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1995

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PATNA SERIES

VOLUME LXXIV

INDEX

REPORTED BY

HIGH COURT, PATNA ... SHYAMESHWAR DAYAL, M.A., B.L. (*Reporter*).

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PATNA

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PATNA HIGH COURT

1995

Chief Justice

1. *The Hon'ble Mr. Justice Kondaswami Venkataswami*—date of appointment—19th June, 1994. Elevated to Supreme Court of India as Judge on 6th March, 1995.

2. *The Hon'ble Mr. Justice G. B. Pattnaik*—date of appointment—19th May, 1995. Elevated to Supreme Court of India as Judge on 11th September, 1995.

. *The Hon'ble Mr. Justice D. P. Wadhwa*—date of appointment—29th September, 1995.

Judges

The Hon'ble Mr. Justice B. L. Yadav—date of appointment—24th May, 1984/28th April, 1994.

The Hon'ble Mr. Justice Dr. J. N. Dubey—date of appointment—24th May, 1984/28th April, 1994.

(*i*) Leave on full allowances for 2 days with effect from 4th December, 1995 to 5th December, 1995.

(*ii*) Commuted leave for 15 days with effect from 2nd September, 1995 to 16th September, 1995 with liberty to suffix Sunday the 17th September, 1995 to the Leave.

(*iii*) Commuted leave for 10 days with effect from 20th September, 1995 to 29th September, 1995 with liberty to suffix D. P. Holidays.

(*iv*) Leave on full allowances for 3 days with effect from 24th May, 1995 to 26th May, 1995 with liberty to suffix annual vacation including Muharram with effect from 27th May, 1995 to 25th June, 1995.

(*v*) Leave on full allowances for 12 days with effect from 21st August, 1995 to 1st September, 1995 with liberty to prefix Sunday the 20th August, 1995 to the leave.

(*vi*) Leave on full allowances for 5 days with effect from 15th May, 1995 to 19th May, 1995 with liberty to prefix 13th May, 1995 and 14th May, 1995 to the leave.

(*vii*) Leave on full allowances for 3 days with effect from 19th April, 1995 to 21st April, 1995.

(*viii*) Leave on full allowances for 2 days with effect from 12th April, 1995 to 13th April, 1995.

(*ix*) Leave on full allowances for 9 days with effect from 6th March, 1995 to 14th March, 1995 with liberty to prefix 3rd March. 1995 to 5th March, 1995 to the leave.

(*x*) Leave on full allowances for 12 days with effect from 30th January, 1995 to 10th February, 1995 with liberty to suffix 11th February, 1995 and 12th February, 1995.

6. *The Hon'ble Mr. Justice Bishwa Nath Agrawal*—date of appointment—17th November, 1986. Leave not taken.

7. *The Hon'ble Mr. Justice B. P. Singh*—date of appointment—9th March, 1987. Leave not taken.

8. *The Hon'ble Mr. Justice N. Pandey*—date of appointment—31st October, 1988. Leave on full allowances for 11 days with effect from 10th January, 1995 to 20th January, 1995.

9. *The Hon'ble Mr. Justice S. K. Homchoudhary*—date of appointment—5th December, 1988/28th April, 1994.

10. *The Hon'ble Mr. Justice Nagendra Rai*—date of appointment—10th July, 1990.

11. *The Hon'ble Mr. Justice S. N. Jha*—date of appointment—10th July, 1990.

12. *The Hon'ble Mrs. Justice Indu Prabha Singh*—date of appointment—10th July, 1990.

Leave not taken.

13. *The Hon'ble Mr. Justice Dharmpal Sinha*—date of appointment—10th July, 1990.

14. *The Hon'ble Mr. Justice R. N. Sahay*—date of appointment—10th July, 1990.

Leave not taken.

15. *The Hon'ble Mr. Justice R. N. Prasad*—date of appointment—27th July, 1990.

16. *The Hon'ble Mr. Justice Shanshank Kumar Singh*—date of appointment—27th July, 1990.

17. *The Hon'ble Mr. Justice Aftab Alam*—date of appointment—27th July, 1990.

Leave on full allowances for 18 days with effect from 6th November, 1995 to 23rd November, 1995 with liberty to prefix 5th November, 1995 to the leave.

18. *The Hon'ble Mr. Justice S. K. Chattopadhyaya*—date of appointment—18th September, 1991.

19. *The Hon'ble Mr. Justice A. N. Chaturvedi*—date of appointment—18th September, 1991.

Leave on full allowances for 26 days with effect from 28th August, 1995 to 22nd September, 1995 with liberty to prefix Sunday the 27th August, 1995 to the leave.

Leave on full allowances for 17 days with effect from 9th May, 1995 to 25th May 1995.

20. *The Hon'ble Mr. Justice Choudhary S. N. Mishra*—date of appointment—2nd December, 1991.

Leave not taken.

21. *The Hon'ble Mr. Justice Radha Mohan Prasad*—date of appointment—2nd December, 1991.

22. *The Hon'ble Mr. Justice Narayan Roy*—date of appointment—2nd December, 1991.

23. *The Hon'ble Mr. Justice Amir Das*—date of appointment—2nd December, 1991.

Leave on full allowances from 13th February, 1995 to 2nd March, 1995.

24. *The Hon'ble Mr. Justice Guru Sharan Sharma*—date of appointment—19th October, 1992.

25. *The Hon'ble Mr. Justice Naresh Kumar Sinha*—date of appointment—19th October, 1992.

Commuted leave for 12 days with effect from 13th November, 1995 to 24th November. 1995.

26. *The Hon'ble Mr. Justice Loknath Prasad*—date of appointment—19th October, 1992.

27. *The Hon'ble Mr. Justice A. K. Ganguly*—date of appointment—10th January, 1994/4th April, 1994.

Leave not taken.

28. *The Hon'ble Mr. Justice P. K. Deb*—date of appointment—10th January, 1994/14th February, 1994.

29. *The Hon'ble Mr. Justice A. N. Trivedi*—date of appointment—1st February, 1994/14th February, 1994.

(*i*) Commuted leave for 12 days with effect from 10th July, 1995 to 21st July, 1995 with liberty to prefix 8th July, 1995 to 9th July, 1995.

(*ii*) Leave on full allowances for 4 days with effect from 13th February, 1995 to 16th February, 1995 with liberty to prefix 11th February, 1995 and 12th February, 1995.

(*iii*) Leave on full allowances for 5 days with effect from 2nd January, 1995 to 6th January, 1995 with liberty to prefix Christmas Holidays and suffix New Years Day.

30. *The Hon'ble Mr. Justice O. N. Asthana*—date of appointment—1st February, 1994/21st February, 1994.

Leave not taken.

31. *The Hon'ble Mr. Justice Pramod Kumar Sarin*—date of appointment—1st February, 1994/21st February, 1994.

(*i*) Leave on full allowances for 5 days with effect from 16th October, 1995 to 20th October, 1995 with liberty to prefix D. P. Holidays with effect from 16th October, 1995 and Sunday the 15th October, 1995 to the leave.

(*ii*) Leave on full allowances for 19 days with effect from 8th May, 1995 to 26th May, 1995 with liberty to prefix Sunday the 7th May, 1995 and to suffix annual vacation with effect from 27th May, 1995 to 25th June, 1995 to the leave.

32. *The Hon'ble Mr. Justice D. S. Dhaliwal*—date of appointment—20th June, 1994/21st July, 1994.

(*i*) Leave on full allowances for 14 days with effect from 8th July, 1995 to 21st July, 1995.

(*ii*) Leave on full allowances for 12 days with effect from 26th June, 1995 to 7th July, 1995 with liberty to prefix annual vacation and to suffix 8th July, 1995 and 9th July, 1995 to the leave.

33. *The Hon'ble Mr. Justice Surinder Sarup*—date of appointment—26th April, 1994/21st July, 1994.

Leave on full allowances for 11 days with effect from 13th December, 1995 to 23rd December, 1995 with liberty to suffix christmas holidays from 24th December, 1995 to 1st January, 1996 to the leave.

34. *The Hon'ble Mr. Justice S. J. Mukhopadhaya*—date of appointment 8th November, 1994. Leave not taken.

1995

CORRIGENDA

Page No.	Para No.	Line No.	For	Read
1	..	2nd from bottom.	On inference	an inference
2	..	2nd from bottom.	a absence	in absence
2	.	2nd from bottom.	orders	order
3	.	1st from bottom.	apprpriate	appropriate
3	.	17th from bottom.	got	get
4	..	3rd from bottom.	way of advance	by way of advance.
4	..	7th from bottom.	more's case	more a case (sic)
5	4	12	Precluded	precluded
5	4	18	mere	more
7	5	7	direction	direct
8	7	5	three another	three months

Page No.	Para No.	Line No.	For	Read
12	11	last	transferes	transferee
13	..	13	transferee	transfer
14	13	2	Cottector	Collector
14	13	3	custons	customs
15	..	4th from bottom.	preceedings	proceedings
17	14	last	the after	thereafter
18	14	last	under	order
18	16	1	them	then
25	23	3rd from bottom	objection on certificate.	objection certificate.
26	..	5th from bottom	mandamous	mandamus
27	1	4	os	of
28	..	14	jointed	joined
28	..	5th from bottom	Residence	Resident
35	10	1	consel	counsel
35	11	3	with	which
35	11	6	pointe	points
38	..	7	days down	lays down
40	..	6	counection	connection

Page No.	Para No.	Line No.	For	Read
40	.	3rd from bottom	confermed	conferred
42	..	2nd from bottom	arbtrainess	arbitrariness
44	3	4	connerned	concerned
44	4	5	or family	of family
46	..	6	retirement of	retirement or
46	7	2nd from bottom	explanstion	explanation
47	8	7	ans	and
49	..	3	ans	and
49	..	9	Cr. P. 9	G. P. 9.
49	..	10	petitioner	state
50	..	1	atayed	stayed
50	..	3	prcceeding	proceeding
54	..	8th from bottom	my work	any work
56	footnote	..	(1992) P.L.J.R. 535.	Delete
57	..	2	conditian	condition
57	..	5	sdvertisement	advertisement
57	..	7	wither	whether
57	..	7	guranteed	guaranteed

Page No.	Para No.	Line No.	For	Read
59	..	8	vacncies	vacancies
59	..	11th from bottom	adver sement	advertisement
59	..	8th from bottom	Dagree	Degree
63	..	5	over	ever
65	..	9	relalx	relax
69	7	21	be fause	because
71	..	1	wit	writ
71	9	10	vancant	vacant
75	10	4	Rues	Rules
76	..	4	vancant	vacant
76	..	22	sooth	smooth
83	1	4	form	from
83	2	last	paregraph	paragraph
85	4	16	Registrar	Register
90	10	last	patitiorer	petitioner
94	..	2	entreprenours	entrepreneurs
97	5	6	that	than
100	10	1	learndd	learned

Page No.	Para No.	Line No.	For	Read
101	11	3	canverted	converted
101	11	4th from bottom	form	from
102	14	2	of conduct	or conduct
105	..	last	oven	even
106	..	7	alsone	alone
107	2	3rd from below	Gazotte	Gazette
109	..	1	collcctor	collector
109	..	last but one	previso	proviso
110	4	last	Aprial	April
110	5	5	preceeding	proceeding
110	5	last	potitioners	petitioners
111	11	3	oven	even
113	..	13	appelants	appellants
113	..	18	dealy	delay
114	2	14	de rejected	be rejected
115	..	10th from bottom.	any purpose	public purpose
116	13	10	amened	amended
117	..	1	to	two

Page No.	Para No.	Line No.	For	Read
133	..	13th from bottom.	meangless	meaningless
141	..	3	circumstance	circumstances
144	5	9	imcone	income
146	..	7	appication	application
146	..	16	presoribed	prescribed
149	12	2	suffice is	suffice it
155	21	2	Aristotelion	Aristotelian
156	..	5th from bottom	reating	relating
160	4	1	apperars	appears
162	8	4th from bottom	cerifiable	certifiable
165	..	3	this	these
168	..	2	this	these
169	21	2	cessessation	cessation
169	22	1	reamins	remains
170	24	7th from bottom	congtitution	Constitution
171	..	2	perscribed	prescribed

Page No.	Para o.	Line No.	For	Read
171	25	4	cessassation	cessation
172	..	3	uatravires	ultravires
172	26	4	in is	it is
172	26	5th from bottom	cannt	cannot
175	..	2	vidence	evidence
175	1	5	I may	It may
183	..	3	Lerdships	Lordships
185	10	5	Applicants	applicants
187	.	7th from bottom	remady	remedy
190	..	5	regard in	regards
196	10	5	peutoner's	petitioner's
199	9	2	As	An
200	..	6	or	of
201	15	3	expection	expectation
211	28(3)	3rd from bottom	alternation	alteration
237	.	1	aforesaid	appointed
241	.	9	proposision	proposition
241	6	3	this	the

Page No.	Para No.	Line No.	For	Read
244	12	3	related	belated
245	..	6	act of men	acts of men
246	..	8th from bottom	bounded	bounden
247	2	8	28-2-1988	28-2-1989
248	..	8	respondeents and	respondent's end
250	7	3	arrieved	arrived
250	7	11	is is	it is
251	10	7	it any	if any
251	10	2nd from bottom	licensce	license
252	13	2	prociding	providing
252	13	4th from bottom	drtermined	determined
253	14	13	contractuab	contractual
253	14	19	equiorfy	equity
256	21	6	cristal	crystal
269	7	5th from bottom	authorivavively	authoritatively
271	.	10th from bottom.	amount to	amounted to
272	9	last line	in	an

Page No.	Para No	Line No.	For	Read
277	3	10th from bottom.	dic'sior	dcc'sior
287	..	6th from bottom	hte	the
293	..	6th from bottom	Deasi	Desai
294		1 from bottom	vigilense	vigilance
294		9th from botton	excutive	Executive
295	..	12 from bottom	vig lence	vigilance
299	..	2	modifed	modified
301	..	6	clasue	clause
301	..	Last line	support in	support of
303	..	6	B'partits	Bipartite
303	..	4th from bottom	desposing	disposing
309	4	6	action	section
310	..	7	unbiguous	unambiguous
312	..	4th from bottom	case in pending	case is pending
314	3	6	partice	part'es
315	..	1	record to	record of
319	9	6	father or	father of
321	..	6	time harred	time barred

Page No.	Para No.	Line No.	For	Read
324	.	6	condoing	condoning
324	16	4	filling	filing
326	.	4th from bottom	than	then
329	..	1	premilinary	preliminary
329	23	last but one	judiciarly	judiciary
334	2	1	plaintsf	plaintiff
334	2	2	posesion	possession
335	..	7	othercoise	other wise
335	5	10th from bottom.	porforming	performing
336	6	4	berred	barred
336	6	8	adjuicate	adjudicate
336	6	14	jurialiction	jurisdiction
337	..	5	on libility	or liability
337	8	2	doas	does
337	10	4	natute	nature
337	10	5	not question	no question
339	..	15	beteen	between

Page No.	Para No.	Line No.	For	Read
340	2	5	litle	title
343	7	3	possessing	possession
344	..	5	13-2-1947	18-2-1974
345	..	19	9-8-1974	19-8-1974
345	..	24	R/S	M/S
346	2	2	uner	under
354	19	12	permanet	permanent
355	..	11	for	or
356	23	4	stated	state
358	..	2	abceed	abetted
358	..	11	or	of
358	..	15	held	hold
359	..	26	panel	Penal
359	—	31	materia	material
363	..	8	Bidat	Bidai
363	..	16	help-hessness	helplessness
368	..	15	contian	contain
369	..	5	D.s.	D.W,s.

Page No.	Para No.	Line No.	For	Read
371	11	17,20	appelant	appellant
373	..	21	rgarding	regard
373	..	24	levave	leave
374	..	3	wheming	whelming
374	13	1	appeant	appellant
380	8	6	demestic	domestic
380	9	5	2	12
381	10	13	supramc	Supreme
382	13	1	Homever	However
385	4	15	she	who
392	..	1(last word of the line)	to	delete (to)
392	15	6	a long period of the petitioner was a appointed to the post.	Delete (these words)
400	17	Las line	queshed	quashed
402	..	5	schame	scheme
407	5	11	constiunt	constituent
412		10	the he	then he

Page No.	Para No.	Line No.	For	Read
414	..	15	Collete	College
417	17	9	carde	cadre
420	22	4	reaised	raised
420	22	7	collage	college
425	4	1	firther	further
428	9	7	Annaxur	Annexure
430	..	3	wrre	were
433	..	2	petitieners	petitioners
434	4	9	re	were
434	4	10	ders	orders
442	..	2	Polytechnies	Polytechnics
443	..	30	be	de
443	...	31	rose	hors
444	..	12	Jand v. Keral Nath Authority	Jacob M.Puthu parambil and ors. v. Kerala Water Authority.
460	20	3	the	due
460	20	5	cecision	decision

Page No.	Para No.	Line No.	For	Read
460	20	12	regisite	requisite
462	23	7	Materiats is	Materials
463	..	3	Polyteachndes	Polytechnic
464	..	24	employemt	employment
468	27	20	premotion	promotion
469	..	5	omit and delete	Inviting application for recruitment fill in".
477	33	4	judgeents	Judgements
480	38	6	ork	work
481	..	14	extacons	extraneous
484	2	6	979	1979
487	..	10	purehsed	purchased
489	6	5	delete the entire line after word "It and before the word "is" delete the word "is".	
494	15	3	Codl	Code
495	..	27	assistanece	assistance

Page No.	Para No.	Line No.	For	Read
497	21	17	ceforec	enforce
498	..	14	continued	continued
501	26	4	India	Indian
505	4	2	as	was
507	..	21	scals	scale
511	..	17	adapted	adopted
511	..	Last line	B.P.Singh	B.L. Yadav, J.
512	..	1	in	for
512	..	2	resprodents	respondents
513	6	7	L.L.J.R.61	P.L.J.R. 61
513	7	8	benefictant	beneficent
513	8	2nd line from bottom	some	same
514	9	5	brneveelent	benevolent
514	10	7	interpreated	interpreted
514	10	17	leggelation	legislation
514	10	20	tanst	tenart
518	18	18	Amir Das, J.	Amir Das J. I agree.

Page No.	Para No.	Line No.	for	Read
518	..	17	seep	sweep
521	2	9	stae	state
526	..	17	repy	reply
527	9	13	constituled	constituted
528	..	7	empoyed	employed
529	10	14	fi'ng	filing
530	11	18	shoud	should
530	..	6th from bottom	controerted	controverted
530	..	6th line from bottom	cousel	counsel
594	..	Last Line from bottom	panchayat	Panchayat
604	..	5	corss	Cross
615	..	21	arbiporily	arbitrarily
617	..	13	registor	register
641	..	26	alos	also
655	..	8	prodiction	production.
655	..	18	ahould	should
657	..	18	maintable	maintainable

Page No.	Para No.	Line No.	For	Read
559	..	4	wrintpetition	writ-Petition
660	..	18	Hihg	High
662	..	5th line from bottom.	examed	examined
663	..	13th line from bottom.	coruse	course
663	..	12th line from bottom	appeare	appears
663	..	10th line from bottom.	slso	also
663	..	10th line from bottom.	be	he
665	Name of Bench.	1	Home Chaudhuri.	Homchaudhuri
665	Head note.	6	rescribing	prescribing
669	7	14	prescrting	prescribing
670	8	8	aborb	absorb
670	8	7th from bottom	card	cadre
671	Headnote	5	latches	laches
672	3(7)	6th line from bottom.	suppling	supplied

Page No.	Para No.	Line No.	For	Read
673	..	2	(in which they will be brought on the new scales)	DELETE
675	..	14	counterd	countered
678	Headnote	4-5	(he has been representation of 1988 it was stated)	DELETE
678	..	15	Evern	Even
681	3	22	exa omatopm	examination
682	..	10	arb	garb
682	4	10	state	State
684	..	1	ran	rank
685	7	3	Comtandant	Commandant
687	8	2nd line from bottom.	significanse	significance
689	..	1	provisin	provision
689	..	5	knowledgs	knowledge
689	9	10	J.C.Ca	J.C.Cs
691	..	3	promitions	promotions
691	..	6	latches	laches

Page No.	Para No.	Line No.	For	Read
691	..	10	obsticles	obstacles
691	..	16	adminiatrative	administrative
691	..	19	aleep	sleep
691	..	22	lordshipe	Lordships
691	..	23	earvice	service
691	11	1	couneel	counsel
691	11	2	riable	liable
691	11	6	respoect	respect
691	11	3rd line from bottom.	rsprssentation	representation
691	11	2nd line from bottom.	Annexure OG	Annexure G
692	..	5	alread	already
692	..	5	explationed	explained
692	..	6	easape	escape
692	..	6	form	from
692	..	11	subssquent	subsequent
692	..	11	promitions	promotions
692	..	18	invoked	invoke

Page No.	Para No.	Line No.	For	Read
692	..	22	inoridinatedalay	inordinate delay
692	12	1	encloaing	enclosing
692	12	4	pyryer	prayer
693	..	1	connet	cannot
693	..	10	come	some
693	..	15	metioned	mentioned
693	..	4th line from bottom.	orders court	orders of the Court.
693	..	Last but one line	necesary	necessary
694	14	1	hearned	Learned
694	14	6	promtion	promotions
695	..	1	petitioner	petitioner
695	15	1	reassese	reasons
695	15	3	repared	prepared
695	15	4	lanches	laches
695	15	5	dismiessed	dismissed
697	..	3	facs	facts
697	3	10	dendoped	developed

Page No.	Para No.	Line No.	For	Read
697	3	4th line from bottom.	permarently	permanently
697	3	4th line from bottom.	mionr	minor
697	3	lst line	catate	estate
698	..	7	eas	cars
699	4	4	step mentherly	step motherly
699	4	17	cause	caused
699	4	18	persosn	persons
699	4	19	mortgea	mortgage
700	..	5	isruption	disruption
702	v	..	judicats	judicata
702	8(*iii*)	1	Cealid	valid
704	8(*d*)	last line	proprty	property
706	(K)	3	aforeaisaid	aforesaid
707	..	9	colested	molested
708	13	3	departune	departure
709	..	3rd line from bottom.	manago	manage

Page No.	Para No.	Line No.	For	Read
710	..	1	noil	no. 1
711	16	7	out	oust
712	..	9th line from bottom.	chastited	chastised
712	17	1	visting	visiting
712	16	7	out	oust
712	..	15	chastited	chastised
712	17	1	visting	visiting
712	17	7	this	his
713	..	8	mange	manage
714	20	1	evidenes	evidence
714	21	1	Sharn	Sharan
715	22	4	in luence	influence
715	23	8	ul imately	ultimately
716	..	9	insprire	inspire
716	24	1	undrue	undue
717	..	10th from bottom.	afther	after
718	..	2	Prsent	present

Page No.	Para No.	Line No.	For	Read
718	26	1	advrse	adverse
719	..	13	contants	contents
720	27(*d*)	5	obstensively	ostensibly
720	28	4	harself	herself
721	..	2	clupons	coupens
721	..	5	cupons	coupens
721	..	11	Acfording	according
722	29	6	hr	her
723	30	1	havin	having
723	30	5	amily	family
724	..	16th line from bottom.	member	members
724	..	9th line from bottom.	and equal	an equal
725	..	12	alomst	almost
726	(4)	3	distiction	distinction
726	(4)	2nd line from bottom.	wischief	mischief
726	(4)	last line from bottom.	complsurily	compulsorily

Page No.	Para No.	Line No.	For	Read
727	31	3	aftr	after
727	31	4th line from bottom.	Equitible	Equitable
728	32	1	authorirative	autheritative
728	32	6	arrangment	arrangement
728	32	11	seettlement	settlement
729	..	5	rsult	result
729	..	12th line from bottom.	contradie	contradict.
730	Name of parties		Chancllor of Univerities.	Chancellor of Universities.
731	..	7th line from bottom.	nemenciature	nomenclature
732	3	7th line from bottom.	Lecture	lecturer
733	..	20th line from bottom.	rominder	reminder
733	..	Last line from bottom.	petioner	petitioner
734	..	12	permanot	permanent
734	..	15	addrssed	addressed
734	6	2	doted	dated

Page No.	Para No.	Line No.	For	Read
735	..	10th line from bottom.	conocrn	concern
736	8	4	with drawon	withdrawn
736	..	6th line from bottom.	recognisig	recognising
740	(c)	1	continous	continuous
740	(c)	12	University	university
741	..	3	b	be
741	..	15th line from bottom	stature	statute
742	15	2	petitionr	petitioner
743	17	4	neminated	nominated
743	18	2	subsequant	subsequent
744	79A	9	promulation	promulgation
745	..	11	sonate	senate
746	20	2	experence	experience
749	4	4	tho	the
750	..	7	not preferred	not been preferred.
750	7	7	and the	and she

Page No.	Para No.	Line No.	For	Read
750	8	2	rallised	raised
751	10	5	revying	relying
754	..	9	held	hold
758	...	28	bad	had
764	10	1	amendment petitioner.	amendment petition.
766	..	12	f	of
766	12	21	ratire	retire
772	17	18	untontolled	uncontrolled
773	..	5	anough	enough
774	..	15	prporlety	property
774	..	24	impormissible	impermissible
777	..	10	rogard	regard
777	..	22	wall	well
782	..	3	hald	hold
785	..	24	previso	proviso
787	..	8	theated	treated
791	..	27	delabrately	delebrately
792	..	22	in	for

Page No.	Para No.	Line No.	For	Read
793	3	7	scerratary	Secretary
794	..	17	made	make
797	7	8	of	or
797	..	10	Satate	State
798	..	Last line from bottom.	Starutory	statutory
798	...	ditto.	thereafter	thereforc
800	...	7	Sessios	Sessions Judge
801	...	1	an	on
801	10	2	preposal	proposal
801	..	10	appoit	appoint
802	13	1	despits	despite
803	..	17	far	for
804	..	10	taht	that
804	..	29	Prosector	Prosecutor
805	15	4	assused	assumed
806	16	5	occurdance	accordance
807	..	2	sarinn	Sarin
807	...	Footnotel	Deach	Death

Page No.	Para No.	Line No.	For	Read
808	..	21	recorded	recovered
809	..	22	303/34	302/34
811	..	18	7 at 8am	7–8 am
811	..	30	withness	witness
812	4	8	autopay	autopsy
813	6	1	susained	sustained
814	..	4	Colure	Colour
814	7	6	tempralare	temporal
814	7	13	injurise	injuries
814	7	14	weaspon	weapon
814	..	18	xamination	examination
817	1	1	statement to loses.	statement loses as.
817	10	11	ahort	short
819	..	7	nay	any
819	..	23	decribed	described
821	15	21	hralty	healthy
824	..	21	withnsses	witnesses

Page No.	Para No.	Line No.	For	Read
828	..	3	revived	received
829	..	14	himself the	himself left the
832	..	27	ot	to
835 836 837	OMIT Index pages VIII and VII			On the back of the pages 835, 836, 837. wrongly printed
837	(b)	8	inadvenertance	inadvertence
837	2	5	Mitakchara	Mitakshara
838	3	10	reversioner	reversioners
840	9	3	in	a
842	11	7	VII f	VII of
843	13	11	taken	taking
846	16	4	affected	effected
847	22	4th line from bottom.	has	had
848	..	6	t such	to such
850	headnote	5	as many	as as many
850	„	11	t higher	to higher
850	headnote	5th line from bottom.	con nuing	continuing

Page No.	Para No.	Line No.	For	Read
851	..	12	fasts	facts
857	1	8th line from bottom.	Consumers	consumers
852	3	8th line from bottom.	fore	for
853	..	5	agamkuan	Agamkuan
853	4	5th line from bottom.	the	thus
854	..	7th line from bot om.	ben	been
855	..	10	the	DELETE
855	..	13th line from bottom.	Manner	manner
856	8	1	Stated by the state.	stated by the State
857	..	11	lysts	lysis
859	12	6	poof	proof
859	12	7	warrant	warrants
862	Headnote	10	section	action
862	Headnote	12	bemome	become
862	Headnote	13	Conforming	confirming

Page No.	Para No.	Line No.	For	Read
863	1	10th line from bottom.	moods operand	modus operandi
864	..	10	resources	resourceless
865	..	10	22th	22nd
871	..	10th line from bottom.	bar	bear
872	..	4	It equaly	It is equally
872	56	2	regual	regular
875	..	12	de horese	de hors
876	15	1	if	of
876	16	3	guietly	guilty
880	headnote (2)	3	high body	his body
880	Headnote (3)	3	I producing	in producing
882	2	2nd line from bottom.	Set them	sent them
887	..	6	besmerged	besmirched
887	..	7	flatened	flattened
888	..	10	what	that

Page No.	Para No.	Line No.	For	Read
890	..	12	communisty	communist
897	..	1	connectio	connection
897	20	2	eastablish	establish
899	2	3	juriadiction	jurisdiction.
901	..	3	deligated	delegated
901	7	3	came	case
902	..	6	Chariman	Chairman
902	..	7	containded	contended
903	..	3	Regualtion	Regulation
903	11	1	natification	Notification
904	12	10	Industrial Disputed.	Industrial Disputes.
906	..	5	bee	been
906	..	6	metter	matter
906	..	10	laways	always
908	..	1	clauss	clause
913	19	5	state	stage
914	10	1	lia	lie
916	..	3	erase	arose
916	..	14	he work	the word

Page No.	Para No.	Line No.	For	Read
917	27	6	will and	will end
917	29	1	patant	patent
917	32	1	in impugned	impugned
918	34	1	tow	two
918	38	Last line	S.L. Yadav	B.L. Yadav
918	..	Last line	Appeal petitioner.	Appeal dismissed
919	..	9	Decree	Degree
928	..	Last line	How	now
929	..	15	pepose	purpose
930	..	1	manifast	manifest
932	..	4	wth	writ
932	15	6	mandamag	mandamous
932	15	6	direction	directing
934	..	3rd line from bottom.	sale dead	sale deed.
935	..	22	deeping	keeping
935	..	27	pardamasin	Pardanashin
936	..	Foot Note	A.L.R.(P.R.)210	A.I.R. (Pat)210

Page No.	Para No.	Line No.	For	Read
945	13	12	his	him
951	13	18	indegrity	integrity
953	..	5	manifect	manifest
953	..	Foot note	I.L.R. 87	I. P.L.L.R. 87
956	..	1	v'lated	violated
958	5	4	teh	the
959	10	2	if	it
961	..	Last	ed·ts	Costs
966	..	15	fo	of
967	..	19	Wege	were
971	2	17	exam'nace	exam'nees
974	8	Last line	from	form
975	8	5	of	or
978	17	10	P.J.L.	P.I.L.
978	17	12	coste	costs
979	..	2	such	sub
980	..	11	substant:se	substantive
980	2	6	are	age

Page No	Para No	Line No.	For	Read
983	..	Foot Note	P.L.I.R.	P.L.J.R.
984	..	Foot note	&	of
984	..	Foot note	dispondent	disposed of
987	..	7	Kukhopadhaya, J.	Mukhopadhaya, J.
987	..	15	petitioners	petitions
988	4	16	cadr	cadre
988	4	Last line	Sanierity	seniority
997	17	2	pet tioners	petitions

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Agreement for Supply of High Tension Electrical energy by Bihar State Electricity Board to writ-petitioner—clause 13—whether applicable when there is non supply of electrical energy and also when the consumer is prevented from receiving or using electrical energy either in whole or in part—whether embraces within its fold not only acts of God but also act of men viz, strikes riots, fire etc—writ-petitioner claiming remission of Annual Minimum Guarantee charges and maximum demand charged due to non-supply/short supply of electrical energy—General Manager directing an enquiry—enquiry report finding contention of writ-petitioner to be correct—General Manager rejecting the claim without considering the enquiry report—whether sustainable.

From a perusal of the provisions laid down in clause 13 of the agreement entered into between the writ-petitioner and Bihar State Electricity Board hereinafter referred to as the Board, it is clear that this clause is not only attracted when the Board is unable to supply electrical energy but also to a case where the consumer is prevented from receiving or using the electrical energy to be supplied under the agreement either in whole or in part. The words prevented from receiving or using the electrical energy by contract are significant. Receiving of electrical energy the consumer may have a direct with supply of electrical energy but clause 13 is also attracted in a case where the consumer is prevented from using the electrical energy. Clause 13 is also not a *vis* major clause simpliciter. It embraces within its fold not only acts of God but also acts of men like strikes, riots, fire and explosion.

Where the writ-petitioner claimed for remission of Annual Minimum Guarantee charges and maximum demand charges due to non-supply—short supply of electrical energy before the General Manager of the

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Board and the General Manager directed Respondent no. 3 its subordinate, to inspect and verify inability of writ-petitioner to utilise electricity for the cause reasonably beyond its control for two hours after each interruption in the supply of energy who after due enquiry found the contention of the writ-petitioner to be correct;

Held, that Respondent no. 2 the General Manager, of the Board has completely misdirected himself in rejecting the claim of the writ-petitioner without even referring to the report of Respondent no. 3 Respondent no. 2 under clause 13 of the Agreement was deciding the matter as quasi-judicial authority and as such it was his bounded duty to consider the report of Respondent no. 3 as well as other documents filed on behalf of the writ-petitioner;

Held, further that the part of the impugned order, by reason of which Respondent no. 2 has rejected the claim of the writ-petitioner in respect of relief for total hours of trippings, load sheddings etc. as well as amount of remission for hours of non-supply on the basis of writ-petitioner's failure to consumer electricity during the total work of supply, can not be sustained in law and is set-aside.

M/s. Pyrites, Phosphates and Chemicals Ltd. v. *The Bihar Electricity Board and Ors.* (1995), I.L.R. 74, Pat. 245

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AGREEMENT—*contd.*

teaching experience as Assistant Professor—recommendation by Bihar Public Service Commission and consequent appointment of Respondent no. 4 by the State of Bihar, whether liable to be set aside.

For the purpose of giving the meaning of 'teaching experience' as mentioned in the advertisement no 18/93, dated the 4th April, 1993 issued by the Bihar Public Service Commission for the post of Associate Professor of Mathematics in Engineering Colleges under State of Bihar, it is to be construed that such experience must be a regular experience and not some sort of experience, here and there, on a date and/or dates, like part-time experience;

Held, that the five years teaching experience as laid down in the said advertisement no. 18/93, dated 4th April 1993 means a regular five years teaching experience as distinct from five years of part-time teaching experience. The persons who do not have regular five years teaching experience, but have part-time teaching experience, are not eligible for appointment to the post of Associate Professor (Mathematics) in Engineering College;

Held, further, that the post of Assistant Professor being just below the post of Associate Professor, teaching experience at the 'appropriate level' will mean teaching experience at the level of Assistant Professor and/or equivalent or high post and not at any other level;

Held, further, that Respondent no. 4 had got no five years teaching experience as laid down in the advertisement no. 18/93, and here he was not eligible for appointment to the post of Associate Professor (Mathematics) in an Engineering College;

Held, also that whatever teaching experience that had been claimed by Respondent no. 4 are not that of

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AGREEMENT—*concld.*

'appropriate level' as required by the said advertisement and as such Respondent no. 4 was not eligible for appointment to the post of Associate Professor (Mathematics) in an Engineering College. Accordingly, the recommendation of the name of Respondent no. 4 dated 24th January 1994, as well as the Notification of his appointment dated 3rd December 1994 are set aside.

Bhushan Sharma v. *The State of Bihar and others* (1995), I.L.R. 74, Pat. ... ...

Appointment—Public analyst and Joint Food Controller not made—effect of—Constitution of India—Article 226—writ of Quo warranto—issuence of.

The post of Senior Chemist has been lying vacant since 1977, this is most unfortunate as many as 9 posts of Public Analyst have been lying vacant. The continuanc of vacancies for long period is somewhat paradoxical in a society where large number of educated persons with high qualification seek employment. It also disturbs the morale of the officers holding inferior posts who cherish the hope of being promoted to higher posts in due course. Vacancies exist in higher posts, but are not filled up and consequently they continued to stagnate in lower cadres. Apart from these consequences, Public interest obviously suffers if a post remains vacant for long. Even if a person is put in additional charge of the post, public interest still suffers because a person incharge of more than one post may not be able to discharge the duties either efficiently and effectively. The practice, therefore, of continuing vacancies for long periods and providing a stop gap arrangement by putting other officers incharge of such post temporarily must be discontinued. If necessary, rules should be framed for regulating the exercise of such power by the State authorities no officer should hold additional charge of any other post for a period exceeding three months;

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APPOINTMENT—*concld.*

Held, issuance of writ of Quo warranto unwarranted but direction issued to the State of Bihar to take immediate steps for appointment to the post of Joint Food Controller if the post of Joint Food Controller is not filled up within the period of four months from the date of the receipt of copy of this order Respondent no. 2 should be relieved of the Additional charge of the Joint Food Controller.

Rajendra Prasad Mehta v. *The State of Bihar through Secretary, Public Health Department and Anr.* (1995), I.L.R. 74, Pat. 850

BIHAR BUILDINGS (LEASE, RENT AND EVICTON) CONTROL ACT, 1982—*sections* (1) (*e*) *and Rule* 3 *of the Bihar Buildings (Lease Rent and Eviction) Control Rules,* 1983—*Provisions of—whether a beneficient piece of legislation, interpretation of.*

Section 3 (1) (*e*) and the proviso of the Bihar Buildings (Lease, Rent and Eviction) Control Act, 1982, hereinafter referred to as the Act, and Rule 3 of the Bihar Building (Lease, Rent and Eviction) Control Rules, 1983 are couched in a language having a wide sweep. It is a piece of beneficient piece of legislation enacted keeping in view the welfare of the landlord. It has to be interpreted keeping in view the dominant purpose the application for enhancement of rent has been correctly decided.

The provision of a piece of beneficial legislation, as the present one, has to be given wider interpretation. A beneficial legislation for the interest of landlord, even if capable of two interpretations, that construction has to be adapted, which projects the policy of the legislation and is more beneficial to the person in whose favour those provisions have been enacted.

Saraswati Devi and others v. *Commissioner of Bhagalpur Division, Bhagalpur & Ors.* (1995) I.L.R. 74, Pat. 511

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BIHAR BUILDING (LEASE, RENT AND EVICTION) CONTROL ACT, 1982.

2——————*section* II(C) *proviso—ambit of—no finding recnrded by trial Court on the question of part eviction—effect of.*

It is, manifest from a reading of proviso to section II(C) of the Bihar Building (Lease, Rent and Eviction) Control Act, 1982 that the Court has to consider with regard to partial eviction which can be done only by recording a finding on the question recording of finding on the question of partial eviction is a statutory requirement which arises only when a lannlord succeeds in providing his requirement for obtaining an order of eviction.

As no finding was recording by the trial Court on the question of partial eviction the case was remitted to the trial Court for recording a finding on the question of partial eviction.

Ram Kuamr Devi and anr. v. *Mahabir Prasad Tibriwal and Ors.* (1995), I. L. R. 74, Pat. 953

BIHAR CONTROL OF CRIMES ACT, 1981—*section* 2(d) (1), 3(i) (b) (i) *and* (ii)—*provisions of—whether a proceeding can be initiated against a person for a single Criminul Act—proceeding under section* 30—*maintainability of.*

Where the writ-petitioner challanged the proceeding initiated against him under section 3 of the Bihar Control of Crimes Acts, 1981 on the ground that it was initiated against him on the basis of under a single instance of crime committed by him;

BIHAR CCONTROL OF CRIMES ACT, 1981—*concld.*

Held, that the proceeding under section 3 of the Act having been initiated against the writ-petitioner on the basis of the single instance, is illegal.

For initiation of the proceeding under section 3 of the Act, the first requirement is that a man must be anti-social element and thereafter it must fulfil the other requirement as enumerated in section 3(1) (*b*) (*i*) and (*ii*) of the Act. On a single instance of an occurence, a man cannot be branded as an anti-social element, in view of the provisions contained in section 2(*d*) (*i*) of the Act.

Bouwa Singh @ Babua Singh v. *The State of Bihar and others* (1995), I. L. R. 74, Pat. ... 307

BIHAR LAND REFORMS (FIXATION OF CEILING AREA AND ACQUISITION OF SURPLUS LAND) ACT, 1961—*section 45B, ambit of—Land Ceiling proceeding dropped in* 1975 *was reopened in* 1982—*no sufficient cause to for reopening the ceiling proceedings—order of the Collector reopening the ceiling case, whether arbitrary and without jurisdiction.*

The ceiling proceeding against the writ-petitioners which was dropped by the Collector by his orders dated 4th July, 1975 was reopened in 1992 and Ceiling Case no. 7/21 of 1982 was initiated under the provisions of section 45B of the Bihar Land Reforms (Fixation of Ceiling

BIHAR LAND REFORMS ACT, 1961—*contd.*

Area and Acquisition of Surplus Land) Act, 1961, hereinafter referred to as the Act, was initiated against them and unit allotted to them earlier by order dated 4th July, 1975 was reduced and some of their lands were declared as surplus. Appeal and Revision filed by the landholder against the impugned order dated 16th April, 1988 passed by Subdivisional Officer, Sasaram were dismissed;

Held, that the Collector had no jurisdiction to reopen the ceiling case without sufficient cause. The longer the period when the case is reopened, stronger should be the ground for reopening the ceiling case and since the ceiling case was being reopened after 7 years, there had to be a strong ground to do so which is completely missing in the instant case.

Since State could produce no order of the Collector or for that matter any authority reopening the ceiling case under section 45B of the Act and also could not produce the ground on which the ceiling case was reopened after 7 years of its dropping except that it was made after observing all the legal formalities, it becomes necessary to peruse the records to find out from the materials appearing therein that the reopening was ordered for sufficient reasons;

Held, that the order reopening the ceiling proceedings under section 45B of the Act is arbitary, the legality of which cannot be upheld.

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BIHAR LAND REFORMS ACT, 1961—*concld.*

Since the ceiling case was reopened without a valid order in the eye of law, all subsequent proceedings viz. the order passed in the ceiling case no. 7/21 of 1982 and in Appeal and Revision therefrom deserve to be quashed.

Ghura Tiwary and others v. *State of Bihar and ors.* (1995), I. L. R. 74, Pat. ... 558

BIHAR MOTOR VEHICLES RULES, 1940—Rule 88—SEE MOTOR VEHICLES ACT, 1988— 48

BIHAR VIDHAN SABHA (RECRUITMENT AND CONDITION OF SERVICE) RULES, 1965—RULE 4(2)(A)—SEE CONSTITUTION OF INDIA ... 57

BIHAR NON-GOVERNMENT ELEMENTARY SCHOOLS (TAKING OVER OF MANAGEMENT AND CONTROL ACT 1976—*section* 4, *sub-section* (2)—*provisions of—writ-petitioner was getting pay scale of I. A. Trained teacher on and from* 1*st July*, 1980—*school taken over on* 4*th April*, 1981 *by Government—denial of the pay scale of I. A. Trained Teacher to writ-petitioner, whether violative of the mandate of sub-section* (2) *of section* 4 *of the Act.*

On a plain reading of the provisions of sub-section (2) of section 4 of Bihar non-Government Elementary Schools (Taking over of Management and Control) Act, 1976, hereinafter referred to as the Act, it is apparent that after

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BIHAR NON-GOVERNMENT ELEMENTRY SCHOOLS ACT, 1976—*concld.*

taking over of the school by the Government, on 4th April, 1981 the writ-petitioner was entitled to the same remuneration, terms and conditions of service which he used to enjoy at the time of taking over of the School. It having been established that the writ-petitioner was granted the pay scale of I. A. Trained Teacher on and from 1st July, 1989 and he had been paid his monthly salary in the said pay scale till taking over of the school, the writ-petitioner is legally entitled to be paid his salary in the pay scale of I. A. trained teacher on and from the date of taking over of the School;

Held, that denial of the benefit of pay scale of I. A. trained teacher of the writ-petitioner on and from the date of taking over of the school is, therefore, arbitrary and violative of the mandate of sub-section (2) of section 4 of the Act.

Upendra Mishra v. *The State of Bihar* and *ors.* (1995), I. L. R. 74, Pat. 503

BIHAR SERVICE CODE, 1952—[1—RULE 71—*notification under—the date when notification under* 71 *of the Code terminating the service of the State Government employee was issued, whether would be the date when he ceases to be a Government employee—guideline issued by State dated* 13*th February*, 1974 *for the purpose of calculation of pension and gratuity—applicability of.*

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BIHAR SERVICE CODE, 1952—*contd.*

The writ-petitioner who was an officer serving under the Bihar Government with the consent of the Bihar Government was appointed as secretary in Metallurgical and Engineering Consultants (India) Ltd., hereinafter referred to as MECON, on probation on 25th March, 1973 and was granted lien. After completion of the period of probation on 24th February, 1974 he was confirmed and the writ-petitioner filed a representation on 5th April, 1974 to the authorities of the Bihar Government that as he has been absorbed in the service of MECON, his lien should be terminated. By Government notification dated 19th March, 1974 the lien of the writ-petitioner was terminated with immediate effect.

There after the writ-petitioner represented before the authorities of the State Government for releasing his post-retirement benefit of pension and gratuity. The State Government by several letters requested. the Accountant-General, Bihar to fix the pension and gratuity of the writ-petitioner and to release the same, the Accountant-General, Bihar instead of fixing the gratuity and pension of the writ-petitioner, sought clarification from Finance Department regarding the date of his retirement. The Finance Department replied that the date of retirement of the writ-petitioner be treated to be the date when his lien was terminated. The Accountant-General, Bihar by letter dated 7th January, 1994 intimated to Finance Department that the notification dated 19th August, 1974 was not

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BIHAR SERVICE CODE, 1952—*contd.*

in accordance with Rules 68 and 71 of the Bihar Service Code;

Held, that the writ-petitioner ceased to be a State Government employee only with effect from 19th August, 1974 when notification terminating his services was issued by State Government in accordance with Rule 71 of the Bihar Service Code;

Held, further that the guideline issued by the State on 18th February, 1974 for purpose of calculation of pension and gratuity is applicable in the case of the writ-petitioner he having retired on 19th August, 1974.

Purushottam Kumar Sharma v. *The State of Bihar* and *ors.* (1995), I. L. R. 74, Pat. ... 344

2——RULE 92 CLAUSE (2)—*ambit of—competent authority exonerating the writ-petitioner of all the charges ordering that the writ-petitioner was not entitled to arrears of pay from the date of his suspension to date of his superannuation—legality of.*

Once the competent authority chose to exonerate the writ-petitioner of all charges for whatever reasons, it was a case where the Government servant had been fully exonerated within the meaning of clause (2) of Rule 97 of the Bihar Service Code and the writ-petitioner would be

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BIHAR SERVICE CODE, 1952—*concld.*

entitled to full pay and allowance to which he would have been entitled had he not been suspended;

Held, that the part of the impugned order which directs that the writ-petitioner would not be entitled to his arrears of pay for the period commencing from the date of his suspension to the date of his superannuation was illegal and is quashed.

Ram Sagar Sinha v. *The State of Bihar* and *ors.* (1995), I. L. R. 74, Pat. 285

BIHAR STATE UNIVERSITIES ACT, 1976—*Section—35—Writ-petitioner appointed on daily wage in the Post-Graduate Department of Music and Drama of Mithila University—appointment, whether a nulity—writ-petitioner, whether has a right to hold the post—service rendered by him after the termination of his service without any order of the competent authority, whether entitles him to claim wages.*

The writ-petitioner was appointed as Assistant on daily wage basis in Post-Graduate Department of Music and Drama in the Mithila University, Darbhanga by appointment letter issued under the signature of Registrar of the University dated 13th October, 1984 and the writ-petitioner worked on daily wage basis and received wages upto April, 1985, whereafter the

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BIHAR STATE UNIVERSITIES ACT, 1976—*contd.*

respondents stopped payment of wages to him from the month of May, 1985. The writ-petitioner made representation to the authorities to no effect. Thereafter the writ-petitioner filed the writ-application for regularisation of his appointment and up-to date payment of salary;

Held, that the writ-petitioner's appointment which was made in contravention of the provision of section 35 of the Bihar State Universities Act. 1976. was a nullity and consequently. the writ petitioner had no right to hold the post;

Held, further, that the writ-petitioner's service having been terminated by a competent authority on 7th June, 1985, the service stated to have been rendered by him after termination of his service without any order passed by competent authority does not confer any right to claim wages from the Mithila University.

Ratneshwar Jha v. *L. N. Mithila University, Darbhanga and others* (1995), I. L. R. 74, Pat. 81

BIHAR STATE UNIVERSITY (CONSTITUENT COLLEGES) SERVICE COMMISSION—CONSTITUTED BY THE STATE GOVERNMENT BY NOTIFICATION DATED 16TH MARCH, 1994—*validity of—Two of the Members of the Commission were granted promotion as Professors under Time-bound Promotion Scheme—their promotion not concurred within six month by Commission in accordance with sub-section* (10) *of section* 58 *of the Bihar State Universities Act,* 1976 *as incorporated by Bihar*

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BIHAR STATE UNIVERSITIES ACT, 1976—*contd.*

State Universities (Amendment) Act, 1993—*whether stand automatically reverted to their lower posts—their nomination as member of the Commission, whether invalidates the constitution of the Commission—selection of principals and their consequent appointments by the Commission, whether void—Bihar State Universities Act,* 1976 *as amended by Bihar State Universities (Amendment) Act.* 1993 *section* 53, *sub-section* (10)—*provisions of.*

Where the Government of Bihar, Department of Higher Education by a notification dated 16th March, 1994 constituted the Bihar State University (Constituent College) Service Commission, hereinafter referred to as the Commission, with a Chairman and four other members including B. P. Yadav and Suresh Prasad Singh as members of the Commission;

Held, that both B. P. Yadav and Suresh Prasad Singh were promoted under the Time-Bound Promotion Scheme without the recommendation of the Commission and their appointment were also subsequently not concurred by the Commission, consequently, in accordance with the provisions of sub-section (10) of section 58 of the Bihar State Universities Act, 1976, as incorporated by Bihar State Universities (Amendment) Act 1993, the time-bound promotion of both B. P. Yadav and Suresh Prasad Singh to the posts University Professor came to

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BIHAR STATE UNIVERSITIES ACT, 1976—*contd.*

an end after the expiry of six months from the date of their promotion to the said posts and they stand automatically revereted to the lower posts, from which they were so promoted. Hence both B. P. Yadav and Suresh Prasad Singh ceased to hold the posts in the rank of University Professor long before their appointment as Members of the Commission. As such, they did not have requisite qualifications for their appointments as Members of the Commission and consequently the Commission, constituted by the impugned notification dated 16th March, 1994 is illegal and invalid;

Held, further, that constitution of the Commission by notification dated 16th March, 1994 having been held illegal and invalid, any selection of the Principal by Commission or any appointment made on the basis of such selection are equally invalid, inoperative and void;

PER S. K. HOMCHAUDHURI, J.

Held, further, that Principal of a College holds the key position in the institution and that the maintenance of academic discipline and imparting of proper education in the College much depend on the ability, personality and efficiency of the individual holding the post of the Principal. In respect of appointment of the Principal of the College there should be no compromise as regards the merit of the incumbent

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BIHAR STATE UNIVERSITIES ACT, 1976—*contd.*

on any ground. A mechanical approach in keeping reservation in the post of Principal of the College at a uniform percentage is unreasonable and unrealistic.

Dr. Ratneshwar Prasad Singh and anr. v. *The State of Bihar and ors.* (1995), I. L. R. 74, Pat. 402

BIHAR STATE UNIVERSITIES ACT, 1976 AS AMENDED BY BIHAR STATE UNIVERSITIES (AMENDMENT) ACT, 1993—*Section* 58 *sub-section* (10) *See Bihar State Universities (Constituent Colleges) Service Commission.* 402

BIHAR STATE UNIVERSITIES (SECOND AMEDMENT) ORDINANCE, 1994 AND PATNA UNIVERSITY (THIRD AMENDMENT) ORDINANCE, 1994—*promulgated by the Chancellor—Validity of—University Grant Commission, whether had the jurisdiction to issue guidelines for appointment of Lecturers in University and Colleges of Bihar—provision exempting candidates who had done M. Phil. upto* 31st *December* 1993—*validity of.*

Held, that the University Grant Commission was within its jurisdiction in issuing guidelines for appointment of teachers in the University and Colleges of the State of Bihar and the Chancellor was also within his jurisdiction in promulgating the Bihar State Universities (Second Amendment) Ordinance, 1994 and the Patna Universities (Third Amendment) Ordinance, 1994 in consequence thereto. The provision for exempting the candidates who had done Ph. D. or submitted Ph. D. thesis upto 31st December 1993 or have done M. Phil. upto

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BIHAR STATE UNIVERSITIES (SECOND AMENDMENT) ORDINANCE, 1994 AND PATNA UNIVERSITY (THIRD AMENDMENT) ORDINANCE, 1994—*concld.*

31st December 1992 from appearing at the Bihar Eligibility Test to be conducted by Bihar University Service Commission is valid.

Anil Kumar and others v. *The State of Bihar and Ors.* (1995), I.L.R. 74, Pat. 487

CENTRAL ADMINISTRATIVE TRIBUNAL ACT, 1985—*Section 28—ambit of—matter relating to recruitment in Indian Civil Service or Indian Police Service, whether to be decided by Central Administrative Tribunal—High Court, jurisdiction of.*

Any relief sought by a party in a writ petition is to be read along with the cause of action. This Court, without any cause of action on the part of the writ-petitioner can not direct the State Government to send the integrity certificate of the writ-petitioner to the Union Public Service Commission. Such direction can be given only after going through the cause of action of the party concerned. In the instant case the cause of action of writ-petitioner is consideration of his case for appointment/promotion to the post in Indian Police Service. Hence it is manifest and clear that the writ-petitioner has moved the High Court for a direction to send his integrity certificate for the purpose of consideration of his case for appointment/promotion to the post of Indian Police Service, *i.e.*, a matter relating to recruitment;

Held, that the matter relating to recruitment in the Indian Police Service is now vested with the Central Administrative Tribunal and not with the High Court. The moment the prayer linking with the character roll and/or integrity certificate is to be made, which has a direct nexus with recruitment in the Indian Civil

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CENTRAL ADMINISTRATIVE TRIBUNAL ACT, 1985—*concld.*

Service/Indian Police Service, in that case the High Court will cease to have such jurisdiction in terms of section 28 of the Central Administrative Tribunal Act, 1985.

Megh Nath Ram v. *Union of India and other* (1995). I.L.R 74, Pat. 947

CERTIFIED STANDING ORDER, 1976 OF BIHAR STATE ELECTRICITY BOARD—*Certifying Officer amending the standing Order by his order to dated 21st August 1987—inclusion of clause 6 (a) relating to transfer in the Standing Order, legality of—clause 30 (d) relating to 'suspension', whether can be sustained—Industrial Employment (Standing Order) Act, 1946 as amended by Industrial Employment (Standing Order) Amendment Act, 1982, section 10-A whether takes care of employees who are put under suspension—clause 9 (4) relating to absence of workmen beyond period of leave—whether offends Article 14 of the Constitution—Constitution of India—Article 14—clause 22 (a) relating to sick leave and clause 22 (c) (2) relating to special sick leave, whether can be deleted—item 'promotion' not mentioned in the first schedule of Industrial Employment (Standing Order) Act, 1946—certifying officer not including promotion in the Certified Standing Order—propriety of.*

Where the 'transfer' was all along existing in the Certified Standing Order, 1976 of the Bihar State Electricity Board hereinafter referred to as the Board and the employees of the Board being aware of this condition joined service under the Board and there was no grievance either on the part of the employees or employer regarding this item and no objection was raised by the employees or employer before the appellate authority;

Held, that the inclusion of the clause 6 (a) relating to this transfer in tne Standing Order can not be challenged by the writ-petitioner. If the Management was of the view

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CERTIFIED STANDING ORDER, 1976 OF BIHAR STATE ELECTRICITY BOARD—*contd.*

that this clause was against its interest or was unnecessarily included in the Standing Order, it was open to it to get it modified by a regular application in terms of section 10(2) of the Industrial Employment (Standing Order) Act, 1946 hereinafter referred to as the Act;

Held, further, that from reading of section 10-A of the Act which has been inserted by Industrial Employment (Standing Order) Amendment Act, 1982, it is clear that the provision takes care of employees who are put under suspension hence the amendment of clause 30 (*d*) of the Standing Order as by passed by the Certifying Officer on 21st August, 1937 can not sustain and should be deleted from the Standing Order;

Held, further, that clause 9 (4) of the Standing Order, relating to absence of workmen beyond the leave period is violative of the principle of natural justice as per this provision, the workman is entirely at the mercy of the Management which may or may not accept the explanation given by the defaulting workman, for whatever genuine ground might be there. In a welfare state the fate of a workman can not be allowed to be rested on the discretionary power of a single individual viz the Manager;

Held, further, that clause 9 (4) of the Model Standing Order is ultra vires of the Constitution of India in as much as it offends Article 14 of the Constitution of India. The appellate Court, Presiding Officer, Industrial Tribunal Patna, was justified in deleting this clause 9 (4);

Held, also, that clause 22 (*c*) relating to 'sick leave and clause 22 (*c*) (2) relating to special sick leave can not be deleted;

Held, also, that the Certifying Officer, was justified, in not including the item promotion in the Certified Standing Order as there in no authority to extend the Standing

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CERTIFIED STANDING ORDER, 1976 OF BIHAR STATE ELECTRICITY BOARD—*concld.*

Order to topics not mentioned in the first schedule of Industrial Employment (Standing Order) Act, 1946.

The Secretary, Bihar State Electric Supply Workers Union and another v. *The Presiding Officer, Industrial Tribunal, & Ors.* (1995), I.LR. 74, Pat. ... 156

CODE OF CIVIL PROCEDURE, 1908—[1——*Section* 115 *Order* 13 *rule* 2 *and Order* 18 *rule A—provisions of—trial court rejecting the prayer of plaintiff to admit in evidence a document of authorisation after close of evidence—legality of—whether amounts to the case decided as manifested in section* 115 *Code of Civil Procedure as amended by Code of Civil Procedure (Amendment) Act,* 1976—(*Central Act no. IV of* 1976).

Where the plaintiff filed a suit claiming the relief for recovery of principal amount along with interest from the defendant till disposal of the suit and after close of evidence filed an application for accepting in evidence the document of authorisation which was rejected by the trial Court;

Held, that a perusal of the impugned order would indicate that the trial court has exercised its jurisdiction without looking into the provisions contained in Order 13 rule 2 and order 18 rule 17-A of the Code of Civil Procedure, 1908. The Court below should have recorded its finding as to whether the document could not be filed earlier inspite of due diligence of the plaintiff;

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CODE OF CIVIL PROCEDURE, 1908—*concld.*

Held, further, that as the impugned order was made rejecting the application to admit the document pertaining to the authorisation hence this amounts to case decided. The Civil Revision application under section 115 of the Code of Civil Procedure, 1908 as amended in 1976, is maintainable.

Vishnu Sugar Mills Ltd. v. *Chandrika Prasad* (1995) I. L. R. 74, Pat. 265

2——————*Order 26 rule 1 read with section 132—provisions of—materials on record disclosing that the lady appeared before Public and mixed with common people, whether entitled to the issuance of commission for her examination as a witness in the suit.*

Where the petitioner filed application under *Order 26 rule 1 of the Code of Civil Procedure*, 1908 hereinafter referred to as the Code, read with section 151 of the Code for issuance of commission for her examination in the suit as a witness, at her residence as she was pardanashin lady and was 60 years old and was not keeping good health;

Held, that there were materials on record to show that the petitioner being a pardanashin lady appeared before Public and was mixing with common people and in such circumstances her application under Order 26 rule 1 of the Code for issuance of commission is not bonafied and as such she cannot claim the benefit envisaged under Order 26 rule 1 read with section 132 of the Code as a matter of right.

Most. Devi of Hasan Banu, Ram Sebakiwa Sharma and others (1995) I.L.R. 74, Pat. ... 993

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CODE OF CRIMINAL PROCEDURE, 1973—*section* 205—*representation of accused through his lawyer—grant of.*

As the petitioners are being prosecuted as partners of a firm and have not indulged in any act in their individual capacity and also the fact that the actual agreement was between the State Government and firm based in United Kingdom and also taking into consideration that one of the partner is an old and infirm man who has undergone open heart surgery, as such, the special judge should have granted benefit to him under section 205 of the Code of Criminal Procedure, 1973 allowing him to be represented through his counsel.

Vivek Bhargava and others v. *The State of Bihar* (1995), I.L.R. 74, Pat. 940

CODE OF CRIMINAL PROCEDURE, 1973—[1—*section* 24 *Sub-section* (4) *and* (5) *Provisions of—respondent no.* 5, *whose name did not find place in the panel prepared by the District Magistrate in consultation with the Sessions. Judge in accordance with the provisions of sub-section* (4) *of section* 24, *appointed as Public Prosecutor—validity of—section* 24 *sub-section* (5)—*no person to be appointed as a Public Prosecutor by the State Government if his name does not find place in the panel sent by the District Magistrate.*

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CODE OF CRIMINAL PROCEDURE, 1973—*contd.*

The term of Office of Public Prosecutor, Bhagalpur had come to an end in June, 1988. The District Magistrate, Bhagalpur in consultaion with the District and Sessions Judge of the District sent a panel of names for appointment of Public Prosecutor with his recommendation to the State Government but instead of making appointment from that panel, the State Government called for fresh recommendation from the District Magistrate in consultation with Session Judge, persuant to that eleven names were again recommended by the District Magistrate in consultation with the Session Judge by his letter dated 13th April, 1991. The State Government took no action and again by letter dated 20th April, 1992 the District Magistrate was asked to send another fresh panel in consultation with the Sessions Judge. The District Magistrate again sent a panel of ten names in consultation with the Sessions Judge by his letter dated 21st September, 1992 yet the State Government did not find it possible to take a decision in the matter of appointment of Public Prosecutor. Instead of appointing one of the persons from amongst the panel sent by the District Magistrate, the Secretary, Department of Law wrote to the District Magistrate stating that he had been directed to seek his opinion in consultation with the Sessions Judge with regard to the appointment of respondent no. 5 as Public Prosecutor, upon which name of respondent no. 5 was sent to the State Government by the District Magistrate by his letter

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CODE OF CRIMINAL PROCEDURE 1973—*Contd.*

dated 14th April, 1993 enclosing there with the recommendation of the Session Judge in which the Sessions Judge had stated that he had no occasion to see the work of respondent no. 5 in his Court but he had no objection if the State Government wanted to appoint him as Public Prosecutor. District Magistrate stated that he agreed with the recommendation of the Sessions Judge. Thereafter by the impugned order dated 22nd April, 1993 the State Government appointed respondent no. 5 as Public Prosecutor of Bhagalpur;

Held, that having regard to the provisions of section 24 of the Code of Criminal Procedure, 1973 hereinafter referred to as the Code, the writing of the letter by the Law Secretary seeking opinion of the District Magistrate regarding the appointment of respondent no. 5 as Public Prosecutor was highly improper section 24 sub-section 4 of the Code vests in the District Magistrate the power to prepare a panel in consultation with the Sessions Judge of the District on the basis of his opinion. In preparation of the panel the State Government has no role to play. Such a provision has been deliberetely incorporated to exclude interference in the matter of preparation of the panel. Sub-section (5) of section 24 of the Code provides that the State Government shall not appoint any one as Public Prosecutor, unless his name appears in the panel of names prepared by the District

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CODE OF CRIMINAL PROCEDURE, 1973—*contd.*

Magistrate in consultation with the Sessions Judge. The Law therefore, clearly demarcates the two domains by providing that the District Magistrate in consultation with the Sessions Judge shall prepare the panel and after such a panel is received by the State Government it may appoint a Public Prosecutor, but it cannot appoint a person as a Public Prosecutor unless his name appears in the panel sent by the District Magistrate under sub-section (4) of section 24 of the Code. The discretion of the State Government is only with regard to the choice of the candidate whose name is included in the panel and it cannot appoint a person as Public Prosecutor, if his name is not included in the panel;

Held, further, that the letter of the Law Secretary seeking opinion of the District Magistrate in consultation with the Sessions Judge with regard to the appointment of respondent no. 5 as Public Prosecutor amounts to an unwarranted interference by the Law Secretary in the discharge of statutory duties by the District Magistrate under section 24(4) of the Code;

Held, also that the appointment of respondent no. 5 contained in Annexure 1 and 2 are quashed.

Reyasat Ali Khan v. *The State of Bihar through the Secretary, Law Department and ors.* (1995), I.L.R. 74, Pat. 790

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CODE OF CRIMINAL PROCEDURE, 1973—*contd.*

2——————*section* 145—*proceeding under—dure,* 1973—*section* 145—*proceeding under—whether can proceed when, there is civil suit pending between the parties—remedy of the parties is to approach the Civil Court for interim relief to protect the property.*

Section 145 of the Code of Criminal Procedure, 1973, hereinafter referred to as the Code, is a remedy for prevention of breach of the peace arising out of a dispute relating to immovable property. Its primary object is to maintain peace and not to decide the dispute between the contending parties or adjudicate upon the right of the parties to possession. An order under section 145 of the Code deals with the factum of possession of the party on a particular day. It confers no title to remain in possession over the disputed property.

Where a Civil Suit between the parties is pending for adjudication of title, interest and possession over disputed land, where right to possession has to be gone into, and no final order has been passed in the proceeding under section 145 of the Code;

Held, that the parties may approach the Civil Court for interim relief to protect the property in dispute. In such a situation the proceeding under section 145 of the Code can not be allowed to proceed during the pendency of the suit as it would amount to wastage of time over meaningless litigation;

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CODE OF CRIMINAL PROCEDURE, 1973—*contd.*

Held, further, that in the instant case the proceeding under section 145 of the Code cannot be allowed to continue and is quashed.

Kriti Yadav @ Kartik Yadav v. *The State of Bihar* and *ors.* (1995), I. L. R. 74, Pat. ... 339

3——— —*section* 340—*First Information Report filed by a party to the judicial proceeding with respect of which an offence has been committed in the records of the judicial proceeding—legality of—Constitution of India Articles* 226 *and* 227—*exercise of power under—Information Report, whether can be quashed.*

Held, that no First Information Report by Prabin Kumar could have been filed before the police and even if such First Information Report has been filed, the same has to be quashed for the simple reasons that Prabin Kumar or for that matter any party to any judicial proceeding cannot lodge First Information Report with respect to an offence which has been committed in the record of a judicial proceeding. It is only the Court where the case is pending or the court superior to it that can file a complaint petition in its respect before a competent Magistrate as laid down under section 340 of the Code of Criminal Procedure, 1973;

Held, further, that such a First Information Report filed by a private person can be quashed in exercise of powers conferred under Articles 226 and 227 of the constitution of India.

Ram Ballabh Sharma and another v. *The State of Bihar and ors.* (1995), I.L.R. 74, Pat. ... 312

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CODE OF CRIMINAL PROCEDURE, 1973—*contd.*

4——*section 427—provisions of—appellant serving sentence of life imprisonment for a conviction under section 302, subsequently sentenced to undergo life imprisonment in another Session Trial—sentences, whether to run concurrently, prospectively from the date of subsequent sentence coming into operation.*

The writ-petitioners who were undergoing imprisonment for life in Session Trial no. 119 of 1977 was subsequently sentenced to undergo imprisonment for life in Sessions Trial no. 230 of 1985, filed the application under Articles 226 and 227 of the Constitution of India for issuance of a writ of mandamus for releasing them forthwith as they had already served a sentence of 12 years and taking in account the remission of sentence granted to them they be deemed to have served the sentence for a period exceeding 14 years, on the plea that both sentences have to run concurrently and not consecutively with retrospective effect from the commencement of the sentence passed in Sessions Trial no. 119 of 1977;

Held, that according to the provisions contained in section 427(2) of the Code of Criminal Procedure, 1973, that when person already undergoing a sentence of imprisonment for life is sentenced to subsequent conviction to imprisonment, the subsequent sentence should run concurrently with previous sentence prospectively from

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CODE OF CRIMINAL PROCEDURE, 1973—*concld.*

the date when the subsequent sentence comes into operation after passing thereof;

Held, further, that section 57 of the Penal Code, 1860 provides that calculating fractions of terms of punishment, imprisonment for life shall be reckoned as equivalent to imprisonment of twenty years, conseqcently the writ application is dismissed.

Hari Narain Singh and ors. v. *The State of Bihar and ors.* (1995), I. L. R. 74. Pat. ... 483

5————*section* 468(2) (c)—*offences punishable with a sentence of three years—cognizance taken after three years, whether liable to be quashed.*

Fard Bayan with respect to different offences punishable with a sentence of maximum of three years were lodged on 8th September, 1988 in all the three cases and cognizance of the offences with respect all the cases were taken against the petitioner on 16th February, 1994.

The cognizance of the offences against the petitioners in all the cases having been taken after more than three years, after the expiry of the period of limitation, the cognizance as also the criminal prosecution against the petitioners are quashed in accordance with section 468(2) (*c*) of the Code of Criminal Procedure, 1973.

Jagmohan Singh and *anr.* v. *The State of Bihar* and *ors.* (1995), I. L. R. 74, Pat. ... 394

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CONSTITUTION OF INDIA—[1—*Articles* 12, 226 *and* 227—*power of High Court to review administrative action—Court, whether to see that the act of administrative authorities, who are State instrumentalities under Article* 12 *of the Constitution have acted fairly and reasonably—Oil Selection Board Selecting Responaent no.* 5 *for grant of retail outlet dealership of Hindustan Petroleum Corporation and the Hindustan Petroleum Corporation granting dealership to respondent no.* 5—*effect of.*

Hindustan Petroleum Corporation Ltd. hereinafter called the Corporation by an advertisement called for application for awarding of retail outlet dealership of the Corporation at Jokihat in the District of Araria. the minimum qualification was laid down as matriculate. After holding interview the Oil Selection Board selected respondent no. 5 for grant of dealership and the Corporation granted dealership to respondent no. 5;

Held, that so far the eligibility of the respondent no. 5 is concerned, it has been found to be befitting the advertisement;

Held, further, that the power of the High Court under Articles 226 and 227 of the Constitution of India to review the administrative action is well defined and it cannot act as an appellate authority nor it can put itself in the place of administrative authority exercising the the power vested in law. The Court has only to see as to whether the acts of the authorities, who

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CONSTITUTION OF INDIA—*contd.*

are State Instrumentalities under Article 12 of the Constitution of India, have acted fairely and reasonably.

The function of the Oil Selection Board is neither judicial not adjudicatory. It is purely administrative and there is no rule or regulation which requires the Oil Selection Board to record reasons and in absence of any such legal requirements, the selection made without according reasons cannot be found fault with.

Manzoor Alam and anr. v. *Union of India and others* (1995), I.T R. 74. Pat. .. 962

2——————*Articles* 14 *and* 16—*ambit of*—*Bihar Vidhan Sabha* (*Recruitment and Condition of service*) *Rules*, 1965—*Rule* 4 (2)—(a)—*Speaker of Bihar Vidhan Sabha making appointment of* 285 *persons including the post of Class III without making advertisement or publishing notice—no competitive examination held—appointments made whether ab initio void—whether violate the constitutional mandate guaranteed under Articles* 14 *and* 16 *of the Constitution of India.*

Where no advertisement or notice was ever published nor any competitive examination was ever held in terms of notification made under section 4(2) (*a*) of the Bihar Vidhan Sabha (Recruitment and Conditions of Service) Rules. 1964. hereinafter referred to as the Rules, and the

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CONSTITUTION OF INDIA—*Contd.*

Speaker of the Bihar Vidhan Sabha made appointment to Class III posts as well as other posts of a total of 285 persons including respondent no. 6 to 17 in the office of the Bihar Vidhan Sabha;

Held, that the Speaker of the Bihar Vidhan Sabha has made appointments of 285 persons including respondent no. 6 to 17 without complying with the requirement of law as also in violation the constitutional mandate enshrined in Articles 14 and 16 of the Constitution of India and as such are ab intio void and are quashed.

Herendra Kumar Pandey and 3 *ors.* v. *The State of Bihar and ors.* (1995), I. L. R 74, Pat. 57

3——*Articles* 14 *and* 16—*appointment of writ-petitioners made without following the mandate of Articles* 14 *and* 16—*validity of.*

The writ-petitioners were initially appointed on daily wage basis by Notified Area Committee, Nokha and after the posts were sanctioned, they were appointed on temporary basis against those posts and only a few months later they were confirmed against those posts. At no stage the posts were advertised and the writ-petitioners were not subjected to any process of selection to judge relative merit. Subsequently on direction of State Government, the writ-petitioners were served with notice to show cause as

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CONSTITUTION OF INDIA—*Contd.*

to why their appointment be not cancelled, as they were appointed without following the procedure prescribed by law and thereafter they filed their show cause their appointment were cancelled by the impugned orders;

Held, that the appointments of the writ-petitioners were clearly in breach of Articles 14 and 16 of the Constitution of India. The action of the Notified Area Committee in cancelling their appointments is justified and is in accordance with laws.

Rajendra Prasad Sinha and 7 others v. *The State of Bihar and ors.* (1995), I. L. R. 74, Pat. 432

4——————*Articles* 14 *and* 16—*fundamental rights guaranteed under, whether violated in the matter of ...promotion of writ-petitioner from the post of Dalpati to the post of Panchayat Sewak—Letter no.* 3537, *dated* 26*th November* 1987 *issued by Director, Panchayat Raj-cum-Additional Secretary, Department of Rural Development prescribing the guidelines of fixation of* inter so seniority *of the Dalpaties—Respondent no.* 3 *promoting, Respondent no.* 7 *to* 20 *on the basis of seniority list prepared on* 3*rd January* 1997 *validity of.*

When Director, Panchayat Raj-*cum*-Additional Secretary, Government of Bihar, Department of Rural Development, the competent authority issued instruction contained in letter

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CONSTITUTION OF INDIA—*Contd.*

no. 3537, dated 26th November 1987 prescribing the guidelines for fixation of *inter se* Seniority of the dalpaties, viz., on the basis of the date of approval of their appointment and in the case of the date of approval being the same, the date of the respective appointment of such incumbent was to be taken into consideration, there could not be any justification on the part of Respondent no. 3 to stick to the earlier seniority list said to have been prepared on 3rd January 1987 without any guidelines;

Held, that, the seniority list prepared on 3rd January 1987 has no force after the instruction was issued by the Director, Panchayat Raj-*cum*-Additional Secretary, Department of Rural Development in his letter dated 26th November 1987. This is the only guideline for fixation of Seniority of Dalpaties. As such, promotions of Respondent no. 7 to 20 to the post of Panchayat Sewak ignoring the case of the writ-petitioner are violative of the fundamental rights guaranteed under Articles 14 and 16 of the Constitution of India.

Manu Ram v. *The State of Bihar and others*, (1995). I.L.R. 74, Pat. 665

5——————*Article* 227—*ambit of—in a case where second revision application was barred-writ application under Article* 227, *whether maintainable—Code of Criminal Procedure*, 1973 (*Central Act II of* 1974) *section* 125—*failure of wife to aver in the application that 'she was unable to maintain herself' whether will affect*

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CONSTITUTION OF INDIA—*Concld.*

the jurisdiction of the Magistrate to grant maintenance.

Mere failure to aver in application under section 125 of the Code of Criminal Procedure, 1973 hereinafter referred to as the Code, for maintenance by wife that she is unable to maintain herself is not fatal where wife has stated on oath that she was unable to maintain herself;

Held, that the absence of words 'unable to maintain herself in the pleading is only a technical irregularity and would not affect the jurisdiction of the Magistrate to grant maintenance.

Strict rules of pleadings as in a civil suit are not applicable to proceeding under section 125 of the Code.

Writ application under Article 227 of the Constitution of India is not maintainable when a second revision application by the husband was barred by section 397(3) of the Code.

Bhola Nath alias Bhola Nath Sah. v. *The State of Bihar and ors.* (1995), I.L.R. 74, Pat. ... 657

CRIMINAL TRIAL—

1——— ———*identification by hearing voice—value of—expression 'short size', by prosecution witnesses regarding one of the accused without giving his height—effect of—observation of Sessions Judge made at the time of examination of accused no. 2 Md. Nasim under section 313 of Code of Criminal Procedure*, 1973, *whether*

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CRIMINAL TRIAL—*Contd.*

connects him as being the person in company of accused no. 1 'Md. Rafique—search—Video Cassette Recorder recovered from the house of Md. Nasim from under the earth on the information given by Md. Nasim—Sessions Judge while awarding sentence referred to only aggravating circumstances—mitigating circumstances, whether to be given due weight and balanced in awarding sentence—award of death sentence on accused no. 1 Md. Rafique whether deserves to be commuted to imprisonment for life—Code of Criminal Procedure, 1973—section 313.

The identification by hearing the voice of the accused is an identification which is very weak identification. More over the witness was hearing noise coming from the room, in such circumstances, it may be doubtful whether she was in a position to distinctly hear the voice so as to identify that it was of accused Md. Rafique.

The 'expression short size is a loose expression and is largely a matter of inference unless supported by detail such as height. Since none of the prosecution witnesses including P.Ws. 6 and 10 had given the height of the person whom they have described as a short statured person, the observation of the Session Judge made at the time of examination of the accused under section 313, Code of Crimnal Procedure, 1973, would not necessarily connect this accused no. 2 Md. Nasim as the person seen in the company of Md. Rafique accused no. 1 on the date of occurrence. Even if it is considered for the sake

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CRIMINAL TRIAL—*Contd.*

of argument that P.W. 7 had heard Md. Rafique name his companion as Md. Nasim, that would not necessarily mean that it was Md. Nasim accused no. 2 who was named by Md. Rafique.

The house of accused no. 2 Md. Nasim was raided immediately after the occurrence on the information given by accused no. 1 Md. Rafique. Md. Nasim was not in his house and the Video Cassette Recorder was also not recovered. But subsequently Md. Nasim was arrested and the Video Cassette Recorder was recovered on the information given by him after digging out the earth from inside his house in the presence of witnesses;

Held, since the Video Cassette Recorder stolen in the occurrence was recovered from inside the house of Md Nasim only after it was dugged out from inside the earth, it is strongly suggestive of the fact that as claimed by the prosecution that the recovery was made on the basis of the information received from Md. Nasim.

The Session Judge while awarding death sentence has only referred to the aggravating circumstances. There are certain mitigating circumstances which have got to be considered and given due weight. While balancing the mitigating circumstances and the aggravating circumstances the scale sightly tilts in favour of the former;

Held, that in the instant case it cannot be said with certainty that the circumstances of the

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CRIMINAL TRIAL—*Contd.*

crime are such that there in no alternative to impose death sentence. Hence, the death sentence passed against the accused no. 1 Md. Rafique deserves to be commuted to imprisonment for life;

Held, further that Md. Nasim is acquitted of the charges under sections 302/34 and 380 of the Penal Code, 1860, and his conviction for said offences are set aside. His conviction under section 411 of the Penal Code is upheld and he is sentenced to undergo rigorous imprisonment for three years.

Md. Rafique, v. *The State of Bihar* (1995) I.L.R. 74, Pat. 807

2——————*non-Production of means of identification and non-production of bullet which was found inside the body of the deceased during post mortem—whether necessary to test the vercacity of the oral testimonies of prosecution witnesses—non-production, whether cast doubt on the prosecution case—Code of Criminal Procedure, 1973, section 313—material circumstances, not put to the accused during his examination under section 313—effect of.*

Production of material object, viz., the means of identification, the bullet which hit and killed the deceased and was found inside his body during the post-mortem as well as drawing up a sketch-map of the place of occurrence before the court are not empty formalities but are necessary to test the varacity of the oral testimonies. Withholding

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CRIMINAL TRIAL—*Contd.*

production there of without any reasonable ground may cast a doubt on the prosecution case and such omission may cause aberration in course of justice.

In the instant case the only means of identification of the appellant alongwith other accused was the torch of prosecution witness no. 4. There was no difficulty in producing the same if it was there. There is no eye-witness to the act of firing. The appellant is sought to be convicted on the evidence that he was seen dragging the body of Nand Kishore Jha (deceased) with a pistol in his hand alongwith others and the deceased made a dying declaration that the appellant shot at him. Undisputedly the bullet was found inside the body of the deceased during the post-mortem examination and was handed over to the police, as such before concluding that it was the appellant who killed a deceased by shooting him down with pistol, it was necessary to as certain that the bullet found inside the body of the deceased was of a pistol and not of other fire arms. Non-production of the bullet may give rise to a presumption that had the bullet been produced it would have been found that the same was not of pistol but of other fire arm;

Held, that, it is well settled that any material circumstance appearing against the accused should be put to him when examined under section 313 of the Code of Criminal Procedure, 1973 hereinafter referred to as the code, and that in case the material circumstances which appears against the accused is not put to him during the examination under

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CRIMINAL TRIAL—*contd.*

section 313 of the Code, the said circumstance cannot be taken into consideration to convict the accused. In the instant case the act of absconding by the accused was not put to him while he was examined under section 313 of the Code;

Held, further, that the prosecution has failed to establish the charge against the appellant beyond reasonable doubt.

Bishwanath Singh v. The State of Bihar (1995), I.L.R. 74, Pat. 886

3——*prosection not unfolding true story—not examining witness of the place of occurrence—one of the accused was confined in Sangrampur Hospital—casts a doubt on the prosecution case—conviction and sentence of appellants, whether liable to be set aside.*

On the direction of the Superitendent of Police, Khagaria, the investigating officer did not examine the owner of the Pan-shop which was near the place of occurrence nor other independant witnesses were examined though P. W. 18, the sub-Inspector of Police, who arrived at the place of occurrence and recorded the Fard Byan of the informant stated in his evidence that on reaching the place of occurrence on the fateful day he found a large gathering;

Held, that the aforesaid facts coupled with the fact that the appellant Naresh Yadav was found to have been confined in the Sangrampur Hospital and could not be present at the place of occurrence on 3rd October 1981, the day of occurrence, casts doubt in the prosecution case;

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CRIMINAL TRIAL—*concld.*

Held, further, that the prosecution has not unfolded true story and as such it is not safe to convict the appellant, and their conviction and sentences are set aside;

Naresh Yadav alias Naresh Kumar Yadav alias Naresh Kumar Nirala v. *The State of Bihar* (1995), I.L.R. 74, Pat. 596

DEPARTMENTAL ENQUIRY—*Against an Award Staff, whether can be done by a person who is not an employee of the State Bank of India—Disciplinary Authority, Assistant General Manager, State Bank of India appointing Commissioner for Departmental Enquiries/*Central *Vigilance Commission to conduct departmental enquiry against Award Staff, whether maintainable—Sastry Award as amended by Desai Award and Third Bipartite settlement—Clause* 19 (14)—*effect of.*

The Assistant General Manager of State Bank of India, who is the Disciplinary Authority of writ-petitioner who was working as clerk-cum-cashier in Munger Branch of the Bank by his letter, dated 15th January 1992 sent to the writ-petitioner, containing the statement of charges called upon him in terms of Rule 521 (4) (*j*) of the Sastry Award, as retained in Desai Award, to submit his written statement of defence if any. The writ-petitioer submitted his statement of defence in time. The Disciplinary Authority by his letter, dated 23rd November 1992 informed the writ-petitioner that his explanation had not been found satisfactory and an enquiry had been ordered to be conducted against him by the Commissioner for Departmental Enquiry, Central Vigilance Commission, Government of India. Writ-petitioner by his letter, dated 6th January 1993 informed the Discipilinary Authority that, the writ-petitioner being an Award Staff, discipilinary proceeding can only be initiated in accordance with the provision of the Award, by Bipartite Agreement/Settlemtnt where in there

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DEPARTMENT ENQUIRY—*contd.*

was no provision enabling the Disciplinary Authority to appoint the Commissioner for Departmental Enquiries, an outsider, who is not an officer of the Bank to function as Enquiry Officer against an Award Staff of the Bank;

Held, that the order of appointment of the Commissioner for Departmental Enquiries, Central Vigilance Commission by the Disciplinary Authority, can not be sustained.

The procedure for taking Disciplinary action Against Award Staff is contained in section III of Chapter XXV of the Sastry Award which was amended by the Desai Award and four Bipartite Settlements. A perusal of Clause 19 (14) of the Third Bipartite Settlement provides that the Chief Executive Officer or the Principal Officer in India of the State Bank of India or an alternate officer of the Head office or the Principal Officer nominated by the Chief Executive Officer, for the purpose is to decide which officer shall function as the Disciplinary Authority in the case of cash office or establishment.

As in the instant case the Disciplinary Authority, the Assistant General Manager of Bank, State Bank of India had appointed Commissioner for Departmental Enquiries who is not officer of the Bank as the Enquiry Officer and not the Chief Executive Officer or an officer nominated by him as envisaged in clause 19 (14) of the Third Bipartite settlement, the order appointing the Commissioner for Departmental Enquiry as Enquiry Officer is bad.

Though an outsider may be appointed as Enquiry Officer even against an Award Staff, but such a decision has to be taken by the Chief Executive Officer or the Principal Officer in India of the Bank or an alternate officer at the Head Office or Principal Officer nominated by the Chief Executive Officer as to who shall be the Disciplinary Authority and while taking such decision, it is

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DEPARTMENT ENQUIRY—*concld.*

open for the Chief Executive Officer or such other officer mentioned in clause 19 (14) of the third Bipartite settlement to decide that the enquiry shall be conducted by the Commissioner for the Departmental Enquiries, Central Vigilance Commission of its officers.

C. M. Prasad and others v. *The State Bank of India & Ors.* (1995), I.L.R. 74, Pat. ... 293

DISMISSAL OF GOVERNMENT SERVANT—*order passed after the Superannuation of the Government Servant—legality of.*

The service of the writ-petitioner was not extended by the appropriate authority after he attained the age of superannuation on 31st December 1987 and he effectively retired on and from 31st December 1987;

Held, that the impugned order of dismissal was passed by the appropriate authority on 21st May 1990 long after the retirement of the writ-petitioner, when the disciplinary action could not be taken against him. As such the impugned order of dismissal of the writ-petitioner is illegal and without jurisdiction and is a nulity.

Bhagwat Prasad Singh v. *The State of Bihar and Anr.* (1995), I.L.R. 74, Pat. 377

EVIDENCE ACT, 1872—*section 113A—presumption that sucide of the deceased was abeted by her husband, whether can be drawn against the appellant—cruelty referred in this section whether has the same meaning as in section 498 A Penal Code—circumstantial evidence—no direct evidence that the appellant caused the death of his wife—circumstances pointing that the appellant had demanded gold chain and she was tortured due to her Nalher people not being able to meet the*

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EVIDANCE ACT, 1872—*contd.*

demand—conclusion that she committed suicide due to torture by the appellant— Penal Code, 1860 *section* 302*—charge not framed under section* 306*—validity of—section* 498*A—provisions of.*

In a case based on circumstantial evidence as in the instant case, there being no direct evidence that the appellant caused the death of his wife the only course left is to hold that the prosecution has proved that the deceased committed suicide. Such a conclusion is not only reasonable but also inevitable in the facts and circumstances of the case because the deceased died in her sasural and there was evidence that she had been ill-treated and subjected to torture by her husband and that there was evidence that the deceased has complained about the ill-treatment and torture on account of her Naihar People not meeting the demand of the appellant for golden chain of 2½ bhars.

The presumption under section 113A of the Evidence Act 1872, that the suicide of the deceased was abeted by the deceased's husband, can safely be drawn against the appellant. The cruelty refered to in section 113A of the Evidence Act, 1872 carries the same meaning as in section 498A of the Penal Code, 1860, wherein the explanation points that cruelty means any wilful conduct which is of such a nature as is likely to drive that woman to commit suicide or to cause grave injury or danger to life or harassment of the woman where such harassment is with a view to coercing her or any person related to her to meet any unlawful demand for any property or valuable security or

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EVIDANCE ACT, 1872—*concld.*

is on account of failure by her or any person related to her to meet such demand. There is not only ample but overwhelming evidence on record that the appellant has subjected his wife to cruelty as defined in section 498A Penal Code;

Held, that since the essential circumstance viz., the death of the deceased under suspicious circumstances in her sasural within one and half year of her marriage, as also the allegation that the deceased had been killed for not bringing the gold chain as dowry having been put to the appellant, in his examination under section 313 of the Code of Criminal Procedure, 1973 it is difficult to even suspect that any prejudice had been caused to the appellant by not framing a charge under section 306 Penal Code;

Held, further, that the appellant is guilty under section 306, Penal Code.

Ram Dayal Jaiswal v. *The State of Bihar* (1995), I.L.R. 74, Pat. 358

Family Pension Scheme—limitation in the scheme that marriage after retirement will not be recognised for the scheme—whether suffers from the Vice of arbitrariness and discremination—Constitution of India—Article 14—ambit of—the limitation incorporated in the family pension scheme, whether ultra vires Article 14.

Where the writ-petitioner retired on 31st January, 1987 but before the pension papers

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FAMILY PENSION SCHEME—*concld.*

could be finalised, his wife died on 4th April, 1987 whereafter he married again and applied to the Accountant General, Bihar for nomination of his second wife to get family pension in the event of his death which was rejected on the ground that marriage after retirement will not be recognised for the purpose of family pension;

Held, that the limitation incorporated in the Family Pension Scheme that, marriage after retirement will not be recognised for the purpose of this scheme suffers from the Vice of arbitrariness and discrimination. The limitation as incorporated in the Family Pension Scheme is *ultra vires* Article 14 of the Constitution of India and cannot sustain. The respondents are directed to allow the prayer of the writ-petitioner for nomination of his wife to be entitled for the benefit of Family Pension Scheme.

Abdul Manan v. State of Bihar and others. (1995), I L.R. 74, Pat. 42

HINDU MARRIAGE ACT, 1955—*Section 24—order for interim maintenance, whether interlocutory order—whether the order is revisable and Civil Revision application is maintainable—whether the section stipulates interim maintenance as also cost of necessary expenses of the proceeding—Family Court granting cost of necessary expense but not ad interim maintenance—order whether contradictory—Family Court Act*, 1984 *section* 19(1)—*whether prescribes appeal against every judgment and/or order.*

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HINDU MARRIAGE ACT, 1955—*contd.*

From a plain reading of section 19(1) of the Family Courts Act, hereinafter referred to as the Act, 1994, it is evident that appeal is only maintainable against every judgment and/or order, but it is not maintainable against an interlocutory order. An order passed under section 24 of the Hindu Marriage Act. 1955, for ad-interim maintenance, being an interlocutory order appeal under section 19(1) of the Act is not maintainable. The petitioner has rightly chosen the form of Civil Revision application before this Court and the same is maintainable.

Section 24 of the Hindu Marriage Act, 1955 stipulates not only with respect to ad-interim maintenance but also with respect to cost of necessary expenses of proceeding. It is evident that necessary expenses to fight out the litigation are dependent on the factor as to whether the claimant, has sufficient independent income or not;

Held, that by the impugned order the Family Court has not taken into account the income of the husband of the petitioner as such the Court has erred in coming to the definite conclusion as to whether the petitioner has got, sufficient independent Income or not;

By the impugned order the Court has allowed cost of Rs. 4,000=00 in favour of the petitioner as necessary expenses of the proceed

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HINDU MARRIAGE ACT, 1955—*concld.*

ings. Thus it is evident that the Court for the said purpose has come to a conclusion that the petitioner has got, sufficient independent Income "to fight" out the case. By the same impugned order the Court has held that the petitioner has got sufficient independent Income" for determination of ad-interim maintenance. The impugned order is to that extent contradictory.

Smt. Indu Singh v. *Dr. Ranjeet Singh* (1995), I. L. R. 74, Pat. 747

INCOME TAX ACT, 1961—[1——*Section 245C—ambit of—Settlement Commission considered the report of the Commissioner of Income-Tax, facts and circumstances of the case and the finding of the Income-Tax Officer in the assessment proceeding—concealment on the part of the assessee evident—Settlement Commissioner deciding that the application under section 245C need not be proceeded with—legality of—power of judicial review of High Court—extent of—High Court whether concerned only with legality of the procedure and the process by which the decision has been arrived at.*

The Settlement Commissioner in an application under section 245C of the Income-Tax Act, 1961 hereinafter referred to as the Act, considered the report of the Income-Tax Commissioner, the facts and circumstances of the case as also the findings recorded by the Income-Tax Officers in the assessment proceedings which

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INCOME TAX ACT, 1961—*contd.*

makes it evident that there was concealment on the part of the assessee and that the penalty proceedings initiated against him were justified;

Held, that the Settlement Commission has correctly recorded the findings and arrived at the conclusion that the application under section 245C of the Act need not be proceeded with;

Held, further, that it is well settled that power of judicial review, in such matters against an order of Settlement Commission deciding not to proceed with is very limited. The Court is concerned with the legality of the procedure and the process by which the decision has been arrived at and not with the validity of the orders challenged.

Dindayal Agrawal v. *Union of India and another* (1995), I.L.R. 74, Pat. ... 141

2——————*Section* 269, *UD*(1)—*ambit of*—*order of pre-emptive purchase of property passed by competent authority*—*High Court after quashing the order of the competent authority observed that the prescribed authority may proceed in accordance with law*—*effect of.*

There is no provision for appeal or revision against an order of pre-emptive purchase of a property passed by the competent authority under section 269—UD(1) of the Income-Tax Act, 1961, hereinafter referred to as the Act.

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INCOME TAX ACT, 1961—*concld.*

Where the High Court after quashing the order of preemtive purchase passed by the competent authority under section 269. UD (1) of the Act in its writ jurisdiction, ordered that the prescribed authority may proceed in accordance with law.

Held, that the order passed by the High Court did not by its own force authorise the prescribed authority to pass a fresh order of preemptive purchase dispite the expiry of the period of limitation prescribed by law. In absence of express words in the order the Court should not readily draw an inference that the High Court by its order intended to defeat the right which had accured in favour of the petitioners to dispose of the property as they like in absence of a void orders under section 269. UD(1) of the Act,

M/s. Ajay Construction, a registered partnership firm through its constituted attorney Sri Mathura Prasad Singh v. *The Union of India and Ors.* (1995), I.L.R. 74, Pat ... 1

INDIRA GANDHI INSTITUTE OF MEDICAL SCIENCES ACT. 1984—*Section* 12 *sub-section* (3) *and section* 27—*provisions of—section* 12 *sub-section* (3)—*Board of Governors of Indira Gandhi Institute of Medical Sciences whether can delegate powers to the Director of the Institute—draft of the Indira Gandhi Institute of Medical Sciences Regulation approved by the Board of Governors, but not approved by State Government, effect of—Board of Governors, whether have inherent*

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INDIRA GANDHI INSTITUTE OF MEDICAL SCIENCES ACT, 1984—*contd.*

jurisdiction make such conditions of service as it is clothed with, by way of inherent powers in absence of statutory Regulations—Director of the Institute suspending an employee—validity of—suspended employee, whether to get full salary during the period of suspension.

Under section 12(3) of the Indira Gandhi Institute of Medical Sciences Act, 1984, hereinafter referred to as the Act, the Board of Governors can delegate powers to the Director of the Indira Gandhi Institute of Medical Sciences hereinafter referred to as the Institute. Hence the decision of the Board of Governors approving the draft Regulation namely Indira Gandhi Institute of Medical Sciences Regulation hereinafter referred to as the Regulation, issued under section 27 of the Act, is a valid piece of document delegating the power to the Director of Institute. It is evident that the draft Regulation amounts to a delegation of power by Resolution dated 19th June, 1984. The powers having been delegated to the Director by the Board of Governors to suspend even an employee/officer, who is being appointed by the Board of Governors, the Director has got full powers to suspend the writ-petitioner.

The Draft Regulation cannot be held to be a Regulation in terms of section 27 of the Act. It can be merely termed to be a decision of the Board of Governors which has the power to lay down conditions of service with respect to the

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INDIRA GANDHI INSTITUTE OF MEDICAL SCIENCES 1984—*contd.*

employees of the Institute only in terms of section 27(*e*) of the Act. It is only by a Resolution, validly approved by the State Government that the condition of service of the employees can be framed.

Held, that the Board of Governors cannot frame any condition of service by any other mode as has been done by Resolution dated 5th/6th March, 1991 as well as dated 31st August, 1985 and 2nd April, 1986. Though being an employer, the Board of Governors have its inherent jurisdiction to make such conditions of service applicable, as it clothed it by way of inherent powers, in absence of statutory Regulations;

Held, further, that the appointing authority has got power to suspend its employee, even in absence of a statutory rule for suspension in contemplation of a departmental proceeding. The only rider will be that the employee will be getting the full salary during the period of suspension;

Held, also, that the impugned order of suspensions having been made under the signature of the Deputy Director of the Institute and he having not been made party-respondent in writ application, the writ-petition is not maintainable in absence of such necessary party;

Held, also, that the writ-petitioner has failed to make out any case of *malafide* on facts

Indian Council of Medical Sciences Act, 1956—*contd.*

against the Medical Board, Chairman of the Institute;

Dr. [illegible] Kumar v. Indian Council of Medical Science, Patna and others (1996), I L R 74 Pat. .. [illegible]

Land Acquisition Act, 1894—*Sections 4, 6 and 9—notification under section 4 and declaration under section 6—not challenged—resulting in award in favour of writ-petitioners—even in writ-petition, notification under section 4 and declaration under section 6—delay and laches on the part of writ-petitioners—writ-petition, whether maintainable—notice under section 9 served on husband of the writ-petitioner—respondent directed to serve notice under section 9 on the writ-petitioner and consider any representation made by her and pass appropriate orders in accordance with law.*

Where the writ-petitioner allowed the land acquisition proceeding to continue till it culminated in Award and did not initially even challenge the notification under section 4 of the Land Aquisition Act, 1894, hereinafter referred to as the Act, and the declaration under section 6 of the Act in the writ-application and later on after several months challenged the notification under section 4 and declaration under section 6 of the Act by amending the writ-petition;

Held, that the writ-applications deserve to be rejected on ground of delay and laches alone;

LAND ACQUISITION ACT, 1894—*contd.*

Where notice under section 9 of the Act with respect to land in [illegible] was served on the husband of the writ-petitioner and not on the writ-petitioner;

Held, that the respondents are directed to serve a notice on the writ-petitioner under section 9 of the Act and thereafter to consider any representation made by the writ-petitioner and pass appropriate orders in accordance with law.

Smt. Mridula Chandra and ors. v. The State of Bihar and Ors. (1995), I. L. R. 74. Pat. ... 105

LETTERS PATENT OF THE PATNA HIGH COURT—*clause* 10—*appeal under, whether maintainable against an order which is not, judgment as occurring in clause* 10.

On a plain reading of the last three paragraphs of the impugned order, it can not be said that the effect of the order in the procedure is to put an end to the said proceeding, so far the Court passing the impugned order is concerned. The effect of such order is also not that proceeding will end if the impugned order is not complied with. The impugned order cannot be said to be a decree which finally concludes/terminates the proceeding;

Held, that analysing the true nature of the impugned order, it cannot be said to be a judge-

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LETTERS PATENT OF THE PATNA HIGH COURT—*concld.*

ment within the meaning of the word 'Judgement' occurring in clause 10 of the Letters Patent of the Patna High Court. This Letters Patent Appeal is consequently not maintainable.

Chandra Mohan Jha and another v. *Awadh Kishore Sharma and Ors.* (1995) I.L.R. 74, Pat. ... 907

MOTOR VEHICLES ACT, 1988—*Section* 117 *read with rule* 88 *of Bihar Motor Vehicles Rules* 1940—*Regional Transport Authority, Darbhanga after enquiry notifying bus-stand on the land of the writ-petitioner—Collector, Samastipur, staying the working and construction of the bus-stand—order of Collectir, whether without jurisdiction—Bihar Motor Vehicles Rules,* 1940 *Rule* 88—*provisions of.*

Where on the application of writ-petitioner the Regional Transport Authority, Darbhanga, after enquiry notified the bus-stand on the petitioners land on 18th July, 1992 under the provisions of section 117 of the Motor Vehicles Act, read with the provisions of Rule 88 of the Bihar Motor Vehicles Rules, and after entering into an agreement in pursuance of the said notification the petitioner started construction work for the bus stand investing substantial amount in the filling of the land and construction, but the Collector. Samastipur on dispute being raised by the respondent no. 5 stayed the working and construction of the bus-stand by order dated 14th April, 1994;

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Held, that the impugned order passed by the Collector, Samastipur staying further construction of the bus stand by the writ-petitioner is without jurisdiction and is quashed.

Samant Kumar Choudhary v. *The State of Bihar and Ors.* (1995), I.L.R. 74, Pat. ... 48

NATURAL JUSTICE—*Principles of—lease of pisciculturist right granted to writ-petitioner—writ-petitioner depositing entire bid amount and other amounts as required by rules—the lease impugned order of cancellation of lease, whether in utter violation of principles of natural justice—Doctrine of legitimate representation.*

Where the writ-petitioner was the highest bidder for pisciculture right in Mallikpur Branch canal for the years 1993 to 1996 and deposited the entire bid amount and other amounts or instalments, as required by the relevant rules and also invested handsome amount for rearing fish, suddenly received impugned order dated 5th February, 1994 cancelling the lease without any opportunity to him to show cause or any hearing;

Held, further, that the impugned order of cancellation of the lease deed in favour of the writ-petitioner for a period of three years has been rendered in utter violation of the principles of natural justice;

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NATURAL JUSTICE—*concld.*

Held, further, that as neither the writ-petitioner was afforded any opportunity of hearing nor he was given any opportunity making representation, hence the principles of natural justice was violated and the writ-petitioner was also deprived of the Doctrine of Legitimate Representation.

Vijay Choudhary v. *The State of Bihar* and *Ors*. (1995), I. L. R 74, Pat. 195

Natural Justice—Principles of—whether violated—writ-petitioner given opportunity of hearing and 12 dates were fixed in the departmental proceedings, but not availed by him.

Where from, a perusal of impugned order it is clear that as many as 12 dates were fixed for the departmental proceeding and the writ-petitioner was given opportunity of hearing but he did not appear to support his case;

Held, that, it cannot be said that the writ petitioner was deprived of the opportunity of hearing or that the principle of natural justice was not followed;

Held, further, that no factual foundation was laid to show that the copy of enquiry report was not served on the writ-petitioner when explation was called from him against the proposed punishemnt.

Vijay Choudhary v. *The State of Bihar and Ors*. (1995), I. L. R 74, Pat. ... 956

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Notification issued by Administrative Reforms Department—carving out new Divisions, whether automatically makes a change with respect to Divisions as mentioned in the Bihar Nationalised Secondary School (Service Condition) Rules, 1983—*District of Khagaria and the schools situated therein, whether included in Kosi Division after notification made in that regard by Human Resources Development Department by notification dated 18th July*, 1990—*writ-petitioner posted in District of Khagaria, after it was included in Kosi Division transferred to Saharsa, legality of—writ-petitioner posted in the District of Begusarai, continued to be in Darbhanga, Divisional Cadre—his transfer within Darbhanga Division is not illegal—Human Resources Development not having created Munger Division—effect of*

Whenever any notification is issued from the Personnel and Administrative Reforms Department of the State of Bihar, making a change in one or other way with respect to Divisions created by the Personnel and Administrative Reforms Department, the same automatically does not make a change with respect to the Divisions for the purpose of Human Resources Devepopment department, including the Division as mentioned in the Bihar Nationalised Secondary School (Service Condition) Rules, 1983, hereinafter referred to as the Rules:

Held, that when the notification dated 10th January 1990 was issued from the personnel and Administrative Reforms, Department the

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Khagaria District automatically did not come out of Bhagalpur Division and was not placed within the Kosi Division with respect to Human Resources Development Department. But when the notification was issued by the order of Government of Bihar on 18th July, 1990. which was issued from the Human Resources Development Department, the District of Khagaria and the schools situated therein were taken out of Divisional Cadre of Bhagalpur and were placed under the Divisional Cadre of Kosi Division. The writ-petitioners, who were posted in the schools situated in the District of Khagaria since 18th July, 1990, were placed in the Divisional Cadre of Kosi Division.

So far as the other writ-petitioner is concerned, he was posted in a school in the District of Begusarai. As the District of Begusarai was within the Darbhanga Division since 26th September, 1983, he continued to remain as a member of Darbhanga Divisional Cadre since then;

Held, further, that uptill now no new Division like Munger Division has been created for the purpose of the Rules and the teacher of the Human Resources Development Department, the writ-petitioners, cannot derive any benefit out the Notification dated 22nd April, 1992.

The writ-petitioners who were posted in the district of Khagaria and were placed under the Divisional Cadre of Kosi Division by virtue of

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Notification issued on 18th July, 1990, issued by the Human Resources Development Department, since 18th July, 1990, hence the writ-petitioners are members of Kosi Divisional Cadre. They have been transferred to Saharsa by the impugned orders which is also within Kosi Division and as such there is no illegality in the Notification transfering them.

The other writ-petitioner, who was posted in Begusarai district and was originally in the Darbhanga Division, there being no new cadre of Munger Division, in the Human Resources Development Department he is still in the Darbhanga Division By the impugned order, he having been transferred to a school within the Darbhanga Division, there is no illegality in the impugned transfer order.

Rajendra Prasad Sahu and *ors.* v. *The State of Bihar and ors.* (1995), I.L.R. 74, Pat. ... 985

PART-TIME LECTURERS—*appointed in different Government Polytechnics following the procedure for appointment of regular full-time Lecturers—whether can be absorbed as full time Lecturers—whether their service can be regularised—Government by office order appointing the writ-petitioners, provided that their engagement will stand terminated on appointment of regular full time Lecturers—Estoppel, principles of—whether applicable.*

The appointment of regular full time lecturer can be made by open advertisement on all India

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PART TIME LECTURERS—*contd.*

basis, on the basis of selection by Bihar Public Service Commission followed by appointment made by State Government on the basis of such recommendation. This procedure was not at all followed, and, therefore, the appointment of part-time lecturers in different Government Polytechnics was not in accordance with law prescribing the procedure for appointment of full time lecturers. The part-time lecturers so appointed cannot, therefore, claim to be absorbed as full time lecturers.

Government decision in this regard was not followed because the decision clearly postulates that only those persons should be appointed on part-time basis who possessed the requisite qualification and who were otherwise employed elsewhere. The State Government by the office order appointing the petitioners on part-time basis, provided that engagement shall stand terminated on the appointment of regular full time teachers. The orders also provided that they could be terminated at any time without notice. No representation was made by State Government, which could lead the writ-petitioners even to entertain a reasonable expectation that they are likely to continue indefinitely, and may be absorbed later;

Held, that no principle of estoppel applies in the case of the writ-petitioner. The law is well settled that temporary arrangement made for carrying on the work must come to an end when regular appointments are made;

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PART TIME LECTURERS—*concld.*

Held, further, that if such temporary appointments/engagements are to be terminated in accordance with terms and conditions of appointment, the provisions of Article 311 of the Constitution of India are not attracted;

Held, also, that the writ-petitioners cannot claim regularisation of their services against permanent posts. Their appointment is de hors the rules and constitutional mandate. They cannot claim regularisation against the posts to which they were never appointed.

When the State Government averred in their counter affidavit that part-time lecturer engaged 2 classes in a week where as full time lecturers engaged 22 classes in a week and the same was not controverted by the writ-petitioners;

Held, that the quantum of work load shouldered by part-time lecturers are not the same as shouldered by full time lecturers. The writ-petitioners, therefore, cannot claim equal pay when their work is not equal to that of regularly recruited full time lecturers.

Lal Bahadur Singh and 32 *ors. The State of Bihar* and *ors.* (1995), I.L.R. 74, Pat. ... 442

PATNA REGIONAL DEVELOPMENT AUTHORITY ACT, 1974—*section* 91, *whether bars a suit for right, title or interest in the Civil Court.*

The Patna Regional Development Authority Act, hereinafter referred to as the Act, does not

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PATNA REGIONAL DEVELOPMENT AUTHORITIES ACT, 1974—*concld.*

provide any remedy for adjudicating the right, title possession of the person;

Held, that section 91 of the Act, which is in unambiguous term, cannot be said to have ousted a jurisdiction of a Civil Court for adjudication of right, title or possession of the person.

No doubt, the Authority under the Act has power to pass an order of eviction which can be nullified in appeal, but there is no provision for adjudication of right, title and interest of the person in the property.

Sarimati Shanti Devi v. Ram Chandra Ram ors (1995), I.L.R. 74, Pat. 333

PATNA UNIVERSITY ACT, 1976 AS AMENDED BY PATNA UNIVERSITY (AMENDMENT) ACT, 1993—*Section 64 clause (a) third proviso—whether enabling provision—power of reappointment—whether provided guidelines for exercise of the power of re-appointment—re-appointment, whether to be made after the Patna University frames statutes made in this behalf—third proviso, whether lays down any condition precedent for operation of main part of the section—third proviso, whether any right conferred on the retiring teacher to get re-appointed—Patna University (Amendment) Act, 1993 a colourable piece of legislation—amended provisions apply to the teacher to remain in service and are prospective in operation.*

The third proviso of section 64 of the Patna University Act, 1976 hereinafter referred to as the Act, as amended by Patna University (Amendment) Act, 1993, is in the nature of an enabling provision, vests in the

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PATNA UNIVERSITY ACT, 1976—*contd.*

University the power of re-appointment, but controls the exercise of such power by providing guidelines for its exercise namely, that such power must be exercised only in appropriate cases upto the age 65 years, and in the manner laid down by the statutes made in this behalf in accordance with the guidelines of the University Grants Commission. The power of re-appointment, therefore, can not be exercised unless statutes are framed as provided under the third proviso of Section 64 of the Act. It would be difficult to read into the third proviso a duty cast upon University to frame statutes, because it is a matter of policy whether the University will provide for re-appointment under its statutes.. The University may or may not provide for re-appointment of teachers after retirement, but if it is provided, it must be done in accordance with the third proviso, namely after framing statutes in the manner laid down in the third proviso;

Held, that it is quite clear that the main part of section 64 of the Act takes effect by its own force, and the third proviso does not lay down condition precedent for operation of the main part of section 64 of the Act. Even if statutes are not framed providing for re-appointment of teacher of the University, those teacher who attain the age of 60 years, must retire from University Service;

Held, further, that the third proviso of section 64 of the Act does not confer any right upon a retiring teacher of the University to get re-appointed. No doubt, if the statutes are framed, in appropriate cases, retiring teacher may be considered for re-appointment in accordance

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PATNA UNIVERSITY ACT, 1976—*Contd.*

with the statutes, but it is not that any and every retiring teacher, can, as a matter of right, seek re-appointment;

Held, further, that the power vested in the third proviso of section 64 of the Act is un-controlled and unbridled, because the third proviso of section 64, which vests the power in the University to re-appoint retired teacher, lays down the guidelines in which that power is to be exercised. The amending Act is not colourable piece of legislation. It is well settled that plenary legislative power of the State legislature to pass laws has no limitation except to which the legislative powers of State legislature is subject. Though a law can be invalidated for contravention of constitutional limitations which inhibits upon the power of State Legislature to pass laws, it cannot be declared invalid on the ground that it was cancelled with improper motives;

Held, also, that on the 15th August, 1992, the date on which the Patna University (Amendment) Ordinance, 1992 lapsed, the writ-petitioner had a mere right to take advantage of the provision of the Ordinance. It cannot be said that a right had accrued in favour of the petitioners which could not be defeated or taken away by subsequent legislation, *i.e.*, Patna University (Amendment) Act 1993. The right acquired under an Ordinance cannot be treated to be right superior to one created by law enacted by the legislature. The right created whether by Ordinance or legislation,

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PATNA UNIVERSITY ACT, 1976—*Concld.*

stand on the same footing. Once the law under which the right was claimed was amended, the right ceased to exist and is only saved under the amended law, such right could not be sustained as were either conferred or the Patna University (Amendment) Act, 1993, deemed to have come into effect retrospectively from 6th August, 1992, as not be characterised to be retrospective. The amended provisions apply only to the persons who remain in service and, therefore, operated prospectively. These who had attained age of 60 years on the date on which the amending Act was promulgated were asked to retire and others who remained in service were to retire on attaining the age of 60 years;

Held, also that section 64 of the Act as amended applies to existing employees and operates in future

Ranjit Prasad Shrivastava and 4 *ors.* v. *The State of Bihar through Chief Secretary* and *ors.* (1995), I.L.R. 74, Pat. 756

Penal Code, 1860—*section* 306 *and* 498A *See* Evidence Act, 1872. 358

PENSIONARY BENEFIT—*continuous service rendered by writ-petitioner as extra-clerk from the date of his initial appointment as extra-clerk to the date of his absorption as temporary clerk in the establishment of the District Registrar—whether can be*

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PENSIONARY BENEFIT—*Concld.*

counted as qualifying service for the purpose of pension and pensionary benefit—Bihar Pension Rules, Rule 59—Provisions of;

Held, that the continuous service rendered by the writ-petitioner as extra-clerk from April, 1957 to 23rd January 1981 in the establishment of District Registrar, Samastipur when he was appointed as temporary clerk in the said Department. should be counted as qualifying service for the purpose of pension and Pensionary benefit only

Respondent no. 1 and 2 are directed to pass appropriate order in exercise of power under rule 59 of the Bihar Pension Rules, declaring that the service rendered by the writ-petitioner, as extra-clerk from April, 1957 till the date of his appointment as temporary clerk should be treated as qualifying service for the purpose of pension and pensionary benefit only.

Upendra Prasad v. *The State of Bihar* and *ors.*, (1995), I.L.R. 74, Pat. 383

PROMOTION TO THE POST OF READER—*Experience acquired by a part-time Lecturer, whether can be considered for promotion as a Reader under the Time-bound Promotion Scheme.*

Held, that, the experience acquired as part-time Lecturer cannot be taken into consideration while promoting a Lecturer to the post of a Reader. It is only the experience acquired by him

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PROMOTION TO THE POST OF READER—*Concld.*

as a full time Lecturer which can be taken into consideration while considering his case for promotion to the post of a Reader under the time bound promotion scheme.

Dr. Dhirendra Bahadur Chand (since deceased) through his legal representatives (a) Smt. Sneh Prabha Srivastava (b) *Gyandra Bahadur Chand* v. *The Chancellor of Universities, Bihar & ors.* (1995), I.L.R. 74, Pat. 730

Preparation of Panel for appointment as Assistant Professor/Registrar General Surgery—points under the head teaching experience, publication of journals and having obtained Ph. D. degree illegally disallowed—legality of.

Where the writ-petitioner's application for appointment to the post of Assistant Professor/Registrar, General Surgery againsst 1992 panel was rejected;

Held, the petitioner is entitled for the points for teaching experience, publication of journal and having Ph. D. Degree which have been illegally and arbitrarily refused to him while preparing the provisional list for appointment to the post of Assistant Professor;

Held, further, the writ of mandamus be issued directing respondents to re-consider the case of writ petitioner for inclusion of his name in the panel.

Dr. Indra Shekhar Thakur v. *The State of Bihar* and *Ors.* (1995), I.L.R. 74, Pat. ... 28

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PUBLIC INTEREST LITIGATION—*ambit of—dispute involved in respect of over seven thousand entrepreneurs being individual disputes depending on nature of each writ—writ-petitions by them, whether maintainable as Public Interest Litigation.*

Held, that the dispute involved in respect of more than seven thousand entrepreneurs are individual disputes depending upon the nature of writ, hence in such a situation the public Interest Litigation is not maintainable.

Dr. Taj Singh Lakshmana v. *The State of Bihar and Ors.* (1995), I.L.R. 74, Pat. ... 94

PUBLIC INTEREST LITIGATION PETITION—filed by an advocate—whether maintainable in respect of individual dispute.

Where the writ petitioner, an advocate of the Court filed a writ application as Public Interest Litigation, claiming therein that the examinees for admission in the Technical Institution (Medical/Engineering) and other competitive examination may be allowed choice examination centre/residential centre in respect of subsequent year when examination had already been held in May-June, 1995;

Held, that the dispute involved in the instant case is an individual dispute for which the students or their parents would have come forward and filed writ application. The present application in the form of Public Interest Litigation is not maintainable.

Ratnesh Kumar Singh v. *The State of Bihar and ors.* (1995), I.L.R. 74, Pat. 970

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RECEIVER APPOINTED BY TRIAL COURT IN THE PARTITION SUIT—*filing application for Police help to evict tenant, who were not parties to the suit, from the suit premises—Order of Trial Court rejecting the application whether in proper exercise of its Jurisdiction—Code of Civil Procedure*, 1908 *section* 115—*provisions of.*

Where Receiver appointed by Trial Court in a suit for partition, filed an application before the trial court under Rules 1 and 3 of Order 40, Code of Civil Procedure, 1908 seeking police help to oust the tenants, who were not parties to the suit, alleging that the tenants who occupied shops in the suit premises are not paying rent to the Receiver, which was rejected by the trial court;

Held, that the Trial Court rightly exercised jurisdiction in refusing to extend police help in aid of the Receiver for eviction of the said tenants.

The trial court rightly concluded that whether the said tenants were defaulter within the meaning of the Bihar Buildings (Lease, Rent and Eviction) Control Act, 1982 are matters to be decided in a properly constituted suit and not in the summary proceeding.

Md Abbas v. *Madan Prasad and Others* (1995), I.L.R. 74, Pat. 129

REGISTERED DEED OF FAMILY ARRANGEMENT—whether binding on the parties—plaintiff having derived benefit under the deed of family arrangement—whether can challenge validity of the same in a

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REGISTERED DEED OF FAMILY ARRANGEMENT—*concld.*

suit for partition—whether operates as estoppel—suit for partition filed after 19 years, whether barred by limitation.

Where the deed of family arrangement was entered into in the year 1945 and the suit for partition was filed in the year 1964;

Held, that the registered deed of family arrangement being of the year 1945 and the plaintiff having derived benefits therein, cannot be allowed to reopen the validity or otherwise of the same.

The family arrangement being binding on the parties to the arrangement clearly operates as estoppel so as to preclude any of the parties who have taken advantage thereunder, from revoking or challenging the same.

The registered deed of family arrangement had been executed in 1945, hence the suit for partition filed in 1964 is clearly barred by limitation as for getting a registered deed declared as void and illegal, the period of limitation is three years.

Ram Sumiran Prasad Singh and ors. v. *Smt. Sita Sinha and ors.* (1995), I.L.R. 74, Pat. ... 696

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SERVICE———[1—*Appointment made in breach of statutory rules, law or constitutional provisions whether can be regularised.*

It is well settled that an irregular appointment may be regularised, but an appointment made in breach of statutory rules, law or the constitutional provisions is not irregular, but illegal and void. An illegal or void act cannot be regularised. Regularisation does not connote permanency and therefore, no person who claims to have been regularised, can claim that he has been confirmed in service. Where regularisation is permissible, the action which was irregular is cured, but the nature of appointment remain the same. A temporary employee irregularly appointed does not become permanent employee merely because his services are regularised by confirming to some matter relating to procedure, not going to the root of the matter which was not complied earlier at the time of his appointment;

Held, that the writ-petitioner can be granted no relief. He secured an appointment by illegal means. This can be taken judicial notice of, because all the rules, directions and constitutional provisions were thrown to the wind when he was appointed. The interestedness of the appointing authority is obvious from the fact that soon after his appointment, only a few months later, he purported to regularise the services of the writ-petitioner. This gives further proof of the *malafide* intention of

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SERVICE—*cont'd.*

the appointing authority. The writ-petitioner was in *pari delicte*, and, therefore, cannot claim any sympathy by saying that he is not to blame.

Vimal Kishore Rai, v. *The State of Bihar and others*. (1995), I. L. R. 74, Pat. ... 862

2——————*Arts Trained Graduates and Science Trained Graduates appointed on the same date and granted Matric Trained Scale—Science Trained Graduates promoted to Graduate Trained Scale—Arts Trained Graduates continued in Matric Trained Scale—for consideration for promotion as Headmaster, Seniority in Graduate Trained Scale taken into account—whether arbitrary.*

Arts Trained Graduates and Science Trained Graduates who were appointed initially as Assistant Teachers on stipend basis in Elementary Schools on the same day were granted Matric Trained Scale. But Science Graduates were promoted to the higher scale, namely Graduate Trained Scale whereas the writ-petitioners and other Arts Graduate Teachers have continued in the lower scale of Matric Trained Scale. Writ-petitioner's grievance was that they should also be promoted in Graduate Trained Scale otherwise they would not come within the zone of consideration as Headmaster but the Science Graduates Teachers may be considered for appointment as Headmaster because of quicker promotion granted to them;

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SERVICE—*contd.*

Held, that for promotion as Headmaster, if seniority of teachers in the highest scale, namely Graduate Trained Scale is taken into accounts, that cannot be termed a arbitrary, because teachers in the Graduate Trained Scale must be considered as a separate class and appointed against a higher scale, as against teachers in the Intermediate Trained Scale or Matric Trained Scale. The writ-petitioners are in Matric Trained Scale, whereas those considered for promotion as Headmaster are persons, who are in Graduate Trained Scale. The writ-petitioner must wait for their promotion in higher scale, and such higher scale cannot be granted to them unless there are vacancies is the higher scale in Arts against which they may be promoted.

Uma Kant Yati and others v. *The State of Bihar through the Education Secretary, Government of Bihar and others.* (1995), I. L. R. 74, Pat. 553

3——————*benefit of seniority granted to ex-army personnel in the matter of appointment to the post of District Engineer in terms of paragraph* 8(a) *of Government memorandum contained in letter no.* 877, *dated* 21*st June*, 1969—*validity of.*

The writ-petitioner and respondent no. 4 were appointed as District Engineer on 23rd March, 1973, pursuant to their selection for appointment by the Bihar Public Service Commission and in order of merit the writ-petitioner

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SERVICE—*contd.*

was placed at serial no. 2 whereas the respondent no. 4 was placed at serial no. 3.

Respondent no. 4 filed representation that as he had joined Short Service Commission in Indian Army on 14th February, 1965 and after serving as such for five years he was released from Army Service on 15th May, 1970, he was entitled to seniority in pursuance of Government decision contained in paragraph 8(*a*) of the letter no. 8772, dated 21st June, 1969 hence his seniority be decided accordingly.

After considering the representation it was ordered by notification dated 24th June, 1985, that respondent no. 4 be deemed to have been appointed as District Engineer with effect from 1st February, 1967, the date on which he attained the age 25 years, which was the minimum age prescribed for appointment as District Engineer and that he should be granted consequential benefit of seniority in accordance with the Government decision contained in letter no. 8772, dated 21st June, 1969;

Held, that the notification dated 26th June, 1985, granting the benefit of seniority to respondent no. 4 cannot be assailed.

The decision has been taken perfectly in accordance with the decision of the Government contained in paragraph 8(*a*) of memorandum no. 8772, dated 21st June, 1969. The decision of the Government contained therein is a valid decision

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SERVICE—*contd.*

as it grants certain concessions to persons, who had rendered valuable military service when the country faced external aggression.

Prabhakar Chandra Jha v. *State of Bihar and others* (1995), I.L.R. 74, Pat. ... 274

4——————*Circular dated 24th June*, 1989, *of Rural Development Department providing that only trained Dalapaties to be selected for appointment as Panchayat Sewak—no provision therein for their being sent for training again—order sending them for training—validity of—words "Niyukti Kia Jata Hai" in their order—effect of—other persons selected to the post of Panchayat Sewak and sent for training, whether to get regular scale of pay from the date they joined their training.*

In accordance with the Circular dated 24th June, 1989 of the Rural Development Department of the State Government, it is only the trained Dalpaties who are to be selected and to be appointed against the post of Panchayat Sewak. There is no provision for sending them again for training except for the Scheduled Caste/Scheduled Tribe candidates, who are not trained at the stage of Dalpaties. The writ-peti-petitioners being already trained Dalpaties there is no question of again sending them for training for the purpose of appointment to the post of Panchayat Sewak.

It is evident from a perusal of order dated 29th August, 1994 and order dated 20th April.

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SERVICE--*contd.*

1995 that the respondents have appointed the writ-petitioner of C.W.J.C. No. 4561 of 1995 respectively to the post of Panchayat Sewak. The words "Niyukti Kia Jata Hai" have been mentioned therein. In view of the facts that the writ-petitioners have been provided with the order of appointment to the post of Panchayat Sewak, there is no question of sending them for training and paying stipend to them during the period of such training.

So far as writ-petitioners of C.W.J.C. No. 4025 of 1995 are concerned, who have been sent for training by letter dated 9th December, 1994 after selection to the post of Panchayat Sewak, cannot be discriminated in the matter of appointment to the post of Panchayat Sewak;

Held, that the writ-petitioners of C.W.J.C. No. 4025 of 1994 should be provided with appointment letter to the post of Panchayat Sewak in its regular scale of pay with effect from the date the writ-petitioners joined their training.

Ram Krishna Singh Yadav and 11 (*eleven*) *others* v. *The State of Bihar and Ors.* (1995), I.L.R. 74, Pat. 585

5——————*Excise. Clerks on passing departmental examination promoted as sub-Inspector Excise on recommendation of Departmental Promotion Committee—subsequently promotion*

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SERVICE—*contd.*

cancelled as they were found to be not eligible for promotion being overage—legality of.

The writ-petitioners, who were initially appointed as Excise Clerk. passed the departmental examination and were recommended by Departmental Promotion Committee were consequently promoted to the next higher post of Excise Sub-Inspector, subsequently, a show cause notice was issued to them to show cause why their promotion be not cancelled as on the date of promotion they were more than 35-years of age due to which they were not eligible for promotion. On cause being shown, the promotion of writ-petitioners were cancelled;

Held, that as on date on which the cases of writ-petitioners were considered by the Departmental Promotion Committee, they were not eligible for their promotion, being over-age and as such there is no illegality in the impugned order cancelling their promotion.

Basudeo Prasad and another v. *The State of Bihar and Anr.* (1995), I.L.R. 74, Pat. ... 979

6——*Excise constables in class IV post appointed by Deputy Commissioner Excise with due information to Commissioner Excise on 13th June*, 1980—*appointment cancelled on 7th April*, 1992 *by Commissioner Excise after* 12 *years of the appointment—legality of.*

The writ-petitioners in pursuance to the advertisement issued by Deputy Commissioner

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SERVICE—*contd.*

Excise and prohibition, Darbhanga and Koshi Division hereinafter referred to as the Deputy Commissioner, applied for class IV posts of Excise constables and were duly appointed on the recommendation of Selection Committee by order dated 13th June 1980 passed by the Deputy Commissioner and functioned as Excise constables. Suddenly after 12 years by order dated 7th April, 1992 passed by Commissioner-*cum*-Secretary of Excise and Prohibition Department the services of the writ-petitioners were cancelled stating therein that their appointment was illegally made by the Deputy Commissioner;

The appointments having been made on 13th June, 1980 and intimation of it having been sent by Deputy Commissioner to Commissioner Excise as far back as 13th June, 1980 the respondents had knowledge of it 12 years back, they cannot reopen the matter of departmental proceeding against the Deputy Commissioner.

Held, that if the departmental proceeding against the Deputy Commissioner cannot be initiated at the belated stage of 12 years, the respondent cannot re-open the matter of illegality of the appointment of writ-petitioners, they having knowledge of the appointments made by the Deputy Commissioner 12 years back.

Dhrub Prasad and others v. *The State of Bihar and others*, (1995), I.L.R. 74, Pat. ... 237

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SERVICE—*Contd.*

7——————*gradation list of* 1972 *of Rural and Urban Home Guards-writ-petitioner promoted on the basis of list of* 1972 *in* 1981 *filing writ-application in* 1988—*in his representation of* 1988 *it was stated that he has been representing since* 1991—*but he was not restored to his original position—writ-petitioner filing writ-petition after inordinate—writ petitioner filing writ-petition after inordinate delay guily of laches—writ-petition, whether maintainable.*

The gradation list of 1972 of Rural and Urban Home Guards in Department of Home (Special) of the State Government continu to hold goos an even the writ petitioner was promoted to the next higher rank of Inspector in 1981 on the basis of the said gradation list. All subsequent promotion and confirmation were made on the basis of the said 1972 gradations list. Even the representation dated 1st November, 1988 filed by the writ-petitioner after promotion itself mentions that he had been regularly filing the representations since 6th July, 1981 but he was not restored to his original position in the gradation list. The writ-petition was filed on 19th December. 1988. Even after 1981 the petitioner waited for more than 7 years to invoke the writ jurisdiction of the High Court with prayer for correction of the gradation list of the year 1972:

Held, that the petitioner has approached the court for relief after in ordinate delay and was therefore guilty of lachs and acquiescence.

Shri Shambhu Sharan Pandey v. *The State of Bihar and Ors.* (1995), I.L.R. 74, Pat. 678

8——————*persons having experience in another organisation appointed on deputation as Assistant in Bihar Intermediate Education Council, whether will be senior*

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SERVICE—*Contd.*

to persons appointed on daily wage basis—service rendered by persons appointed on deputation in other organisation, whether could be taken into accounts.

Bihar Intermediate Education Council, hereinafter referred to as the Council by advertisement recruited Assistants in 1982 from amongst persons working in other organisations having experience on deputation. In 1983 and 1984 Assistants on daily wage basis were appointed, the persons working on deputation had taken over as section incharge though on temporary basis. The persons appointed on deputation were absorbed in the service of the Council in 1987 with effect from 1st June, 1985;

Held, that decision of the Council to absorb experienced hands for efficient disposal of work of the Council cannot be characterised as unreasonable or arbitrary. The actual length of service of the persons appointed on deputation could not be ignored unless there was a law, rule or regulation to the contrary, which may have the effect of obliterating their past experience. If the actual length of service of the persons appointed on deputation could be reasonably taken into account having regard to the circumstances of the case, there can be no doubt that the persons appointed on deputation were far senior to the persons appointed on daily wages, the writ petitioners, whose services were regularised with effect from 1st June, 1985.

Bihar Intermediate Education Council Employees Union Through its General Secretary Shri Kali Das Sinha and 54 others v. *The State of Bihar through the Secretary Human Resources Development Department and others* (1995), I.L.R. 74, Pat. 573

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SERVICE—*Contd.*

9————*Service of persons appointed as Lecturer in Government Ayurvedic College in Class II Gazetted post on daily wages—whether can be regularised—equal pay for equal work—principle of—writ-petitioner working on the post of Lecturer for a decade, whether to be paid wages calculated on the basis of minimum pay in the pay scale of Lecturers.*

The writ-petitioners were appointed to the post of Lecturer in Yatindra Narain Asthana Government Ayurvedic College, Nathangar herinafter referred to as the College, on 1st March, 1985 by the Governing Body of the College by its Chairman-Commissioner, Bhagalpur at the rate of Rs. 25 per Lecture after the management of the college was taken over by the Government. The services of writ-petitioners as daily rated Lecturers was cancelled by the impugned order. Writ-petitioners do not claim to have been appointed on the basis of any advertisement nor they appeared at any interview. The post of lecturer in the Ayurvedic College is a Class II post and appointment to the post has to be made on the recommendation of Bihar Public Service Commission;

Held, that since the writ-petitioners were working on the post of Lecturer on daily wages which post being class II Gazetted post, could be filled in only on the basis of the recommendation of the Bihar Public Service Commission and their appointment even on daily wages not having been made in accordance with any rule as also the fact that the appointments had been made not by the State Government but by another authority after the take over of the College by the State Government, they are not entitled to any order or direction for automatic absorption/regularisation to the post of Lecturer in the College;

Held, further, that the writ-petitioners have been found to be discharging duties and functions of regularly appointed Lecturers and instead of being paid at a

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SERVICE—*Contd.*

rate calculated at the minimum of the scale of pay admissible to regularly appointed Lecturers are being paid a paltry sum of Rs. 25 per day. The Concept of equal pay for equal work cannot be dismissed as an abstract doctrine not capable of being enforced in a court of law. The writ-petitioners are, therefore, entitled to issue of a direction to pay their wages calculated on the basis of the minimum pay in the pay scale of regularly employed Lecturers;

Held, also, that the order cancelling the appointment of the writ-petitioners as daily rated Lecturers is quashed, they are not entitled to any order or direction to the respondents for regularisation/absorption of their services. The writ-petitioners shall be paid wages at a rate calculated on the basis of minimum pay in the pay scale of regularly employed Lecturers from October, 1992 onwards except holiday and absence from duty on working days within three months from today

Dr. Bhanu Pratap Rai and Ors. v. *State of Bihar and Ors.* (1995), I.L.R. 74, Pat. ... 519

10——*Standing order no.* 642. *dated* 20*th July,* 1983, *whether vests power in the Chairman of the Bihar State Electricity Board to suspend any employee of the Bihar State Electricity Board in contemplation of departmental proceeding—standing order no.* 642. *dated* 29*th July,* 1983, *whether a service Regulation framed by the Bihar State Electricity Board in terms of section* 79(*c*) *of the Electricity (Supply). Act,* 1948—*section* 79(*c*).

The writ-petitioner while he was posted as General Manager-*Cum*- Chief Engineer in Tirhut Area Electricity Board was suspended in contemplation of departmental proceeding by order dated 22nd August, 1995 on the

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SERVICE—*Contd.*

orders of the Chairman, Bihar State Electricity Board, hereinafter referred to as the Board. The writ-petitioner alleged that his appointing authority being the Board, the Chairman has no jurisdiction to suspend an officer of his rank;

Held, that the Chairman of the Board has got jurisdiction to suspend an employee like the writ-petitioner, in contemplation of a departmental proceeding and for such suspension no approval is to be taken from the Board

It is evident from paragraph 4 of the standing order no. 642, dated 29th July, 1983 that Rule 49-A of the Civil Service (Classification, Control and Appeal) Rules, 1930 has been adopted. Power has been vested not only with the appointing authority and/or to the Board but also to the Chairman of the Board to suspend any employee of the Board even in contemplation of departmental proceeding.

From a plain reading of standing order no. 642, dated 29th July, 1993, it is manifest and clear that the said standing order cannot be construed to be an standing order issued under the Industrial Disputes Act, 1947, but is a Service Regulation framed by the Board in terms of section 79 (c) of the Electricity (supply) Act, 1948.

Daya Nath Singh v. *The Bihar State Electricity Board and Ors.* (1995), I.L.R. 74, Pat. 898

11——*writ-petitioners who are Acharyas and Fazils claim to be equated with the trained graduates they were yet to be granted replacement scale—writ-petitioners claimed that the replacement pay scale accured to him in 1968, but filed writ application for the relief in 1979—whether guilty of laches.*

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SERVICE—*Concld.*

It is clear from the last paragraph of the Resolution of the Education Department, Government of Bihar, dated 4th May, 1968 that Acharyas and Fazils, who were equated with trained graduates, were yet to be granted replacement scale of pay of Rs. 220 to 400 as paid to the trained graduates. The writ-petitioner neither made any statement nor annexed any document granting the replacement scale to Acharyas and Fazils;

Held, that the writ-petitioner's claim has become stale due to the laches on his part in pursuing his remedy, in as much as according to the writ-petitioner he was denied the right to the pay scale which accrued to him in 1968, but he approached the High Court for the first-time in 1979. The writ-petitioner's contention about pursuing remedy by making representations is casual and vague.

Chandra Kishore Jha v. *The State of Bihar and others* (1995), I.L.R. 74, Pat. 671

STATE BANK OF INDIA (SUPERVISING STAFF) SERVICE RULES—1975, *Rule* 49 (*f*), *applicability of—Employee of State Bank of India introducing his wife for grant of gold loan without disclosing his relationship with her—no rules or circular or even the application form requiring to disclose the relationship of the loanee with the Bank employee—writ petitioner compulsorily retired for not disclosing relationship with loanee—legality of.*

The writ-petitioner, an officer of the State Bank of India was compulsorily retired mainly on the charge that he had introduced his wife to the Katihar Branch of the State Bank of India for grant of gold loan to her of Rs. 10,000 but did not disclose that she was his wife.

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STATE BANK OF INDIA (SUPERVISING STAFF) SERVICE RULES 1975—*Concld.*

There was no rule, circular or order to show that there was a requirement that the applicant must disclose his or her relationship if so related. In the application form as well there was no column for disclosure of the fact that the applicant was related to a bank employee. The applicant was entitled to grant of loan in her own right subject to fulfilment of necessary conditions and had accordingly, pledged gold ornaments to secure the loan advanced to her. The loan was actually realised by sale of the ornaments pledged;

Held, that there was no justification for the State Bank authorities to hold that the writ petitioner was guilty of fraudulent conduct;

Held, further that having regard to the nature of the transaction, and in the absence of any requirement obliging the petitioner to disclose his relationship with the loan applicant, no case of misconduct has been made out against the writ-petitioner;

Held, also, that the order dated 12th September, 1992 passed by Chief General manager, State Bank of India, Patna Compulsorily retiring the writ petitioner from service under rule 49 (*f*) of the State Bank of India (Supervising Staff) Service Rules is quashed. The writ-petitioner shall be deemed to have continued in service till the date of his superannuation, and will be entitled to all consequential benefits.

Satyendra Kumar Ghosh v. State Bank of India through the Managing Director and Ors. (1995) I.L.R. 74, Pat. 225

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SUBMISSION OF CASTE CERTIFICATES BY CANDIDATES BELONGING TO SCHEDULED CASTE AND SCHEDULED TRIBES—*caste certificate in support of their claim for reservation not submitted by writ petitioners within the time prescribed for the purpose—Bihar Public Service Commission, whether justified in not entertaining the evidence of reservation produced after the last date prescribed for the purpose.*

Where the Bihar Public Service Commission conducted examination for appointment to the post of Assistant Public Prosecutor in 1991 for only candidates belonging to the Scheduled Caste and Scheduled Tribes and the writ-petitioners did not submit the necessary caste certificate which they were required to do within the prescribed period and consequently were not selected and they in the writ-application stated that candidates who has lesser mark than them were appointed and as such claimed that their names should be included in the merit list;

Held, that where the candidates were required to submit evidence in support of their claim for reservation, before the last date for doing so, the authority Viz Bihar Public Service Commission, was justified in not entertaining the evidence produced after the last date prescribed for the purpose.

Rajmani Harijan and Ors. v. *Bihar Public Service Commission and Ors.* (1995) I.L.R. 74, Pat. ... 174

SUCCESSION—*property inherited by Christian convert daughter of Hindu—Christian daughter dying in* 1955, *before the coming into force of Hindu Succession Act,* 1956—*whether property inherited by the Christian daughter will pass to the reversioner of her father on her death.*

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SUCCESSION—*Concld.*

One of the two daughter of a Hindu adopted Christainity as her religion in December 1891 and married a Christian. In 1926 the father died and the daughter inherited the properties left by the father. The Christian daughter filed Title suit no. 1 of 1927 and obtained a decree for partition of the estate left by her father and the properties were partitioned in equal shares. The Christian daughter died in 1955 before the Hindu Succession Act, 1956 came into force. Dispute arose between children of the Christian daughter and the Hindu daughter for the properties left by the Christian daughter the Hindu daughter claiming that as the Christian daughter, had only a limited estate, on her death, the properties must revert to the reversioners and as such he was entitled to the said properties. She filed Title Suit no. 58 of 1963 for declaration of title and recovery of possession of the said properties left by her Christian sister which was decreed but reversed on appeal whereupon this second appeal was filed;

Held, that the proprty inherited by a Christian Convert daughter estate, as a daughter estate which is a life estate, from a Hindu father by virtue of caste Disabilities Removal Act, 1850, on her death, prior to the coming into force of Hindu Succession Act, 1956, will pass to the reversioners of her father and not to her own Christian progeny under the Indian Succession Act.

Held, further, that the law laid down on the point in *Khunni Lal* v. *Kunwar Govind Krishna Narain* is not in conflict with the decision in *Fakeer Bux* v. *Saira Begum, Matingni Gupta* v. *Ramratan Roy* and *Miter Sen Singh* v. *Maqbul Hasan Khan.*

Prayag Gope v. *Mrs. Ethal Smart and Ors.* (1995), I.L.R. 74, Pat. 835

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TRADE UNION ACT, 1926.—*section 8—Registrar, Trade Union, under the section can only hold enquiry for maintaining and updating the register—Registrar, has no authority to issue any direction to the employee or Labour Department to recognise any person or group of persons to be recognised as duly elected office bearer of the Trade Union—Registrar has no authority to direct holding of election—proper forum for settling any dispute of this nature lies by way of suit.*

In a dispute between two rival factions claiming to be the office bearer of a Trade Union, it is open to the Registrar Trade Union to hold an enquiry for the purpose of maintaining and updating the register as required to be maintained under section 8 of the Trade Union Act, 1926. The decision of the Registrar, Trade Union, shall; neither confer any right on any person or group of persons nor divest any person or group of persons of any lawful rights.

The Registrar Trade Union has no authority or power to issue any direction asking or advising the Labour Department of the Government or the employer to recognise and treat any particular person or group of persons as duly elected office bearers of the Union in dealing without that Union.

The Registrar, Trade Union has no authority or power to direct holding of election of the office bearers of a Trade Union under his own supervision or under the supervision of his nominee;

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TRADE UNION ACT, 1926—*Concld.*

Held, that the action o. the Registrar, Trade Union in issuing the impugned direction that election will be held under the supervision of Deputy Labour Commissioner, Bokaro Steel City as his representative cannot be justified and is not legal:

Held, further, that in the absence of any provision in the Trade Union Act, 1926, any dispute of this nature can only be resolved by means of a suit and since in the instant case that suit is at the stage of argument and as such the entire controversy can be effectively resolved in the suit itself.

Bokaro Steel Workers Union and another v. *The State of Bihar and others* (1995) I.L.R. 74. Pat. ... 204

TRANSFER OF PROPERTY ACT, 1885—*Section 60—clog on equity of redemption of the mortgaged property, whether void—defendant, heir of mortgage—a recital that payment of rent was the duty of the mortgagee—the right of equity of redemption, whether can be lost.*

In a suit for redemption of mortgage by the mortgagor defendants, the heirs of the mortgagee in the written statement took the plea that they were the owners and not the mortgagee having purchased the same from the auction purchaser who had purchased the same at court sale for arrears of rent;

Held, that mortgage is essentially a conveyance of an interest in a property as a security for payment of debt. The security must be redeemable on payment of debt or mortgage money : section 60 of the Transfer of Property Act, 1885 confers a statutory right of redemption. It is an inviolable right of mortgagor on redemp-

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TRANSFER OF PROPERTY ACT, 1885—*Concld.*

tion to get back the subject of mortgage. Any clog on the equity of redemption is inequitable, bad in law and void. The defendant had admitted the execution of the mortgage deed and the mortgage deed contained a recital that, payment of rent was the duty of the mortgagee himself, hence, in view of first proviso of section 60 of the Act being mandatory, the right of equity of redemption cannot be lost. It was the statutory obligation of the defendant mortgagee to supervise the property as a prudent man particularly in view of the recital in the mortgage deed.

Haquik Mian v. *Rajendra Prasad and Ors.* (1995) I.L.R. 74, Pat. 487

CIVIL WRIT JURISDICTION

Before Bisheshwar Prasad Singh & Naresh Kumar Sinha, J J.

1994

November, 2.

M/S Ajay Construction, a registered parnership firm through its constituted attorney

Sri Mathura Prasad Singh & anr.

v.

The Union of India and ors.

INCOME TAX ACT, 1961, (Central Act no. XLIII of 1961) — *section* 269. UD (1)—*ambit of—order of preemptive purchase of property passed by competant authority—High Court after quashing the order of the competent authority observed that the prescribed authority may proceed in accordance with law—efect of.*

There is no provision for appeal or revision against an order of pre-emptive purchase of a property passed by the competent authority under section 269-UD (1) of the Income Tax Act, 1961, hereinafter referred to as the Act.

Where the High Court after quashing the order of preemptive purchase passed by the competent authority under 269, UD (1) of the Act in its writ jurisdiction, ordered that the prescribed authority may proceed in accordance with law;

Held, that the order passed by the High Court did not by its own force authorise the prescribed authority to pass a fresh order of preemptive purchase dispite the expiry of the period of limitation prescribed by law. In absence of express words in the order the Court should not readily draw on inference that the High Court by its order intended to defeat the right which had

accrued in favour of the petitioners to dispose of the property as they like a absence of a valid orders under section 269-UD (1) of the Act.

C.B. Gautam v. Union of India and Ors. (1)

Director of Inspection I. T. v. Puranmal and ors. (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 Bisheswar Prasad Singh, J.

M/s. Mohan Lal Verma (Sr. Adv.),

Pawan Kumar(Sr. Adv.) and

Sanjay Kumar for the petitioner in both cases.

Mr. S.K. Sharan for the respondents

B.P. Singh j.

These two writ petitions raise common question and have been heard together. They are being disposed of by this common judgment. C.W.J. C.No. 5734 of 1994 has been filed by the vendee.where as C.W.J.C. No. 4283 of 1994 has been filed by the vendor. the vendor. The represntative facts are taken from C. W. J. No. 6734 of 1994. The petitioner has challenged the notice dated 12.4.1994 (Annexure-8) issued by the Deputy Commissioner of Income-Tax (appropriate authority), and the order passed by him dated 26-7-1994 (Annexure-11) whereby the competent authority has ordered the pre-emptive purchase of the property in question. The petitioner has also prayed for a writ

(1) 199 I. T. R. 530 (S.C.)

(2) 96 I. T. R. 390 (S.C.)

of mandamus commanding the apprppriate authority to issue "no objection" certificate and directing the Sub-Registrar, Patna, to compulsorily register the sale deed in favour of the petitioner. The petitioner's grievance is that the order for pre-emptive purchase has been passed in utter violation of law and causing much harassment to the petitioner who has been compelled to approach this Court thrice against the arbitrary and illegal actions of the respondents. The purchase order impugned in this writ petition is the third purchase order passed by the appropriate authority. Apart from other objections, the petitioner mainly challenges the issuance of the pre-emptive order on the ground that the appropriate authority was not authorised to pass to such an order which is barred by limitation prescribed by law. It is urged on behalf of the petititoner that if the order of pre-emptive purchase is quashed by this Court, as a consequence the respondents are bound to issue "no objection" certificate in favour of the petitioner so that he may got the sale deed registered.

2. The facts of the case are not in dispute. The subject matter of the proceeding is a three storied building over Holding No. 3/4, Circle no. 242 of Mohalla Addlatganj. Budh Marg, Patna. The aforesaid plot was owned by M/S Muzaffarpur Properties Private Limited (petitioner in C. W. J. C. No. 4283/94). The property was got valued by a registered valuer approved by the Government on 15th May, 1989, and according to the valuation report of the valuer, the property was worth Rs. 17,52000/-. By an agreement for sale exocuted on 19th May, 1989, the aforesaid owner entered into on agreement in writing for the sale of the aforesaid property for a consideration of Rs.

21,00000/-. The petitioner in C. W. J. C. No. 6734/94 agreed to purchase the property for the said consideration. A sum of Rs. 15,00000/- was paid way of advance, and it was agreed that the balance sum of Rs. 6,00000/- will be paid at the time of registration. Subsequently, by another agreement dated 21.5.1989 possession was handed over to the vendee since major part of the amount had been paid. It is not in dispute that Chapter XX-C of the Income Tax Act became operative in Patna with effect from 1.6.1989-vide Notification No. so 339-E dated 8th May, 1989. The deed which had been presented before the registering authority even before chapter XX-C of the Act came into force in Patna, has not registered by the Sub-Registrar, Patna, who took an objection that the petitioner was required to obtain clearance certificate from the concerned authority under the provisions of Chapter XX-C of the Income Tax Act. The petitioner states that though Chapter XX-C of the Act did not apply to the transactionin questions which was entered into before the aferesaid chapter became applicable to Patna, the petitioner in good faith applied for grant of necessary permission by filling up form no. 37-1 as required and prescribed under section 269-UC of the Act. It is not disputed that though the form was filled up on 28.6.89, it was filed on 4th September, 1989. It is more's case that the form was not filled up in the manner prescribed under the Act.

3. On 17.11.1989 the first pre-emptive purchase order was passed by the competent authority. The said order was challenged by the petitioner by filling a writ petition being C. W. J. C. No.10016/89. In the aforesaid writ petition this court granted an order of stay.

4. The provisions of Chapter XX-C of the Income-Tax Act were challanged before the Supreme Court in *C. B. Gautam* Vs. *Union of India and others*, and the Supreme Court by its Judgment, reported in 199 I. T. R. 531 upheld the validity of the provisions except the provision relating to vesting in the Government free from all encumbrances". The Court held that the requirement of a reasonable opportunity being given to the concerned parties, particularly the intending purchaser and the intending saler must be read into the provision of Chapter XX-C. That the time frame within which the order for compulsory purchase had to be made though fairly tight, was not such as precluded a reasonable opportunity of being heard or to show cause being given. The court took the view that the provisions are intended to be used only in cases where, an agreement to sell a movable property in urban area to which the provisions of that Chapter apply, there was significant under valuation of the property by 15 percent or mere if the appropriate authority was satisfied that the apparent consideration shown in the agreement for sale was less than the market value by 15 percent, or more, it could draw a presumption that this under-valuation had been done with a view to evading tax. Such a presumption, however, was rebuttable and the intending seller or purchaser could lead evidence to rebut it. The judgment of the Supreme Court in the writ petition was delivered on Novermber 17, 1992.

The Union of India moved an application for clarifications and directions with a view to obviating certain difficulties that it envisaged in applying the principles laid down in the main judgment of the Supreme Court dated 17th November, 1992. In

the main judgment the court had noticed that if the original time frame prescribed in Chapter XX-C was rigidly applied, it would not be possible for the appropriate authority concerned to pass an order under section 269-UD (1) at all in respect of the property in question. The court, therefore, held that in order to avoid that situation, and yet to ensure that no injutice is caused to the petitioner, the statemett in Form 37-1 shall be treated as if it were submitted on the date of signing of the judgment i. e., 17.11.1992. The clarification was sought by Union of India in respect of other pending proceedings. The clarification was granted by the Supreme Court in the following terms.

"We, accordingly, clarify by this supplemental direction to be read as part of the judgment that, in respect of cases other than that of the patitioner, C.B. Gautam, the period of two months referred to in section 269-UD (1) shall be reckoned with reference to the date of disposal of each of such pending matters either before this court or before the High Courts, as the case may be, where, however, the stay order inhibiting the authorities from taking further proceedings are vacated, the period roferred to in the said section 269-UD (1) shall be reckoned with reference to the date of such vacating of the stay orders. This clarification and further direction shall be supplemental to and be treated as part of the main judgement.

The second clarification sought is in respect of matters pending before the authorities and which, though not agitated in courts of law, are pending at various stage before the authorities in all such cases. We direct that form No. 37-1 shall be deemed to have been filed as on the date of the judgment of this

Court dated November 17, 1992, for purposes of completion of proceeding in terms of section 269-UD (1). This further direction shall also be a part of the main judgment."

5. The writ petition filed by the petitioner before this Court was disposed of by order dated 7.4.1993 in the following terms;

"We have heard counsel for the parties and they are agreed that the questions now stands settled by a judgment of the Suprme Court in *C. B. Gautam* Vs. *Union of India*, (1) reported in 199 I. T. R. 530. We. accordingly, direction the authorise to act in accordance with the direction contained in the aforesaid judgment and to take further steps in accordance with law. Since the petition stands disposed of so far as this Court is concenad all interim orders stand vacated and it is open to the authorities to act in accordance with law, as clarified by the Supreme Court in the aforesaid judgment.

This writ application law is allowed to the extent indicated above."

6. Since the writ patition was disposed of by the High Court by its order dated 27.4.1993, and all interim orders stood vacated with a direction to the respondents to act in accordance with the judgment of the Supreme Court, it was open to the authorities to pass an order of pre-emptive purchase within a poriod of two months referred to in section 269-UD (1) reckoning the date of disposal of the writ petition as the date on which the statement under form 37-I filed.

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(1) 199 I. T. R. 530.

7. I may only notice that a second proviso was added to section 269-UD by Finance Act of 1993 with effect from 1st June, 1993, in respect of statements in form 37-I filed on or after 1st june, 1993, the period for passing of the order was increased from two months to three another. The amendnent is obviously not applicable to the instant case, because the statement in form 37-1 was filed on 4th September, 1989 and even the deemed date of filing of such statement by reason of the order of the Supreme Court was the date of disposal of the writ petition by the High Court, namely, 27.1.93 i.e. much before 1st june, 1993.

8. It is not in dispute that thereafter a second pre-emptive purchase order was passed by the competent authority on 15.5.1993. According to the petitioners, this order was again passed in violation of principles of natural justice. It is not necessary for to go into this questions because the petitioner challanged the second purchase order by filling a writ petition before this Court being C. W. J. C. No. 5971 of 1993 which was disposed of by this Court by judgment and order dated 5th April, 1994. This Court was pleased to quash the order as it found that the same had been passed in violation of principles of natural justice. This Court held;

" For the purpose of disposal of these three cases it is sufficient to state that it is agreed before us by the counsel for the revenue that the order dated 15.6.93 was passed without hearing the petitioners. It cannot be doubted that the order dated 15.6.93 visits the potitioners with civil consequences. Before rendering the order the petitioners should have been

heard. That is the minimal requirement. That is necessary to conform to "fairness in actions". Since it is common ground before us that the petitioners were not heard by the appropriate authority before passing the order dated 15.6.93, we are candidly of the view that the order in questions is infirm. We quash the said order in all the three cases. It is, however, open to the revenue to proceed further in the matter, in accordance with law."

This Court did not go into other grounds urged in the writ petitions since the order stood quashed on the ground of violation of principles of natural justice.

9. After the writ petition filed by the petitioner was allowed by this Court a show cause notice was issued by the appropriate authority on 16.4.1994 calling upon the petitioner to appear and show cause as to why an order under section 269-UD (1) for the property in questions be not passed. The letter addressed to the petitioner mentions that the Hon'ble Patna High Court-Vide its order dated 5.4.1994 while setting aside the order dated 15.6.1993 passed under section 269-UD (1) had "directed that the appropriate authority may pass a fresh order according to law. The petitioner filled his show cause and submitted that the notice had been issued on wrong assumption that the High Court had directed the appropriate authrority by remanding the matter to it to pass a fresh order in accordance which law. It was submitted that since the period of two months had lapsed, the appropriate authority had no jurisdiction to proceed in the matter any further. The notice dated 12.4.1994. has been annexed as Annexure-8 to the writ petition from which it apears that 27th April 1994 was fixed as the date for filing of written submissions. By

a subsequent latter dated 8th June, 1994 (Annexure-10) the date for filling of written statement was extended to 6th July, 1994 and the petitioner was also required to appear before the appropriate authority at Lucknow on the same date. Therefore the impugned purchase order dated 26.7.94 was passed by the appropriate authority which is Annexure-11 to the writ petition. Learned counsel for the petitioner submitted that in terms of the judgment of the supreme Court in *C.D.Gautam's* case (supra) the appropriate authority could pass an order for pre-empting purchase within two months from the end of the month in which the statement referred to in section 269-UC in respect of the property in question was received by the appropriate authority, by reckoning the date of disposal of the writ petition as the date on which the said statement was filed as required by section 269-UC. So calculated the appropriate authority could pass an order on or before 30th June, 1993. The appropriate authority indeed purported to pass such an order on 15th June, 1993. That order was quashed by this Court on the ground that the same had been passed in violation on of principles of natural justice. According to the petitioner, the authority could pass another order for pre-emtive purchase after lapse of the aforesaid period even if the order passed by it had been struck down by the court on the ground of violation of principles of natural justice. It was contended before us that the High Court while quashing the order did not remand the matter back to the appropriated authority, nor did it direct the appropriate authority to pass a fresh order. It only observed that it was open to the authorities to proceed further in the matter in accordance with law. The High Court by its order neither conferred a right on the appropriate

authority nor did it intend to curtail the right of the petitioner which, had accrued to it by reason of the fact that a valid order had not been passed by the appropriate authority within the period proscribed by law. On the other hand, counsel for the Revenue contended that by reason of the order of the High Court the appropriate authority was directed to pass a fresh order in accordance with law, and therefore the provision with regard to limitation for exercise of such power, did not apply in the instant case.

10. Counsel for the petitioner relied upon two decisions in support of the proposition that if the authority failed to pass an order for pre-emptive purchase within the period prescribed by law, it could not pass such an order after expiry of the period so prescribed. If an order of purchase was not passed, then it was imperative and obligatory on the appropriate authority to issue the certitficate under section 269- UL (3). In the case of *Tanvi Trading* and Credits V. Appropriate Authority (1) the appropriate authority did not pass an order of pre-emptive purchase, as it was of the view that the agreement between the parties was not a proper agreement. The Court held that in exercise of its power to decide whether to purchase the property, the authority had other implied powers to make that power effective. It would be entitled to see materials and documents like document of title, agreements etc. in order to satisfy itself whether the apparent consideration is proper or not in order to come to the conclusion whether to purchase the property or not. If it had reservations or doubts with regard to the legality of the proposed sale, it was

(1) 188 I. T. R. 623

open to it not to exercise its right to purchase the property. Section 269- UD however, did not centemplate the rejection of any statement by the appropriate authority. There was no provision in Chapter XX-C of the Income Tax Act, 1961, which enabled the appropriate authority to create a situation where by the Government neither decided to purchase the property nor issue a certificate under section 269-UD (3). If the appropriate authority chose not to purchase the property in questions, then section 269-UD did not contemplate the passing of orders simliar to those passed by the appropriate authority in that case. The Court thereafter proceeded to issue a writ of mandamus directing the appropriate authority to Issue a no-objection certificate in terms of section 269-UD (3) to the petitioners within four weeks. It may be noticed that the aferosaid decision of Delhi High Court was taken in appeal to the Supreme Court and the Supreme Court by its Judgment, reported in 191 I. T. R. 307 (*Appropriate Auhtority* v. *Tanvi Trading and* credits P. Ltd (1) dismissed the petition holding that under the scheme of the legislation only two alternatives were open firstly, the Union of India through the appropriate authority could buy the property or secondly in the event of its decision not no buy, it has to issue a no-objection certificate leving it open to the parties to deal with the preperty.

11. The Bombay High Court in the case of *Sonal Gum* Industries V. C. I. T. Gujrat (2) took the same view. In that case the appropriate authority treated to be invalid . Form No. 37-1 filed by the transferor and the transferes to be invalid since it

(1) 191 I. T. R. 307.
(2) 197 I. T. R. 609.

was of the opinion that the petitioners had no transferable intesest in the property in question. The Court held that an enquiry by the appropriate authority into the right, title and interest to the property in question was uncalled for and the appropriate authority had no jurisdiction to enter into that arena. The appropriate authority may either decide that the property should be purchased by the Central Government or issue no objection certificate. It was not permissible to examine the issue of title to the property and then hold that form No. 37-I filed by the transferor and the transferee was not valid. The High Court therefore proceeded to issue a direction to the appropriate authority to issue a no objection certificate to transferee the property within a period of four weeks.

11. These authorities do support the proposition urged on behalf of the petitioner that if the appropriate authority fails to exercise its power to purchase the property in question within the period prescribed by law, it had no option but to issue the no objection certificate in favour of the transferor and the transferee as a natural conseqence.

