maruti Shelke V. State of Maharashtra*, AIR 1973 SC 2474, at page 2479 (Para 18), their lordships have observed as follows:

" In order to base the conviction of an accused on circumstantial evidence the court must be certain that the circumstantial evidence is of such a character as is consistent only with the guilt of the accused. If, however, the circumstantial evidence admits of any other rational explanation, in such an event an element of doubt would creep in and the accused must necessarily have the benefit thereof. The circumstances relied upon should be of a conclusive character and should exclude every hypothesis other than must be a chain of evidence so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused. The circumstances must show that within all reasonable probability the impugned act must have been done by the accused. If two inferences are possible from the circumstantial evidence, one pointing to the guilt of the accused, and the other, also plausible, that the commission of the crime was the act of someone else, the circumstantial evidence would not warrant the con-

viction of the accused."

In the case of *State of Maharashtra V. Champal Punjabi Shah*, AIR

1981 SC 1675, at page 1679 (Para 5) it has been observed as follows:

" It is well to remember that the Evidence Act considers a fact as "proved" when, after considering the matters befit, the Court either believes it to exist, or considers its existence so probable that a prudent mind ought under the circumstances of the particular case, to act upon the supposition that it exists. It is also worthy of remembrance that a Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business in their relation to the facts of the particular case."

In the case of *Prem Thakur V. State of Punjab*, AIR 1983 SC 61, the Supreme Court, at page 63 (para 11), has observed as follows:

"The High Court could not but be aware of the Principle that in a case which depends wholly upon circumstantial evidence, the circumstances must be of such a nature as be capable of supporting the exclusive hypothesis that the accused is guilty of the crime of which he is charged. That is to say, the circumstances relied upon as establishing the involvement of the accused in

the crime must clinch the issue of guilt;. Very often, circumstances which establish the commission of an offence in the abstract are identified as circumstances which proved that the prisoner before the Court is guilty of the crime imputed to him. An a priori suspicion that the accused has committed the crime transforms itself into a facile belief that it is he who has committed the crime. Human mind plays that trick on proof of the commission of a crime by resisting the frustrating feeling that no one can be identified as the author of that crime."

In the case of *Sharad Birdhichand Sarda V. State Of Maharashtra*. AI1984-SC 2622, it has been observed at page 1655 (para 152), while referring to the decision of *Hanumant V.State of Madhya. Pradesh* 1953 SCR 1091:(AIR 1952 SC 343), which has been uniformly followed and applied by this Court in a large number of later decisions up-to-date, for instance, the cases of *Tufail V. State of Uttar Pradesh* (1969) 3SCC 198 and *Ramgopal V. State of Maharashtra*, AIR 1972 SC 656, as follows:

152: "A close analysis of this decision would show that the following conditions must be fulfilled before a case against an accused can be said to be fully established:-

(1) The circumstances from which the conclusion of guilt is to be drawn should be fully established. It may be noted here that this Court indicated that the cir-

cumstances concerned & must or should' and not 'may' be established. There is not only a grammatical but a legal distinction between 'may be proved' and 'must be or should be proved' as was held by this Court in *Shivaji Saheb rao Bobade V. State of Maharashtra* (1973) 2 SCC 793 : (AIR 1973 SC 2622) where the following observations were made:

"certainly, it is a primary principle that the accused must be and not merely may be guilty before a Court can convict and the mental distance between 'may be' and must be is long and divides vague conjectures from sure conclusions."

(2) the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty.

(3) the circumstances should be of a conclusive nature and tendency,

(4) they should exclude every possible hypothesis except the one to be proved, and

(5) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.

*53: "These five golden principles, if we may say so,

constitute the panchshell of the proof of a case based on circumstantial evidence."

In the case of *Laxmi Raj Shetty and another versus State of Tamil Nadu*, AIR 1988 SC 1274, at page 1283 (para 20) their lordships have observed as follows:

"The law relating to the proof of a case based purely on circumstantial evidence has been settled by several authorities of this Court as well as of the High Court. In *Earabhadrapa V. State of Kfarnataka*, (1983) 2 SCC 330: (AIR 1983 SC 446) at page 448 it was observed: "In cases in which the evidence is purely of a circumstantial conclusion of guilt is sought to be drawn must be fully established beyond any reasonable doubt and the circumstances so established should not only be consistent with the guilt of the accused but they must in their effect be such as to be entirely incompatible with the innocence of the accused and must exclude a reasonable hypothesis with his innocence." Shri Natarajan, learned counsel appearing for the appellants rightly points out that in such cases there is always the danger that 'conjecture or suspicion may take the place of legal proof' and draws our attention to the caution administered by Baron Alderson to the jury in the of-quoted passage in *Reg V.Hodge*, (1838) 2 Lew 227 where it was said:"

"The mind was apt to take a pleasure in adpting circumstances to one another, and even in straining them a little, if need be, to force them to form parts of one

connected whole; and the more ingenious the mind of the individual, the more likely was it, considering such matters, to over reach and mislead itself, to supply some little link that is wanting, to take for granted some fact consistent with its previous theories and necessary to render them complete."

It is therefore well to remember that in cases where the evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should in the first instance be fully established, and all the facts so established should be consistent only with the hypothesis of the guilt of the accused. Again, the circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved. In other words, there must be a chain of evidence so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability the act must have been done by the accused."

Recently in the case of *Harendra Narain Singh V. State of Bihar*, AIR 1991 SC 1842, it has been observed in paras 5 and 6 as follows:

5: "The entire case of the prosecution rests on the circumstantial evidence as no prosecution witness has given any direct testimony against the appellants for the commission of the offence for which they have been

convicted. The trial court as well as the High Court both have relied on circumstantial evidence in convicting the appellants for the offences under Section 302/34 of the IPC. Since the entire case rests on circumstantial evidence it is necessary to refer to the principles which should guide the Court in considering the conviction of an accused resting on circumstantial evidence. It is a cardinal principle of criminal jurisprudence that circumstantial evidence must be fully established from which there should be inevitable conclusion of the guilt of the accused beyond any reasonable doubt and the facts so established should be consistent only with the hypothesis of the innocence of the accused in *Hanumant V. The State of Madhya Pradesh* (1952) 3 SCC 1091 this Court laid down fundamental and basis principles for appreciating the circumstantial evidence Mahajan, J. Speaking for the Court observed.

"It is well to remember that in cases where the evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should in the first instance be fully established and all the facts so established should be consistent only with the hypothesis of the guilt of the accused. Again the circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposal to be proved. In other words, there must be a chain of evidence so far complete as not to leave any reasonable ground for a conclusion

consistent with the innocence of the accused and the act must have been done by the accused.

Para 6: These principles were reiterated by this Court in *Shivaji Saheb Rao Bobade and another V. State of Maharashtra* (1973 2 SCC 793 wherein it was emphasised that where the prosecution rests merely on circumstantial evidence, the facts established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty. The Court further observed that the circumstances should be of a conclusive nature and tendency and they should exclude every possible hypothesis except the one to be proved and the chain of evidence should be so complete as to rule out any reasonable ground for the conclusion consistently laid down by this Court in several decisions, it is not necessary to refer to all these decisions. However, we would like to refer to the decision in *Sharad B.Chand V. Maharashtra* (1985) 1 SCR page 88 as this case has been relied upon by the High Court in upholding the conviction of the appellants. In *Sharad B.Chand's case* (Supra) this Court while considering the absence of explanation or a false explanation of the accused for the circumstances and the facts proved against him, struck a note of caution that before a false explanation is used as additional link against the accused the Court should satisfy itself that (1) Various links in the chain of evidence led by the prosecution have been

satisfactorily proved; (2) The circumstance point to the guilt of accused with reasonable definiteness and (3) The circumstances are in proximity to the time and situation. Where all these conditions are fulfilled only then a Court can use a false explanation or a false defence of an accused, as an additional link to lend an assurance to the Court and not otherwise."

24. In the law, some presumption are there under section 113 A of the Evidence Act. If a woman commits suicide within 7 years from the date of marriage and if it is done by her husband or such relatives or in-laws by subjected her to cruelty, the court, having regard to all the circumstances of the cases, may presume that such suicide has been guided by the victim's husband or his relatives. Under Section 313(b) of the Evidence Act, if the death of a woman has been caused on account of cruelty or harassment for or in connection with the dowry, the court shall presume that such person has caused the death. Section 114 of the Evidence Act also gives out about the presumption of existence of certain facts, if a person is found in possession of stolen goods, soon after the death, then it has been presumed that theft was committed or he has received the goods knowing it to be of stolen unless he was in possession of the articles. Under Section 5A of the Prevention of Corruption Act, if the illegal gratification is recovered from the possession of the accused then he has to account for the possession of the same though the law presumes everybody in-

nocent unless proved otherwise but on account of these presumption, burden shifts from the prosecution to accused. In this instant case, demand of dowry has not been given out in the fard beyan nor has been stated by the father of the girl and the informant has said about the same in court though the same had not been said to the police but the fact remains that the girl has died during the seven years of her marriage and that too in the house of the appellants under very mischievous and mysterious circumstances for which explanation of suicide has been sought to be given which is not made out from the material on record which all will also be a material circumstance and so it cannot be ignored and will have to be taken into circumstances.

25. Learned counsel for the appellants has contended that the victim herself had committed suicide by burning herself as she was suffering from hysteria which has suicidal tendency and the medical evidence points towards the same. As to this contention, except suggestions that she was suffering from hysteria, nothing concrete has come on the record. Only suggestions have been made which have been denied and it has come in evidence of P.W.6 Shiv Murat Ram that she was an educated girl having good physique and was not suffering from any disease but only her eyes were a bit slanting. The witness have said that a complaint was made that she could not prepare food properly and she used to sleep very much in which is no ailment or

disease. The doctor (P.W.13) in his cross examination (Para 23) has said that "There was no suicidal throttling in this case and in case of hysterical occurrence, self throttling is impossible." Thus, the contention about her suffering from hysteria is not at all made out from any evidence and the material brought on record.

26. As regards the contention that she herself committed suicide and was not killed by anyone at the hands of her in-laws, the doctor had said that corona of hyoid bone fractured due to throttling. In cross examination, he has said that the whole body was burnt and as such, he could not detect the sign of injury. He could not find mark of strangulation because of the extensive burnt of skin. The learned counsel for the appellants has referred to the various authorities on medical jurisprudence to show that the injuries were on account of burn and that they were antemortem and post mortem meaning that by the death was caused on account of burns and not by strangulation, throttling or being killed earlier than being burnt. In H.W.V.Cox, Medical Jurisprudence and Toxicology by Dr. Bernard Knight, 5th edition, 1987 dealing with differentiation between ante-mortem and post-mortem burns, it has been said at page 322:

" The most important criterion is the presence or absence of a vital reaction at the margin of the burns (See fig. 99). Where part of the body surface is burnt during life, there will almost inevitably be a zone of

hyperaemia at the edge of the burn area. While the persons still alive, there may be reddening of the skin even beyond this zone, but this may fade after death leaving only the marginal zone of erythema at the edge of the burn. This may vary in width but is usually a centimeter or unless death supervened very soon. It is due to oedema of the tissues and capillary dilation and merges with the edge of the burn which may show blistering or coarring. Unfortunately, where death occurs very rapidly (within a few moments) then the erythematous margin of an ante-mortem burn may be indistinct or even absent. However, wherever survival persists for more than a few moments it is almost invariably found.

"Though it is very difficult to determine in peri-mortal burns, where the injury came just before or just after death, the presence of a "vital reaction" has for long been taken as proof of infliction before death. However, this can be unreliable and theoretically, should be so, as "death" usually means cessation of the heart beat, where as a red flare on the skin is due to muscular action in the small arterioles, which remain active, as does all muscle for up to some hours after death. As proof of this unreliable sign, the author recently dealt with a murder by strangulation, where the killer, at least half an hour after death, made an abortive attempt to destroy the evidence by burning the body. He started a small fire, which soon went out, but on examination of the skin, a large, wide zone of erythema "vital reaction" was clearly

visible.

Difficulty arises where the body is completely covered with burns so that no unburnt skin remains to display a vital reaction. Where the body is actually charred or incinerated then naturally this aspect of determining the time of the burns is impossible. The older text books of forensic medicine have made much play with the content of blisters, claiming that the ante-mortem blister contains a fluid high in protein whereas the post-mortem burn is either empty or contains serous fluid. In actual fact theory and practice diverge and this criterion is often of little use. The blisters may have already collapsed or in severe burns the skin may be charred and there may be ante-mortem and post-mortem blisters present in the same body, because the heat continued after death occurred.

The appearance of ante-mortem blisters is of a raised dome either containing gas or fluid and with a reddened base. However, the base of a post-mortem blister may also present a similar appearance. Where the burns are per-mortal, i.e. death and burning occurred simultaneously, it may be quite impossible to say definitely whether or not life was extinct at the time of the burns. It must also be remembered that where wide areas are burned, the burning process is a continuous one and may often overlap the point at which life become death. Other pointers to distinguish ante-mortem from post-mortem

burns are to be seen in other organs, rather than the skin. Where death has occurred in a fire in a dwelling, in a motor vehicle or aircraft or indeed any where there is burning material, then there will often be smoke, fumes and carbon monoxide produced.

If soot and carbon particles are found in the larynx, trachea, main bronchi and smaller bronchi, the respiration must have been proceeding during the conflagration and therefore the fire was in progress during life. It is possible for some passive percolation of soot and smuts to reach the back of the pharynx even after death if the mouth is open, but they certainly cannot be carried in any quantity beyond the vocal chords and certainly not into the deeper bronchi. Histological examination of the lungs may reveal carbon terminal bronchioles which is absolute proof of life during the fire. Similarly, though soot may be found in the mouth and throat in a dead person not alive during the fire, swallowing could not take place and therefore soot particles could not be carried to the lower oesophagus and into the stomach as it is commonly found in victims of conflagrations.

The next important matter is the presence of carbon monoxide in the body, which may be obvious even externally by the pinkness of the post-mortem hypostasis. In many fire victims, the first incision at autopsy reveals a cherry pink colour of the blood and muscles which can be confirmed by simple spectroscopic ex-

amination to be due to carboxy-haemoglobin. Even in the rapid fires such as in automobiles, considerable quantities of carbon monoxide may be released and be respired even though life only survives for a moment or two.

However, great caution must be used in interpreting carboxy- haemoglobin in fire victims. The following two rules are of first importance :

(a) If the tissues of a deceased victim contain a significant quantity of carbon monoxide (say more than 10% saturation) then the victim must have been alive during the fire.

(b) However, if the tissues contain no carbon monoxide, this does not mean that he must have been dead during the fire.

This latter statement is of great importance as several cases have occurred in which false accusations of murder have been made against persons where alleged victims have been found dead in a fire with no carbon monoxide in their body. It is a confirmed fact that undoubted cases of ante-mortem fatal burns have no carbon monoxide, convection currents, rapid death, any other factors which make it quite unsafe to use the absence of carbon monoxide as a criterion of death before the fire occurred. Further, proof of the variability of Hb-Colevels is found in multiple deaths in the same house fire, where bodies in the same room may show widely differing

monoxide levels. However, the converse can be accepted with confidence, that is, the presence of carbon monoxide means that the person was alive during the fire."

27. Learned counsel for the appellants has urged that no histological examination of the body had been done and also it has not been shown and there is nothing to show the presence of carbon monoxide and also there was no test which might have shown presence of carbon monoxide which would show that the person was alive during the fire. He has also referred to the Modi's Medical Jurisprudence and Toxicology which has dealt with differentiation between ante-mortem and post-mortem injuries at page 194 and has said that there are three points for differentiations : (1) Line of redness, (2) Vesication and (3) reparative processes.

Line of redness : In the case of a burn caused during line of redness involving the whole true skin is formed round about the injured part. It is a permanent line, persisting even after death, but redness or erythema, which is found beyond this line of redness due to distension of the capillaries, is transient. The line of redness, being a vital function, separates living from dead tissues and is always present in burns caused during life, it takes so much time to appear, presence it is possible that it may be absent in the case of a person of a very weak constitution who dies immediately from shock due to

burns.

2. *Vesication* : Vesication caused by a burn during life contains a serous fluid consisting of albumen and chlorides, and has a red, inflamed base with raised papillae. The skin surrounding it is of a bright red or coppery colour. This is known as true as compared with false vesication which is produced after death. false vesication contains air only, but may contain a very small quantity of serum comprising a trace of albumen, but not chlorides as in a person suffering from general anasarea. Again, its base, is hard, dry, horny and yellow, instead of being red and inflamed.

3. *Reparative Processes* : Reparative processes, such as signs of inflammation, formation of granulation tissue, pus and sloughs, will indicate that the burns were caused during life. Burns caused after death have a dull appearance with the openings of the skin glands coloured grey. The internal organs are roasted, and emit a peculiar offensive colour.

Period of Burns : In the case of a burn a question is raised as to when it was caused, and in the case of several burns on the same individual a further question is raised as to whether they were inflicted simultaneously. Both these questions may be answered by examining carefully their condition as regards the different stages of reparative processes.

Redness occurs immediately after a burn : Vesication

forms within two to three hours. Pus forms in two to three days but not before thirty six hours. Superficial sloughs separate out usually from the fourth to the sixth day. and deep ones within a fortnight. After this period granulation tissues begins to cover the surface of the burn. The last result is the formation of a cicatrix and deformity after several weeks or even months, dependig upon the amount of suppuration, sloughing and depth and extent of the burn."

28.In Taylor's Principles and Practice of medical jurisprudence, edited by A.Keith Mant, thirteenth edition, at page 253-54, there is a mention about ante-mortem and post-mortem burns : "It is obvious that the surface of a human body may be burnt, whether or not person is alive at this time. But determination of whether the burns were sustained before or after the death may have considerable medico-legal importance, and it is fortunate that the distinction is not difficult, provided that all the skin has not been destroyed. In the intact skin adjacent to a burn, there will normally be a well-marked 'vital reaction' in the form of reddening of the skin bordering the burn, when the injury was sustained in life. This zone of vital reaction is normally about a $\frac{1}{4}$ inch in width, although it may be broader where several burns are in close proximity and, taken in conjunction with the internal findings of presence of the life during the fire, such as soot in the air passage, usually admits of little doubt that

the burns were sustained before death.

Blisters of the skin are usually burst and collapsed by the time that the body is examined in the post-mortem room, but if they remain intact, the contained fluid can be examined for the presence of albumen, which is held to be evidence that the blisters was caused in life. Thus "Albustix" strips supplied by Ames Ltd, make a convenient method of testing. Obviously, for this test to give a positive result there must have been an early inflammatory reaction to the extent of dilation of blood vessels and exudation of plasma into the tissues. Burns sustained very shortly after the death may be indistinguishable, though according to conzales at all any blisters formed will contain no albumen.

Histological methods of distinguishing ante mortem and post mortem burns have been described by Mallik using burns inflicted experimentally on guinea pigs, burns of human skin obtained for autopsy examinations and burns inflicted experimentally on amputated human tissues. The burns were examined by conventional histological and by histochemical techniques. He found that reactions could be detected earlier in the guniea pigs than in humans. In the case of human burns, the earliest histological change in ante-mortem burns was leucocyte infiltration at 6 h. after burning. Staining reaction for DNA and RNA, at the margine of the burnt area, increased at the same time, as did the staining reaction for the

enzyme alkaline phosphates. An increase in the reaction for acid phosphates was detected at 3 hr. for leucine aminopeptidase at 2 h and for non-specific esterase at 3/4 h.

The histochemical reactions were unaffected by topical surgical dressings, by position of the body, or by a lapse of time between death and post-mortem examination up to 72 h.

"while dealing with the examination of the burnt body for external examination, it has been said at page 256 :

If the body is severely burnt then all the skin surface may be destroyed, making it impossible from external examination alone to ascertain whether there is any vital reaction to the burns. However, if undamaged skin remains adjacent to the burns, then the appearance of vital reaction should be identifiable as bands of redness bordering the burns. The appearance of burns caused by the red margins, and with dried scorching of the skin surface, like burnt paper."

While dealing with the internal examination of the burnt body, it has been said at pages 257 and 258 as follows :

"Even when the body appears externally to be very badly burnt, the damage rarely extends beyond the superficial tissues directly beneath the skin. The outermost muscles are coagulated by the heat, and appear

rather pallid , though the deeper muscles may have proportion of carboxyhaemoglobin, derived from the fumes. Internal organs, such as the liver and lungs may points be coagulated, firm and pallid, and occasionally the body cavities may be opened by partial destruction of their walls, in which hollow organs, like stomach and intestines, may be ruptured. Obviously all these effect may occur, whether the victim was alive or dead during the fire.

* * *

"Not uncommonly the victim who inhales smoke also vomite and inhales some vomit, presumably due to bursts of couging, and plugs of regurgitated stomach contents mixed with soot may be found in the small bronchi, in the depths of the lungs.

Together with one soot, the smoke which is inhaled unusually contains carbon monoxide, which is absorbed by the blood.

* * *

"The presence of carbon monoxide in the blood serves to confirm the conclusion that the haemorrhags is a heat artefact and not a fatal injury occurring before the fire."

29. Dr. Jhala, in his Crime Investigation and Medical Sciences has dealt with the burns in Chapter 17, at page 12 and onward in which he has observed as follows :

" From medical point of view, extent and degree of burns are important. The extent of burns is useful in predicting or judging the result specially with relation to death".

The degrees of burns are determined on the basis of the depth to which the skin is involved. There are two types of classifications one classification comprehends three degrees only i.e. I degree where the cut is not involved and there is no scar.

In the II degree burns skin, is involved scar or cicatrix invariably results. There is initially an eschar or a crust when falls off, leaving an ulcer. This heals by granulation and a scar results. The depth of the burn governs the disfiguration, the deformity or the disability.

125. In the III degree burn all the layers of the skin subcutaneous tissue, muscles and even bones may be involved. The parts are completely charred.

127. In determining the nature of the episode whether suicidal, homicidal or accidental, extent and disposition are important points to be considered. Of course in final evaluation, circumstantial evidence plays a vital role.

Thus the scene of offence should be examined in minor details, It is this examination over and above the post-mortem examination which offers valuable clues. From these clues one can decide whether the fact was

accidental, suicidal or homicidal in origin.

128: To arrive at a correct conclusion systematic observation of the scene of event should be made. This should include noting and observing the facts as presented. The position of the dead body is the most important item. Next comes the condition of the doors and windows.

129: Suicidal burns are not uncommon. As a matter of scientific even though they may be provoked they are cases of suicide without doubt. In such cases clear cut signs of self inflicted burns would be apparent. Of course in case of burns one fact should be noted. Burns have been known to involve entire body when the person sets fire to the body. But in every case, the ignition is always applied from accessible area. This results in the front or accessible area being more affected. This is because that area is exposed for longest period and gets maximum exposure to highest temperature. This point is evident in the form of deeper or higher degree of burns being found in accessible area. This is the deciding factor. Hence the discrepancy in extent and degree of burns in accessible and inaccessible area must always be incorporated in the panchnama of the scene of event.

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The one point which requires to be borne in mind is the absence of burns in certain area. This is known as exemption areas. A person who commits suicide would

be formally in standing position. In this situation the soles get clearly exempted from the exposure to heat. Thus when the soles are clearly not involved and the accessible areas more involved, strong presumption of suicide is fully justified.

130. One interesting finding occasionally found in suicidal burns in females is presence of kerosene in hair and some times in the stomach, This point while noted on post mortem examination strongly points to the suicidal origin.

It is known that majority of cases of suicidal burns are in fact provoked by circumstances or by precipitating conditions which leave no other alternative to the victim. In such cases a thorough inquiry and circumstantial evidence often prove very useful.

131 : It is not possible to burn any body without encountering resistance or shouts for defence. To avert that attempt is always made by the accused. This has to be done by gagging. Further hands and feet have to be tied to prevent struggle and attempt at warding off the attack.

By and large every case of burns requires to be investigated as a potential homicidal act. Even then the cases have been reported where the person has been killed by other means and subsequently burnt, to misguide the investigating officer. This can be overcome by ensuring a definite opinion from the medical officer. This

is as regards ante-mortem nature of burns i.e. the burns were caused before death. There are certain medical features which enable one to come to a reliable conclusion on this issue. Burns are commonly caused by exposure to heat or flame. This is a physical agency. It gives rise to an inflammatory response. Thus in any burn caused during life, the capillaries get stimulated and give rise to a red line around the margins. Over and above in superficial burns there is oozing fluid and lifting of the upper layer of the skin. This gives rise to formation of vesicles or blisters. In the cases of burns where the person has survived for 36 hours there may be presence of pus. This of course doubtless confirms the ante-mortem nature.

Thus when there is evidence of burns which are not likely to have been caused before death the viscera must be preserved. It is sometimes found even in the case of ante-mortem burns.

132: Victims of burns die in different ways. Further all do not die immediately. Thus the cause of death depends on the extent and degree of burns, and the time the patient survives. Those cases where half to two third of the total area of the skin is involved, the victim usually dies.

31. Thus, on a consideration of these authorities it is clear that the injuries by burn can be ante-mortem and

post-mortem. The doctor conducting the post-mortem examination is to do external and internal examinations of the dead body. The degree of burn throws light in the damage to the tissues and also the exposure of the skin to the certain high temperatures, commonly known as flames, for a certain period. The extensiveness of the occurrence depends on the exposure. Various signs like line of redness, vesication and reparative processes are also there to differentiate between ante-mortem and post-mortem. In a burn during life a line of redness involving the whole true skin is formed a round about the injured part. Though it is a permanent line existing after death, yet redness disappears under pressure during life and fades after death, The line of redness separates living from dead tissues and is always present in burn caused during life, though it takes time to appear. Vesication is caused by burns during life. The false vesication is produced after death. It is formed within an hour. Reparative process, such as signs of inflammation, formation of granulation tissues, plus, and slough, will indicate that burns were caused during life. Burns caused after death show no vital reaction and have a dark white appearance with the openings of the skin glands coloured grey. The internal organs are roasted, and emit a peculiar offensive odour. Redness occurs immediately after burn. Vesication forms within two to three hours. Pus forms within two to three days but not before thirty six hours. Then starts the superficial sloughs which separates out usually from

the fourth to sixth day and deep within a fortnight. Then granulation tissues begins to cover the surface of the burn. In the case of death due to fire, the cause of death may be either by or immediate shock from the burns or asphyxiation on account of inhaling fumes. If the death was not due to fire, but already dead before fire then it may be due to other causes. Histological and histochemical methods are also for distinguishing between an ante-mortem and post-mortem burns. In the human burns, the earliest histological change in ante-mortem burns was leucocyte infiltration at 6 hrs after burning. Staining reactions for DNA and RNA at the margin of the burnt area increased at the same time, as did the staining reaction for the enzyme alkaline phosphates, for the application of histochemical methods to burn, no extensive work on human material is said to have been published. Besides the internal examination of the dead body which gets very badly burnt can be done. The damage rarely extends beyond the superficial tissues directly beneath the skin. The internal organs like liver and lungs, stomach and intestines are also affected, in case of alive or dead person. The victim may inhale smoke but he may vomit the same by coughing and together with soot the smoke which is inhaled usually contains carbon monoxide. Histological examinations of the lungs may reveal carbon in the terminal bronchioles which is an absolute proof of life during fire. The presence of carbon monoxide in the blood serves to confirm the conclusion. If the tissue of

the deceased contain a sufficient quantity of carbon, then victim may have been alive during fire. But in many ante-mortem no carbon monoxide is found for various reasons, like, low production of carbon monoxide, convection currents, rapid death. But it can be said that presence of carbon monoxide means that the person was alive during fire. Whatever may be data before a doctor, it is often insufficient for a correct result. The doctor has to proceed with it as a case of homicide. The situation of burns is also is a point A genuine accident has no limitation of site. If a man dies or is killed or has already died then there will be no signs of resistance at the time of getting injuries from fire but if a man is not dead, definitely there will be resistance and shouting for defence which process is stopped either by gagging the mouth or tying the hands and the feet to ward struggle off and attack in resistance. It is also seen that some portions of the body which are most exposed to flame get extensive burns as the case may be and those which are not there, they are not damaged or not at all damaged as the case may be specially in case of one burnt during standing position and so the soles may not be affected. All these external and internal examinations are to be conducted by the doctor during the post mortem examination for a definite opinion as to whether it was ante-mortem or post-mortem, the nature of burns, and also causes of burns whether suicidal, homicidal or accidental. Besides this medical evidence, circumstantial

evidences is also an important and helping factor in the final evaluation. The circumstantial evidence may include the circumstances leading to the death in any nature of case, the direct evidence as well as the objective findings or the spot connected with the spot and things recovered on the spot. But the fact remains that the doctor who conducts the post mortem examination on seeing the dead body and examining minutely, is the best person to give opinion. Hypothetical considerations are to be looked into in the light of the opinion of the person who had seen and examined the victim and also in the light of the circumstances, circumstantial evidence and objective findings.

A court is no doubt, is an expert of experts. But the court cannot give its opinion in place of the experts and draw the conclusion. A doctor who examined the injuries of the person dead or alive is best and competent to give opinion about the nature of the injuries, nature of the weapons of assault and even if the manner of assault. That becomes the positive opinion of the doctor. But if it is found by the court that the opinion of the doctor in respect of the nature of injuries, weapons used and the manner of assault and the like, appears to be obscure or oscillating, improbable or that there is no fairness or impartiality, then the Court considering the circumstances and the medical evidence, can give its own finding on account of its expertise and being expert of the experts. The Supreme Court, in the case of *State of U.P. v.*

Shankar, AIR 1981 SC 897, at page 904 (para 31) has said : Dr. Bhuneshwar prasad (p.w.3) also, who had examined the child Jai Devi, testified that the injuries done on the child had been caused with sharp edged weapon including farsa. The High Court was thus clearly in error in substituting its own opinion resting on conjectural premises for that of the medical expert regarding the nature of injuries. In the case of Munir Ahmad and others V. State of Rajasthan, 1989 - SCC (Cri) 455, it has been said : " The doctor who has examined the injuries of the deceased when alive and who conducted post mortem on the dead body, is competent to opine about the nature of weapon of assault having to the nature of injuries regard sustained. The Medical Board, examining the injuries ten days after the incident and failing to give definite opinion about the nature of weapon of assault in view of lapse of time and treatment already given to the patient. Another Medical Board examining the preserved brain matter of the deceased one year after the incident also failing to express any positive evidence in regard to the weapon of assault as the preserved content had become firm and distorted by then. Therefore, the evidence or the medical Board cannot efface the positive evidence of the doctor who had initially examined the deceased while alive and had conducted the post mortem examination after death in absence of anything showing unfairness or partiality in this report."

32. As regards the nature of the medical evidence

and opinion of the experts, the Supreme Court has said that the medical evidence is not an exact evidence and is based on theories of medical men and skilled witness of what he thinks may or may not have taken place in a set of circumstances. It is fallible and imperfect knowledge. There can be no exactitude and precision. On the basis of these theories the doctor who has seen and examined the injuries and given out what he has seen, can not be discarded, nor the evidence of the eye witness can be brushed aside in view of theories and observations in a particular set of circumstances. If any thing is to be considered, then the text and authorities should be put to the doctor in the witness box so that the doctor may be able to give his reply on the basis thereof. Without confronting the doctor with those authorities and so rejecting his observation, will not be proper. Even the evidence of a medical man cannot over-ride the positive, reliable and direct evidence of eye witnesses. In the case of *Pratab Mishra V. State of Orissa*, AIR 1977 sc 1307, at page 1311 (para 5), the Supreme Court said : "It is well settled that Medical jurisprudence is not an exact science and it is indeed difficult for a doctor to say with precision and exactitude as to when a particular injury was caused." The Supreme Court in the case of *Paras Singh or V. State of Punjab*, AIR 1977 sc 2274, at page 2277, quoted with approval the following observations in the case of *Queen V. Allay* (1869) 11. Smith WR (Cr) 35, a Division Bench of Calcutta High

Court, "Dr. Duncan may have given his evidence like an intelligent man, but it is not the proper way to try a case to rely on mere theories of medical men or skilled witnesses of any sort against facts positively proved." ... "The evidence of a medical man or skilled witness, however, eminent as to what he thinks may or may not have taken place under a particular combination of circumstances, however, confidently he may speak, is ordinarily more fallible. Human knowledge is limited and imperfect." In the case of *Manga V. State of Haryana*, AIR 1979 SC 1194, it was said at page 1195 (para 2) : " the Medical evidence can hardly be relied upon to feaisify the evidence of eye witnesses because medical evidence is guided by various factors based on guess and calculation." In the case of *Pattipati Venkaih V. State of A.P.*, AIR 1985 SC 1985 SCC (cr) 464, their lordships said that medical evidence should not be viewed with mathematical precision and accuracy. In the case of *Bhagwan Dass V. State of Rajasthan*, AIR 1957 SC 589 at page 591 (para 13). the Supreme Court has said : " But the learned judge of the High Court disposed of the matter by saying that the doctor was comparatively young and that his statement was not in accordance with the opinion expressed in books on Medical Jurisprudence by authorities like Modi and Lyon. But it cannot be said that opinion of these authorities were given in regard to the circumstances similar to those which arose in the case now before us, nor is this a satisfactory disposing of an expert unless

the passages which are sought to discredit his opinion are put to him. This court in *Sunder Lal V. State of M.P.* (AIR 1954 sc 28 (A)), disapproved of judges drawing conclusion adverse to the accused by relying upon such passages in the absence of their being put to the medical witness."

33. But the Courts have considered the various cases of burning on the basis of evidence on the record, and given opinions. In the case of *State of (Delhi Administration) V. Laxman Kumar and others*, AIR 1986, SC 250, it has been observed at page 264 (para 40) as follows :

" Undue importance was given by the High Court to the fact that there was no smell of kerosene on the head or hair of Sudha. Sudha has been found in a standing posture by these witnesses when apparel was burning. There is some evidence that the clothes emanated the smell of kerosene. At no stage Sudha had even suggested that kerosene had been poured or sprinkled on her head. The observations of the High Court that if Kerosene had been poured on her body or over the wearing apparel the burns would have been of a greater dimension is not a conclusion based upon expert evidence. The Medical examinations conduct does not appear to have been made keeping this aspect in view. Admittedly, every part of the body had not been equally burnt. Therefore, it is quite possible that the presence of

kerbse on the wearing apparel had damaged certain parts of the body more than the other parts. Non-presence of kerosene on the head is not a material feature and presence of smell in the clothes probabalises the prosecution case that on Sudha's clothes kerosene had been sprinkled." Mr Singh has placed some passages from Taylor's Medical Jurisprudence in support of his submission that in view of the medical evidence that Sudha's burns were either of the first or the second degrees, use of kerosene which would have aggravated the burns was untrue. We are not much impressed by the argument."....

How much kerosene was sprinkled is not known. How long of Sudha actually burnt is also not exactly known. Towards the back wards for the injured condition of Sudha's body may in the premises lead to a concrete conclusion."

In the case of *Subedar Tiwari V. State of U.P.* and others, AIR 1989 sc 733, it has been observed at page 738 (para 12) : " He explained that pugilistic attitude is arrived after getting extensive heat for a long period and after coagulations of muscle portions due to burn. He has clarified that if the deceased must have been burning for a period of at least half an hour to one and a period must have been getting extensive heat and in that case the pugilistic attitude of the body will be visible." He has opined that the condition of stomach goes to show

that the deceased must have died within five hours from the time of taking food. It is stated by him that is in the fire ghee or oil is put, the temperature of the fire becomes excessive."

In the same case, it has been observed at page 746 (para 19) : " xxx Sub para 7 : "the medical evidence shows that the body was found in a pugilistic attitude and in a fencing posture. It means that the body must have got coagulated to about 65 degree c. For generating heat of this order, she must have drenched herself with a large quantity of kerosene or som other catalyst agent. How could such intense heat have been generated? The heat was so intense that her brain was cooked. If some large quantity of catalyst had been poured on herself and fire had been applied by herself she would have been in intolerable and intense pain. She would have shouted and screamed. She would have run about. How did it happen that in the dark kitchen where she set herself on fire she neatly slumped down on the ground in a prostrate position. That too in a dark kitchen with less than 6 feet width ? If she had shouted and screamed in the stillness of night, it would have aroused the occupants of the adjoining rooms."

Further, in *the case of Ashok Kumar V. State Of Rajasthan*. AIR 1990 sc 2134, the Supreme Court has observed at page 2135 (para 3) : " But when post mortem report indicates, as was in this case, that smell of

kerosene was coming from body and even burnt hairs smell kerosene then it not only believed the statement of her sister-in (nand) that she was burnt while making tea but it ruled 'out remotest possibility of accident. that is why the findings were not seriously challenged by the appellant." A Division Bench of this Court, in the case of Nesar Ahmad alias Nesar Ahmad Khan and others. V. State of Bihar, 1991 East Cr C. 136 (Pat), has said at page 143 (para 18) in respect of the post mortem injuries as follows :

If Aleha would have died due to burning either by accidental fire or by deliberately putting herself ablaze there could be no such sign as protusion of the tongue, nor would have there any blood mixed with froth or faeces coming out of anus and urine having dropped out from the urethra or red margin around the waist where from skin had been peeled off. These signs would definitely go to show that the death had not been caused by burning alone. To be sure the doctor did not find any external injury on the body, and so it was contended by any of the appellants some such marks of ante mortem injuries could be found by doctor. But the evidence of the doctor also shows that due to burnt injuries external injuries could not be detected. The signs indicated above about the blood mixed with froth coming out from mouth and nostril and faeces coming out of anus and the tongue indicates putting of pressure on the body of Aleha and burning was done later either if she was still

having some life or she had just died. If she had died only by burning some sooty & carbon particles would have been found on the larynge, and trachea because of respiration. The doctor did not state that he found any such thing but only found blackening sooty of face."

34. In the instant case the doctor has found whole body burnt except both the soles and the scalp hair singed and the smell of kerosene was coming from the very little amount of unburnt clothes below the back and the burns were of first degree but no puglistic attitude was found. But no puglistic, no lines of redness and no vesication caused by dry beat of flame. The cause of death has been given out by throttling. The evidence of the doctor is to the same effect. He has also said that he did not find any mark of struggle because of extensive burns. He did not find any elegatum mark but damage of skin due to burn. Face was congested and lips swollen and fracture of corona. Besides this, the evidence of the witness is that eyes were open and tongue was protruding. Bangles were found intact and tikuli on forehead. The Investigating officer has found a blouse of the victim on the spot. The witnesses have said that the body was naked. If at all, she had committed suicide, she must have struggled, screamed or cried out on account of extensive burns but there is nothing to show that she did so. The bangles on her person were not broken and the tikuli was not removed. the doctor has not been put and confronted with the theories and opinions of expert.

Therefore, in view of the positive and categorical evidence of the doctor supporting the other circumstantial evidence given out by the reliable and trustworthy witnesses, the theories and opinions of authorities cannot be taken into consideration by this court to come to a conclusion, other than the made out on the basis of medical and circumstantial evidence. The Court cannot draw its own conclusion on the basis of these authorities and skilled witness observations contrary to the own positive observations by the doctor on seeing the dead body injuries besides the other positive and trustworthy evidence on the record. This evidence of the doctor shows that the marks of the external injuries could not be detected as the body was burnt. The doctor on internal examination, did not find sooty and carbon particles on the larynx and trachea because of respiration which clearly shows that she was not alive when burning. Therefore, from all this evidence it is made out that she was first killed and after her death, she was set fire to give it a colour of suicide. Thus poor and miserable Manti died not on an out-come of suicide but on account of designed move of the members of the family to put to an end to her life.

35. Besides the medical evidence and oral evidence as seen earlier, there is the letter (Ext. 2) said to have been written by Manti giving out the continuous mal-treatment, torture and beating to her and so hers a miserable life which she used to say as hell. Although it has come

that besides this letter, there was other letters also, though not produced, yet this ver. letter can be considered. It is something natural and logical for a girl to disclose her tale of sufferings and miseries to her nears and dears, father, mother, uncle, brother and so on. Which she did and she had been doing, as has been deposed by the witnesses. this letter has been brought on record and its entry has not been objected to by the appellants though is being done at this stage. A full Bench of Allahabad High Court, in the case of *Sadique V. State* 1981 Cr.LJ 379 (para 8), has observed as follows:

" In our opinion, if the prosecution or the accused does not dispute the genuiness of a document filed by the opposite party u/s (1) of S.294, Cr.P.C. it amounts to an admission that the entire document is true or correct. It means that the document has been signed by the person when it purports to be signed and its contents are correct. It does not only amount to the admission of being signed by the person whom it purports to be signed, but also implies the admission of the correctness of the contents. Such a document may be read in evidence under sub- section (3) of Section 294 Cr.P.C. neither the signature nor the correctness of its contents need be proved by the prosecution or the accused examining its signatory as it is admitted to be true or correct."

In paragraph 9 of the same case it has also been observed as follows :

" It is open to the prosecution or the accused to dispute the genuineness of the document filed by the opposite party under sub section (1) of Section 294 Cr.P.C. In such a case the signatory of the document must be examined by the party filing the document to prove his signature and also the correctness of his contents and the evidence of the signatory will be the substantive evidence and the document may be used to corroborate or discard the testimony. But where genuineness of a document filed by the prosecution or accused under Section 294 (1), Cr.P.C., is not disputed by the opposite party or accused, Sub .s. (2) of Sec.294 Cr.P.C.is applicable and such a document may be read as substantive evidence. section 294 Cr.P.C. is a new Section, as it has not equivalent in the code of Criminal Procedure 1898. It is based on the rule of evidence that facts admitted need not be proved as contained in S.58 of the Evidence Act."

In a Full Bench decision, in the case of SK. Farid Hussain Saheb Vs. State of Maharashtra, 1983 Cr. LJ 487. it has been observed (in para 8):" The document being primary or secondary or substantive or corroborative, is not relevant for attracting Section 294 of the Code.

In disputing its genuineness is the solitary test of evidence." But in the test of evidence case of Vinod Chaturvedi V. State

of M.P., AIR 1984 sc 91, (para 6), it has been observed : " So far as the other document is concerned, as already indicated by us, it is a letter written by S.P. to this administrative superior. The writer of the letter has not been examined as a witness. No opportunity has been given to the defence to cross examine the writer to rely on the contents of that letter in such circumstances, is totally misconceived. The document was not available to relied on for any purpose. The High Court went wrong in seeking support from it by way of corroborative and oral evidence." In the instant case, the letter has come on the record, the production of which has not been objected at any stage. Positive evidence of the witness and uncle of the victim, Mewa Lal Gupta is that it is a letter sent by Manti to her father, bearing her signature. She is also no more. In these circumstances, this letter cannot be brushed aside and can be looked into along with the other circumstances and material on the record.

36. As regards the motive, it has been said that in this case motive has not been proved by the prosecution. The fard beyan does not gave any demand of dowry. The demand for television has been introduced by the informant in the court and that too has not been given before the investigating officer. So, it is an improvement. Even the father of the girl has not said about the demand of any article. For this reason, according to the learned counsel for the appellants, there was no motive for the appellants to commit the offence. As to this contention,

it appears that the suggestions have been made that she was suffering from hysteria. Even if she was suffering from hysteria, that is no ground for committing the offence but it has also come in the evidence that her eyes were slanting and there was complain that she could not cook the food properly and she used to sleep very much. Apparently, they may be grounds for the husband and her family members not to accept her in the family. with these consistent evidence about the torture, mal-treating, beatings and trouble for food are in the letter. She had gone to her parents house, stayed there, panchayati held and then against her wishes, she again brought back by her husband. The witness had no grudge against the accused and falsely implicated them. In this, they have reason to believe that she was tortured. Though it cannot be said to be a cruelty for dowry but ill-treatment and mal-treatment, beating and assault or also cruelty given out to her. She has been harassed, beaten, coerced and so, these are sufficient to hold that the appellants have been cruel. The death has occurred within seven years of her marriage. If the prosecution connected this case under Dowry Death case, they could have manipulated or falsely given out a demand of dowry which they did not do at the initial stage though said, later on ,that the tape-recorder given to Anjani had been thrown back by him at her house to be kept back along with the daughter and that there was a demand of television. It will not bring the case under

the dowry death. Yet cruelty is there. motive is no doubt an important factor and element to be considered in circumstantial evidence. But it has also been said by their lordship of the Supreme Court in the case of state of M.P. V. Digvijay Singh, 1981 Cr.LJ-1278, at page 1281 (para 18): " It may be that the prosecution was not able to prove the motive for the crime but that could not possibly be a matter when circumstantial evidence brought on the record was sufficient to prove beyond any doubt that it was the respondent and no one else which intentionally caused the death of Smt. Tula Bai " It has also been said by the Supreme Court, in the case of State of Haryana v. Sher Singh and other, Alr 1981-SC1021 : " That the prosecution is not bound to prove motive or any offence in a criminal case in as much as motive is known only to the perpetrator of the crime and may not be known to others. If the motive is proved by prosecution, the court has to consider it and see whether it is adequate. In this case, motive is apparently inadequate." In the case of Subedar Tiwary v. State of U.P. (SUPRA) it has been observed at page 450 (para 20) : "The evidence regarding the existence of motive parts in the matter of assessing is very often than no (not) within the reach of others. The motive may not even be known to the victim of the crime. The motive may be known to assailant and no-one else may know what gave birth to the evil attitude in the mind of the assassin. A crime can not take place even without premeditation or pre-plan

ning in the context of particular situation on the spur of the moment. In any case, the evidence on record is sufficient to show that the two spouses dislike each other It is not possible to pronounce on the question as to what exactly was the motive and what exactly triggered or spoiled of the incident resulting in the death of Meena. Taking into all that view of the circumstances in the light of discussion hereinbefore, we are satisfied beyond reasonable doubt that the death of Meena was not suicidal but homicidal."

37. As regards the case of murder of a wife, the Supreme Court, in the case of Nanak v. State of U.P., AIR 1983 sc 1091 (1983 Cr.LJ.1444), has been pleased to observe at page 1092 :

"In a case of murder of the wife by the husband, there are many circumstances which have to be looked into and it is very difficult to know the exact motive in the circumstances of given case." The explanation which an accused gives with regard to an offence also assume written importance in considering the circumstances against him along with the other circumstances." A Division bench, in the case of *Kuldip Shyam V. State of Punjab*, 1980 Cri,LJ 71, at page 78, it has been said : "Circumstances including the conduct of the accused in putting forward false explanation is so complete in itself that no other conclusion which may be consistent with the guilt of the accused, is possible. " A Division Bench, in the case of *Gopalan V. State of Kerala*, 1985 Cri, LJ.NDC.3, relying on the said decision of *Nanak V. State*

of UP (supra), has further said : "It is not always easy to prove the motive for the crime. Often the crime is locked in the heart of the offender. Discovery of the true motive is not comperative and the circumstances proving the guilt of the accused are not weakened at all by the fact that the motive has not been established. In a case of murder of the wife by the husband there are many Circumstances which have to be looked into and it is very difficult to know the exact motive in the circumstances of a given case (1983 -Cr.LJ- 1444)." xxx

Further it often happened that only the culprit himself knows what moved him to certain course of action. If the evidence shows that the accused is having strong enough motive and had the opportunity of committing the crime and the established circumstances on the record considered along with the explanation, If any, of the accused exclude reasonable possibility of any one else being real culprit, the chain of evidence can be considered to be so complete as to show that all human probable crime has been committed by the accused." Similarly, in the case of *Deo Nandan Mishra V. State of Bihar*, AIR 1955-SC-801, it has been observed that in a case of murder when there is no direct evidence and the prosecution case based only on circumstantial evidence on explanation or false explanation by the accused serves as an additional link in the chain of circumstances to connect the accused with the offence. In the case of *Udaipal V. State of UP*, AIR 1972-SC-54 also, it has been

said that in a case where only circumstantial evidence is available, at the outset, one starts looking at the motive and the opportunity to commit the crime. If the evidence shows that the accused had strong enough motive and had opportunity of committing crime and the establish circumstances on the record, considered along with the explanation, if any, of the accused exclude the reasonable possibility of any one else being the real culprit, then the chain of evidence can be considered to be so complete as to show that within all the human probability, the crime must have been committed by the accused.

38. Falsity of a defence offered by the accused either to the witness after the occurrence or in defence given in the court, will not be a ground to establish the case of the prosecution as the prosecution has to stand on its own legs. But that explanation is becomes a supporting link and can be called in only to lead assurance to the court that the case set up by the prosecution with this extract to the other additional link which, if found to be strong enough on their own. The Supreme Court in the case of *Shrawan Lal Grarasi Lal Dixit V. State of Maharashtra*, AIR 1981 SC 765, has said at page 770 (para 30) : "Falsity of defence cannot take place of proving the facts which the prosecution has to established. A false plea of defence can at best be considered as an additional link if other circumstances point unfal-ingly to the guilt : of the accused. "Again in the case of

Sharad Birdhichand Sarda V. State of Maharashtra, AIR 1984 SC-1622, at page 1655 (para 150), it has been observed as follows :

“ It is well settled that the prosecution must stand or fall on its own legs and it cannot derive any strength from the weakness of the defence. This is trite law and no decision has taken a contrary view. What some cases have held is only this : Where Various links in a chain are in themselves complete, then a false plea or a false defence may be called into aid only to lend assurance to the Court. In other words, before using the additional link it must be proved that all the links in the chain are complete and do not suffer from any infirmity. It is not the law that where there is any infirmity or lacuna in the prosecution case, the same could be cured or supplied by a false defence or a plea which is not accepted by a court.”

A Division Bench, in the case of Malkhani V. State of Orissa, 1986-Cri.LJ - 430, in para 3, has said: “falsity on the version of the accused will not establish the prosecution but will be an additional link if there is no other link pointing to the guilt of the accused person.”

39. Though prosecution case is not proved on account of falsity of the defence though falsity of defence can lend assurance and support as additional link to the links in the chain, already being by themselves complete and without any defect. The prosecution has to stand on

its own legs as the burden of proof is upon the prosecution itself for the proving its case. The accused are neither to prove anything nor give any thing to defence. They have only to make denials. If at all they have got any case in defence, they can make suggestions to the prosecution or witness against them. If at all they want to produce any witness in defence, then burden of proof of the same is not so heavy as on them as the prosecution has to prove its case to the hilt. The burden of proof shifts only in case of alibi or under section 5 A of Prevention of Corruption Act. The defence is to create doubt about that too of a reasonable mind in the case of the prosecution. In the case of Laxmi Singh and others V. State of Bihar, AIR 1976 SC 2263, at page 2270 (p.13), the Supreme Court has said : " It is well settled that it is not necessary for the defence to prove its case with the same vigour as the prosecution is required to prove its case and it is sufficient if the defence succeeds in arriving at a reasonable doubt on the prosecution case which sufisficient to enable the court to reject the prosecution version."

40. In the case of circumstantial evidence, the court may some across with such evidence which create suspicion about the complicity and participation of the accused in the offence. But suspicion however strong, can not take place of proof based on legal evidence, to convict an accused. Doubts and suspicion cannot be the basis of legal proof and foulness of the crime increases

the degree of proof of the offence against the accused. The Supreme Court, in the case of *Palvinder Kaur V. State Of Punjab*, AIR 1952Sc 354, has been pleased to observe : " In cases depending on circumstantial evidence, the courts should safeguard themselves against the danger of basing their conclusion on suspicion howsoever strong." Again in the case of *Chandrika Ganpat Sovitkar V. State of Maharashtra*, AIR 1974 SC 1290, It has been said that : " No one can be convicted on the basis of mere suspicion though strong it may be." In the case of *Sharat Veer Chandra Sharda* (supra) (AIR 1984-SC-1622), it has been said : "suspicion however great, cannot take place of legal proof and the foulness of the crime, the higher the proof." Recently in the case of *Pandala Veera Reddy V. State of Andhra Pradesh*, AIR 1990- SC 79. It has been observed : " the circumstances indicated by the learned counsel undoubtedly would not sufficient to held that the respondent had committed heinous crime as no one can be convicted on the basis of mere suspicion however it strong may be."

41. As to the contention that no independent witness has been examined, it appears that not only father, uncle, sisters and brother have been examined but two neighbours have also been examined giving out the truth. Because in this case, there is circumstantial evidence and there are about the complain and allegations by the prosecution continuing by her to her relations about the

treatment meted out to her specially in the presence of her brother when he had come to take the victim and also about the panchayati, with witnesses connected with matters are the most natural witnesses. In case of calamity and difficulty, the friends, relations, neighbours are the most natural witnesses besides others also. It all depends upon the facts and circumstances of each case. P.W.3, Anupam Kumar Buxi, a neighbour of the appellants says that the appellants had approached him for a torch after being awakened, as the appellants had given out that their babu was missing. He too has said that he had heard the cries of Manti 15-20 times earlier than the occurrence though he could not say that it was the cries of daughter of Bali Prasad or daughter-in-law. P.W.11, Jay Shankar Prasad, a contractor, has said that he had heard about the panchayati though he was not present there. Besides these two witnesses, others have not come. Nothing has come out to show that these two out-siders and unrelated persons had animosity or falsely depose against the appellants or had any special interest in this case. These two witnesses have withstood the test of cross-examination and that there is nothing to disbelieve them. In the locality or area, many things happened. Some persons do not know the matter as they have not seen the occurrence or heard about it. They cannot be expected to come out and depose for or against. But some persons in spite of the fact of knowing and seeing the facts and circumstances, do not want to get them-

selves involved in the matter as they think that this is a matter of civil dispute between the two parties though it is a criminal matter. For this apathy and non-alignment or keeping away, is for very obvious and unobvious, known or unknown, reasons or considerations, may be factions, affinity, fear, caste considerations and now added to it political considerations. It is also for this reason that relations, friends or even partisans may be examined in such cases. The Court is to examine the evidence produced by the prosecution and find out the ring of truth. The evidence of the witness examined, cannot be brushed aside unless the evidence suffers from any infirmity, lacuna, improbability and legal defects. The court has to consider all these circumstances and has to come to a definite conclusion for or against.

42. Thus, following the guidelines for the evaluation of the evidence and special circumstances, it appears that the victim Manti Devi was not having a pleasant and peaceful life since her marriage. She was being ill-treated, tortured, beaten and also given trouble for food. She had been making complaint repeatedly to her nears and dears at her parental house orally as well as through letters. On account of the mal-treatment, torture of the husband and her other in-laws, she stayed at her naihar for $1\frac{1}{2}$ years, whereafter panchayati was held in which assurance was given by her husband that she will be given a human treatment yet she was not given. After some time, her

husband brought her back and she was again subjected to tortures and beatings. Her letter (Ext.2) which has been brought on record is full of her miseries and inhuman and callous treatment to her. She was beaten even in presence of her brother when he went to fetch her. The husband and other in-laws were all one in human tortures, callousness and trouble for food to her. She was also said to be not preparing the food properly and had a sleeping habit. She has been found to have glanting defect in her eyes. The appellants have given out that she was suffering from hysteria and was mad, though the evidence shown to the contrary. By merely suggesting that she was suffering from hysteria and so she had suicidal tendency in her, efforts have been made to give the death a colour of suicide which is not at all made out from the trustworthy, circumstantial, cogent and reliable evidence of the doctor who has given out it as a case of throttling and then burning. If she would have committed suicide herself, or if she could not have been burnt alive, then she would have struggled and her glass bangles and tikuli would have not been intact. Her blouse would not have been recovered by the investigating officer on the spot, when burnt ashes of the clothes were on the dead body which had become naked. All this shows that first she was throttled and killing her, the accused set fire to the body. Then the appellants gave out fasely to the neighbour Anupam Kumar Baxi that she had gone away and for searching her, torch was needed.

Later on recovery of the dead body from orchard of the appellants, colour of suicide was given to this brutal murder. Thus, the sequence of events and facts and circumstances proved by the prosecution, clearly shows that all the linked in the evidence are complete and nothing is missing. The facts established by this cogent and trustworthy evidence are consistent only within the hypothesis of the guilt of the accused and there is no conclusion consistent with the innocence of the appellants. Therefore, the evidence which is reliable, trust worthy and cogent is sufficient to warrant the conviction of the husband and father -in -law of Manti for her gruesome and callous murder.

43. The effect of acquittal of others upon the case of the appellants, the learned counsel for the appellants has contended that as against Lalsa Devi, Mansa Devi and Ashok Kumar Gupta, the accused persons, the case of the prosecution has failed, so on the same evidence, the case of the prosecution against these appellants, Anjani Kumar Gupta and Bali Prasad Gupta, should also fail. As to this contention, the court below has given them the benefit of doubt as there was no direct circumstantial evidence against them and also that they were minors. The case of the appellants and the acquitted accused is not very similar though the acquitted accused also have been said to be party to the tortures but they have not been found to do anything like appellants as role of the husband about the torture has been there, beating parts

have been assigned to him and so, father was also a party to the torture directly and later on, after the murder, husband and the father had gone to independent witness (neighbour) Anupam Kumar Baxi, P.W. 3, for a torch on the pretext that Bahu was missing though she had been found by the witnesses and others in the house in a burnt condition and according to the medical evidence, and also the circumstantial evidence of the case, the death was due to throttling and not by suicide and burnt during life time. For that reason, the role of the acquitted accused appears to be different. No doubt in the case of Balika Singh V. State of Punjab, AIR 1975 Sc 1962, it has been said : "that in a murder case, when four out of nine accused have been acquitted and the case of the convicted accused is not separable from that of the acquitted accused, then entire prosecution case must be discarded. But in this case, the position is not the same and the case is different in the case of Sat Kumar V. State of Haryana, AIR 1974 SC 294, 2 in para 7, it has been said that " there is no rule of law that if the court acquits certain accused on the evidence of a witness finding it be open to some doubt with regard to them for definite reasons, any other accused against whom there is absolute certainty about his complicity in the crime based on the remaining credible part of the evidence that witness, should acquitted. It will, however, call for a close scrutiny of the evidence and the court must feel assured that it is safe to rely upon the witness for the conviction

of the remaining accused." In the case of *Molu V. State of Haryana*, AIR 1976 SC 2499 (para 10), The Supreme Court has said : "The mere fact that out of many accused, some are acquitted, is not sufficient to entitle the rejection of the entire prosecution case, On the other hand, the court should make an effort to disengage the truth from falsehood and shift the grains from other rather than take the easy course of rejecting the entire prosecution case merely because there are embellishment. " In the case of *Dalvir Kaur V. State of Punjab*, AIR 1977 SC 472 (para 28) it has been observed : " I do not agree that the other part of the argument that merely because Ajit Singh was given benefit of doubt, others also should be acquitted. " In the case of *Hazari Parida V. State of Orissa*, Air 1979 SC 1344, the Supreme Court, where four of the accused was found pointing to their guilt as witnesses were corroborated by medical evidence, their lordships did not hold that the conviction of the remaining accused were given benefit of doubt. In the case of *Krishna Lal Singh V. State of Haryana*, AIR 1980 SC 1252. it has been said in para 5 : "We are not satisfied that when merely because the trial court has ultraconsciously acquitted someone, the higher must for that reason acquit every one."

44. It has also been contended that the provisions of Section 313 of the Code have not been complied with as the circumstances and the material being relied on against the appellants, have not been put to the accused

and so, those (Sic)

Para - 7 : "The practice of putting general questions to the accused must also be depreciated. The duty of the Court while examining an accused is not to put to him the entire evidence on record. The duty is to put specific circumstance of incriminating nature upon which the prosecution relies, and which appear from the evidence on record. The specificity must be in regard to the circumstances appearing against the accused. The Court cannot absolve itself of its duty by putting general questions without specifying the incriminating circumstances.

Para 12 : "In the performance of its duties, the Court necessarily has to take up itself the responsibility of framing appropriate questions and this entails a comprehensive marshalling of the evidence brought on record. Before questioning an accused under section 313 of the Code should not be attempted. Unfortunately, as large number of cases have demonstrated before us, the responsibility cast upon the Courts is not being seriously undertaken in large number of cases and an impression has gained ground that the examination of the accused is a mere formality, which must be performed after the prosecution closes its evidence."

45. Accordingly, the bench in the end remanad the case to the court of Special Judge with the direction that he shall re-examine the accused afresh under section 313 of the Code in the light of the observations made by them

and thereafter proceed in accordance with law, to continue the trial and pronounce its judgment. Since the later party before the bench was also aggrieved that having regard to the manner in which the accused has been examined in the case, it will be most fair course to follow so that no prejudice may be caused either to the accused or to the prosecution. Ultimately, the bench set aside the judgment and order of learned special judge remanded the case to proceed with the trial in accordance with law and the directions contained in the judgment.

46. Thus, considering the entire material on the record and the contents both on law and facts, it is well made out that it was appellants who have committed the murder of Manti Devi and then burnt her. The prosecution evidence, on appreciation, does not suffer from any infirmity or any illegality, proved its case against the appellants. The trial court has rightly convicted the appellants under section 302 read with 34 of the IPC and sentenced them to undergo rigorous imprisonment for life. Accordingly, this appeal is dismissed, the judgment and order of the trial court is confirmed, the bail bonds of the appellants no.2, Bali Prasad Gupta is cancelled and he is directed to be taken into custody to serve out his remaining period of sentence. Appellant no.1 Anjani Kumar Gupta is in custody, so, he will serve out the remaining period of his sentence.

Amir Das, J I agree.

M.K.C.

Appeal Dismissed

CRIMINAL WRIT JURISDICTION

Before N.P.Singh & R.N. Prasad

1992

August, 25

Sumitra Devi *

V.

The state of Bihar.

Penal Code, 1860 (*Central Act XLV of 1860*), sections 302 and 326 of Penal Code — omission in the order whether sentences shall run concurrently — effect of — High Court, whether can direct sentences to run concurrently — Code of Criminal Procedure, 1973 (Act 2 of 1974), Section 31 (1) .

Where the accused has been convicted and sentenced under sections 302 and 326 to life imprisonment and 7 years imprisonment respectively but there was no specific direction of the Court that the two sentences shall run concurrently.

Held, that the Criminal law treats punishment more as a reformatory or corrective than as a deterrent or punitive measure. The order of the High Court, therefore, deserves to be clarified for the ends of justice in exercise of inherent power and the two sentences are directed to run concurrently to make the form of sentences har-

* CrW.J.C. 144 of 1991 (R). In the matter of an application under Articles 226 and 227 of the Constitution of India.
Sitting at Ranchi

moneous.

Case laws reviewed.

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

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

Mr. T.R. Bajaj, Amicus curiae for the petitioner.

M/S. M.R. Eqbal, K.P. Sinha, for the respondent.

N.P. Singh, J. — The petitioner, Sumitra Devi wife of convict Lohra Mahto sent a petition to the Hon'ble Chief Justice stating there in that her husband Lohra Mahto was tried before 5th Additional Judicial Commissioner, Ranchi in S.T. No. 167/76 on the charge under sections 302 and 326 of the Indian Penal Code and was convicted and sentenced to death and R.I. for 7 years respectively. The High Court in appeal commuted the death sentence to life imprisonment and affirmed the sentence awarded under section 326 of the Indian Penal Code, Her husband has already undergone the sentence of life imprisonment, despite that he is not being released by the Superintendent Central Jail, Hazaribagh on the plea that there was no specific direction of the Court that the two sentences shall concurrently.

2. The petition was treated a Criminal writ under Articles 226 and 227 of the Constitution of India and admitted for hearing.

3. The question that arises for consideration is whether the sentence of life imprisonment and sentence of 7 years imprisonment awarded under section 326 of the Indian Penal Code should be deemed to be executable consecutively or concurrently.

4. In the instant case, the husband of the petitioner was sentenced to death and imprisonment for 7 years under section 326 of the Indian Penal Code. Therefore, the trial court never anticipated the point that has arisen on account of subsequent order of commutation of death sentence to a sentence of life imprisonment passed by the High Court.

5. The normal rule is that the sentences should be consecutively. They may be made to run concurrently if there is some reason. The Court, must expressly direct whether the sentences are to run concurrently or consecutively.

6. The principle underlying section under section 31 of the code of Criminal Prosedure can be taken into consideration in dealing with this case. Section 31(1) of the Code of Criminal Procedure runs as follows :-

(1) "When a person is convicted at one trial of two or more offences, the Court may, subject the provisions of Sec. 71 of the Indian Penal Code (45 of 1860), sentence him for such offences, to the several punishments prescribed there-

fore which such Court is competent to inflict; such punishments when consisting of imprisonment to commence the one after the expiration of the other in such order as the Court may direct, unless the Court directs that such punishments shall run concurrently.

7. A bench of Orissa High Court presided over by Chief Justice R.N. Mishra as he then was in the case of *Basudeo Pradhan vrs State of Orissa* ¹ observed that :-

" A direction to make consecutive sentences concurrent does not touch the merit of the matter and proceeds on the acceptance of judgment of conviction as also " quantum of sentence. The inherent power vested in the Court is obviously intended for superintending the administration of Criminal Justice within the jurisdiction of the Court with a view to ensuring that ultimate justice is done."

His lordship, extended the consecutive sentences passed in three trials, in first two cases 4 years and in the third case 5 years, one each under section 395 of the Indian Penal Code to run concurrently.

8. In an exactly identical case where there was omission to specify how the separate sentences are to run, a Division Bench of Rajasthan High Court in the case of *Surja Ram vrs. The State* ² , has observed that the separate sentences shall be enforced concurrently with the life imprisonment.

1. (1983) Cr. L.J. 527

2. (1963) A.I.R. (Raj) 202

9. Again, a Bench of Punjab and Haryana High Court in the case of, *Pritam Singh vrs State of Punjab and others*,¹ held that :-

"where an accused who was convicted for several offences was sentenced to undergo rigorous imprisonment for different terms for different offences which in all aggregated to a period of 23 years and the sentence of life imprisonment was set aside in appeal, it could not be said that as there was no order by the Additional Sessions Judge whether the sentences were to run concurrently or consecutively the accused could be detained in prison for a period of more than fourteen years."

10. It is admitted that the convict has already undergone imprisonment for more than 21 years including the remission earned by the convict. The position that has arisen on account of omission in the order of the High Court, therefore, deserves to be clarified for the ends of justice, in exercise of inherent power, in order to make the form of sentences harmonious.

11. The criminal law treats punishment more as a reformatory or corrective than as a deterrent or punitive measures. Therefore, I think, the ends of justice would be served, if the two sentences are extended to run concurrently. The sentence of 7 years imprisonment awarded under section 326 of the Indian Penal Code

1. (1981) Cr. L.J. (NOC) 119

against the husband of the petitioner is, therefore, directed to run concurrently with life imprisonment.

12. The petition is, accordingly, allowed. The Superintendent, Central Jail, Hazaribagh, is directed to set at liberty the husband of the petitioner forthwith, if not wanted in any other case.

R.N.Prasad, J. While fully entirely agreeing with the result of the case, I feel it necessary to mention some facts, Which are not in dispute, as also my reasonings for coming to the conclusion :

2. At the admission stage, learned Government advocate received instruction dated 13.9.1991 from the Superintendent, Central Jail, Hazaribagh, which has been placed on the records of the case. It appears from the said institution that he calculated the period of sentence, treating the same to be for twenty-seven years (twenty years for life imprisonment under section 302 of the Indian Penal Code and seven Years under section 326 thereof). It also appears from the said calculation made by the Superintendent of Central Jail, Hazaribagh that the convict has already undergoes imprisonment for 21 years, 4 months and twenty days on 13.9.91, including the remission earned by the convict.

The question arises, for consideration in this case, whether the sentence of life imprisonment under section 302 of the Indian Penal Code and the sentence of imprisonment for seven years under section 326 thereof

awarded to the convict can be ordered to run concurrently on the facts and in the circumstances of the cases.

4.The general rule is that a sentence commences to run from the time it is imposed, but section 427(1) of the Code of Criminal Procedure, hereinafter referred to as the Code, is an exception to this general rule in the case of a person who is already undergoing a sentence of imprisonment. However, a discretion has been given to the Court to direct that the subsequent sentence shall run concurrently with the previous sentence. Sub-section (2) of section (427) of the Code is in consonance with the general rule, which provides that- 'when a person already undergoing a sentence of imprisonment for life is sentenced on a subsequent conviction to imprisonment for a term of imprisonment for life, the subsequent shall run concurrently with such previous sentence. A similar discretion has been provided by section 31 of the Code where a person is convicted and sentenced for two or more offences at one trial. It provides that the sentences inflicted for various offences shall commence to run after the other unless the Court directs that such punishments shall run concurrently. Obviously the stage for exercising the discretion is when the court records the conviction and inflicts punishments.

5. The present case, in an unusual circumstances, does not fall either under section 31 or section 427 of the Code, for the reason that section 427 (1) of the code

deals with the sentences earned by the convict in subsequent trial and there was no occasion for the trial court to apply the said discretion under section 31(1) of the code, as the convict was sentenced to death and after execution thereof, there would have nothing left to be executed. This situation arose only after the sentence of death was commuted to life imprisonment by the appellate court.

6. In the circumstances of the present case, a question arises for consideration as to whether the High Court is competent to exercise its inherent power to meet the ends of justice. the inherent power of the High Court is not controlled by any provisions of the Code. The power may be exercised to give effect to any order under the Code, or to prevent abuse of the process of any court and to secure the ends of justice. A discretion that the sentences shall run concurrently does not touch the merit of the case and proceeds on acceptance of judgment of conviction as also quantum of sentences. The power of the High Court obviously intended for superintending the administration of justice, with a view to ensure that ultimate justice is done. It is well established that the inherent power is to be exercised to do the right and to undo the wrong in the course of administration of justice. Hence, I am of the view that this court has power, in the circumstances of the case, to direct the sentence to run concurrently.

7. It is true that the discretion conferred under the provisions of law has to be exercised on some judicial principles. A Division Bench of the Rajasthan High Court in *Surja Ram Vrs. The State* (A I.R. 1963 Rajasthan 202) faced with the similar situation ordered the sentences to run concurrently.

8. There is nothing on the record of the case that the convict is a hardened criminal. Nothing has been brought on the records of the case nor has it been submitted by learned counsel appearing for the respondent that the convict has any criminal antecedent. Accordingly, I am of the view that it is a fit case where the sentence awarded to the convict be ordered to run concurrently; and my learned brother has very rightly ordered the sentence to run concurrently.

9. In the result, this petition is allowed with the observations and directions as above.

M.K.C.

Petition allowed

CIVIL WRIT JURISDICTION

Before S.B.Sinha, J..

1993

March, 16

Mostt. Sakuntala Devi & others *

V.

The State Of Bihar and others

Bihar Land Reforms (Fixation of Ceiling Area and Acquisition of Surplus Land) Act, 1961 (Bihar Act XII of 1962), section 16 (3) -- pre-emption, right of -- purchaser himself becoming adjoining raiyat by subsequent sale transfer, whether to be effective from the date of execution of the sale deed and not from the date of its registration -- application for pre-emption, whether maintainable.

Where the land was sold on 15-6-1979 and the purchaser became an adjoining raiyat by virtue of a subsequent purchase by a registered deed of sale dated 29-3-1979 which was registered on 26-9-1979 and an application for pre-emption was filed in respect of the sale deed dated 15.6.1979 on 3-9-1979;

Held, that the application for pre-emption filed on 3-9-1979 was not maintainable as purchaser himself be-

*: Civil Writ Jurisdiction Case No. 7303 of 1993. In the matter of an application under Article 226 and 227 of the Constitution of India

came an adjoining raiyat by reason of the registered deed of sale dated 29-9-1979 from the date of execution thereof and not from the date of its registration.

Application by the petitioner.

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

Miss, Kanak Verma, advocate for the petitinesr.

M/S. Jagannath Jha, S.C.I. & Rana Pratap singh, Advocate for the respondents.

S.B.Sinha, J. — This application is directed against a resolution dated 2.12.1982 passed by the Additional Member, Board of Revenue, as contained Annexure-1 to the writ application whereby and whereunder the revision application filed by Respondent number 3 has been allowed.

2. The fact of the matter lies in a very narrow compass.

3. Respondent number 3 purchased 11 katha 5 dhurs of land from Guneshwar Singh by a registered deed of sale dated 15.6.1979 which was registered on 17.7.1979.

4. Sita Devi was allegedly one of the adjoining raiyats. Subsequently, Respondent number 3 purchased 10 kathas of lands from Sita Devi by reason of a registered

deed of sale dated 29.8.1979 which was registered on 26.9.1979.

5. An application for pre-emption was filed by the petitioner in respect of the aforesaid deed of sale dated 15.6.1979 on 3.9.1979.

6. The question, which arises for consideration in this application, is as to whether the Respondent number 3 by reason of his subsequent purchase from the adjoining raiyat himself became an adjoining raiyat so as to defeat the claim of the petitioners.

7. Miss. Kanak Verma, learned counsel appearing on behalf of the petitioners has submitted that in view of the fact that the deed of sale dated 29.8.1979 was registered on 26.9.1979, the petitioners application for pre-emption could not have been defeated in as much as the said application was filed prior to registration of the said deed of sale executed by Sita Devi in favour of Respondent number 3.

8. In support of her contention the learned counsel has relied upon a Supreme Court decision in *Hiralal Agarwal Etc. Versus Rampadarath Singh & others* reported in 1969 B.L.J.R., 186.

9. the contention of the learned counsel appearing on behalf of the petitioners can not be accepted. Although, in terms of the provisions of section 60 & 61 of the Indian Registration Act, the deed is registered at a

later date but by reason of section 47 thereof, the right, title and interest in relation to the lands stands transferred from the date of execution of the deed of sale and not from the date of its registration.

10. Miralal Agarwal's case, (supra) is not an authority for the proposition that the right, title and interest of a transferee would pass from the date of registration. In that case, the Supreme Court was considering the question as to whether an application for pre-emption which was filed prior to the registration of the deed, although, cognizance in relation thereto was taken thereafter was valid or not.

11. It was held by the Apex Court that the provision of Rule 19 of the Bihar Land Reforms (Fixation of Ceiling Area and Acquisition of Surplus Land) Rule is directory and not mandatory and in view of the fact that in that case cognizance was taken after the deed of sale was registered, it was held that there has been substantial compliance of the provision of Section 16(3) of the said Act and the Rule 19 aforementioned.

12. In that view, the Learned Member, Board of Revenue has correctly held that the Respondent number 3 also became an adjoining raiyat by reason of the registered deed of sale dated 29.8.1979 from the date of execution thereof and on 3.9.1979 he himself became an adjoining raiyat.

13. Further, as is well known that the right of pre-

pre-emptor is a weak right which can be defeated by a subsequent acquisition of an interest in respect of the adjoining lands.

14. Reference in this connection may be made in *Dhaniklal Mahto & others Versus the Additional Member, Board of Revenue & others* reported in 1985 B.B.C.J.597.

15. In that view of the matter, I find no merit in this application and the same is accordingly dismissed.

16. In the facts and circumstances of the case, there would be no order as to costs.

S.P.J.

Application dismissed



APPELLATE CRIMINAL

Before S. Haider Shaukat Abidi & Lok Nath Prasad,
JJ.

1993

April, 12

Gupteshwar Ram @ Gupteshwar Gupta and others.*

v.

The State of Bihar

Penal Code 1860 (Central Act XLV of 1860), Section 147, 148, 149, 302 and 326 -- scope and applicability of -- accused more than five in number coming with arms, indulging in unlawful activities and committing offence, whether to be said to be members of unlawful assembly sharing the common object -- one of the accused firing his gun causing death on the spot -- effect of.

Where the accused persons more than five in number assembled together armed with lethal weapons, indulged in unlawful activities and committed the offence;

Held, that the assembly was an unlawful assembly. the conduct of the members of unlawful assembly both before and after the commissions of the offence has to be considered.

Where the accused persons came armed with lethal

*. Criminal Appeal No.189/1989. From the Judgment of Mr. Sohaillur Rahman, 6th Additional Sessions Judge. Arrah dated

weapons in block, remained till the final, participated in brickbattling and two of the accused gave lathi blows on the head and leg of the father of the deceased and while the deceased was going to help his father, another accused fired his gun at him causing his death on the spot but two of the accused did not use their garasa and bhala.

Held, further, that by bringing the gun, garasa, bhala, and lathis the members of the unlawful assembly knew very well that grievous hurt was likely to be caused and as such the object of the members of the unlawful assembly was to cause at least grievous hurt. The firing by only one of the accused was his individual act and so his conviction under section 302 I.P.C. For his individual act makes him liable for conviction under section 302 I.P.C. and his individual act does not bring the rest of the accused within the clutches of section 302 read with section 149 I.P.C. But the other accused, however, cannot get out as they were sharing the common object of unlawful assembly which was to cause at least grievous hurt or they know that grievous hurt was likely to be caused because of the deadly weapons like gun, garasa, bhala and even lathis, which therefore makes them liable to be convicted under 326 read with section 149 I.P.C.

Case law discussed.

Appeal by the accused. The facts of the case

material to this report are set out in the judgment of Abidi, J.

M/S. Prakash Narain Pandey. A.K. Mishra
& Arun for the appellante.

Mr. K.P. Gupta for the State.

S.H.S. Abidi, J. — Appellant Gupteshwar Ram has been convicted under section 302 of the Indian Penal Code (for short I.P.C.) and 27 of the Arms Act and has been awarded sentence of rigorous imprisonment for life and two years rigorous imprisonment under each Court. Appellants - Nand Kumar, Budhu Ram, Tribhuwan Ram, Mahendra Ram and Raj Bali Pd. Ram have been convicted u/ss/302/149 I.P.C. and have been sentenced to rigorous for life. Appellants Gupteshwar Ram, Nand Kumar Ram and Budhu Ram have further been convicted under section 148 I.P.C. and sentenced to two years imprisonment. Appellants - Tribhuwan, Mahendra and Rajbali have been further convicted under section 147 I.P.C. and sentenced for one year R.I. Appellant Mahendra has further been convicted under section 323 of I.P.C. and sentenced six months R.I. However, all the sentences have been ordered to run concurrently. The other four accused, namely, Bhikhari Ram, Radha Ram and Shree Narain Ram have been acquitted by the trial court.

2. A first information report (Ext.6) was recorded on 28.5.1986 at 1.30P.M. by Kanhaiya Ram (P.W.9) at Jag-

dishpur police station district Bhojpur saying that on 28.5.1986 the female of the house of the informant had gone to perform Puja in connection with *chauthari* of his maternal nephew Vijay Kumar at about 10.30 A.M. and when they were returning and reached in the gali in front of the house of Budhu Ram, then Budhu Ram abusively said that they were coming at his door. Upon this Amir Ram and his son (deceased) protested. Hence the matter escalated. Then Gupteshwar Ram armed with gun, Rajbali with lathi, Budhu with bhala, Mahendra with lathi including Nand Kumar with garasa and Tribhuwan with lathi came together and started brickbattings. On reaching Mahendra Ram gave lathi blow on the head of Amir Ram. When Rajnath went to save his father then Gupteshwar Ram fired at Rajnath who getting gun shot injury on the right side of his chest fell down and died immediately. On the sound of gun fire the people of the village collected and so the accused ran away. At that time Rampujan Ram (P.W.2), Vijay Kumar Ram (P.W.1), Devendra Kumar (p.w.3) and others were present on the spot who had seen the occurrence. The motive for the offence was said to be old enmity on account of Jagdishpur P.S. case No. 156/85 and counter case No. 157/85 and there was a proceeding under section 107 Cr.P.C.

3. The case was investigated by Birendra Mohan Jha (P.W.10) who examined the informant (P.W.9), Sheeji Ram (P.W.5) & Ganga Bishun Ram (not examined). He went

to the place of occurrence where he found the dead body and prepared the inquest report (Ext.7). He examined the witnesses. He then sent the dead body for post-mortem examination which was done by Dr. K.P.Rai (p.w.11). After completing the investigation he submitted chargesheet against the appellants.

4. The accused in their defence said that they have been falsely implicated in this case. Three witnesses in defence have been examined being Ambika Singh and Sheo Nraian Singh both for alibi for the acquitted accused Sheo Naraan Ram (D.W.3) Saryug Ram has said that the bullet of Raj Nath Ram had not fixed up and so he was killed.

5. The prosecution, in support of its case, examined 11 witnesses. Vijay Kumar Ram, Rampujan Ram, Devendra Ram, Sukhia Devi and informant Kanhai Prasad (P.W.S.1,2,3,6,7,8 and 9) have deposed as eye witnesses. P.W.4 Bharat Lal has proved the inquest report and seizure list P.W.5 Sheoji Ram is a hearsay witness. Birendra Mohan Jha (P.W.10) had conducted the investigation and submitted chargesheet. P.W.11 Dr. K.P.Rai had conducted post-mortem examination as well as the medical examination of Amir Ram.

6.The trial court after considering the evidence and material on record convicted and sentenced the appellants as said above.

7. Learned counsel for the appellants has urged that

upon the material on record it appears that there was brickbattling from both sides; that conviction of the appellants under section 302/149 is not made out as there was sudden quarrel and not there was individual acts and so conviction of Gupteshwar Ram u/s 302 I.P.C. is not made out as there is variance in the medical and oral evidence. To appreciate the contentions of the learned counsel for the appellants the evidence in the case has to be scrutinised with care and caution.

8. P.w.9 Kanhaiya Prasad is informant .P.W.9 has said that on 28.5.1986 at about 11.30 A.M. when the women of his family were returning after chauthari from Goriya Asthan Budhu Ram abused as to why they were passing through his door. About this Shukhia complained to her husband Amir Ram. Then Amir Ram went to forbid, then Budhu began to abuse more loudly. Amir Ram protested then Budhu called his men who came armed with gun, garasa, lathis and bhala. Budhu had bhala, Mahendra Ram gave a lathi blow on the head of Amir Ram and Rajbali gave a lathi blow on the leg of Amir Ram. When Rajnath (deceased) went to save his father, Gupteshwar fired at him who on getting the injury in his chest fell down and died. The occurrence was seen by Vijay Kumar, Devendra Ram and Rampujan (P.W.S.1 to 3) and others. Then accused ran away. The motive of occurrence is due to old enmity. Then he went to police station alongwith Sheoji Ram and lodged the report. Witnesses Ganga Bishun and Shanti had colluded with the accused

and were not prepared to give evidence. In cross examination he said that he had no talk with these witnesses as he did not know whether those witnesses had received any notice. The menfolk had not gone to Goriya Asthan. There was no marpit with women but they were abused. He had tone to the accused all alone. Amir Ram had got injury. He fell down on getting 2-3 lathis blows. Rajnath Ram and Amir Ram were going together. The gali is 2-2-1/2 cubits wide. One shot was fired from 20-25 paces. Rajnath had not abused. Rajnath and others were standing. On getting injury Rajnath fell down and profusely bleeding. He denied the suggestion made by the defence.

9. The next eye-witness is injured Amir Ram (P.W.7) . He has said that after return from Chauthari the women told that Budhu had abused them and so he went to Budhu who began to abuse loudly and had called out his men who came armed with gun, lathis, bhalā and pharsa. Mahendra Ram gave lathi blow on his head and Rajbali gave lathi on his left leg and when his son Rajnath rushed to help him, Gupteshwar fired at him who fell down dead. He was examined at State Dispensary, Jagdishpur. The occurrence was seen by the witnesses. In cross examination he said that there was a dispute about land and Inara(well). Budhu was abusing and not giving out particular names. Only the bridegroom had gone for Chauthari and not the bride. Budhu was abusing and persons from the prosecution side had not abused when

the women were returning. There was no mar-pit earlier. The firing had been done from the backside. After the son had fallen no brickbatting was done. Blood had fallen. There was no chasing of the firing man. He had said to the I.O. that Rajbali had assaulted him on his leg.

10. Besides these two eye-witnesses there is other eye witness (P.W.1), namely, Vijay Kumar the maternal nephew of the informant whose marriage had been performed and on the day of occurrence he had gone with the ladies for Puja and while returning with the women, Budhu began to abuse. He and others returned. Amir Ram went to protest and on the call of Budhu other accused, came, out of whom Gupteshwar had gun, Nand Kumar had garasa and others had lathis. They threw brickbats and stones. Mahendra Rai gave a lathi blow on the head of Amir Ram. The acquitted accused Sheo Narain said as to why brickbats and why not shoot and so firing was done hitting Rajnath who fell down. He had signed the inquest report of Rajnath. Budhu, Mahabir and acquitted Radha Ram are real brothers.

11. The other eye witness is Rampujan Ram who has said that at the time of occurrence he was in his dalan where Vijay Kumar, Devendra Ram and Rajnath deceased were there, and Chauthari was going. Budhu Ram began to abuse the women and when his brother Amir Ram went to stop him he began to abuse more

loudly. He and others also came out and stood by the side of electric pole. Then Budhu Ram called his men and so the appellants came with gun, bhala and lathis. Mahendra Ram gave a lathi blow on Amir's head which was punctured and when he wanted to run away then brickbatting started. Sheo Narain said why not the firing and why brickbatting and so Gupteshwar aimed at Rajnath and fired at him which hit in his chest and so he fell down dead. There was no other witness except family members. For Puja 8-10 women had gone, out of whom P.W.6 - Meena Devi of the village was also there. Only the women and Dulha had gone and not Nai, Dome or Pandit. Vijay had got Kajarauta. No one present there could try to chase the accused or catch them. In all there were 5 or 6 men and women. One Jai Kumar, who is the son-in-law, had come to Chaudhari and it was not correct that in the gun of Jai Kumar the shot had stuck up and so went on hitting the deceased. It was not correct to say that only to save the son-in-law the accused have been implicated falsely.

12. P.W.3 - Devendra Ram has also said that at the relevant time he was in Dalan with Rajnath, Vijay, Kanhaya, Rampujan Amir, Sheoji and Ramji Choudhary and when Budhu began to abuse, Amir Ram went to stop where the accused came with their weapons and Mahendr Ram gave a lathi blow. Rajnath, Vijay, Kanhaya and Rampujan went out of dalan to the electric pole and Budhu was abusing. The accused had come. They were

throwing brickbats. Rajnath went to save his father. Guptaeshwar fired at him and so Rajnath died. On 31.5.1986 bullet was seized by the I.O. before him and so he signed the seizure ;memo. Rajnath was his cousin. Chauthari had started from 10 a.m. Goriya Baba is north of village and the well is 40-50 steps from his house and Budhu's house is towards east of his house. There is electric pole in the north of his house.

13. P.W.6 - Meena Devi has said that she had also gone along with other women for performance of Puja and when they were returning from Goriya Asthan and were proceeding towards well they had to pass through the Darwaja of Budhu Ram and then Budhu Ram began abusing them. Sukhia Devi (P.W.8) went to her husband Amir Ram and complained about the abusing. When Amir Ram went to Budhu to persuade him not to abuse, then the occurrence took place. She has said that the accused were asking not to take water from the well. The water was taken by them from the hand pipe of Manju. She is Bhabhi of Kanhaiya. Five or six men got injuries. Amir Ram had got lathi injury. There was brickbatting and firing. Guptaeshwar fired from his gun. On alarm witnesses went there but no attempt were made to catch the accused.

14. P.W.8 - Sukhiya Devi wife of Amir Ram has also said that she had gone for Puja and when returning Budhu began to abuse and so she went to her husband

Amir who went to Budhu to stop him from abusing. But Budhu began to abuse more loudly and called his men who came armed with weapons. Mahendra Ram gave a lathi blow on the head of her husband. Budhu had a bhala, Nand Kumar a pharsa, Gupteshwar a gun and rest lathis. When her son went to save his father and when he was taking with him, then, taking aim Gupteshwar fired at him. Gupteshwar used to create trouble regularly. Puja continued till 11 a.m. and when they reached the village there was singing. Pakwan was not eaten. They were going to the well from the outside. There was no abusing from her side. Her husband was given two lathi blows. She denied the defence suggestion that when Jai Kumar was firing on account of Chauthari, then his shot got stuck up and so Victim got gun shot injury.

15. P.W. 5 - Sheoji Ram says that while returning at 11-30 a.m. from another village Harsia he heard the gun fire near the village and went to the place and saw Rajnath lying with bleeding injury near the electric pole and blood was also coming from the head of Amir Ram. Amir Ram told him that Gupteshwar fired at Rajnath and Mahendra gave lathi blow to him. He went the police station along with the informant. He admitted that Rajnath and his brother Amir Ram at the time of occurrence were at the Dalan and chauthari was being performed. The women had been coming from northern side and when he reached near the house of Budhu, Budhu started

abusing. From all these evidence led by the prosecution about the occurrence, it is made out that on the day of occurrence when the women were returning after chouthari along with Vijay Kumar Ram (P.W.1) the appellant Budhu began to abuse and when Sukhia Devi (P.W.8) wife of Amir Ram complained to her husband then Amir Ram went to Budhu and protested against the abusing upon which Budhu started abusing more loudly and called his men who came armed with weapons and started brick-batting. Mahendra gave a lathi blow on the head of Amir Ram and also a blow was given by Rajbali Prasad Ram to him (Amir Ram). When Rajnath went to support his father, Gupteshwar fired at him who getting the injury fell down and thereafter the accused ran away.

16. Besides these oral evidence there is medical evidence of Dr. K.P. Rai. He had performed the post mortem examination on the dead body of Rajnath Ram on 29.5.1986 at about 8 A.M. and he found the following two lacerated wounds on the chest of the deceased :-

"1. One lacerated punctured wound 1" in diameter with overt margin on lateral aspect of right chest in the middle with blood oozing.

II. One lacerated punctured wound 2" in diameter with overt margin on the lateral aspect of left chest."

On dissection 4th rib of right side was fractured. Both lungs and heart were punctured and lacerated. All chambers of heart were empty. All the injuries were ante

mortem and were caused by fire arms. Time elapsed since death was within 24 hours. The cause of death was due to injury to the vital part of head and brain and was sufficient to cause death in ordinary course of nature. He also said that at 8.A.M. he examined Amir Ram of the same village and found the following injuries :-

" I. One lacerated wound 1.5" X .5" on the parietal bone in the mid line.

II. One bruise 2" X 1" on the right leg below knee joint."

According to the doctor both the injuries were simple caused by hard blunt substance, such as lathi within 24 hours. In cross- examination he said that injury of Rajnath could have been caused if the appellant was just facing him and the said injury could not have been caused from behind. Thus the medical evidence also corroborates the version about firing by Gupteshwar and injury given to Amir Ram on the head and right leg below knee joint.

17. The investigation officer Birendra Kumar Jha also says that he had gone to the place of occurrence after registration of first information report and found the deceased on the spot, for whom he prepared inquest report and sent the dead body for post mortem examination. He also examined the witnesses on the spot including the injured Amir Ram. The place of occurrence is the same as said by prosecution and he found the dead

body there in the Gali. He also said about the well, Dalan and the bullet. He seized the blood. So the objective finding of the I.O. is also supporting the case of the prosecution.

18. The defence has examined the two defence witnesses, for the alibi of acquitted accused Shree Narain. But the third witness p.w.8 Saryug Ram has said that the victim was injured on account of Ajay whose bullet had stuck up in the barrel and when Ajay tried to clear of it suddenly went off hitting and killing the victim Rajnath - on the spot. This plea of the defence about accidental firing on account of gun of Ajay is falsified by the objective finding of the I.O. that the dead body was found in the Gali in front of the house and not inside the house of the informant. The witnesses also say that the deceased fell down there. Besides Amir Ram has got two injuries on the head and leg and there is no reason to disbelieve the injured witnesses when other facts and circumstances of the case are giving out the version given by the injured witnesses. Thus from this evidence it is made out that the firing was done by appellant Gupteshwar Ram. This role has been given to none else but Gupteshwar Ram. The defence suggestion as well as the statement of P.W. 3 that during chauthari of Vijay his brother Ajay was making merry with gun and in doing so the bullet stuck in the barrel and when Ajay tried to clear it suddenly fired hitting Rajnath and killing him on the spot is not at all made out. The eye-witnesses are

clear and categorical about the role of the firing by Gupteshwar Ram. Nothing has come out to show that this witness was not on the spot. The victim on getting gun shot injury died on the spot. As such the case u/s 302 I.P.C. against the appellant Gupteshwar is well made out.

19. Learned Counsel for the appellants has urged that it was a sudden quarrel and so there could not be any question of an unlawful assembly and therefore the individual acts, if at all made out, can be taken into consideration and also for that reason offences under sections 147, 148 and section 302 read with section 149 are not made out. For this contention he has referred to and relied upon a decision of the Supreme Court in the case of *State of U.P. v. Jodha Singh & others.*¹ (I) where lordships have been pleased to observe in para 19 as follows :-

“ On the question whether all the accused or only some of them should be convicted for the injuries caused to the deceased and P.W.1, we must, say even at the outset that the accused cannot be convicted for the offence of rioting the attack on the victims had taken place in the course of a sudden quarrel. The accused had not formed themselves into a unlawful assembly in order to commit the offence of rioting. Hence none of the accused can be convicted under section 147 or 148

1. (1989) A.I.R.(SC)1822 = (1989) Cr. L.J. 2113

I.P.C. In so far as the injuries caused to the deceased and P.W. 1 are concerned, we find that though A-1 was armed with a lathi and A-7 was armed with a Tamancha, they had not made use of them on the deceased or P.W.1. Therefore, A-1 and A-7 cannot be convicted for the injuries caused to the deceased and P.W.1 and their acquittal has to be sustained, though for different reasons. As regards A-2 to A-4 and A-6, they were armed with tamanchas and they had caused injuries to the deceased. A-5 was armed with a lathi and he had used the same against the victims. The evidence does not establish as to who among the assailants caused the fatal injuries to the two deceased. Consequently A-2 to A-6 merit conviction under Section 304 Part II I.P.C. read with Section 34 I.P.C. As regards the attack on P.W.1 it cannot be said that A-2 to A-6 had attempted to murder him because the injuries had been caused in the course of a sudden quarrel. They can therefore be convicted only under Section 326 read with Section 34 I.P.C. and not under Section 307 read with Section 34 I.P.C. Accordingly we convict A-2 to A-6 under Section 304 Part II I.P.C. read with Section 34 I.P.C. (two counts) and under Section 326 read with Section 34 IPC."

There is also a decision of the Supreme Court in the case of *Mariadasan & oths. vs. State of Tamil Nadu*¹ wherein their Lordships have been pleased to observe

1. (1980) A.I.R. (SC) 573

at page 574 para 4 " In the evening, at 6 p.m. on the date of occurrence, it appears that there was a sudden altercation between P.W.1 and the accused in which the deceased Francis tried to intervene as a result of which A-2 assaulted him with knife on several parts of the body and caused a serious injury on the chest. According to the evidence, A1 is said to have assaulted P.W.1 with knife and inflicted knife injuries to him. According to the evidence of P.W.1, A3 had beaten him on the shoulder with a stick and A4 had given a beating to P.W.1 on the left knee. No overt act was ascribed to A5. Reading the evidence of P.W.1 as also the allegations made in the F.I.R. we are satisfied that there was no satisfactory evidence to prove the formation of any unlawful assembly at any time with the common object of assaulting or killing either the deceased Francis or P.W.1 The whole 'fight' started suddenly on the spur of the moment in a heat of passion and, therefore, the accused could only be liable for the individual acts committed by them. For these reasons, therefore, we agree with Mr. Singh that there is no evidence to support the conviction of rioting under Section 149, 148 or 147, I.P.C. as recorded by the High Court."

20. In the instant case Budhu was abusing and when Amir Ram went to complain to Budhu, then Budhu began abusing more loudly and on persuasion not to do so Budhu called the appellants who came armed. Out of whom Gupteshwar had a country made gun. Nand

Kumar had garasa, Budhu himself had bhala and Tribhuwan, Mahendra and Rajbali had lathis. It has not come out at all in evidence that besides injured Amir Das (P.W.7) any other person with Amir Ram had also gone to protest. The prosecution side were in the Dalan and later on they came only upto the electric pole and did not go to the house of Budhu or they went there or shouted or did any overt act. In the circumstances when only Amir Ram alone had gone, then Budhu Ram called his relations and the appellants came armed with such lethal weapons and that too, all together and started brick batting and brickbats have also been found by the I.O. on the spot, besides being stated by the witnesses. This is a clear proof of the fact that the appellants more than five in number, formed an unlawful assembly and indulged in unlawful activities of pelting stones and thereafter committing the offence. First Mahendra and Rajbali gave lathi blows to Amir Ram and when Rajnath Ram went to give support to his father and that too being unarmed, then Gupteshwar fired from his gun causing death on the spot immediately. So it cannot be said that the assembly was not an unlawful assembly. The conduct of the members of unlawful assembly, both before and after the commission of the offence has to be considered. Even if their coming together may have been lawful, but later on suddenly and at the spur of the moment it became unlawful. From the beginning till the

last they remained together sharing the common object of the unlawful assembly. In the case of *Moti Das & others. vs. State of Bihar*¹ it has been observed at page 659, para 7:-

"7. Now an assembly which was lawful when it assembled can become unlawful subsequently. This is the Explanation to section 141 of the Indian Penal Code. The law on this point has, in our opinion, been correctly set out in the 18th edition of Ratanlal's Law of Crimes at page 333 in these words:-

'An assembly which is lawful in its inception may become unlawful by the subsequent acts of its members. It may turn unlawful all of a sudden and without previous concert among its members. But an illegal act of one or two members, not acquiesced in by the others, does not change the character of the assembly.' Previous concert is not necessary. The common object required by section 141 differs from the common intention required by section 34 in this respect." In the case of *Masalti v. State of Uttar Pradesh*¹ the Supreme Court observed at page 210 in para 17:-

"It appears that in the case of Baladin, (S) AIR 1956 SC 181 the members of the family of the appellants and other residents of the village had assembled together, some of them shared the common object of the unlawful

1. (1965) A.I.R. (SC.) 202

assembly, while others were merely passive witnesses. Dealing with such an assembly, this court observed that the presence of a person in an assembly of that kind would not necessarily show that he was a member of an unlawful assembly. What has to be proved against a person who is alleged to be a member of an unlawful assembly is that he was one of the persons constituting the assembly and he entertained along with the other members of the assembly the common object as defined by S.141. I.P.C. section 142 provides that however, being aware of the facts which render any assembly an unlawful assembly, intentionally joins that assembly, or continues in it, is said to be a member of an unlawful assembly. In other words, an assembly of five persons actuated by, and entertaining one or more of the common objects specified by the five clauses of S.141, is an unlawful assembly. The crucial question to determine in such a case is whether the assembly consisted of five or more persons and whether the said persons entertained one or more of the common objects as specified by S.141. While determining this question, it becomes relevant to consider whether the assembly consisted of some persons who were merely passive witnesses and had joined the assembly as a matter of idle curiosity without intending to entertain the common object of the assembly. It is in that context that the observations made by this Court in the case of *Baldin*, (S) AIR 1956 SC 181 assume significance; otherwise in law, it would not be correct to

say that before a person is held to be a member of an unlawful assembly, it must be shown that he had committed some illegal overt act had been guilty of some illegal omission in pursuance of the common object or the assembly. In fact, S. 149 makes it clear that if an offence is committed by any member of an unlawful assembly in prosecution of the common object of that assembly, or such as the members of that assembly knew to be likely to be committed in prosecution of that object, every person who, at the time of the committing of that offence, is a member of the same assembly, is guilty of that offence; and that emphatically brings out the principle that the punishment prescribed by S. 149 is in a sense vicarious and does not always proceed on the basis that the offence has been actually committed by every member of the unlawful assembly. Therefore, we are satisfied that the observations made in the case of *Baldin*, (S) AIR 1956 SC 181 must be read in the context of the special facts of that case and cannot be treated as laying down of that case and cannot be treated as laying down an unqualified proposition of law such as *Me. Sawhney* suggests."