12. Reliance was placed-upon a decision of a Delhi High Court in *Mrs. Satwant Narang.* v. *Appropriate Authority* (1) wherein a submission was urged on benalf of the respondents that in case it was held that the impugned order of the appropriate authority was not on sound footing, it be given an opportunity to reconsider the statement of the petitioner filed in form 37-1 of the Act, and to make up its mind, if the Central Government would like to purchase the property on the apparent consideration in the agreement or not. Negativing the submission the

(1) (1991) 188 I. T. R. 656.

court held that the Act lays down a very tight schedule for the appropriate authority to make up its mind to purchase or not to purchase the property. There is no provision for extension of time. The respondents had missed the bus and had passed the impugned order rejecting the permission on quite irrelevant consideration. In such circumstances, the Court would not extend the period and frame a fresh time schedule for the Department, specially when the statute did not give any such power to the court. The court observed that there was no worth while explanation as to why at that point of time the Department wanted to purchase the property, except the only consideration that the prices had gone up. There was no equity in favour of allowing the respondents another opportunity to make up its mind.

The same view was reiterated by the Calcutta High Court in *The Moi Engineraing Ltd* v. *Appropriate Authority* (1).

13. Counsel for the Union of India placed reliance upon a judgment of Madras High Court in *Mangilal Jain* V. *Cottector of Custons, Madres ors* (2) and contended that once the initial order required to be passed by the statute is passed within the period prescribed, any subsequent order that may be passed pursuant to the directions given by the High Court in exercise of its writ jurisdiction or to any order legally passed by an authority empowered under the Act to do so, such an order would not be subject to the limitation prescribed by law. In the aforesaid case an order was passed under section 132 (4) of the Income Tax Act by the Income Tax Officer seizing an amount from the petitioner.

(1) 198 I. T. R. 270. (2) 133 I. T. R. 762.

It was not in dispute that the aforesaid order had been passed with in the period of 90 days prescribed by law after seizure. The High Court on an appreciation of the material placed before it came to the conclusion that the Department had failed to give notice to the petitioner before passing the order under section 132(5) of the Income Tax Act, 1961, and that such an order passed without any notice to the petitioner was in violation of the principles of natural Justice and had to be set aside. A specific plea was raised before the court that in these circumstances the court should not pass any order granting the Deprtment another opportunity of passing an order after complying with the requiremnts of natural justice, and that the petitioner was entitled to the relief of the writ of mandanus for the release of the money. The Court after considering the authorities on the subject negatived the plea of the petitioner, but considered the scheme of section 132 of the Act and came to the conclusion that even under the Act, a person aggrieved by an order passed under section 132 (5) of the Act, could approach the notified authority under section 132 (11) within 30 days and that authority could direct the Income Tax Officer to Pass a fresh order. Relying upon the Judgment of the Supreme Court in *Director of Inspection of Income Tax* v. *Pooran Mall and ors* (1) the court held that if the first order was made within the period of time fixed under section 132(5), there after if any direction was given under section 132 (12) or by a court in writ preceedings, the order made in pursuance of such a direction would not be subject to the limitations prescribed under section 132(5). Any other consequence would take away the right made available to persons

(1) (1974) I. T. R. 390 (S. C.)

aggrieved by the order to prefer objections under section 132 (11). It will also make any order that may be passed under section 132 (12) ineffective. Further, the court which exercises its powers under Article 226 of the Constituion, has got inherent powers to make all such orders as are necessary for doing complete justice to the parties. Having considered the matter in the light of the Supreme Court docisions the High Court passed an order quashing the order passed by the Income Tax Officer under action 132 (5) of the Act, but directed him to pass a fresh order under section 132 (5) after giving the petitioner a reasonable opportunity of being heard.

13. Having regard to the law as laid down by the Supreme Court in *Puranmal's* case (supra) it must be held that where an initial order is passed within the period of limitation prescribed by law, any subseqent order that may be passed pursuant to a direction or order in the appeal, revision or by other authority in exercise of statutory power vested in it,or a direction passed by the High Court in exercise of writ jurisdiction directing the authority to pass a fresh order, such subsequent order will not be subject to the limitation presecribed for passing the initial order. There are sound reasons for the proposition. Firstly, where the law itself provides for an appellate or revisional forum or provides or vests in an authority a statutory power to set aside or modify the order passed by a competent authority, no finality attaches to the order as the law itself envisages a scheme where in, by the very nature of things, all subsequent orders passed pursuant to the exercise of statutory power by the authorities or writ jurisdiction by the High Court, cannot be subject to the same law of limitation as is prescribed for the initial order. In

such cases it must be held that the law itself provides, by providing such a scheme, that the provision with regard to limitation will not apply to such subsequnt orders passed. What is, however, of significance is the fact that the subsequent order must be passed pursuant to a direction issued by such authority or court.

14. There is another reason why when such a direction is made by the appellate, revisional or other authority under the statute or by the High Court in exercise of its writ jurisdiction, the period of limitation prescribed for passing the initial order will not apply to such subsequent orders passed in pursuance of the direction issued by an authority or court. This is justified on the principle of binding effect of judgments. Where an order is passed in a duly constituted proceeding against a party, and that order attains finality on account of not being appealed against or not being set aside in any other proceeding, the order binds the parties to the lis. The binding nature of the order is not on account of its being right or wrong, but on the principle that once an issue has been adjudicated between the parties before the appropriate forum in a valid manner, the parties cannot be permitted to avoid the consequences that flow from such adjudication the after the under attains fimalily.

15. Reliance was placed upon the judgment of Andhra Pradesh High Court, reported in 158 I. T. R. 662 (*Mohammadi Begum* v. *C. I. T.* (*A.P.*) (1). That was also a case in which the original order of assessment was revised by the Commissioner in exercise of statutory power conferred upon him under section

(1) 158 I. T. R. 662

264 (3) of the Income Tax Act. The revisional order directed the Income Tax Officer to pass a fresh order in accordance with law, and such order was passed in pursuance of such direction. It was, therefore, held that in view of the fact that the original orders of assessment were not void and a fresh assessment was made pursuant to a positive direction given by the Commissioner under section on 153 (3) of the Income Tax Act, the assesment made pursuant to such a direction was a fresh assessment and was, therefore, not barred by limitation.

16. Counsel for the Revenue them referred to the judgment of the Supreme Court in *Supertintendent of Central Excise* Vs. *Pratap Ray* (1). That was again a case where the Assistant Collector of Customs passed an order seizing the watches and ordering their confiscation. A penalty was also levied. The respondents carried an appeal to the appellate Collector under section 128 of the Customs Act. The appeal was allowed by the appellate Collector, who passed an order vacating the order of adjudication passed by the Assistant Collector, without prejudice. The Supreme Court held that the appellate Collector had not set aside or vacated the order of Assistant Collector on merit, but vacated it only on technical infirmity, namely, violation of the rules of natural justice. That is why the appellate Collector advisedly used the words "without prejudice" in his order. It was further found that the appellate Collector did not intend to bar fresh adjudicatory proceeding, provided they were conducted according to the principles of natural justice, because in that event the appellate authority should have passed a conseqential

(1) (1978) A. I. R. (S. C.) 1244.

order for refund of the amount of penalty and release of the property confiscated.

17. As would be noticed from the facts of the case, this was again a case in which the order of the Assistant Collector of Customs was set aside by the appellate Collector in exercise of Jurisdiction vested in him, under the Act.

18. Lastly reliance was placed upon a judgment of the Punjab and Haryana High Court, reported in 203 T. I. R. 919 (*Commissioner of Wealth Tax* vs. *Smt. Rajlaxmi*). (1) That was again a case of levy of penalty under the Wealth Tax Act, 1957. It was held that though section 18 (5) (b) of the Wealth Tax Act provided that penalty can be imposed within two years from the end of the financial year in which the proceeding in course of which action for imposition of penalty has been initiated is complete, the prescribed period of limitation will not apply if a final order imposing penalty is passed after the expiry of the said period, but pursuant to an order passed by the highest authority in the hierarchy of appellate authorities, and where the matter is brought before the court then after the orders passed by the court are complied with. It was, therefore, held that if the initial order was passed by the competent authority within the period prescribed by law, fresh orders passed by the Wealth Tax Officer in pursuance of the direction of the appellate Assistant Commissioner were not barred by limitation.

19. Having regard to the authorities cited at the Bar it cannot be disputed that where a period of limitation is prescribed for passing of an order by the competent authority, but that order

(1) 203 J. T. R. 919.

is expressly made subject to any order that may be passed in appeal or revision or subject to any order that may be passed by any higher authority, then the fresh order that may be passed pursuant to order or directions issued by such appellate, revisional or other authority will not attract the bar of limitation, provided the initial order was passed within the period of limitation prescribed by law. That is because the Act itself contemplates an appeallate or revisional forum with power to set aside or modify the order passed by a competent authority. The law itself envisages a scheme where in by the very nature of things all subsequent orders passed pursuant to the exercise of statutory power by the authorities or an order passed by the High Court or the Supreme Court in exercise of writ jurisdiction, cannot be subject to the same law of limitation as is prescribed for the initial order. In other words, the law prescribes that the initial order must be passed within the period of limitation prescribed by law, but the law of limitation will not apply to any subsequent order that may be passed pursuant to any direction or order by the appellate or revisional authority or by the High Court or by the Supreme Court in exercise of its writ jurisdiction.

20. So far as the instant case is concerned, it is not in dispute that there is no provision for appeal or revision against an order of pre-empive purchase passed under section 269-UD (1) of the Act. Obviously, the principles which apply to orders that are subject to appeallate or revisional jurisdiction will not apply to such an order passed under section269-UD (1) of the Act. However, that principle will be applicable if it is shown that the order passed was pursuant to a direction or order of the High Court or the Supreme Court in exercise of writ jurisdiction

because in the absence of a provision for appeal or revision, the orders may be challenged before the High Court or the Supreme Court in writ jurisdiction. The case of the Revenue as would appear from the show cause notice issued by the appropriate authority is that the High Court had directed that "the appropriate authority may pass a fresh order according to law." Obviously, therefore, the Revenue relies upon the direction of the High Court while disposing of the earlier writ petition to clothe the competent authority with the power to pass a fresh order despite the expiry of the period of limitation. But for such a direction by the High Court, the prescribed authority could not pass an order of pre-emptive purchase after the expiry of the period of limitation.

21. Having regard to the provisions of the Act it cannot be disputed that failure on the part of the prescribed authority to make an order for pre-emptive purchase under section 269-UD (1) within the period of limitation prescribed by law results in accrual of a right in favour of the vendor and the vendee to dispose of the property as they like. The authorities cited at the Bar also in clear terms lay down that in such an event, the prescribed authority is bound to issue no objection certificate enabling the parties concernad to effectuate the sale of the property in question. It cannot be disputed that in exercise of writ jurisdiction the courts can pass an order in the interest of justice even if that involves defeating the right which may have accrued to the writ petitioner. Where such a right is defeated by an order expressed in clear terms, no difficulty arises. In the instant case, if the order of the High Court disposing of the writ petition in express terms directed the prescribed authority to

pass a fresh order under section 269-UD (1) after complying with the principles of natural justice, I would have no hesitation in holding that by reason of such an order the prescribed authority was empowered to pass a fresh order of pre-emptive purchase notwithstanding the expiry of the period of limitation. However, the difficulty arises because all that the High Court observed after quashing the order was as follows; "It is, however, open to the Revenue to proceed further in the matter, in accordance with law". Counsel for the petitioners urged that after the order was quashad, the prescribed authority could proceed further in the matter in accordance with law by issuing a no-objection certificate. The Court did not consider the question as to whether in the facts and circumstances of the case, a right having accrued in favour of the petitioners, that should be defeated in the interest of justice. It was submitted that in the case, reported in 133 I. T. R. 762 there was a clear direction by the High Court directing the Income Tax Officer to pass a fresh order under section 133 (5) of the Act after giving the petitioner a reasonable opportunity of being heard. In that case a specific plea was raised before the Court that it should not grant the Department another opportunity of passing an order after complying with the requirement of natural justice. The plea was considered by the court and having regard to all the facts and circumstances of the case, in exercise of its inherent power to make all such orders as are necessary for doing complete justice to the parties, the High Court passed an express direction directing the Income Tax Officer to pass a fresh order. It was also submitted that in the absence of express direction by the court authorising the prescribed authority to pass a fresh order, the prescribed authority

is denuded of its power to pass such an order after the expiry of the period of limitation. That is why, it is contended, it was necessary for the Department of seek a clarification from the Supreme Court in *C. B. Gautam's* case (supra), because otherwise it would not have been possible for the prescribed authority to pass orders under section 269-UD (1) in pending proceedings where the period of limitation had run out.

22. There appears to be substance in the contention that the court will not readily infer that a right which has accrued in favour of a citizen has been defeated by an order of the Court passed in exercise of writ jurisdiction, unless the direction in express words or by necessary implication leads to that conclusion. The power to pass a fresh order is derived from the direction of the court. If the order of the court is only to this effect that the presscribed authority may proceed in accordance with law, it cannot be read as a direction to pass a fresh order, if the same is not permitted by law otherwise. The direction of the High Court was to the effect that it was open to the Revenue to proceed further in the matter in accordance with law. There is no express direction that a fresh order may be passed by the prescribed authority despite the expiry of the period of limitation, and all that is said is that it will be open to the Revenue to proceed further in the matter in accordance with law.Obviously, therefore, the Revenue could proceed further in the matter only if the law permitted it to do so. The prescribed authority has proceeded on the basis that it is the direction of the High Court which empowered him to pass a fresh order, but a reading of the order leaves no room for doubt that the prescribed authority could proceed further only in accordance with law. So far as the provisions of the the Act are concerned, it is not disputed that but for the direction of the High Court, a fresh order of pre-emptive

purchae could not be passed after the expiry of the period prescribed for passing such an order. I am, therefore, of the view that the order passed by the High Court did not by its own force authorise the prescribed authority to pass a fresh order of pre-emptive purchase despite the expiry of the period of limitation prescribed by law. It authorised the prescribed authority only to proceed further in a manner permitted by law. The law did not permit the prescribed authority to pass an order after the expiry of the period of limitation prescribed under the Act and. therefore, he could not pass a fresh order. It is true that the High Court in exercise of its writ jurisdiction may pass all such orders as are necessary for doing complete justice to the parties. Equitable consideration are, therefore, significant in the exercise of writ jurisdiction. In the instant case, despite the judgment of the Supreme Court in *C. B. Gautam's* case (supra) laying down the law in clear terms, and despite the order of the High Court directing the prescribed authority to proceed further in accordance with the judgment of the Superme Court in *C. B. Gautam's* case, the prescribed authority proceeded to pass an order without complying with the principles of natural justice. Having regard to these facts, could there be any justifiction for the High Court to grant a further opportunity to the prescribed authority to pass a fresh order. Counsel for the petitioner submitted that the order passed by the prescribed authority was in defiance of the order of the Supreme Court which had given another opportunity to the prescribed authority to pass order in accordance with law within the period of limitation. If despite all these the prescribed authority chose to act in defiance of law, the petitioners could well have pleaded before the High Court that another opportunity to pass a fresh order should not be given to the prescribed authority. Since this issue was not expressly

raised in the earlier proceeding and since such an express order was not passed by the High Court, there was no occeassion for the petitioners to urge these submissions before the High Court in the earlier proceeding. If such an order had been prayed for on behalf of the prescribed authority, the petitioners could well have contested the matter and satisfied the Court that in the facts and circumstances of these cases a direction on for passing a fresh order under section 269-UD—1 should not be made. It was, therefore, submitted and in my view rightly, that in the absence of express words in the order, the Court should not readily draw an inference that the High Court by its order intended to defeat the right which had accrued in favour of the petitioners to dispose of the property as they like in the absence of a valid order undersection 269 - UD(1) of the Income Tax Act.

23. I am, therefore, of the view that these writ petitions deserve to be allowed and they are accordingly allowed. The notice dated 12-4-1994 (Annexure-3) issued by the Deputy Commissioner of Income-Tax (Appropropriate authority) and the order passed by him on 26-7-1994 (Annexure-11) are hereby quashed. A writ of mandamus shall issue commanding the approriate authority to issue no objection on certificate within a period of four weeks from today. There shall be no order as to costs.

N.K.Sinha, J. — I agree.

R. D. Applications allowed.

CIVIL WRIT JURISDICTION

Before Choudhary S. N. Mishra, J.

1994

November, 24.

Dr. Indra Shekhar Thakur.

V.

The State of Bihar & others.

Preparation of Panel for appointment as Assistant Professor/ Registrar General Surgery— points under the head teaching experience, publication of journals and having obtained Phd-decree illegally disallowed— legality of.

Where the writ-petitioner's application for appointment to the post of Assistant Professor/Registrar, General Surgery against 1992 panel was rejected;

Held, the petitioner is entitled for the points for teaching experience, publication of journal and having Ph. D. Deeree which have been illegally and arbitrarily refused to him while preparing the provisional list for appointment to the post of Assistant Professor.

Held, further the writ of mandamous be issued directing respondents to re-consider the case of writ petitioner for inclusion of his name in the Panel.

Ashok Kumar Sharma and ors. V. *Chandra Shekhar and ors* ...(1) relied on.

S. K. Verma V. *State of Bihar* (2) ... followed

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* Civil Writ Jurisdiction Case No. 3459 of 1994, In the matter of an application under Articles 226 and 227 of the Constitution of India.

(1) (1993) A. I. R. (S. C.) Supply Vol. 2 page 611.

(2) (1992) 1 P. L. J. R. 657.

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 judgement of Choudhary S. N. Mishra, J,

Mr. P.K.Shahi, Advocate for the petitioner :

Mr. J.P.Karn, S.C. VII

Mr. D.N.Mallik, J.C. to S.C. VII for the State.

Mr. Tej Bahadur Singh, Advocate.

Mr. Anil Kr. Upadhyay, Advocate. for the intervenor.

Mishra, J.

In this writ application the petitioner has prayed for the following reliefs: To issue an appropriete writ/order/direction commanding the respondents to consider the application of the petitioner for appointment to the post os Assistant professor/ Registrar, General Surgery against 1992 panel in accordance with the criteria laid down and notified in the advertisement no. 1927 (Swasth)—105 published in the Patna daily edition of 'Hindustan Times' on 25. 7. 1992 and to command the respondents to allow the petitioner the benefit of adding 12 points for publication of Journal, 2 points for Ph. D.2. additional points for teaching experience as envisaged in the criteria duly notified by the respondents.

2. In order to appreciate the points raised by the respective parties, it is necessary to state some relevant facts. The petitioner passed the M. B. B. S. examination in the year 1981 and secured 65. 70 marks and distinction in Surgery, pharmacology and preventive Social Medicine. After obtaining the M. B. B. S. degree he was appointed as Assistant Civil Surgeon by the

order dated 4. 8. 1993. The petitioner thereafter applied for admission in M. S. General Surgery in any college out side the State of Bihar and after obtaining permission having been granted by the State, the petitioner took admission in M. S. General Surgery in King George Medical College, Lucknow. He worked in Residency scheme in the said college with effect from 17. 8. 1985 to 29. 10. 1987 and as a Residency fellow he rendered teaching works for more than two years. In token of having rendered the teaching work for the aforesaid period, a certificate was granted by the Head of the department, General Surgery, King George Medical College, Lucknow, copy of which has been made Annexure-5 to this writ application. After completing the post graduate courses and the Residency in the aforsaid college at Lucknow, the petitioner jointed the State Health Services which was accepted by the State-respondent vide Memo No.237 (3) dated 18. 3. 1988 with effect from 30. 10. 1987, copy of which has been made Annexure-6 to this writ application. The petitioner worked from 17. 6. 1988 to 27. 8. 1988 as Civil Assistant Surgeon, Primary Health Centre in the district of Madhubani. The petitioner worked as Tutor in the department of pharmacology and also trainee Medical Officer in the department of Anesthesia, D. M. C. H., Darbhanga. Pursuant to the advertisement published in the year 1987, the petitioner was selected and posted as Residence Surgical Officer, department of Surgery, P. M.C. H. on 19. 5. 90 and since then he is working in the said hospital. Before joining the post of Resident Srugical Officer, the petitioner got himself registered for Ph. D. in Surgery in L. N. Mithila University. He completed this course and submitted his

thesis on 1. 11. 1991. His thesis was duly approved both by the External examiners as well as the Internal Examiners on 25. 1. 1992 and 31. 1. 1992 respectively and finally the petitioner was awarded a degree of Ph. D. on 10. 4. 1992. The receipt showing submission of thesis on 1. 11. 1991 is made Annexure-7 to this writ application. Seven research papers of the petitioner were published in Journals of the State and Indian Medical Journal, the datails where of are as follows—

Sl. No.	Name of Research Articles published.	Name of the Journal	Date of acceptance & volume no. of Journal in which published.
I.	Observation on dicectomy	The patna Journal of Medicine.	12. 5. 92 No. 66 (6) 126-127.
II.	Observation on the Surgical Management of Sigmoid Volvalus with special Reference to the single layer serosubmucosal Anastomosis.	—do—	12.5.92 66 (7) 146-147
III.	Typhoid perforation (A clinical study of prognostic Factors)	Indian Medical Journal	7.2.92 Vol. 86 30. 3. 92
IV.	Hydrated Cyst	—do—	7. 2. 92 Vol. 86 4. 4. 92.

V. Malignant Lymphoma the chest wall.	—do	7.2.92 / Vol. 86 4.4.92.
VI Chycolymphatic Masentric Cyst children	—do—	7. 2. 92 / Vol. 86 5. 5. 92
VII. Observation on Serum copper levels in Malignant condition of the body.	—do—	7.2.92 / Vol. 86 6. 6. 92

The aforesaid facts have not been denied either by the State-respondent or by the intervenor.

3. The State-respondent through advertisement invited application for preparing a panel for appointment to the various teaching posts in the different Medical colleges of the State including Assistant professor/Registrar, General Surgery, a copy of the aforesaid advertisement is made Annexure-1 to this writ application. Pursuant to the said advertisement/notice (Annexure-1) the petitioner applied for the post aforesaid claiming the following points in terms of Annexure-1—

M. B. B. S.— 65·70% and above—	4 points.
Subject paper (General Surgery) 75·01% & above—	5 points.
Honours (General Surgery, pharmacology & P.S.M.)—	4 points.
Rural Service—	3 points.
Teaching experience—	3 points.
Post Graduation (M. S. General Surgery and Ph. D. (Surgery)—	6 points.
publication of Journal—	12 points.
	37 points.

4.It may be mentioned here that the advertisement/ notice contained in Annexure-1 was subsequently amended by publication in the news paper dated 30. 8. 92, copy of which has been made Annexure-12 to the writ application, whereby it has been provided that the candidates should possess three years teaching experience in the subject concerned for the post of Assistant professor. The applications received pursuant to the advertisement (Annexure-1) were processed in the department of health and the provisional panel of the applicants for the post of Assistant professor and Registrar was circulated for the purpose of inviting objections. The petitioner's name was not included as eligible candidates in the panel for the post of Assistant professor. However, in the provisional panel of Registrar the petitioner's name was at serial no. 10 allowing total 21 points to him. Copy of the provisional panel of Assistant professor and Registrar, General Surgery have been made Annexure-8 & 9 to this writ application. The petitioner, accordingly, filed two separate objections, one against exclusion of the name in the panel of Assistant professor and other objection regarding not allowing him the points for his teaching experience, Ph. D. degree for the posts of Registrar, General Surgery. The representations filed by the petitioner (Annexures 10 and 11) were rejected whereby the petitioner was not allowed points for his teaching experience in King Gorge Medical College, Lucknow, Ph.D degree and publication of journals. The said representations filed by the petitioner (Annexures 10 & 11), as stated above, were finally rejected by the Minister of Incharge of the department by his order dated 23. 3. 94. (Annexures 13)

5.Counter affidavit has been filed on behalf on behalf of the respondent State wherein, inter alia, it is stated that the petitioner did never submit his claim in the manner in which he made prayer in the present writ application. It is further stated that the teaching experience acquired by the petitioner at King George Medical College, Lucknow, is not permissible to be counted in terms of the critaria laid down by the State Government for the post of Assistant professor. It is further stated that the petitioner was allowed the benefit of teaching experience acquired by him during the course of P. G. studies at Lucknow in the panel of 1987 and 1991. It is stated that some of the candidates were allowed the benefit of points on the basis of qualification and other achievements acquired by them after cut off date. It has also been stated that another doctor one Dr. Vinay Prasad was allowed teaching experience acquired by him outside the state during the P. G. studies. As regards points for publication of research papers in the journals, it is stated that the petitioner is not eligible for publication as principal author, were published after cut off date. Similarly it is stated that the petitioner is not entitled for any additional points for having Ph. D. degree which was acquired after cut off date.

6.On a Prayer made by the intervenor by filling a petition, this Court by its order dated 6. 5. 94 has directed the intervenor to be impleded as party resopondent in this case and, accordingly, he has filed counter affi. avit almost on the same line as of State-respondent. The apprehension of the intervenor is that since his name finds place at serial no. 1 in the provisional panel for the post of Assistant professor having allowed 36 points in total, his position may be reduced if the petitioner's prayer is

allowed and on that apprehension he has filed the intervenor application.

7.The petitioner filed reply to the counter affidavit both by the State as well as the intervenor disputing the averment made in those counter affidavits which are contrary to the stand taken by the petitioner in the main writ application and further it is stated that in terms of the recommendation of the Medical Council of India the teaching experience acquired by the petitioner in the King George Medical College, Lucknow, is to be counted in terms of the critaria laid down by the Medical Council of India. The extract of recommendation of the Medical Council of India is made Annexure-15 to the reply to the counter affidavit, which reads as follows—

"The teaching experience of postgraduate students who are (i) holding teaching appointments, or (2) holding beds under their charge; or (3) doing tutorial work, may be considered as teaching experience for purposes of appointment of Lecturers in Medical Colleges." Lecturers are equivalent to Assistant professors.

In short it is stated that according to the terms of the advertisement (Annexure-1) although for the post of Registrar, no point is admissible for publication of journal whereas such point is available only for being considered for the posts of Assistant professor. The petitioner having applied for both the posts, is therefore, entitled for total 25 points for the post of Registrar and 37 points for the post of Assistant Professor.

8.On the basis of the aforesaid pleadings learned counsel for the petitioner has submitted that admittedly the petitioner

acquired such required teaching experience in course of P.G. studies as well as residency scheme, has to be counted for the purpose of preparing panel for the appointment of Assistant professor, in terms of the advertisement.(Annexure-1) as also in terms of the regulation framed by the Medical Council of India. Learned counsel submits, in course of argument, that it is not the requirement in terms of Annexure-1 that the teaching experience must be acquired while posted against teaching based cadre. Such teaching experience acquired in any recognised Medical colleges will have to be taken into consideration for the purpose of such appointment. The King George Medical College, Lucknow, is one of the recognised medical college where the petitioner has rendered teaching experience. In support of his contention learned counsel has relied upon a Division Bench decision of this court in a case *Dr. S. K. Verma vs. State of Bihar* (1) reported in 1992 (1) PLJR 657, wherein their Lordships after taking into consideration the law laid down in the case of *Dr. Ashim Kr. Bose* vs. *Union of India and others* (2) reported in 1983 SC 509, has held that there is no difference as to whether the teaching experience acquired on regular appointment or in any manner in a teaching hospital, actual teaching experience acquired, in such teaching hospital has to be taken into consideration for computing actual teaching experience acquired by the candidate.

9.Learned counsel appearing on behalf of the State has submitted on the basis of the pleadings aforesaid that the

(1) (1992) I. P. L. J. R. 657.

(2) 1983 S. C. 509.

teaching experience acquired by the petitioner from the King George Medical College, Lucknow cannot be counted for the purpose of preparing the panel for appointment on the post of Assistant professor, as the same is not in a accordance with the Rules framed by the State Government. He has relied upon the various clauses of the advertisement (Annexure-1) and similarly he submits that the petitioner is also not entitled any point for publication of his research papers in the journals as well as the Ph.D. degree which were published and obtained after cut off dates.

10.The learned consel for the intervenor, on the other hand, submitted that the petitioner is not entitled for the additional points as he was not appointed against a regular teaching post, inasmuch as in Bihar such points are allowed only if he/she holds regular teaching post.

11.The question that falls for consideration is whether the petitioner is entitled for points for the teaching experience with he has gained at Lucknow Medical College. In this connection it may also be mentioned here that the petitioner was an applicant for the post of Residency Surgical Officer against 1987 panel wherein he was allowed two pointe against the teaching experience and similarly in the year 1991 also he was the applicant for the post of Registrar, General surgery wherein he was allowed two points against teaching experience. From the pleadings it appears that in a similar situation the other doctors were allowed such benefits who obtained the teaching experience in a similar situation outside the State of Bihar.

12. After taking into consideration all the submissions

advanced on behalf of the petitioner as well as the State counsel and intervenor and also upon relying the aforesaid decision, I am of the definite view that the teaching experience gained by the petitioner in King George Medical College, Lucknow is to be counted for the purpose of consideration of appointment on the post of Assistant Professor. Having heard the parties and the material available on the record, it is difficult to support the action taken by the respondents in holding that the teaching experience gained by the petitioner in King George Medical College, Lucknow cannot be taken into consideration. This view of mine is also supported by the decision of this Court in the case of *Dr. S. K. Verma* vs. *State of Bihar* (supra).

Publication of research papers in journals— 12 points.

Now coming to the publication of seven research papers in journals of the State and Indian Medical Journal, it in submitted on behalf of the counsel for the petitioner that the petitioner made valuable contribution and his seven research papers were published in journals of the State as well as in the Indian Medical Journal, details whereof have been already mentioned in the aforementioned paragraphs. Learned counsel, accordinaly, submits that the petitioner is entitled for 12 points in terms of the critaria laid down in Annexure-1 to the application. As against this, the learned counsel for the intervenor submits that claim for 12 points for publication of research papers in the journal is misconceived inasmuch as the papers published after cut off date are not to be taken into consideration for preparing the panel for appointment on the post of Assistant professor. In order to appreciate the points raised by the parties it is relevant to mention the relevant dates for the purpose of

deciding the points in issue. There are two cut off dates mentioned in the advertisement, one is for filing application and other for the qualification, namely, 31. 8. 92 is the date for making application for appointment on the post as Assistant professor and the other cut off date 31. 1. 92 was date for fixing the qualification of the candidates. It is submitted that before the date of filing of the application in terms of Annexure-1 the research papers authored by the petitioner were accepted for publication have been mentioned in paragraph-15 of the petition, which go show that all those papers accepted before the date of filing of the application, as submitted by the learned counsel for the petitioner. The learned counsel on behalf of the State as well as the intevenor submits that since the research papers were not published before the date fixed for accepting the qualifications of the candidates, the benefits for publication of research paper cannot be allowed to the petitioner. In support of his contention learned counsel refers to clause 15 of Annexure-1 and submits that the cut off date fixed for accepting the qualification of the candidates is 31. 1. 92, beyond that any qualification acquired by the candidates could not be taken into consideration. Learned counsel for the petitioner, on the other hand, relied upon clause 3 (ga) of Annexure-1. It is manifest from perusal of clause (3) (ga) that if such research paper is accepted for publication the candidate is eligible to submit the acceptance report till the last date of submission of application, i. e. 31. 8. 92. It is admitted position that all the research papers authored by the petitioner were accepted for publication before the date of filing application and also finally published before the said date. The petitioner admittedly annexed the certificate showing the

acceptance of the said research papers for publication along with the application, and, accordingly the petitioner is eligible for the points as claimed. On the basis of the submissions raised by the counsel for the parties, I have considered both the clauses, namely, 3 (ga) and 15 of Annexure-1. It appears to me that clause 3 (ga) has an overriding effect as it specifically deals with the publication of journal whereas clause 15 days down general terms and conditions and accordingly the provision contained in clause 3 (ga) will prevail over clause 15. The reasons assigned for not allowing the points against publication of research papers in the juournals are fallacious and bereft of any substance contrary to the provision of Annexure-1. Learned counsel appearing on behalf of the petitioner relied upon a decision in a case of *Ashok Kumar Sharma and others* vs. *Chandra Shekhar and others* (1) reported in AIR 1993 Supply, Vol. 2 page 611. Somewhat similar question came up for decision before the Apex court. The question fell for consideration before their Lordships was whether or not candidates who were fully qualified to be appointed as junior Engineers on the date of interview but whose results had not been declared on the date of submission of their application, were entitled to be considered for appointment to the post of Engineers. Their Lordships after taking into consideration all aspects of the matter have held as follows—

"That fact is that the appellants did pass the examinations and were fully qualified for being selected prior to the date of interview. By allowing the appellants to sit for the interview and by their selection on the basis of their comparative merits,

(1) (1993) A. I. R. (Supply) Vol. 2 part 611.

the recruiting authority was able to get the best talents available. It was certainly in the public interest that the interview was made as broad based as was possible on the basis of qualification. The reasoning of the learned Single Judge was thus based on sound principle with reference to comparatively superior merits. It was in the public interest better candidates who were fully qualified on the dates of selection were not rejected, not with standing that the results of the examinations in which they had appeared had been delayed for no fault of theirs. The appellants were fully qualified on the dates of the interview and taking into account the generally followed principle of rule 37 in the State of Jammu & Kashmir, we are of the opinion that the technical view adopted by the learned Judges of the Division Bench was incorrect and the view expressed by the learned Single Judge was, on the facts of this case, the correct view. Accordingly, we set aside the impugned judgement of the Division Bench and restore that of the learned Single Judge. In the result, we uphold the results announced by the recruiting authority. The appeal is allowed in the above terms. However, we make no order as to costs."

Learned counsel for the intervenor, on the other hand, had relied upon a decision in the case of *Dr. Rita Sinha* vs. *State of Bihar* (1) in 1990 (2) P. L. J. R. 243 and also in the case of *Dr. Anil Kumar Sinha* v. *State of Bihar* (2) reported in 1990 (1) P. L. J. R 124. In support of his submission that since the date of eligibility fixed i. e. 31. 1. 91, the petitioner has rightly been denied the points as claimed by him on this issue. These decisions, in my view, do not deal with the points involved.

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(1) (1990) 2 P. L. J. R. 243
(2) (1990) 1 P.L.J.R. 124

I have heard leanned counsel for the petitioner, State as well as the intervenor and after going through the relevant clauses of Annexure-1, I am of the view that the petitioner is entitled for the points as claimed by him on this head. This view of mine is also supported by the law laid down in the *Ashok Kumar Sharma's* case (supra).

14. Ph. D.— 2 points.

The petitioner claiming two points for having Ph. D. degree which have not been allowed on the same ground as has been mentioned while dealing with the points relation to publication of research paper, inasmuch as the petitioner acquired Ph. D. degree after 31. 1. 92 i. e. after cut off date fixed for accepting the qualificafication. In this connetion statement made in paragraph 14 of the writ application is relevant wherefrom it appears that the petitioner submitted his thesis on 1. 11. 91, which was approved on 25. 1. 92 and also approved by the External External Examiners on 31. 1. 92 i. e. on the cut off date fixed for acceptance qualification. Although the Ph.D. degree was awarded on 10. 4. 92. This statement has not been denied either by the State or by the intervenor. Accordingly, learned counsel for the petitioner relying on the aferesaid *Ashok Kumar Sharma's* case (Supra), submits that the the petitioner is entitled for 2 points as claimed by him on that head. Learned counsel for the intervenor, with reference to the statement made in paragraph 14 of the conter affidavit, submits that actually Ph. D. degree was confermed after cut off date for accepting the qualification and as such the petitioner is not entitled for any point for having acquired Ph. D. degree after cut off date.

After having heard learned counsel for the parties and after having relied upon the law laid down by the Apex court in the *Ashok Kumar Sharma's* case (supra) and also the reasons assigned while dealing with publication of research papers, I am of the view that the petitioner is entitled for 2 points for having acquired the Ph. D. degree in terms of Annexure-1 aforesaid.

15.Accordingly, it is held that the petitioner is entitled for the points for teaching experience, publication of journals and having Ph.D. degree, which have been illegally and arbitrarily refused to him while preparing the provisional list for appointment on the post of Assistant Professor. Let, therefore, a writ of mandamus be issued directing the respondents to reconsider the case of the petitioner in the light of the obsevations / directions as above.

16. In the result, this writ application is allowed but in the facts and circumstances of this case, there shall be no order as to costs.

R. D. Application allowed

CIVIL WRIT JURISDICTION

Before N. Pandey and S. K. Chattopadhyaya, J. J.

1994

December, 12.

Abdul Manan.

V.

State of Bihar & others.

Family pension scheme— limitation in the scheme that marriage after retirement will not be recognised for the scheme—whether suffers from the vice of arbitrariness and discremination—Constitution of India—Article 14—ambit of—the limitation in-corporated in the family pension scheme, whether ultra vires Article 14.

Where the writ-petitioner retired on 31. 1. 1987 but before the pension papers could be finalised, his wife died on 4. 4. 1987, whereafter he married again and applied to the Accountant General Bihar for nomination of his second wife to get family pension in the event of his death which was rejected on the ground that marriage after retirement will not be recognised for the purpose of family pension.

Held, that the limitation incorporated in the family, pension scheme that marriage after retirement, will not be recognised for the purpose of this scheme suffers from the Vice of arbitrainess and discrimination. The limitation as incorporated in the family pension scheme its ultra vires Article 14 of the

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Order no. 14 dated 2. 12. 1994.

C. W. J. C. No. 6955 of 1991. In the High Court of Judicature at Patna.

Constitution of India and cannot sustain. The respondents are directed to allow the prayer of the writ-petitioner for nomination of his wife to be entitled for the benefit of family pension scheme.

Case laws discussed.

Application under Article 226 of the Constitution of India.

The facts of the case material to this report are set out in the order passed by N. Pandey, J.

ORDER

2. 12. 94

In this application under Article 226 of the Constitution, the petitioner has made a grievance against the decision of the Accountant General, Bihar, whereby his application for nomination of his second wife for family pension has been rejected.

2. The petitioner having completed the age of superannustion, retired on 31. 1. 1987. Before the pension papers could be finalised, his wife died on 1. 4. 1987. Therefore, he solemnised a second marriage with Javeda khatoon. The petitioner thereafter filed an application before the Accountant General through the Subdivisional officer, Aurangabad, for nomination of his second wife to get family pension in the event of his death.

The aforesaid application of the petitioner was rejected on the ground that marriage after retirement will not be recognised for the purpose of family pension. Therefore, the petitioner"s wife with whom marriage was solemnised after retirement will not be entitled for family pension.

3.Therefore, in view of the facts stated above, two questions emerge for consideration— (1) whether a spouse—man or woman, as the case may be— married after retirement of the connerned Government servant can be kept out of the definition so as to deprive him or her from the benefit of the family pension; and (ii) whether offsprings born after retirement are entitled to the benefit of such pension ?

4.A common stand both of the Accountant General and the State of Bihar has been taken that family pension would not be admissible to a spouse who got married after the retirement of the concerned Government servant. While examining the benefit or family pension scheme and entitlement of widows and dependent minors, the Supreme Court in the case of *Smt. Poonamal etc. etc.* v. *Union of India and others* (1) held hereunder—

"7. X X X

Where the Government servant rendered service to compensate which a family pension scheme is devised the widow and the dependent minors would equally be entitled to family pension as a matter of right. In fact we look upon pension not merely as a statutory right but as the fulfilment of a constitutional promise inasmuch as it partakes the character of public assistance in cases of unemployment, old-age, disablement or similar other cases of undeserved want. Relevant rules merely make effective the constitutional mandate....."

5. In the case of *Deoki Nandan prasad* v. *State of Bihar* (2) the Supreme Court held as below—

(1) (1985) A. I. R. (S. C.) 1196.

(2) (1971) A. I. R. (S. C.) 1409

"The payment of pension does not depend upon the discretion of the Government but is governed by the relevant rules and anyone entitled to the pension under the rules can claim it as a matter of right."

6. It is well known that the pension is payable on the consideration of past service of the Government servant. There are instances where a Government servant contracts marriages after retirement. It is not the case of the respondents that the family pension is admissible on account of the fact that the wife contributed to the efficiency of the Government servant during his service career. The Supreme Court while examining idential question in the case of *Smt. Bhagwati* vs. *Union of India* (1) held that in most of the cases, marriage after retirement is done to provide protection and to secure companionship during old age. It was held that for the purpose of family pension, no distinction can be made with a spouse who gets married during service or after the retirement. Considering the facts of that case wherein there was denial to the widow for family pension, at page 2091 it was held thus—

"13.C ons idered from any angle, we are of the view that the two limitation incorported in the definition of 'family' suffer from the vice of arbitrarinees and discrimiation and cannot be supported by nexus or reasonable classification. The words 'provided the merriage took place before retirement of the Government servant' in clauses (i) and but shall not include son

(1) (1969) A. I.R. (S. C.) 2089.

or daughter born after retirement in clause (ii) are thus ultra vires Art. 14 of the Constitution and cannot be sustained."

It is well known that the Government Service conduct Rule prohibits marriage, during life time of a spouse. Besides the aforsaid, as per provisions of the Hindu Marriage Act and Indian Panel Code, second marriage during the life time of the first wife is void and makes such person liable for prosecution. Therefore, a Government servant both before retirement of after retirement has no scope to have second wife of husband as the case may be during the life time of the husband or the wife.

7. Similar view was taken by the Supreme court in the case of *Kanta Devi* vs. *Union of India and others* (1). This was a case where a widow of a ex-serviceman had made a grievance that she was not being paid family pension because she married the ex-serviceman after his retirement form active service. This was because of Army Instruction No. 51 of 1980 which defines 'family" though includes wife note (2) says that marriage after retirement will not be recognised. The Supreme Court holding such instruction as irrational and harsh, struck down note no. (2) because of its irrationality and directed the respondents to pay family pension as if the aforesaid Army Instruction had not contained Note No. (2). In the case of *Smt. Bhagwanti* vs. *Union of India* (supra) it was held that the purpose for the family pension is to compensate the widow and the dependent minors in case of death of a Government servant. The respondents have not been able to give any plausible explanstion for exclusion of the benefit of the family pension to a wife who gets marriage after

(i) (1994) A. I. R. (S. C) 3891.

retirement of Government servant or to the minor children born after the retirement of such wedlock.

8. Considering from different angle as indicated above, we hold that the limitation incorporated in the family pension scheme that 'marriage after retirement will not be recognised for the purpose of this scheme' suffers from the vice of arbitrariness and discrimiation. Thus, the limitation as incorporated in the family pension scheme is ultra vires to Article 14 of the constitution ans cannot sustain.

9. For the reasons stated above, the writ application is allowed. The respondents are directed to allow the prayer of the petitioner for nomination of his wife to be entitled for benefit of family pension scheme. But in the circumetances of the case, there shall be no order as to costs.

R. D. Application allowed

CIVIL WRIT JURISDICTION

Before Aftab Alam and P. K. Sarin, JJ.

1994

December 24.

Samant Kumar Choudhary.

v.

The State of Bihar & others.

Motor Vehicles Act, 1988 (Central Act No. LIX of 1988), section 117 read with rule 88 of Bihar Motor Vehicles Rules. — 1992 Regional Transport Authority, Darbhanga, after enquiry notifying bus-stand on the land of the writ petitioner... Collector, Samastipur, staying the working and Construction of the bus stand— order of Collector, whether without jurisdiction— Bihar Motor Vehicles Rule 88— provisions of.

Where on the application of writ-petitioner the Regional Transport Authority, Darbhanga, after enquiry notified the bus-stand on the petitioners land on 18. 7. 1992 under the provisions of section 117 of the Motor Vehicles Act, 1939. read with the provisions of Rule 88 of the Bihar Motor Vehicles Rules, and after entering into and agreement in pursuance of the said notification the petitioner started construction work for the bus-stand investing substantial amount in the filling of the land and construction, but the Collector, Samastipur on dispute being raised by the Respondent no. 5 stayed the working and construction of the bus-stand by order dated 14. 4. 1994;

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* Civil Writ jurisdiction Case No. 5916 of 1994. In the matter of an application under Articles 226 and 227 of the Constitution of India.

Held, that the impugned order passed by the Collector, Samastipur stying further construction of the bus-stand by the writ-petitioner is without jurisdiction ans is quashed.

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

The facts of the case material to this report are set out in the judgement of P. K. Sarin,J.

Mr. Prabhakar Tekriwal and Mr. Shashi Dhar Jha. Mr. V. N. Sinha, Cr. P. 9 jain for the petitioner.

Mr. Dharmesh Kumar, for the petitioner.

P. K. Sarin, J The writ petition has been filed for quashing the entire proceding in case No. 48 of 1994, including the order for staying Construction of bus stand at Dalsinghsaral and for a direction to respondent no. 3 (the Collector, Samastipur) and respondent no. 4 (the subdivisional officer, Dalsinghsarai, District Samastipur) not to interfere with the working of the bus stand at Dalsinghsarai which has duly been notified.

2. According to the petitioner, he is owner of old survey plot No. 1102 in Khata no. 1 in an area of 12 kathas and 3 dhurs in the town of Dalsinghsarai and on his application the Regional Transport Authority, Darbhanga after enquiry notified the bus stand on the petitioner's land on 18. 7. 1992 under the provision of section 117 of the Motor Vehicles Act read with the provision of rule 88 of the Bihar Motor Vehicles Rules. A copy of the said notification is at Annexure 1 to the petition. The petitioner alleges that after entering into an agreement in pursuance of the said notification he started construction work for the bus stand and has already invested substantial amount in filling up the land and construction. However, the Collector on a dispute being

raised by respondent no. 5 atayed the working and construction of the bus stand by his order dated. 14. 4. 1994. The said order is at the last page of Annexure 7 and a regular preceeding was started on 18. 4. 1994 vide case no. 48 of 1994 (Annexure 9). The petitioner filed his rejoinder before the Collector stating the facts and also taking the plea that the Collector has no jurisdiction in view of the Supreme Court judgement. However, the Collector is not hearing the matter and the proceedings are still pending. It has been stated that the Collector has got no power to interfere with the functioning of the bus stand as only Regional Transport Authority has jurisdiction to notify the bus stand and pass any order in respect thereof and the preceeding being conducted by the Collector is without jurisdiction.

3. Notice was issued to the respondent no.5 in admission matter so that the application may be disposed of finally at the stage of admission itself. The respondent no. 5 has filed counter-affidavit. According to respondent no. 5, the petitioner is not the owner of the disputed land and he has no right to make any construction on the disputed land which is owned by the respondent no. 5. It is stated that respondent no. 5 has filed a declaratory suit in the year 1990 in the court of the subordinate Judge, Samastipur in respect of the disputed land which is pending. It has been further stated the petitioner has not as yet entered into any agreement with the state for the said bus stand. It has also been stated that under rule 187 of the Bihar Motor Vehicles Rules, 1992, the District Magistrate is the only authority to exercise powers under section 117 of the Motor Vehicles Act, 1988 as such the Collector has full power to draw the proceeding in question.

4. The contending parties have been heard. It has been contended on behalf of the petitioner that the bus stand can only be notified by the Regional Transport Authority and none else as such the Collector cannot interfere with the working of the bus stand which has been notified under the order of the Regional Transport Authority vide Annexure (1). The cases of *T. B. Ibrahim* v. *The Regional Transport Authority, (1) Municipal Board Pushkar* v. *State Transport Authority, Rajasthan (2) and Hari om Gautam* v. *District Magistrate, Mathura. (3)* I have been cited in support of the contention that the bus stand can be notified by the Regional Transport Authority and not by the District Magistrate.

5. Chapter V of the Motor Vehicles Act, 1988 (hereinafter to be referred to as the Act) deals with the provision of control of transport vehicles. Section 96 of the Act empowers the State Government to make rules for the purpose of carrying into effect the provisions of the chapter. Sub-section (2) of section 96 of the Act specifically enumerates the matter for which rules may be made by the State Government. Clause (xxi) of sub-section (2) of section 96 of the Act shows that the rules may be made for prohibiting the picking up or setting down passengers by stage or contract carriages at specified places or in specified area or at places other than duly notified stands or halting place and requiring the driver of a stage carriage to stop and remain stationary for a reasonable time when so required by the passenger desiring to board or alight from the vehicle at a

(1) (1953) A. I. R. (S. C) 79

(2) (1965) A. I. R. (S. C) 458

(3) (1987) 2 unreported judgements 146 (S. C.)

notified halting places. It is with reference to this provision that the contention has been raised that the bus stand can only be notified by the Regional Transport Authority. However, the petitioner himself in paragraph 9 of his petition has stated that the bus stand was notified under the provision of section 117 of the Act. Section 117 of the Act runs as follows—

> " Parking places and halting stations— The State Government or any authority authorised in this behalf by the State Government may, in consultation with the local authority having jurisdiction in the area concerned, determine places at which motor vehicles may stand either indefinitely or for a specified period of time, and may dtermine the places at which public service vehicles may stop for a longer time than is necessary for the taking up and setting down of passengers."

The said section is contained in chapter VIII of the Act dealing with control of traffic. Section 138 (1) of the Act contained in the said chapter VIII shows that the State Government may make rules for the purpose of carrying into effect the provision of the said chapter other than the matter specified in section 137 of the Act.

The State Government of Bihar has framed the Motor Vehicles Rules, 1992 (hereinafter to be referred to as 'the Rules'). Rule 187 of the Rules shows that the State Government has authorised the District Magistrate to exercise the powers under section 117 of the Act. Rule 191 (1) of the Rules shows that the Regional Transport Authority may by notification prohibit the use of any specified place or any place of specified nature or class

for picking up or setting down the passegers and may ruquire that certain specified stand or halting places only shall be used and no place which is private owned shall be so specified except with the previous consent in writing of the owner thereof. It has been further provided by sub-rule (2) of Rule 191 of the Rules that where a place has been notified as being stand or halting place for the purpose of the rules the same shall be deemed to be a public place within the meaning of the Act and the Regional Transport Authority may enter into an agreement with or grant a licence to any person for the provision or maintenance of such place, including the provision or maintenance of the buildings or works necessary there to, subject to the termination of the agreement or licence for the with upon breach of any conditions there of. The Regional Transport Authority may also require the owner of the land to erect such other works as may be specified in the Rules or in the direction and to maintain the same in serviceable clean and sanitary condition. Although rule 187 of the Rules empowers the District Magistrate to exercise the powers under section 117 of the Act but section 117 of the Act itself shows that under that section the State Government or the authority authorised in this behalf by the State Government may determine place at which motor vehicles may stand either indefinitely or for specified period of time. The determination of the parking places and halting stations may be done under section 117 of the Act. However, rule 191 of the Rules specifically provide that it is only the Regional Transport Authority, who has the jurisdiction to notify the (Bus) stand and only the Regional Transport Authority is empowered to enter into an agreement with any person for provision or maintenance of such places,

including the provision or meintenance of the building or works necessary there to. In view of these provisions the Collector can neither notify any bus stand nor he can enter into any agreement in respect of the said stand including the matter relating to maintenance of any building or work there to. The bus stand has been notified under the resolution of the Regional Transport Authority, Darbhanga as is evident by Annexure 1. In these circumstances, the Collector cannot make any alteration in the said notificatiopn or cannot do any act as to nullify the said notification. On behalf of the Collector an order was issued on 14. 1. 1994 (Annexure 3) which conveys the permission for private bus stand in view of the order of the Commissioner-chairman, the Regional Transport Authority, Darbhanga. It further requires the petitioner to enter into an agreement with the State Government through the Collector, Samastipur. The Collector in view of rule 191 of the Rules is not empowered to nullify any notification of bus stand or to pass any direction in respect thereof under the Act. In the circumstance the said Annexure 3 should be taken only conveying the decision of the Regional Transport Authority notifying the private bus stand. Under the Rules the Collector has no authority to pass any direction in respect of construction or maintenance of my work relating to bus stand. Hence, he was not competent to stay the construction work or give any other direction relating to the bus stand under the Act although he is free to pass necessary order in accordance with law for maintenance of law and order. On fact also it appears that earlier a dispute was raised by respondent no. 5 and the subdivisional officer, Dalsinghsarai directed that construction work of the bus stand be stopped (vide Annexure

4) and the petitioner should file the proof regarding the ownership before him. It appears that on such enquiry having been made the Collector accorded permission to the petitioner to operate the bus stand vide order dated 5. 4. 1994 (Annexure 5). After this order, the Collector again entertained an application of respondent no. 5 (Vide Annexure 7) and on that application he called for a report with the record from the subdivisional officer, Dalsinghsarai for perusal and hearing and till then the working of and construction of bus stand was ordered to be stopped. This order was passed on 14. 4. 1994 which has been assailed by the petitioner in the present petition. There appears to be no special circumstance for passing that order on 14. 4. 1994 when on 5. 4. 1994 itself the Collector has passed the order (Vide Annexure 5) according the permission for the bus stand. Further the Collector did not take any decision in the matter even after the petitioner had filed his objection in pursuance of the notice issued to him and the matter is said to be still pending before the Collector. The contention on behalf of respondent no. 5 that the Collector has been empowered to exercise the powers under section 117 of the Act and he is fully competent to pass direction or order in respect of the bus stand does not appear to be tenable in view of the specific provision made under Rule 191 of the Rules. The title suit of respondent no. 5, if decided in this favour would settle the dispute regarding ownership between the contending parties of the said suit. The pendency of the suit would not clothe the Collector to exercise any power under the Act and the Collector also does not appear to be competent to settle the question of title between the contending parties when the same is the subject matter of title suit.

6. In the circumstance, the impugned order passed by the Collector staying further construction of the bus stand by the petitioner is without jurisdiction and the same is quashed hereby. However, the Collector shall be at liberty to take steps or pass an appropriate order under any other law than the Motor vehicles Act, 1988, if the same empowers him to take such steps or pass orders.

The application is thus allowed.

Aftab Alam, J. I agree.

R. D. Application allowed.

(1) (1992) P.L.J.R 535.

CIVIL WRIT JURISDICTION

Before Choudhary S. N. Mishra, J.

1994

December, 23.

*Harendra Kumar Pandey and 3 others.**

V.

The State of Bihar and 4 others.

CONSTITUION OF INDIA—Aritieles 14 and 16—ambit of—Bihar Vidhan Sabha Recruitment and conditian of Service Rules, 1964—Rule 4 (a)—Speaker of Bihar Vidhan Sabha making appointment of 285 persons including to the post of Class III ithout making sdvertisement or publishing notice—no competitive examination held—appoint ments made whether ab intio void—wither violate the constitutional mandate guranteed under Articles 14 and 16 of the Constitution of India.

Where no advertisement or notice was ever published nor any competitive examination was ever held in terms of notification made under section 4 (2) (a) of the Bihar Vidhan Sabha (Recruitments and conditions of service) Rules, 1964, herein after referred to as the Rules, and the Speaker of the Bihar Vidhan Sabha made appointment to Class III posts as well as other posts of a total of 285 persons including respondent no. 6 to 17 in the office of the Bihar Vidhan Sabha;

Held, that the Speaker of the Bihar Vidhan Sabha has

Civil Writ Jurisdiction Case No. 7995 of 1990. In the matter of an application under Ariticles 226 and 227 of the Constitution of India.

made appointments of 285 persons including respondent no. 6 to 17 without complying with the requirement of law as also in violation the constitutional mandate enshrined in Articles 14 and 16 of the Constittution of India and as such are abintio void are quashed.

Case Laws discussed.

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

The facts of the case material to this report set out in the judgment of Choudhary S. N. Mishra, J.

M/S J.P.Shukla (Sr. Advocate) and

B.K.M.Tripathi (Advocate) for the petitioners

M/s Basudeva Prasad (Sr.Advocate),

Shakil Ahmad Khan (Sr. Advocate) for the respondents.

Chy. S. N. Mishra, J.

In this application, the petitioners have questioned the legality/validity of the appointments of 234 persons on various posts by respondent no. 2, namely, the Speaker of the Bihar Legislative Assembly in between 15. 6. 90 and 1. 11. 90 and for quashing the office Order No. 1 Accounts 15./90–39, Vidhan Sabha, Patna, dated 14. 9. 90 by which respondents no. 6 to 10 were appointed as Assistants in the Accounts Section of the Bihar Legislative Assembly, Patna, (hereinafter referred to as' the Assembly') including the letters of appointment of respondent nos. 11 to 17, dated 15.11.90. Copies of the said orders of appointment are made Annexures 2 series to this writ appication.

2.In order to appreciate the controversies and submis-

sions raised on behalf of the respective parties, it is necessary to mention some relevant facts and the case of the respective parties on the basis of the pleadings. The petitioners are duly qualified for the posts, which were filled up by respondent no. 2 in between the aforesaid period. According to the petitioners no. 2, 3 and 4, they could not apply for the post of Assistant, Typist, Routine Clerk, Peon etc. in the Bihar Vidhan Sabha as the vacncies were neither advertised in any Newspaper nor applications were invited from the prospective candidates through any Employment Exchange. Respondents no. 6 to 17 were appointed on 14.9.90 and 15.9.90 and the appointment letters were issued accordingly, as per Annexures 2 series, as stated above. That apart, 234 persons were appointed on various posts of Assistant, Typist, Hindi Research Assistant, Personal Assistant, Hindi Expert, Security Guard, Darwan, Daftary, Peon and Sweeper by the Speaker in between the period from 15. 6. 90 to 1. 11. 90 through different appointment letters. All the aforesaid 234 persons including respondents no. 6 to 17 were appointed without any adver sement and / or without having held any competitive test. The minimum academic qualification required for appointment to the post of Assistant in the Assembly is a Bachelor Dagree in Arts, Science and Commerce, for the post of Personal Assistant, Bachelor Degree in the same faculties having knowledge of shorthand and typing with the minimum speed of 80 to 120 words per minute and for the post of Typist, Intermediate having knowledge of typing with the minimum speed of 30 words per minute and for Routine Clerk and peon, Matriculation and Middle Pass, respectively. Similarly, the age limit for the aforesaid posts is 18 to 30 years. The petitioners

caim to be duly qualifid and eligible for appointment to the post of Assistant, Personal Assistant and Typist. It has also been alleged that out of 234 persons, who have been appointed in the Assembly on different posts, 20 persons are overage and one person is minor and most of the persons are sons, brothers, daughters-in-law daughters and relations of the Officers and employees of the Assembly and the Members of the Assembly. Lastly, it has been stated that while making such appointments, the Bihar Legislative Council published advertisement in the Daily Newspaper' Nav Bharat Times', on 1. 11. 90; whereas respondents I to 5 did not follow the prescribed procedure while making such appointments .

3. A counter-affidavit has been filed on behalf of respondents 2 to 5 wherefrom it appears that they have not denied the aforesaid basic facts alleged by the petitioners in this writ application. what has been alleged, inter alia, is that this writ application is not maintainable in absence of the aforesaid 234 persons, who have not been impleaded as party responents in this writ application. It is further alleged that that petitioner no. I was appointed in the Assembly and, as such, he cannot question the validity of such appointments. It is further alleged that the authority has power to condone the age-limit. It is also alleged that all the appointments were made by respondent no. 2 after assessing the merit of the respective candidates through the interview. It is also alleged that the Speaker is fully empowered to make such appointments under the Bihar Vidihan Sabha (Recruitments and Conditions of Service) Rules, 1964 (hereinafter referred to as' the Rules') So far as petitiomers no. 2 to 4 are concerned, their case was also considered by respondents no. 2

to 5, but they were not found fit for appointment to the said posts. This statement in the counter-affidavit filed on behalf of respondents 2 to 5 has been controverted by the petitioner in their rejoinder alleging that the petitioners had neither applied for the post. at any point of time nor did they join the post and, as such, the question of condideration of their case does not arise at all. Had they ever applied for appointment to the said post/s, respondents no. 2 to 5 must have produced their applications even at the time of final hearing of this writ application.

4. On the basis of the aforesaid pleadings, learned counsel, appearing on behalf of the petitioners, submitted that the appointment of 234 persons including respondents 6 to 17 made by respondent no. 2 without making advertisement and/ or holding any test, as required under the Rules are violative of Articles 14 and 16 of the Constitution. He further submitted that respondent no. 2 completely ignored the provisions of the Rules inasmuch as, without inviting applications from the qualified persons like the petitioners, appointed 234 personss, and, as such, the appointments of the aforesaid persons are wholly illegal, arbitrary and without jurisdiction. Learned counsel further submitted that no notice whatsoever specifying the requisite qualification of the candidates for filling up the aforesaid posts was published anywhere at any point of time by respondents 1 to 5 and no examination for testing the competitive merit of the individual competetors was held before appointing the aforesaid 234 persons. This procedure according to the learned counsel, adopted by respondent no. 2 is wholly unknown and contrary to the provisions laid down in the Rules while making such appointments, which has violated the equal-

ity clause enshrined under Articles 14 and 16 of the Constitution of India, and, thus, the appointment of the aforesaid 234 persons including respondents 6 to 17 are *ab initio* void. In this connection, learned counsel also submitted that earlier 89 persons were appointed on the post of Assistant, Typist and Routine Clerk by the then speaker, but such appointment were cancelled by the Successor speaker on the ground that those appointments had been made directly without advertisement and / or without following the procedures prescribed under the Rules. That order of the speaker cancelling previous appointment was brought under challenge before this High Courtin C. W. J. C. No. 7953 of 1989 disposed of on 6. 9. 90 wherein, a counter-affidavit had been filled on behalf of the Speaker of the Assembly that those appointment had been made by the then Speaker without any advertisement. Ultimately, the order of cancellation of the appointments of 89 persons made by his predecessor Speaker was confirmed by this Court. Learned counsel, appearing on behalf of the petitioners, accordingly. submitted that respondent no. 2 has adopted the same arbitrary procedure while making appointments under challenge in the present writ application without advertisement and without holding any examination for testing the competitive merit of the individual candidates and, therefore, it was not open for the respondents 2 to 5 to make such appointments without following the procedures prescribed under the Rules. Learned counsel, however, submitted that all the 234 appointments including the appointments of respondents 6 to 17 were made purely on political consideration as the appointees are related to the Officers, employees and the Members of the Assembly. It was further alleged that in exercise of the power

under rule 4 (2) of the Rules, a notification was issued by the Assembly wherein it has been categorically stated that the appointment on the posts of Assistant shall be made through the competitive examination, but admittedly in the instant case, no such examination and/or interview was over held, which is violative of Articles 14 and 16 of the Constitution as also in contravention of the mandatory provisions mentioned in the aforesaid notification which was issued in exercise of power under rule 4 (2) of the Rules, (rule 9 is a mistake for rule 4(2) of the Rules under which the aforesaid notification was issued by the Assembly). The submissions made by the learned counsel for the petitioners may now be summarised as follows—

(i) The entire appontments of 234 persons including respondents 6 to 17 in between the peiod 5. 6. 90 and 1. 11. 90 are in contravention of the mandatory provisions of the Rules and the notification issued thereunder;

(ii) No advertisement or any kind of notice was ever issued inviting applications from the prospective candidates nor the names were called from the Employment Exchange and, therefore, such appointments are wholly vitiated;

(iii) No competitive examination and / or test as envisaged under the aforesaid Rules has ever been held for filling up such posts; and

(iv) The entire appointments were made purely on political consideration as all the persons appointed on the different posts are closely related to the politicians and the officers and staff of the Assembly and, as such, their appointments cannot be held to be valid.

Learned counsel, in support of his contention, has relied upon various decisions, namely, *Krishan Yadav and another* V. *State of Haryana and others* (1) reported in A. I. R. 1994 Supreme Court 2166, *Vijay Kumar* vs. *The State of Bihar & ors*,(2), reported in 1993 (1) P. L. J. R. 99, *Birendra Prasad Singh and ors* vs. *The State of Bihar & ors* (3) reported in 1993 (1) P. L. J. R. 206, *Prabodh Verma and others etc. etc.* v. *State of Uttar Pradesh and others etc.* (4) reported in A. I. R. 1985 Supreme Court, 167, *J. & K. Pubic Service Commission etc.* v. *Dr. Narinder Mohan and others etc.* (5) reported in A. I. R. 1984 Supreme Court 1808, *Shivaji Rao Nilangekar Patil* V. *Dr. Mahesh Madhav Gosavi and others* (6) reported in A. I. R. 1987, Supreme Court, 294 and *Ram Janam Singh* V. *State of Uttar Pradesh and another* (7) reported in A. I. R. 1994, Uttar Pradesh, 1722.

5. In opposition to the aforesaid submissions, learned counsel for the respondents nos. 2 to 5, has agrued that this writ appication is not maintainable in absence of the persons whose appointments have been challenged. Learned counsel next submitted that the petitioner no. I has been appointed by the respondent no. 2 and, as such; he cannot challenge the appointments made by respondent no. 2. According to the learned counsel, the Speaker is fully competent under the Rules to make appointments and in making such appointments, advertisements and / or written test are not necessary. According to the

(1) (1994) A. I. R. (S. C.) 2166. (2) (1993) I. P. L. R. 99.

(3) (1993) I. P. L. R. 206. (4) (1985) A. I. R. (S. C.) 167.

(5) (1984) A. I. R. (S. C.) 1808. (6) (1987) A. I. R. (S. C.) 294.

(7) (1994) A. I. R. (S. C.) 1722.

learned counsel, all appointments have been made strictly in conformity with the Rules and hence, the same cannot be challenged in the courts of law. The last submission of the learned counsel is that all the appointments have been made in order to meet the emergent exigncies as respondent no.2, the Speaker, was going abroad and the long Session of the Assembly was to commence soon. In that situation, respondent no. 2, the Speaker was well within his jurisdiction to relalx the provisions of the notification made under the Rules, and, accordingly, while going to abroad, it was not possible for the Speaker to conduct the Assembly Session in absence of sufficiennt number of staff and, therefore, he made the aforesaid appointments after scrutinising the applications recelived from the various candidates and taking interview, which cannot be said to be arbitrary and / or in contravention of the Rules. While dveloping his artument, learned counsel submitted that the advertisements of the vancancies for appointments on such posts are not necessary, if reasonably the authorities adopt the mode and method of recruit ment, which is by and large just and fair. Then in that event, this Court cannot interfere with the appointments merely on the ground of some hypertechnical infraction. Learned counsel further submitted that respondent no. 2, namely, the Speaker, had made appointments of those persons, who had applied for the same came to him, and due to the urgent need of the staff in the Assembly, and, particularly, when he was going out of the country and the ensuing long session, filled up the posts and, in such a situation, there had been unavoidable departure from the observance of the normal rules. The learned counsel, in support of his contention, has relied upon two decisions, namely, *Sardara*

Singh and others etc. v. *State of Punjab and others* (1) reported in A. I. R. 1991, Supreme Court, 2248, and *Daljit Singh Minhas and others* v. *The State of Punjab and others* (2) reported in A. I. R. 1978, Punjab and Haryana, 117.

6. Before I proceed to examine the respective submissions of the parties, I feel it worthwhile to quote the relevant provisions of the Rules. Rule 2(e) defines 'post' as follows—

> " 2 (e).'Post' means a post in the Secretariat and a post shall be deemed to be a post in Class I, Class II, Class III or Cllass IV, according as such post is specified in Class I Class II, Class III or Class IV, as the case may be in the Second Suchedule;
>
> ×× ×× ××
>
> 4. Method of Recruitment,—(I) Subject to the provision of sub-rule (a) of rule 6, recruitment to a post or class of posts may be made by any one of the following methods, namely
>
> (a) & (b) ×× ×× ××
>
> (c) by direct recruitment.
>
> (2) Subject to the provisions of sub-rule (a) of rule 6, the Speaker may, by order, from time to time—
>
> (a) specify the mehod or methods by which a post or class of posts may be filled;
>
> ×× ×× ××
>
> 5. Qualifications for recruitment, —Subject to the provisions of sub-rule (a) of rule 6, the qualifications for recruitment

(1) (1991) A. I. R. (S. C.) 2248.

(2) (1994) A. I. R. (Punj. and Har.) 117.

to any post or class of posts shall be such as the Speaker may, from time to time, by general or special order, specify.

6. Appointing Authority.—(a) The appointment to the post of Secretary or Joint Secretary shall be made by the Governor in consultation with the Speaker from amongst persons serving in the Bihar Superior Judicial Service.

(b) Appointment to alll other posts shall be made by the Speaker:

Provided that the Speaker may, by general or special order delegate to the Secretary or any other officer of the Secretariat his power to make appontment to any post or class of posts in Class III or as may be specified in such order.

7. ×× ×× ××

8. ×× ×× ××

9. Other Conditions of Services.— In respect of other matters regulating the consitions of service of officers for which no specific provision has been made in these rules, officers shall be governed by such rules, orders or directions as are applicable to the officers of the corresponding rank in the Civil secretariat of the State Government, subject to such modifications, variations or exceptions, if any, in such rules as the Speaker may, after consultation with the Finance Department, by order, form time to time, specify.

Explanation.—For the purposes of this rule and the preceding rule the Speaker may, after consultation with the Finance Department, by order, specify the posts in the Civil secretariat which shall correspond to the posts in this Secretariat.

10. Relaxation in exceptional cases.—Where the Speaker is satisfied that the operation on any rule or provision in the matter of the conditions of service of an officer causes undue hardship in any particular case, the Speaker may, after consultation with the Finance Department, by order, dispense with or relax the requirements of that or provision to such extent and subject to such conditions as may be considered necessary for dealing with the case in a just and equitable manner.

11. to 14 ×× ×× ××

15. Disciplainary action against an officer on deputation to the Secretariat.—If, in the case of an officer on deputation to the Secretariat, and without prejudice to the provisions of the foregoing rules, the Speaker or the Secretary or any other officer, as the case may be, is of opinion that any of the penalties referred to in rule 13 should be imposed upon the said officer, his services shall be replaced at the disposal of the lending authority and the relevant papers connected with the enquiry, if any held, shall also be sent to that authority. Final orders in the disciplinary matter shall be passed by lending authority which shall forward a copy there of to the Secretariat.

16. to 19. ×× ×× ××

20. Residuary powers.—Subject to the provisions of rule 9, all matters not specifically provided for in these rules, whether incidental or ancillary to the provisions of these rules or otherwise, shall be regulated in accordance with such orders as the Speaker may, from to time, make."

7. In reply to the submission that the writ application is not maintainable in absence of the 234 persons, who were appointed by respondent no. 2, learned counsel for the petitioners, firstly, submitted that this writ application has been filed adding respondent nos. 6 to 17 in the representative capacity and, as such, it is not necessary to implead all those persons, who have been illegaly appointed, as party-respondents in this writ application. Secondly, it was submitted that the petitioners have not sought any relief against any individual, but they have sought intervention of this Court to declare the actions of the respondent no. 2, namely, the Speaker, as arbitrary and without jursdiction and, as such, the petitioners are not required to implead all the persons, who have been appointed even though they may be affected by the result of this writ applications. He submitted that if anyone is going to be affected by the verdict of this Court, he or they can challenge the verdict of this Court in an appropriate proceeding. Learned counsel, in support of his contention, relied upon the decisionin *Ram Janam Singh* (supra) and *Prabodh verma and others etc. etc.* (supra). It is true that all the persons, who have been appointed, have not been made party-respondents in this writ appication befause of the reasons, firstly, that their whereabouts and parantage are not know to the petitioners, as they have not been appointed through the prescribed procedure and, secondly, that in the facts and circumstances of this case, it is not either necessary for the petitioners to implead those persons as party-respondents, who have been appointed during the aforesaid period by respondent no. 2. Since, however, the matter has been brought to the notice of this Court, this Cout irrespective of the fact whether those appoin-

tees have been impleaded as party-respondents in this writ application or not, can very well examine the propriety of the orders making appointments on different posts in Government / public office. In an almost identical situation, in *Shivaji Rao Nilangekar Patil's* case (supra), their Lordships of the Supreme Court have observed in paragraph 36 of the judgment as follows—

"36. The allegations made in the petition disclose a lamentable state of affairs in one of the premier universities of India. The petitioner might have moved in his private interest but enquiry into the conduct of the examiners of the Bombay University in one of the highest medical degrees was a matter of public interest. Such state of affairs having been brought to the notice of the court, it was the duty of court to the public that the truth and the validity of the allegations made be inquired into. It was in furtherance of public interest that an enquiry into the state of affairs of public institution becomes necessary and private litigation assumes the character of public in terest litigation and such an enquiry cannot be avoided if it is necessary and essential for the administration of justice."

Accordingly, the preliminary objection as to the maintainability of this writ application raised by the learned counsel for the respondents is rejected.

8. It is now well settled principle of law that once the Rules have been framed for appointment on the different posts, that have to be strictly followed. In this connection, reference may be made to the notification, dated the 22nd of November, 1967, as

contained in Annexure—4 to this wit application, which has been issued in exercise of the power conferred under rule 4(2) of the Rules, which specifically provides that the appointments to Class III posts shall be made through competitive examination. Admittedly, in the instant case, no examination whatsover has ever been held before making the aforesaid appointments.

9. According to the learned counsel for respondents 2 to 5, rule 4 (2) (b) empowers the Speaker to make appointments in the Assembly and, accordingly, respodent no. 2, the Speaker, has made 234 appointments after scrutinising the applications and taking oral interview. The same cannot be interfered with. The learned counsel further relied upon rule 10 of the Rules and submitted that in the given situation, the Speaker can relax the provision of the Rules, since he was going abroad and in order to ensure smooth functioning of the Assembly, the Speaker filled up the Vancant posts and in that unavoidable situation, the usual rules of procedure have been relaxed. The submission of the learned counsel for respondents no. 2 to 5 cannot be accepted for the simple reason that once the Rules prescribe the procedure that cannot be relaxed and / or overlooked. As has been stated above, the notification has been issued in exrcise of the power conferred under the Rules, which categorically fixes the qualification, age and the procedure for appointments to the different posts. One of such procedure is that appointments to class III posts shall be made through the competitive examination. Admittedly, that has not been done in this case. Therefore, in my cnsidered view, the procedure prescribed under the Rules cannot be subsequently altered and appointments cannot be made through backdoor. It is true that the Speaker can relax the

age-limit in a suitable case, but cannot alter the academic qualification fixed for appointment to such posts and also the fundamental requirement of the examination fixed under the notification as well as holding of the competitive examination in order to judge the comparative merit of the individual candidates. The Supreme Court in *J. &. K.* Public *Service Commision's* case (supra) has held as follows—

"Existence of Statutory Rules is not a condition precedent to appoint an eligible and fit person to a post. The executive power is co-extensive with legislative power of the State and under Art. 162, the State can create civil posts and fill them up according to executive instructions consistent with Articles 14 and 16 of the Constitution. It is settled law that once statutory rules have been made, the appointment shall be only in accordance with the rules.

×× ×× ××

No express power was conferred and, in fact, cannot be conferred to relax the rules of recrutment. Having made the rules, the executive cannot fall back upon its general power under Art. 162 to regularise the an hoc appointments under the Rules.

×× ×× ××

Backdoor adhoc appointments at the behest of power, source or otherwise and recruitment according to rules are mutually anagonistic and strange bed partners. They cannot co-exist in the same sheath. The former is in negation of fair play. The latter are the products of order and regularity. Every eligible person not necessarily be appointed to a post or office under the State, selection according to rules by a properly constitued

commission and fitment for appointment assures fairness in selection and inhibits arbitrariness in appointments."

If, therefore, the notification issued in exercise of the power conferred under the Rule prescribes that the appointments shall be made through the competitive examination, the appointments made without holding such examination, and in some cases even person do not fulfil the minimum requirement as envisaged in the notification, in my view, are violative of Articles 14 and 16 of the Constitution and, thus, the appointments of 234 persons including respondents no. 6 to 17 dehors the Rules and, accordingly, cannot be held to be valid appointments. In this case, admittedly, no advertistment and / or notice even worth the name, for the aforesaid appointments has at all been published or exhibited. The contention of the learned counsel for the petitioners that had there been an advertisement issued / published for appointments to the aforesaid posts, petitioners no. 2 to 4, being properly qualified, must have applied for the same, but in absence of such advertisement and / or publication of notice, they could not apply, though they fulfiled the requisite qualification for appointment to the different posts in class III. Learned counsel for the respondents no. 2 to 5, on the other hand, submitted that for appointment to public posts, in every case, advertisement is not necessary. He further submitted that a notice to the effect was exibited on the Notice Board of the Assembly office and in pursuance there of, applications were made and after scrutinising the same, respondent no. 2, namely, the Speaker, appointed suitable candidates out of those applicants to the different posts on the basis of the interview held by

him. In support of his contention, learned counsel relied upon the decision in the case of *Daljit Singh Minhas* (supra). In that case, the constitutional validity of the State Giovernment's notification authorising regularisation of services of the theachers appointed on ad hoc basis, if they satisfied the conditions specified therein, was the subject-matter of challenge wherein different questions were raised including the appointment as being not in accordance with law and the procedures prescribed under the rules. In that case, while interpreting rule 2(e) of the Punjab Educational Service Class III School cadre Rules, 1955, their Lordships have held as follows—

"11. I would, therefore, hold on principle that it is not the requirement of the Constitution under Art. 16 that for direct recruitment to an office under the State, there must be an advertisement in the public press, so as to reach every conceivable candidate within the country. Indeed, such a requirement appears to me as both doctrinaire and also impossible of actual implementation. Nor do I find any thing in the particular rules, which are under consideration which may warrant a similar requirement."

It is true that in all cases, the advertisement through press is not essential, but for the purpose of appointment on public posts, some sort of notice must be issued / published in order to invite applications from suitable candidates. In this case though it was submitted by the learned counsel for respondents 2 to 5 that a notice was published on the Notice Board of the Assembly office, but neither a copy of any such notice nor any sort of notice inviting application has been produced before this

Court except the oral submission made in this behalf in course of arguments that such a notice was exhibited on the Notice Board of the Assembly office. The decisions, which have been relied upon by the learned counsel for the respondents no. 2 to 5 will not help him for simple reason that their Lordship, while interpreting rule 2(e) of the aforesaid Rules have held as follows—

"Therefore, on the particular language of R. 2(e) as also the genaral import of the rules, there seems to be nothing to warrant that direct appointments here necessarily reqire a resort to the public at large and, there fore, an advertisement in the press in resorting to this source of recruitment either."

10. The next submission of the learned counsel appearing on behalf of the petitioners was that the appointments were made by respodent no.2, namely, the Speaker, not in accordance with the Rues, but on poitical considerations. This submission on behalf of the petitioners has to be considered in the backgnounds, as mentioned above. As has been stated above, no advertisement and / or notice was ever published nor any competitive examination was ever held in terms of the notification made under the Rules, the only reasonable inference would be that such appointments on large scale were made in a hush hush manner only to get the near and dear of the politicians as well as the relations of the officers and staff of the Assembly. On the other hand, learned counsel for the respondents. no 2 to 5 submitted that in order to meet the emergent situation, the provisions of the Rules have been unavoidably relaxed. In course of arguments, I wanted to ascertain the total sanctioned strength of Class III and Class IV employees of the Assembly including the vacant posts

and the number of appointments made during the period in question by respondent no. 2. By a supplementary counter affidavit enclosing a chart therewith showing the total sanctioned posts including the total sanctioned vancant posts and the appointments made against such posts, the information has been furnished. The Chart shows the total strength of different Class III and Class IV posts numbering 603; number of vacant posts shown as 191 and the appointments made as 191. It is also mentioned in the Chart that as many as 94 posts were newly created, meaning thereby 191 + 94 = 285 persons were appointed during the aforesaid period although the petitioners have, no doubt, stated that apart from 234 persons including respondents no. 6 to 17, some other persons have also been appointed. Such a submission has not been denied by the respondents 2 to 5. From the Chart furnished annexed with the supplementary counter-affidavit, it is almost clear that 285 persons have been appointed by respondent no. 2 during the aforsaid period. Appointments in such a large scale, in my view, cannot be held to have been made to meet the emergent situation. Obviously, therefore, the contention of the learned counsel for the respondents no. 2 to 5 is not acceptable that the appointments were made in order to ensure sooth functioning of the Assembly in absence of respondent no. 2, the Speaker. This Court, while dealing with such a question, has held in the case of *Bijay Kumar* (Supra) as follows—

"20.This Court, times without number, have pointed out that appointments in the State of Bihar are made either for monetary consideration or for other extraneous consideration. Frequently, appointments are made in violation of the recruitment rules and

/ or guidelines given by the State from time to time. Even the reservation policies are not followed— in such cases. Taking into consideration the facts and circumstances of this case, we are of the view that the appointment of the petitioner has been made in a hush hush manner and in violation of the recruitment rules as also Art. 16 of the Constitution of India.

11. Learned counsel for the respondents 2 to 5, with reference to the various provisions of the Rules quoted above, submitted that the Speaker, respondent no. 2, while making appointments on different posts, has followed the procedure prescribed in rule 4(2) (a) of the Rules. He also relied upon rules 15 and 20 of the Rules and submitted that in the given situation, the Speaker is fully empowered to exercise his discretion in such matters. The submission of the learned counsel seems to be misconceived inasmuch as these rules do not, in any way, confer power on the Speaker to make appointments in such a large scale without following the normal procedure, as has been stated above, in exercise of his power. Under rule 4(2) (a) of the Rules, the aforesaid notification was issued wherein a definite procedure for appointment to Class III posts has been laid down, which has, admittedly been not followed. Therefore, in that view of the matter, it cannot be said that the respondent no. 2, the Speaker has followed the procedures in making the aforesaid appointments. In the backgrounds of this case, it is not open for the respondents 2 to 5 say that the appointments, aforesaid, were made due to exigencies of the situation as a result of which the normal rules of procedure have not been followed. As has been stated above, similar appointments had been made by the then

Speaker of the Assembly without making any advertisement and without holding competitive examination, which had been cancelled by his successor—in—office only on the ground that the normal rules of procedure in making those appointments had not been followed and in that situation, the appointments of 89 persons to the posts of Assistant, Typist and Routine Clerk had been cancelled. The aforesaid order of cancellation was challenged before this Court wherein a counter—affidavit was filed on behalf of the Speaker stating, inter alia, that the then Speaker had appointed those persons on differnt posts without making any advertisement and / or following the provisions of the rules and, ultimately, on the pleadings of the parties, this Court upheld the order of cancellation. In the facts and circumstances of this case, it is highly unfortunate and regrettable that the holder of a high public office has completely forgotten his responsibilities while discharging the statutory duties entrusted to him.

The entire system of appointments in the instant case, in my considered view, is wholy illegal, arbitrary and without jurisdiction. In the case of *Krishan Yadav and another* (supra), their Lordships of the Supreme Court, while dealing with some what a similar question, have held as follows—

"18.It may not be too much to draw an inference that all was motivated by extraneous considerations. Otherwise, how does one account for selection without interview, fake and ghost interview, tampering with the final records, fabricating documents, forgery ? Each of this would attract the penal provisions of Indian Penall Code. They have been done with impunity.

19. The story does not end here. From out of the 'selection list' secret communications have been sent to the candidates. Selections were made without medical test or verification of antecedents.

20. It is highly regrettable that the holders of public offices both big and small have forgotten that the offices entrusted to them are sacred trust. Such offices are meant for use and not abuse. From a Minister to a menial everyone has been dishonest to gain undue advantages. The whole examination and the interview have turned out to be farcial exhibiting base character of those who have been responsible for this sordid episode. It shocks our conscience to come across such a systematic fraud. It is some what surprising the High court should have taken the path of least resistance stating in view of the destrucation of records it was helpless. It should have helped itself. Law is not that powerless."

In the facts and circumstances of this case, particularly when the basic facts have not been denied by the respondents, I do not feel it necessary to deal with the other cases cited by the learned counsel for the petitioners.

12. After going through the pleadings of the respective parties and after having heard the submissions of the learned counsel appearing on their behalf in great details, I find that the respondent no. 2, the Speaker, has made the appointments of 285 persons including those of the respondents no. 6 to 17 without complying with the requirement of law as also in violation of the constitutional mandate enshrined in Aricles 14 and 16 of the Constitution of India. Thus, such appointments

made by respondent no. 2, the Speaker, is ab initio void and, as such, cannot be sustained and are, accordingly, liable to be quashed.

13. In the result, this writ appication is allowed and the orders of appointments of 285 persons made by the respondent no. 2, the Speaker of the Assembly, as contained in Annexures—2 Series are hereby quashed being declared as void ab initio, but in the circumstances of the case, there shall be no order as to costs.

Before, however, parting with this judgment, I must observe that the respondents no. 2 to 5, if so advised, may now take steps to fill up the vacancies on various posts afresh in accordance with law.

R. D. Appication allowed.

CIVIL WRIT JURISDICTION

Before S. K. Home Choudhary

1994.

December 23.

Ratneshwar Jha.

V.

L. N. Mithila University, Darbhanga and others.

Bihar State Universities Act, 1976 (Bihar Act, no. XXIII of 1976) section 35—writ-petitioner appointed on daily wage in the Post Graduate Department of Music and Drama of Mithila University—appointment, whether a nullity—writ-petitioner, whether has a right to hold the post—service rendered by him after the termination of his service without any order of the competent authority, whether entitles him to claim wages.

The writ-petitioner was appointed as Assistant on daily wage basis in post Graduate Department of Music and drama in the Mithila University, Dharbhanga by appointment letter issued under the signature of Registrar of the University dated 13. 10. 1994 and the writ-petitioner worked on daily wage basis and received wages up to April, 1985,where—after the Respondents stopped payment of wages to him from the month of May, 1985. The writ-petitioner made representation to the authorities to no effect. Therefore the writ-petitioner filed the writ application for regularisation of his appointment and up-to-date payment of salary.

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* Civil writ Jurisdiction Case No. 11 of 1991. In the matter of an application under Article 226 and 227 of the Constitution of India.

Held, that the writ-petitioner's appointment which was made in contravention of the provision of section 35 of the Bihar State University Act, 1976, was a nullity and consequently, the writ-petitioner had no right to hold the post.

Held, further, that the writ-petitioner's service having been terminated by a competent authority on 7. 5. 1985, the service stated to have been rendered by him after termination of his service without any order passed by competent authority does not confer any right to claim wages from the Mithila University.

B. R. Singh and ors. v. *Union of India (1).*

Bhagwat Prasad v. *Delhi State Mineral Development Corporation (2).*

Daily R. C. Labour P & T Department v. Union of India (3)— *distinguished.*

Sukh Sagar Prasad v. *State of Bihar* (4)— followed

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 judgement of S. K. Homchandhuri, J.

M/s Yogendra Mishra, Mithilesh Kumar Khare and Mr. Pankaj Kant Thakur. for the Petitioner.

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(1) (1990) A. I. R. (S. C.) 1.

(2) (1990) A. I. R. (S. C.) 371.

(3) (1987) A. I. R. (S. C. 2342.

(4) (1994) 1. P. L. J. R. 811.

Mr. Azfar Hasan of the University.

S. K. Homchaudhuri, J.

In this petition under Article 226 of the Constitution of India, the petitioner has approached this court for issuance of an appropriate writ, or direction commanding Respondents no. 1 to 3 to make payment of his salary form May, 1985 to-date and to regularise his appointment.

2. It is stated by the petitioner in the writ petition that by order of the Vice Chancellor, Mithila University, Darbhanga (in short the University), the petitioner was appointed as an Assistant on daily wage basis in the post-graduate Department of Music and Drama of the University until further orders. The order of appointment was issued under the signature of Respondent no. 3, the Registrar of the University on 13. 10. 1984. The petitioner, joined his post and worked on daily wage basis and he was paid his wages up to April, 1985. The Respondents, however, stopped payment of wages to the petitioner from the month of May, 1985. The petitioner made representations before the Respondents for payment of his wages but they did not pay any heed. The Respondent no. 4, the Head of the Department of post-Graduate Music and Drama, by his letter dated 26. 3. 1986, ruquested the Respondent no. 3, to pay the petitioner's wages as he was working under him in the Department. The Respondent no. 4 again drew attention of Respondent no. 3 by letter dated 20. 7. 1987 requesting him to make payment of the petitioner's wages. The Copies of the aforesaid letters dated 26. 3. 1986 and 20. 7. 1987 are annexed to the petition and marked as Annexures 2 and 4, respectively. In paregraph 11 of the petition, the

petitioner has contended that after receipt of the aforesaid letters Respondent no. 3 proceeded with the matter to some extent, but informed the Respondent no. 4 that the daily rated employees had been removed from services under the orders of the Syndicate. Respondent no. 4, thereafter, intimated Respondent no. 3 that he had no information of the decision taken by the Sydicate and he did not remove the petitioner or the peon Shri Subodh Thakur from their services and they had been continuously working.

3. The petitioner has further contended that finding no response, he submitted a representation to Respondent no. 2 on 18. 8. 1988. The petitioner submitted his representation before the chief Minister on 9. 9. 1983, which was sent to the Human Resources Development Department and the joint secretary, by his letter dated 28. 2. 1989, directed Respondent no.3 to consider the case of the petitioner. Thereafter, the petitioner again made an application dated 25. 5. 1989 to Respondent no. 2, who ordered that the matter be placed before the committee, but no step was taken in the matter. Inspite of the aforesaid representations of the petitioner, Respondents no. 2 and 3 having not taken any decision in the matter, the petitioner submitted a representation dated 16. 5. 1990 before the chancellor of the university and the Deputy secretary to the chancellor, by letter no. 2112 dated 18. 7. 1990 directed Respondent no. 3 to take immediate action in the matter and send compliance report. But Respondents no. 2 and 3 did not take any action. The petitioner has, thereafter, approached this court in this writ petition.

4. Respondents no. 1 to 3 have filed counter affidavit. The Respondents have contended that the petitioner was appointed by order dated 13. 10. 1984 on daily wage basis and as per the order of the Syndicate of the University, the services of the petitioner, along with others, were terminated by a notification issued under memo no. 4563-4460 dated 7. 5. 1985, A copy of the notification is annexed as Annexure 'A' to the counter-affidavit. The notification indicates that the persons concerned as well as all afficers/Section officers and the Accounts Department of the University were also served with copies of the notification. The vice chancellor of the University, thereafter, by letter dated 13. 5. 1985, directed the Registrar to send him the list of persons whose services were terminated by order dated 7. 5. 1985, and to inform all the officers to see that none of the persons concerned was allowed to work, and also to check in the Attendance Registrar of all sections of the office in this connection. After the counter-affidavit was filed, the petitioner has filed a supplementary petition challenging the order dated 7. 5. 1985. The petitioner has contended that he did not know about the notification terminating his service earlier and that for the first time he has come to know about the notification after receipt of the copy of the counter-affidavit.

5. I have heard learned counsel for the petitioner and the learned counsel for the Respondent-University.

6. Learned counsel for the petitioner submits that the petitioner was appointed by the Vice Chancellor of the University and the Vice Chancellor was the only competent authority to terminate his service after application of his mind on the

question of termination. In the instant case, the impugned notification dated 7. 5. 1985, purporting to terminate the service of the petitioner, was issued under the orders of the Syndicate of the University. Drawing my attention to section 10 (6) and 23 of the Bihar State Universities Act, 1976 (hereinafter called 'the Universities Act'), learned counsel for the petitioner submits that it is only the Vice Chancellor, who has jurisdiction in the matter of appointment to the sanctioned grades, to which the petitioner was appointed and the syndicate has no jurisdiction to terminate the petitioner's service and as such, the impugned notification cannot be sustained. Placing raliance on Annexures 4, 6, 15, and 22, learned counsel for the petitioner had been continuously working under the Head of the Department Music and Drama of the University and Respondent no. 4 also requested Respondent no. 3 to pay the petitioner's wages. As such, the petitioner having worked in the University under the Head of the Department of Music and Drama, he is entitled to get his wages for the period from May, 1985 to-date.

Learned counsel for the petitioner further submits that as per the terms of the agreement dated 26. 4. 1989. reached between the Bihar State University and College Employees Union and the State Government, the employees working before 10. 5. 1986 would be allowed to continue in their services till they would be absorbed against the posts created in future and that the petitioner was appointed before 10. 5. 1986 and, he has been working in the post-Graduate Department in Music and Drama of the University since then. As such, as per the terms of the agreement the petitioner is entitled to continue in service and to

be absorbed against the future vacant post. In this connection, learned counsel for the petitioner has also drawn my attention to the order of the Hon'ble Supreme Court passed in writ petition No. 409 of 1991, wherein the Hon'ble Supreme Court, by order dated 25. 9. 1991, directed the Respondents to consider the cases of the petitioners of that writ petition for their absorption strictly in accordance with the terms and agreement entered into between the Bihar State Universities and Colleges Employees Federation and the State Government on 26. 4. 1969. Learned counsel for the petitioner submits that though the said order of the Hon'ble Supreme Court was confined to the petitioners of the said writ petition, for the ends of justice, the petitioner, who is identically placed, is entitled to the same benefit to in the light of the order of the Hon'ble Supreme Court.

7. In support of his contention, the learned counsel for the petitioner places reliance on the following decisions of the Hon'ble Supreme Court—

(i) In the case of *B. R. Singh and others* Vs. *Union of India*, (1) reported in A. I. R. 1990 Supreme Court 1.

(ii) In the case of *Bhagwati Prasad* Vs. *Delhi State Mineral Development Corporation*(2) reported in A. I. R. 1990 Supreme Court 371.

(iii) In the case of *Daily R. C. Labour P. T. Department* versus *Union of India* (3) reported in A. I. R. 1987 Supreme Court 2342.

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(1) (1990) A. I. R. (S. C.) 1. (2) (990) A. I. R. (S. C.) 371.

(3) (1987) A. I. R. (S. C.) 2342.

8. Learned counsel for the University, on the other hand, submits that is is apparent form Annexure 'A' to the counter affidavit that the petitioner's services were terminated, along with other, From Annexure 'A' it can be seen that the persons concerned were also served with the copies of the notification. In any view of the matter, it is inconceivable that the petitioner, who is an educated person, would have no occasion to know the reason for stoppage of his wages for long time. The petitioner, who has even access to the internal documents of the University; such as Annexure 15, cannot be expected to be ignorant of the order of termination. Besides, admittedly, Respondant no. 4, under whom the petitioner claims to have worked at least in the year 1988 came to learn that the petitioner's service was terminated by notification dated 7. 5. 1985. Learned counsel for the University submits that admittedly the petitioner was appointed against an unsanctioned post, which is yet to be sanctioned by the Government and the petitioner was, thus, appointed in violation of the provisions of section 35 of the Universities Act and as such his appointment was a nullity. In support of his contention, learned counsel for the University has placed reliance on a decision of this court in the case of *Sukh Sagar Prasad* Vs. *State of Bihar*(1) reported in 1994 (1) P. L. J. R. Page 811, wherein this court, amongst others, held that the appointments in contravention of the provision of section 35 of the Universities Act are nullities. Learned counsel for the university submits that the Vice Chancellor happens to be the Execu-

(1) I. P. L. R. 811.

tive Member of the Syndicate, Section 23 (c) of the Universities Act confers power on the syndicate to determine and regulate all matters concerning the University in accordance with the Act, the Statutes, and the Regulation. The petitioner, along with other persons having been appointed as daily-rated workers in contrevention of the provision of section 35 of the Universites Act. the Syndicate had full authority to direct termination of services of those persons, including the petitioner, whose appointment were nullities. Learned counsel for the University further submits that even if the petitioner was allowed to work after the termination of his service, by notification dated 7. 5. 1985, as asserted by Respondent no. 4, the University is not liable to make payment of any wages for the said period. The petitioner may realise his wages from respondent no. 4 inasmuch as after termination of the service of the petitioner, the University is not liable to make payment for the period, during which he had been unauthorisedly allowed to work by Respondent no. 4.

9. I have considered the submissions made on behalf of the petitioner as well as on behalf of the Respondants and perused the materials placed before me. I find force in the submission of the learned counsel for the University that in view of the decision of this court in the case of *Sukh Sagar Prasad* (Supra), the petitioner's appointment which was undisputedly made in contravention ot the provision of section 35 of the Universities Act, was a nullity and consequently the petitioner had no right to hold the post. I also find force in the submission of the learned counsel for the University that the petitioner, who is an educated person,

could not be ignorant about the facts of termination of his service by notification dated 7. 5. 1985 till filing of the counter-affidavit in the year 1992 by the Respondents. According to the petitioner, he has been continuously working in the post-Graduate Department of Music and Drama when payment of his wages was stopped from the month of May, 1985, the petitioner, who is an educated person, and working in the University compound, would have naturally enquired about the reason for stoppage of payment of his wages. It passed one's comprehension as to how the petitioner could remain inactive to know about the reason of the stoppage of his wages form the respective branch of the University for such a long time. That apart, admittedly in the year 1988, respondent no. 4 was informed by respondent no 3 about the fact of termination of the petitioner's service. It cannot be believed that respondent No. 4, who earnestly took up the case of payment of wages of the petitioner with respondent no. 3, would not have told the fact of termination of the petitioner's service after coming to know about it in 1988. The aforesaid fact and circumstances lead to the irresistible conclusion that if not earlier, at least in the year 1988, the petitioner came to know about the termination of his service and no reliance can be placed in the petitioner's contention that he came to know about the fact of termination of his service after receipt of a copy of the counter-affidavit by Respondents no. 1 to 3. This plea has been taken only to cover up the laches on the part of the petitioner for challenging the order of termination dated 7. 5. 1985 after lapse of several years.

10. To appreciate the submissions of the learned counsel for the patitioner and learned counsel for the University, as regards

the jurisdiction of the syndicate to pass an order for termination of service of the petitioner and the other similarly employed persons, it is appropriate to have a look into the following provisions of the Universities Act—

> "10(6) The vice-chancellor shall subject to the provisions of this Act, the statutes and the ordinances have power to make appointment to posts within the sanctioned grades and scales of pay and within the sanctioned strength of the ministerial staff and other servants of the University not being teachers and officer of the University and have control and full disciplinary powers over such staff and servants.
>
> 23. Power and duties of the syndicate The syndicate—
>
> (a) shall hold, control and manage the property and funds together with endowments, bequests and donations) of the University and other transfers of property made to college for their benefit;
>
> (b) shall regulate the form, provide for the custody and regulate the use of the common seal of the University,
>
> (c) shall, subject to the powers conferred by or under this Act on the vice chancellor and all matters concerining the University in accordance with this Act, the statutes, and the Regulation:
>
> (d) shall manage any funds placed at the disposal of the University for specific purposes."

11. It is apparent from a perusal of section 10 (6) of the Act that the Vice Chancellor is empowered to make appointment to

the post within the sanctioned grades and scales of pay within the sanctioned strength of the ministerial staff and other servants of the University. Undisputedly, the petitioner was not appointed against the post sanctioned by the appropriate authority. Moreever, on perusal of section 23 of the Act, I find that as per the provisions of section 23 (c), the Syndicate, which is empowered to regulate all matters concerning the University, is competent to pass order directing termination of services of the incumbents, who have been appointed against the posts, which are not sanctioned and in contravention of the provision of section 35 of the Act. In my opinion, the Syndicate is competent to direct termination of services of those candidates, whose appointments are nullities. That being so, I do not find any infirmity in the impugned order of termination. The submission of the learned counsel for the petitioner that as per terms of agreement and the Bihar State University and College Employees Union, the petitioner will be entitled to continue in service till his absorption against the future vacancy is without substance. As per the agreement, the employees, who were appointed before 10. 5. 1986 and were continuously working on the date of the agreement, would be allowed to continue and would be absorbed on any posts as and when the posts would fall vacant or would be created in future, but the petitioner's service was terminated on 7. 5. 1985 and after termination of his service, he cannot be deemed to be working under the University, consequatly, the petitioner was not working on 26. 4. 1989 when the agreement was reached. As such, the benefit of the agreement is not available to the petitioner.

As to the question whether the petitioner is entitled to the arrears of salary for the period of service stated to have been rendered in the post-Graduate Department of Music and Drama up to April, 1993 after termination of his service, I am inclined to hold that the petitioner's service having been terminated by a competent authority on 7. 5. 1985, the service stated to have been rendered by him after termination of service without any order passed by the competent authority do not confer any right to claim wages from the University. The decisions of the Hon'ble Supreme Court in the cases on which reliance has been placed on behalf of the petitioner's case, have absolutely no application on the facts of the instant case.

12. For the reasons stated above, the petition is without merit and is, therefore, dismissed. I make no order as to cost.

R. D. Application dismissed

CIVIL WRIT JURISDICTION

Before Banwari Lal Yadav and Shashank kumar Singh, JJ.

1995

January 25.

Dr. Taj Singh Lakshmana.

V.

The State of Bihar and others.

Public Interest Litigation— ambit of— dispute involved in respect of over seven thousand entreprenours being individual disputes depending on nature of each writ— writ petitions by them, whether maintainable as public Interest Litigation.

Held, that dispute involved in respect of more than seven thousand entrepreneurs are individual disputes depending upon the nature of writ, hence in such a situation the public Interest Litigation is not maintainnable.

Case laws discussed.

Applications under Articles 226 and 227 of the constitution.

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* Civil writ jurisdiction case No. 8725 of 1994 with Civil writ jurisdiction case No. 423 of 1996 with Civil writ Jurisdiction case No. 9418 of 1994. In the matter of an applic 'ion order Articles 226 and 227 of the Constitution of India.

In C. W. J. C. No. 423/95— Bihar Industries Association. Petitioner

In C. W. J. C. No. 9418/94— Uttar Bihar Udyamee Singh. Petitioner.

The facts of the cases material to this report are set out in the judgement of B. L. Yadav, J.

Dr. Taj Singh Lakshman (in person) and Mr. C. M. Saxena for the petitioners.

Messrs P. K. Shahi, Nirmal Kumar, Kishore Kumar Sinha, Chitranjan Sinha and Subodh Kumar, Rajesh Kumar and Abhimanyu Sharma for the respondents.

B. L. Yadav, J.

These three analogous writ petitions have been filed under Article 226 of the Constitution of India as public Interest Litigation (for short P. I. L.) and the points involved are similar in nature. Hence it is convenient to dispose them of by this common judgement. These petitions would, however, be referred as first, second and third writ petitions.

2. In the first writ petitions filed by Dr. Taj singh Lakshman (in person), chairman of the Bihar Sick Industries Association the petitioner has stated tbat about 7000 Entrepreneurs have obtained separate loans from the Bihar State Financial Corporation, Frazer Road, Patna (respondent no. 2) and seperate aggrements have been executed in respect of all the Emtrepreneurs. But those agreements have not been filed and only one of them was shown in the court.No thing can be ascertained with certainty from the alleged prayer made in paragraph 10 of the first writ petition. However, the prayer in the first writ petition is that this court may treat this petition as a regular writ petition against the Bihar State Financial Corpora-

tion (for short "the B. S. F. C.") and to take necessary action against Shri A. K. Singh, Managing Director, B. S. F. C. (respondent no. 2), so that any allegation stated by the petitioner, if contested by the said respondent, shall be proved by him with concrete evidence and supporting documents. Further prayer is that the B. S. F. C. may be restrained from taking any action against those entrepreneurs whom the B. S. F. C. had failed to disburse the full sanctioned loans. The next part of the relief appears to be that this court may write of the entire interest and other charges accumulated during the past many years against the aforesaid 7000 entrepreneurs, who have obtained loans from the B. S. F. C. and have not paid the amount as agreed upon and that only principal amount may be left to be paid by the promoters after deducting the amount already paid by them.

3. The aforesaid 7000 entrepreneurs obtained different loans from the B. S. F.C. (respondent no. 2) and executed different agreements. It appears that part of the loan was disbursed to all the entrepreneurs, but the entire amount was not disbursed and when they went for further relief of the loan, they were expolited as the petitioner or the entrepreneurs refused to pay bribe (vide paragraph 2 of the first writ petition).

4. The petitioner, Dr. Raj Singh Lakshmana, chairman of the Bihar Sick Industries Association has appeared in person. He strenuously contended that the respondent-BSFC is deliberately delaying to disburse the sanctioned loan for the last two years and therafter the promoters are directed to apply for the second loan which they would sanction and would adjust

against the overdues of the first loan. After failure of the entrepreneurs in these three writ petitions to make payment, proceedings under sections 29 and 30 of the State Financial Corporation Act, 1951 (for short "the Act") are initiated and the assets in the unit are sold to the collaborators at a price equal to the total amount due from the owner. Under the said Act the B. S. F. C. was to act under the Regional Development Bank for assistance to the small and the medium scale Industries of Bihar. The B. S. F. C. can ascertain whether the units obtaining loans, have necessary working capital and can also have a watch on the working and performance of the unit. In paragraph 9 of the first writ petition it has been stated that the debased officers of the B. S. F. C. threw all the prescribed norms and objective to the winds and started acting worse than the traditional village money lenders. It was further urged that a committee be set up by the High Court to decide all the matters pertaining to these writ petitions and the committee may submit a report.

5. When the judgement was almost dictated a detailed written argument was also filed. We have peerused the same. Nothing new was added. It was in the form of a Rajoinder Affidavit. It was emphasised that the approach of the respondents including the B. S. F. C, must be project oriented rather that security oriented. It was emhasised that a Three Member committee headed by a retired High Court Judge, the Managing Director and the petitioner himself, be constituted to solve the dispute. It was further submitted that interest recoverable on different units may not be recovered.

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(1) (1993) A. I. R. (S. C.) 935.

6. In the second writ petition the prayer is to direct the B. S. F. C. (respondent no. 2) to follow strictly the guidelines laid down in *Mahesh Chandra* vs. *Regional Manager, U. P. Financial Corporation and others* (1) and to direct the State Government to set up a High Level Committee or Tribunal to consider all the cases of sick small scale Industries and of incipient. In this second writ petition no counter Affidavit has been filed.

7. An averment has been made in the second writ petition that the sanctioned loan is disbursed only after the entrepreneurs have made substantia investment in the project from his own resouces. Short points sharply focussed by Mr. C. M. Saxena, learned counsel for the second petition are that the principles laid down in *Mahesh Chandra's* case (supra) are not followed and that total amount of sanctioned loan is never disbursed and without any notice proceedings are initiated under Section 29 of the Act. The points focussed by Mr. Saxena was echoed with some variant note by the learned counsel appearing for the third writ petitioner. In the second and third writ petitions also even though a number of entrepreneurs are involved who have executed different agreements but neither those agreement containing different agreement but neither those agreement containing different conditions depending on the nature of loan and units have been filed nor complete facts have been stated. In these three writ petitions individual and separate disputes are involved, but the petitions as P. I. L. have been filed.

8. *Mr. P. K. Shahi has appeared on behalf of the respondent*— B. S. F. C. Mr. N. Kumar and other counsels have appeared for other respondents and all of them were heard at great length. Mr.

Verma urged that more than 7000 entrepreneurs have obtained separate loans and they have entered into different agreement containing different clauses depending upon the nature of the loan and the nature of the transactions and units. P. I. L. In such a different individual disputes has been filed just with a view to conceal the material facts and to obtain relief, directing the respondent—B. S. F. C. not to initiate proceeding for recovery of the loans, particularly in view of the procedure under section 29 of the Act and not to initiate proceeding which are consistent with the agreements of the entrepreneurs. Specific and separate agreements executed by more than 7000 entrepreneurs have not been filed, nor the material facts have been stated. As to at which stage the proceedings are pending has not been stated. In these writ petitions (as public Interest Litigation), the petitioners have not disclosed clear facts in respect of each entrepreneurs, so that the same may be replied through counter affidavit and the correct facts may be brought before the Court to appreciate the controversy. In the P. I. L. the petitioner must come with clean hands; with clean mind and clean objective like the writ petitions filed by other petitioner. As there are individual diputes depending upon the facts with particular individual dispute, in that event there is no justification for P. I. L. nor it can be entertained. As the petitioners have concealed the material facts in these writ petitions and there are disputed questions of facts, hence no ground for interference has been made out.

9. Mr. P. K. Shahi emphatically urged that there is no quarrel and/or dispute with the dictum laid down and the direction given in *Mahesh Chandra* vs. *Regional Manager, U. P.*

Financial Corporation and others (supra). But those dictums or directions or principles are based on particular facts of that case. In these three writ petitions several thousand units and entrepreneurs are involved, having executed different agreements, but the petitioners have not come with clean hands. In the circumstances no relief can be granted to the petitioners in all the three writ petitions.

10. Having scrutinised the submissions of the learndd counsel for the parties, the questions for consideration are whether the P. I. L in such a way where more that 7000 applicants (entreprenurs) and several units with varying characteristics with different individual claim are involved, the writ petitions as P. I. L can be entertained, and whether in the circumstances of the case any relief can be granted to the petitioners of all the three writ petitioners, particularly when they have not come with clean hand, clean mind and clean objective. Suffice it to say that their Lordships of the Apex Court have laid down a dictim in *K. P. Shrinivas* vs. *R. M. Premchand* (1) to the effect tbat it cannot be forgotten that a writ petitioner who comes to Court for the relief in P. I. L., must come not only with clean hands like any other writ petitioners but also must further come with a clean heart, clean mind and clean objective. In these three writ petitions even after making all sincere efforts we could not ascertain the nature of the agreements executed by different entrepreneurs and units, nor copies of the same were furnished nor details were given nor necessary material facts were stated. In our considered opinion neither the petitioners in all the three writ petitions have come with clean hands nor they

(1) (1994) 6 S. C. C. 620.

have come with clean mind nor with clean objective. Even the prayer of the relief sought by the petitioners is not clear as to what they actually want. Only this much can be ascertained that they want that no action need be taken against them to recover the loan obtained by them and no proceeding under section 29 of the Act be initiated against them and the interest on the loans advanced may be written of.

11. *In Dr. Nandjee Singh Vs. P. G. Medical students Association* (1) their Lordships of the Apex Court have ruled that an independent dispute cannot be canverted into P. I. L. This observation and direction were relied upon with profound respect by a Division Bench of this Court in *Arijit Dutta & others* Vs. *Union of India & ors.* (2) Necessary facts in respect of every agreement and every entrepreneurs and units have not been stated with accuracy in the present cases nor these petitioners have come with clean hands, nor with clean mind, nor with clean objective. We have profound regards for the dictum laid down in *Mahesh Chandra* vs *Regional Manager, U. P. Financial Corporation and ors,* (supra), but in the present three writ petitions necessary facts have not been indicated and nothing has been brought to our notice to indicate how we may grant any relief to the writ petitioners or to the different entrepreneurs or how we may direct the respondent—B.S. F. C. not to recover the unpaid amount form the petitioners, nor any case of P.I. L has been made out dircting the respondent— B. S. F.C. not to initiate any proceeding under section 29 of the Act.

12. In our considered opinion as the petitioners in these three

(1) (1993) A. I. R. (S. C.) 2264.

(2) (1994) (2) B. L. J. R. 839).

writ petitions have not come with clean hands nor they have come with clean mind or clean objective, as directed by their Lordships of the Apex Court in (1994) 6 SCC 620 (supra). The disputes involved in these writ petitions are individual disputes, consequently the individual disputes cannot be converted into the P. I. L (See *Dr. Nandjee Singh* Vs. *P. G. Medical students Association* (supra).

13. Half heartedly, on behalf of the petitioners, our attention was invited to the Doctrine of Promissory Estopp[el and on Article 21 of the Constitution and that the B. S. F. C. cannot take recourse to the remedy of Sections 29& 30 of the Act. As regards Article 21, suffice it ot say that life includes right to live with human dignity, but whatever action would be taken against different entrepreneurs in these three analogous writ petitions would be in accordance with the procedure established by law, particularly the relevant provisions of the said Act. Article 21 of the Constitution is, accordingly, not attracted.

14. In our opinion the Doctrine of promissory Estoppel comes in operation where one party by his words of conduct to a transaction makes to the others an unambigous promise or assurance, which is intended to affect the legal relations between them and other party acts upon it, altering his position to his detriment, the party making the promise will not be permitted to act inconsistently with it. This is called Doctrine of Promissory Estoppel, Quasiestoppel or equitable estoppel. (See *Isreal cocoa Ltd.* v. *Nigerian Produce marketing co. Ltd.* (1) *Braith Waite* v. *Winwood* (2) *Durhem Fancy Goods Ltd.* v. *Michael Jackson* (3) small's principles of Equity (27th Edition) page 562).

(1) (1997) A. C. 41, 758. (2)(1960) I. W. L. R. 1257.

(3) (1968) 2. Q. B. 639.

15. The factual foundation to attract the application of this doctrine is suspensive in nature and does not extinguish the promisee's obligations (i. e.. obligations of entrepreneurs to pay the loan advanced by BSFC). As the petitioners have not disclosed correct facts nor they have come with clean hands and clean objectives, nor facts necessary to apply this doctrine have been stated with sufficient clarity, the petitioners cannot be held to be entitled to this doctrine. The facts of the cases AIR 1988 SC 1247, AIR 1980 SC 1245) are different, the dictum laid down by the Apex court applies to the facts of those cases and petitioners cannot claim the benefit, similarly.

16. In respect of other cases relied upon by the petitionerss including Mr. Lakshman, we are reminded what Earl of Halsbury L. C. said long ago in *Quiun* V. *Leathem* (1) to the following effect:

"Now before discussing *Allah* V. *Flood* (1889) A. C. I, and what was decided therein there are two observations of a general character which I wish to make and one is to what I have very often said that every judgement must be read as applicable to the particular facts proved or assured to be proved, since the generality of the expression which may be found, they are not intended be exposition of the whole law but governed and qualified by the particular facts of the case in which such expression are to be found. The other is that a case is only an authority for what it actually decided. I entirely deny that it can be quoted for a proposition that may seem to follow logically from it."

These observations were relied upon by their Lordships of the

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(1) (1901) A. C. 495.

Supreme Court in *M/s Good Year India Ltd.* V. *State of Haryana* (1) In our considered opinon the observations made in other cases relied upon by Mr. Lakshman need not be referred or discussed as every judgement must be read as applicable to the particulars facts proved and that a case is only an authority for what it actually decided and not what may seem logically to follow form it.

18. To sum up the dispute involved in respect of more than seven thousand entrepreneurs are individual disputes depending upon the nature of unit. hence in such a situation the public interest Litigation is not maintainable. As the petitioners have not come to this Court with clean mind and clean objectives and they have not stated material facts in respect of every dispute provisions of section 29 of the Act can be made applicable only when the necessary facts and cirumstances exit. There is no justification to write off either interest or to constitute a committee headed by a retired Judge of this Court to go into the matter. Remedy under Articel 226 being discretionary in nature no grounds for intereference in these three petitions have been made out.

19. Resultantly in view of the premises aforesaid we do not find any merit in any of these three writ petitions nor they are maintainable as P. I. L. Hence they are dismissed without any order as to costs. Let a copy of this judgement be kept in other two analogous cases also.

Shashank Kumar Singh, J. I agree

R. D. Application dismissed.

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(1) (1989) Judgement Today 4 S. C. C. 229, 246.

CIVIL WRIT JURISDICTION

Before Bisheshwar Prasad Singh & Naresh Kumar Sinha, J.

J.

1995

Februry 7.

Smt. Mridula Chandra and others. *

v.

The State of Bihar and others.

Land Acquisition Act, 1894 (Central Act, no. I of 1894) Sections 4, 6 and a—notification under sectiion 4 and declaration under section 6 not challenged, resulting in Award in favour of writ petitioners—even in writ petition, notifieation under section 6 not challenged—after several months of the filing of writ-petition, petitions amended to challenge the notification under section 4 and declaration under section 6—delay and laches on the part of writ-petitioners—writ petition, whether maintanable—notice under section 9 served on husband of the writ-petitioner—respondent directed to serve notice under section 9 on the writ-petitioner and consider any repesentation made by her and pass appropirate orders in accordance with law.

Where the writ-petioner allowed the land acquisition proceeding to continue till it culminated in Award and did not initially oven challenge the notification under section 4 of the

* Civil Writ Jurisdiction Case Nes. 2929,—3256 & 2993 of 1994. In the matter of applications under Artices 226 and 227 of the Constitution of India.

Land Acquisition Act, 1894, hereinafter referred to as the Act, and the declaration under section 6 of the Act in writ-application and later on after several months challenged the notification under section 4 and declaration under section 6 of the Act by amending the writ petition;

Held, that the writ-applications deserve to rejected on ground of delay and laches alsone.

Where notice under section 9 of the Act, with respect to plot no. 722 was served on the husband of the writ-petitioner and not on the writ-potitioner,

Held, that the respondents are directed to serve a notice on the writ-petitioner under section 9 of the Act and there after to consider any representation made by the writ-petitioner and pass approprite orders in accordance with law.

Case laws discussed.

Applications under Artieles 226 227 of the Censtitution of India.

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

M/s. A. B. Ojha, Ram Balak Matho & Kamla Prasad for the petitioners.

Mrs. Sheema ali Khan (S. C. IX). Mr. Syed Ashfaque Ahmad (J. C.), Mr. Rao Kundan Kr. Karamvir & Mr. Subodh Kr. Sinha for the State.

B. P. Singh,J. These three writ petitions involve common questions and have, therefore, been heard together and are being dispcsed of by this common judgment. Apart from the

submission urged in C. W. J. C. Nos. 2929/94, and 2993/94, in C. W. J. C. No. 3256/94 an additional submission was advanced on behalf of the petitioners which shall be dealt with separately.

2. The facts of the case may be taken from C. W. J. C. No. 2993/94, as learned counsel for the petitioners submitted that the facts are more or less the same and, therefore, it is not necessary to refer to the pleadings in C. W. J. C. No. 2929/94. In these writ petitions the petitioners have challenged the acquisition of land under the land Acquisition Act by the State of Bihar for the purpose of widening the Braj Kishore path. The petitioners are some of the owners as well as tenants of the premises situate on the portion of the land sought to be acquired. Initially, in the writ petitions the petitioners had challenged the approval granted by the State Government to the making of the award by order dated 16-3-1994 (Annexure—1). The award made by the Collector (Annexure—2) dated 16-3-1994 was also challenged. Later, the petitioners sought leave to amend the writ application with a view to challenge the notiffcation dated 25-8-1990 under section 4(1) of the Act as also the notification as published in the Bihar Gazette on 1-9-1990. They also challenged the declaration made under section 6 of the Act on 19-9-1991 and the publication of the said declaration in the Bihar Gazotte dated 13-3-1992. These have been annexed as annexures 7, 8, 9 and 10 respectively to the supplementary affidavit filed on behalf of the petitioners.

3. The facts, not in dispute, may first be noticed. The Cabinet took a decision to acquire the land necessary for widening the Brij Kishor path. Pursuant to the said decision of the Cabinet, Secretary, Road Construction Department, Government of Bihar wrote to the Vice Chairman of the Patna

Regional Development Authority for necess-ary action. The aforesaid letter contains the guidelines subject to which the acquistion was to be made. A requisition was sent by the Executive Engineeron 26-4-1990 for acquisition of the land in question. Consequently, a notification was issued under section 4 of the land Acquisition Act notifying the lands in question for acquisition. The aforesaid notification under section 4 was Published in the Bihar Gazette on Ist September, 1990, and was also published in two local dailies on 17-9-1990, as required by the Act. According to the State. the substance of the notification was also given in the locality on 18-3-1991. This is disputed by the petitioners.

A declaration under section 6 of the Act was issued on 19-9-1991 and the same was pubished in the Bihar Gazette on 18-3-1992. The declaration was also published in the two local daiies on 14-10-91. and 16-10-91. It is not in dispute that objections were invited, and the same were considered and disposed of under section 5–A of the Act. Learned counsel appearing for the petitioners in C. W. J. C. 3256/94 and 2993/94 submitted that the notification issued under section 4 of the Act was not in accordance with the provisions of the Act. Firstly, the notification was bad for the reasons that it did not record the satisfaction of the appropriate government that the land in question was needed or likely to be needed for any public purpose. The notification (Annexure—7) does not record the satisafaction of the State Government, but only records the satisfaction of the Additional Collector, Patna, which is contrary to the provisions of sub-section(1) of section 4 of the Act. Secondly, it was submitted that the substance of the notification

was to be given at convenients places in the locality. This was not done and, therefore, the notification was invalid.

The notification issued under section 6 of the Act was challanged on the ground that the same should have been issued within one year from the date of issuance of notifiifcation under section 4 of the Act. Since the same was issued on 18-3-1992, the same was barred by the second proviso to section 6(1) of the Act. The declaration under section 6 was also bad for the reason that the substance of the said declaration was not given at convenients places as roquired by sub-section (1) of section 6 of the Act.

The award made by the Colloctor was challenged on the ground of non-compliance with the provision of section 11 of the Act. It was submltted that the award could have been made only with the prior approval of the Sate Government as required by the first previso to sub-section (iii) of sub-section (1) of section 11 of the Act.

4. Mrs. Sheema Ali Khan, learned Standing counsel appearing on behalf of the State, submitted that the notification issued under section 4 and the declaration under sectioin 6 of the Act were issued in accordance with law and were duly notified in the manner required by law, Even if it was assuned that public notice of substance of declaration under section 6 was not given at conveniont places in the said locality, that did not affect the validity of the acquisition.The provisions of the law were substantially complied wich and, in any event no prejeudice was caused to the petitionors. She further maintained that the writ petitions filed by the petitioners should be disnissed on the ground of delay alone, because the petitioners had approached in this court in March and Aprial 1994, when the notification

under section 4 was issued on 25-81990 and the declaration under section 6 on 19-9-1991. She has relied upon decisions of the Supreme Court in support of her contention that such delayed writ petitions should not be entertained. It was also submitted by her that section 11 did not require that the award should be approved by the Government. It only required that before an award is made, an appreval of the Goverment should be obtained.

5. Learned Standing Counsel appearing on behalf of the respondents vehemently contended that in exercise of its writ jurisdiction, this court should not interfere with the acquisition proceeding as the petitoners are guilty of delay and laches in approaching this court for quashing of the acquisition preceeding. She submitted that the notification under section 4 was published in the Gazette on 1-9-90. Objections under section 5–A were thereafter invited and considered. A declaration under section 6 followed on 19–9–91 which was also notified in the Gazette on 18-5-92. Even before that the same was published in two local dailies in October 1991. Notices were thereafter issued under section 9 of the Act, and ultimately an award was made on 16-3-94. The instant writ petitions were filed in March and April 1994, but the notification and the doclaration under socition 4 and 6 respectively, were not challenged. It was only in July 1991, that the petitioners sought to amend the writ potitions and challonged the aforesid notification and declaration. Thus the notification under section 4 was challonged after 3 years and 10 months of its, publication in the gazette, and similarly the declaration under section 6 was challenged after two years and four moths of its publication in the Gazetto. Such long unexplained delay disentitied the potitioners from claiming relief. She

relied upon several. decicions of the Supreme Court, and a decision of this Court in support of her plea.

6. In (1975) 4 Supreme Court cases 285 (*Aflatoon* vs. *Lt Governor of Delhi*) a notification under section 4 was issued in 1959, the declaration under section 6 was published in 1966, and notices under section 9 issued in 1970. The petitioners filed the writ petitions in 1972, Dismissing the writ petitons on the ground of delay, the Court held;

11. Nor do we think that the petitioners in the writ petitions should be allowed to raise this plea in view of thoir conduct in not challonging the valadity of the notification oven after the publication of the declaration under section 6 in 1966. Of the two writ petitions, one is filed by one of the appellants. There was apparently no reason why the writ petitioners should have waited till 1972 to come to this Court for challenging the validity of the notification issued in 1959 on the ground that the particulars of the public purpose were not specified. A valid notification under section 4 is sine qua non for intitiation of proceedings for acquisition of property. To have sat on the fence and allowed the Goverment to complete the acquisition procedings on the basis that the notification under section 4 and the declaration under section 6 were valid and then to attack the notification on grounds which were available to them at the time when the notification was published would be putting a premum on dilatory tactics. The writ petitions are liable to be dismissed on the ground of laches and delay on the part of the petinioners (see *Tilekchand Motichand* v. *H. B. Munshi and Rabindranath Bose* v. *Union of India*)."

7. In (1976) 2 SCC 895 (*State of Mysore* V. *V. K. Kangan*, in similar circunstances, the court held:

"13. The notification under Section 4 was published on April 13, 1967. Objections were filed by the repondent undor section 5A of the Act. The Deputy Comissloner submitted his report to the Government. The Government overruled the objections. The notification under Section 6 was published in the gazette on October 19, 1968. The writ petition challenging the validity of the notifications was filed sometime in July or August, 1969. We do not think that the respondent was entitled to challenge the validity of the notification under section 4 of the Act as the writ petition challenging the notification was filed after an unreasonable lapse of time. If public notice as required by section 4 of the Act was not given and that would per se vitiate the notification under section 4, the appellant, should have challenged its validity within a reasonable time of the publication of the notification. The respondent know of the notification and filed objection under section 5A of the Act. In these circumstances we see no reason to accept the submission of Counsel.

8. In AIR 1984 SC 1020 (*Hori Singh* vs. *State of U. P.*) the Supreme Court held that a delay of 2 to $2\frac{1}{2}$ years in challenging the notification was enough justification for dismissing the writ petiton on ground of laches alone. It was observed;

"4. At the out set we ar of the view that the writ petition filed in July, 1982 questioning the notification issued in January, 1980 after a delay of nearly two and a half years is liable to be dismissed on the ground of laches only. It is no doubt truc that the applellants have pleaded that they did not know anything

about the notifications which had been published in the Gazette till they came to know of the notices issued under section 9(3) of the Act but they have not pleaded that there was no publication in the locality of the public notice of the substance of the notification as required by law. It is significant that a large number of persons who own the remaining plots have not cahllenged the acquisation proceedings. The only other petition in which these proceedings are challenged in Civil Misc. Writ petition No. 11476 of 1982 on the file of the High Court filed subsequently by Amber Singh and four others. Moreover in a small place like Keragarh where these plots are situate, the acquisition of these lands would be the talk of the town in a shortwhile and it is difficult to believe that the appelants who are residents of that place would not have known till July. 1982 that the impugned notification had been published in 1980. Any interference in this case filed after two and a half years with the acquisition proceedings is likely to cause serious public prejudice. This appeal should, there fore, fall on the ground of dealy alone. "

In similar facts, this court in AIR 1985 Patna 70 (*Keshav Pal* Vs. *State*) held;

"10. In my opinion, these petitioners should not have waited till 1982 to come to this Court for challenging the validity of the notification issued on Ist Sept, 1980. They ought to have moved this Court within a reasonable time, These petitioners should have moved this Court in 1980 for quashing the notification under S. 6 of the Act. In these two writ petitions, these petitioners have offered no explanation as to why the writ

petitions were filed after such an inordinate delay and after the entire process of acquisition was over. These writ petitions are liable to be dismissed on the ground of laches and dealy on the part of the petitioners. This view is also being supported by the decision in *Babu Singh* v. *Union of India*, AIR 1979 SC 1713."

No good explanation is forthcoming from the petitioners for the delay in filing of the writ petitions. They permitted the proceading to continue till it culminated in an award. Even thereafter, though the writ petitions were filed, the notification under section 4 of the Act and declaration under section 6 there of, were not challenged. Only several months later, the notification and the declaration were challenged by amending the writ petitions. I am, there fore, of the view that C. W. J. C. Nos, 2993 and 3256 of 1994, deserve to de rajected on the ground of delay and laches alone.

11. In view of my finding on the question of delay, it is not necessary to consider the other submissions urged on behalf of the petitioners. However, since counsel appearing on their behalf angued at length and advanced submissions before us, out of deference for him, I proceed to consider his submissions.

12. I shall first take up the contention urged on behalf of the petitioners that the notification under section 4(1) issued on 25-5-1990 should have recorded the satisfaction of the appropriate Government that the land was needed for a public purpose. Instead, the notification under section4 records the satisfaction of the Additional Collector. On the other hand, counsel for the State contends that section 4 of the land Acquisition Act. 1894, has been amended in so far as it is

applicable to the State of Bihar by the land Acquisition (Bihar Amendment) Act, 1960 (Act 11 of 1960). The amendment to the Central Act by the State Act must apply in so far as the State of Bihar is concerned, since the said Act was enacted after following the procedure under clause (2) of Article 254 of the Constitution of India. The Act was enacted with the approval of the President of India and must, therefore, prevail over the provisions of the Central Act. With a view to appreciate the submission urged at the bar sub-section(1) of section 4 can be divided into two parts. The first part relates to the satisfaction of the authority that the land is required for a public purpose. The second part deal with the manner in which the notification is to be published or given. Under the land Acqusition Act, 1894, sub-section (1) of section 4 begins with the following words: "whenever it appears to the appropriate Government that the land in any locality is needed or is likely to be needed for any public purpose ....." Sub-section (1) of section 4 as amended by the Bihar Act 11 of 1960 begins with the following words" Whenever it appears to the appropriate Government or the Collector that land in a locality is needed or is likely to be needed for any purpose ....." It would, thus, be apparent that while under the Central Act it was only the appropriate Government which had to be satisfied about the need to acquire land for a public purpose, under the Act, as amended by the State law, the appropriate Government or the Collector may be satisfied about the need to adquire land for a public purpose, If the State Act is to prevail as it should, the notification is perfectly valid since it has been issued by the additional Collector, who was authorised to exercise all the powers of a Collector under the Act. Counsel for the petitioners

did not dispute that such was the legal position till the year 1984, but submitted that after amendments brought about in the land Acquisition Act, 1894, by Act 68 of 1984 the position has changed. It was submitted that in view of the subsequent amendment of sub-section (1) of section 4 of the land Acquisition Act, 1894, shall override the provisions of the Land Acquistion (Bihar Amendment) Act, 1960. The submission is attractive, but devoid of merit.

13. It will be seen that so far as the first part of sub-section (1) of section 4 is concerned, Act 68 of 1984 did not bring about any change by amendment. The provision remained the same as before and only after the words 'public purpose'. the words for a Company' was added. It would thus be seen that the provision remained the same, as it was before Act 68 of 1984. except the addition of the words' or for a Company'. No change was brought about and, therefore, the law continued to be what it was before Act 68 of 1984 was enacted. It is not as if Act 68 of 1984 substitued a new provision or altered or amened any part of section 4 (1) so as to make it inconsistent with the State law. Since no amendment was effected, the position in law remained the same. as it was before Act 68 of 1984 was enacted. This view is supported by a decision of a Full Bench of this court, reported in 1992(1) PLJR 264 (*T. S. Griha Nirman Samiti Ltd.* Vs. *State of Bihar*). One of the learned judges held:

"45. I, therefore, hold that under the Central Amendment Act, 1984, nothing has ben added or substituted which makes the State Act (11 of 1961) repugnant to the Central Act. The question of repugnancy does not arise because there is no

conflict between these to Acts in pith and substance. I fail to understnd when the State Amendent Act. 1961 was not repugnant to the Cantral Act. 1894 how It is repugnant to the new Central Act. If both the Acts could tread the same filed before the amendment of the Central Act, it can tread the same field even after amendment. In the premises aforesaid, the argument of the respondents that after the amendment of the Cantral Act, the State Amendment Act stands repealed has to be rejectd."

Another learned Judge agreeing with the said view held:

"57. Another submission, which has been made highlighting the Central Amendment of 1984, is that after the Central Amendment it is only the State Government being the appopriate Government which can issue notification and not the Collector as provided by the Bihar Amendment. The argument also, for the reasons already stated above, is devoid of any substance. Proviso to clause (2) of Article 254, no doubt, empowers the Parliament to anact at any time any law with respect to the same matter including a law adding to, amending, varying or repealing a law so made by the legislature of the State. However, merely because few words have been added in sub-section (1) of section 4, it cannot be said that the whole of sub-section has been amended or varied or repealed..... The Central Amendment as it stood originally and as It stands even now after the amendment of 1984. empowers only the State Government being the appropriate Government to issue notification in that regard. The Bihar Amendment of 1961 empowering the Collector also to issue notification on the basis of his satisfaction, does not stand amended or varied and, therefore, there is no question of repeal

of that part of the Bihar Amendment. In my opinion, sub-section (1) of section 4 consists of several parts, the first part deals with the satisfaction of the competent authority in regard to the need of for any public purpose, the second part deals with the mode of publication of the notification or substance of the notification. These parts are different 'subjects' or 'matters' severable from each other and, therefore, if some amendment has been made adding something to one part of the provision, it cannot be said that the other part(s) is also necessarily affected by reason of any such addition. According to me, it is a case of 'addition' within the meaning of the proviso to Article 254 (2), and not a case of repeal, so far as sub-section (1) of section 4 is concerned. We have already seen above that the amendment made by the Central Act adding few words in regard to the mode of publication does not amount to repeal of even that part of the Bihar Amendment since it is not necessary to deal with that aspect again. In my opinion, therefore, not with standing the Central Amendment of 1984, the Collector is competent to issue notification on the basis of his satisfaction that a particular land in any locality is needed or is likely to be needed for any pubic purpose."

In view of the authoritative pronouncement of the Full Bench of this Court which binds us, the first submission must be rejacted.

14. The second submission urged on behalf of the petitioners that no public notice of the substance of such notification was given at convenient places in the locality and, therefore, the notification was not published in accordance with the provision of sub-section (1) of section 4 of the Act, must also

be rejected in view of the facts brought on record. In the original writ petiton filed by the potitioners no such plea was taken. For the first time, such a plea was taken in paragraph no. 12 of the supplementary affidavit filed on behalf of the petitioners, affirmed on 7th July. 1994. In its reply the State has controverted the facts alleged in the said supplementary affidavit. In paragraph no. 6 of the reply filed in C. W. J. C. No. 3256 of 1994 it was stated that a public notice was put up at a convenient place in the locality on 18-3-1991. The learned Stainding Counsel produced before us the original record for our perusal. From the record it appears that such a notice was read over and was affixed to a electric pole in the locality. The said notice has been witnessed by a member of the public. We are satisfied after perusal of the original record that a public notice was affixed at a convenient place in the locality on 13-1-1991. Counsel for the petitioners, however, submitted after perusing a copy of the said notice that the notice had not been issued in the manner prescribed by section 45 of the Act which required that such a notice should be signed by the officer there in mentioned. Counsel for the State rightly submitted that the original notice had been affixed to a electric pole in the locality after being read out to the public and after the same was witnessed in writing by a member of the public. The copy of the notice produced in court may not bear the signature of the officer concerned, because it was not the original notice. In my view, the counsel for the State is justified in her submission. There is no averment in the writ petition that the notice which had been displayed in the locality did not bear the signature of the officer issuing the notice. In fact,

the plea of the petitioners is that no such notice was ever affixed at a conspicuous place in the locality. In the absence of specific plea on the question of fact, I shall presume that official acts have been done in a regular manner. The second submission must, therefore, be rejected.

15. It was then submitted that since the notification under section 4 was published last in the two local dailes on 17-9-1990, the declaration under sectin 6 should have been made within one year from that date. This submission was made on the basis that public notice was not given at a conspicuous place in the locality and, therefore, in terms of section 4(1) of the Act, the date of publication in the local dailies should be tneated as the date of publication of the notification. On that basis it was submitted that the declaration under section 6 of the Act should have been made on or before 16th September, 1991. In view of my finding that the last notice given under section 4 (1) of the Act was the public notice given at a convenient place in the the locality on 18-3-1991, the last date for making the declaration would be 17th March, 1992. In the instant case, the declaration was made on 19-9-1991 though it was published in the official gazette on 18-3-1992. For the purpose of proviso (ii) to sub-section (1) of section 6, the making of the declaration and not its publication is relevant for the purpose of determining the period of one year under the said proviso. Learned counsel for the petitioners also submitted that if it is believed that public notice was given on 18 th March, 1991, then the declaration under sction 6 was made within time. This submission, therefore, must also be rejected.

16. It was then contended that the substance of the declaration ought to have been given at convenient places in the locality, but this was not done. It is not disputed that the declaration under section 6 of the Act was published in the official gazette. It is also not disputed that the declaration was published in two local dailies having circulation in the area in question, what was not done, was the giving of public notice by notifying the substance of the declaration in the locality in question. Counsel for the potitioners contends that non-compliance in this regard vitiated the declaration itself made under section 6 of the Act. The learned Standing Counsel, on the other hand, contends that even if it is assumed that the substance of the declaration was not notified in the locality in question, that would not affect the declaration made under section 6. On behalf of the petitioners reliance was placed on the decision of the Supreme court in AIR 1985 SC 1622 *Collector (District Magistrate) Allahabad & another Vs. Raja Ram Jaiswal,* and other decisions of the Supreme court holding that the requirement of notice under section 4 of the Land Acquisition Act was mandatory. Learned counsel submitted that the Supreme Court in that case held that if the substance of the notification was not given publicity in the locality in quastion, that effect the validity of the notification. It is true that the provisions of section 4 are mandatary, and there are good reasons for holding that the provisions are mandatory. After a notification under section 4 of the land Acquisition Act an agrieved party may profer objection and may be able to influence the mind of the concerned authority that his land should not be acquired. There is no doubt that the

provisions with regard to the manner in which notification the undor section 4 must be published, is a mandatory requirement. The question is whether the giving of public notice of the declaration under section 6 is also mandatory in the sense that for non-compliance with the requirement to give public notice, the acquisittion itself will be vitiated, Though in a slighly different context the matter came up for consideration before the Supreme Court in AIR 1976 SC 417 (*Khadim Hussain* V. *State of U. P*). Their Lord ships after considering the provision of section 6 of the Land Acquisition Act observed :

"25. It is clear from the provisions set out above that the objcet of the notification under Section 6 is to ensure that the Govt. is duly satisfied, after an enquiry at which parties concerned are heard, that the land under consideration is really needed for a public purpose and that the declaration is to operate as conclusive evidence to show that this is so. The conclusiveness of this declaration cannot be questioned any where if the procedure dealing with its making has been observed. The notification which takes place under section 6 (2), set out above, follows and serves only as evidence of the declaration. That the declaration mentioned in section 6(1), set out above, differs from its notification is shown by the fact that it has to be signed by a secretary or other officer duly authorised, The declaration is in the from of an order. The notification is its publication and proof of its existence, It has been shown, in the case before us, that the deemed notification under section 6 took place about three and a half months after the expiry of two years from the commencement of the Ordinance of 1967. but, it is not argued on behalf of

the appellants that the declaration undersection 6 was similarly delayed. Presumably, it was within time.

26. A Look at the amendment introduced by section 4 (2) of the land Acquisition (Amendment and Validation) Act 1967; shows that it is the declaration which has to take place within two years of the expiry of the commencement of the Ordinance which came into force on 20th January, 1967. Infact, section 4(2) of itself makes a distinction between a "declaration" under section 6 and its "notification" under section 4 of the principal Act. section 6 of the principal Act can take place beyond the time fixed. The publication is confined to declarations made beyond the specified period. If the case of the appellant could be that no declaration was made within the prescribed time, it was his duty to prove it. He has not discharged that onus."

17. From the above observation it is clear that the satisfaction of the Government is recorded in the decalartion made under section 6(1) of the Act. The notification which follows, serves only as evidence of the declaration. The declaration is in the from of an order whereas the notification is its publication and proof of its existence. Moreover, no prajudice is caused to the potitioner because pursuant to the publication of the declaration, the petitioners were not required to do anything. Their rights were not, therefore, adversely affected. The declaration had been published in the official gazette and had also been published in two deilies. Having regard to the fact that several adjoining plots were being acquired, the petitioners could not say that they had no knowlodge of the acquisition or that any

prejudice was caused to them by not giving public notice as required. Moreover, the petitioners have been found guilty of delay and laches. Subsequently, as well notices under section 9 were given to the petitioners. With regard to enhancement of compensation the petitioners could always resort to the provision of section 18 of the Land Acquisition Act. In fact, an award has been made in favour of the petitioners.

Assuning that the requirements of section 6 also are mandatory. I am of the view that the provision has been substantially compied. by publication of the declaration in the gazette and publication of the declaration in two local dailes. Substantial compliance to my mind is enough to save the acquisition, particularly when the petitioners have approached this court after much dealy which disentitled them from grant of discretionary relief. In this view of the matter, I do not feel persuaded to quash the acquisition only on the ground that the public notice as to the substance of the deciaration was not given in the concerned locality though the other two modes of publication of the declaration were complied with.

18. The last submission in support of the writ potitions was that in making the award the Collector disregarded the provisions of the first proviso to sub-section (iii) of saction (1) of sction 11 which provided that no award shall be made by the Collector under this sub-section without the previous approval of the appropriate Government or of such officer as the appropriate Government may authorise in this behalf. Counsel for the petitioners submitted that before its publication the award had not been sent to the Government for its approval. The learned

Standing counsel contends that the aforesaid proviso does not provide that the award shall be sent to the appropriate Government for its approval. All it requires is that no award shall be made by the Collector without the previous approval of the appropriate Government. The purpose is obvious. Before an award is made which is in the nature of an offer made by the Government to the owners of the land, the Government must know as to what approximately is the extent of liabiity that it might incur if an award is to be made. The Collector, therefore, is only required to seek the approval of the appropriate Government by placing before it the necessary material which may enable the appropriate Government to make up its mind whether to acquire or not to acquire the land in question having regard to the costs involved. The provision is really with a view to protect the interest of the State so that it is not burdened with unforseen liability. Annexure 1, which is approval granted by the State Government on 16-3-1994 discloses that the estimate and the relevant particulars had been forwarded to the State Government for its approval and after considering all aspects of the matter, the approval was granted by the State Government. I am satisfied that the approval was properly granted by the State Government and there was no need for the Collector to send the award for the approval of the State Government. It should not be forgotten that in making an award, the Collector under the Act performs a function of quasi judicial nature and it would be impermissible for him in the performance of such duties to get his decision approved by the State 'Government in advance. The purpose of the aforesaid proviso in Section 11 of the Act is not to

compel the Collector to seek approval of the Government even in regard to his quasi judicial acts, but only to apprise the State Government of the liability that it might incur if an award is made acquiring the notified lands. This as I have said earlier is only with a view to apprise the Government of the approximate liability that it might incur so that after the award is made, the State may not feel embarassed on account of incurring unforseen liability which it may find difficult to discharge. I have, therefore, no hesitation in holding that th approval of the State Government was properly obtained by the Collector under section 11 of the Act.

19. I, therefore, do not find any merit in C. W. J. C. No. 2993/94 and C. W. J. C. No. 3255/94 and the same are, accordingly, dismissed.

20. In C. W. J. C. No. 2929 of 1994 Sri A. B. Ojha, counsel for the petitioners submitted that the petitioner is the owner of a pertion of plot no. 722 as also of plot no. 715. The petitioner has no griovance with regard to the notices for served upon her so far as theyno griovance with regard to the notices served upon her so far as they relate to plot no. 715. However, with regard to plot no. 722 it was submitted that she received no notice under 9 of the Land Acquisition Act. It was contended that she has a right to represent under section 9 of th Land Acquisition Act and she has been deprived of that opportunity. It is not disputed that an award has been made in favour of the potitioner. It also appears that in respect of two portions of plot no 722 notice was given to the husband of the petitioner under section 12 of the Land

Acouisition Act, who accepted the same, but with on objection that the plots in question should not be acquired since they were not required for the widening of the road to the extent of 90 Ft. Learned counsel for the State submitted that even if no notice was given under section 9 to a particular person whose land was sought to be acquired, the acquisition preceading as a whole will not be vitiated. In any event, such opportunity can be given even now, so that the petitioner may have no grievance. Counsel for the potitioner also submitted that if an opportuity is given to the petitioner she may make her represontation as required by law. In these circumstances, the respondents ae directed to serve a notice on the petitioner under section 9 and thereafter to conilder any represntation made by the petitioner. The concerned authority will thereafter pass appropriate orders in accordance with law.

21. Learned counsel also urgod before us that with a slight realignment of the road the property of the petitioner can, perhaps, be saved from acquisition. with his assistance and the assistance of the learned Standing. Counsel we have perused the acquisition plan and we are satisfied that we should not be justified in interfering in this matter. If an attempt is made to save the plot of land belonging to the petitioner from acquisition, that may result in the acquisition of many other plots on the other side of the road, because otherwise the road cannot to widened in a straight line. Having regard to the area in question the road has to bear the burden of heavy traffic. It is, therefore, desirable that the road should be straight and should not have unnecessary curves because that may impede free flow of trafic.

22. C. W. J. C. No. 2929,94 is, therefore, partly allowed to the extent that the respondents are directed to give notice to the petitioner under section 9 of the Land Acquistion Act in respect of two portions of plot no. 722 having the arears of 0. 062 acres and 0. 01325 acres respectively.

23. These writ petitions are disposed of accordingly.

Naresh Kumar Sinha, J. I agree.

R. D. Order accordirgly.

REVISIONAL CIVIL

Before Ashish N. Trivedi, J.

1995

Februari, 10.

Md. Abbas. *

v.

Madan Prasad and others.

Receiver appointed by Trial Court in the partition suit—filing application for police help to evict tenants who were not parties to the suit, from the suit premises—Order of Trial Court rejecting the application whether in proper exercise of its jurisdiction—Code of Civil Procedure, 1908 (Central Act no. V of 1908) section 115—provisions of.

Where Receiver appointed by Trial Court in a suit for partition, filed an application before the trial court under Rules 1 and 3 of Order 40, Code of Civil Procedure, 1908 seeking police help to oust the tenants, who were not parties to the suit, alleging that the tenants who occupied shops in the suit premises are not paying rent to the Receiver, which was rejected by the trial court;

Held, that the Trial Court rightly exercised jurisdiction in refusing to extend police help in aid of the Receiver for eviction of the said tenants.

The trial court rightly concluded that whether the said tenants were dafaulter within the meaning of the Bihar Build-

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* Order no S.—10. 2. 1995.

Civil Revision No. 590 of 1994. In the High Court of Judieature at patna.

ings (Lease, Rent and Eviction) Control Act, 1982 are matters to be decided in a properly constituted suit and not in the summery proceeding.

Case Laws discussed.

Application by the Receiver, appointed by Trial Court.

The facts of the case material to this report are set out in the order of A. N. Trivedi, J.

8. 10. 2. 1995. This application under section 115 of the Code of Civil Procedure is directed against an order dated 12. 1. 1994 passed by the 4th Subordinate judge, Begusarai in Title suit No. 44/81 (Md. Abbas and others Vrs. Md. Ashique and others).

Title suit No. 44/81 was filed by Md. Abbas, the petitioner and opposite party nos. 14 to 18 against opposite party nos. 2 to 10 (defendants Ist set) and opposite party nos. 11 to 13 (defendants 3rd set) for partition.

During the pendency of the suit is appears that Md. Ashique was appointed as receiver who died and in his place Md. Abbas Plaintiff no. 1 was appointed as receiver vide order dated 22. 4. 1992 by the trial court.

He made an appication under order 40 Rules 1 and 3 read with nection 151 of the Code of Civil Procedure on 24. 5. 1993 seeking poice help to oust the tenants Madan Prasad and Samsuddin @ sharma Jee alleging that they had occupied some shops in the suit premises but they are neither paying rent to the receiver nor obeying his directions. Some of the defendants objected to the prayer of the receiver and filed objection. Thereafter both Madan Prasad and Samsuddin who were not parties

to the suit were issued notice and they filed their objection against the application made by the receiver.

The trail court by the impugned order dated 12. 1. 1994 rejected the application made by the receiver for police help to oust Madan Prasad from the suit premises.

In this Civil Revision Application Madan Prasad has been arrayed as opposite party no. 1 who has filed his counter affidavit. Counter affidavit has also beenfiled on behalf of opposite party nos. 11 to 13.

I have heard learned counsel for the parties and considered the materials on record.

From perusal of the averments made in the Civil Revision Application it appears that the petitioner does not dispute that Madan Prasad and Samsuddin alias Sharma Jee are tenants. Paragraph 3 of the Revision Appication is reproduced here under :—

"That the receiver Md. Abbas filed a petiton under order 40 Rule 1 and 3 read with section 151 C. P. C. in this court seeking police help to outs the tenants Madan Prasad and Samsuddin alias Sharma Jee, who have occupied some shops in the suit premises but they are neither paying rents to the receiver nor obeying his direction. The prayer of receiver was objected by the defendants, Madan Prasad and Samsuddin by filing a rejoinder. Thereafter both Madan Prasad and Samsuddin who are not parties of this suit were noticed to show cause as to why the prayer of the receiver would not be granted".

It is also not in dispute that Madan Prasad is in occupation of the tenanted premises since 1978 which were let out by

Md. Ashique and according to the plaintiff had stopped paying rent and therefore he had been sought to be ousted.

The trial court found that Madan Prasad is a tenant in one of the disputed premises on payment of rent and that the receiver has claimed that Madan Prasad has not been paying rent to him and as such he has defaulted and made himself liable for eviction.

Madan Prasad in his objection contended that he is a tenant on payment of rent since 1978 is running a shop of readymade garments under the name and style of M/S Maharaja Dresses and had paid rent in advance up to September, 1995 to the earlier receiver Md. Ishaque and asserted that he is neither a trespasser nor a defaulter and as such cannot be evicted under the summary proceeding. The trial court further observed that whether the rent receipts from 1978 up to September, 1995 are genune or forged, whether the advance rent paid by Madan Prasad to the previous receiver or his agent can be adjusted wholly or in part and whether Madan Prasad is a dafaulter within the meaning of Bihar Buildings (Lease, Rent and Eviction) Control Act, 1982 are matters which cannot be decided in summary proceeding and therefore the trial court was of the view that the receiver will have to bring a suit as provided under the law.

Learned counsel for the petitioner conteded that the trial court failed to exercise jurisdiction vested in it in not extending police help to evict Madan Prasad from the premises as he is a trespasser who is not paying rent. The contention is that once the property becomes custodia legis it is the duty of the court to

protect it and any interference in the possession of the court would amount to contempt and so as to preserve and protect the property the court ought to have evicted Madan Prasad and in any case ought to have directed Madan Prasad to deposit rent in the court. In support of his contetion learned counsel for the petitioner relied upon a decision in *Nalini Kant Sinha* Vrs. *Ajoy Krishna and other* (1) in which it was held-----

"It is true that there is no provision in the whole of the Code of Civil Procedure as to how the receiver's hands should be strengthened for protecting the property in his custody from trespass, illegal and wrongful possession, the inherent power of the court will be exercised depending on the situation to make such orders to secure the ends of justice and to prevent the abuse of the process of the Court. The argument of absence of any provision in the Code of Civil Procedure in this regard is, therefore, irrelevant and meangless. The mighty hands of law will strike at every illegality whenever and wherever it is committed and sighted. It is well settled, as held in the case of *Rayapati Audemma* V. *Pothineni Narasimham* (A. I. R. 1971 Andhra Pradesh 53 at page 57) that in order to do justice between the parties or to prevent

the abuse of the process of the Court, the Civil Court has ample jurisdiction to give direction to the police authorities to render aid to the aggrieved party with regard to the implimentation of the orders of the court or the exercise of the rights created under the orders of the Court. To ask the receiver to go for a suit for recovery of possession and eviction of Anugrahit Naryan in a regular civil suit would be failure to do justice. It would be

(1) (1985) P.L.J.R. 156.

weakening the office of reciver to perform the duties of his office as enjoined by law in administration and management of court's property".

The next decision relied upon by learned counsel for the petitioner is of a Division Bench of this court in *Prahled Prasad Modi and another* Vrs. *Tikaitni Faldani Kumar and another* (1) in which after review of earlier decisions the following principles of la were settled,

(1)That a third party in possession having a bona fide paramount title is not affected by the appointment of a receiver in a suit relating to that property.

(2)That in case his possession is interfered with either by the court, which appoints the receiver, on the receiver himself, he has two remedies open to him to redress his grievance (i) either to place his claim before the court, which has appointed a receiver for his examination pro interesse suo' or (ii) to institute a regular suit with the leave of that court.

(3)That in case the third party claimant follows the first remedy and examines himself pro interesse suo', it is for the Court to test the claim judicially so that, as observed in '36 Cal 713 (N)' "the court shall not by its dominant power hold the property on which the parties to the suit have no claim and hold it in despite of the real owners."

(4)That in case a regular suit has already been institued by the third party claimant for the relief against the receiver or when the facts of the case are too much complicated for an easy decision in a summary proceeding like one by way of examining

(1) (1956) A. I. R. (Pat) 233.

the objector 'pro interesse suo' it is open to the Court not to decide the matter in that summary proceeding but to direct the party to get the claim tested in a regular suit on the grant of leave to him for the same".

Learned counsel has further referred to a decision of the supreme court in *Everest Coal Company Pvt. Ltd.* Vs. *State of Bihar and others* (1) in which it was held——

"When a court puts a Receiver in possession of property, the property comes under court custody, the Receiver being merely an officer or agent of the court. Any obstruction on inter ference with the court's possession sounds in contempt of that court. Any legal action in respect of that property is in a sense such an interference and invites the contempt penalty of likely invalidation of the suit or other proceedings. But, if either before starting the action or during its continuance, the party takes the leave of the court, the sin is absolved and the proceeding may continue to conclusion on the merits. In the ordinary course, no court is so prestige-conscious that it will stand in the way of a leagitimate legal proceeding for redressal or relief against its receiver unless the action is totally meritless, frivolous or vexatious or otherwise vitiated by any sinister factor. Grant of leave is the rule, refusal the exception. After all, the court is not, in the usual run of cases, affected by a litigation whcih settles the rights of parties and the receiver represents neither party, being an officer of the court. For this reason, ordinarily the court accords permission to sue, or to continue. The jurisdiction to grant leave is undoubted and inherent, but not based on black-

(1) (1977) A.I.R. (S. C.) 2304.

letter law in the sense of enacted law. Any litigative disturbance of the court's possession without its permission amounts to contempt of its authority, and the wages of contempt of court in this jurisdiction may well be voidability of the whole proceeding. Equally clearly, prior permission of the court appointing the Recevier is not a condition precedent to the enforcement of the cause of action. Nor is it so grave a vice that later leave sought and got before the decree has been passed will not purge it. If before the suit terminates, the relevant court is moved and permission to sue or to prosecute further is granted, the requirement of law is fulfilled. Of course, failure to secure such leave till the ends of the lis may prove fatal".

In the aforesaid decision of the Supreme Court. the treaties by Mula on Code of Civil Proceduce have been considered in paragraph 7 of the report which is reproduced hereunder:—

"Mulla, with characteristic clarity, has condensed the whole law correctly:

"A receiver cannot sue or be sued except with the leave of the Court by which he was appointed receiver. A Party feeling aggrieved by by the conduct of a receiver may seek redress against him in the very suit in which he was appointed receiver, or he may bring a separate suit against the receiver in which case he must obtain the leave of the court".

× × × × ×

"There is no statutory provision which requires a party to take the leave of the Court to sue a receiver. The rule has come down to us as a part of the rules of equity, binding upon all courts

of Justice in this country. It is a rule based upon public policy which requires that when the Court has assumed possession of a property in the interest of the litigants before it, the authority of the Court is not to be obstructed by suits designed to disturb the possession of the court. The institution of such suits is in the eye of the law a contempt of the authority of the court, and therefore, the party contemplating such a suit is required to take the leave of the court so as to absolve himself from that charge. The grant of such leave is made not in exercise of any power conferred by statute, but in the exercise of the inherent power which constitute or are akin to an abuse of its authority".

The last case relied upon by learned counsel for the petitioner is the decision of the Supreme Court in *Hiralal Patni* Vrs. *Loonkaran Sethiya and others* (1) in support of his contention that the trial lcourt ought to have empowered the receiver to evict Madari Prasad with the aid of police force. It was held in this case:

"Under this order, a receiver is an officer or representative of the court and the functions under its directions. The court may for the purpose of enabling the receiver to take possession and administer the property, by order, remove any person from the possession or custody of the property. Sub. R (2) of R. 1 of the Order limits that power in the case of a person who is not a party to the suit, if the plaintiff has not a present right to remove him. But when a person is a party to the suit the court can direct the receiver to remove him from the possession of the property even if the plaintiff has not a present right to remove him. In the

(1) (1962) A. I. R. (S. C.) 21.

present case, the appellant was a party to the suit and the court, through the Receiver took possession of the mill and thereafter the Receiver, during the course of the administration of the property, under a compromise arrangement for running the mills leased out the flour mill to the appellant with an express condition that the appellant should redeliver the property to the Receiver on the expiry of the lease. Admittedly the term of the lease had expired and the court directed the Receiver to take possession of the mill. The court. in our view. was legally competent to confer a power on the Receiver under order X. L. R. 1 (1) (d) of the Code of Civil Procedure to recover the property from the appellant".

Learned counsel for the petitioner submitted that to avoid multiplicity of proceeding it was necessary for the trial court to detemine the question of default and to direct Madan Prasad to deposit rent and on failure to do so to evict him and it is unnecessary to ask the receiver to file a suit for eviction against Madan Prasad.

Learned counsel for opposit party no. 1 Madan Prasad contended that the impugned order does not suffer from any infirmity and the proper course, if so advised, for the receiver is to file a suit under the provision of the Bihar Buildings (Lease, Rent and Eviction) Control Act for recovery of arrears of rent, if any, and ejectment against Madan Prasad and in support of his contention placed reliance on a decision of Allahabad High Court in *Ram Saran Das* Vrs. *Shanti Devi* (1) (A. I. R. 1977 Allahabad 175) where it was held that :—

(1) (1977) A. I. R. (Act.) 175.

"When a receiver is appointed under Order 40, Rule 1, the property is in custodia legis. The receiver is an officer or representative of the court. His possession is possession of the Court through receiver and when he is appointed to receive rent and profits of immpovable property, the tenant becomes virtually the tenant of the Court and the Court becomes his land lord. Therefore, receiver is competent to bring suit for ejectment against the tenant on the authority of the court's permission"..

In my view the trial court has not committed any Jurisdictional error, illegality or material irregularity in rejecting the appliction of the receiver for police help to evict opposite party no. 1. The trial court rightly concluded that whether the rent receipts were genuine or forged, advance rent allegedly paid could be lawfully adjusted wholly or in part and whether Madan Prasad is a defaulter within the meaning of the Act are matters to be decided in a properly constituted suit and not in the summary proceeding.

It is not the case of the receiver that Madan Prasad had occupied the premises during the pendency of the suit or after the receiver was appointed. It is thus evident that Madan Prasad was in occupation of the premises in question before the appointment of the receiver who according to the receiver defaulted in payment of rent. In my view, non-payment of rent would not amount to interference in the possessin of the court nor does the status of Madan Prasad become that of trespasser.

None of the decisions relied upon by learned counsel for the petitioner are authorities for the proposition that a tenant who is not even a party to the suit can be forcibly evicted with the aid of police by the receiver on account of default in payment of rent.

On the contrary decision of the Allahabad High Court relied upon by learned counsel for opposite party no. 1. applies to the facts of the present case. Sub-rule (d) of Rule 1 of Order 40 of the Code of Civil Procedure empowers the Court where it appears to it to be just and convenient confer upon the receiver all such powers, as to bringing and defending suit and for the realisation, management, protection, preservation and improvement of the property, the collection of the rents and profits thereof, and the execution of documents as the owner himself has, or such of those powers as the court thinks fit.

Grounds on which a suit for eviction can be brought against a tenant and the procedure to be followed is contained in the Bihar Buildings (Lease, Rent and Eviction) Contorl Act and a tenant can be evicted only according to law even when a receiver is appointed through whom the court becomes a landlord,

In the circumstances, the trial court rightly exercised jurisdiction in refusing to extend police aid to the receiver for the eviction of Madan Prasad opposite party no. 1. The appliction moved by the receiver before the trial court was misconceived.

There is no marit in this Civil Revision application. It is accordingly dismissed with cost to opposite party no. 1.

R. D. Application dismissed.

CIVIL WRIT JURISDICTION

Before B. L. Yadav, A. C. J. and S. K. Singh, J.

1995

March, 22

Dindayal Agrawal *

v.

Union of India and another.