In the case of *Amarjit Singh & oths. V. State of Punjab*¹ their Lordships have been pleased to observe at page 223 para of 10 :-

" In inferring the common object of unlawful assemb-

1. (1993) A.I.R.(S.C.)229

ly, various factors depending upon the facts and circumstances of each case have to be taken into consideration. In the instant case these appellants were found to be armed with fire-arms as well as other deadly weapons. They went in a body and participated in the occurrence. In such a situation even Section 34, I.P.C. is attracted particularly having regard to the fact that four persons were killed and several others received injuries at the hands of the members of the unlawful assembly. The participation of each of these appellants is established. Therefore all of them shared the common object and Section 149 is squarely attracted. In this context we are also not prepared to accept the submission of the learned counsel that the case of A-2, A-4 and A-6 stands on a different footing namely that though they were armed with fire-arms it is not established that they used them. The prosecution witnesses have consistently deposed that they were members of the unlawful assembly and we have already held that the common object of the unlawful assembly was to commit the murder. In such a situation these three accused who were members of the unlawful assembly armed with fire-arms cannot get absolved."

In the case of *Thakore Dolji Vanvirji & oths. V. State of Gujarat*¹ (1993) AIR (SC) 209 their lordships again considered this aspect and observed at page 211 in para

1. (1993) A.I.R. (S.C) 209

2 :-

" Now the question is whether all the accused would constructively be liable for an offence of murder by virtue of Sec. 149. I.P.C. So far A-1 is concerned, it is the consistent version of all the eye-witnesses that he dealt a fatal blow on the head with a sword and the medical evidence shows that there was a fracture of skull and the blow must have been very forceful because even the brain was injured. Therefore, he was directly responsible for the death of the deceased and the High Court has rightly convicted him under Sec. 302 I.P.C. Now coming to the rest of the accused, all the eye-witnesses have made an omnibus allegation against them. Even A-2, according to the eye witnesses, gave only one blow and that the remaining accused gave stick blows. As these injuries were not serious and were simple.... It is only the injury No.1 which was serious and proved fatal. Therefore the question is whether under these circumstances common object of the lawful assembly was to cause the death of the deceased and whether every member of the unlawful assembly shared the same. No doubt section 149, I.P.C. is wise in its sweep but in fixing the membership of the unlawful assembly and in inferring the common object, various circumstances also have to be taken into consideration. Having regard to the ominous allegations, we think it is not safe to convict everyone of them for the offence of murder by applying sec.149 I.P.C.... No doubt he inflicted only one blow but having regard to the

nature of the weapon and the vital organ on which the blow was inflicted and the medical evidence regarding the result of injury proving fatal, he must be held responsible for offence of murder. In differentiating the case of A-2 to A-5 to that of A-1 we do not mean to say that for the purpose of section 149 I.P.C. everyone of them should participate and inflict serious injuries but having regard to the special circumstances of this case particularly in sudden manner in which the occurrence took place in the village itself, we think it would be unsafe to make every one of the accused liable for offence of murder by application of section 149, I.P.C. Accordingly, we confirm the conviction of A-1 under section 302, I.P.C. and sentence of imprisonment for life thereunder. Regarding the rest of the accused, we set aside their conviction under 5. 302/149 and sentence of imprisonment for life. Instead, we convict them under section 326/149 and sentence each of them to undergo seven years of I.R."

21. Thus considering the case of the appellants besides Gupteshwar who has got his role of firing at the deceased, the other appellants cannot say that they were not members of unlawful assembly, as they came armed with lethal weapons in block and remained till the finale. They participated in the brickbattings. Mahendra and Rajbal are said to have given lathi blows on the head and leg of Amir Ram whose injuries are made out by the evidence of the witnesses as well as the medical report

and when Rajnath was going to help his father, Gupteshwar fired at him. It is also a fact that Nand Kumar and Budhu Ram did not use their garasa and bhala. By bringing the gun, garasa, bhala and lathis the members of the unlawful assembly knew very well that grievous hurt was likely to be caused. Lathi was first used. Garasa and bhala were not used. Gupteshwar used his gun. As such appellants were members of unlawful assembly whose object was to cause at least grievous hurt to the accused. Gupteshwar Ram's firing was his individual act and so his conviction under section 302 I.P.C. for his individual act makes him liable for conviction u/s 302 I.P.C. and his individual act does not bring the rest of the appellants within the clutches of section 302 read with section 149 I.P.C. The appellants however, cannot get out as they were sharing the common object of the unlawful assembly - which was to cause at least grievous hurt or they knew grievous hurt was likely to be caused because of the deadly weapons like gun, garasa, bhala and even lathis, which therefore makes them liable to be convicted u/s 326 read with section 149 I.P.C.

22. Learned counsel for the appellants has also contended that because the other accused Bhikhari, Umesh, Radha and Seho Narain have already been acquitted, so on the basis of this evidence the appellants also should be acquitted. This contention cannot be accepted. Amir Ram is an injured witness and there is nothing to show that his evidence suffers from any

infirmity. Similarly the other witnesses are most reliable and probable witnesses. Their evidence inspires confidence. All of them have said about the participation of the appellants and simply because other accused have been acquitted, the appellants also cannot be acquitted. In the case of *Amarjit Singh & Oths. vs. State of Punjab*¹ their Lordships have observed at page 232 and 333 (paras 7 and 9) :-

"7... In the instant case all the eye witnesses are injured witnesses. It cannot be said that every one of them is active partisan in the sense that they would have the tendency of implicating the innocent persons leaving out the real culprits. In any event their evidence has been scanned carefully and has been accepted only in respect of those accused whose presence and participation in the occurrence has been established beyond all reasonable doubts. While scrutinising their evidence, the Courts below have applied the relevant test namely whether the names are mentioned in the earliest report and whether there are circumstances to prove their participation etc. The acquittal of some of these accused does not render the evidence of the injured witnesses wholly unacceptable.."

"9.... The mere fact that A-17 is acquitted, we cannot on that ground reject the evidence of the eye-witnesses in respect of the convicted accused.."

1. (1993) A.I.R.(S.C.) 229

23. In the result, the conviction of Gupteshwar Ram u/s 302 I.P.C. U/s 148 I.P.C. and u/s 27 Arms Act and his sentences of regirous imprisonment for life, two years and two years under the respective counts are maintained. The conviction of other appellants, Budhu, Nand Kumar, Rajbali, Mahendra and Tribhuwan u/s 302 read with section 149 I.P.C. and sentence of rigorous imprisonment for life are set aside but each of them is convicted u/s 326/149 and sentenced to seven years rigorous imprisonment. The conviction of Budhu and Nand Kumar u/s 148 and their sentence of two years and those of Rajbali, Mahendra and Tribhuwan u/s147 and sentence of one year R.I. and further that Mahendra u/s 328 and sentence of six months R.I. are upheld. However, the sentence of the appellants are ordered to run concurrently. With these modifications in conviction and sentence, this appeal is dismissed.

Lok Nath Prasad, J.

M.K.C.

Appeal dismissed with modification



L E T T E R S P A T E N T

Before S.B.Sinha &
A.N.Chaturvedi, JJ.

1993

May 21,

Gyan Das Shaw *

vs.

The State of Bihar and others.

Land Acquisition Act, 1894 (Central Act No.1 of 1894) sections 16 and 48 — section 16 — provisions of — possession of Land taken under the provisions of the section — whether can be divested — section 48 — applicability of — land acquired by the Collector and possession given to the allottee by Patna Industrial Area Development Authority — land whether could be released from acquisition, by Collector without giving opportunity to the allottee or to the requisitioning authority — natural justice, principles of — State of Bihar, whether could rectify its mistake by revoking the order of release.

State Government acquired 330 acres of lands for establishment of Industrial Area at Jasidih, Patna Industrial Area Development Authority allotted a portion of

*. Letters patent Appeal No.71 of 1992. Against the judgment and order dated 23rd March, 1992 of Hon'ble Mr. Justice Narbadeshwar Pandey dismissing CWJC No.2476 of 1988.

this land to M/S Hyderabad Industries Ltd., both intervenor to whom possession was given. Subsequently writ petitioner learning that 17.64 acres of his land were not utilised by Industries Departments for a long time approached for release of the land and on report by Additional Collector, Deoghar that the lands were still in possession of the writ petitioner, the State Government by notification dated 21.3.1986 ordered for release of 17.46 acres aforesaid land but before the deed of reconveyance could be signed by the Deputy Commissioner, Deoghar, the State Government by notification dated 14.7.1987 cancelled the earlier notification dated 21.2.1986 releasing the land.

Held, that it was obligatory on the part of the State to give an opportunity of hearing to Patna Industrial Area Authority as also to M/S Hyderabad Industries Ltd. as by reason thereof they were adversely affected.

It is well known that principles of natural justice are required to be complied with even in case where civil or evil consequences ensue by reason of passing an administrative order.

Held, further, that the State of Bihar in such a situation was entitled to rectify its own mistake by issuance of notification dated 14.7.1987. Such a power is inherent in the State

Held, further, that by reason of notification dated 21.3.1986 no finality can be said to have been attached

to the proceeding for release of land in favour of landholder. The State therefore, could change its mind for valid reasons.

Held, also that in terms of section 16 of the Land Acquisition Act, 1894, lands vested in the State of Bihar under the provisions of the Act cannot be divested. In that view of the matter section 48 of the Act, cannot be said to have any application whatsoever in the facts and circumstances of this case.

Case laws discussed.

Appeal under clause 10 of the Letters Patent.

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

M/S.K.K.Mishra for the appellant.

J.P.Karn, S.C.5 for the State

Dr.Alak Ranjan Pandey for Respondent
No.4

Mr.L.K.Bajla, for respondent No.5

S.B.Sinha, J. — This Letters Patent Appeal arises out of a judgment dated 23rd March,1992 passed in CWJC No.2476 of 1988 by a learned Single Judge of this court whereby and whereunder the writ petition filed by the petitioners has been dismissed.

2. The petitioner filed the aforementioned writ ap-

plication interalia for quashing a notification dated 14.7.1987 as contained in Annexure-1 to the writ application, in terms whereof it cancelled an earlier notification dated 21.3.1986 as contained in Annexure-5 thereto, releasing 17.46 acres of lands from the purview of the Land Acquisition proceedings.

3. The State of Bihar with a view to establish an industrial area at Jasidih acquired 330 acres of lands in village Chhotu Manikpur, Badaldih and Jasidih.

4. Two proceedings being Land Acquisition Case no.61/73-74 and 86 of 1973-74 were initiated, the latter case was in relation to 29.47 acres of land whereupon buildings were allegedly constructed.

5. The petitioners questioned the notification issued under the said Act by filing two writ applications in this court being CWJC Nos.230 of 1974 and 3231 of 1983 which were dismissed.

6. The petitioner, however, having come to learn that 17.46 acres of lands were not being utilised by the Industries Department for a long time, approached for release there of, whereupon the Additional Collector Deoghar upon local inspection reported that the said lands were still in possession of the petitioner. The matter was thereafter processed and ultimately, the Director, Land Acquisition, informed the Deputy Commissioner, Deoghar, that a decision had been taken by the Government for release of the aforementioned 17.46 acres of

land. He, however, opined that for the said purpose a deed of reconveyance has to be executed by the Deputy Commissioner on the condition that the petitioner should withdraw L.A.R. Case no.7 of 1980 filed by him for enhancement of compensation in terms of section 18 of the Land Acquisition Act (hereinafter referred to as the Act).

7. According to the petitioner, he relying on or on the basis of the said representation on the part of the State of Bihar, withdrew the aforementioned case, but before a deed of reconveyance was signed by the Deputy Commissioner, the impugned notification was issued.

8. In the aforementioned writ application, the Patna Industrial Area Development Authority as also M/S Hyderabad Industries Limited intervened and filed counter affidavits wherein it was inter alia contended that out of 37.11 acres of land, 20 acres of land have been leased out in favour of M/S Hyderabad Industries Limited, by the Patna Industrial Area Development Authority and in terms of its resolution dated 5.3.1987, 6.03 acres of land has been ear-marked for development of the railway siding.

9. It was contended that the Government took the decision to release the land *exparte* and without giving an opportunity of hearing to the intervenor, although the possession thereof had been given to the Authority on

25.2.1974 and on 9.8.1980 and in that view of the matter in terms of section 48 of the Land Acquisition Act the State of Bihar had no jurisdiction to withdraw the lands from acquisition.

10. It had been contended that having come to learn about the decision of the State, a protest was made by the Authority by its letter dated 24.4.1985 and on the basis thereof the entire matter was reenquired and the mistake having been detected, the impugned notification had been issued.

11. The learned single judge having considered the matter in great details inter alia held that as possession had been delivered to the respondent authority and M/S Hyderabad Industries Limited, section 48 of the Act has no application and in that view of the matter, both the orders dtd 21.3.1985 (Annexure-5 to the writ petition) as also the notification dated 14.7.1987 (Annexure-1) thereto being illegal, the same are liable to be quashed.

12. The learned Judge, however, observed as follows

"Although I have held that such action of the Government Officials, on the basis of which the petitioner has withdrawn, the Compensation case, will not give any right to the petitioner to invoke the doctrine of estoppel. But the fact remains that the petitioner has already withdrawn the compensation case. A question arise whether in such a circumstance, the petitioner can claim for enhancement

of compensation henceforth. The learned Advocate, appearing for the State, Patna Industrial Area Development Authority and Hyderabad Industries Limited have agreed that no objection will be made in case, the L.A.R. case No.7 of 1980 is restored to its original file. Taking into consideration, the peculiar facts of the case as also the stand taken by the respondents it will be in the interest of the petitioner to direct the Sub-Ordinate Judge, Deoghar to restore the L.A.R. Case No.7 of 1980 to its original file and start its proceeding from the stage where it was permitted to be withdrawn."

13. Mr. K. K. Mishra, the learned counsel appearing on behalf of the appellant inter alia submitted that as the petitioner withdrew his application under Section 18 of the Act, the State, is bound by the doctrine of 'promissory estoppel particularly in view of the fact that in terms of order 23, Rule 22 of the Code of Civil Procedure the petitioner would not be in a position to file another application under section 18 of the Act as the said application has become barred under the law of limitation.

14. It was further submitted that the Learned Single Judge has failed to take into consideration the report of the Director Land Acquisition as also that of Additional Secretary to the effect that the petitioner had been continuing in permission, and thus it was wrongly held no application in the facts and circumstances of the case.

The learned counsel in support of this contention has

relied upon a decision of the Supreme Court in *Spl. Land Acquisition Officer, Bombay Vs. M/S. Godrej & Boyce* reported in AIR 1987 S.C. 2421.

15. Mr. J.P.Karn the learned Standing Counsel No.5, however, submitted that as the delivery of possession had been affected on 9.8.1980 in the Land Acquisition proceeding Nos. 61 of 1973-74 and 86 of 1973-74, the provisions of Section 48 of the Act could not have been taken recourse to and in that view of the matter, the petitioner is not entitled to any relief.

16. Dr. Alak Ranjan Pandey learned counsel appearing on behalf of the Patna Industrial Area Development Authority and Mr. L.K. Bajla learned Counsel appearing on behalf of M/S. Hyderabad Industries Limited also submitted that for the purpose of passing a valid order a notification under Section 48 of the Act has to be issued and in view of the fact that no such notification had been issued, it was open to the Government to change its opinion at any stage prior thereto.

17. It was further submitted that even assuming that the State has no power to review its earlier order as was contended by the petitioner, this court cannot be said to have committed any illegality in quashing both the notifications.

The learned Counsel in support of this connection has relied upon a decision of this court in 1991 (1) PLJR 636.

The learned counsel has also relied upon decision *Lt. Governer, H.P. Avinash Sharma reported in AIR 1970 S.C.1576 Balwant Narayan Bhagde vs. M.D.Bhagwat and others reported in AIR 1975 S.C. 1767* and *Khan Bahadur Chowkaran Kloth, Mammad Koyi Vs. Province of Madras reported in AIR 1946 Madras 450.*

18. Section 48(1) of the Act reads thus :-

"Completion of acquisition not compulsory, but compensation to be awarded when not completed - (1) Except in the case provided for in Section, 36 the Government shall be at liberty to withdraw from the acquisition of any land of which possession has not been taken."

19. It is, thus clear that the provisions of Section 42 would be applicable only in a case where possession of the land had not been taken.

20. From a perusal of a letter dated 2.11.1986 issued by the Additional Collector, Deoghar to the Additional Secretary Land Acquisition, it appears that the possession of the lands in question was handed over to Patna Industrial Development Authority. The Additional Collector, However in his report dated 9.8.1980 stated that 17.46 acres of land were still in possession of the petitioner.

21. However, from the letter dated 21.7.1986 addressed by the Director Land Acquisition to Deputy Commissioner Deoghar as contained in Annexure 3 to the writ application which is the sheet-anchor of the petitioner's claim, it appears that therein it had been

stated that legal possession of the land in question had been delivered.

22.It would therefore not be correct to contend that no possession was delivered in terms of the provisions of the Land Acquisition to the Industries Department.

23. In the application for intervention filed by the Patna Industrial Area Development Authority, it has been contended that it had been put in possession of the land including the house, and out of the said area 20 acres of land had been leased out to M/s. Hyderabad Industries Limited and thereupon a factory has also been constructed.

24. The petitioner has further accepted the position that it had filed application under section 18 of the Act for enhancement in the amount of compensation.In that view of the matter, it is too late in the day for the petitioner to contend that the land acquisition proceedings had not validly come to an end.

25. From a perusal of Annexure-6 to the writ application it appears that it had specially been mentioned there in that possession of the lands has been given to the Patna Industrial Area Development Authority.

26. From A perusal of a copy of the Certificate of Anchal Adhikari, Deoghar which is contained in Annexure - A to the counter affidavit, it also appears that the possession of the lands had been given to the intervenor.

27. The petitioner in reply to the said counter affidavit has not controverted the statements made therein. It is also evident that proceedings under section 144 of the Cr. P.C. was initiated as there has been apprehension of breach of peace with regard to possession of the land.

28. The learned Single Judge upon taking into consideration all the facts and circumstances of the case has come to the conclusion that possession had been delivered by the State of Bihar in favour of Patna Industrial Area Development Authority. If possession had been delivered in terms of section 16 of the Act any subsequent encroachment made by the petitioner would not confer him any right.

In terms of Section 16 of the Act, the land vested in the State of Bihar under provisions of the Land Acquisition Act cannot be divested. In *Maharaj Singh Vs. State of U.P.* reported in 1976 S.C.2602; 1977(1) S.C.C.155 it has been held as follows :-

“True, this cutback on the amplitude of the vesting is not an incident of the estate created but is provided for by the Act itself. Even so, we have to envision, in terms of reality law, what are the nature and incidents of the interest vested in the sabha-full ownership divestible under no circumstances of partial estate with the paramount interest still surviving in present in the State.

It is reasonable to harmonize the statutory provisions

to reach a solution which will be least incongruous with legal rights we are cognisant of in current jurisprudence. Novelty is not a favoured child of the law. So it is right to fix the estate created by section 117 into familiar moulds if any such an approach lends to the position that the vesting in the State was absolute but the vesting in the Sabha was limited to possession and management subject to divestiture by Government. Is such a construction of vesting in two different senses in the same section, sound? yes, it is, because 'vesting' is a word of slippery import and has many meanings. The context controls the text and the purpose and scheme project the particular Semantic shade or nuance of meaning. That is why even definition clauses allow themselves to be modified by contextual compulsions. So the sense of the situation suggests that in section 117 (1) of the Act 'vested' in the State carries a plenary connotation, while shall right to full possession and enjoyment so long as it lasts. Lexicographic support is forthcoming, for this meaning. Black's law dictionary gives as the sense of 'to vest' as give an immediate fixed right of present or future enjoyment, to clothe with possession, to deliver full possession of land or an estate, to give sesin Webster's Third International Dictionary gives the meaning as 'to give to a person a legally fixed immediate right of present or future enjoyment. "

29. In this view of the matter, Section 48 of the said Act cannot be said to have any application whatsoever

in the facts and circumstances of this case.

30. In *special Land Acquisition Officer, Bombay and others Vs. M/S. Godrej and Boyce* reported in 1987 S.C 2421 it has been held that unless possession is taken over the ownership of the land continues with the original owner.

It was therefore held :-

“ It is in view of this position, that the owner’s interest remain unaffected until possession is taken, that section 48 gives a liberty to the State Govt. to withdraw from the Acquisition at any stage before possession is taken. By such withdrawal no irreparable prejudice is caused to the owner of the land, and if at all he has suffered any damage in consequence of the acquisition proceedings or incurred costs in relation thereto, he will be compensated therefor under section 48 (2). In this view of the matter, it does not matter even if there is lapse of considerable time between the original notification and the withdrawal under Section 48 as held in *Trustees of Bai Sarth Jain Shvetambar Mutipujak Gyanochaya Trust V. State of Gujrat*, Alr 1981 Guj, 107. It also follows that the State can be permitted to exercise its power of withdrawal unilaterally and no requirement that the owner of the land should be given an opportunity of being heard before doing so should be read into the provision.”

31. However, in that case the Supreme Court was not required to take into consideration a situation where

possession has already been delivered to a third party and who had also deposited the amount of compensation.

32. The lands in question, as noticed hereinbefore, were acquired for the purpose of establishing an industrial area. The lands by reason of the acquisition vested in the Patna Industrial Area Development Authority who in turn allotted in various possession of the lots to the intervenors. The lands in question, as noticed hereinbefore, had been given in favour of M/S. Hyderabad Industries Limited. In this situation, in any opinion, it was obligatory on the part of the State to give an opportunity of hearing Patna Industrial Area Development Authority as also the aforementioned M/S. Hyderabad Industries Limited. As by reason thereof, they would be adversely affected.

33. It is now well known that principles of natural justice are required to be complied with, even in a case where civil or evil consequences ensue by reason of passing an administrative order.

34. As the principles of natural justice have not been complied with, the order dated 21.3.1986 (Annexure 5) was passed.

35. The State of Bihar, in such a situation, was entitled to rectify its own mistake. Such a power is inherent in the State.

Recently in *Jai Singh Dalal Vs. State of Haryana* reported in 1992 AIR Supreme Court Weekly page 632 has held as follows :-

“ It was then argued that the State Government had no power to withdraw or rescind the earlier notifications of December, 20.1990 and January, 25.1991. On behalf of the State Government counsel submitted that the State Government had inherent power to withdraw, rescind or cancel the notification it had issued on the principle that the authority in whom the power to create is vested has that power to destroy or mould its creation. Reliance was also placed on Section 19 of the Punjab General Act, 1898, which reads as under :-

“19. Power to make to include power to add to laws, amend, vary, or rescind orders, rules or by laws where, by any Punjab Act, a power to issue notifications or make orders, rules or bye-laws is conferred, then that power includes a power exercisable in the like manner and subject to like sanction and conditions (if any) to add, to amend, vary or rescind any notifications orders, rules or bye-laws so issued or made.”

Counsel for the appellants argued that since the notifications were under the Rules and not any statute the said provisions would not be applicable.

It was further submitted that the power, even if exercisable, could be exercised 'in the like manner and subject to like sanction and conditions', which neces-

sitated consultation with the HPSC before the issuance of the notification dated December, 30, 1991 by which the earlier two notifications were cancelled or withdrawn. We see no merit in these submissions."

The Supreme Court proceeded to observe :-

"Even if Section 10 does not apply, *stricto sensu*, we see no reason to hold that a State Government which has the power to specify the method of special recruitment by notification has no inherent power to revise the same if it for good reasons considers the same necessary. To so hold would mean that even if the State Government had committed a mistake it has no power to rectify or correct the same."

36. In *Khan Bahadur Chowkaran Keloth Mammad Koyi Vs. province of Madras* reported in AIR 1946 Madras 450 it has been held that where Government decided to withdraw the acquisition proceedings and directed the Collector to submit through the Board of Revenue the necessary notification for publication but before it was published it again decided to go on with the acquisition, no illegality can be said to have been committed by the government, in a fresh notification under Sections 4 and 5 was necessary.

37. By reason of Annexure- 5 to the writ application, no finality can be said to have been attached to the proceeding for release of the land. The State therefore, could change its mind for valid reasons.

38. In *Lt. Governor of H.P.V. Sr. Avinash Sharan* reported in 1970 (2) SCC 149 it has been held:-

"Power to cancel a notification for compulsory acquisition is, it is true, not affected by Section 48 of the Act; by a notification under Section 21 of the General Clauses Act, the Govt. may cancel, or rescind the notification issued under Sections 4 and 6 of the Land Acquisition Act. But the power under section 21 of the General Clauses Act cannot be exercised after the land statutorily vests in the State Government. "

39. The same view has been taken by a division Bench of this Court in *M/S. Jethmal BhoJraj and another Vs. State of Bihar* reported in 1975 Patna 339.

40. Further in this case, the petitioner shall not be prejudiced at all in view of the fact that the learned Single Judge has also directed restoration of the reference case which was initiated on the basis of an application filed by the petitioner for enhancement of compensation under Section 18 of the Land Acquisition Act and in that view of the matter, neither the doctrine of promissory estoppel nor the provisions of order 23 Rule 2 of the Code of Civil procedure can be said to have any application.

41. For the reasons aforementioned, there is no merit in this appeal which is accordingly dismissed but in the facts and circumstances of the case, there will be no order as to costs.

R.D.

Appeal dismissed

CIVIL WRIT JURISDICTION**Before B.P.Singh &****Radha Mohan Prasad, JJ.****1993****October, 15.****Bihar State Co-operative Marketing Union Ltd. and
another.*****V.****Indian Farmers Fertilizer Co-operative Ltd. and
Others.**

Constitution -- Articles 12 and 226 -- Articles 12 -- Indian Farmers Fertilizer Co-operative Limited, Whether a "State or an "Authority " under Article 12 -- whether amenable to writ jurisdiction -- Multi State Co-operative Societies Act, 1984 -- section 74 -- alternative remedy available to writ petitioner under -- writ application, maintainability of .

Where the Bihar State Co-operative Marketing Union Ltd., herein-after referred to as Biscomaun, the petitioner, incurred disqualification as per Rule 19 of the Rules framed under Multi State Co-operative Societies Act, 1984 leading to the passing of the impugned resolution by Indian Farmer's Fertilizer Co- operative Ltd,

*. Civil Writ Jurisdiction Case No. 7303 of 1993. In the matter of an application under Article 226 and 227 of the Constitution of India.

herein- after referred to as IFFCO, to the effect that Biscomaun will forfeit their right to send their nominee on the Board of IFFCO and Biscomaun sought the quashing of the aforesaid resolution by this writ application;

Held, that from a perusal of the bye-laws of IFFCO it is clear that IFFCO is neither a "State nor an " Authority" under Article 12 of the Constitution and is thus not amenable to the writ jurisdiction of the High Court, From the said Bye-Laws it appears that the Government of India has subscribed only a small part of the capital and that can also be retired. The Government of India has no control over the management of IFFCO. In no way function of IFFCO can be said to be functions of a State.

In the instant case it can not be said that while passing the impugned resolution, any duty was imposed on IFFCO which can be said to be of public nature or involving people at large. The High Court in exercise of its power under Article 226 of the Constitution cannot adjudicate upon such a dispute by entertaining a writ application under Article 226 of the Constitution.

Held, further, that the remedy of the petitioners lies under section 74 of the Multi State Co-operative Societies Act, 1934 which is equally convenient remedy available to them hence they cannot maintain this writ application.

Case laws discussed.

Application under Articles 226 and 227 of the Constitution.

The facts of the case material to this report are set out in the judgement of Radha Mohan Prasad, J.

Mr. R.B.Mahto for the patitineor.

Mr. K.D. chatterjee for the responded.

Radha Mohan Prasad, J. — This writ application has been filed for quashing the resolution of the Board of Directors of the Indian Farmers Fertilizer Co-operative Ltd., 34, Nehru Place, New Delhi, in its 206 th meeting held on 14.5.1993 communicated by respondent no. 2 vide his letter dated 15.5.1993 whereby and whereunder it has been resolved that in view of the prolonged default, the Biscomaun have incurred disqualification as per Rule 19 of the Multi State Co-operative Societies Act, 1984 (hereinafter referred to as "the Act") and that they will forfeit their right to send their nominee on the Board of the respondent Co-operative from the next Board meeting of the same till they clear all pending dues as arrived at and settled mutually. Besides this it was further resolved authorising the Managing Director to take further necessary action as required under the provisions of the Act.

2.Mr. K.D. Chatterjee, learned Senior Counsel appearing of behalf of the respondent Co-operative has raised a preliminary objection as to the maintainability of

the present writ application on the grounds that the respondent Co-operative is not a 'State' within the meaning of Article 12 of the Constitution of India and rather it is merely a Co-operative Society registered under the Act. Further, it has been contended by him that the respondent Co-operative is neither an agency nor instrumentality of the State. The other preliminary objection, as taken by Mr. Chatterjee, is that in view of Section 74 of the Act, the writ petition is fit to be rejected on this score as well in as much as in view of the dispute which touches the management or business of the respondent Co-operative is subject to statutory determination under the aforesaid provisions which envisages that any dispute touching the Constitution on management or business shall be referred to the Central Registrar, Co-operative Societies for decision.

32. Two counter affidavits have been filed on behalf of the respondents, one on behalf of respondents no.1 and 2 and the other on behalf of respondent no. 2, sworn by the same person, namely, Senior Manager (Co-operative Services). Besides raising the aforesaid preliminary objections, the respondent Co-operative has also given the details of fact in support of the reasons for passing of the impugned resolution which we need not go into in the present case, in view of the order which we propose to pass in this case.

4. As regards the first question Mr. R.B.Mahto,

learned Advocate General appearing on behalf of the Biscomaun (petitioner) has at first ventured to submit that respondent no. 1 is a 'State' as the majority of the share capital is subscribed by the Government of India and other public financing institutions. Further, it has been contended that the Board of Directors of respondent no. 1 consists of different categories of Directors, and five of them are to be nominated by the Government of India, financing agency or agencies providing long term credit. Thus even from the composition of the general body, Board of Directors and authorised paid up share capital of respondent no. 1 all taken together the same is a 'State' within the meaning of Article 12 of the Constitution of India and is thus amendable to the writ jurisdiction of this Court.

5. On the other hand, Mr. Chatterjee appearing for the Indian Farmers Fertilizer Co-operative Limited (hereinafter referred to as 'IFFCO') has produced its registered Bye-Laws, as amended upto may 11, 1992. Clause 3 of the said Bye-Laws contains the objects, according to which its main object is to promote the economic interests of its members by undertaking manufacture of chemical fertilizers and its marketing. Clause 4 provides for the membership of IFFCO and clause 5 regarding the share capital.

6. It appears that the respondent Society being unique one as was initially started in the year 1967 with

a huge capital of more than a million on experimental basis.

7. After going through the Bye-Laws we feel satisfied that the respondent Society is neither a 'State' nor an 'Authority' under Article 12 of the Constitution of India. From the said Bye-Laws it appears that the Government has subscribed only a small part of capital and that can also be retired. The Government has no control over the management of IFFCO. In no way the function of IFFCO can be said to be the functions of a State.

8. Mr Chatterjee appearing for the IFFCO has produced several judgments and orders of different High Courts about which reference has been made in subparagraph (ii) of paragraph 4 of the first counter affidavit filed on behalf of respondents no, 1 and 2. In the said judgments, the question as to whether the respondent Society is a 'State' or its agency or instrumentality of the State was considered, in detail, and it was held that it is neither 'State' nor a 'Authority' under article 12 of the Constitution of India. We are in respectful agreement with the reasoning given in the aforesaid judgments.

9. Mr. Mahto, learned counsel appearing for the petitioners, then submitted that even assuming ~~that~~ it is not 'State' within the meaning of Article 12 of the Constitution, yet this Court in exercise of its power under Article 226 can issue writ to the respondent Co-operative which performs public duty. He submitted that Article 226

confers power on the High Courts to issue writs for enforcement of the fundamental rights as well as non-fundamental rights. He further contended that the word "any person or authority" used in the said Article are not to be confined only to statutory authorities or instrumentalities of the State. It can cover any other person or body performing public duty as well. He also submitted that what is relevant is the nature of the duty imposed on the body and the duty must be judged in the light of positive obligation owed by the person or authority to the affected party. Further, he submitted that the High Court cannot refuse to exercise its power under Article 226 on the ground that the duty to be enforced is not imposed by the statute. In this regard he referred the Supreme Court decision in the case of *Shri Anandi Mukta Sadguru Shree Muktajee Vandasjiswami Suvarna Jayanti Mahotsav Smarak Trust and others v. V.R. Rudani and others*, reported in AIR 1989 Supreme Court 1607, the relevant portion of which as extracted from the placitum, is quoted hereunder :-

" If the rights are purely of a private character no mandamus can issue, if the management of the college is purely a private body with no public duty mandamus will not lie. These are two exceptions to Mandamus. But once these are absent and when the party has no other equally convenient remedy, mandamus cannot be denied. The law relating to mandamus has been made the most spectacular advance. Articles 226 confers wide

powers on the High Courts to issue writs in the nature of the prerogative writs. This is a striking departure from the English law. Under Article 226, writs can be issued to any person or authority". It can be issued " for the enforcement of any of the fundamental rights and for any other purpose". The term "authority" used in Article 226, in the context, must receive a liberal meaning unlike the term in Article 12. Article 12 is relevant only for the purpose of enforcement of fundamental rights under Art. 32. Article 226 confers power on the High Courts to issue writs for enforcement of the fundamental rights as well as non-fundamental rights. The words "any person or authority" used in Article 226 are, therefore, not to be confined only to statutory authorities and instrumentalities of the State. They may cover any other person or body performing public duty. The form of the body concerned is not very much relevant. What is relevant is the nature of the duty imposed on the body. The duty must be judged in the light of positive obligation owed by the person or authority to the affected party. No matter by what means the duty is imposed. If a positive obligation exists mandamus cannot be denied. It may be pointed out that mandamus cannot be denied on the ground that the duty to be enforced is not imposed by the statute. The judicial control over the fast expanding maze of bodies affecting the rights of the people should not be put into watertight compartment. It should remain flexible to meet the requirement of variable circumstances. Man-

damus is a very wide remedy which must be easily available 'to reach injustice wherever it is found'. Technicalities should not come in the way of granting that relief under Article 226."

10. By placing reliance on the said decision, learned Counsel appearing for the petitioners submitted that the respondent Co- operative performs public duty in promoting the economic interests by undertaking manufacture of chemical fertilizers and allied products/ bye products and their conversion, storage, transportation, marketing etc. Thus, according to him, the submission of Mr. Chatterjee that the writ is not maintainable cannot be sustained.

11. On other hand, Mr. Chatterjee submitted that in the facts and circumstances of this case, no public duty is involved nor there can be an question of performance of public duty by the respondent Co-operative. According to him, the matter relates to internal management and there is nothing to show that the respondent Co-operative is required to perform duty of any public nature. In this regard he has placed reliance of the decision of the Supreme Court in the case of *Life Insurance Corporation of India v. Escorts Ltd. and others* reported in AIR 1986 Supreme Court 1370, in which the Supreme Court while considering the State's action and action of instrumentality of the State with reference to Articles 14, 12, 32 and 226 of the Constitution of India, held as follows :-

“While it cannot be doubted that every action of the State or an instrumentality of the State must be informed by reason and that, in appropriate cases, actions unfirmed by reason may be questioned as arbitrary in proceedings under Art. 226 or Art. 32 of the Constitution, Art. 14 cannot be constr as a char for judicial review of State actions and to call upon the State to account for its actions in its manifold activities by stating reasons for such actions, For example, if the action of the State is political or sovereign in character, the Court will keep away from it. The Court will not debate academic matters or concern itself with the intricacies of trade and commerce. if the action of the State is related to contractual obligations or obligations arising out of the t ort, the court may not ordinarily examine it unless the action has some public laws character attached to it. Broadly speaking, the court will examine actions of State if they pertain to the public law domain and refrain from examining them if they pertain to the private law field. The difficulty will lie demarcating the frontier between the public law domain and the private law field. It is impossible to draw the line with precision and it may not be attempted. The question must be decided in each case with reference to the particular action, the activity in which the State or the instrumetality of the State is engaged when performing the action, the public law or private law character of the action and a host of other relevant circumstances. When the State or an instrumentality of

the State ventures into the Corporate world and purchases the shares of a company it assumes to itself the ordinary role of a shareholder, and robes of a shareholder, with all the rights available to such a shareholder. There is no reason why the State as a shareholder should be expected to State its reasons when it seeks to change the management, by a resolution of the Company, like any other shareholder."

12. In my opinion, in the facts of the present case, it is difficult to hold that while passing the impugned resolution, any duty was imposed on the respondent Body which can be said to be of public nature or involving people at large. It is true that there appears to be long standing business relationship between petitioner no.1 and the respondents but the prolonged default which disqualified them as per Rule 19 of the Rules framed under Multi -State Co-operative Societies Act, 1984 led to passing of the impugned resolution. The alleged default and the claim of the petitioners that the disqualification cannot be automatic and unilateral in view of section 34 of the Act which contemplates disqualification only after receipt of the notice of default issued to the members of such Society within the date for repayment or payment of which, according to the petitioners, they were never given any notice by respondent no.1, is purely an internal dispute between the petitioners and the respondent Co- operative and the same has nothing to do with the performance of any

public duty. Thus in my opinion, this Court in exercise of its power duty. Thus, in my opinion, this Court in exercise of its power under Article 226 cannot adjudicate upon such a dispute by entertaining a writ application under Article 226 of the Constitution. Moreover it has been rightly contended by Mr.Chatterjee , learned counsel appearing for the respondents that the petitioners have remedy for settlement of such dispute under section 74 of the Multi State Co-operative Societies Act,1984, by the Central Registrar which is wide enough to include even the present dispute which exists between the member and the Board and, thus, even according to the Supreme Court decision in the case of *Shri Anadi Mukta Sadguru S.M.V.J.M.S. Trust vs. V.R.Dudani* (Supra) in which it has been held that if the rights are purely of a private character no mandamus can issue, if the management of the college is purely a private body with no public duty mandamus will not lie. But, besides these, their Lordships also have held that once the aforesaid are absent and when the party has no other equally convenient remedy, mandamus cannot be denied.

13. In the instant case as I have already noticed above, the parties have the remedy for settlement of the dispute under section 74 of the Multi State Co-operative Societies Act,1984, and, thus even assuming for argument sake that the aforementioned two conditions are absent, yet the parties here have equally convenient remedy. Thus, in my opinion, the writ is not maintainable

on this score as well.

14. Mr.Mahto, learned Counsel appearing for the petitioners, has ventured to submit that as the default has not yet been determined or reconciled, the question of disqualification under Rule 19 does not arise. Thus, according to him, the dispute has not as yet arisen which can be referred to the Central Registrar for settlement under section 74 in as much as it has been submitted that the Registrar does not come into picture before even a dispute be raised. In this regard, Mr.Mahto has submitted that the question of dispute would only arise if the disqualification for a member of a Board is finally determined in terms of section 34 of the Multi State Co-operative Societies Act, 1984. The relevant provision in this regard referred to by Mr.Mahto is quoted hereunder :-

"34. No member of any multi state cooperative society or nominee of a member-society on a national co-operative society shall be eligible for being chosen as, or for being, a member of the board of such multi-state Co-operative society or national cooperative society or of any other co-operative society to which the multi-state co-operative society is affiliated, if such member -

(g) has taken loan or goods on credit from the society of which he is a member, or is otherwise indebted to such society and after the receipt of a notice of default issued to him by such society, has defaulted -

(i)

(ii) When such loan or debt or the price of goods taken on credit is to be paid in instalments, in payment of any instalment, and the amount in default or any part thereof has remained unpaid on the expiry of six months from the date of

such default."

He, therefore, contended that as no such notice of default was ever issued to the petitioners, the petitioners cannot be held to be ineligible for being chosen as a member of the respondent co-operative. According to him, thus the dispute would only arise when the default is finally determined and not before that. In my opinion, the said submission is fallacious and fit to be rejected.

15. The point urged by Mr. Mahto is by itself a dispute as to whether the disqualification of the petitioners under Rule 19 without giving any notice is permissible. Further, the questions formulated in paragraph 2 of the writ application in which the action of the respondents to disqualify the petitioners under Rule 19, who have acquired membership by virtue of having subscribed to the share capital of respondent No. 1, on the false plea of being defaulter when the accounts have not been reconciled, by itself is a dispute. Thus, in my opinion, the remedy of the petitioners very much lies under section 74 of the Multi State Co-operative Societies Act, 1984, and even assuming for argument sake that it is held that the rights involved in the present case are not purely of a private character and that the management of respondent No. 1 is not purely of a private body with no public duty, yet on the ground of the aforementioned equally convenient remedy available to the petitioners, they cannot maintain the present writ application.

16. For the reasons aforementioned, I hold that the writ application is not maintainable, and , thus , it is fit to be summarily dismissed.

17. In the result, this writ application is dismissed without costs:

B.P.Singh,J. I agree

R.D.

Application dismissed.



CIVIL WRIT JURISDICTION**Before S.B.Sinha & Gurusharan Sharma,JJ.****1993****December,21****Prayag Prasad Gupta *****v.**

The Chairman-cum-Managing Director, Bihar State Road Transport Corporation, Sultan Palace, Bihar at Patna & ors.

Constitution -- Article 226 -- writ petitioner found guilty of committing fraud -- High Court whether to exercise its discretionary jurisdiction in his favour -- appellate order a nullity, whether a declaration that it was a nullity and without jurisdiction was sufficient.

A disciplinary proceeding was initiated against the petitioner a Class III employee of Bihar State Road Transport Corporation and his services were terminated with effect from 24.10.1968 as he was found guilty of the offence of allowing ten passengers to travel without tickets in the bus.

Subsequently, the writ petitioner was reinstated by order dated 15.9.1988 passed by the Chief Administrator, the appellate authority, and the writ petitioner rejoined his service. The Chairman-cum-Managing Direc-

* . Civil writ Jurisdiction case No.1241 of 1993. In the matter of an application under Article 226 and 227 of the Constitution of India..

tor of Bihar State Road Transport Corporation terminated the service of the writ petitioner by his order dated 11.11.1992 by which he cancelled the order of the appellate authority dated 15.9.88 holding that the appellate order was bad as it was obtained by fraud 20 years after termination of his service.

Held, that in view of the finding that fraud had been practiced by the writ petitioner in collusion with the appellate authority in obtaining favourable order although in fact no appeal was preferred by the writ petitioner, the appellate order is a nullity and hence in relation to such an order no specific order was required to be passed, but merely, a declaration that the appellate order was without jurisdiction and thus a nullity.

Held, further, that , in the facts and circumstances, of the case and particularly in view of the fact that the writ-petitioner has been found guilty of committing fraud, this High Court in its writ jurisdiction cannot exercise its discretionary jurisdiction in favour of the writ petitioner.

Case laws discussed.

Application by the petitioner.

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

M/S. Shyama Prasad Mukherjee, Rajiv Kumar Sharma and Abhimanyu Sharma for the petitioner

Mr.J P Karn, G.P.7 for the respondents.

S.B.Sinha.J. This application is directed against an order dated 11.11.1992 issued by the Chairman cum-Managing Director (C.M.D.) whereby and where under the services of the petitioner was terminated by cancelling the order dated 15.9.1988 passed by the then Chief Administrator Sri.M Minj in terms whereof the petitioner was directed to be reinstated in the services.

2. The petitioner was appointed as class III employee by the Respondent Corporation in the year 1965, A disciplinary proceeding was initiated against him in the year 1968. It appears that there had been some complaint against him. The petitioner was allegedly found guilty in relation to an offence of allowing ten passengers to travel in the bus without any tickets. His services were terminated with effect from 24.10.1968.

3. Allegedly, an appeal was preferred by the petitioner before the General Manager, Patna against the said order of termination in the month of November, 1968. According to the petitioner prior to the said order of termination, no departmental proceeding was initiated against him nor he was given an opportunity of being heard.

4. According to the petitioner on or about 15th September 1988, he received a copy of the order passed by the Chief of the Administration, Patna, which is contained in Annexure - 1 to the writ application whereby

and whereunder the aforesaid termination order was sought to be cancelled and the same was substituted by the following punishments :-

* (i) Rs.300/- (Three hundred) by way of fine and the same would be recovered from the salary of the petitioner in 3 instalments.

(ii) The period of termination would not be counted in continuation of the services and as such there would be breakage in service of the petitioner.

(iii) The petitioner shall be posted under Gaya Division and the Divisional Manager, Gaya will make posting of the petitioner at his level.

(iv) The petitioner will not be entitled to any monetary benefits, increment, etc. for the period of termination, i.e., from the date of the termination till the date of joining."

5. Allegedly the petitioner joined in the Gaya division of the respondent corporation on 20.9.1988 pursuant to the aforementioned order.

6. However, on 15.11.1988 the petitioner filed a representation against that part of the order dated 15th September, 1988 as contained in Annexure-1 to the writ application whereby he was awarded with the punishments. The said representation is contained in Annexure-2 to the writ application.

7. According to the petitioner as despite several

reminders, no order was passed on the said representation, he filed a writ petition in this court being CWJC No.7060 of 1991 which was dismissed on 29.7.1992.

8. During the pendency of the aforementioned writ petition the authorities of the respondent corporation initiated an enquiry with regard to the validity of the order directing reinstatement of the petitioner and issued a show cause notice to him. The petitioner filed a reply thereto.

9. It is stated that the Chairrnan_cum-Managing Director thereafter passed the impugned order dated 11.11.1992 whereby he cancelled the order of reinstatement passed in favour of the petitioner.

10. According to the petitioner, the impugned order is wholly illegal and without jurisdiction as no departmental proceeding was initiated against him nor he was given an opportunity to adduce evidence.

11. A counter affidavit has been filed on behalf of the Respondent corporation wherein, interalia, it has been stated that one Sri.M. Minj, the then Chief of Aministration in more than 100 cases passed orders of reinstatement on appeals purported to have been preferred by the employees of the Corporation. Thereafter Shri.Minj , has been divested of his appellate power.

A writ petition was filed in this court being CWJC No.2348 of 1989 by some employees and by a judgment

dated 28.4.1989 as contained in Annexure-A to the counter affidavit, the said writ petition was allowed holding :-

"We cannot at this stage entertain the arguments advanced on behalf of the respondents that the materials brought on the record by way of the counter affidavit are such that the petitioners cannot have anything to say in their defence. That we say for the reasons that even if according to the employer, there may not be any thing in his defence, still a notice of hearing in defence is a must. Without compliance with such a rule, the rule of fair play in the matter of administration shall be a casualty.

We have not entered into any controversy that the respondent corporation is a state under Article 12 of the constitution of India, because it has not been denied. Since the impugned order have been issued in violation of the principle of natural justice, Article 14 of the Constitution of India has been violated in issuing the termination orders."

12. It has been stated that pursuant to the said judgments a show cause notice had been issued to the petitioner so as to comply with the principles of natural justice.

13. It has been stated that the petitioner obtained an order of reinstatement 20 years after his dismissal, on a fake claim that he had preferred an appeal in the year 1968 but from a perusal of the photostat copy of

the certificate of posting the postal stamps thereon were found to have been issued in the year 1981.

14. According to the respondent, a show cause notice was issued to the petitioner by registered post whereby the petitioner was directed to show cause as to why the said order should not be recalled on the ground that from the office records no proof was available that any appeal was filed against the initial order of termination and thus he obtained the order of reinstatement by practising a fraud.

15. According to the respondents, the petitioner did not file any show cause. It has further been stated that a large number of cases had been filed against similar order being CWJC No.2348 of 1989 and other analogous cases and all such writ applications have been dismissed.

16. Mr. Shyama Prasad Mukherjee, the learned counsel appearing on behalf of the petitioner raised the following contentions in support of this application :-

(i) In view of the fact that the appeal of the petitioner was earlier allowed by a competent authority, the said order could not have been recalled.

(ii) It was further submitted that there is nothing on records to show as to when the appellate power of the respondent No.3 was withdrawn and thus the impugned order must be held to be wholly illegal and without

jurisdiction.

(iii) in view of the fact that the petitioner was allowed to serve for four years after reinstatement, the impugned order must be held to be without jurisdiction.

(iv) In any event, as the services of the petitioner had been terminated on trifling charges, the same was not sustainable in law.

17. The learned counsel in support of his contention has relied upon a decision of the Supreme Court in *Central Bank of India Vs. C.Barnard reported in 1991*)1) SCC 319 and *West Bengal State Electricity Board vs. Desh Bandhu Ghosh, and others*, reported in AIR 1985 S.C.722.

18. Mr.Keshav, the learned counsel appearing on behalf of the respondent corporation, on the other hand, submitted that in view of the fact that similar writ applications have been dismissed by this court, this court should not entertain this writ application also.

19. According to the learned counsel, from a perusal of the impugned order as contained in Annexure-3 to the writ application, it would appear that the petitioner has been found guilty of committing a fraud in collusion with the appellate authority and thus no relief should be granted to him.

20. The Chairman-cum-Managing director by his order dated 11th November, 1992, as contained in An-

nexure-3 to the writ application, inter alia, observed that the period of preferring of an appeal against the order of punishment is six months from the date of communication thereof and thus, the said appeal therefore, could not have been entertained after 20 years.

21. The respondent No.2 further observed that the petitioner did not file his show cause as according to him, he had filed a writ application before the Patna High Court being CWJC No.7680 of 1991.

22. The findings arrived at by the respondent No.1 in his order as under :

" I have perused the records in this case and find that the petitioner committed fraud and misrepresentation. The petitioner has himself stated in his appeal petition dt.28.8.88 that he had learnt that the appeal authority was looking into past pending cases and that some of the workers who were out of service had been given a chance for serving the Corporation. Moreover the use of photostat of postal certificates attached with the petition to support the apparently fake claim that he had filed an appeal in time and had sent reminder, it is manifestly wash and designed at committing fraud on the Corporation. Two out of three such photostat contain the image of stamps. 'Minor irrigation' with dates of 1977 and 1978 when the postal stamps was introduced in the form of the booklet.' India Postage Stamps 1947-1988' of the postal department. The whole exercise by the petitioner

was so apparently fraudulent that the indulgence shown by Shri. M.Minj then Chief of Administration clearly indicates that he was acting in collusion with the petitioner in accepting his plea and deciding the case in his favour. There is no doubt that there was an unholy understanding between the discharged employee and the said appellate authority in taking up and allowing the so called appeal after about 20 years.

Any appeal based on such wrong plea and misrepresentating the facts could not be treated as appeal at all. I therefore, hold that there was no such appeal and there could have been no such order of reinstatement after 20 years. I, therefore, recall and cancel the order dated 15.9.1988 passed by the then C.A. Sri.Minj."

23. The findings arrived at by the respondent no.1 are findings of fact.

24. It is now well known that this court in exercise of its writ jurisdiction cannot sit as an appellate authority over the findings of the enquiry officer.

25. In State of Gujarat vs. P.Raghav reported in AIR 1969 S.C. 1297, it was held that in terms of the provisions of Bombay Land Revenue Code, the power of the Commissioner to revise order made under section 65 thereof should be exercised within a reasonable time. The aforementioned decision has therefore, no application in the facts of the present case.

26. A full bench of this court in *Rita Mishra vs. Director Primary Education, Bihar*, reported in 1987 PLJR 1090 has held that when no appointment was made in the eye of law, no consequential right to salary *stricto sensu* would arise.

It was further held that if the servant of the State of Bihar either acted beyond the scope of the duty or in contravention of its directions or standing administrative instructions, the State will not be bound thereby under the doctrine of promissory estoppel.

27. In this case the respondent No.2 of course passed an order before 3.10.1988, but as noticed hereinbefore, a definite allegation of fraud had been made as against the petitioner and the same upon enquiry has been found to be correct.

28. In CWJC No.4178 of 1992 (*Rajendra Prasad and ors. vs. The Bihar Road Transport Corporation and ors*) disposed of on 4.9.92 a division bench of this court upon consideration of cases arising under similar situation observed as follows :-

"Respondent No.2, apart from other grounds, cancelled the appellate order on the ground that no appeal was filed by them and the documents on which they relied, namely, certificate of posting in support of filing an appeal were forged documents. Regarding petitioner Nos.1,2 and 3 of CWJC No.4450 of 1992 - Respondent No.2 cancelled the appellate order on the ground that

their appeals had been dismissed earlier by the Competent Authority and by suppressing the said fact they obtained the appellate order in their favour on the false ground. Regarding petitioner No.9, in CWJC No.4450 of 1992 - Respondent No. 2 cancelled the appellate order on the ground that his order of termination was upheld by the Industrial Tribunal and by suppressing the said fact the appellate order was passed.

The other admitted fact is that the power to hear appeal against the order of dismissal was conferred on respondent Nos.4 and 5 by an office order dated 13.8.1987 and again by another office order dated 3.10.1988 the appellate power was withdrawn from respondents Nos.4 and 5 and the power to hear appeal was delegated to the Additional Managing Director (Respondent No.3). During this period, i.e., in between 13.8.1987 and 3.10.1988, these petitioners filed petitions before respondent Nos.4 and 5 stating therein for the first time that they filed an appeal and in support of that they also Produced the photo copies of the Under Certificate of Postings to show that they were sending reminders after reminders for disposal of their appeal. Respondent Nos.4 and 5, as the case may be, thereafter passed the order in 1988 allowing their appeal, as stated above."

29. Upon consideration of the entire matters on records, the Division Bench inter-alia held that the appel-

late authority had no jurisdiction to pass such orders. The judgment passed by this court in the aforementioned writ application has been affirmed by the Supreme Court in S.L.P. (Civil) No.2685/95 by an order dated 12.4.1983.

30. In this case also as noticed hereinbefore, not only a finding has been arrived at that the fraud has been practised by the petitioner in collusion with the appellate authority in obtaining a favourable order from him and although in fact no appeal was preferred the petitioner, the appellate order has been passed on 15.9.1988.

31. It appears from the judgment passed in (CWJC No.3178 of 1992) *Rajendra Prasad's case* (Supra) that an office order has been issued as far back as on 13.8.1987 whereby and whereunder the power of the appellate authority was withdrawn.

32. The decisions cited by the learned counsel for the petitioner has no application in the facts and circumstances of this case. In *Central Bank of India vs C.Bernard* reported in 1991(1) SCC 319 the Supreme Court merely considered the defacto doctrine which has no application to the facts and circumstances of the case.

In *Desh Bandhu Ghosh's* (Supra) the Supreme Court was considering a regulation of West Bengal Electricity Board whereby the services of an employee could be terminated only upon giving notice which was held to be unconstitutional.

33. So far as submission of Mr.Mukherjee to the effect that the respondent No.1 had no jurisdiction to review the order passed by Shri Minj is concerned, it may be noticed, that in view of the findings aforementioned the appellate order must be held to be a nullity and thus in relation to such order no specific order was required to be passed, but merely a declaration to that effect that the appellate order was without jurisdiction and thus a nullity would suffice. It is true that the petitioner had served for a period of four years, but the same having been done pursuant to or in furtherance of a wholly illegal order which is not binding upon the respondent corporation in view of the decision of the full bench in *Rita Mishra's case* (Supra) we are further of the opinion that in this situation the petitioner is not entitled to any relief either on sympathy or any equitable consideration.

So far as the submission of Mr.Mukherjee to the effect that the services of the petitioner was terminated on trifling charges cannot also be accepted, in the facts and circumstances of the case and a particularly in view of the fact that the petitioner has been found guilty of committing fraud, this court in our considered view should not exercise its discretionary jurisdiction in favour of the petitioner.

34. It is now well known that issuance of a writ of certiorari is a discretionary remedy and the High Court may not exercise its jurisdiction only because it is lawful

to do so.

35. For the reasons aforementioned, there is no merit in this application which is accordingly dismissed.

Gurusharan Sharma, J., I agree

R.D.

Application dismissed.



CIVIL WRIT JURISDICTION**Before S.B.Sinha & Gurusharan Sharma,JJ.****1993****December,24****Awadhesh Kumar *****v.****The Life Insurance Corporation of India & ors.**

Life Insurance Corporation of India Staff Regulation , 1960, Regulation 14(3) — expiry of initial period of probation -- person, whether to be confirmed automatically.

The phraseology used in Regulation 14 as such do not justify an interpretation that the person promoted to a higher post on probation for a period of one year would automatically be confirmed in service only because his initial period of probation has expired, Clause 3 of Regulation 14 clearly stipulates that the period of probation could not be extended for a period of more than 2 years, thus only on the expiry of the said period of 2 years the petitioner would be treated to have been confirmed in the post of Branch Manager automatically.

Held, therefore, that in the present case if the petitioner has been reverted to the post of Assistant Branch Manager, within the aforementioned period of 2

* Civil Writ Jurisdiction Case No.9879 of 1993. In the matter of an application under Articles 226 & 227 of the Constitution of India.

years by which time he was not confirmed in the service no exception can be taken to the said order as in view of Regulation 14(3) he could not be automatically confirmed only because the initial period of probation has expired.

Case laws discussed.

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

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

M/S.Shyama Prasad Mukherjee, Satish Kumar Agrawal, Mridula Mishra, Gyanand Roy and Shanti Pratap for the petitioners

M/S Umesh Pd. Singh & Rajiv Ranjan Prasad for the State.

S.B.Sinha,J. — In this application the petitioner has prayed for quashing of an order dated 8.1.1991 issued by the Life Insurance Corporation of India, (hereinafter referred to as the Corporation) whereby he was reverted back from the post of Branch Manager to the post of Assistant Branch Manager, the order dated 22.8.1989 issued by the Zonal Manager of the respondent Corporation whereby he was posted as Assistant Branch Manager (Sales), under Bhagalpur Division as contained in Annexure-2 to the writ application the order dated 31.1.1991 whereby he was posted as Assistant Branch Manager(sales). in the Purnea Branch as contained in

Annexure-3 thereto as also the charge sheet issued against the petitioner under the signature of Zonal Manager (Disciplinary authority) in terms whereof a Departmental enquiry has been initiated against him as also for quashing of the order dated 6.8.1993 as contained in Annexure-5 to the writ application whereby the petitioner was intimated that he would retire from the services of the Corporation on 30.11.1993 on the ground of his attainment of age of 58 years, as allegedly in the service records his date of birth is entered as 31.12.1939.

2. The fact of the matter lies in a very narrow compass.

The petitioner was appointed as a Development Officer of the Corporation on 1.4.1967 at Kathmandu Branch and was later on transferred to Sitamarhi Branch. He was promoted to the post of Assistant Branch Manager/Administrative Officer in the year 1984 and by an order dated 22.8.1989 as contained in Annexure-7 to the writ application he was promoted to the post of Branch Manager in the said branch.

3. According to the petitioner his career had all along been brilliant. He was transferred to Purnea branch by an order dated 1.10.1990. The petitioner was informed that his salary as Branch Manager has been fixed in the scale of pay of Rs.2940-4520/-. By the said letter he was also informed that he would be treated on probation of higher post for a period of one year from

the date of taking charge on promotion i.e., 14.9.1989 and he shall be liable to be reverted without any notice during the period of probation.

4. However, by reason of the aforementioned order dated 8.1.1991 the petitioner was reverted to the post of Assistant Branch Manager.

Aggrieved by the said order, he preferred an appeal before the Chairman of the Corporation but no order has been communicated to him. In the meantime, the aforementioned charge-sheet dated 17.2.1993 was issued by the Zonal Manager, Eastern Zone, Calcutta. The petitioner had submitted that however by a letter dated 6.8.1993 he has been informed that he would reach the age of superannuation on 30.11.1993.

5. Mr. Shyama Prasad Mukherjee, the learned counsel appearing on behalf of the petitioner, has principally raised two contentions in support of this application.

The learned counsel submitted that from a perusal of Regulation 14 of the Life Insurance Corporation of India Staff Regulations 1960, it would appear that the petitioner in law could not have been reverted back after expiry of the aforementioned period of one year which was the period of probation without extending the same in writing.

6. The learned counsel in support of his contention has relied upon a decision of the Supreme Court in the

cases reported in *State of Punjab Vs. Dharam Singh* reported in AIR 1968 S.C. 1210, *State of Gujarat vs. Akhilesh C.Bhargav* and others reported in AIR 1987 S.C. 2135, *N.K.Agarwal vs. Gurgaon Gramin Bank* reported in 1987Suppl.S.C.C. 643 and *Om Prakash Maurya vs. U.P.Coop. Sugar Factories Federation* reported in AIR 1985 S.C. 1844.

7. It was submitted that if the order of reversion passed as against the petitioner and as contained in Annexure-1 to the writ application is held to be illegal by logical corollary it has to be held that the departmental proceeding initiated as against the petitioner is illegal as a departmental proceeding as against a Branch Manager can only be initiated by the Corporation or not by the Zonal Manager.

8. Mr.Umesh Prasad Singh, the learned counsel appearing on behalf of the Corporation, on the other hand, submitted that upon correct interpretation of the staff regulation, it would appear that the period of probation can be extended to two years and in view of the fact that the petitioner cannot claim confirmation in service by way of legal right automatically on the expiry of the period of probation, unless an order of confirmation is specifically passed in this regard, the petitioner could have been reverted to his parent post within the aforementioned period of two years.

9. The learned counsel in support of his contention

has relied upon a decision of this court in R.J.Jha vs. J.P.Choudhary reported in 1970 BLJR 447.

10. The learned counsel further submitted that the petitioner cannot question the entry of date of birth in his service book upon coming to learn that he would superannuate on a particular date.

11. According to the learned counsel, the petitioner cannot be permitted to say on the basis of the insurance policy etc., that he was born on 30.12.1939 in derogation to the entry of his date of birth recorded in his service book, which is binding on him.

12. In this case, it is not necessary for us to decide the question as to what is the actual date of birth of the petitioner, as in this writ application, this court cannot enter into a disputed question of fact with regard there to .

13. This court can exercise its jurisdiction in such matters only when entry of the date of birth is altered to his disadvantage without complying with the principles of natural justice.

14. The question which principally falls for consideration in this application is the interpretation of Clause 14 of the Regulations which reads thus:-

“ 14(i) Persons appointed to posts belonging to Classes 1 & II shall, on the first appointment in the Corporation's service, be required to be on probation for

a period of one year from the date of appointment.

(2) Persons appointed to posts belonging to classes III & IV shall, on the first appointment in the Corporation's service, be required to be on probation for six months/

(3) Subject to the provisions of any law for the time being in force the appointing authority may, at its discretion, dispense with, reduce or extend the probationary period, but in no case shall the total period of probation exceed :

(a) in case of employees belonging to classes I & II ... two years.

(b) In other cases ... one year.

(4) During the period of probation an employee shall be liable to be discharged from service without any notice."

15. In State of Punjab vs. Dharam Singh reported in AIR 1968 S.C.1210, it has been held :-

"This court has consistently held that when a first appointment or promotion is made on probation for a specific period and the employee is allowed to continue in the post after the expiry of the period without any specific order of confirmation, he should be deemed to continue in his post as a probationer only, in the absence of any indication to the contrary in the original order of appointment or probation or the service rules. In such a

case, an express order of confirmation is necessary to give the employee a substantive right to the post, and from the mere fact that he is allowed to continue in the post after the expiry of the specified period of probation it is not possible to hold that he should be deemed to have been confirmed. This view was taken in *Sukhbanba Singh vs. State of Punjab*, 1963-1 SCR 416 at pp.424-426 - (AIR 1962 SC 1711 at PP. 1714-1715), *G.S.Ramaswamy V. Inspector General Madhya Pradesh*, Gwalior V.Bani Prasad Bhatnagar Civil Appeal No. 548 of 1962, D/23-1.1964 (SC) *D.A.Dyall v. Chief Conservator of Forests, U.P.*, Civil Appeal No.259 of 1963, d.24.2.1965 (S.C.) and *state of U.P. vs. Akbar Ali* (1966) 3 SCR 821 at P.P. 825 (AIR 1966 SC 1842 at P.1845). The reason for this conclusion is that whereon the completion of the specified poeriod of probation the employee is allowed to continue in the post without an order of confirmation, the only possible view to take in the absence of anything to the contrary in the ordinal order of appointment of promotion or the service rules, is that the initial period of probation has been extended by necessary implication. In all these cases, the conditions of service of the employee permitted extension of the probationary period for an indefinite time and there was no service rule forbidding its extension beyond a certain maximum period."

16. In *State of Gujarat vs. Akhilesh* reported in AIR 1987 S.C. 2135, it has been held by the Apex Court :-

"We are of the view that the rules read with instructions creates a situation as arose for consideration by this court in the case of *State of Punjab vs. Dharam Singh* (1968) 3 SCR 1 : (AIR 1968 SC 1210). The constitution Bench of this court in that case interpreted the Punjab Educational service (Provincialised cadres) class III Rules and found that there was a maximum limit of three years beyond which the period of probation could not be extended. When an officer appointed initially on probation was found to be continuing in service beyond three years without a written order of confirmation this court held that it tantamounts to confirmation. In view of what we have stated above we are in agreement with the High Court about the combined effect of the rules and instructions. We hold that the respondent stood confirmed in the cadre on the relevant date when he was discharged. For a confirmed officer in the Cadre, the Probation Rules did not apply and therefore, proceedings in accordance with law, were necessary to terminate service. That exactly was the ratio of the decision in *Moti Ram Doka vs. General Manager, NEF Railways, Maligaon, Pandu* (1964) 5 SCR 683 : (AIR 1964 SC 600). On the analysis indicated above, the net result, therefore, is that the respondent No.1 had become a confirmed officer of the Gujarat I.P.S. cadre and under Rule 12 (bb) of the Probation Rules his services could not be brought to an end by the impugned order of discharge."

17. In *Om Prakash Maurya vs. U.P. Coop. Sugar*

Factories Fedn. reported in AIR 1986 S.C. 1844 it was held by the Supreme Court :

“ In view of the above discussion it is manifestly clear that the appellant's Services were regulated by the U.P. Cooperative Societies Employees Service Regulations, 1975. Since under those Regulations appellant's probationary period could not be extended beyond the maximum period of two years, he stood confirmed on the expiry of maximum probationary period and thereafter he could not be reverted to a lower post treating him on probation. The order of reversion is illegal.”

18. In *M.K.Agarwal, vs. Gurgaon Gramin Bank* reported in 1987 (Supp) Supreme Court cases 643 it was again held,

“The period of probation was one year, in the first instance. The employer could extend it only for a further period of six months. The limitation on the power of the employer to extend the probation beyond 18 months coupled with the further requirement that at the end of it the service of the probationer should either be confirmed or discharged render the inference inescapable that if the probationer was not discharged at or before the expiry of the maximum period of probation, then there would be an implied confirmation as there was no statutory indication as to what should follow in the absence of express confirmation at the end of even the maximum permissible period of probation. In cases

where, as here, these conditions coalesce, it has been held, there would be confirmation by implication. (See *State of Punjab vs. Dharam Singh, Om Prakash Maurya vs. U.P.Cooperative Sugar Factories Federation, Lucknow*)."

19. It is now a trite law that a question as to whether an employee would be confirmed in a promoted post upon completion of the period of probation essentially depends upon the phraseology used in the offer of appointment or the concerned rules or regulations.

20. The letter dated 17.10.1990 as contained in Annexure-9 to the writ application , reads thus—

"In accordance with regulation 16 of the (Staff) Regulation, 1960, you shall be treated as on probation in the higher post for a period of one year from the date of your taking charge on promotion viz 14.9.1989 and you shall be liable to be reverted without notice at any time during the period of probation. Your confirmation in the higher post on the expiry of the probationary period will depend on the manner in which you have discharged your duties during this period."

Evidently no letter of confirmation had been issued in favour of the petitioner. N.P. 21. In *N.J.Jha vs. J.P.Choudhary* reported in 1970 BLJR 447, this court upon taking into consideration the decision of the Supreme Court reported in *State of Punjab vs. Dharam Singh*, it has been held as follows :

"That , if under the rules or the order of appointment it can be called (SIC) out that a probationer on the expiry of his period of probation will be deemed to have been

confirmed by necessary implication, then and then only, there will be automatic confirmation. In other cases, it would not be so. A person placed on probation remains as a probationer when his period of probation is extended by an express order or in absence of any such order, by necessary implication, if the case is not covered by the type just indicated above. On the facts and circumstances of this case, I have come to the conclusion that the petitioner was not confirmed automatically on the expiry of his period of probation fixed by Annexure-7. He remained a probationer. On the expiry of his period of probation, he asked for an express order of his confirmation by Annexure-8. Such an order was never passed. He continued on probation. That being so, his services could be terminated at any time with a notice, as observed by *S.R.Das C.J. in Dhingra's* case and that notice does not mean a notice to show cause as argued on behalf of the petitioner, but it means a notice of termination of the services. The government cannot terminate the services even of a probationer by passing an order in its file only. The order must be communicated to the incumbent. In other words, notice of termination must be given to the incumbent. No period of notice of termination is necessary, as the service of a probationer or a temporary servant can be terminated without giving him any period of notice or pay for that period. In that view of the matter, I have no difficulty in rejecting the third admission made on behalf of the

petitioner. I may also say that learned counsel for the petitioner did not pursue this point and had to concede that the correct position of law is as has just been mentioned by me."

22. In *K.A.Barot vs. State of Gujarat* reported in 1990 (Supp) Supreme Court cases 287 it has been held that probationer cannot claim automatic confirmation unless a specific order in this regard is issued.

23. The petitioner in view of Regulation 1(3) aforementioned could not be automatically confirmed only because the original period of probation had expired. The phraseology used in Regulation is as such do not justify an interpretation that the petitioner would automatically be confirmed in the services only because his initial period of probation of one year had expired. Clause 3 of Regulation 14 clearly stipulates that the period of probation could not be extended for a period of more than two years, thus only on the expiry of the said period of two years, the petitioner could be treated to have been confirmed in the post of Branch Manager automatically. If the petitioner has been reverted to the post of Assistant Branch Manager within the aforementioned period of two years by which time he was not confirmed in the services, in my opinion, no exception can be taken to the said order.

24. However, we may hasten to add that in this application we have not applied our mind with regard to

the question as to whether on facts, the petitioner should have been reverted back to the post of Assistant Branch Manager from the post of Branch Manager during the period of probation. As the appeal against the said order is pending before the higher authority, the said authority would dispose of the appeal of the petitioner on merits without in any way being prejudiced by this order, as the appellate authority is bound to take into consideration the entire service record of the petitioner and his conduct during the period of probation. In view of the fact that the petitioner has at this stage failed in his first submission admittedly the Zonal Manager of the corporation have jurisdiction to initiate a departmental proceeding as against him, the departmental proceeding against the petitioner cannot, therefore, be said to be wholly illegal and without jurisdiction and thus it is not a fit case where we can exercise out discretionary jurisdiction at this stage.

25. We have also not considered the submission of Mr. Mukherjee to the effect that a departmental proceeding cannot continue as against an employee after he is allowed to superannuate, in as much as such a question does not arise in this case.

26. The respondent Corporation, cannot be said to have finally applied its mind as to whether the petitioner would be allowed to superannuate or the disciplinary proceeding as against the petitioner would continue.

Such a question therefore does not arise for consideration in this application. As and when cause of action therefore arises, the petitioner may raise his grievances before an appropriate forum.

27. This application is, therefore, dismissed with the aforementioned observations but without any order as to costs.

Gurusharam Sharma,J., I agree.

M.K.C

application dismissed
with observation

of -- Mahant -- position of under the Hindu Law
- -- code of Civil Procedure , 1908 section 11 and
Hindu Law.

Page

Where the plaintiff filed a suit for declaration of his title over the suit land as also for a declaration that a particular deed was sham, invalid, illegal and inoperative and paid advalorem court fee on the plaint, but no relief for recovery of possession was prayed for;

Held, that as the plaintiff - appellant has paid advalorem court fee all though, there is no legal difficulty in granting relief for recovery of possession of the suit properties under the issue framed to what other relief or reliefs, the plaintiff is entitled.

Held, further, that when a matter in issue between the parties is finally heard and decided by a competent court at one stage of the suit or proceeding, the matter will operate as res - judicata between the parties in the subsequent stage of the suit or proceeding if the same is not set aside by the appellate or revisional Court as the case may be.

Held also, that so far as the position and status of a Mahant is concerned, it is well settled that the Mahant is a mere custodian for manager of the Math property and he cannot alienate Math property without legal necessity nor he can change the constitution of the Math .

Mahant Vidhaya Nand Giri V. Mahant Rama Nand Giri and ors

CIVIL WRIT JURISDICTION

**Before Bisheshwar Prasad Singh and
Shamim Ahsan, JJ.**

1993

May, 18.

Zakia Afaque Islamia College, Siwan.*

v.

The State of Bihar and others.

Constitution --- Articles 14 and 30 (1) --- provisions of --- Rules framed under Bihar Non - Government Physical Training Colleges and Non - Government Teacher's Training Colleges and Non - Government Primary Education Colleges (Control and Regulation) Act 1982, (Bihar Act no. XXXIX) of 1982 rule 3 (1) --- ambit of --- rule, whether provides for grant of affiliation to Teachers Training College and not to faculty of a College --- provision of the rule whether violative of Articles 14 or 30 (1) of the Constitution .

Where the writ-petitioner, a College declared by State Government to be a minority institution which was affiliated upto degree standard in faculty of Arts and Science, applied for grant of affiliation in the faculty of Education upto B. Ed. standard but the same was

*. Civil Writ Jurisdiction Case No. 1143 of 1987. In the matter of an application under Articles 226 and 227 of the Constitution of India

rejected by the State Government;

Held, that rule 3 (1) of the Rules framed under Bihar Non - Government Physical Training Colleges and Non - Government Teacher's Training Colleges and Non Government Primary Teacher's Education Colleges (Control and Regulation) Act, 1982, which requires that affiliation will be granted only to Training Colleges and not to faculties of a College, is based on sound principle and does not offend the right of citizens under Article 14 of the Constitution. It also does not offend Article 30 (1) of the Constitution, since the rule does not place any fetter on the right of the minority to establish and maintain educational institutions of their choice. The rule, without offending the minority character of the institution, and without imposing conditions which would involve surrender of the right guaranteed under Article 30 (1) of the Constitution as a condition for the grant of affiliation, lays down a regulation which is conducive to attaining high standard of teaching and training and academic brilliance. The validity of such a rule must be upheld both on the touchstone of Article 30 (1) and Article 14 of the constitution.

Case laws discussed.

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 B.P.Singh, J.

Dr. Sadanand Jha and Mr. Harish Chandra
Mishra for the Petitioner

M/s Gagannath Jha & Sharangdhara
Upadhyaya for State

Mr. Indu Shekhar Prasad Sinha for the
Bihar University.

B.P. Singh, J. — The petitioner - college was established in the year 1971 by Abdul Ghani Memorial Trust. The object was to conserve the religious culture and language of Muslim community and to impart higher education to Muslim girls and boys and the public in general, and also to provide educational facilities in professional and technical education. The State Government by order dated 14 - 1 - 1978 declared the college to be a minority Institution. It is not in dispute that the petitioner - college was affiliated upto degree standard in the faculty of Arts and Science to the University of Bihar. Thereafter the college applied on 20th June, 1980 for grant of affiliation in the faculty of Education upto B. Ed. standard. The application having been rejected by the State Government, the petitioner filed the instant writ application impugning the order dated 3 - 1 - 1987.

After the writ application was admitted for hearing and several counter - affidavits and supplementary affidavits were filed, this Court passed an order dated August 20, 1991 directing the Government to take a final decision in the matter in the light of the report of the high powered committee constituted by the Court. The order gave liberty to the petitioner to assail the decision that the state government may take in this regard. The State Government was directed to pass a speaking order. Pursuant to the order of this Court the State Government took a decision on 5th September, 1991, again rejecting the application of the petitioner - college for reasons recorded in the said order. The petitioner has assailed the aforesaid order of the State Government dated 5th September 1991 as well. Having regard to the submissions urged before us by Dr. Jha appearing on behalf of petitioner-college, it is not necessary to refer to the facts of the case in detail, but it would still be necessary to briefly refer to the chequered history of this case. I may only indicate at this stage that the order dated 5th September, 1991, has been impugned by Dr. Jha appearing on behalf of the petitioner - College, it is not necessary to refer to the facts of the ground that the

order and the reasons therefor violate the fundamental right of the petitioner - college guaranteed under Article 30 of the Constitution of India. He submitted that the Act and the Rules upon which reliance has been placed by the State Government in its impugned order offend Article 30 of the Constitution of India, inasmuch as they have the effect of violation of the fundamental right of the religious minority to establish and maintain educational institutions.

2. As observed dearlier, by an application made on 20th June , 1980 , the petitioner - college applied to the University of Bihar for grant of affiliation in the faculty of education upto B.Ed. standard. The college had already been granted affiliation up to degree standard in the faculty of Arts and Science. It intended to start a faculty of education in which education up to B.Ed. Standard was to imparted. The application of the petitioner - college was rejected by the Joint Secretaty to the Government of Bihar in the department of Education by letter dated 18th March, 1981 (Annexure -5) saying that affiliationfor B.Ed. could not be granted as the petitioner - College was a Non - Government

Teachers Training College. The petitioner being aggrieved by the order (Annexure - 5) challenged the same before this Court by filing a writ petition being C.W.J.C. no. 1784 of 1981. This Court by its order dated 19 - 8 - 1981 allowed the writ application and quashed the order (Annexure - 5) and issued a writ of mandamus directing the University to get the institution inspected and after considering the inspection report with regard to the faculty in question grant affiliation to the petitioner - college in the faculty of education, if no irregularity was found or no reason having any connection with the question was assigned. A special leave petition being S.L.P.(Civil) 10497 of 1981 preferred against the said order of the High Court was dismissed by the Supreme Court on August 30, 1982.

3. A committee was appointed on November 14, 1981 to inspect the college and to submit a report. I need not go into the controversy as to whether the committee performed its function in the manner it should have, and whether a copy of report was or was not given to the petitioner - College. It is enough to notice that the Government of Bihar acting on the basis of the inspection

report and the report of the University decided not to grant affiliation to the petitioner - College in the faculty of education upto B.Ed. standard. A writ application was filed by the petition - college being C.W.J.C.No. 1932 of 1983 challenging the validity of the order dated 11 - 3 - 1993 refusing to grant affiliation. The High Court dismissed the writ application on 11 - 5 - 1983, but a special leave petition was preferred by the petition - college, which was admitted by the Supreme Court and upon grant of special leave it was registered as Civil Appeal no. 5265 of 1983. In the said Appeal an order was passed by the Supreme Court on 5 - 9 - 1983 appointing Dr. Kalimuddin Ahmad to make an enquiry into the affairs of the College and to make his recommendation on the question of grant of affiliation. Later, on the demise of Dr. Kalimuddin Ahmad the Supreme Court was pleased to appoint Justice Wasiuddin, a retired Judge of the Patna High Court as Special Officer to submit a report to the Supreme Court on that question. The Special Officer has submitted his report on 26 - 5 - 1984. There is again considerable dispute as to whether the Special Officer recommended the grant of affiliation or whether he found deficiencies which did not entitle the

petitioner - College to the grant of affiliation. It is unnecessary to go into this controversy. After submission of the report, the Supreme Court considered the same, and by order dated 12 - 9 - 1984 held that since the case involved important and arguable points, it required examination by the High Court and was certainly not a case which could be dismissed in limine as the High Court had done. It, therefore, remitted the case to the High Court for consideration of the question of grant of affiliation according to law, mainly on the basis to the inspection report which the Government had got from the University or any other relevant materials as also the report of the Special Officer filed before the Supreme Court. The matter was thus remitted to the High Court and consequently C.W.J.C. No. 1932 of 1983 was admitted for hearing. By judgment and order dated 5th August, 1986 this Court after considering all relevant matters directed the State Government to decide the question of affiliation within a period of four months from the date of order of the High Court, Though the State Government was required to take a decision within four months in terms of the order of the High Court dated 5th August, 1986, it took a decision on 3rd January,

1987 , and that too after the petitioner filed an application for initiation of a proceeding under the Contempt of Courts Act against the State of Bihar and its officers. In the contempt proceeding the Education Commissioner as well as the Director of Training, Department of Education, filed their counter - affidavits, and brought on record an order dated 3rd January, 1987, by which the Government refused to grant affiliation to the college on the ground that the college did not have the necessary facilities, such as building, library and requisite number of teachers with requisite qualification. It was this order dated 3 - 1 - 1987 which was challenged in the instant writ application when it was originally filed on 2nd April, 1987. Even before the writ petition was admitted for hearing, on 10 - 8 - 1987 this Court passed an order directing the respondents to get the College inspected and report to be submitted within three months. The State Government was thereafter directed to take a final decision in the matter with regard to the grant of affiliation in the faculty of education upto B.Ed. standard. It appears from the order of this Court that the court made the aforesaid direction since it was pointed out that the College was last inspected in the year 1985 by the University. It also appears from the order that the parties agreed that such a committee ought to be appointed to inspect the College and to submit a report. Pursuant to the order of this Court a high powered committee was constituted by the State Government under the Chair-

manship of the Deputy Development Commissioner, Siwan, with the Inspector of Colleges (Arts), Bihar University, the Regional Deputy Director of Education, Siwan Division and the Director (Training and Research) or his representative as the other members of the Committee. Annexure A -1 is the report of the said high powered committee. After considering the matter the committee did not recommend grant of affiliation to the College.

4. On 23 February, 1988 the writ petition was admitted for hearing. When the matter was taken up for hearing on 16th May, 1990 it was submitted on behalf of the petitioner College that after submission of the report of Justice Wasiuddin on 26 - 5 - 1984 there had been many significant improvement and development in the institution, such as addition to the building, provision for a big library, playground, furniture, teachers etc. The financial position of the College had also improved considerably. Under these circumstances, the Court was persuaded to direct that Special Officers be appointed who will report the latest position of the College with regard to the fulfilment of the conditions for grant of affiliation upto B.Ed standard keeping in view the impugned order dated 3 - 1 - 1987. The Court appointed Justice Wasiuddin and Mr. Fahimuddin Ahmad, a former Vice Chancellor, to constitute the committee, and requested them to inspect the institution and submit their report after giving notice to the Principal of the College.

Director of Training, Education Department, Government of Bihar and the Vice Chancellor, University of Bihar, Muzaffarpur. The matter was directed to be listed for hearing after submission of report. The report was submitted by the Committee on 20th December, 1990. By order dated August 20, 1991, this Court directed the Government to take a final decision in the matter in the light of the report of the Committee constituted by the High Court. It further gave liberty to the petitioner to assail any adverse decision that the Government may take in this regard. It also directed the State Government to pass a speaking order. Pursuant to the order of the High Court dated 20th August, 1991, the State Government took a decision on 5th September, 1991, rejecting the request of the petitioner - College for grant of affiliation.

5. Counsel for the petitioner - College assailed the decision of the Government contained in its order dated September 5, 1991. The order of the State Government proceeds on the basis of the provision contained in the rules framed under the Bihar Non - Government Physical Training Colleges and Non - Government Teachers Training Colleges and Non - Government Primary Teachers Education Colleges (Control and Regulation) Act, 1982 (Bihar Act 29 of 1982). It is stated in the order that rule 3 (1) of the Rules provides that affiliation shall be granted to such institutions only if they are Teachers Training Colleges and affiliation will not be granted if such educa-

tion is sought to be imparted in a faculty of a College. Since the petitioner - college had applied for grant of affiliation upto B.Ed. standard in the new faculty of education of the College, in view of the rules framed under the Act, the Government could not grant such affiliation. In a nutshell, the application for affiliation has been refused on the ground that the petitioner - College wishes to impart education upto B.Ed. standard in a faculty of the College which also imparts education upto B.A. and B.Sc. standard in Arts and Science. Since the application has been made for grant of affiliation to a faculty of the College, and not for affiliation of a full - fledged College where specialised education is imparted in the subject, grant of affiliation is not permissible under the rules.

6. Dr. Sadnanad Jha appearing on behalf of the petitioner - College submitted that no doubt the rules framed under the Act do provide that in the matter of grant of affiliation up to B.Ed. standard, affiliation can be granted only to a College and not to a faculty of a College but the rule should not be made applicable to a minority institution because in that event it would offend the provision of Article 30 of the Constitution of India, and violate the fundamental right of the minority to establish and manage educational institutions. He submitted that the law on the subject is well settled, and relying upon the judgment of the Supreme Court in *St. Xaviers College Society and another vs. State of Gujrat and another*

contended that even if the State has power to frame regulations applicable to minority institutions, such regulations can be made applicable to the minority institutions only if the regulations aim at achieving academic excellence. Any regulation which does not have as its objective the achievement of high academic excellence or is not germane to raise the academic standard of an institution, cannot be made applicable to minority institutions. The justification for application of such regulations to minority institutions is that they achieve to attain high educational standard and, therefore, must apply alike to minority institutions other institutions. He submitted that the State cannot compel a minority institution to establish an independent training college for imparting education upto B.Ed. standard. When the College itself had all the necessary facilities, there could be no objection to the starting of a faculty of education as a part of the existing college, which could be granted affiliation by the University.

7. He further submitted that there is no judgment of larger Bench than the one which decided *St. Xaviers College case*. He submitted that any judgment subsequently rendered by a smaller Bench cannot have the effect of over-riding or over ruling the principles laid down in *St. Xaviers College case* (*Supra*). Anticipating that counsel for the State may justify the rule on the basis of the observation made in some of the later judgments of the Supreme Court, he submitted that even if there

were any observations to the contrary, they must be understood in the light of the principles laid down by the Supreme Court in *St. Xaviers College* case.

It was also submitted before us that the rules were framed in the year 1987, whereas the petitioner applied for affiliation as early as in the year 1980. Relying upon the decision of the Supreme Court in *Vellore Educational Trust Vs. State of Andhra Pradesh*.

(i) It was submitted that the rules now framed must not be made applicable to the case of the petitioner which had applied for affiliation much before the framing of the rules.

8. On behalf of the State, Mr. Jagannath Jha, Standing Counsel, submitted that the rules framed by the Government are based on sound principles and policy. The object of the rules is to achieve excellence in education. The subject of education has been given high priority by the State of Bihar because the State of Bihar is a backward State with illiteracy as one of its banes. The Government has, therefore, decided that it can implement its policy to educate the masses only with the help of well - qualified teachers, who must not only know their subjects but must also know how to deal with persons whose initial reluctance to go to the educational institutions must first be got over. The art of teaching is, therefore, considered important in this context. A teacher must not only educate but must also inspire and en-

courage. Having this in mind, a policy has been laid down in the rules that the subject of education must be treated as a specialised subject and the education in the art of educating must be imparted through such specialised institutions. He submitted that the rules, which have been framed by the State, apply to all institutions and do not discriminate against the minority institutions. In any event, the rules do not touch upon the subject of establishment or administration of educational institutions whether minority institutions or otherwise.

(ii) He further submitted that the judgment of the Supreme Court in *St. Xaviers College case* (Supra) holds the field and he would support the validity of the rules on the basis of the principles laid down by the Supreme Court in that case. He submits that the subsequent judgments of the Supreme Court are not inconsistent with the judgment in *St. Xaviers College case*, and that those judgments must undoubtedly be understood in the light of the judgment in *St. Xaviers College case*. He submitted that the subsequent judgments merely elucidate any particular aspect of the matter which came up for consideration in subsequent cases. He submitted that it is not necessary to go in to the question as to whether there is anything said in the subsequent judgments of the Supreme Court which run contrary to or are inconsistent with the judgment of the Supreme Court in *St. Xaviers College case*, because he would not urge such a submission to defend the rules.

As to the applicability of the rules framed in the year 1987, he submitted that the application of the petitioner was considered on earlier occasions as well but was rejected. Now that the rules have come into force and their application has to be considered by the authority concerned, it must be considered in the light of the rules which are in force today. The authority cannot ignore the rules framed, which have statutory force and must apply to all cases for grant of affiliation.

9. I shall first consider the submission urged on behalf of the petitioner that Rules of 1987 will not govern the case of the petitioner since the application was made for grant of affiliation as early as in the year 1980. I have referred to the various events which followed after the application was made by the petitioner in the year 1980. It would be evident from the facts noticed above, that the application of the petitioner was rejected on several occasions, after consideration of the same. It is, therefore, not a case where it can be said that the application of the petitioner was kept pending and remained pending for all these years without a decision being taken on the same. It would be evident from the facts noticed above, that the application of the petitioner was rejected on several occasions, after consideration of the same. It is true that those decisions were challenged, but challenges were not upheld in the sense that no mandamus was issued at any stage to the State Government to grant affiliation. The matter was directed to be reconsidered.

10. So far as the judgment of the Supreme Court in *Vellore Educational Trust* case (*Supra*) is concerned, the same was rendered in the peculiar facts and circumstances of that case.

The application of the petitioner in that case was rejected by the Government on the basis of the policy of the Government not to give permission any more to private engineering college until the existing engineering colleges get stabilised and consolidated. The said policy of the Government is said to have been adopted in July 1985. From the judgment in *Vellore Education a Trust* case (*Supra*) it appears that the petitioner - Society had applied for permission as early as in May 1984 i.e., much before the policy was adopted by the Government. Another Society, namely, Nagarjuna Education Society, Guntur had applied for permission to establish a Private Engineering College under section 20 of the Andhra Pradesh Education Act, 1982. In the case of Nagarjuna Education Trust permission was granted for establishment of new Engineering College even after the Government policy was said to have been adopted in July 1985. It was also found that another Trust which had made a similar application was granted permission after July 1985. Such permission was not granted to the petitioner despite the fact that its application was earlier in point of time. On these facts the court found that the impugned order of the State of Andhra Pradesh refusing permission for establishment of a private Engineering

College to the petitioner solely on the ground of the policy of the Government was not at all tenable because such permission had been granted to Nagarjuna Education Society. The application of the petitioner was neither considered nor granted and had been kept pending only to be rejected in the light of the subsequent policy decision of the Government . In these circumstances, the Supreme Court quashed the order refusing to grant permission and directed the State to reconsider the application of the petitioner .

11. It will thus appear that *Vellore Educational Trust Case* had its own peculiar features. Firstly, the application of the petitioner - Trust had been kept pending without being disposed of . Subsequent applications made by other Societies / Trusts were considered and permission granted even though those applications had been made after the application of the petitioner - Trust. Lastly despite the policy of the Government said to have been adopted in July 1985, others had been granted permission to establish a Private Engineering College even though their applications were later in point of time than that of the petitioner. The Court, therefore , found no substance in the plea that the policy decision formulated by the Government was the reason for rejection of the application made by the petitioner. This was belived by the fact that permission was granted to other Trusts / Societies even after the adoption of the policy decision. In the instant case the objection is not on the basis of

a government policy, but on the basis of rules framed by the Government. It is not the case of the petitioner that any other Society or Trust has been granted affiliation in the faculty of education for imparting education upto B.Ed. standard. Moreover, the application of the petitioner was earlier considered by the Government and rejected. In view of these distinguishing features of the case, the decision in *Vellore Educationl Trust* case does not support the petitioner's case.

I shall now consider the only other point vehemently urged before us by Dr. Sadanand Jha , that the rules framed by the Government did not have as their objective excellence in education and , therefore, the same cannot be made applicable to minority institutions. In any event, he urged that the rules should be read down so as not to be applicable to minority institutions.

12. I shall first deal with the submission based on Article 30 (1) of the Constitution. The said Article confers a fundamental right on all minorities, whether based on religion or language, to establish and administer educational institutions of their choice. Article 30 of the Constitution is in terms absolute , unlike the rights contained in Article 19 which are subject to reasonable restrictions. However, by judicial interpretation it is now well - settled that the absolute term in which Article 30 is couched

does not prevent imposition of reasonable restrictions in the interest of efficiency of instructions, discipline, health and sanitation. Such regulations have never been considered to be restrictions on the substance of the right guaranteed by that Article, since they have as their objective to secure proper functioning of the institution in educational matters. This has been the basis on which reasonable restrictions may be imposed by the State in the matter of grant of recognition or affiliation to such institutions. Such regulations could only be made in the interest of the institutions so as to make them effective educational institutions and secure excellence of training, without compelling the minority concerned to surrender its right to establish and administer educational institutions of its choice. It is, therefore, well-settled that the State may, by legislative or by executive direction, impose reasonable restrictions. The position in law is so well-settled that Dr. Jha did not challenge the right of the State to impose such regulations as would contribute to excellence of training or education in such institutions, but urged with considerable justification that unless such were the objectives of the regulatory measures, they should not be supported on any other ground, and should be held to be violative of the right guaranteed to the minorities under Article 30 (1) of the Constitution of India.

13. In *St. Xavier's College* case the Supreme Court reiterated its earlier consistent view that there is no

fundamental right of a minority institution to affiliation. However , it recognised the fact that affiliation is necessary for a real and meaningful exercise of the right of the minority to establish and administer educational institutions. Any law which provides for affiliation on terms which will involve abridgement of the right of the linguistic and religious minorities to administer and establish educational institutions of their choice will offend Article 30 (1) . The educational institutions set up by minorities will be robbed of their utility if boys and girls cannot be trained in such institutions for University degrees.

14. The moot question which arises for consideration is what is the content of the right guaranteed to minorities under Article 30 (1) of the Constitution . In *St. Xaviers College* case, the principle laid down by the court earlier in *State of Kerala Vs. Very Rev. Mother Provincial etc* ¹.

(1) was reiterated . I am tempted to quote from the opinion of the learned Chief Justice:

" When a minority institution applies for affiliation, it agrees to follow the uniform courses of study. Affiliation is regulating the educational character and content of the minority institutions. These regulations are not only reasonable in the interest of general secular education but also conduce to the improvement in the stature and strength of the minority institutions. All institutions of general secular education whether estab-

1 (1971) I.S.C.R. 734

lished by the minorities or the non - minorities must impart to the students education not only for their intellectual attainment but also for pursuit of careers. Affiliation of minority institutions is intended to ensure the growth and excellence of their children and other students in the academic field. Affiliation mainly pertains to the academic and educational character of the institution. Therefore, measures which will regulate the course of study, the qualifications and appointment of teachers, the health and hygiene of students, facilities for libraries and laboratories are all comprised in matters germane to affiliation of minority institutions. These regulatory measures for affiliation are for uniformity, efficiency and excellence in educational courses and do not violate any fundamental right of the minority institutions under Article 30.

The entire controversy centres round the extent of the right of the religious and linguistic minorities to administer their educational institutions. The right to administer is said to consist of four principal matters. First is the right to choose its managing or governing body. It is said that the founders of the minority institution have faith and confidence in their own committee or body consisting of persons selected by them. Second is the right to choose its teachers. It is said that minority institutions want teachers to have compatibility with the ideals, aims and aspirations of the institutions. Third is the right not to be compelled to refuse admission to

students. In other words, the minority institutions want to have the right to admit students of their choice subject to reasonable regulations about academic qualifications. Fourth is the right to use its properties and assets for the benefit of its own institution.

The right conferred on the religious and linguistic minorities to administer educational institutions of their choice is not an absolute right. This right is not free from regulation. Just as regulatory measures are necessary for maintaining the educational character and content of minority institutions similarly regulatory measures are necessary for ensuring orderly, efficient and sound administration. Das, C.J. in the Kerala Education Bill case (Supra) summed up in one sentence the true meaning of the right to administer by saying that the right to administer is not the right to mal-administer ".