INCOME TAX ACT, 1961, (Central Act no. XLIII of 1961) *section 245C—ambit of—Settlement Commission considered the report of the Commissioner of Income Tax, facts and circumstance of the case and the finding of the Income Tax Officer in the assessment proceeding—concealment on the part of the assessee evident—Settlement Commissioner deciding that the application under section 245C need not be proceeded with—legality of—power of judicial review of High Court—extent of—High Court whether concerned only with legality of the procedure and the process of by which the decision has been arrived at.*

The Settement Commissioner in an application under section 245 C of the Income Tax Act. 1961 hereinafter referred to as the Act, considered the report of the Income Tax Commissioner, the facts and circumstances of the case as also the findings recorded by the Income Tax Officer in the assessment proceedings which makes it evident that there was concealment on the part of the assessee and that the the penalty proceedings initiated against him were justified.

Held, that the Settlement Commission has correctly recorded the findings and arrived at the conclusion that the application under section 245C of the Act need not be proceeded with.

*C. W. J. C. No. 10806 of 1994.

Held, further, that it is well settled that power of judicial review, in such matters against an order of Settement Commission deciding not to proceed with is very limited. The court is concerned with the legality of the proceedure and the process by which the decision has been arrived at and not with the validity of the order challenged.

Case laws discussed;

Application by the assessee.

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

M/s. L. N. Rastogi and S.K.P. Sinha for the petitioner.

Mrs. Renuka Sharma. for the respondents.

B. L. Yadav, A. C. J.

What are the contours of enquiry and procedure to be adopted by the Settlement Commission in an application under section 245 C of the Income Tax Act, 1961 (compendiously the Act') and what is the scope of judicial review in such matters against an order rejecting such an application. and whether a writ petition would lie before this Court even though the cause of action or a part of the same did not arise within the territory of the State of Bihar, are the short but significant questions for our consideration in the instant writ petition preferred by the assessee under Articles 226/227 of the Constitution of India seeking the relief for issuance of a writ of certiorari quashing the order dated 18. 9. 1991 (Annexure—5) (at page 83 to 91 of the brief) and 15. 9. 1994 (Annexure-5/1) (at page 92 to 101 of the brief) and a writ of mandamus directing the Settlement Commission to allow the appication to be proceeded with.

2. The factual matrix of the case is that the petitioner being an individual derives income from business run under the name and style of M/.S Glass King and from other sources as well, for which no Books of Accounts were maintained. The Books of accounts pertaining to M/S. Glass King contain transaction in glass etc. During the course of assesment proceedings for the year 1988 – 89, the Assessing Officer found certain items of purchase not recorded in the Books of accounts and detected certain discrepancies in respect of bank drafts purchased by the petitioner. The petitioner denied those discrepancies but his explanation was rejected. The Assessing Officer estimated the income at Rs. 71,000/— and made an addition of Rs. 3,69.389/— by way of income from undisclosed sources against the net income return at Rs. 30,010 which included income from business at Rs. 27,550/— against a loss of Rs. 2,161/— (vide Profit & Loss Account furnished along with the return). Income from undisclosed sources was also indicated. In fact the Assessing Officer estimated the income from business at Rs. 71,000/— as against Rs. 27,550/— shown by him apart fom addition by way of income from undisclosed sources.

3. The Assessee, the petitioner has filed an application on 25. 7. 90 under section 245 C of the Act before the Settlement Commission for settement of the case for the assessment year 1988–89 and the same was dismissed by the first impugned order whereas the second application was filed again for the assessment year 1988-89 and 89-90 on 27. 3. 92 which was dismissed by the second impugned order.

4. The Commissioner of Income-tax objected to the admission of the application on the ground that the Assessing Officer

has already detected concealment of income and has initiated a penalty proceedings under section 271 (1) (C) of the Act for the Assessment year 1988-89 and re-opened the proceedings for the Assessment year 1989-90 under section 147 (A) for not disclosing true income and concealment was likely to be detected for other assessment years.

5. The petitioner has funds available other than business and some transactions not recorded in the account books while in course of assessment proceedings for the assessment year 1988-89 the Assessing Officer found certain items of purchase not recorded in the Books of account and some discrepancies in respect of the bank draft. The petitioner tried to explain the discrepancies but it was rejected and the Assessing Officer estimated his business imcone at Rs. 71,000/— and made an addition of Rs. 3,69389/— by way of inocme from undisclosed sources against the net income return at Rs. 30, 010/— which included income from business at Rs. 27,550/— against the loss of Rs. 2161/—, as per profit & Loss Account filed along with the return. Details of the addition as income from undisclosed sources referred to by the Assessing Officer (for Assessment year 1989-90) is as follows :—

a.	Rs. 1,51,179/—	Expenditure made out of undisclosed income.
b.	Rs. 70, 000/—	Investment in business outside the books in respect of unrecorded purchase.
c.	Rs. 2, 40, 000/—	Payment to M/S. Indo Ashia Glass and Triveni Glass Shect.

d. Rs. 59, 210/—	Investment in house construction on the basis of Valuer's Reprot, over and above shown in the books,
Rs. 5, 20,389/—	
Rs. 1, 51, 000/—	less credit for withdrawal and intangible addition in trading account.
Rs. 3, 69, 389/—.	

6. Learned counsel for the respondents, however, raised a preliminary objction that the writ petition itself was not maintainable, inasmuch as the Office of the Settlement Commission (Respondent no. 2) is situate at Calcutta and Respondent no. 1 is Union of India through the Secretary Ministry of Finance, Government of India, New Delhi. The Offices of Respondent no. 1 nor Respondent no. 2 are not situate within the territory of the State of Bihar. As the appication under section 245D (1) was decided at Calcutta even the Commissioner of Income tax, Patna has not been made party as one of the respondents. Hence the petition was not maintainable before this High Court. Under Article 226 (2) of the Constitution of India, it has emphatically been provided that a writ petition would lie before the High Court of a State only when a cause of action or part of the same arises within the territory of that High Court. But in the instant case neither the cause of action nor part of the same arose within the territory of this State.

7. Refuting the aforesaid submissions of the learned counsel for the respondents pertaining to the preliminary objection, Mr. Rastogi, learned counsel for the petitioner, urged that no doubt settlement commission decided the matter at Calcutta but initially the cause of action arose at Patna and even though

the Commissioner of Income tax, Patna has not been made party, but never-the-less the writ petition was maintainable. It was further contended that Chapter XIX A (pertaining to the settlement of cases) of the Act was added by Amendment Act 1975 with effect from Ist April, 1966 and section 245—A to 245—M were added providing compete machinery for the settlement of cases by preferring an appication for settlement under section 245—C which provides that an assessee may, at any stage of a case relating to him, make an application in such form and in such manner as may be prescribed, containing a full and true disclosure of his income which has not been disclosed before the Assessing Officer, the manner in which such income has been derived, the additional amount of income tax payable on such income and such other particulars as may be presoribed, to the Settlement Commission to have the case settled and any such application shall be disposed of in the manner herinafter provided.

8. Petitioner's application under section 245—C was to be decided in view of the procedure provided under sectin 245—D which provides" On receipt of an application under section 245—C, the Settlement Commission shall call for a report from the Commissioner and on the basis of the material contained in such report and having regard to the nature and circumstances of the case or the complexity of the investigation involved therein, the Settlemtnt Commission may, by order, allow the application to be proceeded with or reject the application. Two other provisos have been added. The first was that an application shall not be rejected under this subsection unless an opportunity has been given to the applicant of being heard and by second proviso it was indicated that the report of the Commissioner shall be furnished within 120 days.

9. Sri Rastogi, the learned counsel for the petitioner was very emphatic about sub-section 1—A of section 245—D which was omitted by Finance Act, 1991, w. e. f. 27th September, 1991 which provided that an application shall not be proceeded with under this sub-section if the Commissioner objects to the application being proceeded with on the ground that concealment of particulars of income on the part of the applicant or perpetration of fraud by him for evading any tax or other sum chargeable or imposable under this Act, has been established or is likely to be established by any income-tax authority. In other words it was urged that as sub-section 1—A of section 245—D was omitted hence the report of the Commissioner has become meaningless, but Respondent no. 2 proceeded to reject the application on that ground alone. It was further contended that otherwise also the Settlement Commission could have allowed the application to be proceeded with. In this way, it was contended that there were errors on the face of record which justified the relief claimed for. It was further urged that the assessments for the year 1985—86 and 1985—87 were re-opened under section 147 of the Act. Re-assessments were also complete in March, 1990. These re-assessment orders were received by the peitioner on 23. 3. 1990. Against that appeals before Commissioner of Income-tax (Appeals), Patna were filed which were pending when the settement application was filed on 4. 12. 90. Proceedings for assessment for the year 1987-88 were pending with the Assessing Officer. A search took place by the Income-tax department on 11. 2. 88 (within the Assessment year 1989-90) at the business premises of the Company. Some loose sheets and valuable assets were seized from the residential accommodation of the Managing Director. The assessment

order for the year 1987-88 was received and the appeal was also preferred and the same was pending on the date of filing of application for settlement. He leaned heavily on the decisions of the Apex Court in *Commissioner of Income Tax* v. *Express News Paper Ltd.* (1) *R. B. Shreeram Durga Prasad and Fatechand Nursing Das* v. *Settlement Commission and another* (2) *Commissioner of Income Tax, (Central); Calcutta* v. *B. N. Bhattachargee and another* (3).

10. Learned counsel for the respondents, on the other hand, urged that even though sub-section 1—A of section 245—D was omitted by the Finance Act, 1991, w. e. f. 27-9-91 never-the-less under sub-section 1 A of section 245—D the Commissioner of Income Tax was required to furnish a report within 120 days for consideration of the Settlement Commission indicating in detail the nature and circumstances of the case and complexity of the investigation involved and as to whether the application could be allowed to be proceeded with or rejected.

11. Having scrutinised the submissions of the learned counsel for the parties the points for our determination are as to whether the petition was maintainable and what are the contours of enquiry and procedure to be adopted by the Settlement Commission in an application under section 245—C of the Act and what is the scope of judicial review of this Court against an order rejecting the application under section 245—C.

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(1) (1994) 206 I. T. R. 443.

(2) (1989) 176 I. T. R. 169.

(3) (1979) 118 I. T. R. 461.

12. As regards the first point about the maintainablility of the petition under Article 226 before this court suffice is to say that Clause (2) of Article 226 provides that the powers conferred by Clause (1) can be exercised by a High Court in relation to the territories within which the cause of action wholly or in part arises. As office of the Settlement Commission (Respondent no. 2)was situate at Calcutta and Respondent no. 1, the Union of India at New Delhi, hence none of the respondents have their office at Patna. The Commissioner of Income-tax who submitted the report as required by section 245—D of the Act has not been made party even though an objection to that effect was raised by the learned counsel representing the Income-tax department and other respondents. In our considered opinion, therefore, as the cause of action, either wholly or in part did not arise within the territory of the State of Bihar, hence the petition is not maintainable before this court.

13. Reply to the first point was sufficient for disposal of the writ petiton but as the learned counsel for the peitioner was very much emphatic about other points, hence we are proceeding to decide the same.

14. We are reminded of certain old latin maxims. The first is EX PRAECEDENTIBUS ET CONSEQUENTIBUS OPTIMA FIT INTERPRETATIO—Which connotes that the best interpretation is made from the context (see Gram Panchayat V. Director. The next Maxim is "UTRES MAGIS VALEAT POTIUS QUAM PEREAT" which connotes that Court would avoid that construction which would fail to achieve the manifest purpose of legislation, as the presumption is that legislature would enact only for bringing about an effective result. It is not inapt to have a statement in

(1) (1990) A. I. R. (S. C.) 763

Maxell's The Interpretation of Statutes (12 th Edition) page 256. "Statutes which impose pecuniary burdens are subject to the same rule of strict construction. It is a well-settled rule of law that all charges upon the subject must be imposed by clear and unambiguous language, because in some degree they operate as penalties: the subject is not to be taxed unless the language of the statute clearly imposes the obligation, and language must not be strained in order to tax a transaction which, had the legislature thought of it, would have been covered by appropriate words, "In a taxing Act," said Rowlatt J., "one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to a tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used." But this strictness of interpretation may not always enure to the subject's benefit, for "if the person sought to be taxed comes within the letter of the law he must be taxed, however great the hardship may appear to the judicial mind to be." (see Russell v. Scott (1) *I. R. C.* v. *Wolfson* (2). *In union of India* v. *Kanunga Industries* (3) it was held that "taxation Statutes have to be construed strictly, and the benefit of doubt, if any, has to be given to the assessee."

15. Applying these salutary principles of interpretation let us consider relevant provisions of law. Section 245 DD, however, enacts that in case during the pendency of the application the Settlement Commission is of the view that for the purpose of protecting the interests of the revenue it is necessary so to do, it may, by order, attach provisionally any property belonging to

(1) (1948) A. C. 422.

(2) (1949) I. All E. R. 865.

(3) (1992) supp (1) S. C. C. 35.

the applicant, Section 245 F provides the procedure where the application under section 245 C has been allowed to be proceeded with. Section 245 E provides the powers to the Settlement Commission to re-open the complete proceedings. 245 H provies powers of Settlement Commission to grant immunity form prosecution and penalty. 245 HA provides power of Settlement Commission to send a case back to the Officer if the assessee does not co-operate. 245 I provides that the order passed by the Settlement Commission under sub-section (4) of section 245—D shall be conclusive as to the matter stated there in.

16. The Settlement Commission after considering the report of the Incom Tax Commissioner pertaining to the disclosure of income, not earlier disclosed before the Assessing Officer and looking into the order passed by the Assessing Officer about the concealment held against the petitioner. A detailed order of assessment was passed by Sri U. K. Sharma, Income-tax Officer, Ward— 1(2) (Patna) (Annexure 2/3). (At page 50 of the brief) and his findings were to the following effect:

"Considering that the purchase to the extent of Rs. 6, 34, 534/— from Triveni Sheet Glass Company and Indo Ashia Glass co. has not been recorded in the books of account. Estimate sales outside books of account at Rs. 7. 10, 000/—. Although the assessee has disclosed a gross profit of $12\frac{1}{2}$% keeping in mind assessee's submission of quick purchase and sales profit is estimated at 10% or Rs. 71, 000/—. The assessee has not furnished details of any overhead expenditure in respect of not recorded in the books of account."

17. Similar investments in the house construction and other investments have been considered. Ultimately the conclusion

was drawn and findings of fact were recorded (on page 60 of the brief) to the effect that assessed income from undisclosed sources has ben determined at Rs. 5, 20, 389/— but the same was reduced by a sum of Rs. 1, 51, 000/— and the balance of Rs. 3, 09,390/— was included as assessed income from some undisclosed sources. The result of the detailed discussion (in about 14 pages)in impugned order is that the income from business of the petitioner was Rs. 99, 342/— and income from other sources was Rs. 4, 16, 845/—. The total income, thus, was Rs. 5, 16, 187/— The concealment of income was obviously proved. In the operative portion it was stated that the penalty proceedings under section 271 (1) (c) and 273 (2) (b) of the Act have been intiated for the concealment of income and furnishing of advance tax under section 209 A. In view of these findings of the Income-tax Officer the scope of enquiry by the Settlement Commission became easier. It was to gather the materials to establish particulars of such income which might establish concealment keeping inview the report of the Income-tax commissioner and the findings of the Income tax Officer the concealment was self evident. In such situation the course to be adopted by the Settlement Commission has been pointed out by their Lordships of the Apex Court in *Commissioner of Income-tax v. Express Newspaper Ltd.* (supra) to the effect that the assessee should not be allowed to take advantage of the comparitively easy course of settlement. He must face the normal channels of assessment/appeal etc..... Section 245 C is meant for those assessee who seek to disclose income not disclosed before the Income-tax Officer including the manner in which such income has been derived. If the Department already knows, and has gathered particulars of such income and the manner is which

it has been derived, there is no disclosure by the assessee. In view of this dictum of the Lordships of the Apex Court the Settlement Commission was justified in arriving at the conclusion that the application of the petitioner need not to be proceeded with.

18. *In Commissioner of Income-tax, (Central), Calcutta* v. *B. N. Bhattachargee and another*, (supra) relied upon by the learned counsel for the petitioner their Lordships had considered the policy of law as disclosed in Chapter XIX-A. A bare reading of all the sections in chapter XIX-A would indicate the policy and object of the legislation. The policy apears to be not to provide shelter for big tax-dodgers who indulge in criminal activities by apporoaching the Settlement Commission, who shall take due note of the gravity of economic offences on the wealth of the nation which the Wanchoo Committee had emphasised and will exercise power of immunisation against criminal prosecution by using its power only sparingly and in deserving cases, otherwise such orders may become vulnerable if propery challenged. In our opinion, the Settlement Commission has considered the report of the Income-tax Commissioner, the facts and circumstances of the case and also the findings recorded by the Income-tax officer in the assessment proceedings which makes it evident that there was concealment on the part of the petitioner and the penalty proceedings initiated against him were justified. In such situation the Settlement Commission has correctly recorded the finding and arrived at the conclusion that the application under section 245-C of the Act need not be proceeded with.

19. As regards the scope of the judicial review suffice it to say that there are string of decisions rendered by the Lordships of

the Supreme Court indicating the scope of judicial review. It is by now settled that power of judicial review, in such matters against an order of Settlement Commission deciding not to proceed with, is very limited. This Court is concerned in regard to the legality of the procedure and the process by which decision has been arrived at and not with the validity of the orders challenged. To put it differently the power of judicial review of this Court is not concerned with a decision but actually with the decision making process. see *R. B. Shreeram Durga Prasad and Fatechand Nursing Das V. Settlement Commission and other* (supra).

20. Coming back to the submissions of the learned counsel for the petitioner about the legal effect of sub-section 1-A of section 245-D having been omitted by the Finance Ac t, 1991. In fact that provision was to the effect that the application under section 245-C shall not be proceeded with,under that sub-section if the Commissioner of Income tax objected to the application to be proceeded with, on the ground that concealment of particulars of income was on the part of the assessees. Even after the omission of sub-section 1 A of section 245-D, the rest of the provision of 245 D (1) is intact, Even after omission of sub-section 1 A of scetion 245-D, Even after omission of sub-section 1 A of section 245-D, the settlement commission shall call for a report from the Commissioner of Income tacx on the basis of the material contained and having regard to the nature and circumstances of the case or complexity of the investigation involved and after considering all this, Settlement Commission, may, by order, allow the application to be proceeded with, or reject the same. In the present case the Settlement Commission has not relied upon the report of the Commissioner of Income tax

as furnished under sub-section 1A of section 245-D (1). In our opinion the conclusion arrived at and findings of facts recorded by the Settlement Commission are perfectly correct. With a view to be satisfied from all perspectives we have examined in detail the findings of the Commissioner and of Income tax Officer. In our opinion the findings of the Settlement Commission are perfectly correct. As the scope of judicial review is very limited and it is not in respect of actual error in the order but the decision making process we do not find any merits in either of the submissions of the learned counsel for the petitioner.

21. In view of the premises aforesaid, and applying the Aristotelion and Baconian methods of reasonings, the present petition lacks merit and the same is dismissed without any order as to cost.

R. D. Application dismissed

CIVIL WRIT JURISDICTION

Before Narbdeshwar Pandey and Sanat Kumar Chattopadhyaya, JJ.

1994.

July, 12

The Secretary, Bihar State Electric Supply Workers Union and another.

v.

The Presiding Officer, Industrial Tribunal, ors.

Certified Standing Order, 1976 of Bihar State Electricity Board— Certifying Officer amending the standing order relating to transfer in the Standing Order, legality of — clause 30 (d) relating to 'suspension, whether can be sustained ... Industrial Employment (Standing Order) Act, 1946 (Central Act no. XX of 1946) as amended by Industrial Employment (Standing Order) Amendment Act, 1982 (Central Act XVIII of 1982)... Section 10-A whether takes case of employees who are put under suspension —clause 9 (4) relating to absence of workmen beyond period of leave— whether offends Article 14 of the Constitution — Constitution of India — Article 14 — clause 22 (c) relating to sick leave and cause 2 (c) (2) reating to special sick leave whether can be deleted— item' promotion, not mentioned in the first schedule of Industrial Employment (Standing Order) Act, 1946... Certifying Officer not including promotion in the Certified Standing Order-propriety of.

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* Civil Writ jurisdiction Case No. 1101 of 1989. Writ Jurisdiction Case No. 3396 of 1989. In the matter of an application under Articles 226 and 227 of the Constitution of India.

Where the 'transfer' was all along existing in the certified Standing Order 1976 of the Bihar State Electricity Board herein after referred to as the Board, and the employees of the Board being aware of this condition joined service under the Board and there was no grievance either on the part ofthe employees or employer regarding this item and no objection was raised by the employees or employer before the appellate authority;

Held, that the inclusion of the clause 6 (a) relating to transfer in the Standing Order cannot be challenged by the writ-petitioner. If the Management was of the view that this clause was against its interest or was unnecessarily included in the Standing order, it was open to it to get it modified by a regular application in terms of section 10 (2) of the Industrial Employment (Standing Order) Act, 1946, hereinafter referred to as the Act,

Held, further, that from a reading of section 10-A of the Act which has been inserted by Industrial Employment (Standing Order) Amendment Act, 1982, it is clear that the provision takes care of employees who are put under suspension hence the amendment of clause 30 (d) of the Standing Order as by passed by the certfying officer on 21st August, 1987 cannot sustain and should be deleted from the Standing Order.

Held, further, that clause 9 (4) of the Standing Order, relating to absence of workmen beyond the leave period is violative of the principle of natural justice as per this provision, the workmen is entirey on the mercy of the management which may or may not accept the explanation given by the defaulting workmen, for whatever genuine ground for his absence that may be there. In a welfare state the fate of a workmen can not be allowed to be

rested on the discretionary power of a single individual viz the Manager.

Held, further, that clause 9 (4) of the Model Standing Order is ultra vires to the Constitution of India/in as much as it offend. Article 14 of the Constitution of India. The appellate Court, Presiding Officer, Industrial Tribunal Patna, was justified in delating this clause 9 (4).

Held, also, that cause 22 (c) relating to 'sick leave and clause 22 (c) (2) relating to special sick leave can not be deleted.

Held, also, that the certfying Officer was justified in not including the item promotion in the certified Standing Order as there is no authority to extend the Standing Order to topics not mentioned the first shedule of Industrial Employment (Standing Order) Act, 1946.

D. K. Yadav V. *J. M. A. Industries Ltd* (1) and

Sobhana Das Gupta V. *The State of Bihar and ors.* (2)

— followed

Workmen of Lakheri Cement Workmen Ltd. V. *Associated Cement Companies Ltd.* (3) *distinguished.*

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. K. Chattopadhaya, J.

Mr. J.Krishna, Sr. Advocate & Mr. Shivaji Pandey, Advocate for the petitionerin (C.W.J.C.No. 1101/89)

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(1) (1993) 3 S. C. C. 259.

(2) (1974) P. L. J. R. 382.

(3) (1970) 38 F.J. R. 342.

Mr. T.K.Prasad, Sr.Advocate, Mr. Bijoy Nandan Sahay, Mr. Arun Kumar Sinha and Mr. A.K.Upadhyaya, Advocates. for the respondents in (C.W.J.C.No. 1101/89)

Mr. T.K.Prasad, Sr. Advocate, Arun Kumar Sinha, Advocates for the petitionerin (C.W.J.C.No. 3396/89)

Mr. Rajiv Roy, Mr.Shivaji Pandey & Mr. A.K.Upadhyaya, Advocates. for the respondents in (C.W.J.C.No. 3396/89)

S. K. Chattopadhyaya, J. In C. W. J. C. No. 1101 of 1989, the Secretary Bihar State Electricity Supply Workers Union is the petitioner which has challenged the order dated 17. 11. 1989, as contained in annexure 1, passed by respondent no. 1 the Presiding officer, Industrial Tribunal, Patna, by reason of which respondent no. 1 has retained deleted and modified some of the clauses in the Standing Orders. In C. W. J. C. No. 3396 of 1989, on the other hand, the Bihar State Electricity Board through its Secretary as petitioner has challenged the order dated 21st August, 1987, passed by the Certifying officer under the Industrial Employment (Standing Orders) Act, 1946 respondent no. 2 as well as the judgment of the appellate authority dated 17. 11. 1988 as contained in Annexure-2 to this application whereas Bihar Pradesh Vidyut Shramik Sangh through its secretary has been made as respondent no. 5 in both the writ applications.

2. As facts in both the cases are common, it is desirable to mention the case of the parties in nutshell.

It appears that Bihar Rajya Vidyut Parishad Field, Kamgar Union respondent no. 4 in C. W. J. C. No. 1101 of 1989 and respondent no. 3 in C. W. J. C. No. 3396 of 1989 (hereinafter referred to as Kamgar Union') filed an application before the respondent no. 2 under section 10 of the Industrial Employment

(Standing Orders) Act, 1946 (hereinafter referred to as 'the Act') for modification of certified Standing Orders of the Bihar State Electricity Board (in short 'the Board'). On receipt of such application, respondent no. 2 issued notices to the Board as well as the registered Trade Union; inviting objection thereto. The Board filled its objection against three items, namely, promotion, transfer and suspension in the proposed modification. The petitioner union filed its proposal for modifications with respect to promotion, suspension and transfer. After considering the objection and hearing the parties, the respondent no. 2, certified the Standing Order of the Board and made provisions with respect to recruitment, promotion, transfer and suspension by its order dated 21. 8. 1987.

3. Being aggrieved by the aforesaid order, Board moved the Industrial Tribunal, an appellate authority constituted under the aforesaid Act. It apperars that when the appeal was pending, a compromise was entered into between the petitioner union and the Board. They filed separate appication before the appellate authority with a prayer to dispose of the appeal in terms of the compromise. However, all the parties, except Kamgar Union accepted the said compromise. Rather Kamgar Union opposed the compromise orally without filing any written objection. On such objection being made, the Tribunal decided to dispose of the appeal on merit.

4. It apperars after admitting the appeal, notices were sent to two Unions, namely, Bihar State Electricity Supply Workers Union and Bihar Pradesh Vidyut Shramik Sangh and they accordingly participated in the proceeding. When the hearing was taken up, a petition was filed on behalf of the Bihar State Electricity Supply Workers Union through one Chakardhar

prasad singh for being impleaded as party but the prayer was rejected by the appellate authority.

5. Mr. Sivajee Pandey, learned counsel for the petitioner in C. W. J. C. No. 1101 of 1989 at threshold had contended that the Act itself contains a schedule with regard to items of service conditions which the Certifying Officer as well as the appellate authority will have a jurisdiction to certify Standing Order. But either of them cannot go beyond the items, mentioned in schedule of Standing Order. It was next contended that the appellate authority was not justified in ignoring the compromise petition only on the objection raised by Kamgar Union and should not have decided the appeal on merit.

From respective plea of the parties, it appears that the petitioner has challenged some parts of the Clause 30 (d)and Clauses 5, 4, 19, 20 and 21 whereas the Board on the other hand, has challenged the Clauses 22(b), 22(c), 22(c) (2), 22(c) (3), 24 and 33 (d).

6. Before discussing the objections, made by the Board, it will be useful to notice the objection of the petitioner in respect of the aforesaid clauses. Clause 5 relates to promotion. It is contended that the promiation authority should not have modified the provisions for promotion as certified by the Certifying officer, inasumch as, this was included within the term method of vacancies.

In this context, I may refer to the existing provisions for promotion which as noted by the appellate authority, the same reads as follows:

"Promotion shall be granted on merit with due regard to seniority and by applying objcetive standards of assessment.

The Board may provide suitable trade tests for departmental examinations for judging the merit of a candidate."

This existing provision was modified by the Certifying Officer by deciding the provisions in to two parts. First part relate to promotion and the other to the removal of stagnation. The appellate authority relying on some case laws has come to the conclusion that this clause cannot form part of the standing order and therfore has to be deleted for the simple reason that item promotion is not in the schedule.

7. Mr. Pandey attacking this finding of the appellate authority has argued that even though item promotion is not included in the schedule but the item being fair and reasonable and as such it was correctly certified by the Certifying Offcer.

8. Section 2(g) of the Act defined 'Standing Orders" as rules relating to the matters set out in the schedule. Section 3 of the Act provides that within six months from the date on which the Act becomes applicable to an industrial establishment, the employer shall submit to the Certifying Officer five copies of the draft 'Standing Orders' proposed by him for adoption in his industrial establishment. Sub-section 2 of Section 3 provides that provision shall be made in such draft for every matter, set out in the schedule, which may be applicable to the industrial establishment, and where Model Standing Orders have been prescribed, so far as is practicable, shall be in conformity with such model. Section 4 postulates that 'Standing Order' shall be cerifiable under this Act, if provision is made therein for every matter set out in the schedule which is applicable to the industrial establishment, and the Standing Orders otherwise inconformity with the provisions of this Act.

This provision also says that it shall be the function of the Certifying officer or appellate authority to adjudicate upon the fairness or reasonableness of the provisions of any Standing Orders.

There is prescribed schedule under the Act which relates to the matters to be provided in Standing Orders under this Act. From perusal of the items specified in the schedule, it is amply clear that item 'promotion' does not find place in schedule of the Act.

9. In this context, it is necessary to refer to the Bihar Industrial Employment (Standing Orders) Rules, 1947 which have been framed in exercise of the powers conferred by section 15(2)(b) of the Act. Rule 5 speaks of Model Standing Orders which shall be set out in Appendix—A to these Rules. Perusal to Model Standing Orders as contained in Appendix—A to the aforesaid rules, it appears that item promotion is not there even in the Model Standing Orders. Mr. Pandey has tried to convince the Court by referring to item 11 of the schedule of the Act, which contemplates "any other matter which may be prescribed" and submits that even item promotion is not to be found either in the Model Standing Orders or in the schedule of the Act, on the ground of fairness and reasonableness this item should be incorporated in the certified Standing Order. I am afraid this contention of Mr. Pandey can not be held good. In the case of *Workmen of Lakheri Cement Works Ltd.* reported in 38 (1970) FJR 342, the apex court has held that there is no authority to extend the Standing Orders to the topics not mentioned in the first schedule of the Act. The Certifying authorites were quite justified in not including them in the certified Standing orders.

10. Taking into consideration this aspect of the matter, in my opinion, the finding of the appellate authority deleting the item from the Standing Orders cannot be interferred with.

11. Challenging the jurisdiction of the appellate authority in retaining clause 6(a) regarding 'transfer' Mr. Pandey has submitted that the appellate authority had no jurisdiction to retain this item, inasmuch as, item 'transfer' is not specified either in schedule of the Act or the Model Standing Order. It is further contended that the appellate authority has wrongly interpreted item no. 4 of Rule 10—B of the Industrial Employment (Standing Order) Central (Amendment) Rules, 1983 (hereinafter referred to as 'Central Rules') which was inserted by notification dated 17. 1. 1973 because it has no application to the industrial establishment controlled and or managed by State Government. Advancing his argument, Mr. Pandey has drawn our attention to provision of section 15 of the Act and has contended that it is only the appropriate Government may, after prior publication, in the official Gazette, make rules to carry out purposes of this Act. The appropriate Government under the Central Rules is the Central Government and the present case is not governed by Central Rules but by the Bihar Industrial Employment (Standing Orders) Rules, 1947 (in short 'Bihar Rules') Thus, it is urged that the appellate authority has wrongly placed reliance on Rule 10—B of the Central Rules.

12. Mr. Prasad, learned Senior counsel appearing on behalf of the Board agreeing with the submission of Mr. Pandey submitted that item 'transfer' could not have been added in this schedule. He has also submitted that Rule 10—A of the Central Rules, which has been relied by the appellate authority is not

applicable to the industrial establishment under the control of the respective State Governments. Referring to Clauses— 1 & 2 of the Central Rules, it is urged that this rules obviously apply to industrial estabishments under the control of the Central Government or railway administration or in a major port, mine or oilfield and so the appellate court has committed an apparent error by relying on provisions of Rule 10—A for inserting item 'transfer' in the Standing Orders.

13. Strongly refuting this argument, advanced above, Mr. Rajeev Roy for the respondent no. 4 and 3 (in C.W. J. C. No. 1101 of 1989 and C. W. J. C. No. 3396 of 1989) contended that the items which are already existing in the certified standing orders for the workmen of the Bihar State Electricity Board since 1976 can not be held invalid merely on the ground that certain items were not in the schedule. It was contended that the Act is a beneficent piece of legislation and if the Management had no objection to certain matters, being included in the Standing Orders, and if its inclusion was accepted by the workmen as well as the Certifying Officer as back as in 1976, there is no reason why the Act be so interpreted so as to strike off certain clauses of the Standing Orders. In this context, Mr. Roy drawing our attention to the Certified Standing Orders of the Board of 1976 has submitted that item 'transfer' exists in Clause—C of the said Standing Orders and the petitioner or the Board could have very well filed an application for modification under section 10 of the Act after the Standing Orders were certified in 1976. But admittedly it was not done.

14. Secondly petitioner-Union did not file any objection to the draft proposal for amending the existing Standing Orders, which as filed by respondent no—4 before the Certifying Officer. Moreover petitioner-Union did not even file any appeal against the modifying Standing Order.

15. Though Board filed objection and appeal before the Certifying Officer but in para 19 to 22 of the memo of appeal, the Board has categorically admitted that 'transfer' is a condition of service, which is an essential feature and it has to be made on administrative grounds and also according to exigency of the situation.

16. In my opinion, argument of Mr. Roy is well found. I am conscious of the decision of the Hon'ble Supreme Court in the Case of Workmen of *Lakheri Cement Works Ltd.* Vrs. *Associated Cement Companies Ltd.* (supra), but in this particular case, it has to be noticed that the item 'transfer' was all along existing in the certified Standing order, 1976 of the Board. It can not be disputed that 'transfer' is an incident of service. The employees of the Board being aware of this condition joined services under the Board. Moreover, from 1976 there was no grievance either on part of the employees or employer regarding this item. Rather the Board, before the appellate authority, specifically conceded that retention of the item'transfer' in the Standing Order would be beneficial for both to the Board as well as its employees. Above all the petitioner Union, neither filed any objection before the Certifying Officer nor any appeal before the Board, This inclusion thus cannot be challenged in this Court by the petitioner, If the Management was of the view that this clause was against its interest or was unnecessarily included in the Standing Orders, it was open to it to get it modified by a regular application in terms of section 10(2) of the Act. If the Management was not aggrieved with clause 6 of the Standing Order of 1976, it cannot challenge the finding of appellate authority in this regard.

17. In the case of *Abu Monammad and others* Vrs. *State of*

Bihar and others reported in 1977 Labour and Industrial case 1390, a Division Bench of this court had to deal with some what similar situation and after relying on Supreme Court decision, the Division Bench held that;

"The Act is a beneficent piece of legislation. In my view, therefore, if the Management has no objection to certain matters being included in the Standing Orders, and if its inclusion is accepted by the workmen as well as the certifying Officer, I see no reason why the Act should be so interpreted as to strike off that clause in the Standing Order. It must be accepted on all hands that providing wage slips to workmen is a beneficent Act. In terms of the scheme of the Act the provision regarding wage slips in clause 14 must have been given in the draft by the Management or it may have found place after the objection of the Workmen which was certified by the certifying officer. The furnishing of wage slips, therefore, became a condition of the employment although it was a matter not directly connected with the subjects enumerated in the schedule. But I see no reason for restricting the parties to the Standing Orders to its inclusion. If the Management was of the view that clause was hurting it or that it was unnecessarily included in the Standing Orders, it was open to it to get it modified by a regular application in terms of section 10 (2) of the Act. Thus the Management was not aggrieved by inclusion of Clause 14, the workmen were not aggrieved and the certifying officer had no objection."

18. It is true that the appellate authority has mis-directed itself in placing its reliance on Rule 10—B of the Central Rules, inasmuch as, the aforesaid Central Rules do not apply to the Industrial Establishments under the control of the State

Governments. My view finds support from sub-rule 2 of Rule—1, which inter alia, contemplates that this rules extend to industrial establishments under the control of the Central Government or a railway administantion or in a major port, mine or oilfield.

But in my view the finding of the appellate court cannot be interferred with only for this reason. I have already indicated my reasoning for holding that the item 'transfer' as inserted by the appellate court was nothing new. It was already in existence since 1976. Therefore, for this simple reason the findings of appellate authority cannot be interfered with.

19. Attacking the findings of the appellate court in relation to payment of subsistence allowance Mr. Pandey urged that though payment of subsistence allowance is in the schedule, but it has been reduced by the appellate authority which is unreasonable and cannot be sustained. Mr. Prasad while agreeing with Mr. Pandey on this score submitted that section 10—A of the Act, clearly provides payment of subsistence allowance at a given rate and as such the appellate authority was not justified in modifying clause 30(d) of the Standing Order. Mr. Roy agreeing with the aforesaid submissions has urged that finding of the appellate authority in this regard is not reasonable.

20. Section 10—A of the Act has been newly inserted by Act 18 of 1982. From reading of the provision as a-whole, it appears that this provision takes care of the employees who are put under suspension. The rate at which subsistence allowance is to be paid has also been prescribed under this section itself. In such circumstances, in my opinion, the amendment of Clause 30(d)

cannot sustain and as such this should be deleted from the Standing Order.

21. Coming to the questin of Automatic Cessessation" of employment as contained in Clause 24 of the impugned order., Mr. prasad submitted that as it is an old provision which was already inserted in certified Standing Orders of 1976 and therefore it should be retained with some modification. It is urged that the appellate authority has failed to consider clause 9(4) of the Model Standing Orders and as such this finding of the appellate court must go.

22. Clause 9(4) of the Model Standing Order reads as folows:—

"If the Workman reamins absent beoynd the period of leave originally granted or subsequently extended, he shall lose lien on his appointment unless he (a) returns within 8 days of the expiry of the leave and (b) explains to the statisfaction of the manager his inability to return before the expiry of his leave. In case the workman loses his lien on his appointment, he shall be entitled to be kept on the 'badli' list."

23. From this provision, it appears that even if for certain unavoidable circumstances a workman remains absent beyond the leave period or subsequently extended period, he shall loose his lien on his appointment unless he returns within 8 days of the expiry of the leave and gives satisfactory explanation to the management about his inability to return before the expiry of such leave. In my opinion, this clause is violative of principle of natural justice. As per this provision, the workman is entirely on the mercy of the management which may or may not accept the explanation given by the defaulting workman, whatever genuine ground might be there. In a welfare State the fate of a workman

cannot be allowed to be rested on the discretionary power of single individual, namely, the manager.

24. In a recent decision in the case of *D. K. Yadav* vers. *J. M. A. Industries Ltd.* reported in 1993 (3) SCC 259, while interpreting clause 13(2) (iv) of the relevant standing order their Lordships have obsereved as follows:

"The cardinal point that has to be borne in mind, in every case, is whether the person concerned should have a reasonable opportunity of presenting his case and the authority should act fairly, justly, reasonably and impartially. It is not so much to act judicially but is to act fairly, namely, the procedure adopted must be just, fair and reasonable in the particular circumstances of the case. In other words application of the principles of natural justice that no man shoud be codemned unheard ntends to prevent the authority from acting arbitrarily affecting the right of the concerned person.

It is a fundamental rule of law that no decision must be taken which will affect the right of any person without first being nformed of the case and giving him her an opportunitly of putting forward his/her case. An order involving civil consequences must be made consistently with the rules of natural ustice. In *Mohinder Singh Gill* V. *Chief Election Commissioner* the Congtitution Bench held that 'civil consequences' covers infraction of not merely property or personal right but of civil liberties, material deprivations and non-pecuniary damages. In its comprehensive connotation every thing that affects a citizen in his civil life inflicts a civil consequence. Black's Law Dictionary, 4th dn., page 1487 defined civil rights are such as belong to every citizen of the State or country..... they include ..... rights capable of being enforced or redressed in a civil action ..... In

State of Orissa v. *Miss Binapani Devi* even an administrative order which involves civil consequences must be made consistently with the rules of natural justice. The person concerned must be informed of the case, the evidence in support there of supplied and must be given a fair opportunity to meet the case before an adverse decision is taken. Since no such opportunity was given it was held that superannuation was in violation of principles of natural justice."

Their Lordships further held that :

"The law must therefore be now taken to be well-settled that procedure perscibed for depriving a person of livelihood must meet the challenge of Article 14 and such law woud be liable to be tested on the anvil of Article 14 and the procedure prescribed by a statute or statutory rule or rules or orders affecting the civil rights or result in civil consequences would have to answer the requirement of Article 14. So it must be right, just and fair and not arbitrary, fanciful or oppressive. There can be no distinction between a quasi-judicial function and an administrative function for the purpose of principles of natural justice. The aim of both administrative inquiry as well as the quasi-judicial inquiry is to arrive at a just decision and if a rule of natural justice is calculated to secure justice or to put it negatively, to prevent miscarriage of justice, it is difficult to see why it should be applicable only to quasi-judicial inquiry and not to administrative inquiry. It must logically apply to both."

25. In the aforesaid decision it has been held that certified Standing Orders have statutory force which do not expressly exclude the application of the principle of natural justice. It is to be noted that though item' automatic cessessation of employment's finds place in the Model Rules and not in the

schedule of the Act. There fore, in the given circumstances, I have no hesitation to hold that clause 9 (4) of the Model Standing Order is uatravires to the Constitution, inasmuch as, it offends Article 14 of the Constitution. In such view of the matter, the appellate court was justified in deleting this clause. In support of my conclusion it will be useful to notice a Bench decision in the case of *Sobhana Das Gupta* Vrs. *The State of Bihar and others* reported in 1974 PLJR 382.

26. Mr. Prasad referring to the clause relating to privilege leave or annual leave with wages as contained in clause 22(b) of the Standing Order, has contended that though item 5 talks of leave but in is only one of the conditions and procedure in applying for leave as to how leave is to be granted and by whom. Referring to clause 9 of Model Standing Order, it is urged that though it speaks of leave but proviso to this rule contemplates that this provision shall not apply where sickness benefit are available under the Employees State Insurance Act, 1948. Continuing argument, it is submitted that this proviso has not been taken into consideration and as such the appellate authority has committed an error.

As against this Mr. Roy has submitted that these provisions are in existence since 1976 and Board never questioned the quantum of leave before the Certifying Officer and as such it cannot be allowed to raise this point before this court. Standing Order is in force since more than four years and as such it has attained its finaity under section 7 of the Act and cannt be challenged at this belated stage. It is also contended that taking together the provisions in item 5 of the schedule of the Act and clause—9 of Model Standing Order, the finding of the appellate authority should not be interfered with.

Having heard the parties and going through the reasonings given by the appellate authority, I am of the view that retaining this clause is quite justified and cannot be interfered with.

27. On the aforesaid reasonings, in my view, clause 22 (c) relating to "sick-leave" and Clause 22 (c) (2) in relation to special sick leave cannot be deleted. No serious challenge has been made either by the Board or petitioner-Union regarding Clause 8(a), terminal benefit, and in my opinion righty.

28. In the result, these writ applications are allowed in part and the order of the Certifying Officer as well as the appellate authority are partly modified and affirmed to the extent indicated above. However, there will be no order as to costs.

N. Pandey, J. I agree.

R. D. Applications Partly allowed.

CIVIL WRIT JURISDICTION

Before Bisheshwar Prasad Singh, J.

1995

Janaury, 18

*Ramjani Harijan and another.**

v.

Bihar Public Service Commission & others.

Submission of Caste Certificates by candidates belonging to Scheduled Caste and Scheduled Tribes—caste certificate in support of their claim for reservation not submitted by writ petitioners within the time prescribed for the purpose—Bihar Pubic Service Commission, whether justified in not entertaining the evidence of reservation produced after the last date prescribed for the purpose.

Where the Bihar Public Service Commission conducted examination for appointment to the post of Assistant Public Prosecutor in 1991 for only candiates belonging to the Scheduled Caste and Scheduled Tribes and the writ-petitioners did not submit the necessary caste certificate which they were required to do within the preseribed period and consequently were not selected and they in the writ-application stated that candidates who had lesser mark than thm were appointed and as such claimed that their names should be included in the merit list;

Held, that where the candidates were required to submit evidence in support of their claim for reservation, before the last

* Civil Writ Jurisdiction Case No. 5791 of 1993. In the matter of an application under Articles 226 and 227 of the Censtitution Of India.

date for doing so, the authority viz, Bihar Pubic Service Commission, was justified in not entertaing the vidence produced after the last date prescribed for the purpose.

Case laws discussed.

Applicationunder Articles 226 and 227 of the Constitution of india.

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

M/s. Navneet Kumar & Anjani Prasad for the petitioners.

Mr. S.K.Ghose for the respondents.

B. P. Singh, J. The two petitioners herein have prayed for cancellation of the list of candidates selected by the respondent—Bihar Public Service Commission, and recommended for appointment as Assistant Public Prosecutor on the basis of the special competitive examination held in the year 1991. I may be noticed that the aforesaid special competitive examination was held only for candidates belonging to the Scheduled Caste and Scheduled Tribes. The petitioners have further prayed that their names may be included in the merit list since the candidates who secured lesser marks have been recommended for appointment. The respondent-Commission has justified its action stating that the petitioners had not submitted the necessary caste certificate which they were required to do within the prescribed period.

2. The facts of the case are not in dispute. The petitioners claim that they are Harijans, and as such they are members of Scheduled Caste. Pursuant to the advertisement they had submitted their applications with necessary certificates and were called upon to appear at the written test. Since they

qualified at the written test, they were called for interview, which was held on 19—1—1993. It appears from the letters dated 17th February, 1993, issued to the petitioners after the interview, that they were reminded that while issuing the advertisement it had been clearly stated that those who sought benefit of reservation as candidates beonging to Scheduled Caste/Scheduled Tribe category must submit a caste certificate either signed or counter-signed by the District Magistrate or signed by the subdivisional Magistrate. The caste certificates counter-signed by the Subdivisional Magistrates were not acceptable. The petitioners were informed that the caste certificates submitted by them were not in accordance with the advertisement. They were, therefore, informed that they should submit caste certificates issued by the competent authority in any event latest by 28th February, 1993. The letter issued to petitioner no. 1 (Rajmani Harijan) mentioned that the caste certificate produced by him had been issued by the Additional District Magistrate (Administration), Gyanpur, Varanasi. Similarly, the letter issued to petitioner no. 2(Suresh Chandra) stated that the caste certificate issued to him had been counter-signed by an officer for the District Magistrate. The certificates produced by petitioner no. 2 has been annexed as Annexure —3 and it appears that the same had been signed by the Tehsildar, but conter-signed by someone on behalf of the District Magistrate. In response to the communication of the respondent-Commission petitioner no. 1 submitted a caste certificate signed by the pargana Magistrate Bhadahi, Varanasi, which was counter-signed by some other officer for the District Magistrate. This certificate is Annexure 3—A to the writ petition, and appears to have been signed on 27-2-1993. It is not disputed that the aforesaid caste certificate was produced before the

respondent-Commission on 1st March, 1993. petitioner no.2., however, submitted the caste certificate on March 10, 1993, issued by the District Magistrate. Allahabad (Annexure—3).

3. It is not disputed that the merit list was published on 3rd March, 1993, two days after the receipt of the caste certificate from petitioner no. 1 and seven days before the receipt of caste cerificate from petitioner no.2.

4. The case of the respondent-Commission is that even if the petitioners had secured higher marks than the selected candidates, since/both the petitioners had not submitted the caste certificate within the period prescribed, they could not be given the benefit of reservation. Obviously, they could not be recommended. As noticed earlier, the special competitive examination was held for selecting only scheduled caste and scheduled tribe candidates. So far as the certificate submitted by petitioner no. 1 is concerned, there was another objection, namely, that the said certificate was neither signed nor counter-signed by the District Magistrate.

5. Counsel for the petitioners submitted that even if the certificate was not signed by the District Magistrate, since some one had signed it for the District Magistrate, the same should have been accepted by the Commission. The petitioners have also relied upon four unreported decisions of this court to which I shall advert later. On principle, the submission urged on behalf of the petitioners does not deserve acceptance. It is open to the Bihar Public Service Commission to feel satisfied by production of evidence before it that the concerned application belongs to a

particular reserved category, so that he is entitled to the benefit of reservation in the matter of appointment. For the said purpose it can insist that the certificate must be genuine and must be issued by a responsible authority. The advertisement, therefore, in clear terms prescribed that only such caste certificates will be acceptable, which are either signed or counter-signed by the District Magistrate or singned by the Subdivisional Magistrate. It cannot be said that it was unreasonable on the part of the Commission to ask for such caste certificate, Obviously, one cannot act on the basis of a certificate granted by any officer or person. To attach credibility to a caste certificate it was insisted upon that it should be signed either by the Subdivisional Magistrate or by the Distirct Magistrate or at least counter-signed by the District Magistrate. Such conditions are usually found in all the advertisements inviting applications for filling up vacancies in public service are not insisted upon, fake and bogus certificates may be produced, and undeserving persons may illegally claim benefit of reservation. Counsel for the petitioners realising the weakness of his broad submission, in the alternative argued that a certificate issued by an officer for and on behalf of the District Magistrate should be acceptable to the Commission. At one stage he submitted that an Additional District Magistrate is also a District Magistrate. The submission obviously cannot be accepted. because even if an Additional District Magistrate is authorised to perform all the functions of a District Magistrate, he is still not the District Magistrate. Under the old Code of Criminal Procedure an Additional District Magistrate could be authorised to perform all the functions of the District Magistrate under the Code. Even so it was held by the Supreme

Court in the case of *Ajaib Singh* Vs. State of Punjab (1) that in the matter of detention, he could not exercise the power under the Defence of India Rules, because he was not the District Magistrate and was in rank inferior to the District Magistrate. The same principle was followed in the case of *Hari Chand Aggrawal* Vs. *Batala Engineering Company Ltd.* (2) Obviously, therefore, if the advertisement required that the caste certificate must be issued by the District Magistrate, or counter-signed by him, the petitioners could not get away with filing a caste certificate not so signed or counter-signed. so far as the counter-signing by an authority for the District Magistrate is concerned, it is not clear whether it was done pursuant to any law or rule or Government circular issued in this regard. In the State of Bihar such a practice is not followed, but it is not known whether in the State of Uttar Pradesh authority is vested in any other officer to sign caste certificates on behalf of the District Magistrates. In any event, if the District Magistrate can issue a caste certificate in the State of Uttar Pradesh, there is no reason why the candidates should not submit caste certificates either signed or counter-signed by the District Magistrate.

6. The second submission urged on behalf of the petitioners was that since the certificates had been received by the Commission, they should have accepted the same and altered the select list by including their names, if they had secured higher marks and the caste certificates submitted by them were found to be in order. If the submission urged on behalf of the petitioners is accepted, the selection process can never come to an end. In the

(1) (1965) A.I.R. (S. C.) 1619.
(2) (1969) A.I.R. (S.C.) 483.

instant case, the petitioners had been given an opportunity of producting caste certificates at the time of interview. The Commission was very considerate in permitting both, even after the interview, to submit a proper caste certificate since the one filed by them were not signed or counter-signed by the competent authority. The last date mentioned in the aforesaid communication was 28th February, 1993. I have no hesitation in holding that if the candidates were required to produce the necessary certificates in support of their claim at the time of interview, the Commission could have as well rejected their applications, if they did not produce the caste certificates at the time of interview, or produced the caste certificates not in terms of the advertisement and, therefore, not acceptable to the Commission. In the instant case, the Commission gave them one further opportuity to produce the caste certificates latest by 28th February, 1993. The merit list was published on 3rd March, 1993. It is not in dispute that both the certificates reached the Commission after the last date fixed for submission of the certificates. No objection, therefore, could be taken if the Commission refused to accept those certificates after the last date fixed for the purpose. In the case of petitioner no. 1 the aforesaid certificate was received two days before the publication of the list. However, in the case of petitioner no.2 it was received seven days after the publication of the select list. I shall deal with the case of petitioner no. 1 after I consider the unreported judgments of this court. so far as petitioner no.2 is concerned, It certainly cannot be contended that the Bihar Public Service Commission was required to consider the certificate furnished by the aforesaid petitioner even after they had finalised the selection and made its recommendation to the State of Bihar. I there fore, hold

that if the candidates are required to produce documentary evidence in support of their claim by a particular date, the Commission is not obliged to consider the documents produced by the concerned candidates after the last date prescribed by it. In case, for any reason the Commission extends the time for submission of such documents, the extension must be granted to all candidates and not to any particular candidate alone.

7. I shall now consider the unreported judgments of this Court on which reliance has been placed by counsel for the petitioners. The first decision was rendered in C. W. J. C. No. 8229 of 1988 on 22nd November, 1988. Their Lordships referred to another writ petition (C. W. J. C. No. 2387 of 1988, disposed of on 11-8-1988) from which a passage was quoted which is as follows:

" Besides the above, we find as a fact that before the Commission had made recommendations, the petitioner had produced the certificate granted by the District Magistrate, though produced after the interview, it confirmed, the certificate granted to him by the Additional Colloctor-cum-Additional Distric Magistrate. The Commission could take notice of the certificate granted by the District Magistrate and, thus, give consideration to the case of the petitioner."

Following the principle laid down in the aforesaid decision their Lordships allowed the writ petition and directed that if thepetitioner had produced the income certificate granted by the Subdivisional Officer counterigned by the Acting District Magistrate at the time of interview, it should be deemed that there was substantial compliance, and if the petitioner had competed the

Commission should not withhold the recomendation merely on that ground. From the facts stated in the order it appears that the petitioner in that case had submitted a certificate granted by the subdivisional officer and counter-signed by the Acting District Magistrate. The said certificate was produced at the time of interview, but since the Commission did not accept that certificate, the petitioner filed an application before the Collector, and the Collector informed the Secretary of the Commission to consider the certificate produced by the petitioner earlier as certificate granted by the District Maginstate himself. It will thus appear that in both the writ petitions the candidate had produced in addition a certificate granted by the District Magistrate himself before the Commission made its recommendation. The aforesaid decision, there fore, does not support the argument of the petitioner that even in the absence of certificate granted by the District Magistrate, the Commission was obliged to accept the certificate granted by any other officer as a valid certificate.

The next decision upon which reliance is placed was rendered in C. W. J. C. No. 6277 of 1989, disposed of on 12—2—1990. In that case also the petitioner had earlier produced a caste certificate signed by the Additional District Magistrate, but later produced a caste certificate granted by the District Magistrate. Following the principle laid down in C. W. J. C. No, 8229 of 1988, disposed of on 22-11-1988 it was directed that if the petitioner was found to be otherwise fit, his claim should not be rejected merely on the ground that initially he had produced a caste certificate signed by the Additional District Magistrate, specially when later he had produced a certificate from the District Magistrate concerned. It is not clear form the facts stated in the order as to whether the caste certificate was produced

before the Commission published the merit list. The third decision rendered on 8-4-1991in C. W. J. C. No. 4463 of 1990 does not lay down any new principle. Their Lerdships observed that the matter had been considered by this court in C. W. J. C. No. 5277 of 1989 and C. W. J. C. No. 3229 of 1988 and, accordingly, directed that the names of the petitioners be considered and their claim should not be rejected merely on the ground that the caste certificates produced by them were not signed by the Distict Magistrate. It was also observed that the fact that the petitioners belonged to the scheduled caste has not been denied. I have already referred to two earlier decisions of this Court and noticed that in both the cases the petitioners had in fact produced certificates granted by the District Magistrate before the Commission. In C.W. J. C. No. 4463 of 1990 only one of the petitioners had produced a certificate duly granted by the District Magistrate, but it appears that rulief was granted to all the petitioners. The judgment does not lay down any principle of law, but merely follows the earlier decisions which proceeded on the factual basis that a caste Cartificate granted by the District Magistrate was actually produced before the Commission, and that too before it had made its recommendation. The last unreported decision of this Court, rendered on 10-3-1992 in C. W. J. C. No. 3071 of 1990 was with regard to a petitioner who had produced a caste certificate granted by the Paragana Magistrate, and counter-signed by the Additional District Magistrate 'Krite' District Magistrate, Azamgarh. The court observed that the word 'krite' is used for signing for another and, there fore, the certificate issued by the Paragana Magistrate was counter-signed by the the Additional District Magistrate for the District Magistrate. Their Lordships observed that in substance that meant a certificate by the District Magistrate. The Court pro-

ceeded on the basis that nothing had been shown to it which prohibited the Additional District Magistrate to sign for the District Magistrate in the State of Uttar Pradesh and, accordingly, allowed the writ petition. In the instant case as well, the certificate produced by petitioner no.1 is counter-signed by an officer for the District Magistrate. It is not known on what basis the counter-signature had been made. neither the petitioner nor the respondents are in a position to enlighten us on this aspect of the matter. On the other hand, from the certificate produced by petitioner no. 2 it is established that in the State of Uttar Pradesh as well caste certificates are issued under the signature of the District Magistrate. It is not as if an applicant is called upon to perform an impossible task, namely, of securing a certificate from the District Magistrate when the District Magistrate is not required to sign such certificates and which are under the law or under Government circulars required to be signed or conunter-signed by any other officer.

8. Having considered these decisions, I have no doubt that none of the decisions support the case of the petitioners that a caste certificate can be produced at any time, and certainly not after the Commission has completed the process of selection and published the merit list. On the other question as to whether a certificate signed for the District Magistrate should be accepted by the Bihar Public Service Commission, at least in one case, namely, C. W. J. C. No 3071 of 1990 a Division Bench of this Court in the absence of any material to show that the Additional District Magistrate was not authorised to sign for the District Magistrate in Uttar Pradesh, Accepted the certificate counter-signed by the Additional District Maistrate for the District Magistrate.

9. The position in law, therefore, appears to be as follows: If the candidates are required to submit evidence in support of their claim for reservation and the authority prescribes the last date before which such evidence must be produced, the authority will be justified in not entertaining the evidence produced after the last date prescribed for the purpose.....If extension of time is granted for any reason, the benefit must be extended to all candidates. As a matter of rule, the document must be submitted within the period prescribed, but in exercise of writ jurisdication a writ court may in exceptional circumstances, having regard to the hardship caused to the petitioner, and in the interest of justice direct that the certificate produced may be taken into consideration by the Commission, such relief cannot be granted if certificate is produced after this selection process has been concluded and the merit list announced. The exercise of such jurisdiction must be in rare cases of extreme hardship.

10. As a matter of law, the selecting authority is entitled to call upon applicants to submit evidence of their belonging to a particular caste in a particular form to be certified by a particular. designated authority. Difficulties may arise if the Applicants from the other States are unable to produce such certificates from the designated authority by reason of any law, rule or Government circular. In such a case if it is not possible for the designated authority to issue the certificate, the Commission must accept certificates issued by the authority, who is authorised by law, rule or by Government circular to issue such certificate on behalf of the designated authority. This must, however, be subject to the condition that the designated authority is unable to sign or countersign the certificate himself. If he is authorised to sign or counter-sign such a certificate, the mere fact that some other authority can also grant such a certificate

will not be enough justification for deviation from the requirement of the advertisement requiring certificates signed or counter signed by a particular designated authority.

11. In these circumstances, this writ petition must be dismissed. There is material on record to show that in the State of Uttar Pradesh as well, the District Magistrate does issue caste certificates as is obvious from the certificate produced by petitioner no.2 which was signed by the District Magistrate, Allahabad. Unfortunately, that certificate was received by the Commission much after the publication of the merit list. Petitioner no. 1 cannot, there fore, contend that it was not possible to obtain the caste certificate from the District Magistrate in the State of Uttar Pradesh and, therefore, the certificate produced by him was rightly rejected by the Commission. I may only observe that if petitioner no. 1 had produced valid certificate, perhaps this court might have granted him relief ignoring the delay of one day in the submission of the certificate. However, since the certificate was not signed or counter-signed by the prescribed authority, the same cannot be taken into consideration.

This writ petition is, accordingly, dismissed.

R. D. Applications Dismissed.

CIVIL WRIT JURISDICTION

Before S.K. Homchaudhuri, J.

1995

February,7

Chandra Kishore Jha *

v.

The State of Bihar and others.

Constitution— Articles 226 and 227— writ-petition filed in 1977 for the first time for the right accrued to the writ petitioner in 1968——whether became stale due to laches on the part of writ-petitioner.

Where the writ-petitioner claimed that Acharya and Fazil family Teachers of Government High School started receiving pay scale equi-valent to Trained Graduates in the Scale of Rs. 220/- to Rs.400/- from 1.4.1968 but he was denied the same and he filed representation to the authorities and ultimately filed writ application in 1979;

Held, that the writ petitioners claim has become stale due to laches on his part in pursuing his remady in as much as according to petitioner,he was denied the right to the pay scale which had accrued to him in 1968, but he approached this court in 1979 for the first time by filing a writ-petition. Besides, the writ-petitioner's contention about pursuing remedy by making representation is casual and vague.

Case law discussed.

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*Civil writ Jurisdiction Case No. 4426of 1990. In the matter of an application under Articles 226 and 227 of the Constitution of India.

Application under Articles 226 and 227 of the Constitution.

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

Mr. Gajendra Kumar Jha and

Mr. Satish Chandra Jha. for the petitioner.

Mr. P.K.Sharma, J.C. to G.P. 7 for the respondents.

S.K.Homchaudhuri. J, The prayer of the petitioner in this petition is for issuance of an appropriate writ, order or direction commanding the respondents to grant the petitioner the pay scale of Subordinate Education Service (Gr.), namely, Rs. 220-400/- with effect from 1.4.1968 with all consequential benefits.

2. The petitioner was appointed in the Subordinate Education Service in Lower Division as Sanskrit Teacher (Jyotisacharya) in the year 1958 by the Director, Public Instruction, Bihar, by order dated 30.1.1958 and, thereafter, he was confirmed in the said post by order dated 16.2.1962. According to the petitioner in the year 1964, the Government of Bihar, Department of Education, decided that the Acharyas and Fazils should be treated as equivalent to the Trained Graduates.

3. In paragraphs 6 and 7 of the petition, the petitioner has stated as follows :—

"6. That by another resolution of Government of Bihar dated 4th May, 1968 Model Scale of Acharya was fixed at Rs. 220-9-310-EB-400/-and the same given into effect from 1.4.1969.

7. That the petitioner in accordance with Annexure 3 is

entitiled to salary in the pay scale of Rs. 220-400/- from 1.4.1968.*

But on perusal of a copy of the resolution dated 4.5.1968, annexed as Annexure-3 to the petition, I find that the contentions made in paragraphs 6 and 7 of the petition are not correct, inasmuch as, it is apparent from the last paragraph of the resolution dated 4.5.1968 that the Acharyas and Fazils were yet to be granted the benefit of the pay scale of Rs. 220-9-310-EB-400. The last paragraph of the resolution dated 4.5.1968 translated copy of which is supplied by the learned counsel for the petitioners is as follow :—

"Achary as and Fazils who are equated with trained graduates will not get the replacement scale of pay of Rs. 220-9-310-EB-400 for trained graduates. Separate instruction will, however, issue in respect of manner in which they will be brought on the new scales of pay. Indicating the different stages of staggering, pending issue of final order in this regard, Acharyas and Fazils may be given on Ist April, 1968 an ad-hoc increase of Rs. 15/- in the salary which they would have get in the existing scale on that date."

4. In paragraph-9 of the petition, the petitioner has contended that as he has been discriminated in the matter of grant of said pay scale with effect from 1.4.1968; inasmuch as other Acharya Teachers, namely, Shri Nirmala Narayan Jha of Zila School, Dhanbad, Purndar Jha of Government High School, Gardanibagh, patna as well as Acharya and Fazil family Teachers of Government Schools and Non-Government Schools started receiving the salary in the pay scale of Rs. 220/- to Rs. 400/- with effect from 1.4.1968. But the petitioner was denied the pay scale although he was also entitled to get the said scale from

1.4.1968. The petitioner has stated in paragraph 10 of the petition that he made several representations to the Government for granting him the pay scale of Rs. 220/- to 400/- with effect from 1.4.1968. The petitioner, however, has not made any specific averments as regard in the date of the representations and the authorities before whom the representations were made.

5. The petitioner's further case is that the pay scale of Rs. 220/-to 400/- was revised to Rs. 387/- to 600/- by the Government by resolution dated 1.1.1971 and the petitioner was granted the pay scale of Rs. 387/- Rs. 600/-with effect from 1.1.1976. The petitioner approached this court in a writ petition as late as in the year 1979, which was registered as C. W. J. C. No. 247 of 1979. This court, by order dated 6.8.1979, permitted the petitioner to withdraw the writ petition with certain observation and direction. The order dated dated 6.8.1979 of this court is as follows :—

" 6.8.79 The petitioner in this case, who is a Jyotisha charaya employed in the Government Sanskrit High School, Ranchi, claimed the pay scale of a trained graduate under some decisions of the Government. He has been allowed that scale with effect from 1.1.1976 but he claims that scales with effect from 1.4.1968. The petitioner had also filed some representations before the Chief Minister, which was forwarded to the department on 17.8.1976 (vide Annexure-6). This is a departmental matter and the petitioner should be able to get his relief through his department itself, if he is entitled to it. The learned counsel for the petitioner, therefore, agree that he will file a representation before the department concerned containing full details of his claims so, the department is directed to dispose of the representation within a period of three months from the

receipt thereof. The department will be well advised to give him a hearing if he prays for. In view of this observation the learned counsel for the petitioner seeks permission to withdraw this application. This application is, accordingly, permitted to be withdrawn.

After the order of this court was passed, the petitioner made representation before the Director of Public Instructions Education Department, Government of Bihar, Patna, which was ultimately rejected and the order of rejection was communicated by the impugned letter dated 15.4.1988-a copy of which is annexed as Annexure 1 to the petition.

6. By the impugned order, the petitioner was intimated that the Government Order no. 1438 dated 4.5.1968, on which the petitioner placed reliance in support of his claim for grant of higher pay scale with effect from 1.4.1968, was applicable to Non-Government State Subsidised High/Higher Secondary Multipurpose School and was not applicable to the Government Schools and their working teachers and that as per the seniority list, the petitioner was not entitled for promotion at the material time after filling up posts reserved for the candidates of Scheduled Caste and Scheduled Tribe community.

7. The Respondents in their affidavit-in-opposition have denied the allegation of the petitioner that he has been discriminated in the matter of grant of the said pay scale of Rs. 220- Rs. 400/- with effect from 1.4.1968. In paragraph 6 of the affidavit-in-opposition, the Respondents have contended that all the teachers working in Government Sanskrit High Schools were brought in the cadre of the Subordinate Education Service with effect from 1.1.1976 and, accordingly, the petitioner, along with similarly situated persons, was granted the pay scale of the cadre

of Subordinate Education Service with effect from 1.1.1976. The petitioner was granted Subordinate Education Service in the pay scale of Rs. 337/- to 600/- with effect from 1.1.1976 as per approval of Government of Bihar. Finance Department, and, as such, the claim of the petitioner regarding the said pay scale with effect from 1.4.1968 had rightly been rejected. The petitioner filed rejoinder to the counter-affidavit and in paragraph 6 thereof has contended that the statement made in paragraph 6 to the counter-affidavit was wrong and misleading.

8. Learned counsel for the petitioner submitted that the petitioner has arbitrarily been denied the pay scale of Trained Graduate Teacher with effect from 1.4.1968 and consequently he has suffered perpetual loss of pay on and from 1.4.1968. Learned counsel for the petitioner submitted that the reason and ground, on which the Respondents have rejected the prayer of the petitioner, are not at all tenable. Learned counsel for the petitioner placed reliance on a decision of the Hon'ble Supreme Court in the case of *Haryana State Adhyapak Sangh* Vs. *State of Haryana* (1) reported in the said case, until 1979, the State of Haryana was following the principle of parity between the teachers in aided private Schools and Government Schools in the matter of pay scale and other emoluments as per the recommendations of Kothari Commission. The State met the increased expenditure entirely in regard to pay and Dearness Allowance. In 1979, the pay scale of teachers in Government Schools was revised by the State as per recommendations of the pay Commission : but in the case of the teachers of aided Schools, the revision was given effect to after two years. On the facts of the case, the Hon'ble Supreme Court held that the

(1) (1988) S. C. 1663.

teachers of the aided schools must be paid the same pay scals and Dearness Allowance as teachers in Government Schools for the entire period claimed by the petitioners and that the expenditure on that account should be apportioned between the State and the Management in the same proportion in which they shared the burden of the existing emoluments of the teachers.

9. I have considered the submissions made on behalf of the petitioner and perused the contents of the petition, affidavit-in-opposition and the Rejoinder thereto. The statments made in the writ petition and the Rejoinder are vague and devoid of material facts. So also the contentions made in the affidavit-in-opposition by the Respondents. It is clear from the last paragraph of the resolution dated 4.5.1968 (Annexure 3) that the Acharyas and Fazils, who were equated with trained graduates, were yet to be granted replacement scale of pay of Rs. 220/- to 400/- as paid to the trained graduates. The petitioner has neither made any statement nor annexed any document granting the replacement scale of pay of Rs. 220/- to 400/- to Acharyas and Fazils. Annexure 4, on which the petitioner has placed reliance, speaks of revision of pay scale of members of Subordinate Education Service and not grant of the replacement scale of pay for the trained graduates to the Acharyas and Fazils with effect from 1.4.1968. Although the petitioner has contended that he was discriminated in the matter of grant of pay scale and cited names of some teachers of Acharyas and Fazils of some schools, but he has not stated as to by which orders, those teachers, whose names were mentioned in paragraph 9 of the petition; were granted pay scale of Rs. 220/- 400/-. There is no specific averment in the petition that the petitioner was similarly situated with those teachers named in paragraph 9 of the petition, whereas, the Respondents in paragraph 6 of the affidavit-in-

opposition have contended that the teachers working in Government Sanskrit High Schools were brought in the cadre of the Subordinate Education Service with effect from 1.1.1976 only.

10. The petitioner's claim has become stale due to laches on his part in pursuing his remedy inasmuch as according to the petitioner he was denied the right to the pay scale which accrued to him in 1968, but he approached this court for the first time in 1979. Besides, as already observed, the petitoner's contention about pursuing remedy by making representations is casual and vague. Laches on the part of the petitioner writ large on the facts of the case.

11. For the reasons stated above, I am inclined to hold that the petitioner is not entitled to the relief prayer for at this belated state. The petition is, therefore, dismissd I make no order as to cost.

R. D. Application dismissed.

CIVIL WRIT JURISDICTION

Before Banwari Lal Yadav and Naresh Kumar Sinha, JJ.

1995

February, 7

*Vijay Choudhary.**

V.

The State of Bihar & others.

Natural Justice—principles of—lease of pisciculture right granted to writ-petitioner—writ-petitioner depositing entire bid amount and other amounts as required by rules—the lease cancelled without any notice to show cause—impugned order of cancellation of lease, whether in utter violation of principles of natural justice—Doctrine of legitimate Representation.

Where the writ-petitioner was the highest bidder for pisciculture right in Mallikpur Branch canal for the years 1993 to 1996 and deposited the entire bid amount and other amounts on instalments, as required by the relevant rules and also invested handsome amount for rearing fish, suddenly received impugned order dated 5.2.1994 cancelling the lease without any opportunity to him to show cause or any hearing;

Held, further that the impugned order of Cancellation of the lease deed in favour of the writ-petitioner for a period of three years has been rendered in utter violation of the principles of natural justice.

Held, further, that the neither the writ-petitioner was afforded any opportunity of hearing nor he was given any oppor-

*Civil Writ Jurisdiction Case No. 4109 of 1994. In the matter of an application under Articles 226 and 227 of the Constitution India.

tunity of making representation, hence the principles of natural justice was violated and the writ petitioner was also deprived of the Doctrine of Legitimate Expectation.

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 B.L.Yadav, J.

Messrs Prasoon Sinha and *Pushkar Narain Shahi* for the Petitioner.

Mr. V.N.Sinha (G.P. 9) for the Respondents.

B.L.Yadav, J. Whether the petitioner-l essee for a period of three years, as pisci culturist (since 1995 to 1996) for rearing fish under Mallikpur Branch Cenal, was entitled to the benefit of principle of natural justice and entitled to the benefit of the doctine of Legitimate Expectation under the circumstances of the instant case are the short questions for determination in the present writ petition filed by the petitioner under Article 226/227 of the Constitution, seeking the relief to quash the order dated the 5th of February, 1994 (Annexure 4)cancelling the lease without any opportunity of show cause/hearing.

2. The essential facts are these. The petitioner, being highest bidder of an auction sale, obtained a lease and after complying with all the formalities in pursuance of letter no. 264/Goraul dated the 7th of August, 1993 issued under the signature of the S. D. O., Tirhut Canal Subdivision No. 1, Goraul, deposited the entire required auction sale and other amounts and started fishing after having invested a handsome amount. Approval of the higher officials including the Executive Engineer, Tirhut Canal Division was also obtained. Earlier he had received a

certificate of being a higher bidder vide/Annexure 2 and was required to deposit a sum of Rs. 16,200/- and Rs. 40,701/- After the receipt was obtained and the amount was deposited, as required the petitioner started fishing operation in the ditches in question. The petitioner also made purchases for a sum of Rs. 27,130/-on 15.10.1993, Rs. 37,080/- on 18.10.93 and Rs. 35,460/- on 22.10.1993 for developing the ditches settled in his favour, as contained in Annexure 3 to this petition. Investment was made particularly for purchase of pisci fauna, fish-seeds. Additional huge amount for investment by way of labour cost etc. was also made by the petitioner.

3. It is needless to say that it takes about six months for pisci-gauna to grow. By the time the petitioner was expecting the out come after investment of an huge amount, he learnt that the settlement made in his favour on the basis of public auction held on 3.9.1993, has been cancelled without any notice for repesentation and without affording any opportunity for hearing, when in fact the petitioner was legitimetely expecting that in case his lease per chance is sought to be cancelled even after having complied with all the formalities and also being highest bidder, having invested a handsome amount he would be afforded an opportunity of hearing. But nothing was done and by the impugned order dated 5.2.1994 (Annexure 4) the petitioner's lease for three years was cancelled.

4. A Counter Affidavit was filed and the averments in the petition, including that the petitioner must be entitled to hearing in compliance with the principle of natural justice and to the Doctrine of Legitimate Expectation were denied.

5. The learned counsel for the petitioner contened that by

grant of the lease in favour of the petitioner, a legal right was created in his favour to continue to operate for a period of three years. He has invested a huge amount and deposited the requisite sale amount and other amounts, but without any notice for representation or any opportunity of hearing the lease deed has been illegally cancelled. In such matters the petitioner expects that some notice would be given to him and some explanations in respect of some assumed irregularity would be asked from him and he would be afforded an opportunity of hearing before the lease was cancelled but nothing was done. All of a sudden he received the impugned order of cancellation. It was arbitrary and violative of the rules of natural justice. In any case he being the highest bidder, obtained the lease after complying with all the formalities and was legitimately expecting to be heard and informed about the process of cancellation, but nothing was done. The learned counsel leaned heavily on a Full Bench decision of this Court in *M/S Pancham Singh* vs. *the State of Bihar & others* (1).

6. The learned counsel for the respondents, including the State, on the other hand, urged that the principles of natural justice are not a strait jacket formula nor it can be stretched too far. In the present case it was not required to be complied with. Simillarly the Doctrine of Legitimate Expectation would not apply.

7. Having considered the submissions of both sides, the points for determination are whether on the facts and in the circumstances of the case the petitioner was entitled to the principle of natural justice and to the benefit of Doctrine of Legitimate Expectation.

(1) (1991) (I) P.L.J.R. 352 (F.B.)

8. Apart from the rule of Audi Alteram Partam, which means that no one shall be condemned unheard, corollary of which is that he should be given reasonable notice of the nature of the case to be met, there are other rules of common law to the same effect. (See *Frankline* vs. *Minister, Town and Country Planning* (1). *John* vs. *Rees* (2). In case any person has acquired any right in any property orhis right is being affected by any process, he would be afforded reasonable opportunity of hearing and also to meet the cause against him.

9. In *Cleveland* vs. *Board of Education* (3) it was held :—

"As essential principle of due process is that a deprivation of life, liberty or property be preceded by notice and opportunity of hearing appropriate to the nature of the case (See *Mullane* vs. *Central Hanover Bank and Trust Company*- 339 U.S. 306-94 L. Ed. 865). It has been described that root requirement of the due process clause being that an individual be given an opportunity for hearing before he is deprived of any significant property or interest."

10.In *S.L.Kapoor* vs. *Jag Mohan* (4) it was held that even where a statute is silent in respect of observance of this rule, it shall be read into the statute as an inbuilt provision. This rule must be held to be a necessary postulate in all the cases where a decision is to be taken affecting a person's right or interest, unless such rule is specifically excluded by the statute.

11.A natural justice is a concept which has succeeded in keeping arbitrary action of the State within limits. At the same time a Court has to be circumspect in deciding whether it can

(1) (1948) A.C. 87= (1947) 2Al (Eng Rep. 289.
(2) (1970) Ch.D. 345.
(3) 470 U.S. 532. [84 lewyers Edition 2nd 494 (503)]
(4) (1981) A.I.R. (S. C.) 136.

extend the rule. In the instant case it cannot be said to be a strait jacket formula nor it can be stretched too far. However, it has significant place in modern administrative law. In other words it is substantially fair play in action. (See *Smt. Maneka Gandhi* vs. *Union of India* (1) It was held by the Apex Court that the principles or natural justice constitute the basic elements of a fair hearing, having their roots in the innate sense of men for fair play and justice which is not the reserve of any particular race or country but, is shared in common by all men. (See *Union of India* Vs. *Tulsi Ram* (2).

12. By grant of lease in favour of the petitioner, who was highest bidder, who deposited the entire required amount and other amount or instalment, as required by the relevant rules, and also invested handsome amount for rearing fish, he never expected that his lease would be cancelled without affording any opportunity of hearing and without serving any notice upon him. But by the impugned order it is crystal clear that before cancelling the lease in question no notice was served on the petitioner nor he was afforded any opportunity of hearing nor he was actually heard. The principle of natural justice constitute the basic element of a fair hearing. As the petitioner was being deprived of the significant property right or an interest there in, hence compliance of the principles of natural justice, in my opinion, was a must.

13. In that view of the matter, in my opinion, the impugned order of cancellation of lease deed in favour of the petitioner for a period of three years has been rendered in utter violation of the principles of natural justice.

(1) (1978) 2 S. C. R. 621.

(2) (1985) Supp (2) S. C. R 131, 225.

14. As regards the second point about the Doctrine of Legitimate Expectation and its concept and applicability it is better to quote the statement of law from the Halsbury laws of England (4th Edition) Volume I (1) 151 as follows :—

"A person may have legitimate expectation of being treated in a certain way by an administrative authority, even though he has no legal right in private law to receive such treatment. The expectation may arise either from a representation or promise made by the authority including an implied repres entation or from consistent past practice. In common parlance it means that the authority ought not to act so as to defeat the expectations without some over riding reason of public policy to justify its doing so."

15. In *Schmidt* vs. *Secretary of State for Home Affairs* (1). It was observed that "an alien who had been given leave to enter U. K. for a limited period, had a legitimate expection of being allowed to stay for the permitted time, and if that permission was revoked before the time expires that alien ought to be given an opportunity to making representation."

16. In *Council of Civil Service Unions & others* Vs. *Minister for Civil Service* (2) it was observed—

"A question arose whether decision of the minister withdrawing the right to trade union membership without consulting the staff which, according to the appellant, was his legitimate expectation arising from the existence of a regular practice of consultation was valid."

It was further held :

(1) (1969) 2 Ch. D. 149.

(2) (1984) 3. All Eng. Rep. 935.

"An aggrieved person was entitled to invoke judicial review if he showed that a decision of a public authority affected him by depriving him of some benefit or advantage which in the past he has been permitted to enjoy and which he could legitimately expect to be permitted to enjoy either until he was given reasons for its withdrawal and the opportunity to comment on these reasons or because he has received an assurance that it would not he withdrawn before he had been given an opportunity of making representation against the withdrawal. The appellant's ligitimnte expectation arising from the existence or a regular practice of consultation which the appellant could reasonably expect to continue, gave rise to an implied limitation on the minister's exercise of the powers."

17. In my opinion, in case, in a given situation a person even though strictly he might not have some legal rights in private law, but never theless in case he has an expectation from the promise made by the authorities or from the consistent past practice, he was given to operate a lease or some other right consistent with the legal transaction, or in case any action pertaining to the petitioner's lease was initiated, he could legitimately expect that he shall be informed about the actions initiated and also would be afforded reasonable opportunity to make representation and an opportunity of being heard. This is how the Doctrine of Legitimate Expectntion comes into operations.

18. To put it differently the petitioner being the highest bidder was granted lease and has deposited required sale amount, including the other requisite amount and also instalments within time and also spent handsome amount in making investment for the purpose of rearing fish. In that case he could legitimately expect that before he was compelled to leave the operation of fishing eve - fter compliance of all the legal

formalities, he would have at least been given an opportunity to make representation, and an opportunity of hearing, for which he has been leagitimately expecting. This is how this new Doctrine comes into operation. In my opinion, the petitioner was entitled to the benefits of this Doctrine. (See *Judgments* Today 1992 (6) S. C. 259 = (1993) 1. S. C. C. 71 in *Food Corporation of India* vs. *M/S Kamdhenu Cattle feed Industries).*

19. As neither the petitioner was afforded any opportunity of hearing nor he was given any opportunity of making representation, hence the principles of natural justice were violated and the petitioner was also deprived of the Doctrine of Legitimate Expectation. In that view of the matter the impugned order dated the 5th of Feburary, 1994 (Annexure 4) cannot be sustained.

20. In the result the present writ petition succeeds and the same is allowed and the impugned order dated the 5th of February, 1994 (Annexure 4) is quashed to the extent it is applicable to the case of the petitioner. The inevitable corollary is that the respondents are restrained from disturbing or interfering with the petitioner's right to operate fishing undertaking in the said ditches of Mallikpur Branch Canal in respect of which the lease was granted for a period expiring the 31st of March, 1996.

N.K.Sinha, J. I agree

R. D. Application allowed.

CIVIL WRIT JURISDICTION

Before Aftab Alam and P.K.Sarin, JJ.

1995

February, 10

*Bokaro Steel Workers Union and Another.**

v.

The State of Bihar and others.

Trade Union Act, 1926. (Central Act no. XVI of 1926) section 8— Registrar, Trade Union, under the section can only hold enquiry for maintaining and updating the register——Registrar, has no authority to issue any direction to the employer or Labour Department to recognise any the person or group of persons to be recognised as duly elected office bearer of the Trade Union— Registrar has no authority to direct holding of election—— proper forum for settling any dispute of this nature lies by way of suit.

In a dispute between two rival factions claiming to be the office bearer of a Trade Union, it is open to the Registrar. Trade Union to hold an enquiry for the purpose of maintaining and up dating the register as required to be maintained under section 8 of the Trade Union Act, 1926. The decision of the Registrar, Trade Union, shall neither confer any right on any person or group of persons nor divest any person or group of persons of any lawful right.

The Registrar Trade Union has no authority or power to issue any direction asking or advising the Labour Department of the

*C. W. J. C. No. 6834 of 1994. In the matter of an application under Articles 226 and 227 of the Constitution of India.

Government or the employer to recognise and treat any particular person or group of persons as duly elected office bearers of the Union in dealing with that Union.

The Registrar, Trade Union has no authority or power to direct holding of election of the office bearers of a Trade Union under his own supervision or under the supervision of his nominee.

Held, that the action ofthe Registrar, Trade Union in issuing the impugned direction that election will be held under the supervision of Deputy Labour Commissioner, Bokaro Steel City as his representative can not be justified and is not legal.

Held, further, that in the absence of any provision in the Trade Union Act, 1926, any dispute of this nature can only be resolved by means of a suit and since in the instant case the suit is at the stage of agrument and as such the entire controversy can be effectively resolved in the suit itself.

Mukund Ram Tanti v. *S. I. Raza. Registrar. Trade Union* (1) — followed

Application under Articles226 and 227 of the Constitution.

The facts of this case material to this report are set out in the judigment of Aftab Alam, J.

Mr. Gopal Subramanium, Sr. Advocate & Mr. Ajay Kumar Tripathi for the pititioners.

Mr. Rameshwar Prasad, Advocate-General for the State

Mr. K. N. Gupta for Respondent No 3.

Aftab Alam, J.The petitioner in this application, claimng to represent the Bokaro Steel workers Union as its General Secre-

(1) (1962) A.I.R. (Pat) 338.

tary seeks to challenge the directions contained in the communication dated 25-7-1994 addressed by the Labour Commissioner, Bihar, to the General Secretary, Rastriya Mazdoor Congress. This communication (copy at Annexure 4) states that in the Bokaro Workers Union, registration no. 1034, affiliated to the INTUC an internal dispute had come into existence on account of the conflicting claims of two factions to be its rightful office bearers. It was further stated that one C. L. Srivastava (respondent no. 3), the leader of one faction claimed that the Union's election was held in 1991 in which he was elected as its General Secretary; similarly one P.N.Tripathi, the leader of the other faction (after whose demise the present petitioner claims to have assumed the office of the General Secretary) claimed that the Union's election was held in 1992 when he was elected the General Secretary of the Union. The letter goes on to state that on enquiry it was found that neither of the two elections, on which the rival factions founded their respective claims, was in accordance with the Union's constitution and it was accordingly decided that an election of the office bearers of the union be held through the national head quarter of INTUC and following the procedures provided in the Union's constitution. The letter further directs that the election will be held under the supervision of the Deputy Labour Commissioner, Bokaro Steel City as the representative of the Registrar, Trade Unions and the list of the office bearers prepared on the basis of this elecion and duly counter signed by the Registrar's representative shall be accepted as the list of the validly elected office bearers. The letter concludes with the direction that the election must be held within three months from the date of the letter failing which further action would be taken in terms of the provisions of the

Trade Unions Act and the Code of Discipline framed by the department. The letter, however, does not disclose the source of power for the Labour Commissioner/ Trade Union Registrar to issue the directions of the nature as stated above.

2. Each of the rival factions claiming to lawfully represent the union has its own story to narrate. I need not to go into the details of the rival claims for the simple reason that this court in this application would not undertake an adjudication on the merits of the conflicting claims involving disputed questions of facts. It would be, however, appropriate to note the following facts which are not in dispute.

3. According to the petitioner, an election was held on 24-8-1990 in which Messrs Bindeshwari Dubey and P.N. Tripathi (since deceased) were elected as the president and the General Sectetary respectively of the union. The intimation in this regard was duly given to the Registrar, Trade Unions as required under section 28 of the Trade Unions Act. It appears that Mr. Srivastava (respondent no.3) had then raised a dispute before the Registrar regarding the alleged election of the petitioner's faction as the office bearers of the union and questioning the validity of the election said to have been held on 24.8.1990. The Registrar appears to have referred the dispute to the parent body, the INTUC and on the advice received from it 'recognised' the members of the petitioner's faction as the duly elected office bearers of the union vide his letter dated 15.9.1990 addressed to the General Manager, Bokaro Steel Plant (copy at Annexure 1). This letter appears to have been challenged first by filing a writ petition being CWJC No 2009/1990 (R) before the Ranchi Bench of This Court. But this Court declined to interfere in the matter and then Mr. Srivastava filed a suit being T. S. No. 87/1990 in

the Court of Munsif, Chas. This suit was later with-drawn but on the same day another suit being T.S. No. 120/ 1990 was filed questioning the validity of the election said to have been held on 24-8-90 and also challenging the Registrar's letter dated 15.9.90. In this suit, in addition to the members of the petitioner's faction, the Registrar, Trade Union and the Deputy Labour Commissioner, Bokaro were impleaded as defendants. It was also an admitted fact that in this suit the Munsif, Chas granted an order of injunction restraining the members of the petitioner's faction from functioning as the office bearers of the union. In appeal, however, the injunction order was set aside by the VIth Addl. District Judge, Dhanbad and the appellate order was affirmed when the injuction matter came before the High Court.

4. According to the petitioner the next election of the union was held on 27-5-92 in which the members of the petitioner's faction were declared elected to the different offices of the union on 28-5-92. The result of the election was duly communicated by Mr.P. N. Tripathi, the General Secretary to all concerned including the Registrar, Trade Unions, vide letter dated 31-5-1992.

5. The validity of the election said to have been held on 27/ 28-5-1992 was challenged in T. S. No. 11/1993 filed in the Court of Sub-Judge I, Chas. This suit has been filed by one B. Upadhya, a member of Srivastava's faction who according to the claim of the 3rd respondent was elected as the Union's General Secretary in the election held on 12-12-1991. In this suit also a prayer for ad-interim injunction was made which was turned down by the trial court.

6. As appearing from the statements made in the counter affidavit filed on behalf of the respondent no. 3, it is an admitted

position that both the afore-said suits are still pending. As regards the earlier suit being T. S. No. 120/1990, it is stated (vide para 11 of the counteraffidavit) that it was pending at the stage of argument.

7. In addition to filling the aforesaid T. S. No. 11/1993, a dispute appears to have also been raised before the Registrar, Trade Unions alleging that no-election was, in fact, held on 27-5-1992 and the list of the office bearers dated 28-5-1992 was fake. On such a complaint having been made, the Registrar initiated an enquiry and called the leaders of the rival factions to appear before him on 22-7-1993 with all the materials in support of their contention. Following the enquiry, the impugned directions were given by the Registrar after more than two years of the election as claimed to have been held by the petitioner. The petitioner claims that in the meanwhile the union has entered into a number of agreements with the management of the Bokaro Steel Plant and the consequences of the annulment of the election would be very grave and would adversely affect the workmen employer relations and the industrial peace and harmony.

8. It is to be clarified that the aforesaid facts have been noted not with a view to examine the merits of the respective claims of the petitioner and the 3rd respondent. And in fairness to Mr. Gopal Subramanium, learned counsel for the petitioner, it must be stated that he did not urge that the petitioner's claim be upheld on the basis of any findings of facts. He, however, sharply questioned the authority and the power of the labour Commissioner (even conceding that the same officer was the Registrar, Trade Unions) to issue the directions of the nature as contained

in the communication dated 25-7-1994. Mr. Subramanium contended that there was no provision in the Trade Unions Act empowering the Registrar, Trade Unions to issue directions for holding the Union's election under the supervision of the Registrar or his nominee. He submitted that the provisions of section 28 of the Act at best empowered him to hold an enquiry to ascertain as to whether or not a set of persons were validly elected office bearers of the union with the limited object of updating the register required to be maintained under section 8 of the Act.

9. Thus, the only question that falls for consideration in this application is whether there is any provision in the Trade Unions Act justifying the action of the Registrar in issuing the directions as noted here-in-above.

10. Although no provision has been disclosed in the impugned communication, in the counter affidavit filed on behalf of the Registrar, the provisions contained in section 28 of the Act are cited as the source of power to justify the issuance of the directions coming under challenge in this application.

11. Mr. K. N. Gupta, learned counsel appearing on behalf of respondent no. 3 submitted that section 28 read with sections 8, 10 and 25 and regulations 6, 9 and 11 of the Bihar and Orissa Trade Unions Regulations provided the Registrar with adequte authority to issue the impugned direction.

12. The Trade Unions Act was enacted in 1926 with the object 'to provide for the Registration of Trade Unions and in certain respect to define the law relating to registered trade unions'; section 3 of the Act provided for the appointment of the Registrar of Trade Unions for each State; section 8 provided that on being

satisfied that a trade union had complied with the requirment of the Act in regard to registration, the Registrar would register the trade union by entering in a register to be maintained in such form as may be prescribed the particulars relating to the trade union; section 10 provided that under certain circumstances the certificate of registration could be withdrawn or cancelled by the Registrar; section 25 contained provisions regarding the change of name of a trade union or amalgamation of more than one unions; section 28 required the submission of annual returns to the Registrar; it will be useful at this stage to reproduce this section :-

"28. Returns— (1) There shall be sent annually to the Registrar on or before such date as may be prescribed, a general statement audited in the prescribed manner, of all receipts and expenditure of every registered Trade Union during the year ending on the 31st day of December next preceding such prescribed date, and of the assets and liabilities of the Trade Union existing on such 31st day of December. The statement shall be prepared in such form and shall comprise such particulars as may be prescribed.

(2) Together with the general statement there shall be sent to the Registrar a statement showing all changes of office-bearers made by the Trade Union during the year to which the general statement refers, together also with a copy of the rules of the Trade Union corrected up to the date of the despatch thereof to the Registrar.

(3) A copy of every alternation made in the rules of a Registered Trade Union shall be sent to the Registrar within fifteen days of the making of the alteration.

(4) For the purpose of examining the documents referred to in sub-sections (1), (2) and (3), the Registrar or any office authorities by him, by general or special order, may at all reasonable time inspect the certificate of registration, account books, registers and other documents, relating to a Trade Union at its registered office or may require their production at such place as he may specify in this behalf, but no such place shall be at a distance of more than ten miles from the registered office of a Trade Union.

It is important to note that there is no provision in the Act empowering the Registrar to exercise any superintendance or control over the internal affairs or the day today functioning of a trade union. The Act thus envisages that the Registrar should maintain an up-to-date record relating to the trade unions without in any manner interfering in their internal affairs. This is understandable too for a trade union in its nature is an organised association of employees formed to protect their inerests and to secure, by means of collective bargaining with the employer, better and improved conditions of service. In many cases the employer is the Government or an undertaking owned by the Government. It is, therefore, obvious that any legal sanction for the Government to interfere in the internal affairs of a trade union would very seriously undermine the union's ability to effectively up hold the employee's interests. However, a grave lacuna in this archaic Act of the year 1926 is that it does not contain any provisions to resolve the intra union disputes such as the present one when two rival factions claim to represent the union as its office bearers. This hiatus in the law has often tempted the executive to step in to resolve the dispute in its own way. As a result, orders with varying degree of

executive interference are known to have been passed; in some cases the Registrar simply refused to accept the claim of any particular person or group arising on the basis of an alleged election and declined to recognise him/them as the validly elected office bearers; in some other cases the Registrar went to the extent of issuing an order directing the concerned employer and the Labour Department of the Government to recognise any particular person or group as the validly elected office bearers and to act accordingly in dealing with the union; in some other cases a direction of the present kind has been given asking to hold election under the supervision of the Registrar in order to resolve the dispute regarding the office bearers of a union.

13. In dealing with similar cases earlier the Courts have had occasion to examine the scope and ambit of section 28 (read with section 8) of the Trade Unions Act. In some cases the provisions of sections 8 and 28 have been interpreted in a manner to give certain power to the Registrar, Trade Unions to hold an enquiry regarding the validity of the claim of a set of persons to be the duly elected office bearers of a union. It is proposed to examine here-in-below the para-meters of section 28 as emerging from the earlier judical decisions.

14. One of the earliest decisions examining the scope of section 28 of the Act appears to be from a division Bench of our own High Court in the case of *Mukund Ram Tanti* vs. *S. I. Raza, Registrar, Trade Unions* (1). The petitioner in that case claimed to be the newly elected president of a union. According to him, he was elected at the Union's general meeting held on 27-2-

(1) (1962) A. I. R. (Pat.) 338.

1960. Respondents 2 to 7 of that case were the old office bearers who admittedly continued in office till the date when the general meeting was allegedly held electing the petitioner as the new president. The old office bearers did not accept that there was any valid general meeting of the union electing the petitioner as the president. This led to a dispute and the Registrar, Trade Unions issued notices to both the parties to appear before him with the materials in support of their claims. The Registrar heard the rival parties and held that the decision said to have been taken in the alleged meeting would not be binding on the old office bearers of the union, who under the rules, had to continue till a new general election was held in accordance with law. In those circumtances, the Registrar observed that respondents 2 to 7 would continue to be the properset of office bearers of the union until they were removed from office in a proper election held according to the rules; *and that for the purpose of maintenance of records in the office of the Registrar of Trade Unions*, no notice could be taken by him of the election held on 27-3-1960. The petitioner challenged this decision of the Registrar, Trade Unions and contended that the Registrar had no authority in law or jurisdiction to hold an enquiry as to the legality of the election and to pass an order directing the old office bearers to continue till a fresh election was held. This Court held that it appeared from certain provisions of the Act (1) though not specifically but impliedly-'that it was a part of the duty of the Registrar of the Trade Unions to record the changes of the office beares in the appropriate register in order to discharge his duty under the Act. In that view, it was held :

"That on being informed about the election of the new

office bearers, the Registrar is within his right to ascertain whether they were legally elected so as to be recorded in the register maintained for the purpose and to be bound for compliance of the provisions of the Act. In other words, the Registrar has full jurisdiction to enquire about the legality of the new election *for the purpose of maintaining a proper register showing the names of the office bearers who* may be at the relevant time required to comply with the provisions of the Act or to be dealt with in accordance there with. *In this particular case the order of the Registrar clearly shows that the election of the new office bearers was not accepted by him to be legal only for the purpose of maintenace of records in his office to facilitate the administration under the Act.*" [From the facts of this case, it is clear that this Court justified an enquiry by the Registrar for the purpose of maintenance of records in his office to facilitate the administration under the Act. The findings of the Registrar did not confer any right on any party nor was any party divested of his right to represent the union. Moreover, in that case, there was no direction by the Registrar to hold the union's election under the supervision of his nominee.]

15. Next in line is a single judge decision of the Allahabad High Court in the case of *North Eastern Railway Mazdoor Union* vs. *The Registrar of Trade Unions* (1). In that case Mr. Justice M.H. Beg (as His Lordship then was) held that the Act did not provide for any adjudication of a dispute between the rival groups of a trade union. It was further held that though the Registrar was invested with quasi judicial powers in registering trade unions or in cancelling their registration, he had only an administrative duty to record changes in office bearers under

(1) (1969) L.L.C.209.

section 8 read with section 28. The relevant passage from the decision is as follows :-

"The result of the foregoing discussion is that the functions of the Registrar under section 8 read with section 28 of the Act to record changes in accordance with the position revealed by a return in a year is an administrative function only. In exercising the administrative functions, the Registrar can under take a reasonable inquiry to discover whether alterations he is going to record are in conformity with the actual facts and rules. The implied power of the Registrar to ascertain actual facts from the parties where there appears to be some conflict between two versions placed before him by means of two forms filled up and filed by two rival groups could not convert the inquiry held by the Registrar into a quasi-judicial proceeding in which each side has the right to lead evidance and cross-examine witnesses.

"All that the Registrar can do is to hold a summary inquiry for his own satisfaction. As the Registrar has not been given the power to adjudicate, in a quasi-judicial fashion, upon conflicting claims to represent the trade union, based upon divergent versions on questions of fact, the proper course for the Registrar in such cases is to refer the parties to a Civil Court for a decision and then to act in accordance with the decision arrived at by the Civil Court."

In another decision a learned single Judge of the Andhra Pradesh High Court in the case of *Sanjeeva Reddy and Resistrar of Trade Unions and another*, (1) held that a duty for maintaining the record having been cast on the Registrar, it followed that he had got the necessary powers to ascertain for his own purpose

(1) (1989) I. L. L. J. 11.

which set of office bearers had been validly elected and represented the union. These powers were ancilliary to the main power given to the Registrar under the Act. It was, however, clarified that the communication by the Registrar that the new set of office bearers was the true representative of the union was outside the purview of the Act and could not be justified by any provision therein. In other words, the enquiry by the Registrar was for his own satisfaction and for the purpose of up dating the register required to be maintained under section 8 and his decision would neither confer any right of representing the union on any person or group of persons nor divest any one of such right. Thus, the Registrar, Trade Unions could hardly assume the power to advise the employer or the officials or the Labour Department to recognise and treat any particular person as having the right to represent the union. That being the position as emerging from the Andhra Pradesh decision, the question of the Registrar having the power to direct for the holding of an election under the supervision of his nominee would further not arise.

16. In another decision, a learned single Judge or the Madras High Court in the case of *R. Murugesan and Union Territory of Pondichery and others* (1) held that any enquiry made for the purpose of section 28 (2) was administrative in character and did not finally adjudicate on the claims of the parties. *It was further held that any dispute concerning the election has to be fought before the appropriate forum* and the Registrar's decision was no bar to any further independent legal proceedings. In that case a writ petition was filed seeking

(1) (1976) 11 L. L. J. 435.

to challenge the following order passed by the Trade Union Registrar :

"With reference to your letter dated 1-8-67 on the subject mentioned above, the list of office bearers newly elected by your union in general body meeting held on 30-7-67, is *approved* and registered in this office."

The learned single Judge referring to the Andhra Pradesh decision in *Sanjeeva Reddy's* case (supra) and this Court's decision in *Mukund Ram Tanti's* case (supra) held that the Registrar in the event of competing claims between two sets of office bearers has to necessarily decide for his own purpose as to which of them he would recognise in relation to the administration of the Trade Union Act. But it was pointed out that when the Registrar takes any such decision he is not determining the dispute between the parties so as to bind them. The learned judge dismissed the writ petition for the reason and on the sole ground that the impugned order of the Registrar had not decided and could not have decided the legality of the election of the office bearers. In that view, it was held that the writ petition was misconceived and it was also observed that the word 'approved' occurring in the impugned order had contributed to that misconception. It was further pointed out that the Act had not constituted the Registrar as the Election Court or Election Tribunal for the purpose of determining such a dispute. The decision rendered by the Registrar was merely administrative and ancilliary to the discharge of duties and power under the Trade Unions Act. The determination of such a question so as to bind the party was out side the jurisdiction of the Registrar and a binding decision on the dispute could be obtained only in an appropriately instituted legal proceeding before the proper forum.

17. At this stage, it will be necessary to consider the other point of view canvassed by Mr. Gupta, learned counsel for respondent no. 3. Mr. Gupta submitted that in a number of decisions directions were issued for holding the union's election under the supervision of the Registrar, Trade Union or his nominee. He referred to the decision of a learned single judge of the Calcutta High Court in the case of *O. N. G. C. Workmen Association* vs. *State of West Bengal* (1). By an order passed in that case, the learned single Judge appointed the Trade Union Registrar as a Special Officer and/or conferred on him sugh rights to conduct the election afresh of the office bearers of O. N. G. C. Workmen Association within two months from the date of communication of the order. The Trade Union Registrar was directed in this regard to verify the voters list and to ask the intending parties to file nomination papers and to hold the election by secret ballot and to declare the result of the election according to law and there-after to record the names of the persons so elected under sections 8 and 28 of the Trade Unions Act. It is to be noted that in para 9 of that decision the learned Judge found and held that it was beyond any doubt that the Registrar, Trade Unions had no quasi-judicial authority to hold any enquiry by allowing parties to examine witnesses and to allow the party to cross-examine such witnesses and to decide the dispute as to who were the real office bearers. He also found that the proper forum for an adjudication on a dispute of this kind was civil suit but in the facts and circumstances of that case was of the opinion that a suit before the Civil Court would delay the matter and the circumstances required that the dispute should be resolved expeditiously and hence issued the directions as noted above.

(1) 1988 L. I. C. 555.

18. Mr. Gupta then referred to a decision of the Supreme Court in the case of *North Eastern Railway Employees Union* vs. *3rd Addl. District Judge, Farukhabad and others* (1). From the brief decision it appears that the Allahabad High Court had designated the General Manager, North Eastern Railway as the authority to hold elections of North Eastern Railway Employees Union. The Supreme Court by its order substituted the Registrar, Trade Unions in place of the General Manager, North Eastern Railway observing that the Registrar was the authority charged with the duty of administering the provisions of the Trade Unions Act, and directed that the election would be held under the supervision of the Registrar or by any officer designated by him for that purpose.

19. At this stage, I would like to observe that in relying upon the above mentioned decisions Mr. Gupta over looked the very significant fact that in those two cases directions to hold the union's election were issued not by the Registrar but by the High Court in exercise of its writ jurisdiction. It is another matter for the High Court or even a Civil Court in a fit case to issue direction for holding election of the office bearers of a union and to designate the Registrar, Trade Unions or his nominee to supervise the election and to confer upon him such authority by virtue of the Court's order. It would be an altogether different matter for the Registrar who is a creature of the Act and must therefore act within the parameters of the Act to assume this authority and to issue such an order on his own and the two situations cannot be equated.

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(2) (1988) A. I. R. (S.C) 2117.

20. Mr. Gupta also relied upon a division Bench decision of this Court in the case of *Indian Explosive Workers Union and another* vs. *State of Bihar and others* (1). It is a brief order which can be quoted in full :-

"A supplementary affidavit has been filed on behalf of the petitioners. Let it be kept on record.

2. Mr. B. C. Ghosh, learned counsel for the petitioners submits that the Registrar, Trade Unions, Bihar, respondent no. 2 has no jurisdiction to hold any election of the two rival Trade Unions in question and has, therefore, challenged Annexure 13, a communication from the Registrar (respondent no. 2) to furnish certain informations for holding of due election. This is in the background of an earlier petition filed by the petitioners in this Court which has been registered as CWJC No. 1262 of 1988 (R) in which by an order dated 25-7-1989 a Bench of this Court had directed that during the pendency of that application, no independent Board shall function in any manner but the Registrar of the Trade Unions may, if he thinks fit, discharge statutory duty in regard to two rival trade unions. That writ application is, however, still pending. Mr. Ghosh submits that the Registrar of Trade Unions respondent no. 2 cannot be said to have discharged any statutory duty in issuing Annexure 13.

3. Mr. Ghosh relies upon the provisions of section 28 of the Trade Unions Act, 1926 for the purpose of showing that there is no such statutory power or duty in the Registrar which he can exercise or perform and for that purpose he also placed reliance on a Bench decision of this Court in CWJC No. 2072 of 1974 in the case of *Kishori Pd. Mahto* v. *State of Bihar and others.*

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(1) (1989) 37 (2) B. L. J. R. 315.

4. We are afraid, there is no force in his contention. The Supreme Court in the case of *North Eastern Railway Employees Union and others* v. *IIIrd Additional District Judge and others*, (reported in AIR 1988 S. C 2117) has held that the Registrar of Trade Unions is the authority charged with the duty of administering the provisions of the Trade Unions Act. Nothing has been shown to us in the Act which can be said to detract from the generality of what the Supreme Court has observed in that case."

5. We do not find any merit in this application which is, accordingly, dismissed."

With utmost respect, I find myself unable to follow this decision. First, it appears that the basic scheme of the Trade Unions Act as emerging from its different provisions and the decisions of this Court as also of the other High Courts as noted above were not borught to the notice of the Bench passing that order. Secondly, the decisions seems to completely over look the context in which the observation was made by the Supreme Court. As explained above, the direction to hold the election had come from the High Court which had said that the election should be held under the supervision of the General Manager, North Eastern Railway. The Supreme Court had only substituted the Registrar, Trade Unions in place of the General Manager, Railways.

21. I am, therefore, of the considered opinion that the cases relied upon by Mr. Gupta cannot defend or justify the action of the Registrar in issuing the impugned directions. I have also stated my reasons for not following the decision of this Court in the case of *Indian Explosive Workers Union* (supra) and I find myself in respectful agreement with the earlier decision of this

Court in *Mukund Ram Tanti's* case and those of the Allahabad High Court and the Madras High Court.

22. On an examination and analysis of the Patna decisions (*Mukund Ram Tantis'* case), the Allahabad, Andhra and the Madras decisions, I come to the following conclusins :

(i) In a dispute between two rival factions claiming to be the office bearers of a union, it is open to the Registrar to hold an enquiry for the purpose of maintating and up-dating the register as required to be maintained under section 8 of the Act.

(ii) His decision in this regard shall neither confer any right on any person or group of persons nor divest any person or group of persons of any law ful rights.

(iii) Consequently the Registrar has no authority or power to issue any direction asking/advising the Labour Department of the Government or the employer to recognise and treat any particular person or group of persons as the duly elected office bearers of the union in dealing with that union.

(iv) The Registrar, Trade Union has no authority or power to direct the holding of election of the office bearers of a union under his own supervision or under the supervision of his nominee.

(v) In the absence of any provision in the Trade Unions Act, any dispute of this kind can only be resolved by means of a suit filed before a Civil Court.

(vi) The adjudication in a suit at least in this state is normally a slow and time consuming process and does not constitute a wholly satisfactory remedy for resolving the disputes.

(vii) The legislature will, therefore, be well advised to

address itself to this lacuna in The Trade Union Act the and to take steps to remedy it which has been long over due.

23. At this stage Mr. Gupta urged that in the interest of the smooth functioning of the union it was necessary that an election be held and asked the Court not to interfere with the order or to issue direction of its own for holding of the election. In the facts and circumstances of this case, I am not inclined to accept this submission either. The admitted position is that the suit is now at the stage of arguments and I think the entire controversy can be effectively resolved in that suit before the Civil Court.

24. For the reason stated above, I come to the unescapable inference that the impugned directions as contatined in the letter dated 27-7-1994 were wholly without any authority or jurisdiction and are unsustainable in the eye of law. The impugned directions are accordingly quashed.

25. In the result, this application is allowed. However, without any order as to costs.

P.K.Sarin, J. I agree.

R.D. Application allowed.

CIVIL WRIT JURISDICTION

Before Bisheswar Prasad Singh and Ram Nandan Prasad, JJ.

1995

March, 28

*Satyendra Kumar Ghosh.**

v.

State Bank of India through the Dy. Managing Director & others.

State Bank of India (Supervising Staff) Service Rules, 1975 Rule 49 (f), applicability of—Employee of State Bank of India introducing his wife for grant of gold loan without disclosing his relationship with her— no rules or circular or even the application form requiring to disclose the relationship of the loanee with the Bank employee—writ petitioner compulsorily retired for not disclosing relationship with loanee legality of.

The writ petitioner, an officer of the State Bank of India was compulsorily retired mainly on the charge that he had introduced his wife to the Katihar Branch of the State Bank of India for grant of gold loan to her of Rs. 10,000/-but did not disclose that she was his wife.

There was no rule circular or order to show that there was a requirement that the applicant must disclose his or her relationship if so related. In the application form as well there was no column for disclosure of the fact that the applicant was

*Civil writ jursidication Case No. 10356 of 1993. In the matter of an application under Articles 226 and 227 of the Constitution of India.

related to a bank employee. The applicant was entitled to grant of loan in her own right subject to fulfilment of necessary conditions and had accordingly, pledged gold ornaments to secure the loan advanced to her. The loan was actually realised by sale of the ornaments pledged.

Held, that there was no justification for the State Bank authorities to hold that the writ petitioner was guilty of fraudulent conduct.

Held, further, that having regard to the nature of the transaction, and in the absence of any requrement obliging the petitioner is disclose his relationship with the loan applicant, no case of misconduct has been made out against the writ-petitioner.

Held, also, that the order dated 12.9.1992 passed by Chief General Manager, State Bank of India, Patna compulsorily retiring the writ petitioner from service undr rule 49 (f) of the State Bank of India (Supervising Staff) Service Rules is quashed. The writ petitioner shall be deemed to have continued in service till the date of his superannuation, and will be entitled to all consequential benefits.

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

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

Mr. Shivendra Kishore for the petitioner

M/s. Shailesh Kumar Sinha & Kishore Kumar Sinha for the respondents

B. P. Singh, j. The potitioner herein, an officer of the State Bank of India, has impugned the order dated 12-9-1992 passed by respondent no. 2 Chief General Manager, State Bank of India, Patna, compulsorily retiring the petitioner from service as a measure of punishment, while agreeing with the opinion of the disciplinery authority and the report of the enquiry officer. The petitioner has also impugned the appellate order rejecting his appeal, as communicated to him by the letter of General Manager (Operations) dated 14-401993.

2. Two main submissions have been urged by counsel in support of the writ petition by the petitioner. He firstly contends that even on the basis of the findings recorded by the enquiry officer, and accepted by the disciplinary authority and the appointing authority, no case of misconduct has been made out. secondly, it is submitted that the disciplinary authority as well as the appointing authority and also the appellate authority have taken into account the punishments inflicted on the petitioner in the past without the same having formed part of the charges levelled against the petitioner. They have, therefore, acted on the basis of extraneous consideration in imposing the punishment of compulsory retirement.

3. It is not in dispute that the petitioner on attaining the age of 50 years was granted extension of service till he attained the age of 55 years i. e., till 1st January, 1994. This was without prejudice to the departmental proceeding initiated against him.

4. In September 1981 the petitioner was posted at the Saharsa Branch of the respondent—Bank. On 12-9-1981 he introduced one Smt. Obi Kumari Devi to the Bank for the grant of gold loan amounting to Rs. 10, 000/—. The said application

was made at the Bank's Katihar Branch which sanctioned the same. It appears that there was later some difficulty in realishing the amount from the said Smt. Obi Kumari Devi, and it transpired that she is the wife of the petitioner. Though the petitioner made promises to repay the debt, he failed to do so. However, it is not disputed that the debt was realised by auction of the gold ornament which was provided as security to the Bank by the borrower.

5. On these facts three charges were levelled against the petitioner. The charges read as follows :-

"(i) On 12-9-81, when you were posted at our Saharsa Branch, you introduced one Smt. Obi Kumari Devi to the Bank to whom a gold loan of Rs. 10000/— was sanctioned by our Katihar Branch. It later came to light Smt. Devi is your wife, whose other name is Smt. Rita Rani Ghosh, and you had intentionally concealed your relationship with her, at the time of sanction of loan, in order to avoid the linkage of repayment of the loan with your monthly salary.

(ii) Further, you did not care to liquidate the outstanding of the said gold loan even after your assurance, though your undated letter addressed to the Branch Manager of our Katihar Branch, to deposit Rs. 500/- p.m. out of your salary to liquidate the loan account. The outstandings were later transferred to the Branch Protested Bills Account.

(iii) You thus, failed to ensure and protect the interest of the Bank as required in terms of Rule 32(4) of State Bank of India (Supervising Staff) Service Rules."

6. The case of the petitioner was that Smt. Obi Kumari Devi his wife, had the independent income from the land gifted to her by his father-in-law, on account of successive failure of crops she required financial assistance and, therefore, she applied to the Katiher Branch of the State Bank of India for sanction of gold loan amounting to Rs. 10000/—, which was permisible according to the rules. The loanee was required to pledge the gold ornaments to secure the loan advanced to the loanee. His wife as an ordinary applicant without claiming any benefit for being the wife of the petitioner, who was a Bank employee, applied for grant of the loan. The petitioner introduced her to the Bank, and while filling up the form disclosed the fact that he was an employee of the State Bank of India. In the column meant for the address of the applicant also, one of the addresses disclosed was that of the petitioner There was, therefore, no effort to conceal any fact from the Bank, The form prescribed for the purpose does not provide any cloumn where such particular could be furnished. The petitioner, therefore, bonafide filled up the form, and introduced his wife to the Bank, His wife was entitled to the grant of loan subject to certain conditions which she fulfilled, It is further submitted that the allegation made against him that he has wilfully concealed the fact that the applicant is his wife, in order to avoid the linkage of repayment of the loan with his monthly salary was merely imaginary. There is no rule nor is a Bank employee required to state this fact, when the person applying for the loan is entitled in his own right to secure a loan from the Bank on payment of usual rate of interest. In her case as well the rate of interest was charged as is usually charged by the Bank, and no concession was made in her favour, on the

ground that she was the wife of an employee. It is, therefore, submitted that in the absence of any requirement that an employee of the Bank must declare that an applicant for the loan is related to him, and in the absence of any column in the form for providing such particulars, a charge cannot be levelled against the concerned Bank employee for holding him guilty of intentional concealment of relationhip with the applicant.

7. At the outset it may be noticed that no rule, circular, order etc. has been shown to us to justify the accusation that the petitioner had intentionally concealed his relationship with the applicant, which he was required to declare. From the report of the enquiry officer, the approval of the disciplinary authority, and the impugned orders passed by the appointing authority and the appellate authority, it does not appear that the concerned authorities have referred to any such rule or direction which required the petitioner to disclose his relationship with the applicant. In is not clear on what basis the authorities have come to the conclusion that he should have disclosed his relationship with the applicant. A photo copy of the application form has also been produced as Annexure—10. From the application form also it appears that there was no column for the applicant or the concerned employee of the Bank to declare that they are related. It appears from the application form that the applicant had described herself as a house-wife and one of the addresses disclosed was C/O S. K. Ghose, JMGSI, Saharsa. This is the correct address and designation of the petitioner. In the column meant for introduction of the applicant the petitioner has signed and given his name as also his address, which is shown as "SBI, Saharsa". There is also a column to the following

effect the "how known to Bank" against which the word' staff has been written, meaning there by that the applicant is kno through a member of the staff of the Bank. It is, therefore, quite apparent that the applicant had filled up the form, as required, and the petitioner had also signed as introducer disclosing his employment in the Bank. There is no column meant for disclosing relationship of the applicant with a Bank employee. The liability to repay the debt is that of the Borrower.

8. The finding of the enquiry officer on this point is as follows:

"I am fully convinced with the arguments and the documents produced by the prosecution that the charged officer had intentionally concealed the relationship with Smt. Obi Kumari Devi at the time of sanction of loan in order to avoid linkage of payment of the loan with his monthly salary. The Defence argument that Shri Ghosh has stated in the introduction column reading "C/o Shri S. K. Ghosh, does indicate that he has disclosed the fact, does not hold good. Mere wiriting the address as C/O shri S. K. Ghosh, JMGS 1 does not indicate any clear relationship of the applicant with the introducer. If he had real intention to disclose the fact that Smt. Obi Kumari Devi is his wife, he should have categorically stated the reataionship in the application form, perhaps, in order to avoid obtaining prior permission from the controlling authority for sanction of loan, he had intentionally not disclosed the relationship. Since shri S. K. Ghosh is a responsible officer and he is supposed to be aware of the Bank's rules, he should have disclosed his relationship in the application form and obtained prior permission from the control-

ling authority and the repayment could have been linked with deduction form his salary. It is also evident from EXT. 4 that Shri Ghosh disclosed the fact that Smt. Obi Kumari Devi, is his wife only after the intimation was received by him for auctioning the ornaments by public auction.

The charge is therefore proved beyond doubt from EXT 1 to 5."

The disciplinary authority agreed with the findings of the enquiry officer, as would appear from the impugned order of compulsory retirement passed by the appointing authority. The disciplinary authority keeping in view the gravity of charges proved against the petitioner as also the undernoted penalties infliceted upon him in the past had recommended infliction of compulsory retirement under rule 49(f) of the State Bank of India (Supervising Staff) Service Rues. The appointing authority also agreed with the findings of the enquiry officer, and accepted the recommendation of the disciplinary authority. He held that in view of the gravity of the charges proved against the petitioner in the instant case and repetitive nature of serious irregularities committed by him, it was not in the interest of Bank to continue him in service. Consequently, he inflicted penatly of compulsory retirement. The decision of the appellate authority has been communicated to the petitioner-vide Annexure—2 wherein the conclusion of the appellate authority has been recorded as follows :-

"..... The documentary evidence brought in the enquiry and the findings of the Inquiring Authority clearly established the fact that you intentionally concealed your relationship with

the applicant when the latter obtained gold loan from Katihar branch. While there is no ground at present to go into the merits of the imposition of punishemtns referred by you relating to Saharsa, Dhamdaha and Bihta branches it is amply clear that you are a habitual offender. Four penalties imposed on you in the past have failed to reform you. The Appellate Authority is, therefore, of the opinion that the punishment meted out to you is reasonable and in the Bank's interest, and, is, therefore, not inclined to interfere with appeal and has ordered accordingly."

9. As I have noticed earlier, no rule, circular or order has been shown to us to satisfy us that there was a requirement that the applicant must disclose his relationship with an employee of the Bank, if he was so related. In the application form as well, there is no column for disclosure of the fact that the applicant is related to a Bank employee. It is not disputed that the applicant in the instant case was entitled to the grant of gold loan, subject to the fulfilment of the necessary conditions. She had, accordingly, pledged gold ornaments to secure the loan advanced to her. It is, therefore, difficult to understand how an allegation of misconduct can be alleged against the petitioner for not informing the Bank that the applicant happened to be his wife, particularly when no benefit was claimed on such ground, and his wife was entitled in her own right to get the loan. What has been suggested is that if the petitioner had disclosed this fact, in the matter of repayment of the loan, perhaps the amount could be realised from his salary in case of default. It is doubtful whether in a case of this nature, where an applicant in his own right secures a loan on pledge of gold ornaments his or her spouse can be held responsible for repayment of the loan. In any

event, since there was no such requirement of the rules, omission to disclose relatitionship whould not amount to misconduct. It is not as if the petitioner had made any wrong statement in the application form, where by he had introduced the applicant to the Bank. What is alleged in that he should have disclosed something more, namely, his relationship with the applicant. I fail to understand on what basis this allegation is made against the petitioner, when no rules have been shown to us which require such disclosure, and the form does not provide any column for disclosure of relationship. Moreover, the wife of the petitioner in her own right was entitled to the grant of loan on payment of the usual rate of interest, subject to her pledging gold ornaments to secure the loan. Failure to make a disclosure amounting to misconduct can be alleged only if there is a requirement to make that disclosure. In the absence of such requirement, the fact that the petitioner could have disclosed more facts is no ground to punish him for misconduct. It may bear repetition to observe that none of the impugned orders, referred to any rule or circular which required the petitioner to make such disclosure. It is also not the case of the Bank that if the discloure was made, loan may not have been sanctioned to the wife of the petitioner. There is, therefore, no justification for holding that the petitioner ws guilty of fraudulent conduct. I have, therefore, no hesitation in coming to the conclusion that having regard to the nature of the transaction, and in the absence of any requirement obliging the petitoner to disclose his relationship with the applicant, even if the facts alleged against the petitioner are taken to be true, no case of misconduct has been made out. The other two charges are dependent upon the

finding on the main charge. If the first charge fails, the other two charges must also fail, particularly because the liability was that of the wife of the petitioner, who in her own capacity had taken a loan from the Bank after pledging her gold ornaments. In the absence of any undertaking by the petitioner to repay the debt, he could not be charged with the liability to repay the loan which his wife owed to the Bank. In my view, therefore, the impugned orders must be quashed.

10. In view of my aforesaid conclusion, it is not necessary to examine the other contentions urged on behalf of the petitoner, namely, that in imposing the punishment of compulsory retirement, the disciplinary authority as well as the appointing authority and the appellate authority had taken into account previous punishments inflicted upon the petitioner, though no such charge was framed against the petitioner. The point deserves consideration, but in view of the findings earlier recorded on the main question, it is not necessary to go into this question in the instant case.

11. Before parting with this judgment we may notice that objection was taken by counsel for the Bank that the appellate order could be reviewed suo motu by the Reviewing Committee. We had adjourned this matter for sometime to enable the Revewing Committee to take a decision, but since no order was passed by the Reviewing Committee, we had no option but to proceed with the matter on merit.

12. In the result, the order dated 12-9-1992 passed by the Chief General Manager, State Bank of India, Patna (respondent no. 2), compulsorily retiring the petitioner from service under

rule 49(f) of the State Bank of India (Supervising Staff) Service Rules is quashed. Consequently, the appellate order passed by the Deputy Managing Director (personnel), as communicated to the petitioner by the General Manager (Operations) by his letter dated 14th April, 1993 (Annexure-2) is also quashed. The petitioner shall be deemed to have continued in service till the date of his superannuation, and will be entitled to all consequential benefits.

13. This writ petition is allowed, but there will be no order as to costs.

R. N. Prasad J. I agree.

R. D. Application allowed.

CIVIL WRIT JURISDICTION

Before Sudhansu Jyoti Mukhopadhaya, J.

1995

March,28.

*Dhrub Prasad and others.**

v.

The State of Bihar and others.

Service— Excise Constables in class IV posts aforesaid by Deputy Commissioner Excise with due information to Commissioner Excise on 13. 6. 1980--- appointment cancelled on 7. 4. 1992 by Commissioner Excise after 12 years of the appointment--legality of---

The writ-petitioners in pursuance to the advertisement issued by Deputy Commissioner Excise and Prohibition, Darbhanga and Koshi Division hereinafter referred to as the Deputy Commissioner, applied for class IV posts of Excise constables and were duly appointed on the recommendation of Selection Committee by order dated 13. 6. 1980 passed by the Deputy Commissioner and functioned as Excise Constables. Suddenly after 12 years by order dated 7. 4. 1992 passed by Commissioner-cum-Secretary of Excise and Prohibition Department the services of the writ-petitioners were cancelled stating therein that their appointment was illegally made by Deputy Commissioner.

State of Madhya Pradesh v. *Bansi Singh and ors.* (1)

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* Civil Writ Jurisdiction Case No. 7050 of 1992. In the matter of an application under Articles 226 of the Constitution of India.

(1) (1990) A. I. R. 2 (S. C.) 1308

Shyam Kishore Singh v. *State of Bihar and ors.* (1) followed

The appointment having been made on 13. 6. 1980 and intimation of it having been sent by Deputy commissioner to Commissioner Excise as far back as 13. 6. 1980 the respondents had knowledge of it 12 years back, they cannot reopen the matter of departmental proceeding against Deputy Commissioner.

Held, that if the departmental proceeding against the Deputy Commissioner cannot be initiated at the belated stage of 12 years, the respondent can not re-open the matter of illegality of the appointment of writ-petitioners, they having knowledge of the appointments made by the Deputy Commissioner 12 years back.

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. J. Mukhopadhaya, J.

Mr. Ashok Kumar Choudhary, Advocate. for the petitioners.

Mr. Rajendra Prasad, S.C.I. for the State.

S. J. Mukhopadhaya, J.

The petitioners in this case have challenged the order, contained in Memo No. 1165 dated 7th of April, 1992 (Annexure-5), by which the appointment of the petitioners have been cancelled on the ground of illegal appointment after about 12 years of their services.

2. The case of the petitioners lies in a narrow compass, as stated hereunder :—

(1) (1991) C. W. J. C. No. 4584 of 1991 disposed of on 30. 10. 91.

The respondent-State vide their resolution dated 15th of January, 1979 laid down mode and procedure for appointment against class-IV posts. According to the aforesaid resolution selection committee at the district level were to make selection for appointment against class IV post available in the district offices under the Excise and Prohibition Department of the State of Bihar. In the said year 1979 a number of posts of Excise constables (Class IV posts) were created in the Excise and Prohibition Department in different offices vide letter dated 10th of October, 1979. Total 1267 posts were created. According to the petitioners, notice was published by the Deputy Commissioner Excise and Prohibition, Darbhanga and Koshi Division, Begusarai in the year, 1980 for filling up the Class IV posts of Excise constables, which were under his jurisdiction. Petitioners along with others applied for the said posts. They were called for interview, which held on 13th of June, 1980 and after the recommendation of the Selection Committee, they were appointed to the post of Excise Constables vide orders, contained in different letters dated 13th of June, 1980 (Annexure-1 series). The orders of appointment were issued by the Deputy Commissioner Excise and Prohibition Department, Darbhanga and Koshi Division, Begusarai.

3. The petitioners thereafter joined respective posts and continued to function but their salary was not released. It was only vide letter dated 13th of June, 1981 (Annexure-2), when the extension relating to posts were granted, salary of the petitioners and others were released from the month of June, 1981. The petitioners continued to receive their salary from June, 1981 onwards.

In the letter dated 13th of June, 1981 (Annexure-2) while it was ordered to release the salary, it was ordered that the

payment should be released in favour of those, who have been appointed prior to 30th of June, 1980, and they will be getting the salary. Any appointment made after 30th of June, 1980 will not be recognized. Further it was mentioned therein that the temporary posts will continue till the persons appointed for prohibition purpose are not adjusted against permanent posts. A bar was put to make new appointment.

4. According to the petitioners, the petitioners and others continued to function against the post of Excise Constables, having been appointed prior to 30th of June, 1980 and their services were transferred and placed at other places for their absorption against permanent post. Further according to the petitioners, all the time their services remained satisfactory and when pay revision was made, the salary of the petitioners was also revised. It was after about 12 years, when the petitioners were still continuing the respondents came out with the impugned order dated 7th of April, 1992 (Annexure-5) stating therein that the appointments of the petitioners have been made illegally by the Deputy Commissioner, Excise and Prohibition Department, Darbhanga and Koshi Division, Begusarai and their services have been cancelled. The order has been passed by the commissioner-cum-Secretary of the Excise and Prohibition Department of the State.

5. Counsel for the petitioners submitted that they were appointed after following the procedures of appointment. They were interviewed; selection was made by the selection committee, who declared fit and recommended the petitioners along with others and then only the orders of appointment have been issued in favour of the petitioners. It was further contended by the counsel for the petitioners that no show cause notice was given to the petitioners prior to the issuance of the impugned

order of cancellation of appointment dated 7th April, 1992 (Annexure-5), in complete violation of the rules of natural justice. Counsel for the petitioners relied on different decisions, including a decision of the Hon'ble Supreme Court in the case of *Puttaswamy and others vs. The Hon'ble chief Justice of Karnataka High Court, Banglore and others* (1). He also submitted that the petitioner having already performed their duties for about 12 years, it was not open to the respondents to re-open the matter relating legality of appointment. For this proposison was counsel for the petitioner relied on a decision of this court in the case of *Bhairvi Nandan Mishra* vs. *State of Bihar and others* (2).

6. Counsel for the State submitted that the appointment of the petitioners having been made illegally, there was no question of giving any show cause notice in favour of this petitioners. According to him, this matter stands settled by different decisions of this court as well as that of the Hon'ble Supreme Court.

7. In the counter affidavit filed by the respondent State, it was stated that the temporary vacancies of Class IV posts are to be filled up by the Excise Suprintendent in accordance with the list of candidates from the panel. It was further stated therein that total number of class IV posts, which were created in the districts, vide letter dated 10th of september, 1979 (Annexure-A) all the District Officers were asked to make appointment of Excise Constables in their respective districts. The Deputy Commissioner, Excise and Prohibition Department was not empowered to make such appointment and thereby the appointment was illegal. No other ground has been given by the

(1) (1991) A. I. R. (S.C.) 295.

(2) (1994) 2 B. L. J. 449.

respondents as to what specific instruction or rule, which is mandatory in nature was violated when the appointments of the petitioners were made.

8. The assertion of the respondents in their counter affidavit to the extent that the District Officers were directed to make appointment against Class IV posts of Excise Constables but such power was not vested with the Deputy Commissioner, Excise, this argument is to be rejected. The Deputy Commissioner of Excise is admittedly higher authority than that of the District Officers. In the District Office, the Collector is the head. Different Districts and the Controlling Officers of such districts are within the control and jurisdiction of the Divisional Commissioner. The power, which was vested with his subordinate officer automatically stands vested on him, being suprior officer, the power of appointment being administrative in nature. The Rule 3 of the Bihar Boards Miscellaneous Rules also vests such power on the higher officer. Thereby, if the power of appointment is vested with the District Officer, the same stands automatically vested on the superior officer like Deputy Commissioner.

9. So far as the appointments of the petitioners are concerned the same have been made after due interview and on the recommendation of the Selection Committee, this matter hasnot been denied by the respondents. The respondents had also knowledge with respect to the appointment of the petitioners will be evident from the fact that in the counter affidavit it has been stated by the respondents themselves that the information regarding appointments of the petitioners was sent to the Secretary to the Excise Commissioner vide Deputy Commissioner's letter no. 93 dated 13th of June, 1980, If for 12 years, i. e., since June, 1980 up to 1992 the respondent-Excise Commissioner has not acted on the basis of the same by

approving and/or dis-approving such appointment, in spite of his knowledge as back as in the month of June, 1980, I feel that after 12 years this matter cannot be re-opened.

10. At this stage it is also to be taken into note that the intimation relating to appointment of the petitioners was sent vide letter no. 93 dated 13th of June, 1980. It was one year thereafter the respondent-State from its Excise and Prohibition Department issued a letter dated 13th of June, 1981 (Annexure-2). In that letter it was stated that the persons appointed after 30th of June, 1980, theirs services will not be recognized, meaning thereby the persons appointed prior to 30th of June, 1980 relating to which the knowledge was there, recognition was granted by the respondent-State. This letter dated 13th of June, 1981 (Annexure-2) the decision of the respondent-State having been issued by the order of the Governor of Bihar, the respondent-Commissioner and Secretary cannot re-open the matter at this belated stage.

11. Further it is to be taken into note that according to the Government circular dated 3rd of December, 1980, if any person makes illegal appointment, then it is open to the respondent-State to start a departmental proceeding against the person, who made illegal appointment and to dismiss him from service, if it is found that he has made illegal appointment. In this case appointment having been sent by the Deputy Commissioner of Excise and Prohibition, Darbhanga and Koshi Division, Begusarai as back as on 13th of June, 1980 to the Excise Commissioner, the respondents thereby having their knowledge 12 years back, they cannot re-open the matter of departmental proceeding against such officer. This finding I am giving on the basis of the decision of the Hon'ble Supreme Court in the case of *State of*

Madhya Pradesh v. *Bansi Singh & Anr* (1) as well as decision of this court in the case of *Shyam Kishore Singh* v. *State of Bihar and others.*(2)

12. If the matter of departmental proceeding cannot be initiated against the Deputy Commissioner of Excise at this related stage of 12 years, I fail to understand as to how the respondents can re-open the matter of illegality of appointment of the petitioners, they having such knowledge 12 years back Commissioner of Excise.

13. Accordingly, this writ application is allowed and the impugned order dated 7th of April, 1992 (Annexure-5) is hereby quashed.

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

R. D. Application allowed.

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(1) (1990) A. I. R. 2 (S. C.) 1308.

(2) (1991) C. W. J. C. No. 4584 of 1991 disposed of an 30.11.1991.

CIVIL WRIT JURISDICTION

Before S. K. Chattopadhyaya, J.

1995

March,29

*M/s Pyrites, Phosphates & Chemicals Ltd.**

v.

The Bihar Electricity Board & ors.

Agreement for Supply of High Tension Electrical energy by Bihar State Electricity Board to writ-petitioner—clause 13—whether applicable when there is non supply of electrical energy and also when the consumer is prevented from receving or using electrical energy either in whole or in part—whether embraces within its fold not only acts of God but also act of men viz. strikes riots, fire etc—writ-petitioner claiming remission of Annual Minimum Guarantee charges and maximum demand charges due to non-supply/short.supplyy of electrical energy—General Manager directing an enquiry—enquiry report finding contention of writ-petitioner to be correct—General Manager rejecting the claim without considering the enquiry report—whether sustainable.

From a perusal of the provisions laid down in clause 13 of the agreement entered into between the writ petitioner and Bihar State Electricity Board, herinafter referred to as the Board, it is clear that this clause is not only attracted when the Board is unable to supply electrical energy but Clause 13 is also attracted to a case where the consumer is prevented from

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Civil Writ Jurisdiction Case No. 5939 of 1994. In the matter of an application under Articles 226 and 227 of the Constitution of India.

receiving or using the electrical energy to be supplied under the agreement either in whole or in part. The words prevented from receiving or using the electrical energy by contract are significant, Receiving of electrical energy by the consumer may have a direct nexus with supply of electrical energy but clause 13 is also attracted in a case where the consumer is prevented from using the electrical energy. Clause 13 is also not a vis major clause simplicitor. It embraces within its fold not only acts of God but also acts of men like strikes, riots, fire and explosion.

Where the writ-petitioner claimed for remission of Annual Minimum Gurantee Charges and maximum demand charges due to non supply of electrical energy before the General Manager of the Board and the General Manager directed Respondent no. 3 its subordinate, to inspect and verify inablity of writ-petitioneer to ultilise electricity for the cause reasonably beyond its control for two hours after each interruption in the supply of energy who after due enquiry found the contention of the writ-petitioner to be correct;

Held, that respondent no. 2 the General Manager, of the Board has completely misdirected himself in rejecting the claim of the writ-petitioner without even referring to the report of Respondent no. 3. Respondent no. 2 under clause 13 of the Agreement was deciding the matter as a quasi judicial authority and as such it was his bounded duty to consider the report of Respondent no. 3 as well as other documents filed on behalf of the writ-petitioner.

Held, further, that that part of the impugned order, by reason of which Respondent no. 2 has rejected the claim of the writ-petitioner in respect of relief for total hours of trippings, load sheddings etc. as well as amount of remission for hours of non-supply on the basis of writ petitioners failure to consume

electricity during the total work of supply, cannot be sustained in law and is set aside.

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

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

M/s. L.K.Bajla, S. S. Rekhi & Pravin Kr. Sinha for the petitioner.

Mr. S.K.Sinha for the respondents.

S. K. Chattopadhyaya, J.

1. The point for consideration in this writ application is as to whether the petitioner is entitled for remission in Annual Minimum Guarantee charges and maximum demand charges preferred by the petitioner.

2. The fact of the case lies in a narrow compass.

The petitioner-company entered into an agreement with the Bihar State Electricity Board (hereinafter referred to as 'the Board') for supply of High Tension electrical energy at 33 KVA but subsequently the contract demand was revised at the request of the petitioner and fresh agreements were entered into. The said agreement was for—

From 15. 10. 1988 to 28. 2. 1988— 4000 KVA

From 1. 3. 1989 to 28. 2. 1992— 9000 KVA

From 1. 3. 1992 to till date— 7000 KVA.

Bills were raised by the Board for shortfall in annual minimum guarantee charges (in short AMG charges) for the period 1988 to 1992 based on uninterrupted supply of electricity by the Board for 24 hours each day and for 365 days in the year.

According to the petitioner, this bill was raised without giving any proportionate reduction for the duration of non-supply by the Board even though the supply was interruted with frequent trippings and load sheddings. The petitioner filed claims for all the aforesaid years and made repeated request to the respondent no. 2 for expeditious hearing and disposal of their pending claims. As the disposal of the claim was being delayed at the respondeents and, the petitioner moved this court in CWJC No. 3386/94 and this Court directed the respondent no. 2 to dispose of the claims of the petitioner. By an order dated 22. 6. 1994 the reespondent no. 2 decided the claims of the petitioner for all the said years by reason of a composit order, which is impugned in this application as Annexure 1.

3. Mr. Bajla, learned counsel appearing on behalf of the petitioner, has firstly contended that the claim of the petitioner was for remission in respect of the period of two hours after each interruption and ground for such claim was that the machineries and equpments installed in the factory are so sophisticated that any interruption in supply of power makes it impossible for the petitioner to use electrical energy for at least two hours even after resumption of supply. Such claim,it is contended, was being a question of factual verification. The respondent no. 2 directed the Electrical Superintending Engineer, respondent no. 3 to hold physical inspection of plants and machineries of the petitioner and to submit his report. The respondent no. 3 submitted his report after visiting the plants as well as after physical verification of the process and perusing the literatures and manuals submitted to him by the petitioner in respect of the sequence of starting the operations. The report of the respondent no. 3 is dated 5th May, 1994 as contained in Annexure 7.

4. The grievance of Mr. Bajla is that though the respondent no. 3 made physical verification of the process and inspected the plants on the basis of the order passed by the respondent no. 2 himself but unfortunately the respondent no. 2 did not even care to mention about the report of the respondent no. 3 in the impugned order. It is contended by the learned counsel that the respondent no. 2 has failed to consider the very important words in clause 13 of the High Tension Agreement which is— "any other case reasonably beyond control—"

5. Lastly it is contended that in view of the illegal impugned order, the bills as contained in Annexure 8 which were raised on the basis of the said order, are fit to be set aside.

6. Mr. Shiv Kriti Singh, learned counsel apparing on behalf of the Board, while countering the submission of Mr. Bajla, has raised a preliminary point regarding maintainability of the writ application. It is urged that the agreement entered into between the petitioner and the Board is contractual agreement and not a statutory one and as such, the petitioner cannot move this court under Article 226 of the Constitution for enforcement of any contractual obligation. According to Mr. Singh, the respondent no. 2 is not a statutory Arbitrator inasmuch as he is appointed as an Arbitrator by mutual agreement by the parties and as such, any decision of the General Manager under clause 13 of the agreement cannot be said to be a quasi judicial dicision which can be challenged in the writ court. Alternatively, it is urged that even if the decision is taken to be on the basis of a statutory contract and amenable to writ jurisdiction, the High Court can issue writ only when there was failure of principle of natural justice and / or the decision is error of law apparent on the face of it. In support of his contention, he has relied upon the

decision reported in AIR 1954 SC 440, AIR 1975 SC 2151 and AIR 1989 SC 1030.

7. On the merit of the case, learned counsel for the Board submits that the petitioner has not pressed relief against the findings arrieved at paragraph 2 (c), 2 (d) and 2 (e) as contained in Annexure 1. Regarding the grievance of the petitioner in respect of finding at paragraph 2 (a) of the impugned order, Mr. singh submits that the claim for remission for shortfall duration has been rejected on the basis of chart 'A' and log book maintained by the Board which were taken into consideration. The real contested finding is the finding of the respondent no. 2 at paragraph 2 (b) of the impugned order. Mr. Singh submits that is is for the petitioner to satisfy the General Manager that it was beyond the capacity of the petitioner to use electricity for mechanical incapabilities and reasons of process for not utilising the electricity for the said period. The satisfaction of the General Manager as to whether the petitioner was prevented from using the electricity for the reasons beyond his control is a subjective one and as such, cannot be interfered. It is further contended that it is an admitted fact that the petitioner is having four generators of 1000 KVA each for maintaining the temperature of his machines and as such, interruption of electric supply for a short period cannot be a reason for the petitioner being prevented from availing full supply of power by the reason of process and machanical incapabilities.

8. Mr. Bajla, in all fairness, has not pressed the relief in relation to findings arrieved at sub-paras (c), (d) and (e) of paragraph 2 of the impugned order, by reason of which the respondent no. 2 has rejcted certain other claims of the petitioner. However, Mr. Bajla, refuting the argument of Mr. Singh,

submits that chart (Annexure A) annexed to the impugned order could not have been taken into consideration by the respondent no. 2 inasmuch as the chart was prepared on the basis of log book of the Board itself. The said log book or extracts there from were neither given to the petitioner nor produced during the course of hearing in his presence and as such, the same could not have been relied upon by the respondent no. 2..

9. On the other hand, learned counsel urged that the document produced by the petitioner in support of his claim has not even been mentioned in the impugned order. with reference to the report of Senior Manager (operation) of the plant, it is contended that even the said report has not been taken into consideration by the respondent no. 2.

10. In order to appreciate the preliminary objection raised by Mr. Singh, some of the provisions of the Indian Electricity Act, 1910 (hereinafter referred to as 'the Act') have to be looked into. The Act provides the law relating to the supply and use of electrical energy. "State Electricity Board" has been defined in section 2 (11) of the Act in relation to any state means the State Electricity Board, If any constituted for the state under section 5 of the Electricity (Supply) Act, 1948 (in short 'the Supply Act') and includes any Board which functions in that State under Electricity Board which function in that State under Sections 6 and 7 of the said Act. The respondent-Bihar State Electricity Board is a Board.In view of section 2 (h) "licensee" means any person licensed under part II to supply energy. The Board is such a licensee under this provision. Similarly the word "consumer" has been defined in section 2 (c) which means any person who is supplied with energy by a licensce or the government or by any other person engaged in the business of supplying energy to the

public under this Act or any other law for the time being in force, and includes any person whose premises are for the time being connected for the purpose of receiving energy with the works of a licensee, the Government or such other person, as the case may be. It is not controverted that the petitioner is a consumer.

11. In view of sub-section (1) of section 23 of the Act, in order to prevent any undue preference to any person by the licensee in making any agreement for the supply of energy, this provision envisages making of an agreement by the licensee with the consumer for supply of energy. Thus the agreement entered into between the petitioner and the Board, in the instant case, has to be held as one envisaged by this provision.

12. section 49 of the Supply Act makes provision for the sale of electricity by the Board to persons other than licensees. Other provisions are also there in Section 49. with which we are not concerned in this case.

13. The statutory basis for the terms in the agreement prociding for minimum annual charge is to be found in section 22 of the Act and Section 48 of the Supply Act. section 22 deals with obligation on licensee to supply energy provided the person entitled to demand, or to continue to receive, from a licensee a supply of energy for any premises having a separate supply minimum annual sum as will give him a reasonable return on the capital expenditure, and meet the possible maximum demand for those premises, the sum payable to be drtermined in case of difference or dispute by arbitration. section 48 of the supply Act. It is not in dispute that the agreement for supply of electricity with the Board ompowered it to revise the rates.

14. In this context, the observation of the Hon'ble Supreme Court in the case of Bihar State Electricity Board, Patna vs. M/s Green Rubber Industries and ors, reported in AIR 1990 SC 699 is to be noted. Their Lordships have observed that agreement is in a standard form of contract and the standard clauses of this contract have been settled over the years and have been widely adopted because experience shows that they facilitate the supply of electric energy. It is a type of contract on which the conditions are fixed by one of the parties in advance and are open to acceptance by anyone. The contract, which frequently contains many conditions is presented for acceptance and is not open to discussion. It is settled law that a person who signs a document which contains contractuab terms is normally bound by them even though he has not read them and even though he is ignorant of the precise legal effect. It is further observed that every contract is to be considered with reference to his object and the whole of its terms and accordingly the whole context must be considered in endeavouring to collect the intention of the parties, even though the immediate object of enquiorfy is the meaning of an isolated clause. Difference between this contractual element and the statutory duty have to be observed A supply agreement to a consumer makes his relation with the Board mainly contractual, where the basis of supply is held to be statutory rather than contractual.

15. On the premises of aforesaid discussions, it can very well be said that even if the agreement between the petitioner and the Board was a contractual one but the basis of supply of electricity is a statutory one rather than contractual. Under these circumstances, in my opinion, the High Court, in its writ jurisdiction, has ample power to find out as to the reasonings

given by the respondent no. 2 in the present case were justified/ illegal or not.

16. The matter can be looked into from a different angle It is now well settled that writ of certiorari can be issued whenever anybody of persons having legal authority to determine questions affecting rights of subjects, having the duty to act judicially, and act in excess of their legal authority. In course of time, the above traditional view has been expanded by extending this remedy even to administrative proceedings where there may not be any statutory obligation to proceed quasi judicially.

17. I may usefully refer in this context the observation of the Hon'ble Supreme Court in the case of *Raja Anand Brahma Shah* vs. *state of Uttar Pradesh & ors*, (1) reported in AIR 1967 SC 1081. While discussing the scope of ambit of section 17 (4) of the Land Acquisition Act, 1894, their Lordships have held "but even though the power of the State Government has been formulated under section 17 (4) of the Act in subjective terms the expression of opinion of the State Government can be challenged as ultra vires in a court of law if it could be shown that the State Government never applied its mind to the matter or that the action of the State Government is mala fide.

18. Moreover, the courts in India are becoming more and more conscious of arbitrary action taken by administrative authority in spheres where the relevant statute does not lay down any quasi-judicial obligation. It is now well settled that old distinction between a judicial and administrative act has withred away and we have been liberated from the pestillent incantation of administrative action. The direction in which the Apex Court has developed the law is more vital and intriguing and the

(1) (1967) A.I.R. S. C. 1081.

attempt now is to disregard the old distinction between administrative and quasi judicial decisions for the purpose of requiring that an administrative authority, in respect of whom the court cannot predicate a quasi judicial obligation even by implication, must comply with the minimal requirements of justice and fair play (See AIR 1958 SC 1018, AIR 1970 SC 150, AIR 1978 SC 851 and A. I. R. 1958 S. C. 851 and AIR 1981 SC 136.

19. The requirement of 'fairness' implies that even an administrative authority must act in good faith; and without bias; apply its mind to all relevant considerations and must not be swayed by irrelevant considerations; must not act arbitrarily or capriciously and must not come to a conclusion which is perverse or is such that no reasonable body of persons properly informed could arrive at. The principle of reasonableness would be applicable even in the matter of exercise of exeutive power without making a law. It is settled principle of law now that the court would strike down an administrative action which violates any of the foregoing conditions.

20. Having considered the settled principle of law, let me examine as to whether the General Manager, the respondent no. 2 was under any obligation to act reasonably and with fairness. This court in the case of *M/s Asia Insulated wires Pvt. Ltd. & another vs. The South Bihar and Chotanagpur Area Electricity Board, Ranchi & ors,* (1). upon taking into consideration various decisions of the Apex Court has held as follows—

"The respondent no. 2 has, thus, a public duty to perform when adjudicating upon claim of consumer for proportionate

(1) (1991) C. W. J. C. no. 642 of 1987 (R) disposed of on 29. 8. 1991.

reduction in the AMG charges and particularly when its order is final. It is required to consider the genuine claim of a consumer with objectivity. It must act judicially and its decision must be supported by reason."

This decision has further been relied by a learned single Judge of this court in th case of *M/s Banarsilal Jhunjhunwala & Sons* vs. *The South Bihar and chotanagpur Area Electricity Board, Ranchi & ors*(1) , reported in 1993 (1). PLJR 462.

21. In view of clause 13 of the Agreement, the consumer may file his claim for proportionate reduction in the bill before the authority appointed by the Board itself. The decision of such authority, in this respect, shall be final. If one looks to the different clauses of the agreement as well as clause 13 in particular, it is cristal clear that the authority concerned to decide the claim of the consumer must act fairly and reasonably. The expression "the decision of the Chief Engineer, Bihar State Electricity Board, in this respect, shall be final" is very important and it cannot be doubted that when finality has been attached to a decision of an authority, the authority must act not only in accordance with law and by following principle of natural justice but also with all fairness and reasonableness. In my view thus, the decision of the respondent no. 2 even if taken to be a decision of an administrative authority, can be scrutinised under the writ jurisdiction. The decision relied by Mr. Singh, in my considered opinion, cannot be applicable to the facts and circumstances of the case and as such, the preliminary objection raised by the respondent has no leg to stand.

22. Now coming to the merit of the case, it is to be seen as

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(1) (1991) C. W. J. C. no. 642 of 1987 (R) disposed of on 29. 8. 1991.

to whether the respondent no. 2 was justified in rejecting the petitioner's claim regarding remission for two hours besides duration of each trippings on account of revival of the process. The petitioner's claim for such remission was on the basis of the fact theat he was prevented from availing full supply of power by the reasons of process and mechnical incapabilities. According to the respondent no. 2, this was not hit by clause 13 of the agreement and such, the claim of the petitioner was not entertainable.

23. Clause 13 of the agreement reads as followas :—

"13. If at any time the consumer is prevented from receiving or using the electrical energy to be supplied under this agreement either in whole or in part due to strikes, riots, fire, floods, explosions, act of God or any other case reasonably beyond control or if the Board is prevented from supplying or unable to supply such electrical energy owing to any or all of the causes mentioned above then the demand charge and guaranteed energy charge set out in the Schedule shall be reduced in proportion to the ability of the consumer to take or the Board supply such power and the decision of the Chief Engineer, Bihar State Electricity Board, in this respect shall be final."

24. I have already observed that relevant provisions of any instrument has to be read as a whole so as to cover the intention of the parties thereto. Clause 1 (a) of the agreement imposes a contractual obligation on the part of the Board to make constant supply of electrical energy. The Board has a statutory obligation to supply electrical energy to a consumer in terms of the provisions of the Supply Act read with the Act and the Rules framed thereunder. It, therefore, does not matter as to whether

at a given point of time the consumer is required to supply electrical energy or not because a consumer may at his convenience run his factory for a part of the day or for the whole day. Even when the machines are not operating, the consumer may require supply of electrical energy for the purpose of maintenance of machinery, security etc. The provisions of the contract of supply of electrical energy vis-a-vis the power of the Board to charge minimum guaranteed charges and maximum demand charges have to be viewed in that context.

25. In the case of *Bihar State Electricity Board* vs. *Dhanawat Rice and Oil Mills*, reported in AIR 1989 SC 1030, the Supreme Court has clearly held that in the cases of trippings, load shedding and power cuts as also in the cases where the consumer was unable to take supply of electrical energy of one or the other reasons enumerated in clause 13 of the Agreement will be entitled to proportionate reduction in annual minimum guaranteed charges.

26. In the case of *M/s Suprabhat Steels Ltd.* vs. *Bihar State Electricityy Board & ors* (1) a Division Bench of this court has held as follows—

"In terms of the agreement the consumer is liable to pay the maximum demand charges on the basis of the recording in the maximum demand indicator as if the same had been the contract demand for the month in question; but the same, in my opinion, does not mean that if for the rest of the period the Board is unable to supply electrical energy or the consumer is unable to consume electical energy for one or the other reasons

(1) (1994) C. W. J. C. No. 7679 of 1992 and other analogous cases disposed of on 11. 4. 1994.

enumerated in clause 13 of the agreement, it would not get proportionate reduction in the maximum demand charges."

27. Relying on the several decisions of the Apex Court, the Division Bench further held that the consumer is not only entitled to proportionate reduction to the extent of the trippings, load sheddings and power cuts but would also be entitled thereto to the extent he was unable to consume electrical ener . if his case comes within the purview of clause 13 of the agre ment.

28. A bare perusal of the provisions laid down in clause 13 of the agreement, it is clear that this clause is not only attracted when the Board is unable to supply electical energy but also to a case where the consumer is prevented from receiving or using the electrical energy to be supplied under the agreement either in whole or in part. The words 'prevented from receiving or using the electrical energy by a contract' are significant. The words 'receiving or using', in my opinion, signify different contexts. Receiving of electrical energy by the consumer may have a direct nexus with supply of the electrical energy but clause 13 is also attracted in a case where the consumer is prevented from using the electrical energy. Clause 13 is also not a vis major clause simplicitor. It embraces within its fold not only acts of God but also acts of men like strikes, riots, fire and explosions.

29. In the case of *Suprabhat Steels Ltd.* (supra), the Division Bench after dealing with the relevant clauses of the agreement have held that the words 'any other cause reasonably beyond control' must be read as illustrative but cannot be read as ejusdem generis to the words 'act of god'. The words 'any other cause reasonably beyond control' do not signify only vis major.

However, what would be the reasonable beyond control of the consumer would depend on the facts and circumstances of each case.

30. Similarly, clause 13 of the agreement cannot be interpreted in a restrictive manner as argued by Mr. Singh. Clause 13, as noticed hereinbefore, on the other hand, must be construed liberally.

31. In the case in hand, the general Manager, as would appear, on receiving the claim of the petitioner directed its own subordinate to inspect and verify the enability of the petitioner to utilise electricity for the cause reasonably beyond its control for two hours after each inerruption in the supply of energy.

Annexure 6 is order dated 15. 3. 1994, by reason of which the respondent no. 3 was directed to hold physical inspection of the plants and machineries of the company and to submit a report accordingly. From bare perusal of the order, it appears that the General Manager of the petitioner had assured to submit papers concerning the guidelines/instructions of the manufacturer-company of the electrical equipments installed in the plants to justify their claim.

32. Annexure 7 is a report of the respondent no. 3 dated 5th May, 1994, which was submitted to the respondent no. 2. In his report, it appears, the respondent no. 3 clearly mentioned that he visited the workshop of the petitioner on 5. 5. 1994 and checked up regarding non-functioning of the plants due to power interruption and low frequency. He has given his finding that the contentions of the petitioner are correct that they could not operate their plants for at least two hours after resumption of power supply after each interruption because of lot of rechecking activities involved and preheating of convertor to 400 deg. cent.

@10-15 deg. cent. per hour etc. The respondent no. 3 also found that the petitioner could not operate their plants at the lower frequency that 48·5 cycles. According to him, he reached to the conclusion aforesaid after also going through the literatures and mannuals submitted by the petitioner-company in support of above and the start up sequence was enclosed therewith. While enclosing the relevant literatures alongwith his report the respondent no. 3 has observed that motors have been designed as per S. S. Which comprises that these motors should not be operated out of the limit i. e. ± 3% of supply frequency, which is 50 cycles. Literatures of original plant manufacturer was also enclosed with the report.

33. The contention of Mr. Singh that the claim for adding two hours to each and every interruption has rightly been rejected by the respondent no. 2, in my opinion, is not tenable. Even the petitioner having four generators could have maintained the machineries but it is the case of the petitioner that after sudden power cut, some time is required to operate the generators and this short time is also enouth to bring the aforesaid machineries in a stand still. Moreover all these facts ought to have been discussed by the respondent no. 2 inasmuch as he was required to take into consideration the relevant facts which admittedly he has not done while rejecting the claim of the petitioner in this regard.

34. Further argument of Mr. Singh that the burden of proof and claim advantage as per clause 13 is not on the Board but on the petitioner, is also have no force inasmuch as it is an admitted fact that on the direction given by the respondent no. 2 himself, the respondent no. 3 made a physical verification of the plant and after such verification and going through the

relevant literatures, the respondent no. 3 had come to a conclusion that the claim of the petitioner was correct. Uncontrovertedly the report was submitted by the respondent no. 3 to the respondent no. 2 but even then the respondent no. 2 has failed to apply his mind to the said report. If the said report would have been considered in its true perspective, probably the respondent no. 2 could have come to a conclusion that the petitioner was able to prove his claim before him. That not being done, in my opinion, it is futile to argue on behalf of the Board that the respondent no. 2 has committed no illegality in refusing the said claim.

35. From the impugned Annexure, it is found that while rejecting the claim of the petitioner in respect of the said incapabilities to consume electricity, the respondent no. 2 has not even whisper about the report submitted by the respondent no. 3. While rejecting the said claim he has only held that the claims are untenable as prevention from availing full supply of power by reasons of process and machanical incapabilities, is not hit by clause 13.

36. In my considered opinion, the respondent no. 2 has completely misdirected himself in arriving at this finding. The respondent no. 2 under clause 13 of the Agreement was deciding the matter as a quasi judicial authority and as such it was his bounded duty to consider the report of the respondent no. 3 as well as other docoments filed on behalf of the petitioner. Moreover, when this report was submitted on his own direction, the same could not have been ignored. When impugned order does not disclose about discussion of the report, it is futile for the respondent Board to submit in the counter affidavit that the report was not considered because respondent no. 3 based his

findings only on the literatures in relation to the plant and machineries. If the respondent no. 2 was not satisfied with the said report of respondent no. 3 he could have very easily directed either the respondent no. 3 to make another physical verification or in order to do justice, could have personally inspected the plant for satisfying himself as to whether the claim of the petitioner was justified or not. One should remember that public authorities are required to do justice in accordance with law and justice not only to be done but must seem to have been done.

37. Considering this aspect of the matter, in my opinion that part of the impugned order, by reason of which the respondent no. 2 has rejected the claim of the petitioner in respect of relief for total hours of trippings, load sheddings etc. as well as amount of remission for the hours of non-supply on the basis of petitioners failure to consume electricity during the total work of supply, cannot be sustained in law and is fit to be set aside.

38. This application is allowed to the extent that the findings of the respondent no. 2 as given in paragraph 2 (a) and 2 (b) of the impugned order are set aside and the respondent no. 2 is directed to assess the claim of proportionate reduction of the annual minimum guarantee bill in respect of disputed years on the basis of the documents available on record. It is further directed if the respondent no. 2 is of the opinion that a fresh physical verification/ inspection report and other documents are required for considering the claims of the petitioner for such remission, he is at liberty to do the same. It is further directed that until this is not done, the power supply will not be disconnected on the basis of failure to pay the annual minimum

guarantee bills for the period stated above. It is made clear that the respondent no. 2 will give adequate opportunity to the petitioner to prove its claim for remission and if the petitioner wants personal hearing, the same should be given by him. However, after disposing the matter if fresh demand is made, the Board will be entitled to take recourse to the normal procedure if the consumer fails to pay.

39. In view of the aforesaid discussions, the writ application is allowed to the extent indicated above. In the facts and circumstances of the case, there will be no order as to costs.

R. D. Order accordingly.

REVISIONAL CIVIL

Before Banwari Lal Yadav and Shashank Kumar Singh, JJ.

1995

March,29.

*Vishnu Sugar Mills Ltd.**

V.

*Chandrika Prasad.**

Code of Civil Procedure, 1908 (Central Act no. V of 1908)— section 115 order 13 rule 2 and order 18 rule 17-A— provisions of—trial court rejecting the prayer of plaintiff to admit in evidence a document of authorisation after close of evidence— legality of—whether amounts to the case decided as manifested in section 115 of the Code of Civil Procedure as amended by Code of Civil Procedure (Amendment) Act, 1976— (Central Act no. CIV of 1976.

Where the plaintiff filed a suit claming the relief for recovery of principal amount along with interest from the defendant till disposal of the suit and after close of evidence filed an application for accepting in evidence the document of authorisation which was rejected by the trial court.

Held, that a perusal of the impugned order would indicate that the trial court has exercised its jurisdiction without looking in to the provisions contained in order 13 rule 2 and order 18 rule 17-A of the Code of Civil Procedure 1908. The court below should have recorded its findings as to whether the

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Civil Revision No. 169 of 1990. Against the order dated the 30th of January, 1990 passed by Sri R. P. Sinha, 5th Subordinate Judge, Gopalganj in Money Suit No. 37 of 1986.

document could not be filed earlier inspite of due diligence of the plaintiff.

Held, further, that as the impugned order was made rejecting the application to admit the document partaining to the authorisation hence this amounts to case decided. The Civil Revision application under section 115 of the Code of Civil Procedure 1908, as amended in 1976, is maintaineble.

Case laws disccused.

Application by the plaintiff.

The facts of the case material to this report are set out in the judgement of B. L. Yadav, J.

The case in the first instance came up before Binod Kumar Roy, J, who referred it to be listed before a Division Bench.

On this reference.

Messra Y. V. Giri and M. N. Parbat for the petitioner.

Mr. Yogendra Prasad Sinha for the Opposite Party.

B. L. Yadav, J.

This is a plaintiff's Civil Revision preferred under section 115 of the Code of Civil Procedure, 1908 (for short "the Code") arising out of an order dated the 30th January, 1990 passed by the Fifth subordinate Judge, Gopalganj, rejecting the documents in respect of authorisation filed after the settlement of the issues. This case was earlier listed before Hon'ble Binod Kumar Roy, J. who feeling the significance of the question involved, referred it to be listed before a Division Bench. This is how this case has come up before us.

2. The factual matrix of the case in brief is that the plaintiff-applicant has filed the suit claiming the relief for

recovery of a principal amount Rs. 18, 265·66 Paise along with interest (including future and pendentilite) from the defendant till the disposal of the suit. After close of the evidence, however, an application was filed by the plaintiff-applicant that the document of authorisation may be accepted in evidence, but the said prayer was rejected by the impugned order. Against that order the present Revision has been filed. A preliminary objection was raised by the I earned counsel for the opposite party which was refuted by the counsel for the applicant.

3. The learned counsel for the applicant urged that the provision of Rules 1 and 2 of order 13 of the Code may be read together along with order 13 rule 17A of the Code. If these provisions are interpreted together, the applicants application would have been allowed. He leaned heavily on a single Judge decision of this court In *Adalat Choudhary* vs. *Satan Choudhary and others*, (1). *Mohanth Som Prakash Das Vs. Sri Udasin Panchayati Akhara Bera & others* (2), and *Baldevdas Shivlal and another* vs. *Filmistan Distributors (India) Pvt. Ltd. and others* (3).

4. The learned counsel for the opposite party, on the other hand, urged that the Civil Revision itself was not maintainable, as the impugned order rejecting the application for admission of the documents does not amout to the case decided, as is manifested from section 115 of the Code and that there are no merits in this Revision and the impugned order is correct, as it was within the discretion of the court either to accept or to not

(1) (1984) A. I. R. (Pat) 223.

(2) (1982) P. L. J. R. 486.

(3) (1970) A. I. R. (S. C.) 406.

accept the document, particularly when the same was filed after the evidence was closed.

5. Having scrutinised the submissions of the learned counsel for the parties, the points for our determination are as to whether the present Revision is maintainable, and if so, whether the impugned order could be maintained and whether there was justification for interference within the provisions of section 115 of the code.

6. As regards the first point, the provisions of section 115 of the Code, as amended by Act No, 104 of 1976, indicated that noticeable Amendment has been made by adding a proviso and an Explanation. It is well settled that a proviso carries out an exception to the main provision, Its principal function is to except and deal with a case which would otherwise fall within the General language of the main enactment. In fact, it excludes out some thing which would otherwise have been within the main provision. In the words of Lord Macnaghten "Proviso" is a qualification of the preceding enactment; which is expressed in terms too general to be quite accurate. *(See Local Government Board* vs. *South stoneham Union* (1).

In other words a Proviso has no repercussion on the interpretation of the enacting portion of the section so as to exclude some thing by implication which is embraced by clear words in the enactment, (See *A. N. Sehgal* vs. *R. Shooram* (2) that the High court may call for the record of any case which has been decided by any court subordinate to such High court and in which no appeal lies thereto, and if such subordinate court appears to have exercised a jurisdiction not vested in it by law, or to have

(1) (1908) A. C. 57 (H. L.) 62.

(2) (1991) A. I. R. (S. C.) 1406.

failed to exercise a jurisdiction so vested or to have acted in the exercise of its jurisdiction illegally or with material irregularity, the High Court may make such order in the case as it thinks fit. By Proviso it has been provided that the High Court shall not vary or reverse any order made including an order deciding an issue, except when order, if it had been made in favour of the party applying would have finally disposed of the suit or if allowed to stand it would occasion a failure of justice.

7. By the 1976 Amendment Act an Explanation has also been added to this section to explain the meaning of expression "any case which has been decided". This Explanation is part and parcel of the enactnent. So far this expression has received different and contradictory meaning in different High Courts, hence to evolve a consistent meaning to be assigned to this expression. construction consistent with the purpose has to be placed upon it. *In Bengal Immunity Co. Ltd.* vs. *State of Bihar* (1) the Explanation added to Article 286 (1) was restricted to its avowed purpose of explaninig an out side sale for the purpose of clause (1) and was construed as not conferring any taxing power or as restricting the ban imposed by clause (2) of the same Article. Even prior to 1976 Amendment Act the Apex court has already authoritavively held *inhanne* vs. *Dhillon* (2) and *Baldev Das* vs. *Filmistan* (supra) that the Revision lies even against interlocutory order. Following these pronouncements the Explanation was added indicating that expression "any case which has been decided includes an order made or an issue decided".

(1) (1995) A. I. R. (S. C.) 661.

(2) (1964) A. I. R. (S. C.) 497.

In other words Revision would lie against an order (interlocutory of final) and even against an order deciding an issue. To put it differently by this Explanation a substantial change was brought in the concept of the case decided. The Explanation has been couched in the language having wide sweep. If any order has been made or any order deciding an issue has been passed, that means that the case has been decided. In the istant case as the order was made rejecting the application to admit the document pertaining to the authorisation, hence this amount to case decided. In case all the provisions of section 115 of the Code are read together, in that event the impugned order rejecting the application to admit certain documents amounts to the case decided. The preliminary objection raised by the opposite party is over ruled and the present Civil Revision is maintainable.

8. Reverting to the merits of the case, the provisions of order 13 Rule 1 and order 18 Rule 17-A of the Code be read together. Order 13 Rule 1 provides that docuentary evidence shall be produced at or before the settlement of the issues. Order 13 Rule 2 of the Code provides that in case good cause is shown, the documentary evidence can be received at a subsequent stage. Order 18 Rule 17-A of the Code enacts that in case a party satisfies the court that a particular document was not within his knowledge or he could not produce it along with other evidence, in that case the court may permit that party to produce that evidence at a later stage. An application was filed to admit some documents after close of the documentary evidence. In such matters Rule 1 of order 13 would not apply. Rule 2 of order 13 of the Code reflects that in case good cause was shown the same can be admitted in evidence at a subsequent stage. The application was filed and reasons were indicated how the documents

about authorisation could not be filed earlier. Consequently the condition was prima facie satisfied. Rule 2 of order 13 of the Code has to be read along with Rule 17-A of order 18 of the Code, which provides that where a party satisfies the court that after the exercise of due diligence, any evidence was not within his knowledge or could not be produced by him at the time when that party was leading his evidence, the court may permit that party to produce that evidence at a later stage on such term as may appear to it to be just and proper. In the present case the application was filed for inclusion of document for which reasons were indicated that even after exercise of due diligence the documents could not be filed earlier, and consequently it was filed after close of the evidence. But the court below without considering the reasons indicated in the application and without holding as to why the documents could not have been admitted in evidence, even if produced at a later stage, rejected the same. Rule 2 of order 13 and Rule 17-A of order 18 of the Code deserve to be read together and the court below has not given any reason about the requirement or Rule 17-A of Order 18 and Rule 2 of Order 13, rather findings have been recorded on the merit of the document as to whether it was genuine or not. This amount to failure to exercise the jurisdiction even though the same was vested in the court. But according to the proviso this court cannot vary or reverse the order of the court below, except where the order passed finally disposes of the proceedings, or if it had been passed in favour of the person applying for Revision it would have finally disposed of that proceeeding. As the application of the applicant in Revision was to admit certain documents at a later stage and it also contained reason for not filing the documents of authorisation at an earlier stage. We have perused

the application and the same contains sufficient reasons for not furnishing certain documents at the earlier stage. But that application was rejected. The rejection of the application disposes of the application to file documents at a later stage. The rejection was against the provision of Order 13 Rule 2 and Order 18 Rule 17-A of the Code. The rejection of such application of the applicant amounts to disposel of the proceedings and in case this order was allowed to stand, it would ocaasion a failure of justice.

9. In *Adalat Chaudhary's* case (supra) the learned single Judge of this court has held that the scope of Rules 1 and 2 of Order 13 and and Rule 17-A of Order 18 of the Code is that the court would not be justified to reject the admission of the documents on the ground of closure of the evidence. The effect of this provision has to be taken in to account before passing the order of rejection of the documents. *Baldev Das* vs. *Filmistan* (supra) was a case where it was held that the Revision would be maintainable against in interlocutory order.

10. In *S. M. James and another* vs. *Dr. Abdul Khair* (1) it was held by a single Judge of this court that the provisions of Rules 1 and 2 of Order 13 of the Code and Rule 17-A of order 18 of the Code and Circular Order (civil), 1954 and Rule 10 have to be read together and it was the discretion of the court to admit any document even after it was filed later. In our opinion, therefore, a perusal of the impugned order would indicate that the court below has exercised its jurisdiction without looking into the provisions of law contained under Rule 2 of Order 13 and Rule 17-A of Order 18 of the Code. In other words, the court below first must have recorded its findings as to whether the

(1) (1961) A. I. R. (Pat) 242.

document could not be filed earlier inspite of the due diligence of the plaintiff-petitioner. In that view of the matter the impugned Order cannot be sustained, as it is against the provision of Order 13 Rule 2 read with order 18 Rule 17-A of the Code.

11. In view of the premises aforesaid, this Civil Revision application succeeds and the same is allowed. The impugned order dated the 30th of January, 1990 is, accordingly set aside and the learned subordinate Judge, Gopalganj is directed to decide the matter afresh within three months from the date a certfied copy of this order is furnished, in accordance with law in the light of the observations made above. In the circumstances of the case, however, there shall be no order as to costs.

S. K. Singh, J. I agree.

R. D. Application allowed.

CIVIL WRIT JURISDICTION

Before Bisheshwar Prasad Singh, J.

1995

March,31.

Prabhakar Chandra Jha.

v.

The State of Bihar & others.

Service—benefit of Seniority granted to ex-army personal in the matter of appointment to the post of District Engineer interms of paragraph 8 (a) of Government memorandam contained in letter no. 877 to dated 21. 6. 1989—validity of.

The writ-petitioner and respondent no 4 were appointed as District Engineer on 23. 3. 1973 pursuant to their selection for appointment by the Bihar Public Sercvice Commission and in order of merit the writ-petitioner was placed at serial no.2 where as the respondent no.4 was placed at serial no.3.

Respondent no.4 filed representation that as he had joined short service commission in Indian Army on 14. 2. 1965 and after serving as such for five years he was released from Army Service as on 14. 5. 1970, he was entitled to seniority in pursuance of Government decision contained in paragraph 8 (a) of the letter no. 8772 dated 21. 6. 1969 his senority be decided accordingly.

After considering the representation it was ordered by notification dated 24. 6. 1985, that respondent no. 4 be deemed

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Civil writ Jurisdiction Case No. 5545 of 1990. In the matter of an application under Articles 226 and 227 of the constitution of India.

to have been appointed as District Engineer with effect from 1. 2. 1967, the date on which he attained the age 25 years, which was the minimum age preseribed for appointment as District Engineer and that he should be granted consequential benefit of seniority in accordance with the Government decision contained in letter no. 8772 dated 21. 6. 1969,

Held, that the notification dated 26. 6. 1985, granting the benefit of seniority to Respondent no. 4 cannot be assailed.

The decision has been taken perfectly in accordance with the decision of the Government contained in paragraph 8 (a) of Memorandum no 8772 dated 21. 6. 1969. The decision of the Government contained therein is a valid decision as it grants certain concessions to persons, who had rendered valuable military service when the country faced external aggression.

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

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

Mr. Prabhakar Chandra Jha (In person) for the petitioner.

M/s Daya Nand Singh & Kameshwar Kumar for the state.

M/s S.J.Mukhopadhaya &Shivendra Kishore for respondent no.4.

B. P. Singh, J.

The petitioner herein is aggrieved by the notification dated 24. 6. 1985 (Annexure-9) whereby respondent no. 4 has been deemed to have been appointed as District Engineer with effect from 1st February, 1967, the date on which he attained the age of 25 years, which was the minimum age prescribed for

appointment as District Engineer. Respondent no. 4 has been granted consequential benefit of seniority. This has been done pursuant to the Government decision dated 21. 6. 1969, whereby certain concessions were granted to short service commission and Emergency commission officers, who had served the Indian Army after 1st February, 1962, and who were released according to a phased programme or on the expiry of the tenure of their service in the Indian Army. The petitioner claims that his case should be considered on the basis of seniority-cum-merit for appointment as Chief Engineer in the Road Construction Department of the Government of Bihar.

Admittedly, the petitioner as well as respondent no. 4 were appointed as District Engineer on the same date i. e., on 23. 3. 1973 pursuant to their selection for appointment by the Bihar Public Service Commission. In order of merit, the name of the petitioner was shown at serial no. 2, whereas respondent no. 4 was shown at serial no. 3. It is not disputed that if the position in the merit list was to determine the seniority inter se of the petitioner and respondent no. 4, the petitioner would rank senior to respondent no. 4. The question is whether the benefit of seniority given to respondent no. 4 pursuant to the Government decision contained in letter no. 8772 dated 21. 6. 1969 is legal and proper.

2. I shall first notice the factual background in which this controversy arises. The petitioner was appointed as Assistant Engineer in the public works Department of the Government of Bihar in the year 1962. His record of service shows that the petitioner possesses abilities far above average. Apart from the fact that the petitioner had a brilliant academic career, he was also awarded National Research Council Scholarship of Canada twice in the year 1965 and 1969. He was awarded M. Sc.

(Engineering) Degree by the University of Calgary, Canada for original research for professional proficiency. The research papers of the petitioner were published in the journals published by the American concerete Institute, USA, and the thesis of the petitioner was also purchased by the British Library, U. K. in the year 1986.

3. As earlier noticed, the petitioner was appointed as Assistant Engineer in the Public Works Department of the Government of Bihar in the year 1962. He continued to work as an Assistant Engineer, till he was selected for appointment as District Engineer on 23rd March, 1973. Apart from the petitioner, two other persons were also appointed District Engineer by the same order. Respondent no. 5 was placed number one in order of merit, whereas the petitioner was placed at serial no. 2 and respondent no. 4 at serial no. 3 It is also not disputed that respondent no. 4 was appointed against the post reserved for Engineer released by the Indian Army. After their appointment, all the three District Engineers were confirmed. On 18. 2. 1977 the cadre of District Engineer and the Executive Engineer, P. W. D. were merged. It was only thereafter on 18. 5. 1977 that respondent no. 4 represented his case before the Government for grant of seniority on the basis of the Government dicision contained in paragraph no. 8 (a) of letter no. 8772 dated 21. 6. 1969. The said letter has been annexed as Annexure-3 to the writ petition. The Rural Development Department after consultation with the Appoitment Department rejected the representation of respondent no. 4 by order dated 4-8-1977 (Annexure-4). This led respondent no. 4 to file a writ petition before this court, being C. W. J. C. No. 1037 of 1978. The order rejecting the representation of respondent no. 4 being a non-speaking order, this court was pleased to allow the writ petition and remanded back the case for

a fresh decision on the question of seniority in accordance with law, after affording to the parties concerned an opportunity of hearing. After the writ petition was allowed by this court, a notice was issued to the petitioner, and he filed his written objections to the grant of seniority to respondent no. 4, as claimed by him. Ultimately, the impugned notification (Annexure-9) was issued on 24. 6. 1985. By the said notification it was declared that respondent no. 4, who had joined military service on 20th July, 1964, and who had attained the age of 25 on 1. 2. 1967, which was the minimum age for appointment as District Engineer, and who was appointed against the post reserved for Engineers released from military service, and who had been appointed as District Engineer-vide notification no. 1383 dated 14. 3. 1973, shall be deemed to have been appointed as District Engineer on 1. 2. 1967 in terms of the Government decision contained in paragraph no. 8 of letter no. 8772 dated 21. 6. 1969. His seniority was determined accordingly. Since the cadre of District Engineer was merged with the cadre of Executive Engineer in the public works Department, his seniority in the merged cadre shall be determined on the same basis, and respondent no. 4 shall be entitled to all other benefits to which he was entitled under the aforesaid memorandum dated 21. 6. 1969.

4. So far as respondent no. 4 is concerned, it is not in dispute that he possesses a degree in Engineering, and had applied for short service commission in the Indian Army. He was called for training on 20th July, 1964, and was ultimately granted short service commission in the In[illegible] on 14. 2. 1965. Thereafter, he served Indian Army, and was ultimately released from Army service on 14. 5. 1970. On 23. 6. 1971 he was appointed as Engineer Assistant, and worked as such till 23. 3. 1973, when he was selected for appointment as District Engi-

neer along with the petitioner. It may be noticed that the post of Engineer Assistant existed for some time, and has thereafter been abolished. The said post of Engineer Assistant was class III non-gazetted post at the relevant time.

5. The core question, therefore, is whether in view of the military service rendered by respondent no. 4 he is entitled to the benefit conferred by Memorandum no. 8772 dated 21. 6. 69 issued by the Appointment Department of the Government of Bihar.

6. It is well-known that this country faced a serious threat of external aggression in the year 1962 and again in the year 1965. With a view to meet the emergency situation created by such aggression, the country required large number of army officers including Engineers and Doctors to meet the challenge faced by the country. It was in this context that many persons were recruited to the Indian Army as Emergency Commissioned Officers or Short Service Commissioner Officers. In recognition of the meritorious and selfless service rendered by persons, who were under no obligation to render military service, the Government decided to grant them certain concession in the matter of civil employment. The matter was considered by the Government, and concessions were granted to two categories of persons, namely, (a) persons who were already in the State service and joined the military service on deputation, and who came back after release from [illegible] (b) persons who joined milirary service from the open market and were released from military service after completing the short service commission. By its decision contained in Memorandum dated 12th July, 1967 (Annexure-5) certain concessions were given to the first category of Government servants who had opted for military

service. That is not relevant in the instant case. What is relevant is the concession granted to persons belonging to the second category, namely, the Engineers and Doctors, who joined Emergency Commission and Short Service Commission directly, and who were released from military service after completing the Commission. It was decided that 50 percent of the permanent vacancies which occur as a result of retirement and other casualties from the permanent cadre of class I and class II State Engineering and Medical Service should be reserved for Ex-Army Personnel having to their credit satisfactory military service, and who were found physically fit for appointment against reserved vacancies. It was also decided that for the purpose of fixation of pay and seniority such a candidate shall be deemed to have been appointed to the civil post on the date on which he joined the military service, provided that no officer was to get advantage in matter of seniority and pay fixation for the period of military service rendered by him before 1. 11. 1962.

7. Another Memorandum no. 8772 dated 21. 6. 1969 was issued by the Government of Bihar, which slightly modified the earlier Memorandum. The Memorandum dated 21. 6. 1969 is Annexure-3 to the writ petition. From a perusal of Annexure-3 it appears that the Government realised that Ex-Armymen of Engineering and Medical corps were not being absorbed in civil post because very few vacancies, if at all, occurred in permanent cadre. By and large recruitments were made on temporary basis, and no reservation was provided for against temporary posts. The Government, therefore, decided that in the Engineering and Medical service also 30 percent of the vacancies, both permanent and temporary, instead of permanent vacancies only, should be reserved for those Engineers and Doctors who had joined the

armed forces from the open market during the last emergency and thereafter released. It may be worth noticing that the reservation of posts was only in class I and class II Engineering and Medical Service for graduate Engineers and Doctors, who took up military service during the emergency. It is not necessary to refer to other paragraph of the Memorandum, but paragraph no. 8 thereof is most significant. It reads as follows:

"Seniority and pay of these candidates who are appointed against the reserved vacancies will be determined in the following manner—

(a) A candidate shall be treated as belonging to the year in which he would have been appointed on attaing the minimum age of entry into service/post concerned or on the date of his joining military service, which ever is later.

(b) All such candidates shall rank below the non-service recruits of the year in which they are alloted.

(c) The particular date on which a candidate should be deemed to have been appointed to the service/post concerned shall be decided by the Administrative Department."

8. A mere perusal of the paragraph quoted above leaves no manner of doubt that as a special concession to ex-army officers, who were released from the army, a benefit was sought to be conferred, whereby on appointment against a civil post he was treated as having been appointed in the year in which he would have been appointed on attaining the minimum age of entry into the service/post concerned, or on the date of his joining military service, whichever is later. However, he would rank below the non-service recruits of the year in which he was allotted. This was in slight modification of the earlier Memorandum (Annexure-5), which provided that such a

candidate shall be deemed to heve been appointed to the civil post on the date on which he joined military service on or after 1. 12. 1962.

9. The case of respondent no. 4 has been considered in the light of paragraph no. 8 of the Government decision, as contained in Annexure-3 dated 21. 6. 1969. In my view, no error has been committed by the Government in giving to respondent no. 4 the benefit of deeming him to have been appointed District Engineer on 1. 2. 1967, the date on which he attained the age of 25, which was the minimum age for appointment as District Engineer. As earlier noticed respondent no.4 was granted short service commission on 14. 2. 1965. In accordance with the earlier Memorandum (Annexure-5) he could be deemed to have been appointed on 14. 2. 1965 as District Engineer, but since that was modified by Memorandum (Annexure-3) he could be deemed to have been appointed as District Engineer on the date when he attained the qualifying age for entry into service, namely, 25 years. It is not in dispute that respondent no. 4 attained the age of 25 years on 1. 2. 1967. If that be so, in terms of paragraph no. 8 of the Government Memorandum, he was rightly treated as having been appointed as District Engineer on 1. 2. 1967. The benefit of the aforesaid Memoranum was available only to respondent no. 4, and by reason of the concession granted to him he was deemed to have been appointed as District Engineer on 1. 2. 1967. The petitioner, on the other hand, joined the post of District Engineer on 23rd March, 1973, obviously, therefore, he became junior to respondent no. 4 by reason of concession conferred upon the latter under Annexure-3. The petitioner, therefore, has no justifiable ground to challenge the seniority conferred on respondent no. 4.

10. The petitioner submitted that it was necessary for a

person to have five years experience of working in the public works Department or District Board in connection with the construction work before he could be appointed as District Engineer. On 1. 2. 1967 the petitioner did not have the requisite experience and, therefore, he could not be deemed to have been appointed as District Engineer on that date. The submission overlooks the fact that respondent no 4 was actually appointed as District Engineer in March 1973. He had rendered services as Engineer in the Indian Army on Short Service Commission from 14. 2. 1965 till 14. 5. 1970 i. e., for a period over five years. That was considered to be adequate experience for appointment as District Engineer. In view of the decision of the Government, as contained in Annexure-3, he has been given the benefit of seniority treating him as having been appointed on 1. 2. 1967. This concession has been given to respondent no. 4. in recognition of special services rendered by him as an army officer at the time of peril. There is, therefore, no illegality in the grant of such concession to respondent no. 4.

11. The petitioner also contended that the impugned order was passed by the Department of Road Construction, whereas the parent Department of the petitioner was the Rural Development Department. This submission on has no force. It is true that earlier the parent Department of the petitioner was Rural Development Department, but at the time when Annexure-9 was issued, the Rural Engineering organisation was under the control of the Road Construction Department. Obviously, therefore, the notification was issued by that Department. It appears that later the organisation was again under the control of Rural Development Department, but that is not very material.

12. It is not disputed that the petitioner had submitted his objection in writing to the grant of seniority to respondent no. 4 under Memorandum dated 21. 6. 1969 (Annexure-3). It cannot therefore, be contended that the decision was taken in violation of the principles of natural justice.

13. Having considered all aspects of the matter, I have no hesitation in coming to the conclusion that the impugned notification (Annexure-9) dated 24. 6. 1985 cannot be assailed. The decision has been taken perfectly in accordance with the decision of the Government, as contained in paragraph no. 8 (a) of Memorandum No. 8772 dated 21. 6. 1969. The decision of the Government contained in the aforesaid Memorandum is a valid decision, which has not been assailed by anyone before this court, obviously because it sought to grant certain concessions to persons, who had rendered valuable military service when the country faced external aggression.

14. This writ petition has, therefore, no merit and is, accordingly, dismissed, but without any order as to costs.

R. D. Application dismissed.

CIVIL WRIT JURISDICTION

Before Naresh Kumar Sinha, J.

1995

March, 31.

Ram Sagar Sinha

V.

The State of Bihar and others.

Bihar Service Code, 1952 Rule 92 clause (2)—ambit of—competent authority exonerating the writ-petitioner of all the charges ordering that the writ-petitioner was not entitled to arrears of pay from the date of his suspension to the date of his superannuation—legality of.

Once the competent authority chose to exonerate the writ-petitioner of all charges for whatever reasons, it was a case where the government servant had been fully, exonerated within the meaining of clause (2) of Rule 97 of the Bihar Service Code and the writ-petitioner would be entitled to full pay and allowance to which he would have been entitled had he not been suspended.

Held, that the part of the impugned order which directs that the writ-petitioner would not be entitled to his arrears of pay for the period commencing from the date of his suspension to the date of his superannuation was illegal and is quashed.

Application under Articles 226 and 227 of the Constitution.

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*C.W.J.C. No. 4253 of 1985. In the matter of an 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 Naresh Kumar Sinha, J.

Mr. Rajendra Singh. for petitioner

M/s Narendra Kishore Sinha,

G. P. III & Abhay Prakash Sahay,

J. C. to G. P. III. for the respondent

Naresh Kumar Sinha, J.

In this application under Articles 226 and 227 of the Constitution of India the petitioner prays for quashing the order dated 16. 3. 85 (Annexure-1) passed by respondent no. 2 and for a direction to pay the full salary to the petititoner after deducting the suspension allowance paid to him.

2. The petitioner is a retired Headmaster of High school, Mahendrapur in the district of Begusarai. He was suspended with effect from 3. 11. 73 as he opposed tthe Secretary of the school in his attempt to embezle the school amount. The petitioner filed Title suit against the order of suspension in which an interim injunction was granted but was subsequently vacated. He also filed an application before the District Control Committee through the District Education officer challenging the order of suspension. The Managing Committee of the school without notice to the petitioner and without holding any enquiry and hearing the petitioner discharged him on 29. 8. 74. Since the power of appointment, suspension and removal was taken away from the hands of the Managing Committee of all recognised high schools and was vested in the Bihar Secondary Education Board from 21st May 1974 by the repeal of Bihar Act 13 of 1960 by Bihar ordinance No. 112 of 1974 on 21. 5. 74, the resolution of the Managing Committee dated 29. 8. 74, was void abinitio. The Secretary of the Managing Committee sent the resolution of the

Committee regarding the discharge of the petitioner from service for approval to the District Education officer (respondent no-3) and the respondent no.3 placed the matter before the District Control Committee and the District Control Committee in its meeting held on 16. 12. 74 approved the suspension of the petitioner but not of his discharge with a direction that the petitioner would be entitled to receive the suspension allowance as per Rules. The aforesaid decision was communicated to the respondent no.3 vide letter dated 20th December 1974, a copy of which is Annexure-2. The petitioner, thereafter, continued to receive the suspension allowance. The District Control Committee again met on 12. 1. 76 and decided to lift the suspension order and in pursuance there of order dated 13. 8. 76 was issued to the respondent no. 3. vide Annexure-3. The Managing committee of the school then filed C. W. J. C. no. 1883 of 1976 against the order contained in Annexure-3 which was enclosed as Annexure-6 in the said writ petition. The Hon'ble High Court by its judgment and order dated 14th April 1973 quashed the said order which as already referred to above is Annexure-3 to the present writ application. The petitioner continued to receive his suspension allowance. Meanwhile the Title suit filed by the petitioner against the order of suspension was dismissed for default. In a meeting held on 12. 8. 76 the District Control Committee again considered the matter and ordered that the suspension of the petitioner is being lifted and it also ordered for payment of back wages to hte petitioner. Maanwhile the petitioner retired from service on 5. 3. 77. The respondent no.3 issued an order on 1st February 1983, copy of which is Annexure-4, lifting the suspension of the petitioner and directing that he would be entitled to arrears of pay as per recommendation of the District Control Committee. Respondent no.3 by his letter dated

7th March 1983 directed the acting Headmaster of the school to comply with the order contained in Annexure-4 and a copy of the said letter is Annexure-5. The acting Headmaster of the school then filed C. W. J. C. No. 1668/83 in the High Court against the orders contained in Annexures 4 and 5 which were also Annexures 4 and 5 in the writ application of 1983. The Hon'ble court by its judgment and order dated 19. 8. 83 ordered for keeping Annexures 4 and 5 in abeyance and directed respondent no. 2 to consider and dispose of the matter within a month. In accordance with the direction given by the Hon'ble court respondent no. 2 heard the matter and passed the impugned order vide Annexure-1. By the impugned order respondent no. 2 after tracing out the chequered history of the case took note of the fact that the petitioner had retired with effect from 31. 3. 77 and hence he exonerated him from the charges without any enquiry but that he would not be entitled to any arrears of pay for the period commencing from the date of his suspension to the date of his superannuation.

3. Sri Rajendra Singh learned counsel for the petitioner argued that once the Director of Secondary Education-cum-Special Secretary, Education Department, Government of Bihar (respondent no. 2) by the impugned order (Annexure-1) exonerated the petitioner of the charges levelled against him, he was duty bound to direct payment for arrears of salary for the period of suspension. In support of his contention Mr. Singh contended that the petitioner being a Government servant he would be guided in the matter by the provisions of Rule 97 of the Bihar Service Code (in short the 'Code'). He referred to clause (2) of Rule 97 of the Code which provides that in case the competent authority is of the opinion that the Government servant has been fully exonerated or in the case of suspension that it was wholly unjustified, the government servant shall be given full pay and

allowances to which he would have been entitled had he not been dismissed, removed or suspended as the case may be. Learned G. P. III appearing on hehalf of respondents, however, contended that the petitioner having superannuated, respondent no. 2 in pursuance of the judgment and order of the Hon'ble court dated 19. 8. 83 in C. W. J. C. no. 1668/83 considered the matter and passed the impugned order specifically mentioning that the petitioner would not be entitled to arrears of pay during the period of his suspension. On behalf of the State-respondent it was further contended that the provisions of the Code even if applicable to the petitioner had not been violated by the impugned order as the order exonerating the petitioner of all the charges levelled against him had been passed only on account of the fact that he had superannuated on 31. 3. 77. Learned G. P. III relied on a decision of the Apex court reported in A. I. R. 1974 S. C. 1074. The decision, however, does not appear relevant in the facts of the present case. It may be mentioned that whereas the impugned order gives the date of superannuation of the petitioner as 31. 3. 77, the petitioner's own case is that he superannuated on 5. 3. 77. The State-respondents for the reasons best known to them did not file any counter affidavit.

4. Thus the short question raised for consideration is whether the petitioner was entitled to arrears of pay for the period he was under suspension. There is no dispute between the parties that the period of suspension would be with effect from 3. 11. 73 when the petitioner was put under suspension until March 1977 when he superannuated from service. It is also not in dispute that the petitioner has already been paid the subsistence allowance for the aforesaid period. The petitioner's claim thus is for payment of salary for the said period minus the

allowance of subsistence already paid to him. It is not necessary to take notice of the details of the case and for the limited purpose of disposal of the petition it can be safely assumed that the petitioner had been put under suspension pending enquiry in respect of certain charges levelled against him. The nature of the charges levelled have not been disclosed. However, it follows that for one reason or the other the enquiry could not be completed. As mentioned in the petition some orders in favour of the petitioner were passed and at one stage respondent no. 3 had issued an order lifting the suspension of the petitioner and directing payment of salary for the period of suspension. That order could not be implemented because of some orders passed by the Hon'ble Court and it is not necessary to go into their details. The undisputed fact remains that even during the period of more than 3 years that the petitioner remained under suspension, the proposed enquiry against him in respect of the charge were not concluded. The only reason given in the impugned order for exonerating the petitioner of all the charges without any enquiry is that he had superannuated. If respondent no. 2 the competent authority had chosen not to continue with the euquiry for the aforesaid reason and exonerated the petitioner of all the charges, it was nontheless an exoneration of the petitioner of the charges levelled against him. Provisions of Rule 97 of the Code reads as follows—

> "97 (1) when a Government servant who has been dismissed, removed, or suspended, reinstated, the authority competent to order the reinstatement shall consider and make specific order—
>
> (a) regarding the pay and allowance to be paid to the Government servant for the period of his absence from duty, and

(b) whether or not the said period shall be treated as a period spent on duty,

(2) Where the authority mentioned in sub-rule (1), is of opinion that the Government servant has been fully exonerated or in the case of suspension, that it was wholly unjustified, the Government servant shall be given full pay and allowance to which he would have been entitled had he not been dismissed, removed or suspended, as the case may be.

(3) In other cases, the Government servant shall be given such proportion of such pay and allowances as such competent authority may prescribe:

Provided that the payyment of allowance under clause (2) or clause (3) shall be subject to all other conditions under which such allowance are admissible.

(4) In a case falling under clause (2) the period of absence from duty shall be treated as a period spent on duty for all purposes.

(5) In a case falling under clause (3) the period of absence from duty shall not be treated as a period spent on duty, unless such competent authority specifically directs that it shall be so treated for any specified purpose:

Provided that if the Government servant so desires such authority may direct that the period of absence from duty shall be converted into leave of any kind due and admissible to the Government servant."

5. There is a clear provision that when a government servant has been dismissed, removed or suspended is reinstated the authority competent to order the reinstatement shall consider and make specific order regarding the pay and allowance to be paid to the government servant for the period of absence from duty and whether or not the said period shall be treated as a

period spent on duty. This is provided by clause 1 (b) of rule 97. Sub-clause (2) then provides that where the authority mentioned in sub-rule (1) is of opinion that the government servant has been fully exonerated the government servant shall be given full pay and allowances to which he would have been entitled had be not been dismissed, removed or suspended as the case may be. Once the competent authority chose to exonerate the petitioner of all the charges for whatever reason it was a case where the government servant had been fully exonerated within the meaning of clause (2) of Rule 97 of the Code and the petitioner would be entitled to full pay and allowances to which he would have been entitled had he not been suspended. In view of the aforesaid provisions of the Code the competent authority after exonerating the petitioner of all the charges without any enquiry had no option but to make an order that the petitioner would be given full pay and allowances for the period of his suspension. In this view of the matter the part of the impugned order which directs that the petitioner would not be entitled to his arrears of pay for the period commencing from the date of his suspension to the date of his superannuation was illegal and cannot be sustained. The impugned order (Annexure-1) to the extent mentioned above is accordingly quashed.

6. This writ petition is accordingly allowed. The petitioner shall be paid the arrears of salary for the period commencing from the date of his suspension to the date of his superannuation less the amount of subsistence allowance already drawn by him along with interest calculated at the rate of 10% per annum from the date of filing of the writ petition until payment which shall be made within six weeks from today.

R. D. Application allowed.

CIVIL WRIT JURISDICTION

Before Ashish N. Trivedi, J.

1995

April, 7.

C. M. Prasad and others.

V.

The State Bank of India & ors.

Departmental Enquiry Against an Award Staff, whether can be done by a person who is not an employee of of the State Bank of India—Disciplinary Authority, Assistant General Manager, State Bank of India appointing Commisssioner for Departmental Enquiries Central Vigilence Commission to conduct departmental Enquiry against Award Staff, whether maintainable. Sastry Award as amended by Desai Award and Third Bipartite Settlement—clause 19. 14—effect of.

The Assistant General Manager of State Bank of India, who is the Disciplinary Authority of writ-petitioner who was working as clerk-cum-eashier in Munger. Branch of the Bank by his letter dated 15. 1. 1992 sent to the writ-petitioner, containing the statement of charges called upon him in terms of Rule 521 (4) (i) of the Sastry Award, as retained by Deasi Award, to submit his written statement of defence, if any. The Disciplinary Authority by his letter dated 23. 11. 1992 informed the writ petitioner that his explanation had not been found satisfactory and an enquiry had been ordered to be conducted against him by the Commissioner for Departmental Enquiry, Central Vigilence

Civil Writ Jurisdiction Case No. 1439. In the matter of an application under Articles 226 and 227 of the constitution of India.

Commission, Government of India. Vigilence Commission, Government of India. Writ petitioner by his letter dated 6. 1. 1993 informed the Discipilinary Authority that, the writ-petitioner being an Award Staff, discipilinary proceeding can only be initiated in accordance with the provision of the Award, by far Bipartite Agreement/Settlement wherein there was no provision enabling the Disciplinary Authority to appoint the Commissioner for Departmental Enquiries, an outsider, who is not an officer of the Bank to function as Enquiry Officer against an Award Staff of the Bank.

Held, that the order of appointment of the Commissioner for Departmental Enquiries, Central Vigilance Commission by the Diciplinary Authority, can not be sustained.

The procedure for taking Diciplinary action Against Award Staff is contained in section III of chapter III of the Sastry Award which was amended by the Desai Award and four Bipartite Settlement. A perusal of clause 19. 14 of the Third Bipartite Settlement provides that the Chief Executive Officer or the Principal Officer in India of the State Bank of India or an alternate officer of the Head office or the Principal Officer nominated by the Chief Excutive Officer, for the purpose is to decide which officer shall function as the Disciplinary Authority in the case of each office or extablishment.

As in the instant case the Disciplinary Authority, the Assistant General Manager of the State Bank of India had appointed Commissioner for Departmental Enquiries, who is not an officer of the Bank as the Enquiry officer and not the Chief Executive Officer or an officer nominated by him as envisaged in clause 19.14 of the Third Bipartite settlement, the

order appointing the Commissioner for Departmental Enquiries as enquiry officer is bad.

Though as outsider may be appointed as Enquiry Officer even against an Award Staff, but such a decision has to be taken by the Chief Executive Officer or the Principal Officer in India of the State Bank of India or an alternate officer at the Head officer or Principal officer nominated by the Chief Executive Officer as to who shall be the Disciplinary Authority and while taking such are decision it is open to the Chief Executive Officer or such other officer mentioned in clause 19. 14 of the third Bipartite settlement to decide that the enquiry shall be conducted by the Commissioner for the Departmental Enquiries, Central Vigilence Commission of its officers.

State Bank of India v. Workman of the State Bank of India (1)

K. C. P. Employees Association. Madras v. The management K. C. P. Ltd. and ors. (2)—*followed.*

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 A. N. Trivedi, J.

Dr. Sadanand Jha, Sr. Advocate with M/s Indu Bhushan Singh, Asim Jha, and Prakash Chandra Gupta, Advocates, for the Petitioners.

M/s S.K.Sinha and Kishore Kumar Sinha, Advocates for the Respondent-Bank.

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(1) (1990) A. I. R. (S. C.) 2034.

(2) (1979) A. I. R. (S. C.) 474.

Ashish N. Trivedi, J.

This writ petition has been filed by the petitioner No. 1, a clerk-cum-cashier, working in the State Bank of India, Munger Branch (hereinafter referred to as 'the Bank') and the petitioner No. 2 is the State Bank of India Employee' Union, Bihar Branch and its General secretary is the petitioner No. 3. Respondent No. 1 is the State Bank of India, Respondent No. 2 to 4 are its officers and Respondent No. 5 is the Commissioner for Departmental Enquiries, Central Vigilance Commission, Government of India, New Delhi.

The petitioners have prayed that the directions issued by the Respondent No. 5, the Commissioner for Departmental Enquiries, contained in the telegram dated 28. 12. 1993 (Annexure-5) directing the petitioner No. 1 to participate in the departmental proceedings failing which it would proceed ex parte as well as the order dated 21. 1. 1994 (Annexure-7) directing the petitioner to participate in the enquiry being taken/ conducted by the Respondent No. 5 in respect of the statement of charges contained in the chargesheet dated 15. 1. 1992 (Annexure-1) be quashed, and it has been prayed that the Respondent No. 5 be restrained from taking/conducting the disciplinary proceedings against the petitioner No. 1, who is an Award Staff, and for a declaration that the Respondent No. 5, the Commissioner for Departmental Enquiries can only conduct enquiries against the Midd' Management Level-III officers and officers of higher rank of the Bank and not against the Award staff of the Bank for a direction that the disciplinary proceedings against an Award Staff is to be conducted strictly in accordance with the provision of the Sastry Award as retained by Desai

Award, according to which only the officers of the Bank can be deputed by the Disciplinary Authority to function as an Enquiry officer.

The case of the petitioner No. 1 is that he was working as clerk-cum-cashier at the Munger Branch of the Bank when he received a Letter dated 15. 1. 1992 (Annexure-1) from the Assistant General Manager, the Respondent No. 3, who is the Disciplinary Authority of the petitioner No. 1 which contained the statement of chages calling upon the petitioner No. 1 in terms of Rule 521 (4) (i) of the Sastry Award as retained by Desai Award to submit his written statement of defence, if any, within fifteen days of the receipt of the Letter. Written statement of defence dated 29. 1. 1992 (Annexure-2) was submitted by the petitioner-No. 1 before the Disciplinary Authority, who by the letter dated 23. 11. 1992 (Annexure-3) informed the petitioner No. No. 1 is that he was working as clerk-cum-cashier at the Munger Branch of the Bank when he received a Letter dated 15. 1. 1992 (Annexure-1) from the Assistant General Manager, the Respondent No. 3, who is the Disciplinary Authority of the petitioner No. 1 which contained the statement of chages calling upon the petitioner No. 1 in terms of Rule 521 (4) (j) of the Sastry Award as retained by Desai Award to submit his written statement of defence, if any, within fifteen days of the receipt of the letter. Written statement of defence dated 29. 1. 1992 (Annexure-2) was submitted by the petitioner-No. 1 before the Disciplinary Authority, who by the letter dated 23. 11. 1992 (Annexure-3) informed the petitioner No.1 that his explanation had not been found satisfactory and, therefore, an enquiry had been ordered to be conducted against the petitioner No. 1 by Sri J. D. Verma, the Commissioner for Departmental Enquiries, Central Vigilence

Commission, Government of India, New Delhi, Respondent No. 5 and Sri I. Fadili, Manager (vigilence) of the Bank's local Head office, Patna was appointed as the presenting officer. Petitioner No. 1 by his Letter dated 6. 1. 1993 (Annexure-4) informed the Disciplinary Authority that the petitioner being an Award Staff, disciplinary proceedings can only be initiated in accordance with the provisions of the Awards and Bipartite Agreements/Settlement and there was no rule or any provision in the said Awards and Settlements enabling the Disciplinary Authority to appoint the Commissioner of Department Enquiries an outsider, who is not an officer of the Bank to function as the Enquiry officer in the disciplinary proceedings against an Award Staff of the Bank. Soon thereafter, telegraphic communication was received on 28. 12. 1993, a copy of which has been annexed as Annexure-5 from the Respondent No. 5, the Commissioner for Departmental Enquiries intimating that the enquiry against petitioner No. 1 is to commence on 21. 1. 1994 at New Delhi advising the petitioner No. 1 to appear on that date. Petitioner No. 1 by his registered letter dated 8. 1. 1994 (Annexure-6) informed the Respondent No. 5 that he was a clerical employee posted in the Munger Branch of the Bank and as such the enquiry is to be held in terms of Rule 52/70 of the State Bank of India. (Supervisory/Officers Staff) Service Rules, which provides that the Bank shall consult the central vigilance commission wherever necessary, in respect of all disciplinary cases, having vigilance angle, and it was pointed out that such consultation was confined only to those vigilance cases in which the Middle Management Grade-III officers or officers of higher rank drawing a minimum pay not less than Rs. 1800/— per mensem and as regards the disciplinary proceedings and the procedure there for in so far as the

petitioner No. 1 is concerned is governed by clause 520 and 521 of Sastry Award as modifed by Desai Award and the three Bipartite Settlement; none of which provides for referring the disciplinary cases of Award Staff to the Central Vigilance commission, and in view of clause-521 (12) of the sastry Award, it is only the Disciplinary Authority, who is competent to appoint another officer of the Bank as an Enquiry officer and further that in view of the Departmental Enquiries (Enforcement of Attendence of witnesses and production of Documents) Act, 1972 the petitioner No. 1 cannot be forced/coerced to attend/ participate in the enquiry as he was not being called as a witness, and in the circumstances the petitioner No. 1 expressed his inability. A copy of the letter addressed to the Respondent No. 5 was also sent to the concerned officers of the Bank.

The Commissioner of Departmental Enquiries, Respondent No. 5 by his letter dated 21. 1. 1994 (Annexure-7) informed the petitioner No. 1 that preliminary hearing in the departmental enquiry against him was held on 21. 1. 1994 and a copy of the order-sheet recorded on that date was sent for his information and complinace.

Extracts from the "Vigilance Manual" and "the State Bank of India Vigilance Manual relating to Central Vigilance Commission" have been annexed as Annexures-8 & 9 to the writ petition.

Counter affidavit has been filed on behalf of the Respondent-Bank opposing the writ petition stating that Departmental proceedings have been initiated against the then Branch Manager and the then Field officer of the Munger Branch of the Bank by the Commissioner for Departmental Enquiries, Respondent No. 5 and since the charges against the petitioner No. 1 and those

two officers arose out of same transaction and are based on same facts and documents, it was considered just and proper that the charge against the petitioner No. 1 be enquired into by the same Enquiry officer, and accordingly the Disciplinary Authority of the petitioner No. 1 ordered the enquiry against him to be conducted by the Commissioner for Departmental Enquiries, Respondent No. 5. It is claimed that the provisions contained in clause-521 (12) of the Sastry Award as modified by the Desai Award and the Bipartite Settlement do not prohibit holding of Departmental Enquiry by the Commissioner for Departmental Enquiries appointed as Enquiry officer by the Disciplinary Authority. It is emphasised that the Commissioner for Departmental Enquiries is an independant authority and as such the chances of the allegation of bias are ruled out, and the enquiry can be expeditiously concluded, if continued by the same Enquiry officer.

No counter affidavit has been filed on behalf of the Respondent No. 5. Petitioner has not filed Rejoinder Affidavit to the counter Affidavit filed on behalf of the Respondent-Bank.

The grievance of the petitioner is that the disciplinary proceedings against the petitioner No. 1, an Award Staff, can be conducted only in accordance with the procedure prescribed in the Sastry Award as modified by the Desai Award and the Bipartite Settlement, a according to which the Departmental Enquiry against an Award Staff is to be conducted either by the Disciplinary Authority or any other officer of the Bank appointed by the Disciplinary Authority for this purpose and the Central Vigilance Commission or for that matter Respondent No. 5 has no authority to conduct the enquiry against the Award Staff of

the State Bank of India. The petitioners have no objection to the enquiry being conducted either by the Disciplinary Authority or by any other officer of the Bank appointed by the Disciplinary Authority.

Learned counsel for the petitioners contended that in terms of clasue-521 (12) of the Sastry Award, the Disciplinary Authority and the Enquiry officer has to be an officer of the Bank and not an outsider. Learned counsel referring to various provisions of the vigilance Manual and the State Bank of India Vigilance Manual (Annexures-8 & 9) submitted that the role of the Central Vigilance Commission was advisory in nature and none of the provisions empower the Bank to appoint Central Vigilance Commission or its officers as the Enquiry officer in disciplinary proceedings against an Award Staff.

Learned counsel contended that Sastry Award is a self-contained code and since the procedure for taking disciplinary action has been prescribed in clause-520 and 521 of the Sastry Award any deviation from the prescribed procedure renders the action invalid, and in support of his contention, placed reliance on the decision of the Supreme Court in *State Bank of India* vs. *Workmen of the State Bank of India* (1). in which it was observed that clause-521 of the Sastry Award is a self-contained code of disciplinary action and of the procedure for taking it and that the predominant object of the Award is to protect the interests of the employees. Learned counsel further contended that since there is no express provision enabling the disciplinary Authority to appoint the Commissioner for Departmental Enquiries as the Enquiry officer, the benefit should go to the petitioner and in support in his contention placed reliance on the decision of the

(1) (1990) A. I. R. (S. C.) 2034.

Supreme Court in *K. C. P. Employees Association, Madras* Vs. *The Management of K. C. P. Ltd & ors*(1) in which it was observed that in Industrial law, interpreted and applied in the perspective of Part-IV of the Constitution, the benefit of reasonable doubt on law and facts, if there be such doubt, must go to the weaker section, Labour.

Learned counsel for the petitioners placed reliance on the decision of the constitution Bench of the Supreme Court in *Union of India* Vs. *H. C. Goyal* (2) in support of his contention that the procedure prescribed in the disciplinary proceedings has to be followed.

On behalf of the Bank, it was submitted by the learned counsel that 'the officer' mentioned in clause-521 (12) of the Sastry Award includes even an officer not in the employment of the Bank and there is no provision in the Awards or the Bipartite Settlements, which prohibits the appointment of the Central Vigilance Commission or its officers as the Enquiry officer in the disciplinary proceedings against an Award Staff. It was submitted that equally effcacious alternative remedy was available to the petitioner by raising Industrial dispute and the writ petition is not maintainable.

Having considered the submissions made by the learned counsel for the parties and the material on record, I am of the view that the order of appointment of sri J. D. Verma, Commission, New Delhi, Respondent No. 5 by the Disciplinary Authority, the Assistant General Manager, State Bank of India, Zonal office, Bhagalpur, Respondent No. 3 made by Annexure-3 cannot be sustained.

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(1) (1978) A. I. R. (S. C.) 474.

(2) (1963) A. I. R. (S. C.) 364.

The procedure for taking disciplinary action against an Award Staff which was contained in section III of chapter-XXV of the Sastry Award was amended by the Desai Award and the four Bipartite Settlement. For the adjudication of controversies involved in the present case. the relevant provisions are contained in clause-19. 14 of the Third Bipartits Settlement which read as under—

"The Chief Executive Officer or the Principal Officer in India of a Bank or an alternate officer at the Head office or principal office nominated by him for the purpose shall decide which officer)i. e. the Disciplinary Authority) shall be empowered to take disciplinary action in the case of each office or establishment. He shall also decide which officer of body higher in status than the officer authorised to take disciplinary action shall act as the Appellate Authority to deal with or hear and dispose of any appeal against orders passed in disciplinary matters. These authorities shall be nominated by designation. to pass original orders or hear and dispose of appeals from time to time and a notice specifying the authorites so nominated shall be published from time to time on the bank's notice board.

It is clarified that the disciplinary authority may conduct the enquiry himself or appoint another officer as the Enquiry officer for the purpose of conducting an enquiry.

The Appeallate Authority shall, if the employee concerned is so desirous, in a case of dismissal, hear him or his represeentatives before dosposing of the appeal. In cases, where hearings are not required, an appeal shall be disposed of within two months from the date of receipt thereof. In cases where hearings are required to be given and requested for, such

hearings shall commence within one month from the date of receipt of the appeal and shall be disposed of within one month from the date of conclusion of such hearings. The period within which an appeal can be preferred shall be 45 days from the date on which the original order has been communcated in writing to the employee concerned."

A perusal of clause-19. 14 hereinablove would show that the Chief Executive Officer or the Principal Officer in India of the Bank or an alternate officer at the Head office or the principal officer nominated by the chief Executive officer for the purpose is to decide which officer shall function as the Disciplinary Authority in the case of each office or establishment and will also decide which officer or Body higher in status than the officer authorised to take disciplinary action will be the Appellate Authority. It is further evident that it is open for the Disciplinary Authority either to conduct the enquiry himself or appoint any other officer as the Enquiry officer.

In the present case, admittedly the Disciplinary Authority is the Respondent No. 3, the Assistant General Manager, who has appointed the Respondent No. 5, the Commissioner for Departmental Enquiries, as the Enquiry officer. It is not the case of the Respondent-Bank that the Chief Executive officer or an officer nominated by him as envisaged in clause- 19. 14. of the Sastry Award had taken a decision to appoint the Commissioner for Departmental Enquiries, Respondent No. 5 to function as the Enquiry officer in the departmental proceedings against the petitioner No. 1. It is also not in dispute that the Commissioner for Departmental Enquiries, Respondent No. 5 is not an officer of the Bank. There is no provision contained in clause-19 of the

Bipartite Settlement which enables the Disciplinary Authority to appoint a person, who is not an officer of the Bank to conduct the enquiry against an Award, Staff.

The contention of the learned counsel for the Respondent-Bank that it is just and convenient that the Respondent No. 5 be permitted to continue with the Departmental Enquiry, as eenquiry is being made against two officers and the charges are the same for which the enquiry has been initiated against the petitioner No. 1, cannot be accepted for the reason that there is no provision enabling the Disciplinary Authority to appoint any person other than an officer of the Bank as the Enquiry officer. Accordingly, the order dated 23. 11. 1992 (Annexure-3) passed by the Respondent No. 3 appointing the Respondent No. 5, the Commissioner for Departmental Enquiries, as the Enquiry officer in the Departmental proceedings against the petitioner No. 1 and the directions dated 28. 12. 1993 (Annexure-5) and 21. 1. 1994 (Annexure-7) passed by the Respondent No. 5 against the petitioner No. 1 cannot be sustained.

It may be clarified that though an outsider may be appointed as the Enquirty officer even against an Award Staff but such a decision has to be taken by the Chief Executive Offiecer or the Principal Officer in India of the Bank or an alternate officer at the Head office or principal office nominated by the Chief Executive Officer as to who shall be the Disciplinary Authority and while taking such a decision it is open for the Chief Executive Officer or such other officers mentioned in clause 19. 14 to decide that the enquiry shall be conducted by the Central Vigilance Commission or its officers, and in my view, no legitimate exception can be taken by the petitioners to the appoint-

ment of the Commissioner for Departmental Enquiries as the Enquiry officer in the matter of an Award Staff like the petitioner No. 1 provided that the decision is taken by the Chief Executive Officer or the other officers mentioned in clause-19. 14 of the Bipartite Settlement.

In the result, the writ petition is allowed in part and the impugned orders dated 23. 11. 1992, 28. 12. 1993 and 21. 1. 1994 passed by Respondent Nos. 3 and 5 respectively are quashed. The Respondent No. 5 is restrained from functioning as the Enquiry officer in pursuance of Annexure-3 in the disciplinary proceedings against the petitioner No. 1. It is, however, open for the Respondent-Bank and its authorities to proceed against the petitioner No. 1 keeping in view the observation made above and in accordance with law. No order as to costs.

R. D. Application allowed in part.

CRIMINAL WRIT JURISDICTION

Before Ram Nandan Prasad & Loknath Prasad, JJ.

1995

April, 26.

*Bouwa Singh alias Babua Singh.**

V.

The State of Bihar and others.

Bihar Control of Crimes Act, 1981 (Bihar Act No. VII of (1981) section 2 (d) (1) (b) (i) and (ii)—provisions of whether a proceeding can be initiated agaist a person for a single Criminal Act—proceeding under section3—maintainablity of.

Where the writ-petitioner challenged the proceeding initiated against him under section 3 of the Bihar Control of Crimes Acts, 1981 on the ground that it was initiated against him on the basis of a single instance of crime committed by him;

Held, that the proceeding under section 3 of the Act having been initiated against the writ-petitioner on the basis of the single instance, is illegal.

For initiation of the proceeding under section 3 of the Act, the first requirement is that a man must be anti-social element and thereafter it must fulfil the other requirement as enumerated in section section 3 (1) (b) (i) and (ii) of the Act.

On a single instance of an occurence, a man cannot be

Criminal Writ Jurisdiction Case No. 100 of 1995. In the matter of an application under Articles 226 and 227 of the constitution of India.

branded as an anti-social element, in view of the provisions contain in section 2 (d) (i) of the Act.

Case laws discussed.

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

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

M/s. Pankaj Kumar Sinha and Binay Kumar. for the petitioner.

Mr. Dev Narain Yadav. for the Respondents.

R. N. Prasad, J. The petitioner in this application was noticed. vide Annexure '2' to this petition, to explain as to why on order under section 3 (3) of the Bihar Control of Crimes Act, 1981, hereinafter referred to as the Act, be not passed. The present petition has been filed for quashing of the initiation of the proceeding in C. C. A. case No. 6 of 1994 under the Act.

2. The facts leading to the initiation of the proceeding, as mentioned in Annexure '2' was that on 1. 11. 1994 the petitioner and 3-4 other anti-social eleements went to Nandani oil Depot, Dhandaha, district Purnea and demanded Rs. 10,000/—on which the incident of assault took place.

3. The grievance of the petitioner is that the initiation of the proceeding under section 3 of the Act on a single instance is unwarranted and against the mandate of the provisions contained in the Act. The relevant petition of section 3 of the Act reads as follows—

"Externment, etc. of anti-social elements— (1) where appears to the District Magistrate that—

(a) any person is an anti-social element, and

(b) (i) that his movement or acts in the district or any part there of are causing or calculated to cause alarm, danger or harm to persons or property' or

(ii) That there are reasonable grounds for believing that he is engaged or about to engage, in the district or any part thereof in the commission of any offence punishable under chapter XVI or chapter XVII of the Indian Penal Code, or under the suppression of Immoral Traffic in Women and Girls Act, 1956, or abetment of such offence,

the District Magistrate shall by notice in writing inform him of the general nature of the material allegation against him in respect of clauses (a) and (b) and shall give him a reasonable opportunity of tendering an explantion regarding them.

4. From a plain reading of the aforesaid privisions, it is manifest that for initiation of a proceeding under section 3 of the Act, the requirement is that the person must be an anti-social elements as enumerated in section 3 (1) (a) of the Act and also satisfies the other requirements, which have been enumerated in actin 3 (1) (b) (i) (ii) of the Act. 'Anti-social element' has been defined in section 2 (d) of the Act. Section 2 (d) (i) of the Act says that anti social element means a person who either by himself or as a member of or leader of a gang. habitually commits of attempts to commit or abets the commission of offences punishable under chapter XVI and XVII of the Indian Penal Code. In section 2 (d) of the Act, the other ingredients of anti social

elements have also been enumerated in sub-clause (ii) to (v) thereof, but there is nothing in the notice (Annexure- 2) to show that the case in hand is covered under the provisions of section 2 (d) (ii) to (v) of the Act. It is pertinent ot mention herein that section 3 (1) (a) of the Act is not an independent clause as at the end the word "and" has been mentioned. The language of section 3 is in unbiguous term, and hence there is no scope of confusion. For initiation of a proceeding, the first reequirement is that a man must be an anti-social element and thereafter it must fulfil the other requirements as enumerated in section 3 (i) (b) (i) and (ii) of the Act. On a single instances of the occurrence, a man cannot be branded as an anti-social element in view of the provision as contained in section 2 (d) (i) of the Act, and if a man cannot be branded on a single instance of the occurrences as an anti-social element, a proceeding under section 3 of the Act cannot be initiated. The view expressed, as aforesaid, is also supported by a Division Bench deecision in *Naresh Singh* Vs. *The State of Bihar* (1). In the instant case only on a single instances of the occurrence, the proceeding under section 3 of the Act has been initiated and hence in view of the discussions made above it cannot be held to be legal.

5. Learned counsel for the respondents, however, relied upon a decision in *Sudhir* Vs. *The State of Bihar and others* (2) to show that a single instance of the occurrence is sufficient for initiation of a proceeding under section 3 of the Act. The decision relied upon by the learned counsel for the respondents has no application on the facts and circumstance of the case. The

(1) (1980) B. L. J. R. 154.

(2) (1989) P. L. J. R. 908.

aforesaid decision is with regard to a case under section 12 of the Act. Besides, in the aforesaid case several cases were mentioned with regard to the antecedent of the detenu and the court after considering the entire facts and circumstances of the case held that the background factor (antecedent) may be taken to be the ground for detention after furnishing a copy of the first information report of the previous cases to the detenu. There was no consideration with regard to section 3 of the Act.

6. In the instant case, no case with regard to the antecedent of the petitioner has been mentioned in the notice contained in annexure to this petition. Furthermore, there is a great difference between section 3 and section 12 of the Act, which is apparent from a plain reading of the aforesaid sections. In the case of *Lalan Singh* Vs. *The State of Bihar* (1) a Full Bench of this court has considered in detail the scope of sections 3 and 12 of the Act and held that both in substance and in procedure externments are altogether different and distinct from the grounds of preventive detention. Thus, on a consideration of the entire facts and circumtances of the same. I find no substance in the submission of the learned counsel for the respondents. Accordingly, this application is allowed and the entire proceeding of C. C. A. No. 6 of 1994, including the notice as contained in annexure '2' is hereby quashed.

Loknath Prasad, J. I agree

R. D. Application Allowed.

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(1) (1988) P. L. J. R. 64.

CRIMINAL WRIT JURISDICTION

Before Indu Prabha Singh, J.

1995

April,26.

Ram Ballabh Sharma and another.

V.

The State of Bihar and ors.

Code of Criminal Procedure, 1973 (Central Act No. II of 1974) section 340—First Information Report filed by a party to the judicial proceeding with respect of which an offence has been committed in the record of the judicial proceeding—legality of—Constitution of India Articles 226-and 227—exercise of power under—First Information Report, whether can be quashed.

Held, that no First Information Report by Prabin Kumar could have been filed before the police and even if such First Information Report has been filed, the same has to be quashed for the simple reason that Prabin Kumar or for that matter any party to any judicial proceeding cannot lodge first Information Report with respect to an offence which has been committed in the record of a Judicial proceeding. It is only the Court where the case in pending or the court superior to it that can file a complaint petition in its respect before a competent Magistrate as laid down under section 340 of the Code of Criminal Procedure, 1973.

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* Cr.W.J.C. 668 of 1993. With Cr.W.J.C no. 417 of 1993. In the matter of an application under Articles 226 and 227 of the Constitution of India.

In C.W.J.C. No. 417 of 1993

Shri Nunulal Singh

Held, further, that such a First Information Report filed by a private person can be quashed in exercise of power confered under Articles 226 and 227 of the Cons-titution of India.

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 Indu Prabha Singh, J.

Mr. Jayanadan Singh, Mr. Praveen Kumar for the petitioner.

Mr. D. N. Yadav, Government Advocate, Mr. P. N. Pandit, J. C. to G. A. for the State in Cr. W. J. C. No. 668 of 1993.

Mr. Rajeev Ranjan Prasad, Advocate, Mr. Rajesh Kumar for the respondent in Cr. W. J. C. 668 to 1993.

Mr. Rajeev Ranjan Prasad, Advocate, Mr. Rajendra Kumar, Advocate. for the petitioner in Cr. W. J. C. 417 of 1993.

Mr. D. N. Yadav, Government Advocate. fot the state in Cr. W. J. C. No. 417 of 1993.

Mr. Jaynandan Singh, Advocate. for the respondents in Cr. W. J. C. No 417 of 1993.

I. P. Singh, J. These two writ applications filed under Articles 226 and 227 of the Constitution of India have been heard together and this judgment will govern both of them. In Cr.W.J.C. No. 668 of 1993, Ram Ballabh Sharma, is the petitioner whereas Nunu Lal Singh is respondent no. 2. In Cr. W.J. C. No. 417 of 1993 this Nunu lal Singh is the petitioner, whereas Prabin Kumar son of Ram Ballabh Sharma is respondent no. 2.

2. *Cr. W. J. C. No. 668 of 1993.*

This application has been filed for quashing the order and judgment dated 25.9.1993 passed by Shri Birendra Singh, VIII Additional Sessions Judge, Munger in Cr. Appeal No.81 of 1993 by which he dismissed the appeal as barred by limitation. He also refused to quash the order dated 6.1.1993 passed by the Sub-Divisional Magistrate, Lakhisarai in Case No. 192-M/92 refusing to initiate a criminal prosecution under section 471 of the Indian Penal Code against respondent no. 2 and 3 on an application filed by the petitioner under section 340 of the Code of Criminal Procudure (in short the 'Code').

3. The facts of this case are in a narrow compass. Respondent no. 2, Nunu Lal Singh, filed a petition before the Sarpanch, Mahsaura Gram Panchayat (Respondent no. 3) for initiating a proceeding under section on 144 of the Code and section 26 and 27 of the Arms Act against the petitioner. The Sarpanch issued notice to both the partice who filed their attendance on 27.6.1992. After few adjourments the Sarpanch recorded the attendance of both the parties on 20.7.1992 and heard them. He, however, found that the Gram Kuchhari has no jurisdiction to pass any order under section 144 of the Code and section 26 and 27 of the Arms Act. He, accordingly, forwarded the matter to the Sub Divisional Magistrate, Lakhisarai for the needful. It has been alleged that on this forwarding letter the signature of respondent no. 3 was missing. Only the seal of the Sarpanch was found on it. This fraud has been played by respondent no. 2; who in place of respondent no. 3; himself forwarded the matter to the Sub-Divisional Magistrate, Lakhisari. On the recept of the record the learned Sub Divisional Magistrate. Lakhisarai issued notices to the parties to appear before him on 31.7.1992. When the

petitioner got the record to this case inspected he was shocked to find that the entire order sheet of the court of Sarpanch was in the writing of respondent no. 2. Accordingly, the petitioner filed Cr. Mise. No.9888/92 before this Court for quashing the entire proceeding of the court below on the ground that the reportof the Sarpanch (Respondent no. 3) was fraudulent and collusive and the same amounted to abuse of the process of the court. This Cr. Misc. case was permitted to be withdrawn on 8.6.1992 by this court with an observation that this petitioner shall file a petition before the court for dropping the proceeding. Thereafter, the petitioner filed a petition before the learned Sub Divisional Magistrate, Lakhisarai in Case No. 857-M/92 who after hearing the parties and after being satisfied about the collusive, false and concocted report of the Sarpanch at the instance of respondent no. 2 dropped the proceeding on 28.8.1992. The true copy of this order is Annexure 2 to this petition. In this order the learned Sub Divisional Magistrate has made the following observations :-

"After going through the report of the Sarpanch of Gram Kuchhari Mehsaura, Police Station-Lakhisari District Munger it is proved beyond reasonable doubt that the said report is collusive and the said report has been submitted at the instance of the Ist party members. There is no sufficient material to warrant initiation of proceeding under section 144 of the Code of Criminal Procedure as, the said Sarpanch, it appear has duped the court by submitting false and concocted report."

4. The petitioner, accordingly, filed a petition on 3.11.1992

before the Sub Divisional Magistrate, Lakhisarai under section 340 of the Code for initiating a criminal proceeding against respondents 2 and 3 for their prosecution under section 471 of the Indian Penal Code. After few adjourments the case was fixed for 6.1.1993. On this date the learned Sub Divisional Magistrate, Lakhisarai dropped the matter on the ground that the main case has already been disposed of. A copy of this order is Annexure 3 to this petition.

5. Being aggrieved by this order the petitioner filed Criminal Revision No. 213 of 1993 before this Court on 8.4.1993. Notices to respondent nos. 2 and 3 were issued. However, in view of the provision of section 341 of the Code this Court permitted this criminal revision application to be withdrawn on 11.5.1993 for proceeding according to law (by filling an appeal under this section). This order was received by the petitioneron 23.5.1993 who filed a memorandum of appeal along with a petition for condoning the delay before the learned Sessions Judge on 30.5.93 which was numbered as Criminal Appeal No. 81 of 1993. On 1.6.93 the learned Sessions Judge, Munger was pleased to admit this appeal and condone the delay in its filling. He also ordered for issue of notices to respondent nos. 2 and 3. By the same order he transferred this appeal to the court of VIII Addl. Sessions Judge, Munger for disposal. Learned Addl. Sessions Judge, however, by his order dated 25.9.1993 dismissed this appeal only on the ground of delay without entering into the merits of this case. In the meantime, respondent no. 2. filed Cr. W.J.C. No. 556 of 1993 praying therein to quash the order dated 28.8.1992 passed by the learned Sub Divisional Magistrate,

Lakhisarai in Case No. 857-M/92. This petition was also withdrawn.

6. The petitioner has contended that this order of the learned Addl. Sessions Judge dismissing the appeal only on the ground of limitation is wrong in law inasmuch as at the time of admission of this appeal the learned Sessions Judge had already condoned the delay and had admitted the appeal. If the respondents had any objection about this condontion of delay by the learned Sessions Judge they should have taken this stand immediately on their appearance in this appeal. However, at that time they did not question the condonation of delay. Hence they could not have taken this plea at the time of hearing of this appeal. Accordignly, the petitioner has prayed to quash the order and Judgment dated 25.9.1993 passed by the learned Addl. Sessions Judge as also the order dated 6.1.1993 passed by the Sub Divisional Magistrate, Lakhisarai.

Cr. W. J. C. No. 417of 1993;

7. This application has been filed by Nunu Lal Singh (Respondent No. 2/ in Cr. W. J. C. No. 668 of 1993) to quash the First Information Report (Annexure 1) and also the police investigation pursuant there to and to issue writ of mandmus restraining the police from mis-using its powers under the following circumstances.

8. In this application, it has been contended that this petitioner had lodged a complaint before Mehsaura Gram Panchayat against Ram Ballabh Sharma the father of Prabin Kumar (Respondent no. 2) making out various allegations against him. The parties were noticed by the Sarpanch and after hearing them the Sarpanch referred the matter to Sub Divisonal

Magistrate, Lakhisarai on the ground that the Gram Kuchhari was not empowered to look into the allegations made under section 144 of the Code read with sections 26 and 27 of the Arms Act. On receipt of this report the learned Sub Divisional Magistrate, Lakhisarai intiated a proceeding under section 144 of the Code and issued notices to the parties. In the meantime, Ram Ballabh Sharma, the father of respondent no. 8 filed Cr. Misc. Case No. 9888/92 before this court for quashing the entire proceeding pending before the learned Sub Divisional Magistrate, Lakhisarai. When this Criminal Misc. Case was taken up for admission, Ram Ballabh Sharma, the petitioner of the said case, on 6.8.1992, prayed for permission to withdraw the application before Hon'ble Mr. Justice S. B. Sinha. His Lordship, accordingly, permitted its withdrawal with an observation that the petitioner will file a petition for dropping the proceeding before the Sub Divisional Magistrate, Lakhisarai who was directed to dispose it of within a period of two weeks. When this matter was placed on 28.8.1992 before the learned Sub Divisional Magistrate, Lakhisarai he passed his order dropping the proceeding. However, he made certain observations against the present petitioner as also the Sarpanch of the Gram Panchayat. A petition before the Sub Divisional Magistrate was filed for initiating a proceeding under section 195 (i) (b) (ii) of the Code for punishing the present petitioner and the Sarpanch. Finally on 6.1.1993 the learned Sub Divisional Magistrate passed the order refusing to initiate any proceeding against them in terms of section 195 of the Code. Against this order the father of respondent no. 2. filed a Criminal Revision (Cr. Revision No. 213/1992 before this Court which was taken up for admission before Hon'ble Mr. Justice B. P. Singh on. 11.5.1993. After hearing the

parties this Court permitted the petitioner in that case to withdraw the revision application as the same was not maintainable. On 31.7.1992 the present respondent no. 2 who happens to be the son of Ram Ballabh Sharma (second party before the Sub Divisional Magistrate, Lakhisarai and the petitioner in Cr. Misc. No. 9888/92, loged the F. I. R. before the Lakhisarai Police Station against the present petitioner and the Sarpanch of the Gram Panchyat alleging that in connivance with each other they committed forgery and fraud. The F. I. R. was registered as Lakhisarai P. S. Case No. 259 of 1992 dated 31.7.1992 under sections 470, 467 and 468 of the Indian Penal Code.

9. The petitioner has contended that on 3.11.1992 Ram Ballabh Sharma the father of the present resondent no. 2 filed an application before the learned Sub Divisional Magistrate, Lakhisarai for initiating a proceeding against the present petitioner under section 471 of the Indian Penal Code. Since already a complaint petition has been filed by the father or respondentno. 2 the present F. I. R. (Annexure 1) filed by respondednt no. 2 is not maintainble. However, it is not in terms of section 340 of the Code. So far as the observations made by the learned Sub Divisional Magistrate, Lakhisarai in his order dated 28.8.1992 is concerned no opportunity to the present petitioner or the Sarpanch was given for being heard and this order was passed behind their back. There is absolutely no justification for this F. I. R. . As a matter of fact, section 340 of the Code as also section 195 of the Code do not permit any private party to file the F. I. R. with respect to any matter covered there in. On these grounds,

amongst others, it has been prayed that this F. I. R. should be quashed.

10. The parties have been heard at length with respect to these two writ applications. I now propose to deal with and decide the points raised by the parties in these two writ applications one by one.

11. *Cr. W. J. C. No. 668 of 1993.*

I will firstly take up for consideration the prayer made in Cr. W. J. C. No. 668 of 1993. In it the petitioner, Ram Ballabh Sharma, has prayed for quashing the judgment and order dated 25.9.1993 passed by the learned Addititional Session Judge, Munger in Cr. Appeal No. 81 of 1993. As per this order the learned Additional Sessions Judge refused the prayer of the present petitioner, Ram Ballabh Sharma, for setting aside the order dated 6.1.1993 passed by Shri S. Prasad, Sub Divisional Magistrate, Lakhisarai in Case No. 192/M/2/92. Also the petitioner has made a prayer for quashing the aforesaid order passed by the learned Sub Divisional Magistrate for his refusal to take action under section340 of the Code against respondent nos. 2 and 3.

12. On the perusal of the impugned judgment and order dated 25.9.1993 passed in Cr. Appeal No. 81 of 1993 it appears that the learned Additional Sessions Judge without going into the merits of the case had dismissed the appeal on the ground of delay in its filling. This finding of the learned Addl. Sessions Judge has been seriously challenged before me on behalf of the petitioner. It has been pointed out that the learned Addl. Session Judge was not justified in holding this appeal time barred

inasmuch as the learned Sessions Judge had condoned the delay at the time of admission of this appeal by his order dated 1.6.1993 (Annexure 5) and had transfered this appeal to the Court of the learned Addl. Sessions Judge for disposal. In this view of the matter, the learned Addl. Sessions Judge was not competent to dismiss this appeal as time harred and to over-ride and nullify the decision of the learned Sessions Judge condoning the delay. In support of this contention the learned counsel for the petitioner has placed reliance on the case of *Chedi Tanti* Vrs. *Smt Gangati Devi* (1). Learned counsel for the respondents have also placed reliance on this decisions. In this view of the matter, since both the parties have reliance on this decision it has become all the more important to find out the ratio of this decision and also to find out whether this decision supports the contention of the petitioner or that of the respondents.

13. The facts of the case of *Chedi Tanti* (supra), however, appear to be quite different. This decision is by a learned Single Judge of this Court passed in Second Appeal No.708 of 1978 filed under section 100 of the Code of Civil Procedure. It is well known that section 100 of the Code of Civil Procedure lays down the procedure for filling of the second appeal and also circumscribes the parameters under which a second appeal under the Code of Civil Procedure can be filed. This also shown that the scope and the grounds for filling the second appeal are quite limited. From the facts of this case it appears that when an appeal was filed before the learned District Judge he by his order dated 26.5.1977 condoned the delay in filling the same and admitted the appeal.

(1) (1995) P.L.J.R. 91.

The condontion petition explaining the delay for 8 days was supported by an affidavit. The facts stated in the affidavit were at no stage controveted during the entire career of the case. The learned Additinal District Judge to whom this appeal was transferred recalled the order of condonation passed on 26.5.1977 by the learned District Judge even when no evidence was adduced before him controverting the explanation furnished in the condonation petition supported by an affidavit which found favour with the District Judge. In this decision the learned Single Judge at paragraph 5 of the judgment has observed as follows :—

"5. There in no quarrel on principle, nay it is well settled where an appeal is filed beyond the period of limitation, without notice to the opposite party, and the appeal is admitted after execusing the delay under section 5 of the Limitation Act, it must be regarded as a tacit term of the order admitting the appeal that though unqualified in expression it should be open to reconsideration at the hearing at the instance of the party prejudicially affected and at the hearing the Court has jurisdiction to reconsider the sufficiency of the cause shown, and to dismiss the appeal as time barred....."

14. In the case of *Krishnasami* Vrs. *Ramsami* (1). it was held that it was desirable that the courts must follow the practice which will secure at the stage of admission, the final determination (after due notice to all parties)of any question of limitation affecting the competence of the appeal. In the present case it is clear that the learned Sessions Judge had condoned the delay in

(1) (1917) A.I.R. (P.C.) 179.

filing Criminal Appeal No. 81 of 1993 at the time of admission itself without any notice to the respondents. In the case of *Chedi Tanti* (supra) the learned Single Judge had held in paragraph 7 of the Judgment that there was no material whatever before the lower appellate court to recall the order of condonation beyond what was available when the ex-parte order condoning the delay was passed. It was, accordingly, held that the decision recalling the order of condonation without there being any evidence to the contrary is completely vitiated by law. The order recalling the condonation of delay based on no evidence at all was, therefore, fit to be set aside.

15. As stated above the facts of the present case are, however, some what different. In the present case the learned Additional Sessions Judge did not recall the order of the learned Sessions Judge condoning the delay in filling the appeal. From the order of the learned Sessions Judge, it is clear that this delay was condoned and the appeal was admitted even before the appearance of the respondents who were not given any opportunity to challenge the facts stated by the appellant praying for the condonation of delay. The same also does not appear to be supported by any affidavit. In the present case the respondents were able to show that there were circumstances before the learned Additional Sessions Judge to refuse the prayer for the condonation of delay already granted by the learned Sessions Judge at the initial state. However, in the present case no order of recall of the order of condonation passed by the learned Sessions Judge is involved. The learned Sessions Judge had condoned the delay ex-parte at the time of admission of the

appeal before him. This order was not passed after due notices to all the parties and after hearing them. As such the view expressed by the learned Single Judge in paragraph 5 of this judgment (as quoted above) fully applies according to which it was open to learned additional Sessions Judge to reconsider the question of condoing the delay in filing the appeal. Hence the ratio of the decision of the case of *Chedi Tanti* (supra) supporte the case of the respondents.

16. From the judgment passed in Cr. Appeal No. 81/93 (Annexure 3) it appears that it was submitted on behalf of the respondents before the learned Additional Sessions Judge that the delay in filling the appeal should not have been condoned behind their back. It further appears from paragraph 7 of this judgment that when the respondents appeared they challenged the appeal on the point of limitation. The learned Additional Sessions Judge, accordingly,held that his court was competent to decide the same since the record clearly showed that no notice in the matter of limitation was issued to respondent nos. 1 and 2 by the learned Sessions Judge who condoned the delay only after hearing the learned counsel for the appellant and the learned A. P. P. In paragraph 8 of his judgment the learned Additional Sessions Judge proceeded to examine the merits of the prayer for condonlion of delay in filing this appeal. From this paragraph it appears that only explanation given by the appellant before him for this delay in filing the appeal was that the appellant received the copy of the order dated 6.1.1993 in the last week of may. The learned Additional Sessions Judge found this statement was completely vague and he was not satisfied

with this explanation. He, accordingly, found that no sufficient cause was shown for the delay in filing the appeal. Hence he dismissed the prayer for the condonation of delay and also dismissed the appeal as time barred. As such the above noted case law is of no help to the learned counsel for the petitioner.

17. Even from the facts of this case it would appear that it was not a fit case in which the delay should have been condoned. It also appears that the appellant before the learned Additional Sessions Judge had not come forward with clean hands. Even before him the petitioners have not been able to show that there was sufficient ground for delay in filling the appeal and, therefore, the same should have been condoned.

18. It is clear that the order under challenge was passed on 6.1.1993. It further appears that being aggrieved by the order dated 6.1.1993 of the learned Sub Divisional Magistrate the petitioner on 8.4.1993 filed Criminal Revision No. 213 of 1993 before this Court in which notices to respondent nos. 2 and 3 were issued. However, this criminal revision was permitted to be withdrawn on 11.5.1993. According to the petitioner this order passed in criminal revision was received by him on 23.5.1993 and thereafter he applied for the certified copy of the order dated 6.1.1993 which he received on 27.5.1993. It was only after this that the Criminal Appeal No. 81/93 was filed on 1.6.1993 before the learned District Judge who condoned the delay and admitted the appeal on the same day even without hearing the respondents.

19. On behalf of the respondents it has seriously been contended before me that this explanation of delay, to say the least, is without any merit and has to be rejected at the first sight.

It has been pointed out that admittedly Criminal Revision No. 213 of 1993 against the order dated 6.1.1993 was filed before this court on. 8.4.1993. Obviously this could not have been done without obtaining copy of the order dated 6.1.1993. From this it would appear that before 8.4.1993; the date on which Criminal Revision No. 213/92 was filed; the petitioner was armed with copy of the order dated 6.1.1993. If it was so, where was the necessity for him to again apply for its copy on 24.5.1993 and to get the same on 27.5.1993. In any view of the matter only 4 days time is taken in obtaining the copy of the order dated 6.1.1993 and if there has been inordinate delay in filling this appeal on 31.5.1993 as stated in paragraph 20 of the present petition the petitioner alone can be held responsible for this delay. Moreover, any time lost in Criminal Revision No. 213 of 1993 (which did not lie according to law) was due to the miscalulation on the part of the petitioner and now he can not be allowed to take refuse under this pretext as ignorance of law is no excuse. As such the benefit of the provisions of section 14 of the Limitation Act can not be made available to the petitioner since the petitioner has not been able to show that criminal revision was filed in good faith and period between 8.4.1993 the date on which this revision petition was filed and 11.5.1993 when this revision petition was permitted to be withrawn can not be excluded from the period calculated to find out the delay in filing the appeal. A party to a litigation can not be allowed at its sweet will to delay the filing of an appeal on one pretext or the other and than to claim its condonation on the same ground. Hence properly speaking the period covered by Criminal Revision No. 213/93 (From 8.4.1993 to 11.5.1993) also cannot be excluded from the calculation of the

period of delay. By stating that the petitioner applied for the copy of the order dated 6.1.1993on 24.5.1993 and obtained the same on 27.5.1993 does not a appear to be a proper explanation specially when it goes without saying that the petitioner must be armed with a copy of this order at the time of filling of the Criminal Revision No. 213/93 on 8.4.1993. Hence it is clear that the explanation given for the delay does not inspire confidence and the petitioner has not come with clean breast on this point before the court below. As such I do not find any reason to interfere with the impugned judgment and order dated 25.9.1993 passed by the learned Additional Sessions Judge.

Cr. W.J.C. No. 417 of 1993 :—

20. In Cr. W. J. C. No 417/93 Nunulal Singh, opposite party in Cr. W. J. C. No. 668/93, is the petitioner. It has been filed for quashing the F. I. R. (Annexure 1) dated 31.7.1992 (Lakhisarai P. S. Case No. 259/92) filed by Prabin Kumar, the son of the petitioner of Cr. W. J. C. No. 668/93 for action under section 416, 467 and 468 of the Indian Penal Code. It is not in dispute that this Prabin Kumar isnot a party to the proceeding before the learned sub Divisional Magistrate and appears to be a person unconcerned with this litigation. Only connection appers to be that he happens to the son of Ram Ballabh Sharma.

21. As per this F. I. R. Prabin Kumar has prayed for action under section 419, 467 and 468 of the Indian Penal Code against Nunu Lal Singh. The allegation is that Nunu lal Singh forged the proceeding before the Sarpanch of Mehsaura Gram Panchyat. In short the allegation against this Nunu Lal Singh is that he has

committed forgery with respect to a proceeding before a judicial court namely that of the Sarpanch of the aforesaid Gram Panchayat.

22. In this connection the first question that will arise for consideration would be whether a private party; even if he is a party to the proceeding pending before a court of law; can file the F. I. R. for the prosecution of the another person concected with this litigation for having committed offences in connection with the records of the judicial court. In this connection a reference may be made to section 340 of the Code which provides that if any court is of opinion that it is expedient in the interest of justice that an enquiry should be made into any offence referred to in clause (b) (i) of Sub section (1) of section 195, which appears to have been committed in or in relation to a proceeding in that court or, as the case may be, in respect of a document produced or given in the evidence in a proceeding in that court, such a court may, after such preliminary enquiry record a finding to that effect and make a complaint there of in writing to Magistrate of the First Class having jurisdiction. No doubt this power by the court can be exercised upon an application made to it in this behalf by one of the parties to the litigation. However, section 340 of the Code does not leave any scope for a person, even if he is a party to the litigation, to file the F. I. R. before the police with respect to any offence that is alleged to have been committed in relation to a proceeding of that court. Section 340 of the Code clearly debars lodging of any such F. I. R. before the police. It simply provides that in suitable cases when an application in made before the court, or even otherwise, to the effect that an offence mentioned is clause (b) (i) of sub seetion (1) of section 195

have been committed that court alone; after holding premilinary enquiry, and after being satisfied about the allegatons made therein can file a petition before a Magistrate. Here the allegations made in this F. I. R. are with respect to committing forgery in the records of the court of Sarpanch. This offence of forgery have been defined in section 463 of the Indian Penal Code. As per this definition making a false document also amounts to the offence of forgery. According to section 195 (i) (b) (ii) the offence described in section 463 of the Indian Penal Code is also covered. As such under this circumstances the filing of the First Information Report with respect to any alleged offence of forgery with respect to the record of a judicial court is covered under section 340 of the Code and as such a private perty is excluded from filing of the First Information Report with respect to any such offence.

23. The next question that will arise in this connection is that even if the law does not permit the filing of F. I. R. by a private person in connection with the forgery made in the records of a judicial court can the same be quashed in exercise of powers under Articles 226 and 227 of the Constitution of India ? This question has come up for consideration in various decisions of different courts. The leading case on this point is *Emperor Vrs. Nazir Ahmad* (1). In this case the judicial committee of the Privy Council has very clearly defined the functions of the judiciary and the police. It has been observed as follows in this decision :

"The function of judiciarly and the police are complementary and not over-lapping and the combination of individual

(1) (1945) A. I. R. (P. C.) 18.

liberty with due observation of law and order is only to be obtained by leaving each to exercise its own functions, always of course, subject to the right of the court to intervene in an appropriate case when moved under section 491 of the Code of Criminal Procedure to give directions in the nature of habeas corpus."

24. In this connection reference may also be made to the case of *R.P.Kapur* Vrs. *The State of Punjab* (2). In this case the scope of section 561 (A) (Old Code) was under consideration. It was held in it that ordinarlly criminal proceedings instituted against the accused must be tried under the provisions of the Code and the High Court would be reluctant to interfere with the said proceeding at an interlocutory stage. However, some of the categories of cases in which the High Court could exercise its inherent powers to quash a proceeding have also been stated in this decision and one of those cases is where there is a legal bar against the institution or continuance of a criminal proceeding. In the present case also there is a legal bar against the institution of the F. I. R. by a private person with respect to the forgery committed in the records of a judicial proceeding. Similarly in the case of *Nagawwa* Vrs. *Veeranna* (2) the scope of issue of the process under section 204 of the Code was being examined. It was held that where the complaint suffers from fundamental material legal defects such as want of sanction or absence of the complaint by a legally competent authority no order for issue of the process can be passed under section 204 of the Code. From the

(1) (1960) A. I. R. (S.C.) 866.

(2) (1976) A. I. R. (S. C.) 1947.

principle of law laid down in this decision it becomes clear that in a case in which the complaint or the F. I. R. is not by a legally competent authority no action in this regard can be taken. The legal position in this regard has been set at rest by a recent decision of the Hon'ble Supreme Court in the case *State of Hariyana* Vrs. *Bhajan Lal* (1). In this decision the examples of certain categories of cases have been given in which High Court may, in exercise of its power, under Article 226 or under section 482 of the Code interfere in the proceedings relating to cognizable offences to prevent abuse of the process of any court or otherwise to secure the ends of justice. However, a word of caution has been sounded that such a power should be sparignly exercised and that too in the rarest of the rare cases. Seven such cases have been categorised under this heading. Its category number (6) runs as follows :—

(6) Where there is an express legal bar engrafted in any of the provisions of the Code or the concerned Act (under which a criminal proceeding is instituted) to the institution and continuance of the preceeding and/or where there is, a specific provision in the Code or the concerned Act, providing effcicacious redress for the grivance of the aggrieved party."

25. This observation made in paragraph 108 of this judgment leaves no room for doubt that in the present situation when there is clearly a legal bar under section 340 of the Code in the lodging of the F. I. R. by a private person the same could be quashed in exercise of powers conferred under Article 226 of the Constitution of India.

26. From these discussions is appears that under law no

(1) (A.I. R. 1992 S. C. 604).

such F. I. R. by Prabin Kumar could have been filed before the police and even if any such F. I. R. has been filed the same has to be quashed for the simple reason that Prabin Kumar; or for that matter of fact any party to any judicial proceeding; can not lodge the F. I. R. with respect to an offence which has been committed in the record of a judicial proceding. It is only the court where the case is pending or the court superior to it that can file a complaint petition in its respect before a competent Magistrate as has been laid down under section 340 of the Code.

27. From the detailed discussions made above it becomes perfectly clear to me that there is no merit in Cr. W. J. C. No. 668/1993. The sameis, accordingly, dismissed.

28. So far as Cr. W. J. C. No. 417/1993 is concerned, the same is allowed; the F. I. R. of Lakhisarai P. S. Case No. 256/92 dated 31.7.1992 (Annexure 1) is quashed and the police are restrained from proceeding with any investigation on the basis of this F. I. R. . The applications are ordered accordingly.

R. D. Order accordingly.

REVISIONAL CIVIL

Before Ram Nandan Prasad, J.

1995

April,27.

*Shrimati Shanti Devi.**

v.

Ramchandra Ram and others.

Patna Regional Development Authority Act, 1981 (Bihar Act No. XL of 1982), section 91, whether bars a suit for right, title or interest in the Civil Court.

The Patna Regional Development Authority Act, hereinafter referred to as the Act, does not provide any remedy for adjudicating the right titile, possession of the person.

Held, that section 91 of the Act, which is in unambiguous term, can not be said to have ousted a jurisdication of a Civil Court for adjudiction of right, title or possession of the person.

No doubt, the Authority under the Act has power to pass an order of eviction which can be nullified in appeal, but there is no provision for adjudiction of right title and interest of the person in the property.

Case laws discussed.

Application by the defendant.

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*Civil Revision No. 650 of 1993. Against an order dated 2.2.1993 passed by Shri B. N. Choudhary Subordinate Judge-VII, Patna, in Title Suit No. 496 of 1990.

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

M/s. Vinay Kiriti Singh and Abhijeet Kumar Lal for the petitioner.

M/s Kalyan Kumar Ghose, Vinod Kumar Jha and Vijayechwar Prasad. for the opposite Party.

R. N. Prasad, J. This Application in revision is directed against the part of the order date 2. 2. 1993 passed by the Subordinate Judge—VII, Patna, in Title Suit No. 495 of 1990, where by the petition of defendant-oppcsite party no. 2 and the defondent-petitioner, questioning the maintainability of the suit, was rejected holding that the suit is maintainable.

2. The plaintsf-opposite pary no. 1 filed the suit for declaration of the title and confirmation of posesion over the land in dispute and also for declaration that the eviction proceeding under the Bihar Regional Development Authority Act, herein after referred to as to as the Act was not maintainable with regard to the suit property and the eviction order passed therein was vold and did not affect his title.

3. The petitioner and the opposite party no. 2 filed a petition in the suit stating, inter alia, there in that the suit is not maintainable. The court below, after hearing the parties, rejected the aforesaid petition by the impugned order.

4. Learned counsel for the petitioner contended that under section 85 of the Act, the officers of the Bihar Regional Development Authority, herein after referred to as the Authority, have been empowered to pass an order of eviction against a perso

who is in unauthorised occupation of the land or house of the Authority, and under section 59 of the Act an appeal against such an order has been provided. According to the learned counsel, in view of section 91 of the Act, the jurisdiction of a civil court has been ousted.

Section 91 of the Act reads as follows:—

"Bar to jurisdiction of Civil Courts—Save as othercoise provided in this Act no suit shall be brought in any civil Court to set aside or modify any order made under this Act and no injunction shall be granted by any Civil Court restraining the Authority or its officers or servants from doing any act or exerecising any power of performing any duty purported to be done under this Act rules or regulation framed threunder."

5. From a perusal of the aforesaid provisions, it is manifest that a civil court shall have no jurisdiction to set aside or modify any order made under the Act or to pass an injunction order in a suit restraining the Authority or its officers from doing any act or exercising any power or porforming any duty purported to be done under the Act and the rules framed there under. In other words, the Jurisdiction of a civil court has been ousted only in respect of the setting aside or modifying any order made under the Act or to pass injunction order against the Authority or its officers restraining them from doing any act or exercising any power or performing any duty purported to be done under the Act and the rules framed there under. Thus, it is obvious that if it is found that even a suit for declaration of title and confirmation of pessession has to be decided and dealt

with under the provisions of the Act, then section 91 of the Act will operate as a bar on the power of a civil court to enterain a suit.

6. Section 9 of the Code of Civil Procedure is very much explicit and unambiguous which says that a civil court shall have jurisdiction to try all suits of civil nature, except the suit, of which cognizances is either expresaly or impliedly berred. Learned counsel for the petitioner, after going through the provisions of the Act and the Rules framed there under, could not be able to lay his hands on any provision which empowers the authority or its officers to adjuicate the questionof title, interest and possession of the parties. He also could not be able to show any provision which bars the juriadiction of a civil court for adjudication of such a right and claim of parties. It is well established rule of law that if there is no provision under any statue, either expressly or impliedly. debarring taking cognizance by a civil court, the juriallction of a civil court cannot be held to have been ousted.

7. In the Case of *Shiv Kumar Chandra* Vs. *The Municipal Corporation of Delhi and others* (1)—the apex court has held that where statutory enactments only create rights or liabilites without providing a from of remedies, any person being aggrieved that he has been wronged or his right is being affected, can approach the ordinary civil court on the principle of law that where there is a right there is a remedy; and also where a partcular Act creates a right and also provides a forum for enforcement of such right and bars the jurisdiction of a civil

(1) (1993) S. C. C. 161.

court, then ouster of the civil courts jurisdiction has to be upheld. But the situation will be different where the statute neither creates a right nor provides any remedy, or having created any right or liability. no forum for adjudication of any dispute arising out of such right on libility is provided. In such a situation ouster of the civil court's jurisdiction is not to be easily inferred. The similar view has also been expressed by the supreme court in *Saraswati and others* Vs. *Lachanna* (1).

8. In the instant case, it is an admitted position that the Act doas not provide any remedy for adjudicating the right and title or possession of a person. Thus, section 91 of the Act, which is in unambiguous term, cannot be held to have ousted the jurisdiction of a civil court for adjudication of such a dispute.

9. Learned counsel for the petitioner, however, further contended that in the suit declaration has also been sought for that the eviction proceeding under the Act was not maintainable and the order of eviction passed in the aforesaid proceeding was void and did not affect his title and hence the suit is barre dunder the provisions of section 91 of the Act.

10. In this regard, it is pertinent to mention herein that the main relief sought for in the suit was declaration of title and of possession, and the other relief as claimed by the plaintiff was consequential in natute. If the main relief in not granted, there is not question of granting the consequential relief. Furthermore, in the case of Satyaproamode *Thirtheswaraulavaru* vs. *Mula Cunnayya and other* (2). it has been held that where only

(1) (1994) 1 S. C. C. 611.

(2) (1932) A. I. R. (A. P.) 24.

a part of the relief claimed can be granted under the Act, the civil court has jurisdiction to entertain the suit. In the instant case, the Authority under the Act, no doubt, has power to pass an order of eviction which can be nullified in appeal, but there is no provision for adjudication of right, title and interest of a person in the property as has been claimed in the present suit, meaning there by that the Authority under the Act cannot grant the entire relief as claimed in the suit and as such I do not find any substance in the submission of the learned counsel for the petitioner.

11. In the result, this application is dismiseed but without cost.

R. D. Application dismissed.

MISCELLANEOUS CRIMINAL

Before Ram Nandan Prasad and Loknath Prasad JJ.

1995.

May, 3.

Kriti Yadav @ Kartik Yadav.

v.

The State of Bihar and & anr.

CODE OF CRIMINAL PROCEDURE, 1973 (Central Act II of 1974) *section 145—proceeding under—whether can proceed when, there is civil suit pending between the parties—remedy of the parties is to approach the Civil Court for interim relief to protect the property.*

Section 145 of the Code of Criminal Procedure, 1973, hereinafter referred to as the Code, is a remedy for prevention of breach of the peace arising out of dispute relating to immovable property. Its primary object is to maintain peace and not to decide the dispute between the contending parties or adjudicate upon the right of the parties to possession. An order under section 145 of the Code deals with the factum of possession of the party on a particular day. It confers no title to remain in possession over the disputed property.

Where a civil suit beteen the parties is pending for adjudication of title. interest and possession over disputed land where right to possession has to be gone into, and no final order has been passed in the proceeding under section 145 of the Code;

Held, that the parties may approach the Civil Court for interim relief to protect the property in dispute. In such a situation the proceeding under section 145 of the Code can not

Criminal Misselanceous No. 9113 of 1992. In the matter of an appication under section 482 of the Code of Criminal Procedure Case.

be allowed to proceed during the pendency of the suit as it would amount to wastage of time over meaningless litigation.

Held, further, that in the instant case the proceeding under section 145 of the Code cannot be allowed to continue and is quashed.

Case laws discussed.

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

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

M/s Umakant Prasad and Rajiv Ranjan Singh for the petitioner.

M/s Birendra Pd. Verma, M. K. Singh. M.M.Singh and V.B. Ambastha for the Opp. party no. 2.

Ram Nandan Prasad. & Loknath Prasad, JJ.,

The question for consideration in this case is whether the proceeding under section 145 of the Code of Criminal Procedure (hereinafter referred to as the 'Code') should be allowed to continue during the pendency of the Title suit.

2. The facts, not in dispute, are that on 5. 3. 1991 a proceeding under section 144 of the Code was intitiated. On 1. 5. 1991 the said proceeding was coverted under section 145 of the Code, On 4. 3. 1992 the Title suit No. 24/92 was filed by the petitioner for declaration of litle. interest and possession over the suit land and also the sale deed dated 22. 3. 1969 executed in favour of defendant no. 1, Indradeo Rai as illegal and null and void, Opp. party no. 2 is the son of Indradeo Rai, defer.dant no. 1. Opp. paryt no. 2. along with others are defendants in the suit. The petitioner after filing of the suit filed an application before the Magistrate for dropping of the said proceeding under section 145 of the Code on the ground that the civil suit was pending. The

said application was rejected by order dated 16. 4. 1992 which has been impugned in this application. On. 18.1.1993 while admitting this application the court directed hearing of this case by a Division Bench.

3. Section 145 of the Code is a remedy for prevention of breach of peace arising out of dispute relating to immovable property. Its primary object is to maintain peace and not to decide the dispute between the contending parties or adjudicate upon the right of the parties to possession. An order under section 145 of the Code deals with the factum of possession of the party on a particular day. It confers no title to remain in possession over the disputed property.

4. In a properly constituted suit when the question of possession is involved, right to possession has to be gone into by the civil court. The civil court may decide the suit contrary to the order of the criminal courts in a proceeding under section 145 of the Code as the order of the criminal court is not binding on the civil court, but the decision of the civil courts would be certainly binding on the criminal courts and same has to be respected by the criminal courts. Furthermore, the parties to the litigation, may approach the civil court for interim order such as injunction or appointment of receiver for adquate protection of the property during the pendency of the suit: Thus, parallel proceeding in the criminal court under sectin 145 of the Code during the pendency of the suit in the civil court would be meaningless as its order has no finality and is subject to the decision of the civil court.

5. However, learned counsel for the opp. party no. 2 contended that the proceeding under section 145 of the Code was initiated earlier and the suit was filed much there after and thus in such a situation the proceeding should be allowed to continue. In support of his submission, learned counsel relied upon a decision in the case of Smt. Kalindi Devi vs. *The State of Bihar*

and other reported in 1991 (2) P. L. J. R. 552, wherein it has been held that filing of a civil suit subsequent to initiation of a proceeding under section 145 of the Code cannot be a ground to drop the proceeding. The initiation of a proceeding prior or subsequent to the institution of a suit is immaterial for the purpose of the decision on the point involved in the case. The petitioner also relied upon a decision in *Mostt. Shamrati kuer and others* vs. *Janki Saran Singh* reported in 1981 P. L.J.R. 166 wherein it has been held that existance of a civill suit between the parties can be no bar in law for initiation of a proceeding under section 145 of the Code. The view expressed in the aforesaid decision cannot be accepted in view of the decision in *Ram Sumerpuri Mahant* vs. *State of U. P. and others* reported in 1985 B. B. C. J. 37 (SC) wher in the apex court has held that the criminal court should not be allowed to invoke jurisdiction when possession is being examined by the civil court and the parties are in a position to approach the civil court for interim orders, such as, injunction or appointment of recevier for adequate protection of the properties during the pendency of the dispute, Multiplicity of the litigation is not in the interest of the parties nor should public time be allowed to be wasted over meaningless litigations.

6. It is, hewever, made clear that the position would be different if a final order is passed under section 145 of the Code by a Magistrate competent to decide such proceeding and then a suit is filed by the parties against whom an order under section 145 of the Code is passed. In such a situation, the final order passed under section 145 of the Code cannot be set at naught only because unsuccessful party has approached the civil court. In this connection reference may be made to the decision in *Jhunamal Devananddas* vs. *State of Madhya Pradesh* reported in A. I. R. 1988 S. C. 1973.

7. In the instant case it is an admitted position that the suit between the parties is pending for adjudication of title, interest and possessing over the disputed land, In the civil suit right to possession has to be gone into. No final order has been passed in the proceeding under section 145 of the Code.The parties may approach the civill court for interim relief to protect the properties in dispute. Thus, in such a situation the proceeding under section 145 of the Code cannot be allowed to proceed during the pendency of the suit as it would amount to wastage of time over meaningless litigation.

8. On consideration of the entire facts and circumstances as discussed above, we are of the view that in the facts and circumstances of the case the proceeding under section 145 of the Code shoud not be allowed to continue. Any of the parties in the suit, if so likes, may approach the civil court for grant of injunction or appintment of receiver if the sutuation so arises, Accordingly, this application is allowed and the entire proceeding including the order dated 16. 4. 1992 passed in case No. 350/91 pending before the Executive Magistrate, Bhagalpur is quashed.

9. Howevr, both the parties are interested for early disposal of the civil suit. In the circumstances, parties are at liberty to approach the civil court for early disposal of the suit and if such request is made by the parties, the court shall also take all steps for early disposal of the suit.

R. D. Application allowed.

CIVIL WRIT JURISDICTION

Before Sudhansu Jyoti Mukhopadhaya, J.

1995

May,5.

Purushottam Kumar Sharma.*

v.

The State of Bihar and ors.

BIHAR SERVICE CODE, 1952 Rule 71—*notification under—the date when notification under* 71 *of the Code terminating the service of the State Government employee was issued, whether would be the date when he ceases to be a Government employee—guideline issued by State dated* 13. 2. 1947 *for the purpose of calculation of pension and gratuity—applicability of.*

The writ-petitioner who was an officer serving under the Bihar Government with the consent of the Bihar Government was appointed as secretary in Metallurgical and Engineering Consultants (India) Ltd. herinafter referred to as MOCON, on probation on 25.3. 1973 and was granted lien. After completion of the period of probation on 24. 2.1974 he was confirmed and the writ-petitoner filed a representation on 5.4. 1974 to the authorities of the Bihar Government that as he has been absorbed in the service of MECON, his lien should be terminated. By Government notification dated 19. 8. 1974 the lien of the writ-petitoner was terminated with imediate effect.

There after the writ petitioner represented before the authorities of the State Government for releasing his post-retirement benefit of pension and gratuity. The State Govern-

* C.W.J.C.No. 2023 of 1993. In the matter of an applicationunder Articles 226 and 227 of the Constitution of India.

ment by several letters requested the Accountant General, Bihar to fix the pension and Gratuity of writ-petitioner and to release the same. The Accountant General Bihar instead of fixing the Gratuity and pension of the writ-petitioner, sought clarification from Finance Department regarding the date of his retirement. The Finance Department replied that the date of retirement of the writ petitoner be treated to be the date when his lien was terminated. The Accountant General Bihar by letter dated 7. 11. 1994 intimated to Finance Department that the notification dated 19. 8.1974 was not in accordance ith Rules 63 and 71 of the Bihar Service Code.

Held, that the writ-petitioner ceased to be a State Government employee only with effect from 19. 8. 1974 when notification terminating his services was issued by State Government in accordance with Rule 71 of the Bihar Service Code.

Held, further that the guideline issued by the State on 18. 2. 1974 for purpose of calculation of pension and gratuity is appicable in the case of the writ-petitioner he having retired on 9. 8. 1974.

Applicationunder Articless 226 and 227 of the Constitution .

The facts of the case material to this report are set out in the judgment of Sudhansu Jyoti Mukhopadhaya, J.

R/s. Rajeev Ranjan Prasad and Rajendra Kumar. for the petitioner,

S. J.MUKHOPADHAYA, J. The petitioner in this writ petition has prayed for post retirement benefits of pension and gratuity with effect from 25th of February, 1974 and/or 19th August, 1974, which ever the date on which the petitioner ceased to be a State government employee. Such relief has been prayed for by the petitioner against the Respondents-State of Bihar.

There by, prayer has been made for grant of post retirement benefits of pension and gratuity from the aforesaid dates (25th February, 1974 and/or 19th August, 1974), On the baiss of Finance Department's Memo No. 1950–F dated 18th February, 1974 (Annexure—6).

2. The brief facts of the case are as follows. Admittedly the petitioner was initially appointed uner the Respondents State of Bihar in August, 1955 to the post of Assistant Director (Research) in the Office of the Director, Statistics and Evaluation. The petitioner joined the said post on 18th August, 1955. There after, the petitioner continued against one or other post of Deputy Director of Agriculture Statistics and/or Senior Deputy Director till 8th February, 1960. In the meantime, on the basis of one advertisement, the petitioner was given appointment to the post of Industrial Economist in the then Industries and Mines Department of the State of Bihar by one Notification dated 18th December, 1959 (Annexure—2) which post he joined on 9th February, 1960. The petitioner was confirmed to the said post of Industrial Economist with effect from 9th February, 1961 by one Notification dated 9th June, 1961 (Annexure—3). Since the initial appointment of the petitioner made in August, 1955, the petitioner continued under the Respondents-State of Bihar without any break, even when be was given appointment to the post of Industrial Economist in the Industries Department of the State of Bihar. By Notification dated 6th April, 1962 (Annexure—4) the petitioner was given appointment as secreatary and Controller of Accounts, by way of deputation in one Bihar State Industrial Development Corporation, a Government of Bihar Undertaking. In the said Notification dated 6th April, 1962 (Annexure—4), it was mentioned that the lien of the petitioner will remain with the Respondents State of Bihar till he substantively absorbed in the said Industrial Developement Corporation.

3. The Metallurgical & Engineering Consultants (India) Ltd. (MECON), a Government of India Undertaking, notified vacancy for the post of secretary, for the which the petitioner appied through his parent Department of the State of Bihar. It was after the consent of the State of Bihar, on 25th August, 1973, the petitioner was given appointment to the post of secretary (MECON) and was placed on probation for six months. The petitioner completed his probation period of six months on 24th February, 1974, when an order was issued on 5th March, 1974 (Annexure—5), where in it was ordered by the authorities of the MECON that the petitioner having completed his probation satisfactorily on 24th February, 1974, approval has been granted by the Competent authority. This order dated 5th March, 1974 (Annexure—5), the Petitioner and the Respondents are treating as the order of confirmation of the petitioner to the post of Secretary (MECON) and there by treating the same as a substantive appointment. The petitioner filed a representation on 5th April, 1974 (Annexure—7) and intimated the authorities of the Respondents-State that he had already been absorbed in the services of MECON with effect from 24th February, 1974, and there by requested for termination of his lien from the services of the Respordents-State. It was only there after the Respondents State came out with one Notification dated 19th August, 1974 (Annexure—8) by the order of the Governor of Bihar, terminating the lien of the petitioner with immediate effect.

4. As the services of the petitioner stood terminated from that of the Respondents-State of Bihar, the petitioner represented before the authorities of the Respoondents-State for releasing his post retirement benefits of pension and gratuity. The Rspondents-State by their letter dated 20th December, 1975, 6th February, 1976 and 20th April, 1976 (Annexure—9 series) requested the Respondent—Accountant General, Bihar to fix the pension and gratuity of the petitioner and to release the

same. By letter dated 24th July, 1987 (Annexure—10), a no due certificate was also given by the Respondents-State in favour of the petitioner. Curiously in the said letter dated 24th Juy, 1987 (Annexure—10), it was mentioned that the petitioner was in the services of the Respondents-State of Bihar til 24th August, 1973 i. e. the date the petitioner was initially given appointment as Secretary, MECON, on probation for six months.

5. For the purpose of calcuation of pro-rata pension, the Bihar State Industrial Development Corporation by their letter dated 7th November, 1988 (Annexure—11) as also sent all the details relating to petitioner. All these correspondences were going on, when petitioner retired from the services of MECON on 28th February, 1989 having attained the age of 58 years.

From the aforesaid fact, it will be evident that since 1974 the matter relating to payment of pension and gratuity in favour of the petitioner though initiated, but was not decided upto the year 1989, when the petitioner superannuated from the services of MECON.

6. It was on 28 th November, 1989, the Accountant General fixed certain amount as pension and gratuity of the petitioner, which was objected to by the petitioner by his representation dated 29th November, 1989 (Annexure—2). According to the petitioner, such fixation was incorrect both with respect to pension and gratuity. The Industries Depratment of the State of Bihar asked for certain infomation from the petitioner, which information the petitioner gave by letter dated 30 th July, 1990 (Annexure—13).

7. It was only there after vide letter dated 24th April, 1992, the Respondent—Accountant General, Bihar asked for certain clarification from the Finance Department of the State of Bihar. The main clarification which was sought for by the Accountant General was with respect to the date of retirement of the petitioner from the services of the Respondents-State.

8. The petitioner having come to know of the letter dated 24th April, 1992 (Annexure,14), filed a representation on 6th May, 1992 (Annexure—15) and pointed out to the Accountant General that his date of retirement from the services of the Respondents—State should be treated as 19th August, 1974, when by Annexure—8 the lien of the petitioner was terminated from the Respondents-State. Inspite of the same when no order was issued from the end of the Accountant General and the petitioner, in effect, was not paid the post retirement benefits of pension and gratuity from the Respondents-State, the petitioner moved this court and hence the present writ petition.

9. During the pendency of the writ petition, certain developments have taken place. The Industries Department, where in the petitioner was functioning, have sent a letter dated 2nd November, 1993 (Annexure—F) to the Finance Department, wherein they have treated the date 25th August, 1973, as the date on which the petitioner ceased to be a State Govt. employee. According to them, the petitioner was appointed on 25th August, 1973 as secretary in the MECON and, there fore, from the said date the petitionr should be treated to have retired from the services of the State Government. After consideration of the aforesaid letter of the Industries Department dated 2nd November, 1993 (Annexure—F), the Respondents-State from its Finance Department issued a letter dated 31st May, 1994 (Annexure—E). By the said letter dated 31st May, 1994 the Finance Department intimated the respondent—Accountant General, Bihar that the date of retirement of the petitioner is to be treated that of 17th August, 1974 i. e. from the date the lien of the petitioner was terminated vide Annexure—8.

10. Curiously the Accountant General, Bihar objected to the same by their letter dated 7th November, 1994 (Annexure—G). It was intimated by the Accountant General to the Finance Department that the Notification dated 19th August. 1974 was

not in accordance ith the Rules 68 and 71 of the Bihar Service Code. The Finance Department of the State of Bihar again requested to take up the matter and it was opined by the Accountant General that the petitioner should be treated to have retird from the services of the State Government with effect from 25th August, 1973, he having been absorbed in the services of MECON on the said date i.e. 25th August, 1973. The Respondents-State from the Industries Department, this time has issued a letter dated 18th April, 1995 (Annexure—A to the counter affidavit of the Respondents-State), where in they have treated the date of retirement of the petitioner, as 24th February, 1974, from that of the Respondents-State.

11. At this stage, it is to be taken into note that for the purpose of calculation of pension and gratuity with respect to the persons similarly situated like the petitioner, circulars/guidelines have been issued from the Respondents-State from time to time. One of such guideline was issued on 20th September, 1968 as contained in Annexure-Bto the counter affidavit of the Accountant General, Bihar. The said guideline speaks as to how the pension and gratuity are to be paid. The guideline dated 20th September, 1968 (Annexure—8) was subsequently modified by another guideline of the Respondents-State of Bihar issued on 18th February, 1974, as contained in Annexure—6. By virtue of issuance of guideline dated 18th February, 1974 (Annexure—6), the earlier guideline dated 20th September, 1968 (Annexure—8) stood superceded.

12. The subsequent guideline dated 18th February, 1974 is little bit beneficial to the petitioner and it is for the said reason it was claimed on behalf of the petitioner that his date of retirement from the services of the Respondents-State should be treated to be that of 25th February, 1974 and/or 19th August, 1974, so that his pension and gratuity can be fixed on the basis of the guideline dated 18th February, 1974 (Annexure—6).

According to the Accountant General, the date of retirement of the petitioner from the services of the Respondents-State should be treated to be 25th August, 1973, which is the date on which the petitioner was appointed as secretary in MECON and there by the petitioner is entitled for pension and gratuity on the basis of the guideline date 20th September, 1968 (Annexure—C) and he (petitioner) cannot get his pension and gratuity on the basis of the guideline dated 18th February, 1974.

13. From the afore said facts, it is evident and clear that different authorities as well as the petitioner, are claiming one or other date as his date of retirement from the services of the Respondents-State. According to the Accountant General, the said date is 25th August, 1973. According to the Finance Department of the State of Bihar, the date of retirement of the petitioner should be treated to be as 19th August, 1974. And on the basis of the last letter of the Industries Departmnet of the State of Bihar dated 18th April, 1995 (Annexure—A), the petitioner's date of retirement should be treated to that of 25th February, 1974. There is no dispute to the fact that on the basis of the date of retirement of the petitioner, either the guideline dated 20th September, 1968 (Annexure—C) will be applicable or the guideline dated 18th February, 1974 (Annexure—6) will be applicable.

14. Counsel appearing for the petitioner submitted that the petitioner was appointed in the services of MECON on 25th August, 1973, on probation for six months. There fore, as on 25th August, 1973, the petitioner was not appointed on substantive basis against a permanent post under MECON and for that the petitioner cannot be treated to be retired from the services of the Respondents—State from that date, his lien from the Respondents-State having not been terminated from the said date. It was further contended on behalf of the petitioner that in

fact the Respondents—State by Notification dated 19th August, 1974 (Annexure—8) have terminated the lien of the petitioner from prospective date.

15. Counsel appearing on behalf of the State submitted that either 24th February, 1974 and /or 18th August, 1974 be treated as the date of retirement of the petitoner from the services of the Respondents-State and not from 25th August, 1973. There by, according to them, the guideline dated 18th February, 1974 (Annexure—6) is appliccable for fixation of pension and gratuity of the petitioner.

16. On the other hand, counsel appearing on behalf of the Accountant General has vehemently opposed the contention made on behalf of the petitioner as well as of the Respondents-State. He relied on the provisions of Rules 68 and 71 of the Bihar Service Code. According to the Counsel for the Accountant General, the the petitioner having been substantively appointed against a permanent post under MECON, under Rule 68 of the Bihar Service Code, the lien of th petitioner stood automatically cancelled. In such circumstances, the petitioner automatically ceased to be a state Government employee right from 25th of August, 1973, i. e. the date on which he was so appointed in MECON. It was further contended on behalf of the Accountant General that the lien of the petitioner could not have been terminated on the basis of the representation of the petitioner. It was there by argued that the Notification dated 19th August, 1974 (Annexure—8) being against the law the same cannot be taken into account to decide the date of retirement of the petitioner from the services of the Respondents-State.

17. From the argument advanced by the parties, it is to be decided as to from which date the petitioner stood retired from the services of the Respondents-State. whether such date is 25th August, 1973 and/or 24th February, 1974 and/or 18th August,

1974, as claimed by one or other parties.

18. The relevant provisions of the Bihar Service Code, as enumerated under Rules 68, 70 (a) and (b) and 71 of the Bihar Service Code, are extracted below:

"68. Unless in any case it be otherwise provided in these rules a Government servant on substantive appointment to any permanent post acquires a lien on that post and ceases to hold any lien previously acquired to any other post.

70 (a) The lien of a Government servant on permanent post which he holds substantively shall be suspended if he is appointed in a substantive capacity.—

(1) to a tenure post, or

(2) to a permanent post outside the cadre on which he is borne, or

(3) provisionally, to a post on which another Government servant would hold a lien had his lien not been suspended under the rule.

(b) The State Government may, at its option, suspend the lien of a Government servant on a permanent post which he holds substantively if he is deputed out of India or transferred to foreign service, or, in circumstances not covered by clause (a) of this rule is transferred, whether in a substantive or officiating capacity, to a post in another cadre, and if in any of these cases there is reason to believe that he will remain absent from the post on which he holds a lien for a period of not less than three years.

71. (a) A Government servant's lien on a post in no circumstances be terminated even with his consent, if the result will be to leave him without a lien or a suspended lien upon a permanent post.

(b) In a case covered by sub-clause (2) of clause (a) of rule

70, the suspended lien may not, except on the written request of the government servant concerned, be terminated while the Government servant remains in government service."

19. From a plain reading of the aforesaid Rules, it would be evident that Rue 68 of the Bihar Service Code is subject to the other provisions/Rules of the said Bihar Service Code. It would be further evident from Rule 70 of the Bihar Service Code that even if a Government servant who holds lien against a permanent post, and is appointed substantively against another permanent post, outside the cadre and/or in a foreign service, in such case, his lien is to be suspended.

From the aforesaid Rule 70 of the Bihar Service Code, it is further clear that there cannot be automatic termination of lien in pursuance of Rule 68 of the Bihar Service Code, if a person, who already holds a lien against a permanet post is substantively appointed against another permanent post. So far as Rule 71 is concerned, a plain reading of Rule 71 it is manifest that it never-bars terminationof lien with consent of a Government servant. The only bar envisaged there in to the effect that lien of a person cannot be terminated, even with the consent of the government servant, if the same results in leaving the Government servant without any lien and/or suspended lien.

20. In the present case, it is to be seen as to on which date the lien of the petitioner stood terminated from the services of the Respondents-State. As on 25th of August. 1973 when the petitioner was appointed as secretary in MECON, he was so appointed on probation. Thereby, it is clear that as on 25th of August, 1973, the petitioner was not appointed in substantive capacity in the MECON, he being on probation on the said date. So far as 24th February, 1974 is concerned, admittedly on the said date, the petitioner's probation period of six months was completed and the services of the petitioner were approved by the MECON authorities. In this background, it can be construed

that petitioner was substantively appointed on 24th February, 1974 in MECON. But as pointed out in the preceding paragraph. there cannot be automatic termination of lien under Rule 68 of Bihar Service Code, if a Government servant who holds lien in the Government service is appointed on substantive basis against permanent post in any other cadre and/or in foreign service. A specific notification of termination of lien is to be issued by the Respondents—State. Such termination can be made by the Respondents—State of their own or on the representation of the Govt. servant, if it does not render the Government employees without any lien and for suspended lien.

21. In the present case of the petitioner, admittedly the Rspondents-State came out with such notification terminating the lien of the petitioner, as envisaged under Rule 71 of the Bihar Service Code by Notification dated 19th of August, 1974 (Annexure—8). There by, for all purposes, the petitioner ceased to be a State Government employee only with effect from 19th of August, 1974 and not a date earier and / or later.

22. So far as the argument as advanced by the counsel for the Accountant General, that the Notification dated 19th August, 1974 (Annexure—8), is illegal being against the provisions of law, I feel such argument cannot be advanced by the counsel for the Accountant General. First of all, I have already held that the Notification dated 19th of August, 1974 (Annexure—8) has been issued in consonence with the Rule 71 of the Bihar Service Code; apart from the same, the Accountant General being a Respondent in the present case, and the Notification dated 19th of August, 1974 having been issued by the Respondents—State, the same cannot be challenged by the Respondent—Accountant General, he being a Respondent in the case, that too after more than 20 years.

23. For the reasons stated above, I hold that the stand taken by the Finance Department of the State of Bihar is correct and the petitioner stood retired from the services of the Respondents—Stated on 9th August, 1974.

I further hold that the guideline issued by the Respondents—State on 18th February, 1974 (Annexure—6), is applicable in the case of the petitioner, he having retired from the service on 19th August, 1974.

24. At this stage, it is to be taken into note that by virtue of an interim order passed by this court on 12th September, 1994, the petitioner has been provided with some interim relief towards pension and gratuity. But admittedly, the full relief, to which the petitioner is entitled under the law, treating the date of retirement of the petitioner that of 19th of August, 1974, has not yet been paid to the petitioner.

25. Accordingly, I direct the Respondents to provide the petitioner with the following benefits :

(i) to pay the petitioner his full pension and gratuity including arrears there to treating the date of retirement of the petitioner from the Government service that of 19th of August, 1974, on the basis of the guidelines of the Respondents-State dated 18th of February, 1974 (Annexure—6);

(ii) any amount that has already been paid to the petitioner towards pension and/or gratuity be adjusted while releasing the pension and gratuity in favour of the petitioner inpursuance of the direction above;

(iii) the petitioner be paid such arrears of pension and gratuity along with 10 per cent simple interest there to. Such interest is to be calculated from the due date of retirement of the petitioner (19th August, 1974) till the same is paid in favour of the petitioner; and

(iv) such arrears of pension and gratuity including the interest there to is/are to be paid in favour of the petitioner within a period of three months' from the date of receipt/ production of a copy of this order.

26. It is made clear that if the petitioner has already received any amount towards the employer's contributory part of provident fund from the authorities of the MECON, for the period from 25th August, 1973 to 19th August, 1974, the petitioner is duty-bound to return the said amount in favour of MECON with 10 per cent simple interest there to. such interest is to be counted from the date the petitioner received the excess amount, if any, towards the employer's contributory part of provident fund, till the same is to be paid by the petitoner. For the purpos of proper calculation, the petitioner is to intimate this decision to the authorities of MECON within a period of one month from the date of judgment and the authorities of MECON will give the petitioner the necessary calculation to that effect, which is to be refunded by the petitioner towards the employer's contributory part of provident fund with 10 per cent interest, with in a period of one month there after. The petitioner is to refund such amount within a period of one month from the date of receipt of such intimation of calculation from the MECON.

27. This writ petition is disposed of with the aforementioned observations and directions. There shall be no order as to costs.

R. D. Order accoordingly.

APPELLANTE CRIMINAL

Before Naresh Kumar Sinha, J.

1995

May,5

Ram Dayal Jaiswal. *

v.

The State of Bihar.

EVIDENCE ACT, 1872 (Central Act 1 of 1872) *section* 113A—*presumption that suicide of the deceased was abceed by her husband, whether can be drawn against the appellant—cruelty referred in this section whether has the same meaning as in section* 498 A *Penal Code—circumstanlal evidence—no direct evidence that the appellant caused the death of his wife—circumstances pointing that the appellant had demanded gold chain and she was tortured due to her Naihar people not being able to meet the demand—conclusion that she committed suicide due to torture by the appellant—Penal Code,* 1860 (*Central Act no.* X L V *or* 1860) *section* 306—*charge not framed under section* 306—*validity of—section* 498A—*provisions of.*

In a case based on circumstantial evidence as in the instant case, there being no direct evidence that the appellant caused the death of his wife the only course left is to held that the prosecution has proved that the deceased committed suicide such a conclusion is not only reasonable but also inevitable in the facts and cireumstances of the case because the deceased died in her sasural and there was evidence that she had been illtreated and subjected to torture by her husband and that there was evidence that the deceased has complained about the ill-

* Criminal Appeal No. 297(s) of 993. Appeal against the judgment and order dated 16/17 of August, 1993 passed by Sri Siwakar Jha Additional Session Judge. I, Bhabhua in Sessions Trial No. 199/201 of 1990.

treatment and torture on account of her Naiher people not meetting the demand of the appellant for golden chain of 2 $\frac{1}{2}$ bhars.

The presumption under section 113A of the Evidence Act 1872, that the suicide of the deceased was abetted by the deceased husband, can sefely be drawn against the appellant. The cruelty refered to in section 113A of the Evidence Act, 1872 carries the same meaning as in section 498A of the Penal Code, 1860, where in the explanation points that cruelty means any wilful conduct which is of such a nature as is likely to drive the women to commit suicide or to cause grave injury or danger to life or harassment of the woman where such harassment is with a view to coercing her or any person related to her to meet any unlawful demand for any property or valuable security or is on account of failure by her or any person related to her to meet such demand. There is not only ample but over whelming evidence on record that the appellant has subjected his wife to cruelty as defined is section 498A penal Code.

Held, that since the essential circumstances viz, the death of the deceased under suspicious circumstances in her sasural within one and half year of her marriage, as also the allegation that the deceased had been killed for not bringing the gold chain as dowry having been put to the appellant, in his examination under sectin 313 of the Code of Criminal Procedure, 1973, it is difficult to even suspect that any prejudice had been caused to the appellant by not framing a charge under section 306 panel Code.

Held, further, that the appellant is guilty under section 306, Penal Code.

Appeal by the accused.

The facts of the case materia to this report are set out in the judgment of N. K. Sinha, J.

Mr. B. P. Pandey, Sr. Advocate,

Mr. Dinesh Singh, Mr. Bachunee Ojha Advocates. for the appellant.

Mr. S. K. P. Sinha, Addl. P. P. for the State.

Naresh Kumar Sinha, J. The sole appellant was convicted and sentenced to undergo rigorous imprisonment for ten years for the offence under section 304(B) and rigorous imprisonment for two years each for the offences under sections 201 and 498(A) of the Indian Penal Code (for short (IPC) for causing the death of his wife. All the sentences were. however,. ordered to run concurrently by the learned Additional Sessions Judge by his judgement and order dated 16/17 of August, 1993 against which this appeal has been preferred.

2. Minakshi Devi alias Munni, the younger sister of Rajendra Prasad (P. W. 5). the informant, of Mohalla shobhaganj within sasaram police station Rohtas Distirct was married in March, 1988 to Ram Dayal Jaiswal (appellant) of village punnaon of Bhagwanpur p. s. of the same district. In March, 1989, Gauna was performed and the deceased there after went to live in her Sasural. At the time of her marriage and Gauna, the parents of the deceased had given her ornaments, clothes and other articles such as radio and tape. Only a golden chain of 2 $\frac{1}{2}$ bhars was not given as a result of which the husband, father-in-law mother-in-law, dewar of the deceased and their wives started scolding and physically and mentally torturing her. The deceased was even threatened that she would be killed and would never be sent back to her Naihar unless the golden chain was delivered. The informant has sent kalewa on the occasion of Holi and Rakshbandhan for her sister (deceased) through his cousin, Ani Kumar Jaiswal (P. W. 3). The deceased had sent a message through P. W. 3 for sending the goden chain. The demand, however, could not be met on account of poverty. On 13. 8. 1989,

while the informent along with Gaya Prasad Sah (P. W. 4) was on way to the sasural of the deceased, they learnt that the deceased had been killed by her in-laws and the dead body has been burnt on Mondy last. On the basis of a written report (Ext. 2) dated 1. 10. 1989 filed by the informant before the Officer-in-charge of Bhagwanpur P. S.the police drew a formal first information report (Ext. 1) and registered a case under sections 302/201/34 IPC and Section 304 (B) of the Dowry Prohibition Act against the appellant and four others including his parents. After completion of investigation, the police charge sheeted five accused persons including the appellant under sections 304(B) 498(A)/ 201/ 34 IPC. All the five accused persons were put on trial on charges under sections 304(b) 34/201.IPC for causing murder of the deceased and for disapperance of her body on 25. 9.1989. Eight witnesses were examined for the prosecution and nine witnesses on behalf of the defence and a number of documents were also exhibited both on behlf of the prosecution and the defence. The defence case was that the deceased died of cholera and her dead body was cremated in due course after sending an information to that effect to her Naihar. The learned Additional Sessions Judge did not accept the defence plea that the deceased died of cholera. He. however, acquitted all the accused persons exept the appallant whom he convicted and sentenced in the manner already indicated above not only for the offences under sections 304 (b) and 201 IPC for which he had been charged but also for the offence under section 498 IPC.

3. Shri B. P Pandey, Learned counsel appearing for the appellant, argued that there was no legal and satisfactory evidence on the record to support the conviction of the appellant.He pointed out that it was not a case of dowry death as the deceased was subjected to tortuce in connection with the demand of dowry, had not been proved. Two letters of the deceased marked Exts. 3 and 3/1, were said to contain no

allegation of torture inso far the husband of the deceased, namely, the appellant, was concered and the learned Additional Sessions Judge had fallen in error in acquitting four of the co-accused and then proceeding to rely on the same evidence to convict the appellant. Another infirmity pointed out in the impugned judgment is that the appelant had adduced legal and satisfactory evidence to prove that the deceased had died of cholera and the evidence including that of the doctor who had examined her while she was alive, had been brushed aside by the learned Additional Sessions Judge for no good and cogent reason. Shri S. K. P. Sinha, learned counsel appearing on behalf of the State-respondent, however, supported the judgment and order of conviction and sentences passed against the appellant as based on facts and circumstances amply proved in course of the trial.

4. Since both the prosecution and defence had adduced evidence, some fact do not appear to be in dispute. There is no serious challenge to the fact that the deceased was married to the appellant in the year, 1988 and has gone to her sasural in 1989 after Gauna where she died on 25. 9. 1989. Even according to the prosection case, the deceased died on 25. 9. 1989 and to that very effect is the evidence of some of the defence witnesses including Dr. Rama Shankar Singh, D. W. 7 who examined the deceased and issued the certificate (Ext. F) stating that the deceased was examined by him and she died of cholera on 25. 9. 1989.

5. There was some argument at the bar whether on the evidence adduced, the death of the deceased can be described as a dowry death. While Shri Pandey contended that on the facts and circumstances brought on the record, it was not a case of dowry death whereas Shri Sinha, counsel for the State, took the position that it was so. The prosecution, in support of its case, relies on the evidence of P. W. 2 Mahendra Singh, P.W. 3 Anil

Kumar Jaiswal, P.W.4 Ganga Prasad Sah, P. W. 5, Rajendra Prasad (informant) and P. W. 6, Faujdari Kuer.. The other witnesses included a formal witness Lalita Prasad (P.W. 1) the choukidar of the village Raghubir Dusadh (P. W. 8) declared hostile and Churaman Yadav (P. W. 9) the police Officer who investigated the case and submitted charge sheet. The testimony of the informant (P. W. 5), who is none other than the brother of the decessed, is that the *Bidat* ceremony had been performed as per practice at the time of the marriage of the deceased with the appellant in March, 1988 and His sister had returned to her *Maika* after her marriage. According to this witness. the appellant, his father and other family members along with some co-villagers, had come to his place at the time of Gauna. At the time of taking meals in the night, a demand was made for a golden chain of $2\frac{1}{2}$ *Bhars* and when the informant's party expressed their helphessness, the appelant lost his temper and threw his *thali* after holding out threats. After Gauna and on the occasion of Holi and Rakshabandhan festivals, the informant sent his cousin (P. W. 3) and Mama (P. W. 4) to the sasural of his sister with Kalewa, on return, they informed that his sister was weeping and had told them that her in-laws demanded a goden chain of $2\frac{1}{2}$ *bhars* and assaulted her. According to the informant, they had no information about the death of the deceased and when the informant had gone to her sasural a week after the death and had made an inquiry to the said effect, the accused persons had then abused and had threatened to assault them, P. W. 3 testified to the fact that he had gone to the Sasural of the deceased on the occasion of Holi and Rakshabandhan festivals with kalewa when the deceased had told him that accused Suraj Sah, Babban Sah, Lallan Sah and Gangia Devi used to assault her and keep her starved for 2 to 3 days. According to this withess, the deceased hid told him to convey the information in her Naihar other wise they would kill her. The witness claimed

to have conveyed the information to P. W. 5 in the Naihar of the deceased. This is supported by the evidence of P. W. 4 who had accompanied P. W. 3 to the Sasural of the deceased. He, however, included the name of the appellant among the inlaws who assauted her and kept her starved for getting the golden chain. He also added that the deceased had told him that if the golden chain was not given, her in-laws would kill her. Even P. W. 6, the mother of the deceased, has stated that her daughter had returned to her Naihar four months after the marriage and the Gauna was performed there after. She has supported the testimony of the informant, P. W. 5 that the appellant and his relations had come on the occasion of Gauna and at the time of taking food, they had refused to do so after making a demand for a golden chain of $2\frac{1}{2}$ bhars. She claims that on the occasion, both she and her son, p. w. 5, had expressed their inability to meet the damand as they had no means to do so. She has, however, stated that after the Gauna, she had received a letter from her daughter wherein she had mentioned that her in-laws used to assault her for fan and sewing machine. Two such leters had been received one by post and another by hand. The letter dated 23. 7. 1989 received by post was marked Ext. 3 and the other received through one Pradeep Kumar, was marked 3/1 in the evidence of P. W. 5 who claimed that both were in the hand-writing of the deceased.

6. It was argued on behalf of the appellant that it was the definite case of the prosecution that the deceased had been tortured for not getting a golden chain of $2\frac{1}{2}$ bhars form her Naiher. The prosecution witnesses have stated this fact in their evidence and the story is also mentioned in the first information report. A question was also put to the appellant in his examinatio under section 313 of the Code of Criminal Procedurs (for short 'Code') that he had demanded the golden chain of $2\frac{1}{2}$ bhars from the parents of the deceased and had tortured her for the same.

Another question put to the appelant was that on account of the appelant not getting the golden chain that the appelant along with members of the famiy, had killed the deceased on 25. 9. 1989. The appellenat answered both the questions in the negative. Both the letters Exts. 3 and 3/1said to have been written by the deceased to the mother, however, do not mention the demand regarding the golden chain although both contain a tale of mental and physical humiliation to which the deceased was being subjected by her in-laws. It as pointed out on behalf of the appellant that the demand of the golden chain was made long after the marriage and the prosecution case itself is that the in-laws of the appellant never agreed either directly of indirectly to give the golden chain. It was argued that even if this part of the prosecution case is accepted as proved, the alegation made would not constitute a dowry death. Section 304—B of the Indian Penal Code reads as follows:—

> "304—B—Dowry death.— (1) Where the death of a woman is caused by any burns or bodily injury or occurs other wise than under normal circumstances within seven years of her marriage and it is shown that soon before her death she was subjected to cruelty or harassment by her husband or any relative of her husband for, or in connection with, any demand for dowry, such death shall be called "dowry death", and such husband or relative shall be deemed to have caused her death.
>
> Explanation:— For the purposes of this sub-section "dowry" shall have the same meaning as in section 2 of the Dowry Prohibition Act, 1961 (28 of 1961).
>
> (2) Who ever commits dowry death shall be punished with imprisonment for a term which shall not be less than seven years but which may extend to imprisonment for life."

If was emphasised that in order to make out a case of dowry death, the prosecution must establish that the deceased was

subjected to cruelty or harassment for or in connection with any demand for dowry. As mentioned in explanation to sub-section (1) dowry was to have the same meaning as in section 2 of the Dowry Prohibition Act, 1961. The definition of dowry as contationed in section 2 of the said Act after its amendemnt in 1985 and 1986 reads as folows:—

> "In this Act, "dowry" means any property or valuable security given or agreed to be given either directly or indirectly—
>
> (a) by one party to a marriage to the other party to the marriage
>
> (b) by the parents of either party to a marriage or by any other person, to either party to the marriage or to any other person;
>
> at or before or any time after the marriage in connection with the marriage of the said parties, but does not include dower or mehr in the case of persons to whom the Muslim Personal Law (Shariat) applies."

Thus, unless any property or valuable security is given or agreed to be given, it woud not constitute dowry within the meaning of section 304—B IPC. The contention that the definiton of the term 'dowry' as given in section 2 of the Act, should include a demand made by one party though the other party would not agree to pay that amount, cannot be accepted as correct as such a construction cannot be given to the said term in view of its definition in the section itself. It may be recalled that the definite case of the prosecution is that the golden chain was demanded at the time of Gauna and the informant and his mother had expressed their helplessness in metting the demand. Thus, learned counsel for the appellant is right in his contention that in the absence of of the most important ingredients of the offence of committing dowry death being completely absent an offence

under section 304—B IPC was not made out and the conviction of the appellant for the said offence could not be upheld.

7. It may be mentioned that in the letter Ext. 3/1, the deceased had written to her mother that she was being assaulted by her in-laws who scolded her for not bringing tape, radio, fan and sewing machine. The letter Ext. 3/1 does not bear any date. The prosecution case is that this letter was delivered to the mother of the deceased through one Pradeep. No person by name of Pradeep has been examined in this case to prove the aforesaid fact. The letter. now here bears the name of sender. It was argued that this letter Ext. 3/1 was produced for the first time during the depsition of P. W. 5 who proved it. In any view of the matter. no much imporance can be attached to the statement of the letter that the deceased was being tortured for not bringing radio, tape, fan and sewing machine because of the definite case of the prosecution witnesses that the deceased had complained to P. Ws. 3 and 4 when they visited her place that she was being tortured for not bringing the golden chain. Neither in the first information report nor in evidence of prosecution witness there is any suggestion that the deceased was being tortured for not beinging radio, tape, fan and sewing machine. No question regarding the aforesaid demand was put to the appellant in his examination under section 313 of the Code. Moreover, the genuineness of the letter Ext. 3/1 is itself in doubt in view of the circumstances attending its production in the court for the first time.

8. However, the letter market Ext. 3 said to have been written by the deceased to her mother is an Inland letter mentioning 23. 7. 1989 as the date of the letter. The Inland letter is addressed in the name of late father of the deceased and mentions the name of the Mohalla correctly. The name of the sender is also menioned which happens to be the deceased. The letter was written ony two months prior to the date on which the

deceased is said to have died in her Sasural. The letter contains a description of the agony through which the deceased was passing her days in the Sasural. The letter, however, does not make any mention of the demand of dowry. It contains no referance to the demand of golden chain or radio, tape, fan and sewing machine. It also contains a reference in favour of the husband, that it the appellant. The deceased had mentioned that she used to quarrel with her husband for taking her to her Naihar and her husband was willing to reach her provided the mother wrote a letter to that effect in case she had no man to spare for the same. However, in another part of the letter, the deceased has categorically mentioned that she was being assaulted by. the people which obviously referred to her in-laws and if the contents of the letter are read as a whole, it does contian an allegation that even her husband had assaulted her in such a manner that her hand and feet had swellen. The letter also contains reference to the appellant where he appears to have endorsed the suspicion of his brother against the character of the deceased and it was in connection with the said suspicion that the allegation that the husband had also assauted her was made, There is not reason to doubt the genuineness of the letter notwithstanding the defence suggestion to P. W. 5 in the cross-examination that the letter was not in the hand-writing of the deceased. There is nothing on the record to indicate that attempt as made by the defence to get the hand-writing of the letter compared with the admitted hand-writing of the deceased and hence, the mere defence suggestion challenging the genuineness of the letter is hardly of any significance.

9. It is the admitted position that the deceased was a young lady who died in her Sasural within $1\frac{1}{2}$ years of her marriage. There is no evidence that prior to her marriage and immediately after the marriage, she was suffering from any serious ailment which would cause her premature death. There is no dispute

that she died in her Sasural on the date in question. The defence case is that the deceased died of cholera. This was the suggestion given to the p.ws in the cross-examination and some of the defence withesses have also made such a claim. The defence examined D. s. 4, 5, 6, and 7 to prove that the deceased died of cholera. D. W. 4 lives in the P. O..village and clamis that he learnt about the death of the deceased at about 2.30 P. M. He conceded that he did not know since when the condition of the deseased had detoriated. If his evidence is to be belived, the dead body was cremated in the village at 3 P. M. The cremation ground, according to this witness, was less than $\frac{1}{2}$ Km away and the people had returned within half an hour. An important admission made by this witness in his cross—exmination was that he endorsed his statement before the police that the in-laws of the deceased had informed him that the deceased suffered from diarrhoea and vomiting during the night as a result of which she died. D. W. 5 happens to be the Sarpanch of the Gram panchayat and he proved his certificate Ext. D stating that the deceased died due to cholera on 25. 9. 1989. The witness claimed that the deceased died in his presence at 3 P. M. There is nothing in the testimony of D.W.5 to suggest that the statement that the deceased died of cholera, was based on his personal observation. The important question is not that the deceased died 3 P. M. which even according to the D. W. appears tobe established, what is important is as to how she died. In my opinion, not much reliance can be placed in the testimony of D.W. 5 for the apparent contradication in his testimony before the court and the statement made in a certificate, Ext. D. The certificate, Ext. D mentions that the death of the deceased took place on 25. 9. 1989 5. P.M. who had been cremanted in the cremation ground of the village and that the information had been given by Suraj Sah (father of the appellant) on 26. 9. 1989. The certificate makes no mentions of the cause of the death including cholera that is

being suggested by the witness in his evidence. D. W. 6 has a house contiguous west of the house appellant. While claiming that the deceased died of cholera, he also mentions that a doctor had come for her treatment. There is nothing in the testimony of this witness to suggest that he had given the cause of death on the basis of his personal observation. In all probability, he may be making the statement that the deceased died of cholera on the basis of what he was told presumbaly by the in-laws of the deceased regarding the cause of her death. D. W. 7 happens to be the doctor who claims to have treated. the deceased. He clamied that the deceased was suffering from cholera and she was senseless and while he was arranging for transfusion of saline water the deceased died. He also proved a certificate given in his hand—writing under his signature marked Ext. F. He claimed that he was called for treating the patient at 3 P. M and he had reached the P. O. village at 5 p. m. In the certificate, the doctor has stated that he had treated the petaint at 5 P. M. and on examination, found her suffering from serious cholera and while he was preparing to treat her by arranging for transfusion of saline water. the petient died.The testimony of the doctor as also his certificate are not worth the ink by which thay have been written. On his own admission in the cross examination, the doctor had given the medical certificate that the patient was suffering from cholera not on the basis of his medical exmination but on the statement made by others.

10. It is common knowedge that a patient suffering from cholera would become senseless only after sufficient loss of fluid which produces a state known as dehydration. This is a gradual process and takes time. No witness including any witness of the neighbourbood, claims to have seen the deceased while she was in a position to speak. If the appellant or any other mamber of his family was serious about the treatment of the deceased, the

doctor could have been sent for well in advance and not only at the last moment. The evidence adduced by the defence to prove that the deceased died of cholera, thus, lacks total credibility and the learned Additional Sessions Judge was thus, right in rejecting this part of the defence case.

11. Another circumstance being relied upon against the appellant is that the dead body of the deceased was disposed of in haste without informing the Naihar people of the deceased. It is the consistent case of the informant (P. W. 5) that when he was on way to the sasural of the deceased along with P. ws. 3 and 4,he learnt from some-one whom he did not know from before, that his sister (deceased) had been killed by the accused persons. When the informant and party reached at the house of the appellant, the appellant's father first told him that his sister died of cholera. The appellant's father subsquently told the informant that the deceesed had hanged herself to death. The evidence of the informant is that on enquiry as to why the information rgarding the death of the deceased was not sent to them, the accused persons are said to have abused the prosecution party and then threatened to assault them by means of lathi. Both P. Ws. 3 and 4 have supported the testimony of the informant, P.W. 5 to the aforesid effect As against this, the defence of the appelant is that the appellant had himself conveyed the information about the death of the deceased to her Naithar. D. Ws. 1, 2, and 3 have supported the appellants case that on 26. 9. 1989, the appellvant has been to the house of his brother-in-law, namely, p. w. 5 and had given the information to the wife of the informant regarding the death of the deceased as the informant (P. W. 5) had taken his mother (P. w. 6) to Banaras for her treatment. Learned defence counsel, in this connection,referred to the admission of the informant's mother, Pw 6 in the cross-examination that at the time when the news about the death was received, she had gone to Banaras. In my opinion, the answers given by P. w. 6 in

her cross-examination, if read as a whole, in no way supports the appellant's case that he had gone to his Sasural to inform about the death of his wife. All that P.w. 6 appears to have admitted. was that at the time of receiving information regarding the death of the deceased, she was at Banaras. According to the defence case, the deceased was cremated in the after-noon on 25.9. 1989 within a few hours of her death. As per the evidence of D. Ws 1, 2 and 3, the appellant went to the house of the deceased to inform about the death on the following day i. e. 26. 9. 1989.

The sasural and Naihar of the deceased were not very far from each other. The deceased's Naihar was in Sasaram police Station of Rohtas district whereas the appellant belonged to a palce in Bhagwanpur Police Station of Bhabhua district. Both the districts are contiguous to each other and formerly part of the same district, namely, Rohtas. Bhabhua before being made a revenue district, was a sub-division of old Rohtas district. If the deceased died in the after-noon of 25. 9. 1989, there was no reason why the appellant and members of the family made no attempt to, convey her Naihar people who did not live far away, regarding the news of her death and wait until such time that that they arrived to participate in the cremation. Even if it is believed for the sake of the argument that the appellant informed the Naihar people of the deceased about her death on the folloing day such conduct was hardly consistent with the innocence of the appellant. In other wards, the fact that the dead body of the deceased was cremated with un-holy haste, was thus a circumstance appearing against the appellant which strongly suggested that the deceased did not die of cholera as claimed by the appellant. If the deceased was a young healthy woman with no history of any ailments, either immediately before or after the marriage and there being no evidence that she died of any such ailment including cholera, the only plausible inference that can be drawn on the beasis of the facts and circumstances brought on record,

in the absence of any direct evidence suggesting that the husband caused her death, was that she had committed suicide. It has to be conceded that in a case based on circumstantial evidence as the present one, there being no direct evidence that the appellant caused the death of the deceased, the only course left is to hold that the prosecution has proved that the deceased committed suicide. such a conclusion appears to be not only reasonable but also inevitable in the facts and curcumstances of the case because the deceased died in her Sasural and there was evidence that she had been illtreated and subjected to tortue by her husband and that there was also evidence that the deceased had complained about the ill-treatment and torture on account of her Naihar people in-not meeting the demand of the appellant for a golden chain of $2\frac{1}{2}$ bhars. In this connection, a presumption is raised that the suicide of the deceased had been abetted by her husband with in the meaning of Section 113 A of th Indian Evidence Act which provides that when the question is whether the commission of suicide with in period of seven years form the date of her marriage and that her husband or such relative of her husband had subjected her to cruelty, the court may presume having regarding to all other circumstances of the case that such suicide had been abetted by her husband or by such relative of her husband. The circumstances already brought on record levave no room for doubt that presumption under Section 113 A of the Indian Evidence Act that the suicide of the deceased was abetted by the deceased's husband, can be safely drawn against the appelant. The cruelty referred to in Section 113 A of Act carries the same meaning as in Section 498—A of the Indian Penal Code where in the explanation points that cruelty means any wilful conduct which is of such a nature as is likey to drive the woman to commit suicide or to cause grave injury or danger to life or harassment of the woman where such harassment is with a view to coercing her or any person related to her to meet

any unlawful demand for any property. or valuable security or is on account of failure by her or any person related to her to meet such demand. There is not only ample but over wheming evidence on the record that the appellant had subjected his wife to cruelty as defined in Section 498—A IPC.

12. The question is whether the appellant who has been charged under section 304—A IPC, can be held guilty for an offence under section 306 IPC when no specific charge under section 306 IPC had been farmed against him. The appellant had knowedge of the evidence on the basis of which an offence under section 306 IPC was being made out against him. Since the essential circumstances, namely, the death of the deceased under suspicious circumstances in her Sasural with in 1½ years of her marriage, as also the allegation that the dece ased had been killed for not bringing the golden chain as dowry, having been put to the appellant in his examination under section 313 of the Code, it is difficult to even suspect that any prejudice had ben caused to the appellant by not framing a charge under section 306 IPC. In this connection, the decision of the apex Court in the case of *Lakhjit Singh and another* Vs. *State of Punjab* repoted in 1994-Supp—(1)—SCC—173 may be referred to where the court rejected the contention put forward on behalf of the appellant that since charge was for the offence punishable under section 302 IPC, the accused were not put to notice to a charge under section 306 IPC and were there by prejudiced. The apex court also rejected the contention that the presumption under section 113 A of the Indian Evidence Act could not be drawn and a conviction under section 306 IPC could not be awarded. The apex court, while rejecting the contention, was pleased to observe that the appellant had enough notice of the allegations which attract section 306 IPC.

13. In the facts and circumatancs of the case, the appeant is found guilty and convictd for an offence under section 306 IPC

and is sentenced to undergo rigorous imprisonment for five years. His conviction under section 304 B IPC is set aside and so also the sentence of seven years rigorous imprisonment passed against him.

14. The trail court has convicted the appellant for the offence under section 498—A IPC and sentenced him to undergo rigorous imprisonment for two years with out framing a specific charge. As has been held by the learned Additional Sessions Judge, there is clear, cogent and circumstantial evidence on record to prove the commission of offence under section 498—A IPC by the appelant. The letter, Ext. 3, written by the deceased and the evidence of the prosecution witnesses leave no room for doubt that the husband of the deceased, namely, the appellant, had subjected her to cruelty of such a nature as was likely to drive the woman to commit suicide. As held by the apex court in the case of Smt. *Shanti and another* Vs. *The State of Haryana* reportedin AIR 1991—SC—1226, a person charged and acquitted under section 304—B, can be convicted under section 498—A IPC without charge being there, if such a case is made out. However, the apex court observed that if a person was convicted for both the offences under sections 304—B and 498—A IPC, no separate sentence need be awarded under section 498—A. Since the appellant has been held guilty and convicted under section 306 IPC, relying on the presumption under section 113 A of the Indian Evidence Act, It would be only fair and proper to maintain the conviction of the appellant for the offence under section 498—A IPC after setting aside the sentence of two years rigorous imprisonment passed by the trial court and it is ordered accordingly.

15. There is no specific evidence brought on the record as to the actual role played by the appellant in disposal of the dead body. His conviction for the offence under section 201 IPC for

causing disappearance of the evidence of the offence. cannot be upheld only on the ground that in the facts and circumstances of the case, the appellant must have been one of the persons responsible for the same. The suspicion, howsoever strong, cannot take the place of proof and the conviction of the appellant under section 201 IPC, can not there fore, be upheld. His conviction as also the sentence of rigorous imprisonment for two years for the offence under section 201 IPC are, there fore, set aside.

16. In the result, the appeal is dismissed subject to the modifications mentioned above.

R. D. Appeal dismissed.

CIVIL WRIT JURISDICTION

Before S. K. Homc haudhuri, J.

1995,

May,23.

Bhagwat Prasad Singh.*

V.

The State of Bihar and another.

Dismissal of Government Servant— Order passed after the superannuation of the Government Servant—legality of.

The service of the writ-petitioner was not extended by the appropriate authority after he attained the age of Superannuation on 31. 12. 1987 and he effectively retired on and from 31. 12. 1987.

Held, that the impugned order of dismissal was passed by the appropriate authority on 21. 5. 1990 long after the retirement of the writ-petitioner, when the diciplinary action could not be taken against him. As such the impugned order of dismissal of the writ—petitioner is illegal and without jurisdiction and is a nullity.

C. L. Verma V. *State of M. P.* (1)

N. L. Sastry V. *State of Andhra Pradesh* (2)

B. J. Shelat V. *State of Gujarat*(3)

Union of India V. *Sayed Muzaffar Mir* (4) ..... followed.

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

* Civil Writ Jurisdiction Case No. 6519 of 1990. In the matter of an application under Articles 226 and 227 of the Constitution of India.

(1) (1990) A. I. R. (S. C.) 463. (2) (1969) 3 S.L. R. 372.

(3) (1978) 2 S. C. C. 202 (4) (1995) Supp 1 S. C. C. 76.

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

M/s. R. N. Mukhopadhaya and Ambarnath Banerjee for the petitioner.

Mr. D. N. Singh for the State.

S. K. Homchauduri, J. This petition is directed against the order issued under memo no. 397 dated 21. 5. 1990 (Annexure 1) by the Collector, Samastipur (Respendent no. 2) dismissing the petitioner from service with effect from 19. 9. 1987.

2. The petitioner assailed the impugned order on the short ground that on attaining the age of superannuation he having retired from service on 31. 12. 1987 the employer and employee relation between him and the respondents came to an end after 31. 12. 87 and, as such, the impugned order dated 21. 5. 1990 passed after his retirement is a nulity.

3. To appreciate the point involved in the case, it is necessary to state the facts leading to the passing of the impugned order in a nutshell. While working as Nazir in the District Nazarat, Samastipur, a ciriminal proceeding was initiated against the petitioner on the allegation of defalction or embezzelement of Government fund. A departmental proceeding was also initiated against him on the same allegation of defalcation or embezzlement of the Government fund and charge-sheet was issued on 18. 1. 1982 The petitioner submitted reply to the charges denying the allegations. A domestic enquiry was held and the Enquiry Officer after conclusion of the enquiry gave finding holding that charges against the petitioner were established. There after, a second show-cause notice was issued by the disciplinery authority asking the petitioner to make representation against the proposed penalty of removal from service. After receipt of the second show-cause notice, the petitioner approached this court in C. W. J. C. No. 1222 of 1982 contending

that enquiry proceeding was initiated in violation of principle of natural Justice, By order dated 30. 3.1982, the writ petition was admitted and an interim order was passed as follows:—

"During the pendency of this writ application, no further steps shall be taken on the basis of the enquiry report as contained in Annexue I to the writ application and the show cause notice (Annexure 2) It is made clear that the petitioner shall remain under suspension during the pendency of this application and that order is not being stayed."

4. C. W. J. C. No. 1222 of 1982 was, how ever, dismissed on withdrawal by order dated 7. 9. 1987. The order of the High court was communicated to Respondent No. 2. by letter dated 7. 9. 1987 itself. The petitioner did not submit any reply to the second show-cause notice. There after, by the impugned order dated 21. 5. 1990, respondent no. 2, the Collector, Samastipur passed the impugned order dismissing the petitioner from service with retrospective effect from 19.9. 1987— the date of receipt of the order of the High Court dated 7. 9. 1987.

5. I have heard Mr. R. N. Mukhopadhaya, Learned counsel for the petitioner and Mr. D. N. Singh, learned Standing Counsel No. 2 for the Respondents.

6. Mr. R. N. Mukhopadhay, learned counsel for the petitioner, submitted that it is well-settlled that after retirement, a Government servant ceases to remain an employee of the Govrnment. In the instant case, undisputedly, the petitioner attained the age of superannuationon 31. 12. 1987 and no order was passed by the Government extending the service of the petitioner and consequently the petitioner retired from service on 31. 12. 1987. Thus petitioner ceased to remain an employee under the Respondents and became a pensioner after his retirement. As such, the impugned order passed after the petitioner's retirement from service is a nullity. Mr.

Mukhopadhaya further submitted that the impugned order purporting to give retrospective effect there of is ex—facie illegal.

7. In support of his contantion, Mr. Mukhepzdhaya peaced reliance on a decision of the Hon'ble Supreme Court in the case of *C. L. Verma* Vs. *State of M. P.*, reported in A. I.R. 1990 Supreme Court 463. He also placed reliance on a decision of the Andhra Pradesh High Court in the case of *N. L. Sastry* Vs. *State of Andhra Pradesh*, reported in 1969 Vol. 3 S. L. R. 372.

8. Mr. D. N. Singh learned Standing Counsel No. 2, on the other hand, submitted that the departmental proceeding was initiated against the petitioner on the charge of defalcation of public fund to the tune of Rs. 4, 42, 625, 76 paise in the year 1982 and after holding domestice enquiry the charge against the petitioner was established. The demestic enquiry was concluded in the year 1982. However, because of the interim order passed in C.W. J. C. No. 1222 of 1982, the departmental proceeding coould not be concluded. After dismissal of the said writ petition on withdrawal by order dated 7. 9. 1987, the departmental proceeding could be concluded. The disciplinary authority waited for submission of the reply to the second show cause notice. But the petitioner not having submitted reply to the second show cause, the disciplinary authority ultimately passed the impugned order dated 21. 5. 1990 dismissing him form service.

9. I have considered the submissions made on behalf of the petitioner and on behalf of the Respondents and perused the impugned order. Admittedly, the petitioner on attaining the age of superannuation i. e. 58 years retired from service on . . 31. 2. 1987. Learned Standing Counsel has not been able to lay hand on any rules under which the deparimental proceedings could be confirmed after retirement of the petitioner from service. In the case of *B. J. Shelat* vs. *State of Gujarat*, reportedin 1978(2) SCC 202 the Hon'ble Supreme Court has held that once a Govern-

ment servant has effectively retired from service, disciplinary action cannot be taken egainst him. In the case of *C. L. Verma* (Supra)the Hen'ble Supreme Court held that the appelant, having attained the age of superannuation i. e. 58 years, he ceased to be a Government servant and in view of the fact that he had already super annuated, the Government had no right to deal with in its disciplinary jurisdiction available in regard to employees. In the case of *N. L. Sastry* (Supra), the petitioner retired from service during the pendency of the departmental proceding. However, the departmental proceeding continued and punishment was imposed on him after his retirement, The Andhra Pradesh High Court held that the continuance of the enquiry and punishment imposed after attaining the age of super annuation was illegal as no specific order was passed to retain the Government sarvant in service after the age of superannuation.

10 Recently in the case of *Union of India* vs. *Sayed Mazafar Mir*, reported in 1993 Supp (1) S. C. C. 76, the Hon'ble Supreme Court reiterated the aforesaid view. In that case the respondent Railway employee, was suspended in contemplation of a departmental proceeding and during the continuance of the departmental proceeding, he gave a notice of voluntary retirement under Rule 1802 (b) (b) of Indian Railways Establishment Code and statutory period of notice had expired without an order being passed by the authority either witholding the permission or retaining the Railway employee in service and that after expiry of the statutory period of notice of voluntary retirement, the order of removal was passed on conclusion of the departmental proceeding. The Hon'ble Suprame Court upheld the judgment of the Central Administrative Tribunal holding that the order of removal passed after the exipiry of the Statutory period of notice of voluntary retirement was a nulity.

11. The aforesaid decisions squarely apply on the facts of the

instant case. Admittedly the petitioner's service was not extended by the appropriate authority after he attained the age of 'super annustion on 31. 12. 1987 and consequently the petitioner effectively retired from service on and from 31. 12. 1987. The impugned order of dismissal was passed on 21. 5. 1990 long after the retirement of the petitioner, when the discipinary action could not be taken against him. As such, the impugned order is illegal and without jurisdiction and is a nullity.