15. If a close analysis is made of the provisions which were declared to be violative of the fundamental rights of the minorities in St. Xaviers College case, it would be clear that only those provisions which touched upon the right of minorities to establish or administer the educational institutions of their choice were held to be ultra vires. The Court was concerned with the provisions of the Gujrat University Act, 1949, as amended in 1972. Section 33 A (1) provided that every College other than a Government College or a College maintained by the Government, shall be under the manage-

ment of a governing body which included among others, the Principal of the Collège and a representative of the University nominated by the Vice - Chancellor. Section 33 A (1) (b) (1) provided that in the case of recruitment the principal, a selection committee should be constituted consisting of , among others, a representative of the University nominated by the Vice - Chancellor and (ii) in the case of selection of a member of the teaching staff of the college a selection committee consisting of the Principal and a representative of the University nominated by the Vice - Chancellor. Sub - section (3) provided that the provisions of sub - section (1) of section 33 A shall be deemed to be a condition of affiliation of every college referred to in that section. Section 40 (1) enacted that the Court or the University may determine that all instructions, teaching and training in courses of studies in respect of which the University competent to hold examinations shall be conducted by the University and shall be imparted by the teachers of the University. Sub - section (2) of section 40 provided that the State Government shall issue a notification declaring that the provisions of section 41 shall come into force on such date as may be specified in the notification. Section 41 (1) of the Act provided that all colleges within the University area which are admitted to the privilege of the University under section 5 (3) and all colleges within the said area which may hereafter be affiliated to the University shall be constituent colleges of

the University. Sub - section (4) provided that the relations of the constituent college and other institutions within the University area shall be governed by statutes to be made in that behalf. Section 51A (1) (b) enacted that no member of the teaching other academic and non - teaching staff of an affiliated college shall be dismissed or removed or reduced in rank except after an enquiry in accordance with the procedure prescribed in clause (a) and the penalty to be inflicted on him is approved by the Vice - Chancellor. Clause (b) required that such termination shall be approved by the Vice - Chancellor in this behalf. Section 52 A (1) provided that any dispute between the governing body and any member of the teaching and other staff shall, on a request of the governing body or of the member concerned, be referred to a tribunal or arbitration consisting of one member nominated by the governing body of the college, one member nominated by the member concerned and an umpire appointed by the Vice - Chancellor. These provisions were held by the Supreme Court to violate the fundamental rights of the minorities guaranteed by Article 30 (1) of the constitution of India and, therefore, could not be applied to minority institutions. It will be seen that all these provisions touched upon the right of the minorities to establish or administer educational institutions of their choice. Since these provisions affected the fundamental right of the minority to administer educational institutions of their choice, they were held to be not

applicable to the minority institutions .

16. Coming to the rules in question, it will be found that the rules apply to all non - Government Teachers Training Colleges within the State of Bihar . They apply to all such institutions and not confined in their application to minority institutions alone.

They lay down requirements to be fulfilled before recognition / affiliation can be granted to such institutions . The requirements include the facilities to be provided by such intitutions, such as lecture rooms, laboratories, library , common rooms, playground etc. The challenge is confined to Rule 3 (1) which provides that such institutions which may be granted affiliation shall not be opened as a faculty, but should be a full - fledged training college. Counsel for the petitioner submitted that the said rule offended the minority rights of the petitioner.

17. It was not contended before me that the rules had put any fetter on the right of the management to choose its governing body nor did it in any way affect their right to choose their teachers if properly qualified. No restrictions have been placed on their right to admit students if they had the requisite academic qualification. The rules also do not touch upon the right of the petitioner in regard to its properties and assets. On these major aspects of right of establishment and management, there is nothing in the rules which compel the minority to surrender its fundamental right guaranteed under "Ar-

Article 30 (1) of the Constitution of India. Such being the position, there is hardly anything in the rules which offends minority rights guaranteed by the Constitution. No inroad is made on the substance of the right, and so far as the rules provide for the facilities which the institution must provide and the qualification prescribed for teachers, it is no one's case that those regulations are unreasonable. The challenge is only to the rule which provides that affiliation be granted to a full - fledged training college and not to a faculty of the college. There is nothing in the rules which prevents a minority, or curtails its right, to establish a full - fledged training college. If a minority establishes a full - fledged training college, its application for affiliation must necessarily be considered in accordance with the rules. The validity of the rule must be tested by applying a dual test, the test of reasonableness and the test that it is regulative of the educational character of the institution and is conducive to making the institution an effective vehicle of education for the minority community or other persons who resort to it. Obviously, therefore, the question that may be asked is whether the rule is unreasonable, and that must be answered on the touchstone of Article 14 of the Constitution of India. Whether the rule is regulative of the educational character of the institution while maintaining its character as a minority institution without compelling the minority to surrender any part of the right guaranteed to it, is a question which falls for consideration having

regard to the content of the right embodied in Article 30 (1) of the Constitution of India. It is well accepted that without recognition or affiliation there can be no meaningful exercise of the right to establish or administer educational institutions under Article 30 (1), and at the same time the regulatory measures for affiliation cannot prescribe conditions which compel the minority to surrender their right to establish and administer such institutions. The rule which prescribes that affiliation shall be granted for B.Ed. standard only to specialised colleges and not to a faculty of a college, in my view, cannot be said to be a regulation which impinges upon the right of the minority to establish and to maintain educational institutions of their choice. As observed earlier, such a rule does not compel the minority to surrender any part of its right guaranteed under Article 30 (1) because it does not touch upon the subject of establishment or administration of the institution.

18. The rule also cannot be said to be unreasonable merely because it insists that for teaching upto B.Ed. standard the institution must be a full - fledged college imparting training exclusively in that subject. Rules and Regulations cannot ignore the realities of the situation and must take note of the advancement in society. For years together affiliation / recognition has been granted to Engineering Colleges and Medical Colleges as specialised intitutions, and it has never been contended that the requirement that a Medical College or an En-

gineering College must be a full - fledged College for imparting education in the subject of medicine or engineering, is unreasonable. In the present day context specialisation has special significance, and in many important subjects the course of progress has been not only from the general to the special, but from the special to the super - special. The rule that affiliation will be granted to a full - fledged college and not to a faculty, recognises this need for specialised training in education. In the State of Bihar where the educational system is virtually in shambles, the role of teachers gains considerable importance. They must not only teach, but must also be proficient in the art of teaching having regard to the high rate of drop - outs in the schools in Bihar. Obviously, therefore, the Government has attached greater importance to the subject of education than before, and the requirement that teaching and training must be imparted for the B.Ed. course in specialised institutions is a recognition of this fact. The insistence of the rule therefore, that recognition will be granted only if the institution is a full - fledged teachers training college, cannot be said to be unreasonable.

19. Dr. Jha contended that there is no guarantee that teaching in a specialised college will always be superior to teaching in other colleges. He submitted that in many colleges teaching of a subject in a faculty may be far superior to the teaching of that subject in a specialised college and, therefore, any rule which

proceeds on the assumption that teaching in a specialised college will be of superior quality, proceeds on an untenable hypothesis. While what Dr. Jha submits may in some cases be factually correct, that can be of no help in judging the validity of a rule. The failure of a policy may be on account of many reasons. It may be on account of the failure of those who are entrusted with the responsibility of implementing the policy. It may be on account of financial constraints, or it may be on account of many other reasons. If the policy is sound and reasonable the mere fact that it may fail is no ground for holding that it offends Article 14 of the Constitution of India as being arbitrary and unreasonable. It is too late in the day to suggest that specialised institutions for special subjects are not conducive to attaining high standard of academic brilliance. In any event, if a rule proceeds on this assumption, it cannot be said that the rule is unreasonable or arbitrary. I have, therefore, no doubt that the rule, which requires that affiliation will be granted only to colleges, and not to faculties, is a rule based on sound principle, and does not offend the right of citizens under Article 14 of the Constitution of India. It also does not offend Article 30 (1) of the Constitution of India, since the rule does not place any fetter on the right of the minority to establish and maintain educational institutions of their choice. The rule, without offending the minority character of the institution, and without imposing conditions which would

involve surrender of the right guaranteed under Article 30 (1) of the constitution as a condition for grant of affiliation, lays down a regulation which is conducive to attaining high standard of teaching and training and academic brilliance. The validity of such a rule must be upheld both on the touchstone of Article 30 (1) and Article 14 of the Constitution of India.

20. I, therefore, find no merit in this application, and the same is, accordingly, dismissed, but without any order as to costs.

Shamim Ahsan, J. I agree. Application dismissed
R.D.



CIVIL WRIT JURISDICTION**Before S.B.Sinha, J.****1993****May.21.****Mostt. Janki Thakurain & ors.*****v.****The Additional Member, Board of Revenue, Bihar,
Patna & others.**

Code of Civil Procedure, 1908 (Act V of 1908)
Order 18, Rule 4 and Order 19, Rule 1 --- taking of
affidavit in evidence --- reasons therefor , whether to be
assigned by the Court --- affidavit sworn before Execu-
tive Magistrate --- no order passed by Collector prior to
getting the same admitted in evidence --- effect of.

In terms of Order 19 , Rule 1 of the Code of Civil
Procedure, before an affidavit is taken in evidence
reasons therefor have to be assigned by the Court.
Adduction of oral evidence as contemplated under Order
18, Rule 4 of the Code of Civil Procedure is the ordinary
rule. Admission of evidence by way of affidavit is an
exception to the rule . Thus, before a party can be
permitted to lead evidence by filing an affidavit, reasons
therefor have to be assigned by the Court concerned. In
the present case, the affidavit was sworn before the

*. Civil Writ Jurisdiction Case No. 783 of 1984. In the matter of
an application under Article 226 and 227 of the Constitution of
India.

Executive Magistrate. The petitioners did not contend that prior to getting the said affidavit admitted in evidence, any order was passed by the Collector.

Held, therefore, that no reliance could be placed upon the said affidavit by the Collector.

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

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

M/s Mritunjay Kumar Jha,

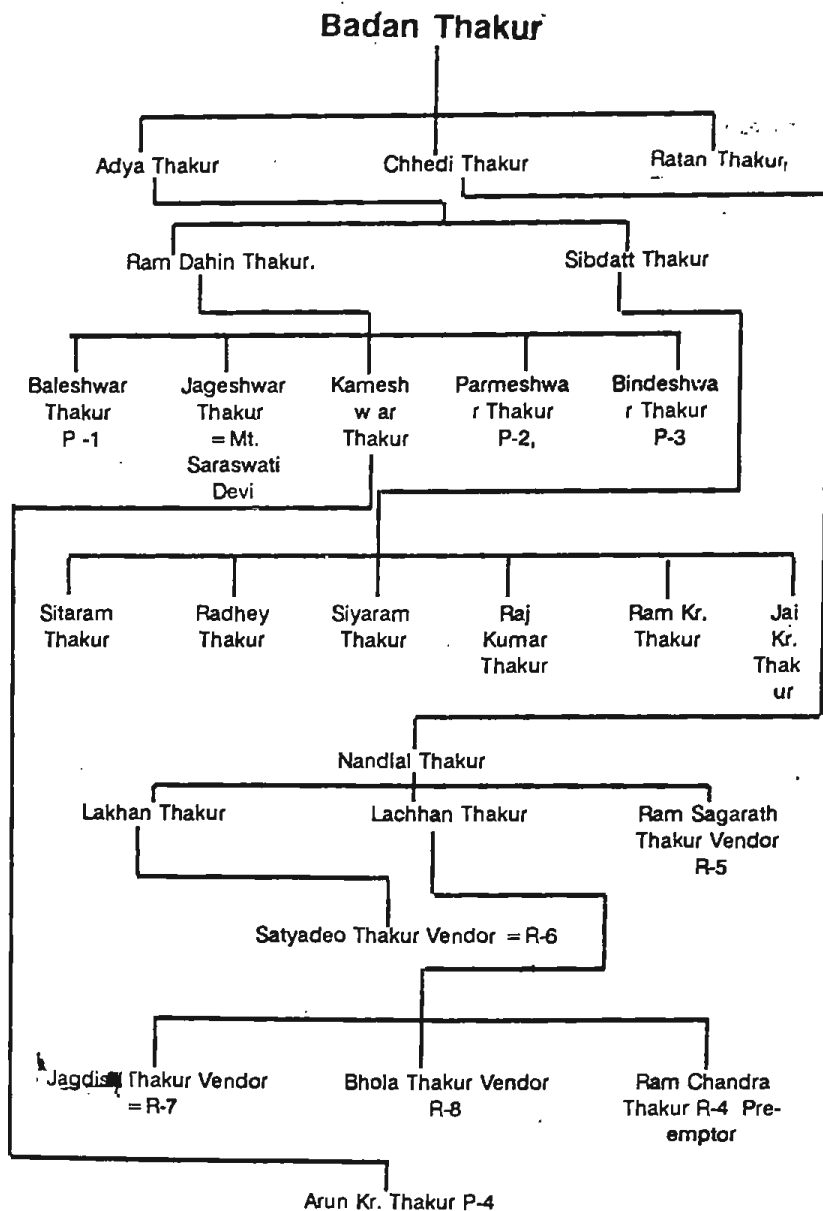
Vijoyashwar Narayan Sinha, Advocates for the petitioner

S.C, IV for the state.

Mr. Pran Kumar Jha, Advocate for responded No. 4

B.Sinha, J — This application is directed against a resolution dated 5.9.1983 passed by the Additional Member, Board of Revenue (Respondent No. 1) and the order dated 24. 5. 1983 passed by the Collector, Vaishali (Respondent No. 2) as contained in Annexures - 5 and 3 respectively to the writ application .

2. The vendors and the pre - emptors are allegedly descendants of one Badan Thakur. The geneological table of the family of Badan Thakur is given below for the sake of convenience.



3. The petitioners hail from the branch of Adya Thakur whereas respondents hail from the branch of Nandlal Thakur and Chhedi Thakur. Badan Thakur is said to have acquired the disputed plot no. 2005 measuring an area of 85 decimals. It has been alleged that in the revisional survey records of right the name of Ramadhin Thakur, deceased father of petitioner nos . 1 to 3 were not recorded in respect of the aforesaid plot no. 2005, although, they had a share therein.

4. The petitioners have, however, contended that, although, there had been a partition in the family of the petitioners but the said plot no. 2005 was left joint. Allegedly, between the parties the dispute with regard to title and possession of the said plot was resolved at the intervention of their common relations and well wishers and it was agreed that the respondent nos. 4 to 8 would execute a deed admitting the title and possession of the petitioners over the land in question.

5. It was further alleged that the respondent nos. 4 to 8 were to execute a sale deed in favour of the petitioners and in order to avoid any future controversy, a sum of Rs. 15000/- as amount of consideration was to be shown therein.

6. The sale deed was, therefore, executed by respondent nos. 5 to 8 on 12 . 3. 1982 as the respondent no. 4 resiled from his promise to execute the sale deed. The said sale deed was registered on 28.4.1982.

7. Respondent No. 4, thereafter, filed a pre - emption application in terms of Section 16 (3) of the Bihar Land Reforms (Fixation of Ceiling Area and Acquisition of Surplus Land) Act, 1961 (hereinafter to be referred to as ' the said Act') on 5. 5.1982 before Deputy Collector Land Reforms (Respondent No. 3). Allegedly , an affidavit had been filed by one Sri Satyadeo Thakur who was one of the executants of the sale deed to the effect that despite the fact that the land belonged to the petitioners and they had been coming in possession since long as it was their ancestral property but as their names were not entered in the Khatian, and the disputed sale deed was executed only to admit the title of the petitioners over the disputed land and to avoid future controversy and complications.

8. The said application for pre - emption was dismissed by Respondent no. 3 (Deputy Collector Land Reforms, Hajipur) by reason of an order dated 3. 1. 1983 as contained in Annexure - 2 to the writ application.

9. Respondent No. 4 , thereafter, preferred an appeal against the said order before the Collector who by reason of an order dated 24. 5. 1983 as contained in Annexure - 3 to the writ application allowed the same holding that the respondent no. 4 was a co - sharer as also a raiyat on the adjoining land and, thus , pre-emption application should be allowed.

10. The petitioners filed a revision application

against the aforementioned order dated 24. 5. 1983 before the Board of Revenue which was dismissed by the Addititonal Member, Board of Revenue by his order dated 5. 9. 1983 as contained in Annexure - 5 to the writ application.

11. The petitioners have contended that in the Consolidation proceeding respondent nos . 1 to 5 jointly obtained permission for transfer of the said land from the Consolidation Officer in Permission Case No. 550 of 1982.

12. A counter - affidcavit has been filed in this case on behalf of the State. In the said counter - affidavit it has been denied that plot no. 2005 remained joint. It has been contended that a partition took place amongst the heirs and legal representatives of Ratan Thakur long back and, thus, the petitioners ceased to be the co - sharer of the respondents.

13. It has been further denied that the entry in the revisional survey records of right was wrong or the deed of sale was executed with a view to resolve the controversy as alleged by the petitioners.

14. It has been contended in the said counter - affidavit as follows :

" It is needful to mention here that in any view of the matter, petitioners have failed to establish their own case because they did not prove as to when the alleged

partition was made, how they got 1/4 share in the disputed plot, why their one brother Jageshwar Thakur and two sisters namely Sumitra Devi and Urmila Devi as well as the branch of Sibdatt Thakur, and Ratan Thakur were not allotted their respective share in the disputed plot, and how and when the disputed plot, was allegedly acquired by one Badan Thakur etc.

" It is further stated that if the plea of being a co - sharer as raised by the vendee petitioners would have been correct then the branch of Sibdatt Thakur as well as Ratan Thakur would have also claimed for the their respective share in the disputed plot, either before the Survey Authority or before Consolidation authority, thus the non - interference by the branch of Sibdatta Thakur and Ratan Thakur clearly goes to show that the branch of Adya Thakur. (petitioners) has no manner of concern with the title and possession for the disputed land at any point of time. Thus, it is wrong to say that the petitioners have sold away any tree standing over the disputed piece of land any time earlier ; and at present the disputed land is being used for agriculture purpose. It is further reiterated that the land in question was exclusively acquired by Chhedi Thakur from the then landlord who filed the return in the name of said Chhedi Thakur accordingly and since acquisition, they were duly granted rent receipts etc.

15. Mr. V.N. Sinha, learned counsel for the petitioners

has raised a short question in support of this application. The learned counsel submitted that from the very fact that the respondent no.4 joined in the application for permission filed before the Consolidation Authorities goes to show that he alongwith respondent no.5 to 8, also intended to transfer the land in question in favour of the petitioners and, thus, the application for pre-emption was not maintainable.

16. The learned counsel submitted that in this view of the matter, the Appellate Authority must be held to have committed an illegality in so far as it held that the joining of respondent no. 4 in the application for pre-emption is not such a good ground to defeat the claim of the appellant.

17. The Appellate Authority, according to the learned counsel, has further mis - directed himself in not relying upon the affidavit filed on behalf of the petitioners.

18. Mr. Sinha further submitted that, although, a presumption of correctness arises in relation to an entry in the records of rights, but such a presumption is rebuttable and in that view of the matter, it was open to the petitioners to show that the said entry was not correct and in fact the said deed of sale was executed by way of an arrangement amongst the co - sharers.

19. Mr. Prem Kumar Jha, learned counsel appearing on behalf of the respondent no. 4, on the other hand , submitted that the land in question has been taken in

settlement by Chhedi Thakur and the return was filed by the predecessors - in - interest of the respondent.

20. It was submitted that, although, the revisional survey records of right were finally published in the year 1961 - 1962, no objection was filed by the petitioners in relation thereto. According to the learned counsel, even in the Consolidation proceeding the land was registered in the name of the respondent nos. 4 to 8.

21. It has been submitted that in view of the fact that the petitioners purported to have purchased the lands in question and even respondent nos. 5 to 8 applied for permission for sale of the said land, clearly establishes the fact that the pititioners have accepted the right, titile and interest of their vendors and, thus, they are estopped and precluded from denying and disputing the same.

22. The learned counsel further submitted that even in terms of the provisions of Bihar Tenancy Act, an entry in the records of right can not be questioned after 12 years. The learned counsel further drew my attention to the fact that in terms of Sections 91 and 92 of the Evidence Act, no oral evidence could be admissible in evidence. It was further submitted that the said entry was made in the revisional survey records of right on 25. 4. 1963 upon contest and the respondents can not question the same at this stage.

23. It was further submitted that no evidence had been adduced to the effect that the petitioners and /

other co - sharers were in possession of the properties in question . In fact, except the petitioners, no other co - sharer had been claiming possession and, thus , the plea of the petitioners that the plot no. 2005 was the joint property can not be believed.

24. It was further submitted that in any event as the petitioners had admitted that a partition had taken place long back, the onus of proof was upon them to show that the plot in question remained joint.

25. In terms of sub - Section 3 of Section 103 B of the Bihar Tenancy Act, a strong presumption arise about the correctness of the entries made in the records of right. It is true that such a presumption is rebuttable one.

26. So far as Hindu joint family is concerned, again there is a presumption of jointness. However, when a partition takes place, it has to be presumed that all the joint family properties have been partitioned. If according to any party to the partition some properties have been kept joint despite the fact that partition had taken place, the onus of proof in relation thereof lies upon him.

27. The petitioners appear to have relied upon an affidavit of one Satyadeo Thakur. The said affidavit was filed before the Executive Magistrate, Hajipur and not before the Collector under the said Act.

28. In terms of Section 33 of the said Act, a Collector

has the same power in making enquiries under the Act as vested in a Civil Court under the Code of Civil Procedure in trying a suit *inter - alia* in respect of admission of evidences by affidavits.

29. In terms of Order 19 Rule 1 of the Code of Civil Procedure, before an affidavit is taken in evidence, reasons therefor have to be assigned by the Court. Adduction of oral evidence as contemplated Under Order 18 Rule 4 of the Code of Civil Procedure is the ordinary rule. Admission of evidence by way of affidavit is an exception to the said rule. Thus, before a party can be permitted to lead to evidence by filing an affidavit, reasons therefor have to be assigned for by the Court concerned.

30. In this case, the affidavit was sworn before the Executive Magistrate. The petitioners have not contended that prior to getting the said affidavit admitted in evidence, any order was passed by the Collector under the said Act. Presumably, such an order could not have been passed as the affidavit was sworn before an Executive Magistrate and not before the Collector under the Act. Thus, in my opinion, no reliance could be placed upon the said affidavit by the Collector under the said Act.

31. Regarding the order of correctness of the entry made in the records of right, the petitioners were required to adduce cogent evidences.

32. Except the affidavit of Satyadeo Thakur, no other evidence was adduced. Even the Collector under the said Act did not refer to any other materials which clearly shows that no other materials have been brought on record by the petitioners for the purpose of rebutting the presumption of correctness arising out of the entry made in records of right. The petitioners have also not adduced documentary evidences to show that they had all along been in possession of the properties in question. Even Satyadeo Thakur in his affidavit has stated that he had knowledge of their possession for a period of 25 years.

33. If the contention of the petitioners and the said Satyadeo Thakur had been correct, they would have been in joint possession throughout and not for 25 years. In Paragraph - 9 of the said affidavit it has been contended that the petitioners are members of joint family but the said contention is apparently incorrect as, even according to the petitioners the properties of joint family had been partitioned long back except the plot in question.

34. Further, as noticed here in before, the petitioners have not adduced any evidences to show that despite the said partition, the plot in question was allowed to remain a joint family property.

35. In Paragraph - 23 of the writ application it has been contended that the respondent no. 4 had also joined in the application for obtaining permission for sale

of the land in question before the Consolidation Authorities. This fact has not been denied by the respondent no 4. However, it has been contended that the very fact that respondent nos. 4 to 8 filed an application for executing a Kewala in favour of the petitioners on 18. 2. 1982 clearly goes to show that the petitioners admitted the title of respondent nos. 5 to 8. The contention of the respondents thus has substance.

36. Further, it is well known that a deed of sale registered under the provisions of Indian Registration Act has some sanctity and, thus, the contents of such a document would be presumed to be correct.

37. Mr. Sinha, learned counsel for the petitioners has strongly placed reliance in *Ganesh Singh Vs. Widow of Sri Sibbaran Singh & others* /reported in 1988 P.L.J.R.,686, wherein it has been held as follows:-

" On the issue of the validity of the sale deed for consideration, however, there appears to be an evident erroneous approach by the learned Subordinate Judges as to the burden of proof upon the plaintiffs. In all cases, in which his position of property is required by law to be reduced to the form of the document, section 91 of the Evidence Act says that no evidence shall be given in proof of such deposition of properties. Section 92 of the Evidence Act says that no evidence of any oral agreement or statement shall be admitted in between the parties to any such instruments or their representative in

interest for the purpose of contracting, varying, adding to or subtracting from its terms subject to the exceptions enumerated in the proviso there to. Proviso 1 to Section 92 says that any fact may be proved which would invalidate any document or which would entitle any person to any decree or order relating thereto, such as fraud, intimidation, illegality, want of due execution, want of capacity in any contracting party, want or failure of consideration or mistake of fact or law. These provisions do recognise the right of a contracting party or any representative - in interest to question the validity of the document of disposition or property by proving want or failure of consideration, but they leave no manner of doubt that a person holding the document of disposition and proving its executing will be the owner of the disposition and the terms incorporated in the document shall be proof therefor. The party questioning the validity may resort to extrinsic or parol evidence to prove want or failure of consideration, but the burden shall always be in favour of the document. Such cases are covered by Section 101 of the Evidence Act which says that the party desirous of the judgment as to any legal right or liability on the existence of facts which he asserts, must prove that those facts exist. The learned Subordinate Judge has erred in asking the plaintiffs beyond the document to prove that they had paid consideration before the documents are held valid."

38. It is pertinent to note that it is not the case of

the petitioners and / respondent nos 5 to 8 that they did not receive any consideration in respect of the aforesaid deed of sale. If the respondent nos 5 to 8 accepted any amount of consideration the deed in question would be a deed of sale. Parties to a deed may show by adducing evidences that the nature of the document was not such which was intended to be executed. However, as noticed hereinbefore, even in order to prove the said fact, the petitioner have not adduced any evidence.

39. In view of the fact that onus of proof lay upon the petitioners and they have failed to discharge the same, the Appellate Authority as also the Revisional Authority could not be said to have committed any illegality in passing the orders on the basis of statutory presumptions.

40. Proviso 2 appended to Section 92 of the Evidence Act reads thus:

" The existence of any separate oral agreement as to any matter on which a document is silent, and which is not inconsistent with its terms, may be proved. In considering whether or not proviso applies, the Court shall have regard to the degree of formality of the document. "

The terms and conditions in a deed of disclaimer and the terms and conditions of deed of sale would be certainly contradictory to each other.

41. For the reasons aforementioned, in my opinion, there is no merit in this application and accordingly the same is dismissed.

42. In the facts and circumstances of the case, however there will be no order as to costs.

M.K.C.

Application dismissed.

*

APPELLATE CIVIL

1993.

September

Mahant Vijaya Nand Giri.*

V

Mahant Rama Nand Giri and ors.

Suit --- Suit for declaration of title and for a declaration that a particular deed is illegal, invalid, and in - operative -- - advolerum court fee paid on valuation of the suit property --- Court, whether can grant relief for recovery of possession --- principles of res - judicata --- applicability of --- Mahant --- position of under the Hindu Law --- Code of Civil Procedure, 1908 (Act No.V of 1908), section 11 and Hindu Law.

Where the plaintiff filed a suit for declaration of his title over the suit land as also for a declaration that a particular deed was sham, invalid, illegal and inoperative and paid advolerum court fee on the plaint, but no relief for recovery of possession was prayed for ;

Held, that as the plaintiff - appellant has paid advolerum court fee all through, there is no legal difficulty in granting relief for recovery of possession of the suit properties under the issue framed to what other relief or reliefs, the plaintiff is entitled.

*. Appeal From Original Decree No. 707 of 1977. Against the judgment and decree dated 22. 7. 1977 passed by the 4th Addl. Subordinath Judge, Siwan in T.S.No. 11/73 of 1973 - 76.

Held, further, that when a matter in issue between the parties is finally heard and decided by a competent court at one stage of the suit or proceeding, the matter will operate as *res - judicata* between the parties in the subsequent stage of the suit or proceeding if the same is not set aside by the appellate or revisional Court as the case may be.

Held also, that so far as the position and status of a Mahant is concerned, it is well settled that the Mahant is a mere custodian for management of the Math property and he cannot alienate the Math. Appeal by the plaintiff.

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

Mr. Arun Bihari Mathur & Mr. Pramod Bahadur Mathur, Advocates for the appellants

Mr. Thakur Prasad, Senior Advocate for the respondent

N.P.Sinha, J — This appeal by the plaintiff appellant, is directed against the judgment and decree dated 22nd July, 1977 passed by the 4th Additional Sub - ordinate Judge, Siwan in T.S.No. 11 /73 of 1973 - 76, dismissing the suit.

2. The plaintiff - appellant, brought a suit before the Sub - ordinate Judge, Siwan for declaration of his title over the suit land and for a declaration that the trust

deeds dated 18th October 1962, *Ext - K & K - 1*, executed by late Mahant Govind Giri of Sadikpur Math, in favour of defendant - respondent no. 1 Mahant Rama Nand Giri, in respect of the Math property fully described in Schedule - 1 of the plaint and sale - deeds dated 27th May, 1972 executed by defendant - respondent no. 1 Rama Nand Giri in favour of defendant - respondent nos. 2 to 5 in respect of the math property, fully described in Schedules 2 & 3 of the plaint are sham, invalid, illegal and inoperative. Further prayer for permanent injunction to restrain the defedant - respondent no. 1, from executing any deed of alienation in respect of the jsuit land, changing the structure of the suit land, changing the stucture of the Math and from establishing a ' Shivaling ' in the Math premises was also mede.

3. The point for consideration, in this appeal is whether Mahant Govind Giri was competent to execute trust deads, *Ext-K & K_1* in respect of the Math property. Making the defendant-respondent no.1 Mahant Rama Nand Giri of Sargati Math a trustee of the trust property and Sewait of Lord Shiva.

4. Admittedly, Sadikpur Math is a Maurushi and Grihasth Math and there is no deed of endowment or a deed of nomination of Mahant, after the death of the mahant of the Math. According to the usage and customs of the Math, the senior Chela succeeds to the Office of Mahant of the Math.

5. In the plaint, the plaintiff- appellant stated that Mahant Mahesh Giri, who was an ascetic founded a private and Grihastha Math, at Sadikpur and formally dedicated all his personal property to the Math. After the death of Mahant Mahesh Giri, his initiated disciple, Dilip Giri succeeded him and he managed the math property. On his death his disciple Kodai Giri succeeded him and on his death, Mahant Govind Giri succeeded him. Mahant Govind Giri in his life time had initiated the plaintiff-appellant Vijay Nand Giri, his Chela and the plaintiff - appellant thereafter started looking after and managing the affairs of the Math.

6. Mahant Govind Giri died on 4th May 1972 at the ripe age of 100 years. After his death, the plaintiff - appellant succeeded him being his initiated Chela and performed Terahi and Bhandara of his Guru Mahant, Govind Giri.

7. Some time before the death, Mahant Govind Giri had become senile on account of his very old age and dotage. The defendant - respondent no. 1 Rama Nath Giri disciple of Mahant Giri and firstly got a will, Ext - M of the Math property executed in his favour and 4 others but subsequently got the will (Ext - M) cancelled by a deed of cancellation, Ext - L and on the same day got Ext - K & K -1 executed fraudulently, making him the trustee of the trust property and Sewait of Lord Shiva.

8. Subsequently, the defendant respondent no. 1

alienated the Math property in favour of defendant nos. 2 to 5 by registered sale deeds on 27th May 1972.

9. The plaintiff, however, asserted that the trust deeds or the sale deeds or the sale deeds never came into operation and he continued managing the Math property as usual as he was managing from the life time of his Guru, Mahant Govind Giri.

10. Further case of the plaintiff - appellant was that the defendant - respondent no. 1 Rama Nath Giri belonged to Sargati Math and he had no concern with Sadikpur Math nor he was a disciple of mahant Govind Giri. The defendant - respondents on the strength of trust deeds and sale deeds, started interfering with the management and the affairs of the Math and, hence the suit.

11. The defendant - respondent no. 1, Rama Nand Giri filed his written statement and contested the suit. The defendant - respondent nos. 2 to 5 filed their separate written statements supporting the case of the defendant - respondent no. 1.

12. The defendant - respondent no. 1, in his written statement inter alia, pleaded that the suit, as framed, was not maintainable. The suit was grossly undervalued, bad for non - joinder of Lord Shiva as party and hit by Sections 31 and 42 of the Specific Relief Act. According to him, the plaintiff - appellant was an outsider and he was not initiated disciple of Mahant Govind Giri. The

plaintiff was set up by his enemy to lay a false claim over the Math property. The genealogy of Guru - chela, as given in the plaint was not correct. Mahant Govind Giri had two Chelas, namely, Raj Kumar Giri. Maharaj Giri and Dilip Giri. Govind Giri was the disciple of Kodai Giri who, in turn, was the disciple of Mahant Dilip Giri and he was disciple of Mahant Sheo Shanker Giri, who was disciple of Mahant Sahraj Giri, a disciple of Maharaj Giri and Mahant Govind Giri was his Checha Guru. Mahant Govind Giri had no initiated Chela and he bestowed all his love and affection upon him like his initiated disciple.

13. Further case of the defendant- respondent no.1 was that Sadikpur Math was a branch of Sargati Math. Mahant Mahesh. Giri had made his elder disciple Maharaj Giri, in charge of Sargati Math and his younger disciple. Dilip Giri was made in charge of Sadikpur Math. Subsequently Govind Giri called defendant- respondent no.1 from Sargati Math and he came to Sadikpur Math in the year 1950 after handing over the management of Sargati Math to his disciple Mahant Sachchidanand Giri and he began to look after and manage the property of sadikpur math since then. He further asserted that on 10th August 1951, Mahant Govind Giri executed a will, Ext- Min respect of the suit iand in his favour and 4 others. The will was however cancelled by a deed of cancellation dated 18.10.1962, Ext-1 mahant Govind Giri was a Shaiv and he had established a 'Shivaling' in the Math premises and some time there after, he executed

trust deeds Ext-K & K-1 for the performance of religious ceremony and rituals of Lord Shiva, making him trustee of the trust property and Sewait of Lord Shiva. Mahant Giri had instructed him to construct a Shiva temple in the Math premises and established a 'Shivaling' . He denied that Mahant Govind Giri had become senile due to old age at the time of execution of the trust deeds and the trust deeds were brought into existence by practising fraud upon the Mahant. The sale deeds executed by him in favour of defendant- respondent nos. 2 to 5 were genuine and operative. The plaintiff had no cause of action for the suit and the suit was liable to be dismissed with cost.

14. In the pleadings of the parties, issues were frames and the learned Additional Sub-ordinate judge, on consideration of the evidence adduced by the parties, decided issue nos. 3 and 4 in favour of plaintiff-appellant holding that the plaintiff- appellant was disciple of Mahant Govind Giri and the suit was not bad for non-joinder of Lord Shiva as a party. He however, decided issue Nos. 5& 6 and issue Nos. 2 to7 against the plaintiff- appellant, holding that the plaintiff had failed to prove that the trust deeds, Ext-K & K-1 were brought into existence by practising fraud and undue influence upon Mahant Govind Giri and the plaintiff had no valid cause of action for the suit and dismissed the suit.

15. No cross-appeal has been filed by the defendant-

respondents against the finding of the learned trial court that the plaintiff- appellant is the Chela of Mahant Govind Giri. It is, therefore, now not open to the defendant-respondents to challenge this finding of the trial court. This finding of the trial court will now therefore, operate as resjudicata between the parties.

16. It is well settled that when a matter in issue between the parties is finally heard and decided by a competent court at one stage of the suit or proceeding, the matter will operate as res judicata between the parties in the subsequent stage of the suit or proceeding, if the same is not set aside by the appellate or revisional court, as the case may be.

17. As regards the position and status of Mahant under the Hindu Law is concerned, it is well settled that the Mahant is a mere custodian or manager of the Math property and he cannot alienate the math property without legal necessity nor he can change the constitution of the math.

In the case of *Krishna Dayal Giri Vs.Laldhari Giri*,¹ Chamier, Chief justice speaking for the Bench observed,

" The head of a religious or inheritable institution has no power to bargain away his office or alter the constitution of the institution of which he is in charge. "

19. The Privy Council, in the case of *Ganesh Chunder Dhur Vs. Lal Behary Dhur and others*¹ observed.

“ All estates of inheritance created by gift or will , so far as they are inconsistent with the general law of inheritance are void as such, and by Hindu Law no person can succeed thereunder as heir to the estates described in the terms which in English Law would designate estates tail and the rule is applicable to an hereditary office and endowment as well as to other immovable property. ”

20. The Supreme Court, in the case of *Sital Das v. Sant Ram and others*² observed.

“ Succession of Mahantship of a Math or religious institution is regulated by customs or usage of a particular institution, except where a rule of succession is laid down by the founder himself who created the endowment. ”

21. The Supreme Court, in the case of *Prafulla Choron v. Staya Choron*.³ further observed.

“ Shevaitship being property, it devolves like any other species of heritable property. It follows that ; where the founder does not dispose of the Shebaiti rights in the endowment created by him, the Shebaitship devolves

1 (1936) A.I.R. (Pat) 318

2 (1954) A.I.R. (S.C) 606

3 (1979) A.I.R. (S.C) 1682

on the heirs of the founder according to Hindu Law , if no usage or custom of a different nature is shown to exist."

22.. A Division Bench of Calcutta High Court, in the case of *Anath Bandhu De V. Krishna Lal Das*¹ and others has also observed,

" If the founder of the Devottar had laid down any mode of devolution of the office of Sewait, the office would devolve according to that mode. In its absence, the office would devolve in accordance with Hindu Law of succession i.e. the office of Sewait would be hereditary one. It was further observed that prescribing a line of succession to the office of Sebait in tail male being opposed to Hindu Law would be void."

23. In the present case, Sadikpur Math is admittedly a Mauroushi and private Math and according to the customs and usage of the Math, the office of Mahant. The defendant respondent no. 1 has failed to prove that Govind Giri was his Chachaguru and he bestowed all his love and affection upon him like his initiated Chela and Mahant Govind called him to Sadikpur and he started managing the Math property right from 1950. The claim of the defendant - respondent no. 1 stands contradicted by trust deeds Ext - K and K - 1 wherein it is mentioned that the defendant no. 1 was resident of Sargati. On the

other hand, the plaintiff - appellant has successfully proved his case that he was initiated Chela of Mahant Govind Giri. Therefore, Mahant Govind Giri who was the last Mahant of the Math and a mere custodian of Math property had no right to change the line of succession of the office of Mahant by executing trust deeds Ext - K and K - 1 making the defendant respondent no. 1 as trustee of the Math property and Sewait of Lord Shiva.

24. The plaintiff's case that the trust deeds Ext - K and K - 1 were obtained by practising fraud however stands proved from the fact that the trust deeds were executed on 18th October 1962 on which date the will Ext - M executed by Mahant Govind Giri had been cancelled by Ext - L. It is obvious that there was no reason for Mahant Govind Giri to execute either will or the trust deeds. The plaintiff has led evidence of P.Ws. 3, 7, and 11, besides his own evidence, who examined himself as P. W. 1 that Mohan Govind Giri had become senile and he was of feeble mind on account of his old age at the time of execution of will and trust deeds. "

25. Sri Thakur Prasad appearing on the defendant respondents contended that the appellant remained silent all along during the life time of Mahant Govind Giri and he filed the Suit after his death. There is not much force in the contention of Sri Prasad. It is obvious that the suit has been filed on 20th January 1973, well within the period of limitation. Article 107 of the Indian Limitation

Act, 1963 prescribes limitation of 12 years for possession of a hereditary office, from the date the defendant takes possession of the office adversely. Article 92 of the Limitation Act also prescribes limitation of 12 years for recovery of immovable properties conveyed or bequeathed in trust and afterwards transferred by the trustee.

26. The trust deeds, Ext - K, K - 1 were executed by Mahant Govind Giri on 18th October 1962 and the trustee defendant respondent no. 1 Rama Nand Giri transferred the suit land to the respondent nos. 2 to 5 on 27th May 1972 and the suit was thus filed within 12 years of the period of limitation prescribed under the Limitation Act. The finding of the trial court that the suit was not maintainable is misconceived.

27. Sri Prasad further contended that defendant - respondent nos. 2 to 5 had taken over possession of the suit property rightly or wrongly by virtue of the sale deeds in their favour but no relief for recovery of possession was sought for by the plaintiff. Therefore, even if the appeal is allowed and the suit is decreed, the plaintiff - appellant will not be able to enjoy the benefit of decree.

28. However it appears that the plaintiff has paid ad valorem court fee on the valuation on the plaint on the valuation of the suit property as also on the memo of appeal. Therefore, by the necessary implication, the

plaintiff will be deemed to have sought for recovery of possession of the suit land also, in case he was found out of possession of the suit property.

29. As the plaintiff - appellant has paid ad valorem court fee all through therefore, there is no legal difficulty in granting relief for recovery of possession of the suit properties to the plaintiff - appellant under the issue framed to what other relief or reliefs, the plaintiff is entitled to, may be granted to him. The plaintiff - appellant is, therefore, entitled to get relief for recovery of possession of the suit property.

30. The trust deeds, Ext - K and K - 1 and the sale edde executed by respondent no. 1 in favour of other respondents are, therefore, declared ab initio void, illegal and inoperative and accordingly they are set aside.

31. In the result, the appeal is allowed and the suit is decreed with cost assessed at Rs. 500/- (five hundred).

M.K.C.

Appeal allowed.



CIVIL WRIT JURISDICTION

**Before Binod Kumar Roy and Ram Nandan Prasad,
JJ.**

1993

October, 1.

Ranjit Prasad Sinha. *

V.

The State of Bihar and another.

Res Judicata --- principles of --- findings of the High Court, on merit recorded against the writ - petitioner which were not set aside by the Supreme Court, whether operate as res Judicata in subsequent writ petition before the High Court for the same relief.

Held, that permitting a writ petition filed under Article 32 of the Consitution before the Supreme Court, to be withdrawn only with liberty to file a writ - petition under Article 226 and 227 of the Constitution befor High Court cannot mean that the doctrine of Res Judicata / Constructive Res Judicata will not be applicable if it applies.

The writ petitioner had earlier moved this Hon'ble Court for declaration which he is claiming in this writ - petition.

*. Civil Writ Jurisdiction Case No. 2899 of 1990. In the matter of an application under Articles 226 and 227 of the Constitution of India.

Held, that the finding of this Court on merit recorded against the writ - petitioner, which were not set aside by the Hon'ble Supreme Court, operate as res-judicata / constructive resjudicata.

Case laws discussed.

Applications under Articles 226 and 227 of the Constitution.

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

M/s. Padam Narayan Singh, Chandra Shekhar Singh, Baban Sharma, D. K. Singh, Mahendra Prasad Sharma and Shrideo Mishra for the petitioner.

None for respondent no. 1

M/s Basudeva Prasad, Sunil Kumar, Rajeev Prakash, Subodh Kumar for respondents no. 2

Binod Kumar Roy & R.N. Prasad, JJ., — In this writ application, the petitioner, who at the relevant time was an officiating Subordinate Judge posted as Additional Subordinate Judge, Ranchi and who was found guilty of the charges levelled against him, prays for issuance of an appropriate writ, direction or order for treating the order contained in Memo No. 380 v - 92 / dated Patna the 29th March, 1933 of this Court (Respondent No. 2)

as contained in Annexure - 1 as non - est, void, inoperative, arbitrary, un - constitutional and violative of his fundamental rights guaranteed under Articles 14 , 16 and 21 of the Constitution of India and to issue a writ of mandamus directing the Respondents to treat him to be promoted as an Additional District Judge and District Judge retrospectively in view of the notification dated 25- 2- 1978 of the Department of Personnel and Administrative Reforms of the Government of Bihar as contained in Annexure - 2 and also to grant consequential benefits of promotion and other advantages which he would have been entitled in due course and to pay all salaries and allowances during the period which he was under suspension and to award compensation of rupees ten lacs to him.

2. The petitioner asserts that he was appointed as Munsif in the Bihar Civil Service (Judicial Branch) in the year 1958 and was promoted as an Additional Subordinate Judge, in July, 1972, he crossed his first efficiency bar in the year 1973 and the second efficiency bar in 1975 with effect from 11 - 2 - 1974, he was also Chief Judicial Magistrate and Assistant Sessions Judge, Nawadah from April 1974 and was drawing maximum salary of Subordinate Judge and his confidential remark for the year 1975 - 76 was excellent; that his trouble started in the year 1976 when he incurred the displeasure of the then Hon'ble Judge, Administrative Department of this Court on account of his protest,

when the name of his relation was recommended for the special post of Under Secretary, Law Department, Government of Bihar against his rightful claim and seniority: that in January, 1976 several Subordinate Judges were confirmed except him though he was fit to be confirmed against several vacancies existing at that time; that further in August, 1976 names of some Subordinate Judges above him were recommended for promotion to the post of Additional District Judge leaving some posts vacant for his promotion but his name was not recommended at that time; that on 2- 5- 1977 he was superceded though eligible and no adverse report of any kind was communicated to him; that no reason was assigned No.1, the State of Bihar, after examining the excellent service record and finding that the Officers having inferior service record than the petitioner, were recommended for promotion as Additional District Judge, demanded reasons from this Court for superceding him but this Court vide letter dated 2- 8- 1977 refused to disclose the reasons and took a stand that the Government has no authority to ask for reasons for supersession from this Court; that Respondent No.1 did not accept the stand of this Court and insisted for disclosing the reasons; that on 9- 2- 1978 this Court confirmed the Subordinate Judges, junior to him and took up a stand before the Government that since he is not a confirmed Subordinate Judge, he could not be promoted as an Additional District Judge; that the Government was not

convinced as the names of all the un - confirmed Sub-ordinate Judges were recommended for promotion and accordingly vide notification dated 25- 2- 1978, as contained in Annexure - 2, kept one post reserved for him and asked this Court to disclose reasons for supersession or to recommend his name for promotion as an Additional District Judge; that as this Court did not recommend his name for promotion, he filed a writ application under Article 32 of the Constitution of India before the Hon'ble Supreme Court which was dismissed in the year 1979 as the petitioner had the opportunity of representing him before the Governor and the post of an Additional District Judge was kept reserved for him; on 20- 2- 1980 the petitioner filed representation to the Governor; that on 21- 2- 1980 a departmental proceeding was started against him under Rule 55 of the Civil Services (Control, Classification and Appeal) Rules, 1930 (hereinafter referred to as the Rules) and he was put under suspension by this Court; that the proceeding was initiated relating to some manufactured anonymous letters of the year 1975 - 76, the contents of which were not disclosed to him nor was he supplied copies thereof, when demanded; that he also challenged the order of his suspension as illegal and arbitrary submitting his written statement within a fortnight stating further, inter alia, that the enquiry was illegal and debarred under the Government circular besides the allegations made in the judicial orders of the year 1974 - 75 could not be

enquired into in such proceedings ; that the petitioner demanded copies of the alleged anonymous letter enquired into confidentially and the relevant materials including the evidence of the witnesses collected against him but were not supplied to him nor was he served with the notice of hearing of the proceeding; that the departmental enquiry was delayed for more than six months against the government circular and thus the petitioner filed a writ petition before this Court bearing C. W. J. C. No. 3068 of 1980; that in the aforementioned writ application this Court passed an order on 16-3-1980 directing the Judicial Commissioner of Ranchi, who was the enquiring officer, to conclude the departmental proceeding and send his report to this Court; that at that time Sri A. P. Sinha was the Judicial Commissioner, Ranchi, who had examined two witnesses during enquiry but despite the aforementioned direction of the judicial side of this Court did not conclude the enquiry and submit a report; that later on Shri B.P. Griyaghey, another Judicial Commissioner, concluded the enquiry exparte and submitted report on 4-9-1981 even without examining a single material witness or without even discussing the written statement filed by him holding that the changes have been proved; that on 30-3-1982 this Court issued second show cause notice of dismissal to him, as contained in Annexure-5; that C.W. J. C. NO. 3068 of 1980 was dismissed by this Court without considering his plea that the second show cause on the administrative side

of this Court; which was rejected on 25-3-1983 vide Annexure-1 without giving reasons and awarding punishment of censor, withholding of increments and promotion for two years and salary for the period of suspension, though withholding of salary for suspension period after re-instatement is not privileged in the Rules; that against the aforementioned order, the petitioner preferred an appeal before the Governor of Bihar on 10-5-1983 but this Court refused to forward the same to the Governor of Bihar, who was his appointing authority; that there after Respondent no. 1 took opinion of Shri K.P. Verma, the then Advocate-General but took no decision even after his representation dated 28-4-1985; that there after the petitioner filed writ petition No. 12263 of 1985, before the Hon'ble Supreme Court, which was allowed to be withdrawn with liberty to move this Court for grant of writ in the nature of mandamus or other appropriate directions and orders under Article 226 of the Constitution, vide order dated 31-10-1985, as contained in Annexure-6; that there after the petitioner filed a writ application bearing C. W. J. C. No. 6215 of 1985 before this Court which was dismissed on 17-2-1986 holding, inter alia, that no appeal lies before the Governor against the administrative order of this Court; that the petitioner there after filed Special Leave petition (Civil) No. 3723 of 1986 before the Hon'ble Supreme Court in which by order dated 10-9-1986 (as contained in Annexure-7) Special Leave was granted, though confined to the question

whether an appeal lies to the Governor against the order dated 16-9-1986 of the High Court, and Leave petition was converted as Civil Appcal No. 3535 of 1986 during hearing of which the learned counsel for this Court took up a stand that the Rules aforesaid do not apply to the members of Judicial Service, and the appeal was dismissed vide order dated 16-7-1987, as contained in Annexure-8, observing, inter alia, that neither party was able to indicate as to what was the Rule which will govern the judicial service to which he belonged and that the present regrettable state of confusion must be ended; that there after the petitioner filed another writ petition No. 443 of 1988 before the Hon'ble Supreme Court for quashing the order of this Court dated 25-3-1983, which by order dated 26-3-1990, as contained in Annexure- 9, was permitted to withdrawn with liberty to him to approach this Court and hence this writ application.