12. For the reasons stated above, the petition is allowed and the impugned order issued under Memo No. 397 dated 21.5. 1990 (Annexue—1) by the Colector, Samastiput (Respendent no. 2) is set eside.

13. Homever, this decision setting aside the impuguned order shall not preclude the respondents to proceed against the petitioner under the provisions of the Bihar Pension Rules in accordence with law. I make no order as to cost.

R. D. Application allowed.

CIVIL WRIT JURISDICTION

Before S. K. Homechaudhuri, J.

1995.

May, 23.

Upendra Prasad

V.

The State of Bihar & ors.

PENSIONARY BENEFIT— continuous service rendered by writ-petitioner as extra-clerk from the date of his initial appointment as extra-clerk to the date of his absorbtion as temporary clerk in the establishment of the District Registrar,— whether can be counted as qualifying service for the purpose of pension and pensionary benefit— Bihar Pension Rules 1950, Rule 59..... provisions of.

Held, that the continous service rendered by the writ-petitioner as extra-clerk from April, 1957 to 23. 1. 1981 in the establishment of District Registrar. Samastipur when he was appointed as temporary clerk in the said Department, should be counted as qualifying service for the purpose of pension and pensionary benefit only.

Respondent no 1 and 2 are directed to pass appropriate order in excrcise of power under section 59 of the Bihar Pension Rules 1950. declaring that the service rendered by the writ-petitioner, as extra-clerk from April, 1957 till the date of his appointment as temporary clerk should be treated as qualifying service for the purpose of pension and pensionary benefit only.

Appication under Articles 226 and 227 of the Constitution of

* Civil Writ Jurisdiction Case No. 11980 of 1993. In the matter of an application under Articles 226 and 227 of the Constitution of India.

india.

The facts of the case materialto this report are set out in the judgment of S. K. Homchaudhuri j.

Mr. Y. V. Giri, Mr. Dhananjay Kumar Dubey & Mr. Jyoti Saran for the petitioner.

Mr. J.P.Karn,. S. C. VII, Mr. Rana Bhupendra Nr. Singh, J. C. to S. C. VII for the respondent No. 6.

By this petition under Articles 226 and 227 of the Constitution of India, the petitioner has approached this Court for issuance of an apporpriate writ or direction commanding the respondents to taken into account the petitioner's services rendered as Extra clerk from the period April, 1957 to 23. 1. 1981 in the establishment of District Registrar, Samastipur before he was absorbed as temporary clerk in the said Department as qualifying service for pensionary benfit .

2. The unidisputed facts in this case are that after being selected, the petitioner was appointed as extra clerk in the office of the district Sub-Registrar, Samastipur on and from in the month of April, 1957 and he continued to work as extra clerk till he was absorbed as temporary clerk by the order issued under Memo No. 172 dated 24. i. 1981,While working as temporary clerk, the petitioner was absorbed as permanent clerk in the said Dapartment by the order dated 30. 5. 1990 and he continued to work as such till he retired from service on attaining the age of superannuation on 31. 12. 1992. After his retirement, the petitioner was granted pension and pensionary benefit by taking into account the period from 24. 1. 1981 to the date of his retirement as qualifying service and the continuous period of service he rendered as extra clerk in the office of the District Registrar, Samastipur from April, 1957 was not taken into account for the purpose of granting pensionary benefit.

3. The petitioner made serveral representations with the

prayer to take into account the continuous service rendered by him as extra clerk from April 1957 to 23. 1. 1981 for the purpose of granting pensionary benefit but of no avil. The petitioner has therefore approached this court in this writ petition.

4. The petitioner's case, in short, is that in the Registration office, Samastipur, there are (1) Permanent, (2)Temporary and (iii) Extra Clerks, whereas the permanent and temporary clerks have a regular scale of pay, the extra cllerks are being paid wage on the basis of piece-rate orginaly Rs. 1. 00 per page which subsequently raised to Rs. 2. 00 per page, subject to a maximum of 24 pages per day. There is a modality for appointment of extra clerks, provided in Rule 26 (2) of the Bihar Registration Manual, 1946. As per the provisions, a select list of extra clerks should be prepared in advance in each sub-registry office. The selection of the persons should be made after proper advertisement. In making selection, importance should be attached to neatness and quality of writing and those who are matriculate's and can also write the vernacular language should be given preference. preference should also be given to persons sho are not over 30 years of age and the appointment should be confined to persons who are residents of the district. According to the petitioner, appointments to the post of temporary or permanent clerks from the post of extra clerks were made by way of promotion which is evident from he Government letter/instruction dated 8th July, 1987 issued to all the District Registrars where in it has been clarified that the appointment from the post of extra clerk to the post of temporary clerk and form the post of temporary clerk to the post of permanent clerk,would be treated as promotion and the District level roster should be applied there in. The petitioner having been promoted from the post of extra clerk to temporary clerk and there after from the post of temporary clerk to the post of permanent clerk, he is entitled to the benefit of counting the continuous period of service he rendered as extra clerk, till his

promotion as temporary clerk, for the purpose of pension or pensionary benefit and denial there of is arbitrary and unjust.

5. The respondent in their counter affidavit have contended that the period of service rendered by the petitioner as extra clerk could not be counted for the purpose of pensionary benefit for the simple reason that the extra clerk is not a post in Government service. The Extra clerks are engaged on the basis of remuneration Rs. 2/— per page for copying deeds and are not entitled to any benefit of Government service. Under the policy decisions of the Government, an extra clerk is appointed to the post of temporary clerk as and when vacanoy arises.

6. I have heard Mr. Y. V. Giri, learned counel for the petitioner and Mr. J. P. Karan, S. C. VII, for the respondents.

7. Mr. Giri has submited that undisputedly in the Registration Office, Sanastipur, there are three cadres, namely, (1) Permanent, (11) Temporary and (iii) Extra Clerks. Rule 26 (2) (a) of the Bihar Registration Manual, 1946 provides modaity for Appointment of extra clerks. The appointments are made on the basis of selection. The extra clerks discharged the same duties and functions as is discharged by temporary and permanent clerks. Only because that the extra clerks are paid wages on the basis of piece-rate, i. e. Rs. 2. 00 per page it cannot be said that they do not hold government post. Sub-Regisistrur or the District Registrar is not authorised under the Rule to appoint any one as extra clerk without following the procedure under the Bihar Registration Manual, 1946. There is also provision for reservation in the appointment of extra clerks. It is apparent that by the clarification made by the Government in the letter/instruction dated 8th July, 1987, that appointment of temporary cerks from the post of extra clerks is not a fresh appointment and such, appointment is to be treated as promotion. Mr. Giri has contended that extra clerks hold civil post under the Govern-

ment. In support of the contention Mr. Giri has placed reliance on the decision of this court in the case of *Subodh Kumar Jha* vs. *The State of Bihar & ors.*, reported in 1989 PLJR—1, where in this court in exercise of Jurisdiction under Article 226 of the Constitation of India interfered with the order of termination of services of extra clerks and quashed the orders of termination holding that the termination of service was bad in law. Mr. Giri has also placed reliance on the decisions of the Hon'ble Supreme Court in the case of *Superintendents of post Offices* vs. *Rajamma*. reported in AIR 1977 S. C. 1677, where in the Hon'ble Supreme Court held that extra departmental agents connected with postal department hold civil post.

8. Mr. Giri has also drawn my attention to Rules 59 and 63 of the Bihar Pension Rules and has submitted that under Rule 59 the Government is empowered to declare that any special kind of service renderd in a non-gazetted capacity shall qualify for pension and that as per note to Rule 63 of the Bihar Pension Rules the holder of a temporary post supplementing a permanent cadre of posts of the same kind and so arrying parallel duties, though actually employed on work properly pertaining to a permanent post in this cadre, shoud still be considered to have rendered service in the temporary post. He also submitted that the continous service as extra clerk till the petitioner's promotion as temporary clerk should be counted for the purpose of pension and pensionary benefit and denial there of is unjust and inequitable.

9. Mr. Karn, S. C. VII, on the other hand, has submitted that the extra clerks are out side the regular civil services and consequently the service rendred by the incumbent as extra clerk cannot be counted for the purpoe of pension and pensionary benefit. Mr. Karn further submitted that it is apparent from the Provisions of Rules 45 and 58 of the Bihar Pension Rules that the petitioner's service as extra clerk cannot be counted for the

purpose of pension and pensionary benefit. Mr. Karn has placed relince on a decision of a Division Bench Judgment of this Court in C. W. J. C. No. 7379 of 1992 and other analoguous cases (*Janki Tante & ors. vs. The State of Bihar & ors.* where in this court held that the services rendered by the petitioners under the management of the Institution prior to the nationalisation could not be treated as service under Govt. for the purpose of pension and pensionary benefit.

10. Mr. Karn has submitted that by the letter dated 8th July, 1987 the Government made some clarification but that does not mean that the Government made a policy decision that the appointment to the post of Temporary clerk from the post of extra clerk was promotion and the petitioner cannot take advantage of that clarification.

11. I have considered the submissions made on behalf of the petitioner had the respondents and perused the materials placed before me.

12. It is not disputed that the modality for appoiontment of extra clerks in the office of the District Registrar is provided under rule 26 (2) (a) of the Bihar Registration Manual, 1946 and as per the provisions of the said Rule the extra clerks are selected and a select list is prepared in each district. There are permanent. temporary and extra clerks in the Registratin Office but while the permanent and temporary clerks are appointed in a regular scale of pay scale, the extra clerks are paid on the basis of piece-rate originally Rs. 1. 00 per page which subsequently increased to Rs. 2. 00 per page subject to maximum of 24 pages per day. The extra clerks are appointed because the temporary clerks and permanent clerks employed in the office cannot cope with the work of making copies of registered documents. Evidently the extra clrks are employed to supplement the works of permanent and temporary clerks so that the copies of registered

document can be supplied to the public in time within 21 to 30 days. The difference between the extra clerks and the permanent clerks is that while the permanent and temporary clerks have a regular scale of pay and the extra clerks are paid wages on the basis of piece-rate. Taking into consideration the aforesaid facts this court in the case of *Subodh Kumar Jha* & ors. (supra) interfered with the order of termination of service of extra clerks in the exercise of power under Articles 226 and 227 of the Conntitation of India, treating the post held by the extra clerks as civil posts under the Government. As such the extra clerk may fall out side the regular civil service but they hold civil post under the Government.

13. To appreciate the rival contentions, it is appropriateto have a look into ths provisions of Rules 45, 58,59, 61 and 63 of the Bihar pension Rules1950.

"45. In the following cases no claim to pension is admitted :—

(a) When a government servant is appointed for a limited time only, or for a specified duty, on the completion of which he is to be discharged.

(b) When a person is employed temporarily on monthly wages without specified limit of time or duty.

(c) When a person's whole time is not retained for public service, but he is merely paid for work done, such as Government pleaders and law Officers not debarred from private practice.

(d) When a public servant holds some other pensionable office, he earns no pension in respect of an office of the Kind mentioned in clause (c) or in respect of duties paid for by compensatory allowance.

(e) When a Government servent serves under an agreement which contains no stipulation regarding pension, unless the provincial government specially authorise him to count such service towards pension.

58. The service of a Government servant does not qualify for pension unless it conforms to the following three conditions:—

First— The service must be under Government.

Second— The employment must be substantive and permanent.Third—The service must be paid by Government. These three conditions are fully explained in the folloing sub-sections.

59. The Provincial Government may. however, in the case of service paid from general revenues, even though either or both of conditions (1) and (2) are not fulfilled—

(1) declare that any special kind or service rendered in a non gazetted capacity shall qualify for pension;

(2) in individual cases, and subject to such conditions as it may think to impose in each case, direct that service redered by Government servant shall count for pension.

61. Service does not qualify unless the Government servant holds substantively a post on a permanent establishment.

63. A Government servant transferred from a temporary to a permanent appointment can count his service in the temporary post, if though at first created experimentally or temporarily, it eventually becomes permanent.

Note:—This rule implies that when an isolated post unconnected with a cadre, sanctioned temporarily or experimentally in the first instance is subsequently made permanent, the whole temporary service of a Government servant or Goverment servants in that post should count for pension provided that such a Government servant or Government servants are subsequently appointed substantivey to a permentent post. The concession is admissible only to Government setrvant who render temporary service, substantive

or officiating, while having no lien on a permanent post, and is admissible to a Government servant even though he no longer holds the temporary post when it is made permanent.

To obviate anomalies that may arise from a literal application of this rule in case of a particuar class, the following principles should be observed in applying the rule in such case: —

(1) The holder of a temporary post supplementing a permanent cadre of posts of the same kind and carrying parallel duties, though actually employed on work properly pertaining to a permanent post in this cadre, should still be considered to have rendered service in the temporary post.

(2) When some of several temporary posts, supplementing a permanent cadre as in (1) above, are converted into permanent posts and permanent promotion to these posts is made according to seniority or by selection, the Government servants actually so promoted should be considered as the holders of the temporary posts which have been converted and should be allowed to count their temperary service rendered in the posts."

14. Mr. Giri is right in submitting that Rules 45, 58 of the Bihar Pension Rules, on which the learned Standing counsel has placed reliance, should not be read in isolation but has to be read with Rules 59, 61 and 63 of the Bihar Pension Rules with note thereunder. Reading the aforesaid provisions of the Bihar Pension Rules it becomes clear that intendment is not to curb but to extend the pensionary benefit to the different classes of employees for the period of services renderd. In order words, the approach in extending the benefit of pension for the service rendered, is liberal, Rule 59 of the Bihar pension Rules also empowers the Government to daclare that any special kind of service rendered in a nongazetted capacity shall qualify for

pension. The continuous period of service from April, 1957 to to 23. 1. 1981 rendered by the petitioner as extra clerk as apparently by way of supplementing that of cadre posts of the same kind carrying parallel duties.

15. Had the petitioner not been appointed as temporary clerk while rendering continous service as extra clerk, he might not have atall been entitled to pension and pensionary benefit. In the instant case, while rendering continuous service as extra clerk for a long period, the petitioner was appointed to the post a long period, the petitioner was appointed to the post of temporary clerk and there after as permanent clerk in the same establishment and the Government by the order/ instruction dated 8th Juy, 1987 clarified that appointment from the post of extra clerk to the post of temporary clerk should be treated as promotion. This court can also take judicial notice of the fact that both the Central Government and the State Governments are making schemes for granting old age pension to the citizens. The petitioner has rendered public service continuously from April, 1957 to 23. 1. 1981 as extra clerk and denial of pensionary benefit in respect of the said period of service by taking supertechnical and pedantic approach is unjust and inequitable. The decisions of this Court in the case of *Janki Tante & ors.* (C. W. J. C. No. 7379 of 1992) on which the learned Standing counsel has placed reliance has no application on the facts of the present case. In that this Court held that a lecturer or an employee of a College was not entited to claim pensionary benefit for the period of service rendered by him under the Managing Committee of the private college before nationalisation there of by the Government. But the petitioner also being appointed as extra clerk by the District Sub-Registrar under the provisions of the Bihar Regulation Manual, 1946 had rendered continuous public service holding civil post under the Government during the period in question.

16. For the reasons stated above, I am inclined to hold that the continuous service rendered by the petitioner as extra clerk from April, 1957 till his appointment as temporary. clerk, should be counted as qualifying service for the purpose of pension and pensionary benefit only. The petition is, therefore, allowed and reapondents no. 1. and 2. are directed to pass appropriate order in exercise of power under section 59 of the Bihar Pension Rules declaring that the service rendered by the petitioner as extra clerk from April, 1957 till the date of his appointment as temperary clerk should be treated as qualifying service for the purpose of pension and pensionary benefit only. The respendents shall ensure that passing of the appropriate order under Rule 59 of the Bihar pension Rules and payment of consequential revised pension to the petitioner in pursuarce of the order, is completed with in six months from the date of receipt of a copy of this order.

R. D. Application allowed.

MISCELLAEOUS CRIMINAL

Before Indu Prabha Singh J.

1995.

May, 25.

*Jagmohan Singh and anr.**

V.

The State of Bihar and ors

Code of Criminal Procedure, 1973 (*Central Act no.* II *Of* 1974) *Section* 468 (2) (c) ——*offences punishable with a sentence of three years* ——*cognizance taken after three years, whether liable to be quashed.*

Fard Beyan with respect to different offences punishable with a sentence of maximum of three years were lodged on 3. 9. 1988 in all the three cases and cognizance of the offences with respect all the cases were taken against the petitioners on 16. 2. 1994.

The cognizance of the offences against the petitioners in all the cases having been taken after more than three years is after the expiry of the period of limitation, the cognizance as also the criminal prosecution against the petitioners are quashed in accordance with section 468 (2) (c) of the Code of Ciminal Procedure, 1973.

Case Laws discussed.

Application by accused.

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* Criminal Misc. No. 17787 of 1994. With Criminal Misc. No. 17848 of 1994. with Criminal Misc. No. 14612 of 1994. In the matter of an application under section 482 of the Code of Criminal Procedureg.

(1) In cr. Misce. No 17848 of 1994 Inderjit Singh and ors ..... Petitioner.

(2) In cr. Misc. No. 14612 of 1994 ..... Jitendra Pal Singh..... petitioner

The facts of the case material to this report are set out in the judgment of Mrs Indu Prabha Singh,. J.

Mr. Chitranjan Sinha and, Mr. Rabindra Nath Choudhry for the petitioners (in all cases)

Mr. Swarn Singh Bagga (in person) for opposite party no.2.

I. P. Singh, J. These three case have been heard together and this judgment will govern all of them.

2. The order dated 28. 3. 1995 passed in Cr. Misc. No. 17787of 1994 runs as follows :—

"Heard.

Since three cases, namely, Cr. Misc. Nos. 17848 of 1994, 14612 of 1994 and this case seem to have been filed against the same impugned order, it appears proper that all the cases be listed together for consideration analogous. It appears that there is already a note in the record of Cr. Misc. No. 14612 of 1994 indicating that Hon'ble that Chief Justice and Hon'ble N. K. Sinha, J. had observed to place this case before the Bench of Hon'ble I.P. Singh, J. Let all three cases be listed for admission before the same Bench in the weeks."

3. In Cr. Misc. No. 14612 of 1994 the order dated 6. 10. 1994 runs as follows:—

"Iasue notice to opposite party no. 2, in the admission matter so that this application may be finally disposed at the stage of admission itself on process etc..., being filed by tomorrow (7. 10. 94) failing which this application as against him shall stand rejected without further reference to a Bench."

Similarly in Cr. Misc. No. 17848 of 1994 the order dt. 4. 1. 1995 has been passed as follows:—

"Issue notice to opposite party no. 2. in the admission matter to show cause as to why this application be not admitted and, if

possible, finally disposed of at the admission stage itself for which requisites etc. must be filed within one week failing which the application as against O. P. No. 2 shall stand rejected without farther reference to a Bench."

4. In Cr. Misc. No 17787 of 1994 the order dated 18. 1. 1995 was passed as follows:—

Issue notice to opposite party no. 2 in admission matter to show cause as to why this application be not admitted and, if posible, disposed of at the admission stage itself, for which, process etc. must be filed within one week failing which the application as againat him shall stand rejected without further reference to a Bench."

5. This is how all these three Cr. Misc. cases have been heard together at the stage of admision itself and are being disposed of at this stage.

6. In Cr. Misc. No. 17787 of 1994 opposite party no. 2, Sardar Swarn Singh Bagga, is the complainant while the petitioner Indrajit Singh Khanna and others have been made accused. In Cr. Misc. No. 14612 of 1994 also opposite party no. 2, Sardar Swarn Singh Bagga, is the complainant while the petitioner Jitendra pal Singh is the accused.

7. In all three Cr. Misc. cases a common point has been taken by the petitioners that since the cognizance against them has been taken beyond the statutory period as provided by section 468 of the Code of Criminal Procedure (in short the 'Code') the same should be quashed and criminal cases against them should not be allowed to proceed.

8. This takes up to the consideration of the true seope of section 468 of the Code to which I will refer to subse quently, but firstly the facts have to be stated.

9. In Cr. Misc. No. 17787 of 1994 arising out of the Com-

plaint case No. 171 (c)/ 1992 the Fardbeyan of oppesite party no. 2, Sardar Swarn Singh Bagga, was filed on 8. 8. 1988, on the basis of which Kotwali P. S.case,No. 884 of 1988 was instituted under sections 341, 323, 371 and 194 of the Indian Penal Code. In course of investigation a protest petiton was filed on 11. 12. 1988. The final form was submitted by the police on 24. 4. 1991 as" case not true" with a request to prosecute the informant under sections 182 and 211 of the Indian PenalCode. This Final Form was accepted by the Magistrate and the protest petition was transferred under section 192 of the Code to another Magistrate who proceeded to examine opposite party no. 2 on selemn affirmation and to take cognizance of the offence under sections 379 and 232 of the Indian Penal Code by the impugned order dated 16. 2. 1994. It is this order which has been challenged in the present application.

10. Similarly in Cr. Misc. No. 17848 of 1994 also opposite party no. 2, Sardar Swarn Singh Bagga, is the complainant in the same complaint case no. 17(c) of 1992. The other facts of this case has already been stated in Cr. Misc. No. 17787 of 1994. Here also the Fardbeyan was recorded under sections 341, 328, 379 and 334 of the Indian penal Code and the final report as stated above was submitted on 24. 4. 1991. In the meantime, the protest petition was filed on 11. 12. 1988. while the cognizance taking Magistrate accepted the final report submitted by he police he transferred the protest petition to another Magistrate under section 192 of the Code who examined the complainant on solemn affirmation and took cognizance on 16. 2. 1994 for the offence under sections 379 and 325 of the Indian Penal Code.

11. The facts in Cr. Misc. No. 14612 of 1994 are also the same. Here also opposite party no. 2, Sardar Swarn Singh Bagga, is the complainant and complaint casee No. 171 (c) of 1992 was started on the basis of his complaint. The matter went to the police which submitted final form on 24. 4. 1991 as "case not

true" with a request to prosecute the informant under section 182 and 211 of the Indian Penal Code. In the meantime, the protest petition was filed on 11. 12. 1988. The cognizance taking Magistrate accepted the final report on 23. 3. 1992 and transferred the protest petition for inquiry and disposal under section 192 of the Code to another Magietrate who took cognizance of the offence by the impugned order dated 16. 2. 1994 under sections 379 and 328 of the Indian penal Code.

12. The main contention on behalf of the petitioners in all these thres cases is that the alleged date of occurrence is 8.8. 88 the day on which the fardbeyan was recorded. Even Kotwall P.S. Case No. 884 of 1988 was registered on 9. 8. 1988 and the cognizance has been taken on 16. 2. 1994. The main thrust of argument is that this cognizance against the petitioners in all these three cases is directly hit by section 468 of the Code and, there fore, the orders taking cognizance are liable to be quashed.

13. This takes us to the consideration of section 468 of the Code which runs as follows:—

> "468. Bar to taking cognizance after lapse of the period of limitation— (1) Except as other wise provided elsewhere in this Code, no Court shall take cognizance of an offence of the category apecified in sub-section (2), after the expiry of the period of limitation.
>
> (2) The period of limitation shall be—
>
> (a) six months, if the offence is punishale with fine only;
>
> (b) one year, if the offence is punishable with imprisonent for a term not exceeding one year;
>
> (c) three years, if the offence is punishable with imprisonment for a term exceeding one year;
>
> (3) For the purposees of this section, the period of limitation, in relation to offences which may be tried to-

gether, shall be determined with reference to the offence which is punishable with the more severe or, as the case may be, the most severe punishment."

14. This section clearly provides that no court shall take cognizance of the offences of the category specified in sub section 2(c) after the expiry of the period of limitation, Under sub-section 2 (c) the period of limitation is three years, if the offence is punishable with imprisonment for term exceeding one year but not exceeding three years.

15. Coming to the allegations made against the petitioners they are under sections 341, 323, 379 and 384 of the Indian Penal Code Whereas the cognizance against them has been taken only under sections 379 and 323 of the Indian Penal Code. Even if all the allegations made againat the petitioners are taken into consideration section 384 of the Indian Penal Code is punishable with imprisonment for three years or fine or both. Similarly the affence under section 379 of the Indian Penal Code is punishable with imprisonment for three years or fine or both. Offences under sections 341 and 323 of the Indian Penal Code call for lighter punishments. while the offence under section 341 of the Indian Penal Code is punishable with the simple improsonment for one month or fine of Rs. 500/— or both. the offence under section 323 of the Indian Penal Code is punishable with imprisonment for one year or fine of Rs. 1000/— or both. From this it would appear that for all these offences the most sevre punisment is imprisonment for three years which could be awarded for the offence under section 379 or section 384 of the Indian Penal Code. Hence they will clearly come with in the seope of section 468 (2)(c) of the Code for which the period of limitation for taking cegnizance would be only three years and not more. In the present ease while the alleged offence is said to have taken place on 8. 8. 1988 and the police case was registered on 9. 8.1988 the cognizance against the petitioners in all these

applications was taken on 16. 2. 1994, namely, after a period of five years four months and seven days. Thus, the cognizance taken against the petitioners in the present case is clearly hit by section 468 of the Code, The present cases do not come under the various exceptions given in this chapter (Chapter XXXVI). According to section 478 of the Indian Penal Code the period of limitation can be extended in certain cases authorising a court to take cognizance of an offence even after the expiry of period of limitation if it is satisfied on the facts and in the circumstances of the case that the delay bas been properly explained or that it is necessary so to do in the interest of justice. In the present case there is no prayer on behalf of the complainat (O.P. No. 2) for the extencion of period of limitation. Even the court taking cognizance of the offences has not extended the period of limitation on any ground whatsover. Under the circumtances, the opposite party no. 2. can not claim the benefit of asction 478 of the code. The offences alleged against the petitioners are not of continuing nature and, there fore, the provision of section 472 of the Code would also be not attracted.

16. Under the aforeasid circumstances, it is clear that the contentions reaised by the petitioners are correct and have to be accepted. It also becomes clear that the cognizance against the petitioners in all these cases were taken after expiry of period of limitation and are, accordingly, liable to be quashed.

17. On behalf of the petitioners reliance has been placed on the case of *Rama Kant Singh* Vrs. *The State of Bihar* (1). This was a case of an accused being charged with an offence for which a maximum term of one year imprisenment could be awarded. However, the cognizance of the offence was taken by the court after the expiry of this period.It was, accordingly, held by this Court that taking of cognizance and the criminal proscution of the petitioner must be queshed. In this reported decision reli-

(1) (1990) 2 P. L. J. R. 70.

ance has been placed on the case of *Surinder Mohan Vikal* V. *A. L.Chopra* (1). in which the Hon'ble Supreme Court has clearly held that in a clear case of limitation and on admitted facts if the cognizance is taken after the expiry of period of limitation it can be quashed by the High court in exercise of the powers vested in it under section 482 of the Code. In this very decision reliance has also been placed on the case of *State of Punjab Vrs. Swam Singh* (2).

18. On behalf of the respondents reliance has been placed on the case of *Rabri Karshan* Vrs. The *State of Gujrat* (3) This decision is, however, of no help to the respondents inasmuchas it is a decision with respect to what should be treated to be the First Information Report and what could be excluded as the subsequent complaint hit by section 162 of the Code. The respondents have also relied on the decision of *Bhagwan Singh Vrs. The Commissioner of police* (4). This decisaion is also of no assistance to the respondents.

19. From the detailed discussions made above, it becomes perfectly clear that the prayer of the petitioners in all these cases are completely justified and are fit to be allowed.

20. In the result, these Criminal Misc. cases are allowed and the order taking cognizance against thepetitioner in all these three cases on 16. 2. 1984 or on any other date as also the crminal proecution aginst them are quashed. The petitions are allowed, acordingly.

R. D. Applications allowed.

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(1) (1978) A. I. R. (S. C.) 986.

(2) (1981) A. I. R. (S. C.) 1054.

(3) (1977) Cr. L. J. 107.

(4) ((985) P. L. J. R. 53

CIVIL WRIT JURISDICTION

Before S.K.Homchaudhuri and Aftab Alam, JJ.

1995.

May, 25.

Dr.Ratneshwar prasad Singh and ors.

v.

The State of Bihar and others.

Bihar State University (Constituent Colleges) Service Commission— constituted by the State Government by notification dated 16.3. 1994— validity of —Two of the Members of the Commission were granted promotion as professors under *time bound promotion schen e— their promotion not concurred within six month by Commission in accordance with sub-section* (10) *of section* 58 *of the Bihar State Universities Act 1976 as incorporated by Bihar State Universities (Amendment) Act,*1993—*whether stand automatically reverted to their lower posts—their nomination as member of the Commission, whether invalidates the constitution of the Commission—selection of Principals and their consequent appointments by the Commission, whether viod— Bihar State Universities Act,* 1976 *(Bihar Act no.* XXIII of 1976 *as amended by Bihar State Univrsities (Amendment) Act,* 1993 *(Bihar Act no.XVII of* 1993) *section* 58 *subsection* (10)—*provisions of.*

Where the Government of Bihar, Department of Higher

* Civil Writ Jurisdiction Case No. 5354 of 1884 and Civil Writ Jurisdiction Case Nos. 8221 of 1994. In the matter of an application under Articles 226 and 227 of the Constitution of India.

In C. W. J. C. No. 8221/1994..... Dr. Meera Das Gupta & ors... Petitioners

Education by a notification dated 16. 3. 1994 constituted the Bihar State University (Constituent College) Service Comission, here in after referred to as the Commission, with a Chairman and four other members including B.P.Yadav and Suresh Prasad Singh as members of the Commission:

Held, that both B.P. Yadav and Suresh Prasad Singh were promoted under the time-bound promotion scheme without the recommendation of the Commission and their appointment was also subsequently not concurred by the Commission, Consequently, in accordance with the provisions of sub-section (10) of section 58 of the Bihar State Universities Act, 1976 as incorporated by Bihar State Universities (Amendment) Act 1993, the time bound promotion of both B. P. Yadav and Suresh Prasad Singh to the posts University Professor came to an end after the expiry of six months form the date of their promotion to the said posts and they stood automatically revereted to the lower posts, from which they were so promoted. Hence both B. P. Yadav and Suresh Prasad Singh ceased to hold the posts in the rank of University Professor long before their appointment as Members of the Commission. As such, they did not have requisite qualifications for their appointments as Members of the Commission and consequently the Commission, constituted by the impugned notification dated 16. 3. 1994 is illegal and invalid.

Held, further, that constitution of the Commission by notification dated 16. 3. 1994 having been held illegal and invalid, any selection of the principal by Commission or any appointment made on the basis of such selection are equally invalid, inoperative and void.

per S. K. Homchaudhuri, J.

Held, further, that Principal of a college holds the key position in the institution and that the maintenance and academic discipline and imparting of proper education in the college

much depend on the ability, personally and efficiancy of the individual holding the post of the Principal. In respect of appointment of the Principal of the college there should by no compromise regards the merit of the incumbent on any ground. A mechanical approach in keeping reservation in the post of Principal of the College at a uniform percentage is unreasonable and unrealisitic.

Indra Sawhney v. *Union of India* (1)— followed.

Case Laws discussed.

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

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

Shri Rajendra Prasad Singh, Sr. Advocate and Shri Anil Kumar Upadhyay for the petitioners in C. W. J. C. No. 5854 of 1994

Mr. Sadanand Jha, Sr. Advocate, M/s Prakash Chandra Gupta, Indu Bhushan Singh, Asim Jha & A. K. Srivastava, in C. W. J. C. No. 8221 of 1994.

Mr. S. A. Narayan, A. A. G. II of the State.

Mr. P. N. Roy of the University.

S. K. Homchaudhuri, J. In both the writpetitions identical points are involved and as such, the petitions are disposed of by this common judgment.

2. The points for decision involved in these petitions are:

(i) Whether constitution of the present Bihar University

(1) (1992) A. I. R. (S. C.) 447.

(Constituent Colleges) Service Commission by the notification dated 16. 3. 1994 is invalid and if so whether the selections by the said Commission for the post of principal are illegal and void?

(ii) Whether the reservation sought to be made in the post of Principal of the Constituent Colleges at a fixed percentage is arbitrary, unreasonable and untenable.

(iii) Whether reservation in the post of Principal, even if permissible, would apply retrospectively in respect of the posts which fell vacant and for filling of which applications were already invited and received from the eligible candidates prior to enactment of the Bihar Reservation of Vacancies in the post and service (for scheduled Castes, Scheduled Tribes and other Backward Classes (Bihar Act 3 of 1992) or not.

In C. W. J. C. No. 5854 of 1994, following additional points are raised;

(i) that the Members of the Expert Committe appointed for selection of the Principals do not possess requisite qualification.

(ii) that constitution of the "Commission" close on the heels of the amendment of the provisions of the Bihar State Universities (Constituent Colleges) Service Commission Act, 1987, by Bihar Act 5 of 1994, is mala fide.

3. It is necessary to state the relevant facts, in brief, for deciding the points urged in the petitions. The Principals of the Constituent Colleges of the Universities in the State of Bihar are appointed on the basis of the selection made by the Bihar State Universities (Constituent Colleges) Service Commission (here in after referred to as the Commission'). The Commission is constitued as per the provisions of the Bihar State University (Constituent Colleges) Service Commission Act, 1987. Since 1987 posts of principal in a number of Constituent Colleges of the Universities in the State of Bihar fell vacant and the Commission invited applications from time to time from the

eligible candidates for appointment of Principal to fill up the vacant posts. the petitioners of both the writ petitioners along with others submitted applications in response to the advertisements offering their candidatures. But the Commission continued to sit over the applications and did not make any selection for a long time since 1987.

4. In the year 1992. the Bihar Reservation of Vacancies in post of service for scheduled castes, Scheduled Tribes and other Backward Classes Act, 1991 (Act 3 of 1992) was enacted. section 4 of the Act 3 of 1992 reads as follows:—

> "4.Resevation for direct recruitment—All appointments to services and posts in an establishment which are to be filled by direct recruitment shall be required in the following manner, namely:—
>
> (1) The available vacancies shall lbe filled up—

(a) Scheduled Castes.....	14 %
(b) Scheduled Tribes.....	10 %
(c) Extremaly Backward Class	12 %
(d) Backward Class	8 %
(e) Economically Backward Woman.....	3 %
(f) Economically Backward	3 %
Total	50 %

Under section 15 of Act 3 of 1992, the State Government is empowered to frame rule to give effect to the provisions of the Act. provision of Act 3 of 1992 was amended and by such amendment,after Clause (e) of sub-ection (6) of section 4, new clause (f) has been added, which reads as follows:—

> "(f) Notwithstanding anything contained in the contrary in the Ordinace or in any other law or rules for the time being in force, or in any judgment or decrec of the Court, the provisions

of section 4 shall apply to all such cases in which all formalities of selection have been completed before 28th April, 1993 but the appointment letters have not been issued."

Section 2(c) of the Act 3 of 1992, provides that term 'establishment', amongst others, includes Universities and Colleges affiliated to the University.

5. Following the enactment of Act 3 of 1992, the 'Commission' made an advertisement on 27. 7. 1992 inviting applications for vacant posts of Principlas of Constituent Colleges of different Univerities of Bihar indicating the total number of vacant posts number of posts reserved for the candidates of Scheduled Coste, scheduled Tribes and other Backward Classes etc. It is stipulated in the said advertisement that the candidates, who had already applied in response to previous advertisement need not apply again. In the year 1994, by the Bihar State University (Constituent Colleges) Service Commission known as Bihar State University (Constiuent Colleges) Service Commission (Amendment) Act, 1993 (Bihar Act 5 of 1994), the Bihar State University (Constituent Colleges) Service Commission Amendment Act, 1987, was amended. Section 3 of the Act 5 of 1994, which has direct bearing in petitioners' case runs as follows:—

"3. In place of section 6 of the Bihar Act, 18 of 1987, the following will be substituted;

"6. Qualification of Chairman and Members:—

(1) A person to be appointed as Chairman shall have a minimum of 5 years experience as a University professor.

(2) Excluding the Chairman, half of the members shall not be below the rank of University professor and half of the members shall not be below the rank of Additional Secretary of the Government of India State Government."

6. The Amendment Act, Bihar Act 5, 1994 was published in

the Bihar Gazette (Extra-ordinary) on 15. 3. 1994. Close on the heels of amendment, by notification dated 15. 3. 1994. the Government of Bihar, Department of Higher Education issued a notification on 16. 3. 1994 purporting to constitute the Commission as follows:—

"No ..... 14/94-149/ After the passing of the Bihar State University (Constituent Colleges) Service Commission (Amendment) Act, 1994 and because under the provisions of section 3 (ka) of the said Amendment Act, the tenure (karyakal) of the Chairman and all members of the Commission have automatically expired, the Governer, in exercise of the powers vested in him under section 3 of the original Act, makes appointment of the Chairman and members of the Bihar State University (Constituent Colleges) service Commission in the following manner:—

1.	Prof. Syed Abdul Waheb Asharfi M. A. (Urdu), M. A. (persian) M. A. (English), B. L. Ph. D. University Professor and Head, the Ranchi University, Ranchi.	Chairman
2.	Prof. L. N. Sahu, Head of the Department of Electrical Engineering, R. I. T. Jamshedpur.	Member
3.	Prof. B. P. Yadav, Former Member, Bihar State University Service Commission.	Member
4.	Prof. Suresh pd. Singh, University professor of Jeeva Vigyan (biology), Ranchi University & Principal,	

G. N. College, Dhurva, Ranchi. Member

5. Shri Satyanarayan Prasad,
professor of physics, Bhagalpur
College of Engineering, Bhagalpur. Member

2. The appointment of Chairman and members is done for a period of 6 years from the date of their joining or until they attain the age of 62 years whichver is earlier.

7. The newly constituted 'Commission' by way of Corrigendum made advertisement on 26. 4. 1994 forthe posts of Principal in the light of the new reservation policy indicating the total number of vacant posts of Principal in the constituent Colleges of different Universities and the number of posts reserved for the candidates belonging to Scheduled Caste, Scheduled Tribes, extremely Backward Classes, Women Backward classes etc. It is stipulated in the said advertisement that, the candidates, who had already applied in response to the previous advertisements, need not apply again.

8. In both the petitions, all the four members of the Conmission constituted by notification dated 16. 3. 1994 have ben impleaded as Respondents. The petitioners have challenged the constitution of the Commission by the notification dated 16. 3. 1994 on the ground that none of the respondents members so appointed possesses requisite qualification for appointment as the member of the Commission; inasmuch as:—

(i) R. I. T., Jamshedpur, is an autonomous body and is neither a Government College nor a University and, as such Respondent Prof. L. N. Sahu, who is the Head of the Department of Electrical Engineering, R. I.T., Jamshedpur, does not hold post equivalent to the rank of University Professor or the rank of Additional Secretary to the State Government or Central Govern-

ment.

(ii) Respendent Prof. Satyanarayan Prasad is a professor of physics of Bhagalpur college of Engineering. Bhagalpur. Bhagalpur College of Engineering is a Government College and is not a College under the Bhagalpur University and that in Bhagalpur Engineering College, there is no sanctioned post of University Professor. As such Respendent Satyanarayan Prasad does not hold the post equivalent to the rank of University professor or that of the Additional Secretary to the State Government or Central Government.

(iii) Both Respendent Prof. B. P. Yadav and Respondent Prof. Suresh Prased Singh were temporarily promoted to the post of professors form the post of Reader under the time-bound promotion scheme with out recommendation of the 'Commission' by the Ranchi University as per notifications dated 8. 2. 1989 and 28. 9. 1989, respectively. Their promotions to the posts of professor under the time-bound promotion scheme having not ben concurred by the 'Commission', their temporary promotions to the posts of Profesor were valid only for a period of 6 months and consequently both of them stood reverted to the posts of Reader after expiry of six months from the date of their promotion, by operation of law and they ceased to hold the posts of professor long before their appointment as Member of the 'Commission'.

9. The Petitioners have challenged the reservstion in the post of Principal of the Constituent Colleges on the following grounds:—

(i) There is no common cadre of Principal for the constituent colleges of the Universities in Bihar; inasmuch as

no rule constituting a common cadre of the Principls of the Constituent Colleges in the University, has yet been framed, which is mandatory for the constitution of a separate cadre. As such, the post of Principal in each Constituent College is a single post and there can be no reservation for a single post.

(ii) No amendment to the Rules has been made under the provisions of section 26 of the Bihar State Universities Act by the Senate. As per Clause 16 of the Bihar University Calender, there are reservations in the posts of Lacturer and no reservation in the post of principal can be made without making amendment to the relevant Rules. The amendment of Statutes as regards reservation of post made in the purported excercise of power under section 5(2) of the Bihar Inter University Board Act. as circulated under memo dated 10. 1. 1992 (Annexure B/1 to the affidavit-in-opposition is illegal and without jurisdiction.

(iii) The post of Principal is the key post in a College and the academic descipline and imparting of proper education to the students in the College much depend on the efficiency and ability of the Principal. As such, the reservation in the post of Principal, sought to be made is unreasonable and as such reservation will invariabily defeat the purpose of imparting proper education and upliftment of the students belonging to Scheduled caste, Scheduled Tribs and other Backward communities.

10. The Respondents in their affidavit-in-opposition, on the other hand, contended that the Commission has been validly constituted by notification dated 16. 3. 1994 and all the Members of the Commission have requisite qualifications for being appointed as Members there of in as much as:—

(i) Prof. L. N. Sahu is a Professor of Electrical Engineering in the Electrical Engineering Department of the Regional Institute of Technology (in short R. I. T.), Jamshedpur and the present scale of the post he held is Rs. 4. 500/—to 7, 300—, which is equivalent to the pay scale of the University Professor. Being the seniormost professor, Respondent Prof. L. N. Shahu was also working as Acting Principal of the R. I. T. Jamshedpur, at the time he was appointed as a Member of the Commission. He was appointed to the post of professor after being selected by the Select Committee through open advertisement and the he joined the post of Professor in the year 1975 and he was confirmed in the post long back. It was also contended by the Responden that the R. I. T., Jamshedpur, is an autonomous institution having been established by the Government of India in constultation with the concerned State Governement. As such, the post held by respondent Prof. Sahu cannot be held to be a post below the rankof a University Professor.

(ii) Respondent Satya Narayan Prasad is a professor of Physics in a Government College, namely, Bhagalpur College of Engineering and the pay scale of Professor of the said college is Rs. 4. 500/— to Rs. 7, 300/—, which is equivalent to the pay scale of a University professor as well as to the post of the Additional Secretary to the State government. Respondent Satya Narayan Prasad is a Class I Officer in the rank equivalent to that of the Additional Secretary to the State Government.

(iii) Respondents B. P. Yadav and Dr. Suresh Prasad Singh were appointed to the posts of professer from the posts of Reader under the time-bound promotion scheme by notifications dated 8. 2. 1989 and 20. 12. 1988, respectively, Respondent B. P. Yadav had been the members of the previous Commission. None of B. P. Yadav and Suresh Prasad Singh has attained the age of 62 years.

11. Rebutting the contention of the petitioners that the reservation in the post of principal is illegal and untenable, the Respondents have contended that the posts of Professsors are transferable from one college to another College. The Respondents have disputed the contention of the petitioners that the post of Principal being a single post, there can be no reservation for a single post. According to the Respondents, for the purpose of reservation, a provision has been made under the Act and Statutes so farmed was circulated to the Vice Chancellors of the Universities by letter dated 10. 1. 1992 of the O.S.D. (II), Governor's Secretariat, Bihar. Photo copy of the said letter is annexed as Annexure B/1 to the affidavit-in-opposition,which reads as follows:—

"I am directed to invite a reference to this Sectt. letter no. SU—28/82—53 18—GS (1) dated 24—25/11/80 on the above subject and to say that on the advice of the Bihar Inter University Board and the State Government in the Human Resource Development Department, Bihar, Patna, the Chance 11 or has been pleased to approve the following amendment to the Statute under section 5(2) of the Bihar Inter University Board Act, 1981 for implementation in all Universities (excluding Agricultural University) of Bihar—

PARINIUM KI KANDIKA (1) KE ANT ME WIHIT PRAWDHANO provided that the reservations shall apply only to the posts of lecturers and not to other categories of posts of teachers "KE ASTHAN PAR"Provided that these reservations shall apply to the posts of Lecturers/Principal and not to other categories of posts of teachers "KEPRATISTHAPIT KIYA JAYE."

12. Heard the learned counsel for the petitioners and the learned Additional Advocate General for the Respondents.

13. Learned counsel for the petitioners submitted that because of the fact that the pay scale of the professor of Electrical

Engineering in the Regional Institute of Technology, Jamshedpur, is equal to that of the university Professor, that cannot per se make the rank of Professor in R. I.T., Jamshedpur, equivalent to that of University Professor; inas much as the R. I. T., Jamshedpur, is not an University, but a College. Drawing attention to the definition of the 'University Professor' under the provision of section 2(w) of the Bihar State Unviersities Act. 1976. the learned counsel for the petitioners submitted that the function of the professor of Electrical Engineering is quite different from that of University Professor.

As regards the question of validity of appointment of respondent Staya Narayan Prasad, learned counsel for the petitioners, submitted that admittedly the Bhagalpur Engineering College is a Government College and Respondent Satya Narayan Prasad is a Professor of Physics in the said Collete. Mrely because the pay scale of the professor of the Bhagalpur Engineering College is. Rs. 4, 500/— to 7, 300/— and is not below to that of the Additional Secretary to the Government of Bihar, the rank of Professor of the said College cannot be equal to that of the rank of Additional Secretary to the Government of Bihar inasmuch as not only the Profesor of the said College and the Additional Secretary to the Government of Bihar belong to different and distinct cadre, their nature of function is also altogether different and distinct.

14. Learned counsel for the petitioners further submitted that so far as Respondents B. P. Yadav and Suresh Prasad Singh are concerned, admittedly, they are promoted to the posts of professors under the time-bound promotion scheme without recommendation of the Commission. It is also not disputed that their promotions on the posts of Professor under the time-bound promotion scheme have not been concurred by the Commission. That being so, under the provisions of sub-section (10) of section 58 of the Act, incorporated by Bihar State Universities (Amend-

ment—Act, 1993, Bihar Act 17 of 1993, their temporary promotions from the posts of reader to the posts of Professor automatically came to an end; inasmuch as such promotions shall not be valid for the period exceeding six months unless recommended by the Commission. As such both Respondents S. P. Yadav and Suresh Prasad Singh, as per the provision of law, stood reverted to the posts of Reader after expiry of six months from the date of their promotion and they had ceased to hold the posts of professor long before their appointments as Members of the Commission.

15. The learned Additional Advocate General, on the other hand, submitted that the pay scale is the most important criterian to determine the rank of a post. Respondent Prof. Satya Narayan Prasad is a Professor of Physics in the Bhagelpur Engineering College and pay scaleof the Professor in the Bhagalpur Engineering Collegeis Rs. 4,500/— to 7,300/—, which is not below to the pay scale of the Additional Secretary to the Government of Bihar. The Professor of the Government College is a Class—I Officer of the Government and he is treated equivalent to the rank of an Additional Secretary to the Government of Bihar. In any view, of the matter, the rank of Professor of the Bhagalpur Engineering College is not lower to the Rank of the Additional Secretary to the Government of Bihar. As such Respondent prof. Satya Narayan Prasad possesses requisite qualification for his appointment as a Member of the Commission. The learned Additional Adovcate General further submitted that Prof. L. N. Sahu is a professor of Electrical Engineering in R. I. T., Jamshedpur. The pay scale of professor of the R. I. T. is equivalent to that of the University professor. The term (professor' is to be taken in generic sense for determining the rank of Professor.The University Grant Commission made recommendation for giving the pay scale of Unviersity Professor to the Professor of the R.I.T. taking into consideration the impor-

tance, status, nature of job and the academic achievements. The most important criterain for determining the rank being the identical pay scale, it cannot be said that the rank of the post of Professor/Head of the Dempartment of the R.I.T., Jamshedpur is below the rank of Unviersity Professor.

So far as Respondents B. P.Yadav and Suresh Prasad Singh are concerned, learned Additional Advocate General submitted that although they were appointed temporarily under the time-bound promotion they continued to hold the posts of Unviversity Professor at the time of their appointments as Members of the Commission and as such they have had the requisite qualification for their appointments as Members of the Commission.

16. To appreciate the rival contentions of the parties, it is necessary to consider the meaning of the term 'rank' The word 'rank' as used under Article 311 of the Constitution of India has not been defined. However, it is to be noted that the rank has different connotation from the cadre. The rank ordinarily means a class or grade of service while the cadre means the strength of service or apart of service, which is sanctioned as a separate unit.

In the case of *Gopal* Vs. *Union of India*, reported in A.I. R. 1967 Supreme Court, page 1864, the appellant, a confirmed Inspector-Gereral of Registration and a head of the department in Madras State was transferred to the post of Accommedation Controller's post carrying the same scale of pay, as the former post was included in the I.A. S. Cadre post. The appellant challenged the legality of the transfer on the ground that the transfer resulted in reduction in rank firstly because the latter post was not the post of a head of the department and secondly because the post of I. G. was superior in rank to that a Deputy Secretary and the latter was not.

In that case, the Hon'ble Supreme Court took note of the fact

that the post to which the appellent was transferred, carried the same pay scale of the post from which he was transferred and rejected the contention of the appellant holding that the fact that the latter post was not designated as that of a head a of department was of no consequence as rank in Government service did not depend upon the mere circumstances that the Government servant in the discharge of this duties is given certain powers.

In the case of *S. K. Srivastava* Vs. *Union of India*, reported in 1971 (2) S. L.R. page 453, a Division Bench of the Delhi High Court observed as follows:—

"The concept of "rank" being solely significant for the purpose of administration of service and the law relating to it, the Government has always applied the criterion of pay to distinguish one class or grade of particular post or the scale of pay of a particular service, the Government considers the status and respon-subility attached to a particular post or class of service."

17. From the aforesaid decision of the Hon'ble Supreme Court as well as the Delhi High Court, it becomes apparent that the scale of pay is the important factor for determining the rank in Government service. I find force in the submission of the learned Additional Advocate General that the term 'Professor' should be taken in generic sense. The pay scale of the post held by Prof. L. N. Sahu is, admittedly, equivalent to the post of the University professor although the post of Professor of R. I.T., Jamshedpur does not belong to the carde of University Professor. In view of the fact that as per recommendation of the University Grant Commission, the Professor of R. I. T., Jamshedpur, has been provided scale equivalent to that of University Professor and the nature of profession of the University Professor and that of the Professor of R. I. T., Jamshedpur, is teaching, I am of the opinion that the post held by Prof L. N.

Sahu is not below the rank of University Professor and as such he has requisite qualification for his appointment as a Member of the Commission.

So far as the question of appointment of Prof. Satya Narayan Prasaad as a Member of the Commission is concerned, it is not disputed that the post of Professor of physics of the Bhagalpur Engineering College, which is held by him, is a Class—I post and his pay scale is equal to that of the Additional Secretary to the Government of Bihar and the Bhagalpur Engineering College being a Government College,it a cannot be said that the post of Professor of Bhagalpur Engineering College is below the rank of the Additional Secretary to the State Government. That being so, in my opinion, Prof. Satya Narayan Prasad possesses requisite qualification for his appointment as a Member of the Commission.

18. So far as Respondents B. P. Yadav and Suresh Prasad Singh are concerned, undisputedly they were provisionally promoted to the post of University Professors under the time-bound promotion scheme from the posts of Reader without recommendation of the Commission by the order issued by the University in the years 1989 and 1988. respectively.

19. The Statute regarding the time bound promotion Scheme was framed on the recommendation of the Bihar Inter University Board and the State Government, which was approved by the Chancellor under the provisions of the Bihar Inter Universities Act, 1981. The Statute was circulated by an office letter dated 21. 12. 1986. Under the Scheme, a Lecturer, after completion of ten years of continous service in one or more Universities, can be promoted to the post of Reader and similarly a Reader after completion of the prescribed period of continous service as Reader can be promoted to the post of University Professor in accordance with the provisions prescribed under the Statute

Clause 2 of the Statute provides that such promotion under the time-bound promotion scheme shall be deemed to be a personal promotion. but it shall not be automatic. Such promotion has to be made on the recommendation of the Commission on consideration of the experience. C.C. Roll of the teacher concerned.

20. The Scheme of time-bound promotion has been introduced with a view to removing stagnation of the individual employee in the pay scale of a particular post for a long time. such promotion is personal and is made primarily to give benefit of pay of the higher post. Such promotion is made irrespective of the fact whether there existed sanctioned post in the cadre of the higher post or not and the promotion is made generally without corresponding obligation to discharge the duties and responsiblities of the higher post.to which one is promoted. As such it is doubtful as to whether such personal promotion to higher post under the time-bound promotion Scheme can be regarded as promotion to the rank of higher post, to which one is promoted. Subsection (10) of section 58 of the Bihar State Universities Act, as incorporatd by Act 7 of 1973, to which learned counsel for the petitioners drow my attention, reads as follows:—

"10) Notwithstanding to the contrary contained in this Act or Statute, Rules or Regulations made there under promotion given on temporary basis of the University shall not be valid for a period exceeding six months unless recommended by the Bihar State University (Constituent Colleges) Service Commission."

21. Undisputedly, both Respondents B.P. Yadav and Suresh Prasad Singh were promoted under the time-bound promotion scheme without the recommondation of the Commission and their appointments were also subsequently not concurred by the Commission. Consequently, by operation of law, time-bound promotions of Respondents B. P. Yadav and Suresh Prasad Singh to the posts of University Professor came to an end after the expiry of six months from the date of their promotions to the

said posts and they stood automatically reverted to the lower posts, from which they were so promoted. For the reasons stated above, both Respondents B. P.Yadav and Suresh Prasad Singh ceased to hold the posts in the rank of University Professor long before their appointments as Members of the Commission. As such, they did not have requisite qualifications for their appointments as Members of the Commission and consequently the Commission, constituted by the impugned notification dated 16. 3. 1994, is illegal and invalid.

22. The petitions having succeeded on the ground that the contsitution of the Commission by the notification dated 16. 3. 1994 is illegal and invalid, I do not feel inclined to go into the other points realsed in the petitions. However, as regards the question of reservation in the post of principal of the Constituent Colleges of the Universities in Bihar. I am of the view that the Principal of a collage holds the key position in the institution and that the maintenance and academic discipline and imparting of proper education in the college much depend on the ability, personalty and efficiency of the individual holding the post of the Principal. There fore, in respect of appointment of the Principal of the college, there should be no compromise as regards the merit of the incumbent on any ground. In this connection, it is appropriate to take note of the observation of he Hon'ble Supreme Court made in paragraph 442 of the judgment passed in the case of *Indra Sahney* vs. *Union of India*, reported in A.I.R. 1993 S. C. 447, On which the learned counsel for the petitioners had placed reliance. In paragraph 442 of the said judgment, the Hon'ble Supreme Court, amongst others, was pleased to observe as follows:—

"In this connection, it is worth serious consideration whether reservations in the form of preference instaead of exclusive quota should not be resorted to in the teaching profession in the interests of the backward classes themeslves. Education is The source of advancement of the individual in all walks of life. the

teaching profession, there fore, holds a key position in societal life. It is the quality of education received that determines and shapes the equipment and the competitive capacity of the individual, and lays the foundation for his career in life. It is, there fore, in the interests of all sections of the society–socially backward and forward— and of the nation as a whole, that they aim at securing the ensuring the best of education. The student whether he belongs to the backward or forward class is also entitled to expect that he recevies the best possible education that can be made available to him and correspondingly it is the duty and the obligation of the management of every educational institution to make sincere and diligent efforts to secure the services of the best available teaching talent. In the appointments of teachers, there fore, there should be no compromise on any ground. For as against the few who may get appointments as teachers from the reserved quota, there will be over the years thousands of students belonging to the backward classes receiving education whose competitive capacity needs to be brought to the level of the forward classes. What is more, incompetent teaching would also affect the quality of education received by the students from the other sections of the society. However, whereas, those coming from the advanced sections of the society can make up their loss in the quality of education received, by education at home or out side through private tuitions and tutorial classes. those coming from the backward classes would have no means for making up the loss. The teachers them selves must further command respect which they will do more when they do not come through any reserved quota. The indiscipline in the educational campus is not a little due to the incompetence of the teachers from whatever section they may come, forward or backward. It is. there fore, necessary that there should be no exclusive quota kept in the teaching occupation for any section at all-However, if the candidates belonging to both backward and forward classes are equal in merit, preference should be

given to those belonging to the backward classes. For one thing, they must also have a "look into" the teaching profession as in other professions. Secondly, in this vital profession also, the talent, the social experience and the new approach and outlook of the members of the backward classes is very much necessary. That will enrich the profession and the national life. Thirdly, it will also help to meet the complaints of the alleged step-motherly treatment received by the students from the backward classes and of the lack of encourageement to them even when they are more meritorious. Hence in the teaching profession, it is preference rather than reservation, which should be resorted to under Article 16(4) of the Constitution. A precaution, however, has to be taken to see that the selection body has a representation from the backward classes."

23. The aforesaid observation of the Hon'ble Supreme Court in the case of *Indra Sawhney*, (supra) squarely applies against the reservation in the post of the Principal of the Colleges. A mechanical approach in keeping reservetion in the post of Principal of the Colleges at a uniform percentage is unreasonable and unrealistic.

24. In the result, he petitions are allowed. Constitution of the Commission by notification dated 16. 3. 1994 having been held illegal and invalid, any selection of the Principal by the Commission or any appointment made on the basis of such selection are equally invalid. inoperative and void. The Respondents are directed to reconstitute the Commission with qualified Members at an early date so that the vacant posts of the Principal in the Constituent Colleges may be filled up without further delay. In the facts and circumstances of the cases, I make on order as to cost.

Aftab Alam, J. Without going into the question of reservation, I agree that the constitution of the Commission was illegal and invalid and on that ground alone these applications are allowed.

R. D. Application allowed.

CIVIL WRIT JURISDICTION

Before B. L. Yadav and Shaskank Kumar Singh, JJ.

1995.
June, 27

*Anil Kumar and others.**

v.

The State of Bihar and ors.

Bihar State Universities (Second Amendment) Ordinace, 1994 and *Patna University (Third Amendment) Ordinance, 1994* --- promulgated by the Chancellor---validity of-----University Grant Commission, whether had the jurisdiction to issue guidelines for appointment of Lecturers in University and Colleges of Bihar---provision exempting candidates who had done Ph.D. or submitted Ph.D. thesis upto 31.12.1993 or who had done M. Phil. upto 31.12.1993 validity of.

Held, that the University Grant Commission was within its jurisdiction in issuing guidelines for appointment of teachers in the University and Colleges of the State of Bihar and the Chancellor was also within his jurisdiction in promulgating the Bihar State Universities (Second Amendment) Ordinance, 1994 and the Patna University (Third Amendment) Ordinance, 1994 in consequence thereto. The provision for exempting the candidates who had done Ph.D. or submitted Ph.D. thesis upto 31.12.1993 or have done M. Phil. upto 31.12.1992 from appearing in the Bihar Eligibility Test to be conducted by Bihar University Service Commission is valid.

Bhagalpur University Research Scholars v. State of Bihar and ors. (1) followed.

University of Delhi and ors. v. Raj Singh and ors. (2) followed.

*Civil Writ Jurisdiction Case No. 744 of 1995. In the matter of an application under Articles 226 and 227 of the Constitution of India.

(1) (1994) 2 L.L.J. 388.

(2) (1995) A.I.R. (S. C.) 336.

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 Shashank Kumar Singh, J.

M/S Dr. Sadanand Jha and Asim Jha for the petitioner :

Mr. Shashi Anugrah Narayan, A. A. G.II for respondent No. 1

Mr. Gautam Banerjee and Mr. Bimalendu Mishra. for respondent Nos. 3 to 5 :

Mr. Yugal Kishore for respondent No. 5.

Shashank Kumar Singh, J. In the present application filed under Articles 226 and 227 of the Constitution of India the petitioner has prayedr for issuance of a writ in the nature of mandamus/certiorari or any other appropriate writ, order or direction holding that the Bihar State Universities (2nd Amendment) Ordinance, 1994 and the Patna University (3rd Amendment) Ordinance, 1994, as contained in Annexure-5 and 5/1 are ultra vires. Further prayer has been made for quashing the corrigendum/advertisement, as contained in Annexure-6 so far as it provides exemption to the candidates, who had done Ph. D. or even submitted Ph. D. thesis upto 31.12.1993 or have done M.Phil upto 31.12.1992 from appearing in the Bihar Eligitility Test to be conducted by the Bihar University Service Commission (he reinafter referred to as the 'Commission'). A prayer has also been made for quashing the directions of the Commission, as contained in Annexures 7 and 7/1.

2. Learned counsel appearing on behalf of the petitioner has contended that the minimum essential qualification for appointment to the post of Lecturer in any University/Constituent College-affiliated College was high 2nd class Master Degree in that subject, subject to the said candidate passing National eligibility Test conducted by the Commission or any other equivalant examination, which was approved by the University Grants Commission. It has further been contended that the said

Circular of the University Grants Commission laying down the minimum essential qualifaction, as contatined in Annexure-2, cannot be altered or modified by way of letters or instructions issued by the Commission.

3. Another submission by the learned counsel for the petitioner is that the provision of appointment of lecturers being covered by entry 66 of list 1 of 7th schedule of constitution of India, the State Legislature does not have power to legislate in the said field. The said entry is only subject to the provision of the Central Act, i. e., University Grants Commission Act.

4. Firther contention of the learned counsel for the petitioner is that the Bihar Ordinance, 1994 (hereinafter referred to as 'Ordinance, 1994') as contained in Annexures 5 and 5/1 and the advertisement, subsequent there to, as contained in Annexure-6 so for as it gives exemption to M.Phil/ Ph. D. candidate are ultra vires and fit to be quashed. According to the learned counsel the same has been done to accommodate a particular class of persons, which is violative of Article 14 of the Constitution of India.

5. Learned counsel appearing on behalf of the State has filed a counter-affidavit and stated that the Bihar Universities (2nd Amendment) Ordinance, 1994 and Patna University (3rd Amendment) Ordinance, 1994 were issued under the Guidelines laid down by the Commission. It has further been stated that the state was competent in promulgating those ordinances and the said ordinances were promulgated in accordance with section 26 of the University Grants Commission Act.

Reliance has been placed upon a decision in the case of *Bhagalpur University Research Scholars* vs. *State of Bihar*(1). in which holding of eligibility test itself was under challenge. The present Circular as well as the Ordinance came into consideration and the same were held to be valid and the Chancellor was

(1) (1994) 2 P. L. J. R. 168.

found competent to promulgate the said Ordinance.

Further reliance has been placed upon a decision in the case of *University of Delhi Vrs. Raj Singh and others* (2). In the said judgment, while affirming the judgment of the Delhi High Court, it has been held that the U. G. C. was competent to issue regulation for appointment of lecturers from time to time. It has also been held that if the University wanted to proceed on its own and make appointment even without following those regulations, it was free to do so. It was open to the authorities of the University to make appointments either by following the said Regulations or by seeking prior approval for the relaxation of this requirement in a case; or it may appoint as lecturer one who does not meet these requirements without having first attained the U. G. C.'s approval, in which event it would, if it failed to show cause for its failure to abide by the said Regulations to the satisfaction of the U. G. C. forfeit its grant from the U. G. C. If however, it did show cause to the satisfaction of the U. G. C. it not only would not forfeit its grant but the appointment made without obtaining the U. G. C.'s prior approval would stand regularised. As such, according to the learned counsel, in view of the said judgment the U. G. C. was competent in issuing regulation, relaxing the minimum essential qualification for appointment as a lecturer and the Chancellor was also competent to promulgate an Ordinance in consonance with the said regulations.

6. A counter-affidavit has also been filed on behalf of Respondent No. 3, the University Grant Commission. In the said counter-affidavit circumstances have been explained as to why the candi-dates, who have been awarded M. Phil degrees upto 11.12.92 and those candidatas who have been awardad Ph. D. degrees or who had submitted their thesis upto 31.12.93 have been exempted by Ordinance, 1994 from appearing at the eligility test for lecturership. It has been stated that in exercise of powers under section 26 (1) (a) of the University Grants Commission act, 1956, Regulations were made in the year 1982

(1) (1995) A. I. R. (S.C.) 336.

regarding qualification required by a person to be appointed to the teaching staff of a University or other institutions affiliated to the said University. As per the said regulations the minimum qualifications prescribed for appointment to the post of lecturer included a Doctorate degree or a Research work of equally high standard; weightage was also given to M.Phil or equivalent degree or research work of quality. These qualifications were in consonance with the recommendation of the Sen Committee. The University Grants Commission in 1994 introduced a National Level Test for scholarships to promising candidates which scholarship was known as Junior Research Fellowship (JRF). Subsequently, the Union of India after considering the recommendation of the U.G.C. decided on 17.6.1967 to revise the pay scale of teachers in Central Universities and recommended the revised pay scale to the State Govt. In view of the recommendation of the Union of India in or about December, 1989 it became necessary to introduce a National Level Qualifying Test for eligibility for lecturer which was combined with the scholarship test introduced in 1984 and all those candidates, who were holding M.Phil/Ph.D were given exemption from the said examination by a Circular in January, 1990. This was in view of the modification of the Mehrotra Committee report in its implementation and because the minimum statutory eligibility under the 1982 regulations included a research degree.

7. According to the learned counsel the present regulations were introduced in the year 1991 when the present regulation was gazetted. It was thought necessary to provide for a transitional period as those who have already entered or done M.Phil/Ph.D course would have a legitimate expectation not to sit for National eligibility Test in view of the past practice. According to the learned counsel at the time of introducing the present regulations persons, who were qualified to be appointed as lecturer as per the 1993 Regulations and possessed the mini-

mum qualification, had a reasonable expectation and, as such, it is just and proper to grant exemption to such candidate during the transitional period.

8. Learned counsel appearing on behalf of Respondent No. 3 has further relied upon a decision in the case of *University of Delhi* Vrs. *Raj Singh and others* (1) By the said judgment the regulations as framed by the University Grants Commission have been held to be valid. It has been stated that specially in view of clause 2 of the U. G. C. Regulations, 1991, the U. G. C. was competent to issue Circular granting exemptions for a time bound period. Learned counsel for the U. G. C. has further stated that the said exemption is only one time exemption and it has not been granted to all the condidates, who have applied for lecturership or had done/M. Phil or Ph. D. but the said concession has only been granted to those candidates, who had alrady started doing Ph. D. or M. Phil course pursuant to old regulation and as it takes about 3 years to do Ph. D and two years to complete the M. Phil course. As such, exemption has only been granted to such candidates, who have done/ submitted Ph.D. thesis by 31.12.93 or have done their M.Phil course by 31/12/1992. He has further contended that this was only one time exemption during the transitional period and no further exaemption was likely to be granted.

9. Learned counsel appearing on behalf of the Respondant No. 3, the University Grands Commission, has further contended that similar matters have already been adjudicated by this court in C. W. J. C. No. 321/94 and C. W. J. C. No. 13395/92. After disposal of the aforesaid writ petitions a review petition has also been filed and the same was disposed of by order dated 27.4.94, as contained in Annaxur-4/1 to the presant writ application. By the said order paragraph 40 of the judgment

(1) (1994) 3 Supp 3. S. C. C. 576.

passed in the above mentioned writ applications had been modified to the extent indicated below.

"The respondens may consider the candidature of such persons, who are also eligible to be considered in terms of the Regulations framed by the University Grants Commission as has been stated in the earlier part of the judgment."

In view of the decision of this court in the review application, according to the learned counsel, there was no further scope for the petitioner to challenge the regulations of the University Grants Commission as well as the Ordinance issued in consonance there to, as the same had already been adjudicated by this court.

10. In view of the decision of this court reported in P. L. J. R. 1993 (2), 168 as well as the Supreme Court reported in A. I. R. 1995 S. C. 336, the regulation issued by the University Grants Commission from time to time cannot be said to be invalid and does not require any consideration. As the matter has already been adjudicated by a Division Bench, as such the same cannot be allowed to be the subject matter of another writ petition and the petitioner cannot be allowed to raise this point again and again. Applying the ratioes enunciated in the above mentioned case I have no option but to hold that as at the time of enfoxrement of the U. G. C. Act the Patna University Act as well as Bihar University Act were already in existence.

11. In paragraph 19 of the Judgment reported in A. I. R. 1995 S. C. 136, special reliance has been placed, which reads as follows :—

"The Delhi University Act was on the statute book when the U. G. C. Act was enacted by Parliament under Entry 66 of list I. It must be assumed that Parliament was aware of the provisions of the Delhi University Act when it enacted the U. G. C. Act, particularly because the power to enact legislation concerning the Delhi University lay with Parliament under Entry 63 or List

The Delhi University and other Universities covered by Entry 63 were consciously made subject to the regulation of the U. G. C. in so far as co-ordination and determination of standard wrre concerned. This was made explicit by the definition University in 6.2 (f) of the U. G. C. Act. To take any other view would be to make otiose, qua the Universites covered by Entry 63, not only the U. G. C. Act bue Entry - 66 itself. The agrument that S. 2 (2) of the U. G. C. Act defining University had to be read not with reference to the U. G. C. Act as a whole but only reference to such provisions of the U. G. C. Act as deal with funding must be rejected. If there were merit in the argument that Entry 66 operated only vis-s-vis institutions other than those mentioned in Entry-66, the U. G. C. Act in its entirety would not apply to the Delhi University and the Delhi University would, consequently, not be entitled to receive any grant thereunder. It is for this reason to avail the grant but shed the obligation under the U. G. C. Act, that the argument has been so cautiously advanced.

While dismissing the appeal against the judgment of the Delhi High Court their Lordships modified the judgment of the Delhi High Court to the extent indicated below :—

"As analysed above, therefore, the Delhi University may appoint as a lecturer in itself and its affiliated colleges one who has cleared the test prescribed by the said Regulations, or it may seek prior approval for the relaxation of this requirement in a specific case; or it may appoint as lecturer one who does not meet this requirement without having first obtained the U. G. C. 's approval, in which event it would, if it failed to show cause for its failure to abide by the said Regulations to the satisfaction of the U. G. C. forfeit its grant from the U. G. C. if, however, it did show cause to the satisfaction of the U. G. C., it not only would not forfeit its grant but the appointment made without obtaining the U. G. C.'s prior approval would stand regularised."

12. In view of the above mentioned decisions and the arguments advanced by the learned counsel appearing on behalf of the University Grants Commission, Respondent No. 3, I have no

option but to hold that the University Grants Commission was with in its jurisdiction is issuing guidelines for the appointment of lecturer in the University and Colleges of the State of Bihar and the Chancellor was also within his jurisdiction in promulgating the Ordinances in conseqence thereto. The present case is squarely covered by the ratio laid down in the judgment reported in A. I. R. 1995, S. C. 335 as well as in a decision of this court reported in P. L. J. R. 1994 (2) 168 and the order passed in the review application. which is appendad as Annexure - 4/1 to the present writ application.

13. In the result, this writ application fails and the same is dismissed. However, in the facts of this case, parties shall bear their own cost.

B.L.Yadav A. C. J. I agree.

R.D. Application dismissed

CIVIL WRIT JURISDECTION

Before Bisheshwar Prasad Singh and Ashish N. Trivedi, JJ.

1995

June,27

*Rajendra Prasad Singh & 7 others.**

v.

The State of Bihar and others.

Constitution of India ---Articles 14 and 16----appointment of writ-petitioners made without following the mandate of Articles 14 and 16---validity of.

The writ-petitioners were initially appointed on daily wage basis by Notified Area Committee, Nokha, and after the posts were sanctioned, they were appointed on temporary basis against those posts and only a few months later they were confirmed against those posts. At no stage the posts were advertised and the writ-petitioners were not subjected to any process of selection to judge their relative merit. Subsequently on direction of State Government, the writ-petitioners were served with notice to show cause as to why their appointment be not cancelled, as they were appointed without following the procedure presecribed by law and after they failed to show cause, their appointments were cancelled by the impugned orders.

Held, that the appointment of the writ-petitioners were clearly in breach of Articles 14 and 16 of the Constitution of India. The action of the Notified Area Committee in cancelling their appointments is justified and is in accordance with laws.

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 the Court.

*Civil writ Jurisdiction Case No. 10977 of 1992. In the matter of an application under Article 226 of 227 of the Constitution of India.

M/S Rajendra Prasad Singh, Anil Kumar Upadhyay & Amaresh Kumar Singh of the petitieners

M/S Ganesh Pd. Singh & Sunil Kumar Singh No. 1 For respondent No. 3.

M/S Krishna Murari, G. P.5 for the State.

B.P.Singh & Ashish N. Trivedi. JJ. We have heard counsel for the parties at length. Respondent no. 3, the Vice Chairman of the Notified Area Committee, Nokha, has filed a caveat in the form of a counter-affidavit, to which the petitioners have filed their rejoinder. We, therefore, proceed to dispose of this writ petition by this order.

2. The petitioners here in have prayed for the issuance of a writ quashing the letter dated 6th May, 1992 (Annexure-1) containing a direction to the authorities to terminate all appointments, which have been made illegally without following the procedure established by law. The petitioners have also challenged the order dated 21-9-1992 where by respondent no. 3 has terminated the appointment of the petitioners on the ground that they were illegally made. Those orders are Annexure 1-A to 1-M to the writ petition.

3. The facts pleaded by the petitioners in the writ petition are as follows : Petitioner nos. 1 to 4 were engaged on 1.10.85 on daily wage basis by respondent no. 3. Notified Area Committee, Nokha, as Tax Daroga, Clerk, Safai Jamadar and Peon. Petitioner nos. 5 to 8 were appointed subsequently with effect from different dates in the years 1986 and 1987. They were all appointed as Safai Majdoors on daily wages. Apparently, these posts were not sanctioned posts, because it is the case of the petitioners that nine posts were sanctioned by the Government by order dated 20th Octobar, 1986. This fact is not disputed by the respondents, and is also apparent from the material on record. The Notified Area Committee, Nokha, met on 6th October, 1988, and resolved to appoint the petitioners against the sanctioned posts on a temporary basis. The resolution passed by

the Committee makes an interesting reading. It refers to the fact that the Government had been pleased to sanction nine posts by order dated 20th October, 1986. The persons in the employment of the Committee had made a representation that they be appointed against these nine sanctioned posts. Since the Committee was faced with financial difficulties, it was not necessary to adopt any procedure for making fresh appointment, because if the prescribed procedure was to be followed, it would entail time and expeonditure which the Committee was not in a position to bear. In these circumstances, the Committee resolved that from amongst the persons already employed by the Committee, the petitioners and one other may be appointed according to their ability against the posts mentioned against their names on a temporary basis with effect from the date on which the order of the Government sanctioning the posts was received, namely, with effect from 11-11-1986. The effective date from which they were appointed on temporary basis has been shown to be 11-11-1966, because that appears to be the date on which the order of the Government sanctioning the posts was received by the Committee. What is indeed not understandable is the fact that even according to the petitioners, some of them were appointed on daily wage basis in the year 1987. Even that be so, it is not understandable how they the could have been appointed with effect from 11-11-1986 though on temorary basis. The decision of the Committee has been annexed as Annexure-2 to the writ petition.

4. Within five months of their appointment on temporary basis the Committee took a decision on 17th March, 1989 to grant permanency to the nine persons appointed on temporary basis pursuant to the decision of the Committee dated 6-10-88. In anticipation of sanction by the State Government, the confirmed employees were to be paid according to the prescribed pay scales. The decision of the Committee is Annexure-3 to the writ petition. Pursuant to the aforesaid decision of the Committee orders were issued granting permanency to the petitioners. The orders are annexures 4 series.

5. It appears that the Government had received several complaints about illegal appointments made by local bodies. In this connection, the Deputy Secretary, Nagar Vikash Bibhag, Government of Bihar, Patna (respondent no.2) addressed a letter to all the District Magistrates referring to earlier communications, including resolution of the Government, and pointing out that several instances had been brought to the notice of the Government of appointments being made by local bodies against unsanctioned class III and Class IV posts on daily wage basis etc. Similarly, even as against sanctioned posts appointments/ promotions were being made without following the procedure prescribed by law. This was clearly illegal and cast a heavy financial burden on the state and the local bodies. It was, therefore, directed that all appointments should be made against sanctioned posts strictly in accordance with the procedure prescribed by law, and if it is found that appointments have been made illegally in the past, they should be immeditely cancelled.

Pursuant to the direction of respondent no. 2 a show cause notice was issued by the Notified Area Committee to the petitioners on 3rd July, 1992, which is Annexure-5 series. All the notices called upon the concerned employee to show cause why his appointments be not cancelled, since he was appointed without following the procedure prescribed by law. In some of the notices it has also been mentioned that the concerned employee was guilty of unauthorised absence from duty. This is not very relevant, because the order ultimately passed did refer to the unauthorised absence of the employees concerned as a ground for cancellation of the appointment. The petitioners filed show cause in response to the notices issued to them, and their show cause is Annexure-6 series. It was thereafter that the impugned orders (Annexures 1-A to 1-H) were passed on 21-9-1992. The impugned orders refer to the communication of the State of Bihar dated 6-5-1992 (Annexure-1), and further state that the show cause submitted by the concerned employee was consid-

ered and the Committee decided to terminate the employment of the concerned employee.

6. It is, therefore, apparent from the impugned orders that they have been passed pursuant to the directive of the Government dated 6-5-1992 (Annexure-1), meaning thereby, the services of the petitioners have been terminated on the ground that they were not appointed in accordance with law and their appointments are illegal. The termination order does not either mention or proceed on the basis of any proved misconduct so as to cast a stigma.

7. Counsel for respondent no. 3 has contended that the appointments were illegally made without following the procedure prescribed by law. In fact, no procedure whatsoever was followed. A show cause notice had been issued, and only after considering the show cause filed by the petitioners, the impugned orders terminating their services were issued.

8. From the facts stated by the petitioners in the writ petition, it is quite apparent that the appointments were illegally made. It is not the case of the petitioners that the posts were ever advertised, and that the candidates concerned were ever subjected to any selection process for judging their relative merit. Apparently, they were all appointed on the basis of their individual approaches, and on considerations not legal. Assuming that it is permissible for an appointing authority to make appointment on purely temporary basis for a short duration having regard to the exigency of service, it would be illegal to confirm those persons in permanent service without subjecting them to the process of selection prescribed by law. A person illegally appointed cannot be regularised, because that would amount to back-door entry into Government service (See 1994 (2) SCC 630 — *J & K Public Service Commission* Vs. *Dr. Narinder Mohan*). The same decision has held that the judgment of the Supreme Court in *Puttaswamy's* case (1) was in exercise of

(1) (1991) A. I. R. (S. C.) 295.

jurisdiction under Article 142 ofthe Constitution and was not in the nature of a binding precedent. In the instant case the petitioners initially entered service on daily wage basis without being subjected to any test, and without any other citizen having an opportunity of applying for appointment against the post in response to any notice or advertisement issued, calling for applications from qualified candidates. What, however, is surprising is the fact that after the posts were sanctioned the Committee decided to appoint the petitioners as temporary employees against the sanctioned posts. The reasons given in the resolution are indeed amusing. The reasons disclosed are that the prescribed procedure for appointment, if followed, would take time, and secondly that it will involve expenses, which the Committee was not in a position to bear. This is a novel device to avoid the law, including the constitutional mandate. But the Committee was not satisfied with conferring temporary status on the petitioners, because it went further, and only five months later by its decision (Annexure-3) it decided to confirm the petitioners against the sanctioned posts, thereby conferring permnaency. The facts are eloquent. and the motivations are also apparent. In this connection it will be useful to remember the observations of the Supreme Court in *(K.S. College Stop-Gap Lectures Association* Vs. *State of Karnataka* (1) and in *Delhi Development Horticulture Employees' Union* v. *Delhi Administration* (2). *In K. S. P. College stop-Gap lectures Association* (Supra) it was observed;

"Ad hoc appointments, a convenient way of entry usually from backdoor, at times even in disregard of rules and regulations,are comparatively recent innovations to the service jurisprudence. They are individual problems to begin with,

(1) (1992) A. I. R. (S.C.) 677;

(2) (1992) A. I. R. (S.C.) 789;

became a family problem with passage of time end with human problem in court of law. It is unjust and unfair to those who are less fortunate in society with little or no approach even though better qualified, more meritorious and well deserving. The infection is widespread in Government or semi-Government departments or State financed institutions. It arises either because the appointing authority resorts to it deliberately as a favour or to accommodate someone or for any extraneous reason ignoring the regular procedure provided for recruitment as a pretext under emergency measure or to avoid loss of work etc. Or the rules or circulars issued by the department itself empower the authority to do so as a stop-gap agrangement. The former is an abuse of power. It is unpardonable. Even if it is found to have been resorted to as a genuine emergency measure the courts should be reluctant to grant induigence. Latter give rise to equities which has bothered courts every now and then..."

In Delhi Development Horticulture Employee's Union (Supra) the Court observed :

"...Although there is Employment Exchange Act which requires recruitment on the basis of registration in the Employment Exchange. It has become a common practice to ignore the Employment Exchange and the persons registered in the Employment Exchanges, and to employ and get employed directly those who are either not registered with the Employment Exchange or who though registered are lower in the long waiting list in the Employment Register. The Courts can take judicial notice of the fact that such employment is sought and given directly for various illegal consideration including money. The employment is given first for temporary periods with technical breaks to circumvent the relevant rules, and is continued for 240 or more days with a view to give the benefit of regularisation knowing the judicial trend that those who have completed 240 or more days are directed to be automatically regularised. A good deal of illegal

employment market has developed resulting in a new source of corruption and frustration of those who are waiting at the Employment Exchanges for years....."

9. It is a notorious fact that in the State of Bihar the appointing authorities have a Code of their own, not in accord either with the Constituion of India or with the laws or rules framed by the State of Bihar, or with the instructions, directions, circulars and resolutions issued by the State of Bihar in regard to the procedure for appointment. The appointing authorities observe the provisions of Articles 14 and 16 of the Constitution in their breach. Perhaps, they have foxgotten the very existence of those Articles in the Constitution of India, and this business of clandestine appointment for whatever consideration is carried on by them fraudulently and with impunity regardless of the warnings issued by the state from time to time. They believe that by the time the illegal appointments are discovered, the persons concerned may have put in several years of service so as to justify their regularisation on humanitarian consideration. It is very often pleaded that the poor employees are not to blame. That does not hold good, at least in this State, because it is known to all concerned that employment is bought, since merit is no consideration, and the objective can be best achieved only if the rules are thrown to the wind and a procedure is adopted which is clearly contrary to all norms of fairness and equality. In fact, the Supreme Court itself was constrained to take judicial notice of the fact that where the rules are thoroughly disregarded, and in blatant violation of the law appointments are made, they are made for monetary consideration. It would, therefore, be difficult to say that one, who has bought an employment is not to blame, and that he is free of any guilt. Misplaced sympathy for such a person may have the effect of depriving other eligible and meritorious candidates of even an opportunity of applying for the posts for which they may be considered, even if not appointed. Every appointment of this nature, therefore, breaches Articles

14 and 16 of the Constitution, and it would be difficult for the Court to bring in equitable considerations while dealing with such cases in writ jurisdiction.

10. The postulate of Article 16 of the Constitution is that every citizen must have equality of opportunity in the matter of employment under the State. It is well-settled that even if specific rules are not framed for appointment, the executive power of the State being co-extensive with its legislative power, it may make an appointmenteven in the absence of rules, but in accordance with law, and the constitutional provisions. As long a fair procedure is followed, the mere fact that secific rules have not been framed, will not denude the state of its power to make appointment in exercise of its executive authority. It is, however, a condition of the exercise of such power that the same should be exercised not contrary to the law or rules already framed. The law is well-settled, and I may only refer to a few decisions of the Supreme Court to show that this has always been the law. In this connection, reference may be made to the decisions, reported in *R. N. Nanjundappa* vs. *T. Thimuuish* (1). and *B. N. Nagrajan* vs. *State of Karnataka* (2). Both those decisions have been relied upon as binding precedents by the Supreme Court in a recent decision, reported in AIR 1995 S.C.586. *Shreeenivas Reddy* vs. *Government of Andhra Pradesh*. Similarly, the rule of audi-alteram partem is not attracted if an illegal Appointment is terminated on the ground of illegality, without reference to any misconduct on the part of the concerned employee See (1990) 4 SSC 55).

11. In the instant case, the petitioners were initially appointed on daily wage basis. After the posts were sanctioned, they were appointed on temporary basis against these posts, and only a few months later they were confirmed against those posts. Apparently, at no stage were the posts advertised. The petitiners were not subjected to any process of selection to judge their relative merit. The appointments were, therefore, clearly in

breach of Articles 14 and 16 of the Constitution of India. I have no hesitation in coming to the conclusion that these are appointments procured on the basis of extraneous considerations. The action taken by the Committee is, therefore, justified and in accordance with law. In any event, no interference is called for by this Court in exercise of its writ jurisdiction, because if the impugned orders are interfered with, it would have the effect of perpetuating an illegality by reviving the orders of appointment which are patently illegal.

12. The writ petition is, therefore, dismissed. However, when the posts are regularly filled up, the petitioners if eligible, may also be considered for appointment, if they apply, and age relexation to the extent of their continuous service may be granted to them.

R. D. Application dismissed.

CIVIL WRIT JURISDICTION

Before Bisheshwar Prasad Singh and Ram Nandan Prasad, JJ.

1995

June.28

*Lal Bahadur Singh and 32 others.**

v.

The State of Bihar and others.

Part time Lecturers---appointed in different Government Polytechnics following the procedure for appointment of regular full-time lecturers---whether can be absorbed as full time Lecturers-- whether their Service can be regularised---Government by office order appointing the writ-petitioners, provided that their engagement will stand terminated on appointment of regular full time Lecturers---Estoppel, principles of---whether applicable.

The appointment of regular full time lecturers can be made by open advertisement on all India basis, on the basis of selection

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* Civil Writ Jurisdication Case Nos. 6751 and 9186 of 1991. 7885, and 2707 of 1992, 2236, 13085, 12118, 423, 4948 and 2318 of 1993.

In C.W.J.C. No. 9186/91...Vivek Kumar and 44 others...Petitioners

In C.W.J.C. No. 7885/92...Chandradeo Singh Vidyarthi & others. ...Petitioner

In C.W.J.C. No. 2707/92... Ram Pravesh Singh & 5 others. Petitioners.

In C.W.J.C No.2236/93 Braj Bhushan Choudhury & 12-ors. Petitioners.

In C.W.J.C No. 13085/93... Ashok Nath Pandey & 14 ors. Petitioners.

In C.W.J.C No. 12113/93... Anand Mohan Tiwary & anrs. Petitioners.

In C.W.J.C No. 4223/93... Rakesh Kumar Choudhary &-3 ors. Petitoners.

In C.W.J.C No. 4348/93... Amresh Kumar Sharma... Petitioners.

In C.W.J.C. No. 2318/93... Moti Lal Sah... Petitioner.

by Bihar Public Service Commission followed by appointment made by State Government on the basis of such recommendation. This procedure was not at all followed, and, therefore, the appointment of part-time lecturers in different Government Polytechnic was not in accordance with law prescribing the procedure for appointment of full time lecturers. The part time lecturere so appointed cannot, therefore, claim to be absorbed as full time lecturers.

Government decision in this regard was not followed because the decision clearly postulates that only those persons should be appointed on part time basis who possessed the requisite qualification and who were otherwise employed else where.

The State Government by the office order appointing the petitioners on part-time basis, provided that engagement shall stand terminated on the appointment of regular full time teachers. The order also provided that the engagement could be terminated at any time without notice. No representation was made by State Government, which could lead the writ-petitioners even to entertain a reasonable expectation that they are likely to continue indefinitely, and may be absorbed later.

Held, that no principles of estoppel applies in the case of the writ petitioners. The law is well settled that temporary arrangement made for carrying on the work must come to an end when regular appointment are made.

Held, further, that if such temporary appointments/ engagements are to be terminated in accordance with terms and conditions of appointment, the provisions of Article 311 of the condition of India are not attracted.

Held, also, that the writ-petitioners cannot claim regularisation of their service against parmanant post. Their appointment is be rose the rules and constitutional mandate. They cannot claim regularisation against the posts to which they were never appointed.

When the State Government averred in their counteraffidavit

that part-time lecturer engaged 2 classes in a month where as full time lecturers engaged 22 classes in a week and the same was not controverted by the writ-petitioners :

Held, that the quantum of work load shouldered by part time lecturers are not the same as shouldered by full time lecturers. The writ-petitioners, therefore, cannot claim equal pay when their work is not equal to that of regularly recruited full time lecturers.

Jand K. Public Service Commission v. *Dr. Narindar Mohan* (1) *Madhya Pradesh Hasta Shilpa Vikas Nigam Ltd* v. *Devendra Kumar Jain and ors* (2)— followed.

Jand v. *Kerala Nath Authority* (3)—dishiuguished

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

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

M/S Tara Kant Jha (Sr. Adv.), Chittaranjan Sinha, Subodh Kumar & Sanjay Prasad for the petitioners in C.W.J.C. 6751/ 1991)

Government Pleader No. 4 for the state of Bihar C.W.J.C. 6751/ 91)

M/S Shyama Pd. Mukher Jee (Sr. Adv.), *Chittaranjan Sinha, Subodh Kumar & Sanjay Prasad* for the petitioners C.W.J.C. 9186/91

Mr. Rajendra Prasad, Miss Madhurima for the State of Bihar C.W.J.C. 9186/91).

M/S Sadanand Jha (Sr. Adv.), *Chittaranjan Sinha, Subodh Kumar & Sanjay Prasad* for the petitioners in C.W.J.C. 7885 of 1992.

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(1) (1994) 2. S. C. C. 630.

(2) (1995) 1. S. C. C. 635.

(3) (1990) A. I. R. (S. C.) 2228

M/S Rajendra Prasad (S.C.I)& Pramod Kumar for the state in C.W.J.C. 7885 of 1992.

M/S Chittranjan Sinha, Subodh Kumar & Sanjay Prasad for the petitioners C.W.J.C. 2707 of 1992.

M/S. Rajendra Prasad (S.C.I) & Ram Prasad for the state in C.W.J.C. 2707 of 1992.

M/S Shyama Prasad Mukherjee (Sr. Adv.), Ganand Kumar, Chittaranjan Singh & Suboth Kumar for the petitioners in C.W.J.C. 2236 of 1993.

M/S Deo Narayan Yadav (G.A.) & Nirmal Kumar Singh for the State in C.W.J.C. 2336 of 1993.

M/S Basudeo Prasad (Sr. Adv.), Rajiv Sinha & Anil Kumar for the petitioner in C.W.J.C. 13085 of 1993.

M/S K. P. Yadav (S.C.V) & Suresh Kumar for the state in C.W.J.C. 13085 of 1993.

M/S Rajesh Kr. Pandey, Subodh Kumar Dubey & Manan Kumar Mishra for the petitioner in C.W.J.C. 12118 of 1993.

M/S D. N. Yadav (G.A.) & Nirmal Kumar Sinha for the State of in C.W.J.C. 12118 of 1993.

M/S Chandranauli Chaurasis for the Petitioner in C.W.J.C. 4223 of 1993.

M/S Deo Narayan Yadav (G.A.) & Nirmal Kr. Sinha for the state in C.W.J.C. 4223 of 1993.

M/S. Murari Pd. Sinha for the petitioner in C.W.J.C. 2318/ of 1993.

M/S. Deo Narayan Yadav (G.A.) & Nirmal Kumar Sinha for the state in C.W.J.C. 2318 of 1993.

B.P.Sinha, J. In this bunch of writ petitions, the petitioners, who were engaged on part time basis to deliver lectures at different Government Polytechnics maintained by the Government of Bihar, for which they are paid honorarium at the rate fixed per lecture subject to a maximum honorarium per

month fixed from time to time, have claimed a writ of mandamus, directing the respondents to pay to the petitioners the same pay scale which is being paid to the full time regularly appointed lecturers working in the various Government Polytechnics maintained by the State of Bihar. They have also claimed regularisation of their services on the ground that they are being discriminated against by being compelled to discharge the same duties as are discharged by full-time lecturers of the Government Polytechnics, but their tenure of appointment is precarious and the honorarium paid to them is not comparable with the emoluments paid to regularly appointed full-time lecturers.

2. I shall take the relevant facts from C.W.J.C. 6751 of 1991. There are 33 petitioners in the aforesaid writ petition. They claim that they are Engineering graduates, each one of them possessing B. Sc. (Engineering) Degree from a recognised institute/University. Pursuant to an advertisement issued by the respective principals of the Institutions, they applied for appointment as part-time lecturers in different years. They were selected to work against the post of part-time lecturer, and this was approved by the Department of Science and Technology. They were to be paid honorarium at the rate prescribed for each lecture, subject to a maximum amount each month. The honorarium payable to the petitioners was enhanced from time to time. The petitioners took engineering classes in the same manner as the permanent lecturers of the Institutes. They had also to perform invigilation work, setting of question papers, evaluation of answer-books etc. They have performed these duties to the satisfaction of the authorities concerned, and in this manner they have put in several years as part-time lecturers.

3. It is contended that the Government by its communication dated 26-2-1991 enhanced the honorarium to Rs. 60/- per lecture from Rs. 30/-per lecture, subject to a maximum of Rs. 1300/- per month. However, they are being denied regular scale of pay of Rs. 700-1300/- which is being paid to the lecturers

appointed on regular basis. According to them, since the nature of duties discharged and the responsibilities shouldered by them are of the same quality and nature as those discharged by regularly recruited full time lecturers, on the doctrine of equal pay for equal work, they are entitled to be paid the same emoluments as are being paid to full-time lecturers. They have also invoked the equality clause enshrined in Articles 14 and 16 of the Constitution and submitted that there is no reason to distinguish between part-time and full-time lecturers, if they are required to perfom the same duties and shoulder similar responsibilities. It is their case that since they have rendered services for so many years, they must be absorbed in the reqular service of the State and cannot be subjected to expoitation by the State. The denial of regularisation, according to them, is denial of justice to them. The petitioners have represented before the concerned authorities for the regularisation of their services but that has yielded no result. In these facts and circumstances, the petitioners have prayed that they be regularised in service and be paid the same emoluments as are being paid to the regularly appointed lecturers of the various Government Polytechnics.

4. In the counter-affidavit filed on behalf of Respondent nos. 1 to 3, it has been averred that the post of teachers of Enginerring Colleges, Government Polytechnics and Mining Institutes are gazetted posts. These posts are duly filled up by open advertisement on all India basis and on the basis of recommendation made by the Bihar Public Service Commission. The rule is that when vacancies occur, after getting the roster clearance on the point of reservation by the personnel Department, a requisition is made to the Bihar Public Service Commission, and thereafter other steps are taken to fill up the vacancies. The process of recruitment entail delay and, therefore, with a view to safe-guard the interest of the students studying in the different institutions, the Government engages suitable qualified persons serving in other Government institutions, semi Government or private institutions or Industrial undertakings as part-time lecturers

against the sanctioned posts on payment of honorarium. Initially the honorarium was allowed at the rate of Rs. 10/- per lecture subject to a maximum of Rs. 200/- per month vide Government order dated 1-7-1960. This was subsequently enhanced to Rs. 20/- per lecture subject to a maximum of Rs. 400/-per month for Government Polytechnics in the year 1975. In the year 1987, the honorarium payable to part-time lecturers in Government Polytechnics was increased to Rs. 30/-per lecture subject to a maximum of Rs. 800/- per month. Again in the year 1991 the honorarium was increased to Rs. 60/- per lecture subject to a maximum of Rs. 1300/- per month. Annexure-A contains the decision of the Government of Bihar dated 1st July, 1960 whereby the state Government decided that in order that the teaching work in the various Engineering Colleges, Government Polytechnics and Mining Institutes may not suffer due to delay in appointment on the posts of teachers on the recommendotion of the Bihar Public Service Commission, suitable qualified persons serving in other Government Institutions, semi Government and private Institutes or Industrial undertakings, should be engaged as part-time teachers against the eanctioned vacant posts etc, on payment of honorarium of Rs. 10/- per lecture subject to a maximum of Rs. 200/- per month each. It was further decided to vest the power of engaging part-time teachers in the Director of Industries, Bihar, who was to certify that the particular person engaged as such possessed the requisite qualification for teaching, and that their engagement was against sanctioned post lying vacant. Honorarium was to be sanctioned by the above officer on a monthly basis. The temporary appointment shall terminate as soon as the vacant posts against which part-time teachers are engaged, are filled by the Government. Annexure 'A' series are the different Government orders issued by the Government from time to time enhancing the amount payable by way of honorarium.

5. According to the State, the engagement of part-time lecturers does not amount to an appointment. It is only a local

arrangement to enable them to deliver lectures at the Government Polytechnics on the basis of honorarium paid for each lecture delivered in the month, subject to a maximum amount fixed by the Government. Since it is purely a temporary arrangment, neither the Bihar Public Service Commission was consulted in the matter nor was any roster clearance required, which is a must before a regular appointment is made. Letters of appointment make it quire clear that the engagement was as part-time lecturer and the same could be terminated at any time. In any event as soon as a regular candidate was appointed against a sanctioned post, the part-time lecturer against that post would stand automatically disengaged. Having regard to the scheme of engagement of part-time lectuers, letters of appointment were never issued by the Government. Only office order were issued by the Director, Science and Technology, permitting part-time lecturers to deliver lectures at the institute, and even the said office orders make it abundantly clear that it was only a temporary arrangement and the tenure was pracerious. They were not allowed time scale of pay permissible to full-time lecturers, nor were they entitled to the privilege of casual leave, earned leave, dearness allowance etc. allowed to regular employees. They were free to leave the work withqut information to the department and without obtaining any permission for the same. It has been further clarified by the order of the department of science and Technology dated 14-9-90 that part-time lecturers should be engaged against vacant posts that exist, and not more than 2 part-time leacturers can be appointed against one vacant post. Obviously, therefore, if two part- time lecturers have been working against one vacant post, both cannot be regularised as permanent lecturers against a single post.

6. Before adverting to the averment in the rejoinder. I may refer to the letters of appointment annexed by the petitioners to the writ peition. Office orders, which are said to be letters of appointment, state that the appointment has been made against sanctioned post as a purely temporary measure and may be terminated at any time without notice. For performing the said

work the appointees shall be paid a sum of Rs. 20/- per lecture by way of honorarium, subject to a maximum of Rs. 400/- per month. Some of the letters of appointment make it clear that the engagement will stand terminated as soon as a lecturer is regularly appointed against the sanctioned post. From Annexure 2/B, which is another office order, the engagement has not been described as an appointment; but it is stated that the persons named in the order are permitted to work as part-time lecturers. It further clarified that permission granted was purely temporary, in the nature of a local arrangment, that could be terminated without any notice, and shall be deemed to have been terminated on the appointment of a regularly recruited professor/lecturer.

7. It would thus appear that the decision of the Government pursuant to which such part-time lecturers have been appointed, leaves no room for doubt that part-time lecturers were permitted to work against sanctioned posts as a purely temporary arrangement pending appointment of regularly recruited candidates. The arrangement could be terminated at any time without notice, and those engaged were only entitled to a honorarium. The effice order permitting the petitioners to work also made the position clear that the appointment was on part-time basis and was a purely temporary engangement. The petitioners could, therefore, entertain no expectation that in due course their services may be regularised. One fact which is very significant is that the Government decision to appoint part-time lecturers is clear and specific that "suitable qualified persons serving in other Government Institutions, semi Government and private Institutes or Industrial undertakings should be engaged as part-time teachers against sanctioned vacant posts etc, on payment of a honorarium of Rs. 10/- each per lecture subject to a maximum of Rs. 200/- per month each. "The Govrnment decision, therefore, permitted the engagement as part-time lecturers of persons, who were already employed else where. There can, therefore, be no doubt that in terms of the Government decision, no one could have entertained a reasonable

expectation that for long service rendered as part time lecturer he may be regularised in service. The Government decision also makes it clear that the appointment as part-time lecturer was not a mere pretence, because the eligibility conditions laid down in the Government decision make it a condition precedent that the persons so engaged should already be in the employment of other institution, institute or undertaking. It appears that the appointing authorities have observed the rule laid down in Annexure-A in its breach. The petitioners claim that they are solely dependant upon the honorarium paid to them by the Government Polytechnics. Obviously, therefore, the appointments have not been made in accordance with the decision of the Government, and the appointing authorities as also the approving authority were remiss in not obeying the Government decision which they were bound to obey.

8. The petitioners filed a petition before this Court on 25-11-1993 complaining that on 12-11-1992 an advertisement had been published in the local daily inviting application for filling up 139 posts of lecturers in the different Government Polytechnics only from amongst those persons, who have retired from Government Polytechnics or Engineering Colleges as lecturers/Assistant Professors, Readers/Assistant Professors and Professors, and who have not attained the age of 65 years. The advertisement also called upon the applicants to indicate the amount which they expected by way of employment for the services to be rendered by them. According to the petitioners, the posts against which the appointments were to be made on the basis of such advertisement included the posts against which the petitioners have been working as part-time lecturers.

9. The petitioners have also brought to the notice of this Court that another notification dated 28-10-1993 has been issued by which different Assistant Professors/Lecturers working in different Engineering Colleges, which were private institutions and were taken over by the Govrnment, have been posted in the different Government Polytechnics and Mining Institutes. They apprehend that as a result of this the services of several of

the petitioners were likely to be dispensed with. The petitioners, therefore, prayed for leave to amend the writ petition with a view to challenge the validity of the notification dated 28-10-93 (Annexure-37). By another application filed on 25-11-1993, the petitioners prayed that the aforesaid notification dated 28-10-93) be stayed. Yet another application was filed by the petitioners praying that the respondents be restrained from giving effect to the advertisement dated 12-11-1992 (Annexure 36) by transferring teachers from other institutes to the posts against which the petitioners held appointment as temporary lecturers, and further to restrain the respondents from terminating the services of the petitioners. It is not necessary to refer to some other applications filed in this connection by the petitioners, since the same are not relavant for deciding the issues which arise for consideration in the instant writ petition.

10. Mr. Tara Kant Jha, Senior Advocate, appearing on behalf of the petitioners, submitted that in C. W. J. C. No. 6751 of 1991 there are 33 petitioners of whom two were appointed in the year 1983, namely, petitioner nos. 1 and 6. Similarly petitioner nos. 17 and 24 were appointed in the year 1985 and petitioner no. 3 in the year 1986. In the year 1987 three of the petitioners were appointed, namely, petitioner nos 2, 14 and 20. In the year 1988, 7 of the petitioners were appointed, namely, petitioners nos. 4, 7, 11, 12, 13, 31 and 32. In the year 1989 petitioner nos. 5, 10 and 15 were appointed. In the year 1990 as many as 11 of the petitioners were appointed, namely, petitioner nos, 8, 9, 16, 18, 21, 25, 26, 27, 28, 29, and 33. In the year 1991, 2 of the petitioners, namely, petitioner nos. 19 and 30 were appointed. He submitted that all the appointments have been made against sanctioned posts. The posts were duly notified and a Selection Committee was constituted which interviewed the candidates. On the basis of its recommendation, the petitioners were appointed as part-time lecturers, For sevral years no regular recruitment has been made in accordance with the Rules and, therefore, the procedure followed for appointment of part-time lecturers should now be considered to be the mode of recruit-

ment. The normal mode of recruitment throught the Bihar Public Service Commission has completely been abandoned. He, therefore, submitted that law apart, on the principle of equity, this Court should exercise its jurisdiction to grant relief to the petitioners. In any event, the respondents should be restrained from removing the petitioners till all the posts are filled up, either by direct recruitment following the normal procedure, or by regularisation of services of the petitioners. He submitted that the services of the petitioners can be regularised by referring their cause to the Bihar Public Service Commission. The matter may be referred to the Commission only for the purpose of judging qualification of the petitioners as on the date of first engagement. In the alternative, he submitted that the competition may be limited to the petitioners similarly placed, meaning thereby the petitioners appointed in the same batch. No test need be held, and selection be made only on the basis of their qualification and suitability within the time frame in accordance with the rules and the norms to be framed by the State.

11. Mr. Basudeo Prasad, Senior Advocate, appearing for the petitioners in C.W.J.C. No. 13085 of 1993 submitted that the petitioners have been appointed between the years 1986 and 1991 pursuant to a Government decision dated 1-7-1960 (Annexure 9) which is the same as Annexure-A in C.W.J.C. No. 6751 of 1991. The aforesaid Government decision was never challenged. The petitioners constitute a class by themselves as all of them are suitable and qualified for the post of lecturer in Government Polytechnics. Having served for a considerably long period, they cannot now be ignored. If the Government decides to reguiarise their services that cannot be objected to. Conseqently, they can also claim regularisation. They deserve to be treated a little differently from others who are yet to join. He also submitted that it was not necessary for the Government to frame rules, because even in the absence of rules, the matter could be regulated by Executive instruction, which may lay down the procedure to meet a particular contingency. He submitted that Annexure-9 dated 1-7-60 should be treated as a 'regulation'

made in exercise of power under Article 162 of the Constitution of India. There is no law or rule that the Bihar Public Serive Commission must be consulted and, therefore, in the absence of rules, consultation with the Bihar Public Service Commission was not mandatory. Since the petitioners constiture a class by themselves, brought into existence by a legal method, they have acquired an indefecsible right on the basis of judge made laws.

12. Dr. S. N. Jha. counsel appearing for the petitioners in C.W.J.C. No. 7883 of 1992 submitted that the appointments were made after the posts were duly advertised/notified. The appointments were made regularly on part-time basis, and the persons appointed were eligible and qualified. There can be no reason to discriminate against them, particularly when it appears that those appointed in the private institutions, even without following the regular procedure, were now sought to be appointed against regular posts after taking over of those private institutions by the State. The move of the Government in recent years, as well as in the year 1993, is clearly unfair because if such teachers of private institutions, can be appointed against posts of lecturer etc. There was no reason why the petitioners who have worked for several years should not be regularised. Moreover, the facts disclose that the Government is willing even to engage retired hands for teaching purpose on payment of honorarium. The petitioners were all qualified and eligible when they were initially appointed, and continue to be so even today. They form a separate and special class and, therefore, if special treatment is meted out to them, there will be no violation of Article 16 of the Constitution of India.

13. Mr. S. P. Mukherji, counsel appearing for the petitioners in C.W. J.C. No. 9186 of 1991 and C. W. J. C. 2236 of 1993 submitted that having regard to the facts of the case, the service of the petitioners should be regularised. If that is done, it will not offend Articles 14 and 16 of the Constitution of India. Of course the norms must be declared and followed in the matter of regularisation as well, as has been laid down by the Supreme

Court in several decisions. He submitted that the concept of a part-time lecturer was not a new or novel concept. The University Statutes also provide for appointment of part-time teachers in the University. It could not be said that such appointments are illegal. The petitioners having worked for sufficiently long periods, a hope was generated in them that on account of long engagement,on equity, they mey be regularised. For the mistake of the Government the petitioners cannot be punished. They are not back door entrants, because they were appointed following the practice, which was in vogue in almost all the Government Polytechnics. The State could not challenge its own order, as it was prevented by the principle of promissory estoppel to raise any plea with regard to the illegal nature of appointments. If at all, the mistake was committed, not by the petitioners, but by the appointing authorities. The respondents, therefore, cannot take advantage of their own wrongs.

Counsel for the petitioners in the other writ petitions adopted the arguments advanced by the senior counsels appearing in the other cases which I have noticed above.

14. The Government Advocate submitted that the petitioners were not appointed as part-time lecturers, but they were only permitted to work as part-time lecturers by an office order on the clear understanding that the engagements were of temporary duration and that the same could be terminated without prior notice at any time. The petitioner were entitled to receive only on honorarium on the basis of number of lectures that they delivered in a month, subject to a maximum fixed from time to time. The appointments were in the nature of a local arrangement made with a view to carry on the teaching work in the Government Polytechincs. The selection and the recruitiment rules were not followed, inasmuch as no open advertisement was issued on all India basis, and the matter was never processed through the Bihar Public Service Commission. The post of lecturer in the Government Polytechnics being a gazetted posts, it was mandatory that appointments be made against such posts on the basis of the recommendation of the Bihar Public Service

Commission. Referring to the Bihar Public Sservice Commission (Limitation of Functions) Regulation, 1957, he submitted that the appointment of lecturers in the Government Polytechnics was not one of the subjects which is not required to be processed through the Bihar Public Service Commission, and therefore appointment on the basis of recommendation made by the Commission was mandatory. The question as to whether the appointing authority, namely, the State, was bound by the recommendation made by the Bihar Public Service Commission, was a different matter altogthter. That could not be a justification for by-passing the Bihar Public Service Commission. He submitted that heving regard to the exigency of the situation, and particularly in view of the fact that only apart-time arrangement was being made at local level, it was not considered expedient to process the matter through the Public Service Commission. the engagements were temporary in nature, and in clear terms it was mentioned that the appointments were part-time appointments. He submitted that part-time employees of the Government cannot equate themselves with full-time employees of the Government. A part-time employee cannot be regularised.

He further referred to Annexure—A dated 1—7—60 and submitted that so far as the State is concerned, the decision to appoint lecturers on part-time basis was subject to certain conditions. The Government decision made it clear that the appointment on part-time basis shall be made only against sanctioned posts lying vacant, and that only suitable and qualified persons serving in other Government, semi Government institutions or organisation, or even private instutions and undertakings should be engaged as part-time teachers, The decision of the Government, therefore, unambiguously clarified that the engagement was a purely part-time engagement and those eligible for such appointment must be persons, who were otherwise employed elsewhere. There was, therefore, a clear intention evinced in the Government's decision, that persons to be appointed on part-time basis were not to be treated as

Government servants, nor was there any question of their being absorbed in Government service later. The petitioners knew of it, and yet if they managed to get appointment without fulfilling the conditions laid down in the Government decision, they cannot now claim any further benefit. In fact, if the petitioners were not employed elsewhere at the time of their first engagement, they were not even eligible for appointment even on part-time basis. The appointments made contrary to the Government decision, if that decision is treated as a regulation, as urged on behalf of some of the petitioners, framed under Article 162 of the Constitution of India, cannot acquire legal santity.

15. He furhter explained that the appointments were made in special circumstances. Since regular appointments took time, and the State was of the view that on accountof such delay teaching work in the polytechnics might suffer, a conscious decision was taken to engage eligible candidates working in other organisations, on part-time basis. Letters of appointment clearly specify that in the event of a person being regularly appointed to the post, part-time engagement shall cease automatically. Even otherwise, in law, where appointments are made on temporary or ad-hoc basis, once a regular appointment is made, such temporary or ad-hoc appointees must give way to the regularly appointed candidates. He also emphasised the fact that the appointments were not made after due publicity, as would have been the case if the petitioners were to be regularly appointed. He referred to the materials on record to show that by local advertisement / notice, applications were invited and candidates selected. Some of the documents on record would show that against the vacancies notified very few candidates appeared for interview, and in some cases the number of candidates interviewed for selection was equal to the number of vacancies, and in some cases, even less. The petitioners, therefore, cannot take advantage of the fact that the posts were supposedly notified, as if the posts were advertised in the newspaper or that the matter was given wide publicity.

16. He also submitted that the principle of equal pay for equal

work was not applicable in the factsof this case. In para 12 of the counter-affidavit, it has been averred that whereas part-time lecturer engagod only 22 classes in a month, the full-time lecturers engaged 22 classes in a week. Having regard to this he submitted that, at best, in equity, the petitioners could be permitted to compete with other candidates, who may apply in response to the advertisements that may be issued for fillingup the posts on regular basis. That process has begun and the petitioners, therefore, may be well advised to apply for regular appointment. Unless they are appointed in a regular way, they must make way for those who are appointed in accordance with law in a regular manner on the basis of open all India competition.

17. Counsel appearing on behalf of the petitioners as well as counsel appearing on behalf of the respondents have referred to a large number of decisions in suppert of their respective contentions. Before considering these decisions, it would be useful first to consider the decision of the State Government and its implications, so far as the appointment of part-time lecturers is concerned,and also to consider the manner in which such appointments have been made.

18. It is not disputed before me that the decision to appoint part-time lecturers was taken by the Government as is evident from Annexure—A in C. W. J. C. No. 6751 of 1991. In fact, counsel for the petitioners also rely upon the same decision to justify their appointment. Some of them contend that in the absence of rules, the said decision must be taken to be a regulation' framed under Article 162 of the Constitution of India in exercise of executive power, which is co-extensive with the legislative power of the State. It has not been disputed that the posts being Gazetted posts, the normal mode of recruitment is to notify the vacancies and to issue an advertisement on all India basis inviting applications for appointment. The matter has to be processed through the Bihar Public Service Commission, and on the basis of recommendation made by the Bihar Public Service Commission, the appointment has to be made by the State

Government. It is also not in dispute that under the Bihar Public Service Commission (Limitation of Functions) Regulation, 1957, the matter relating to appointment of lecturers in the Government Polytechnics has not been taken out of the Jurisdiction of the public service commission. It must, therefore, be held that in appointing lecturers and other members of teaching staff in Government polytechnics against gazetted posts, the posts are required to be advertised on all India basis and there after the selection has to be made by the Bihar Public Service Commission. On the basis of select list prepared by the Bihar public service commission, the state Government is required to make the appointments. It is also not disputed that this procedure has been followed in making regular appointments.

19. Since the method of regular appointment entails considerable time, the Government thought that with a view to avoid inconvenience to the students of such polytehnics, and so that the teaching in those polytechnics may not suffer, part time appointments may be made with a view to carry on the work till such time as regular appointments are made, The decision of the Government in this regard contained in Annexure—A dated 1—7—60, on which reliance has been placed by all the parties, is quite clear and unequivocal. For the sake of convenience, the relevant part of the letter is being reporudced below : —

> "I am directed to say that the state Government have been pleased to decide that in order that the teaching work at the various Engineering colleges and schools and Mining Institutes may not suffer due to recommendation of the Bihar Public Service Commission suitable qualified persons service in other Govt. Institution, Semi-Govt. and private Institutes or Industrial undertaking should be engaged. as part time teachers against sanctioned vacant posts etc. on payment of an honorarium of Rs. 40/— each per lecture subject to a maximum of Rs. 200/— per month each.

2. The State Government are further pleased to vest the power of engaging the part time teachers in the Director of Industries Bihar who will certify that the particular persons engaged as such possess the requisite qualifications for teaching and that their engagement is against sanctioned posts lying vacant. The honorarium will be sunctioned by the above officer on a monthly basis. This temporary appointment will terminate as soon as the vacant posts against which part-time teacher are engaged are filled by Govt.

20. It will appear from the Government decision that in order that the teaching work at the various institutions may not suffer the to dealy in appoinement on posts of teachers on the recommndation of the Bihar Public Service Commission; a cecision was being taken to appoint suitable and qualified persons onpart-time basis. The decision further emphasises the fact that suitable and qualified persons serving in other Government institutions, semi Government and private institues or Industrial under takings should be engaged as part-time teachers. This clearly implies that only those persons were to be employed on part-time basis, who were gainfully employed elsewhere and possessed the regisite qualifications, The decision, there fore, did not envisage the appointment of persons liks the petitioners, who were not employed else where. It was also clarified that only suitable and qualified persons were to be engaged on part-time hasis against sanctioned posts on payment of honorarium. Obviously, there fore, no one could be appointed on part-time basis uhless a vacant post existed, This was obbviously so because the appointment on part-time basis was to be made on account of existence of vacancies, which was to be filled up in normal course, but the delay involved justified the appointment on part-time basis. Further, the Director of Industries was required to certify that the persons engaged possessed the requitite qualification and that their engagement was against sanctioned posts lying vacant. The temporary

appointment was to terminate as soon as the vacant post against which a part-time teacher was engaged was filled up by the Government. It is not disputed that the Government letter clarified that as against one vacant post not more than two part-time lecturers may be anpointed. This was obviously done in the interest of teaching work in the institutes, because a part time lecturer was not required to shoulder the same work load as a regularly appointed full time teacher.

21. The Government decision is so clear that it admits of no controversy. The appointments were to be made on part-time basis because it was thought that filling up of the vacancies may take time, and consequently the teaching work may suffer. The policy envisaged that as soon as regular appointments were made, engagement on part-time basis must terminate. Precaution was taken to see that only suitable and qualified condidates who were employed elsewhere were engaged by the Government on purely part-time basis. There was no scope for misunderstanding the decision. part-time lecturers were only entitled to honorarium and nothing more.

22. Much was sought to be made of the fact that the petitioners were appointed against sanctioned posts and that they were appointed after due selection by a Selection Committee. As I have already discussed earlier, part-time lecturers were engaged pursuant to Governement decision against the sanctioned posts of full-time lecturers. Necessity to appoint part-time lecturers as a temporary arrangement arose from the fact the permanent posts to be filled up by regular recruitment were lying vacant. The petitioners cannot, therefore, take any advantage of the fact that they were appointed against sanctioned and vacant posts, because those posts were meant for regular appointees to be appointed by the normal procedure through the Bihar Public Service Commission. Obviously, therefore, they have to make way for those who may be regularly recruited, particularly was there mean express stipulation in the office order engaging them, that their engagement on part-time basis was purely temporary, and that their engagement shall stand terminated authomatically

when the posts were filled up on regular basis, if not earllier.

23. The submission that the petitioners were appointed after an interview, is not of such help to them because admittedly the normal rule of advertising the posts on all India basis and of making recruitment thereafter through Bihar Public Service Commission, was never followed. Even the socalled notices notifying the vacancies in the different polytechnies were not given enough publicity. It is apparent from the materials is placed on the record by the petitioners themselves that very few candidates were considered for appointment pursuant to such notices. There is no material to show that the vacancies were widely publicised, and it appears that the notices, if at all given any publicity. were displayed only on the notice Boards of the respective institutions, and that is why very few candidates offered tiemsslves for appointment on part-time basis. This is amply demonstrated by the material on record. It would appear from Annexure '3/F' that in the Government polytechinc, Saharsa, four vacancies axisted against which part-time lecturers were proposed to be appointed. In the intervlew conducted on 17-3-1986 only one candidate appeared and he was recommended for appointment. Similarly, in the year 1983 three appointments were sought to be made on part-time basis in Civil Engineering Department, three in Mechanical Engineering and one only in Electrical Engmeering, As would appear from Annexure 6/C, only three candidates appeared at the interview for selection as part-time lectuers in Civil Engineering and all the three were appointed No candiate offered himself for appointment in the department of Machanical Englineering. In the department of Electrical Engineering, only one candidate appeared and he was appointed. It is not necessary for me to examine the proceedlings of each and every Government polytechnic which would show that there was not much response to the notices notifying the vacancies of part-time lecturers. the annexures aforesaid, and there may be many more, only give an idea as to the manner in which the posts were advertised and the interviews conducted. Obviously, there fore, having regard to the peculiar facts and the

circumstancesof the case, not much importance can be attached to the notifying of vacancies and the holding of interviews by the different Government Polyteachndes before appointing part-time lecturers. It appears that there was really no selection of candidates, and the notices, if any,were issued only to suit the candidates who may be available for appointment on part-time besis. There is material on record to show that really there was no advertisement and the process of selection was mere formality.

24. It was next submitted that the appointment of part-time lecturers in educational Institutions is not semething unknown to law. Even the University Statutes provide for appointment of lecturers on part-time basis. The appointment of part-time lecturers, therefore, can not be said to be irregular or illegal. It cannot be disputed that the University statutes do provide for appointment of part-time lecturers, In the case of Government polytechnics, the Government took a decision to make appointments on part-time basis till the vacancies were not filled up by the candidates regularly selected. An university teacher appointed on part-time basis cannot claim regularisation or absorption in regular service. The very nature of his appointment is indicative of the fact that he can have no claim for absorption in the Government / university service. In the case of a Government polytechnic. appointments were made on part-time basis clearly stipulating that the appointees will be paid only honorarium and that the appointment shall be terminated at any time without notice. It was further provided that on the appointment of regularly selected candidates by the regular process, the appointment against the post on part-time basis, shall terminate automatically. the mere factthat both, a part-time lecturer and a full-time lecturer, engage classes and, there fore, perform similar duties cannot be a ground for ignoring the basic differencee in the nature of the appointments. part-time lecturers are a class distinct from regular full-time lecturers. A full-time lecturer regularly appointed is a whole-time Government servant. He cannot take up any other employment under any employer.

Even in regard to other activities including business, or commercial venture, he has not the freedom to carry on such activities exept in some cases with the prior permission of the Government. He is entitled to pensionary benefits and other allowances under the Rules. He is also subject to the disciplinary code of the Government. On the other hand, a part-time employee is free to engage himself in any other activity. It is open to him to seek employment under any other employer. In fact, the Government decision, Annexure—A provided for appointment on part-time basis of persons, who were already employed elsewhere. A part-time employee is not entitled to pensionary benefits and other allowances admissible to a full-time Government employee. He is only paid honorarium and his service can be terminated at any time without notice. Unlike a full-time Government servant, his terms and conditions of service are not governed by rules which are applicable to full-time Government servants. The distinction, therefore, between a part-time employee and a full-time employee is real, and cannot be ignored merely by reference to the fact that both of them deliver lectures and engage classes in the performance of their duties. Assuming that it is permissible for the Government to make appointment on part-time basis, and such appointments are not illegal but recognised by law, there can be no justification for claiming that part-time employment should be regularised as full-time employemt. The question of regularisation can arise only in a case of irregularity, and not in a case where an appointment is made in accordance with law. On their own argument, therefore, it is clear that part-time employmentis also recognised by law and there fore the petitioners cannot claim regularisation as full-time employees. this is not a case where an appointment is sought to be cancelled or terminated on the ground that it was illegally made. Nor is this a case where persons appointed as full time lecturers on temporary basis claim regularisation against that post. this is really a case where person validly appointed to a post claim regularisation against another post, even though they were not appointed according to the procedure prescribed for appointment to that other post.

25. I may also notice the submission urged on behalf of the petitioners that the Government decision, Annexure—A should be considered to be a regulation,and since the appointments have been made in accordance with a regulation. they must be treated as regular appointees. The argument is misconceived because Annexure—A does not purport to provide a procedure for regular appointment. Moreover, I have already held that the petitioners were not even eligible for appointment on the basis of the Government decision as contained in Annexure—A because they were not employed in any other organisation which was a condition precedent for appointment on part-time basis. Apart from these, in law, the posts being gazetted, had to be filled up on the basis of advertisement and selection by the Bihar Public Service Commission. It is not disputed that the Bihar Public Service Commission is reguired to be consulted when appointment is made against gazetted posts, unless the jurisdiction of the commission is curtailed by law. It is also not disputed that so far as Bihar Public Service commission (Limitation of Functions) Regulation, 1957 is concerned, it does not exclude from the purview of the Commission's jurisdiction selection of candidates for appointment as lecturers in Government polytechnics. Bihar Public Service Commission, therefore, was required to hold a competitive examination and to select and recommend candidates for appointment as lecturers. The fact that the recommendation of the Bihar Public Service Commission may not be binding on the Government is of no consequence. If the law requires that the commission should be consulted, the Commission could not be by-passed. In the case of appointment of lecturers in Government Polytechnics, an open advertisement followed by a competitive examination to be conducted by the Bihar Public Service Commission was mandatory. If such a law existed, there was no scope for the operation of an executive instrution cocntrary to the law. The Government decision as contained in Annexure—A there fore, must beconfined in its application to engagement on part-time basis to meet the exigency of the situation created by the existence of vacancies

in the cadre of lecturers in different polytechnics. The procedure adopted under Annexure—A cannot substitute the procedure required to be followed in law, which envisages an advertisement on all India basis, selection by the Bihar Publice Service Commission and appointment on the basis of Commission's recommendation. Law is now fairly well settled by several decisions of the Supreme Court. Recently in *J & K Public Service Commission* Vs. *Dr. Narinder Mohan & ors.* (1) the Supreme Court observed:

> "Existence of statutory rules is not a condition precedent to appoint an eligible and fit person to a post. The executive power is co-extensive with legislative power of the State and under Article 162, the State can create civil posts and fill them up according to executive instructions consistent with Articles 14 and 16 of the Constitution. It is settled law that once statutory rules have been made, the appointment shall be only in accordance with the rules. The executive power could be exercised only to fill in the gaps but the instructions cannot and should not supplant the law, but only supplement the law. The Governor exercising the power under proviso to section 125 (Article 309 of the Constitution of India) made the rules which do not expressly give the power to the State Government to make ad hoc appointments. No such rule has been brought to our notice. No express power was conferred and in fact cannot be conferred to relax the rules of recruitment. Having made the rules the executive cannot fall back upon its general power under Article 162 to regularise the ad hoc appointments under the Rules. Rule 9(3) empowers only to relax the qualification of age in particular exigencies which cannot be called in aid to relax the rules of recruitment. To tide over unforeseen exigencies, power to make ad hoc appointments, may be visualised as envisaged by Explanation (b) to Rule 4 but it expressly states that by virtue of such appointment, the ad hoc appointee does not become member to the service. The Rules prescribe direct recuruitment /

(1) (1994) 2 S. C. C. 630.

promotion by selection as the mode of recruitment which would be done only PSC or promotion committee duly constituted and by a nother body. Therefore, ad hoc employee should be replaced as expeditiously as possible by direct recruits. A little leeway to make ad hoc appointment due to emergent exigencies, does not clothe the executive Government with power to relax the recruitment or to regularise such appointment nor to claim such appointments to be regular or in accordance with rules, Back door ad hoc appointments at the behest of power source or otherwise and recruitment according to rules are mutually antagonistic and strange bed partners. They cannot co-exist in the same sheath. The former is in negation of fair play. The latter are the product of order and regulartity. Every eligible person need not necessarily be fit to be appointed to a post or office under the State, selection according to rules by a properly constituted commission and fitment for appointmentassures fairness in selection and inhibits arbitrariness in appointments."

26. Having considered all reievant aspectsof the matter, I have no hesitation in concluding that appointment of regular full time lecturers can be made by open advertisement on all India basis, selection by Bihar Public Service Commission followed by appointment made by the State Government on the basis of such recommendation. This procedure was not at all followed, and, there fore, the appointment of part-time lecturers was not in accordance with law prescribing the procedure for appintment of full-time lecturers. The part-time lecturers so appointed cannot, there fore, claim to be absorbed as full time lecturers. Even the government decision in this regard as contained in Annexure—A was not followed because the decision clearly postulates that only those persons should be employed on part-time basis who possessed the requisite qualification and who were otherwise employed elsewhere. Even so their appointment as part time lacturer is not in issue. The claim that part-time lecturers and full-time lecturers perform similar nature of duties

and are entitled to the same pay must be negatived because,in fact, part-time lecturers do not work to the same extent as full-time lecturers as has been asserted in the counter-affidavit filed on behalf of the State. Moreover, they are two distinct classes, and it is open to a part-time employee to engage himself in any other business / commercial activity as also to seek or continue in the employment of any other employer. They cannot, there fore, claim the same emolument as full time lecturers on the basis of equal pay for equal work. nor can they claim regularisation against a post to which they were never appointed.

27. The petitioner then submitted that having regard to the facts and circumstances of the case, the cases of the petitioners may now be referred to the Bihar Public Servi e Commission and the Commission may take its recommendation for their regular appointment. In doing so the Bihar Public Ser ice Commission shall only consider the eligibility of the candidates on the date of their first engagement. In the alternative, it was suggested that a limited competition may be held for the persons similarly placed. Explaining this, it was submitted that the persons appointed in each year may be treated as a separate class and a limited competition be held for each class. both the submissions must be rejected in view of the clear principles laid down by the Supreme Court in the case of *J & K Public Serv' Commission* (Supra). The Court held:

> 'The next question is whether the direction given by the High Court to regularise the services of the respondents is valid in law. It is true that the ad hoc appointees have been continuing from 1986 onwards but their appointments are de hors the Rules. Rules prescribe only two modes of recruitment, namely, direct recruitment or premotion by selection. As regards the lecturers are concerned, it is only by direct recruitment. the mode of recruitment suggested by the High Court, namely, regularisation by placing the service record of the respondents before the PSC and consideration there of and PSC'S recommendation in that behalf is only hybrid

procedure not contemplated by the Rules. Moreover, when the Rules prescribed direct recruitment, every eligible candidate is entitled to be considered and recruitment by open advertisement which is one of the well accepted modes of recruitment. Inviting applications for recruitment to fill in Inviting applications for recruitment to fill in notified vacancies is consistent with the right to apply for, by qualified and eligible persons and consideration of their claim to an office or post under the State is a guaranteed right given under Articles 14 and 16 of the Constitution. The direction, therefore issued by the Division Bench is in negation of Articles 14 and 16 and in violation to the statutory rules. The PSC cannot be directed to devise a third mode of selection, as directed. to devise a third mode of selection, as directed by the High Court, nor be mandated to disobey the Constitution and the law."..... .....

It is difficult to accept the contention of Shri Rao to adopt the chain system of recruitment by notifying each year's vacancies and for recruitment of the candidates found eligaible for the respective years. It would be fraught with grave consequences. Itis settled law that the Government need not immediately notify vacancies as soon as they arose. It is open, as early as possible, to inform the vacancies existing or anticipate to the PSC for recruitment and that every eligible person is entitled to apply for and to be considered of his claim for recruitment provided he statisfies the prescribed requisite qualifcations. Pegging the recruitment in chain system would deprive all the eligible candidates as on date of inviting application for recruitment offending Articles 14 and 16."

28. Dr.S. N. Jha appearingon behalf of some of the petitioners submitted that if the teachers of taken over colleges could be transferred to the posts held by the petitioners, there was no reason why the petitioners could not be so appointed. The argument is unsustainable because in the case of taken over Colleges, terms and conditions of the existing employees of such

Colleges is governed by the relevant statute. If the statute provides that the teachers of taken over Colleges shall become the employees of the Government, the law must be given effect. Secondly, the taken over employees had not been engaged on part-time basis. Such is not the case of the petitioners. There is no material to establish that the persons appointed in private Colleges were not eligible and qualified for appointment, and were not appointed in accordance with the relevant rules. The petitioners, therefore, cannot compare themselves with the teachers of taken over colleges whose terms and conditions of service are regulated by a special law, which provides for take over of such institutions.

29. The submission urged by Mr. S. P. Mukherjee is that for the mistake, if any, committed by the appointing authorities and the Principals of the different Government Polytechnics, the petitioners should not be penalised. It was submitted that the State Government is stopped from challenging the legality of the appointment of the petitioners. The submission is misconceived. It is not the case of the State Government that the appointments made on part-time basis are illegal. On the contrary it is submitted on behalf of the State that part-time engagement is permissible to meet the exigency of the situation. It has only been pointed out that in the instant cases, the Government decision was not followed in its letter and spirit and persons were appointed on part-time basis even though they were not employed elsewhere, as was the requirement of the Government decision. Apart from this, it is not the case of the Government that the appointments are illegal. In fact the case of the Government is that in terms the office order appointing the petitioners on part-time basis, provided that engagement shall stand terminated on the appointment of regular full-time teachers. The order also provided that the engagement could be terminated at any time without notice. No representation was made by the Government, which could lead the petitioners even to entertain a reasonable expectation that they are likely to continue indefinitely, and may be absorbed later. In fact the representation, if

any, was to the contrary. No principle of estoppel, therefore, applies in the facts and circumstances of this case. The law is well settled that temporary arrangement made for carrying on the work must come to an end when regular appointments are made *State of Haryana* Vs. *Piara Singh* (1) *Surendra Kumar Gyani* Vs. *State of Rajasthan* (2) and *Director, Institute of Management Development* Vs. *Pushpa Srivastava* (3)

Similarly it is now well settled that if such temporary appointments / engagements are terminated in accordance with the terms and conditions of appointment, the provisions of Article 311 are not attracted, and the procedure prescribed need not be followed. The Supreme Court held in *Madhya Pradesh Hasta Shilpa Vikas Nigam Ltd.* Vs. *Devendra Kumar Jain and others* (4)

"A plain reading of these two orders will go to show that the appointments were made purely on temporary basis and their services were liable to be terminated at any time without notice or assigning any reason. In the caseof appointment on temporary basis a servant who is so appointed does not acquire any substantive right to the post, even though the post itself may be permanent and it is an implied term of such appointment that it may be terminable at any time and without notice. A temporary government servant does not become a permanent government servant unless he acquires that capacity by force of any rule or he is declared or appointed as a permanent servant. In the present case there is no rule under which the respondents may be deemed to have become permanent by force of such rule nor they were so declared by any subsequent order of the appellate-Company to have acquired that status On the contrary the respondents all along continued to be temporary and according to the terms of the order of appointment their services could be terminated at any time without any notice or assigning any reasons. In such a case it is not necessary to follow the

(1) (1992) A. I. R. (S. C.) 2130
(2) (1993) A.I. R. (S. C.) 115
(3) (1992) A. I. R. (S. C.) 2070
(4) (1995) 1 S. C. C. 635.

formalities contemplated by Article 311 of the Constitution. In these facts and circumstances the High court was not right in holding that the respondents were entitled for being heard before passing the said order of termination of theirservices and that the order of termination was bad in law on that account."

30. At this stage I may notice some of the authorities cited at the Bar. It was first contended relying upon the decisionof the Supreme Court in *Jacob* Vs. *Kerala Water Authority* (1) that some of the petitioners having worked for long periods, they should be regularised in service, as was ordered by the Supreme Court in the aforesaid case. I have carefully considered the submission advanced on behalf of the petitioners on the basis of the said authority, and I have come to the conclusion that the decision in that case rested on the Special facts of that case, and the specific provisions in the relevant rules, The rules themselvs provided for absorption of certain class of employees in the circumstances mentioned in rule 9 (a) (1) and (e) of the Kerala State Subordinate Service Rules, 1958, consequently it was held by the Supreme Court that such of the employees who fulfilled the conditions laid down in the rules aforesaid must be given the benefit envisaged under the rules and absorbed in service. No such or similar rule has been shown to us which may benefit the petitioners. The aforesaid decision of the Supreme Court came up for consideration by the Court in a subsequent decision, reported in *Director, Institute of Management Development* Vs. *Pushpa Srivastava*. The Court referred to the aforesaid judgment and held that the judgment in *Jacob's case (supra)* turned on the interpretation of the relevant rules, and distinguished the case on that ground holding that in that case with which the Court was concerned there was no such rule. The appointment was purely ad hoc, and on a contractual basis for a limited period and, there fore, the repondents did not have a right to ramain in the post after the expiry of the period.

(1) (1990) A. I. R. (S. C.) 2228

Reliance placed upon the decision, reported in AIR 1991 SC 2088 is also of no help to the petitioners. From the decision it appears that a special leave had been preferred against an 'nterim order passed by the High Court. The Supreme Court, however, passed certain directions and left it to the parties to move the High Court to dispose of the pendinglitig ations in terms of the supreme Court order. No principle of law has been laid down in that decision, and having regard to the special facts of that case, the Supreme Court in the interest of consistency issued directions which were to govern all cases pending before the courts.

31. The petitioners relied heavily on the decision of the Supreme Court, reported in *State of Haryana* Vs. *Piara Singh* (1) The Court cautioned the authorities against indiscriminate regularisation of temporary employees and observed that a scheme should be framed by the Government before the employees are regularised. The Court observed:

"The normal rule, of course, is regular recruitment through the prescribed agency but exigencies of administration may sometimes call for an ad hoc or temporary appointment to be made. In such a situation, effort should always be to replace such an ad hoc/ temporary employees by a regularly selected employee as early as possible. Such a temporary employee may also compete along with others for such regular selection / appointment. If he gets selected, well and good, but if he does not, he must give way to the regularly selected candidate. the appointment of the regularly selected candidate cannot be with held or kept in abeyance for the sake of such an ad hoc / temporary employee.

Secondly, an ad hoc or temporary employee should not be replaced by another ad hoc or temporary employee; he must be replacedonly by a regularly selected empleyee. This is necessary to avoid arbitrary action on the part of the appointing authority.

(1) (1992) A. I. R. (S. C.) 2130

Thirdly, even where an ad hoc or temporary employment is necessitated on account of the exigencies of administration, he should ordinarily be drawn from the employment exchange unless it cannot brook delay in which case the pressing cause must be stated on the file. If no candidate is available or is not sponsored by the employyment exchange, some appropriate method consistent with the requirements of Article 16 should be followed. In other words there must be a notice published in the appropriate manner calling for application and all those who apply in response thereto should be considered fairly.

An unqualified person ought to be appointed only when qualified persons are not available through the above processes.

If for any reason, an ad hoc or temporary employee is continued for a fairly long spell, the authorities must consider his case for regularisation provided he is eligible and qualified according to rules and his service record is satisfactory and his appointment does not run counter to the reservation policy of the State."

The aforesaid judgment also emphasises the fact that the regularisation may be permissible only in given circumstances, and temporary or ad hoc employees cannot be indiscriminately regularised. Temporary appointments may be necessitated on account of the exigencies of the administration, but the method employed should be consistent with the requirement of Article 16. Back-door entrants should not be regularised. Ad hoc temporary employees should be replaced without delay by regularly selected employees as early as possible, what is important is the emphasis on the fact that those illegally appointed contrary to the constitutional mandate or law regulating the appointment should not be regularised. I shall refer to the other authorities on the subject later, but at this stage I may notice the observation of the Supreme Court in *J & K Public Service Commission and other* where the Supreme Court after noticing the decision in *Piara Singh's* case observeed:

"In *State of H. aryana* V. *Piara Singh* this Court noted that the normal rule is recruitment through the prescribed agency but due to administrative exigencies, In such a situation, this Court held that efforts should always be made be replace such ad hoc or temporary employees by regularly selected employees, as early as possible, The temporary employees also would get liberty to compete along with others for regular selection but if he is not selected, he must give way to the regularly selected candidates. Appointment of the regularly selected candidate cannot be withheld or kept in abeyance for the sake of such an ad hoc or temporary employed ad hoc or temporary employee should not be replaced by another ad hoc or temporary employee. He must be replaced only by regularly selected employee. The ad hoc appointment should not be a device to circumvent the rule of reservation. If a temporary or ad hoc smployee continued for a fairly long spell the authorities must consider his case for regularisation provided he is eligible and qualified according to the rules and his service record is satisfactory and his appointment does not run counter to the reservation policy of the State. It is to be remembered that in that case, the appointments are only to Class-III or Class—IV posts and the selection made was by subordinate selection committee. There fore, this Court did not appear to have intended to lay down as a general rule that every category of ad hoc appointment, if the ad hoc appointee continued for long period, the rules of recruitment should be relaxed and the appointment by regularisation be made .....

It is difficult to accept the contention of shri Rao to adopt the chain system of recruitment by notifying each year's vacancies and for recruitment of the candidates found eligible for the respective years. It would be fraught with grave consequences. It is settled law that the Government need not immediately notify vacancies as soon as they arose, It is open, as early as possible, to inform the vacancies existing or

anticipated to the PSC for recruitment and that every eleigible person is entitled to apply for and to be considered of his claim for recruitment provided he satisfies the prescribed requisite qualifications. Pegging the recruitment in chain system would deprive all the eligible candidates as on date of inviting application for reamirment offending Articles 14 and 16."

32. *In Dharwar District P. W. D. Literate Daily Wage Employees Association* Vs. State of Karnataka & others (1) the facts were quite different. In that case it was pleded that about 50000 workers had been employed in different Government establishments and though many of them had put in 16 to 20 years continuous service, they had not been regularised in their service, and were not being paid equal pay for equal work. Having regard to the permanent need of such employees, the Court directed the State Government to frame a scheme for their absorption in due course. Such a scheme framed by the Government approved with modifications by the Supreme Court. The aforesaid Judgment really deals with the principle of equal pay for equal work, and having regard to the fact that large number of persons were involved and they had worked for 16 to 20 years the Court considered that they should be regularised in accordance with the scheme to be framed by the Government. The regularisation scheme also envisaged their regularisation in due course and not at once, but the benefit of enhanced emolument was extended to all the workers. It is also not insignificant that the persons involved were engaged mostly against Class IV posts and the engagement was not on part time basis. In my view, in the matter of regularisation, part time lecturers cannot equate themselves with Class III and Class IV employees, particularly when such employees have worked for 16 to 20 years without break. In the instant case, we are concerned with part-time lecturers who have been engaged to deliver lectures pending regular appointment and obviously, therefore, once the regular recruitment takes place, they are required to make way for the

(1) (1990) A. I. R. (S. C.) 883.

regular appointees. Their services may be terminated in accordance with the terms and condition of engagement.

33. Dr. S. N. Jha also referred to four other decisions of the Supreme Court, reported in 1993 (3) SCC 259, 1993 (3) SCC 584, 1993(6) Judgments Today 307 and AIR 1993 (SC) 1126. I have found no principle has been laid down in any of these judgeents which may advance the case of the petitioners, and the observations made there in are consistent with the view that I have taken.

34. Counsel for the State, on the other hand, has relied upon the decisions, reported in AIR 1993 (SC) 115 and AIR 1992(SC) 2070 to which I have referred earlier for the proposition that temporary appointees must make way when regular appointment takes place. He has also referred to several decisions of this Court and, there fore, it is not necessary to refer to each one of them.

35. No authority of the Supreme Court has been cited before us for the proposition that even part time employees may be regularised in service against permanent posts. In *Bhagwan Dass and others* Vs. *State of Haryana and others* (1) the Court was considering case where the supervisers in the Education Department were appointed each time for a periodof six months and reappointed after giving break of a day or two. The appointments were made under a scheme which was of temporary nature. but it was found that the nature of duties and functions discharged and the work done by them was similar to those discharged and done by the regularly employed persons. The Court held that in such a case having regard to the special facts, the principle of equal pay for equal work was attracted and it was immaterial as to whether they were temporarily or regularly appointed as long as the nature of duties and functions discharged by them and the work done was similar to those discharged by regularly recruited persons. The claim for regularisation was, however, negatived. It was held:

(1) (1987) A. I. R. (S. C.) 2040.

"..... In our opinion, therefore, the prayer of the petitioners to absorb them as regular employees on a permanent basis from the date of their initial appointment has no justification. That however does not mean that the petitioners should be deprived of the legitimate benefits of being fixed in a pay-scale corresponding to the one applicable to respondents 2 to 6 by treating them as employees who have continued from the date of initial appointment by disregarding the breaks which have been given on account of the peculiar nature of the Scheme. While, there fore, the petitioner cannot claim as a matter of right to be absorbed as permanent and regular in claiming pay on the basis of the length of service computed from the date of their appointment depending on the length of service by disregarding the breaks which have been given for a limited purpose ....."

Similarly, in K. S. P. College Stop Gap Lecturers' Association Vs. State of Kernataka (i) the claim for regularisation of service of temporary teachers appointed due to exigency of service was negatived, but it was held that since they discharged similar nature of duties, they should be absorbed as and when regular vacancies arose. It was further held that the temporary teachers shall be paid the salary as was admissible to teachers appointed against permanent posts. It was observed that a temporary or ad hoc employee may not have a claim to become permanent without facing selection or being absorbed in accordance with the rules but no discrimination can be made for same job on the basis of method of recruitment. It may, however, be observed that the appointments made were on ad hoc basis, and not on part time basis.

The case, reported in AIR 993 S. C. R. 3229 related to part-time lecturers. Though it was initially contended by the appellants before the Supreme Court that they were entitled to absorption and regularisation as lecturers, the Court was pleased

(1) (1992) A. I. R. (S. C.) 677

to issue notice limited only to the question of payment according to the minimum of the pay scale prescribed for the post of regular lecturers. The direction was given by the Supreme Court after it was found that the appellants were not gainfully employed elsewhere and that the nature and amount of work done by them was equal to that of regular lecturers. The Court directed that the appellants shall be paid according to the minimum of the pay scale prescribed for the regularly appointed lecturers, the duties of which post they were discharging during the period their appointment as part time lecturers subsisted.The aforesaid decision does not support the case of the petitionrs for regularisation of their services. Moreover, the observations in the case, reported in (1) *State of Punjab* Vs. *Gurdarshan Singh Grewal* (1) supports the contention of the State that part time employee is not a Government servant.

36. Reliance was also placed by the petitioners upon the judgment, reported in (*S. C. Puttaswamy* Vs. *Hon'ble the Chief Justice of Karnataka* (2) but as held by the Supreme Court in *J & K Public Servic Commission's case (supra)* the order passed by the Supreme Court was in exercise of Jurisdiction under Article 142 of the Constitution of India and, there fore, was not in the nature of a binding precedent. In the special facts and circumstances of that case, the Supreme Court with a view to do complete justice between the parties gave direction. as contained in that judgment.

37. Having regard to the principles of law well-settled, and the several decisions of the Supreme Court above referred, I have no hesitation in coming to the conclusion that the petitioners cannot claim regularisation of their services against permanent posts. The petitioners were appointed on part time basis with a clear stipulation that their services may be terminated at any time. and that their engagement shall come to an end when regular appointments were made against the post held by them.

(1) (1993) A.I.R. (S. C.) 2452.
(2) (1991) A.I.R. (S. C.) 295.

The engagement was necesitated by exigencies of service having regard to the existing vacancies and the delay entailed in making regular appointments. The petitioners were not appointed according to the rules which involved an open advertisement on all India basis, selection by the Bihar Public Service Commission followed by appointment by the State. They were, there fore, appointed de hors the rules and constitutional mandate. Moreover. they were not appointed as full time lecturers. but only as part time lecturers. They cannot claim regularisation againstthe posts to which they were never appointed. The parties are agreed that their appointment as part-time lecturer is not illegal and, there fore, there can be no question of curing any irregularity. They can become full time lecturers on regular basis only after they are selected for appointment in accordance with law. The State Government has informed the Court that the process of regular recruitment has already commenced and, therefore, it will be open to the petitioners to compete at the open competition test held for the purpose of filing up regular vacancies. Following several decisions of the Supreme Court, in *J & K Pubic Service Commission's case (supra)* it has new been settled once for all that a person appointed on ad hoc or temporary basis cannot be regularised unless he is appointed or absorbed in accordance with the rules. In view of the authoritative pronounement by the Supreme Court, the prayer of the petitioners for regularisation must be negatived.

38. So far as the question of equal pay for equal work is concerned, the averment in the conter-affidavit filed on behalf of the State that part time lecturers engaged 2 classes in a month, where as full time lecturers engaged 22 classes in a week has not been contrbverted. It cannot, therefore, be said that the quantum of ork load shouldered by the part time lecturers is the same as that shouldered by full time lecturers. The petitioners, therefore, cannot claim equal pay when their work is not equal to that of regularly recruited full time lecturers.

39. Having noticed the facts of the case, I am tempted to quote from the judgment of the Supreme Court. reported in AIR 1992

SC.677. The Court observed:

> "Ad hoc appointments, a convenient way of entry usually from backdoor, at times even in disregard of rules and regulations, are comparatively recent innovations to the service jurisprudence. They are individual problem to begin with, become a family problem with passage of time and with human problem in court of law. It is unjust and unfair to those who are less fortunate in society with little or no approach even though better qualified, more meritorious and well deserving. The infection is widespread in Government or semi-Government departments or State financed institutions. It arises either because the appointing authority resorts to it deliberately as a favour or to accommodate some one or for any extrancous reason ignoring the regular procedure provided for recruitment as a pretext under emergency meassure or to avoid loss of work etc. Or the rules or circulars issued by the department itself empower the authority to do so as a stop-gap arrangement. The former is an abuse of power. It is upardonable. Even if it is found to have been resorted to as a genuinc emergency measure the courts should be reluctant to grant indulgence. Latter gives rise to equities which have bothered courts every now and them....."

40. In the instant case I have noticed that despite the Government's clear direction to appoint only those persons on part time basis, who were otherise gainfully employed elsewhere, the appointing authorities observed the direction in its breach. I have also considered the materials on record which disclose that not many candidates offered themselves for appointment. The notices regarding vacancies were not given wide publicity and, therefore, at times only as many candidates offered them selves as there were vacant posts and sometimes their number was even less than the number of vacancies that existed. All these create an impression that the appointment of part time lecturers was not done in the manner in which it should have been done, and the appointing authorities acted with a view to confer favours. One cannot also lose sigsht of the fact that the lecturers appointed in Government polytechnics shoulder the

heavy and onerous responsibility of training up technicians of future, who will guide the country's progress towards prosperity. The need of the hour, therefore is not mere appointment of qualified teachers, but the appointment of the best available qualified talent. This can be done only by open advertisement and selection by an impartial body, more particularly in the State of Bihar where the system of education has completely crumbled, and the process of selection has been reduced to a farce. Having regard to the larger public interest, it would not be proper to confer legal sanctity on notions which do not appear to be above board. If that is done, it would only ensure the entry of back-door entrants into the Government polyteachnics, At the same time it would not be fair to permit the State to continue its apathetic attitude towards the educational institutions. Public interest demands that the best talents available in the country should be available to the Government polytechnics and, therefore, short-cut methods and stop-gap arrangements must be brought to end, since they have continued too long. I, there fore, direct the respondents to immediately take steps to fill up the sanctioned posts, which are lying vacant and against which no regular appointments have been made, with in a period of six-months from today. Since the Government Pleader informed us that the State has already commenced the process to fill up these vacancies, the period of six-months is more than sufficient to complete the process, and this Court should not be bothered again for extension of time to complete the process.

41. In the result, these writ petitions fail and are accordingly dismissed, but subject to the above directions, There will be no order as to costs.

R. N. Prasad, J. I agree.

R.D. Appication dismissed

CRIMINAL WRIT JURISDICTION

Before S. K. *Homchaudhury* and *Narayan Roy*, JJ.

1995

June, 29.

*Hari Narain Singh and ors.**

V.

The State of Bihar and ors.

Code of Criminal Procedure, 1973 (Central Act no. II of 1974) *section 427—provisions of—appellant serving sentence of life imprisonment for a conviction under section 302, subequently sentened to undergo life improsonment in antother Sessions Trial—sentences, whether to run concurrently, prospectively from the date of subsequent sentence coming into operation.*

The writ-petitioners who were undergoing imprisonment for life in Sessions Trial no. 119 of 1977 were subsequently sentenced to undergo imprisonment for life in Sessions Trial No. 280 of 1995, filed the application under Articles 226 and 227 of the Constitution of India for issuance of a writ of mandamus for releasing them froth with as they had already served a sentence of 12 years and taking in account the remission of sentence granted to them they be deemed to have served the sentence for a period exceeding 14 years, on the plea that both sentences have to run concurrontly and not consecutively with retrospective effect from the commeneement of the sentence passed in Sessions Trial no. 119 of 1977.

Held, that according to the provisions contained in section 247 (2) of the Code of Criminal Procedure. 1973. that when a person already under going a sentence of imprisonment for life is sentenced to subsequent conviction to imprisonment, the subsequent sentence should run concurrently with previous

*Criminal Writ Jurisdiction Case No. 661 of 1994. In the matter of an applicatioin under Articles 226 and 227 of the Constitution of India.

sentence prospectively from the date of the subsequent sentence comes into operation after passing there of.

Held, further, that section 57 of the Penall Code, 1860 provides that calculating fractions of terms of punishment, imprisonement for life shall be reckoned as equivalnt to imprisonment for twenty years, consequently the writ application is dimissed.

APPLICATION UNDER ATTICLES 226 AND 227 OF THE CONSTITUTION OF INDIA.

THE FACTS OF THE CASE MATERIAL TO THIS REPORT ARE SET OUT IN THE JUDEMENT OF S. K. HOMCHAUDHURI, J.

S. K. Homchaudhuri, J.

In this petition under Articles 226 and 227 of the Constitution of India, the petitioners have approached this court for issue of a writ in the nature of mandamus or any other appropriate writ commanding the respondents to relaase the petitioners forthwith holding that the sentences awarded to the petitioners in Sessions Traial No. 119 of 1977 and Sessions Trial No. 280 of 1985 have to run concurrently and not consecutively.

2. The petitioners had been convicted under section 302 / 64 I. P. C. 302/149 Src7other offences in Sessions Trial No. 199 of 1977 and sentenced to undergo rigorous imprisonment for life. The judgment of conviction and sentences passed against them was confirmed by the High Court in Cr. Appeal 6 No. 308 of 979 and a Special Leave petition (Criminal) No. 534 of 1985 against the judgment and order of this Court before the Supreme Court, was also dismissed. while serving sentence of R. I. for life, the petitioners were tried in Sessions Trial No 280 of 1985 on the charge of committing mumder which took place on 25th of August, 1982. By judgment passed in Sessions Traial No. 280 of 1985, the learned Sessions Judge convicted the petitioners Parmanand Singh and Shyam Singh under section 302 I. P. C. and sentenced them to death. The other four petitioners were convicted under section 302/149 I. P. C. and each of them was

sentenced to undergo RI for life. In Death Reference case No. 2 of 1985 and other appeals preferred against the judgment of conviction and sentence, this Court affirmed the conviction of the petitioners but modified the sentence of death passed by the petitioners Judge against the petitioner—Parmanand Singh and Shyam Singh to life imprisonment. The appeal preferred against the judgment passed by the High appeal preferred against the Judgment passed by the High Court in a Special Leave petition in the Supreme Court was rejected.

3. Heard learned counsel for the petitioners and learned Government Advocate.

4. Learned counsel for the petitioners has submitted that under the mandatory provision of sub-section 2 of section 427 Cr. P. C., as the petitioners having already been sentenced to undergo life imprisonment in Sessions Trial No. 119 of 1977 sentences passed subsequently in Sessions Trial No. 280 of 1985 should run concurrently and not consecutively According to the learned counsel for the petitioners the sentence passed in subsequent Sessions Trial No. 280 of 1985 should be treated to have run concurrently with retrospective effect from the date of commencement of the sentence passed in Sessions Trial No. 119 of 1977.

5. Learned counsel for the petitioners has further submitted that all the petitioners had been in jail for a period of more than 12 years and that taking into account the period of remission of sentence granted to them,because of their good conduct in jail, each of them deemed to have served sentence for a period exceeding 14 years and as such the petitioners are entitled to be released from the jail. But the respondents are arbitrarily and illegally refusing to release the petitioners from jail after they have completed 14 years of imprisonmant. Learned counsel for the petitioner in not releasing the petitioners from the jail after they deemed to have served 14 years f imprisonment, is arbitrary and discriminatory inasmuch as other convicts sentenced to R. I. for life are being released by respondents on serving sentence

for a period of 14 years incuding the period of remission.

6. I have considered the submission made on behalf of the petitioners and perused the materials placed before us. The learned counsel for the petitioners is right in submitting that as per mandatory provision of sub-section 2 of section 427 Cr. P. C. the subsequent sentences to underge RI for life passed in Sessions Trial No. 280 of 1995 while the petitioners were serving the sentences for life passed in Sessions Trial No. 119 of 1977, are to run concurrently and not consecutively. However, I find it difficult to accept the contention of the learned counsel for the petitioners that the subsequent sentence should be treated to have run retrospectively from the date of commencement of the sentence of life imprisonment passed earlier in Sessions Trial No. 119 of 1977. On perusal of the provision of section 427 Cr. P. C. I have no hesitation to hold that when a person already undergoing sentence of imprisenment for a life is sentenced to subsequent conviction to imprisonment, the subsequent sentence should run concurrently with previous sentence prospectively from the date the subsequent sentence comes into operation after passing there of. That apart, section 57 I. P.C. provides that in calculating fractions of terms of punishment, imprisonment for life shall be rackoned as equivalent to imprisonment for twenty years.

7. For the reasons stated above the petition is without merit and is dismissed.

Narayan Roy, J. I gree.

R.D. Appication dismissed

APPELLATE CIVIL

Before B. L. Yadav, J*

1995

June. 29.

Haquik Mian.

V.

Rajendra prasad and others.

Transfer of property Act, 1885 (Central Act no. IV of 1885) *section* 60—clog on equity of redemption of—the mortgaged property; whether void—defendant,heir of mortgagee, admitting the execution of mortgage and that the mortgage deed contained a recital that payment of rent was the duty of the mortgagee—the right of equity of redemption, *whether can be lost.*

In a suit for redemption of mortgage by the mortgagor defendants, the heirs of the mortgagee in the written statement took the plea that they were the owners and not the mortgagee having purehased the same from the auction purchaser who had purchased the same at court sale for arrears of rent.

Held, that mortgage is essentially a conveyance of an interest in a property as a security for payment of debt. The security must be redeemable on payment of debt or mortgage-money; section 60 of the Transfer of property Act, 1885 confers a statutory right of redemption. It is an inviolable right of mortgagor, on redemption to get back the subject of mortgage, Any clog on the equity of redmption is inequitable, bad in law and void. The defendant had admitted the execution of the mortgage deed and morgage deed contained a recital that payment. of rent was the duty of the mortgagee himself, hence, in view of first provisio of section 60

*Second Appeal No. 283 of 1993. Against the Judgment and decree dated 30—4—1993 passed by Sri Prem Narain Shukla, Subordinate Judge, Gopalganj, in Title Appeal No. 64 of 1978 reversing the Judgment and decree dated 12. 7. 1978 passed by Sri Chandika Prasad, Ist Additional Munsif, Gopalganj in Title Suit No. 175 of 1967.

of the Act being mandatory, the right of equity of redemption cannot be lost. It was the statutory obligation of the defendant mortgagee to supervise theproperty as a prudent man particulaly in view of the recital in the mortgage deed.

CASE LAWS DICUSSED.

APPEAL BY THE PLAINTIFF.

THEFACTS OF THE CASE MATERIAL TO THIS REPORT ARE SET OUT IN THE JUDEGMENT OF B. L. YADAV, J.

B. L. Yadav, J. This is a plainftiff's Second Appeal preferred under section 100 of the Code of Civil procedure, 1908 (for short the Code) in a suit for redemption of mortgage over an area of 11 Bigha, 15 kathas 6 dhurs in Khata No. 388 of village Balaeshra Balahat. This Khata belongs to Nurul Mian, Zan Mohammad Mian, Adbul Aziz, Ahmad Mian and Ali Hussain Mian. They executed a mortgage on 23. 1. 1922 in favour of Lala Sital Lal after obtaining Rs. 600/— the mortgage money in respect of an area of 4 Bighas and the possession was given to the mortgagee. there was another oral mortgage dated 1. 4. 1934 in favour of same mortgagee Lala Sital Lal for Rs. 500/— in respect of the remaining area of Khata. Sital Lal died and Rspondent nos. 1 to 6 are his heirs. Plaintiffs are the heirs of Abdul Aziz, the mortgagor.

2. The amount of mortgage money was sent by mortgagor to the defendants, the mortgagees but they did not accept it rather they asserted the rights of vendees. They further asserted that they are not mortgagees rather a suit for arrears of rent was filed by Malik Hathuaraj and decree was obtained and land in dispute was put to auction sale and the defendants managed that the property to auction sale was purchased by Guru Gokul Dubey and later the defendants purchased the property in suit and came in possession as vendees, hence they would not deliver back possession to the plaintiffs as defendants are no longer mortgagees.

3. The suit was contested by the defendans alleging that they

are on the date of the suit not as mortgagees. Earlier mortgage was created in favour of LalaSital Lal the predecessor-in interest of the defendants. The suit for arrears of rent was filed by Malik Hathuaraj and it was decreed exparte. The property was put to auction sale as the arrears of rent could not be paid. Lala Sital Lal purchased the property in the name of Guru Gokul Dubey and thereafter from him defendants came in possession as vendee. the defendants are no longer mortgagees. The suit was time barred and liable to be dismissed.

4. The trial court after considering the oral and documentary evidence decreed the suit holding that the defendants were mortgagees and not owners and were liable to re-deliver the property to the plaintiffs, the mortgagors. The suit alleged to have been filed by Malik Hathua Raj, for arrears of rent, was fraudulent and fabricated.

5. The defendants-respondents, the mortgagees, preferred appeal before the lower appellate court and the same has been allowed and suit has been dismissed without reversing the findings of the trial court and without considering the material evidence particularly the oral evidence considered by the trial court. Against the decree of the Ist appellate court the present Second Appeal has been filed by the plaintiffs, the alleged mortgagors.

6. Learned counsel for the plaintiffs—appellants urged that the oral evidence including the statements of P. W. 5 Laloo Khan aged about 70 years, P. W. 1 Abdul Karim and P. W. Musafir Ram, has not been considered and that the contradiction in the statement of D. Ws. was and that the contradiction in the statement of D. Ws. was not notieed, Normally the appreciation of oral evidence by trial court need not be interfered with as the trial court has advantage to watch demeanour of witnesses. The burden of proof has been placed only on the plaintiffs— appellants, whereas both parties led evidence and parties were aware about the pleadings of the other side, in that event the questionof burden of proof loses its importance. Lala Sital Lal the original

mortgagee was liable to pay rent in view of the covenant recital in mortgage deed itself and he was to supervise the property as a common prudent man, that being so where was the necessity to file a suit for arrears of rent by Malik Hathuaraj. Even if it was so suit must have been filed against Lala sital Lal. the trial court held that the proceedings in respect of arrears of rent and auction sale, and purchase of land in dispute by Lala sital Lal were fraudulent and fabricated but the lower appellate court without adverting to this aspect just on presumption dismissed the suit and allowed the appeal. It was also contended that the purchase by the mortgagee who was obliged to pay rent under the terms of the mortgage, but committed default and got a suit for arrears of rent filed by the Malik Hathua Raj, and got the land in suit sold in auction sale, amounts to an advantage so derived for benefit of the mortgator. The equity of redemption will also not be affected in view of section 60 of the T.P. Act, 1882 and section 90 of the Trusts Act, 1882. The suit cannot be said to be time barred. Reliance was placed on *Mrutunjay Pani and another* v. *Narmada Bala Sasmal and another*, AIR 1961 S. C. 1353 and *Jaya Singh Dnyanu Mhoprekar and another* v. *Krishna Babaji Patil and another*, AIR 1985 S. C. 1646.

7. Learned counsel for the respondents, on the other hand contended that the appeal was concluded by the findings of fact inasmuch as the lower appellate court recorded a finding that the mortgage was redeemed much prior to the filing of the suit which was clearly time barred, and that oral statement s of the withesses have been considered and burden of proof always remains on the plaintiffs. Earlier suit for arrears of rent was correctly filed by Malik Hathuaraj and correctly decreed and land in suit was put to auction-sale and later on correctly purchased by the heirs of Lala Sital Lal and the land mortgaged came in possession of the defendants as an auction purchaser. There was no covenant that Lala Sital Lal. mortgagee must pay the rent. The appeal was liable to be dismissed. He leaned heavily on *Mahabir singh* v. *Rameshwar Singh and others*. 1978 B. L. J.

R. 768; *Ramjit Choudhary alias Bagar Choudhary* v. *Satan Devi and another*, 1970 B. L. J. R. 756.

8. Having carefully weighed the submissions of the learned counsel for the parties, the question for determination is as to whether the suit was time barred and was the suit dismissed just on presumption, whether burden of proof has correctly been placed on the plaintiffs-appellants, and whether the question of burden of proof remains important even after both the parties have ledevidence, and whether the oral evidence appreciated by the trial court which has the advantage of watching the demeanour of the witnesses, can be ignored by the lower appellate court without pointing out special features which have been lost sight of by the trial court, and whether the fraudulent nature of transaction in getting the earlier suit filed by Malik Hathuaraj for recovery of rent has been taken into account particularly with reference to duty to pay rent and whether on account of default of the mortgagee to pay rent, the suit was filed for recovery of rent and the property was put to auction sale, the transaction or proceedings would not affect the right of redemption ?

9. As regards the first point whether the suit was barred by limitation suffice it to say that the point was not taken by the defendants-respondents in the written statement. The plea about the limitation is mixed question of fact and law. That need not be raised for the first time in the second appeal without there being a factual foundation including pleadings or evidence. Itis evident by a perusal of the written statement as discussed by the learned First Additional Munsif, Gopalganj that no plea about suit being barred by limitation was taken by the defendants nor any issue was framed on the point of limitation. Recently in K. *Chelliah Serval* V. *M. Muthusami Serval*, Patna Law Reports 1995 (Supreme Court) 66, their Lordships of the Apex Court ruled that in the second Appeal it was not open to the High Court to have gone into question which was neither pleaded nor raised or dealt with by the trial court or lower appellate court. In such situation, High court exceeded its jurisdiction under Section 100 of the

code. But as point was urged emphatically hence for precaution's sake I am proposing to decide. The execution of mortgage deed was a dmitted even to the defendants-respondents, and once a mortgagee always a mortgagee till redeemed. The first mortgage was executed on 23. 1. 1922 and second oral mortgage was dated 1. 4. 1934. The defendants alleged that it was redeemed prior to the filing of the suit.

10. Article 61 (a) the Limitation Act, 1963 (for short the Act) provides 30 years limitation for redemption. Section 30 of the Act postulates that in case some shorter period of limitation has been provided then provided under the (old) Indian Limitation Act, 1908 in that event suit shall be deemed to have been filed within 7 years from the date of enforcement of the Act. Article 148 of old Limitation Act, 1908; prescribes 60 years period of limitation and corresponds to Article 61(a) of the Act. As a salutary principle the mortgagee or the person claiming under him is estopped from claiming any adverse rights against the mortgagors. In such matters Article 61(a) of the Act and old Art. 148 would apply. the suit having been filed in 1967 much within 60 years under the extended period of limitation under Article 61 (a) read with Section 30 of the Act, hence cannot be said to be barred by limitation.

11. As regards the point about the question of burden of proof suffice it to say that as both the parties have led evidence, further they were aware to the pleadings of the other side, in that event question of burden of proof loses its significance. The lower appellate court erred in holding that the burden of proof was on the plaintiffs.

12. Reverting to the next question whether the suit was dismissed by the lower appellate court just on the presumption. On page 20 of the certified copy it has been stated:

"On the basis of circumstantial evidence the presumption will be that Zarpeshgi deed of 1922 was redeemed sometimes in 1927 as stated by D. W. 3 and 4 and the land was put on auction

sale in1928 as alleged by the defendants and it was purchased by Gokul Dubey in the auction sale."

In my opinon, in a judgment of reversal the suit cannot be dismissed just on presumption.

13. As regards appreciation of oral evidence by the lower appellate court, suffice it to say that the trial court has considered the statements of P. W. 4, Musafir Ram aged about 65 years, P. W. 5 Laloo Khan, and P. W. 1 Abdul Karim but their statements have not ben considered rather just the witnesses of the defendants have been enumerated and their testimony has been relied upon without reversing the findings of the trial court and without considering the statements of P. W. 4 Musafir Ram, P.W. 5 Laloo Khan and P. W. 1 Abdul Karim, When the question turns upon oral evidence to be appreciated by the appellate court in that event it must be slow in reversing the findings of the trial court as the trial court had the advantage of watching the demeanour of the witnesses, whereas the appellate court is deprived of that oportunity. (See *Madhusudan Das* v. *Smt. Naraini Bai* (1).

14. Reverting to the question whether transaction which culminated in putting the property on auction sale and subsequent purchase by the mortgagee would amount to fraudulent nature of transaction. A copy of the mortgage deed dated 23. 1. 1922 is on the record. About the liability of payment of rent there is following statement:

"व जर लगान मोतजक्रेरा सदर निज्द मालिक देहे मारफत रेहनदार मजकूर व अरवज रसीद साल व साल अदाय किया करें।"

From the aforesaid recital it was evident that the liability of payment of rent was of the mortgagee and not mortgagor. In other words the liability of payment of rent was of the mortgagees, which was to be paid every year but the lower appellate court by ignoring material evidence i. e. mortgage deed etc., has held that it was the responsibility of the mortgagor. The mortgagor was not obliged to pay rent particularly when in the mortgage

(1) (1983) A. I. R. (S.C.) 114.

deed itself there was specific mention to that effect that rent shall be paid by the mortgagee only. It is is significant to mention that the trial court on page 12 of the judgment has noticed the recital in the mortgage deed dated 23. 1. 1922 as follows :

"जरपेशगी का लगान मालिक को मारगेजी (mortgagee) लाल शीतल फेक देगें।

But the lower appellate court failed to notice the recital in the mortgage deed about liability to pay rent. In that view of the matter, I am of the opinion, that the lower appellate court has decided the appeal by ignoring the material evidence including the important documentary evidence i. e. mortgage deed, etc., in such situation the findings of the lower appellate court would not be binding as on the second Appeal under section 100 of the Code, there must be substantial question of law. In my opinion, non consideration of material evidence including recital in the mortgage deed about the obligation to pay rent and non-consideration of statements of P. W. 1 Abdul Karim, P. W. 4 Musafir Ram and P. W. 5 Laloo Khan would constitute substantial question of law. (See Dilbagrai Punjabi v. Sharad Chandra (1). Jagdish Singh v. Nathoo Singh (2).

15. *Recently in Mohd. Yunus* V. (3). their Lordships of the Supreme Court while considering the contours of section 100 of the Codl, have held as follows:

"Where there is a gross misappreciation of evidence, which goes to the root of the matter certainly the Second Appellate Court can exericise its jurisdiction."

In the instant appeal the learned Subordinate Judge, Gopalganj has committed gross misappreciation of evidece which goes to the root of the matter.

16. As regards the duty of payment of rent recital in the mortgage deed, as indicated above, clearly shows that it was the responsibility of the mortgagee to pay rent every year, in that

(1) (1988) A. I. R. (S. C.) 1858.

(2) (1992) A. I. R. (S. C.) 1604.

(3) (1995) P. L. R. 73 (S. C.).

event findings of the lower appellate court to the contrary was in complete disregard of the documentary and oral eveidence on record. As the rent was payable by the mortgagee hence there was no question of filing a suit by Malik Hathua Raj against mortgagor or his successor and getting a decree for arrears of rent and putting the suit land to auction sale or purchase or settlement in favour of mortgagee, the respondents. In that view of the matter all those proceedings in rent suit were fraudulent, fabricated and manoeuvred and liable to be ignored or set aside. This resulted in purchase of property which, in my opinion amounts to purchase of equity of redemption But right of redemption cannot be affected. The purchase of equity of redemption is only in trust for the mortgagor (see *Mrutunjaya pani* v. *Narmada Bala Sasmal*, (1) It is convenient to refer to the cases relied upon by the learned counsel for the respondents. *Ramjit Chaudhry* V. *Satan Devi* (2). was a case based on its own facts where there was no allegation of fraudulent proceedings, whereas in the present case even though the obligation was of the mortgagee to pay rent but he managed to get a suit filed by Malik Hathua Rai for arrears of rent against the mortgagor, without any knowledge of mortgage and without serving any notice on him got a decree, which was put in execution and land was purchased by mortgagee the defendants. The dictum of *Ramjit Chaudhary's* case (supra) would not apply. *Mohabir Singh* V. *Rameshwer Singh*, (3) was a case where holding was not transferable where as in the present case it was transferable hence that case is of no assistanece to the respondents.

17. The matter can be angulated from another perspective. The provisions of sections 60 and 71 of the Transfer of proberty Act clearly provide that once a mortgage always a mortgage and once the mortgage has been admitted the responibility of mort-

(1) (1961) A. I. R (S. C) 1353 and A. I. R.1985 S. C. 646

(2) (1970) B. L. J. R. 756.

(3) (1978) B. L. J. R. 768.

gagees is to convey the property mortaged after accepting the mortgage money and the equity of redemption cannot be lost.

18. In the matter pertaining to principles of equity particularly equity of redemption its origin with special reference to creation of morgage and equity of redemption, it is interesting to notice relevant provisions of Indian jurisprudence. The study of the English and American Jurisprudence would indicate that English jurists invented principles of equity in the medieval period; particularly in the period of Edward I. Robert Burnell is one of the great names in legal history and he was Chancellor of Edward I. To be precise principles of equity were invented in the beginning of thirteenth century, whereas Indian Jurisprudence written in Sanskrit containing principles of Equity dates back at least Five Thousand years B. C. The origin and purpose of equity may be traced from H. C. Hanbury's Modern Equity, (Eighth Edition):—

"Howerver, expansion through the Chancellor was once more facilitated by the liberty given to the clerks of the Chancery, by the Statute of Westminster II in 1285, to issue writs in consimili casu".

19. The following statement appears to be useful:—

The idea of conscience:

The medieval Chancellor was peculiarly well fitted to relieve hard cases: he was always an ecclesiastic, generally a bishop, and learned in the civil and canon law. In granting relief in hard cases to the poor and oppressed, the Chancellor did not conceive himself to be interfering in any way with the common law. The aim of the common law was smooth and automatic working, and it was very desirable that this should be so. But there was nothing aut omatic about the action of the medieval Chancellors. They would give or withhold relief, not according to any precedent, but according to the effect produced on their own individual sense of right and wrong by the merits of the particular case before them, as viewed in the light of their innate ideas.

prompted by morality, honesty, conscience, or knowedge of good and evil.

20. From these abstract virtues springs equity; conscience and equity in the medieval period present the appearance of Siamese twins who are well content not to be separated. And, indeed, the moment for separation had not yet come. English equity is a peculiar and unique growth, but the idea of equity in general is by no means unique. Every legal system must at times find the peculiarly hard case that cries aloud for relief, the case which no judge could decide according to rule without putting an intolerable strain on his own conscience. It is in order to prevent the collapse of all certainty in the law by reason of the conflicting influences of precedent and conscience in the judicial mind that equity must be introduced.

21. Similarly Maitland in his admirable treatise "Equity" States as follows:—

> ".....in the thirteenth and fourteenth centuries the Chancellor very probably did not regard himself as administering a new body of law in many cases we see him working in close co-operationwith the common law judges. His attitude may be sumed up some what in this manner; while thoroughly recognising the authority of the common law courts, he interfered in order to protect litigants in two varieties of hard cases:
>
> (a) those which were unjusticiable by the common law court owing to the rigid and circumscribed nature of the writs, even those in consimili casu, which issued out of the Chancery as the first step in common law action;
>
> (b) those which, even though a judgment at common law had been delivered upon them, nevertheless remained hard owing to the melancholy fact that the machinery of the common law courts was inadequate to enable them to enforec that judgment by the effective method of personal constraint.

22. Similarly " the origins and history of equity" can be traced out in Snell's Equity, Twenty-ninth Edition of P. V. Baker,

London Sweet & Maxwell, 1990:—

The origins of equity :

(a) Common law. The period from the Norman coquest to the reign of Henry III in the thirteenth century witnessed the inception and rapid growth of the common law. This was administered by the King's justices on circuit and in the three common law courts of King's Bench. Common pleas and Exchequer.

The need of a separate court of equity is not yet felt, for the King's court, which is not yet hampered by many statutes or by accurately formulated 'case' law' can administer equity. There after the common law courts are fettered both by precedent and by the provisions of Exford, 1258, which restrained the Chancellor from issuing new types of writ of his own initiative.

(b) Emergence of equity. Although the common law still continusd to develop, perhaps under the some what limited authority of chapter 24 of the Statute of westminster II 1285 (In consimili casu) these fetters prevented it from developing fast enough to do justice in all cases. Moreover, in the rough days of the thirteenth century, a plaintiff was often unable to obtain a remedy in the common law courts, even when they should have had one for him, owing to the strength of the defendant, who would defy the court or intimidate the jury. Either deficiency of remedy or failure to administer it was a ground for petition to the King in Council to exercise his extraordinary judicial powers. A custom developed of referrring certain classes of these petitions to the Chancellor, and this custom was confirmed by an order of Edward III in 1349. The Chancellor acted at first in the name of the King in Council, but in 1474 a decree was made on his own authority, and this practice continued, so that there came to be a court of Chancery as an institution independent of the King and his Council.

(c) Conscience. In the Middle Ages the Chancellor's Jurisdiction as undefined, His powers were wide but vague, and coextensive only with the necessity that evoked them, He exercised his powers on the ground of conscience. This appears to have been an importation from the canon law; almost all the medieval Chancellors were ecclesiasties.

'Conscience' was in theory based on universal and natural justice rather than the private opinion or conscience of the Chancellor. The principle seems to have been secularised during the sixteenth century, perhaps by Sir Christopher Hatton (Chancellor 1587-91); "conscience" became the conscience of the Queen and the Chancellor was designated the keeper of the Queen's Consedence. Yet this theoretical basis of the principle did not prevent the cynical gibe voiced by Selden (perhaps more in jest them in earnest) about the standards varying with each chancellor, even as his foot.

23. The aforesaid discussions from standard works of eminent Authors on 'Equity' indicates that principles of Equity were invented in the beginuing of Thirteenth Century. In Indian Jurisprudence the principles of nature and variety of mortgages and duties of mortgagees and equity of redemption are traceable from Standard Works of Yajnavalkya Smriti, Dharmakosh, Katyayan Smriti and Manusmriti etc. These admirable books were written at least Three to Five Thousand years B.C. ..... The concept of mortgage (Adhi) can be gathered from following shlok of Sajnavalkya Ymriti—Mitakshra commentary. Adhi means in sanskrit security furnished by a debtor or to the creditor. Better to quote:—

आधिर्नाम गृहीतस्य द्रव्यस्योपरि विश्वासार्थमधमर्णे
नोत्तमर्णे ऽधिक्रियते आधीयत इत्याधिः ॥
मिताक्षरा-याज्ञवल्क्या आधिस्तु द्विविधः प्रोक्तो जङ्गम स्थावरस्तथा ।
सिद्धिरस्योभयस्यापि भोगो यद्यस्ति नान्यथा ॥
(धर्मकोश 649)

It connotes that mortgage or Adhi means the hypothecation of a property or thing by the debtor with the creditor as a security and for the sake of creating confidence with the creditor for the amount borrowed. The mortgage is of two kinds (i) of a moveable property (Jangama), (ii) of an immoveable property (sthavara). The mortgage comes into existence by placing property in possession of creditor.

24. Again there is following provision in Narad smriti p. 27 (Dharmkosh p.) :

अधिक्रियत इत्याधिः स विज्ञेयोद्विलक्षणः।
कृतकालोपनेयश्च यावद्देयोद्यतस्तथा॥
स पुनर्द्विविधिः : प्रोक्तो गोप्यो भोग्यस्तथैव च।
उपचारस्थैवास्य लाभहानिर्विपर्यये॥

This connotes mortgage according to its period is of two types— (1) Kritakala i. e. (कृतकाल) a mortgage or pledge, created or given for a specific period. It must be redeemed within that period and (ii) Akritakala (अकृतकला) means a mortgage without any time limit. The property can be retained by the mortgagee till the amount is paid. It means payment of money by debtor and redemption or leaving the possession of property by mortgagee and handing it over to the mortgagor on receiving the mortgage money. As regards the use by mortgagee, there are two types of mortgage (i) Gopya— that which is kept as security for ensuring payment of loan but not to be kept in possession of mortgagee and (ii) phala bhogya or usnfructuary mortgage. The property mortgaged is to remain in possession of mortgagee and to be used by him in the manner possible.

25. The usnfructuary mortgage has been defined in Katyayan Smriti as follows :—

द्रव्यं गृहीत्वा वृद्धयर्थं भोगयोग्यं ददाति चेत्।
जङ्गमं स्थावरं वापि भोग्याधिः स तु कथ्यते।
मूल्यं तदाधिकं दत्वा स्वक्षेत्रादिकमाप्नुयात्॥

It connotes that in the usufructuary mortgage the creditor is called Bhogyavadhi, whether property mortgaged is moveable or immoveable, which is capable of being used enjoyed by the mortgagee for the purpose of meeting the interest. The debtor could repay the debt and get back the property. In other words the equity of redemption was a must. Again the usufructuary mortgage has another two varieties according to use I sapratyaya Bhogyavadhi which means that enjoyment of property is not only

in lieu of interest but also in lieu of a portion of a principal amount as agreed upon between the parties. II Apratyaya Bhogyavadhi is a veriety of usufructuary mortgage only in lieu of interest and on payment of mortage money he was to hand over the property mortgaged to the mortgagor. In this way the document of equity of redemption was a must and there was no clog on the equity of redemption.

26. In view of the aforesaid classical texts it is evident that there were much vivid, detailed and intelligent systems of equity prevalent in India society thousands years prior to Thirteenth Century when these principles of equity were invented or borrowed from Indian Jurisprudence. In this way the document of equity of redemption was a must and there was no clog on the equity of redemption.

26. In view of the aforesaid classical texts it is evident that there were much vivid, detailed and intelligent system of equity prevalent in Indian seciety thousands years prior to Thirteenth Century when these principles of equity were invented or borrowed from Indian Jurisprudence. In this way this can be an interesting subject for research to ascertain whether our country has not more intelligent jurisprudence, and principles of equity, thousand years earlier, then these principles appear to have been transplanted into the British and American Jurisprudence. A discussion about origin of principles of equity in English Law with reference to eminent authors like Shell, Maitland and M. G. Nanbury, it is proved rather admitted that principles of equity were invented in Great Britain in Thirteenth Century.

27. The lower appellate court did not consider the nature of the transaction-mortgage and its incidents. In other words mortgage is essentially a conveyance of an interest in a property as a security for payment of debt. The security must be redeemable on payment of debt or mortgage-money; section 60 of T. P. Act confers a statutory right of redemption. It is an inviolable right of mortgagor, on redemption to get back the subject of mortgage. Any clog on the equity of redemption was inequitable,

bad in law and void. The courts must ignore any transaction or proceeding, as the proceeding for recovery of rent from mortgagor when it was the obligation of mortgagee to pay rent and order or decree obtained exparte without any notice and consequential auction sale etc. But the court below lost sight of the nature of transactions and basic principles of once a mortgage always a mortgage and there must not be any clog on the equity of redemption see *Pomal Kanji Govind Ji* v. *Vrajlal Karsandas Purohit.* (1). The defendant has admitted the execution of the mortgage deed and mortgage deed contained a recital that payment of rent was duty of mortgagee himself, in that event in view of Ist proviso to section 60 of the T. P. Act being mandatory the right of equity of redemption cannot be lost. It was the statutory obligation of the defendant mortgagee to supervise the property as common prudent man, particularly in view of the recitals in the mortgage deed.

28. Inview of the aforesaid premises the judgment and decree of the lower appellate court cannot be sustained.

29. Resultantly the present appeal succeeds and the same is allowed. The decree of the lower appellate court is set aside and appeal is remanded back to the lower appellate court to decide afresh in accordance with law and in the light of the observations made above. The cost, however, shall abide the result.

R.D. Application allowed.

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(1) (1989) A. I. R. (S. C.) 436 = (1989) I. S. C. C. 458.

CIVIL WRIT JURISDICTION

Before S. K. Homchaudhuri, J.

1995

June, 29

*Upendra Mishra.**

V.

The State of Bihar and ors.

Bihar Non-Government Elementary Schools (Taking over of management and Control) Act, 1976 (Bihar Act no. XXX of 1976) section 4, sub-section (2)—provisions of—writ-petitioner was getting pay scale of I. A. Trained teacher on and from 1.7. 1980—School taken over on 4. 4. 981 by Government—denial of the pay scale of I. A. Trained teacher to writ-petitioner, whether violative of the mandate of sub-section (2) of Section 4 of the Act.

On a plain reading of the provisions of sub-section (2) of section 4 of Bihar Non-Government Elementary Schools (Taking over of Control) Act, 1976, hereinafter referred to as the Act, it is apparent that after taking over of the school by the Government, on 4. 4. 1981 the writ-petitioner was entitled to the same remuneration, terms and conditions of service which he used to enjoy at the time of taking over of the School. It having been established that the writ-petitioner was granted the pay scale of I. A. trained teacher on and from 1.7. 1980 and he had been paid his monthly salary in the said pay scale till taking over of the School, the writ-petitioner is legally entitled to be paid his salary in the pay scale of I. A. trained teacher on and from the date of taking over of the School.

Held, that denial of the benefit of pay scale of I. A. trained teacher to the writ petitioner on and from the date of taking over of the school is, there fore, arbitrary and violative of the mandate of sub-section (2) of section 4 of the Act.

*Civil writ Jurisdiction Case No. 89 of 1984. In the matter of an application under Articles 226 and 227 of the Constituion of India.

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

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

Mr. Yogendra Mishra, Sr. Advocate.

Mr. Raghunath Kumar & Mr. Mithilesh Kumar Khare for the petitioner.

Mr. A. K. Keshri, S. C. Viil for the respondents.

S. K. Homchaudhuri, J. In this petitioner under Articles 226 and 227 of the Constitution of India, the petitioner has approached this Court for issuance of an appropriate writ or direction commanding the respondents, particularly, respondents no. 2, 3 and 4 to grant him the pay scale of I. A. trained teacher on and from the date of taking over of Shri Rajbanshi Mishra Middle School, Jadupatti (hereinafter referred to as the 'School') under the provisions of the Bihar Non-Government Elementary Schools (Taking over of Control) Act, 1976 (here in after referred to as the 'Act').

2. The undisputed facts of this case are that the petitioner was appointed in Rajbanshi Mishra Middle School by the Managing Committee of the School on 24. 9. 1978 and while he was working in the said school the School was taken over by the Government under the provisions of the Act with effect from 4. 4. 1981 and that after taking over of the School, by the order dated 4. 4. 1981 (Annexure 1), the petitioner was granted matric trained pay scale which he has been paid since then.

3. The petitioner's case is that while working in the School, being I. A. trained, the Managing Committee granted him the scale of I. A. trained teacher on and from 1. 7. 1980 and he had been paid his salary in the pay scale of I. A. trained teacher from 1. 7. 1980 till the School was taken over by the Government. As such, under the provisions of Sub-section (2) of Section 4 of the Act, he is entitled to get his pay scale of I. A. trained teacher on

and from the date of taking over of the School. The petitioner made a representation to respondents no. 3 and 4 for rectification of the anomaly and granting him the pay scale of I. A. trained teacher from the date of taking over of the School to which he is entitled under the provisions of Sub-section (2) of Section 4 of the Act. The petitioner's further case is that the representation was recommended by the then Assistant Regional Officer, Pupri (Sitamarhi) by his letter no. 34 dated 2. 2. 982 and there after by the District Education Superintendent, Sitamarhi by his letter no. 341 dated 13. 5. 1982, copies of which are annexed to this petition and are marked as Annexures 4 and 5 respectively. In those letters while recommending the petitioner's case the Assistant Regional Officer, Pupri as well as the District Education Superintendent. Sitamarhi intimated that the petitioner had been getting the pay scae of I. A. trained teacher from the Managing Committee of the School with effect from 1. 7. 1980. Finding no response from respondents no, 3 and 4 inspite of recommendatios by the competent authorities, the petitioner has approached this Court in this writ petition.

4. Respondent no. 4 filed counteraffidavit on 23. 11. 1994 contending that the petitioner as a matric trained teacher at the time of taking over of the School and accordingly, pay was fixed in matric trained scale by letter no. 909 dated 4. 4. 1981. The petitioner's contention that at the time of appointment, he was getting his pay in the pay scale of I. A. trained teacher has been disputed in the counter. It is contended that the petitioner was getting the pay of Rs. 55— per month. There after it was raised to Rs. 60/— per month. At that time scale of a I. A. trained teacher was Rs. 190/—. Thus, the petitioner was never given pay scale of I. A. trained teacher by the Managing Committee. It is stated in paragraph 4 of the affidavit-in opposition that from 1976 the scale of I. A. trained teacher was Rs. 296—425 which as not allowed through the Managing Committee of the School to a teacher.

5. The petitioner filed a rejoinder and has annexed the photo

copy of the relevant page of Service book here from it appears that on and from 1. 7. 1980 the petitioner's pay was Rs. 296/— . On 28. 6. 1995 & supplementary counter affidavit has been filed on behalf of respondent no. 1 supporting the contention of respondent no 4. in the counter affidavit and in addition there to in support of the order dated 4. 4. 1981 (Annexure 1) a copy of Government instructionis enclosed as Annexure 'D'.

6. I have heard the learned counsel for the petitioner and the learned Standing Counsel no. VIII.

7. As per direction of this Court, some records, namely, Acquittance Rolls of the School before and after taking over of the School and the Service Book, have been produced by the learned Standing Counsel No. VIII.

8. Learned counsel for the petitioner has drawn my attention to the Government letter dated 4th April, 1981 (Annexure 1) and the letter bearing Memo No. 2344 dated 26th April, 1981 of the District Education Superintendent, Sitamarhi (Annexure 2) and submits that it is apparent from the letters that the petitioner was the only I. A. trained teacher in the School at the time of taking over of the School. lsearned Counsel submits that the petitioner's case is that he was appointed in the I.A. trained teacher scale and was paid his salary in that scale from 1. 7. 1980 has not only been supported by the letter of Assistant Regional Officer dated 2. 2. 1982 (Annexure 3) and that of District Education Superintendent dated 13. 5. 1982 (Annexure 5) but also by the acquittance roll of the relevant period, July, 1980 on wards, and the entry in Service Book of the petitioner and that the respondents are apparently and arbitrarily denying the I. A. trained teacher scale to the petitioner on and from the date of taking over of the School in violation of the mandates of Sub-section (2) of Section 4 of the Act.

9. Learned Standing Counsel No. VIII, on the other hand, submitted that from the acquittance roll it appears that the petitioner was initially appointed by the Managing Committee at

a pay of Rs. 55/— per month which was raised to Rs. 60/— per month after a year. but from the acquittance roll it appears that in the month of June, 1980 the petitioner's pay was shown at Rs. 296/— for that month by interpolation of the original figure and that in the acquittance roll of subsequent months the pay of the petitioner was shown to be paid Rs. 296/— per month Learned Standing Counsel submits that in absence of any letter of appointment issued by the Managing Committee, the petitioner could not have been paid his salary in the pay scale of I. A. trained teacher and apparentaly with a view to climing the pay in the I. A. trained teacher after taking over of the School, entries in the acquittance roll was manipulated showing payment of Rs. 196/— per month on the eve of taking ever of the School although in fact the petitioner was not granted I. A. trained pay scale by the Managing Committee. If the petitioner was granted pay scale of I. A. trained teacher he could have easily produced the letter of appointment in the pay scale of I. A. trained teacher. The learned Standing Counsel submits that what has been stated in the letter dated 2. 2. 1982 (Annexure 5) cannot be taken as fact since the petitioner has not produced the letter appointing him in the scals of I. A. trained teacher by the Managing Committes on and from 1. 7. 1980 Learned Standing Counsel further submits that the instant petition is liable to bs dismissed on the ground of laches alone inasmuch as the School was taken over in 1981 the petitioner was granted matric traned pay scale by the order dated 4th April, 1981, but he has approached this Court long after three years.

10. Learned counsell for the petitioner submits that there is no laches on the part of the petitioner inasmuch as it will be evident from Annexures 3, 4 and 5 that the petitioner pursued the matter by making representations before filing this writ petition. Learned counsel for the patitioner further submits that the Managing Committes of the private school grants benefit of pay scale or any other benefit to the teacher and other employees

by way of resolution and the proceeding book of the Managing Committee is in the custody of the respondents but the proceeding book has not been produced.

11. I have considered the submission made on behalf of the petitioner and the learned Standing Counsel No. VIII and perused the materials on record.

12. I am unable to accept the contention of the learned standing counsel that the petition is liable to be dismissed on the ground of laches. Usually and quite rightly a Government servant is to seek justice departmentally by making representation to the appropriate authorities. In the instant case, the petitioner rightly parsued remedy by making representation to the appropriate departmental authority and his case was admittedly recommended by the Assistant Ragional Officer as well as by the District Education Superintendent in February, 1982 and May, 1982 respectively and after waiting for a reasonable time he has approached this Court in this petition. As such, there is no laches on the part of the petitioner to pursue remedy. I also find it difficult to accept the contentions of the learned Standing Counsel that the petitioner having not produced the order of the Managing Committee appointing him in the scale of I. A. trained teacher, his contention that he was appointed by the Managing Committee of the School in the scale of I. A. trained teacher on and from 1. 7. 1980, should be rejected despite the fact that the materials on records, namely, the acquittance roll and entry in the service book support the petitioner's case. It is apparent from the entries in the acquittance roll of the School that from Juy, 1980 onwards up to taking over of the school by the Government in April, 1981 the petitioner had been paid his salary at the rate of Rs. 296/— per month. It is difficult to accept the contentions of the learned Standing counsel that the petitioner in complicity with the school authorities manipulatd the entries in the acquttance roll showing payment of salary on and from July, 1980, at the rate of Rs. 296/-per month. The entry in the

petitioner's service book discloses that the petitioner's paywas fixed at Rs.296/— on 1. 7. 1980. Amittedly service book has been prepared after taking over of the School. That apart the letters of the Assistant Regional Officer dated 2. 2. 1982 (Annexure 4) and that of the District Education Superintendent dated 13. 5. 982 (Annexure 5) clearly support the petitioner's case that he used to get his pay in the pay scale of I. A. trained teacher with effect from 1. 7. 1980. Whether the petitioner was granted pay scale of I. A. trained teacher on and from 1. 7. 1980 by the Managing Committee of the School could easily been ascertain from the proceedings book of the Managing Committee which admitedly is in the custody of the respondents, but the respondent has not produced all the relevant documents inspite of granting time. From what are stated and discussed above, it is established that the petitioner used to get the pay in the pay scale of I, A. trained teacher at the time of taking over of the school.

13. Sub-section (2) of section 4 of the Act reads as follows:

Sec, 4 (2)— Every Officer, teacher or other employee holding any office or post in the school taken over by the State Government shall be deemed to have been transferred to and become an Officer, teacher or employee of State Government with such designation as the State Government may determine and shall not hold office by the same tenure, at the same remuneration and on the terms and conditions of service as he would have held before taking over of the said school and shall continue to do unless and until such tenure remuneration, terms and conditions of service are only altered by the State Government."

On a plain reading of the provision of Sub-section (2) of section 4 of the Act it becomes apparent that after taking over of the School by the Government, the petitioner was entitled to the same remuneration, terms and conditions. of service which he used to enjoy at the time of taking over of the School. It having been established that the petitioner was granted the pay scale of I. A. trained teacher on and from 1. 7. 1980 and he had been paid his monthly salary in the said pay scale taking over of the School,

the petitioner is lawfully entitled to be paid his salary in the pay scale is lawfully entitled to be paid his saary in the pay scale of I. A. trained teacher on and from the date of taking over of the School. Denial of the benefit of pay scae of I. A. trained teacher to the petitiooner on and from the date of taking over of the Schoo is, therefore, arbitrary and violative of the mandates of Sub-section (2) of Section 4 of the Act.

14. For the reasons stated above, the petition is allowed. The respondents are directed to pass oppropriate order granting pay scale of I. A. trained teacher to the petitioner on and from 4. 4. 1991, within three months from the date of receipt of a copy of this order. The petitioner is also entitled to all conssquential benefits, namely, the monthly salary and annual increments in the pay acale of I.A. trained teacher from 4. 4. 1981 as well as the benefit of revision of the pay scale of I. A. trained teacher, if any The respondents are further directed to pay the consequent arrears of pay and allowances to the petitioner within six months from the date of receipt of a copy of this order.

R. D. Application Allowed.

CIVIL WRIT JURISDICTION

Before B. L. Yadav and Amir Das, JJ.

1995

July, 5

*Saraswati Devi and others.**

V.

*Commissioner of Bhagalpur Division Bhagalpur & ors.**

BiharBuildings (Lease, Rent and Eviction) Control Act 1982 (*Bihar Act no.* IV of 1982 *section* 3 (1) (c) *and Rule* 3 *of the Bihar Buildings (Lease Rent and Eviction) Control Rules,* 1983—*provisions of— whether a beneficient piece of legislation— interpretation of.*

Section 3 (1) (c) and the proviso of the Bihar Buildings (Lease, Rent and Eviction) Control Act, 1982, hereinafter referred to as the Act, and Rule 3 of the Bihar Buildings (Lease Rent and Eviction) Control rules, 1983 are couched in a language having a wide sweep. It is a piece of beneficient piece of legislation enacted keeping in view the welfare of the land lord. It has to be interpreted keeping in view the dominant purpose. The application for enhancementof renthas been correctly decided.

The provisions of a piece of beneficial legislation, as the present one has to be given wider interpretation. A beneficial legislation for the interest of land lord, even if capable of two interpretations, that construction has to be adapted, which projects the policy of the legislation and is more beneficial to the person in whose favour those provisions have been enacted.

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 B. P. Singh, J.

*C. W. J. C.No. 6359 of 1994. In the matter of an application under Articles 226 and 227 of the Constitution of India.

M/s. S. . Majumdar, Mallika Majumdar, in the petitioners.

Mr. S. S. Dwivedi, for private resprodents.

M/s. V. N. Sinha, R. K. Sinha for the state.

B. L. Yadav, J. By the instant writ petition under Articles 226 and 227 of the Constitution of India the prayer of the tenant isthat the order dated 7. 12. 1992 (Annexure—4) passed by the House Rent controller under section 5 read with Section 8 of Bihar Buildings (Lease, Rent & Eviction) Control Act, 1982 (compendiously the Act) passed in an application for enhancementof rent and theorder of the collector and Commissioner of Bhagalpur (Annexs—5 & 6) dated 8. 2. 1994 and 30. 5. 1994 respectively enhancing the rent from Rs. 135/— to Rs. 1852/— be quashed by issuing writ of certiorari.

2. So much of the facts necessary for the disposal of this petition are these :—

The respondent no. 4is the owner-cum-land-lordof the diaputed premises. Prior to him Kedar Nath Sah was the original tenant and after his death respondent no. 4 purchased the accommodation, old holding no. 1098, Newholding no. 69 situatedon station chowk, Shujaganj Bazar Road, present ward no, 16 in the city of Bhagalpur, from the original owner/ landlord and this is how he steppedinto the shoes of the originalowner. Sri sah. original tenant waspaying Rs. 135/— per month as rent. present petitioners are in ocoupation of 1000 sq.feet covered area. An application was filed by the owner of the building for enhancement of rent keeping in view the area coverd. Prayer was made that rent may be enhanced to the extent of Rs. 4000/- per month (vide applicationAnnexare—1).

3. The application for enhancement of the rent was contested by the petitioners, tenant with the averments that the buliding was a part of Tilak Babu's Hat. The land was in dilapidated condition and was settled with the ancestor of kedar Nath sah with the permision of the land-lord. The tenant renovated the buliding and carried their business of sweetmeat. Land-lord, respondent no. 4, the ground rent was only Rs. 30/— which was latter on enhanced to Rs. 135/— The building was purchased by respondent no. 4 along with other shops in July, 1969.

4. The Rent Controller vide order dated 7. 11. 1992 fixed the fair rent at Rs. 1862/— (vide Annexure—4). The petitionrs filed an appeal before the Collector, Bhagalpur which was dismissed for default on 8. 2. 1994 at the stage of admission (vide Annexure—5). petitioner's revision before the Commissioner, Bhagalpur was also dismissed on 30. 5. 1994 (Annexure—6).

5. Against these orders present petition has been filed with the usual prayer to quash these orders (Annexures 4, 5, & 6).

6. Sri S. K. Majumdar, the learned senior counsel for the petitioners contended that on a correct interpreation of Section 8 (1) (c) and its proviso the rent cannot be enhanced beyond that payable on 31. 12. 1980 and in any case more then 5% as provided in the Proviso itself. He leaned heavily on two single judge decisions of this court in Ram Adhin Singh—v— The State of Bihar & ors, reported in 1993 (1) P. L. J. R. — 637 and secretary, *Balika Shiksha Bhawan* v. *State of Bihar & ors*, reported in 1990 L.L. J. R— 61.

7. Sri Shashi Sekhar Dwivedi, the learned senior counsel for the respondents contended that interpretation to a statute of predominant social nature has to be made in that light. Proviso of Section 8 has to be read along with Provision of Section 8 (1) (c) of the Act and Rule 3 of Bihar Buildings (Lease, Rent and Eviction) Control Rule, 1983 (compendiously the Rules) has also to be taken into account.

These are beneficiant provisions from the peint of viw of land-lord, The cases cited by learned counsel for the petitioners actually donot help the petitioner.

8. Sri V. N. Sinha appearing for the State has contended that the impugned order was perfectly correct as it was quite consistant with theprovision of section 8(1) (c) and its proviso read with Rule 3 of the Rules. These are beneficial statute from the point of view of land-lord and may be interpreted in that light. The main function of proviso is to carve out an exception to main enactment, but at the some time it cannot normally be interpreted so as to set at nought the main enactmnt. In other words to qualify

the the meaning of the main provision. Sri Sinha learned heavily on *S. Sundaram Pillai* etc. v. *V. R. Pattabhiram*, A.I.R. 1985 Supreme Court— 582 and An N. Sehgal and others—v— Raja Ram sheoram and others, A. I. R.— 1991 Supreme Court-1406 and also Tribhovandas Haribhai Tamboli—v— Gugerat Revenue Tribunal and others, A. I. R. 1991—Supreme Court—1538.

9. Having given out thoughtful considerations to the points sharply focussed by learned counsel for the parties, primarily two questions fall for our determination. The first in whether the provisions of section 8 (1) (c) of the Act and its proviso read with Rule 3 of the Rules are benevelent legislation in favour of land lord. if so, how it isto beinterpreted and the next is whether the application for enhancement of rent has been correctly decided.

10. As regerd the first question, the provisions of section 8(1)(c) read with Rule 3 of the Rules may be construed keepingin view certain cardinal reules of construction of statute. No doubt the ACt contains certain provisions i. e. Section 8 with its proviso and Rule 3 of the Rule and section 11 (in part) andsimilar other provisions which have been enacted for the benefit of the land lord, such provisions have to be interpreated with the dominant purpose of the legislation, A court should stop short of altering the charcter of a statute. The Apex Court has pointed out in Arjun Khiemel Makhi Jani—v— Jamuna Das c. Tuliani & ors (1). While interpreting Section 12 (3) and 15 of Bombay Rents, Hotel and Lodging House Rates, Control Act 1947, as follows:—

"When the Act containg provisions none of which fall under the category of beneficial legislation with regard to the tenant and other provisions with regard to the land lord, the assertions that even with regard to such provisions of the Act, which fall under the purview of beneficial legielation for the land lord, an effort if made to interprot that also in favour of the tansnt is the negation of till they very p. inciple of beneficial legislation, on which reliance isplacedon behalf of the tensnt. The argumentindeed is self defecting and only justifies the oynical proverb "Head Jwin, the tail Youlose."

(1) (1989) 4 Judgment Today 74(S. C.)

11. The Act in our considered opinion contains certain benefical provisions i. e. sections 5, 7, 8 & partly section 11, contain benefical provisions for land lord where as certain other provisions i.e. section 9. 10. and partly Section 11, are piece of beneficial legislation for tenants. The provisions of beneficial legislation has to be given wider interpretation.

In construing social beneficial legislation the court has to adopt a social beneficial rule of construction, A beneficial legislation for the interest of land lord, even if capable of two interpretations that constructionhas to be adopted which projetes the policy ofthe legilsation and is more beneficial to the person in whose favour these provisions have been enacted. (See Jevan Lal Ltd:)—V— *Appellate Authority* (1) *and Ramji Misir*—v— *State of Bihar* (2), To put it differently the approach to statute of prodominent social nature, has to be made in that light. The court must take a broad view of the back ground of the policy of the statute in question. In such matters the court has to make purposive approach in order to make a correct construction of a benevolent provision. (See Summars—V—Seaford Corporation, (3) Oketake—Brent London Baraugh Council (4) Brown—V—Brach and Ambrose (5) Otheyath Lakshmi Amma Vs. H. G. Naiyar, (6).

12. In our opinion, a beneficial statute particularly section 8 must not be construed too rigidly and restrictively rather it has to be construed liberally, in favour of the person for whose benefit the particular provision has been enacted. Section 8 of the Act is a piece of Statute of a predominantly social nature particularly in favour of owner of the building, the land lord, hence, a purposive approach has to be made with special care, so that the main object of the legislature may not be defeated.

(1) (1984) AIR (S.C.) 1812 at page 1817
(2) (1963) AIR (S.C.) 1088
(3) (1943) A.C. 283
(4) (1967) Q. B. 42
(5) (1948) All Eng. Rep. 922
(6) (1990) 3. S.CC. 230.

13. What section 8 (1) (c) postulates is broadly the factors to be taken into consideration while determining fair rent on an application for fixation of fair rent or for enhanceement of the rent is filed by the land lord under section 5 & 6 of the Act. It has to be decided keeping in view the provisions of Rule 3(ii) of the Rules having due regard to the prevailing rate of rent in the locality for the similar accommodation and in similar circumstances at any time during 12 months preceeding the date of order. But over and above that the rent may also be enhanced keeping in view increased cost of repairs the amanities provided and the commpound or open land, type of construction and location of buliding etc.

14. A proviso has been added to section 8. Normally functionof a proviso is to take out something from the main enactment or in some cases to carve out an exception to main enactment. But at the same time it is not to be so interpreted as to set at naught the main enactment. In *S. Sundaram Illai etc.* v. *V. R. Patubiraman*, (supra) relied upon by Mr. Sinha the learned counsel for the State, their lordships of the Apex Court observed under para 42 (page 592) as follows:—

"A proviso may serve four differnnt purposes:—

(1) qualifyingor excepting certain provisons 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 befulfilled in order to makethe enactment workable;

(3) It may be so cmbedded 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 actas an optional addenda to the enactment with the sole object of explaining the real intendment of the statutory provision."

15. In the present case even though section 8 (1) (c) provides as to how the application for fair rent or its enhancement has to be decided. Broadly speaking it has to be decided, Keeping in

view the prevailing rate of rent in the locality for similar accommodation in a similar circumstances. But primarily ithas to be decided keeping in view the prevailling rate of rent of similar accommedation with in 12 months preceeding 1st day of December, 1980, which was cut-off-date for the purpose of enhancement of rent. For every cut-off-date there remains legislative intendment behind it. why 1st December, 1980 was fixed the cut-off-date, the reason is that the Ordinance no. 63 of 1982 was promulgamated with retrospective effect. There after, the Act was passed which received the assent of president on 31 st January, 1983 and was published in Bihar ExtraOrdinary Gazette and it was deemed to have comein force from 1st April, 1981. It repealed the Ordinance of 1982 which was retrospective. with a view to cover the date before the ordinance 1st December, 1980 was fixedcut-off-date. This is how it has been provided under section 8 (1) (c) that the prevailing rate of rent in the locality during 12 months preceeding the 1st day of December, 1980 shall be the guiding factor. But what the proviso emphasises is that fair rate of rent shall be at a figure which shall not be less than the average monthly rent paid by a tenant for similar accommodation over 12 month period prior to 1st December, 1980. On this minimum fair rent the proviso adds increase of twenty five percent of the average monthly rent, on account of cost of repairs or the general increase in the cost of site etc. In this way the proviso has broadened the contours of the main provision of section 8 (1) (e). The provisions in the proviso have to be treated as an integral part of the main provision. The provisions of Rule 3(ii) (a) to (g) also takes into account the provisions of the proviso to section 8. In our opinion the enhancement of rent under the impugned order cannot be said to be contrary to the provisions of section 8 (1) (c), including its proviso.

16. Coming to the cases relied upon by learned counsel for the petitioners, Ram Adhin Singh —V— The State of Bihar & ors, (supra) was the case decided in respect of application filedunder sections 5, 6, & 8 for the fair rent and such emphasis was laid

in Hindi version of section 8 and its English version and distintion between the two, as to whether Hindi version must prevail or English version must prevail. It was held that Hindi version must preveil in case of conflict. But in brief the object of the proviso was also indicated under para 16. The next case in *Secretary, Balika Shiksha Bhawan* —V— *State of Bihar and others*, (supra) was decided by Brother B.P. Singh, J (for whom we have profound regards) and the decision was held per incurion by Hon'ble Brother G. C. Bharuka, J, in Ram Adhin Singh —V— State of Bihar & ors (supra). Itwas however, observed that it was open to the controller to fix higher amount of rent by way of fair rent having regard to the provisions of section 8 of the Act and Rule 3.

The object of legislature, however, in enacting section 8 (1) (c) and its proviso has not been considered in that case. Section 8 (1) (c) and its proviso & rule 3 in our opinion is couched in language having very wide seep. It is a piece of beneficient piece of legislation enacted keeping in view the welfare of the land lord. It has to be interpreted keeping in view the dominant purpose, Section 8 and its proviso and Rule 3, need not be interpreted in restrictive manner.

17. As regard the second question, we have perused the impugned orders. In our opinion the application for enhancement of rent has been correctly decided. we donot find any merit in the submission of the learned counsel for the petitioner. He derived however much assistance from the illuminating submission of Sri V. M. Sinha, appearing for the State.

18. In view of the premises aforesaid we donot find any merit in the instantpetition and the same is dismissed without any order as to costs.

R. D. Application dismissed

CIVIL WRIT JURISDICTION

Before Naresh Kumar Sinha, J.

1995,
July, 14

*Dr. Bhanu Pratap Rai & others.**

V.

State of Bihar andothers.

Service— services of persons appointed as lecturer in Government Ayurvedic College in Class II Gazetted post on daily wages— Whether can be regularised—equal pay for equal work—principle of—writ-petitioners working on the post of Lecturer for a decade, whether to be paid wages calculated on the basis of minimum pay in the pay scale of Lecturers.

The writ-petitioners were appointed to the post of Lecturer in yatindra Narain Asthang Government Ayurvedic College, Nathnagar, herinafter referred to as the College, on 1. 3. 1995 by the Governing Body of the College by its Chairman-Commissioner Bhagalpur at the rate of Rs. 25/— per Lecture after the management of the college was taken over by the Government. The services of writ-petitioner as daily rated Lecturers was cancelled by the impugned order. writ-petitioners do-not claim to have been appointed on the basis of any advertisement nor thay appeared at any interview. The post of Lecturer in the Ayurvedic College is a Class II Post and appointment to the post has to be made on the recommendation of Bihar public Service Commission.

Held, that since the writ-petitioners were working on the post of Lecturer on daily wages which post being class II Gazetted post, could be filled in only on the basis of the recommendation of the Bihar public service Commissionand their appointment even on daily wages not having been madein accordance with

*C. W. J. C. 5621 of 1991. In the matter of an application under Articles 226 and 227 of the Constitution of India.

any rule as also the fact that the appointments had ben made not by the State Government but by another authority after the take over of the college by the State Government, they are not entitled to any order or direction for automatic absorbtion / regularisation to the post of Lecturer in the College.

Held< further, that the writ-petitioners have been found to be discharging duties and funcitions of regularly appointed Lecturers and instead of being paid at a rate calculated at the minimum of the scale of pay admissible to regularly appointed Lecturers are being paid a paltry sum of Rs. 25/= per day The concept of equal pay for equal work cannot be dismissed as an abstract doctrine not capable of being enforced in a court of law. The writ-petitioners are, there fore, entitled to issue of a direction to pay their wages calculated on the basis of the minimum pay in the pay scale of regularly employed Lecturers.

Held, also, that the order cancelling the appointment of the writ-petitioners as daily rated Lecturers is quashed. they are not entitled to any order or direction to the respondents for regularisation / absorption of their services. The writ-petitioner shall be paid wages at a rate calculated on the basis of minimum pay in the pay scale of regularly employed Lecturers from october 1992 onwards except holidays and absence from duty on working days with in three months from today.

CASE LAWS DISCUSSED.

APPLICATIONUNDER ARTICLES 226 AND 227 OF THE CONSTITUTION OF INDIA.

THE FACTS OF THE CASE MATERIAL TO THIS REPORT ARE SET OUT IN THE JUDGEMENT OF N. K. SINHA, J.

M/s (Dr.) S. N. Jha, Krishna Mohan and Ranjeet Kumar Verma for the petitioners.

Mr. Bhola Lal Das, G.P. 7 for the respondents.

Naresh Kumar Sinha, J. In their applicationunder Articles 226 and 227 of the Constitution of India the petitioners seek a direction to the respondents to regularise their services as

Lecturers and for payment of salary and allowances at par with regular and permanent Lecturers as also for quashing the order contained in Annexure—14 by which their appointments were cancelled.

2. The facts relevant for appreciating the controversies raised, briefly state, are that the petitioners were appointed as lecturers on daily wage basis in yatindra Narain Asthang Government Ayurvedic College, Nath Nagar (here in after referred to as the 'College') The college was established in the year 1946 for the promotion, research and treatment in Indian system of medicine and its affairs were being run by a Managing Committee. The management and control of the college was takeover by the State Government by issue of a notification dated 12. 1. 85 with effect from 10th January 1985. The said notification was issued under section 3 of the Bihar Act No. 10 of 1985 (here in after referred to as the 'Act) passed by the Legislature for takingover the private medical (Indian System of Medicine) colleges in the State by the Govt. Under the relevant provisions of the Act a screening committee was appointed by the State Govt. vide notification no. 347 (Deshi Chikitsa) dated 22. 5. 85 to examine whether the teachers and non-teaching staff appointed in the college till the date of its take over possessed the minimum qualification and satisfied the conditions regarding the eligibility for appointment or not for the purpose of takingover their services. The report of the screening committee was published vide memo dated 21. 1. 89 copy of which is Annexure—5 and it contained a direction that the persons aggrieved whose names did not find mention in the report or had been left out or their services having not been considered may produce their claim before a three member committee within 30 days. The petitioners sent their representations to the Additional secretary in the department of Health through the principal who happened to be the chairman of the aforesaid three member committee within 30 days. The petitioners sent their representations to the Additional Secretary in the department of Health through the principal who happened to be the Chairman of the aforesaid three member committee. A true copy of the representation filed

by petitoner no. 1 is Annexure—6 and similar representations had been filed by petitioners 2, 3 and 4. The petitioners pursuant to a directionreceived from the three member committee appeared before it with their original. certificates on 27th and 28th Septemeber 1989. A copy of the letter dated 12. 9. 89 containing the aforesaid direction is Annexure—7. since the petitioners did not hear any thing in respect of their representations from the Health Department, they claimed that the representations may be deemed to have been rejected.

3. The petitioners concede that they were appointed for the post of Lecturers at the rate of Rs. 25/— per lecture in the college by the Governing Body by its chairman- the commissioner of Bhagalpur on 1. 3. 85 i. e. after the takeover of the college by the State Govt. with effect from 10. 1. 85. petitoner no. 1. was appointed in the Department of Anatomy, petitioner no. 2 in the Department of Rog Vigyan Avam Bikriti Vigyan, petitioner no. 3. in the Department of Kaumar Bhritya (Ball Rog) and petitioner no. 4. in the Department of prashuti Tantra Avam Stri Rog. The true copies of the appontment letters of petitioners have been filed as Annexures 1—A to 1—D. These appointment letters are dated 1. 3. 85 and were issued under the signature of the principal-cum-Executive Magistrate under orders dated 20. 2. 85 of the Commissioner cum-Chairman of the college. It is claimed that petitioner no. 1 was entrusted with the work in the hospital attached to the college known as smt. Dayaram poddar Astang Ayurvedic Aspatal, Karangarh, Nath Nagar, Bhagalpur, under the orders of the principal-cum-Superintendent of the said hospital, respondent no. 4. Likewise the other three petitioners were also deputed to the hospital. The petitioners used to be given Rs. 25/— per lecture up to 30. 4. 87 as also Rs. 25/— per day for doing job in the hospital. Respondent no. 4, however, by his order dated 30. 4. 87, a copy of which is Annexure—3, issued a direction that from 1. 5. 87 all the petitioners will get single payment for all the work performed by them at the rate of Rs. 25/— per day. The petitioners claimed that the payment at the aforesaid rate had not been made from

october 1988 and for which they had filed C. W. J. C. No. 766 of 1991 which was still pending on the date of filing of the present writ application. In view of this by order dated 9. 12. 91 this writ application was ordered to be heard along with C. W. J. C. No. 766 of 1991.

4. The petitioners in their supplementary affidavit dated 15. 12. 92, for amendment of the main writ application stated that the respondents had assured them orally that since the case of the petitioners was being considered by the screening committee their case for regularisation shall be considered favourably and arrears of salary shall also be paid provided they withdrew the writ application. As soon as the salaries of the petitioners were paid they withdrew C. W. J. C. No. 766 / 91 pending in the court for arrears of salaries but declined to with draw the present writ application unless and until an order for reguarisation of their service was passed. It is further stated there in that during the pendency of the present writ application a show cause notice dated 19. 9. 91, copy of which is Annexure—12, was issued against the petitioners stating there in that though a decision on the report of the screening committee was still pending yet the appointment of the petitioners made without the prior permission of the Govt. was illegal. The petitioners filed their show cause describing the action of the respondents as malafide and taken only with a view to make the writ application infructuous. A copy of the show cause dated 28. 9. 91 filed by petitioner no. 1 is Annexure—13. The The petitioners contend that the respondents sat over the matter for more than a year and without affording an opportunity of hearing the Deputy Secretary in the Department of Health, Medical Educationand Famiy welfare by his order dated 24. 11. 92 copy of which is Annexure—14 terminated the services of the petitioners. The petitioners thus prayed for necessary amendment in the writ application for incorporating the further relief that the court be pleased to quash the order dated 24. 11. 92 contained in Annexure—14 and to stay its operation during the pendency of the writ application. A prayer was also made to join the Deputy Secretary as respon-

dent no. 5 to the main writ application. The prayer for amendment was allowed by order dated 5. 1. 93 with a directionthat the petition for amendment shall form part of the writ application. Howevr, no order was passed for joing the Deputy Secretary as respondent no. 5 and the prayer for stay of Annexure—14 was not pressed.

5. Two counter affidavits have been filed-one on behalf of the State of Bihar; the Director, Indian system of Medicine, Health Department and the secretary, Department of Health (respondent nos. 1, 2 & 3 respectively) and another on behalf of principal of the Ayurvedic college (respondent no. 4). The case of the respondent is that the college was takenover bythe State Govt. under the Act on 10. 1. 85 and there after there was no Managing Committee to look after the affairs of the college. The Commissioner of the Division in his capacity as sitting president looked after the work of the college and in that capacity appointed the petitioners on daily wages on 1. 3. 85. The petitioners accepted the wage at the rate of Rs. 25/— per day. It is denied that there was any vacant, sanctioned or approved post for daily rated Lecturers in the college and the appointments were made for a short period only to fulfil the requirements of the college and the petitioners had accepted the daily wage without any grievance.

6. The petitioners filed another supplementary affidavit on 6. 7. 93 after their application for amendment of the writ application was allowed by the court. It was stated there in that a number of complaints had been made from different corners against the conduct of the Deputy secretary and the principal of the college had informed the Deputy Secretary about the situation prevailing in the college by his letter dated 10. 12. 92 copy of which is Annexure—15 seeking certain directions and had also sent a number of reminders one being dated 31. 12. 92 copy of which is Annexure—16. It is claimed that anenquiry was conducted by the Director-cum-Deputy Secretary of the Department who submitted a report dated 15. 4. 93. The true copy of the enquiry report has been filed as Annexure—17. It is claimed

that the report considered the case of the petitioners thoroughly and found that they had been validly appointed on sanctioned posts and possessed requisite qualification for such appointment. The findings arrived in the enquiry report it is said made the order contained in Annexure—14 illegal. The respondents, there after, filed another counter affidavit claiming that what has been described as an enquiry report Annexure—17 was only a surprise inspection note and it was not a Government order of which the petitioners could take any advantage. The respondents reiterated that whenever a private college is takenover by the State Govt. It is only the screening Committee constituted for the purpose which examines the assets and liability as also the position of the staff on the date of its takeover. It further contains the averment that it is only the screening committee which examines which staff is to be takenover in government empoyment after examining all the pross and cons and the State Govt. takes a final decision on the report of the screening committee.

7. Dr. sadanand Jha, learned counsel appearing for the petitioners argued that the materials brought on the record left no room for doubt that the petitioners were performing the duties of Lecturers-cum-physician in the college and the hospital to the satisfaction of the authorities concerned for about 9 years by now. Thus although they were initially appointed as a Lecturers on a daily wage basis, they were nontheless performing the duties and functions of regularly appointed lecturers. He pointed out that the petitioner were working against available posts which were found necessary by the concerned authorities for running the college and the hospital. Dr. Jha, there fore, contended that the petitioners were entitled as a matter of right that their services as Lecturers should be regularised and they be paid salary and allowances at par with the regularly appointed Lecturers in the college. Dr. Jha was very fair to argue in the alternative that if there was any difficulty in regularising the services of the petitioners, they were in any case entitled to receive the same pay and allowances as payable to the regularly appointed Lecturers on the basis of the directive principles of the

State policy of equal pay for equal work. Allhis contentions have been controverted by the learned G. P. 7 appearing for the respondents-State. The petitioners, it is argued, were appointed in an illegal manner without obtaining the permission of the State Govt. after the take-over of the college under the Bihar private Medical (Indian System of Medicine) College (Taking Over) Act 1985 and their services even on daily wage had been ilegally and validly terminated by an order of the State Govt. vide annexure—14 after giving them an opportunity to show cause. The petitioners, however, contend that the legality of the order (Annexure—14) is under challenge and that they have continued to discharge their duties and functions of the post to the knowledge of the authorities. It may be rcalled that while amending the original writ petition for incorporating relief for quashing Annexure—14, the petitioners did not choose to press for staying the operation of Annexure—14 pending hearing of the writ petition. Dr. Jha in repy to queries made by the court had specifi cally stated in the presence of counsel for the respondents that the petitioners continued to be employed on daily wages in the college.

8. It is the admitted case of the parties that the college was takenover by the state Govt. under the provisions of the Bihar private Medical (Indian system of Medicine) college (Taking Over) Act 1985. The college was takenover with effect from 10. 1. 85 being the date mentioned in the notified order issued by the State Govt. under section 3(1) of the Act specifically provides that with effect from the date mentioned in the notified order the management and control of the college shall be exercised by the State Govt. in such manner as specified in the order. section 6 of the Act provides for determination of terms of the teaching staff and other employees of the college. Section 6(1) of the Act provides that from the date of notified order all the staff employed in the college shall cease to be the emplyees of the college body. It contains a proviso that the staff shall continue to serve the college on ad hoc basis till a decisionunder sub-sectin (3) and (4) of this section is taken by the state Government. Sub-section (2)

provides that the State Govt. will set up one or more committees of experts and knowledgeable persons which will examine the bio-data of each member of the teaching staff and ascertain whether appointment, promotion or confirmation was made in accordance with the Act, Statute or Regulations of the University concerned and in keeping with the guidelines laid down by the Indian Medical Council of India and take into consideration all other relevant materials including the length of his service in the college and submit its report to the State Government. Under sub-section (3) the State Government on receipt of the report of the Committee or Committees is enjoined upon to decide in respect of each member of teaching staff on the merits of each case whether to absorb him in government service or to terminate his service or to allow him to continue on ad hoc basis for a fixed term on contract and shall where necessary, redetermine the rank, pay allowances and other conditions of service.

9. Since the petitioners were admittedly appointed on 1. 3. 85 afer the takeover of the college with effect from 10. 1. 85, the provisions of section 6 of the Act strictly speaking were not attracted. This is evident from plain language of section 3 (1) and 6 (1) (2) of the Act. The committee or committees constituted under section6 (2) was required to examine the bio-data of members of the teaching staff who were in employment of the college on the date of its takeover. The State Govt. under section6(3) of the Act was required to consider the report of the Committee only in respect of such teaching staff with a view to decide to absorb the member of the teaching staff in government service on merits of each case. In the circumstances the screening committee constituted by the State Govt. for the purpose was not required to consider the cases of the petitioners for absorption in government service by examining their bio-data and if the screening committee as alleged by the petitioners did not recommend the names of the petitioners for absorption in government service,no legal flaw or infirmity could be found in the said report on that score. The petitioners, however, referred

to the contents of Annexure—4 where by the Joint Secretary of Health Department had directed the principal of the college to furnish information regarding the persons appointed against teaching posts in the college for the period 1974-75 to 1984-85. The aforesaid informationwas required by the State Govt. for taking a final decision on the report of the screening committee for regularisation of staff already empoyed inthe college. Then the required informationwas not furnished by the principal of the College a reminder dated 15. 3. 86 (Annexure—4—1) was also issued by the State Govt. The petitioners have referred to the letter dated 7th May 1986 (Annexure—4—2) sent by the principal of the college to the State Govt. giving the necssary information. The letter contains a statement in tabulor form and all the four petitioners have been shown as employed against teaching post on daily wage for the period 1984-85. It is not in dispute that the State Govt. vide their resolution dated 21. 1. 89 (Annexure—5) took a decisionfor publishing the report of the screening committee and giving an opportunity to the aggrieved teachers and non-teaching staff to file representationwithin 30 days of the publication of the report. By Annexure—5 a three member committee headed under the Chairmanship of sri Munni lal Rajak, Joint secretary, was constitued for consideration of the representations received. A letter dated 12. 9. 89 (Annexure—7) appears to have been addressed to the principal of the college by the Chairman of the three member committee requesting him to direct the persons named in the enclosed list to appear before the committee on 27. 9. 89 and 28. 9. 89 along with their original certificates and other papers. The list enclosed with the letter includes the names of the four petitioners among others as newly appointed teachers. The petitioners claimed that they had appeared before the committee in support of their claims for absorptionin government service. It appears that the state Govt. has yet to take a decisioninrespect of these petitioners on the basis of the recommendation of the three member committee. The petitioners' averment in the writ petition that no order was passed by the State Govt. despite their representa-

tions has not been denied. The respondents 1 to 3 in the counter affidavit have, however, taken the stand that as per government notification the cases of only those persons whowere working before the takeover of the college had to be regularised and since the petitioners were not working in the college on the date of its takeover, the cases of the petitioners were not considered.

10. It may be recalled that these petitioners along with two others has earlier filed C. W. J. C. 766 of 1991 for a direction to the respondents to pay their up-to-date salary as Lecturer. The petitioners had claimed there in that they had been paid salary up to February 1989 but payment from March 1989 was stopped for want of sanction of amount. The said writ petition was allowed to be withdrawn by the petitioners on 16. 7. 92. The petitionersin their supplementary affidavit in the instant writ petition have stated that the earlier writ petition was with drawn after payment of the salary to the petitioners. The respondents have denied the claim of the petitioners that they had been orally assured by the respondents that their cases for regularisation of service would be favourably considered provided they withdrew the writ petition. The petitioners contend that after filing of the present writ petition on 20. 8. 91 for regularisation of the services of the petitioners, the State-respondents out of vindictiveness served a show cause notice on the petitioners on 19. 9. 91 vide Annexure—12 to show cause why their irregular and invalid appointment in the college made without the prior permission of the government be not cancelled. The petitioner no. 1 in his show cause (Annexure—13) described the action of the respondent as malafide with a view to make both the writ applications fied by the petitioners and pending before the court infructuous. The allegation is that though the show cause was filed before 30. 9. 91 as required vide Annexure—12, the Government sat over the matter for more than a year and one fine morning the Deputy Secretary in the department of Health, Medical Education and Family welfare, passed the order dated 24. 11. 92 (Annexure—14) terminating theservices of the petitioners among others with effect from the date of issue of the order.

11. The order cancelling the appointment of the petitioners (Annexure—14) opens with a sentence that a final decision by the State Govt. on the report of the screening committee after the takeover of the college is still awaited. It then proceeded to mention that appointment of persons made in the said college by the incharge principal to gazetted and non-gazetted post on daily wage or full pay which were illegal and irregular as also appointment made without the permission of the Government are cancelled with effect from the date of order. The only exception made in the order was in respect of any persons who had been appointed pursuant to the decision of a court. The order contains 14 names including the four petitioners who were described as Lecturers and the remaining ten happened to be typists, clerks, accountant, orderlies etc. It may be recalled that the writ petitioners were earlier served with a show cause notice (Annexure—12) to show cause why their illegal and irregualar appointment made after the takeover of the college without the prior approval of the State Govt. shoud not be cancelled. Thus it follows as a matter of course that the order of cancellation of the appointment of the writ petitioners vide Annexure—14 was passed only on the ground that the appointment had been made without the prior approval of the State Govt. In other words the appointments do not purport to have been cancelled on the ground that the services of the writ petitioners were no longer required or that their services had been found unsatisactory. Though Annexure—14 had been issued in November 1992 and the writ petitioners while praying for its quashing did not pray for the stay of its operation, the writ petitioners still claimed to be working on the post on daily wages. This was specifically stated by the learned counsel appearing on their behalf in course of argument and not contrverted by cousel appearing for the respondent State. This is also evident from the letter dated 10. 12. 92 (Annexure—15) addressed by the principal of the college to the Deputy Secretary sent in connection with his letter (Annexure—14). The principal requested the Deputy Secretary, Department of Health, to reconsider his letter in so far it

concerned the writ petitioners in view of the pendency of the instant writ petitionand in which he (respondent no. 1) had also filed an affidavit. It appears that the principal did not receive any reply to his letter and he sent a reminder for the same on 31. 12. 92 (Annexure—16).

12. From the report dated 15. 1. 93 (Annexure—17) of the Deputy Secretary, Health Department, Submitted after inspection of the college on 2. 3. 93 pursuant to an order of the Health Commissioner-cum-Secretary dated 17. 2. 93 it appears that one of the recommendations made in the said report was for sympathetic consideration of the order terminating the services of the 14 persons which obviously includes the four writ petitioners by the State Govt. and for payment of their salary. The report specifically mentions that the appointment of five persons of the teaching staff for teaching in the college after its takeover on 10. 1. 85 on a daily wage of Rs. 25/— made on sanctioned and vacant post of Lecturers was proper and it would not be just and proper to remove them from service even on humanitarian grounds as theyhad been teaching and performing the work of physician in a proper way continuously for 7 years. It was also recommended that the screening in respect of the college was still pending and only there after the State Govt. would consider the proposal for the development of the college and for this reason also it would be in the interest of the college as also the State Govt. to keep theminservice. The Deputy Secretary in his report went to the extent of recommending that in the light of the facts stated by him the State Govt. would like to cancel their order dated 24. 11. 92 (Annexure—14) as also to pass orders for payment of arrears of pay. The respondents have simply denied in a genaral way that there were no sanctioned / vacant posts against which the writ petitioners could have been appointed on daily wages. As already mentioned earlier the the order issuing notice to show cause or the order cancelling the appointment of the writ petitioners no where mentions the absence of posts on which the writ petitioners could have been appointed.

13. There is no denial of the claim of the writ petitioners that the appointments had been made by the principal of the college on the orders of Divisional Commissioners, Bhagalpur. It is no body's case that the Principal of the college on his own had by any back door method appointed the writ petitioners on daily wages. On behalf of the respondents no material has been brought on the record that after the takeover of the college, the Principal under the orders of the Divisional Commissioner could not have made appointments even on daily wages without obtaining the prior permission of the State Govt. Even assuming that no such appointment could be made without the prior approval of the State Govt. the fact remains that the appointments of the writ petitioners on daily wages were known to the State Govt. for long. The Principal of the college vide Annexure—4-2 had sent a list of persons appointed on teaching posts during the period 1974-75 to 1984-85 to the Health Department of the State Govt. as early as in May 1986. The list of persons appointed against teaching posts for the year 1984-85 included the names of five Lecturers includingthe names of the four writ petitioners who had been appointed on daily wages. The State Govt. instead of taking any objection to the appointment of the writ petitioners after the takeover date without their prior approval appeared to have forwarded a list of teachers of the college in September 1989 including six newly appointed teachers which also mentioned the names of four writ petitioners to the principal of the college asking him to inform the teachers mentioned in the list to appear before a committee along with their original certificates and documents in support of their case. There is no denial of the claim of the writ petitioners that they had accordingly appeared before the committee constituted by the state Govt. as early as in September 1989. On the face of all this the action of the State Govt. In taking steps for terminating the appointments of the writ petitioners in the year 1991-92 on the ground that their appointments had been made without prior approval of the state Govt. during the pendency of the writ petition filed by the writ petitioners for regularisation of their services and payment of

salary prima facie appears to be based on no cogent reason save and except to make the writ petition filed by the writ petitioners infructuous. This is not to say that the state Govt. is not competent to cancel the appointment of persons appointed on daily wage basis but the power cannot be exercised in a manner which is strongly suggestive of vindictiveness. Perhaps it was for these reasons that the State Govt. did not take any steps to enforce its order Annexure-14 despite the absence of any order of the court staying its operation. Moreover, the writ petitioners were found by none other than the Deputy Secretary of the Health Department to be performing their duties efficiently and had described their services as necessary in the interest of both the college and the State. In these circumstances the action of the State Govt. to cancel the appointmentsonly on the ground that the appointment had been made without their prior approval and that also after a number of years, though the State Govt. were aware from the begining of the appointments having been made without their prior approval cannot be described to be an action taken inaccordance with law and to say the least it was a colourable exercise of power. perhaps it was for these reasons that Annexure—14 has not been implemented in so far as the writ petitioners are concerned. The counter affidavit dated 17. 3. 94 filed by the respondents simply described the aforesaid report of the Deputy Secretary as a surprise inspection note and not a Government order. It, however, did not say a word disputing the correctness of the contents of the report that writ petitioners were discharging their duties efficiently and that the continuance of their services was necessary in the interest of both the college and the state. Annexure—14 issued on 24. 11. 92 thus on the basis of admitted facts appeares to have been ignored by all concerned for a long time and even the Deputy secretary, Health Department who inspected the college on the orders of the Health Commissioner had recommended for its reconsideration with a view to direct its withdrawal. There is no averment on behalf of the respondents that the State Govt. had passed any order rejecting the aforesaid recommendation of the

Deputy Secretary, Health Deptt. Be that as it may the fact remains that the order (Annexure—14) was issued at a time strongly suggesting that it was passed only for the purpose of making this writ petition infructuous and was, there fore, a colourable exercise of power. The legal validity of Annexure—14 cannot be sustained and it deserves to be quashed accordingly.

14. We may now turn our attention to the question of regularisation of the services of the petitioners. The petitioners based their claim for regularisation on the ground that they have the requisite qualification and experience for appointment to the post of lecturers and have been discharging the duties and functions of such post in the college continuously for a number of years to the entire satisfaction of the authorities. They also claimed that there existed a large number of vacancies in the respective departments of the college but only one person was working in one department which clearly went to show that there were still sanctioned posts to be filled up. In this connection Annexure—8 has been referred to and relied upon. It is a letter dated 20.4. 87 addressed by the Secretary of the Central Council of Indian Medicine constituted under the I. M. C. C. Act 1970 to the principal of the college. The letter enclosed a copy of the recommendations of the central council of Indian Medicine prescribing the minimun standards and requirements for Ayurvedic college and attached hospital to be implemented on short term basis. The Central Council of Indian Medicine appears to have prescribed among other things the essential staff for Ayurvedic colleges with seven departments and minimum requirements there of. At page 4 of the recommendations of the Central Conucil of Indian Medicine there is a chart in tabulor form which prescribes the minimum requirement of professors, Readers, Lecturers etc. in the various departments. However, contrary to what has been stated by the writ petitioners in para 22 in their writ petition there is nothing in Annexure—8 by way of an order of the Central Council of Indian Medicine containing a direction to the State Govt. to fill up all the posts in all the

departments of the college and the threat that if the Lecturers in the concerned departments are not appointed forthwith the college would be derecognised.

15. All the four writ petitioners claim to have qualification of G. A. M. S with teaching experience for a few years at the time of appointment as Lectures in the aforesaid college. Hoever, no material has been brought on the record to indicate the minimum qualification and teaching experience prescribed for the post against which the petitioners claim to be working on daily wages. The claim of the petitioners that there ere vacant / sanctioned / approved posts in the college against which they are working on daily wages has been denied by the respondents. No material was produced by the petitioners to show that such posts were in existence having been created before their appointments. So far petitioner no. 1 was concrned he claimed to be working on the post which fell vacant on the death of sri gyan prakash Arya, lecturer in the department of Anatomy. This has been denied by the respondents who claimed that sri Arya had died after the appointment of petitioner no. 1 on daily wages. The petitioners sought to rely on the contents of the report (Annexure—17) of the Director-cum-deputy Secretary, Indigenous Medicines (Deshi Chikitsa) where he had mentioned that the writ petitioners had been appointed as Lecturers against vacant and sanctioned post. The report does not give the necessary details regarding the dates on which posts were created or vacancy on the said post occured. The recommendation of the Central Council of Indian Medicines simply prescribed the minimum requirements of the essential staff including Lectures in each department of the college. By merely pointing out that as per the recommendations number of posts of Lecturer were necessary in each department to conform to the minimum standards and requirements for Ayurvedic college and attached hospital to be implemented on short term basis is not enough to draw the inference that such minimum mumber of posts in each department had been created by the concerned authorities. There is no

material on the record that the State Govt. after the takeover of the college had created the necessary number of minimum posts of Lecturer ineach department of the college to conform to the minimum standards prescribed by the Central Council of Indian Medicines.

16. It may be relevant to notice that the writ petitioners do not claim to have been appointed to the posts on the basis of any advertisement issued for the purpose. They also do not claim that they were requird to appear at any test or interview for the purpose. Respondents 1 to 3 in their counter affidavit have averred that the post of Lecturer in the ayurvedic college is a class II gazetted post and the appointment on this post has to be made on the recommendation of the Bihar public service Commission (in short the 'Commission'). The selection process must of necessity envisage some written test or interview after giving an opportunity to all those who possess the requisite qualifications and experience for being appointed to the post to apply for the same. The purpose of making appointments on class II gazetted post on the basis of the recommendation of the Commission is only to ensure that ony the best among the candidates having requisite qualifications and experience for the post are selected. This is ensuring that only the best among the eligible candidates are selected for the post which is in the interest of all concerned including the students, the college and the society at large.

17. Dr. Jha while arguing the case for regularisation of the services of the petitioners led considerable emphasis on the extraordinary jurisdiction of this court while hearing wirt petitions under Articles 226 and 227 of the Constitution of India to do substantial Justice to those who are being victimised and treated in an unjust manner for no fault of theirs. It was pointed out that the writ petitioners had given the best years of their life for the sake of the institution and had discharged their duties and functions to the satisfaction of all concerned and even the authorities of the State Govt. had occasion to appreciate the

same. In support of the contention relicance was placed on a number of decisions of the Apex Court. A two Judge Bench of the Apex Court in Jacob M. *Puthuparambil* v. *kerala Water Authority* (1) has occasion to deal with the matter of regularisation of service of employees appointed by way of stop gap arrangement till regular appointments were made in the light of the provisions of the kerala State and Subordinate Service Rules. Dr. Jha referred to the observations made in the judgment, to quote,:

"It is unfair and unreasonable to remove people who have been rendering service since sometime as such removal has serious consequences. The family of the employee which has settled down and accommodated its needs to the emoluments rceived by the bread winner will. face economic ruination if the job is suddenly taken away. Besides, the precious period of early life devoted in the service of the establishment will be wholly wasted and the incumbent may be rendered 'age barred' for securing a job elsewhere. It is indeed unfair to use him, generate hope and a felling of security in him, attune his family to live within his earnings and then suddenly to throw him out of job. Such behaviour would be an affront to the concept of job security and would run counter to the constitutional philosophy, particulary the concept of right to work in Art. 41 of the Constitution".

Their Lordships were dealing with the provisions of Rule 9 (a) (i) of the Rules and of employees appointed under the said Rules and had proceeded to interpret the said Rules in so as to hold that the employees who had been serving in the establishment for long spells and had the requisite qualification for the job should not be thrown out but their services should be regularised as far as possible and since the petitioners were working on the post for reasonable long spells they were found entitled to be regularised in service. The workers who were found entiled to the regularisation of the service by the said judgment had been recruited under certain Rule framed by the State Govt. which is not the case with the present writ petitioners who were ap-

(1) (1990) A. I. R. (S. C.) 2228.

pointed as daily wage earners by an authority which had no authority to make the appointments under any Rules framed by the State Government.

18. In A. M. R. P. V. S. *Association* Vs. *State of Manipur* (1) the Apex court dealt with an appeal which concerned the problem of regularisationof substituted / ad hoc teachers in the Education Department of the State of Manipur who had been in service for the past several years and whose services the State Govt. refused to regularise and instead took steps for direct recrutment. More than 1000 substituted teachers had been recruited in 1981-82 and the Apex court while dealing with an interim order passed by the High Court proceeded to direct, inter alia, that all substituted / ad hoc teachers who had put in 5 years of service or more as on October 1, 1990 shall be regularised without pay. In other words a direction was given by the Apex court to the State Govt. to consider the case of regularisation of such teachers before making direct recruitment and also laid down the manner in which reguarisation shall be made. Another decision relied upon by the petitioners is *State of Haryana* V. *Piara Singh* (2). A three Judge Bench of the court as dealing with a large number of writ petitions which were disposed of by the punjab and Haryana High Court giving certain directions in the matter of regularisation of the ad hoc / temporary employees, members of work charge establishment, daily wages, casual labour and those engaged temporarily in temporary schemes. The court in course of the judgment had occasion to observe, to quote:

"Ordinarily speaking, the creation and abolition of a post is the prerogative of the Executive. It is the Executive again that lays down the conditions of service subject, of course, to a law made by the appropriate legislature. This power to prescribe the conditions of service can be exercised either by making Rules under the proviso to Art. 309 of th Constitution or (in the absence

(1) (1991) A. I. R. (S. C.) 2088.
(2) (1992) A. I. R. (S. C.) 2130.

of such Rules) by issuing Rules / instructions in exercise of its executive power. The court comes into the picture only to ensure observance of fundamental rights, statutory provisions, Rules and other instructions, if any, governing the conditions of service. The main concern of the court in such matters is to ensure the Rule of law and to see that the executive acts fairly and gives a fair deal to its employees consistent with the requirements of Articles 14 and 16. It also means that the State should not exploit its empoyees nor should it seek to take advantage of the helplessness and misery of either the unemployed persons or the employees, as the case may be. As is often said, the State must be a model employer. It is for this reason, it is held that equal pay must be given for equal work, which is indeed one of the directive principles of the Constitution. It is for this very reason it is held that a person should not be kept in a temporary or ad hoc status for long. Where a temporary or ad hoc appointment is continued for long the court presumes that there is need and warrant for a regular post and accordingly directs regularisation."

Their Lordships while referring to the observations made and directiongiven in the earlier two judgments reported in A. I. R. 1990 S. C. 883 and A. I. R. 1990 S. C. 2228 proceeded to observe that while giving such direction the court must act with due care and caution. It must first ascertain the relevant facts and must be cognizant of the several situations and eventualities that may arise on account of such direction. The court, there fore, cautioned that a practical and pragmatic view has to be taken, inasmuch as every such direction not only tells upon the public exchequer but also has the effect of increasing the cadre strength of particular service, class or category. Their Lordships of the Apex Court then proceeded to point out several problems that arose if direction for wholesome regularisation of all such persons who had put in one year service and that too unconditionally was given. Some of the problems referred to in para 12 of the judgment are enumerated below:

(a) Take a case where certain vacancies are existing or expected and steps are taken for regular recruitment either through public Service Commission or other such body, as the case may be. A large number of persons apply. Inevitably there is bound to be some delay in finalishing the selections and making the appointments. Very often the process of selection is stayed or has to be re— done for one or the other reason. Meanwhile the exigencies of adiminstration may require appointment of temporary hands. It may happen that these temporary hands are continued for more than one year because the regular selection has not yet been finalised Now according to the impugned direction the temporary hands completing one year's service will have to be regularised in those posts which means frustrating the regular selection. There would be no post left for regularly selected persons even if theyare selected. Such cases have indeed come to this court from these very two States.

(b) In some situations, the permanent incumbent of a post may be absent for more than a year. Examples of this are not wanting. He may go on deputation, he may go on Faculty Improvement Programme (F. I. P.), or he may be suspended pending enquiry into charges against him and so on. There may be any number of such situations. If a person is appointed temporarily in his place and after one year he is made permanent where will the permanent incumbent be placed on his return ? Two persons cannot hold the same post on a regular or permanent basis.

(c) It may also happen that for a particular post a qualified person is not available at a givenpoint of time. pending another attempt at selection later on an unqualified person is appointed temporarily. He may continue for more than one year. If he is to be regularised, it would not only mean foreclosing of appointment of a regular qualified person, it woud also mean appointment of an unqualified person.

(d) Such directions have also the effect of disregarding and violatting the rule relating to reservation in favour of

backard class of citizens made under Article 16 (4). What cannot be done directly cannot be allowed to be done in such indirect manner.

(e) Many appointments may have been made irregularly—in the sense that the candidates were neither sponsored by the Employment Exchange nor were they appointed after issuing a proper advertisement calling for applications. In short, it may be a back door entry. A direction to regularise such appointments would only result in encouragement to such unheathy practices."

Before parting with the case their Lordships THought it proper to say a few words concerning the issue of regularisation of adhoc / temporary employeesin government service, to quote :

"The normal rule, of course is regular recruitment through the prescribed agency but exigencies of administration may sometimes call for an ad hoc or temporary appointment to be made. In such a situation, effort should always be to replace such anad hoc / temporary employees by a regularly selected employees as early as possible. Such a temporary employees may also compete along with others for such regular selection / appointment. If he gets selected, well and good, but if he does not, he must give way to the regularly selected candidate cannot be with held or kept in abeyance for the sake of such an ad hoc / temporary employee.

Secondly an ad hoc or temporary employee should not be replaced by another ad hoc or temporary employee; he must be replaced only by a regularly seleccted employee. This is necessary to avoid arbitrary action on the part of the appointing authority.

....

....

So fare as the work-charged employees and Casual labour are concerned, the effort must be to regularise them as far as possible and as early as possible subject to their fulfilling the

qualifications, if any, prescribed for the post and subject also to availability of work. If a casual labourer is continued for a fairly long spell-say two or three years — a presumption may arise that there is regular need for his services. In such a situation, it becomes obligatory for the concerned authority to examine the feasibility of his regularisation. While doing so, the authorities ought to adopt a positive approach coupled with an empathy for the person. As has been repeatedly stressed by this court, security of tenure is necessary for an employee to give his best to the job. In this behalf, we do commend the orders of the Government of Haryana (contained in its letter dated 6. 4. 90 referred to herein before) both in relation to work charged employees as well as casual labour."

19. In none of the decisions relied upon by the petitioners and referred to above, the Apex court had laid down anyproposition, of law that casual workers or persons employed on daily wages should after a continuous service for a number of years be automatically reguarised or even absorbed in government service. In a recent decision in *Dr. Arundhati Ajit pargaonkar* Vs. *State of Maharashtra & ors.* (1) the Hon'ble supreme Court had occasion to deal with the case of regularisation of service of the appellant who was appointed temporarily against a permanent post. The appelant was appointed as Lecturer in Dentistry in the Medical College and was governed by the Rules framed in 1977 in the State of Maharashtra. It was found that since the appellant had been appointed in disregard of the recruitment Rules she could not claim to be regularised as the post of Lecturer in Dentistry in the State even in 1978 was within the purview of pubic Service Commissionunder the provisions of the Temporary Government Servants Extension of permanency Resolution 1975. Thus the claim of the appellant that she having worked as Lecturer without break for 9 years on the date the advertisement was issued and should, therefore, be deemed to have been

(1) (1995) A. I. R. (S. C) 932

regularised was not found to be well founded and their Lordships observed, to quote:

"Eligibility and continous working for howsoever long period should not be permitted to over-reach the law. Requirement of rules of selection through Commission cannot be substituted by humane considerations. Law must take its course. Consequently the appelant was not entitled to claim that she should have been deemed to have been regularised as she had been working without break for nine years".

In the instant writ application the stand of the respondents-State that the post of Lecturer in the college is class II gazetted post and appointments to such posts are made on the recommendation of the public service Commission has not been denied. The aforesaid decision of the Apex court and the observations made there in were in respect of a Lecturer appointed on a temporary basis but not in accordance with the recuritment Rules. The case of the petitioners in the instant writ petition stands on a still worse footing for their appointment was initially on the basis of payment of fixed amount of Rs. 25/— per lecture and which was subsequently revised to provide for payment at the rate of Rs. 25/— per day w. e. f. 1. 5. 1987 .

20. In this connection a decision of a Division Bench of this court in *Sanjiv Kumar Bimal* v. *Bihar State Agricutural produce Marketing Board* (1) may be referred to. The Bench had occasion to refer to the facts of C. W. J. C.No. 2035 of 1989 (R) filed by a few daily rated employees of the market committee or the engineering cells of the respondent-Board. The petitioners in that case had prayed that they be absorbed permanently in the service of the Board. In the said case it was observed that since the petitioners were working for a long time there was no reason why the benefit of regular empoyees be not given to them and direction was given to the respondents to take proper steps for fiing up the posts which the petitioners were holding but after

(1) (1992) I. P. L. J. R. 706.

due advertisement. Further direction was given that the petitioners and other similarly situated persons may appy for such post and if such applications were made the respondent should consider the past services of the petitioners and other similary situated persons. Their Lordships also referred to the Judgment in C. W. J. C. 1100 of 1991 where by the court declined to give any direction to the Board / Market Committee to permanently absorb the daily rated workers merely because they were aready working. It was accordingly obsrved in course of the judgment that in none of the cases referred to above any direction was given to absorb daily rated workers permanently and that no such direction could be give as that will be in violation of the Article 16 of the Constitution as none of them was appointed by following any procedure known to law by which candidates are selected for filling up public posts. The petitioners had relied on some decisions of the Supreme Court and had submitted that as the petitioners had worked for long years they shall have to be absorbed in regular employment by the respondents. The petitioners had also relied on a decision of the supreme Court in Dharwad District P. W. D. Literate Daily wage Empoyees Association v. State of Karnataka 1990 (2) SCC 396 in which the earlier decisions of the Court had also been noticed. The aforesaid decision was found as an authority for the limited proposition that all persons employed on casual basis must be paid atleast the minimum in the pay scale of the regularly employed persons even though the government may not be compelled to extend all benefits enjoyed by regularly empoyed persons. The Divisions Bench of this Court observed that in none of the decisions cited at the Bar the supreme Court directed for absorbing all daily rated or casual employees. The Court aso did not allow the prayer of the petitioners for direction to the repondents to fill up all vacant sanctioned posts as in its opinion it was for the respondents to decide whether the posts should b filled up or not. But while doing so it took care to make it clear that the respondents cannot be allowed to engage employees on daily rate or casual basis if the work they are discharging is of

permanent nature and that such posts shall have to be filled up on permanent basis in accordance with law.

21. Dr. Jha relied on a judgment of learned single Judge of this court in C.W. J. C. Nos 5409 of 1987 and 1568 of 1988 *Vijay Kumar* V. *State of Bihar* (1) and against which the Special Leave petition was dismissed by the Supreme Court vide SLP No. 16099 of 1990 as reported in 1991 (2) PLJR (SC) 74. It was argued that since the S. L. P. had been dismissed the judgment of the learned Single Judge of the High Court would be deemed to have been affirmed by implication. *In Vijay Kumar's* case (supra) the court was dealing with certain writ applications filed for a direction to the respondents to regularise the services of the petitioner as Lecturer in the Bihar Institute of Silk and Textiles, Bhagalpur. The court on the facts of the case found that the petitioners who possessed all the necessary qualifications and were teaching students and imparting education to the satisfaction of all concerned were still getting a remuneration of ony Rs. 20/— per Lecture while Lecturers promoted from the post of Instructors were getting pay in the prescribed scale of Rs. 880-1570. Counsel for the petitioners referred to the directions of the Bench given in course of the Judgment to quote:

"The petitioners services could not be exploited by the employer by giving a meagre remuneration of Rs. 20/— per lecture. The petitioners are equally qualified and experienced lecturers. On one hand, the Government has been crying hoarse about the democratic and socialist principle to be followed but the present one is a case of utter violation of the said principle. The Government is not expected to act in a manner similar to that of a private capitalists and the full trained and competent lecturers like the petitioners could not be exploited to impart education on remuneration of Rs. 20/— per lecture. I see no reason why, on the facts of the present case, the petitioners could not be absorbed as lecturers on permanent basis who have been performing the same functions and duties as those of other

(1) (1991) (1) P. L. J. R. 747.

permanent lecturers who are being given the prescribed scale of salary for lecturers against those posts. Their cases for such absorption as lecturers on permanent basis was recommended by the Principal of the Institute from time to time. The Principal of the Institute, while recommending their case for absorption to respondent No. 2, impressed upon him that these petitioners laboured hard because of lack of adequate number of hands in the Institute and he was impressed by their prformance as teachers in the said Institute. In not taking such steps for regularising their services and the long silence maintained by the Government in this respect in not giving them the prescribed pay scale is denial of social justice. In order to defeat their claim, a false stand was taken for the first time in the counter affidavit that their appointment was contractual on a remuneration of Rs. 20/— perlecture. The same has been categorically denied by the petitioners. The petitioners have crossed their age limit for any other Government service and, there being no adverse report against their conduct as lecturer for all these years in this Institute, I am left with no option but to direct respondent No. 2 to regularise the services of the petitioners as lecturers in the Bihar Institute of Silk and Textile, Bhagalpur, with the same salary and allowances which are being paid to regular and permanent lecturers."

In my opinion the above decision of the learned single Judge has no application to the facts of the present case. In *Vijay Kumar's* case (supra) the court had occasion to take notice of the fact that the University as also the principal of the Institute had made several requests to sanction the posts held by the petitioners Not only that even the University had constituted a committee for the purpose of permanent affiliation as also to examine the requirement of the Institute in the matter of posts etc. The matter did not end there. The committee inspected the college in February 1986 and had suggested for sanction of two posts in Physics, three posts in Chemistry and one post in Economics. Its recommendation sanctioning the above posts as also other posts was sent to the Director by the Registrar of the University in

March 1986, but the Government did not take a decision and sat over the matter. In the instant case there is nothing to indicate that the authorities of the college including its Principal (respondent no. 4) ever moved the State Government for creation/ sanction of necessary posts against which the petitioners claimed to be working. In view of a number of subsequent decisions of the Apex court including those reported in *State of Haryana* v. *Piara Singh's* case (supra) and *Dr. Arundhati Ajit Pargaonkar's* case (supra) as also of a Division Bench of this court reported in *Sanjeev Kumar Bimal's* case (supra) the principles laid down by the learned single Judge in *Vijay Kumar's* case (supra) for regularisation of the services of Lecturers employed on daily wage basis cannot be considered to lay down the correct law on the subject.

22. Since the petitioners of the instant writ application were working on the post of Lecturer on daily wages which post being class II gazetted post could be filed in only on the basis of the recommendation of the Bihar Public Service Commission and their appointments even on daily wages not having been made in accordance with any rules as also the fact that the appointments had been made not by the State Govt. but by another authority after the takeover of the college by the State Govt., they, in my opinion, were not entitled to any order or direction of this court for authomatic absorption / regularisation to the post of Lecturer in the college. In this connection it also needs to be mentioned that the petitioners have not succeeded in showing the existence of sanctioned or approved posts of Lecturer on which such absorption or regularisation could be made. Thus for the reasons mentioned above the prayer of the writ petitioners for a direction for regularisation of their services is found without merit and is rejected.

23. In so far the prayer of the writ petitioners for a directionto the respondents to pay them the salary at par with the regularly appointed Lecturers in the college is concerned, there does not appear any serious dispute between the parties that though the writ petitioners were initially appointed on the basis of payment of Rs. 25/— per lecture, subsequently they were deputed as

physicians to the hospital attached with the college and from a subseqent date i.e. 5. 1987 they were being paid at the consolidated rate of Rs. 25/— per day. It is true that the petitioners have not brought on record the duties and functions of regularly appointed Lecturer in the college. However, it is not of any importance for the respondents have no where challenged the petitioners' averment to that effect. Moreovr when the State Govt. in the Health Department sought certain information from the principal of the college (respondent no. 4) concerning persons appointed against teaching posts the information furnished by respondent no. 4 vide Annexure—4-2 had enclosed a list mentioning the names of the four petitioners as working against teaching posts in the college. The said list also included the names of teachers who were working on a regular basis. The appointment letters of the petitioners brought on the record both as Lecturer and as physician attached to the hospital also go to show in no uncertain terms that they were performing the duties and functions ordinarily discharged by regularly appointed Lecturers in the college. The four petitioners were described as Lecturers in the college by the State Govt. while ordering cancellation of their appointment vide Annexure—14. In the report (Annexure—7) submitted by the Deputy secretary, Heath Deptt. also the four petitioners have been described as the newly appointed Lecturers-cum-Medical Officer in the college after its takeover. The Deputy Secretary in his report had also dealt with a charge against the principal that he had not yet removed the five teaching and nine non-teaching staff of the college which includes the four petitioners as directed by the State Govt. vide Annexure—14 and had mentioned the stand of the Principal (respondent no. 4) that he had not done so without paying the arrears of pay as advised by the private advocate of the college. The report has specitically mentioned the payment of salary etc. is pending for want of allotment since October 1992. It may be mentioned that the earlier writ petition (C.W. J.C. No. 766/91) filed by these writ petitioners for payment of their salary along with others was allowed to be withdrawn on 16. 7. 92 and as has

been stated by the petitioners the writ petition had been withdrawn following payment of their salary. There is no material on the record to ascertain whether any payment of salary has been made from October, 1992 onwards.

24. Dr. Jha referred to Article 39 (d) in part IV of the Constitution and submitted that in the case of the writ petitioners the State had completely failed in its duty to direct its policy towards securing one of the directive principles of State policy of equal pay for equal work. He pointed out that though the provisions contained in part IV of the Constitution shall not be eforceable by the Court but the principles laid down there in were nevertheless fundamental in the governance of the country as was specifically provided for in Article 37 of the Constitution. The petitioners have relied on a number of decisions of the Apex court. In *K. S. P. College Stop-gap Lecturers Association* vs. *State of Karnataka* (1) . a three Judge Bench of the Apex Court had occasion to deal with the injustice involved in the payment of emoluments to the temporary teachers. It was observed there in, to quote:

"Another obnoxious part is the emoluments that have been paid to the temporary teachers. The order provides that the the teacher shall be paid a fixed salary which is ten rupees less than the minimum payable to regular employee. This method of payment is again beyond comprehension. An appointment may be temporary or permanent but the nature of work being same and the temporary appointment may be due to exigency of service, non-availability of permanent vacancy or as stop-gap arrangement till the regular selection is completed, yet there can be no justification for paying a teacher, so appointed, a fixed salary by adopting a different method of payment than a regular teacher. Fixation of such emoluments is arbitrary and violative of Article 14 of the Constitution. The evil inherent in it is that apart from the teachers being at the beck and call of the management are in danger of being exploited as has been done by the management committees of State of Karnataka who has

(1) (1992) A. I. R. (S. C) 677

utilised the services of these teachers for 8 to 10 years by paying a meagre salary when probably during this period if they would have been paid according to the salary payable to a regular teacher they would have been getting much more. payment of nearly eight months 'salary' by resorting to clause 5, and that too fixed amount, for the same job which is performed by regular teachers is unfair and unjust. A temporary or ad hoc employee may not have claim to become permanent without facing selection or being absorbed in accordance with rules but no discrimination can be made for same job on basis of method of recruitment. Such injustice is abhorring to the constitutional scheme."

Another three Judge Bench of the Apex Court in *Sandeep Kumar* v. *State of U. P.*(1) had occasion to deal with a claim for equal pay for equal work by junior Engineers on daily rate basis on the ground that similary qualified Engineers employed on regular basis were getting higher pay. The Bench while allowing the prayer observed, to quote:—

"From the facts placed before us, it appears that the scheme under which the petitioners are working is of a very specific nature. There is no permanent need for the work and since it is a project for a particular purpose, it will not be possible to direct that the petitioners may be regularised in service. From the materials however, it appears that similarly qualified engineers when employed for the work which the petitioners are called upon to do, on reguar basis are paid a minimum grade pay of Rs. 1, 400/—. We see no justification to discriminate between the petitioners and the regularly employed Junior Engineers who on appointment receive Rs. 1, 400/—. Accordingly, we direct that the petitioners shall be paid a sum of Rs. 1, 400/— per month instead of Rs. 1,000/— as at present and since the pay shall be for the month the question of holidays will not be taken into account."

The learned single Judge in Vijay Kumar's case (supra) observed that the principle of 'equal pay for equal work' is deducible from the provisions of Articles 14, 16 and 39(d) of the Constitution of India, and a Division Bench of this court in

(1) (1992) A. I. R. (S. C) 713.

Sanjeev Kumar Bimal's case (supra) had also expressed similar views in the matter of claim for equal pay for equal work when it observed, to quote:

"It is now settled that even persons employed on daily or casual basis must be paid at the minimum on the same scale as is paid to regular employees".

In *Daily Rated Casual Labour, P. & T. Department* v. *Union of India* (1) the Apex Court directed the Govt. and other authorities to pay wages to the workmen who were employed as casual labourers belonging to the several categories of employees in the posts and Telegraphs Department at the rates equivalent to the minimum pay in the pay scales of regularly emplyed workers in the corresponding cadres but without any increments. The Supreme Court in *Union of India* vs. *Rajendra Kumar Sharma* (2) had occasion to observe that the decision of the court in *Daily Rated Casual Labour's* case (supra) did not say that casual labourers are entitled to be paid even on the days they do not work.

25. The writ petitioners have been found to be discharging duties and functions of regularly appointted Lecturers and instead of being paid at a rate calculated at the minimum of the scale of pay admissible to regularly appointed Lecturers are being paid a paltry sum of Rs. 25/— per day. Inview of the decisions of the Apex court as also of this court referred to above the concept of equal pay for equal work cannot be dismissed as an abstract doctrine not capable of being enforced in a court of law. The writ petitioners are, therefore, found entitled to issue of a direction to the respondents to pay them wages calculated on the basis of the minimum pay in the pay scale of regularly employed Lecturers.

26. Before parting with the case it needs to be mentioned that the petitioner were working on the post of Lecturer since 1. 3. 85 i. e. for about a decade by now. Since they have been working on the post for such a long time there is a strong presumption that the posts were required for running the institution and that the

(1) (1987) A. I. R. (S. C) 2342

(2) (1993) A. I. R. (S. C.) 1317.

work they were discharging was permanent in nature. It needs to be emphasised that the State cannot be permitted to engage employees on dailyrate or casual basis if the work they are discharging is of permanent nature. It appears that the State Govt. has yet to take a final decision with regard to the report of the screening committee in respect of teaching staff of the college following its takeover in 1985 under the provisions of the relevant Act. The Deputy Secretary, Health Deptt., in his report (Annexure—17) had made a recommendation to the State Govt. in respect of teaching staff of the college including these petitioners for consideration of their case after obtaining the recommendations of the Bihar public Service Commission in the matter of reguarisation of their services. It is, therefore, open to the State Govt. to take steps in accordance with law for filling up the posts on a regular basis on the recommendations of the commission if vacancy already exists or are subsequently created and while doing so to consider the necessity/desirability of waiving the age bar in respect of such of the petitioners who are in continuous employment as daily rate Lecturers. If the State Govt. on the other hand after consideration of the matter came to the conclusion that the posts against which the petitioners were working did not exist from before and there was also no requirement for such posts for running the institution, nothing would prevent the State Govt. from taking such action as it may deem fit and proper in respect of continuance of the writ petitioners as Lecturers on daily rate basis in accordance with law.

27. In the result while annexure—14 cancelling the appointment of the writ petitioners as daily rated Lecturers is quashed, they are not found entitled to any order or direction to the respondents for regularisation / absorption of their services. The writ petitioners shall, however, be paid wages at a rate calculated on the basis of the minimum pay in the pay scale of regularly employed Lecturers from October 1992 onwards except holidays and absence from duty on working days within three months from today.'

28. This writ petition is, accordingly, allowed to the extent mentioned above. There shall, however, be no order as to costs.

R. D. Order accordingy

CIVILL WRIT JURISDICTION

Before Bisheshwar Prasad Singh and Indu Prabha Singh, JJ.

1995,
July, 19

*Uma Kant Yati and others.**

V.

The State of Bihar through the Education Secretary, Government of Bihar and others.

Service—Arts Trained Graduates and Science Trained Graduates appointed on the same date and granted Matric Trained scale—science Trained Graduates promoted to Graduate trained scale—Arts Trained Graduates continued in Matric Trained Scale—for consideration for promotion as Headmaster, Seniority in Graduate Trained Scale taken into account—whether arbitrary.

Arts Trained Gradutes and Science Trained Craduates who were appointd intially as Assistant Teacher on stipend basis in Elementary Schools on the same day were granted Matric Trained Scale. But science Grauates were promoted to the higher scale, namely Graduate Trained scale wheras the writ-petitioners and others Arts Gaduate Teachers have continued in the lower scale of Matric Trained Scale. Writ-petitioners grievance was that they should also be promoted in Graduate Trained scale otherise they would not come within the zone of consideration as Headmaster but the Science Gradutes Teachers may be considered for appointment as Headmaster because of quicker promotion granted to them.

Held, that for promotion as Headmaster, if seniority of teachers in the highest scale, namely Graduate Trained scale is taken into accounts, that can not be termed a arbitrary, because teachers in the Graduate Trained scale must be considered as a separate class and appointed against a higher scale, as against

*Civil Writ Jurisdiction Case No. 1726 of 1988. In the matter of an application under Articles 226 and 227 of the Constitution

teachers in the Intermediate Trained Scale or Matric Trained Scale. The wirt-petitioners are in Matric Trained scale, where as those who are considered for promotion as Headmaster are persons, who are in Graduate Trained scale. The writ-petitioner must wait for their promotion in higher scale, and such higher scale cannot be granted to them unless there are vaccancies in the higher scale in Arts against which they may be promoted.

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 Bisheshwar Prasad Singh, J.

M/s Rajendra Prasad (Sr. Adv.), Ram Sagar Singh & Arun Kumar Singh for the petitioners

M/s Deo Narain Yadav & Hari Shankar Roy for the state.

B. P. Singh, J. The instant writ petition has been filed by trained teachers claiming that they should be given the same scale as has been granted to Science graduate trained teachers. The petitioners are Arts graduates. Pursuant to an advertisement the petitioners and many others applied for appointment as Assistant Teachers in the Elementary Schools in the district of Siwan. The petitioners along with many others were selected for appointment, and were appointed initially as Assistant Teachers on stipend basis. All the teachers so appointed were paid monthly stipend of Rs. 175/—. Amongst the Assistant Teachers selected for appointment were Science teachers as also Art teachers. All of them were graduate trained, meaning there by that all of them were graduates, whether in Science or Arts and had acquired the necessary training to wrok as terachers. Twenty teachers in Science and thirty teachers in Arts were appointed. In the Year 1981 all the teachers so appointed were granted matric trained scale. There after, by order dated 28—5—1983 all the Science teachers were promoted to the higher scale, namely, graduate trained scale, but the petitioners and other Arts teachers have continued in the lower scale, namely, matric

trained scale. Their grievance is that they should also be promoted to the higher scale, meaning there by graduate trained scale.

2. It is not disputed that there are different scales for the teacher with different qualifications. namely, middle trained teachers, matric trained teachers, intermediate trained teachers and graduate trained teachers. Different pay scales have beenprescribed for different categories of teachers. It is also not disputed that posts are sanctioned for each category, and though it has varied from time to time, a certain percentage of posts in the service are earmarked for each category. It is also not disputed that a person who is graduate trained cannot seek direct appointment against a post in the graduate trained scale. He has to begin at the bottom of the rung and reach that scale by promotion. Promotions are granted on the basis of the vacancies which occur in different scales. There is also a further subdivision of science and Arts teachers.

3. It is not the case of the petitionrs that graduate trained teachers in Science have been wrongly promoted without there being vacancies in the B. Sc. trained scale nor is it their case that despite vacancies in the graduate trained scale of teachers in Arts, the petioner have not been promoted. It is. there fore, obvious that the petitioners have not been promoted to the higher scale, because there are not sufficient vacancies against which they may be promoted. On the other hand, the Science teachers are luckier inasmuch as they have been promoted against the vacancies which were caused or existed. Obviously, there fore, it cannot be said that there has been any arbitrariness in the matter of promotion of Science teacher, who were Graduate trained. The petitioners cannot claim equal pay for equal work. It may be that all the teachrs do the same type of work, but the different pay scalesprescribed is based on the higher educational qualification required of a teacher before he can be promoted / appointed to that scale. The higher pay scales are menat for different categories of teachers depending upon their educational qualification. The pay scale of a Matric trained

teacher is obviously less than that of Intermediate trained or Graduate trained. It may be that Graduate trained teachers may have been appointed initially in the scale meant for Martic trained teachrs, but they cannot complain if a person with similar qualification; who has been promoted to the Graduate trained scale, is getting higher pay. If the petitioners are also promoted to the higher scale, they willl also get higher scale. The fact that in one branch there are quicker promotions, where as in other branch the promotions are not so many, is a matter of luck and is an incidence of service. For this reason it cannot be held that the grant of promotion to Science teachers and faiure to grant such promotion to teachers in Arts is on account of arbitrary action. As and when vacancies occur, teachers teaching Arts subjects may be promoted and in that event they ill also get the higher scale. are of the view that the principle of equal pay for equal work cannot be invoked in the facts and circumstances of this case.

4. Counsel for the petitioners contended that in the matter of appointment of Head Masters, seniority in the Graduate trained scale is aerelevant consideration and, perhaps, the most important consideration. He, therefore, submitted that the teachers, like the petitioners, who with the same qualification having been appointd on the same day, will not come with in the zone of consideration for appointment as Head Master, but their counter-parts, namely, Science teachers with same qualification and who were appointed on the same day, may be considered for appointment as Head Master because of quicker promotion granted to them. It woud be difficult to hold as a matter of principle that the criterion adopted to take into account the seniority of the incumbent of posts in the immediately lower scale for promotion to the higher scale is either irrational or arbitrary. For promotion as Head Master, if the seniority of teachers in the highest scale, namey, Graduate trained scale is taken into account, that cannot be termed as arbitrary, because teachers in the Graduate scale must be considered as a separate class, and appointed against a higher scale, as against teachers

in the Intermediate trained scale or Matric trained scale. In any event, no rule or Cirucular providing for appointment of Head Masters has been challenged in this writ petition and, therefore, it is not necessary for us to say anything more on this aspect of the matter.

5. Counsel for the State has brought to our notice the fact that the Governor of Bihar has been pleased to frame rules for promotion of the teachers of the Elementary Schools taken over by the Government in exercise of power conferred by proviso to Article 309 of the Constitution of India. The rules are known as The Bihar Taken over Elementary School Teachers' promotion Rules, 1993. These rules are deemed to have come into force with effect from Ist January, 1986. It is indeed heartening to note that such rules have been framed, because for several years matters were governed by Circulars and Memorandums issued from time to time which created a lot of confusion, because sometimes they were found to be inconsistent. With the framing of rules, confusions can now be successfully avoided. The rules provide for the manner in which the seniority is to be determined. Under these rules as well, the date of getting the grade shall be the basis for determining the seniority. Obviously, the *inter se* seniority must relate to the teachers working in the same grade.

6. Hving regard to all aspects of the matter, we are of the view that no relief can be granted to the petitioners. They are in the Matric trained scale, where as those who are considered for promotion as Head Master are persons, who are in Graduate trained scale. The petitioners must wait for their promotion to the higher scale, and such higher scale cannot be granted to them unless there are vacancies in the higher scale in Arts against which they may be promoted.

7. This writ petition is, therefore, dismissed.

R. D. Application dismissed

CIVIL WRIT JRISDICTION

Before Naresh Kumar Sinha, J.

1995.

Juy, 24.

*Ghura Tiwary and others.**

V.

State of Bihar and others.

BIHAR LAND REFORMS (Fixation of Celing Area and Acquistion of Surplus Land) Act, 1961, *(Bihar Act no.* XII *of* 1961) *Section* 45 B.—*ambit of—land ceiling proceeding dropped in 1975 was reopened in* 1982—*no sufficient cause to for reopening the ceiling proceedings—order of the Collector reopening the ceiling case, whether arbitrary and without jurisdiction.*

The ceiling proceeding against the writ-petitioners which was dropped by the Collector by his orders dated 4. 7. 1975 was reopened in 1982 and Ceiling case no. 7/21 of 982 was initiated under the provisions of section 45B of the Bihar LAND Reforms (Fixation of Ceiling Area and Acquisition of Surplus Land) Act, 1961,. here in after referred to as the Act, was initiated against them and unit allotted to earliar by order dated 4. 7. 1975 was reeduced and some of their lands were declared as surplus. Appeal and Revision filed by the land holder against the impunged order dated 16. 4. 1988 passed by subdivisional were dismissed.

Held, that the Collector had no jurisdiction to reopen the ceiling case with out sufficient cause. The longer the period when the case is reopened, stronger should be the ground for reopening the ceiling case and since the ceiling case was being reopened after 7 years, there had been a strong ground to do so which is completely missing in the instant case.

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*C. W. J. C. No. 864/1990. In the matter of an appication under Articles 226 and 227 of the Constitution of India.

Since State Could produce no order of the Colector or for that matter any authority recpening the ceiling case under section 45 B of the Act and also could not produce the ground on which the ceiling case was reopened after 7 years of its dropping except that it wasmade after observing all the legal formalites, itbecome necessary to peruse the records to find out from the materials appearing there in that the reopening was ordered for sufficient reasons.

Held, that the order recpening the celing proceedings under section 45 B of the Act is arbitrary the legality of which cannot be upheld. Since the ceiling case was reopened without a valid order in the eye of law, al subsequent proceedings viz, the order passed in the ceiling case no. 7/21 of 1992 and in Appeal and Revision there from deserve to be quashed.

Praveen Shankar v. *State of Bihar* (1) — followed.

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 Naresh Kumar Sinha, J.

M/s Tarakant Jha and Rajeev Kumar Sinha. for the petitioners.

Mr. Hemendra Prasad Singh, S.C. for the respondents.

Naresh Kumar Sinha, J. This application under Articles 226 and 227 of the Constitution of India is for issue of an appropriate writ in the nature of certiorari for quashing the order dated 16. 4. 88 of the Sub-divisional Officer, Sasaram (respondent no. 4) in Land Ceiling Case No. 7/21 of 1982 (Annexure—7), the order dated 23. 5. 88 of the Collector, Rohtas (respondent no. 2) in Appeal No. 30 of 11988 (Annexure—8) and the order dated 31. 5. 89 passed by the Additional Member, Board of Revenue, Bihar (respondent no. 5) in Revision case no. 272 of 1988 (Annexure—9) on the ground that the impugned orders are illegal, arbitrary and have been passed in colourable exercise of power.

(1) (1987) B. B. C. J. 231 (F. B.)

2. Some facts necessary for disposal of the application may only be recounted. petitioner nos. 1 and 2 (Ghura Tiwary and Ram Nagina Tiwary respectively) are the two sons and petitioner No. 5 (Smt. Kabutra Devi) the daughter of late Kuldip Tiwary. petitioner No.3 (Radheshyam Tiwary) is the son of petitioner No.1 and petitioner No. 4 (Madan Tiwary) the son of petitioner No.2 Kuldip Tiwary died in the year 1960 leaving behind petitioners 1, 2 and 5. Most. Tetara Kuer their mother and widow of kuldip Tiary died in the year 1982. Petitioner Nos. 2 and 4 filed a Title suit No. 1140 of 1970 in the court of subordinate Judge, Sasaram, in which petitioners 1, 3 and Most. Tetara Kuer were defendants. The Title suit which was for partitionof the family properties situated in different villages measuring 49. 5 acres of land was compromised between the parties and a compromise decree dated 13. 12.. 71 was passed. A land Ceiling case (No. 317 of 1974—75) was started against petitioner no. 1 and others. An enquiry report was called for from the Anchaladhikari, Chenari, who submitted the same vide letter No. 1428 datd 14. 7. 75 (Annexure—1) to the Additional Collector, Rohtas, regarding the petitioners' land. The report described petitioners 1 and 2 as the Raiyats and mentioned the classification of the land as also the area and Khata No. in the four villages of Hatta, poulandha, Semari and Sonbarsa. According to the petitioners after conversion of the classification of the land of category Nos. II and III in accordance with the provisions of the Bihar Land Reforms (Fixation of Ceiling Area and Acquisition of Surplus Land) Act 1961 (here in after referred to as the 'Act') class I land came to about 46 acres. Accordingly the land Celing case was dropped by the Additional Collector, Ceiing, Rohtas, by his order dated 4. 7. 75 (Annexure—2). allowing 3 units and additional units to the family of the petitioners. There after the petitioners sold 2. 37 acres of land to other persons through registered sale deed in 1981. The lands sold are said to be in possession of the purchasers and consolidation records had been prepared in the names of the vendees.

3. The ceiling case was reopened by starting case no. 7/21 of 1982 on the ground of mistake in allowing units and a notice dated 18. 2. 83, photostat copyof which is Annexure—3, was issued in the name of petitionr no. 1 alone to show cause by 3. 3. 83 in the court of the Addl. Collector, Ceiing, Rohtas. The petitioners filed show cause dated 9. 4. 83 (Annexure—4) making a request for dropping the proceeding on the ground that it was not maintainable. Petitioners 1 and 2 received a notice dated 27.8. 83 (Annexure—5) informing them that a dreaft pubication u/s/ 10 (II) of the Act had been made declaring 19.40 acres of class I land as surpus land. Petitioners Nos. 1 and 2 filed an objection u/s. 10(ii) on 16.9. 83, copy of which is Annexure—6, stating, inter alia, that the land ceiling case was dropped after proper hearing and reopening of the case is illegal and barred by resjudicata. The Stand taken was that kuldip Tiwary died in 1960 leaving behind his wife Most. Tetara Kuer and daughter petitioner no. 5 and that Most. Tetra Kuer died in the year 1982 and that five majors were entitled to get one unit each and four additional units u/s. 5 (III) (i) of the Ceiling Act. Petitioner No. 5 also fied a petition in the ceiling case on 8. 9. 87 claiming one unit. The petitioners' case was that if class II and III lands are converted into class I and after such conversion three units are allowed and land for additional unit is also allowed. there are no surplus land in the family of the petitioners.

4. The learned Sub-divisional Officer by the impugned order held that the entire lands of the petitioners measuring 49. 40 acres were class I land and declared that 6. 57 acres of class I land were held by the family of the landholders in excess of the ceiling. Against the aforesaid order dated 6. 4. 88 (Annexure—7) the petitioners preferred Appeal No. 30 of 1988 before the Collector, Rohtas. The Appeall was dismissed by order dated 23. 5. 88 (Annexure—8) on merits after considering the grounds. The petitioners then filed Revision No. 272/88 before the Board of Revenue u/s.32 of the Ceiling Act against the order in appeal passed by the Collector affirming the order of the Sub-divisional

Officer in the ceiling case. The revision was also dismissed by the Addl. Member, Board of Revenue, by the order dated 31. 5. 89 (Annexure—9).The writ petitioners have challenged the orders passed in the ceiling case as also in appeal and revision against the said order as illegal and without Jurisdiction on the ground that material facts had been ignored and leagal points raised by the petitioners had not been decided.

5. In their counter affidavits the resopondent State have described the geneological table given in the writ petition as not correct for it was entirely different from the geneology recorded at the time of initiation of the ceiling procedding. The Title Suit in between the petitioners and defendants which had resulted in a compromise decree passed was described as an exercise deliberately undergone for defeating the provisions of the Ceiling Act. The compromise decree has been described as irrelevant as it was dated 13. 2. 71 i. e. after the appointed date namely 9. 9.70. With regard to transfer of land by the sale deed it is Stated that since the transfer had been made after 9. 9.70 without obtaining permission of the Collector u/s. 5 of the Ceiling Act, such transfers cannot be treated to be valid as they had been made only with a view to defeat the provisions of the Ceiling Act. The stand of the petitioners that the transfers had been made after dropping of the ceiling proceeding and before reopening of the same has been described as untenable on the ground that once the case is reopened it wil be presumed that the case was continuing from the very begining. According to the respondent-State all facts and questions of law had been considered along with the evidence produced and the order passed by the S. D. O. in the land ceiling case had been upheld in appeal by the Collector and even revision against the appellate order had been dismissed by the Board of Revenue. The appellate order went to show that the collector had cosidered the entire matter while sitting as an appellate authority. Even the Additional Member, Board of Revenue, had considered the law and facts involved

before dismissing the revision. The consolidation proceedings referred to by the writ petitioners have been described as having not become final. Besides a notice u/s. 4A cancelling the conso lidation proceedings has also been issued and in the circumstances the petitioners cannot derive any advantage from the cosolidation proceedings.

6. According to the writ petitioners th following substantial questions of law arise for consi deration :—

(a) Whether the grounds for re-opening of the case of the petitioners as mentioned in notice (Annexure—1) provide relevant material as required under law or not and that too after about 8 years from the date of dropping the case in 1975 ?

(b) Whether the Collector of the District can be said to have acted legally and fairly transferring the case after re-opening to the Additional Collector / S. D. O for disposal ?

(c) If questions Nos. (a) and (b) are replied affirmativey, then whether the impugned orders can be said to be legal and fair, and whether the proceeding can be said to have been conducted fairy legally in eyes of law ?

(d) Whether the respondents can be said to have acted legally in not deciding the maintainabiity points as raised by the petitioners with regard to re-opening the case ?

(e) Whether once the unit was allotted to Tetara Kuer the mother of petitioners No. 1 and 2 can fresh proceeding be initiated after her death in the year 1982 and the land can be declared surplus and, besides, the transfers made by the petitioners after this dropping of the proceeding can be ignored and that, too without any notice to the transferees and without recording any finding and ignoring the Consolidation papers prepared to that effect ?

(f) Whether the petitoners can be said to have surplus land of 4 units for mother, her two sons (petitioner Nos. 1 & 2)

her daughter (petitioner No. 5) plus additionalland for minors are allotted and after deducting the transferred land measuring 2.37 acres ?

7. Sri Tara Kant Jha, learned counsel for the petitioners contended that as the ceiling case had been dropped in the year 1975, its reopening in 1983 for no rhyme and reason was bad inlaw and on that ground alone the order passed by respondent no. 4 in the land ciling case contained in Annexure—7 and the oders passed by the appelate and revisional authorities as contained in Annexures—8 and 9 respectively deserve to be quashed. He argued that if the aforesaid contention is upheld, it would not be necessary to deal with and consider other questions raised in the writ petition regarding the validity of the orders passed by the authorities in the ceiling case subsequent to its reopening.

8. There is no dispute between the parties that ceiling case No. 317 of 1974-75 (State VS. Ghura Tiwary petitioner no. 1 and other) was dropped by order dated 4. 7. 75 (Annexure,2) passed by the Collector on the ground that the petitioner did not come within the purview of the ceiling case. The said order was admittedly passed by the Collector after considering a report submitted by the Anchaladhikari. The petitioners' case is that a notice dated 18. 2. 83 was issued in the name of petitioner no. 1 alone to show cause, photo copy of which is Annexure—3. The notice referred to land ceiling case no. 7/21 of 1982 and was issued under the signature dated 17. 2. 83 of the Addl. Collector, land ceiling. stating that the ceiling case has been reopened on account of mistake in respect of equiry regarding units. One of the grounds taken in the show cause filed by petitioner no. 1 contained in Annexure—4 was that the petitioner had been served with the notice to reopen the said case again without disclosing the details of the same and, there fore, notice was vague and legally not maintainable. There was some controversy at the Bar as to whether the petitioners or any one of them had been served with a notice for giving them an opportunity of being

heard in the matter of reopening of the ceiling case already dropped. The petitioners contended that no such notice was ever received by them and the order for reopening the case was passed by the Collector beyond their back. The respondents on the other hand contended that notice had been issued before the ceiling case was reopened. It appears that though the writ petition was filed no 6. 2. 90. no counter affidavit was filed on behalf of the State and it was only after arguments had ben heard at length on behalf of the petitioner on 8. 2. 94 that the learned counsel appearing for the State expressed his difficuty in the matter in the absence of a counter affidavit. Since the record of the proceeding were reportedly available with the counsel appearing for the State, his prayer for time to file a counter affidavit on the basis of the records was allowed. The counter affidavit on behalf of the respondents was affirmed on 17. 3.94 and filed in the court on 10. 2. 95. The counter affidavit appears to be wholly unsatisfactory. All that is stated on a very vital question raised in the writ petition was that the reopening was made after observing all the legal formalities and after giving due notice to petitionrs. In view of the averments made in the writ petition, the least the State could have done was to file a copy of the order of the Collector reopening the ceiling case in the year 1983. The records of the proceedings were produced on behalf of the State in course of hearing and counsel for the State was fair to concede that an order purported to have been passed by the Collector reopening the case was so blurred that it was wholly illegible. From perusal of the records of th ceiling proceedings it appears that the Addl. Collector by his order sheet dated 11. 6. 82 had sent a report to the Collector along with the original case record of the ceiling case for suitable action u/s. 45/—B of the Ceiling Act. A copy of the said report has been filed as Annexure— 14 mentioning that the major portion of the report was not legible. However, the report mentioned in the order sheet dated 11. 6. 82 on the file is legibe and it appears there from that the case was dropped in July 1975 after giving three units to the family. The report then goes on to mention that the Circle Officer had

reported two units firsts and subsequently reported three units on the enquiry of the Circle Inspector mentioning that the widow of Kuldip Tiwary is alive. The Addl. Collector appears to have been influenced in recommending to the Collector for reopening the case by the fact that the Circle Officr had not verified the report of the Circle Inspector. Thus though the order of the Collector dated 30. 6. 82 in the records of the case is wholly illegible, there is every reason to believe that the order which though illegible had covered only 1/3rd of a page had proceeded on the report of the Addl. Collector already referred to above. This is also evident from the order sheet dated 25. 1. 83 of the Addl. Collector to whom the ceiling case after being reopened had been transferred by the Collector. The order sheet dated 25. 1. 83 mentions that the proceeding had been reopened as the Circle Officer had not verified the enquiry report of the Circle Inspector. It became necessary to refer to the contents of the record in some detail owing to the failure of the State-respondent to file a detailed counter affidavit with regard to the grounds that weighed with the Collector in ordering the reopening of the ceiling proceeding some 7 years after it had been dropped by him. Thus the records of the proceeding even if they are considered in favour of the State-respondents would only indicated that the ceiling case was reopened not on the ground of information or material which may have come to the knowledge of the Collector subsequent to the dropping of the ceiling case but only with a view to clear a suspicion that the report of the Circle Inspector may not be correct and that the Circle Officer should have verified its correctness. In other words the ceiling cas was reopened only for the purpose of a fishing and roving enquiry.

9. So far reopening of the ceiling case already dropped is concerned, the State Govt. or the Collector of the district authorised on that behalf had the necessary jurisdiction under the provisions of section 45 B of the Celing Act to call for and examine any record of any proceeding disposed of by a Collector under the Act and if it thinks fit to direct that the case be

reopened and disposed of afresh in accordanc with the provisions of the Act. The Collector who reopened the case in the year 1982 some 7 years after it was dropped under orders of the Collector had the necessary powers under the aforesaid provisions. However the question that is for consideration is whether the aforesaid power was exercised in accordance with law. The true ambit and scope of the provisions of section 45 B of the Ceiing Act vis-a-vis the power of the Collector to reopen the land ceiling case have been considered in a number of decisions of this court including a Full Bench decision in Praveen Shankar v. *State or Bihar* (1). The case was referred to the Full Bench for consideration of the correctness of the Full Bench for considerationof the correctness of the law laid down in the case of *Yamuna Rai and ors.* Vrs. *State of Bihar and ors* (2) after the counsel appearing for the petitioners had relied on the aforesaid Division Bench decision in support of his contention that no order u/s. 45 B of the Celing Act can be passed in the absence of any new material or new information on the record. While dealing with the question of interpretation of section 45 B, the Full Bench had occasion to consider the correctness of the decision of the Division Bench of the court in *Yamuna Rai*'s case (supra). While holding that *Yamuna Rai*'s case (supra) was correctly decided the Full Bench proceeded to consider the effect of insertion of the expression "if it thinks fit" in section 45 B and it went on to observe to quote :

"It means that the authority concerned is not to act without sufficient cause. The proceeding cannot therefore be reopened for merely making a fishing enquiry to test the correctness of the earlier order.The next question is as to the process by which the authorityhas to decide that a particular proceeding is fit to be reopened and the basis for taking such a decision. If fresh materiall relevant to the question is discvered, which, if considered along with the existing materials on the record, is likey to

(1) (1987)B. B. C. J. 231 (F. B.)

(2) (1984) B. B.C. J. 487

lead to a different conculsion, the proceeding can certainly be reopened. What about a case where the authority decides to get the matter re-examined on the basis of materials already existing ? Before dealing with this crucial aspect, on which the Division Benchhas sought the opininon of this Bench, I would like to discuss the ratioof Yamuna Rai's case.

In that case, the Collector had granted 4 units of land to land-holders who were members of a Hinu joint family, and since the State Government was of the opinion that it was an erroneous order, it directed a re-examination of the case without issuing notice to the land holders. Both the learned Judges constituting the Bench were of the view that the parties, who were going to be affected, were entitled to notice before the matter could have been reopened. Mr. Justice B. P. Jha further proceeded to consider the scope of the section and held, inter alia, that the authority concerned must be in possession of new materials before acting under section 45—B. From the tenor of the order of reference (of the present writ application to a larger Bench), it appears that the petitioner had argued that before a proceeding could be reopened, it was essential that materials which were not on the records of the case earlier should be available. I do not think, that is the correct interpretation of the Judgment in Yamuna Rai's case. The following observations in paragraph 7 of the Judgment may be seen :

"There fore, in order to reopen the case the State Government or the district Collector must be in possession of new materials which were not available at the time of giving Judgment. This material may be on the basis of the information received by the State Government or the district Collector or from the record as well. Suppose some information may be available to the Anchal Adhikari or the Collector, to which the Collector did not appy his maind while passing the order, that information to which mind was not applied by the earlier authority can be a source of information or material for reopening a case." (Emphasis added).

It is therefore, Plain that Mr. Justice E. P. Jha did not lay down the discovery of some fresh material, which was not on the records, as a necessary condition for exercise of power."

10. The Full Bench in *Praveen Shankar's* case (supra) proceeded to interpret section 45B in the back ground of certain facts namely that the original framers of the Act did not include the extra ordinary provision under that section which was introduced later by an amendment. After noticing that the provisiondid not fix any period of limitation for exercise of the right it referred to the well accepted principle that the public have a great interest in having known limit fixedby law to litigation for the quiet of the community and that there may be a certain fixed period after which the possesser may know that his title and right cannot be called in question. L. M. Sharma, J as he then was with which B.P. Jha, J. agreed went on to hold that it is futile to suggest that the Collector to reopen closed proceeding whenever it or he is inclined to do so and that it cannot be assumed that the Legislature was acting irresponsibly so as to clothe the authorities with unlimited and uncontrolled powers in order to transgress the established jurishprudential principles. While determining the question as to whether the authorities can decide to reopen the procedding on a reconsideration of the materials which had earlier been considered, it was held that it is not permissible to do so and that this interpretation of the section would be consistent with the age old principle mentioned above and would be reasonable just and consistent with fair play. The conclusion arrived at in course of the Judgment was, to quote :-

"If the materials on the records of a case are taken in to consideration by the authorities concerned and a conclusion is reached which becomes final (On appeal and revision or in absence there of), its finality has to be respected and the

proceeding cannot be reopened for giving a second thought. If, however, any material or matter has been omitted from consideration which may be so substantial as to lead to a different conclusion, the power under the section may be exercised."

The Full Bench then proceeded to direct that it was not necessary to discuss the other cases placed during the course of hearing and if there be any observation in any decision of this court decided by a Division Bench or a single Judge to the contrary the same may be deemed to have been overruled.

11. As already observed earlier no order of the Collector reopening the case u/s. 45 B was filed and the records of the proceeding produced in course of hearing did not contain any legible order of the Collector to that effect. The petitioners have filed Annexure—14 which is a copy of the order dated 11. 6. 82 passed by the Addl. Collector, Ceiling, who after examining case no.317/1974—75 namely the earlier land ceiling case submitted a report that the case may be reopened u/s. 45 B to the Collector for suitable action. Annexure—14 does not appear to be a full copy of the order sheet and a good portion of the said order has been described as illegible. Annexure—14 is a copy of the order dated 11. 6. 82 appearing in the proceeding in the ceiling case and as already noticed earlier the order of the Collector appears to have been passed only on the ground that the report of the Circle Inspector had not been verified by the Circle Officer and it was necessary to do so to remove any suspicion about it. A Division Bench of this court comprisig B. L. Yadav and A. K. Ganguly, JJ. had occasion to consider the scope and meaning of expression "if it thinks fit" occurring in section 45 B of the Ceiling Act in *S. K. Taslim* V. *State of Bihar* (1) Their Lordship's held that the expression "if it thinks fit" does not mean that the State Govt. or the Collector has been given very wide powers to reopen the

(1) (1994) 2 P. L. J. R. 455.

proceedings. In other words it does not confer unbriddled power on the State Govt. or the Collector to act without sufficient cause and that such Jurisdiction cannot be exercised as a matter of right and / or as a matter of course. The Full Bench in *Praveen Shankar*'s case (supra) had observed, to quote :

"Although it does not appear to be possible to exhaustively lay down all the circumstances under which power can be exercised, it can be safely said that it ought not to be invoked lightly. The consequences of such exercise may lead to serious civil consequences and the affected parties must, therefore, be given a chance to be heard before taking decision to reopen the proceedings, further the length of time after which the closed matters are sought to be re-examined should be taken into account; longer the period, stronger should be the ground."

It the instant case the ceiling proceeding dropped by the Collector in 1975 was reopened in 1982 i. e. after 7 years. Admittedly after the ceiling case was dropped by the Collector vide Annexure—2 no appeal or revision was preferred against the said order and it had become final. The Collector could not have reopened the case for mere asking or as per his whim or pleasure. In other words the Collector had no jurisdiction to reopen it without sufficient cause. As held by the Full Bench in *Praveen Shankar*'s case (supra), the longer the period stronger should be the ground and since the case was being reopened after 7 years, there had to be a strong ground to do so and which was in fact completely missing in the present case.

12. As already noticed earlier the respondents-State despite repeated opportunity given to file their show cause which they eventually did more than 4 years after the filing of the writ petition did very little to negative the challenge of the petitioners to the legal validity of the order reopening the ceiling case 7 years after it was dropped. To say the least it disclosses a sorry state of affiars in the manner in which the State tried to rebutt the case of the petitioners. Since the State could produce no order of the Collector or for that matter any other authority reopening the

case u/ s. 45 B and also stated nothing in the counter affidavit as to the grounds on which the ceiling case was reopened after 7 years except that it was made after observing all the legal formalities, it had become necessary to peruse the records of the ceiling proceeding and find out from the materials appearing there in that the reopening was ordered by the Collector only for the purpose of verifying the correctness of the report of the Circle Inspector which the Circle Officer had relied upon and on the basis of which the ceiling proceeding had been dropped by the Collector in the year 1975. In the circumstances the order reopening the proceeding must be held as arbitrary the legality of which cannot be upheld. Since the ceiling case was reopened with out a valid order in the eye of law all subsequent proceeding namely the order (Annexure—7) passed by respondent no. 4 in the ceiling case as also the order passed by the appellate authority contained in Annexure—8 and that of revisional authority contained in Annexure—9 deserve to be quashed on that ground alone.

13. In the result this writ application is allowed and impugned orders contained in Annexures—7, 8 and 9 stand quashed. Let a writ in the nature of certiorari issue accordingly. However, there shall be on order as to costs.

R. D. Application alowed.

CIVIL WRIT JURISDICTION

Before Bisheshwar prasad Singh and Ashish N. Trivedi, JJ.

1995.

June, 27.

*Bihar Intermediate Education Council Employees Union through its General Secretary Shri Kali Das Sinha & 54 others.**

V.

The State of Bihar through the Secretary, Human Resources Development Department & 8 others.

Service—persons having experience in another organisation appointed on deputation as Assistant in Bihar Inter mediate Education Council, whether will be senior to persons appointed on daily wage basis—service rendred by persons appointed on deputation in other organisation, whether could be taken in to accounts.

Bihar Intermediate Education Council, here in after referred to as the Council by advertisement recruited Assistants in 1982 from amogst persons working in other organisations having experience on deputation. In 1983 and 1984 Assistants on daily wage basis were recruited. By the time the Assistants on daily wage basis were appointed, the persons working on deputation had taken over as section incharge though on temporary basis. The persons appointed on deputation were absorbed in the service of the Council in 1987 with effect from 1. 6. 1985.

Held, that decision of the Council to absorb experienced hands for efficient disposal of work of the Council cannot be characterised as unreasonable or arbitrary. The actual lenght of service of the persons appointed on deputation could not be ingored unless there was a law, rule or regulation to the contrary.

* CivilWrit Jurisdication Case No. 6580 of 1989. In the matter of an application under Articles 226 and 227 of the Constitutionof India.

which may have the effect of obliterating their past experience. If the actual lenght of service of the persons appointed on deputation could be reasonably taken in to account having regard to the circumstances of the case, there can be no doubt that the persons appointed on deputationwere far senior to the persons appointed on daily wages, the writ-petitionrs, whose services were regularised with effect from 1. 6. 1985.

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

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

: M/S S. J. Mukhopadhyaya, Shivendra Kishore, Ambar Nath Banerjee & Kishore Kumar Thakur for the petitioners

: M/S S. A. Narain (AAG—2) for the state

: Mr. Subhash Chandra Jha for respondents 2 and 3

: M/S Shiv Kirti Singh (Sr. Adv.) & Vinay Kirti Singh. for respondent nos. 4 to 9.

B. P. Singh, J. Petitioner nos. 2 to 55 here in are the Assistants working in the Bihar Intermediate EducationCouncil. They have impugned the Office Order issued by the Secretary of the Council dated 9th May, 1989, where by respondent nos. 4 to 8 herein have been absorbed in the service of the Council (respondent no 9 having already been absorbed in 1987 with effect from 1-6-1985), and they have been promoted to the post of Section Officer with effect from different dates. Respondent nos. 4, 5, 6, and 9 have been promoted as Section Officer retrospectively with effect from 1-12-1988 and respondent nos. 7 and 8 have been granted such promotion with effect from 6—12—1988 and 10-1-1989 respectively. The grievance of the petitioners is that they being senior to the aforesaid respondents as Assistants in the service of respondent Council, the aforesaid respondents could not be granted promotion over looking the claim of the petitioners.

On the other hand, the respondents contend that they cannot be considered to be junior to the petitioners, as they form a separate class of deputationists, who were absorbed in the service of the respondent Council after they had put in several years of service in other organisations from where they were brought on deputation.

2. The facts of the case may first be noticed since there appears to be no serious dispute on the factual aspect of the matter, in so far as they are relevant for the disposal of this writ petition. The Bihar Intermediate Education Council (here in after referred as the Council) was constituted under Bihar Ordinance 149 of 1980. It continued till 20th may, 1985 under successive Ordinancer s and there after it stood dissolved, since no Ordinance was passed extending its life. It was again revived with effect from 4th August, 1988. During the interregnum some of the powers of the Council were to be exercised by the Secretary, Department of Education, under the provisions of Bihar Ordinance 8 of 1985.

3. After constitutionof the Council a question arose as to the staffing pattern of the Council, and the manner in which employees shoud be recruited. It is the case of the respondents that the Government took a decision, as would be evident from Annexure R—A that 60 posts of Assistants (including Typists) sanctioned by the Government should be filled up from internal sources; and no outsider should be appointed. As far as possible those posts shold be filled up by persons who may be called on deputation from other Universities and Departments and re-trenched / surplus employees of other Departments. It is not disputed that an advertisement was published by the Counceil, being Advertisement No. 4 of 1982, inviting applications for appointment as Assistant under the Council. There were two scales against which Assistants were to be appointed. The first scale of Rs. 284—372/— was to be filled up by candidates who

had three years experience, and had passed Secondary School Examination. The Posts in the higher scale of Rs. 348—570/— were to be filled up by candidates who had five years experience, and had passed the Intermediate Examination. The advertisement also provided that persons already employed may also be taken on deputation, and that they may also apply through proper channel. There was also a provision for appointment of retired persons on contract basis. The advertisement has been produced by the respondents as Annexure—A to the counter-affidavit. pursuant to the advertisement respondent nos. 4, 5, 7, 8 and 9 were appointed by the Council on deputation. Respondent no, 4 had been working as an Assistant in the Bhagalpur University since 1976. Respondent no. 5 had been working as a Selection Grade Assistant in the Bhagalpur University and was initialy appointed in the year 1964, Respondent no. 6 had also served the said University in the same capacity for over 15 years, Similarly. respondent no. 7 had been in service of the Patna University in the Institute of Correspondence Course since 1975. Respondent no. 8 was an Assistant in A. N. College, Patna, since the year 1974. Respondent no. 9 was an Assistant working in R. S. College,Tarapur since 1977, These respondens were appointed on deputation, and they were also permitted to work as Section Incharge on account of their long experience. The order granting some of the respondents the status of Section Incharge has been produced as Annexure—B dated 21-5-1983. After these respondents started working on deputationin the Council, and after they had taken over as Section Incharge though on temporary basis, the petitioners here in were appointed in the years 1983 and 1984 to work as Assistants on daily wage basis. As noticed earlier, the Council stood dissolved on account of the lapse of the Ordinance under which it was continued, with effect from 20th May, 1985, and at that time the petitioners were Assistants engaged on daily wage basis, where

as the private respondents were working as Section Incharge, though on a temporary basis, having regard to long years of service rendered in the University Department from where they were brought on deputation pursuant to the Advertisement (Annexure—A).

4. In view of the dissoutionof the Council, with a view to carry on the work, Bihar Ordinance 8 of 1985 was promulgated where by cartain powers were vested in the Secretary, Department of Education. There is considerable dispute between the petitioners and the respondents as to whether the Secretary had power to make appointments, a power which was vested in the Chairman of the Council, or whether he was only vested with the powers to conduct examinations. While the petitioners contend that the Secretary, Department of Education, had all the powers earlier vested in the Chairman of the Council and the Council itself, the respondent-Council as well as the private respondents contend that the power of the Secretary, Department of Education, was limited to the conduct of examinations. It is not necessary for me to go into this question in view of the facts to be noticed here in after.

5. In view of the dissolution of the Council, by order dated 20th May, 1985 (Annexure—C) the private respondents were relieved to enable them to join their parent Departments. There after on, 15 - 2- 1986 the petitioners herein were regularised by the Government as Assistants with effect from 1 - 6 - 1985 subject to one year's probation. They were also subsequently given the benefit on revised pay scale.

The respondents have questioned the regularisation of the petitioners as Assistants in the Council, because it is their contention that the Secretary of the Department of Education had no power to make appointment. It is also the case of the Council that the regularisation was not done in accordance with

law.It is also stated in paragraph no. 21 of the conter-affidavit that the case of the petitioners is under enquiry, and the enhanced pay scale has been given to them on an undertaking given by them that it shall be subject to the approval of the Finance Department. The matter is still under consideration, since the Finance Department has not concurred in the payment of higher pay—scale. The private respondents contend that Bihar Ordinance 8 of 1985 conferred upon the Secretary to the Government, Department of Education, only the powers enumerated under section 15 of the Ordinance of 1984 relating to coduct of Intermediate examinations, which were held by the Council. He was not vested with the power under section 22 of the 1984 Ordinance and hence be had no power to make appointments or to allow promotions. They have, therefore. characterised the order of the Government granting regularisation to the petitioners as wholly illegal and without jurisdication. It is not necessary for me to go into this controversy and in an appropriate proceeding the question can be gone into. I shall proceed on the basis that the petitioners were regularised as Assistants with effect from Ist June, 1985, without expressing any opinion on the legality of the order granting them regularisation.

6. As observed earlier, the Council was again revived on 4–8–1988, though the Chairman of the Council joined in the last week of January 1989. The private respondents were recalled from their parent organisations to serve the Council. Even before the reconstitution of the Council, respondent no. 9 was absorbed by the order of the Government in the year 1987 with effect from 1–6–1985. Respondent no. 6, who was workingon the post of Grade Assistant in Bhagalpur Univrsity for over 15 year was absorbed in the service of the Council with effect from December 1988.

7. The impugned order (Annexure—1) was issued on 9th

May, 1989, whereby the private respondents were absorbed in the servicee of the Counci land were promoted as Section Officers with effect from the dates shown against their names to which I have referred earlier in this judgment.

8. It is not disputed that no recruitment rules have been framed by the Council, In the absence of such rules, it is still open to the Council to make appointments, and to lay down the terms and conditions of service consistent with the principles enshrined in Articles 14 and 16 of the Constitution of India. The only questionwhich, there fore, arises for consideration in the instant case is as to whether the absorption of respondent nos. 4 to 9 in the service of Council is illegal. If not, whether the grant of promotionto them, treating them as senior to the petitioners here in is arbitrary and illegal.

9. Counsel for the petitioners submitted that no norms were followed in the matter of absorption of the private respondents, In any event, they could not be given promotion with effect from a date prior to their absorption in service so as to affect the rights of others. Lastly, it was contended that non-consideration of the cases of the petitioners was violative of Articles 14 and 16 of the Constitution of India.

10. On the other hand, counsel for the respondents contended that the Council acted in accordance with law in taking the decision to absorb the private respondents, who are deputationists, into the seryice of the Council. This was done after follwoing a fair procedure. An advertisement was issued, and there after the cases of the candidates, who applied, were considered by the Counci. Having regard to their long length of service in other Universities and institutions, they were appointed as Assistants initially, but were deputed to work as Section Incharge, though in a temporary capacity. All this happened in the years 1982 and 1983 when the petitioners had

ot even joined the service of the Council even as daily wage mployees. The private respondents had beenworking in differ-nt Universities and institutions between the years 1964, and 977. where as the petitioners for the first time were appointed s Assistants on daily wage basis in 1988. In view of the special rcumstances created by the dissolution of the Council for a nort period, the private respondents were required to go back their parent institutions, but as soon as the Council was evived, they were recalled. According to the respondents, there as no arbitrariness in the action of the Council in absorbing nem in service of the council and in granting them promotion aving regard to their long length of service. In fact, when the etitioners were appointed on daily wage basis, the private espondents were already functioning as Section Incharge.By ranting them promotion, the rights of the petitioners have not een adversely affected, because they must be considered to be ar Junior to the private respondents.

11. It is not disputed that an advertisement was issued in the ear 1982 being Advertisement No. 4 of 1982 inviting applica-ons for appointment to the posts of Assistant under the ouncil. The advertisement clearly mentioned that persons mployed elsewhere may be taken on deputation and will be ntitled to the payment of gereral scale of pay plus deputation llowance. Annexure R/A, though not conclusive, is certainly ndicative of the Government policy not to employ outsiders in the Council, but to employ persons who were engaged in other institutions on deputation and to employ surplus / retrenched taff of other Departments. It can also well be appreciated that the Council had been constitued recently. and there was need for experienced hands at different levels. That is why the Council issued an advertisement and invited applications from experi-nced hands as well, who were employed in other organisations. r that even retired from service. In my view. the decision taken

by the Council was reasonable and justified in the facts an circumstances of the case. In the interest of administration an efficiency the Council was with in its rights to decide to emplo pxperienced hands who could supervice the work of Assistant who may be in experienced. The procedure adopted by th Council was also in accordance with law inasmuch as an ope advertisement was made inviting applications from all cor cerned. No fault, there fore, can be found with the decision of th Council to employ the private respondents on deputation.

12. Respondent nos. 4 to 8 were temporarily made Sectio Incharge having regard to their long experience as employees o the University or institutions from where they had come Respondent no. 9 came on deputation in the year 1983. Th petitioners were appointed there after on daily wage basis. Thus at the time when the petitioners were appointed on daily wag basis, the private respondents had already joined the Counci couple of years earlier and had been made Section Incharge Obviously, there fore, when the petitioners joined the Council they had worked under the private respondents, who were mad Section Incharge, though temporarily. No fault can be found with the decision of the Council on this score as well. If th service of the private respondents in the Universities Organisation from where they came is taken into consideration they were far senior to the petitioners, who joined the service fo the first time in the years 1983 and 1984, and that too on daily wage basis. The Ordinance under which the Council had been continued lapsed in May 1985. On that date the private respondents were working as Section incharge, and the petitioners were Assistants engaged on daily wage basis.

13. The lapse of the Ordinance under which the Council had been continued, created a peculiar situation. The Council stood dissolved and, therefore, the private respondents could not be

continued under the Council. Some of the functions of the Counci were vested in the Secretary, Department of Education, Government of Bihar. However, for the period during which the Council stood dissolved neither the petitioners nor the private respondents can claim that they were serving the Council. Having regard to the special circumstances, neither the petitioners nor the private respondents can take advantage of the situation created by the lapse of the Ordinance. While the private respondents were sent back to their parent Organisations, the petitioners continued to work under the direct control of the Secretary, Department of Education. During this period the petitioners were also regularised with effect from 1 – 6 – 1985. I need not go into the controversy as to whether this could be done, and if so whether it was validly done. But, it cannot be disputed that they were not regularised by the Council.

14. The Council was revived in August 1988, and the constitution of the Council was completed in January 1989, when its Chairman joined the Council. The private respondents were recalled and were engaged to work under the Council.

15. The impugned order was passed on 9th May, 1989, absorbing respondent nos. 4 to 8 into the service of the Council, since respondent no. 9 had already been absorbed in the year 1987 with effect from 1 – 6 – 1985, and promoting them to the post of Section Officer.

16. The first question which arises for consideration is whether the private respondents could be absorbed in the service of the Council. In my view, there appears to be no reason why the Council could not absorb the private respondents in the service of the Council, particularly when they were initially selected on the basis of an advertisement, which clearly stipulated appointment on deputation. There is nothing to show that the action of the Council was malafide, because even the feeble effort made in

the writ petition to suggest that the present Chairman and the Secretary were interesred in the private respondents is destroyed by the fact that those persons did not hold the Office of Chairman and Secretary of the Council when the private respondents were appointed on deputation in the year 1982. Admittedly, there is no law, rule, regulation or contract to regulate recruitment of employees in the Council. There is, there fore, no prohibition against the absorption of the experienced employees, who have worked in other Organistions for several years and have gained valuable experience. It cannot be lost sight of that the Council did require experienced hands. Since it is a newly created Council, it had to appoint employees at all levels to carry on its work efficiently. The circumstances as it existed therefore justified the appointment of experienced hands and, there fore, the decision of the Council to absorb experienced hands for the efficient disposal of work cannot be characterised as unreasonable or arbitrary. At the same time, the actual length of service of the private respondents could not be ignored, unless there was a law, rule, or regulation to the contrary, which may have the effect of obliterating their past experience. If the actual length of service of the private respondents could not be ignored, and be reasonably could taken into account having regard to the circumstances of the case, there can be no doubt that the private respondents were far senior to the petitioners. They had worked in different Universities and educational institutions where they were initially appointed between the years 1964 and 1977, where as the petitioners for the first time were appointed on daily wage basis in the years 1983 and 1984, and were regularised with effect from Ist June, 1985. In fact, it would have been very unfair if the past experience of the private respondents was not taken into consideration. and the persons who had workedas daily wage Assistants under them. when they were functioning as Section Incharge. were promoted earlier then them. Once it is held that the Councill was justified in taking into account the

service rendered by the private respondents in other Organisations from where they had come on deputation, it cannot be disputed that the private respondents were far senior to the petitioners. Their promotion, therefore, even with retrospective effect, did not adversely affect any legal right of the petitioners. It is well settled that promotion can be granted with retrospective effect provided it does not affect the vested right of any person.

17. Having regard to these facts and circumstances, I am satisfied that the impugned order does not suffer from any illegality. It can neither be characterised as arbitrary or unreasonable. The decision takes into account the actual realities, and does not in any manner affect the right of the petitioners, who must be considered far junior to the private respondents.

18. I, therefore, find no merit in the writ petition and the same is, accordingly, dismissed. There will be no order as to costs.

Ashish N. Trivedi, J. I agree.

R. D. Application dismissed.

CIVIL WRIT JURISDICTION

Before Sudhansu Jyoti Mukhopadhaya, J.

1995

July,27.

*Ram Krishna Singh Yadav and 11 (eleven) ors.**

v.

The State of Bihar and ors.

Service---circular dated 24.6.1989 of Rural Development Department providing that only trained Dalpaties to be selected for appointment as Panchayat Sewak---no provision therein for their being sent for training again---order sending them for training--- validity of----wards "Niyukti Kia Jata Hai" in their order---- effect of----other persons selected to the post of Panchayat Sewak and sent for training, whether to get regular scale of pay from the date they joined their training.

In accordance with the Circular dated 24th June, 1989 of the Rural Development Department of the State Government, it is only the trained Dalpaties who are to be selected and to be appointed against the post of Panchayat Sewak. There is no provision for sending them again for training except for the scheduled caste/scheduled tribe candidates, who are not trained at the stage of Dalpaties. The writ-petitioners being already trained Dalpaties, there is no question of again sending them for training for the purpose of appointment to the post of Panchayat Sewak.

It is evident from a perusal of order dated 29the August, 1994 and order dated 20th April, 1995 that the respondent have appointed the writ-petitioners of C. W. J. C. No.7935 of 1994 and C. W. J. C. 4561 of 1995 respectively to the post of Panchayat

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*C. W. J. C. 7935 of 1994. with C. W. J. C. No. 4561 and 4025 of 1995.

In C. W. J. C. 4561/95 ... Keshav Prasad Pandey ... Petitioners.

In C. W. J. C. 4025/95 ... Gupta Nath Singh & anr ... Petitioners.

Sewak. The words "Niyukti Kia Jata Hai" have been mentioned therein. In view of the fact that the writ-petitioners have been provided with the order of appointment to the post of Panchayat Sewak, there is no question of sending them for training and paying stipend to them during the period of such training.

So far as writ-petitioners of C. W. J. C. No. 4025 of 1995 are concerned, who have been sent for training by letter dated 9th December, 1994 after selection to the post of Panchayat Sewak, cannot be discriminated in the matter of appointment to the post of Panchayat Sewak.

Held, that the writ-petitioners of C. W. J. C. No. 4025 of 1994 should be provided with appointment letter to the post of Panchayat Sewak in its regular scale of pay with from the date the writ-petitioners joined their training.

Ram Sakal Mistri and anr. v. *State of Bihar and ors.* (1)... followed.

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

The facts of the case material to this report are set out in the judgement of Sudhansu Jyoti Mukhopadhaya, J.

Mr. Jitendra Kumar Roy, Adv for the Petitioners in all the cases.

Mr. D. N. Singh G. P. No. 4. for the respondents in all the cases.

S. J. Mukhopadhaya, J. In these three writ petitions, as common points of law are involved, they are being disposed of by this common order.

2. The petitioners of C. W. J. C. No. 7935 of 1994 claim to have been appointed to the post of Panchayat Sewak by one order dated 29th August, 1994, as contained in Annexure-3 to the said writ petition. They have prayed for direction on Respondents for payment of Salary in the regular scale of pay of the post

(1) (1995) C. W. J. C. No. 5384 of 1994 decided on. 7. 3. 1995.

of Panchayat sewak with effect from the date they were appointed to the said post and sent for training with effect from 29th August. 1994.

The petitioner of C. W. J. C. No. 4561 of 1995, was also functioning as a Dalpati, has been appointed to post of Panchayat sewak by one order dated 20th April, 1995 as contained in Annexure-3 to the said petition. He also prayed for salary of the post of Panchayat sewak in regular scale of pay with effect from his date of appointment i. e. from 20th April, 1995. Apart from the same, this petitioner has further prayed for his arrears of salary for the period from january, 1995 to 19th April, 1995, during which period, this petitioners performed the duty as Dalpati.

The petitioners of C. W. J. C. No. 4025of 1995, have prayed for direction on the Respondents to provide them with order of appointment with effect from 9th December, 1994 to the post of Panchayat Sewak and for further direction on the Respondents to pay them the salary from the date they have been sent for training in pursuance of one order, contained in letter dated 9th December, 1994, which is enclosed an Annexure-5 to the said writ petition.

3. The Respondents from its Rural Development Department, came out with the policy decision for appointment against the post of Panchayat Sewak out of the persons who are already functioning as Dalpati under the Respondents State. Such policy decision was circulated vide a letter dated 24th June, 1989, as contained in Annexure-1 to C. W. J. C. No. 7935/94. It was laid down therein that the Dalpaties, who are matriculates and are trained, if they have completed two years service as Dalpati; in that Case, their cases will be considered for appointment to the post of Panchayat Sewak. It further stipulates that if in the cases of Scheduled Castes and Scheduled Tribes candidates, trained Dalpaties are not available, in that case, training is to be related and out of eligible S. C. / S. T. candidates working as Dalpaties, appointments are to be made to the post

of Panchayat Sewak and thereafter such S. C. / S. T. candidates are to be sent for training.

4. Admittedly, the petitioners of all the three writ petitions were working as Dalpaties under the Respondents State and all of them were trained Dalpaties, having qualification of matriculation and / or equivalent and had completed more than two years of service as Dalpati, prior of their selection for the post of panchayat Sewak.

5. The petitioners of C. W. J. C. No. 7935 of 1994, after litigation and decision of this Court were provided with the order of appointment dated 29th August, 1994, as contained in Annexure-3 to the said writ petition. In the order of appointment of these petitioners, it was mentioned that on the recommendation of the selection committe, they are being appointed to the post of Panchayat Sewak in the scale of Rs. 975-1540/-. It was further mentioned therein that they will have to proceed for training, during which period, they will be receiving stipend. It has been further mentioned therein that after successful completion of training, these petitioners will be posted against the post of Panchayat Sewak, and on joining the post of Panchayat Sewak, they will be provided with regular scale of pay of the post of Panchayat Sewak.

According to petitioner of C. W. J. C. No. 4561/95. he was functioning as Dalpati since long and inspite of the fact that he has performd his duty for the period from January, 1995 to 10th April, 1995, as Dalpati, his salary was not paid. In the case of this petitioner, he has also been provided with the order of appointment, after a decision of this Court, by order dated 20th April, 1995 (Annexure-3 to this writ petition). In the said order of appointment, it has been mentioned that this petitioner has been appointed on the recommendation of the selection committee to the post of Panchayat Sewak in the regular scale of Rs. 975-1540/-. In this case also he has been sent for training with the stipulation that during the training period, he will be getting the stipend and on successful completion of training, after posting

against the post of Panchayat Sewak, this petitioner will be getting the regular scale of pay of Panchayat Sewak.

So far as petitioners of C. W. J. C. No. 4025 of 1995 are concerned, their selection was made by the selection committee and after recommendation of the selection committee, by one letter dated 9th December, 1994 (Annexure—5 to their writ petition), they have been sent for training for being appointed to the post of Panchayat Sewak. No formal appointment order appointing these petitioners to the post of Panchayat Sewak has yet been issued. It is for the said reason, the petitioners have prayed for their appointment from the date, they have been sent for training and for regular scale of pay of the post of Panchayat Sewak.