3. In the counter affidavit filed on behalf of Respondent No.2, it has been stated, inter alia, that the points raised in this writ application have already been raised earlier in this Court as well as in the Hon'ble Supreme Court of India and all have been negetived and is not maintainable as the prayers made have already been rejected by this Court as well as by the Hon'ble Supreme Court; that this Court is the final authority to recommend the name of the suitable Judicial Officers for promotion and it is absolutely false to say that there was nothing against the petitioner ; that the allegations made against

him, after due enquiry, were found to be correct; that the services of the Officers for promotion and it is absolute false to say that there was nothing against him, after due enquiry, were found to be correct; that the services of the Officers of the Subordinate Courts are government by the Civil Services (Classification, Control & Appeal) Rules, 1930 and that full facts regarding application of the said Rules were not brought to the notice of the Hon'ble Supreme Court; that the petitioner was found guilty in the departmental proceedings and the punishment was inflicted in the enquiry which had to be concluded ex parte because the petitioner opted not to appear before the Enquiring Officer; that the control over the Judicial Officers of Courts subordinate to the High Court has been vested in the High Court under Article 235 of the Constitution of India, which is absolute and complete, subject only to limitation as is imposed in Article 235 of the Constitution of India itself and the High Court can hold enquiry against such Judicial officers, impose punishment, other than dismissal or removal or reduction in rank; that any law or Rule taking away or impairing the jurisdiction of the High Court under Article 235 of the Constitution being in conflict with Article 235 has to be read down ; that the control of the High Court being absolute any punishment other than the one in which High Court has to recommend to the State Government for final order, is absolute with such order in any manner and it is therefore, obvious that provision of

appel against the order of punishment other than dismissal, removal or reduction in rank passed by the High Court, is inconsistent with the object of Article 235 and, therefore, has to be held to be in - applicable and the provision for appeal in the Rules is redundant as the order passed by the High Court is final and binding and no other authority can interfere with the same, be in appeal or otherwise, and accordingly the obvious conclusion is that no right of appeal survives to the judicial officers against the order imposing minor punishment of the category referred to above; and that there is no merit in the writ petition and it is fit to be dismissed. Several statements have been made in the counter affidavit on the merits of the claim of the petitioner supported by various documents but we do not consider necessary to state all of them .

4. Mr. Basudeva Prasad, learned counsel appearing for Respondent No. 2 at the out set submitted that the earlier writ application having been dismissed by this Court, rejecting the petitioner's claim, the instant writ application is barred on account of *res judicata* / constructive *res judicate* and is liable to be dismissed as not maintainable on that account. He placed strong reliance in this connection on a decision of the Hon'ble Supreme Court in *Forward Construction Co. Vs. Prabhat Mandal*, reported in A.I.R. 1986 S.C. 391, wherein it was laid down as follows :--

" So far as the first reason is concerned, the High Court in our opinion was not right in holding that the earlier judgment would not operate as *res judicata* as one of the grounds taken in the present petition was conspicuous by its absence in the earlier petition. Explanation IV to Section 11 CPC provides that any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit shall be deemed to have been a matter directly and substantially in issue in such suit. An adjudication is conclusive and final not only as to the actual matter determined but as to every other matter which the parties might and ought to have litigated and have had it decided as incidentale to or essentially connected with the subject matter of litigation and every matter coming within the legitimate purview of the original action both in respect of the matters of claim or defence. The principle underlying Explanation IV is that where the parties have had an opportunity of controverting a matter that matter had been actually controverted and decided. It is true that where a matter has been constructively in issue, it cannot be said to have been actually heard and decided . It could only be deemed to have been heard and decided. The first reason, therefore, has absolutely no force. "

5. Mr P.N.Singh, learned counsel appearing on behalf of the petitioner, submitted as follows : -- (i) The

instant writ application has been filed in view of the direction given by the Hon'ble Supreme Court as contained in Annexure - 6 and is not at all barred either by res judicata or constructive res judicata.

(ii) The point of applicability of the entire Rules did not arise before the Hon'ble Supreme Court because this Court had held that certain provisions of the Civil Services (Classification, Control and Appeal) Rules, 1930 are not applicable to the Judicial Officers and the learned counsel of this Court (Now one of us) had argued that those Rules do not apply to the Judicial Officers of Bihar and accordingly the proceedings started against the petitioner under Rule 55 of the Rules, in view of the pronouncement of the Hon'ble Supreme Court in which merged the judgment of this court becomes null and void. (iii) As the petitioner was an Assistant Sessions Judge, he was not under the control of this Court. (iv) The petitioner has got a fresh cause of action accordingly to move this Court. Mr. Singh in support of his submission also placed reliance on a number of decisions of the Hon'ble Supreme Court in *Antulay Vs. R.S.Nayek*¹ *Baradakanta Mishra Vs. High Court of Orissa*² *M/S. Andhra Industrial Workers Vs. Chief Controller of Imports*³ *Union of India Vs. All India*

1 A.I.R. 1988 S.C. 1531,

2 A.I.R. 1976 S.C. 1899,

3 A.I.R. 1974 S.C. 1539,

*Judges' Association*¹ *Pratap Singh Vs. The State of Punjab*² *The State of Assam Vs. Kuseswar Saikia*³ *Bandhwa Mukti Morcha Vs. Union of India*⁴ *M.C.Mehta Vs. Union of India*⁵ *Smt. Menaka Gandhi Vs. Union of India*⁶ and *S.S. Rathore Vs. State of Madhya Pradesh*⁷

6. Mr. Basudeva Prasad, learned counsel in his reply reiterated that the writ petition is not maintainable being barred on account of res judicata. The order impugned as contained in Annexure - 1 was assailed by the petitioner before this Court in C.W.J.C. No. 6215 of 1985 in which a Division Bench of this Court after going through the entire evidence was pleased to hold vide judgment and order dated 17-2-1986 that there is no substance in the attack to the validity or propriety of the said order and that it was difficult to quash the same on any account. This Court also rejected the prayer of the petitioner to quash the enquiry report and his claim for promotion. This Court in regard to the question of withholding an appeal held that the forum of a appeal under Rule 57 (5) of the Rule, was available to a Civil Servant under the administrative control of the local Government

1 J.T.1993 (4) S.C. 618

2 A.I.R. 1964 S.C. 72,

3 A.I.R. 1970 S.C. 1616,

4 A.I.R. 1984 S.C. 802,

5 A.I.R. 1987, S.C. 1086,

6 A.I.R.1978 S.C. 597

7 A.I.R.1990 S.C. 10.

against an order passed by the local Government whereas the petitioner was under the administrative control of this Court in terms of Article 235 of the Constitution of India and not under the local Government and that the impugned order having been passed by the High Court and not by the local Government, the Court was justified in refusing to forward the appeal of the petitioner. The learned counsel for the Petitioner was also equally guilty in not pointing out to the Hon'ble Supreme Court that the Rules were really applicable. Even assuming that the petitioner has fresh grounds but he is not entitled to file a second writ application in view of the patent fact that the order to this Court stood tacitly affirmed by grant of restricted Rule in the Special Leave Petition. The petitioner cannot challenge the judgment of the Hon'ble Supreme Court to which he was a party and his remedy, if at all, was to move the Hon'ble Supreme Court for review of the said judgment making out valid grounds before the Hon'ble Supreme Court and that the decisions relied upon by Mr. Singh do not support his contention.

7. Mr. Singh further reiterated that he being the President of the Bihar Judicial Service Association is more eager to know the stand of this Court as to whether the Rule aforesaid governs the service conditions of the Judicial Officers of this State though he has no doubt that the Rules aforesaid governs them.

8. Suprisingly no one appeared on behalf of the Respondent no. 1, the State of Bihar, during hearing which continued in part, because of paucity of time, on several days.

9. We take up first the question of applicability of res judicata / constructive res judicata.

10. We find that a five Judges Constitution Bench of the Hon'ble Supreme Court in the Direct Recruit Class II *Engineering Officers' Association and others Vs. State of Maharashtra and others* (1) A.I.R. 1990 .C. 1607 (at pages 1624 - 25 , paragraph 35) laid down as follows:--

" It is well established that the principles of res judicata are applicable to writ petitions. The relief prayed for on behalf of the petitioner in the present case is the same as he would have , in the event of his success , obtained in the earlier writ petition before the High Court . The petitioner in reply contended since the special leave petition before this Court was dismissed in limine without giving any reason, the order cannot be relied upon for a plea of res judicata . The answer is that it is not the order of this Court dismissing the special leave petition which is being relied upon ; the plea of res judicata has been pressed on the basis of the High Court's judgment which became final after the dismissal of the special leave petition . In similar situation a Constitution Bench of this Court in *Daryao V. State of Up.* (1962) 1 SCR 574: (A.I.R.1961 S.C. 1457) held that

where the High Court dismissed a writ petition under Art. 226 of the Constitution after hearing the matter on the merits, a subsequent petition in the Supreme Court under Art. 32 on the same facts and for the same relief filed by the same parties will be barred by the general principle of *res judicata*. The binding character of judgments of courts of competent jurisdiction is in essence a part of the rule of law on which the administration of justice, so much emphasised by the Constitution, is founded and a judgment of the High Court under Art. 226 passed after a hearing on the merits must bind the parties till set aside in appeal as provided by the Constitution and cannot be permitted to be circumvented by a petition under Art. 32. An attempted change in the form of the petition or the grounds cannot be allowed to defeat the plea as was observed at page 595 (of SCR): (at p. 1467 of AIR) of the reported judgment, thus:

" We are satisfied that a change in the form of attack against the impugned statute would make no difference to the true legal position that the writ petition in the High Court and the present writ petition are directed against the same statute and the grounds raised by the petitioner in that behalf are subsequently the same."

The decision in *Forward Construction Co. V. Prabhat Mandal (Regd.)*, Andheri, (1986) 1 SCC 100: (AIR 1986 S.C 391), further clarified the position final not only as

to the actual matter determined but as to every other matter which the parties might and ought to have litigated and have had decided as incidental to or essentially connected with subject matter of the litigation and every matter coming into the legitimate purview of the original action both in respect of the matters of claim and defence. Thus, the principle of constructive res judicata underlying Explanation IV of S. 11 of the Code of Civil Procedure was applied to writ case is fit to be dismissed on the ground of res judicata.

11. We further find that in Supreme Court *Employees Welfare Association Vs. Union of India* reported in A.I.R. 1990 S.C. 334 it was laid down as follows :--

"The doctrine of Res Judicata is a universal doctrine laying down the finality of litigation between the parties. When a particular decision has become final and binding between the parties, it cannot be set at naught on the ground that such a decision is violative of Article. 14 . So far the parties are concerned they will always be bound by the said decision. In other words, either of the parties will not be permitted to reopen the issue decided by such decision on the ground that such decision violates the equality clause under the Constitution."

12. True it is that in the aforesaid decision the 7 Judges decision in *A.R. Antulay* (Supra) strongly relied upon by Mr. Singh has not been considered. The Majority

judgment in this case noted that earlier the Supreme Court was not called upon and did not decide the express limitation on the power conferred by section 407 of the Code which includes offences by public servants mentioned in the 1952 Act to be over ridden in the manner sought to be followed as the consequential direction of the Supreme Court which were alleged to have been issued without observing the principles of audi alteram partem and when that fact is brought to the notice, the Supreme Court can remedy the situation and that the rules of res judicata would not apply in correcting its error, which has the effect of depriving an accused of his fundamental rights particularly life and liberty; under its inherent jurisdiction without insisting on the formalities of a review petition. However, here the position is different which will appear from the facts below, besides Mr. Singh submits that no review is sought for of the earlier judgment rather a declaration is sought for that the earlier judgment is void and nullity and accordingly non - est.

13. We have been taken through the brief of the earlier writ petition (C.W.J.C. No. 6215 of 1985) by Mr. Singh, Paragraph 1 of the earlier writ petition, which is relevant, reads thus :--

" That the prayer in this writ application are that the Hon'ble Court may be pleased to issue appropriate writ, direction, or orders to the Respondents to consider the case of petitioner for retrospective promotion to the rank

of Additional District and Sessions Judge, a claim accruing to the petitioner since 6th of October, 1976 when by notification of respondent no. 1 six Additional District Judges were appointed and also thereafter when on 25th February, 1958 vide Annexure - 1 , Respondent No. 2, without valid rhyme or reason and under extraneous constitution, in arbitrary and discriminatory manner offending Articles 14 and 16 of the Constitution of India, did not recommend petitioner's name for promotion as Additional District Judge.

(ii) To quash the inquiry report dated 4- 9- 81 submitted by *Sri B.P. Griyaghey* placed at Annexure - 5 as well as the show cause notice dated 30th March 82 placed at Annexure - 6 , as well as the order of the High Court vide letter dated 25-3-1983 the true copy placed at Annexure-8 because these orders are illegal , perverse and against the materials on the record.

(iii) To quash the letter dated 9th July, 83 of Respondent No. 2 communicated to petitioner vide District Judge Letter No. 22 dated 17th August, 83 placed at Annexure - 9 holding that no appeal against the order of punishment passed by the High Court lies before the Governor.

(iv) To quash letter No. 15363 dated 5-9-85 of Respondent No. 2, true copy placed at Annexure - 11 whereby petitioner has been communicated dead and stale adverse remarks giving reason for non - confirmation of the petitioner as Sub Judge.

14. While dismissing the aforementioned writ application this Court vide its Judgment and order dated 17-2-1986 had recorded the following findings :--

(i) " The word ' control ' appearing under Article 235 of the Constitution has been the subject matter of interpretation by the Supreme Court on several occasions. It is now well established that 'control' includes something in addition to the mere superintendence of the Court. The control is over the conduct and discipline of Judges short of dismissal, removal or reduction in rank. The power of the High Court, therefore , to impose the punishments contained in Annexure - 8 cannot be doubted

(ii) " He did not allege malice as a fact against any Judge or Chief Justice of this Court, but submitted that the impugned order was malafide in law. It must be stated that the petitioner made a wild reference of some malice on the part of *Mr. Shambhu Prasad Singh*, the then Judge - Incharge - Administration. That insinuation of assertion is of no consequence in deciding the validity of the punishments imposed upon the petitioner. The malice attributed to him is too far fetched and appears to have been invented only for the sake of litigation. Apart from it at the time the impugned order (Annexure - 8) was passed *Mr. Shambhu Prasad Singh* was not a Judge of this Court at all."

(iii) " As a malice in law, learned counsel for the petitioner failed to advance any substantial argument except suggestion that there was non - application of mind. This submission has absolutely no substance and must be rejected. Annexure - 8 is quite a lengthy document . It is not one line order as is done by the Executive. This had been preceded by calling upon the petitioner to show cause against his dismissal. That notice was preceded by a detailed departmental proceeding conducted by Judicial Commissioner, Ranchi. If there had been non - application of mind, an order of dismissal or removal would have followed and not the punishment mentioned above. In fact, it is rather surprising that upon the findings of the Judicial Commissioner that the petitioner should have been let off only with the punishment incorporated in Annexure - 8 . A detailed departmental proceeding was conducted by Judicial Commissioner, Ranchi, The petitioner refused to take part in it. The Judicial Commissioner, found all charges levelled against him established. If the verdict went against the petitioner, he had himself to thank for it. We are unable to find any malice in fact or in law. The order (Annexure - 8) is not vitiated on that score."

(iv) " Learned counsel for the petitioner submitted that the impugned punishment was vitiated as Mr. B.P. Griyaghey, now a judge of this Court, was not competent to hold the departmental enquiry. This submission as well has no substance." " Submission in regard to the want

of power in B.P.Griyaghey to hold 'he departmental proceeding has only to be stated to be rejected."

(v) " Learned counsel for the petitioner tried to take us through the entire evidence as if we were a court of Appeal. We had to suffer his long arguments, but that has cut notice. We are unable to convert ourselves into a Court of Appeal against the findings of Mr. B.P. Griyaghey or the order of the High Court .In ort writ jurisdiction we cannot convert ourselves into a court of facts. In that view of the matter, we find no substance in the attack at the validity or proprieter of Annexure - 8. It is difficult to quash Annexure - 8 on any court."

(vi) " The attack on Annexure - 8 having been found to be without substance, the prayer for quashing Annexure - 5 and 6 also must be rejected. Annexure - 5 is the report of Mr. B.P.Griyaghey in the departmental proceeding. We wonder how a report can be quashed. It is not definitive. It is only a report into certain allegations. Nothing has been brought to light to persuade us to hold that the petitioner was denied reasonable opportunity of defending himself. Annexure - 6 is only a notice calling upon the petitioner to show cause why he should not be dismissed. He has not been dismissed or removed. We have come much ahead of the notice Notice and report cannot be quashed. In that view of the matter, the prayer to quash Annexure - 5 and 6 no substance and must be rejected. "

(vii) " The petitioner has also prayed for quashing Annexure - 11. These are some adverse remarks in the character roll of the petitioner. The petitioner's stand is that these should not have been communicated to him. If that is his stand, he may ignore it. The High Court was not communicating adverse remarks to judicial Officers in the past. Now it seeks to correct itself and every adverse order is being communicated to every judicial officer. In that background Annexure - 11 was issued. These remarks have now lost significance. The petitioner is about to superannuate within a couple of months - so stated learned counsel for the petitioner. Whether the remarks can be taken into consideration or not are of only academic interest."

(viii) " Learned counsel for the petitioner has submitted and prayed that his case for promotion should be considered because the punishment imposed upon him debarred his promotion only for two years. It is true that was the punishment. But what is there in his favour between 1980, the date of suspension and 1985, the date of imposition of the punishment to merit a promotion. He was always under suspension and has not done any work. The question of his consideration for promotion does not arise. If he had a longer tenure of service left, his case could well have been considered upon his performance after the passing of Annexure - 8. In that view of the matter, there is no substance in this prayer as well.

(ix) " In this case we are concerned only with rule 57 (5) which reads as follows :--

" (5) A member of a Provincial Service, or member of Specialist Service under the administrative control of the Local Government of Governor's Province, may appeal to the Governor from an order passed by the local Government :

Provided that any such person was appointed by the Secretary of State in Council shall be entitled as an alternative to appeal to the Governor - General in Council, and if, his pay as defined in the Fundamental Rules is not less than Rs. 501 per mensem, thereafter to be Secretary of State in Council:

Provided also that any Deputy Collector to whom the provisions of section 25 of Bengal Regulation IX of 1833 apply shall be entitled as an alternative to the Governor General - General in Council :

Provided also that any officer holding the King's Commission on the active list of the Regular Army, the Royal Air Force, or the Royal Indian Navy may appeal to the Governor in Council, and thereafter to the Secretary of State in Council."

From the above provisions, it will be seen that an appeal lies to the Governor from an order passed by Local Government. This is not a case of order being passed by a Local Government. The order was passed

by the High Court. Surely, it cannot be contended that the High Court is Local Government or Subordinate to it. Further the above provision shows that the right of appeal is provided to a civil servant under the administrative control of the Local Government. It is patent that the petitioner is not under the administrative control of Local Government. The control is of the High Court in terms of Article 235 of the Constitution. From the above discussions it will be obvious that the petitioner had no right of appeal to the Governor. Only specified categories of civil servants have been given that right. The petitioner does not fill that category. In our view, therefore, the High Court was fully justified in refusing to forward the appeal filed by the petitioner to the State Government. In that view of the matter, there is no substance in this submission as well."

15. We have been taken by Mr. Singh through a copy of the Special Leave Petition No. 3723 of 1986 of the petitioner, from perusal of which it appears that the petitioner took up the following grounds therein:--

"That this Court ought to have taken into consideration the decision reported in B.S. Yadav Vs. State of Haryana reported in A.I.R. 1981 S.C. 561 wherein it has been laid down that the second part of Article 235 of the Constitution will not deprive a Judicial Officer of the right of appeal conferred upon him by a law made by the Legislature regulating his condition of service and ac-

cordingly he has statutory right of appeal under Article 235 read with rules 56 and 58 and rules 2, 3, 21 and Appendix III of the Bihar Service Code; that this Court ought to have taken into account that the second show cause notice of dismissal dated 30 - 3 - 1982 was beyond its jurisdiction, the power being vested in the Governor only; that once the initial order is held to be void, the subsequent order passed by the authority becomes void and illegal; that this Court has erred in not taking into account that the report of the Enquiry Officer was ex-parte, invalid and has omitted to refer the evidence of material witnesses. Further it does not even mention about the written statement of the petitioner which was on the record and the charges said to have been proved were not the charges in the eyes of law and hence cannot be considered as even misconduct; that this Court has failed to take into account that the order dated 25 - 3 - 1983 of punishment was not a reasoned or speaking order which is the basic demand of natural justice; that this Court has committed a serious error in mis - reading and concluding the submissions about its power; that this Court has also committed serious error of record wherein it concluded that the question of promotion does not arise in the case of the petitioner who has not done judicial work since 1980 - 85 in as much as the petitioner was reinstated by order dated 25 - 3 - 1983 and working till date; that this Court has committed another serious error of fact in as much as even

though the petitioner is due to retire on 1 - 9 - 1987, it was concluded that he is to retire within two months and hence the consideration of remark is only of academic interest; even though rule 11 has nothing to do with the case of the petitioner, this Court has wrongly quoted section 11 of the Service Rules; and that this Court has wrongly relied on rule 49 which nowhere provides with holding of pay. " While granting leave to appeal to the petitioner, the Hon'ble Supreme Court had passed the following orders:--

" Special Leave granted *confined to the question whether appeal lies to the Governor against the impugned order of the High Court.*

(Emphasis added).

16. The Hon'ble Supreme Court finally dismissed the Civil Appeal of the petitioner vide Judgment and order dated 16 - 7 - 1987 (reported in JT 1987 (3) S.C. 84 , a copy of order has been appended as annexure - 8) observing, inter alia as follows:--

(i) " The appellant filed a writ petition in the High Court challenging the order of punishment on several grounds but did not succeed."

(ii) " On 16 September, 1986 this Court granted Special Leave to the appellant confined to the question whether an appeal lay to the Governor against the High Court. That is the sole question for consideration before

US."

(iii) To support his claim to a right of appeal the appellant relies on the Civil Services (Classification, Control and Appeal) Rules, 1930. It is pointed out that these Civil Services Rules of 1930 have been kept in force by the State Government by notification NO. III /RI/10163 - 8051 - A dated 3 July, 1963 issued under the proviso to Article 309 of the Constitution. The submission of the appellant is that, the right of appeal is saved by Article 235 of the Constitution. Article 235 of the Constitution provides that the control over District Courts and Courts subordinate thereto, including the posting and promotion of, and the grant of leave to, persons belonging to the judicial service of the State and holding any post inferior to the post of District judge shall be vested in the High Court but that nothing in that Article may be construed as taking away from any such person any right of appeal which he may have under the law regulating the conditions of service.

5. The question is whether the appellant is governed by the Civil Services Rules of 1930. Rule 14 classifies the Public Services in India into a number of categories, and one such category is constituted of the Provincial Services. Rule 18 declares that the Provincial Services shall consist of such services under the administrative control of the Local Government of a Governor's Province as the Local Government may from time to time declare, by

notification in the local official Gazette, to be included in the Provincial Services of that Province. Rule 49 specifies the penalties which could be imposed upon members of the Services specified in Rule 14. Rule 56 confers a right of appeal on a person belonging to any of the classified Services specified in Rule 14 against an order imposing any of the penalties specified in Rule 49. Rule 57 (5) provides.

" A member of a Provincial Service may appeal to the Governor from an order passed by the Local Government."

We enquired of learned counsel for the parties whether a Notification had been issued designating the Subordinate Judicial Service, of which the appellant is a member, as one of the Provincial Services specified in Rule 14. Neither counsel was able to refer to any Notification in that behalf. In the absence of positive material providing that the Subordinate Judicial Service can be regarded as having been brought within the scope of the Civil Services Rules of 1930, it is not open to the appellant to rely on the right of appeal created by those Rules

6. Our attention has been drawn to the fact that the Civil Services Rules of 1930 were continued with effect from 22 December, 1956, by Notification No. III/RI/101/63 - 8051 - A dated 3 July, 1963. That does not advance the case of the appellant any further because the Notification can take effect in respect of such service

only as has already been brought within the scope of those Rules.

7. Before leaving this case, we must give expression to our great dis - appointment that neither party was able to indicate what were the Rules which governed the judicial service to which the appellant belonged. If no Notification was issued applying the Civil Service Rules of 1930 to such Judicial Service, there must surely be some other body of Rules which does apply. And if there is none, it is time that such body of Rules was framed. The present regrettable state of confusion must be ended. It would certainly be a matter of gratification for the Judicial Officers of the State of Bihar to know where they stand.

8. In the result, the appeal fails and is dismissed but in the circumstances we make an order as to cost."

17. Mr. Singh submitted that the order allowing the petitioner to withdraw his Writ Petition (Civil) No. 448 of 1988 by the Hon'ble Supreme Court with liberty to him to approach this Court, nullifies the bar of Res judicata/ Constructive Res Judicata. We, however, do not find that the Hon'ble Supreme Court had held that the doctrine of Res Judicata will not stand as a bar to the maintainability of this writ petition. Permitting a writ petition filed under Article 32 of the Constitution to be withdrawn only with liberty to file a writ petition under Article 226 of the Constitution cannot mean that the doctrine of Res

Judicata/ Constructive Res Judicata will not be applicable if it applies.

18. We do not find any force in the submission that since the petitioner was an Assistant Sessions Judge, he was not under the control of this Court. Article 235 is clear in this regard and needs no repetition and any elaborate discussion. The reliance of Mr. Singh in this regard on the State of Assam V. Kuseswar Saikia (Supra) is misplaced and in any event cannot be gone into.

It was for the petitioner to move the Hon'ble Supreme Court, if he thinks that on that score the impugned order was without jurisdiction.

19. Much grievance was made by Mr. Singh that the learned counsel for this Court in the aforesaid Civil Appeal had misled the Hon'ble Supreme Court that the Rules aforesaid do not apply pointing out that in the counter affidavit this Court has taken a categorical stand that the Rules apply and perusal of the judgment of the Hon'ble Supreme Court shows that the petitioner's counsel had equally failed to point out the relevant notification. The mistake of the Counsel in not pointing out the finding recorded earlier that by virtue of Rule 3 of the Rules, the Rules are applicable to the Judicial servants of the State, which is binding on us, does not lead anywhere.

20. Mr. Singh also submitted that in any view of the

matter the earlier judgment of this Court having merged in the judgment of the Hon'ble Supreme Court holding that the Rules do not apply will prevail and is binding on Respondent No. 2. This question so far as the petitioner is concerned, is academic but we will consider in the last. In this context yet another submission of Mr. Singh is that the Judgment of this Court has become in - percurium or nullity and void abinitio in view of the findings recorded by the Hon'ble Supreme Court. This question, according to us stands answered by the declaration of the Hon'ble Supreme Court in *State of Punjab Vs. Gurdeo Singh* AIR 1991 S.C. 2219 holding that an order which is ultravires, against the principles of natural justice and void for atleast a defacto operation unless and until it is declared to be void or nullity by a competent body or Court and the party aggrieved by the invalidity of the order has to approach for the relief of declaration that the rule against him is in - operative and not binding upon him. The petitioner earlier had moved this Court for such a declaration which was negatived. Now he cannot be allowed to urge the same question through another writ petition.

21. Mr. Singh, however had placed strong reliance on a seven Judges' judgment of the Hon'ble Supreme Court in *S.S. Rathore Vs. State of Madhya Pradesh*. (1) A.I.R. 1990 S.C. 10 and submitted that in cases of service dispute the cause of action must be taken to arise not from the date on which the original adverse

order was made but from the date on which the higher statutory authority makes an order and accordingly the cause of action for the petitioner arose when the Hon'ble Supreme Court passed its judgment and order on 16th July, 1987 and accordingly no res judicata applies.

22. In our view there is no merit in this submission. The Hon'ble Supreme Court was considering the period of limitation stated in Article 58 of the Limitation Act to obtain any declaration from the Civil Court as three years and in that context held that the period of three years has to be reckoned from the date when the higher statutory authority makes its order. The order passed by this Court on the administrative side had not merged in the judgment and order of this Court passed under Articles 226 and 227 of the Constitution in the earlier writ petition of the petitioner and subsequently in the judgment and order dated 16th July, 1987 of the Hon'ble Supreme Court in the Civil Appeal of the petitioner. Our view stands supported by the latest judgment of the Hon'ble Supreme Court in *Laxman Marotrao Navakare Vs. Keshavrao*, (1) J.T. 1993 (2) S.C 187. The Hon'ble Supreme Court, when a question arose whether, when an appeal on special leave, is denied by this Court, the decree of the High Court merges in the decree of this Court and amounts to passing a decree in the connected suit, though a Division Bench laid down that " it cannot be held that after having entertained a Special Leave Petition against any final or interlocutory order , this Court

converts itself into a court of appeal for hearing of the dispute involved and as such when the appeal is dismissed the decree of this Court and in that situation amounts to passing a decree for eviction."

23. It is significant to note that even the Orissa High Court had withheld the appeal of Baradakanta Mishra, an Addititonal District and Session Judge of Orissa, and refused to forward it to the Governor, when he was suspended as a disciplinary enquiry was decided to be instituted against him, since in the opinion of the High Court no appeal lay to the Governor against an order of suspension passed by tyhe High Court. (See paragraph 2 of *Baradakanta Mishra Vs. Mr. justice Gati Krishna Mishra*, C.J. of the *Orissa High Court* (1) A.I.R. 1974 S.C. 2255. I am also conscious that when he (Bradakanta Mishra) was reduced in rank and dismissed subsequently by the Orissa a High Court and his appeal preferded before the Governor under the Civil Services (Classification, Control and Appeal) Rules, 1962, framed under Article 309 of the Constitution, dismissed and his writ petition dismissed, the Hon'ble Supreme Court (See A.I.R. 1976 S.C. 1899) quashed both orders of the Orissa High Court holding that the major punishment of reduction in rank is exercisable by the appointing authority, namely, the Governor and accordingly reducing him in rank is un - constitutional and that the confirmation of the order of dismissal passed by the Governor, cannot have any legal effect because that

which is void, cannot be confirmed. In our view the decision in *Baradakanta Mishra* (Supra), A.I.R. 1976 S.C. 1899 relied upon by Mr. Singh is again of no help to the petitioner in view of the findings recorded by this Court earlier that the punishments inflicted on petitioner were not major which are binding on us.

24. It is, thus, clear that the findings of this Court on merits recorded against the petitioner, which were not set aside by the Hon'ble Supreme Court, in our view, operates as *res judicata*/ constructive *res judicata*.

25. Despite our finding as above, we proceed to examine the validity of the other submission of Mr. Singh that as no appeal has been provided under the Rules the impugned order (as contained in Annexure -1) ultravires Articles 14,16 and 21 of the Constitution.

26. In *Smt. Ganga Bai Vs. Vijoy Kumar* (1) A.I.R. 1974 S.C.1126 (at 1129) the Hon'ble Supreme Court held that " the right of appeal iners in no one ." In *Anant Mills Vs. State of Gujrat* (2) A.I.R. 1975 S.C. 1234) (at page 1249) the Hon'ble Supreme Court held as follows :--

"The right of appeal is a creature of Statute. Without a statute provision oreating such a right, the person aggrieved is not entitled to file an appeal." In *Most. Narendra Devi Vs. Ram Nagendar Singh* (3) 1986 P.L.J.R., 175, our Full Bench held as follows :-- " Even on a large principle it is mainifent that the right of appeal

is not a guaranteed or a constitutional right. There is nothing what - so - ever in the Constitution which may even remotely vest any such un - alinable right to the Citizen. It is axiomatic that such a right is not fundamental right nor a constitution one. That being so, it is equally evident that there is no internal claim or right to appeal from an original forum." The Full Bench before which the vires of an amending Act taking away the right of appeal was challenged, held further that the abolition of a right of appeal by the competent legislation does not attack equity clause of Article 14". Similarly in *Vijay Prakash D. Mehta V. Collector of Customs (Preventive)* Bombay A.I.R. 1988 S.C. 2010 the Hon'ble Supreme Court held that " right to appeal is neither an absolute nor an ingredient of natural justice, the principles of which must be followed in all judicial and quasi - judicial adjudication. " Thus there is no merit in the submission of Mr. Singh that in the absence of the appeal, Rule 55 of the Rules ultravires Articles 14, 16 & 21 of the Constitution of India. In *D.N. Taneja V. Bhajan Lal* (1) (1988) 3 S.C.C. 26 (Paragraph 12) the Hon'ble Supreme Court held that " right of appeal is creature of Stature and the question whether there is a right of appeal or not will have to be construed on an interpretation of the provision of the Statute and an interpretation of the provision of the Statute and not on the ground of propriety or any other consideration." Even in *Shr Shyam Mishra Vs. Municipal Corporation of Delhi* (2) JT

1992 (5) S.C. 335, the Hon'ble Supreme Court reiterated that right of appeal is neither an absolute nor an ingredient of natural justice rather a statutory right.

27. In *Darshan Singh Vs. Ram Lal Singh* (3) A.I.R. 1991 S.C., 1654 the Hon'ble Supreme Court made a distinction between the right to counter and the right to appeal holding that the former is a customary right where as the latter is always a creature of statute. In the instant case, the petitioner was given an opportunity to contest the charges which he, however, did not avail.

28. In *Maganlal Chhaganlal (P) Ltd. Vs. Municipal Corporation of Greater Bombay*, (4) A.I.R. 1974 S.C. 2009, a 7 Judges Constitution Bench of Hon'ble Supreme Court, speaking through majority, held to the effect that the provisions of Articles 226 and 227 of the Constitution of India, are no less effective than a Second Appeal (See paragraph 19). Accordingly this Court, on its judicial side can will examine the validity of an order passed on its administrative side and in absence of any appeal under Rule 57 (5) read with Rule 56 it cannot be held that Rules 11 and 49 ultravires Articles 14, 16 and 21 of the Constitution of India. No vice of discrimination could be pointed out between the same class of judicial officers qua the Rules when minor punishments are inflicted on them under this Rule.

29. At this stage it is relevant to refer to paragraphs 7 to 9 of the recent decision of the Hon'ble Supreme

Court in *All Judges Association & Others Vs. Union of India and others* (1) JT 1993 (4) S.C. 618 strongly relied upon by Mr. Singh.

30. Paragraphs 7 to 9 of the judgment aforesaid runs as follows:-

“7. It is not necessary to repeat here what has been stated in the Judgment under a review while dealing with the same contentions raised there. We cannot, however, help observing that the failure service and the other services at the bottom to the directions given in the judgment. The judicial service is not service in the sense of ‘employment’. The judges are not employees. As members of the judiciary, they exercise the sovereign judicial power of the State. They are holders of public offices in the same way as the members of the council of ministers and the members of the legislature. When it is said that in a democracy such as ours, the executive, the legislature and the judiciary constitute the three pillars of the State, what is intended to be conveyed is that the three essential functions of the State, are entrusted to the three organs of the State and each one of them in turn represents the authority of the State. However, those who exercise the state - power are the ministers, the legislators and the judges, and not the members of their staff who implement or assist in implementing their decisions. The council of ministers or the political executive is different from the secretarial staff or the administrative executive which carries out

the decisions of the political executive. Similarly, the legislators are different from the legislative staff. So also the judges from the judicial staff. The party is between the political executive, the legislators and the judges and not between the judges and the administrative executive. In some democracies like the U.S.A., members of some State judiciaries are elected as much as the members for the legislature and the heads of the State. The judges, at whatever level they may be, represent the State and its authority unlike the administrative executive or the members of the other services. The members of the other services, therefore, cannot be placed on par with the members of the judiciary, either constitutionally or functionally.

8. This distinction between the judges and the members of the the other services has to be constantly kept in mind for yet another important reason. Judicial independence cannot be secured by making mere solemn proclamations about it. It has to be secured both in substance and in practice. It is strite to say that those who are in want cannot be free. Self-reliance is the foundation of independence. The society has a stake in ensuring the independence of the judiciary, and no price is took heavy to secure it. To keep the judges in want of the essential accoutrements and thus to impede them in the proper discharge of their duties, is to impair and wrattle away justice itself

9. So much for the contention of the review petitioners that the directions given by this Court would lead to the demand from the members of the other services for similar service condition. It is high time that all concerned appreciated that for the reasons pointed out above there cannot be any link between the service conditions of the judges and those of the members of the other services. It is true that under Article 309 of the Constitution, the recruitment and conditions of service of the members of the subordinate judiciary legislature and pending such legislation, the President and the Governor or their nominees, as the case may be, are empowered to make rules regulating their recruitment and the conditions of service. It is also true that after the Council of States makes the necessary declaration under Article 312, it is the Parliament which is empowered to create an All India Judicial Service which will include posts not inferior to the post of District Judge as defined under Article 236. However, this does not mean that while determining the service conditions of the members of the judiciary, a distinction should not be made between them and the members of the other services or that the service conditions of the members of all the Services should be the same. As it is, even among the other services, a distinction is drawn in the matter of their service conditions. This Court has in the judgment under review, pointed out that the linkage between the service conditions of the judiciary and that of the administrative ex-

ecutive was an historical accident. The erstwhile rulers constituted, only one service, viz, the Indian Civil Service for recruiting candidates for the judicial as well as the Administrative Service and it is from among the successful candidates in the examination held for such recruitments, that some were sent to the administrative side while others to the judicial side. Initially, there was also no clear demarcation between the judicial and executive services and the same officers used to perform judicial and executive functions. Since the then Government had failed to make the distinction between the two services right from the stage of the recruitments, its logical consequences in terms of the service conditions could not be avoided. With the inauguration of the Constitution and the separation of the State power distributed among the three branches, the continuation of the linkage has become anachronistic and is inconsistent with the constitutional provisions. As pointed out earlier, the parity in status is no longer between the judiciary and the administrative executive but between the judiciary and the political executive. Under the Constitution, the judiciary is above the administrative executive and any attempt to place it on par with the administrative executive has to be discouraged. The failure to grasp this simple truth is responsible for the contention that the service conditions of the judiciary must be comparable to those of the administrative executive and any amelioration in the service conditions of the former must necessarily lead to

the comparable improvement in the service conditions of the latter."

31. Before we part, in view of the controversy raised, certain provisions of the Rules, which were examined by the Division Bench earlier and held that " Rule 3 lays down that those Rules apply to every Government servant" which is binding on us, needs re-examination in the light of the aforesaid observations of the Hon'ble Supreme Court in All India Judges' Association(Supra) which are elaborate and illustrative and do not call for any further comment of ours except that the ;interference of the executive stood reduced to minimal after the coming into force of the Constitution in regard to the Judicial Services save and except categorically stated in the Constitution.

32. The relevant rules runs as follows:-

"2. For the purposes of these rules, unless there is anything repugnant in the subject or context (a)"Government means the Gover nor General of a Local"Government" as the circumstances require." (Emphasis supplied by us)

3. These rules shall apply to every person in the whole-time civil employment of a Government in India (other than a person so employed only occasionally or subject to discharge at one month's notice or less) except:-

(a) persons for whose appointment and conditions of employment special provision is made by or under any law for the time being in force;

(b) (i) railway servant as defined in Section 3 of the Indian Railways Act, 1890;

(ii) persons holding posts in the Railway Board who are subject to the Railway Services (Classification, control and Appeal) Rules; and

(iii) other persons holding posts under the administrative control of the Railway Board or of the Financial commissioner of Railways;

(c) persons in respect of whose conditions of service, pay and allowances, pension, discipline and conduct, or any of them special provision has been made by agreement entered into before these rules were made or entered into there after in pursuance of the provisions of rule 46:

Provided that in respect of any matter not covered by the provisions applicable to him, his service or his post these rules shall apply to any person coming within the scope of exceptions (a) or (c) above to whom but ;for these exceptions the rules would other wise apply:

Provided also that these rules shall apply to any person temporarily transferred to a service of post coming within exception (b) to whom but for such transfer, these rules would otherwise apply.

14. The public services in India shall be classified as follows:-

- (1) the All India Services;
- (2) The Central Services, Class I;
- (3) the central Services, Class II;
- (4) the Provincial Services;
- (5) the Specialist Services;
- (6) the Subordinate Services.

18. The Provincial Services shall consist of such services (other than the services included in Schedule I), under the administrative control of the Local Government of a Governor's Province as the Local Government may from time to time declare, by notification in the local official gazette, to

be included in the provincial Services of that province;

Provided that one of the services so included shall be entitled the General Service.

33. We have perused the Bihar & Orissa Gazette No. 24 Patna, Wednesday, June 19, 1935 in which notification dated the 13th June, 1935 has been printed, the relevant portion of which runs as follows:-

" No. 1977 A.R. — In exercise of the powers conferred by rule 18 of the Civil Services (Classification, control and Appeal) Rules, the following rule is made by the Governor in Council in so far as it affects Government Servants employed in the Reserved Departments, and by the Governor acting with his Ministers in so far as it affects Government servants employed in the Transferred Departments:-

Rule.

The Provincial services shall consist of the services included in the Schedule annexed to this rule-

Schedule.

1. Bihar Civil Service (Executive and judicial Branches)."

34. In the counter affidavit of Respondent no. 2 it has been stated that the Government of Bihar vide notification dated 3-7-1963 (referred to in the judgment of the Hon'ble Supreme court) in exercise of its power under Article 309 of the Constitution of India had applied the 1930 Rules to all Class I and Class II Officers in the service of the State of Bihar which is also apparent from the subsequent notification dated 31-3-1986 as contained in Annexure to the counter affidavit. That apart a combined perusal of Rules 2 and 3 shows that the 1930 Rules applies to the Provincial judicial Service being in the

whole time civil employment of the State Government. True it is that Rule 18 talks of a declaration by notification of the local Government but absence of a further notification has not made Rule 18 repugnant in the subject of context as referred to in Rule 2. In any view of the matter, from 26-1-1950, The day on which chapter IV of the constitution of India came into force, the Judicial service ceased to be in the administrative control of the State Government, for the apparent reason that under Article 235 the control of the Subordinate Judicial Service was with drawn by the constitution from the State Government and vested in the hands of the High Courts. The ratio extracted afor said also supportstacitly our conclusion.

35. Accordingly, we do not find any merit in the submissions of Mr. Singh rather accept that of Mr. Prasad and hold that the petitioner is not entitled to any relief from this court.

36. In the result we dismiss this writ application but having regard to the peculiar facts and circumstances without cost.

R.D.

Application dismissed.



CIVIL WRIT JURISDICTION**Before S.B. Sinha & A.N. Chaturvedi, JJ.****1993.****October, 15.****Sri Ram Prasad Ojha and others. *****V.****The State of Bihar and others.**

Bihar Land Reforms (Fixation of Ceiling Area and Acquisition of Surplus land) Act, 1961 (Bihar Act No. XII of 1962), sections 2 (ee) and Explanation II, (g), (k), 4 and 5----- unmarried daughter during the life time of her father, whether entitled to a separate unit-- Explanation II appended to section 2 (ee) --- whether confers any right, title of interest on any person or whether inserted merely by way of clarification.

Held, that, an unmarried daughter cannot be granted an additional unit during the life time of her father unless she is herself, a landholder either being a raiyat, under raiyat' or 'Mortgagee' of land in question. A landholder must be a raiyat who in view of its definition as contained in section 2(k) of the Bihar Land Reforms (Fixation of Ceiling Area and Acquisition of Surplus land) Act, 1961,

* Civil Writ Jurisdiction Case No. 12929, 12961, 12962, of 1992 and 1799 of 1993 the matter of application under application 226 and 227 of the constitution of India.

must be primarily a person who has acquired a right to hold land for the purpose of cultivating it. As an unmarried daughter does not get any interest in the property during the life-time of her father, she being not a raiyat, could not be a landholder within the meaning of the provisions of the said Act and this no separate unit can be allotted to her.

The Explanation II, appended to the definition of 'family' as contained in section 2(ee) of the Bihar land Reforms (Fixation of Ceiling Area and Acquisition of Surplus land Act. 1961, is only explanatory in nature and does not control the main Section. It merely provides that personal law of a person shall have nothing to do with regard to the composition of a 'family'. The Explanation thus being not a substantive provision, does not purport to confer any right, title or interest upon a person who either in terms of the personal law governing the family or otherwise was not entitled to any interest therein. The aforementioned explanation does not, thus, create any legal fiction. The same only clarifies that the personal law shall not be relevant for the purposes of determining the composition of the family for the purpose of the said Act and for no other purpose.

In C.W.J.C. 12961/92... Gopi Krishna Prasad Ojha and ors.. Petitioners.

In C.W.J.C. 12962/92... Pankaj Chaubey and ors... Petitioners.

In C.W.J.C. 1799/93... Bhagwan Yadav and ors ... petitioners.

Application by the petitioners.

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

M/s Sashi Shekhar Dwivedi, A.K. Pandey,
R.K. Pandey. for the petitioner

M/s J.P.Shukla, R.K.Choubey and S.K.
Bariyar for the inter - venors.

Mr. H.P. Singh. for the State

S.B. Sinha, J. — In all these writ applications, inter alia, the order dated 18. 11. 1992 passed by the Additional Member Board of Revenue, in Revision Case No. 75 of 1992, as contained in Annexure 6 and the order dated 20. 4. 1992 passed by the Collector, Jehanabad in Case No. 1 - BM of 1991 - 92 as contained in Annexure 4 to the writ applications are in question.

2. C.W.J.C No. 12961 of 1992 has been filed by Gopi Krishna Prasad Ojha and Uma Kumari who are son and daughter respectively of petitioner no. 1 of C.W.J.C No. 12929 of 1992 and who have not been allotted any separate unit, inter alia, on the ground that the petitioner no.2 being the daughter is not entitled to a separate unit.

3. In C.W.J.C. No. 1799 of 1993 has been filed by fourteen persons who are said to be settlees of the land

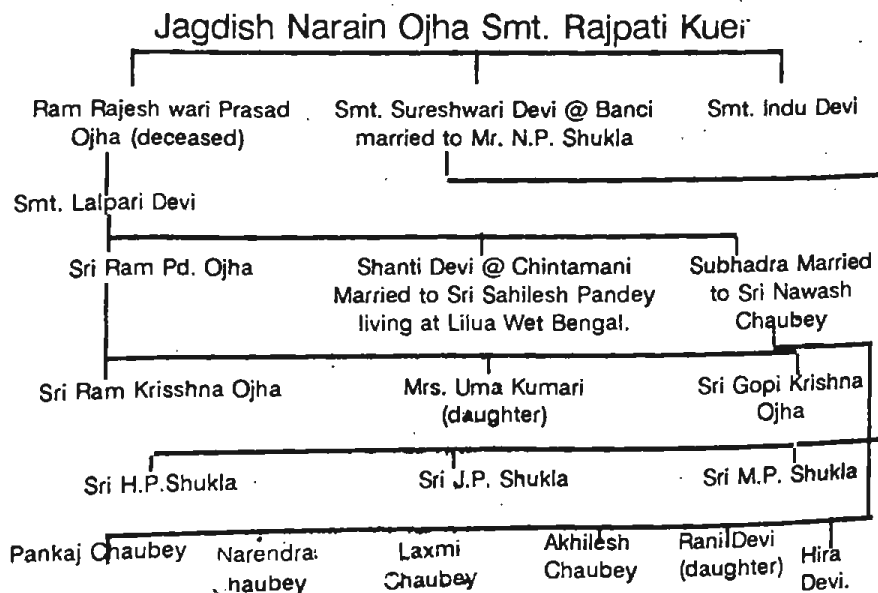
and thus although they claim independent right, title and interest, their lands have been held to be the lands belonging to the land - holders.