6. Counsel for the petitioners submitted that in terms of the policy decision of the State Government dated 24th June, 1989 (Annexure-1 to C. W. J. C. 4561/95), the petitioners having been selected and appointed to the post of Panchayat Sewak, they are entitled for full salary from the date of their appointment to the post of Panchayat Sewak. It is further submitted that the petitioners being already trained Dalpaties, in pursuance of letter dated 24th June, 1989 (Annexure—1), there was no question of sending the petitioners for training, but straight-way, they, should have been posted against the post of Panchayat Sewak. Similar is the argument that has been advanced by the counsel, for the petitioners of C. W. J. C. No. 7935 of 1994.

So far as petitioners of C. W. J. C. No. 4025 of 1995 are concerned, counsel for the petitioners submitted that in terms of Circular dated 24th June, 1989 (Annexure—1), the petitioners being trained Dalpaties, there was no question of sending them for training and the Respondents should have come out with the order of appointment to the post of Panchayat Sewak in favour of the petitioners. It is submitted that the letter dated 9th December, 1994 (Annexure—5) should be treated as an order of

appointment for all purposes and not for the purpose of training for the post of Panchayat Sewak.

Counsel for the petitioners relied on the decisions of this Court given in other cases bearing C. W. J. C. No. 14/90 disposed of on 18th April, 1990, C. W. J. C. No. 472/95 disposed of on 27th June, 1995; and with respect to the case of petitioners of C. W. J. C. No. 4025/95, counsel referred to the decision of this Court dated 7th March, 1995, passed in C. W. J. C. No. 5384/94.

7. Mr. D. N. Singh, Government Pleader No. 4 appearing on behalf of the State submitted that the petitioners of C. W. J. C. No. 4025/95 were rightly sent for training, without providing any order of appointment to the post of Panchayat Sewak in their favour. It is further submitted by the counsel for the State that the orders which have been issued in favour of the petitioners of C. W. J. C. No. 7935/94, dated 29th August, 1994 (Annexure—3) and petitioners of C. W. J. C. No. 4561/95, dated 20th April, 1995 (Annexure—3), the same should not be construed as their order of appointment to the post of Panchayat Sewak. According to the counsel for the State, one post of panchayat Sewak is available in each Panchayat. For the purpose of appointment to the post of Panchayat Sewak, the persons are selected and sent for training. It is only when persons come out successful in the training, their names are empanelled in the list and thereafter out of such list of successful candidates, in accordance with the requirement and vacancy, the post of Panchayat Sewaks are filled up. It is submitted by the state counsel that the petitioners having been sent for training, they do not accrue any right automatically for appointment to the post of Panchayat Sewak. It is only when the persons will be coming out successful in such training, their names will be empanelled for the purpose of appointment to the post of Panchayat Sewak. It is submitted that thereafter, the Respondents will take into note the total number of vacancies of Panchayat Sewak and the order of posting will be issued, which order of posting is the order of appointment in individual cases, for the post of Panchayat Sewak.

Counsel for the State further submitted that the rule relating to reqular appointment to the post of Panchayat Sewak is pending consideration before the Cabinet, and the same will be published in near future. The petitioners having not yet been given appointment to the post of Panchayat Sewak, according to the State counsel, they will be guided by the new rule which will come into force very soon.

8. Having heard the counsel for the parties, I do not subscribe to the argument advanced by the counsel for the state. Admittedly, the Circular dated 24th June '89 (Annexure—1 to C. W. J. C. No. 7935/94) is the only specific Circular for appointment to the post of Panchayat Sewak out of Dalpaties. There is no other Circular or guideline, which has superseded the same. In accordance with the said Circular dated24th June, 1989 (Annexure—1), it is only the trained Dalpaties who are to be selected and to be appointed against the post of Panchayat Sewak. There is no provision laid down for sending them again for training, except for Scheduled Caste/ Scheduled Tribe candiates, who are not trained at the stage of Dalpaties. The petitioners being already trained Dalpaties, according to me, there is no question of again sending them for training for the purpose of appointment to the post of Panchayat Sewak. No such provision has been laid down in the guideline dated 24th June, 1989 (Annexure—1).

9. Further, it will be evident from the order dated 29th Auguust, 1994, as contained in Annexure—3 to C. W. J. C. No. 7935/94, as well as the order dated 20th April, 1995, as contained in Annexure—3 to C. W. J. C. No. 4561/95, that the Respondent have appointed the petitioners of those writ petitioners to the post of Panchayat Sewak. The words 'NIYUKTI KIA JATA HAI' have been mentiond therein. In view of the fact that the petitioners of these two writ petitions (C. W. J. C. No. 7935/94) and C. W. J. C. No. 4561/95) have been provided with the order of appointment to the post of Panchayat Sewak, according to me, there is no question of sending them for training and to

pay stipend during the period of such training. This view is also being supported by the decision of this Court given in the case of *Dinesh Kumar Mall and others*, passed in C. W. J. C. No. 14/94, disposed of on 18th April, 1990, as well as in the case of *Rajendra Prasad* vs. *the State of Bihar and others* in C. W. J. C. No. 472/95, disposed of on 27th June, 1995.

10. So far as the petitioners of C.W. J. C. No. 4025/95 are concerned, who have been sent for training by letter dated 9th December, 1994 (Annexure-5 to the said writ petition), after selection to the post of Panchayat Sewak, according to me, the Respondents cannot discriminate them in the matter of appointment to the post of Panchayat Sewak. It has been seen in the two other analogous writ petitions that the petitioners of the other cases have been given order of appointment and thereafter they have been sent for training. A Bench of this Court in the case of *Ram Sakal Mistri and another* vs. *The State of Bihar and others*, passed in C. W. J. C. No. 5384/94, disposed of on 7th March, 1995, has taken into note a similar case. It has been directed therein to provide the petitioners of the said writ petition with the order of appointment from the date they have been sent for training, for post of Panchayat Sewak and to pay them regular scale of pay of the post of Panchayat Sewak from such date of training.

11. At this stage, counsel for the State produced before me one Resolution of the State Government dated 31st March'92, which deals with the matter of appointment against Class—III post. He has also brought to my notice a decision of this Court in the case of *Ram Shresta Rai* vs. *The State of Bihar* and others, passed in C. W. J. C. No. 1072/93, disposed of on 15th July, 1993. It is submitted by the State counsel that the post of panchayat Sewak being a Class-III post, is to be filled up in terms of the Resolution dated 31st March, 1992. Further it is submitted that the Division Bench of this Court in the said case having taken into note that the post of Panchayat Sewak is to be filled up upon the recommendation of the B. P. S. C. has refused to pass any relief in favour of the petitioners in the said case.

12. I have perused the resolution aforesaid dated 31st March, 1992, which is not a part of the writ petition and/or Counter affidavit. From a bare perusal of the said Resolution of the State Government, it will be evident that the same relates to appointment against general Class—III posts, which are available in Muffasil Offices of the State Government. The said Resolution dated 31st March, 1992 does not specifically deals with respect to the appointment to the post of panchayat Sewak. On the other hand, the guideline dated 24th June, 1989 (Annexure—1) is specific so far as appointment to the post of Panchayat Sewak is concerned, which is limited amongst the employees of the State Government, who are already there as Dalpaties.

In this view of the matter, the Resolution dated 31st March, 1992, being general in nature for outsiders and the Circular dated 24th June, 1989 (Annexure—1) being specific for appointment to the post of Panchayat Sewak out of the Dalpaties I hold that the Circular dated 24th June, 1989 (Annexure—1) will prevail over the Resolution dated 31st March, 1992, for the purpose of appointment to the post of Panchayat Sewak out of the Dalpaties.

13. So far as the Division Bench decision of this Court in the case of *Ram Shresta Rai* (supra) is concerned, I feel that the same is of no avail to the Respondents-state for the purpose of the present writ petitions. In the said case, no specific finding has been given by this Court as to which Circular and/or Resolution will prevail and as to how the post of Panchayat Sewak is to be filled up. In the said writ petition a categorical stand was taken by the State Government that they were not going to fill up the post of Panchayat Sewak, and taking into account such stand of the State Government, this Court observed, by its order dated 15th July, 1993, passed in C. W. J. C. No. 1072/93, that no person has got any right for appointment, particularly when the State is not in a mood to fill up the post. In the counter affidavit, such stand has not been taken by the State that they are not intending to fill up the Post of Panchayat

Sewak. The appointments of the petitioners, which have been made, they have not stated that they are excess to the number of vacancies of Panchayat Sewaks.

14. For the reasons stated above, I have got no other option, but to allow the writ petitions, and for the said reason, I pass the following orders :—

(i) the petitioners of C. W. J. C. No. 7935/94 be paid in the regular scale of pay of Panchayat Sewak with effect from the date they have joined the training, they having been appointed to the post of Panchayat Sewak, by order dated 29th August, 1994 (Annexure—3 to their writ petition.

the period of training of these petitioners is to be counted towards service rendered by the petitioners as Panchayat Sewak, there being no stipulation for training of trained Dalpaties, after they being apointed to the post of Panchayat Sewak. This direction I am giving, taking into note the decision of this Court, referred above, in similar cases. The arrears of salary are to be paid in favour of the petitioners of C. W. J. C. No. 7935/94, within a period of three months from the date of receipt/production of a copy of this order;

(ii) so far as the petitioner of C. W. J. C. No. 4561/95 is concerned, with the same reasoning, I direct the Respondents to pay the petitioner the regular salary of the post of Panchat Sewak with effect from the date the petitioner has joined the training. The period of training of this petitioner is also to be counted as service rendered by the petitioner as Penchayat Sewak. The Respondents are also directed to pay the petitioner his due emoluments for the period from January, 1995 to 19th April, 1995 if during the said period, the petitioner has actually performed his duty as Dalpati. The arrears of salary of the petitioner for the

aforesaid period are to be paid in favour of the petitioner of this writ petition within a period of three months from the date of receipt/production of a copy of this order and;

(iii) so far as the petitioners of C. W. J. C. No. 4025/95 are concerned, I hold that their case is Covered by the decision of this Court in the case of *Ram Sakal Mistri* (supra), and thereby direct the Respondents to provide the petitioners of this writ petition with the order of appointment to the post of Panchyat Sewak, in its regular scale of pay, with effect from the date these petitioners have joined their training. The Respondents are also directed to pay these petitioners the regular scale of pay of the post of Panchayat Sewak from the date the petitioners have joined training by treating the period of training as duty of petitioners against the post of Panchayat Sewak. Such Notification of appointment is to be made in favour of the petitioners (C. W. J. C. 4025/ 95) and arrears are to be paid to them within a period of four months from the date of receipt/production of a copy of this order.

15. Thus all the writ petitions are allowed with the aforementioned observations and directions.

16. Let a copy of this order be handed over to the counsel for the State.

R. D. Applications allowed.

APPELLATE CRIMINAL

Before S. K. Homchoudhuri and Narayan Roy, JJ.

1995

Agust. 22

*Naresh Yadav @ Naresh Kumar Yadav @ Naresh Kumar Nirala and ors.**

v.

The State of Bihar.

Criminal Trial----prosecution not unfolding true story— not examining witness of the place of occurence---one of the accused was confined in Sangrampur Hospital---cast a doubt on the prosecution case----conviction and sentence of appellants, whether liable to be set aside.

On the direction of the Superintendent of Police, Khagaria, the investigating officer did not examine the owner of the Pan-shop which was near the place of occurence nor other independant withnesses were examined though P. W. 18, the sub-Inspector of Police, who arrived the place of occurence and recorded the Fard Byan of the Informant stated in his evidence that on reaching the place of occurence on the fateful day he found a large gathering.

Held, that the aforesid facts coupled with the fact that the appellant Naresh Yadav was found to have been confined in the Sangrampur Hospital and could not be present at the place of occurence on 3.10.1981, the day of occurence, cast doubt on the prosecution case.

Held, further, that the prosecution has not unfolded true story and as such it is not safe to convict the appellant, and their conviction and setences are set aside.

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* Criminal Appeal No. 170 (D. B.) of 1988. Against the judgment and order dated 11.2.1988 passed by Shri R. K. Singh, 10th Additional Sessions Judge, Munger in Sessions Case No. 656 of 1982.

Appeal by the accused.

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

Mr. Braj Kishore Prasad, Sr. Advocate.,

Mr. Anjana Prakash,

Mr. Viveka Nand Singh &

Mr. Sunil Kumar Mandal for the Appellants.

Mr. Lala Kailash Bihari Prasad for the State.

S. K. Homchuadhuri, J. This appeal is directed against the judgment of conviction and sentence dated 11th February, 1988 passed against the appellants by the learned 10th Additional Sessions Judge, Munger.

2. The prosecution case, as disclosd in the Ferdbayan of Kaushal Prasad Yadav (P. 14), is that the informant along with the deceased Rajniti Yadav and deceased Kapildeo Yadav proceeded to Khagaria by motor cycle that day (3.10.1981). on the way to khagaria at Mansi they came to know that the court was closed. While they were returning from mansi at about 1.30 P.M. when they reached near the Basa of Kapil Yadav north of Mansi Balha road, he found his co-villagers, accused Hirdai Yadav, Ram Chandra Yadav, Ajit Asheshar Yadav, Naresh Yadav, Bijendra Yadav and Narain Yadav, standing on the pitch road. Accused Hirdai Yadav then assaulted Kapildeo Yadav, who was having the motor cycle, on the right hand with the stick and Kapildeo Yadav lost the balance and all the three of them fell down with the motor cycle. After they foll down accused Ram Chandra Yadav shouted that enemieswereescaping andorderd to assault them quickly. There upon accused Naresh Yadav fired at Rajniti Yadav, soon thereafter Narain Yadav fired at Kapildeo Yadav from his gun. On sustaining fire arm injury Kapildeo Yadav started to run but accused Bijendra Yadav over-came him and fell him down hitting him with Bhala. After that the accused persons turned towards the informant and the informant started running and that accused Ajit Yadav fired at him but as he fell

down while running the shot did not hit him. Thereafter all the accused persons left them and ran towards west. At the time of occurrence Gholti Yadav (P. W. 15), Bhushan Sah (P. W. 9), Jai Prakash Yadav (P. W. 3), all of village Saidpur, were standing at a little distance towards the North and had seen the occurrence. After the accused persons ran away they came to the place of occurrence and found Rajniti Yadav and Kapildeo Yadav had died. In the afternoon of the date of occurrence the S. I., R. P. Singh (P. W. 18) arrived at the place of occurrence and recorded the Ferdbayan of the informant. In the Ferdbayan, it has further been stated that because of previous enmity the accused persons with the intention to kill them, killed Rajniti Yadav and Kepildeo Yadav.

3. The Ferdbayan was forwarded to Choutham Police Station and Choutham P. S. Case No. 130/81 under sections 147/148/149/302 of the Indian Penal Code and 27 of the Arms Act was registered against the accused persons. The investigation of the case was taken up by Sitaram Das (P. W. 19) under the orders of the Superintendent of Police, Khagaria and the dead body was forwarded to Sadar Hospital, Khagaria for postmortem and Dr. Ramanand Kumar (P. W. 17) conducted the autopsy on the dead body and submitted Postmortem Report (Exts. 4 and 4/1).

4. After completion of investigation the charge sheet was submitted and the learned Additional Chief Judicial Magistrate took cognizance and committed the case to the court of Sessions for trial. Learned Sessions Judge on perusal of the materials on record framed charge against all the five accused persons under sections 302/149 and 307/149 I.P. C.. The learned Sessions Judge also framed charge under section 302 I. P. C. against appellants Naresh Yadav, Narain Yadav and Bijendra Yadav and under section 307 I. P. C. against Ajit Yadav. During the pendency of trial the accused Ramchandra Yadav died.

5. All the accused persons having not pleaded guilty the case was tried.

6. To establish the case against the accused persons the prosecution examined 19 witnesses and produced and proved the various documents marked as Exit. 1 to 12. According to the prosecution, P.W. 2 Dashrath Prasad Yadav. P.W.3. Jai Prakash Yadav, P. W. 4 Arjun Yadav, P. W. 5 Shanker Yadav, P. W.. 9 Shashi Bhushan Sah, P. W. 14 Kaushal Prasad Yadav (informant) and P. W. 15 Gholti Yadav were the eye withnesses to the occurrence. P. W. 17 is Dr. Ramanand Kuar who held the autopsy on the dead bodies. P. W. 18 is the S. I. of Choutham P. S. who came into the place of occurrence and started investigation. P.W.19 is Sita Ram Dason whom the investigation was entrusted by the S. P.,Khageria, investigated the entire case. P. W. 1 was tendered but he was not cross-examined. P. W. 2. Dashrath Pranad Yadav claimed to be the eye witness to the occurrence. He deposed that on the date of occurrence i. e. on 3.10.1981 he went to Khagaria court to appear in connction with the case under section 107 Cr. P. C. . The Pairvi of the case was done by Rajniti Prasad Yadav. When he reached at Mansi at 10 O' Clock Rajniti Yadav told him that the court was closed and asked him to return. After making some purchase at Mansi, he started for home fromMansi and around 12.30 P. M. and near Mansi Chauk, Bhushan Sah (P. W. 9), Jai Prakash Sah (P. W. 3) and Arjun Yadav (P. W. 4) met him and all of them proceeded towards home. When they reached near Kutiawasa, Bhushan Sah (P. W. 9)lagged behind. He saw accused Ramchandra Yadav, Hridai Yadav, Narain Yadav, Naresh Yadav, Bijendra Yadav @ Vijay Yadav, Ajit Yadav @ Asheshar Yadav near the was a of Kutai Yadav and amongst them some were sitting on cot and some were standing and conversing. They kept on going forward. When they reached near a Semal tree about 50 yards ahead, Shankar Yadav met them coming towards Mansi and they stopped to talk to him, he heard sound of motor cycle came from behind. When the motor cycle was slightly south of the was a all the accused persons encircled the road. That motor cycle was being driven by Kapildeo Yadav and Rajniti Yadav and Kaushal Yadav (informant) were sitting behind. Hridai Yadav gave a lathi

blow on the right hand of Kapildeo Yadav who was driving the motor cycle. The motor cycle lost its balance. Kaushal Yadav fell down. As motor cycle advanced a little further Kapildeo and Rajniti fell down on the eastern side and the motor cycle fell down on the western side. As soon as those two wanted to escape after controlling themselves, accused Ramchandra Yadav shouted that enemies were fleeing and ordered to kill them.

Thereafter Naresh Yadav fired shot at Rajniti Yadav and Narain Yadav fired shot at Kapildeo Yadav. Kapildeo Yadav tottered one or two steps further then Bijendra Yadav pierced Bhala as a result of which Kapildeo Yadav fell into a ditch. All the accused persons then rushed towards Kaushal Yadav (P. W. 14) and he fled towards the West. Accused Ajit Yadav fired shot at Kaushal and he fell down. All the above accused persons fled towards the East. In the cross-examination, he stated that 107 proceeding was going on between him and the accused Ramchandra Yadav and there were sixty persons in the case. Jaiprakash Yadav and Kapildeo Yadav were also made party in the case.

7. P. W. 3 Jai Prakash Yadav, P. W. 4 Arjun Yadav and P. W. 15 Gholti Yadav in the examination-in-chief stated exactly with material particulars, what were stated by P. W. 2 with the variation that while P. W. 2, 3 and 15 stated that each of them proceeded to Khagaria court on 3.10.1981 to appear in a proceeding under section 107 Cr. P. C.(Ramchandra Yadav Vs. Janardan Yadav and others) in which they were members of the second party and returned back from Mansi after told them that the court was closed on that date. P. W. 4 deposed that on that date around 12.30 P. M. he proceeded from Mansi with P. Ws. 2, 3, 4, 9 and 15 to his Sasural at saidpur. While P. W. 2 deposed that after Rajniti told around 10 A. M. at Mansi that the court at Khagaria was closed, before he returned back from Mansi, he spent time up to 12.30 P. M. In making purchase in the market, P. W. 3 deposed that he spent time up to 12.30 P. M. In Mansi market. Each of P.Ws 2. 3, and 15 deposed that while returning

back he met P. W. 9 and others at Mansi Chauk. In the cross-examination, P. W. 3 deposed that the statement of P. W.9 was recorded by the police on 3.10.1981 and his statement was recorded by the police on 4.10.1981.

8. P. W. 5 Shankar Yadav deposed that 5 $\frac{1}{2}$ years back he was going from his house to Mansi Bazar. When he reached near Kutai Basa he met Dashrath Yadav (P. W. 2), Jaiprakash Yadav (P. W. 3), Gholti Yadav (P. W. 15) and Arjun Yadav (P. W. 4) on the way while they were coming from Mansi side. But at that time motor cycle was coming from the south side and Kapildeo Yadav, Rajniti Yadav and Kaushal Yadav were the occupants of that motorcycle and that when it reached near the Basa of Kutal Yadav, accused Narain Yadav, Ramchandra Yadav (since dead), Hirdai Yadav, Naresh Yadav, Bijendra Yadav and Ajit Yadav surrounded them. Accused Hirdai Yadav gave a lathi blow on the right hand of Kapildeo Yadav as a result of which the motor cycle started tremouring and Kaushal Yadav fell down. A little ahead Kapildeo Yadav and Rajniti yadav also fell down towards East and the motor cycle fell down towards the West. The moment they rose to run away accused Ramchandra Yadav cried that enemies were fleeing and ordered to kill them. Naresh Yadav fired and Killed Rajniti and Narain Yadav fired at Kapildeo Yadav. Kapildeo Yadav proceeded few steps when Bijendra Yadav gave Bhala blow on his head and Kapildeo Yadav fell down inthe ditch. Thereafter the assailants ran towards Kaushal Yadav who fled away towards west, then Ajit fired on Kaushal Yadav. Kaushal fell down and the accused persons fled away towards east. Kapildeo Yadav and Rajniti Yadav were found dead.

9. P. W. 14, the informant, in the examination-in-chief restated what he has stated in the Ferdbayan except with the following variations :

(i) in the Ferdbayan he has stated the after Hirdai Yadav assaulted Kapildeo by the lathi, Kapildeo lost balance and all three of them, namely, Kapildeo Yadav, Arjun Yadav and the informant fell down from the motor cycle. But in the examina-

tion-in-chief he stated before the court that he fell down first and after motor cycle moved some distance Rajniti yadav and Kapildeo Yadav fell down from the motor cycle.

(ii) In the Ferdbayan, he stated that at the time of occurrence Jai Parkash Yadav (P. W. 3.), Bhushan Sah (P. W. 9) and Gholti Yadav (P. W. 15) were standing at a little distance towards the north and had seen the occurrence. But in the examination-in-chief he stated that at time of occurrence Jai Praksh Yadav (P. W. 3.), Gholti Yadav (P. W. 15), Dashrath Yadav (P. W. 2), Bhushan Sah (P. W. 9), Arjun Yadav (P. W. 4) and Shankar Yadav (P. W. 5) was present at some distance ahead from the place of occurrence.

In the cross examination, P. W. 14 deposed that it took about 15-20 mintus for going from his village to Mansi by motor cycle. Mansi was at a distanceof $2\frac{1}{2}$—3 K. Ms. from Khutia Basa and distance between Khutia Basa and Saidpur was about one K. M. He deposed that as the conditionof the road was bad, it took 15-20 minutes to cover the distance by the motor cycle. He reached Mansi at about 10 A. M. and stayed at Mansi till 1.30 P. M.. He stated that Ramsharan Yadav (P. W. 10) took him to the Officer In-charge and said that he (P. W. 14) was the eye witness and his statement should be recorded. He stated that it was not the fact that Ramsharan Yadav (P. W. 10) consoled him saying that there was no use of weeping before him to give the statement before the Office In-charge and thereinafter he narrated everything and stated that he did not receive any injury on his body even a scratch.

10. P. Ws. 6 and 8 were formal witnesses. P. W. 7 was tendered for corss-examination.

11. P. W. 9 Shashi Bhushan Sah was tendered for cross examination whose statement was recorded under section 161 Cr.P. C. by the police. In the cross-examination, he stated that on the date of occurrence he was returning from Mansi to Saidpur alongwith P. Ws. 2, 3, 4 and 15. He denied the suggestion that on 3.10.1981 at the place of occurrence he was

examined by the police and he had stated before the police that he heard the sound of firing just after proceeding from new Railway line andhe stayed for a while out of fear and thereafter proceeded ahead, he saw eight persons running away towards east and out of them he could recognise only Ramchandra Yadav and Hirdai Yadav. He also denied the suggestion that he was a Manager of Rajniti Yadav (the deceased).

12. P. W. 10 RamSaran Yadav deposed that the occurrence took place 5 years 4 months ago around 1.30 P. M. but could not remember the date of occurrence. On the date of occurrence after he came to know that Rajniti Yadav and Kapildeo Yadav were murdered, he proceeded to the place of occurrence in a jeep. He reached at Raja Jan, near the old houseof Jagat Yadav,he saw Narain Yadav and Hirdai Yadav fleeing Suspiciously towards east out of nervousness. When he reached at the place of occurrence, Ram Pavitra Singh, the S. D of Police also reached there at that very time. He found Kaushal Yadav was nervous and weeping there. He consoled Kaushal and told him to state to S. I. of Police everything. Kaushal Yadav gave his full statement which the S. I. of Police recorded and read over to him. On finding the same to be correct, Kaushal Yadav put his signature and he also puthis signature as a witness. He proved his signature which is markd as Ext. 2/1. He deposed that Ram Swaroop Singh Yadav (P. W. 6) was also there who also put his signature. He further deposed that some days before that occurrence, Rajniti yadav had gone to the place of Khokha Babu, the Ex-Zamindar of Gogari, taking withhim P. W. 10 Veshraj Vadav, Siya Saran Yadav residents of Tikarampur. Tarpi Yadav residentof Dhaukheta and offered to purchase 65 Bighas of land of Khokha Babu, situated at Dighari, Mauza at a price of Rs. 1,30,000/-. Khokha Babu agreed to sell to Rajniti on condition that he would give accused Narain Yadav who cultiviated that land on contract, first chance to purchase and in case Narain would fail topurchase by 10.10.1981, he would execute the sale deed in favour of Rajniti Yadav and that accused Ramchandra

Yadav, Narain Yadav and Hirday Yadav with other persons having reached there, khokha Babu announced his decision to them also. Thereafter Narain Yadav and others tried to arrange money but they could not arrange. In the meantime murder was committedon 3.10.1981. In the corss-examinationhe stated that it was not the fact that he himself produced Kaushal before the S. I. of Police and told him to record his statement as he was an eye witness. In his cross-examination he stated that Rajniti Yadav had no personal enmity with the accused persons. He further stated that when he examined under section 161 Cr. P. C.he did not state before the police that Kaushal Yadav was weeping out of nervousness, and he consoledhim and told him to get the facts recorded by the S. I. of Police. In his cross-examination he admitted that had been accused in many murder cases but the court did not findhim guilty in any case. He stated that Harballabh Yadav was his full brother, but Harballabh Yadav was killed in a encounter and that his nephew was accused in four murder cases out of which there was also case in which Amin was shot down. He denied the suggestion that the people of Khagaria area and the police were afraid with him because he would implicate them in case and make pairvi at the top level. He did not know whether knokha Babu Was alive or not. He stated that no paper was prepared in respect of the sale of Khokha Babu's land. He also did not know whether Knokha Babu had even a single dhur of land at Dhiri Mauza or not and he could file any such paper from which it would appear that Khokha Babu had 65 Bighas of land in Dhiri Mauza.

13. P. W. 11 Bansraj Yadav is the father-in-law of deceased Rajniti Yadav. He deposed that before the occurrence one Rajniti Yadav came to his house and told him about purchase of 65 bighas of land and Rajniti took Ramsaran Yadav (P. W. 10). Siyasaran Yadav, Tarani Babu and P. W. 11 went to Khokha Babu and the price was fixed at Rs. 1,30,000/-. But Khokha Babu said that the accused Narain Yadav was cultivating the

land on Thinka and he should be given first opportunity to purchase the land and in case Narain yadav failed to purchase the land by 10.10. 1981, the land would be sold to Rajniti Yadav. In the cross-examination he has deposed that he and his two sons were accused in a case registered in connection with the murder of Sachchida Yadav. P. W. 10 was his brother-in-law and that his statement was recorded by the police on 19.10.1981.

14. P. W. 12 Tandeshwari Yadav has deposed that the deceassed Rajniti Yadav was his brother and deceased Kapildeo Yadav was his nephew (brother's son). Deceased Rajniti Yadav and Kapildeo Yadav had no enmity with the accused persons. He deposed that the accused persons used to harass the poor people of the village which was objected to by Rajniti Yadav and Kapildeo Yadav. He further deposed that Khokha Babu wanted to sale65 bighas of land which Rajniti Yadav offered to purchase for a sum of Rs. 1,30,000/-. The accused persons also wanted to purchase the said land.

15. P. W. 13 deposed about the pending proceeding under section 107 Cr. P. C.; in one of which Janardan Yadav was the first party and the accused Remchandra Yadav and ors. were the second party and in another case accused Ramchandra Yadav was the first party and Janardan Yadav and others were the second party.

16. P. W. 16 Narsingh Mandal has deposed that he knows about the murder of Rajniti Yadav and Kapildeo Yadav. Before the incident, accused Ajit Yadav and accused Bijen Yadav beat him and took away money from him. Rajniti Yadav and Kapildeo Yadav had no enmity with the accused persons. Before the incident Ramchandra Yadav and Lakhan Yadav got the paddy of Ramdeo Yadav destroyed by a mair and Kapildeo Yadav and Rajniti yadav helped Ramdeo Yadav and got a case registered with the police and on the basis of that allegation a case under section 107 Cr. P. C. was registered.

17. P. W. 17 is Dr. Ramanand Kuar who held the autopsy on the dead body of the deceased. After holding postmortem

examination on Rajniti Yadav he found that the bullet was lodged on the lower lobe of the right lung. Bullet was removed, kept in small glass vial and sealed stomach contained semidigested material with mucuus about 3 aunces. Liver, Kidney, Spleen with plae, Bladder was empty. Time elapsed since death within 12 hours. On holding Postmortem examination on the deceased Kapildeo Yadav, he found the following injuries :

(1) One circular wound 1 cm. In diameter on the right side of chick. The edges of the wound were inverted and echyrosed skin sur rounding the wound was scorched and blackened wound was deep. This was wound of entrance.

(2) One lacerated wound 3 cm. x 3 cm. x 2 cm. on the front scalp right side. The edges of the wound was inverted and irregular. At places it was ragged and torn. It was wound of exit.

(3) Incised wound 3 cm. x 2 cm. x 2 cm. on the mide scalp.

(4) Incised wound 4 cm. x 2 cm. x 2 cm. on the back side of scalp.

(5) Bruise 5 cm. x 4 cm.on the right forearm.

He opined that injury no. 1 and 2 were caused by firearm. Injury nos. 3 and 4 were caused by sharp weapon. Injury No. 5 was caused by blunt weopon. Death was caused due to shok and hammerrhage, Time elapsed since death within 12 hours.

18. P. W. 18 Ram Pavitra Singh is the then Sub-Inspector of Chauthâm Police Station. He has deposed that on the date of occurrence at 8 P. M. he had come to Mansi in connection with investigation of a bus dispute andon receipt of information at Mansi that someone had been murdered while travelling on a motor cycle he came to the place of occurrence and found a large crowd on the north of the Railway lineon Mansi Balha road. He recorded the Fardbayan of Kaushal Prasad Yadav before Ramsaran Yadav (P. W. 10) and Ram Swaroop Yadav (P. W. 5). He held inquest on the dead bodies of Kapildeo Yadav and Rajniti Yadav and prepared inquest report and the reafter sent the dead

bodies for postmortem at Khagaria hospital alongwith the constable Ram Naresh Singh. In the meantime, Inspector Sri B. B. Singh, A. S. P., Sri R. N. Verma and Dy S. P. Sri Pradeep Kumar Sharma reached there. The S. P. orderd that the investigation was to be taken up by sub inspector sita Ram Das (P. W. 17). He did not inspect the place of occurace nor did he record the statement of any witness and the further statement of the informant. In the case diary, the statements of Kaushal Prasad Yadav and Shashi Bhushan Sah have been recorded in his writing but he had not taken their statement and had written the same on the pressure of the Inspctor. He had also not inspected the place of occurrence but wrote in the case diary about inspection on the pressure of the Inspector. He further deposed that he had not made any sketch map of the place of occurrence since he had not inspected the place of occurrence nor the Inspector did so in his presence. He admitted that paragraphs 8, 10, 11 and 12 of the case diary were in his hand but he wrote on the pressure of the Inspector. He deposed that when he reached the place of occurrence, Ram Saran Yadav (P. W. 10) produced Kaushal Kishore Yadav (P. W. 14) before him and stating that he (P. W. 14) was an eye witness to the occurrence. He admitted that in paragraph 9 of the case diary that the statement of Shashi Bhushan was recorded and it was written that Shashi Bhushan Sah (P. W. 9) stated that he was the Manager of Rajniti Yadav and that as soon as they reached ahead of the new Railway line, they heard the sound of fire shots and stopped due to fear and that when he walked little ahead, he saw some persons running towards east out of whomhe recognised Ram Chandra Yadav and Hirdai Yadav but did not recognise others. It is written in the case diary that P. W. 9 stated that he found Rajniti and Kapildeo dead at the Place of occurrence. It was not written in the case diary that P. W. 9 stated that he saw killing himself or that he saw any weapons in the hands of these persons who were found running away. It was also written that he was coming alongwith Gholti Yadav (P. W. 15), Jai Prakash Yadav (P.W.3), Arjun Yadav (P. W.4) and Dashrath Yadav(P. W. 2). In paragraph 10 of the case

diary it was written that he tried to look for Gholti Yadav, Arjun Yadav, Jai Prakash Yadav and Dashrath Yadav at the place of occurrence but he did not find them.

19. P. W. 19 Sita Ram Das had been the S. I. of Police incharge of Mansi and Chautham P. S. at the material time. He deposed that he was living in Mansi. On that day at 16.45 hours on hearing about the murder, he reached the place of occurrence. There were delay in reaching the place of occurrence because on that day itself an occurrence had taken place on Mansi Bus stand. When he was going to the place of occurrence, on that way he met the S. P. and the A. S. P., Kagaria. The S. P. directed him to investigate the case. He reached the place of occurrence and there he met the Daroga R. P. Singh. He asked him to give the case diary but he did not do the same and merely gave him the Ferdbayan. The dead bodies had been sent for postmortem. Before he reached the place of occurrence he also found Gholti Yadav (P. W. 15) and Shashi Bhushan Sah (P. W. 9) present. He inspected the place of occurrence before them. He has deposed that blood stained earth grass with mud, grass and one motor cycle were seized by him from the place of occurrence in the presence of Sri Om Prakash Yadav and Ram Swaroop Yadav and Ext. 5 was the seizure list. He prepared the sketchmap of the place of occurrence in accordance with what he saw. R. P. Singh did not handover any sketchmap. On 4. 10.1981 at 2.30 P. M. he came to Saidpur where he recorded the statement of Jai Prakash Yadav, Shankar Yadav, Arjun Yadav and Dashrath Yadav. On 5.10.1981 he took the statements of Ram Swaroop Yadav and Om Prakash Yadav at Mansi Police Station. On 7.10.1981 he took the statements of Kuldip Mandal, Narsingh Mandal, Suresh Yadav, Samshul Mian and Ramdeo Yadav. On 8.10.1981 he took the stetement of Ram Saran Yadav. On 9.10.1981 he received the postmortom report. On 24.10.1981 he took the statement of Sarjug Singh. On 25.10.1981 he took the further statement of the informant Kaushal Yadav and Arun

Kumar Yadav. On 14.11.1981 he received the case diary from Sri R. P. Singh, S. I. (P. W. 18). In his cross-examination he has stated that he was an accused in a murder case which was registered as Sessions Trial No. 707 of 1982 pending in the court of Addl. Sessions Judge VI, Munger. He was not placed under suspension in Purnea. He stated that at the place of occurence there were hutments of Kusho Yadav, Kishun Yadav and the son of Kishun Yadav and then the huts of Sukhdeo Yadav and Sarjug Yadav. At the place of huts they kept the cattle feed. After that on the west there are some hutments which belong to Sita Ram, Bhadai, Kaleshwari and Chhatri Yadav. He has deposed that he cannot say whether any dirt was found on the persons of Kaushal Yadav. He did not ask the doctor whether he found dirt or dust on the cloths or person of the deceased Rajniti Yadav. He did not see the dead body. He also received the cloths of the deceased alongwith the postmortem report. He seized the motor cycle. He did not seize any paper of the case from the bags of the motor cycle. He did write anything about the scrapping of the motor cycle nor anything about any damage. He has not noted finding about anything such as empty cartridge or the pillets on the huts or the tress. He could not say whether any report from the chemical examiner of blood had been received or not. He admitted that he received the supervision note of the S. P. directing him to make enquiries from Jogindar Saha, owner of Pan shop, situated near the place of occurrence. But he did not take his statement. He denied the suggestion that telegram had been suppressed because it would have spoiled the case. He admitted that the S. P. had directed him to take statement of Shanker Yadav who has reached the police station first. but he did not take the statement of Shankar Yadav. He denied the suggestion that Shanker Yadav had given the information at the police Station which was recorded but they tore it up since it was not compatible with the prosecution case. S. P. has given this order that the statement of all those persons who had gathered at the Khutia Basa be recorded, and that he had also instructed to take the detailed statements of Bhushan Sah, Gholti Yadav, Dashrath Yadav and Jai Prakash Yadav and that they were to be

produced before him but he did not produce those fourpersons before the A. S. P. He has deposed that Dashrath Yadav did not state that motor cycle was being driven by Kapildeo Yadav and Rajniti Yadav and Kaushal was sitting at the back. He also did not state that the pond where Kapildeo fell down contained a little water. P. W. 19 has further deposed that witness Jaiprakash Yadav had not stated before him that Ramchandra Yadav had ordered to assault. He had stated that when Kapildeo Yadav fell down in the pond he was surrounded and killed by all the accused persons. He has further deposed that witness Arjun Yadav has stated before him that after Kapildeo Yadav fell down in the pond all the accused surrounded and killed him. He has deposed that he had taken the statement of Ram Saran Yadav at Mansi Police Station. Witness Nandeshwari Yadav did not state to him that Ramdeo Yadav had caught the horse which Ramchandra had snached away and assaultedhim. He has also deposed that witness Gholti Yadav did not state before him that the motor cycle was at a slow speed but stated that the vehicle was at a medium speed.

20. When examined under section 313 Cr. P. C. all the accused appellants stated that they were innocent and were not involved in the crime and they have falsely been implicated in the case at the instance of P. W. 10 Ramsaran Yadav because of political rivalry since being supporters of Congress party, they never supported Ramchandra Yadav, who was a member of Lokdal party. Accused Naresh Yadav put up the story of alibi stating that on 2nd October, 1981 on his way Babadham at Deoghar having fallen ill he was admitted in Sangrampur hospital and had been in the said hospital on 3.10.1981. In support of the story of alibi of Naresh Yadav, defence examined eight witnesses and also produced and proved the hospital records pertaining to the period.

21. D. W. 1 Saukhi Yadav deposed that about five years nine months back in the 2nd part of the month of Ashwin on Friday, he proceeded to Babadham at Deoghar for offering sprinking water of Ganges and on that day he took Ganges water

at Sultanganj and proceeded to Babadham. His co-villagers Bishuni Yadav (D. W. 3) and Sadhu Sharan Yadav (D. W. 5) also proceeded with him. Madhushudan Singh of Sitakund Dih (D. W. 4) and accused Naresh Yadav were also with them. He identified the accused Naresh Yadav on the dock as the said Naresh Yadav. He stated that after taking water of Gangas st Sultanpur, all of them were proceeded towards Babadham. When they reached near Rampur Dharamsala, Naresh Yadav fell ill having loose motions and they took Naresh Yadav from Rampur Dhramasala to Sangrampur by a Tomtom(horse drivencart) and admitted him in the hospital and they stayed there on that night. On the following morning four of them left the place and proceeded for Babadham at Deoghar leaving Naresh Yadav in the hospital. After three months the police officer examined him by putting questions. Thereafter he sworn an affidavit which was at the marked as Ext. 'B'. In the cross-examination he stated that Sukhdeo Yadav was his co-villager and his house was situated distance of about 2 K. Ms. from his house. He did not know that Sukhdeo Yadav's daughter was married to Naresh Yadav. He stated the Sukhdeo Yadav was an important man of his village. He denied the suggestion that at the instanse of Sukhdeo Yadav he deposed falsely to save his son-in-law Naresh Yadav. He further stated that no doctor or compunder was available at Rampur. Tarapur was situated at a distance of 5 K. Ms. from Rampur and Sangrampur was situated at a distance of (3 K. Ms.) from Rampur. He denied the suggestion that Tarapur was nearer to Rampur than Sangrampur. He further deposed that condition of Naresh Yadav became very bad and became senseless and that admitting Naresh Yadav he did not enquire as to what happended to him. Babadham was situated at a distance of about 44 K. Ms. from Sangrampur and it took one and half day to reach Babadham. He denied the suggestion that he did not go to Babadham nor did he meet Naresh Yadav.

22. D. W. 2. Umeshwar Prasad deposed that all the four affidavits have been typed by him which have been marked as Exts. 'B series'.

23. D. W. 3 Bishnu Yadav deposed that about five years nine months back in the month of Ashwin on Friday he proceeded to Babadham to offer 'Ganga Jal' (Water of the Ganges) with his co-villagers Saukhi Yadav (D. W. 1) and Sadhusaran Yadav (D. W. 5). At Munger Madhusudan Singh (D. W. 4) joined them. At Sultanganj at the Ganges Ghat they met Naresh Yadav. He identified accused Naresh Yadav in the dock as the said person. All five of them took the 'Ganga Jal' from Sultanganj Ghat and proceeded for Babadham together. Before reaching Rampur Dharamshala Naresh Yadav fell ill having loose motions. They reached Rampur Dharmsala and from Rampur they went Sangrampur and got Naresh Yadav admitted in Sangrampur hospital. They spent whole night there. In the following morning, keeping Naresh Yadavin the hospital at Sangrampur then proceeded for Babadham. After one month he was examined by the police Officer by putting questions to him and thereafter he sworn an affidavit marked Ext. 'B/1'. In the the cross-examination he deposed that he did not know Naresh Yadav earlier. He came to know Naresh Yadav for the first time at Sultanganj. The other persons, who were with him, also did not know Naresh Yadav earlier. He stated that Naresh Yadav was alone and he did not ask his name and village. He came to know his name and village after he was admitted in the hospital. He further deposed that Sukhdeo Yadav was his co-villager and his daughter was married to Naresh Yadav.

24. D. W. 4 Madhusudan Singh has corroborated the statement of D. W. 1 and D. W. 3 and deposed that on 2.10.1991 he was going to Sultanganj on his way to Babadham at Deoghar. While going from Munger to Sultanganj in a trekker, he met D. Ws. 1, 3 and another, who were going to Deoghar. After coming to Sultanganj he along with three persons met Naresh Yadav who was also going to Babadham at Deoghar. He identified accused Naresh Yadav in the dock as the same Naresh Yadav. He deposed that all five of them took Ganges water at Sultanganj and proceeded towards Babadham and when they reached near Rampur Darmshala Neresh Yadav fell ill having loose motions.

They admitted Naresh Yadavin Sangrampur hospital and spent whole night there and in the following morning they proceeded to Babadham leaving Naresh Yadav in the hospital. In that respect he sworn an affidavit marked Ext. 'B/2'. In his croos-examination he has deposed that he came to know Naresh Yadav for the first time on 2.10.1981. He did not know him earlier. At the time of taking bath at Sultanganj he came to know Naresh Yadav.

25. D. W. 5 Sadhu Saran Yadav corroborated the statements of D. Ws. 1, 3 and 4 on all material facts. He deposed that on 2.10.1981 he took Ganges water from Sultanganj and proceeded to Deogher and that D. Ws. 1, 3, and 4 were with him. At sultanganj he came to know Naresh Yadav and all of them proceeded to Babadham. He identified the accused Naresh Yadav in the dock as the same Naresh Yadav. After reaching Rampur Dharmshala Naresh Yadav fell ill having loose motions. From Rampur Dharmshala they took Naresh Yadav to Sangrampur hospital and got him admitted in the hospital and spent whole night there. In the following morning they proceeded to Babadham leaving Naresh Yadav there. He has further deposed that he sworn an affidavit regarding the aforesaid facts which was Ext. 'B/3'.

26. D. W. 6 Surendra Prasad Sah was the compounder of Sangrampur Government hospital. He produced the papers of Sangrampur hospital under sealed cover.

27. D. W.7 Dr. Deep Narayan Saha deposed that he had been the Medical Officer In-charge of Sangrampur hospital in October, 1981. On 2.10.1981 around 3 P. M. one Naresh Yadav. S/o Ram chandra Yadav, village Saidpur, P. S. Mansi, district khagaria having suffered from diarrhoea was admitted in the said hospital and he treated him. On 5.10.1981 Naresh was released from the hospital. He prepared the bed ticket in connection with treatment of Naresh Yadav which was marked as Ext. 'N'. The bed ticket contained the seal of Sangrampur hospital. Entry No. 126 dated 2.10.1981 in the indoor register of

the hospital of Sangrampur marked as Ext. 'J/R', was written in his hand. Ext. 'O' was the medical certificate issued by him. In that certificate 1 entification mark of Naresh Yadav was written. He identified accused Naresh Yadav in the dock whom he treated in the Sangrampur hospital on and from 2.10.1981.

28. D. W. 8 Sheo Narayan Yadav deposed that he know Naresh Prasad Yadav, S/o Ranchandra Prasad Yadav of village Saidpur, P. S. Mansi, District Khagaria and that except accused Naresh Yadav that other Naresh Yadav was living in that village.

29. Learned Sessions Judge on consideration of the materials on record found that the prosecution was able to establish the charges leavelled against the accused appellants beyond reasonable doubt and rejected the story of alibi of the defence. On the basis of the finding by the impugned judgment learned Sessions Judge convicted the accused appellants Naresh Yadav, Narain Yadav and Bijendra Yadav under sections 148 and 302 I. P. C., accused Ajit Yadav under sections 302/149, 307 and 143 I.P.C. and accused Hirdai Yadav under sections 302/149 and 147 I. P. C. and sentenced the appellants Naresh Yadav, Narain Yadav and Bijendra Yadav to undergo H. I. for life u/s 302 I. P. C. and to undergo R. I. for one year u/s 143 I.P.C. Learned Sessions Judge sentenced the appellant Ajit Yadav to undergo R. I. for life u/s 302/149 I. P. C. and R. I. for ten years u/s 307 I. P. C. and R.I. for one year u/s 148 I. P. C. The learned Sessions Judge sentenced the appllant Hirdai Yadav to undergo R. I. for life u/s 302/149 I.P.C. and R. I. for one year under section 147 I.P.C . The learned Sessions Judge further ordered that Sentences passed against each of the accused appellants would ran circurrently.

30. During the pendancy of the appeal except the accused appellant Naresh Yadav, the other appellants have been enlarged on bail.

31. I have heard learned counsel for the appellants and the learned public prosecutor and perused the materials on record.

32. Learned counsel for the appellants submitted that purfunctory manner of conducting investigation, delay in registration of the case, delay in examination of the alleged eye witnesses, imaginary story of alleged agreement to purchase 65 bighas of Land between Rajniti Yadav and one Khokha Babu with the condition of giving first preference to accused Narain Yadav provided he could purchase within the certain time, with a view to imputing motive of killing Rajniti Yadav by the accused persons, parrot like statements of the interested witness, non-examination of the natural witnesses, namely, the owner of the shop situated near the place of occurrence as well was Shanker Yadav who first informed the police inspite of specific direction of the S. P. cast a doubt on the prosecution case. On the other hand, defence by adducgin oral evidence by non-interested witnesses as well as documentary evidence established that accused Naresh Yadav who according to the prosescution killed Rajniti Yadav by fire arm, had been confined to Sangrampur hospital on the late of occurrence which has virtually demolished the prosecution case. Learned counsel for the appellants ff fubmitted that the learned Sessions Judge, on assumption of facts which are noton records, erroneously and arbiporily rejected the case of alibi of the accused Naresh Yadav. Learned counsel for the appellants submitted that the contradictory statements of P. W. 18 during inspection of the place of occurrence, drawing sketch map thereof recording statements of Bhushan Sah (P. W. 9) althought the case-diary in his hand disclosed that he inspected the place of occurrence, drew a sketchmap thereof and recorded the statement of P. W. 9 u/s 161 Cr. P. C. as well as his explanation that all there were written by himin the case-diary at the pressure of the Inspectornot only make him throughtly unbelivable but also reveal the attempt of the prosecution to suppress the facts dislcosed initially as the same were incompetable with the prosecution case. Learned counsel for the appellants draw our attention that P. W. 12, brother of Rajniti Yadav and uncle of Kapildeo Yadav, deposed that Kapildeo yadav and Rajniti yadav had no enmity with the

accused persons and P. W. 16 also corroborated the statement of P. W. 12. P. W. 10 in the cross-examination had to admit that Rajniti yadav had no personal enmity with the accused persons. Learned counsel for the appellants submitted that the statement of P. W. 10 that reaching the place of occurrence finding Kaushal Yadav weeping andhe consoled him and asked to state the facts to P. W. 18, the S. I. of Police and that he did not produce P. W. 14 to P. W. 18 telling that P. W. 14 was an eye witness and his statement should be recorded has been proved to be false by the evidence of P. W. 14 and P. W. 18. Learned counsel for the appellants further submitted that this false statement, introducing of unbelievable story of alleged oral agreement between Rajniti Yadav and Khokha Babu to purchse 65 bighas of land with condition, examination of P. W. 10 u/s 161 Cr. P. C. belatedly of 7.10.1981 although he stated to have been present on 3.10.1981, the date of occurrence before the I. C. support the defence case that at the machination of P. W. 10, who had been local MLA accused appellants have been falsely implicated in the case due to the political rivalry of P. W. 10 with them for opposing his party.

33. Learned public Prosecutor, on the other hand, submitted that irregularity in conducting the investigation cannot throw the prosection case out of court if the court belives the testimonies of the eye witnesses. Learned Public prosecutor submitted that the Fardbayan was recorded within two hours of the incident and what was stated in the Fardbayan was supported by the evidence of the eye witnesses The statements of the eye witnesses are consistent with the statement made in the Fardbayan. They are not shaken by thorough cross-examination. Learned Public Prosecutor submitted that the learned Sessions Judge has rightly rejected the story of the defence that accused Naresh Yadav was confined to bed in the hospital on the date of occurrence and convicted the accused appellants.

34. I have considered the submissions made on behalf of

the appellants and the learned Public Prosecutor and perused the materials on record.

35. On perusal of the evidence of the witnesses examined by the defence, as narrated above, it becomes apparent that consistent statements of the witnesses are that accused Naresh Yadav while going to Babadham alongwith D. Ws. 1, 3, 4 and 5 fell ill on the way on 2.10.1981 and was admitted in Sangrampur hospital for treatment in the afternoon on 2.10.1981 and remained in hospitalon 3.10.1981. All the defence witnesses are non-interested witnesses and their statements were not at all shaken by the cross-examination and their statements are corroborated by the documentary evidence, namely, hospital bed ticket (Ext. 'B'), the entry made in the indoor registor of Sangrampur hospitalP. W. 7, who had been the Medical Officer In-charge of Sangrampur hospital at the material time has identified Naresh Yadav in the dock and deposed that it was the said Naresh Yadav who was admitted on 2.10.1981 in the hospital and was under his treatment till 5.10.1981. He has proved the Sangrampur hospital bed ticket (Ext. 'N'), the entry in the indoor register of the Sangrampur hospital (Ext. J/E) which disclosed that Naresh Yadav was admitted in that hospital as indoor patient on 2.10.1981 and was discharged on 5.10.1981. D. W. 7, a public servent, is an non-interested witness and there cannot be any reason on his part to make false statement in favour of the defence. The learned counsel for the appellants has rightly submitted that the learned Sessions Judge on assumption of some facts which are not on record has rejected the defence case of alibi inasmuch as although D. W. 1 in the cross-examination specifically stated that there was no doctor or compounder at Rampur and they took Naresh Yadav by a Tomtom to Sangrampur hospital which was at a distance of 1-1 Kosh (3 K. Ms.), yet the Sessions Judge without any materials on record, held that when medica facilities were available at Rampur story of taking Naresh Yadav for the treatment to Sangrampur situated at a distance of 5 to 6 KMs. from Rampur was not believable. The learned Sessions Judge is not justified

in discarding the bed ticket (Ext. 'N') on the ground that as per Ext, 'N' Naresh Yadav was discharged from the hospital on 3.10.1981, but when examined under section 313. Cr. P. C. Naresh Yadav stated that he had been in the hospital upto 3.10.1981.

35. I have scrutinisd the statement of the appellants made under section 313 Cr. .P. C.. In answer to the question that the 'evidence on disclosed that he alongwith

killed Rajniti Yadav and Kapildeo Yadav on 3. 10. 1981 Naresh Yadav stated that the allegation was false in a much as he was admitted in the hospital Sangrampur on 12.10.1981 and remained in the Sangrampur hospital upto 3.10.1981. I find that the learned Sessions Judge has taken the statement made by the accsed Naresh Yadav and then examined under section 313 Cr. P. C. too literally and arbitraily discarded the documentary evid proval of him evithoud any objected namely, bed ticket which was in the hand of the Medical Officer In-charge and was adduced on behalf of the defence, I hold that the defence has established beyond reasanable doubt, that the accused appellant Naresh Yadav on the date of occurrence (3. 10.1981) was confined to hospital at Sangrampurand could not be involved in crime of killing Rajniti Yadav and Kapildeo Yadav on that date as alleged by the prosecution.

37. From a perusal of the evidence of P. W. 18, the then S. I. of chauthem P. S., who initially started investigation, I find force in the submission of the learned counsel for the appellants that P. W. 18 is not trus tworthy. It also cannot be ruled out that P. W. 18 endeavoured to suppress the facts disclosed from the inspection of the place of occurrence and the sketchmap drawn by him as well as the facts disclosed from examination of P. W. 9 under section 161 Cr. P. C., because those facts were not compatable with the story of the prosecution case. As narrated above. It is apparrant that what have been disclosed from the statement of P. W. 9 under section 161 Cr. P. C. recorded by P. W. 18, are not compatable with the prosecution case that P. W. 2, P. W. 3, P. W. 4, P. W. 9 and P. W.15, while coming together

from Mansi on the date of occurrence. Saw the occurrence. Parrot like statements of P. Ws. 2, 3, 4 and 15 that when they reached near the place of occurrence.P. W. 9 lagged behind disclose the attempt on the part of the prosection to get rid of the statment of P. W.9 recorded under section 161 Cr.P. C. .

38. D. W. 12, who is the brother of Rajniti Yadav and uncle of Kapildeo Yadav has stated in examination-in-chief that Kapildeo Yadav and Rajniti Yadav had no enmity with the accused persons. This statement was also corroborated by the evidence of P. W. 16. P. W. 10 in cross-examination has also deposed that Rajniti Yadav had no personal enmity with the accused persons. Evidence of P. Ws. 10, 11 and 12 adduced in support of the story of oral agreement between Rajniti Yadav and one Khokha Babu about purchase of 65 bighas of land on the condition that the accused Narain Yadav would be given first preference and if he would fail to purchase the land by 10.10.1981, the land would be sold to Rajniti Yadav and that the accused persons could not arrange the price money do not inspire confidence. P. Ws. 10 and 12 were examined on 7.10.1991 and P. W. 11 was examined on 19.10.1991 long after the occurrence. No document in support of the agreement or existence of land under the ownership of one Khokha Babu was produced P. W. 10 even did not know whether Khokha Babu owned any such land or not. The story of agreement to purchase 65 bighas of land is apparently an afterthought and is introduced to impute motive of the accused persons to kill Rajniti Yadav.

Learned Public Prosecutor submitted that the prosecution is not bound to prove motive. But when the prosecution comes with a definite story to impute motive to crime, failure to prove the story may shake the credibility of the prosecution case. particularly, when the accused persons are not of dangerous nature and have no criminal antecedent. In the instant case, even if the story of agrrement of purchase of land by Rajniti Yadav is, accepted failure to purchase the land by the accused persons before the last date to fixed by the accused persons

could not have induced the accused appellants of commit the crime to killing two persons in broad-day light on the public road with arms. It is not the case of the prosecution that the accused appellants were criminal or they have had criminal antecedent and men of dangerous character.

39. From the evidence of P. W. 18 and P. W. 19, it appears that a number of Police Officers, including the Superinatendent of Police came to the place of occuurrence with Police force on the date of the occurrence. Surprisingly, however, no attempt appears to have been made on that day to apprechend the accused persons, who were residents of village Saidpur situated about one and half. K. Ms. away from the place of occurrence and/or to recover the weapons used in the killing of the deceased. There is nothing to show that the attempt was made by the prosecution to recover the fire-arm andthe Bhala alleged to have been used in the killing of the deseased. Had P. Ws. 1, 2, 3, 4, 5 and 15 seen the killing of Rajniti Yadav and Kapildeo Yadav as narrated by them—by mastering courege to remain nearby the place of occurrence from beginning to the end, they would have naturally informed the incident immediately to the Police Station at Mansi, which was only 2-3 K. Ms. away from the place of occurrence, particularaly, when accused Ram Prasad Yadav was adversary in the proceeding under section 107/Cr. P. C. initiated against P. W. 2, P. W. 3 and P. W. 15.

According to Kausal Yadav (P. W. 14) he did not receive any injury even a scratch in the course of the incident. Had P. W. 14 fell down from the running motor-cycle after it lost its balance and again fell down in course of running when accused Ajit Yadav fired at him, it would be quite unlikely that he could not have received any injury or even a scratch. It is also unnatural that the accused persons who allegedly killed Rajniti Yadav and Kepildeo Yadav would have left P. W. 14, after he fell down when Ajit Yadav allegedly fired at him, without being satisfied that he was also killed while P. Ms. 2, 3, 9 and 15 deposed that on the date of occurrence, they precceded to Khagaria in connection

with the proceeding under section 107 Cr. P. C. and deceased Rajniti Yadav was making pairvi in that case on their behalf P. W. 14 has not stated the reason for proceeding to Khagaria on that date. That part, if Rajniti Yadav, who was doing the pairvi of the case u/s 107 Cr. P. C. proceeded to Khagaria he must have papers of the case with him. No paper has been found at the place of occurrence nor in the box of the motor-cycle. The motor-cycle stated to have been seized by P. W. 19, has not been produced before the court. P. W. 19 also cannot say whether there was any damage or even scratch in the motor-cycle because of sudden fall after losing balance.

40. P. W. 18 on reaching the place of occurrence on the fateful day found a large gathering near the place of occurrence. There was Pan-shop at the place of occurrence and the Superintendent of Police, specifically, asked P. W. 19 to examine the owner of the shop. The Superintendent of Police also specifically asked P. W. 19 to examine Shankar Yadav, who informed the Police for the first time. But none of the persons who assembled there nor Shankar Yadav and owner of the Pan-shop were examined by the Police and produced as witnesses. The prosecution has produced only interested witnesses, who according to prosecution happended to be present at the place of occurrence by chance. The prosecution has, thus, examined the chance witnesses as eye-witnesses, who have made parrot like statement, avoiding persons who would have been normally present there.

41. As narrated above, P. W. 14 and P. W. 18 deposed that P. W. 10 produced P. W. 14 before P. W. 18 stating that P. W. 14 was an eye witness and his statement should be recorded. However, P. W. 10 has denied that he produced P. W. 14 before P. W. 18 and on the contrary, he introduced the story that after coming to place of occurrence, he found P. W. 14 was nervous and was weeping and he consoled P. W. 14 and told him to tell P. W. 10 everything. But P. W. 14 did not support that story and denied that P. W. 10 found him weeping etc.

42. Aforesaid facts and circumstances coupled with the fact that appellant Naresh Yadav is found to have been confined in the Sangrampur hospital and could not be present at the place of occurrence on 3.10. 1981 cast doubt on the prosecution case. I am constrained to hold that the prosecution has not unfolded true story and as such it is not sfae to convict the accused appellants.

43. For the reasons stated above, the appeal is allowed. The impugned judgment of conviction and order of sentence passed against the appellants are set aside, Appellant Naresh Yadav should be set at liberly forthwith if not wanted in connection with any other case and other appellants, who are on bail, are discharged from the liability of the bail bonds.

Narayan Roy, J. I agree.

R. D. Appeal allowed.

CIVIL WRIT JURISDICTION

Before Sudhansu Jyoti Mukhopadhaya, J.

1995

January 26

*Dr. Bhushan Sharma.**

v.

The State of Bihar and others.

Appointment---Bihar Public Service Commission recommending the name of Respondent no. 4 who had part-time teaching experience, for appointment as Associate Professor (Mathematics)----State Government appointing Respondent no. 4 on the said recommendation---validity of---Respondent no. 4 not having regular five years teaching experience as per the advertisement issued by Bihar Public Service Commission---teaching experience at 'appropriate level', whether means teaching experience as Assistant Professor---recommendation by Bihar Public Service Commission and consequent appointment of Respondent no. 4 by the State of Bihar, whether liable to be set aside.

For the purpose of giving the meaning of 'teaching experience' as mentioned in the advertisement no. 18/93 dated the 4th April, 1993 issued by the Bihar Public Service Commission for the post of Associate Professor of Mathematies in Engineering Colleges under State of Bihar, It is to be constued that such experience must be a regular experence, and not some sort of experience, here and there, on a date and/or dates, like part-time experience.

Held, that the five years teaching experience as laid down in the said advertisement no. 18/93 dated 4.4.1993 means a regular five years teaching experience as distinction from five years of part-time teaching experience. The persons who do not

* C. W. J. C. No. 2920 of 1994. In the matter of an application under Articles226 and 227 of the Constitution of India.

have regular five years 'teaching experience, but have part-time teaching experience, are not eligable for appointment to the post of Associate Professor of (Mathematics) in Engineering College.

Held, further, that the post of Assistant Professor being just below the post of Associate Professor, teaching experience at the 'appropriate level will mean teaching experience at the level of Assistant Professor and/or equivalent or high post and not at any other level.

Held, further, that Respondent no. 4 had got no five years teaching experience as laid down in the advertisement no. 18/93, and hence he was not eligible for appointment to the post of Associate Professor (Mathematics)in an Engineering College.

Held, also that whatever teaching experience that had been claimed by Respondent no. 4 are not that of 'appropriate level as required by the said advertisement and as such Respondent no. 4 was eligible for appointment to the post of Associate Professor (Mathematics) in an Engineeiring College. Accordingly, the recommendation of the name of Respondent no. 4 dated 24.1.1994, as well as, the Notification of his appointment dated 3.12.1994 are set aside.

Asim Kumar Bose v. *Union of India* (1)

Anant Mohan Das v. *Director General of Health Bihar and ors.* (2)----distinguished.

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

The facts of the case material to this report are set out in the judgment of Sudhansu Jyoti Mukhopadhaya, J.

Mr. C. S. Prasad for the petitioner.

Mr. K. P. Yadav. S. C. V. and Mr. Suresh Kumar, J. C. to S. C. V. for the state.

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(1) (1983) A. I. R.(S. C.) 509.

(2) (1987) P. L. J. R. 1027.

Mr. S. K. Ghosh for the B. P. S. C.

Dr. Sada Nand Jha, Sr. Advocate and Mr. Uday Shankar Saran Singh for respondent no. 4.

S. J. Mukhopadhaya, J. The petitioner originally challenged the recommendation made by the Respondent Bihar Public Service Commission (B. P. S. C. in short), vide Notice dated 24th January, 1994, as contained in Annexure-14, by which the name of Respondent No. 4, Dr. Baidynath Prasad was recommended for appointment to the teaching post of Associate professor (mathmatices), in Engineering Colleges under the Respondent State of Bihar, in pursuance of Advertisement No. 18/93. By an amendment petition, the petitioner has also challenged the Notification dated 3rd December, 1994, as contained in Annexure-20, by which, upon the recommendation of the B. P. S. C. (Annexure—14), the Respondent No. 4 has been appointed by the Respondent-state to the post of Associate Professor (Mathematics) in the scale of Rs. 3700-5700/- in one of its Engineering College, namely, B.I. T. Sindri.

2. The brief facts of the case are, as follows :

The petitioner is an Assistant Professor of Mathematics in the Magadh Engineering College, Gaya, a taken over Engineering College of the State of Bihar. The petitioner was appointed in the then private Engineering College (Magadh Engineering College) to the post of Teacher in Mathematics by order dated 24th November, 1980 (Annexure—3). Thereafter, advertisement was published in the 'Indian Nation' on 3rd May, 1982 (Annexure—4), in pursuance of which the petitioner applied and having been selected and recommended by the selection Committee (vide Annexure—5), the petitioner was appointed to the post of Assistant Professor in Mathematics in the said Magadh Engineering College, Gaya, vide one order dated 21st June, 1982 (Annexure—6). The petitioner was confirmed in the Magadh Engineering College to the post of Assistant Professor, Mathematics by order dated 12th August, 1985, and

ultimately the petitioner obtained Doctorate Degree (Ph. D.) result of which was declared on 26th June, 1986. In pursuance of an ordinance, namely, Bihar Private Engineering College (taking over) ordinance, 1986, the petitioner's College i. e. Magadh Engineering College as well as two other Engineering Colleges was taken over by the State Government with effect from 9th December, 1986. The Screening Committee recommended for taking over of the services of the petitioner and vide Notification dated 31st January, 1991(Annexure—8), the petitioner's services have been taken over as Assistant Professor of Mathematics by the state Government.

The aforesaid facts relating to appointment of petitioner as Assistant Professor, Mathematics in Magadh Engineering College, his qualification etc. as narrated by the petitioner shows that he is eligible for appointment to the next higher post of Associate Professor, Mathematics in Engineering Colleges, which fact has not been disputed by any of the Respondents.

The Respondent- B. P. S. C. came out with an Advertisement No. 18/93 dated 4th April, 1993, as contained in Annexure-9 for appointment to the higher post of Associate Professor (Mathematics) in State Government's Engineering Colleges, in the higher scale of Rs. 3700-5700/-. The following qualifications have been laid down therein :-

(i) First Class post Graduate Degree in concerned subjects (herein Mathematics) with Ph. D. Degree;

(ii) "Five years of experience" in Teaching/Industrial/Reserach work at "appropriate level".

The cut-off date of 1st August, 1993 has been laid down therein for the purpose of age. Both the petitioner as well as Respondent No. 4 along with others applied for appointment against the post of Associate Professor (Mathematics) in pursuance of the aforesaid Advertisement No. 18/93, published on 4th April, 1993 (Annexure—9). After due interview and selection, as stated above, vide Annexure-14, the name of

Respondent No. 4, Dr. Baidynath Prasad has been recommended by the B.P.S.C. for appointment to the post of Associate Professor (Mathematics) and ultimately by the impugned Notification dated 3rd December, 1994 (Annexure—20), the Respondent No. 4 has been appointed to the post of Associate Professor (Mathematics) in B. I. T. Sindri, one of the Engineering College of the state of Bihar.

This Annexure—14, the recommendation of the B. P. S. C. and Annexure—20, by which the Respondent No. 4 has been appointed, are under challenge in the present writ application.

3. The Counsel for the petitioner raised only one point, namely, the Respondent No. 4 is not eligible for appointment to the post of Associate Professor (Mathematics), he having no requisite five years of experience in Teaching/Industrial/Research work at appropriate level.

It has been stated by the counsel for the petitioner that the Respondent No. 4 was a Telephone Operator in the Tele-Communication Department of Government of India, posted at Sindri, during the period from 1983 to 1988. The said Respondent No. 4 was never posted" as a regular teacher" in Mathematice in any Engineering College. Thereby, he has got no teaching experience as a regular teacher much less five years of teaching experience. It was further contended by the counsel for the petitioner that whatever the teaching experiences, the Respondent No. 4 is claiming, such teaching experience cannot be construed to be "teaching experience", as asked for in the Advertisement dated 4th April, 1993 (Annexure—9), he being a part-time lecture in one or other College and that too a part-time lecturer not in the "appropriate level".

4. The Respondent—B. P. S. C. which has made its recommendation in favour of Respondent No. 4 has filed a counter affidavit enclosing thereinthe application forms as submitted by the petitioner and the Respondent No. 4, Dr. Baidyanath Prasad. The application form of petitioner made in pursuance of

Advertisement No. 18/93 is Annexure—R—3/A to the counter affidavit of the B. P. S. C., on the other hand' the application form filed by the Respondent No. 4, Dr. Baidyanath Prasad, in pursuance of the said Advertisement No. 18/93, is Annexure-R-3/B tothe counter affidavit of the B. P. S. C.

5. Mr. S. K. Ghosh, counsel appearing on behalf of the B.P.S.C. submitted that on the basis of the bio-data given by the Respondent No. 4, Dr. Baidynath Prasad in the application form (Annexure-R-3/B), the Selection Board of the B.P.S.C. has considered the case of Respondent No. 4 and found him fit for appointment to the post of Associate professor (Mathematics), they having found more than five years of teaching experience in Mathematics. Thereby, it was submitted by the counsel for the B. P. S. C. that no illegality has been committed in the matter of selection and recommendation of the name of Respondent No. 4 for the post of Associate Professor in Mathematics.

6. Another counter affidavit has been filed by the Respondent No. 4, Dr. Baidyanath Prasad. Dr. Sadanand Jha, Senior Advocate appearing on behalf of the Respondent No 84 submitted that the Respondent No. 4 having much more than five years of teaching experience in Mathematics, he was eligible for appointment to the post of Associate professor (Mathematics) and thereby he has been rightly selected, recommended and appointed to the post of Associate Professor (Mathematics)in the Engineering College of the State of Bihar. He has drawn my attention towards different paragraphs of the counter affidavit filed by Respondent No. 4, particularly Paragraph No. 7 therein. He has also referred to different 'Certificates' as enclosed as Annexure R-4/A to R-4/s to the counter affidavit of Respondent No. 4, to justify the five years teaching experience in Mathematics that of Repondent No. 4.

7. So far as the objection that has been raised by the counsel for the petitioner that the part-time experience of Respondent No. 4 cannot be construed to be an experience for the purpose of determining the eligibility in terms of Advertise-

ment No. 18/93 dated 4th April, 1993(Annexure-9) is concerned, counsel appearing on behalf of Respondent No. 4 submitted that no distinction can be made between the teaching experience as obtained by a regular employee and/or a temporary employee and/or adhoc employee and/ or a part-time employee, the advertisement being silent on that point.

8. It was contended by the counsel for the Respondent No. 4 that the advertisement speaks of five years of experience in teaching, and the language of the said advertisement cannot be interpreted in one or other way to exclude the teaching experience accured by a person as a part-time lecturer. Thereby, he refuted the allegations made by the petitioner. He, in this connection, relied on the decision of the Supreme Court in the case of *Dr. Asim Kr. Bose* vs. *Union of India* reported in A. I. R. 1983 S. C. 509 and a decision of this Court in the case of *Anant Mohan Das* vs. *The Director General of Health, Bihar and others*, reportedin 1987 P.L.J.R 1027. By referring those two decisions, counsel for the Respondent No. 4 submitted that the teaching experience is to be counted if a person has actually tought, as has been held by this Court and the apex court.

9. So far as the allegation that has been levelled by the petitioner that the Respondent No. 4 does not have any such experience at the "appropiate level", counsel for the Respondent No. 4 submitted that the Respondent No. 4 was a teacher in mathematics at the I. Sc. and B.Sc. standard. It is after passing the I.Sc. course, a person is entitled for admission in an Engineering College. Thereby, it was contended by the counsel for the Respondent No. 4 that the word "appropriate level" as used in the Advertisement (Annexure-9), for the purpose of appointment against a teaching post in Engineering College is concerned, such level is to be construed that of I. Sc. standard/ level. Thereby, it was contended by the counsel for the Respondent No. 4 that the Respondent No. 4 having such teaching experience in Mathematics in the "appropriate level", i. e.the level from which admissin is taken in the Engineering College (I.

Sc. level). for all purposes, the Respondent No. 4 is eligible for appointment to the post of Associate Professor, having fulfilling the conditions of 'five years teaching experience at appropriate level'.

10. From the pleadings made by the parties, it will be evident that the main question that is to be determined in this case is as to whether teaching experience as a "part-time teacher", can be construed to be "teaching experience" as is mentioned in the Advertisement dated 4th April, 1993 (Annexure-9) or not. The second point is to be decided in this case as to what is the meaning of "appropriate level", that of teaching exprience, for the purpose of appointment tothe post of AssociateProfessor (Mathematics)in an Engineering College.

11. So far as the word 'experience' is concerned, the general dictionary meaning of the same is 'gaining of knowledge' or 'skill' by doing and seeing things'. The same also includes 'long and varied observations'—personal or general. In the advertisement dated 4th April, 1993 (Annexure—9), the experience of five years(which includes 'teaching experience') have been laid down. The plain reading of the said Advertisement shows that the 'experience' so required is a long and varied experience of teaching 'in this case' and not an occasional experience of teaching. Therefore, for the purpose of giving the meaning of 'teaching experience' as mentioned in the advertisement dated 4th April, 1993 (Annexure—9), it is to be construed that such experience must be a regular experience, and not some sort of experience, here and there, on a date and/or dates, like a part time experience.

Admittedly, the difference between a regular teacher and a part-time teacher is that while the regular teacher supposed to be teaching students regularly, without any break, on the contrary, a part-tme teacher teaches the students on a particular date and/or a month and/or an year. So far as the judgment, which have been referred by the counsel for the Respondent No. 4 in the cases of *Dr. Asim Kr. Bose* (supra) and *Anant Mohan Das*

(supra) are concerned, those cases are completely different and the Respondent No. 4 cannot derive any benefit out of the same. Both the aforesaid two cases relates to teaching experience of doctors who were regular employees. None of the aforesaid cases were relating to the part-time teachers.

12. Apart from the aforesaid fact, it is to be taken into note that the Advertisement talks of 'five years of teaching experience'. The moment it speake of 'five years of teaching experience', it means 'teaching experience' of having totality of five years, meaning thereby five years of regular experence. If such interpretation is not given then there will be a complete anamolous situation. For example, the Respondent No. 4 claimed tohave functioned as part- time lecturer in between 1st January, 1983 to October 1988in Sindri College, Sindri. He has also claimed thathe had functioned as part-time lecturer during the aforesaid period i. e. from1st Feburary, 1985 to October, 1988 in B. I. T. Sindri. If part-time teaching experience is counted with respect to respondent No. 4, in that case, during the aforesaid five years' period, the teaching of Respondent No. 4 will go more than five years. This will be evident from the following calculations :

(A) From 1st January, 1983 to October, 1988 (Part-time lecturer in Sindri College, Sindri.—

—An experience of 5 years and 10 months.

(B) From 1st February, 1985 to October, 1988 (Part-time lecturer in B. I. T. Sindri)—

—An experience of three years and nine month.s

– Total experience of nine years and seven months.

The aforesaid calculation will amount to giving nine years seven months of teaching experience in favour of Respondent No. 4, during the period of five years 10 months (1-1-1988 to October, 1988), as shown above, is absurd.

13. For the reasons stated above, I hold that the 'five years teaching experience', as laid downin the advertisement dated 4th April, 1993 (Annexure—4) means a regular five years of teaching experience as distinct from five years of part-time

teaching experience. The persons who do not have regular five years' teaching experience, but have part-time teaching experience, are not eligible for appointment to the post of Associate Professor (Mathematics) in an Engineering College, in pursuance of the Advertisement dated 4th April, 1993(Annexure—9).

14. So far as experience 'appropriate level' as mentioned in the Advertisement is concerned, my considered views are, as follows:

> The A. I. C. T. E. has laid down rules for appointment and in consonance with the same, criteria in the Advertisement dated 4th April, 1993 (Annexure—9) has been laid down. It speaks of the teaching experience at 'appropriate level' for the purpose of appointment to the post of Associate professor (Mathematics)in an Engineering College. The word 'appointment' includes both direct recruitment as well as through promotion. In this background, the word 'appropriate level' is to be tested, which can be interpreted for both direct recruitment as well as promotion. If the contention as raised by the counsel for the Respondent No. 4 is accepted that the teaching experience at the stage/level of Intermediate course, is to be construed as the teaching experience at the 'appropriate level', in that case, it is to be interpreated that even a teacher of the Intermediate stage will become eligible for promotion to the post of Associate professor. Such interpreation cannot be given, as no teacher of Intermediate level can be promoted to the post of Associate professor. According to me, the persons who are working in the just below stage/level to that of the post of Associate professor, as they can be made eligible for promotion to the higher post of Associate Professor, for all purposes, for appointment to the post of Associate professor, 'appropriate level' is to be held to be a level/stage, just below the level/stage of the post of Associate professor.

15. For the reasons stated above, I hold that the post of Assistant Professor being just below the post of Associate Professor, teaching experience at the 'appropriate level' will mean teaching experience at the level of Assistant Professor and/or equivalentorhigher post and not at any other level.

16. So far as Respondent No. 4 is concerned, he has claimed experience/research work of various period in his counter affidavit. According to me, such teaching experience and/or research work do not make the Respondent No. 4 eligible for appointment to the post of Associate professor. This will be evident from the following discussions.

(a) Claim of teaching experience from 1st January, 1983 to October, 1988, as part-time lecturer in Sindri College, Sindri :—

This teaching experience cannot be counted, as being a part-time teaching experience.

(b) Respondent No. 4 has claimed for 7 (seven) years' of research experienced under Dr. Asraf of B. I. T. Sindri for the period from may, 1984 to Dec.'91 :—

This working experience cannot be taken into account, as no such claim was made by the Respondent No. 4 in his application for appointment, which will be evident from Annexure—R—3/B (the application form of Respondent No. 4).

(c) From February, 1985 to October, 1988, the Respondent No. 4 claimed experience as part-time lecturer :—

This experience cannot be counted, being a part-time experience.

(d) From 2nd November, 1988 upto the date of application, the Respondent No. 4 claimed for teaching experience :—

This experience is less than five years as on the cut off date and the there by, cannot be taken into account to make the Respondent No. 4 eligible for appointment to the post of Associate Professor.

Apart from the aforesaid fact, all the aforesaid part-time experience, research experience and regular experience claimed for by the Respondent No. 4, are not that of 'appropriate level, being experience at the level of intermediate/general graduate standard.

17. For the reasons stated above, I hold that the Respondent No. 4 has got no five years' of teaching experience, as laid down in the Advertisement (Annexure—9) and thereby, he is not

eligible for appointment to the post of Associate Professor (Mathematics) in an Engineering College. In pursuance of the said Advertisement.

Further I hold that whatever the teaching experience that has been claimed for by the Respondent No. 4, and not that of 'appropriate level', as required in terms of the Advertisment (Annexure—9), and for this reason also the Respondent No. 4 is not eligible for appointment to the post of Associate professor (Mathematics) in an Engineering College.

18. Accordingly, I set aside the recommendation dated 24th January, 1994 (Annexure14) as well as the Notification of appointment dated 3rd December, 1994 (Annexure—20). The Respondents are directed to fill up the post of Associate Professor (Mathematice), B. I. T. Sindri, which was occupied by the Respondent No. 4, out of the successful candidates, whose name is appearing in the panel prepared in terms of the Advertisement No. 18/93 (Annexure—9). For the purpose of appointment of the post of Associate professor (Mathematics) in an Engineering College, recommendation is to be made by the Respondents—B. P. S. C. from the said panel, within a period of two months from the date or receipt/production of a copy of this order. The Respondents-State will thereafter issue appropriate notification of appointment in favour of the recommended candidate, within a period of one month from the date of receipt of the said recommendation.

19. The writ petition is allowed with the aforementioned observations and directions. No Cost.

R. D. Application allowed.

CIVIL WRIT JURISDICTION

Before S. J. Mukhopadhaya, J.

1995

August 24.

*Dr. (Mrs.) Jai mala Kamal.**

v.

Indira Gandhi Institute of Medical Science, Patna and others.

Indira Gandhi Institute of Medical Science Act, 1984 (Bihar Act no. X of 1984) Sections 12 subsection (3) and section 27---provisions of---section 12 subsection (3)---Board of Governors of Indira Gandhi Institute of Medical Science whether can delegate powers to the Director of the Institute---draft of the Indira Gandhi Institute of Medical Science Regulation approved by the Board of Governors, but not approved by State Government, effect of---Board of Governors, whether have inherent jurisdiction to make such conditions of service as it is clothed with by way of inherent powers in absence of statutory Regulation---Director of the Institute,suspending an employee---validity of----suspended employee, whether to get full salary during the period of suspension.

Under Section 12 (3) of the Indira Gandhi Institute of Medical Science Act, 1984, hereinafter referred to as the Act, the Board of Governors can delegate powers to the Director of the Indira Gandhi Institute of Medical Science, hereinafter referred to as the Institute. Hence the decision of the Board of Governers, approving the draft Regulation namely Indira Gandhi Institute of Medical Science Regulation hereinafter referred to as the Regulation, issued under section 27 of the Act, is a valid piece of document delegating the power to the Director of the Institute. It is evident that the draft Regulation amounts to a delegation of power by the Boardof Governor to the Director of the Institute by

* C. W. J. C. No. 3975 of 1995. In the matter of an application under Articles 226 and 227 of the Constitution of India.

Resolution dated 19.6.1984. The powers having been delegated to the Director by the Board of Governors to suspend even an employee/officer, who is being apointed by the Board of Governors, the Director has got full powers to suspend the writ-petitioner.

The Draft Regulation cannot beheld to be a Regulation in terms of section 27 of the Act. It can be merely termed to be a decision of the Board of Governors duly approved by it in its meeting. The Board of Governors has the power to lay down condition of service with respect to the employees of the Institute only in terms of section 27 (e) of the Act. It is only by a Resolution, validly approved by the State Government that condition of service of the employees can be framed.

Held, that the Board of Governors can not frame any condition of service by any other mode, as has been done by Resolution dated 5th/6th March,1991 as well as dated 31st August, 1995 and 2nd April, 1986. Though being an employer, the Board of Governors have its inherent jurisdiction to make such conditions of service applicable, as it clothed to it by way ofinherent powers, in absnce of statutory Regulations.

Held, further, that the appointing authority has got power to suspend its employee, even in absence of a statutory rule for suspension in contemplation of a departmental proceeding. The only rider will be that the employee will be gatting the full salary during the period of suspensin.

R. P. Kapoor v. *Union of India* (1)

Cajee v. *U. Jormorika Siem* (2)————followed.

Held, also, that the impugned order of suspension having been made under the signature of the Deputy Director of the Institute, and he having not been made party-respondent, in writ-application, the writ-petition is not maintainable in absence of such party.

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(1) (1964) A. I. R. (S. C.) 737.

(2) (1961) A. I. R. (S. C.) 376.

Held, also, that the writ-petitioner has failed to make out any case of malafide on facts against Sri Mahabir Prasad Chairman of the Institute.

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 Sudhansu Jyoti Mukhopadhaya, J.

M/s. Sunil Kumar, Subodh Kumar, Rajesh Prakash and Anil Kr. Sinha for the petitioner.

M/s. Abhay Kr. Singh, Sr. Adv.,

Sheo jee prasad and Binod Shanker for the Institute.

Mr. V. N. Sinha, G. P. 9 for the state.

S. J. Mukhopadhaya, J. The petitioner, a lady doctor, is an Associate professor of Histopathlogy in the Indira Gandhi Institute of Medical Science, Patna (Institute for short). She has challenged the order of suspension, as contained in letter dated 8th June, 1995 (Annexure—3), issued under the signature of the Deputy Director (Administration) of the Institute.

2. The detail facts for adjudication of this case are not necessary to discus at this stage, as both the parties advanced their arguments on points of law. I will discuss certain facts at relevant places while discussing such points of law.

3. Counsel for the petitioner advanced his argument, as narrated hereunder :

i) The appointing authority of petitioner being the Board of Governors of the Institute, the Director of the Institute has got no authority/jurisdiction to suspend the petitioner;

ii) there is no rule laid down by the Institute to suspend its employees in contemplation of a departmental proceeding,hence the impugned sus-

pension order is without jurisdiction and bad in law and;

iii) the impugned order of suspension has been issued because of mala fideon the part of shri Mahabir Prasad, the Minister of Health, Government of Bihar,Patna (Respondent No. 3). at whose instance the petitionerhas been suspended.

4. To substantiatethe first point.counsel for the petitionerhas drawn my attention towards section 12of the Indira Gandhi Institute of Medical Sciences Act. 1984 (1984 Act for short) and submitted thatthe appointing authority in terms of section 12 of the 1984 Act is the Board of Governors of the Institute.The director ofthe Institute being a lower authority than the appointing authority of the petitionerandhaving not vestedwith such power. cannot suspendthe petitioner.It was furthersubmitted by the counsel for the petitionerthat the Board of Governorshaving been delegated with the power of appointment and disciplinary proce ding with respect to the petitioner. cannot further delegate its power to the Respondent-Director of the Institute.

5. Counsel for the petitioner relied on the decision of the supreme court given in the case of *R. P.Kapoor vs. The Union of India and others* reported in A.I.R.1964 sc 787, and to substantiatehis argument on the basis there of; itis stated that it only the appointing authority.who can suspend its employees, in absence of a statutory rule. Counsel for the petitioneralso relied on the decision of the Supreme Court given in the caseof *V.P. Gindroniya vs.The Stateof Madhya Pradesh and others*, reported in A.I.R. 1970 S.C. 1494. and submitted thatthe power to suspend in the sense of rightto forbid an employee to work, is not an implied term in an ordinary contract between master and servant,but such a power can only be the creature either of a statutegoverning the contract,or an express term in the contract itself.

6. The counsel for thepetitioner while challenging the authority of Directorof the Institute also raised the validity of

appointmentof Director himself. It is contended by the counsel for the petitioner that shri A. N. P. Sinha,the present Director of the Institute is an I.A.S. officer of the state of Bihar. By ad hoc arrangment, it is the Respondent-State of Bihar.who had appointed the Respondent No. 5. as the Directorof the Institute. Counsel for the petitioner while drawing my attention towards the provisionsof the 1984 Act, submitted thatin terms of section 12 (1) of the said Act. the Director is to be appointed by the Board of governors on the recommendation of a Selection Committee.Itis stated that Shri A.P. Sinha, an I.A.S. officer of the state of Bihar, having not been appointedby the Board of Governors, his appointment itself is illegal and thereby, he has no authority to suspend the petitioner.It is also submitted that in terms of the said provisions of 1984 Act,it is only a qualified doctor,who can be appointed after following the procedureof appointment,aslaid down under section 12 of the1984 Act. The Respondent No. 5, Shri A.N.P. Sinha being not a qualified doctor. is not eveneligible for appointmentto the post of Director and for thathehas got no authority to suspendthepetitioner.

7. The counsel for the petitioner, while drawing my attention towardsthe proviso to section12 of the 1984 Act,further submitted thateven for the purposeof appointment on ad hoc basis,the State Government may appoint a person as Director, but such appointment is to be made from amongst the'competent prsons'and 'on the recommendation of the Project Committee'. It is stated that Shri A.N.P.Sinha,an I.A.S. officer,notbeing a competentperson, being nota doctor/medical practitioner; not havingbeen appointed on the recommendation of the Project Committee ofthe Institute,the appointment of ShriA.N.P. Sinha even as a Directoron stop gap basis, is illegal. Such submission was made to substantiate his argumentthatthe said Respondent No. 5 has got no jurisdiction to suspend the petitioner. He relied onthe decision in the case of *University of Kashmir and others* vs. *Dr. Mohd.Yasin and others*, reported inA.I.R. 1974 s.c. 238.

8. With respect to the second point, counsel for the ptitioner submitted that the Board of Governors of the Institute has not yet framed any statutory rule/regulation relating to condition of services of its,employees, including that of the petitioner.He has drawn my attention towards section 27 of the 1984 Act, wherein the power to make regulation has been laid down.It is submitted that the condition of serviceof employees of the Institute, including the teachers ofthe Institute, can be laid down onlyby way of regulation, in terms of section 27 of the 1984 Act. that too after previous approval of the State Government. It is stated that there being no such regulation, the petitioner cannot be suspendedin contemplation of departmental proceeding. counselfor the petitionerhas again referred the case of *R.P. Kapoor* (supra) as well as the case of *V.P. Gindroniya* (supra), for supporting this contention.

9. For the purpose of understanding the third contention raised by the petitioner,certain facts are relevant, as stated by the petitioner, are narrated hereunder.

Accordingto the petitioner,on 7th June, 1995,she wasengrossed in her study of istopathology Evaluations in the library of the Institute. Her attention was drawn to the fact that Shri Mahabir Prasad, Health Minister of the State had come to the library for inspection.The petitionerwas introduced with the Minister, upon which the Minister questioned her presence in the library.The petitioner informed the Minister that her job demanded intensive and extensive studies and research and that is why she was in the library. The Minister thereafter wanted to know the place in the Institute where the petitioner works,when the petitioner repliedthat her work place was primarily laboratory and she studies in the library as well as in her own chambers.It is stated that thereafter,the Minister wanted to have a look at the Laboratory where the petitioner works and on entering laboratory, the Minister enquired from the petitioner as to why there were no patients in the said laboratory.The petitioner informed the Minister thatthe patients are not examined

inthe laboratory and she being Associateprofessor of istopathology, her job is to examine the tissuesin the laboratory through microscope after being processed. It was at this stage,the Minister wanted the petitioner to study two slides and askedher to prepare report on such slides, in his presence.

The petitioner hasalleged that the conduct of the Minister was arrogant, intimidatingand humiliating.The Minister was standing in the laboratory with people in his both sides as well asbehind, In fact,he wassurrounded by number of personsand in their presence, he humiliatedthe petitioner. According to the petitioner,the Minister not only huniliatedthe petitioner, but being made to answer questions, which were clearly beyond the *comprehension of the Minister.*In this background,shefelt extremely chargedand harassed, namely, on two counts,firstly the petitioner being a lady, was deliberately harassed,humiliated and subjected to male chauvinism; secondly thepetitionerbeing an expertin her subject, in her own rightfeltextremely demeaning in being tested on her subject by a person, who was ignorant regarding the same. It is stated thatin the aforesaid background, the petitioner could not subject herself to any form of intellectual subjugation at the hands of the Minister and for that the petitioner walked outof the laboratory in protest.Itis stated thatthe petitioner immediately intimated the matter to the Respondent Director of the Institute, protestingagainst the aforesaid incidentandrequested him to allow her to proceed on indefinite leave. The petitioner alos moved the Indian Medical Association, Bihar Branch for guidance and cooperation vide her letterdated 9th June, 1995.

It has been alleged that the issue involved a 'role problem', where there was apparent roleconflict between the state Government service and aspecialist in a subject. It is stated that the Indian Medical Association has also taken up the issue for taking action as deem fit and proper.The petitioner there after proceeded on leave when she came to know through the Newspaper

dated 9th June, 1995(Annexure-2),thatshe has been placed under suspension.

10. At this stage, it is to be taken into note that the writpetitionwas originally filed for direction on the Respondents not to interferewith the functioning of the petitioneras Associate Professor, Histopathology inthe Institute, andfor directionon theRespondents to produce the alleged order of Respondents publishedin Newspaper andto set aside the same.By one amendment petition,the petitioner has enclosed the impugnedorder of suspension dated 8th June, 1995 (Annexure-3),as statedabove, and has challenged the same. The amendment of the petitioner is allowed.

11. The counsel for the petitioner to substantiate the third point while drawing my attention towards the aforedaid averment, submittedthatthechainof events , as stated above, clearly shown the mala fide attitude on the part of the Respondent-Minister, Sri Mahabir Prasad.It is contended by the counsel for the petitionerthatthe orderof suspension has been issued because of aforesaid incident, at the instance of the Respondent-Minister.

12. The counsel for the petitioner submitted that the grounds which have been given in the impugnedorder(Annexure-3), are all non-existing facts or circumstances and they are completely unreasonable. it is submitted thatthe incident of 7th June, 1955 is the main cause to take action against the petitioner by suspending her.It issubmitted that the Minister of Health has made illegal influence,which is extraneousin nature andthe authorities succumb to such influence. It is contended that such action on the part of the authorities amounts to gross abuseof legal power to punish the petitioner and to destroy her service career in the manner not warranted by law. It is stated that the suspension of the petitioner is not in public interest. The counsel for the petitioner relied on the decision of the Supreme Court in the caseof Smt. S.R. Venkataraman vs. The Union of India and another,reported in A.I.R.1979. S.C. 49. The counsel for the

petitioner also submittedthatthepetitionerhas been suspended by exercising power in bad faith,which will be evidentfrom a chain of events, as statedabove. He relied on the decision of the Supreme Court inthe case of Express News paper Pvt. Ltd. V.s. The Union of India andothers, reported in A.I.R. 1986 S.C. 872.

13. The counsel appearing on behalf of the Institute with respect to the first and second points submitted that the Respondent-Director has got the authority to suspend the petitioner, having been delegated with such power by the Board of Governors of the Institute.Hehasdrawn my attention towards section 12 of the 1984 Act, Particularly sub-section (3) the rein. It is stated that in terms of the said sub-section (3) of section 12, the Director is empowered to perform such duties,not only which is prescribed under regulation,but as may be delegated to him by the Board of Governors. He placed a typed copy of regulation known as Indira Gandhi Institute of Medical Sciences Regulation, Purported to have been issued under section 27 of the Indira Gandhi Institute of Medical SciencesAct, 1984 (for short 1984, Act). The citation of the saidregulation reads, asfollows:

> "In exercise of powers conferred by section 27 of the Indira Gandhi Institute of Medical Sciences Act,1984 (Act10 of 1984),the Indira Gandhi Institute of Medical Sciences,with the previous approval of the State Government, hereby makes the following Regulations namely:

The reafter he referred to Regulation 7(b) there in, which reads as follows:

> 7. Power & Functions of the Director:
>
> × × × ×
>
> b. He shall also exercisethe powers specifiedin schedule of those Regulations as the powers of the Director.

14. The counsel for the Respondents-Institutethereafter reliedon Serial '9' of the Schedule enclosed with the Regulations,which reads as follows :

Sl No.	Nature of Powers	To whom powers deligated.	Extent of Delegation.	Remarks.
9.	Power to suspend and draw up proceedings and impose punishment.	Director	a) Full powers for the posts for which he is the appointing authority.	
			b) Director will be competent to suspend any officer appointed by the Board of Governors and to draw up proceedings against him and inflict following punishments : 2 (I) warning (ii) Censor and stoppageof increments; (III) However in respect of of ficers appointed by the Board of Governors, the punishment of discharge, dismissal and reduction in rank shall be inflicted by the board of goveronrs	

Afterreferringthe aforesaid provisions of the Regulations; counsel for the Respondents-Institute submitted that the power of suspensionhaving been delegated to the Respondent-Director underthe Regulation,which havebeen Framedin terms of section 27 of the 1984 Act, the Respondent-Directorhas rightly issued the impugned orderof suspension (Annexure-3).

Counsel forthe Respondents also drawn my attention towards the proceeding of the Board of Governorsheldon 5th/6th March/1991, vide Resolution No. 32/499, as contained in Annexure-A. Thesame reads, as follows :

"Resolution No. 32/499. To considerand approvedthe change of designation of Clerk/Clerk-Cum-Typist/ Store Clerk/Store Asstt/ Account Assisntant as Assistant.	Not approved. However itwasdecidedthatsalary structure all rules, regulations andserviceconditions, asapplicablein AIIMS will be applicable to all categories of I.G.I.M.S.

It was contended by the counsel for the Respondents thatthe Service Regulation of All India Institute of Medical Sciences,New Delhi having been adopted,it is open to the Respondents to suspend the petitioner in contemplation of departmental proceeding.

He also placed relianceon section 33 of The All India Institute of Medical Sciences Act. 1956", wherein for the purpose of conduct,discipline and penalty, including suspension. 'The Central Civil Services (C.C.A.) Rules1965", has been made applicable mutatis mutandis to the employees of the Institute. The counsel for the Respondents also relied on Rules 7 and 10 of the C.C.S., C.C.A. Rules 1965,to show that there is a power to suspenda person in contemplation of a departmental proceeding.

15. At thisstage,it is to be taken into note that in reply to the counter affidavit,the petitoner has fileda rejoinder. In the said rejoinoer that the Regulation which has been made by the patitioner that.the Regulation which has been placed by the counsel for the Institute before this Court, has never been approved by the State Government even till date, though it has been mentioned therein that the sameis being prepared afterprior approval of the State Government.

On the last occasion, I directed the counsel for the Institute to produce the file relating to suspension of the petitioner as well

as to make specific averment as to whether the Regulation, as produced by the counsel for the Respondents-Institute, has been approved by the State Government or not, in terms of section 27of the 1984 Act.

16. A reply to that affect (second counter affidavit) has been filed on behalf of the Respondents-Institute.They have also produced the relevant file relating to suspenstion of the petitioner.It has been accepted by the counsel for the Institute that the Regulation Placed beforethis Court has not yetbeen approved by the State Government in terms of Section 27of the 1984 Act.

17. The counsel for the Respondents-Institute reliedon different proceedings of the Board of Governors, including proceeding dated 19th June, 1984 (Annexure-B), Proceeding dated 31st August, 1985 (Annexure-D) and a letter dated 16th April, 1995 (Annexure-5).The counsel for the Respondents-Institute submitted that though the Regulation has not yet been approved by the State Government, the same is at last approved by the Board of Governors of the Institute.

The argument of the counsel for the Respondents-Institute is like this :

Interm of section 12 (3) of the 1984 Act, the Director can be delegated with the power by the Board of Governors. By proceeding of Board of Governors dated 31st August, 1985 (Annexure-D), the Regulation having been approved by the Board of Governors,it will amount to delegation of powers by the Board of Governors to the Director for suspending employees, such delegation having been made under the Regulation (which is not approved by the State Government). So, according to the Respondents-Institute, the Director is clothed with the power to suspend the petitioner.

Further, according to the counsel for the Institute, though the Regulation is not approved by the State Government, but by

virtueof Resolution No. 32/49 dated5th/6th March, 1991(Annexure-A), A.I.I.M.S. Rules having been adopted, the petitioner can be placed under suspension in contemplation of a departmental proceeding.

His argument to that effect is like this :

By Resolution No. 32/49 dated 5th/6th March, 1991

(Annexure-A), A.I.I.M.S. Rules and Regulations have been adopted. Section 33 of the A.I.I.M.S.Act is there by applicable to the emplyoyees of the Institute.Section 33 of the said Act having been made C.C.S. (C.C.A. Rules, 1965 applicable, the said C.C.S. (C.C.A.) Rules is applicable to the employees of the Institute. As the C.C.S (C.C.A.) Rules stipulates suspension in contemplation of a proceeding, the employees of the Institute can be suspended in contemplation of a departmental proceeding.

18. So far as the appointment of Shri A.N.P. Sinh.I.A.S. as Director ofthe Institute is concerned.it is contended by the counsel for the Respondents-Institute that the petitioner having not challenged the appointment of said Shir A.N.P. Sinha in this writ petition, she cannot colaterally challenge the same.It is submitted that what has not been challenged directly by the petitioner,she cannot challenge indirectly. It is further submitted by the counsel for the Respondents-Institute that even if it is held that the appointment of shri A.N.P. Sinha as Director of the Institute is bad, any action that has been taken by him, in good faith as the Director of the Institute, cannot be held to be illegal. He relied on the decision given by the Supreme Courtas reportedin 1985 (4) S.C.C. 417, as well as the observations made by the supreme Court at Paragraph 158 in the case of *A.R. Antulay* vs. *R.S. Nair.* reported in 1988 (2) S.C.C. 602

19. With respect to mala fideitis submitted by the counsel for the Respondents-Institute that Shri Mahabir Prasad, thoughe is the Health Minister, but he is the Chairman of the Institute as well. It is stated that Shri Mahabir Prasad being the Chairman and Member of the Board of Governors of the Institute, he inspected the Institute on 7th June, 1995. The counsel for the

Institute there by submitted that whatever the mala fide that has been alleged by the petitioner therein, she has tried to highlight the issue, as if the Minister Incharge of the State Government has interfered with the functioning of the employees of the Institute, which is incorrect. Apart from the said, it is submitted thatthough it is for Shri Mahabir Prasad,who can deny the allegation, but on the basis of materials available on the record (in this writ petition), even no primafacie case has been made out by the petitioner, so far as mala fide on facts is concerned.

20. Having heard the parties andhaving gonethrough the records as well asdifferent provisions of law, my considered views are, as follows :

(1) *Whether the Director has got power to suspend the petitioner :*

It will be evident from section 12 (3) of the 1984 Act thatthe Director can exercise such power and discharge such function, as may be prescribedbyRegulation. Apart from the aforesaid fact, a separate delegation can be made by the Board of Governorsin favourof the Director. In the present case, it is an admitted position that thereis no Regulation that has been framed by the Respondents-Institutein terms of section 27 of 1984 Act, till date no approval having been granted by the State Government on the same. In that view of the matter, the socalled Regulation of the Institute cannot be termed as a Regulation in terms of section 27 of the 1984 Act.

It has been taken into note that the Draft Regulation has been framed by the Board of Governors of the Institute and was placed before the said Board in its meeting dated19th June, 1984 (Annexure-B). By Resolution No.2/15, the said draft Regulation has been approved by the Board. In the aforesaid back-ground, though draft Regulation cannot be treated to be a Regulation under

section 27 of the 1984 Act, but for all purposes, the same can be construed to be a valid resolution and decision of the Board of Governors. As stated above, in terms of section 12(3) of 1984 Act, the Board of Governors can delegate powers to the Director. In this background, the decision of the Board of Governors, approving the draft Regulation is a valid piece of document, delegating the power to the Director of the Institute. The reby, it is evident and clear that the draft Regulation amounts to a delegation of power by the Board of Governors to the Director by Resolution dated 19th June, 1984 (Annexure-B). The powrs having been delegated to the Director by the Board of Governors to suspend even an employee/officer, who is being appointed by the Board of Governors. I hold that the Respondent-Director has got full power to suspend the petitioner.

(ii) Whether the petitioner can be suspended even in absence of a Rule, in contemplation of a departmental proceeding/whether the condition of service laid down for the employees of the AIIMS is applicable to the employees of the Institute or not.

It will be evident from the draft Regulation that it does not speak relating to specific condition of service, particularly Discipline and Appeal Rules, which are to be made applicable for the employes of the Institute. Apart from the aforesaid fact, I have held that the draft Regulation cannot be held to be a Regulation in terms of section 27 of the 1984 Act. It can be merely termed to be a decision of the Board of Governors, duly approved by it in its meeting. It is evident from the decision of the Board of Governors dated 5th/6th March, 1991 (Annexure-A). As well as the subsequent decisions taken by it during its meetings dated 31st August, 1985 (Annexure-D) and 2nd April, 1986 (Annexure-E), by which it has resolved to apply the service conditions, as is

applicable to the employees of the A. I. I. M.S, mutatis mutandis, with rspectto the emploees of the Institute. The Board of Governors has the power to lay down condition of service with respect to the employees of the Institute, only in terms of section 27 (e) of the 1984 Act. It is only by a Regulation,validly approved by the State Government,the condition of serviceof the employeescan be framed. In this background, I holdthat the Borad of Governors cannot frame any condition of service by any other mode, as has been done vide Resolutions dated 5th/6th March, 1991 (Annexure-A), as well as dated 31st August, 1985 (Annexure-D) and 2nd April, 1986 (Annexure-E). Though being the employer, the Boardof Governors have its inherent jurisdication to make such condition of service applicable, as it clothed to it by way of inherent powers, in absence of statutory Regulations.

In the case of R.P. Kapoor Vs. Union of India and others (supra), the Supreme Court held that an employer can suspend an employee pending an enqury into his conduct andthe only question that canariseon such suspension relatating to paymentduringthe period of such suspension. It has held that if there is no express term in the contract relating to suspension and payment duringsuch suspension or if there is no statutory provision in any law or rule, the employee is entitled to have his full remuneration for the peroid of interim suspension. It has specifically laid down that on a general principle, the authority which is entitled to applint a person, would be entitled to suspend him, pending a departmental enquiry into his conduct or pending a criminal proceeding, which may eventually result in a departmental enquiry against him. The apex court further held thatthe employerhas inherent power to suspend its employee, by interim measure of suspension.

Similar finding has been given by the Supreme Court in the case of T.Cajee vs. U. Jormorik Siem, reported in A.I. R. 1961 S.C. 376.

In the caseof Government of India vs.Tarak Nath Ghosh, reportedin A.I.R. 1971 S.C. 823, the Supreme Court pointed out, as follows :

> ".....In substance disciplinary proceeding can be said to be started against an officerwhen complaints about his integrity or honesty are entertained and followed by a preliminary enquiry into them culminating in the satisfaction of the Government that a prima facie case has been made out against him for the framing of charges. When the order of suspension itself shows that Governmentwas of the view thatsuch a prima facie case for departmental proceding hadbeen made out than fact thattheorderalso mentions that such proceedingwere contemplated makes no differnce."

In the light of the aforesaiddecision of the Supreme Court and discussions madeabove, I hold that the appointing authority had got powerto suspendits employee, even in absence of a statutory rulefor suspension in contemplation of a departmental proceeding.The only rider will be that the employee will be getting the full salary duringthe periodof suspension.In the presentcase, the appointing autohrity of the petitioner, the Board of Governors, having delegated powers to suspendan employee, to the Director ofthe Institute, interms of section 12 (3) of the 1984 Act. I hold that even in absence of statutory Rules/Regulations, the Director can suspend the petitioner, even in contemplation of a departmental proceeding. Thereby, the impugned order of suspension, to that effect, has been validly passed. But since therehas been no statutory Rule/Regulation/Instruction, I hold that the petitioner is entitled for full salary during the period of suspension.

I have not accepted the contention of the counsel for the Institute thatthe conditionsof service as applicable in the A. I. I.M.S., can be made applicable to the Institute interms of the Resolutionof the Board of Governors. Even if such contentionis accepted, it will be evident from C.C.S. (C.C.R.) Rules1965 that

there is no provision laid down therein for paymentof subsistance allowance, during aninterim period of suspension. In this background also, the petitoner is entitled for full salary for the period of suspension.

(iii) Whether the appointment of Shri A. K. N. Sinha, the Present Director of the Institute is legal or not.

I have discussed in thepreceding pragraph,the contentions raised by both the parties, including the counsel for the Institute. I accept the contentions as raised by the counsel forthe Institute.The petitioner has not challenged the appointment of Shri A.K.N Sinha, the Director of the Institute. Shehas challenged herorder of suspension. In this background, I hold thatthepetitioner cannot colaterally challenge the appointment of Shri A. K. N. Sinha, in the present writ petition, that too indirectly. The refore, I have not given any finding in this case as to the appointmentof Shri A. K. N. Sinha, the present Director of the Institute is legal or not.

Similarly, no challenge havingbeen made by the petitioner with respect to appointment to the post of Deputy Director of the Institute and Dr. D.R. Yadava, under whose signature Annexure-3 has been issued, and having not been made a party-Respondent either 'by name' and/or by 'designation', I am not inclined to given any finding as to whether the appointment of the Deputy Director of the Institute is legal or not.

Further,the impugned order of suspension, as contained in Annexure-3 having been issued under the signature of Deputy Director of the Institute,and he having not been made party-respondent to thepresent writ petition. I hold that the writ petition is not maintainable in absence of such necessary party.

(iv) Whether the order of suspension has beenissuedonmala fide at the instance of Shri Mahabir Prasad.

I have already discussed the pleadings made by the petitioner in the preceding paragraph. I have also gone through the two documents that have been enclosed by the petitioner, as

Annexure-1 series as well as the news paper report, as contained in Annexure-2. After having gone through the pleadings of the petitioner as well as the documents aforesaid, In find that the petitioner has miserably failed to make out any case of mala fide on facts against said Shri Mahabir Prasad.

In the case of S. Pratap Singh vs. the State of Punjab, as reportedin A. I.R. 1964 S. C. 72, as referred by the petitioner, the same is not applicable in the presentcase. In the said case, the Supreme Court lookinto note the chain of event, as was there in the said case. In the presentcase of petitioner, thechain of eventsare like this :

(i) Shri Mababir Prasad visited the Institute for Inspection on 7th June, 1995. According to me, though as a minister of the State, he may not have any supervisory jurisdiction, but he being the Chairman of the Institute andtherby a Member of the Board of Governors (appointing authority of the petitioner), I find no infermity in his such inspection :

(ii) Shri Mahabir Prasad asked thepetitioner as to why there being no patientin the Laboratory. He was surrounded by a numberof persons. According to me, a person who has got no specific knowledge relating to medical subject like Histo-pathology, if such person makes a query as to whether patients are treated in the Laboratory ornot, that cannot be termedto be a mala fide, as it is always open to the authority to know as to howthe teachers function in a faculty like Histo-Pathology. This act on the part of the Chairman of the Institute also cannot be held to be mala fide on his part:

(iii) The allegation of the petitioner that Shri Mahabir Prasadaskedher to reporton two slide in his presence. I find nothingwrongin the same. Shri Mahabir Prasad

being the Chairman of the Institute and thereby the Member of the Board of Governors, has got rightto makeinspection and evenif such authority hasgotno knowledgerelatingto a particular subject, can ask its employee to preparereport in his presence, so as to see the performance of the employee. Thereby, I hold that this action on the partof Shri Mahabir Prasad, the Chairman of the Institute does not amount to any mala fide action :

(iv) So far as 'sexual harassment' as highlighted by the petitioner in her two letters, giving the aforesaid incident, according to me, the chain of events do not reflect any such 'sexual harassment' including implied one.

The chain of events,asstated by the pertitioner, and as taken into note in the preceding paragraph, cannot be termed to be mala fide, nor can it be observed that there is any objectionable atomsphere thatwas prevailing on the said date in the Institute.

Accordingly, I reject thecontention of the petitioner relating to mala fide.

21. For the reasons stated above, I finde no merit in the writ petition and thesameis rejected.

22. However, taking into note the various controversies which have come to the notice of this Court, in public interest, I am making certain observations, on the basisof admittedfacts.

It has been accepted by the counsel for the Respondents that sincetheconstitution of the Institute,the post of Director of the Institute has never been filledup on regular basis, except on one or two occasions, that too for few months. All the time, the Respondents-State of Bihar is appointingPersonson adhoc basic that too without following the provisions of section 12 of 1984 Act. Even the adhoc appointments are being made without any recommendation of the project committee and/or the Board of

Governors of the Institute. It has alos been accepted by the Respondents that there is no formal order that has been issued sanctioning any post of Depty Director (Administration).

In this background, I pass the following order :

(a) The post of Director of the Institute be filled up by regular appointment from amongst eligible persons, in accordance with 1984 Act. Such appointment is to be madewithina period of six months from the date of receipt/prodictionof a copy of this order. The ad hod arrangement may continue till such regular appointment is made but, in any case, such further ad hoc arrangenent should not continue after the aforesid period of six months, without taking any further order from this court.

(b) The Respondents, Particulary the Board of Governors of the Institute will decide within a period of two months from the dateof receipt/production of a copy of this order, as to whether they require a Deputy Director for the Institute or not. If they so require, the post of Deputy Director ahould be createdwithinthe aforesaidperiodoftwo months. On the other hand, if they do not requireany Deputy Director anddo not createsuch post of Deputy Director withina period of two months aforsaid,thenon completion of two months, period,nobody should be allowed to function as Deputy Director ofthe Institute.

(c) I further direct the Respondentsto pay the petitioner her full salary during the peroid of suspension and:

(d) the Respondensts are also directed to conclude the departmental proceeding, if they choose to proceed with the same and pass final order thereon. within a period of six months from the date of receipt/production of a copy of this order. The petitioner is directed to coopeate in the departmental proceeding. If the petitioner does not cooperate in the

departmental proceeding, in that case, it will be open to the Respondentsto proceed expare, in accordance with law. If the departmental proceedin is not concluded and final order is not passed within a period of six months aforesaid, in that case,the order of suspension will stand revoked on completion of the aforesaid period of six months. It is made clear that the final order is to bepassed by the appointingauthorityof the petitioner i.e. the Board of Governors.

23. The writ petition is dismissed with the aforementioned observations and directions.

R. D. Application dismissed

CRIMINAL WRIT JURISDICTION

Before Naresh Kumar Sinha, J.

1995.

August, 31.

Bhole Nath alias Bhola Nath Sah.

v.

The State of Bihar and anr.

Constitution—Article 227-ambit of-in case where second revision application was barred, writ application under Article 227, whether maintainable-Code of Criminal Procedure, 1973 (Central Actli of 1974) section 125-failureof wife to aver in the application that 'she was unable to maintain herself', whether will affect the jurisdiction of the Magistrate to grant. maintainance.

Mere failure to aver in application under section 125 of the Code of Criminal Procedure 1973 hereinafter referred to as the Code, for maintenance by wife thatshe is unable to maintain herself is not fatal where wife has stated on oath that she was unable to maintain hersalf.

Held that the absence of words 'unable to maintain herself' inthe pleading is only a technical irregularity and would not affect the jurisdiction of the Magistrate to grant maintenance.

Strict rules of pleadings as in a civil suit are not applicable to proceedingundersection 125 of the Code.

Writ application under Article 227 of the Constitution of India is not maintable when a second revision application by the husband was barred by sectioon 397 (3) of the Code.

Csse laws discussed.

Application under Articles 226 and 227 of the Constitution.

The facts of the case material to this report are setout in the judgment of N. K. Sinha, J.

Criminal WritJurisdiction Case No. 614 of 1993. In the matter of an application underArticles 226 and 227 of the Constitution of India.

M/S. Rana Pratap Singh and Anant Bijay Singh for the petitioner.

Mr. Ram Subhas Singh for the State.

M/S Suraj Narain Yadav, P.N. Pandit and Bharat Prasad. for the respondent no. 2.

Naresh Kumar Sinha, J.

In this application under Articles 226 and 227 of the constitution of India the petitioner-husband prays for issue of a writ of certiorari for quashing the order dated 11. 8. 92 (Annexure-1) passed by the learned sub-divisional Judicial Magistrate, Buxar, granting maintenance of Rs. 500/- per month to respondent no. 2-wife as also the order dated 28. 6. 93 (Annexure-2_ passed by the learned Addl. sessions Judge. Buxar, dismissing the revision against the said order.

2. Respondent no. 2-wife filed an application u/s. 125 of the codeof criminal procedure (hereinafter referredto as the 'code')for grant of maintenance at the rate of Rs. 2000/- per month from the petitioner whom she claimsto have married in theyear 1968. She alleged torture anddemandof dowry and claimed that the petitionerhusbandtook a second wife whom hemarried in1971-72.The husband admittedrespondent no. 2 to be his legally wedded wife but resisted the application on the ground that she was having adulterous relationship with her brother-in-law. Both the parties adduced evidence both oral and documentary.The learned S. D. J. M. allowed the application by his order dated 11. 3. 92 andgranted maintenance at the rateof Rs. 400/- per month to the wife holding that her husband had neglacted maintaining her. A revision preferred by the husband against the said order was dimissed by the learned Addl. Sessions Judge by his order dated28. 6. 93

3. The husband– the writ petitioner has sought qushing of the impugned orders by this court in the exercise of its writ jurisdiction mainly on the ground thattherewas no averment by the wife in her application for maintenance or in her statament recorded

by the learned Magistrate thatshe wasunable to maintain herself and that no such finding was racored by the learned S. D. J. M. which was sine quanon for grant of mainteance u/s. 125 of the Code. Some other grounds were also taken in the wrintpetition but were not pressed in course of argument.

4. Sri Rana Pratap Singh learned Sr. Advocate appearing for the petitioner relied on a full Bench decision in Surendra Singh v. State of Bihar (1) to support his contention that orders passed by criminal courts are also amenable to judicial superintendence over subordinate courts by the High Court under Article 227 of the Constituion. N. P. Singh, J (as his lordship then was and presently a Judge of the Supreme Court) Speaking for the Bench comprising of five judges held to quote—

(i) Judicial orders passed by the criminal courts are amenable to the jurisdiction of the High Court under Article 227 of the Constitution.

(ii) Where appeals or revision applications or application under section 482 of the Code are maintainable before this Court for setting side such orders there is no question of exercise of power under Article 227.

(iii) Where appeals or revision applications or applications under section 482 of the Code cannot be entertained by this Court for setting aside such orders, power under Article 227 can be exercised in exceptional cases.

(iv) Where petitioner has already invoked the revisional jurisdiction of the sessions Judge under section 397 of the Code and his second revision application to this Court is barred under section 397 (3) it would indeed require very exceptional circumstances to warrant interference under Article 227 of the Constitution, since the power of the superintendance is not meant to circumvent the statutory bar."

The Full Bench constituted to consider the correctness of the Full Bench dacision of the court in the caseof Ramesh Kumar Ravi alias Ram Prasad V. The State of Bihar andothers (1987 PLJR 650) referred to a number of decisions of the Apex

(1) (1991) 1 B. L. J. 45.

courtincluding Chandrasekhar Singh vs. Siya Ram Sing (A.I.R. 1979 S. C.I.) Jagir Singh vs. Ranbir Singh (A. I. R. 1979 S. C. 381) and held that the decision in Ramesh Kumar Ravi's case (supra) (1) (1991) I. B. L. J. 45. that no writ would lie against the judicial process established by law andthatthe judgmentandordersof the judicial Magistrate and the court of session would be totally out of the purview of the writ of certiorari andamenableonly to the processof appeal, revision or the inherent jurisdiction of the High Court u/s. 482 of the Code and there after by way of a special leave to the Supreme Court did not lay down the correct law. The Full Bench in Surendra Singh's case (supra) observed that any attempt to obliterate the power of this court under Art. 227 of the Constitution by any statutory provision or judicial pronouncement shall be a futile attempt because that will amount to abridging or curtailing the power which flows from the Constitution itself. It, however, laid down a caution thatat the sametimeit has to be borne in mind thatthe axtra ordinary power vested in the Hihg Court under Art. 227 of the Constitution is to be exercised only to keep the courts subordinate to the High Court within the boundsof their authority so thatthey may perform their duties and do not exceed their jurisdiction.

5. In the instantcase the admitted case of the parties is that the husband had challenged the orders granting maintenance to the wife in revision before the sessions court u/s.397 of the Code andthe learned Addl. Sessions Judge had disimissed the same. In the circumstances as laid down by the Full Bench in Surendra Singh's case (supra) wherethepetitioner had already invoked the revisional jursidiction of the Sessions Judge and his second revison application to this court is barred u/s. 397 (3), it would indeed requirevery exceptional circumtances to warrant interference under Art. 227 of the Constitution, since the power of superintendence is not meant to circumvent the statutory bar.

6. Thus the petitioner's contention that this court has the necessary jurisdiction under Art. 227 of the Constitution to even interfere with the impugned judicial orders has got to be accepted ascorrect but the question for consideration is whether

exceptional circumetances exist to warrant such an interference ? Sri Singh referred to the provisions of section 125 (1) (a) of the Code in support of his contention that the husband's liability who has sufficient means and neglects or refuses to maintain his wife is dependent on the condition that the wife is unable to maintain herself. He argued that no wife could be allowed maintenance unless she made an averment that she was unable to maintain herself. The wife in her application to the Addl. Chief Judicial Magistrate copy of which is Annexure-3 u/s. 125 of the Code and which was subsequently transferred to the court of the S. D. J. M. had made no averment that she was unable to maintain herself. It was also pointed out that the wife in her statement before the learned Magistrate did not make any such claim and the learned S. D. J.M. in his order (Annexure-1) also did not record any finding that the wife was unable to maintain herself. Mr. Singh referred to a decision of a learned single Judge of the Allahabad Hight Court in Manmohan Singh v. Mahindra Kaur (1976 Cr. L. J.1664) whereit was held that awardof maintenance is illegal wherethe wife in her application or in the statement recorded by the Magistrate did not state that she was unable to maintain herself andwhereno finding was given to that effect. He also citeda decisionof thelearnedsingle Judge ofthe Karnatak High Court in Smt. Haunsabai vs. Balkrishna (1) that a petition for grant of maintenance to the wife u/s. 125 of the code must fail where the wife fails to make an averment that she was unable to maintain herself and also failed to establish the fact. Learned counsel argued thatthe above two decisions are applicable to the facts of the present case as the wife did not make any avermentin herpetition that she was unable to maintain herselfand had also failed to establish the factin her statement before the Magistrate. The petitioner has filedthestatement made by the wife in the proceeding before the Magistrate. It was incumbentupon him to do so to support his contention that the wife did not make any such claim in herdeposition before the Magistrate.This is all the more significant because in para 3 of the revisional order (Annexure-2) the

(1) (1981) Cr. L. J. 110.

learned Addl. Session Judge while statingthe case of the wife had also mentioned that "she was unable to maintain herself". There is no averment in the writ petition that order of the learned Addl. Session Judge contained some factual errors. The learned Addl. Sessions Judge was cartainly not correct in his observation that the learned S. D. J. M., Buxar, had found and held among other things that the wife was unable to maintain herself. It is nonthe less true that the wife in her application (Annexure-3) madeno such averment. It has to bekept in mind that the provisions ofsection 125 of the Code are in the nature of a measure of social justice falling within the constitutionals weep of Articles 15 (3) and 39 enacted to protect the weaker sections like women and children. The object is to compel a man to perform moral obligation which he owes to society in respect of his wife children andparents. The jurisdiction of the Magistrate is preventive and not remedial and certainly not punitive. The scope is limited. Orders passed by the court as experessly provided u/s. 127 (2) are subject to any final adjudication by a civil court regarding the status and civil rights. There arenumber of authorities in support of the view that at having a social purpose section 125 and sister clauses in their interpretation must receive a compassionate expanse of the sense that the words permit. Strict rules of pleadings as in a civil suit are not applicable to proceedings u/s. 125 of the Code. Thus mere failure to aver in application for maintenance by wife that she is unable to maintainherself is not fatal where wife has statedin her statement on oath that she was unable to maintain herself. In other words the absenceof words "unable to maintain herself" in the pleadings is only a technical irregularity and would not affect the jurisdiction of the Magistrate to grant maintenance. Despiteabsence of such a pleadings the wife could have made out such a case in her evidence before the Magistrate. In theinstant case the wife had entered the witness box and examined herself as a witness but the writ petitioner did not producea copy of the same.

7. The learned S. D. J. M. did not record a finding that the wife was unable to maintain herself and the observations of the learned Addl. Sessions Judge to the contrary must be ignored.

Even assuming that the wife did not make a claim that she was unable to maintain herself in her evidence before the learned Magistrate as a result of which no such finding was recorded in her favour, the question is should this court in the exercise of its extra-ordinary powers interfere with the order ? The undisputed fact is that the husband contested the application and examined a number of witnesses including himself. The only ground on which he resisted the application was that the wife was having an adulterous relationship with her brother-in-law. Though the learned S. D. J. M. failed to record any finding on the allegation made by the husband that the wife was living in adultery, the learned Addl. Session Judge referred to the evidence adduced in course of the proceedings and recorded a finding that the husband's allegation were baseless. The husband had written two letters to the brother-in-law who was examined as a witness in the proceeding and in none of the two letters the husband made any allegation that his wife was living in adultery with him. The brother-in-law denied the allegation in the witness box and no suggestion was given to him in the cross-examination by the husband that as was living in adultery with his wife. Thus any failureon the partof the learned S. D. J. M. to recorda findingin theallagation of the husband that wife was living in adultery is of no consequence as the learned Addl. Session Judge took care and pains to record a finding against the husbandon the basis of the evidnece adduced in coruse ofthe proceeding. From the ordere of the learned Addl. Sessions Judge it appeare that the husband did notdisputethe claim of the wife that she was legally married to him and slso admitted that be had taken a second wife. It is also beyond doubt that the petitioner who contested the application for grant of maintenance by entering into evidence and also filed a revision against the order of the learned S. D.J. M no where claimed that the wife had means to maintain herself and was, therefore, not entitled to the grant of maintenance. If the law provides that a wife in orderto get maintenance u/s. 125 of the Code should be a wife is unable to maintain herself, the converse also holds good that a husband can resist an application for grant of such maintenance on the ground that the wife

had means to maintain herself. Where both the parties i.e. husband and the wife adduced evidence in coures of theproceeding the question as to on whom the burden of proof lies loses much of its significance.

8. Whether or not the wife is unable to maintain herselfis a question of fact. The point iswhethersuch a disputed questionof fact can be gone into, considered and decided in course of hearingof a writ application. The question strictly speaking does not arise. There is no dispute raised by the husband neitherbefore the learned S.D. J. M. in courss of hearing of the application u/s. 125 of the Code or beforethe revisional court that the wife had means to maintain herself. Nowhere in the writ petition the petitionerhas made any averment that the wife had means to maintain herself. Even whena query was made by the court in course of hearing of this application learned counsel for the petitioner did not make any statement atthe Bar that the wife, according to the husband, had means to maintain herself.

9. Even assuming that the ordergranting maintenancewas notstrictly speaking legal, could this court interfere with such an orderunder Art. 227 of the Constitution when a second revision to this court by the husband was barred by section 397 (3) of the Code ? In my opinion the obvious answer is in the negative. Instead of the husband having made out any exceptional circumstances to warrant such an interference by this court, circumstances existed to the contrary suggesting that no such power ought to be exercised. The petitioner ought not to be allowed to raise a technical question beforethis court that the wife had not proved that she was unable to maintain herself when he did not raise any such dispute before the learned Magistrate or the Sessions court in revision and even did not care to make any averment in the writ petition that the wife had means to maintain herself.

10. This writ application has thus no merit and is dismissed with costs :

R. D. Application dismissed

CIVIL WRIT JURISDICTION

Before S. K. Home Chaudhuri. J.

1995

January, 2

Manu Ram *

v.

The State of Bihar and others.

Constitution of India—Articles 14 and 16—fundamental rights guaranteed under, whether violated in the matter of promotion of writ-petitioner from the post of Dalpati to the post of Panchayat Sewak—Letter no. 3537 dated 26. 11. 1987 issued by Director Panchayati Raj-cum Additional Secretary Department of Rural Development's rescribing the guidelines for fixation of inter se seniority of the Dalpaties-Respondent no. 3 promoting Respondent no. 7 to 20 on the basis of seniority list prepared on 3. 1. 1987-validity of.

When Director, Panchayati Raj-cum-Additional Secretary, Government of Bihar, Department of Rural Development, the competent authority, issued instruction contained in Letter no. 3537 dated 26. 11. 1987 prescribing the guidelines for fixation of inter se Seniority of the Dalpaties, viz, on the basis of the date of approval of their appointment and in the case of the date of approval being the same, the date of the respective appointment of such incumbents was to be taken into consideration, there could not be any justification on the part of Respondent no. 3 to stick to the earlier seniority list said to have been prepared on 3. 1. 1987 without any guidelines.

Held, that, the seniority list preparedon 3. 1. 1987 has no force after the instruction was issued by the Director Panchayati Raj-cum-Additional Secretary Department of Rural develop-

* Civil Writ Jurisdication Case No. 9220 of 1992. In the matter of an application under Articles 226 and 227 of the Constitution of India.

ment in his letter dated 26. 11. 1987. This is the only guideline for fixation of Seniority of Dalpaties. As such, promotions of Respondent no. 7 to 20 to the postof Panchayat Sewak ignoring the case of the writ-petitioner are violativeof the fundamental rights guranteed under Articles 14 and 16 of the Constitution of India.

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

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

S. K. Homchaudhuri, J. The petitioner's grievance in this petition is that he has been unjustly and arbitrarily superseded in the matter of promotion to the post of panchayet Sewak from the post of Dalpati by the impugned orders passed in between 6. 5. 1989 to 3. 3. 1990 (as contained in Annexures 6, 6/A,6/B and 6/C). The petitioner's prayer is to quash the impugned orders, which according to the petitioner have been passed in violation of his fundamental rights guaranteed under Articles 14and 16 of the Constitution of India.

2. The petitioner was appointed as Dalpati on 20. 6. 1976 and got training in 1985. As per the instruction contained in letter no. 3537 dated 26. 11. 1987, issued by the Director, Panchayati Raj-cum-Additional Secretary, Government of Bihar, Deparment of Rural Development seniority of Dalpaties was to be fixed on the basis of the date of approval of their appointment as Dalpaties and that in case the date of approval is the same, then the date of their respective appointment would be taken into consideration for fixation of seniority. But the said letter dated 26. 11. 1987, the District Magistrate was directed to prepare the seniority list of Dalpaties for the purpose of their promotion to the post of Panchayat Sewak. It is not disputed that the posts of Panchayat Sewak are filled up from the posts of Dalpaties according to their seniority. The petitioner's case is that on the basis ofthe Government instruction dated 26. 11. 1987, the petitioner is senior to Respondents no. 7th 20. In

paragraphs 12 of the petition, the petitioner has given the dates of approval of appoinements of Respondents no. 7 to 20 as follows—

Respondents No.	*Date of approval*
7	9.1.1979
8	27.2.1980
9	27.2.1980
10	27.2.1980
11	21.4.1980
12	21.4.1980
13	10.8.1981
14	16.7.1981
16	3.12.1981
16	28.1.1982
17	27.2.1980
18	27.2.1980
19	24.11.1981
20	13.12.1982

3. According to the petitioner, the date of approval of his appointment is also 9.1.1979; but having been appointed earlier to Respondent no. 7, he is senior to Respondent no. 7. No seniority list was prepared as per the direction contained in the letter dated 26.11.1987. However, by the impugned order, Respondents no. 7 to 40, who are juniors to the petitioner in the rank of Dalpati, were promoted to the post of Panchayat Sewak in supersession of the petitioner's claim for promotion. The petitioner has annexed a copy of the instruction contained in the letter dated 26.11.1987 as Annexure 5 to the petition.

4. In the affidavit-in-opposition, filed on behalf of Respondent no. 3, aforesaid facts are not disputed. It has, however, been contended on behalf of the Respondent no. 3 that as per

instruction contained in the letter No. 538 dated 30.1.1981, a seniority list of Dalpati was prepared and no seniority list in the district was prepared as per subsequent instruction dated 26.11.1987. Respondent no. 7 to 40 were promoted on the basis of seniority list, prepared as per instruction contained inletter dated 30.1.1981. Although the Respondent no. 3 has referred to the letter dated 30.1.1981, no copy there of annexed to the counter-affidavit. However, letter dated 30.1.1981has been published at page 723 of the Departmental Compendium. The learned counsel for the petitioner has furnished a translated copy of the said letter. None of the Respondents no.7 to 40 has contested the petition.

5. I have heard learned counsel for the petitioner and learned Government Advocate for the State.

6. Learned counsel for the petitioner submits that prior to issuance of the instruction by letter dated 26.11.1987, no instruction was issued prescribing quideline for fixation of inter se seniority of the Dalpaties, and after the said quideline for fixation of inter se seniority of the Dalpaties, question of preparation of inter se seniority of the Dalpaties in the district concerned arose. As such, before considering the case of promotion as Panchayat Sewak and passing the impugned orders in the year 1989 purporting to promote Respondents no. 7 to 40, it was incumbent on the part of Respondnt No. 3 to prepare the inter se seniority of the Dalpaties in the district. The learned counsel for the petitioner submits that apparently by the letter dated 30.1.1981, the earlier instruction dated 26.12.1979, was simply modified, but the provided no guideline for fixation fo seniority of the Dalpaties. The learned counsel for the petitioner further submits that undisputedly as per the guideline in the instructions issued under letter dated 26.11.1987, the petitioner is senior to Respondents No.7 to 20 in the cadre of Dalpaties and he has, thus, been superseded in the matter of promotion to the post of Panchyat Sewak in violation of has fundamental rights guaranteed under Articles 14 and 16 of the

constitution of India. The learned Government Advocate, onthe other hand, submits that the promotion to the post of Panchayat Sewak was made on the basis of the seniority list prepared on 3.1.1987 and as per the said seniority list the petitioner's position was below the postion of Respondents no. 7 to 40 and consequently the petitioner was not promoted to the post of Panchayat Sewak. In the course of hearing, the learned Government Advocate has produced the copy of the inter se seniority list of Dalpatiesin the district said to have been prepared on 3.1.1987.

7. I have considered the submissionsmade by the petitioner and the Respondents and perused the materials placed before me. On perusal of the contents of the letter dated 30.1.1981, I find force in the submission of the learned counsel for the petitioner that the said letter did not provide any guideline for fixation of inter se seniority of the Dalpaties. The so-called seniority list produced in the court discloses that the seniority was fixed on the basis of the year of training. on what basis the year of training was taken as a guideline for fixation of the inter se seniority of the Dalpati is inexplicable. The letter dated 30.1.1981 does not at all contemplate that the inter se seniority of the Dalpaties was fixed on the basis of the dateof training. Moreover, when the competent authority issued instruction dated 26.11.1987 prescrting guideline for fixation of inter se seniority of the Dalpaties, nemely. on the basis of the date of approval of their appointment and in the case of the date of approval is same, the date of the respective appointment of such incumbents would be taken into consideration, there cannot be any justification on the part of Respondent no. 3 to stick to the earlier seniority list said to have been prepared on 3.1.1987, without any quideline. The seniority list stated to have been prepared on 3.1.1987 had no force after the instruction was issued by the Director, Panchayati Raj-cum-Additional Secretary, Govrnment of Bihar, Department of Rural Development in his letter dated 26.11.1987. Indeed, this is the only guideline for fixation of seniority of the Dalpaties. Admittedly, the impugned

order purporting to promote Respondent nos. 7 to 40 were issued long after issuance of the instruction dated 26.12.1987. Undisputedly, if the inter se seniority of the Dalpaties were fixed in compliance with the instruction dated 26.11.1987 the petitioner would be senior to at least Respondent no. 7 to 20 in cadre of Dalpaties. As such, promotions of Respondents no. 7 to 20 to the post of Panchayat Sewak ignoring the case of the petitioner are violative of his fundamental rights as guaranteed under Articles 14 and 16 of the Constitution of India.

8. For the reasons stated above, the petition is allowed. Respondent no. 7 to 20 were promoted in the year 1989. If the impugned orders are quashed, it will create complication and cause great hardship to Respondents no. 7 to 20. Since the seniority is the basis for promotion and it not being the case of Respondent no. 3 that the petitioner was otherwise unfit for promotion, ends of justice will meet, if the direction is issued to Respondent no. 3 to aborb the petitioner against the vacant post of Panchayat Sewak on and from the date of appointment of his immediate junior, namely, Respondent no. 7. In case no post of Panchayat Sewak is available, Respondents no. 1 to 4 shall create a supernumerary post to give effect to the afore said direction. The petitioner shall be entitled to annual increments from the date of appointment of his junior (Respondent no. 7) in the pay scal of Panchayat Sewak. The petitioner shall be assigned seniority above Respondent no. 7 to 20 in the card of Panchayat Sewak. However, the petitioner will be entitled to get arrears of salary in the pay scale of Panchayat Sewak on and from the date of approaching this court i.e. 15.9.1992. The Respondents no. 1 to 4 shall carry out the afore said direction, expeditiousaly, within a period of four months form the date of receipt of a copy of this judgment and order. I make no order as to cost.

R.D. Application allowed

CIVIL WRIT JURISDICTION

Before S. K. Homchaudhuri, J.

*Chandra Kishore Jha.**

v.

The State of Biharand others.

Service—writ petitioners who are Acharyas and Fazils claim to be equated with the trained graduates-they were yet to be granted replacement scale-writ-petitioners claimed that the replacement pay scale accrued to him in 1968, but filed writ application for the relief in 1979-whetherguilty of latches.

It is clear from the last paragraph of the Resolution of the Education Department, Government of Bihar, dated 4.5.1968 that Acharyas and Fazils, who were equated with trained graduates, were yet to be granted replacement scaleof pay of Rs. 220to 400 as paid to the trained graduates. The Writ-petitioner neither made any statement nor annexed any document granting the replacement scale to Acharyas and Fazils.

Held, that the writ-petitioner's claim has become stale due to the laches on his part in part in pursuing his remedy in as much as according to the writ-petitioner he was denied the right to the pay scale which accrued to him in 1963, but he approached the High Court for the first-time in1979. The writ-petitioner's contention about pursuing remedy by making representations is casual and vague.

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

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

Mr. Gajendra Kumar Jha and Mr. Satish Chandra Jha. In the petitioner.

Mr. P. K. Sharma, J. C. to G. P. 7. for the respondents.

*Civil Writ Jurisdiction Case No. 4426 of 1990. In the matter of an application under Articles 226 and 227 of the Constitution of India.

S.K.Homchaudhuri, J. The prayer of the petitioner in this petition is for issuance of an appropriate writ, order or direction commanding the respondents to grant the petitioner the pay scale of Subordinate Education Services (Gr.), namely, Rs. 220-440/- with effect from 1.4.1968 with all consequential benefits.

2. The petitioner was appointed in the Subordinate Education Service in Lower Division as Sanskrit Teacher (Jyotis acharya) in the year 1958 by the Director, Public Instruction, Bihar, by order dated 30. 1.1958 and, thereafter, he was confirmed in the said post by order dated 16.2.1962. According to the petitioner in the year 1964, the Government of Bihar, Department of Education, decided that the Acharyas and Fazils should be treated as equivalent to the Trained Graduates.

3. In paragraphs 6 and 7 of the petition, the petitioner has stated as follows—

"6. That by another resolution of Government of Bihar dated 4th May, 1968 Model Scale of Acharya was fixed at Rs. 220-9-30-EB-400/- and the same given into effect from 1.4.1968.

That the petitioner in accordance with Annexures 3 is entitled to salary in the pay scale of Rs. 220-400/- from 1.4.1968." But on perusal of a copy of the resolution dated 4.5.1968, annexed as Annexure-3 to the petition. I find that the contentions made in paragraphs 6 and 7 of the petition are not correct, inasmuch as, it is apparent from the last paragraph of the resolution dated 4.5.1968 that the Acharyas and Fazils were yet to be granted the benefit of the pay scale of Rs. 220-9-310-EB-400. The last paragraph of the resolution dated 4.5.1968 translated copy of which is suppling by learned consel for the petitions & as follows—

"Acharyas and Fazils who are requated with trained graduates will not get the replacement scale of pay of Rs. 220-9-310-EB-400 for trained graduates, Separate instruction will, however, issue in respect of

manner in which they will be brought on the new scales of in which they will be brought on the new scales of pay. Indicating the different stages of staggering, pending issue of final order in this regard, Acharyas and Fazils may be given on 1St April, 1968 anx ad-hoc increase of Rs. 15/- in the salary which they would have got in the existing scale on that date."

4. In paragraph-9 of the petition, the petitioner has contended that as has been discriminated in the matter of grant of said pay scale with effect from 1.4.1968; inasmuch as other Acharya Teachers, namely, Shri Nirmala Narayan Jha of Zila School, Dhanbad, Purndar Jha of Government High School, Gardanibagh, Patna as well as Acharya and Fazil family Teachers of Government Schools and Non-Government Schools started receiving the salary in the pay scale of Rs. 220/- to Rs. 400/- with effect from 1.4.1968. But the petitioner wasdenied the pay scale although he was also entitled to get the said scale from 1.4.1968. The petitioner has stated in paragraph 10 of the petition that he made several representations to the Government for granting him the pay scale of Rs. 220/- to 400/- with effect from 1.4.1968. The petitioner, however, has not made any specific averments as regards the date of the representations and the authorities before whom the representations were made.

5. The petitioner's further case is that the pay scale of Rs. 220/- to 400/- was revised to Rs. 387/- to 600/- by the Government by resolution dated 1.1.1971 andthe petitioner was granted the pay scale of Rs. 387/- Rs. 600/- with effect from 1.1.1976. The petitioner approached this court in a writ petition as late as in the year 1979, which was registered as C.W.J.C.No. 247 of 1979. This court, by order dated 6.8.1979, permitted the petitioner to withdraw the writ petition with certain observation and direction. The order dated dated 6.8.1979 of this court is as follows—

"6.8.79 The petitioner in this case, who is a Jyotishacharya employed in the Government Sanskrit High School, Ranchi,

claimed the pay scale of a trained graduate under some decisions of the Government. He has been allowed that scale with effect from 1.1.1976 but he claims that scale with effect from 1.4.1968.The petitioner has also filed some representations before the Chief Minister, which was forwarded to the department on 17.8.1976. (vide Annexure-6).This is a departmental matter and the petitioner should be able to get his relief through his department itself, if he is entitled to it. The learned counsel for the petitioner, therefore, agrees that he will filea representation before the department concerned containing full details of his claims so, the department is directed to dispose of the representation within a period of three months from the receipt thereof. The department will be well advised to give him a hearing if he prays for. In view of this observation the learned counsel for the petitioner seeks permission to with darw this application, This application is, accordingly, permitted to be withdrawn

After the orderof this court was passed, the petitioner made representation before the Director of Public Instruction Education Department, Government, of Bihar, Patna, which was ultimately rejected and the order of rejection was communicated by the impugned letter dated 15.4.1988-a copy of which is annexed as Annexure1 to the petition.

6. By the impugned order, the petitioner was intimated that the Government order no.1438 dated 4.5.1968, on which the petitioner placed reliance in supportof his claim for grant of higher pay scalewith effect from 1.4.1968, was applicable to Non-Government State Subsidised High/Higher Secondary Multipurpose School and was not applicable to the Government Schools and their working teacher sand that as per the seniority list, the petitioner was not entitled for promotion at the material time after filling up posts reserved for the candidates of Scheduled Caste and Scheduled Tribe community.

7. The Respondentsin their affidavit-in-opposition have denied the allegation of the petitioner that he has been discriminated in the matter of grant of the said pay scale of Rs.220-Rs.

400/- with effect from 1.4.1968. In paragraph 6 of the affidavit-in-opposition, the Respondents have contended that all the teachers working in Government Sanskrit High Schools were brought in the cadre of the Subordinate Education Service with effect from 1.1.1976 and, accordingly, the petitioner, along with similarly situated persons, was granted the pay scale of the cadreof Subordinate Education Service with effect from 1.1.1976. The petitioner was grantedSubordinate Education Service in the pay scale of Rs. 387/-to600/- with effect from 1.1.1976 and per approved of Government of Bihar, Finance Department, and, as such, the claim of the petitioner regarding the said pay scale with effectfrom 1.4.1968 had rightly been rejected.The petitionerfiledrejoinder to the counter-affidavit and in paragraph 6 there of has counterd that the statement made in paragraph 6 of the counter-affidavit was wrong and misleading.

8. Learned counsel for the petitioner submitted that the petitioner has arbitrarily been denied the pay scale of Trained Graduate Teacher with effect from 1.4.1968 and consequently he has suffered perpetual loss of pay on and from 1.4.1968. Learned for the petitioner submitted that the reason and ground, on which the Respondents have rejected the prayer of the petitioner, are not at all tenable. Learned counsel for the petitioner placed reliance on a decision of the Hon'ble Supreme Court in the case of Haryana State Adhyapak Sangh Vs. State of Haryana, reported in A.I.R. 1988 S.C.-1663. In the said case, until 1979, the State of Haryana was following the principle of parity between theteachersin aided private schools and Government Schools in the matter of pay scales and other emoluments as per the recommendations of Kothari Commission. The State met the increased expenditure entirely in reqard to pay and Dearness Allowance. In 1979, thepay scale of teachers in Government Schools was revised by the State as per recommendation of the pay Commission; but in the case of the teachers of aided Schools, the revision was given effect to after two years. On the facts of the case, the Hon'ble Supreme Court held that the

teachers of the aided schools must be paid the same pay scale and Dearness Allowance as teachers in Government Schools for the entiree period claimed by the petitioners and that the expenditurcon that account should be apportioned between the State and the Management in the same proportion in which they shared the burden of the existing emoluments of the teachers.

9. I have considered the submission made on behalf of the petitioner and perused the contents of the petition, affidavit-in-opposition and the Rejoinder thereto. The statements made in the writ petition and the Rejoinder are vague and devoid of material facts. So also the contentions made inthe affidavit-in-opposition by the Respondents. It is clear from the last paragrph of the resolution dated 4.5.1968 (Annexure 3) that the Acharyas and Fazils, who were equated with trained graduates, were yet to be granted replacement scale of pay of Rs. 220/- to 400/- as paid to the trained graduates. The petitioner has neither made any statement nor annexed any document granting the replacement scale of pay of Rs. 220/- to 400/- to Acharyas and Fazils. Annexure 4, on which the petitioner has placed reliance, speaks of revision of pay scale of members of Subordinate Education Service and not grant of the replacement scale of pay for the trained graduates to the Acharyas and Fazils with effect from 1.4.1968. Although the petitioner has contended that he was discriminated in the matter of grant of pay scale and cited names of some teachers of Acharyas and Fazils of some schools; but he has not stated as to by which orders, those teachers, who se names were mentioned in paragraph 9 of the petition, were granted pay scale of Rs. 220/-400/-. There is no specific averment in the petition that the petitioner was similarly situated with those teachers named in paragraph 9 of the petition, where as, the Respondents in paragraph 6 of the affidavit-in-oppostition have contended that the teachers working in Government Sanskrit High School were brought in the cadre of the Subordinate Education Service with effect from 1.1.1976 only.

10. The petitioner's claim has become stale due to laches

on his part in pursuing his remedy inasmuch as according to the petitioner he was denied the right to the pay scale which accrued to him in 1968, but he approached this court for the first time in 1979. Besides, as already observed, the petitioner's contention about pursuing remedy by making representations is casual and vague. Laches on the part of the petitioner writ large on the facts of the case.

11. For the reasons stated above, I am inclined to hold that the petitioner is not entitled to the relief prayed for at this belated state. The petition is, therefore, dismissed. I make no order as to cost.

R.D. Petition dismissed

CIVIL WRIT JURISDICTION

Before Naresh Kumar Sinha, J.

*Shri Shambhu Sharan Pandey.**

v.

The State of Bihar and others.

Service—gradation list of 1972 of Rural and Urban Home Guards—writ-petitioner promoted on the basis of list of 1972 in 1981—filling writ-application in 1988—in his representation of 1988 it was stated that he has been representation of 1988 it was stated that he has been representing since 1981—but he was not restored to his original position—writ petitioner filing writ-petition after inordinate delay guilty of laches—writ-petition, whether maintainable.

The gradation list of 1972 of Rural and Urban Home Guards in Department of Home (Special) of the State Government continues to hold good and even the writ-petitioner was promoted to the next higher rank of Inspector in 1981 on the basis of the said gradation list. All sub-sequent promotions and confirmations were made on the basis of the said 1972 gradation list. Even the representation dated 1.11.1933 filed by the writ-petitioner after promotion itself mentions that he had been regularily filing the representations since 6.7.1981, but he was not restored to his original position in the gradation list. The writ-petition was filed on 19.12.1983. Even after 1981 the petitioner waited for more than 7 years to invoke the writ jurisdiction of the High Court with prayer for correction of the gradation list of the year 1972.

Held, that the petitionerhas approached the court for relief after in-ordinate delay and was therefore guilty of laches and acquiescence.

Case laws discussed.

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*Civil Writ Jurisdiction Case No. 9330 of 1988. In the matter of an application under Articles 226 and 227 of the Constitution of India.

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

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

Mr. Bamdeo Pandey, Mr. T. P. Verma, Mr. S.P. Sinha, advocates, for the petitioners.

Mr. Jagannath Jha, Sr. advocate, Mr. Uma Kant Sing, advocate, for the state.

Mr. Teg Bahadur Singh, Mrs. Anita Sinha, Mr. Ram Hridaya Prasad, advocates for inpondents No. 6, 8, 9, 21, 22, 25, 27 and 41.

Naresh Kumar Sinha, J. The petitioner is an Inspectorin the Bihar Home Guard Organisation and his conditions of service are regulated by the Bihar Home GuardAct and Rules framed by the State Government. He has filed this writ petition for issue of an appropriate writ/direction commanding the respondents to fix his seniority in the cadre of Inspectors on the basis of Government direction/order dated 7.11.1981 contained in Annexure3 with all consequential benefits including promotion to the post of District Commandant.

2. The petitioner claims to have been initially appointed as Company Commander in the Bihar Home Guard Organisition (hereinafter 'organisation' for short). The appointment was made by a Selection Board and his position in the cadre was at serial no, 5. He joined the said post on 2.11.1965. A copy of the gradation list with the date of joining has been filed as Annexure-1 to the writ petition. Subsequently, on the publication of the proposed seniority list of the company commander, which was prepared without any rationale whereby the petition of the petitioner in the gradation list was disturbed. The petitioner, on failing to get justice in the organisation, filed representation to the state Government in the Home (Special) Department and the Government, after examining the representation and seeing the in justice done to the petitioner, directed the Commandant

Genral, respondent no. 3 to fix the seniority of the petitioner on the basis of the 1934 Circular. The Government also gave a direction to give promotion to the petitioner. A truecopy of theGovernment's order dated 6.7.1981 is Annexure-2. Accordingly, the authorities of the Organisation corrected the seniority list vide memo No. 10022 date 7.11.1981 whereby the petitioner was placed at serial no. 15 in the proposed seniority list in the cadre of company commander. A photo copy of the order dated7.11.1981 is Annexure-3 The petitioner was thereafter promoted to the post of Inspector on 22.8.1981 and he discharged duties of his office efficiently and to the satisfaction of his superiors. As a matter of fact, he received commendation and cash rewards in appreciation of his peformance of duties at different plaaces. The petitioner was, however, shocked and surprised when he saw the seniority list of Inspectors circulated under Meno No. 665 dated 27.2.1967 whereby he was placed at serial no. 93 in an arbitrary manner. A photo stat copy of the aforesaid memo dated 27.2.1987 is annexure-4. The petitioner thereafter filed a representation on 14.3.1987, a copy of which is Annexure-5 for fixing his seniority in accordance with law. by Force order no. 617 of 1988 issued on 4.5.1988. the copy of which is Annexure-6, the petitioner who was placed at serial no. 33, was given Junior selection Grade where as the person junior to him, had been givensenior selection Grade. The petitioner then filed a representation on 1.11.1988 copy of which is Annexure-7 to the Deputy Commandant Genral (respondent no.4) to fix his seniority in the cadre of Inspector as per the direction of the Government in the Home (special) Department (hereinafter 'Department' for short) and to give him senior selection Grade. The petitioner claim to be aggrieved on learning from the office of respondent no.3 that the names of persons junior to the petitioner have been sent to the Government for promotion to the post of District commandant which is equivalant to the post of Deputy Superintendent of Police.The petitioner thus, claims that he had been singled out for hostile treatment in the matter of seniority, confirmation and promotion.

3. Two counter affidavis have been filled. one on behalf of respondent no. 3and the other on behalf of the private respondents. 6, 7, 8, 9, 19, 21, 22, 24, 25, 27 and 46. According to respondent no. 3. 74 persons including the petitioner were appointed as Jamadar Company Commander (hereinafter'J. C.C'S' for short) and were directed by order dated 25.10.1965. copy of which is Annexure-A, to give their joining on 5.11.1965 positively. The petitioner some-howor the other managed to join on 2.11.1965 that is before the date fixed for joining. Only 69 out of 74 candidates joined and 5 subsequently left the job. A circular was isued on 25.7.1966 intimating the newly appointed J. C.C'S to join a refresher course and appear in a test on 5.8.1966 and that their seniority will be decided on the basis of marks obtained by them in the examination to be held. A photo Stat copy of the circular dated 25.7.1966 is Annexure-B to the counter affidavit. Two J.C.C'S appointed priorto 1965, were also allowed to appear at the test. The date fore joining the refresher course was subsequently changed from 5.8.1966 to 11.8.1966 and after the concluction of the training and the test held, the result of the examination was published vide Force Order No. 380/67, copy of which is Annexure-D. The petitioner who had appeared at the exa, omatopm, secured 31 marks only and thereby failed in the examination. subsequently, the proposed seniority list of 33 persons including the J.C.C's Batch of 1965, was published vide Memo dated 28.10.1970, copy of which is Annexure-E wherein the position of the petitioner was shown at serial no. 174. By Annexure-E, objections were also invited. The petitioner, however, did not file any objection against the proposed seniority list. After considering the objections filed by others, the Board presided over by the D.I.G. Home Guards, passed a resolution dated 17.2.1972, copy of which is Annexure-F, whereby the seniority of the J.C.C's was decided. In pursuance of the aforesaid resolution, a final list of J.C.C's (Rural and Urban Home Guards) was published on 20.4.1972 and the petitioner's name figured at serial no. 185, a copy of final seniority list is Annexure-G.on the basis of seniority list (Annexure-G), a Force

Order no.400 dated 27.8.1978 a copy of which is Annexure-H, was issued confirming the services of 268 J.C.C's including the petitioner. The petitioner filed a representation for changeing his position in the seniority list on the ground of his having joined on 2.11.1965. The Department, after considering the matter, rejected the petitoner's representation and communicated this decision to the Home (special) Department vide Meno No. 158 dated 7.12.1974, a copy of which is Annexure-I. The writ petition has been described as not maintainable because the petitioner, in the arb of filing writ for implementing the Government advice, had actually done so for changing the gradation list prepared as far back as in the year 1972. The stand of respondent no. 3 is that the petitioner cannot be allowed to challenge the validity of gradation list after 16 years and thereby unsettle the settled things. The respondent also denies that any person junior to the petitioner, had been considered while recommending Inspectors for promotion to the post of District commandant, The petitioner's claim of seniority on the basis of having joined earlier, has also been refuted on the ground that the seniority has been fixed on the basis of performance in a test i.e. on the basis of merit.

4. The private respondents, while opposing the prayer of the petitioner, like respondent no. 3, have mentioned certain additional facts. Their case is that the writ petitioner and the private respondents were under officers and Sergeant Major and Instructors in N.C.C. under the Ministry of Defence, Government of India. The Ministry of Defence took a decision to abolish the above mentioned posts and at the same time, a policy decision was taken to recruit those found suitable among them in the police department and Home Guard Organisation. The state Government also took a policy decision to recruit such suitable persons in the Home Guards Organisation. As per policy decision, Screening Committee was constituted to judge their suitability for recruitment to the post of Company Commander, Home Guard. Accordingly, 74 out of 125 candidates including the petitioner, were found suitable for appointment to the post of Company Commander. The selected candidates were directed to

join the post in 5.11.1965. The rest of the counter affidavit filed on behalf of private respondents re-iterates the facts already stated by respondent no. 3 in his counteraffidavit and need not be repeated. It is, however, mentioned on their behalf that there was no rule or provision for filing of representation to the Home (special) Department against the gradation list prepared by the Commandant General, Home guards, who is the head of the Institution and the appointing authority of the writ petitioner and these respondents. There is reference to the instructions of the Government order of 1934 to the effect that the decision in respect of the seniority taken by the appointing authority, shall be final and its finality cannot be disturbed by any other authority. Thus, the advice sent by the Under Secretary to the Government, to respondent no. 3 vide Annexure-2, has been described to have no legal basis. The private respondents have described the tentative gradation list, Annexure-3 issued by the Commandant, Home Gurards, as not being consistent with the law, rule or the instructions and both Annexures, 2 and 3 have been described by them as collusive documents created for the benefit of the writ petitioner.They have, therefore, supportedthe action of respondentno. 3 in ignoring them.

5. The petitioner, in his separate reply to the counter affidavits, one filed by respondent no. 3 and the other by some of the private respondents, has refuted most of the assertions made therein. Learned counsel for the petitioner has, however, attacked the gradation list of J.C.C's (Annexure-G) on the ground that it was prepared in violation of Rules 5 (5) of the Bihar Home Guards Rules1953 (hereinafter 'Rules' for short) framed by the State Government by virtue of the powers conferred by Section 13 of the Bihar Home Guards Act, 1947 (hereinafter 'Act' for short). Another ground for attack is that Annexure-G stood superseded by the State Government's order (Annexure-2) and the proposed gradation list of J.C.C's (Annexrue-3) prepared in accordance therewith. Rule 5 provides that the procedure for appointment of officers and men for Home Guards Force, sub-rule (5) of Rule 5 provides that seniority shall be determined by

rank. and as between persons of the same ran by the date fo promotion or appointment to the rank and betwen persons of the same rank some of whom may be promoted officer will ordinarily rank senior, but if the selection is made in consideration of merit by a board or as a result of examination, they will rank, inter se, in the order in which their names appeared in the list of candidates selected. Since the petitioner joined as Company Commander on 2.11.1965, he claimed to be senior to all thosewho had been appointed as Company Commanders subsequently. Annexure-1 which is a copy of the list of Company Commanders of the year 1965, had placed the petitioner at serial no. 5 with the date of his joining as 2.11.1965. Four persons, who have been placed above him, claimed to havejoinedon 1.11.1965. Annexure-1givesthe name of Company Commanders on the basis of the date of joining. Those who joined as Company Commanders on 3.11.1965 and subsequent to that date, have been placed below the petitioner. The authenticity of Annexure 1, has been challenged by the respondents. It is pointed out that Annexure 1does not contain or even purport to contain the names of the Company Commanders placed in orderof their seniority. As a matter of fact, Annexure-1 does not indicate on whose authority the list had been circulated and there is no averment on behalf of the petitioner suggesting that such list had been circulated by competent authority and had placed the names of the Company Commanders in orderof seniority.

6. It is true that theRules have been framed by the State Government in the exercise of its power undersections 13 of the Act. The section provides that the State Government may make rules for carrying out the purposes of this Act and that such Rules may provide for the organisation, appointments, qualifications, condition of service etc: of the Home Guards. Rule 5 (5) provides for the determination of seniority and specifically lays down that as between persons of the same rank, seniority shall be determined by the date of promotion or appointment to the rank. Learned counsel for the petitioner, thus, contends that the petitioner could not hvae been placed below such Company

Commanders who had been appointed on any date subsequent to 2.11.1965 when he had joined the post. The argument advanced on behalf of the respondents is that the provisions of Rule 5 were not attracted in the facts and circumstances of the case. It was pointed out that the petitioner and the private respondents were underofficers and Sergeant Majors Instructors in the N.C.C. under the Ministry of Defence, Government of India. when the posts were abolished, the State Government recruited them in the Home Guard Department. There is no dispute between the parties that a Screesning Committee was formedto judge their suitability for recruitment to the post of Company Commanders of Home Guards and 74 candidates including the petitioner and the private respondents were found suitable. The selected and dates were directed to Join the post on 5.11.1965 and one copy of such an appointment letter is Annexure-A to the counter affidavit of respondent no. 3 and Annexure-A/1 to the counter affidavit of the private respondents. Para-3 of the appointment letter dated 25th October. .1965 clsarly mentions that the person appointed was to report his arrivalto the State Head-quartars, Bihar Home Gards, Patna on 5.11.1965 positively. The case of the respondent is that all the persons, than found suitable for being recruit ass Jamadar Company Commanders, had been to report on 5.11.1965 but the petitioner cauvred to join his post on 2.11.1965. what is significant is thatthe petitioner has no been also to produce any paper to show that the names of the S.C.C's who were found suitable and appointed in the year. 1965, had been placed in order of seniority. If those found suitable had beendirected to join on 5.11.196, the fact that some of them including the petitioner may have joined on any date prior to 5.11.1965, would not, therefore, rank them senior only on the basis of date of joining.