5. In C.W.J.C. No. 12929 of 1992, an application for intervention has also been filed. The said intervenors are also said to be the settlees from the land - holders.

6. In all these writ applications, statements and submissions made in C.W.J.C. NO. 12929 of 1992 have been adopted and in this view of the matter, the matrix of fact is being considered therefrom.

7. Before proceeding to consider the matter in details, the genealogical table of the family of the land - holder may be noticed:--

.Genealogical table



8. The authorities under the Bihar Land Reforms (Fixation of Ceiling Area and Acquisition of Surplus Land) Act, 1961 (here inafter referred to as ' the said Act ') initiated a proceeding against Ram Rajeshwar Prasad Ojha, (since deceased). The said land - holder was, however, alive on the said Act, three units have been granted; one in favour of the land - holder, the second in favour of his son Sri Ram Prasad Ojha and third in favour of his grand - son Sri Ram Krishma Prasad Ojha.

The contention of the petitioners is that as Jagdish Narayan Ojha and Rajpati Kuer died leaving behind two daughters apart from the land - holder, they were also entitled to separate units. It is the further case of the petitioners that in any event, Rajpati Kuer was entitled to at least one unit who died in the year 1974 and her two daughters along with the landholder succeeded to her interest and consequently the heirs and legal representatives of the aforementioned two daughters of Jagdish Narayan Ojha were also entitled to grant of separate units. A further contention which has been raised in this application is that as Uma Kumari and Gopi Krishna Prasad Ojha were major (who are the petitioners of CWJC No. 12962 of 1992) on 9.9.1970, they are also entitled to separate units. Four units had also been claimed by the four deities who are the petitioner nos. 3 to 6 in CWJC No. 12929 of 1992 .

9. The petitioners have also questioned the classifica-

tion of lands made by the ceiling authorities. They have also questioned the finding of the respondents that the transfer of lands made after 9.9.1970 cannot be taken into consideration. It was also submitted that in the facts and circumstances of the case, they are also entitled to exercise their option.

10. There appears to be a dispute as to the date of death of Jagdish Narain Ojha. According to the petitioners, Jagdish Narain Ojha died in the year 1944, whereas according to the State he died in 1937. There is also a dispute with regard to the date of death of Smt. Rajpati Kuer. The contention of the petitioners is that she died in 1974 whereas according to the respondents, she died prior to 9.9.1970.

11. Mr. Shashi Shekhar Dwivedi, learned counsel appearing on behalf of the petitioners first took up the question of classification of lands. Learned counsel submitted that from the resolution dated 26. 2. 1991 as contained in Annexure 2 to the writ application, it would appear that the learned Additional Member of Board of Revenue in Case No. 234 of 1989 remanded the matter back to the Collector, Jehanabad, inter alia, directing him to make verification of the lands in presence of the land - holders but despite the same, no fresh verification in terms of Rule 8 of the Bihar Land Reforms (Fixation of Ceiling Area and Acquisition of Surplus Land) Rules, 1963 (hereinafter to have referred and to 'the said Rules') was

made nor any notice was served upon the landholders in relation there to .

12. In paragraph 7 of the order, the Collector of the district has held that during the course of enquiry, it was found that the mouza in question is situated in a command area which is irrigated area but in some plots, due to obstruction, the irrigational facilities are not being made available.

13. Learned counsel further drew our attention to the findings of the Member, Board of Revenue in paragraphs 65, 67 and 68 of the resolution as contained in Annexure 6 to the writ application, wherein it has been held as follows:--

" I have already pointed out in paras above that as per the verification done under rule 8, it has been found that 176. 49 1/2 acres of lands come under category I, 54.24 acres come under category III and 6.72 acres come under category IV. Despite many opportunities given to the landholders, they were not in a position to bring any acceptable legal evidence or cogent material on record to repudiate the afore said classification. I find that the trial court and the appellate court have gone in to this contention in great details and they have found no merit in the aforesaid contention. Again, after the remand they simply reiterated this objection without producing any relevant material to support the claim. It should also be pointed out that the Addl. Collector had

made spot enquiry in presence of the land holders and the Circle Officer. He did not find any specific change in the classification already recorded and hence he did not propose any specific amendment. The land holders were present and they also were without any evidence for a changed classifications. The report under rule 8 is certainly a statutory report and classification is based on that report. If any particular plot needed to be placed in a different category than what has been shown there in, it needed to be proved on the basis of evidence. In absence of any such clinching and cogent material to the contrary, the classification done on the basis of the verification report will have to be accepted.

The land shown in category I Has been found to be irrigated by flow irrigation (Sone Canal system) which has been constructed, maintained, improved and controlled by the State Govt. ;and the canal provides or is capable of providing water for more than one season. The land is capable of growing at least two crops in a year. There was no question of placing such land in any other category. it could not be placed in category III. Again 54.24 acres of land have been placed in class III. They have been found to be irrigated or capable of being irrigated for at least one season. The Aahars and pains are minor irrigation works. They are maintained at huge cost by the minor irrigation Deptt. They are also maintained, in proved and controlled by the gram panchayats which is also a body corporate constituted under the

Bihar Gram Panchayat Act. No particular individual maintains minor irrigations works. It is wrong to say that they are not works. During the Zamindari days also Fard-Ab-pashi schemes were maintained by zamindars and now they are maintained by Govt. as also in many cases the Gram Panchayats concerned, the Minor Irrigation Deptt. has annual budget of more than fifty crores which are spent over such schemes. Therefore, it can not be argued that the land irrigated by such schemes for one season will not come under Class III. It is erroneous to think that such lands will come under class IV.

14. Learned counsel submitted that the Member Board of Revenue has committed serious error of records in so far as it failed to take into consideration that in terms of section 4 of the said Act, it is for the State to show as to whether the lands are irrigated by works set up by the State or irrigational facilities have been provided for one season or two seasons and/or whether private irrigational facilities exist in relation to the lands in question. It was further submitted that the Member, Board of Revenue has wrongly placed the onus of proof upon the petitioners in this regard. It was further submitted that the classification of land is based only upon the report allegedly prepared in terms of Rule 8 of the Rules without taking into consideration the objections of the petitioners.

Learned counsel in this connection has placed strong

reliance upon a decision of this Court in *Md. Fakhruddin vs. The State of Bihar & others*, reported in 1976 BBCJ 536.

15. Learned counsel next contended that Rajpati kuer has wrongly been denied a separate unit. Learned counsel, in this connection, has again referred to the order of remand as contained in Annexure 2 to the writ application,

He, in this connection, has also drawn our attention to the order dated 30.4.1992 passed by the Collector of the District in Case No. 1 DM/91-92 as contained in Annexure 4 to the writ application and drew our attention to paragraph 25 there of where in it was held that the husband of Rajpati kuer, Jagdish *narayan Ojha*, died in the year 1937 and thus she was not entitled to any unit. Learned counsel submitted that no notice had been issued to Rajpati Kuer and thus no evidence could be led by her with regard to the date of death of her husband.

16. Learned counsel further submitted that the Collector in the said order proceeded woongly on the basis that Rajpati kuer died prior to coming into force of Hindu Succession Act, 1956 without taking into consideration that she inherited the estate of her husband as a limited owner under the provisions of Hindu women's property Act and became an absolute owner in terms of Section 14 of the Hindu Succession Act, 1956.

17. learned counsel further submit ted that in any event if it be held that the husband of Rajpati kuer died prior to coming into force of Hindu Succession act, she would still be entitled to become absolute owner of the property of her husland in terms of Section 14 (i) of the Hindu Succession Act. Learned Counselfor the petitioners has relied upon the decision in *Sellammal vs. Nellammal*, reported in 1977 SC 1265, *Vaddeboyina Tulasamma vs. Vaddeboyina SeshaReddi*,¹ reported in AIR 1977 SC 1944 and *Santhanam Kachapalaya vs. v. Subramanya*, reported in AIR 1977 SC 2024.

18. learned counsel further submitted that in any event as the said Act is secular in character in view of the special Bench Decision of this court in the case of *State of Bihar vs. K.M. Zuberi* (i) every person who was major on the appointed date i.e. 9.9.1970 would be entitled to a separate unit. learned counsel further drew our attention to paragraph. 35 of the revisional court's order and submitted 6th at it wrongly relied upon mulla's hindu law, 14th edition page 912, which reads as follows:-

" It also includes a property which was held and possessed by her at the date of commencement of the Act and of which she is declared to be the full owner by section 14 of the Act. It also includes agricultural land subject to that that legislation relating to prevention of fragmentation of agricultural holdings or fixing of ceiling

1. (1986) P.L.J.R.67)

or the devolution of tenancy rights in respect of such holdings is not to be affected by anything contained in the Act.

19. It has also been submitted that even assuming that Rajpati Kuer died prior to 9.9.1970, her interest would devolve not only upon Rai Rajeshwar Prasad Ojha but also upon her two daughters. According to the learned counsel, in such a situation, Sureshwari Debi and Indu Devi would be entitled to two separate units although the petitioner merely claim one unit for Rajpati kuer. Learned counsel, therefore, submitted that the revisional court in view of its own findings ought to have granted at least two units one in favour of Sureshwari Devi and another in favour of Smt. indu Devi.

20. Learned counsel next contended that the learned court below ought to have granted units to the deities. it was submitted that one registered deed of endowment was executed in the year 1962 and other three endowments were made in favour of three different deities prior to vesting of the estate and thus the deities being separate landholders were also entitled to separate units.

21. It has further been submitted that so far as the transfers made by the landholders after 9.9.1970 are concerned, the lands covered by the deeds of sale should have been excluded from computation of the ceiling area, in as much as the said deeds of sale have not been annuled in any proceedings under section 5 (i)

(iii) of the Act. it was submitted that in any event as it was the landholder alone who sold the land more than the ceiling area (About 300 acres), the said deeds of sale should be deemed to have been selected by him only in terms of sub-section(2) of Section 9 of the said Act and the entire area could not have been included in the ceiling area of the other landholders.

22. It was submitted that the State itself relied upon a suit for partition filed in the year 1956 for the purpose of adjudication on the vexed question as to whether the petitioners of CWJC No. 12961 of 1992 were major or not on 9.9.1970. In this connection, our attention has also been drawn to paragraphs 72 to 74 of the impugned order and on that basis it was submitted that the State has to adopt one stand as to whether there had been a partition or not. If the partition decree is held to be collusive as has been held by the Collector, the question of reliance thereupon for the purpose of determination of age of the minors did not arise.

23. Learned counsel next contended that the landholders have also not been granted any opportunity to exercise their option.

24. So far as the petitioners of CWJC No. 12961 of 1992 concerned, it has been submitted that the learned courts below rejected the contention of the respondents only because matriculation certificate was not produce and their names did not appar in the partition suit of the

year 1956. It was further submitted that though the petitioners had relied upon the medical reports, they have been disbelieved on the ground that on 5.5.1977 when the said certificates had been granted, both the petitioners were found to be the same age without taking into consideration that the difference of age between the two petitioners is of one year only on at a variation of one year of age is possible in the medical test.

It this connection, learned counsel relied upon a decision in Brij Mohan vs Priya Brat, reported in AIR 1965 sc 282 and AIR 1980 SC 2151.

25. In CWJC No. 12962 of 1992, there are two sets of the petitioners. The ;petitioners no. 1 to 6 are the heirs of the deceased daughter of Ram Rajeshawari Prasad Ojha. The second sets namely petitioners no. 7 to 9 are the daughter of Rajpati kuer. It was submitted that no notice have been given to them although they also inherited the estate of Ram Narain prasad Ojha.

It was submitted that they had also filed an application for substitution and in that view of the matter the Collector under the said Act ought to have determined their claim relating to their interest in the property in terms of section 18 of the said Act. Learned counsel in this connection has relied upon a decision of this Court in Ramjee Mishra vs. State of Bihar, reported ;in 1992 (I) B.L.J. 703.

26. In the intervenor application which has been filed

by ten persons, it has been submitted that they have no right, title and interest in relation there to.

27. Mr. J.P.Shukla, learned counsel appearing on behalf of the petitioners of CWJC NO 1799 of 1993 Submitted that they had been granted settlement by reason of Sada Patta by the landholders and they are in possession of the lands claimed by them for a long time. It was submitted that in the revisional survey settlement records of right wrongly the names of the State of Bihar the land holders. had been entered therein which they were not aware of. However, having come to learn the same, they filed applications before the authorities under the Bihar Consolidation of Holdings & Prevention of Fragmentation Act, 1956 in which the State was also a party and the Consolidation authorities under the said Act by taking into consideration the cases of the respective parties passed order in favour of the writ petitioners. It was further submitted that the petitioners had not been given any notice although the revenue authorities were aware of the petitioners' claim in respect of the lands in question in view of the pendency of the consolidation proceedings. It appears that the petitioners of the said writ petition for the first time filed applications for intervention before the revenue authority. Mr. Sharma, learned counsel appearing on behalf of the intervenors in C.W.J.C. No. 12929 of 1992 submitted that the petitioner there of have no other land. It was submitted that the petitioner nos. 1 to 4 claimed only 3.24 acres of land; petitioners

nos. 5 to 7 claimed 5.7 acres and petitioners nos. 8 to 14 claimed 1.07 acres of land and petitioner no. 10 claimed 0.03 acre. It was submitted that no registered deed of sale had been executed in favour of the petitioners but they had been in possession thereof for more than 30 years and their claims have been upheld even by the consolidation authorities. Mr. Sharma further submitted that even in a case where an independent right title and interest is being claimed by the settlees from the land holders, a proceeding under section 5 (1) (iii) of the said Act ought to have been initiated. It was therefore contended that their land should not be tagged with the land of the land - holders since their names have been mutated in the office of the State of Bihar and their claims have been upheld by the consolidation authorities. A grievance had also been made by the writ petitioners that the Member Board of Revenue did not consider their case at all.

28. Mr. Hemendra Pd. Singh learned Standing Counsel appearing on behalf of the State submitted as follows :--

Re. Classification: It was submitted that a large area had been classified as Class I land as the same are situated within the command area. It has been submitted that only because some of the plots are situated in high altitude, the question of their being classified as Class III lands does not arise in as much as the petitioners could

not prove as to which plots are not irrigable or are not being capable of being irrigated from the water of the canal.

Learned counsel in this connection has referred to the findings of the Collector as contained in paragraphs 35 and 36 of this order.

29. It was further submitted that 'ahars' and 'pains' are being maintained by the State Government and thus some lands have rightly been classified as class III lands. It was further submitted that an enquiry had been made in presence of the landholders.

30. Re. Allotment of unit to duties: Mr. Singh submitted that there was only one registered deed of endowment covering an area of 20.14 acres of land, although the petitioners are claiming exemption in respect of more than 90 acres of land. It was therefore submitted that in respect of 70 acres of land, no document has been filed to support the plea of endowment nor there is anything to show that the landholder or his predecessor in interest divested themselves of the property. It has been submitted that the lands have been found to be in possession of the landholders and then have entered into various transactions in relation thereto in their own names. It was further pointed out that out of the lands which are claimed to have been endowed, the landholders have also made voluntary surrender. It was also submitted that the lands in ques-

tion have been registered under the Bihar State Hindu Religious Trust Board only in the year 1976 but despite the same neither any accounts have been produced nor any other document was proved for the purpose of showing that the trust in question had been in existence prior to 9.9.1970.

In this connection, our attention was drawn to the fact that so far as the lands purported to have been donated for charitable hospital are concerned, the same stand in the name of the wife of Ram Prasad Ojha.

31. With regard to the units claimed by the other writ petitioners, it was submitted that the courts below have rightly granted only three units to the family of the land-holders.

32. Learned counsel pointed out that a concurrent finding of fact has been arrived at that the petitioners of C.W.J.C.12961 of 1992 were minor on 9. 9. 1970 and this Court in exercise of its jurisdiction under Article 227 of the Constitution of India should not interfere with the said finding of fact.

33. Learned counsel further submitted that in any event Smt. Uma Kuer was not entitled to separate unit, even if it was held that she was major on 9. 9.1970, as unmarried daughter of her father during his life time. According to the learned counsel, a land - holder must be a raiyat who in view of its definition as contained in section 2(k) must be primarily a person who has acquired

a right to hold land for the purpose of cultivating it. It was submitted that as the daughter does not get any interest, in the joint family property during the life time of her father, she being not a raiyat could not be a land holder within the meaning of the provisions of the said Act and thus no separate unit can be allotted to her.

34. Before adverting to the rival contentions raised at the Bar, it is necessary to notice a few facts.

The authorities under the said Act appear to have proceeded without deciding the main issues which were absolutely vital for arriving at a right decision. It appears that the Collector under the said Act had not categorically held that Jagdish Narayn Ojha died prior to 1937 i.e. before coming into force of the Hindu Womens' Right to Property Act 1937 or not. A decision on said issue was absolutely necessary for the purpose of determining the question as to whether Smt. Indu Devi and the heirs of Smt. Sureshwari Devi would be entitled to grant of separate units or not.

If Jagdish Narain Ojha had died after coming into force of Hindu Womens' Right to Property Act. Smt. Rajpati Kuer being his widow inherited his interest in to property as a limited owner. In that event, she would become absolute owner upon coming into force of the Hindu Succession Act. The word 'possessed of' occurring in Section 14 of the Act must be given a wide meaning so as to embrace within its fold not only actual

physical possession but also a right to possess the same. Smt. Rajpati Kuer as a limited owner while holding the properties alongwith her co-sharers would be deemed to be in possession of the share of Jagdish Narayan Ojha along with the coparceners of her husband. In terms of Section 14(1) of the Hindu Succession Act, therefore, she would become an absolute owner of the property in relation to the estate of Jagdish Narain Prasad Ojha together with her son. In that view of the matter, she would become a separate landholder. The courts below did not take into consideration this aspect of the matter at all.

35. The Member Board of Revenue also appears to have committed a serious mistake insofar as it observed that as Rajpati Kuer died prior to 9.9.1970, her heirs would not be entitled to any share. The learned Member Board of Revenue was not correct.

The date of death of Smt. Rajpati Kuer will be of great significance inasmuch as if she died prior to 9.9.1970, in terms of Section 15 (1) of the Hindu Succession Act, his share shall devolve upon her son and daughters in equal shares. In that event, Smt. Indu devi as also the heirs of her pre-deceased daughter Smt. Sureshwari Devi would be entitled to inherit the properties of Rajpati Kuer along with Ram Rajeshwari Prasad Ojha in equal shares. However, in the event, Smt. Rajpati died in the year 1974 as was claimed by the petitioners, she

would have been entitled to allotment of one unit in which event upon her death, her interest in the property would devolve upon her heirs and legal representatives.

It goes without saying that the properties devolving upon the heirs and legal representative of Smt. Rajpati Kuer, if any, would have to be taken into consideration for the purpose of determining the ceiling area along with the properties of their respective spouses and their minor children. If Rajpati Kuer died after 9.9.1970 the interest devolved upon her heirs and legal representatives will have to be considered in terms of Section 18 of the said Act.

36. This aspect of the matter has been considered in *Rajiv Kumar Thakur Vs. State of Bihar and others*¹ wherein it was observed as follows:-

" There cannot therefore be any doubt that the relevant date for the purpose of determining the ceiling area with reference to the classification of the lands and otherwise must be done with reference to the appointed day. The scheme of the Act clearly postulates that not only the classification but also the ceiling area has to be determined with reference to the appointed day, namely, 9.9.1970."

It was further held that:-

"However, Sheetal Thakur died in 1984. The effect of

1. (1993), B.L.T.R. 418

death of Sheetal Thakur has to be determined in accordance with the provisions of Section 18 of the said Act. In term of Section 3 of the Hindu Succession Act, the right, title and interest of Sheetal Thakur vested in his sons Sheshankar Thakur. Thus the lands held by the family of Sheetal Thakur are required to be considered afresh upon taking into consideration the effect of devoluiution of Sheetal Thakur's interest in his heirs and legal representatives."

37. The matter would, however be entirely different if Jagdish Narayan Ojha died prior to coming into force of 1937 Act. The concerned respondent did not arrive at definite conclution in this regard. Learned Member Board of Revenue although observed that the landholder at different stages of proceedings had taken contradictory stands in as much as in one of his applications, it was stated that Jagdish Narayan Ojha died much prior to 1937 but in some of them, the date of death of Jagdish Narayan Ojha is alleged to have taken place in the year, 1944. It is, therefore, absolutely clear that before proceeding to deal with the matter, the date of death of Jagdish Prasad Ojha and Rampati Kuer was required to be determined on the basis of materials on records which were produced by the parties.

38. There further appears to be a great deal of controversy as to whether on 9.9.1970 the family was a joint coparcenary family governed by a mitakshara

School of Hindu law or a partition had taken place. The learned Member Board of Revenue did not record any finding as to whether there has been a partition in the family or not. He, however, proceeded on the basis that there exists a joint mitakhara Coparcenary. It, however, appears that while considering the question about the grant of unit to Smt. Rampati kuer as also on the question: as to whether Uma Kumari and Gopi Krishna Prasad Ojha attained majority on 9.9.1970 or not, he referred to a decree passed in a partition suit passed in the year 1953 being partition Suit No. 15 of 1953 (Ram Prasad Ojha Vrs. Ram Rajeshwari Prasad Ojha). If there had been a partition amongst the coparceners by reason of any decree passed in partition suit No. 15 of 1953, the coparcenary had come to an end, as a result where of irrespective of the fact whether there had been actual partition by metes and bounds or not, the members of the joint family would be tenants in common and not joint tenants in respect of the properties in question.

Under the Hindu Law, partition amongst the coparceners has two elements namely: (a) an intention to separate and (b) an actual division of properties by metes and bounds. Even if an intention to separate is expressed by a coparcener, a partition would take place as a result where of, as indicated here in before, the parties would become tenants in common. In such an event, each coparcener would have definite share in property. They, thus, in relation to the said property, would be separate

land holders for the purpose of the said Act i.e. for determination of ceiling area at the hands of each statutory family within the meaning of Section 2(b) thereof which has to be done keeping in view their respective right, title and interest in the joint family properties. This aspect of the matter will have a great significance for the purpose of determination of ceiling area at the hands of each of the land holder inasmuch as, it is now admitted that Ram Rajeshwari Prasad Ojha transferred various lands after 9.9.1970.

39. The effect of such transfer will be dependent on the facts as to whether Ram Rajeshwari Prasad Ojha was separate so as to become an absolute owner in relation to specific portions of the properties in which event the lands which were the subject matter of the transfer would be deemed to have been selected by Ram Rajeshwari Prasad Ojha alone, subject to the ceiling area.

On the other hand, if it be held that the parties were the members of the joint family and Ram Rajeshwari Prasad Ojha transferred the property not only on his own behalf and out of his own share, but also on behalf of the other member of joint family property, as a manager thereof, such which transfers have to be considered to have been made by the entire joint family.

40. The question with regard to the allotment of share to the heirs of Smt. Sureshwari as also Smt. Indu Devi as also the matter relating to transfer of property by Ram

Rajeshwari Prasad Ojha will have to be finally determined on the basis of the findings to be arrived by the Collector or under the said Act as pointed here in before.

41. The next question which arises for consideration is whether Mrs. Uma Kumari and Gopi Krishna Prasad Ojha were major on 9.9.1970.

In terms of section 106 of the Indian Evidence Act the burden of proof lies upon a person who has a special knowledge about a fact to be determined by a court of law.

42. The respondents have categorically come to a finding that both Smt. Uma Kumari and Gopi Krishna Pd. Ojha were minors as on 9.9.1970. The courts under the said Act have assigned sufficient and cogent reasons for coming to the aforementioned finding. The said finding is a finding of fact and thus is hardly binding upon this Court unless the same is found to be perverse or based on irrelevant consideration or in determining the same, the authorities had not taken into consideration relevant facts.

43. It is true as has been contended by the learned counsel appearing on behalf of the petitioners that a matriculation certificate is merely a piece of evidence.

44. However, it was rightly pointed out by the respondents that both Uma Kumari and Gopi Krishna Ojha are highly educated persons. It was, thus, incumbent on their

part to produce the matriculation certificate. It is now well known that a party in possession of a document should produce the same which has a bearing on the issue failing which an adverse inference may be drawn to the effect that if such document was produced, the same would have gone against his contention.

45. In *Brij Mohan* (supra) the Supreme Court of course held as follows:-

" In actual life it often happens that persons give false age to the boy at the time of his admission to a school so that later in life he would have an advantage when seeking public service for which a minimum age for eligibility is often prescribed. The court of fact cannot ignore fact while assessing the value of entry and it would be improper for the court to base any conclusion on the basis of the entry, when it is alleged that entry was made upon false information supplied with the above motive."

But in that case, the Supreme Court itself held that the burden to prove that the age of the elected person was below 25 years on the relevant date was on the election petitioner.

In this case the burden of proof that Smt. Uma Kumari and Gopi Krishna Ojha were majors was upon the land holders.

46. The landholders after production of the matriculation certificate could have shown that at the time of

admission the respective age of Gopi Krishna Ojha of Uma Kumari disclosed to the school authority were in fact incorrect by adducing evidence in that regards. In such event, concerned respondent could have come to a finding on the said issue. or the basis of the materials placed on records.

47. The petitioners have not only failed to bring on records the medical certificate but they also did not legally bring on records the medical reports.

The learned courts below have rightly come to the conclusion that the medical report could not be relied upon in absence of the primary documents namely X-ray plates etc. Even no Medical Board was constituted to determine the age of Uma Kumari and Gopi Krishna Ojha. The doctors who examined Smt. Uma Kumari or Gopi Krishna Ojha were not examined. It is true as was submitted by the learned counsel himself that medical determination of age may not be scientifically correct in so far as even the age of a person medically determined may have to be varied to the extent of two years on both sides.

48. The determination of date of birth of a person claiming separate unit as on 9.9.1970 is crucial. Once a person is held to be major on 9.9.1970, he will be entitled to a separate unit. In that view of the matter, he cannot solely rely upon the horoscope which is a self serving document or a medical report without examining the

doctor concerned or without producing the primary materials in support there of.

49. In arriving at their findings, respondents had taken into consideration the circumstantial evidences to show that both Uma Kumari and Gopi Krishna Ojha were minors on 9.9.1970 inasmuch as in Partition Suit no. 15 of 1953 their names did not find place.

It was further found by the respondents that the medical reports suggested the same age both for Uma Kumari and Gopi Krishna Ojha. The submission of the learned counsel for the petitioner in this connection was that according to the petitiners, the difference of age between the aforementioned two persons was only one year but event to this effect no evidence was adduced.

50. This Court in exercise of its jurisdiction under Article 227 of the Constitution cannot embark upon investigation of the disputed question of fact. The scope of writ jurisdiction is limited. While determining a matter, sufficiency or insufficiency of the reasons assigned by the statutory authorities cannot be a ground for interference with such orders. This Court can interfere with such matters sufficiency or insufficiency of the reasons assigned by the statutory authorities cannot be a ground for interference with such orders. This Court can; interfere with such matters only when the impugned orders is perverse of the statutory authority of the courts while determinig the the finding of fact has has committed an

error of record etc.

Recently the Supreme court of India in *U.P. Financial cogroration Vs. M/s. Pam Cap (Indra) Pvt. Ltd.*¹ held as follows:-

" The obligation to act fairly on the part of the administrative authorities was evolved to ensure the rule of law and to prevent failure of justice. This doctrine is complementary to the principles of natural justice which the quasi judicial authorities are bound to observe. It is true that the distinction between a quasi judicial and the administrative action has become thin, as pointed out by this court as far back as 1970 ;in *A.K. Kraipak V. Union of India*. Even so the extent of judicial scrutiny/ judicial review in the case of administrative action cannot be larger than in the case of quasi judicial action if the High Court cannot sit as an appellate authority over the decisions and orders of quasi judicial authorities it follows equally that it cannot do so in the case of administrative authorities. In the matter of administrative action, it is well known, more than one choice is available to the administrative authorities, they have a certain amount of discretion available to them. They have "a right to choose between more than one possible course of action upon which there is room for reasonable people to hold differing opinions as to which is to be preferred". (Lord Diplock in *Secretary of State for Education and Science v.*

1. (1993) 2 SCC. 299

metropolitan Borough counsel of Tame side). The court cannot substitute its judgment for the judgment of administrative authorities in such cases. only when the action of the administrative authority is so unfair or unreasonable that no reasonable person would have taken that action, can the court intervene. To quote the classic passage from the judgment of lord Greene M.R. in Associated provincial picture Houses Ltd. Vs. Wednesbury C Corporation:

"It is true the discretion must be exercised reasonably. Now what does that mean ? Lawyers familiar with the phraseology commonly used in relation to exercise of statutory discretions often use the word 'unreasonable' in a rather comprehensive sense. It has frequently been used and is frequently used as a general description of the things that must not be done. For instance, a person entrusted with the discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting 'unreasonably' Similarly, there may be something so absurd that no sensible person could ever dream that it lay within the powers of the authority."

While this is not the occasion to examine the content

and contours of the doctrine of fairness, it is enough to reiterate for the purpose of this case that the power of the High Court while reviewing the administrative action is not that of an appellate court. The judgment under appeal precisely does that and for that reason is liable to be and is here with set aside."

51. In this view of the matter, it cannot be said that the findings of the courts below are either illegal irregular or irrational so as to warrant interference by this court, in exercise of its writ jurisdiction.

52. It has been submitted that the Member Board of Revenue has come to the conclusion that even if Uma Kumari was major as on 9. 9. 1970, she would not have been entitled to a share as she could not inherit the properties of her father during his life time. The opinion of the Member, Board of Revenue is correct in this regard.

The question which now falls for consideration is as to whether Uma Kumari, the unmarried daughter of the petitioner who had allegedly become major on the appointed day i.e on 9. 9. 1970 would be entitled to a separate unit ?

The question is an intricate one.

The learned counsel appearing on behalf of the petitioner submitted that the matter stands concluded by a Special Bench decision of this court in /State v. Bihar

Vs. K.M. Zuberi reported in 1986 PLJR 67, wherein it has been during the life time of his father does not have any interest in the property has been held to be entitled to allotment of separate unit.

53. The central theme of the argument of the learned counsel is that an unit has to be granted to each and every major member of a family irrespective of the fact as to whether they hold any right title and interest in the property or not. The learned counsel contends that it is wholly immaterial as to whether an adult member of the family is ever in possession of the lands in question, as the statute is a special statute in terms where of the personal Law governing the family has no application .

54. It was further submitted that the Act has been enacted for determining the ceiling area and thus even if an unit is allotted to a major member of the family who does not have any interest therein, he cannot claim any right title and interest of possession therein for he or she can even demand partition of the property.

55. According to the learned counsel the decision of the Special Bench shall prevail over the earlier decisions of this court including the full Bench decision in *Imamul Hasan Vrs. State of Bihar* reported in 1982 BBCJ 208.

56. The learned counsel in this connection has relied upon Manilal and others Vs. M.P. Venkatachal Pathih Iyer & ors. reported in 1943 Madras 471, *Akhauri Krishna* .

Kumar Sinha Vs. Mundrika Prasad reported in 1986 PLJR 1119, *Commissioner of Income Tax, Vs. Sheo Kumari Devi* reported in 1986 PLJR 743 and *Satrudhan Sahami Vs. State of ABihar* reported in 1986 PLJR 796.

57. It was further submitted that this court in *Mahabir Prasad Vs. the State of Bihar* reported in 1976 BBCJ 409, and *Ramdulari Kuer Vs. State of Bihar* reported in 1976 BBCJ 641, categorically held that major daughters are entitled to separate units.

58. Learned Advocate General appearing on behalf of the State, on the other hand, drew out attention to the fact that the operation of the judgment in *K.M. Zuberi's case* (Supra) has been stayed by the Supreme court and thus the said decision at present cannot be treated to be a binding precedent.

59. The learned Advocate General submitted that the sole object of the Act in giving an unit to the family and taking the surplus land, is to allow a " family " within the meaning of the provisions of the said Act to retain with it such extent of land as has been laid down in Section 4 thereof and to acquire the land which is found surplus.

The learned Advocate General has further submitted that before a land of a person can be acquired he must be a landholder which, in turn means he must have a right, title and interest or possession in relation thereto.

60. It is submitted that only in terms of Section 15

of the Act the persons mentioned there in can be conferred title in respect of the lands of the landholder i.e. only upon acquisition thereof.

61. The learned Advocate General submitted that interpretation clause cannot control the charging section.

It was , therefore, submitted that an unmarried daughter having no interest in the property, which is the subject matter fo the proceeding for the purpose of determinaion of surplus land available at the hands of the family . Cannot be granted an unit during the life time of her father.

62.The primary object of the said Act is fixation of ceiling area and consequent acquisition of surplus land and distrubition thereof to landless persons. The object of the Act is to prevent concentration of agricultural lands at the hands of a few persons .

With this backdrop, the matter in issue has to be viewed and considered.

63. the relevant provisions of the said Act which require consideration for resolving the dispute are as follows :--

" Definition - In this Act, unless there is anything repugnant in the subject of cintext:--

(aaa) " Ceiling area " means the area of land fixed under section 4 as the Ceiling Area;

(eee) " minor child " in relation to a family where ceiling area is determined under Section 4 with reference to the land held by it on the 9th September, 1970 shall mean " a person

who had not attained the age of eighteen years on that date " and in respect of future acquisition as contemplated in Section 13 the date on which such acquisition takes place:

2 (g) " Land holder " means a family as defined in clause (ee) holding land as raiyat or as under raiyat or a mortgagee of land in possession or holding land permanently settled by Government.

2 (k) " 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 hired servants or with aid of partner, and includes also the successor in interest or persons who have acquired such a right and includes, in the district of Santhal Parganas, Village head - man in respect of his private land, if any, but does not including the areas to which the Chotanagpur Act, 1908 (Ben. Act. VI of 1908) applies a Mundari, Khuntkattidar or a Bhuihar

2 (n) Words and expressions used but not defined in this Act, shall have -

(i) In their application to any area in which the Bihar Tenancy Act, 1885 (VIII of 1885) is in force, the same meanings as are assigned to them in that act;

(ii) In their application to any area in which the Chotanagpur Tenancy Act, 1906 (Ben. Act VIII of 1908) is in force, the same meanings as assigned to them in that act, and

(iii) In their application to any area in which the Santhal Pargana Tenancy (Supplementary Provisions Act, 1949 as are assigned to them in that Act. . .

64. Section 4 of the said Act determines the ceiling area in respect of one family which necessarily means the family as defined in Section 2 (ee) of the Act namely a person' his or her spouse and their minor children. The significant words occurring in Section 4 are ' one

family :

65 Section 5 is enacted in negative terms; in terms thereof a mandate has been issued that holding of any land by any family in excess of the ceiling area (except as otherwise provided under the said Act) shall not be lawful. The explanation appended to Section 5 creates a legal fiction; by reason where of all lands owned or held individually by the members of a family by some or all of the members of such family shall be deemed to be owned or held by the family.

66. Section 5 (1) (ii) mandates a land holder to obtain permission of the Collector before he makes a transfer after the appointed day.

67. Section 6 provides for issuance of a notice upon the landholder by the State to submit a return.

68. Section 7 authorises the Collector to obtain necessary informations from the Executive Committee of the Gram Panchayat of the area concerned or through such other agency if any person holding land in excess of the ceiling area fails to submit the return under Section 6.

69. Section 8 is a penal provision prescribing penalty for non - submission of the return by a land holder.

Sub - section 3 of Section 10 of the Act gives an opportunity to file an objection to a draft statement prepared under sub - section 1 Section 10 by any person

any claim of interest in the matter enumerated therein.

70. Section 15 A provides for voluntary declaration of surplus land in terms where of the State Government pending final publication of the statement under sub - section 1' of Section 11 of the Act may notice to ' any landholder or to all landholder calling upon him or them to surrender of the State such area which according to him is *owned or held in excess* of the ceiling area prescribed under Section 4.

71. From what has been noticed hereinbefore, it is evident that the surplus land has to be determined at the hands of a ' family' but the family must be a landholder . All the procedures laid down for determining such surplus lands clearly point out that at all stages of the proceedings i.e. from the stage of filing of the return till acquisition of surplus land , only a landholder or any other person who has any right title and interest in relation thereto on any matter specified under sub - section 1 of Section 10 of the Act has any say in respect thereof.

72. The crucial word which is thus required to be constructed is ' landholder '

In terms of Section 2 (g) ' a land holder' is a family as defined in clause 2 (ee) holding as raiyat or as under raiyat or a mortgagee of land in possession or holding land permanently settled by Government or lessee of land not resumable by Government.

Thus sine - qua - non for being a landholder would be that he must be a raiyat or under raiyat or a mortgagee etc.

73. From a bare perusal of the definition of ' Raiyat ' as contained in Section 2 (k) it would appear that the same is in two parts: the first part states as to what is meant by a raiyat i.e. *a person who has acquired right to hold land*; the second part of the definition is an inclusive one which embraces within its fold the ' successor - in - interest or person ' who has acquired *such a right and includes in the district of Santhal Parganas* village head - man in respect of his private land if any but does not include in the areas to which the Chotanagpur Tenancy Act, 1908 (Ben. Act VI of 1908) applies, a mundari Khuntkattidar or Bhuinhar.

Within the extended definition of ' raiyat ' would thus there may only be a ' successor in - interest of a raiyat or a person who by reason of a transfer of otherwise acquires such a right.

74. The words ' *such a right* ' evidently refers to right to hold land for the purpose of cultivation.

In my opinion, there cannot be any doubt that unless a person has acquired a right to hold land or is successor - in - interest of a person who has acquired such a right he cannot be a raiyat and consequently as a logical corollary cannot be a landholder.

75. As indicated hereinbefore, the learned counsel appearing on behalf of the petitioners submits that for the purpose of determining the surplus area, the surplus land must be available at the hands of a family.

76. The definition of family is an artificial one.

77. the object of the Act is to bring all persons constituting ' a family ' within the mischief of the provisions of Act. The member of such statutory family may hold and possess land either separately or jointly but for the purpose of determining the surplus all such lands held by the members of the family have to be taken into consideration together as is evident from the explanation appended to Section 5 of the Act.

In *Nand Lal Vs. State of Haryana* reported in AIR 1980 SC 2097, the Supreme court held that artificial definition of ' family ' under Section 3 (f) of the Haryana Land Holding Act 1972 is not ultravires.

In *Vengdasalam Pillai Vs. Union Territory of Pondichery* reported in 1985 S.C. 571 it was held that the artificial definition of a ' family ' may not conform to (in ceiling Act) to the concept of the ' joint family ' as known in Hindu Law.

In that case , it was held that in terms of Section 4 ° thereof even the separate properties belonging to an individual his wife and minor children will have to be clubbed together for the purpose of computation to the

ceiling limit.

78. It is now well known that a statute has to be interpreted taking into consideration its legislative intent.

The charging section prohibits a family from holding land in excess of the ceiling area. The provisions of the Act apply to Hindu, Mohammendans and Christian alike. Only in the Mitakshara Schools of Hindu Law the minor son has also a share in the joint family property during the life time of his father.

However person governed by other schools of Hindu Law or other laws do not have a right in respect of the properties unless the same devolve upon the 'specified heirs' only upon death of his / her father.

79. The object of the Act is to bring all persons constituting a 'family' within the mischief of the provisions of the Act. Thus although the members of the family within the meaning of Section 2 (ee) may have joint interest or separate interest, only one unit has to be allotted to the 'family' when the same is available.

80. This aspect of the matter has also been considered by me while considering the provisions of Urban Land Ceiling and Regulation Act in Arun Nath Shahdeo Vs. State of Bihar reported in 1992 BBCJ 37.

81. The question which, therefore, arises for consideration is as to the effect of the explanation 2

appended to the definition of 'family' as contained in Section 2 (ee).

82. The said explanation provides that the personal law shall not be relevant or be taken into consideration for determining *the composition of the family for the purpose of the Act*. The explanation, therefore, which is only explanatory in nature does not control the main section. It merely provides that personal law of a person shall have nothing to do with regard to the composition of a 'family'. The explanation thus being not a substantive provision, does not purport to confer any right, title or interest upon a person who either in terms of the personal law governing the family or otherwise was not entitled to any interest therein. The aforementioned explanation, does not, thus, create any legal fiction. The same at the cost of repetition, it may be stated, only clarifies that the personal law shall not be relevant for the purpose of the said Act and for not other purpose.

In any event a bare perusal of the said explanation demonstrates that the same was inserted 'ex majori cautela'. Even without the said explanation, the statutory intentment of providing a ceiling area to a 'family' within the meaning of Section 2 (ee) of the Act is clear and unambiguous.

It is now well known that even a clarification can be brought about by reason of an amendment. Reference in this connection may be made to Escorts Limited and

another Vs. Union of India and another reported in 1993 (1) S.C.C.249.

83. Explanation II appended to Section 2 (ee) of the said Act has been inserted merely by way of clarification. It by itself does not create any right nor extinguishes any.

It merely reiterates what was even otherwise clear from the definition of 'family' ..

84. The said explanation has been inserted only for clarification in relation to composition of a family. Composition of a family under personal law may be different. Even composition of a joint Hindu Mitkashara Co - parcenery differs from school to school and and the same in many cases is also governed by the customary laws. It is only in order to obviate a confusion which may arise with regard to composition of family, the said explanation has been inserted.

85. It is now well known that a literal meaning has to be given to a statute. The question of interpretation of statute arises only when a literal meaning cannot be given to such a statute or if the same shall result in an absurdity or to avoid meaningless anomaly.

Reference in this connection may be made to *Tushar Kanti Das Vs. Chief Judicial Magistrate, Balasore & ors* reported in 1992 S.C. page 1, *Union of India Vs. Deoki Nandan Aggarwal* reported in 1992 S.C. 96 and *Commissioner of Income Tax, Gujrat Vs. Cellulose Products of*

India Ltd and ors. reported in 1991 (4) SCC 467.

86. It is now well settled that even reading down the statute is not permissible when the language is clear and unambiguous. Reference in this connection may be made to *welson Motis Vs. Union of India & Anr.* reported in 1993 (1) U.J. (SC) 45 wherein it has been held as follows :--

" It is well established that if the words of a statute are clear and free from any vagueness and are, therefore reasonably susceptible to only one meaning, irrespective of consequences. The language of the sub-rule here is precise and unambiguous and, therefore, has to be understood in the natural and ordinary sense in the circumstances it is not permissible to read down the provisions as suggested."

87. It is also well settled that objects and reasons of the Act are of great assistance in finding out the intentment of the legislature and only a purposive construction which furthers such intention should be preferred.

In Indian Administrative Service (C.S.C.) Association U.P. & ors Vs. Union of India and ors. reported in 1993 (1) S.C.J. 58 the apex court held :--

" It is the settled cannons of construction that every word, phrase or sentence in the statute and all the provisions read together shall be given full force and

effect and no provision shall be rendered surplusage or nugatory. It is equally settled law that the mere fact that the result of a statute may be unjust, does not entitle the court to refuse to give effect to it. However, if two reasonable interpretations are possible the court would adopt that construction which is just, reasonable or sensible. Courts cannot substitute the words or phrases or supply or sensible. Courts cannot substitute the words or phrases or supply casus omissus. The court could in an appropriate case iron out the creases to remove ambiguity to give full force and effect to the legislative intention. But the intention must be gathered by putting up fair construction of all the provisions reading together. This endeavour would be to avoid absurdity or unintended unjust result by applying the doctrine of purposive construction."

88. The Apex Court proceeded to hold :--

" Thus it is settled law that where the intention of statutory amendment is clear and expressive, words cannot be interpolated. In the first place, they are not in the case, needed. If they should be added, the statute would more than likely fail to carry out the legislative intent. The words are the skin of the language which the legislature intended to convey. Where the meaning of the statute is clear and sensible, either with or without omitting the words or adding one, interpretation is improper since the primary purpose of the legislative intent

is that the statute may to be so. If the language is plain, clear and explicit, it must be given effect and the question of interpretation does not arise. If found ambiguous or uninterided, the court can at best iron out the creases. Any wrong order or defective legislation cannot be righted merely because it is wrong. At best the court can quash it, if it violates the fundamental fights or is ultra vires of the power or manifestly illegal vitiated by fundamental law or gross miscarriage of justice."

89. Reference in this connection may also be made to *Delhi Trasnsport Corporation Vs. D.T.C. Mazdoor Congress* reported in 1991 S.C. 101.

90. It is now well known that while interpreting a provisions of statute no word used there in should be left out of consideration.

The court while interpreting cannot rewrite the statute nor can add any word thereto or subtract any word therefrom, unless the context of the statute demands.

Thus by reason of the said ' explanation ' it has been clarified that although by reason of the personal law a family may have a larger concept, but for the purpose of determination of ceiling area the hands of the family only such members of the family who come within the definition thereof as contained in Section 2 (ee) have to be taken into consideration for the purpose of determining the ceiling area.

91. It is significant to note that any major son or a daughter who has any separate property would constitute a separate family for the purpose of determining the ceiling area which necessarily means that he or she has a right to own or hold land. Such major son or daughter together with their spouses and minor children would constitute a separate family. As noticed hereinbefore, Section 4 specifies ceiling limit for only one family. thus if there is a 'second family' within the meaning of Section 2 (ee) in a larger family they would constitute a separate family and thus it is exapiometic that such other family must also be a 'raiayat' under faiyat' or Mortgagee'.

92. Mr. Dwivedi, however, submitted that if the proviso appended to Section 5 (2) of the said Act is taken in to consideration it must be held that irrespective of the fact as to whether a person has a right in property or not, a unit or additional unit can be granted in his favour.

Proviso to sub - section (2) of Section 5 reads as under :--

" Where the number of members in a family on the appointed day exceeds five the family may hold in addition to the ceiling area determined under Section 4 land not exceeding one - tenth of the ceiling area for that class of land for every such additional member; provided that in no case the aggregate of the land held by the family shall exceed one and half times the ceiling area."

The said act defines a family to mean ' husband,

wife and their minor children. "

However, in terms of the aforesaid provisions of the Act as inserted by Act No. 55 of 1982, additional unit has to be granted to the land - holder if the number of family members exceeds five.

93. such provision has been made in the statute itself; whereas in case of major children, no such provision exists.

Besides the aforementioned reason, there appears to be a rationale behind such legislation. A parent has a statutory duty to maintain his or her minor children as would be evident from Section 125 of the Code of Criminal Procedure and / or Hindu Minority and Guardianship Act but no such statutory duty is enjoined upon the parent so far as his major children are concerned. The law itself thus makes a distinction between the minor child and a major son and daughter.

94. It appears that the legislature has provided for the said concession in favour of the landholder so as to enable him to fulfil his statutory duties. It is also significant to note that in case the statutory family has more than five members, the additional unit to the extent of 1/10 of the each additional number is granted to the land - holder and no separate unit as such is allowed to the children.

In the case of a major son or daughter a separate unit has to be allotted in his favour which can only be

done provided he or she is a land - holder as on 9.9.1970. Only a land - holder has a statutory right to be allotted a unit so that the ceiling area at his hands can be determined and the surplus land available at his hands can be acquired. As a major son and daughter of the land - holder in case does not have any right in present in the property in question, he being not the land - holder, the question of allotment of unit in his favour would not arise.

The object of the said Act is to acquire the surplus lands available at the hands of a family. Even in case of Hindu Joint Mitakshra Co - parcenary family, although a minor has interest in the property or he may have his own separate property, or is owner of separate property, such properties are also to be clubbed along with the properties of his parents. Thus, the said act does not contemplate grant of an unit, which means transfer of ownership of the property in favour of a person although he did not have any right, title and interest in relation thereto. In fact, the object of the Act is to acquire property which may be found surplus at the hands of the statutory family. The Supreme court has stayed the operation of the judgment of the Special Bench in K.M. Zuberi's case (Supra). There cannot be any doubt that normally the interim order passed affects the rights of the parties. But the question which has to be considered, is thus as to whether the said proposition shall apply in a case where a law has been laid down which has to

be followed by the High court and all courts and Tribunals Subordinate to it ? It was the intention of the Supreme court of India to make the judgment inoperative only in relation to the parties to the lis, it would have passed an order to that effect. However, in a case of this nature, where not only the rights of the parties to the lis is an effect, but the same would affect the right of the State as also confer right to hold more properties in favour of some persons in such cases, the matter has to be viewed from a different angle.

In my opinion, therefore, the import on the order of the Supreme court has to be gathered from the facts and circumstances of the case. It is now well known that a judgment and / or order of the Supreme court had to be read in a reasonable manner.

Reference in this connection may be made to *Central Coalfields Ltd. Vs. The State of Bihar & ors* reported in 1993 (1) PLJR 617.

It may be true that even a wrong decision by a court having jurisdiction is as much binding upon the parties as a right one, but such a principle may be applicable only when it is a judgment which is binding upon the parties. If the judgment ceases to be inoperative even for a temporary period by reason of an order of stay granted by the Supreme Court, which has jurisdiction to pass such orders, can it be said that the judgment although shall remain in operative between the parties to

the lis but shall be binding upon persons who were not parties to the lis or the other courts and tribunals. The matter may be entirely different where only an order of status quo is passed by the Supreme Court.

The intention of the court in passing the interim order of stay has to be gathered from the language used therein.

In a case of this nature where the special Bench has laid down a law for the first time differing with the consistent views of the division Bench as also full Bench of this court, in my opinion, it cannot be said to be the intention of the Supreme court in passing the order of stay of the operation of the judgment that the ratio thereof should be followed by the tribunals and courts.

A decision of the High Court binds the smaller benches as also the courts and tribunal within its territorial jurisdiction, the effect of a judgment is to be found out in its ratio which in turn means the reasons assigned for arriving at a particular finding on a question of law. When operation of that judgment is stayed the same not only stays the operative portion of the judgment which is binding on the parties but the reasons assigned in support therein.

It is true that a distinction has to be made between the judgment which is over-ruled and the operation whereof had been stayed. The law laid down by a judgment ceases to operate only when it is reversed by

a higher court or over - ruled by a Higher Bench; but when an operation of a judgment is stayed, its effect remains under animated suspension as the same shall be subject to the ultimate result of the Appeal court which had granted the order of stay .

In *Karam Singh V. State* reported in AIR 1992 S.C. 1439 the Supreme court laid down the law in the following terms:--

" While considering the effect of an interim order staying the operation of the order under challenge a distinction has to be made between quashing of an order and stay of operation of an order. Quashing of an order results in the restoration of the position as it stood on the date of the passing of the order which has been quashed. the stay of operation of an order does not, however, lead to such a result. It only means that the order which has been stayed would not be operative from the date of the passing of the Stay order and it does not mean that the said order has been wiped out from existence. (underlining is mine)

It is, therefore, clear that the Supreme court had laid down that when an order has been stayed the same would not be operative from the date of passing of the said order. If the judgment does not become operative from the date of passing of the said order, in my opinion, such a decision cannot also operate as a binding precedent so long such an order of stay remains operative.

In such an event, the bench hearing a similar Matter has to apply its own independent mind and come to its own conclusion without feeling bound by the judgment, the operation whereof has been stayed by the Supreme court.

In *Ram Naresh Sharma Vs. Vijay Sharma* reported in 1993 (2) PLJR 364 a bench of this court in similar situation has observed as follows:--

" As the operation of the judgment in *Basudeo Rai's* case (Supra) has been stayed by the Supreme court, we had applied our own independent mind to this aspect of the matter."

In this connection it may be noticed that the Supreme court of India apart from its jurisdiction under Article 136 of the court the has also been conferred with a wide power under Article 142 there of which is not limited even by prohibition of limitation imposed by statutory indictment. (See *Union Carbide Corporation Vs. Union of India* reported in AIR 1992 S.C.248).

Filing of an appeal does not automatically stay the execution of the decree unless further proceedings in the execution case is stayed or any other appropriate order is passed.

In some cases, the civil court in exercise of its power conferred upon it under Section 151 of the C.P.C. may stay order or operation passed by the learned court

below or its own judgment/order. So long the said interim order remains in force no effect can be given to the order passed by the court below nor any person can be punished for violation of the said order. Let us now consider the dictionary meaning of the word ' stay '.

In Strouds Judicial Dictionary it has been defined in the following terms:--

"Stayed - Bankruptcy notice on final judgment, "execution thereon not having been stayed" (Bankruptcy Act 1914 (4 & 5 Geo, 5 c, 59) S.1), connotes that the creditor must be in a position to issue execution on the judgment (Re Wood all 13 Q.B.D. 479, cited creditor), Which he cannot do pending the trial of an interpleader issue as to goods which have been seized under a *fiari facies* in the judgment for execution on the judgment is necessarily "stayed" till that issue is determined (Re Ford 18 Q.B.D. 369). *secus* where a *fiari-facies* has been withdrawn in response to a claim made by a stranger to the goods seized (Re a Debtor (1902) 1 K.B., 33, Re.S. (1907) 2 K.B. 896.

In Black's law Dictionary the word has been defined in the following terms:-

"Stay - To stop, arrest, or for bear. To "atay" an order or decree means to hold it in abeyance, or refrain from enforcing it."

Further K.M. Zuberi's case (*supra*) is not a binding

precedent inas much as therein all these experts of the matter which have been considered by this court had not been taken into consideration. The ratio of a decision is binding only on the point may be deduced therefrom. It is also well known that a judgment is not an authority on the point which has not been canvassed therein.

Reference in this connection may be made to good Year Co.Ltd.Vs. State of Haryana, reported in 1990 (2) S.C.C. Para - 71

However, there cannot by any doubt that this decision would be subject to ultimate decision which may be rendered by the supreme court in the appeal preferred by the petitioner against the said judgment.

It is also made clear that if any purchas are distributed pursuant to this judgment, the authorities under the Act must do the same subject to the ultimate decision of the Supreme Court so that the land-holder may not suffer unnecessarily in the event the Supreme Court judgment goes in their favour.

95. For the reasons aforementioned, I am, therefore, clearly of the view that an unmarried daughter cannot be granted as additional unit during the life time of her father unless she is herself a landholder either being a 'raiyat', 'under-raiyat' or mortgagee' etc.

96. So far as the question of allotment of units in favour of the dieties is concerned, it appears that four

units have been claimed for four deities, who are petitioner nos. 3 to 7.

97. Admittedly one registered deed of dedication had been executed in 1962. The said deed of dedication has to be taken into consideration for the purpose of grant of a separated unit unless such transfer is annulled in a proceeding initiated under section 5(1)(iii) of the said Act.

In *Shanti sarup Vs. R.S.sabha* reported in 1969 *Al-lahabad 248*, it has been held:-

" According to strict Hindu Juridical notions there can be no gift in favour of Gods. However , both in the Vedas and Smritis, the idea of making gifts or endowments was considered to be the highest act of piety. when after the Buddhist period sections of the Hindu public started worshipping various deities of the Hindu pantheon, rich donations were made to such deities or the temples where deities were installed or for the maths meant for the residence of ascetics of a particular sect or even for dharamshalas. It therefore , became necessary to determine in whom the property vested after such dedications had been made, and from the earliest times it was held by the Courts that the endowments in favour of any of the Gods of Hindu Pantheon was valid and such gods or deities were capable of holding property, through only in a secondary sense, and could sue or be sued in their own names through the Sarbarkar or the pujari of the

temple. The Hindu deities were held to be juristic persons by fiction of law. At one time the notion was that after the sankalp, Utsava and Prathishtha ceremonies, which were prescribed, the deity became vivified and was capable of holding the property. However that myth was exploded long ago and it was held in the case of Bhupati Nath V. Ram Lal Maitra, (1910) ILR 37Cal 128, that in the case of religious endowments it was not at all necessary that any particular ceremony should be performed before the gift or endowment could become valid and binding, and it was also held that the gift would be complete as soon as there is clear evidence to show that the donor intended to make a gift in favour of a charity and that he had divested himself of the property which he intended to make a gift of or to dedicate. The actual installation of the deity in the temple before the gift could become complete was not necessary, so that till the temple was constructed or the deity was installed, the property could remain vested in the trustees for carrying out the purposes of the trust, that is to say, the construction of the temple and the installation of a particular deity. In the case of AIR 1957 S.C. 133, their Lordships of the Supreme Court, while considering the principles governing the determination whether a particular Hindu Endowment was a public endowment or a private endowment, observed as follows:--

" Then the question is, who are the beneficiaries when a temple is built, idol installed therein and proper-

ties endowed therefor ? Under the Hindu Law an idol is a guristic person capable of holding property and the properties endowed for the institution vest in it. But does it follow from this that it is to be regarded as the beneficial owner of the endowment. Though such a notion had a vogue at one time , and there is an echo of it in these proceedings (vide para 15 of the plaint) it is now established beyond all controversy that this is not the true position. It has been repeatedly held that only in an ideal sense that the idol is the owner of the endowed properties. Vide *Prosunno Kumari Debya V. Golab Chand Baboo*, (1874 - 75) 2 Ind App 145 at P. 152 (PC); *Jagdindra Nath Roy V. Rani Hemanta Kumari Debi* (1904) 31 Ind App 203 (PC); and *Pramatha Nath mullick V. Pradyumna Kumar Mullick*, 52 Ind App 245 = AIR 1925 PC 139. It cannot itself make use of them, it cannot enjoy them or dispose of them or even protect them. In short, the idol can have no beneficial interest in the endowment. This was clearly laid down in the Sanskrit text."

Then, after quoting two Sanskrit texts, it was observed:

" Thus, according to the texts, the Gods have no beneficial enjoyment of the properties, and they can be described as their owners only in a figurative sense (Gaunartha) and the true purpose of a gift of properties to the idol is not to confer any benefit on God, but to

acquire spiritual benefit by providing opportunities and facilities of those who desire to worship. In (1910) ILR 37 Cal 128, it was held on a consideration of these and other texts that a gift to an idol was not to be judged by the rules applicable to a transfer to a 'sentient being' and that dedication of properties to an idol consisted in the abandonment by the owner of his dominion over them for the purpose of their being appropriated for the purposes which he intends. Thus, it was observed by Sri Lawrence Jenkins, C.J., at p. 138 that 'the pious purpose is still' the legatee the establishment of the image is merely the mode in which the pious purpose is to be effected 'and that' the dedication to a deity 'may be a compendious expression of the pious purposes for which the dedication is designed'. Vide also, the observations of Sri Ashutosh Mookerjee at P. 155: In Hindu Religious Endowments Board B. Veeraraghavachary, AIR 1937 Mad 750, Varadachariar, J, dealing with this question referred to the decision in (1910) ILR 37 Cal 128 and observed:

"As explained in the case, that purpose of making a gift to a temple is not to confer a benefit on God but to confer a benefit on those who worship in that temple, by making it possible for them to have the worship conducted in a proper and impressive manner. This is the sense in which a temple and its endowments are regarded as a public trust."

When once it is understood that the true beneficiaries of religious endowments are not the idols but the worshippers, and that worship for the benefit of the worshippers, the question whether an endowment is private or public presents no difficulty. The cardinal point to be decided is whether it was the intention of the founder that specified individuals are to have the right of worship at the shrine, or the general public or any specified portion thereof. In accordance with this theory, it has been held that when property is dedicated for the worship of a family idol, it is a private and not a public endowment, as the persons who are entitled to worship at the shrine of the deity can only be the members of the family, and that is an ascertained group of individuals. But where the beneficiaries are not members of a family or a specified individual, then the endowment can only be regarded as public, intended to benefit the general body of worshippers."

98. In a given case, it may be possible to execute a comprehensive deed so as to create an endowment in favour of an idol or a trust as also settlement in respect of the lands in question but such does not appear to be the position here.

99. There cannot be any doubt that when a valid settlement is made, the deity being a juristic person itself becomes a landholder. The ceiling area has to be determined even at the hands of the deity but the

question as to whether the land - holder would be deity or the temple or the trust would depend upon the stipulations made in the instrument itself. When an endowment is made, the donor must divest himself completely of the properties endowed. In such an event, the juristic person, be it an idol or a trust would become entitled to hold the property on its own behalf. In case such endowment is made in favour of the deity, it would be entitled to one unit whereas in the event such an endowment is made in favour of a trust, the trust only would be entitled to allotment of one unit irrespective of the fact that several deities have been installed.

100. In *Mahabir Prasad Vs. The State of Bihar*¹ it has been held as follows:--

" Sri Kailash Roy said that in his case petitioner no. 5 is a deity and, therefore, has to be treated as separate unit. There can be no doubt that if there is religious or charitable trust or endowment the same has to be treated as a separate unit. the lands belonging to such endowment and trust cannot be tagged on to the land of either the dedicator, the manager, shebait, trustee or the mutwalli. This conclusion follows from section 4 which creates family as a unit. For the purpose of section 4 such trust or endowments must be held to be a separate and distinct person. The question, however, remains whether in the instant case there was really a

1. (1975) B.B.C.J.701

trust. This is a question that has to be determined in the pending proceeding and cannot be decided in this writ application. If the existence of a valid endowment is found by the Collector, the said endowment will have to be treated as a separate unit for the purpose of the Act."

101. In *Lakshmi Narayan Vs. State of Bihar* ¹ this Court has held that deity being a juristic person may become entitled to allotment of unit but this Court in the said decision itself has come to the conclusion that the position would be different in the case of trust, which creates family

102. However, in *Muneshwar Lal and others Vs State of Bihar and others* ² it was held by another Division Bench of this Court that of by reason of a deed of dedication creating a charge on the property for the Puja, Sewa or Raj Bhog of a deity but the real beneficiary thereof being the family members, the unit has to be determined on the basis of surplus land available at the hands of the landholder and not the deities. Hari Lal Agarwal J (as His Lordship then was) who was also a party in *Lakshmi Narayan* (supra) in *Muneshwar Lal* (Supra) held that in a case of partial dedication, the dedication is qualified and property descends in the ordinary way on the heirs and is alienable and partible

1 (1978) B.B.C.J. 489

2 (1978) B.B.C.J. 60

but subject always to the trust or charge in favour of the idol or the beneficiary as the case may be. In Muneshwar's case the court further held that in construing a deed, its nomenclature may not be the material and the intention of the maker of the document has to be gathered on reading the document as a whole together with the surrounding circumstances. If it is held that the grantor did not completely divest himself to every portion of the property but merely created a charge for the upkeep of the idol, the dedication is partial and the property descends on the heirs of the creator of the instrument in the ordinary way and is also alienable and partible. Thus if merely a portion of usufruct is to be spent over the idol and the remaining one is to be utilised by the grantor or his heirs, the dedication cannot be said to be complete. This aspect of the matter has also been considered in *Mahabir Prasad Vs. State of Bihar*¹ wherein it has been held that before deciding a question as to whether there has been endowment in favour of the deity or trust or not, the same has to be determined in the pending proceedings and cannot be decided in the writ petition.

In this case, the purported deeds of settlement as also the deed or endowment executed in the year 1962 have not been construed by the courts below at all

1 (1975) B.B.CJ.701

keeping in view the aforementioned question of law nor the circumstances attending to the grant and subsequent conduct of the parties have been taken into consideration.

In the event, the Collector holds that the purported dedication was merely a camouflage and has been made with a view to defeat the provisions of the Act, it will be open to the Collector to make an enquiry in this regard in terms of Section 5 (1) (iii) of the Act. However, if on construction of the instrument itself, it is found that the dedication was not absolute but only partial, evidently the Collector may hold that the lands in fact belonged to the landholder and not the deity or a trust. This aspect of the matter, In my opinion, required a fresh consideration at the hands of the Collector under the Act. The additional Member Board of Revenue, however, appears to have misdirected himself insofar as he observed that the value of the land donated was Rs. 100/- and, therefore, according to the petitioners, the instrument was not required to be registered. In this writ application it has been denied that such contention was ever made by the learned counsel for the petitioners.

103. The rival contentions relating to classification of lands may now be considered. It appears that in the report made under Rule 8 of the Rules, it was found that 176 1/2 acres are in category I lands ; 54. c4 acres in category III and 6.72 in category IV. The courts below

appeared to have put the onus of proof upon the petitioners to show that the classification of the lands made by the revenue authorities was wrong.

It is true that for the purpose of classification of the lands the land -holders are also required to adduce evidence but in this case, the respondents themselves came to the conclusion that some lands which have been classified as Class I being situated at high attitude do not have the irrigational facilities. It was , thus obligatory on the part of the respondents to definitely demarcate the area which had the irrigational facilities as on 9. 9.1970. The learned Member Board of Revenue held that 54.24 actes of lands have been placed as Class III and the said lands are irrigated by ' Aahars ' and ' Pains '.

Section 4 (c) of the said Act cetegorises as Class III those lands which are irrigated or capable of being irrigated by flow irrigation work or tube wells or lift irrigated by flow irrigation work or tube well or lift irrigation which are constructed and maintained by the Central or State Govt, or by any body corporate which provide or are capable or providing water for one season.

A division Bench of this Court in Md. Fakhruddin (Supra)

Held : "Clause (c) of Section 4 refers to land which

are capable of being irrigated" by works which provide or are capable of providing water for only one season. It has been described as 'Nirman'. On a plain reading also, the word "works" means some sort of construction of a permanent nature and it must be in the existence on the date the ceiling is going to be. If clause (c) is read in this light, the irresistible conclusion is that the ceiling of 25 acres can be fixed only in respect of lands which are being irrigated or are capable of being irrigated by such irrigational work which are providing or are capable of providing or are capable of providing water for one season. If such irrigational works are not in existence, in opinion, there is no question of applying clause (c) to such lands and referring to them as class III lands. In this connection I may point out that the word 'works' has been used only in clause (a) and (c), it has not been used in clause (b), which means that the legislature by the word 'works' means some construction (Nirman) for providing irrigation, which has been constructed and is being maintained by the Central or the State Govt. or a body corporate constituted under any law. In any case, the word "works" mentioned in clause (c) refers to the mode of irrigation mentioned in clauses (a) and (b), that is flow irrigation works, tubewells and lift irrigation, which are constructed and maintained by Central or the State Government or by a body corporate, or private lift irrigation or tubewells which are operated by electric/ diesel power. In other

words, if some private individual is irrigating his land even twice a year, but by some other means of irrigation than those mentioned in clauses (a) and (b), then the lands in question will not be covered by clause (c) and they cannot be referred to as class III lands. The said lands, in my opinion, will be covered by clause (d) and can be referred to as class IV lands."

It does not appear from the orders passed by the respondents that any finding has been arrived at that there exists any works so as to bring the mode of irrigation within clauses (a) and (b) and the same had been constructed and maintained by the central or the State Govt. or by a body corporate etc.

104. The determination of mode of irrigation as on 9. 9. 1970 therefore , must be held to be one of the main ingredients which is required to be determined so as to arrive at a finding as to whether the land in question is to be class III or class IV lands. As there appears to be a dispute only with regard to a small portion of the land , it would be appropriate if the Collector decides the dispute by making a spot inspection and by allowing the petitioners to adduce further as to come to a definite conclusion in this regard.

It is made clear that in the event it is found that some lands classified as Class I and Class III lands in fact do not belong to the said category, the respective areas of the lands appertaining to a specific class should

clearly stated so that the controversy may come to an end once for all.

105. So far as the contention raised on behalf of the petitioners with regard to the transfer made by Ram Rajeshwari Prasad Ojha is concerned, it has been pointed out hereinbefore that the same would depend upon the determination of fact as to whether there has been a partition in the family or not.

However, at this juncture, the main contention raised by Mr. Dwivedi, that in relation to a transfer made after 9. 9. 1970, a proceeding under section 5 (1) (iii) of the Act has to be initiated, may be considered.

106. It is not in dispute that by reason of Bihar Act No. 1 of 1973, the appointed date was fixed as 9. 9. 1970. The ceiling area thus has to be determined with reference to the said date. Section 5 (1) (ii) of the said Act reads thus:--

" No land - holder holding land in excess of the ceiling area shall from the commencement of the Bihar Land Reforms (Fixation of Ceiling Area and Acquisition of Surplus Land) (Amendment Act , 1972 and till the publication of notification under section 15 , transfer any land held by him except with the previous permission in writing of the collector, who may refuse to give such permission if he is satisfied for the reasons to be made with a mala fide intention of defeating the object of this Act :

Provided that the transfer of any land made with the previous permission of the Collector, shall be deemed to have been made in form within the ceiling area admissible to the land - holder:

Provided also that the transfer of any land beyond the ceiling area admississible to the land - holder shall be deemed to have been made with the object of defeating the provisions of the Act."

107. By reason of the said first proviso, the lands transferred shall be deemed to have been made with in the ceiling area admissible to the land - holder. the inten and purport of the said proviso is, therefore, clear that although the lands have been transferred, with the land - holder the same would be deemed to have been made within the ceiling area admissible to the land - holder and thus, the land - holder cannot claim that such transfer be excluded from the purview of the ceiling area. The intention of the legislature atands further clarified fdrom sub - section (2) of Section 9 of the Act, in terms where of the lands so transferred by the land - holder would be deemed have been selected by the land - holder. <

It is , therefore , clear that three legal fictions have been created; one in terms of the first proviso appended to clause . (ii) of sub- siction (1) of section 5; the second in terms of the second proviso thereof and the third in terms of sub- section (2) of section 9 of the Act. It is now well knpw that a legal fiction created by reason of the provisions of the statute has to be given full effect.

108. In *East End Dwellings Co. Ltd.Vs. Finsbury Borough Council* ¹ Lord Asquith stated the law thus:--

1 (1952) App. Cas 109.

"If you are bidden to treat an imaginary state of affairs as real, you must surely, unless prohibited from doing so, also imagine as real the consequences and incidents which, if the putative state of affairs had in fact existed, must inevitably have flowed from or accompanied it... The statute says that you must imagine a certain state of affairs; it does not say that having done so, you must cause or permit your imagination to boggle when it comes to the inevitable corollaries of that state of affairs."

The aforementioned decision has been quoted with approval by the Supreme Court as also by this Court in various decisions.

109. It is, therefore, clear that consequence of a transfer made by a land holder without previous permission of the Collector under the Act having been provided in the Act itself, the same must be a mandatory one. The intention of the legislator becomes further clear from a bare perusal of the second proviso appended to clause (ii) of sub section(1) of section 5 of the Act wherein it is stated that such a transfer shall be deemed to have been made with the object of defeating the provisions of the Act.

110. As noticed hereinbefore, clause (ii) of sub-section(1) of section 5 provides for grant of permission on an application to be filed by the land-holder in this regard. Such a permission can be refused by the Collector only if he is satisfied for the reasons in writing that transfer is

proposed to be made with malafide intention to defeat the provisions of the Act. In terms of second provision as quoted hereinbefore, it becomes absolutely clear that if no application is filed for permission of the transfer and transfer is made by the land holder and transfer is made without obtaining such prior permission, the same would be deemed to have been made with the object or defeating the provisions of the Act. The consequence of the same, in turn, would be that permission would be deemed to have been refused resulting in creation of a legal fiction that the transfer has been made by the land-holder within the ceiling area admissible to him.

111. The question now which arises for consideration is as to whether even in such a case a proceeding in terms of clause(iii) of sub-section(1) of section 5 has to be initiated.

112. According to learned counsel, clause (iii) of sub-section (1) of section 5 of the Act attracts all transfers made after 22nd October, 1959. The contention of the learned counsel cannot be accepted. By reason of the provisions contained in Section 5 of the Act, any transfer made prior to 22nd October, 1959, cannot be the subject matter of an enquiry under the said Act. However, any transfer made after 22.10.1959 and before the appointed date i.e. 9.9.1970 can be the subject matter of an enquiry in terms of clause (iii) of sub-section(1) of section 5 of the Act and in any such enquiry,

a transfer can be annulled by the Collector under the Act, if he is satisfied that the same was made with the object of defeating or in contravention of the provisions of this Act for retaining benami or farzi land in excess of the ceiling area. Clause (ii) of sub-section (1) of section 5 however brings within its purview only such transfers which have been made after 9.9.1970.

The ceiling area of the landholder has to be determined as on 9.9.1970. Thus all lands belonging to the land holder as on 9.9.1970, the same have to be taken into consideration for the purpose of determining the ceiling area. Clause (ii) of the sub-section (1) of section 5 of the Act, however, makes an enabling provision so as to lessen the burden of the land holder by providing that a land holder would be entitled to transfer the land in excess of the ceiling area subject to the condition that he obtains permission in this regard. Clause (ii) of sub-section (1) of section 5 of the Act therefore is a special provision in relation to a transfer made after 9.9.1970; whereas clause (iii) of sub-section (1) of section 5 of the Act is a general provision. The doctrine of *generalia specilibus non derogant* is, thus, applicable in this case.

113. The question which now arises for consideration is as to whether the legislature could give retrospective effect and retrospective operation to clause (ii) of sub-section (1) of section 5 of the Act.

114. It is true that if a person acquires valid title in

respect of a property he cannot be divested from his interest by reason of the provisions of the statute unless the same is expressly or by necessary implication provided for. It is further well known that the legislature is entitled to give retrospective effect to a legislation.

The Bihar Land Reforms (Fixation of Ceiling Area and Acquisition of Surplus Land) (Amendment) Act, 1973 is a protected legislation as the same has been included in the IXth Schedule of the Constitution of India and thus, the same is immune from challenge on the ground that the same is violative of Articles 14, 19 and 31 (as it was) of the Constitution of India.

115. However, as noticed hereinbefore, learned counsel contended that as Bihar Act 1 of 1973 has not made any provision to the effect that all such transfers would be deemed to be non est or void in law, that must be held to be valid as the day when the land holder executed the deeds in question in favour of respondent no.5, no provision for previous permission existed.

116. In *Smt. Kusum Kumari Devi vs. Custodian of Evacuee property, Bihar* and another¹ it has been held as follows:-

"It is a familiar rule that no statute shall be construed to be of retrospective operation unless the terms of the statute expressly state that it is retrospective or such a

1. (1952) A.I.R. (Pat) 238.

construction arises by necessary implication. The rule is based on the presumption that legislature does not intend what is unjust or that transactions which have already vested title to property should be reopened or thrown into doubt."

117. In this case the Amendment Act of 1973 has been given a retrospective effect. The Governor of Bihar in exercise of his power conferred upon him under Article 213 of the Constitution of India promulgated an Ordinance being Ordinance No. 7 of 1970. The said ordinance received the assent of the Governor of Bihar on 8.9.1970 and was published in the gazette on 19.9.1970 which was followed by several ordinances promulgated from time; the last in the series being ordinance No. 66 of 1972. By reason of section 3(3) of the said ordinance, section 5 of the said Act was amended and in terms where of the following proviso has been added to clause (ii) of sub-section (i) of section 5 of the Act:-

"Provided that no land holder holding land in excess of the ceiling area shall from and after the date of commencement of the Bihar Land Reforms (Fixation of Ceiling Area and Acquisition of Surplus Land) Amendment Ordinance, 1970, and until the publication of notification under section 15 transfer any land held by him except with the previous written permission of the collector who may refuse to give such permission if he is satisfied for reason to be recorded in writing that the transfer is proposed to be made with a mala fide intention of defeating the object of this Act."

It is, thus, clear that prior to coming into force of the Amendment Act of 1973, various ordinances were promul-

gated where by and whereunder, permission was required to be obtained before making a transfer.

118. Learned counsel for the petitioner, however, strongly relied upon the decision of the Division Bench in *Deosagar Singh vs. The State*, reported in 1979 BBCJ 589.

In the aforementioned decision neither the effect of clause (ii) of sub-section (i) of section 5 of the Act and the provisos appended thereto nor the provisions of sub-section (2) of section 9 of the Act had been taken into consideration.

The learned Judges observed as follows:-

"It is also important to note that in clause (ii) it has not been provided as to what would be the effect if the permission has not been taken. It only says that the landholder holding in excess of the ceiling area shall not transfer any land without prior written permission of the Collector, but if it is done what will be the point. Therefore, reading clauses (ii) and (iii) together, there is no doubt left that even in respect of transfer coming within clause (ii), an enquiry under clause (iii) is necessary, and that enquiry has to be made before saying one way or the other in respect of the transfer made even after 9.9.1970."

The said decision was, therefore, rendered without taking into consideration the first and second provisos

appended to clause (2) of sub-section (i) of section 5 of the Act which were inserted by Act No.55 of 1992 has been given retrospective effect and retrospective operation. The legislative history in this connection has already been stated in the preceding paragraphs. Section 5(2) of the Act has also not been considered or discussed by a Division Bench of this court in Deosagar's case (supra). The decision of Deosagar's case, therefore, does not create any binding precedent and in any event the same must be held to have been rendered per incuriam.

This aspect of the matter has also been considered by a Full Bench of this court in *Kalika Kuer & Kalika Singh vs. The State of Bihar* and others (1989 BBCJ 717); In *Md. Jainul Ansari vs. Md. Khalil* reported in 1990(2) PLJR 378; in *Md. Nazimuddin and another vs. The State of Bihar* and others reported in 1990(2) PLJR 505; in *Durgapada Banerjee vs. Smt. Anjali Banerjee* reported in 1993 (i) BLJ 313 and *Zeyarat vs. Kamssmali Mian* reported in 1992(i) PLJR 172.

119. So far as the cases of intervenors of CWJC no. 12929 of 1992 and the petitioners of CWJC No. 1799 of 1993 are concerned, they appear to stand on the same footing. It appears that the cases of the intervenors of CWJC No. 12929 of 1992 had not been taken into consideration by the learned Member Board of Revenue although they filed an application for interven-

tion in the revision application also. The petitioners of CWJC No. 1799 of 1993 appear to have filed an application before the revisional authority for the first time. It is true that learned Additional Member Board of Revenue has come to a conclusion that the documents produced by the petitioners of CWJC No. 12929 appear to be of recent origin.

Evidently, the claim of third parties are required to be considered on their own merits and their cases require a detailed scrutiny in presence of the landholder. The land-holder appears to have accepted the claim of the petitioner of CWJC No. 1799 of 1993. The claim of the third party therefore was required to be determined not only on the basis of documents which may be filed by them and/or the landholder but have also to be considered keeping in view the revenue records and the orders passed by the consolidation authorities. Normally the order passed by the consolidation authorities on contest would be binding on the authorities under the said Act and it has been held in a number of decisions by this court that the authorities under the consolidation Act are courts and their decisions except in the matter involving complicated and pure question of title can not even be questioned in civil courts. However, the decision rendered by the consolidation authorities in this case which would be binding on the State Government or not in a given situation, may have to be considered on the facts and circumstances of each case and on the basis of

materials the authorities are required to determine that any transfer made by the land holder in between the period 22. 9. 1959 to 9. 9. 1970 should be enquired to determine that any transfer made by the land holder in between the period 22. 9. 1959 to 9. 9. 1970 should be enquired into in a proceeding under Section 5 (1) (iii) of the said Act. In the enquiry under Section (1) (iii) of the said Act, the finding arrived at by the consolidation authorities may be ordinarily be binding upon the State except in a case where the judgment is a nullity or in case where the same is not otherwise binding on the State of Bihar or in a case where the State of Bihar claims any independent title in respect of the land in question or on the ground that the said proceeding had not been decided in the presence of the State. This aspect of the matter, therefore, also requires a fresh look at the hands of the collector under the said Act.

120. It is, however, made clear that while deciding such a claim, the intervenor, third party must understand that the enquiry made in this regard would be deemed to be an enquiry in terms of Section 5 (1) (iii) of the Act in the event such transfers have been made in between the period 22. 10. 1959 and 9. 9. 1970. In such enquiry, it would also be open to the Collector to consider as to whether even if apparently a transfer had been made prior to 22. 2. 1959, in fact, the same had been effected after the said date or not keeping in view the decision of *Kamla Prasad Mishra Vs. the State of Bihar*

& ors. reported in 1958 PLJR 1004.

121. In the peculiar facts and circumstances and particularly in view of the fact that the matter is remitted back to the Collector under the said Act for a decision on the issues referred to here in the land holders may be given an opportunity to exercise their option afresh.

122. For the reasons aforementioned, CWJC Nos. 12929 and 129962 of 1992 and CWJC Nos. 1799 of 1993 are disposed of and the orders impugned therein are quashed. CWJC No. 12961 of 1992, however, is dismissed. In the facts and circumstances of the case, there shall be no order as to costs.

A.N.Chaturvedi: J: I agree Order Accordingly

S.P.J.



CIVIL WRIT JURISDICTION**Before S.B. Sinha & Gurusharan Sharma, JJ.****Kishori Prasad Gupta. *****1993.****December. 14.****V.****The Life Insurance Corporation of India & ors.**

Service --- holding of degree or diploma, whether can be relaxed under the rules or in accordance with the terms of advertisement.

It is a settled law that holding of a degree or experience may be laid down as a condition of appointment but such a condition in a given case can also be relaxed by the appointing authority which however would depend upon the rules governing appointment and promotion.

It is clear that the question as to whether a case of the candidate may be considered for appointment depends upon the qualification and other conditions laid down in the advertisement itself.

A bare reading of the advertisement in the instant case, clearly shows that relaxation is permissible in case

*. Civil writ Jurisdiction Case No.10382 of 1998. In the matter of an application under Articles 226 and 227 of the Constitution of India.

of holder of diploma as also in the case of an agent or an employee as such, the writ petitioner an agent of Lofe Corporation India, hereinafter referred to as Corporation, should have been considered by the Corporation.

The authorities of the Corporation shall consider as to whether the writ - petitioner is fit for appointment even if some relaxation is granted in his favour with regard to qualification and whether the writ - petitioner's case comes within the purview of extraordinary or Special case or not.

The writ - petitioner may now be interviewed by the authorities of the corporation, and an appropriate order in this regard be passed.

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.B. Sinha, J.

M/s J.P. Shukla, Shyam Narayan Pandey and Satya Prakash Tripathi. for the petitioner

M/s Umesh Prasad Singh, Manoj Kumar Singh & Rajiv Ranjan Prasad for the Respondent.

M/S. J.P. Shukla, Shyam Narayan Pandey
Satya Prakash Tripathi. for the petitioner.

M/S. Umesh Prasad Singh, Manoj Kumar

Singh, Manoj Kumar Singh & Rajiv Ranjan Prasad.

S.B.Sinha,J:-- Whether the petitioner although not a graduate was entitled to be considered for appointment in terms of the advertisement as contained in Annexure - 3 to the writ application is the question involved in this application.

2. The petitioner admittedly is a matriculate. He was appointed as an Agent in the year 1976. According to the certificate issued by the Branch Manager, Nawadah Branch office of the respondent - corporation, his business performance for the years 1990 to 1993 are as follows :

	No. of Lives.	Sum Assured.
"1990 - 91	66	31,80,000
1991 - 92	34	18,17,000
1992 - 93	48	22,50,000"

3. The certificate dated 22. 9. 1993 issued by the Branch Manager (Annexure - 2) shows that the petitioner had been a member of the Branch Manager's Club since 1987 - 88.

4. An advertisement had been issued by the respondent- Corporation on 17. 7. 1993 in the daily newspaper ' Hindusthan' wherein the minimum qualification for holding the said post was stated thus:--

" (i) The candidate must be a graduate of any recognised university in Arts, Science, Commerce, Agriculture and Law or holder of any equivalent degree. Also a FIII Diploma holder of the Life Insurance Corporation of India was eligible to apply."

In the said advertisement, it was further stated that despite the same such candidates who are employees or agents of the Corporation and have experience in Sales of Insurance (or equivalent) or had been in service of the Corporation for a long time, some relaxation may be made in their cases in extraordinary and special circumstances.

5. The petitioner filed an application upon obtaining a no objection certificate from the Branch Manager, Life Insurance Corporation of India which is contained in Annexure - 4 to the writ application. An admit card was issued to the petitioner permitting him to appear at the written examination being Roll No. 3150.

6. Thereafter an interview letter dated 8. 9. 1993 as contained in Annexure - 5 to the writ application was issued to the petitioner inviting him to appear at the interview on 27. 9. 1993. However, the petitioner was not allowed to appear before the Board appointed for that purpose of holding interview.

7. A counter affidavit has been filed in this case, wherein it has categorically been stated that holder of the graduate degree was a pre - requisite for appoint-

ment.

8. It has been submitted that the Corporation had not waived or relaxed the requirement of a Bachelor's degree and even if the petitioner was allowed to appear at the written examination, he was bound to produce the requisite certificates.

9. Mr. J.P.Shukla, the learned counsel appearing on behalf of the petitioner inter - alia submitted that in view of the qualifications for appointment as laid down in the advertisement as contained in Annexure - 3 to the writ application, the petitioner is entitled to be considered for appointment.

10. The learned counsel in support of his contention has relied upon a decision of the Supreme Court in *Hoshiar Singh Vs. The State of Haryana & ors* reported in 1993 (3) SVLR (L) 176 and *Ajaib Singh Vs. Panjab State Electricity Board and others* reported in 1985 (2) Service Law Journal 260.

11. Mr. Umesh Prasad Singh, the learned counsel appearing on behalf of the respondent Corporation, however, relied upon a decision of the Supreme Court in *Distt. Collector & Chairman, Vizianagaram Social welfare Residential School Society Vs. M. Tripura Sundari Devi* reported in 1990 (3) S.S.C.655.

12. It is now a settled law that holding of a degree or experience may be laid down as a condition of

appointment but such a condition in a given case can also be relaxed by the Appoining authority which however would depend upon the rules governing appointment and promotion etc.,

It is true that the advertisement in question stipulates that the applicants must be a graduate in any of the subjects specified therein, but clearly enough a proviso has been appended thereto, in terms whereof not only a holder pf diploma of FIII but also the employees and existing agent of the Corporation, who had gained sufficient experience in sales of the Insurance and / or had been in service of the Corporation for a long time were entitled to be consiered as a provision has been made for grant of some relaxation in their case in extraordinary and special situation. The proviso being in the nature of exception to the main rule, is applicable to the case of the petitioner and thus in our opinion the petitioner was entitled to be considered for appointment in the a forementioned post.

13. In Hoshier Singh's case (Supra), it was inter - alia held :--

" Once it is held that the standards for physical fitness which have been laid down in the advertisement could be so prescribed, the matter of relaxation of the said standards would depend on the terms of the advertisement. The advertisement and the corrigendum are silent about relxation of the said standards by the Board. In

these circumstances the Board could not , on its own , relax the standards of physical fitness as mentioned in the advertisement and the corrigendum."

14. In Ajaib Singh's case (Supra), a learned Single Judge of the Punjab and Haryana High court held as follows:--

" I am also of the view that the authority concerned having laid down the criteria for selection was not entitled to change if not after the inviting of the applications, then at least after the issuance of the letters of interview to various candidates who were covered by that criteria. In the light of that the candidates who became eligible for being considered for the post advertised under the changed criteria have to be excluded from the arena of selection. As a necessary consequence of this the authorities concerned have to be directed to hold fresh selection for the reserved post from amongst the candidates who fulfilled the criteria as initially laid down, i.e. who had secured 55 % or more marks in their Law Course."

15. In *District Collector & Chairman, Vizianagaram Social Welfare Residential School Society, Vizianagaram and Another Vs. M. Tripura Sundari Devi* reported in 1990 (3) S.C.C. 655 it has been held as follows:--

" It must further be realised by all concerned that when an advertisement mentions a particular qualification and an appointment is made in disregard of the same,

it is not a matter only between the appointing authority and the appointee concerned. The aggrieved are all those who had similar or even better qualifications than the appointee or appointees but who had not applied for the post because they did not possess the qualifications mentioned in the advertisement. It amounts to a fraud on public to appoint persons with inferior qualifications in such circumstances unless it is clearly stated that the qualifications are relaxable. No court should be a party to the perpetuation of the fraudulent practice. We are afraid that the Tribunal lost sight of this fact.

It is, therefore, clear that the question as to whether a case of the candidate may be considered for appointment depends upon the qualification and other conditions laid down in the advertisement itself. As a bare reading of the advertisement clearly shows that relaxation is permissible in the case of holder of diploma as also in the case of agent or an employee, the petitioner should have been considered by the Corporation.

17. There cannot however, be any doubt that the authorities of the respondent - Corporation shall consider as to whether the petitioner is fit for appointment even if some relaxation is granted in his favour with regard to qualification and whether the petitioner's case comes within the purview of extra - ordinary or special case or not.

18. The petitioner may now be interviewed by the

authorities of the Respondent - Corporation and an appropriate order in this regard may be passed by them.

19. This application is allowed to the extent mentioned hereinbefore but there will be no order as to costs.

Gurusharan Sharma,J:--

Order according by

I agree.

R.D.

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CIVIL WRIT JURISDICTION**Before S.B. Sinha & Gurusharan Sharma, JJ.****Tausif Ahmad Khan. *****1993.****December, 21****V.****The State Of Bihar & others.**

Bihar and Orissa Excise Act, 1915 (B and O Act no. II of 1915) section 7 (2) (g) --- provision of --- Bihar and Orissa Excise Manual Volume III --- rule 47 of the instructions of Board of Revenue --- ambit of --- power of disciplinary action including suspension delegated by Excise Commissioner to the Superintendent of Excise --- order of suspension passed by Superintendent of Excise against the writ - petitioner --- legality of.

The Commissioner of Excise has exercised his power conferred upon him in terms of section 7 (2) (g) of the Bihar and Orissa Excise Act, 1915 read with the Rule 47 as contained in the instructions issued by the Board of Revenue as contained in the Bihar & Orissa Excise Manual Volume 3, by delegating his disciplinary power to the Superintendent of Excise.

Held, that in view of the fact that the Commissioner of Excise is entitled to delegate his power to the

*. Civil Writ Jurisdiction Case No. 1579 of 1993. In the matter of an application under Articles 226 and 227 of the Constitution of India.

authorities mentioned therein and further in view of the fact that Rule 47 of the Board's instruction clearly stipulates that the Commissioner of Excise has delegated the said power, there cannot be any doubt that the Superintendent of Excise has the jurisdiction to pass an order of suspension as against the writ - petitioner. As the disciplinary authority of the writ petitioner, the Excise Superintendent has the right to place him under suspension during the pendency or in contemplation of a departmental enquiry.

*Brajnandan Prasad and anr.v. State of Bihar and ors.*¹

*Durga Dass V. State of Himachal Pradesh*² and

*Paluru Ramkrishna & ors. V. Union of India & ors.*³ ---
distinguished.

Application under Articles 226 and 227 of the of the Constitution. The facts of the case material to this report are set out in the judgment of S.B. Sinha,J.

M/s Harendra Narain Sinha. Rekha Prasad
for the petitioner

M/s Seema Ali Khan G.P. 7 and Rajesh
Chand Choudhary for the respondents.

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1. (1955) A.I.R. (Pat) 353.
 2. (1981) Lab and Ind cases 1183
 3. (1990) A.I.R. (S.C.) 166

S.B. Sinha J. :— Whether the Superintendent of Excise has any competence, authority or jurisdiction to pass an order of suspension is the question involved in this application.

2. In view of a pure question of law involved in this application it is not necessary to State the fact of the matter in details.

* Suffice it to say that on various charges the petitioner has been placed under suspension by an order dated 13 th April, 1992 passed by the Respondent No. 3

3. It is stated that the acts of omission and commission on the part of the petitioner not only constitutes a grave misconduct but also is an offence which is cognizable and non - bailable.

4. The learned counsel appearing on behalf of the petitioner has raised a short question in support of the application, it was contended that in terms of Rule 1 of Rules made by the Lieutenant - Governor in Council under Section 89 of the Bihar Excise Act (Hereinafter referred to as the Act) as contained in the notification being No.471 - F dated 15th January, 1919, the power of suspension is vested only in the Commissioner of Excise. The said rule reads as follows :--

" The power to promote, to transfer and to suspend, reduce in rank, dismiss or otherwise punish all officers of the Excise Department below the rank of Superintendent of Excise, other than the power to dismiss or remove an Inspector

of Excise, appointed by direct recruitment shall vest in the excise commissioner."

5. The stand of the State, on the other hand, is that by reason of rule 47 as contained in the instructions issued by the Board of Revenue as contained in the Bihar and Orissa Excise Manual, Volume - III, the power of removing or dismissing Excise Sub - Inspectors and Clerks is delegated to the Superintendent of Excise by the Commissioner of Excise. The said rule read as follows:--

"The power of punishing including the power of removing and dismissing from service Assistant Sub - Inspectors and Peons as well as the power of punishing, except the power of removing or dismissing Excise Sub - Inspectors and clerks, is delegated by the Commissioner of Excise to the Superintendent of Excise. The power of removing or dismissing Excise Sub - Inspectors and Clerks is delegated to the Collector. The power to punish an Inspector rests with the Commissioner."

6. Mrs Rekha Prasad, learned counsel appearing on behalf of the petitioner submitted that keeping in view the fact that the aforementioned Rule 1 of the Rules 1919 was framed by the Lieutenant - Governor in Council which was the predecessor in office of the State of Bihar, the same shall prevail over the executive instructions which might have later on issued by the Commissioner of Excise.

7. The learned Counsel submitted that it is now well settled that a statutory rule must prevail over the executive instructions.

Reliance in this connection has been placed in *Brajnandan Prasad and another Vs. State of Bihar and others* reported in AIR 1955 Patna, 353, *Durga Dass Vs. State of Himachal Pradesh* reported in 1981 Labour and Industrial Cases, 1183 and *Paluru Ramkrishnaiah and others Vs. Union of India and others* reported in AIR 1990 S.C. 166.

In *Brajnandan Prasad Vs. State of Bihar* reported in AIR 1955 Patna 353, a Division Bench of this court held:

"I do not think that executive instructions issued by either the Government of India or the State Govt. can have any binding force on the interpretation of statutory rules. The court must interpret the statutory rules in accordance with the language used in the Statutory rules, in the light of well established rules, in the light of well established rules of interpretation."

8. In *Durga Dass Vs. State of Himachal Pradesh* reported in 1981 LIC 1183, a learned single Judge of the Himachal Pradesh High court held that a rule made under Article 309 of the Constitution of India cannot be changed by administrative or executive instructions.

9. In *Paluru Ramkrishnaiah Vs. Union of India* reported in AIR 1990 S.C. 166, the Supreme Court held:-

"It is thus apparent that an executive instruction could make a provision only with regard to a matter which was not covered by the Rule and that such executive instruction could override any provision of the Rule. Notwithstanding the issue of instruction dated 6th November, 1962, therefore, the procedure for making

promotion as laid down in Rule 8 of the Rules had to be followed."

10. The learned counsel for the State submitted that in view of the fact that there exists a statutory rule whereby and where under the disciplinary power of the Excise Commissioner has been delegated, the impugned order of suspension which has been passed by the Superintendent of Excise must be held to be legal.

11. The only question which, therefore, arises for consideration is as to whether the Commissioner of Excise could delegate his power conferred upon him under Rule 1 of the Rule framed by the State in terms of Section 89 of the Bihar Excise Act or not.

The answer to this question is not far to seek.

12. Section 7 (2) (G) of the Act reads thus:--

" The State Government may by notification applicable to the whole of State or any specified local area

" 7 (2) (g) permit the delegation by the Board, the Commissioner of a Division, the Excise Commissioner or the Collector, to any persons or classe of persons specified in such notifica - tion of any powers conferred or duties imposed upon or him by or under this Act."

13. It appears that the Lieutenant Governor in Council had also issued a notification dated 15th January, 1919 being No. 470 F in terms whereof different directions had been made in exercise of powers conferred upon him under the different provisions of the said Act.

Clause IV and Clause V of the said Rules read thus:--

" IV. Under Clause (e) of sub - section (2) of Section 7, to delegate to the Excise Commissioner the power specified below: - -

Power to appoint, by promotion, Inspectors of Excise, and to appoint all other officers of the Excise Department below the rank of Inspector of Excise.

V. Under Clause (g) of sub- section (2) of Section to permit the delegation --

(1) by the Excise Commissioner -

(a) to any Collector or Superintendent of Excise of

(i) his power to appoint excise Constable and to appoint on a temporary or acting basis Officers of the Excise Department below the rank of Inspector of Excise.

(ii) his power under Rule 1 under Section 89 of the said Act to promote transfer, suspend, reduce in rank, or otherwise punish such Officers as are appointed by him, other than the power to punish such Officers involving their removal or dismissal;

(iii) to the Principal of the Police Training College Hazaribagh and constable training schools, Nathnagar of his power under Rule 1 made under Section 89 of the said Act, to censure Excise cadets below the rank of Inspector of Excise or to make recovery from their pay the whole or part of any pecuniary loss caused to the Government by negligence or breach of any order of the principal.

Evidently, therefore, the Commissioner of Excise has exercised his power conferred upon him in terms of Section 7 (2) (g) of the Act read with the aforementioned rule by delegating his disciplinary power to the

Superintendent of Excise.

14. In view of the fact that the Commissioner of Excise is entitled to delegate his power to the authorities mentioned therein and further in view of the fact that the Rule 47 of the Board's instruction clearly stipulates that the Commissioner of Excise has delegated the said power, there cannot be any doubt that the Superintendent of Excise has the jurisdiction to pass an order of suspension as against the petitioner inasmuch as a disciplinary authority of the petitioner, he will have a right to place him under suspension during the pendency or in contemplation of a departmental enquiry.

15. In this view of the matter, it must be held that the decisions referred to by the learned counsel has no application to the facts and circumstances of this case.

16. However, in view of the fact that the order of suspension was passed on 13. 4. 1992, it is desirable that the departmental proceeding should be concluded at an early date and preferably within a period of three months from the date of the receipt of a copy of this order.

17. It has been stated before us that the petitioner has not been paid his lawful dues.

18. We hope and trust that all lawful dues of the petitioner shall be paid within one month from the date of the receipt of a copy of this order.

19. This application is, therefore, dismissed with the
aforementioned observations.

Gurusharan Sharma,J:--

I agree.

Application dismissed.

R.D.



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