7. Learned counsel for the respondents referred to Annexure B which is the copy of a letter dated 25th July, 1966 issued under the signature of the Comtandant, Bihar Home Cuaras to all the Superintendents of Police including the Additional Superintendents of Police. The letter containel a list of 65

J.C.C.'s including the name of the petitioner appearing at serial and contained a direction that all of them be asked to report to attend the refresher course as their seniority will be decided on the result of the test. The refresher couree which was to start from 2.6.1966, was subsequently postponed to 12.8.1966. There is no dispute between the parties that the petitioner attended the refresher course and in the test the result of which was published vide Force order no. 380/67 (Annexure-D), he failed having secured 31 marks only. The case of the respondents is that the seniority of the J.C.C's recruited in the year 1965, were based on the marks obtained by them in the test and proposed seniority list of 338 persons including the J.C.C's of 1965 Batch, was circulated under the Memo no. 8813 dated 28. 1970 (Annexrue.-E) in which the name of the petitioner appeared at serial no. 174. By Annexure-E, representations had also been invited against the proposed seniority list to be filed latest by 30.11.1970. According to the respondents, 43 such objection were filed but no one by the petitioner. This is disputed by the petitioner who in his reply to the counter affidavit of respondent no. 3, has stated that he had filed his objection to the proposed gradation list on 26.11.1970 which was forwarded by the Superintendent of Police, Patna to the Commandant vide Memo No. 1244 dated26.11.1970. The representations received, 43 in all, were considered by the Board presided over by the D.I.G.: Home Guards and the Board, after considering all aspects of the matter, passed the resolution 17.2.1972 (Annexure-7) deciding the seniority of the J.C.Cs. The Board in its notes, referred to the seniority of the J.C.C.'s fixed and circulated in October, 1970 based on the criteria mentioned there in as laid down by the Board, The resolution also refers to the direct recruitent of the persons to the rank of J.C.C made in 1965-66 and1966-67 as a result of expansion of Home Guards in 1965. It also took note that the recruits were claiming seniority on various grounds such as age, qualifications, marks obtained and refersher course etc. There is no dispute that J.C.C's of 1965 Batch including the petitioner and the private respondents were

selected by ForceOrderNo.-402/65. The resolution mentions the fact that the candidates selected by Force Order No. 402/65, was not decided and it was specifically mentioned that their seniority will be fixed on the basis of the test to which they were subjected. The Board then proceeded to resolve that their seniority should be fixed on the percentage of marks obtained by them in the test. It was on the basis of the resolution dated 17.2.1972 that the final seniority list(Annexure-G) of J.C.C's (Rural and Urban Home Guards) were published on 20.4.1972 with the name of the petitioner appearing at serial no.185. It appeares that the petitioner filed a representation for changing his position in the seniority list on the ground that he had joined on 2.11.1965.The representation was rejected vide Annexure-5. The Additional Commandant General sent a letter to the Home (Special) Department explaining the reasons which weighed with the Department in rejecting the representation of the petitioner. It also referred to the fact that at the time of recruitment of the Company Commanders in the year 1965, no merit test had taken place and the merit was decided in the test held after holding of the refresher course and their seniority in the gradation list was fixed on the basis of marks obtained in the test. From the said letter, it also appears that the petitioner had filed a representation earlier also which had also been rejected after thorough examination and the petitioner had been communicated to the decision of the then Commandant General through the Superintendent of Police vido letter dated 8.7.1973. The representation was also rejected on the ground that the seniority of the petitioner had been fixed in accordance with the decision of the Board held under the Presidentship of the D.I.G. Home Guards.

8. There was some argumental the bar as to whether the seniority of the petitioner had been fixed in accordance with the circular of the year 1934, while the petitioner contendad that the instructions contained therein had not been followed, the case of the respondents is that the seniority was fixed in accordance with the circular of 1934. The question has assumed significanse in view of Annexure-2 and 3. On the basis of the representation

filed by the petitioner, the Deputy Secretary of Home (Special) Department wrote the letter dated 6th July, 1988 (Annexure-2) to the Commandant General conveying the decision of the Government that the inter as seniorty of 1965 Batch of J.C.C's should be fixed in accordance with para 2 (c) of the letter dated 12.12.1934, in other words, on the basis of the date of appointment. A propcsed gradation list of J.C.C's on the basis of the letter, Annexure-2, was circulated vide letter dated 7.11.1981 (Annexure-3) by the Commandant. Neither the petitioner nor the respondents have filed copy of letter no. 6509 dated 12.12.1934 referred to in Annexure-2. A copy of the aforesaid letter of theAppointment Department, is available in the Government compilation para-(c) which is relied upon by the respondents, provids that the decision regarding the seniority of direct recruits shall be made by the authority enittled to appoint at the time of their first appointment and in all case such decision shall be final. Para-2(c) of the letter, which hare been referred to in Annexure-2, and relied upon by the petitioner, provides that seniority may be determined by general consideration of merit, by educational qualifications, or by age. It is significant to note that even in the year1981, the State Government had not roferred to the provisions of Rule 5 of the rules for the purpose of fixing the inter se seniority of the direct recruits. Para-2of the letter of 1934, mentions that the Government do not consider it practiceable to lay down definite criteria to determine the seniority of the direct recruits an includes one of the suggestions made by the Government for the guidance of the Department concerned. On the other hand, para-1 of the said letter, contains instructions of the Government for being observed in future in the matter of determining the seniority of officers. On this basis, it was argued on behalf of the respondents that while the instructions contained in para 1 (c) of the letter were mandatory, the suggestions contained in para 2 (c) of the letter were only recommendation and hence directory.The letter of 1934 does not provide for the fixation of inter se seniority on the basis of the date of joining as has been mentioned in Annexure-2. Howevers,

Rule 5(5) does contain such a provisin. It is unfortunate that in the different letters and notifications issued by the Department or the Organisation. there is no reference to Rule5 in the matter of fixing of inter se seniority. The Rules have been framed in the year1953 and nothing has been brought to the knowledgs of this Court as to why the Rule with regard to fixation of seniority of J. C. Cs was not kept in mind while fixing the inter se seniority of J. C. C.'s of 1965 Batch.

9. However, the fact remains that the case of the petitioner has certain peculiarties. Thereis nothing on the record to show that at the time of recruitment of J. C. Cs of 1965 Bacth, a list showing their position in order of merit, was prepared and on the basis of which their inter se seniority could be said to have been determined by the appointing authority on the basis of the recommendation of the Screenin Committee. There was, howevar, material of a satisfactory nature indicating that no such merit list was prepared in the year1965 and their inter se seniority was decided to the knowledge of the J.C.Ca including the petitioner on the basis of a test held after conclusion of a refresher course. It is the consistent case of respondent no. 3 as also private respondents that the inter se seniority of J.C.Cs of 1965 Batch, was decided on the marks obtained by the J.C.Cs in the said test. The petitioner had also taken the test and had obtained 31 mark only. A Board presided over by the D.I.G. of Home Guards. had considered the objections filed by the J.C.Cs to their position mentioned in the seniority list and all such objections had been considered by the Board and it was only thereafter that the final gradation list of the J.C.Cs. was published in the year 1972 videAnnexure-G. It is also the consistent case of the respondents that all subsequent promotions to the rank of Inspectors including that of the petitioner in the year 1981, had been done on the basis of the final seniority list (Annexure-G). It is also argued that Annexure-2 had no legal validity as the seniority list of the J.C.Cs had been published as finally determined by the competent authority and Annexure-3 which mentions the proposed senior-

ity list of J.C.Cs did not have the effect of superseding the final list of theyear 1972. The petitioner has not produced a chit of paper to show that the proposed seniority liest circulated by Annexure-3, ever assumed finality. On the contrary, the different leters and circulars produced, go to show that the proposed seniority list of the J.C.Cs. circulated vide Annexue-3, had not been finalised at any stage and the final seniority list of the J.C.Cs, Annexure-G, circulated in 1972, contained to be the basis for making promotion to the next higher rank, that is, Inspectors and the petitioner was also promoted to the rank of Inspectors on the basis of the seniority list of 1972.

10. It was argued by the learned counsel for the respondents-State as also the private respondents that the petitioner had not filed this writ petition for enforcing the Govrnment's Orders dated 6th July, 1981. Annexure-2, but for all practical purposes for getting rid of the seniority list of 1972 which had become final. It was pointed out that the petitioner could not be permitted to challenge the final seniority list of 1972 in the year 1986 aftr a lapse of 16 years. and that the writ petition, deserved to be rejected out-right on the ground of laches alone. In support of the aforesaid contention, counsel appearing for both the private respondents and the State have referred to a number of decisions of the apex Court. In P.S. Sadasivaswamy vs. State of Tamil Nadu (AIR 1974 SC 2271), it was observed that though no period of limitation is prescribed for the Courts to exsercise their powers under Article 226, it would be a sound and wise exercise of discretion for the Courts to refuse to exercise their extraordinary powers under Article 226 in the case of persons who do not approach it expeditiously for relief and who stand by and allow things to happen and then approach the Court to put forward stale claims and try to unsettle settled matters. The writ petition filed by a Govrnment servant who slept over the promotions of his juniors over his head for 14 year before approaching the High Court, was thus found liable to be dismissed in limine. A 3 judgment of the apex Court in *Amrit Lal Beri* Vs. *Collector of*

Central Excises, Central Revenue and others (1) (AIR 1975 SC 538) held that the writ petition under Article 226 filed in 1971 challenging the promitions made in 1959, was liable to be dismissed on the ground of in-ordinate delay. It was observed thersin that the ineqoality in the equitable balance brought into by the patitioners own latches and acquiescenee cannot be overlooked when considering a claim to enforcethe fundamental rights to equal treatment. It was further observed thatmerely by filing repeated or delayed representations, a petitioner cannot get over the obsticles which daly in approaching the court creates bacause squitable rights of others have arisen. In *Malcom Lawrence Cecil D'souze* Vs. *Union of India and others* (AIR 1974 SC 1269), the apex court held that the seniority list of Assistant Commissioner of Income Tax issuedin 1956, connot be challenged in a writ petition filed in 1971 and that such a writ petition was not maintainable on the ground of latches. It was observed that it is eswential that any one who feels aggrieved with an adminiatrative decision affecting one's seniority should act with due diligence and promptitudeand not aleep over the matter. Raking up oldmatters like seniority after a long timeis likely to resultin administrative complications and difficultes. Their lordshipe, thus, went to conclued that it would be in the intrest of smoothness and efficiency of earvice that such matters should be given a guictus aftr lapse of some time.

11. Learned couneel for the petitioner arguedthatthe writ petition was not riable to be diemissedonthe ground of latches. He pointed out that the J.C.C's and Inspectors belong to two dififerent cadres and Annexure-2 having been issuedin July 1981 by the State Government on the representation of the petitioner in respoect of his seniority in the cadre of J.C.C, the argument advanced on behalf of the respondents that the petitioner had slept overthe seniority listissued in 1972, did not hold good. It is true that the petitioner had been filing one rsprssentation after the other questioning the seniority fixed in 1972 (AnnexureOG) an at one stage the State Government had requested the

Commandant General to fix theseniority of J.C.C's in accordance with the circular of the year1934. It appears that a tentative gradation list of J.C.C's was prepared in the year, 1981 in accordance with thedirection of the State Government vide Anneure-3. But as alread explationed earlier, the list remained tentative and was never finalised. There is no easape form the position that the 1972 gradation list continued to hold good and even the petitioner was Promoted to the next higherrankd of Inspecto in 1981 on the basis of the said seniority list. As contended by the respondents and not controverted on behalf of the petitioner, all subssquent promitions an confirmstions were made on the basis ofthe 1972 gradstion list. The representation dated 1.11.1938 filed by the petitioner afterhis promotion as Inspector, copy of which is Annexure-7, itself mentions that he had been ragularly filing representations since6.7.1981 but he was not restored to his original postion in the gradation list. The writ petition was filed on 19.12.1988 Thus, even after 1981, the petitioner had waited for more than 7 years to invoked the writ juriediction of this Court with prayers which is essentially for correction of the gradation list of the J.C.C's of the year 1 1972. Thus, in any view of the matter, the petitioner had approached the Court for relief after an in-oridinate dalay and was, therefore, guilty of latchea and acquiescence.

12. The petitioner filed a petition dated 5.4.1989 encloaing copy of Notification dated 1.1.1989 marked as Annexur-8 where by some persons junior to the petitioner had been promoted to the poet of District Commandant. The pyryer was madeto quash theorder contained in Annexure-8 (Annexure-7 mentioned by mistaked) and for treating the application as part of the main writ application. Howere, no orders were passed for amendment of the original writ petition for incorporating additional felief for quashing of Annexure-8. The proposed gradaion list of Inspectors dated 1.11.1986 appareto have been circulated to the Inspectore by letter dated 27th February, 1987, copy of which is Annexure-4. It was argued on be half of th petitioner that the gradation listcontainedin Annexure-4 had not yet been finalised

and promotion to the post of District Commandant connot be given on the basis of such a tentative list. It was specifically stated in the petition that respondent no s. 5,6,7,9, and 12 who had been given promotion to the post of District Commandant under Annexure-8, were junior to the petitioner and they could not have been promoted in supersession of the claim of the petitioner. The argumenton behalf of the respondent is that the gradation list of Inspectors reflects the seniority mentioned in the gradation list of J.C.Cs of the year1972 and from the gradation list of Inspectors,come respondents had been posted as an ad-interim arrangement to work as District Commandant with the stipulation that until such time, they are promoted as one District Commandant, pay and allowance would be admissible to them which they had been drawing as Inspectors. As already metioned, the petition dated 5.4.1989 was never made a part of the original writ application and consequently not a word has been stated about the facts stated in the petition in the counter affidavit filed on behalf of the Commandant General, respondent no. 3. The private respondents, in their counter affidavit, have however denied the allegations made by the petitioner in the supplementary affidavit and stated that respondent no s. 5,6,7,9 and11 are all seniors to the petitioner according to the final gradation list or J.C.Cs. issued in 1972 vide Annexure-C. Since the original writ application was not ended under the orders Court to incorporate the additional relier prayed for by the petitioner for quashing Annexure-8, it is not neesarry for this Court to consider and decide the legality or otherwiseof Annexure-8.

13. It nonetheless needs to be pointed out that promotion to the post of District Commandant is made from the rank of Inspectors. The proposed gradation list of Inspectors circulated vide Annexure 4, continues to be tentative. Those who had any thing to say against the proposed gradation list, were directed to do so by 15.3.1981 failing which the gradation list was to be given final shape. The writ petitioner filed his representation on 14.3.1987, copy of which is Annexure-5, against the proposed

gradation list of Inspectors. The averment on behalf of the raspondents is that the gradation list of Inspectors is simply a reflection of the final gradation list of J.C.Cs of 1972. Inspector is a post of promotion for J.C.Cs and even the petitioner was promoted as Inspector in the year 1981 on th basis of the gradation list of J.C.Cs of 1972. In the circumstances, it was not open to the petitioner for reasons already mentioned to challenge his position in the proposed gradation list of Inspectors on the ground that the gradation list of Company Commanders of 1972 was wrong and should be revised in favour of the petitioner. Likewise the petitioner can possibly have no grievance against any order giving Junior Selection Grade/Senior Selection Grade to some persons strictly in accordance with the gradation list of J.C.Cs of 1972.

14. hearned counsel for the petitioner states that the proposed gradation list of Inspectors (Annexure 4) continues to be tentative and has not been finalised till today. This has not been controverted on behalf of the respondents but a contention has been put forward that if the petitioner seeks to challenge the promtion to the post of District Commandant on the basis of the tentative gradation list of Inspectors, he should have joined his seniors also who had already been promoted to the postof District Commandant on the basis of the said list as parties to this writ petition. In other words, it is pointed out that, in the absence of persons admittelly senior to the petitioner who had already been appointed as Campany Commander on th basis of the tentative gradation list of Inspectors, the petitioner cannot challenge the legality of the tentative gradation list of Inspectors. The gradation list circulated in 1987 and inviting objections there to, continues to be tentative and is yet to be finalised. The State-respondents are directed to finalise the list at the earliest and in any case, within six months from today. As already mentioned earlier, this Court had no occasion to considder the legality or otherwise of promotions made vide Annexure-8. After the gradation list of Inpectorsis finalised, it shall be open to the

writ petitioner to challenge its correctness as also any promotion to the rank of District Commandant, that may have been made in supersession of his superior claims, if any.

15. Thus, for the reassose already mentiond, this writ application, in so far it challenges the legality of the gradation list of J.C.Cs repared in the year 1972, is found without merit as also not maintainable on account of lanches and acquiescence. This writ application is, accordingly, dismiessed with the observations directions made above. There shall, however, be no order as to costs.

R. D. Application dismissed

APPELLATE CIVIL

Before S.K.Chattopadhyaya, J.

1995

July, 11.

*Ram Sumiran Prasad Singh and others.**

v.

Smt. Sita Sinha and others.

Registered deed of family arrangement---whether binding on the parties---plaintiff having derived benefit under the deed of family arrangement---whether can challenge validity of the same in a suit for partition---whether operates as estoppel---suit for partition filed after 19 years, whether barred by limitation.

Wherethe deedof family arrangement was entered into in the year 1945 and the suit for partition was filed in the 1964.

Held, that the registered deed of family arrangement being of the year 1945 and the plaintiff having derived benefits therein, cannot be allowed to reopen the validity or otherwise of the same.

The family arrangement being binding on the parties to the arrangement clearly operates as estoppel so as to preclude any of theparties who have taken advantage thereunder from revoking or challenging the same.

The registered deed of family arrangement had been executed in 1945 hence the suit for partition filed in 1964 is cleary barred by limitation as for getting a registered deed deelared as void and illegal. the period of limitation is three years.

Kale and ors v. Dv.Director of Consolidation and ors. (1).

S. Shammugam Pillai v.K. Shanmugam Pillari (2) and Smt.

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*Appeal From Original Decree No. 343 of 1969. Against the judgment & decree dated 10th June. 1969 by Sri F. Rahman. Subordinate Judge. Gaya in Titlesuit no. 77/1964.

(1) (1976) A.I.R (S.C) 807

(2) (1972) A.I.R. (S.C) 2069

Ramti Devi v. Union of India (3)-----relied on.

Appeal by the defendatns.

The facs of the case material to this report aresetout in the judgeement of S.K.Chattopadhaya,J.

Mr. Bhupendra Narain Sinha for the appellants

Mr. Devendra Prasad Sinha for the respondents

S.K.Chattopadhyaya, J: Being aggrieved by and dissatisfied with the judgemnt and decree dated 10/6/69 passed by the learned court below in Title Suit no. 77/64 the defendants have moved this courtin the present appeal.

2. Originally Smt. Chandrawti Devi. widow of Rajeshwari Prasad Narain Singh filed the aforesaid suit for partition claiming 8 annas sharein the scheduied properties with some other consequential reliefs. On herdeath. her heirs and legal representatives were substituted in this court by order dated 10.6.79.

3. The case of the original plaintiff. in short. was that she was married with the father of defendant no. 1, Ram Sumiran Prasad singh, in 1929. The first wife of Rajeshwari died issueless, Then he married second time with the mother of defendant no. 1. The mother of defendant no. 1 died leaving behind defendant no. 1. and his sister. After the death of the second wife. Rajeshwari again married the plaintiff. Out of this wedlock a son and three daughters were born. However, the son pre-deceased his father and elder daughters also died leaving behind two sons and two danghters. Rajeshwari dendoped sign of insanty after the marriage with the plaintiff and for his treatement the plaintiff had to spend a large amount but he could not be cured permarently. As the defendant was mionr, theplaintiff used to manage the family Estate smoothly. As the plaintiff had no fund in her hand, she had to borrow money by mortgaging some of the properties of the eatate for the marriage of her step daughter i.e.

(3) (1995) Judgment Today 223 (S.C.)

the sister of defendant no. 1 in the year 1929. However, the plaintiff could pay back the said debts gradually and almost succeeded in paying the entire dues except a portion of it. It is the case of the plaintiff that in the meantime, the maternal uncle (Mama) of defendant no. 1 began to show some unwanted interest in the family affairs of the parties and tried to poison the eas of defendents against the plaintiff. The marriage of defendent. no. 1 was settled by his Mama and she was accordingly married. Mama also influenced the uncle in-law of the defendant no. 1 and these two persons began to put various hindrances in the smooth management of the family estate and caused bitterness in the family. As a matter of fact, the Mama and uncle in-law took up the managemnt of the estate in their hands and the defendant no. 1 in collusion with those two people and others began to molest the plaintiff on various ways. The plaintiff became apprehensive about her as well as her daugher's safety and, as such, she decided to leave Paleya but both the Mama and father in-law put obstacle in that. They put various pressures and under in fluence on the plaintiff and forced her to sign an agreement on th suggestion made by the defendant-party and only thereafter allowed here to leave the place. According to the plaintiff this arrangement deed is out and out a void one. The plaintiff ultimately came to her brother's place at Chapra, got her daughters highly educated and suitable married. For giving education and marriage of her daughers, she had to incur a large debt but was unable to repay the same as she had no means to pay. In the year 1947 the husband died and as such from that date she acquired interest in the joint family property of her husband. Further, case of the plaintiff is that the scheduled properties are all either ancestral, joint family properties or the properties acquired from the joint fund but as the defendant was managing the family properties, he with some ulterior motive has acquired many properties in the name of his wife and sons. Request was made by the plaintiff several times to the defendants for partition but no heed was paid. As such, the plaintiff has been compelled to file the instant suit.

4. The stand of defendant nos. 1 and 3. on the other hand.is that since her marriage with their fathersometime in 1929 as soon as she arrived at Paleya, she began to illtreat them exactly as a step mother. The step montherly attitude towards the defendants was so apparent and horrible that ultimately their Mama, Babu Dwarike pd. singh had to rescue them from the torture of their step mother. Mama took them at his place andthey were brought up under his guardianship. The marriage of the defendantas well as his sister was also arranged by Mama and the marriage was celebrated at village paleya itselfin theancestral family house. The Plaintiff, taking advantage of the minority of defendant no. 1 as well as the lunacy of his father, in the name of management of the estate, mismanaged the estate to a great extent. Subsequently the defendant no. 1 had to fightout several litigations to get the propertiesfree from complication cause by the plaintiff by granting collusive Hukumnamas to some persosn.The plaintiff also misappropriated the income of the estate. On the basis of a simple mortgee bond from her own cousin's husband, Janki Sharan Shah. she raised a loan of Rs. 2500/- just to cover up her case of misappropriation of income. The stroy of incurring of debt by the plaintiff is false. On getting majority in 1942 the defendant no. 1 took over control of the management of the family properties. This was not liked by the plaintiff. The story of poisoning by Mama and uncle-in-law is also denied. As the defendant took the manaement in his hands, the plaintiff began to create obstruction in theway of managing the affairs and defendant no. 1 was made to involve in some litigation at the instance of the plaintiff. The peacein the family was at stake and.as such, the well wishers of the parties intervened in the matter and brought about an amicable settlement of the disputes between the plainiff and the defendant no. 1 through execution of a registered deed of settlement. One of the well wishers of the plaintiff was her cousin. Sheonath Prasad Singh, a pleader of Chapra. At their instance both the plaintiff and defendant no. 1 executed a deed of family arrangement. The plaintiff executed the same for herself and as guardian of

Rajeshwari. Furthercase is that the plaintiff being highly intillegent, literate and clever, there was no question of any pressure and undue influence as alleged her. As a matter of fact, the said deed of family settlement was entered into in order to savethe family from further isrruption and protection of thefamily properties. On the basis of the said family arrangement the defendant became the absolute owner and proprietor of the estateand the plaintiff was entitled to get a sum of Rs. 450/- per year for herself and for her husband. It was also promised by thedefendants to pay Rs. 3000/- for the marriage expense of each of the three daughters of the plaintiff i.e. the step sisters of defendants. It is asserted that the defendant carried out the aforesaid obligation in toto. The assertion of the plaintiff that she was not allowed to leave village Paleya before execution of thefamily settlement has been deniedby the defendants. It is said that the plaintiff of her own accord, went to Chapra with her husband (father of defendant no. 1) to live with her brother much earlierthan the date of execution of the aforesaid deed. It is admitted thatin view of the family arrangement defendant no. 1 is bound to countinueto pay Rs. 450/- to the plaintiff annually and even after the death of his father he is still paying the same and undertakes to pay the same till the life time of the plaintiff. Inclustion of some of the plots in the plaint hav been strongly countered by the defendant. According to the defendants, some of the plots have been included which are not the properties of either of the parties. Similarly, the properties of schedule A are selfacquired properties of defendant no. 1. The properties of schedule B are of defendant no. 2 and the schedule C properties are the self acquired properties of defendant no. 3. It is alleged that the plaintiff has not filed the suit on her own wisdom rather,her, third son-in-law, Baijnath Pande and some other persons with vested interest are instrumental in instituting the suit against the defendants. Alternatively the stand of the defendant is that they are in exclusive possession of the property for more than twelve years and as such have acquired title and interest by adverse possession.

5. On the pleadings aforesaid the court below framed the following issues on recast :

(i) Is the suit, as framed, maintainable ?

(ii) Has the plaintiff an cause of action for the suit ?

(iii) Is the suit properly valued and the court fee paid thereon sufficient ?

(iv) Is the plaintiff entitled to partition of the properties in suit, if so, for what share ?

(v) To what relief or reliefs is the plaintiff entitled ?

6. After scrutinising the evidences, both oral and documentary, on record the learned court below has come to a conclustion that the a foresaid deed of family arrangement is not valid and proper inasmuch as the same was executed by puttingpressure and undueinfluence on the plaintiff. Having come to this finding, the court below decreed the suit on contest against defendant no. 1 and ex parte against the rest of the defendants.

7. Mr. Bhupendra Narain Sinha, learned counsel appearing on behalf of the appellant, assailing the judgment and decree of the lower court, has contended that:—

(i) the grounds on which the court below has not accepted the family arrangement as valid is not sustainable either in law or on facts inasmuch as there is no cogent evidence on record to show that there was any sort of coercion or pressure on behalf of the defendants on the plaintiff for executing the same ;

(ii) the ground of undue influence as alleged by the plaintiff has not been proved by any reliable evidence;

(iii) that the said deed of family arrangement operates as estoppel against the plaintiff as the same has been acted upon and the plaintiff derived benefits there under right from the date of execution till the filing of the suit by receiving the amount. She kept mum for 19 years without challenging the said deed and, as such, she cannot be allowed to reopen the issue after a lapse of long time;

(iv) the agreement having been entered into on 16.3.1945 the same could not be challenged by filing a suit on 24.11.1964 i.e. after about 19 years.

(v) In view of the finding in Title Suit no. 76/1945 filed by defendant no. 1, in which the plaintiff was proforma defendant, the present suit is barred by res judicata.

8. Mr. Devendra Prasad Sinha, learned counsel appearing on behalf of the respondents, countering the arguments, has submitted that:—

(i) the plaintiff having neither antecedent nor existing for future title on 16.3.45, the date of execution of the alleged deed, could not have executed the same;

(ii) On 16.3.45 the plaintiff was not a family member as she was not a coparcener and so she has no right during the life time of her husband to execute any agreement. But as alleged, was entered by her which was not valid in the eye of law;

(iii) the deed of agreement cannot be said to a cealid one inasmuch as there was no equitable distribution of the properties by dint of the said deed. The plaintiff was given a paltry alimony only but on the other hand, the defendant no. 1 was made absolute owner of the properties in question;

(iv) the said agreement was not acted upon as there is nothing on record to show that any alimony was paid to the plaintiff prior to 1967.

9. From the contention of the parties aforesaid, it appears that the plaintiff, stepmother of defendants, filed suit for simple partition of the scheduled properties claiming 8 annas share therein on amongst the grounds that the family settlement deed (Ext. F) was not binding on her as the same was executed by her under coercion and undue influence. Defendant-appellant no. 2 and 3 are wife and son of defendant no. 1, Ram Sumiran. It further appears that relief in the suit claimed by the plaintiff was challenged by the defendants, inter alia, on the ground that the said registered deed having been executed by the plaintiff of her

own accord without any undue influence much less coercion and she having derived benefits out of it for the last 19 years (nineteen) can not be allowed to reopen the same on such frivolous grounds.

10. In order to understand the point involved in the present appeal it may be necessary to enter into the domain of the contending claims of the respective parties put forward beforethe court elow. To begin with the admittedposition is that Rajeshwari had three wives, the first having died issueless, he married mother of defendant no.land 2. After death of this second wife, Rajeshwari again married the plaintiff-respondent out of which wediock, son and daughters were born. After about two years of his marriage with the plaintiff in 1929, Rajeshwari became insane and as defendant no. 1 was minor at that time the plaintiff began to manage the affairs of the Estate of Rajeshwari. This position continued till defendant no. 1 attained majority and took charge of the Estate of his insane father. some ill feeling and misunderstanding accrued as a result of which the plaintiff had to leave Ptaleya with her husband and daughters and she began to live at Chapra. However, some wellwishers of the plaintiff and defendant no. 1, in order to restorefamily peace as well as to bring about a permanent solution of dispute over the properties persuaded both of them to enter into an amicable settlement by executing a deed of settlement. This is how Ext. F came into existence on 16th March, 1945.

11. In order to find out as to whether by the alleged deed of family settlement dated 16/3/45 the plaintiff-respondent relinquished here right, title and interest in favour of the defendants-appellants, the contents of the deed of agreement which is Ext. is to be looked into. An English translation of Ext. F has been produced during the course of hearing which shows that the plaintiff and defendant no. 1 were the executants of that deed. The plaintiff has described herself as theclaimant for herself and as guardian of Babu Rajeshwari Prasad Narain Singh, insane. The nature of deed has been described as the family arrangement in which the valuation of the arrangement

has been detailed. Recitals in the deed narrate the respective claims of the parties as well as the reasons for the dispute which arose between the parties in respect of the management of the properties. This deed also recites that the well wishers and the relatives of the parties suggested that if a family arrangement is not made, the dispute cannot be solved as a result of which there would be damage to the joint family properties and further it would be impossible to pay off the debts incurred and would be delayed and it would be difficulty in performing the marriage of the daughters. Thus on the advice of the wellwishers and relatives of the parties, both the parties agreed to execute a family arrangement to settle the dispute and the terms have been stipulated in the agreement itself.

Some of the relevant terms of the agreement as embodie in the agrement, in short,are as follows:—

(a)the defendant no. 1-appellant shall be the absolute owner of the entire joint family property and the management, incomeand expenditure there of shall be his concern. Defendant no. 1 shall be responsible for paying off all the remaining debts. Theplaintiff and her husband shall have no concern with that. The defenant no. 1 shall continue to pay Rs. 450/- annually to the plaintiff and her husband from the fund of joint family property after receiving receipt there of and this amount she will be entitled to get from defendant no. 1and his heirs till the lifetimeof her husband and after his death, till the death of the plaintiff herself;

(b) Defendant no. 1 and his heirs shall give Rs. 3000/- for marriage of each of his three stepsisters and the said amount shall be paid to the plaintiff on obtaining receipt;

(c)In lieu of getting Rs.450/-annually and Rs. 3000/- for marriage of her daughters, the plaintiff and her husband thereby relinquished all claims of management over the joint family properties;

(d) the plaintiff neither have nor shall have any claim in that or have any right to get any proprty or to get any property

partitioned either during life time of her husband or even after his death;

(e) On failure on the part of defendant no. 1 to respect the aforesaid obligation (payment of money to the plaintiff as described above) the plaintiff shall be entitled to take interest bearing loan for meeting the expenses of her own, her husband and daughters. She will be at liberty to meet the expenses of marriage of her daughtrs by making portion of lands encumbered or by taking zar-pesgi (advance money) and mortgage in respect of pertion of land out of the joint family property which is a wned and possessed by the defendant no. 1 and the defendant no. 1 and his heirs shall be liable to repay off that money or Rehan money taken by the plaintiff to the creditors. The defendant or his heirs shall have no objection either directly or indirectly for the above steps being taken by the plaintiff and if any objection is raised in that regard, the same shall be null and void before the court of law.

(f) the right to realise the decretal amount in respect of mortgage suit no. 44/37 will be with defendant no. 1 and his father (husband of the plaintiff) or she will have no objection to the same.

(g) the defendant has paid Rs. 160/- towards the instalment to the plaintiff. The plaintiff undertakes to perform the marriage of her eldest daughter within two months and, as such, within the said period the defendant shall give Rs. 3000/- to the plaintiff on taking receipt for peforming the marriage aforesaid. When the marriage of 2nd and 3rd daughter of the plaintiff will be finalised, she will give a notice to the defendant two months prior to the date fixed for each marriage and the defendant shall give Rs. 3000/- to the plaintiff for such expense of each marriage after obtaining receipts.

(h) if the plaintiff dies before marriage of all her three daughters, her brother, Babu Bishwanath Singh shall be the guardian of the daughters and her husband till the marriages of the daughters are performed. The said Bishwanath Singh shall

have right to get money for the maintenance and marriage of her daughters till the marriage of the last daughter is performed (i) the terms and conditions of the agreement shall be binding on the parties and their heirs and no one shall have any right to bring change in those terms and conditions.

(j) the deed shall remain in custody of the defendant no. 1.

(k) The deed shall be deemed to be in force from the date of the registry thereof.

It appears that the aforeasaid deed was scribed on 16th March, 1945 and the plaintiff-Chandrawati Devi for herself and as guardian of her husband on the one hand as well as the appellant-defendant no. 1 on the other hand, executed the said deed on 17th March, 1945, i. e. the next day. Eight persons were the witnesses to the said agreement who have signed on the deed.

12. The Court below, mainly relying on the evidence of P. Ws. 3 and 4, has come to a conclusion that the said deed was an outcome of pressure and coercion and not out of free will of the plaintiff. In order to appreciate that how far the allegation of pressure and coercion is proved, one has to go back to the recitals made in the plaint itself. In para 9 of the plaint the case of the plaintiff is that when she decided to leave village Paleya the Mama and father in-law created some trouble in her way to leave Paleya and put various hindrances by putting pressure and undue influences and forced her to abide by the agreement suggested by the defendant party and, thereafter, allowed her to leave the place. This is the only assertion of the plaintiff regarding pressure and undue influence. This assertion has been categorically denied by the defendants in their written statement.

To substantiate the plea of undue influence and pressure P. Ws.3 and 4 have been examined. P. W. 3 is Brij Bhushan Sharma. According to him defendant no. 1 was a minor when his father became mad and, as such, plaintiff no. 1 began to manage the estate. She brought up the defendant no. 1 and got his full

sister married by spending a substantial amount over the said marriage. Mama of defendant no. 1 began to interfere with the said management of the estate and also took defendant no. 1 with him. At the age of 16 defendant no. 1 returned to his ancestral house. After defendant no. 1 was married, his Mama along with uncle-in-law, Harbans Singh tried to create disturbance in the smooth management of the estate. Both of them began to maltreat the plaintiff somuch so that she was harasced and eolested. With a view to disentitle the plaintiff from the property, the defendant and those two persons got a deed executed under pressure and coercion from the plaintiff. This witness further deposed that after her departure defendant no. 1 began to neglect his father and his treatment. The father of defendant died at Chapra and his Saradh ceremony was performed by the plaintiff out of her own expenses. Defendant no. 1 never attended the Sradh ceremony of his father and or even took the Uttary in the Sradh Sanskar. This witness further deposed that he and his father had intimacy with the family of defendant no. 1.

In cross examination this witness has deposed that the plaintiff used to complain about the maltreatment and they tried to settle the matter but could not succeed. She was ultimately turned away. This witness did not inform the relatives of the plaintiff. He did not see anybody beating the plaintiff as it was not in his presence. The plaintiff left the house with her husband and daughters in the company of servant and none came from her Naiher to take her. According to him, the deed was scribed at Gaya but not in his presence. It was scribed before the departure of the plaintiff to her Naiher. She was in the house of Harbans Narain Singh when the said deed was executed and she was also brought by Harbans Narain Singh. The plaintiff stayed at Gaya for one or two months and left for Naiher from Paleya after 2-3 months. He never went to meet the plaintiff while she was in her Naiher. Her father did not take any action for her maltreatment. This witness did not inquire about the expenses of the marriage

of the daughters of the plaintiff. Even he did not know that where they were married. He denied the suggestion that defendant no. 1 performed the funeral ceremony of his father, but says that he performed his sradh at Gaya. He is unable to say about the income of the parties during the madness of Rajeshwari or at the time when defendant no. 1 was managing the estate. He has denied the suggestion that the deed of family arrangement was executed in order to bring peace in the family.

13. From his evidence it appears that instead of supporting the case of the plaintiff he has practically demolished her stand. This witness has in clear term said that after departune of plaintiff, defendant no. 1 began to neglect his father and treatment. But this is not the case as according to the plaintiff she was forced to leave Paleya with her insane husband and daughters. Subsequently P. W.3 also says so. Thus there is apparent contradiction. Further, according to P. W. 3, the plaintiff was putting up with Harbans Narayan Singh when the deed was executed and she was brought to Gaya by Harbans Narayan Singh. This story is contrary to plaintiff's case and evidence. Apart from that if the plaintiff at the time of execution of the deed was residing with Harbans Narain Singh, can't he said that she had any illfeeeling towards him ?. This Harbans is uncle-in-kaw of defendant no. 1 and plaintiff has alleged many things against him and as such if evidence of P. W. 3 is to be believed then in my opinion, the allegation of coercion and undue influence has no leg to stand. Thus, P. W. 3 has completely demolished the case of the plaintiff.

14. The next witness on this point is P. W. 4, the plaintiff herself. She deposed that Mama began to interfere with the management of the property and defendant no. 1 was taken away by the Mama. After the marriage of defendant no. 1 Dwarika (Mama) and Harbans Narain Singh (uncle-in-law) of defendant no. 1 began to manage theproperties of the family. Both of them began to harass the plaintiff and put her to all sorts of trouble and discomforts. she was assaulted by defendant no.

1 and Mana and, as such, she was apprehensive of her life and that of herdaughters. Expenses were stopped which created difficulty for the plaintiff. They told the plaintiff that she should sign a deed and then go away to Chapra with her daughters and husband. They got a deed executed from her at Gaya but the same was neither read out and explained to her. It was not given to her for going through the same and none of the attesting witnesses put his signature in her presence. She put her signatureoutof fear of defendant no. 1. Dwarika and Harbans singh.

According to this witness her father was a leading lawyer at Chapra while she was married. Her brother, Bishwanath Singh also became lawyer and joined Chapra Bar and practised for some time but subsequently he started business. She denied of having settled any land with any tenant and said that several papers were signed by her at the instance of Dwarika and Harbans. The papers which were in her possession were taken by said two persons. she has also denied that defendant no. 1 was giving her Rs. 450/-annually for her maintenance. According to her she remained at Paleya for one and half months even after execution of the said deed. She admits that she sued to ask for money through letters from defendant no. 1 and at times defendant no. 1 used to send her money through Money Orders. However, no money was paid to her during the marriage of her daughters. The defendant no. 1 paid Rs. 2255/- in the marriage of second and third daughters. She admits that she was a pardanasin lady but now-a-days she is not. In her cross examination she has deposed that after her husband became insane, one Sri Kishum was appointed as Manager by her and her father. He continued as such for three to four years. After that she appointed one Dhurup Babu as Manager. He continued till the management of the estate was being interfered with by Dwarika and Harbans. She continued to manago the estate for 9-10 Years. She admits that after her marriage Dwarika seldom used to come to Paleya. Previously there was no quarrel but after

the marriage of the sister of defendant noil. dispute arose regarding expenses. Dwarika used to control the expenses incurred by the plaintiff. This witness further deposed that there was no family arrangement between her and defendant no. 1 rather, Dwarika and Harbans got one deed executed from her at Gaya. She did not appear before the Sub-Registrar for admission of the said deed at Gaya but somebody came near her rickshaw besides those who were known to her. She did not know that person from before. According to her she had signed several papers in Gaya court while sitting on a rickshaw. She did not execute any deed at Gaya but had executed and registered a deed at Tekari. According to her she did not disclose her brother that she had to execute some documents at Gaya. At that time her father was dead but she did not tell anybody of her Naihar about the execution of the said document. Prior to filing of the present suit she also did not inquire about the said deed.

However, this witness admitted her signature on the deed in question by saying that this deed was executed by her by signing the same on each paper and she knows the same any (they were in her pen. They are marked as Exts. A to A/9. She has proved some documents, one of which is an inland in her pen. She admits of having correspondences with defendar no. 1 from Chapra. She has also proved her signature on the Money Order cuppns etc. The admission towards granting of Hukumnama in favour of Gawaras and one family of Bahari Gope and others is there. She does not remember about title suit no 13/47 between Ram Sumiran and Kulikar Mahto and others in which she was also a party. She fails to remember of having helped those tenants, the defendants of the said suit. Regarding acquisition of the properties in the names of wife and son of defendant no. 1, P.W. 4 is ignorant aboutt hat fact. She is not aware of the fact that which properties were acquired in their names and when.

The most striking feature of her deposition is when she says that she demanded partition from defendant no. 1 through

registered post which were returned to her on refusal. She also sent postal letters for the same. However, this letter has not been exhibited. She admits that she was getting help from the joint family and so she could not file any partition suit at that time. She admits of having received two Money Orders even after filingof the suit. She had denied the suggestion that the suit was filed by her at the instance of her youngest son in-law. Regarding mortgage bond in favour of Janki Sharan Sharma. the deposition of P.W. 4 is to the extent that he had come to village Paleya for advancing money to her in the marriage of sister of defendant no. 1. She denied the sugestion that mortgage bond in favour of Janki sharan was only a paper transaction and without any consideration. She also denied the suggestion that defendant no. 1 paid the dues of loan to Janki sharan sharma. rather, she paid to him the loan amount of the money received from defendant no. 1 by Money Orders.

15. Thus from deposition of P. W. 4 it is not established as to in what manner she was either coerced or influenced by defendant no. 1or his Mama and uncle-in-law. Moreover, accordingto P. w. 3, she after leaving Paleya was living with Harbans and had gone to Gaya for execution with him. In such circumstances it is hard to believe that any coercion or inflience was there which compelled her to execute a registered deed.

16. P. W. 5. Suku Singh was on visiting terms with Rajeshwari Prasad, the husband of the plaintiff. He deposed that the plaintiff used to manage the estate peacefully and efficiently but Mama of defendant no. 1 began to disturb her in such management. Father in-law of the defendant along with Mama also used to disturb the plaintiff in her management and used to abuse her at times with a view to out her from the village. Paleya. Both of them did not give proper attention to the comforts and treatment of Rajeshwari and this sort of treatment was going on for 3 to 4 years and, thereafter, the plaintiff left for Chapra with Rajeshwari and her daughters. According to his defendant no.1did not attend the cremation of the father at

Chapra and all rituals were done by the plaintiff. He has, howevr, stated that Chandrawati Devi used to come to Palyea for receiving her expenses frequently. From the trend of cross examination it appears that this witness had some dispute with defendant no. 1 regarding some hand notes. About 22 years ago the management was taken away from the plaintiff by Mama and father in-law as well as defendant no. 1 and it was at the time when the plaintiffx left for Chapra with her husband. According to him the maltreatment was meted out to the plaintiff for2-3 years during which period she never went to Chapra but her men used to come from Chapra. Though he has stated that he had seen the plaintiff being badly treated at Paleya in the years 1942-45 but at the same breath he stated that the plaintiff used to observe Parda during the said Years. According to him she used to be chastited and used to be harassed for speaking over the assault on Rajeshwari and so she sued to say that Rajeshwari should not 1 be assaulted rather be treated for his insanity. Again this witness says thatRajeshwari was treated even during his stay at Paleya and the said treatement went for more than 20 Years ago. Heis ignorant of the documents of the family. He is not in a position to say the months and years when the plaintiff visitedPaleya from Chapra but said that shealways used to come.

17. P. W. 6 Ram Prasad Singh was also on visting terms with the parties. According to him Rajewhari became insane after 8-10 Years of his marriage with the plaintiff during which period the plaintiff used to manage his estate. The plaintiff managed the same efficiently only for 8-10Years. After marriage, defendant no. 1, his father in-law and Mama began to manage this property. Both of them used to maltreat the plaintiff by putting difficulty in her maintenance. Thus the plaintiff left Paleya with her husband and daughters for Chapra. According to this witness defendant no. 1 to his Manehar but the plaintiff remained at Chapra. This witness categorically stated that the plaintiff left for Chapra when management of the estate was

snatched from her. This evidence of P.W. 3 completely shattered the case of the plaintiff theat she was forced to execute the deed before leaving Paleya.

In cross examisnation he has admitted of having no concern with the affairs of the parties and P. W. 5 was his Babu in Gotiya. He does not know for how many years Rajeshwari remained mad but he was so mad that he was to be put in chain. To mange the estate of Rajeshwari these were servants and one Singh was the Manager during the period of Rajeshwari. This Kamla Singh was continuing as Manager even during the period of madness. The plaintiff remained at Chapra when Mana Dwarika Prasad took defendant no. 1 along with him to Mahehar. During his absence the bakasi lands were given in Chaurahe. Though defendant no. 1 returned to Palya at the age of 13-14 Years, the plaintiff did not return from Chapra. The defendant no. 1 returned to Paleya in the company of his Mama who used to manage the estate. He is unable to say as to whether defendant no. 1 used to send money for maintenance of Rajeshwari who was at Chapra. He admits that defendant no. 1 saved his head and mostague at Paleya but never fed them. This witness had gone in Barat of defendant no. 1. Defendant no. 1, according to this witness, did not go to Chapra for cremation of his father and the Uttery of Rajeshwari was never put on by defendant no. 1, rather, it was kept over a tree. Hedenied the suggestion that as because defendant no. 1could not pay any money, he was deposing falsely.

18. P. W.7, Ram Swaroop Singh knew the parties, mama and father in-law of defendant no. 1. The plaintiff used to manage the property efficiently and sister of defendant no. 1 was married during her management. This witness is on visiting terms with defendant no. 1. After marriage of defendant no. 1 he along with Mama and father in-law used to maltreat the plaintiff over the expenses and treatment of Rajeshwari.

In cross examination he admits that he has no concern with the affairs of the parties but knows the income of the parties. The

plaintiff was married with Rajeshwari 30-35 Years age and began to manage the property from one or two years after her marriage. She managed the same for 8-10 years. According to him the plaintiff used to maintain parda and during the time of Rajeshwari oneKamla Singh was his Manager and there were other amlas in his estate. Amlas continued for 8-10 years even during the time of managementby the plaintiff.

19. P. W. 9 is Lal Singh who was also having visiting terms with defendant no. 1. According to him after marriage Rajeshwari became mad and during this period the plaintiff managed his estate for 12-13 years quite efficiently. After marriage of sister of defendant no. 1. Dwarika began to come to Paleya and he was a litigant. The father in-law and Mama used to maltreat the plaintiff. They used to interfer with the management of the estate by the plaintiff and, as such, the plaintiff left for Chapra with her husband and daughters. Defendant no. 1 did not go to Chapra to perform the last ritual of his father.

In cross examination he admits that Ram swarup Singh is his Gotia. He had no concern with the cultivation and Zamindari of the plaintiff aswell as the management of the plaintiff as he had no occasion to look into the papers. He is unable to say about the month and years during which the father of defendant no. 1 was mad. He did not join his cremation or Sradh at Chapra ashe did not receive any invitation for the same. He is ignorant of the year of marriage of plaintiff with Rajeshwari andalso ignorant about the actual period of interference of Mama and father in-law with the management of the estate.

20. These are the oral evidenes on behalf of the plaintiff on the pointof maltreatment on her, which, inter alia. reveals that except P.W.s. 3 and 4. no witness has stated about coerion on the plaintif by either defendant no. 1 or his Mama and father in-law. The other witnesses. as discussed aove. have stated only about some maltreatment as well as interference by Mama and father in-law over the management of the estate by the plaintiff.

21. P. W. 12 is Janki Sharn Singh, a practising lawyer at Chapra, was junior to Babu Gnurag Singh, a practising lawyer.

the father of the plaintiff. This witness has not even whispered about the maltatment and / or coercion on the plaintiff though he knew the plaintiff from his very childhood. The plaintiff was only 3 years of age when this witness became junior to her father. He has deposed only about advancing some money to the plaintiff as loan for meeting the expenses of marriage of her step daughter. In examination in chief he has said that the plaintiff repaid the money in part and the remaining loan amount was paid by Harbans and Gouri on behalf of defendant no. 1and. as such, the entiredues was satisfied in full.

22. From the discussion of above depositions it is clear that the evidences on record on the point of coercion and in due influence are inconsistentandself contradictory. The plaint itself is silent about the nature of coercion or undue in luence. If there was any sortof pressureon the plaintiff to execute the deed, then there was no earthly reason for her not to taive an advice from her brother who was a lawyer or even from P.W. 12 who happened to be the junior of her father. On the other hand, her specific statemnt is that she did not inform any body muchless her brother about the deed which she was going to execute at Gaya. Moreover, she admitted her signature on the said deed.

23. From the evidence discussed above it is further clear that soon after her marriage with Rajeshwari, she began to manage the property which continued for 8-10 years. Evidence is also there to show that when Mama and father in-law of defendant no. 1, took over the management of the estate from her she left for Chapra not only with husband and daughters but also with defendant no. 1. Defendant no. 1 remained at Chapra with the plaintiff for a couple of years but ul imately the Mama took him to Mahehar though the plaintiff remained at Chapra. Under these circumstances, in my opinion, the plaintiff has failed to prove that the deed was executed by hereither by coercion or by undue influence.

Similarly, except P. Ws.3 and 4 (the plaintfii herself) nobody has supported the case of assault and maltreatment on her.

Even P. W. 3 has said in his cross examination that he did not see anybody beating her as it was not in his presence. In the plaint only statement is made to the effect that the defendants in collusion with his Mama and father in-law began to molest her in various ways. There is no specific statement about the nature of molestation. In her evidence, instead of using the word' molestation' she has stated that she was assaulted by the defendant no. 1 and his Mama and, there after, she leftPaleya for Chapra. The evidence on record, in my view, does not insprire me to concur with the findings of the learned court below about the story of assault.

24. The story of undrue influence is also not supported by any cogent evidence. On the other hand the evidence on record shows that the plaintiff herself had gone to Gaya to execute the said deed. In her deposition she has said that she did not appear before the Sub-Registrar for admission of the said deed and while she was sitting on a rickshaw before Gaya Court, somebody had come to her and several papers were signed by her while sitting on rickshaw. Besides that, unknown person,some persons were also there who were known to her. Further, as I have noticed earlier, she did not tell either her brother or anybody of her Nailher about the execution of the said document at Gaya. Besides this evidence of the Plaintiff which falsifies the story of undue influence, there is no specific statement regarding the nature of undue influence exercised by defendant no. 1 and his Mama and father in-law. Moreover, evidence on record reveals that when Mama and father in-law along with defendant no. 1 tried to put hindrances in the management of the estate by the plaintiff, she left Paleya for Chapra along with her husband and daughters. In her evidence she has categorically stated that she came to execute the documentat Gaya from Chapra and this shows that the Plaintiff came to Gaya on her own accord to execute the said document.

The counter claim of the defendants in the written statement is that as defendant no. 1 was being maltreated by his step

mother, his Mama had to take away him from the plaintiff. To thiseffectis the evidence of D. W. 3, Chhedi Singh, D.W.10, Shebrat Singh and DW 14, Hulash Singh. Beside the aforesaid witnesses DW 15, defendant no. 1 has deposed in categorical term that he and his sisters were badly treated by the step mother and, as such, both of them were taken to Ratanpur by their Mama, Dwarika Prasad. This part of the evidence has been over looked by the learned court below without any reason.

25. The next question which arises for consideration is as to why there arose a need for some family arrangement. The evidence on record are galore to suggest that the father of defendant no. 1 became insane practically immediately after his marriage with the plaintiff i.e. one and half years after. The defendant no. 1 was admittedly 5-6 years old when his father married the plaintiff. It is also not in dispute that after Rajeshwari became insane, as defendant no. 1 and his sisters were minor, somebody in the family was required to be there for the proper management of the estate of Rajeshwari. Though one manager was there to look after the affairs but the plaintiff took charge of the management in that situation. The step taken by the plaintiff clearly shows that she was not only a literate lady but also prudent. In 1941 after attaining the majority the defendant no. 1 took over the management of the proprty. Till Rajeshwari died in 1947 as an insane, the plaintiff acted as guardian of her husband. Some evidences are there that during the mamagement of the property by the plaintiff till 1941, there was much loss to the estate and when the plaintiff began to look afther the estate, the plaintiff became antagonistic towards him and in order to take revenge, settled some lands and trees with other persons for paltry amount. Subsequently when the plaintiff settled some bakast land in favour of Puhkar and others which resulted in a proceeding under section 144 Cr. P. C. and a criminal case under section 379 of the Penal Code, a further bad relationship cropped up. Then at the intervention of the common relatives and well wishers of the parties, family settlement wasentered into. During scribing and execution of the family arrangement deed,

witneses like Sheonath, Gouri Shankar and Nahki saran were Prsent.Sheonath, according to defendant no. 1, was not only a lawyer but also cousin of the plaintiff. D.W. 5, defendant no. 1, further deposed that the deed was scribed and executed with the consent and consultation with him and the plaintiff. The same was read over and explained to both of them, defendant no. 1 and the plaintiff. He has stated that the plaintiff was never forced to exe cute and sign the said deed and there wasno question of any duress or threat. The same was executed by her of her own accord. When his father died at Chapra he attended his funeral at Chapra and, thereafter, performed his sradh at Paleya, the native place of his father. In his cross examination defendant no. 1 has categorically stated that his Maina only looked after his comfort but not towards the estate though he requested his Mama for the same but he did not care. Similarly, as he was managing the estate even prior to his marriage at Ghashi, hence there was no question of requesting his father in-law to look after the same.

26. Nothing advrse could be brought out from thedefendant no. 1 in his cross examination which can suggest that in violation of the terms of agreement no amount had been paid to the plaintiff. Rather, it has come in evidence that he used to send money through Money Orders. This fact also finds support from the evidence of the plaintiff herself when she says that she had received two Money Orders even after filing of the present suit. Ext. B/5 is a letter by Janki Saran Sahi, P. W. 12, who is the brother of brother-in-law of the plaintiff. This letter was addressed by him to Harbans Narayan Singh, uncle in-law of defendant no. 1 This letter reveals that negotiation was made before execution of the deed of agreement. The averment in the deed that due to intervention of the well wishers of the parties the matter was settled finds corroboration by this letter. In have already noted above about the terms of agreement from reading of which it will be clear that there was some dispute between the parties and to settle the same permanently the well wishers tried their best and ultimately succeeded in arriving at an amicable

settlement which result in execution of the said agreement. The agreemnt has been proved by D.W.4 the plaintiff herself has proved her signatures over the same. DN 19. Shital Lal and DW 43. Bindeshwari Lal are two attesting witnesses of the said deed. Shital Lal deposed that the said agreemnt was made through registered deed which was scribed by Kishun Singh who is dead. Sheonath Singh. Gouri Shankar Shahi and Janki Ram Sahi. a pleader. were present on behalf of the plaintiff during execution of the said deed. Sheonath Singh, the cousin of the plaintiff and Janki Sharn Sahi, the brother of brother In-law of the plaintiff were also there. This witness has proved his signature as Ext. 4. The said was executed and signed by the plaintiff and defendant no. 1 in his presence after the contants of the same were read out and explained to the parties. Nothing could be brought out from this witness in his cross examination. On the other hand, he has denied the suggestion that family deed was scribed at Ghashi lodge where the plaintiff was forcibly asked to execute the same.

Similarly Bindeshwari Lal has also deposed that the said registered deed was executed and attested in his presence which was scribed by Kishun Singh. He has proved his signature as Ext. F/5, According to him the deed was scribed with the agreement of both the parties and Sheonath Singh was present during the registration and execution. Janki Sharan Shahi and Gouri Shankar Sahi were slso present during scribing and execution of the deed. Hehas also said that no force was applied upon the plaintiff during execution of the deed. In cross examination he has clarified what he meant by the term family'. According to him the family arrangement was reached for managing the family property and by this arrangement the management went to defendant no. 1 and plaintiff was given 'Khorish' (maintenance). He has also supported the case of the defendant no. 1 to the effect that Janaki, though was prsent and was requested to sign, refused to do so. However, Gouri Shankar Shahi had attested the deed. From this also nothing adverse could be brought out which goes against the case of defendant no. 1.

27. From the evidence discussed above, in my opinion, the following facts are proved :—

(a) that the plaintiff was married with Rajeshwari when defendant no. 1 and his sisters were of tender age;

(b) that one or two years after the said marriage Rajeshwari became insane and as because defendant no. 1 was minor, the management of the estate was being looked after by the plaintiff;

(c) that for some reason or other, Mama of defendant no. 1 took him to his placefor being brought up ;

(d) that defendant no. 1, after attaining majority, began to look after the management of the estate which was not liked by the plaintiff. Defendant no. 1 had to institue some legal proceedings against those who were granted lands by the plaintiff obstensively during her management of the estate;

(e) that there was bickering and illfeeling between the plaintiff and defendant no. 1 and the family peace was at stake. To resolve the dispute for ever well wishers of the parties intervened and ultimately succeeded in execution of the registered deed of family arrangement ;

(f) that the agreement was executed and signed by the plaintiff and defendant no. 1 at Gaya and the plaintiff of herown put her signatures on the deed;

(g) that there was neither any coercion nor exercise of undue influence on the plaintiff for execution of the deed of family arrangement.

28. On this premises another aspect of the matter has to be considered as to whether or not the aforesaid deed was acted upon by the parties. I have already noticed that the plaintiff harself has admitted that even after filing of the present suit she received two Money Orders, from the defendant no. 1 She also said that out of the money received by M.Os. from defendant no. 1 she had paid some amount to Janki Sharan Sahi. Ext. A/10

to A/41 are the signatures of the plaintiff on the Money Order clupons/receipts showing receipt of money sent to her by defendant no. 1 in terms of the family arrangement. All the dates on those receipts are after execution of the deed Ext. F in 1945. Ext. A/42 to A/47 are the M.O. cupons over which the signatureof Janki Shai, P.W.12 is there. These Exts. have been proved by P.W. 12 himself. Ext. A/48 to A/82 are the M.O. cupons showing senders name as Ram Sumiran defendant no. 1 and the receipant's name as ChandrawatiDevi, the plaintiff. These coupons also disclose the amount which were sent to the plaintiff by defendant no. 1 from time to time. Acfording to the plaintiff, defendant no. 1 use to call her 'Didi' and defendant no. 1 was addressed by her as "Nunu", Ext. B is a letter dated 11.6.54 written by the plaintiff to defendant no. 1 from Chapra. This letter demolishes the case of the plaintiff in toto. By this letter she made a grievance to defendant no. 1 that though after the death of his father, the defendant had been to Chapra but after that he did not visit Chapra for five and half years. She also informed that marriage of her daughters were settled and the same was to be performed very soon but her amount of 'khoriship' (maintenance) was not sent for about two and half years due to which she was facing difficulty. This letter further shows that defendant no. 1 was requested by the plaintiff to come down to Chapra so that the amount regarding marriage of her daughters can be discussed. Similar are the letters of the plaintiff which are Exts. B/1 to B/4. Mere perusal of those letters makes it amply clear that after the family settlement in terms of the agreement, theplaintiff used to receive the amount regularly. However, not being satisfied with the accounts given by the defendant no. 1, she requested him to send fresh account and also asked for money for the marriage of her daughters.

Ext. D is a receipt granted by PW 12 which further shows that a sum of Rs. 300/-was received by him from defendant no. 1on account of his dues towards mortgage bond for Rs. 2500/- dated 12.5.34. One of the terms of the agreement was that the rest of the dues amount of mortgage money was to be paid by

defendant no. 1 to Janki Babu and Ext. D corroborates the said recital. Ext. E series are rent receipts in the name of defendant no. 1. This is also in terms of the agreement. Some receipts show the name of the wife and son of defendant no. 1 in respect of some properties which was the self acquired property.

Thus these documentary evidences clearly indicated that the family arrangement was acted upon and the same was not a mere paper transaction. The learned court below in my opinion, has utterly failed to consider this aspect of the matter. Paragraph 55 of the judgment though shows that the court below was going to consider the questions as to whether family settlement deed was acted upon or not, but he has deviated from this point and has considered the case of the plaintiff that the claim was based on remote spés succession and had has come to a finding that by this family agreement the plaintiff has not given a go by to her right to partition and share in the suit land. Obviously, this finding of the court below is against the settled principle of law and cannot be sustained.

29. The argument of the plaintiff that she had no right to claim herself as guardian of Rajeshwari as shown in Ext. F cannot be accepted as valid. The evidences are galore that right from 1947 in several courts proceeding the plaintiff claimed herself as guardian of hr husband. Ext. Z. 2 copy of the registr-D shows that hr name has been entered as guardian of her husband. similary. Ext . X/4, decree in rent of 1943 shows that the plaintiff described herself as guardian of her husband. Exts. O and P are also the documents to that effect which clearly show and prove that the plaintiff was not a pardanasin lady but she fought so many litigations in the capacity of guardian of her husband.

Another revealing feature of the case is that after execution of Ext. F when defendant no. 1 filed several suits against those persons to whom the plainfiff had given the properties in mortgage, the family agreement, Ext. F was referred to and was considered by the courts in those case. Moreoveer, the plaintiff was made a party in those suits and even she was examined on

commission. Ext. M is the plaint in title suit no. 76/45 filed by defendant no. 1 against those mortgages in which the plaintiff was added as a proforma defendant no. 12. Categorical statement was made in the plaint about the circumstances under which the family agreement, Ext F, was executed and on that basis he claimed relief from the courts in that suit against a third person stating that his step mother illegally settled those lands. The plaintiff being defendant no. 12 however, did not contradict the aforesaid stand of defendant no. 1 that suit. Ext. W/1 is the judgment in title suit no. 13/47 in which defendant no. 1was the plaintiff. The suit was decreed and appeal preferred by defendant no. 2, was also dismissed by the first appellate court. The extract of the first appellate court' s judgment is Ext. W. The Second Appeal preferred by the defendant before this court, being S. A. no. 1320/49, was also dismissed.

All these documentary evidences show that even before the present suit was filed by the plaintiff, the defendant filed several suits against different persons making specific avermemts about Ext. F. The plaintiff being a party to those suits had knowledge about the existence of the family agreement, Ext. F but never controverted the averments of defendant no. 1.

30. Havin discussed the factual aspect of the case let me consider the legal aspect of the matter. In cannot do better oxcept referring to the principle of law stiled by the Apex court in the case of Kale and others v. Dy. Director of Consolidation and others reported in AIR 1976 SC 807. The effectand value of amily arrangemnt entered into between the parties with a view to resolve the dispute has been dealt with in para 9 of the judgment which reads as follows :

"Before dealing with the respective contentions put forward by the parties, we would like to discuss in general the effect and value of family arrangements entered into between the parties with a view to resolving the disputes once for all. By virtue of a family settlement or arrangement membersof a family descending from a common ancestor or a near relation seek to sink their

difference and disputes, settle and resolve their conflicting claims or disputed titles once for all in order to buy peace of mind and bring about complete harmony and goodwill in the family. The family arrangments are governed by a special equity peculiar to themselves and would be enforced if honestly made. In this connection Kerr in his valuable treatise "Kerr on Fraud" at P. 364 makes the following pertinent observations regarding the nature of family arrangment which may be extracted thus;

"The principles which apply to the case of ordinary compromise between strangers, do not equally apply to the case of compromise in the nature of family arrangemnts. Family arrangements are governed by a special equity peculiar to themselves and will be enforced, if honestly made, although they have not been meant as a compromise, but have proceeded from an error of all parties, originating in mistakeor ignorance of fact as to what thelf rights actually are, or of the points on which their rights actually depend.

The object of the arrangement is to protect the family from long drawn litigation or perpetual strifes which mar the unity and solidarity of the family and create hatred and bad blood between the various member of the family. Today when we are striving to build up an egalitarian society and are trying for a complete reconstruction of the society, to maintain and uphold the unity and homogeneity of the family which ultimately results in the unification of the society and, therefore, of the entire country, is the prime need of the hour. A family arrangment by which the property is equitably divided between the various contenders so as to achieve and equal distribution of wealth instead of concentrating the samein the handsof a few is undoubtidly a milestionein the administration of social justice. That is why the term 'family' has to be understood in a under sense so as to include within its fold not only close relations or legal heirs but even those persons who may have some sort of antecedent title, a semblance of a claim or even if they have a spes succession so that future disputes are sealed for ever and the family instead of fighting claims inter se and wasting time,

money and energy on such fruitless or futile litigation is able to devote its atention to more construction work in the larger interest of the country. The courts, have therefore, leaned in favour of upholding a family arrangement instead of disturbing the same on technical or trivial grounds, where the courts find that the family arrangements suffer from a legal lacuna or a formal defect the rule of the estoppel is pressed into service and is applied to shut out plea of the person who being a party to family arrangement seeks to unsettle a settled dispute and claims to revoke the family arrangement under which he has himself enjoyed some material benefits. The law in England on this point is alomst the same. InHalsbury's laws of England, vol. 17, Third Edition at PP. 215-216 the following apt observations regardingthe essentials of the family settlement and the principles governing the existence of the same are made:

"A family arrangment is an agreement between members of the same family intended to be generally and reasonsbly for the benefit of disputed rights or by preserving the family property or the peace and security of the family by avoiding litigation or by saving its honour.

The agreement may be implied from a long course of dealing but it is more usual to embody or to effectuate the agreement in a deed to which the term 'family arrangement' is applied.

Family arrangments are governed by principles which are not applicable to dealings between strangers. The court, when deciding the rights of parties under family arrangements or claims to upset such arrangements, considers what in the broadest view of the matter is most for the interest of families and has regard to considerations which in dealing with transactions between persons not members of the same family, would not be taken into account. Matters which would be fatal to the validity of similar transactions between strangers are not objections to the binding effect of family arrangements.'

Reviewing several decisions their lordships have laid down the following propostitions for giving binding effect of family

settlement in the following manner :

(1) The family settlement must be bona fide one so as to resolve family disputes and rival claims by a fair and equitabledivision or allotment of propeerties between the various members of the family;

(2) The said settlement must be voluntary and should not be induced by fraud, coercion or undue influence.

(3) The family arrangements may be even oral in which case no registration is necessary ;

(4) It is well settled that registration would be necessary only if the terms of the family arrangement are reduced into writing. Here also, a distiction should be made between a document containing the terms and recitals of a family arrangement made under the documnt and mere memorandum prepared after the family arrangement had already been made either for the purposeof the record or for information of the court for making necessary mutation. In such a case the memorandum itself does not create or extinguish any rights in immoveableproperties and, therefore, does not fall within the wischief of section 17 (2) (Sic) (Sec. 17 (1) (b) ?) of the Registration Act and is, therefore, not complsurily registrable.

(5) The members who may be parties to the family arrangement must have some antecednt title, claim or interest even a possible claim in the property which is acknowledged by the parties to the settlement has no title but under the arrangment the other party relinquishes all its claims or titles in favour of such a person and acknowledges him to be the sole owner, then the antecedent title must be assumed and the family arrangment will be upheld and the courts will find no difficulty in giving assent to the same;

(6) Even if bona fide disputes, present or possible which may not involve legal claims are settled by a bona fide family arrangement which is fair and equitable the family arrangement is final and binding on the parties to the settlements."

31. Another feature of the present case is that where as in the case before the Supreme Court, the family arrangment was assailed afir more than seven years but in the present case, the plaintiff has come forward to challenge the registered deed of agreement after 19 years. The agreement was entered into, in the present case, in the year 1945 and after that much water have flown through the Ganges but the plaintiff did not whisper a single word against the said agreement. All of a sudden she filed the present suit in 1964. Although she has denied the suggestion that the suit was filed at the instance of her youngest son-in-law but the facts discussed above keeps one guessing as to why after so many years the plaintiff would have filed the said suit against defendant no. 1. In my opinion, the facts of the case compels one to conclude that the plaintiff was instrumental in the hands of some persons with vested interest for filing the instant suit. In my view the deed of family settlement being of the year 1945 and the plaintiff having derived benefits therein, cannot be allowed to reopen the validity and otherwise of the same. In the case of *S. Shanmugam Pillai* V.*K. Shanmugam Pillai* reported in AIR 1972 SC 2069 after exhaustive consideration the Apex court observed as follows:

"Equitible principles such as estoppel, election family settlement etc. are not mere technical rules of evidences. The have an important purpose to serve in the administration of justice. The ultimate aim of the law is to secure justice. In the recent times in order to render justice between the parties courts have been liberally relying on those principles, we would hesitate to narrow down their scope."

Further, in the case of Subbu Chetty's Family Charities V. Gaghava Mudaliar reported in AIR 1961 SC 797 their lordships observed that" if a person having full knowledge of his right as a possible reversioner enteres into a transaction which settles his claim as well as the claim of the opponents at the relevant time, he cannot be permitted to go back on that agreement when reversion actually opens."

In the Case of Kale and Others (supra) it is held that family arrangment being binding on the parties to the arrangement clearly operates as estoppel so as to preclude any of the parties who have taken advantage under the agreement from revoking or challenging the same.

32. On the aforesaid authoriratives pronouncements I am of the view that whenever any party to the family settlement triesto assail it, the court must give effect to the doctrine of estoppel which is always applicable in the case. In the case of Kale and others (supra) inter alia, it is held that even if family arrangment was not registered, it can be used for a collateral purposes, namely for the purpose of showing the nature and character or possession of the parties in pursuance of thefamily settlement and also for the purpose of applying the rule of estoppel which followed from the conduct of the parties who having taken benefits under the seettlement keep their mouth shut for full seven years (here nineteen years) and later tried to resile from the same. In the presentcase the plaintiff having taken advantage of the said agreement for several years has filed the suit to assail the said registered deed after long 19 years and, as such, following the principles laid down in the afore said decision, I am of the view the suit must fail on that ground itself.

The ultimate findings of the court below in para 57 of the judgment are (1) that there was no proper consideration for the family arrangment as there was no semblance of dispute between the parties, (ii) the plaintiff was not entitled to the suit land prior to the death of her husband, (iii) the deed aforesaid could at best be held to be a deed for maintenance of the plaintiff but it cannot be said to be in lieu of her right to partition, (iv) the contract entered into between the parties is against law and cannot be treated as valid one and, as such, (v) the plaintiff could not be said to have relinquished her right to her property, in my considerd opinion, are not only againstlaw but also against the fact of the case. The court below itself having found in para 58 of the judgment that Ext. F was executed because there was some dispute beforeexecution of the same, has wrongly con-

cluded that there was no semblance of dispute before execution of the family deed. Moreover, I have alrady discussed above that it was specific case of the plaintiff that while she was managing the affairs of the estate the defendant no. 1 his Mama and uncle in-law were trying to put hindrance as a rsult of which some ill-feeling was there. Evidences are there to show when her management of the estate was interfered with, she left Paleya along with her insane husband and daughters.

Another important aspect which is to be noticed is as to whether the suit was barred by limitation or not. The court below has committed a grave error of law in holding that the suit was not barred by limitation. In the case of Smt. Ramti Devi V. Union of India reported in JT 1995 (1) SC 223 the Supreme Court has clearly held that to get a declaration that the registered sale deed is void as illegal, the suit has to be filed within three years from the date of cause of action. In the instant case the registered deed of family settlement was executed in the year 1945 and the suit was filed in the year 1964 which is clearly and hopelessly barred by limitation. Moreover, no issue was framed in the suit on the voidity of the sale deed nor finding has been recorded that the sale deed is void under section 23 of the Contract Act. In the aforesaid decision the Supreme Court has observed as follows "Apart from the prohibition under S. 92 of the Evidence Act to adduce oral evidence to contradic the term of recitals there in, no issue in the behalf on the voidity of the sale deed or its binding naturewasraised nor a finding recorded that the sale deed is void under S. 23 of the Contract Act. Pleading itselfis not sufficient.

33. Having considered the pros and cons of the facts and circumstances of the case and scrutinising the evidences on recordI am of the opinion that there is no merit in the suit filed by the plaintiff and the learned court below, as I have already indicated, erred in law as well as on facts in decreeing the suit. Under these circumstances, this appeal is allowed and the judgment and decree of the court below are hereby set aside. The parties to bear their own costs.

R. D. Appeal allowed

CIVIL WRIT JURISDICTION

Before Bisheshwar Prasad Singh and Ashish N. Trivedi, JJ.

1995.

August, 8.

Dr. Dhirendra Bahadur Chand (since deceased) through his legal representatives (a) Smt. Sneh Prabha Srivastava (b) Gyandra Bahdur Chand.

v.

The Chanellor of Universities, Bihar & ors.

Promotion to thepost of Reader--- experience acquired by a part-timeLecturer, whether can be considered for promotion as a Reader under the time bound Promotion Scheme.

Held, that the experience acquired as part-II time lecturer cannot be taken into consideration while promoting a lecturer to the post of a Reader. It is only the experience acquired by him as a full time Lecturer which can be taken into consideration while considering his case for promotion to the post of a Reader under the time bound promotion scheme.

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 judgment of B.P. Singh, J.

M/S Dr. Sadanand Jha, Harish Chandra Mishar, Asim Jha & Indu Bhusan Sinha the petitioner

M/S Indu Shekhar Pd. Singh, Madan Mohan& Mukesh Kumar for the respondents

B. P. Singh, J. In the instant writ petition the petitioner (since deceased, now represemted by his legal representatives)

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*Civil Writ Jurisdiction Case No. 5333 of 1933. In the matter of an appliaction undr Articles 226 and 227 of the Constitution of India.

had prayed for a writ in the nature of certiorari setting aside the order dated 12-7-1986 contained in Annexure-21 whereby the petitioner had been reverted from the post of Reader in the Deparment of Hindi in Ganga Singh College, Chapra, to the post of Lecturer in the same College and subject. The petitioner had further prayed for a writ of mandamus commanding the respondents not to interfere with the services of the petitioner as Reader in the Department of Hindi in the said College, and to treat the petitioner as Reader despite the impugned order dated 12-7-1988, and to pay his emoluments and benefit, and extend to him all privileges of a Reader in the said College, which is a constitutnt College of the Bihar University. The Petitioner had also prayed for a declaration that for the purpose of calculating teaching experience in the College, the nomenciature/ designation of a part-time or full-time teacher is immaterial, when a teacher so designated in fact discharges the duties of a reguler teacher. The petitioner also made a grievance that he had been discriminated against, in asmuch as in similar circumstances one Ram Naresh Singh in the Department of English in the same College was given the benefit of his teaching experiance.

2. The factsof the case are not in dispute, and may be statedthus; Ganga Singh College was established at Chapra by a private Managing Committee in the year 1964. Initially, it functioned from Saran Academy, and later from Bharati Vidya Mandir. The teaching was in one shift, namely, the morning shift in Art subjects from 6-30 A.M. to 10.30 A.M. It is not in dispute that the petitioner at the relevant time was an Assistant teacher in Bisheshwer Seminary, Chapra. He was requested by the mangement to take Hindi classes in the College without remuneration since the College was in its formative stage, and could not afford to engage many teachers. The College was granted affilliation upto B. A. standard for the session 1965-67 The petitioner was designated as a part-time Lecturer, and started teaching in the College on part-time basis from 21.7.1965. It is the case of the petitioner that he had to take full load of

teaching the subject Hindi in the College, as there was no other teacher in that subject till the year1974.

3. The case of the petitioner was that on15.7.1971 he was called by the University Service Commission to appear at an interview for appointment as Lecturer on 16.10.1971. The petitioner faced the interview conducted by the University Service Commission, and thereafter by its order(Annexure-2) issued on 29.11.1971 the University Service Commission concurred in the appointment of the petitioner as Lecturer for the period during which the College remained affiliated. The caseof the petitioner is that in view of the concurrence given by the University Service Coanission, the Petitioner became a full-time Lecture in the College, but this is disputed by the respondent-University. According to the Petitioner the Managing Committee of the College absorbed him as a full-time teacher by resolution passed on 31.3.1974. The facts which shall be noticed hereafter, do not support the case of the petitioner that he became a full-time Lecturer by reason of concurrence grented to his appointment by the University Service Commission.

4. Pursuant to the approval granted by the Univerasity Service Commission, the Vice Chancellor of the University by order (Annexure-4) dated 10.12.1974 was pleased to approve the services of the petitioner as a Lecturer in Hindi on part-time basis. Apartfrom the fact that the Vice Chancellor approved the appointment of the petitioner as a Lecturer on part-time basis, the facts on record also establish that the petitioner continued as a teacher in the Bisheshwar Seninary. The record also establishes that steps for absorption of the petitioner on full time basis were taken subsequently.

5. The case of the petitioner was that he obtained Ph. D from the Bihar University in the year 1975. The record discioses that it was thereafter that steps were taken to absorb the petitioner as a Lecturer on full-time basis. The principal of the College by his letter (Annexure-5) dated 31.3.1975 wrote to the Vice Chanceller to approve the appointment of the petitioner on

full time basis. The letter of the Principal also discloses that the petitioner was continuing as a part-time Lecturer and that the Governing Body of the College in its meeting held on 31.3.1974 had decided that if the University so approved the petitioner may be absorbed as a permanent Lecturer in the College. In response to the letter of the Principal, the Deputy Registrar of the University communicated to the Principle of the College the order of the Vice Chancellor that the College should obtain the concurrence of the University Service Commission for absorotion of the petitioner as full-time Lecturer in Hindi against the post sanctioned by the University. Accordingly, the College referred the matter to the University Service Commission by letter (Annexure-7) dated 27.1.1976. This communication also mentions that the petitioner had been working on part time basis as lecturer, and that his part time appointment had the concurrence of the University Service Commisson, In these circumstances, the concurrence of the Commission for absorption of the petitioner as full time Lecturer was sought. A rominder was sent to the University Service Commission on 20th February 1976, and ultimately the dcision of th University Service Commission was communicated to the Governing Body of the College by the Secretary of the Commission-vide letter (Annexure-9) dated 21st April, 1976. The Commission granted its approval to the absorption of the petitioner as a full-time Lecturer in the Department. From what has been noticed above, it appears quite apparent that the petitioner was ultimataly absorbed as a full-time Lecturer pursuant to the approval granted by the University Service Commission. In fact, a formal approval of the Vice Chancellor was also communicated by a letter (Annexure-10) dated 3.8.1976. Apart from the facts above noticed, the respondent-University has brought on recored three documents, which conclusively establish that the petitioner had continued to teach as an Assistant Teacher in Bisheshwar seminary, Chapra till 12th August, 1976, and he went on leave without pay with effect from 13th August, 1976, and ultimately resigned his post as an Assistant Teacher in the School. In fact, the petioner himself

gave his joining report as full-time Lecturer on 13th Augut, 1976. Annexure R-2/A is a letter written by the petitionerto the College stating that he had been serving as part-time Lecture in Hindi since 21st July, 1965, and he had been working as full-time Lecturer since 13th August, 1976, but he was not being paid the salary of a full-time Lecture. A request was made for payment of salary etc. to the petitioner as full-time Lecturer with effect from 13th August 1976. Annexure R-2/B is the joining report of the petitioner dated 13th August, 1976, where in referring to the concurrence of the University Service Commission, and the orderof the Vice Chancellor, the petitionerrsumed dutiesaspermanot whole time lecturer on 13th August, 1976. AnnexureR-2/Cis a letter written by the Principal of Bisheshwar Saminary, Chapra, where the petitioner was teaching as an Assistant teacher. The letter is addrssed to the Principal of Ganga Singh College, Chapra, and states that the petitionerhad been working as an Assistant Teacher in the School Since 4.4.1960 till 12.8.1976. He went on leave without pay from 13.6.1976 to 12.6.1978. Thereafter on 11.6.1978 he resigned his post in the school. He was paid his monthly salary by th schooll till 12.8.1976. These documents, to my mind, leave no roomfor doubt that the petitioner actually worked as part time Lecturer in Hindi in the College till 12.8.1976, and it was only on 13.8.1976 that he joined as full time Lecturer in Hindi.

6. After the petitioner was absorbed as a full time Lecturer in Hindi, the Government by its decision deted16.1.1979 which was communicated to the Univeersity on 7.3.1979 granted to the petitioner the regular pay scale of a Lecturer with effect from 29.11.1971, which was the date on which the earlier concurrence of the University Service Commission was obtained, when the petitioner was working as a part time Lecturer. However, according to the original petitioner, his date of appointment was wrongly shown as 13.8.1966, because it should have been 21.7.1965. On the other hand, the University contends that perhaps the date should have been 13.8.1976, which was the date on which the petitioner submitted his joining report as a full

time lecturer in Hindi. In the year 1960 the College became constituent College of the Bihar University. The case of the petitioner is that he applied on 2nd March, 1981 vide Annexure-12 to the Vice Chancellor claiming promotion as a Reader, since he had 13 years experience, and had obtained Ph.D, which entitled him to time bound promotion Since the petitioner came to know that some objections were being raised to his promotion on baseless grounds by interested parties he wrote a letter to the pro-Vice Chancellor explaining his position. The aforesaid clarification dated 29.5.1981 has been annexed as Annexure-13 to the writ petition. Two years later, the Syndicate of the University of Bihar at its meeting held on 20th April, 1985 considered the question of promotion of Lecturers whose names had been referred to the Bihar Public Service Commission, for concurrence, and resolved to promote them to the rank of Reader in their respective subjects in anticipation of concurrence of the Bihar Public Service Commission, subject to the condition that the promotional benefits with respect to pay should be given to them only on receipt of the recommendation of the Commission. Subsequently, by its decision taken on 15.5.1983 the decision dated 20th April, 1983 was resolved to be implemented. Accordingly, the petitioner was promoted as a Reader in Ganga Singh College, Chapra. The decision of the syndicate is with regard to large number of teachers with whom this writ petition has no concern. The petitioner claims to have joined as a Reader on 4.8.1983. Thereafter on 20th July, 1984 in partial modification on the earlier notification, the Syndicate of the University was pleased to grant personal promotion as a Reader to the petitioner with retrospective effect from 14.11.1980, in anticipation of the concurrence of the Bihar Public Service Commission, and again subject to the condition that promotional benefits shall be given to him only on receipt of the recommendation of the Commission. Accordingly the pay of the petitioner was fixed in the scale of a Reader, which was at the relevant time Rs. 1200-1900/-.

7. It appears that the Chancellor of the University received representations against the promotion of the petitioner as

a Reader. Coming to know that interested parties were conspiring against him, the petitioner represented to the Pro Vice Chancellor in support of his promotion. No action was taken thereafter for quite some time. On 9.1.1988 the petitioner applied for promotion as a Professor in the College.

8. On 24.2.1988 a show cause notice was issued to the petitioner to show cause why his promotion to the post of Reader with effect from 14.11.1980 be not cancelled, and the recommendation sent to the Commission be not with draw an. A perusal of the aforesaid communication discloses that the allegations levelled against the petitioner in the representation referred to the University by the Chanceller's Secretariat were scrutinised and prima facie it appeared that the petitioner had served as an Assistant Teacher in Bisheshwar Seminary, Chapra, till 12.8.1976, which fact he had concealed in his application to the University for consideration of his claim for promotion to the post of Reader. Secondly that in the aforesaid application the petitioner had made misstatement of fact by stating that he was in the regular service of the college since 21.7.1965, and the nature of his appointment was a permanent one. Thirdly, that the petitioner had concealed the fact that he had submitted his joining report in the College as full time Lecturer with effect from 13.8.1976, but had falsely claimed to be in the service of the College as a permanent Lecturer with effect from 21.7.1965. Lastly it was alleged that the petitioner had submitted his application for promotion to the post of Reader on 2.3.1981 without forwarding of the Principal concerned, with the intention of obtaining undue promotion to the post of Reader in violation of the provisions of the relevant statutes.

9. The petitioner filed his show cause, which is Annexure-20 on 9th March, 1988, in which he stated that there was no occasion for the petitioner to mention about the services rendered as a Teacher in Bisheshwar Seminary, Chapra. He had already informed the Pro-Vice Chancellor-cum-Chairman, promotion Committee-vide his representation dated 17.10.1987 that he was a school teacher in Bisheshwar Seminary, Chapra.

He further explained that in the aforesaid proforma the statement was made on the basis of the concurrence accorded by the Commission, as contained in the letters dated 29.1.1971 and 21.4.1976. It was, therefore, on the record of the University that he was a part-time Lecturer prior to 1976, as is evident from the letters dated 21.1.76 and 3.8.76 (Annexures 7 and 10 respectively). He further explained that he has submitted his application for promotion on 2.3.1981 along with his intimation to the University that the Principal was not forwarding his application. As such, there was no intention of obtaining any undue promotion to the post of Reader. He, therefore, requested that the proceeding may be dropped.

10. The explanation furnished by the petitioner was not accepted by the Vice Chancellor, who in exercise of the powers of the Syndicate vested in her, ordered that the petitioner be reverted to his substantive post of Lecturer with effect from 14.11.1980, as it was found that he did not fulfill the requisite qualification for being promoted to the rank of Reader from the aforesaid date, as per the provision of the relevant statute. The aforesaid notification issued on 12th July, 1988 is Annexure-21 to the writ petition, which has been impugned by the petitioner. Having regard to the ground on which the impugned notification proceeds, it is not necessary to enquire as to whether the petitioner was at fault in making misrepresentation to the University while claiming promotion as a Reader. The order proceeds on the basis that the petitioner did not fulfil the requisite qualification for being promoted to the rank of Reader from the aforesaid date as per the provisions of the statute. The only enquiry, therefore, which is required to be made is whether the petitioner had the necessary qualification for promotion as Reader on 14.11.1980.

11. Dr. Sadanand Jha, Counsel appearing on behalf of the petitioner did not seriously challenge the fact that the petitioner had continued as part time Lecturer in Hindi till 12.8.1976, and that he became a full-time Lecturer with effect from 13.8.1976. In view of his own admissions made in several representations,

and in view of Annexures R-2/A, R-2/B and R-2/C it would have been futile to contend that the petitioner had become a full time Lecturer before 13.8.1976. Dr. Jha, however, contends that for considering the qualification of a Lecturer for promotion to the post of a Reader, only his teaching experience, apart from educational qualification, has to be taken into account. The nature of his appointment, whether part time or whole time, is immaterial. He also contended that on the date on which the impugned order was passed, the petitioner had become entitled to time bound promotion having completed 10 years of service even as whole time Lecturer and, therefore, there was no need to revert him to the post of Lecturer. Thirdly, he submitted that some other teachers of the University had been extended the benefit of teaching experience even when they held the post of Lecturer on part time basis. By not extending to the petitioner similar benefit of teaching experience, the petitioner had been discriminated against. Lastly, it was submitted that the Vice Chancellor of the University had no authority to issue the impugned order, since the power to issue the notification reverting the petitioner to the post of Lecturer vested in the Syndicate, and in case the Syndicate was not duly constituted, its powers could be exercised by the ex-officio and nominated members, and not by the Vice Chancellor. This submission was urged on the basis of section 75-Ka of the Bihar State Universities Act, 1976 inserted by Bihar Act 68 of 1982.

12. Mr. Indu Shekhar Pd. Sinha, counsel for the University submitted that the requisite teaching exerience for promotion to the post of Reader under the statutes was the experience acquired by a teacher working as full time Lecturer in the College, and not as a part time Lecturer. He also submitted that the University had no objection to recognisig the petitioner as a full time Lecturer with effect from 13.8.1976 and granting to him all consequential benefits. He, however, denied the assertion of the petitioner that any other teacher had been given the benefit of teaching experience while working as a part time Lecturer for the purpose of promotion to a higher post. Lastly, it was

submitted that the power exercised by the Vice Chancellor was under Section 79–A of the Bihar State Universities Act, and section 75–Ka had no application in the facts and circumstances of the case.

13. In support of his first submission Dr. Jha referred to Section 3 of the Bihar State Universities Act (hereinafter referred to as the 'the Act'). Section 2(a) defines a 'Lecturer' to mean a teacher of a College or University possessing such qualification as may be prescribed by statute. Section 2(b) defines a 'teacher' to include Principal, University Professor, College Professor, Reader, Lecturer, Demonstrator and other persons imparting instructions in any Department, College or Institute maintained by the University. He refered to the statute for promotion of Lecturers to the post of Reader. The statute provides that a Lecturer may be promoted to the post of a Reader, subject to the following conditions (a) If he holds a Doctorate degree and he has completed at least 13 years of continuous service as a Lecturer in one or more Universities or (b) if he does not held a Doctorate degree, he has completed at least 18 years of continuous service as a Lecturer in one or more Universities. This is subject to the proviso that the period of teaching experience below degree standard shall not be included, and that he holds a substantive appointment on the post of Lecturer. He also referred to the statute for time bound promotion of a Lecturer to the post of a Reader, which provides that a Lecturer serving in an University Department or any Degree College managed and maintained by the University shall on the recommendation of the Bihar State Universities (Constituent Colleges) Service Commission be promoted on the basis of the time bound scheme to the post of a Reader, subject to the following conditions.

(a) That he holds the qualification as prescribed for the post of Lecturer under the statutes;

(b) That he holds a substantive appointment on the post of Lecturer; and

(c) That he has completed at least 10 years of continous service as Lecturer in one or more Universities.

He then referred to Chapter XIV of the statutes and submitted that under the said statute relating to classification and recognition as a teacher of the University, "teacher" of an University includes persons appointed by the Syndicate in consultation with the Academic Counsel, as Honourary Professors, Readers or Lecturers or otherwise as teachers of the University. Under sub-statute (4) of Chapter XV of the Statutes the Syndicate has been vested with the power to appoint distinguished scholors as teachers and visiting Professors to take part in the teaching work in any subject in the Univesity Department for a particular period in any one session on such terms as it may deem fit. Relying upon these provisions in the Act and the statutes it was submitted that a teacher must include even a Lecturer, who is working on part time basis. The statutes recognise as a teacher Honorary Professors, Readers or Lecturers as also visiting Professors. There is, therefore, no reason why a part time Lecturer should not have the same status as a full time Lecturer. In my view, the submission is not well-founded, because it is not the case that the petitioner was ever appointed as an Honorary Lecturer by the Syndicate or that he was ever appointed a visiting Professor by the Syndicate. No doubt, for certain purpose a Honorary teacher or a visiting professor may be regarded as teachers, but that is not to say that for the purpose of promotion to a higher post, they must be equated with whole time teachers employed by the University. In fact, there is no provision for promotion of Honorary teacher or visiting Professors. I have already referred to the statutes for promotion of Lecturer to the post of Reader. Apart from educational qualification and teaching experience, the statute insist on the Lecturer holding a substantive appointment on the post of Lecturer. This must obviously mean an appointment on whole time basis, even if it is assumed that it may not necessarily mean confirmation in service, and must be construed so as to include temperery Lecturers regularly appointed against a sanctioned

post. The submission, therefore, that a part time Lecturer or an Honorary Lecturer must also be treated as a teacher and must b considered for promotion to the higher post, must be rejected. I have advisedly referred to an honorary teacher, because at one stage it was urged by Dr. Jha that the petitioner was not being paid any remuneration by the College and, therefore he should be treated as an honorary teacher. I may also refer to some of the statutes to which counsel for the University has drawn my attention, namely, Chapter XVI, which deals with number grades/qualification/pay scales and other conditions of service of teachers of admitted colleges and their regulation by the University. The grades mentioned in the said Chapter include that of a Lecturer and part time Lecturer. Pay scale of a Lecturer has been mentioned, which is Rs. 200-340 E. B. 500. For part time Lecturer, the stature provides a fixed pay between Rs. 100 and Rs. 250/- per month according to the nature of work. Moreover minimum qualification for a Lecturer has been prescribed by the statute, but no such minimum qualification has been mentioned in the case of part time Lecturer. These provisions, therefore, make it clear that the statutes take notice of the distinction between a Lecturer and a part time Lecturer. Statutes relating to promotion refer to the promotion of a Lecturer to the post of a Reader, not of a part time Lecturer. Obviously, therefore, when the statute relating to promotion refers to Lecturer, it must mean the Lecturer in the regular pay scale and duly qualified to hold that post. Consequently, his experience must be as a Lecturer and not as a part time Lecturer. I am, therefore, inclined to accept the submission urged on behalf of the University that in the context of promotion to the higher post of Reader, the Lecturer referred to in the Statute a Lecturer employed on whole time basis and not part time Lecturer. There is no provision in the Act or the statutes for the promotion of a part time Lecturer.

14. I may only clarify that in the facts of the instant case it cannot be said that the petitioner was merely designated as a part time lecturer, though he was in reality a full time teacher of

the College. It is an admitted position that the petitioner was actually teaching as an Assistant Teacher in a school when he joined the College, and the materials on record conclusively establish that he continued as such Assistant Teacher and drew his salary etc. from the school till 12.8.1976. He actually resigned his post as an Assistant Teacher in the school on 11.8.1978, as is evident from Annexure R—2/C. It cannot, therefore, be urged that the petitioner was really a whole time employee of the College though designated as a part time Lecturer. I, therefore, find no substance in the first submission advanced on behalf of the petitioner.

15. The second submission urged on behalf of the petitioner need not detain us. The petitionr claimed that at least from 13.8.1976 he was a full time Lecturer and, therefore, he was entitled to be considered for time bound promotion on completing 10 years of service. He had actually completed 10 years of service on the date on which the impugned order was passed. His grievance is that he should not have been reverted, and at best he could have been deprived of the monetary benefits which he had received duing that period Counsel for the University fairly stated that the University will treat the petitioner as a full time Lecturer with effect from 13.8.1976, and on that basis whatever be the benefits to which he is entitled, shall be extended to him. In these circumstances, the only relief that can be granted to the petitioner in case his writ petition fails on other grounds, is to direct the University to consider the case of the petitioner for time bound promotion from the due date, and if he is found entitled to such promotion all consequential benefits must be extended to him.

16. The third submission urged on behalf of the petitioner was that in at least two other cases the benefit of teaching experience was extended to part time teachers while they were working on part time basis. Apart from the fact that there is not enough material to support the assertion, which in any event has been denied by the University, the mere fact that two teachers might have been given the benefit to which they were not entitled

under the law. cannot be a ground for extending such illegal benefit or advantage to the petitioner. It is well settled that Article 14 of the constitution of India is not meant to perpetuate an illegality in the garb of equal treatment. No one can claim quality on the basis that illegal advantage or benefit be extended to him as was done in the case of some others. In an appropriate case when brought to the notice of the Court, the illegal action must be struck down rether than to extend the benefit of such action to the petitioner before the Court. The third submission has. therefore, no merit and must be rejected.

17. Lastly, it was submitted that by Act 68 of 1982 soction75-A (75Ka) was inserted in the Act. Section75—A provided that in case the Syndicate was not duly constituted, its ex-officio and neminated members should exercise the powers of the Syndicate, and perform its duties to give effect to the provisions of the Act. It was, therefore, submitted that after 1982, even if the syadicate not duly constituted, its power could be exercised only by the ex officio and nominated members, and not by the Vice Chancellor. The impugned notification was issued on 12.7.1980, i. e. after the amendment inserting section 75-A in the Act. The notification was issued under the order of the Vice Chancellor and was, therefore, without jurisdiction.

18. Counsel for the University submitted that the submission ignores the subsequant legislative changes, and that section 76-A subsequently inserted in the Act vested all the powers of the Syndicate in the Vice Chancellor. The submissionn urged on behalf of the University is well-founded and must be accepted, for the reasons that follow. Bihar ordinance No. 39 of 1986 was promuligated on17.12.1986 with a view tc amend certain provisions of the Act.The provisions which were amended by the said Ordinance included sectuibs 18,22 and 23 of the Act, which dealt with the constitution of Senate, Syndicate and the powers and duties of the Syndicate respectively. Section 24 which provided for the Constitution of the Academic Council was also amended. Certain other amendments were effected in the Act with which we are not concerned. Section 14 of the Ordinance

inserted section 79-A in the Act. The aforesaid section 14 is quoted below for convenience :

"14. Insertion of new section after section 79 of Bihar Act 23, 1976— In the said Act after section 79 the following new section shall be inserted namely :—

"79- A—The present Syndicate and the Senate shall cease to exist with effect from the date of the Bihar State Universities (Third Amendment OOrdinance, 1986 comes into force. The powers and duties of the Senate and Syndicate, as the case may be, shall be discharged by the Vice Chancellor till the constitution of Senate and Syndicate, as the case may be, shall be discharged by the Chancellor so long the new Senate/Syndicate is not censtituted.

The same provision was repromulgated by promulation of Bihar Ordinance 20 of 1989 which was published in the Biha Gazette on 5th May, 1989. The impugned order was passed n 12th July 1938 and, therefore, the exercise of power was controlled by the provisions of the Act, as they stood on that day.

19. It will be seen that bypromuglation of the Ordinance the Syndicate and Senate ceased to exist with effect from 17th December, 1986, the date on which the Bihar Ordinance 39 of 1986 came into force. It further provided that the powers and duties of the Senate and Syndicate were to be discharged by the Vice Chanceller so long the new Senate and Syndicate were not constituted. Dr. Jha submitted that section 75-A and 79-A could not coexist. Under section 75-A the power of Senate and Syndicate was vested in the ex-officio and nominated members, in case the Syndicate or Senate was not duly constituted. On the other hand, under sction 79-A the powers and duties of the Senate and Syndicate were vested in the Vice Chancellor and not in the nominated and exofficio members. The argument appears attractive, but is devoid of merit. Section 75-A proceeds on the assumption that there is a provision for Senate and Syndicate in the Act, but they have not been duly constituted. If the Senate of Syndicate is not duly constituted, with a view to give effect to

the provisions of the Act, the nominated and ex-officio members of the Senate or Syndicate, as the case may be, shall exercise the powers and perform the duties of the senate and syndicate. The provision presupp oses the existence of Senate and Syndicate under the Act.

Section 79-A, on the other hand, provides that the present syndicate and senate shall cease to exist with effect from the date on which the Ordinance comes into force, i. e., from 17th December, 1986. Consequently, there was no senate or Syndicate after the ordinance came into force and the powers and duties of the sonate and syndicate were vested in the Vice Chancellor, and the Vice Chancellor was required to exercise the powers and discharge the duties till such time as the new senate/syndicate under the amended Act was not constituted. There is a reason why it was so provided in the Ordinance. As noticed earlier, the ordinance brought about amendments to the various sections of the Act which deal with the constitution of the Senate, syndicate and the powers and duties of the senate, apart from other University bodies. The Ordinance, therefore, provided that till such time as the senate/syndicate was not constituted under amended provisions of the Act, their power shall be exercised and their duties discharged by the Vice Chancellor. With a view to achieve this the section provided that "the present Syndicate and senate shall cease to exist". Obviously therefore, till a new Senate or Syndicate was constituted under the amended Act there was no senate or syndicate in existence and, therefore, there was no question of the nominated or ex-officio members exercising the powers and discharging the duties of the senate and syndicate. After dissolving the existing, senate and syndicate the ordinance bestowed their powers and duties on the Vice Chancellor till a new syndicate or senate was constituted under the amended Act. In my view, there is no inconsistency between section 75-A and 79-A of the Act. After 79-A was inserted, section 75-A could have no operation till such time as a new syndicate/ senate was coonstituted under the Act, as amended by the ordinance of 1983. It is, therefore, not

necessary for me to consider the alternative submission urged on behalf of the University that even if there was repugnancy between the provisions, the later provision should prevail on the principle of implied repeal. Counsel for the University submitted that he was supported in his submission by the decision of the Supreme Court, in *Ratan Lal Aduki and another* vs. *Union of India* (1). I do not express any opinion on the alternative submission.

20. In the result, no relief can be granted to the petitioner, as prayed for. I have no doubt in my mind that the experence acquired as a part time Lecturer cannot be taken into consideration while promoting a Lecturer to the post of a Reader. It is only the exprience acquired by him as a full time Lecturer which can be taken into consideration while considering his case for promotion to the post of a Reader. However, in view of the fact that the petitioner became a full time Lecturer with effect from 13-8-1975 and in view of the statement made at the Bar by counsel for the University, that the University will consider his case on the footing that he became a full time Lecturer with from 13-8-1976, a direction is issued to the University to consider the case of the petitioner that he had become a full time Lecturer on 13-8-1976 and became eligible for first time bound promotion after completing 10 years of servic. If the University finds him eligible and suitable for promotion to the post of a Reader under the time bound promotion schame, the petitioner shall be given all consequential benefits. Since the petitioner died during the pendency of the writ petition, the monetary benefits which may accrue to the petitioner shall be paid to his widow, who has been bought on record as one of his Legal representatives. If the widow of the petitioner is entitled to any pensionary benefits, such as family pension etc., that shall be calculated on the basis of the emoluments to which the petitioner is found entitled on the date of his death.

21. This writ petition is disposed of in the above terms.

I agree.

R. D. Order acordingly.

REVISIONAL CIVIL

Before Sudhansu Jyoti Mukhopadhaya, J.

1995

July, 11

Smt. Indu Singh.

v.

Dr. Ranjeet Singh.

Hindu Marriage Act, 1995 (Cental Act, no. XXV of 1955) Section 24— order for ad interim maintenance, whether interlocutory order— whether the order isr evisable and Civil Revision application is maintainable— whether the Section stipulates ad interim maintenance as also cost of necessary expenses of the proceeding—Family granting Court cost of necessary expenses but not ad interim maintenance— order whether contradictory— *Family Court Act, 1984* (Central Act No. LXVI of 1984) Section 19 (1)— whether proscribes appeal against every judgment and / or order.

From a plain reading of section 19 (1) of the Family Courts Act, 1984 hereinafter referred to as the Act it is evident that the appeal is only maintainable against every Judgment and/or order, but it is not maintainable against an interlocutory order. An order passed under Section 24 of the Hindu Marriage Act, 1955, for ad-interim maintenance, being an interlocutory order appeal under Section 19 (1) of the Act is not maintainable. The petitioner has rightly choosen the forum of Civil Revision application before this court and the same is maintainable.

Section 24 of the Hindu Marriage Act, 1955 stipulates not only with respect to ad interim maintenance but also with respect to cost of necessary expenses of proceeding. It is evident that necessary expenses to fight out the litigation, are dependent on the factor as to whether the claimant, has sufficient independent income or not.

Held, that by the impugned order the Family Court has not

* Civil Revision No. 2100 of 1994. In the matter of an application under Section 115 of the code of civil Procedure.

taken into account the income of the husband of the petitioner as such the court has erred in coming to the definite conclusion as to whether the petitioner has got 'sufficient independent income or not'

By the impugned order the Court has allowed cost of Rs. 4000=00 in favour of the petitioner as necessary expenses of the proceedings. Thus it is evident that court for the said purpose has come to a conclusion that the petitioner has got no'suffiicient independent Income" to fight out the case. By the same impugned order the Court has held that the petitioner has got 'sufficient independent Income' for determination of ad interim maintenance. The impugned order is to that extent contradictory. Case laws discussed.

Application by the opposite party.

The facts of the case material to this report are set out in the Judgment of Sudhansu Jyoti Mukhopadhaya, J.

M/s. Gautam Bose & Rajan Sahay for the petitioner

M/s Dinesh Kumar Singh and V. N. Mishra, for the opposit party.

ORDER

S. J. Mukhopadhaya, J. The petitioner-opposite party has challenged the order dated 17th September, 1994, passed by the learned principal Judge, Family Court in Matrimonial Case No. 75/93, rejecting, the prayer of the petitioner (the wife), relating to ad-interim maintenance claimed under section 24 of the Hindu Marriage Act.

2. The Opposite party (the husband) is the petitioner in Matrimonial Case No. 75/93 filed against the petitioner (the wife) for dissolution of marriage under section 3 of Hindu Marriage Act.

3. Admittedly, there are four female children born out of wed-lock, the eldest being about 21 years of age and the youngest 5 years of age. The petitioner-opposite party (the wife) filed a petition under section 24 Hindu Marriage Act. praying therein interim maintenance @ Rs. 2,500/- per month and a

sum of Rs. 5,000/- as a lump sum amount as cost of litigation, as according to the petitioner (the wife), the Income of the Opposite party (the husband) is more than Rs. 10,000/- per month the husband being senior professor in the Magadh University.

The Court below has rejected the claim of the petitioner (the wife) relating to ad-interim maintenance under section 24 of the Hindu Marriage Act, by the impugned order dated 17th September, 1994, on the ground that the petitioner (the wife) cannot be deemed to be an indigent person to enable her to get interim maintenance. While rejecting such prayer for interim maintenance, the court below by the impugned order has allowed the other prayer of the petitioner (the wife) by allowing a sum of Rs. 4,000/- as lump-sum amount towards the cost of litigation, to be paid in favour of the petitioner (the wife) by the husband.

4. When the case was taken up, counsel for the opposite party (the husband) raised preliminary objection relating to maintenance of the instant civil revision application itself. According to the opposite party (the husband), tho Civil Revision is not maintainable in terms of section 19 of Family Courts Act, 1984. According to the counsel for the opposite party, the petitioner should have filed an appeal petition against the impugned order.

5. Both the counsel also advanced their arguments on the merit of the case. In view of the aforesaid fact, there are two questions that are to be determined in the present civil revision application, namely, (1) whether the civil revision application is maintainable against an order relating to ad- interim maintenance under section 24 of the Hindu Marriage Act, if passed by a Family Court and (ii) whether on merit, the impugned order passed by the Family Court, rejecting the prayer of the petitioner (the wife) for grant of ad-interim maintenance under section 24 of the Hindu Marriage Act, on the ground that the petitioner (the wife) is not an indigent person, is a reasoned valid order or not.

6. With respect to the first point, namely, maintenance of civil revision application, counsel for the opposite party (the

husband) has drawn my attention towards the provision of section (1) of the Family Courts Act, 1984. It was contended that in terms of the said section 19 (1), the appeal is only maintainable against every Judgment and/or order passed by a family court. It was further submitted by the counsel for the opposite party (the husband) that in terms of section 19 (3) of the said Act, 1984, the appeal having not preferred before this court within 30 days, the petitioner (the wife) is also debarred from filling such appeal before this Court. It was further submitted that the impugned order having reached its finality, this court should not interfere in this matter.

7. Counsel appearing on behalf of the petitioner (the wife), on the other hand, while making his submission, relied on the same provision of section 19 (1) of the family Courts Act, 1984. According to the counsel for the petitioner (the wife), an order passed under section 24 of the Hindu Marriage Act relating to ad-interim maintenance, being an interlocutory order, in nature, the appeal is not maintainable and the has rightly chosen the from by filling the instant civil revision application, which is maintainable according to law.

8. Having heard the parties with respect to the very first point I feel that the contention rallised by the counsel for the petitioner is correct. Section 19 (1) of the Family Courts Act, 1984 reads, as follows :-

> "Appeal:- (1) Save as provided in sub-section (2) and not withstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), or in any other law, an appeal shall lie from every Judgment or order, not being an interl ocutory order, of a Family Court to the High Court both on facts and on law."

From plain reading of the aforesaid section 19 (1) of the Family Courts Act, 1984, it is evident and clear that the appeal is only maintainable against every Judgment and/or order, but it is not maintainable against an interlocutory order. According to me, an order passed under section 24 of the Hindu Marriage

Act, for ad-interim maintenance, being an interlocutory order, appeal under section 19 (1) of the Family Courts Act, 1984, is not maintainable. The petitioner has rightly chosen the forum of civil Revision application before this court and the same is maintainable.

9. So far as the second point is concerned, counsel for the petitioner made the following submissions :

It was submitted that the court below by impugned order has taken into account the sale proceeds of ornaments, out of which the petitioner (the wife) has deposited some amount in the Bank. It was submitted that the same is not permissible. He relied on the decision in the case of *Radhika Bai* vs. *Sadhu Ram* reported in AIR 1970 Madhya Pradesh 14.

It was further submitted by the counsel for the petitioner that the earning of the petitioner (the wife) as has been shown by the court below is erroneous having based on income which is not permanent in nature.

It was further submitted by the counsel for the petitioner that the court below had failed to take into account the actual earning of the opposite party (the husband), for the purpose of coming to a just conclusion as to whether the petitioner (the wife) has sufficient independent Income or not which is directly related with the status of an individual. He relied on the decision in the case of *Smt. Gangu Pandik Waghmare* vs. *Pandlil Maroti Waghmare and another*. reported in AIR Bombay 264

10. Counsel for the opposite party (the husband, on the other hand, submitted that the calculation that has been shown by the court below vide the impugned order, is sufficient and thereby, the petitioner cannot be held to be an indigent person. Counsel for the opposite party (the husband), while levying in his show cause reply, pointed out from different paragraphs and the Annexures attached thereto, that a huge amount is also deposited in the name of the petitioner (the wife) and/ or in the name of the daughters. It was contended by the counsel for the

opposite party that most of the savings of the opposite party (the husband), having deposited in the name of the petitioner (the wife) and/or children, and as petitioner (the wife) is living with children in his (husband's) ancestral house, there was no question of giving any ad interim maintenance in favour of the petitioner (the wife) in terms of section 24 of the Hindu Marriage Act.

11. It will be evident from the impugned order dated 17th September, 1994 that the court below has come to the conclusion that the petitioner (the wife) has admitted Income of Rs. 1,374/-per month and thereby, she cannot claim to be an indigent person. For the purpose of coming to such definite conslusion of Income of the petitioner (the wife) to the tune of Rs. 1,374/- per month, the following purported Income has been taken into account by the court below.

(i)	An interest of Rs. 233/- per month out of one Fixed Deposit of Rs. 20,000/-. There being total three Fixed Deposits of Rs. 20,000/- in the name of the petitioner (the wife); the total interest, the petitioner (the wife) receives out of the aforesaid three Fixed Deposits is	Rs. 699.00
(ii)	The income of the petitioner (the wife), out of another Fixed Deposit of Rs. 15,000/-, towards monthly interest is	Rs. 175.00
(iii)	The income of the petitioner (the wife) from teaching work is	Rs. 500.00
	Total	Rs. 1374.00

12. In the case of *Radhikabai* v. *Sadhuram Awatrai* (supra), the Court held, as follows :

xxx xxx xxx xxx

S. 24 does not envisage substitution of the customary ornaments for the income nor can the Court, in our opinion, refuse to make a grant for support simply because the wife can pull on for some time by selling the ornaments. Accordingly, we find that there being no sufficient independent income, in fact no independent income at all, there was a case for grant for a support. There was also a case for a grant of expenses which has of course been met at least in part.

xxx xxx xxx xxx

All this is likely to be true, at any rate, broadly so, may be subject to some slight exaggeration by the husband who is anxious to avoid having to pay anything; but the real point is, whether because of a potential capacity to grant maintenance, in other words, is the phrase "independent sufficient income" equivalent to "potential earning capacity". In our opinion, it is not. The earning capacity is problematic and, further, no husband can be relieved of his duty to maintain the wife simply by compelling her to earn her livelihood. That way also the case for maintenance is not satisfactorily explained away."

13. It will be evident from the impugned order that the court below in computing the earning of the petitioner has taken into account the money deposited by the petitioner (the wife) after selling her ornaments. If the court according to the aforesaid judgment, in the case of *Radhikabai* (supra), cannot rely on the customary ornaments for the purpose of computing income of the wife, I do not understand as to how the amount deposited by the petitioner (the wife) after sale of such ornaments can be taken into account to compute the income of the petitioner (the wife). It is to be taken into note that the petitioner sold the ornaments to save herself and her four daughters from starvation.

14. Apart from the aforesaid fact, section 24 of the Hindu Marriage Act stipulates not only with respect to ad interim maintenance but also with respect to cost of necessary expenses of proceeding. Therefore, it is evident that both (a) the mainte-

nance and (b) the cost and necessary expenses to fight out the litigation, are dependent on the factor as to whether the claimant has 'sufficient independent income' or not. By the impugned order, the court has allowed cost of Rs. 4000/- in favour of petitioner (the wife) as necessary expenses of the proceeding. It means, the court for the said purpose has come to a conclusion that the petitioner has got no 'sufficient independent income' to fight out the case. If such is the position, I do not understand as to how by the same impugned order, the court below can held that the petitioner has got 'sufficient independent income.' to determine the ad interim maintenance. The impugned judgment to that extent is contradictory.

15. It is to be taken into note that under section 24 of the Hindu Marriage Act, the Family Court is to decide the ad interim maintenance, taking into account as to whether the claimant has got 'sufficient independent income' or not. In absence of any income, the decision is to be given on the basis of income of the other party (the husband in this case). Therefore, it is clear that for the purpose of coming to a definite conclusion as to whether a person has got 'sufficient independent income' or not, the status of the person is to be taken into account, as also the income of the other party, the same having got direct nexus with 'sufficient independent income.'

In the present case, by the impugned order, the court below has not taken into account the income of the husband of the petitioner (the opposite party). Thereby, it is clear that the Court has also erred in coming to a definite conclusion as to whether the petitioner (the wife) has got 'sufficient independent income' or not.

16. For the reasons stated above, I hold that the Civil Revision application is maintainable against an order of ad interim maintenance, passed under section 24 of the Hindu Marriage Act, 1984. I further hold that the impugned order dated 17th September, 1994, as passed in Matrimonial Case No. 75/93 by the learned principal Judge, Family Court, is also erroneous, both on facts and on law.

17. Accordingly, I set aside the impugned order so far as it relates to ad interim maintenance is concerned and remit the matter to the court below for deciding the matter afresh after hearing the parties.

It is expected that the order relating to ad interim maintenance will be passed by the court below within a period of the two months from the date of recept/production of a copy of this order.

18. The Civil Revision application is allowed with the aforementioned observations and directions.

R. D. Application allowed

CIVIL WRIT JURISDICTION

Before Bisheshwar Prasad Singh and Indu Prabha Singh, JJ.

1995.

July, 17.

*Ranjit Prasad Shrivastava & four others.**

v.

The State of Bihar through Chief Secretary and others.

Patna University Act, 1976 (Bihar Act no. XXIV of 1976) as amended by Patna University (Amendment) Act, 1993 Bihar Act no. XVIII of 1993)— section 64 clause (a) third proviso— whether enabling provision— power of re-appointment— whether provided guidelines for exercise of the power of re-appointment—re-appointment, whether to be made after the Patna University frames statutes made in this behalf— third proviso, whether lays down any condition precedent for operation of main part of the section— third proviso, whether any right conferred on the retiring teacher to get re-appointed—Patna University (Amendment) Act, 1993 whether a colourable piece of legislation— amended provisions apply to the teachers to remain in service and are prospective in operation.

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* Civil Writ Jurisdiction Case No. 12685 of 1992. With Civil Writ Jurisdiction Case No. 13131 of 1992. With Civil Writ Jurisdiction Case No. 440 of 1993. With Civil Writ Jurisdiction Case No. 2286 of 1993. With Civil Writ Jurisdiction Case No. 2495 of 1993. With Civil Writ Jurisdiction Case No. 3120 of 1993. With Civil Writ Jurisdiction Case No. 3219 of 1993. With Civil Writ Jurisdiction Case No. 699 of 1993 (R)

In C. W. J. C. No. 131/92 ..... Tarakant Jha & thirty ors ... Petitioners.

In C. W. J. C. No. 440/93 Teg Bahadur Singh ....., Petitioners.

In C.W. J. C. No. 2286/93 Jagdish Narain Srivastava & seven ors. Petitioners.

In C. W. J. C. No. 2495/93 Shyam Bahadur Prasad ..... Petitioners.

In C. W. J. C. No. 3120/93 Sachidanand ..... Petitioners.

In C. W. J. C. No. 699/93 (R) Ranchi University Service Teachers' Association & three others ..... Petitioners.

The third proviso of section 64 of the Patna University Act, 1976, hereinafter referred to as the Act, as amended by Patna University (Amendment) Act, 1993, is in the nature of an enabling provision, vests in the University the power of re-appointment, but controls the exercise of such power by providing guidelines for its exercise namely, that such power must be exercised only in appropriate cases up to the age of 65 years, and in the manner laid down by the statutes made in this behalf in accordance with the guidelines of the University Grants Commission, The power of re-appointment, therefore, cannot be exercised unless statutes are framed as provided under the third proviso of section 64 of the Act. It would be difficult to read into the third proviso a duty cast upon the University to frame statutes, because it is a matter of policy whether the University will provide for re-appointment under its statutes. The University may or may not provide for re-appointment of teachers after retirement, but if it is provides, it must be done in accordance with the third proviso, namely, after framing statutes in the manner laid down in the third proviso.

Held, that it is quite clear that the main part of section 64 of the Act takes effect by its own force, and the third proviso does not lay down any condition precedent for operation of the main part of section 64 of the Act. Even if statues are not framed providing for re-appointment of teachers of the University, these teachers who attain the age of 60 years, must retire from University Service.

Held, further, that the third proviso of section 64 of the Act does not confer any right upon a retiring teacher of the University to get re-appointed. No doubt, if the statutes are framed, in appropriate cases retiring teachers may be considered for re-appointment in accordance with the statutes, but it is not to say that every retiring teacher, can, as a matter right, seek re-appointment.

Held, further, that the power vested in the third proviso of section 64 of the Act is un-controlled and unbridled, because the

third proviso of section 64, which vests the power in the University to reappoint retired teachers, lays down the guidelines in which that power is to be exercised. The amending Act is not colourable piece of legislation. It is well settled that plenary legislative power of the state legislature to pass laws has no limitation, except to which the legislative powers of state Legislature is subject. Though a law can be invalidated for contravention of constitutional limitations which in hibits upon the power of state Legislature to pass laws, it cannot be declared invalid on the ground that it was enacted with impoper motives.

Held, also that on the 15th August, 1992, the date on which the Patna University (Amendment) Ordinance, 1992 lapsed, the writ-petitioner had a mere right to take advantage of the provisions of the Ordinance. It can not be said that a right had accrued in favour of the petitioners which could not be defeated or taken away by subsequent legislation, ie, Patna University (Amendment) Act 1993. The right acquired under an Ordinance cannot be treated to be a right superior to one created by law enacted by the legislature. The right created whether by Ordinance or legislation, stand on the same footing Once the law under which the right was claimed was amended, the right ceased to exist and only saved under the amended law. Such right could not be sustained as were either conferred or the Patna University (Amendment) Act, 1993, deemed to have come into effect retros pectively from 16th August, 1992, can not be characterised to be retrospective. The amended provisions apply only to the persons who remain in service and, therefore, operated prospectively. Those who bad attained age of 60 years on the date on which the amending Act was promulgated were asked to retire and other who remained in service were to retire on attaining the age of 60 years.

Held, also, that section 64 of the Act as amended applies to existing employees and operates in future.

Case laws discussed.

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

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

: M/s Shyama Pd. Mukherjee (Sr. Adv.), Ravi Shankar Pd., Sanjay Priya & Sanjay Kumar for the petitioners in C. W. J. C. 12685 and 13131 of 1992.

: Mr. Ram Hridya Pd. for the petitioner in C. W. J. C. 440 of 1993.

: M/s Rakesh Kr. Srivastava & Subrato Kr. Banerjee for the petitioners in C.W. J. C. 2286 of 1993.

: None for the petitioners C. W. J. C. 2495, 3120, 3219 of 1993 and 689 of 1993 (R)

: M/s Rameshwar Pd. (A. G.), V. N. Sinha (G. P. 9), Ranjan Kr., Ramadhar Singh, Shashi Bhushan Kumar & Mrs. Veena Kumari Jaiswal for the State.

: M/s B. K. Jha (Sr. Adv.) & S. C. Jha for the Bhagalpur University.

: M/s Ram Balak Mahto (Sr. Adv.) & Mukesh Kumar for the Chancellor and Patna University.

B. P. Singh & I. P. Singh, JJ. This group of writ petitions involve common issues and have, therefore, been heard together and are being disposed of by this common judgment.

2. The petitioners in these writ petitions are teachers of Patna University as also of other Universities in the State of Bihar. The Patna University is governed by the Patna University Act, 1976, while other Universities are governed by the Bihar State Universities Act, 1976. The Patna University is a residential-cum-teaching University, whereas the other University are affiliating Universities. This, perhaps, is the reason why they are governed by two separate enactments. The representative facts of the case are taken from C. W. J. C. No. 12685 of 1992.

3. The petitioners are teachers of the Patna University working against sanctioned posts. Section 64 of the Patna University Act, 1976, provided that the date of retirement of

teaching and non-teaching employee other than inferior servants of the University or any College shall be the date on which he attained the age of 60 years. Section 64 of the Patna University Act is as follows :

> "64. Retirement from Service :– (a) Save as otherwise expressly provided in this Act the date of retirement of any teaching or non-teaching employee other than inferior servants of the University or any College, shall be the date on which he attains the age of 60 years;
>
> Provided that such teachers, who do not opt for the pay scales revised with effect from the first day of January, 1973, and such non-teaching employees, who are in the service of the University from date prior to the commencement of this Act, shall retire after attaining the age of 62 years.
>
> Provided further that no University shall extend the period of service or re-appoint any teaching or non-teaching employees after his completing the age of 60 or 62 years as the case may be."

A similar provision is to be found in section 67 of the Bihar State Universities Act, 1976. It is not in dispute that the petitioners would have retired at the age of 60 in accordance with section 64 of the Patna University Act or section 67 of the Bihar State Universities Act, had an Ordinance not been promulgated in the year 1986. The Patna University (Second Amendment) Ordinance 1986 (Bihar Ordinance 34 of 1986) was published in the gazette on 3–12–1986, though it came into effect from 1st April 1986 amending section 64 of the Patna University Act. Similarly, Bihar Ordinance 35 of 1986 was promulgated, which had the effect of amending section 67 of the Bihar State Universities Act, 1976. The Provisions of the two Ordinances are in *pari materia*. For the sake of convenience the relevant provision of Bihar Ordinance 34 of 19865, which sought to amend the Patna University Act may be noticed. It provided :

"3. Amendment of section 64 of Bihar Act 24 of 1976. In the said Act for clause (a) to section 64 the following shall be substituted; namely :-

(a) Save as otherwise expressly provided in this Act the date of retirement of a teaching employee of the University or of a college with effect from the 1st April, 1986 shall be the date on which he attains the age of 62 years. The date of retirement of non-teaching employee (other than inferior servants) shall be the date on which he attains the age of 60 years, but the date of retirement of such non-teaching employees who are in the service of the University prior to the commencement of this Act, shall be the date on which he attains the age of 62 years :

Provided that the University shall in no case, extend the period of service of any of the teaching or non-teaching employee or re-appoint him after he attains the age of 60 or 62 years as the case may be."

The said Ordinance had the effect of altering the age of superannuation, and providing that the date of retirement of a teaching employee of the University, or of a College, with effect from 1st April, 1986, shall be the date on which he attains the age of 62 years.

4. It is not in dispute that successive Ordinances were promulgated from time to time to the same effect, such as Bihar Ordinance 20 of 1987, 11 of 1988 and 17 of 1989. It is also not in dispute that the last of such Ordinances, namely, Patna University (Amendment) Second Ordinance, 1989 (Bihar Ordinance 17 of 1989) lapsed in August 1989, and was not followed by any legislative enactment or repromulgation of an Ordinance. A writ petition was filed before this Court, being C. W. J. C. No. 7784 of 1988, which was disposed of by this Curt on 7-11-1989 holding that after lapse of the last Ordinance, and in the absence of any Act having come into force, substituting the original section 64 of the Patna University Act, the aforesaid section 64 of the Patna University Act revived and the teaching staff of the

University had to retire after attaining the age of 60 years. Faced with this situation, Patna University (Amendment) Third Ordinance, 1990, was promulgated containing the same provisions as in the earlier Ordinances. In view of the fact that there was a time gap between the lapse of the last Ordinance and promulgation of another Ordinance, section 10 was incorporated in the Third Amendment Ordinance of 1990 providing that between the period the Patna University (Amendment) Second Ordinance 1989, lapsed and the date of promulgation of Patna University (Amendment) Third Ordinance, 1990, the provisions of the Ordinance shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force. Obviously, the purpose was to safeguard the interest of the teachers, who may have retired during this interregnum. The benefit of retirement age 62 was consequently bestowed upon all. Thereafter followed successive Ordinances which were promulgated at different times in the years 1990, 1991 and 1992. The last Ordinance being Bihar Ordinance 15 of 1992 lapsed on 15th August, 1992, and thereafter no Ordinance was promulgated increasing the age of retirement to 62.

5. So far as the other Universities governed by the Bihar State Universities Act, 1976, are concerned, after the lapse of the ordinance in the year 1990 the legislature stepped in and enacted Bihar Act 3 of 1990 by which section 67 of the Bihar State Universities Act, 1976 was amended providing that the retirement age of teachers of the Universities governed by the Act shall be 62 years. A specific provision was incorporated in the Act, so that those persons who may have retired during the period between the lapse of the Ordinance and the enactment of the statute were also given the benefit of the amended section 67 of the Bihar State Universities Act.

6. It would thus appear that from the year 1986 till August 992 section 64 of the Patna University Act stood amended by successive Ordinances so as to raise the age of retirement of teachers from 60 to 62. In the case of Universities governed by

the Bihar State Universities Act, section 67 of the Act stood amended by promulgation of Ordinances from 1986 to 1990 and thereafter by enactment of Bihar Act 3 of 1990 so as to raise the age of retirement of teachers of other Universities from 60 to 62.

7. So far as the Patna University is concerned, upon the lapse of Bihar Ordinance 50 of 1992 in August 1992, in view of the provision of Article 213 (2) (A) of the Constitution, the Vice Chancellor of the Patna University authorised the issuance of a notification declaring that the petitioners and others, had retired from University service with effect from 31-8-1992 in view of the lapse of the Ordinance of 15-6-1992, because in view of the lapse of the Ordinance section 64 of the Patna University Act revived, which provided for 60 as the age of retirement of teachers of Patna University. The notification issued under the authority of the Vice Chancellor was published on 4-12-1992 and is Annexure-1 to the writ petition. The instant writ petition was filed on 9-12-1992 challenging the said notification issued by the Vice Chancellor of the Patna University. The order of the Vice Chancellor was challenged on several grounds, and one of the main grounds urged was that the lapse of such Ordinance did not result is automatic revival of the original section 64-of the Patna University Act, 1976. The accomplished facts and accrued right could not be abrogated and snatched by mere lapse of Ordinance

8. On 9-2-1993 the Patna University (Amendment) Ordinance, 1993 (Bihar Ordinance 5 of 1993) was promulgated. On the same day Bihar State Universities (Amendment) Ordinance 1993 (Bihar Ordinance 6 of 1993) was also promulgated. These Ordinances had the effect of substituting clause (a) of section 64 and clause (a) of section 67 of the Patna University Act and Bihar State Universities Act respectively. Since the provisions are identical, the provision of section 2 of Bihar Ordinance 5 of 1993 may be noticed which provided as follows :-

"(a) Notwithstanding anything to the contrary contained in this Act or any other Act, Ordinance, Rules or any judgment or

decrees of a court, the date of retirement of a teaching employee of the University or of a college shall be the date on which he attains the age of sixty years . The date of retirement of non-teaching employee (other than the inferior servants) shall be the date on which he attain the age of sixty years .

Provided that the date of retirement of such non-teaching employee, who is in the service of the University prior to commencement of the Patna University Act, 1976 (Bihar Act 24, 1976) shall be the date on which he attains the age of sixty two years : [Provided further that the University shall, in no case, extend the period of service of any of the teaching or non-teaching employee or reappoint him after he attain the age of sixty or sixty two years, as the case may be.]

9. A mere perusal of the provision makes it clear that the effect of the Ordinance was to prescribe the age of 60 to be the age of retirement of teaching employees of the University or of a college.

10. The petitioner filed an amendment petitioner challenging the validity of Bihar Ordinance no. 5 of 1993. It is not necessary to notice the proceeding before this court at that stage, but it is not in dispute that two further Ordinances in the same terms were repromulgated on 27-4-1993 being Patna University (Third Amendment) Ordinance, 1993 (Bihar Ordinance no. 15 of 1993) and Bihar State University (Third Amendment) Ordinance, 1993 (Bihar Ordinance no. 14 of 1993). The Petitioners again filed a petition paying that they may be granted leave to maintain the challenge of ordinance no. 15 of 1993 on the ground mentioned in the first amendment petition challenging Bihar ordinance no. 5 of 1993. They also incorporated other grounds of challenge. Writ petitions were filed by teacher of other Universities challenging the Bihar State University (Third Amendment) Ordinance, 1993 (Bihar Ordinance no. 14 of 1993).

11. The aforesaid two impugned Ordinance were replaced by the Patna University (Amendment) Act, 1993 (Bihar Act 18 of 1993) and the Bihar State Universities (Amendment) Act, 1993 (Bihar Act 17 of 1993). The legislation's substituting the Ordinance contained the same provisions, as contained in the earlier Ordinances. For the sake of convenience, we may notice the relevant provisions of the Patna University (Amendment Act, 1993 which provided as follows:-

"14. Amendment of Section 64 of Bihar Act 24 of 1976 .-In the said Act for clause (a) of section 64, the following shall be substituted, namely :-

(a) Notwithstanding anything to the contrary contained in any Act, Rules or any judgment or decrees of a court, the date of retirement of a teaching employee of the University or of a college shall be the date on which he attains the age of sixty years. The date of retirement of non-teaching employee (other than the inferior servants) shall be the date on which he attains the age of sixty years:

Provided : that the date of retirement of such non-teaching employee, who is in the service of the University prior to the commencement of the Patna University Act, 1976 (Bihar Act 24, 1976) shall be the date on which he attains the age of sixty...two years :

Provided : further that the University shall, in no case extend the period of service of any of the teaching or non-teaching employee after he attains the age of sixty or sixty-two years as the case may be :

Provided : further also that re-appointment of teachers after retirement may be made in appropriate cases up to the age of sixty five year in the manner laid down in the Statutes made in this behalf in accordance with the guideline of the University Grants Commission."

It is, therefore, apparent that after August 1993 the Patna University Act as also Bihar State Universities Act were amended.

and it was clearly provided by law that the date of retirement of a teaching employee of an university or of a College shall be the date on which he attains the age of 60 years. Section 14 of the Amendment Act which sought to amend section 64 of the Patna University Act was deemed to have come into force with affect 16th August, 1990 The date of coming into effect of the said provision is relevant, because Bihar Ordinance No. 15 of 1992 had lapsed on 15th August, 1992, and that was followed by the promulgation of two Ordinances which were ultimately replaced by Bihar Acts 7 and 18 of 1993, The petitioners amended the writ petitions with a view to challenge the aforesaid Bihar Acts 7 and 18 f 1993 amending the provisions of the Bihar State Universities Act, 1976 and the Patna University Act, 1976 respectively.

12. The petitioners have challenged the validity of the Acts as also the notification issued under the authority of the Vive Chancellor-Vide Annexure- on several grounds. It is the case of the petitioners that by the promulgation of the Ordinance in the year 1986 and the successive Ordinances which followed, the University Acts stood amended so as to provide 62 as the age of retirement of teachers of the University or of a College. Once the Act stood amended, a right accrued in their favour and they could be retired only at the age of 62. Even if the Ordinance lapsed, it did not adversely affect the right accrued in favour of the petitioners. They cannot, therefore, be retired till they attain the age of 62 years. The Acts in so far as they take away the vested rights of the petitioners are violative of Articles 14, 21 and 300 of the Constitution of India. The Act has also been made to operate retrospectively and is, therefore, ultra virus Articles 14 and 16 of the Constitution, since it unreasonably deprives the petitioners of their vested rights. It was was also submitted that the Acts enacted by the legislature were colourable pieces of legislation, since the real object of these enactments was not what it was projected to be. The real object of the enactments was to ratire old teachers so as to create vacancies against which fresh appointments could be made.

It was further submitted that the proviso to section 64 of the Act, as amended, crated a right in favour of the petitioners. It vested a power coupled with a duty and, therefore, the proviso was mandatory in nature, The University and its authorities were bound to frame statutes providing for re employment of retired teachers, but the proviso did not prescribe the period within which the statutes had to be fram. No guideline has been prescribed, and unbridled and unfettered powers were vested in the authorities. It was also submitted that the proviso proscribed a condition without fulfilment of which main part of section 64 of the Patna Universities Act, and section 67 of the Bihar State Universities Act could not be operated. In any event, the Vice Chancellor could not issue an order for the retirement of the teachers unless the statutes were framed in accordance with the provisions contained in the proviso to section 64 and 67 of the Patna University Act and the Bihar State University Act respectively. It was also urged that if the enactments were enacted with a view to meet the requirement of the scheme framed by the University Grants Commission and approved by the Central Government, a composite scheme should have been framed. merely by reducing the age of retirement the objective could not be achieved. The enactments were, therefore, a fraud on the Constitution as also a fraud on power. There was no justification for the reduction of the age of retirement of the teachers, when it was once increased to 62 by the Ordinance promulgated in the year 1986 and successive Ordinances promulgated thereafter.

13. In the counter-affidavit filed on behalf of the State it has been explained that the Patna University (Amendment) Ordinance 1986, whereby the retirement age of the University teachers was raised from 60 to 62 was promulgated at a time when the Government of India's approval to University Grants Commission recommended pay-scales was not communicated. That came in the year 1987 when a letter was received on 17-6-1987 from the Government of India, Ministry of Human Resources Development Department. The U. G. C. scheme of

revised pay-scales, inter alia, stipulated that the age of superannuation for teacher should be 60 years, and that thereafter no extension of service should be granted. The payment of central assistance for implementation of the scheme would be subject to the conditions that the entire scheme of revision of pay scales together with all the conditions attached to it were implemented by the State Government as a composite scheme without any modification what so ever. The Government of Bihar did not immediately accept the U. G. C. recmmended pay scales and the Ordinances were repromulgated where under the teachers continued to retire at the enhanced age of 62 years. The Government of India took a serious view of the matter, because it appeared to the Government of India that if the Government of Bihar were to fix the age of retirement at 62 years, it would have wide repercussions in other States. At the same time for non-implementation of the U. G. C. revised pay scales and other recommended facilities the University teachers in the State of Bihar went on strike, and with a view to find a solution to the problem the Government announced acceptance and implementation of U. G. C. recommended pay scales and other schemes with certain modifications. Though the Government orders were issued in August 1989, which in sum and substance carried the entire composite scheme including the recommended superannuation age of 60 years, it did not provide for reopening all time bound promotions granted to the teachers from 17-6-1987 to 1-3-1989. It may be noticed that under the U. G. C. scheme there was no provision for grant of time bound promotion. It was under these circumstances that the Patna University (Amendment) second Ordinance 1989 was permitted to lapse. However, in the hope that the Government of Bihar would be able to prevail upon the Government of India to agree to these deviations, namely, enhancement of age of retirement from 60 to 62 and shifting of promotion date from 17-6-1987 to 1-3-1989 for the purpose of acceptance of new revised U. G. C. scheme, it decided to repromulgate the Ordinance with similar provisions as in the lapsed Ordinance. The Government of Bihar on 30th January,

1991, submitted a detailed statement, claiming reimbursement of central assistance against introduction of U. G. C. recommended pay scales for University teachers amounting to Rs. 31.18 correas. However, the Government of India was not willing to accept the deviations made by the Government of Bihar with regard to age of retirement and shifting of date of promotion for the reason that such acceptance would have had very wide repercussions on other States. In those circumstances, Bihar Ordinance no. 15 of 1992 was allowed to lapse, because by then it bad become clear that the Government of India would not agree to the proposal of the State of Bihar that the age of retirement of University teachers should be 62 years instead of 60 as provided in the U. G. C. scheme. The Ordinance was allowed to lapse so as to enable the State, firstly, to receive the central assistance and, secondly, to bring the retirement age of University teacher in Bihar on all India pattern. Unless this was done the benefits under the U. G. C. package could not to be extended to the Universities of Bihar.

14. The counter-affidavit filed on behalf of the University is also on the same lines.

15. Before adverting to the submissions addressed at the bar, it would be useful first to notice the amendments brought about to section 64 of the Patna University Act and section 67 of the Bihar State University Act, which are in *pari materia*, with a view to appreciate their true scope and import. Clause (a) of section 64 as amended begins with a non-obstante clause, so that the provision overrides anything to the contrary contained in any Act, Rules or any judgment or decree of a Court. The section then provides that the date of retirement of a teaching employee of University, or of a college, shall be the date on which he attains the age of 60. We are not in this batch of writ petitions concerned with the age of retirement of non-teaching employees. Section 14 of the Patna University (Amendment) Act, 1993, which brings about this amendment to section 64 of the parent Act is deemed to have come into force with effect from 16th

August, 1992, as provided in section 1 of the amendment Act. As noticed earlier, section 64 (a), as it originally stood, provided for age of superannuation to two different categories of teachers, namely, those the had opted for the new U. G. C. scales, and those who had opted for the old U. G. C. scales. In the instant cases, we are concerned with the petitioners, who had opted for new U. G. C. scales, which were higher than old U. G. C. scales. Their age of retirement under section 64 of the Act, as it originally stood, was 60 years. That was amended by subsequent Ordinance, and the age of retirement was 62 when the last Ordinance lapsed on 15th August, 1992. With a view to cover the entire period the amendment to section 64 of the Act has been brought into force with effect from 16th August, 1992.

There can, therefore, be no doubt that the main part of section 64, as amended, alter the conditions of service of teachers of the University and reduces the age of retirement from 62 to 60. The first proviso does not deal with teachers of the University, but the second proviso in express terms stipulates that the University shall in no case extend the period of service of any of the teaching or non-teaching employee after he attains the age of 60 or 62 years, as the case may be. There is, therefore, a complete prohibition against extension of the period of service of any teacher after he attains the age of 60 years. The third proviso is material, since the petitioners have relied upon the said proviso in support of their case. The third proviso enables reappointment of teachers in appropriate cases upto the age of 65 years, but this is subject to the condition that such appointment may be granted in the manner laid down in the statutes made in this behalf in accordance with the guidelines of the University Grants Commission. In a nutshell, the main part of section 64, as amended, reduces the age of retirement from 62 to 60 and thereby alters the conditions of service of the teachers of the University. The second proviso prohibits extension of the period of service of any teacher after attaining the age of 60 years. The third proviso enables the University to appoint a teacher

after retirement upto the age of 65 years, but in the manner laid down in the statutes made in this behalf in accordance with the guidelines of the University Grants Commission. The operation of the main part of section 64 is not made dependent upon the happening of any other event. The main part of section 64 takes effect, as it were, by its own force and the age of retirement is reduced to 60 from 62, as was provided under the successive Ordinances. The second or third proviso does not control the operation of the main part of the section. The second proviso is really in the nature of a prohibition prohibiting the University from extending the period of service of any of the teaching or non-teaching employee after attaining the age of superannuation. This was, perhaps, considered necessary in view of the fact that section 64 before its amendment provided for extension of service of retired teachers . The third proviso clarifies that prohibition against extension of service of a retired teacher will not preclude the University from reappointing teachers after retirement in appropriate cases upto the age of 65 years in accordance with the statutes framed in this regard, which must be framed having regard to the guidelines of the University Grants Commission. The third proviso, therefore, is only an enabling provision, and by reason of the third proviso it is open to the University to farme statutes with regard to reappointment of teachers in appropriate cases, having regard to the guidelines of the University Grants Commission. In one sense the third proviso clarifies and carves out from the scope of extension of service, cases of reappointment in accordance with the statutes. The two provisos read together differentiate a case of extension of service from a case of reappointment of a teacher.

16. The third proviso, which is in the natures of enabling provision, vests in the University the power of reappointment, but controls the exercise of such power by providing guidelines for its exercise, namely, that such power must be exercised only in appropriate cases upto the age of 65 years, and in the manner laid down by the statutes made in this behalf in accordance with the guidelines of the University Grants Commission. The power

of reappointment, therefore, cannot be exercised unless statutes are framed, as porvided under the third proviso. However, it would be difficult to read into the third proviso a duty cast upon the University to frame Statutes, because it is matter of policy whether the University will provide for reappointment under its Statutes. The University may or may not provide for reappointment of teachers after retirement, but if it is provided, it must be done in accordance with the third proviso, namely after framing statutes in the manner laid down in the third proviso.

17. So understood, it appears to us quite clear that the main part of the section takes effect by its own force, and the third proviso does not lay down any condition precedent for operation of the main part of the section. Even if statutes are not framed providing for reappointment of teachers, those teachers who attain the age of 60 years, must retire from University service. There is no obligation mandatorily casts upon the University to frame Statutes. Only in the event it is decided to provide for re-appointment the requirement of the proviso must be met.

We have equally no doubt that the third proviso does not confer any right upon retiring teacher of a University to get reappointed. No doubt, if the statutes are framed, in appropriate cases retiring teachers may be considered for reappointment in accordance with the Statutes, but that is not to say that every retiring teacher can, as a matter of right, seek reappointment. The criticism that power vasted by the third proviso is untontolled and unbridled is also not tenable, because the third proviso, which vests the power in the University to reappoint retired teacher, lays down the manner in which that power is to be exercised. The third proviso clearly provides that only in appropriate cases upto the age of 65, reappointment may be granted. Secondly, it must be granted in the manner laid down by the Statutes, and thirdly that the Statutes must be framed in accordance with the guidelines of the Univesity Grants Commission. The power of reappointment is, threrefore, not uncontrolled or unbridled power, but has to be exercised in

accordance with the provisions of the thrid proviso, which itself lays down clearly the guidelines and the controls. It is not necessary for us to consider whether reappointment of a retired teacher can be granted without the statutes being framed, but it is anough to say that even if the Statutes are not framed in this regard, the main part of the section takes effect and a teacher must retire if he attains the age of 60 years, whether Statutes for reappoitment are or are not framed.

18. Mr. S. P. Mukharjee, counsel appearing on behalf of the petitioners, submitted that the legistlation was a colourable piece of legislation. According to him, the avowed purpose for which the legislation was enacted, was not the real purpose. According to him, the sole purpose for which section 64 of the Patna University Act, and section 67 of the Bihar State University Act were amended was to retire old teachers , so that frosh appointment could be made against the vacancies caused by such retiremment. He further submitted that the excuses put forward by the State, that with a view to meet the University Grants Commission requirements the amendments has become necessary, should also not be accepted, because if that was the intention behind the amendments, other conditions laid down by the Univesity Grants Commission must also be complied with.

19. In our view, the argument that the amending Acts are colourable pieces of legislation cannot be accepted, because it is not the case of the petitioners that the legislature had no legislative competence to enact the amending Acts, In fact, the argument proceeds on the basis that the legislature had the necessary competence, but its motives were doubtful. It is by now well-settled that the plenary legislative power of the State legislatures to pass laws has no limitation, except those to which the legislative power of the State legislature is subject. Though a law can be invalidated for contravention of constitutional limitation which inhibits upon the power of State legislature to pass laws, it cannot be declared invalid on the ground that it was

enacted with improper motives. In the case of *T. Venkate Reddy vs. State of Andhra Pradesh (1)* It was held :

["It is a settled rule of constitutional law that the question whether a statute is cnstitutional or not is always a question of power of the legislature concerned. Dependent upon the subject matter of the statute, the manner in which it is accomplished and mode of enacting it. While the courts can declare a statute unconstitutional when it transgresses constitutional limits, they are precluded from inquiring into the propriety of the exercise of the legislative power. It has to be assumed that the legislative discretion is properly exercised. The motives of the legislature in passing statute is beyond the scrutiny of courts. Nor can the courts examine whether the legislature had applied its mind to the provisions of a a statute before passing it. The proprlety, expediency and necessity of a legisletive act are for the determination of the legislative authority and are not for determination by the courts."]

Similarly, in *K. Nagaraj* vs. *State of Andhra Pradesh* (2) it was held :

".....It was also urged by counsel that by reducing the age of retirement to 55 years, the Government employees were deprived of their right to livolihood. There is no substance in this latter argument because if a rule of retirement can be deemed to deprive a person of his right to livelihood, it will be impormissible to provide for an age of retirement at all. That will be contrary to public interest because the State cannot afford the luxury of allowing its employees to continue in service after they have passed the point of peak performance. Rules of retirement do not take away the right of a person to his livelihood they limit his right to hold office to a stated number of years..."

20. In view of the law well-settled it would not be proper for us to investige the motives of the legislature in passing the amendment Acts. We can only examine whether the legislations

(1) (1985) A. I. R. (S. C.) 724
(2) (1985) A. I. R. (S. C.) 551

have tranagressed the constitutional limitations, without enquiring into the propriety of the exercise of the legislative power.

21. It has not been contended before us that the legislature was not competent to enact the legislation with regard to the retirement age of University employees . In fact, the amendment Acts merely amend the laws already in force. In view of the decision of the Supreme Court in *K. Nagaraj* (supra) it cannot be argued that the age of retirement of an employee of the University cannot be reduced by amending the Law In that case the Government order reducing the age of superan.nuation of Government employee, other than in the last Grade Service, from 58 to 55 years was challenged. Two notifications were issued in exercise of the power conferred by the proviso to Article 390 read with Article 313 of the Constitution. Other consequential amendments were also made. By these notifications every Government servant, whether ministerial or non-ministerial but not belonging to the last grade service, who had already attained the age of 55 years was to retire from service with from February 20, 1985. The challenge to the Government orders and nofification was repelled by the Supreme Court and it was held :

"On the basis of this date, it is difficult to hold that in reducing the age of retirement from 58 to 55, the State Government or the legislature acted arbitrarily or irratinally. There are precedents within our country itself for fixing the retirement age at 55 or for reducing it from 58 to 55. Either the one or the other of these two stages is regarded generally as acceptable, depending upon the employment policy of the Government of the day. It is not possible to lay down an inflexible rule that 58 years is a reasonable age for retirement and 55 is not. If the policy adopted for the time being by the Government or the legislature is shown to violate recognised norms of employment planning, It would be possible to say that the policy is irrational since, in that event, it would not bear

reasonable nexus with the object which it seeks to achieve. But such is not the case here. The reports of the various Commissions, from which we have extracted relevant portions, show that the creation of new avenues of employment for the youth is an integral part of any policy governing the fixation of retirement age. Since the impugned policy is actuated and influenced predominantly by that consideration, it cannot be struck down as arbitrary or irrational."

22. Having regard to the principle laid down by the Supreme Court in the aforesaid judgment, and the proper approach in such matters indicated in the Judgment, we have to examine whether the amendment Acts adopt a policy which is shown to violate recognised norms of economic planning, so that it may be said that the policy is irrational and has no reasonable nexus with the object which it seeks to achieve. In the instant case, the stand of the State is that with a view to derive the benefit of U. G. C. package, it became necessary for the State to reduce the age of retirment of teachers in Univrsities from 62 to 60. It is not disputed that with a view to get the benefits under the U. G. C. scheme the conditions laid by the University Grants Commission, and approved by the Central Government, had to be fulfilled. One such condition was that the age of retirement of teachers of Universities should not be more than 60. It appears from the averments in the counter-affidavit that the State of Bihar tried its very best to retain the age of 62 as the age of retirement of University teachers, but the Government of India did not accede to the request of the State Government, as it thought that doing so would have serious repercussions in other States. This also explains why the amendment Acts were not immediately enacted, and some times elapsed, which were covered by Ordinances successively promulgated to safeguard the interest of the teachers of the University. The events do not disclose an unfavourable approach of the State Government towards the teachers of the Univesity. In fact, it indicates to the contrary.

Only as a last resert, when it was felt that the State will be debared of the sumptuous grants under the University Grants Commission scheme, it was compelled to enact the amending Acts reducing the age of retirement from 62 to 60. There is another reason disclosed in the counter-affidavit of the State, namely, that the State Government found that in most of the Univesities in other States the age of retirement of teacher of the Universities was 60 and, therefore, with a view to bring about uniformity, the of retirement was reduced from 62 to 60. Having rogard to these facts it would be difficult to hold that the policy followed by the State Government in reducing the age of retirement was either irrational or unreasonable, or that it had no nexus with the object sought to be achieved. It was for the Satate to decide whether it would for go the benefits under the central scheme or whether it would comply with requirements of the scheme and fulfil the conditions laid down therein. That was essentially a matter of policy, because it was open to the State not to accept grants from the University Grants Commission, in which case it was not bound to comply with the condition laid down in the scheme formulated the University Grants Commission. Having regard to the various advantages which accrued to the teachers as wall as the State, if the State decided to implement the U. G. C. scheme, and took such a policy decision, it cannot be characterised as irrational, arbitrary or unreasonable. In fact it appears from the averments in the counter-affidavit that the teachers of the Universities in the State of Bihar as well were clamouring for U. G. C. scales, and they had resorted to agitational methods for grant of U. G. C. scales. Obviously, therfore, the reduction of age of retirement became a necessity, and therefore amendment Acts were enacted which were perfectly within the legislative competence of the State legislature.

23. The submission, therefore, that the impugned Acts are colourable pieces of legislation must be rejected.

24. It was then submitted that the petitioners acquired a

right under the lapsed Ordinances to continue in the service of the University till they attained the age of 62. It was, therefore, contended that the legislature could not enact a law retrospectively, so as to divest the petitioners of the rights which had accrued to them. The submission that the right which had accrued to the petitioners could not be divested by enacting a law with retrospective effect must be rejected, for the reasons which we shall hereafter discuss, but before dealing with this aspect of the matter, we shall first consider whether the amending Act which relates to Patna University has retrospective operation in the sense that it purports to divest the accrued rights of the teachers of the University, and secondly whether any right at all accrued to the petitioners to continue till the age of 62. As to what is the effect of expiry of temporary Statute has been the subject matter of large number of decisions including several decisions of the Supreme Court of India, but the oft quoted statement of the law by Park-B in *Steavenson* vs. *Oliver* (1) has evoked no dissent, and in fact has been approved by several decisions of the Supreme Court. It was there observed "the extent of the restrictions imposed and the duration of its provision, are matters of construction". *In State of Orissa* Vs. *Bhupendra Kumar* (2) the Supreme Court held;

"The nature of the right and obligation resulting from the provisions of the temporary Act and their character, may have to be regarded in determining whether the said right or obligation is enduring or not."

The authorities are legion, and the law is well settled that only the rights and obligations resulting from the provisions of the temporary Act which are enduring in nature survive the expiry of the Act. It is always a matter of constructions and interpretation as to whether those rights and obligations are, or are not, of an enduring nature. These principles have also been approved by the Supreme Court in *T. Venkata Reddy* (supra).

(1) (1841) 15 I. E. R. 1024.
(2) (1962) A. I. R. (S. C.) 945.

The question then is whether on the lapse of the Ordinance in the year 1992 the petitioners had acquired a right to retire at the age of 62. In our view, assuming that the Ordinance had the effect of amending the principal Act, at best the petitioners could continue to serve the University till the age of 62, if the law was not amended. No right had accrued to them in the sanse in which it is understood in this context, that is, in the sense of a right accrued which could not be taken away by retrospective legislation. The principle was succinctly stated in *Sakharam* Vs. *Manikchand* (1) thus : "The mere right existing at the date of a repealing statute to take advantage of the provisions of the statutes repealed, is not a right accrued". The aforesaid principle will aptly apply to the facts of this case, because on the date on which the Ordinance lapsed, the petitioner had a mere right to take advantage of the provisions of the Ordinance. Obviously, therefore, it cannot be held that a right had accrued in favour of the petitioners which could not be defeated or taken away by subsequent legislation.

25. The amendment introduced by the Amendment Act in so far as it relates to Patna University no doubt is deemed to have come into effect retrospectively from 16th August, 1992, but it may not be correct to charecterise the operation of the amended provision as retrospective. It is not as if all persons who had retired after 16th August, 1992, and before the enactment of the amending Act were affected by the amondment of section 64. Those who had retired and were no more in the service of the University were unaffected by the operation of section 64 as amended. It is not as if the Act authorised, or the University claimed refund of any salary or allowance paid to them after they were deemed to have retired under the provision of the Act. The amended provisions apply only to the persons who remain in service and, therefore, operated prospectively. Those who had attained the age of 60 years on the date on which the amending Act was promulgated were asked to retire, and others who

(1) (1963) A. I. R. (S. C.) 354.

remained in service were to retire on attaining the age of 60 years. In this sense it cannot be said that the operation of the amended provision of the Act was retrospective in character. The Supreme Court in the case of State of *J & K* Vs. *Triloki Nath Khosa* (1) held :

"An argument which found favour with Mufti Bahauddin, J. one of the learned Judges of the Letters Patent Bench of the High Court, and which was repeated before us is that the 'retrospective' application of the impugned Rules is violative of Arts. 14 and 16 of the Constitution. It is difficult to appreciate this argument and impossible to accept it. It is wrong to characterise the operation of a service rule as retrospective for the reason that it applies to existing employees. A rule which classifies such employees for promotional purposes, undoubtedly operates on those who entered service before the framing of the rule but it operates in future, in the sense that it governs the future right of promotion of those who are already in service. The impugned Rules do not recall a promotion already made or reduce a pay scale already granted."

In the instant case as well section 64 as amended applies to existing employees and operates in future.

26. We, therefore, find no substance in the argument urged on behalf of the petitioners that accrued rights are sought to be divested by enactment of a legislation with retrospective effect.

27. Even assuming that the petitioners had a right to retire at the age of 62 years, there is no bar to the legislature enacting a law unilaterally altering the conditions of service of an employee. In the case of *State of Gujrat Vs. Raman Lal Keshav Lal* (2) upon which petitioners placed reliance, it was held that law, both prospective and retrospective, must satisfy the test of constitutional validity. The legislature has power to legislate retrospectively and to take away or impair any vested right acquired under an existing statute, but if it was shown that the

(1) (1974) 1 S. C. C. 19.

(2) (1984) A. I. R. (S. C.) 161.

legislation was in breach of a constitutional provision, or offended the fundamental rights enshrined in Part III of the Constitution, they could be struck down on that ground. In that particular case it was found by the Court that the petitioners had acquired the status of a Government servant long ago, which were not extinguished either by abolition of the posts of termination of service. Retrospectivity was sought to be given to the Amending Act so that they could not claim to be Government servants ever, and consequently could not complain that they were singled out for differential treatment. The Court held that the Act was unreasonable and arbitrary inasmuch as it had ignored the march of events and purported to defeat their rights as Government servants by enacting a law retrospectively which had the effect of depriving them the status of a Government servant. The law was found to be unreasonable. Similarly in *Prabhakar Rao* vs. *State of Andhra Pradesh* (1) the Court held that if the purpose of the Act was to undo the wrong and injustice caused by reduction of age of retirement, the benefit thereof should have be extended to all including those who had retired under the policy of reduction, and those who had retired thereafter, but before passing of the Ordinance. The affected parties hit by reduction of age of superannuation formed a class and there was no reason to pick out a class of persons for differential treatment when other deserved the same treatment. These decisions only highlight principle that the law which affects the conditions of service has also to be judged on the same touchstone on which any other law is judged for its constitutional validity. If the law transgresses the constitutional limitations, the law is bad, and if it does not it is good. Retrospectivity by itself is not a vitiating factor, even if the law takes away a right or impairs the right of citizens. Not only the terms and conditions of service can be altered, it is open to the legislature to enact a law abolishing the office itself. In *T. Venkata Reddy* Vs. *State of Andhra Pradesh* (2) the Supreme Court was considering an

(1) (1986) A. I. R. (S. C.) 210
(2) (1985) A. I. R. (S. C.) 724.

Ordinance which provided for abolition of posts of part-time village officers. The Ordinance declared that every person who held the post of part-time village Officer would cease to held the post, and that all posts stood abolished and the officers ceased to be empoyees of the State Government. The Ordinance provided for creation of village Assistant and for filling up those posts in accordance with law, and it further provided for some payment to the holders of the post. It was held that once the Ordinance was passed, the posts of part-time village officer stood abolished, and the officers ceased to be the employees of the State Government. These two matters were accomplished facts on the relevant date irrespective of whether the holders of the post were paid as per section 5 of the Ordinance or new posts of village Assistant were filled up. It made no difference if no law was passed by the legislature in terms of the Ordinance which lapsed. The effect of the Ordinance was irreversible, except by express legislation.

28. The learned Advocate General in support of his contention has relied upon a decision of the Supreme Court, (*State of Himachal Pradesh & another vs. Kailash Chand Mahatan* (1)). In that case a member of the Electricity Board continued in office as Member even after attaining the age of 65 years. The provision was amended and section 3 prescribed 65 years as the age of superannuation. Section 3 in that case also contained a non-obstante clause. A member of the Board who had crossed the age of 65 was sought to be removed under the said provision, and it was urged on behalf of the said Member that his tenure of office could not be affected by the Ordinance. The contention was negatived. The Court held :

"One thing that is significant is it contains a 'non obstante' clause. An appointment of a member of the Board made prior to the commencement to this Act namely, 13.7.90 (giving retrospective operation) when gives a right to continue as a member after attaining the age of 65 years, that appointment is rendered void.

(1) (1992) A. I. R. (S. C.), 277.

Once it is so rendered void, the law deems that he has ceased to hold office of the Member of the Board. By a reading of the Section we are unable to conclude how Section 3(1) could fail to apply to a person who on the date of the commencement was already more than 60 years. This line of reasoning adopted by the High Court does not appeal to us. The Section nowhere makes a distinction between those on the date of the enactment are "below" or "over" 65 years of age. Such a distinction is totally unwarranted. The crucial question to be asked is whether the particular incument is continuing after the attainment of 65 years of age, if that question is answered in the affirnative there is a cessation of office, in view of the terms of that Section. The contrary conclusion would lead to strange results. Those who are appointed prior to the Act and on the attainment of 60 years on 13-7-90, would vacate the office while a person already 65 on that date and after the passing of the Act notwithstanding the policy of prescribing the age of suprannuation of 65 years would continue in the office. The object of introducing an age of superannuation itself is to weed out the older elements and infuse fresh blood so that the administration could function with vigour."

In the instant case as well the amended provisions contain a non-obstante clause and the same principles would apply. Obviously, therefore, after the law was amended, those teachers who had attained the age of 60 had to retire notwithstanding the fact that under the earlier Ordinance their age of retirement was 62. The right acquired under an Ordinance cannot be treated to be a right superior to one created by law enacted by legislature. In fact, the right created, whether by an Ordinance or by legislation, stand on the same footing. Once the law under which the right was claimed was amended, the right ceased to exist and only such rights could be sustained as were either conferred or saved under the amended law.

29. It was next argued that the petitioners' right to livelihood guaranteed under Article 21 of the Constitution of India,

and their right guaranteed under Article 300 of the Constitution have been violated. It is alleged that as a result of the amended statute, the petitioners, who had expected to serve the University till they attained the age of 62 years, have been retired. They have been deprived of their right of livelihood for the remaining period, and consequently deprived of the pay and allwances, which they would have earned had they continued till they attained the age of 62 years. The question is not *res integra* and is concluded by the decision of the Supreme Court (See AIR 1985 SC 551). Dealing with the same submission urged in that case where the age of retirement had been lowered, the Court held :

"...It was also urged by counsel that by reducing the age of retirement to 65 years, the Government employees were deprived of their right to livelihood. There is no substance in this latter argument because, if a rule of retirement can be deemed to deprive a person of his right to livelihood, it will be impermissible to provide for an age of retirement at all. That will be contrary to public interest because the State cannot afford the luxury of allowing its employees to continue in service after they have passed the point of peak performance. Rules of the retirement do not take away the right of a person to his livelihood : they limit his right to hold office to a stated number of years.....

Besides, the ordinance-making power being a legislative power, the argument of mala fides is misconceived. The legislature, as a body, cannot be accused of having passed a law for an extraneous purpose. Its reasons for passing a law are those that are stated in the Objects and Reasons and if, none are so stated, assuming that the executive, in a given case, has an ulterior motive in moving a legislation, that motive cannot render the passing of the law mala fide. This kind of 'transferred malice' is unknown in the field of legislation."

If it is held that the petitioners had no right to continue till the age of 62 in view of the amendment of the law, the question of their receiving pay and allowances for the remaining period does not arise, as right to receive pay and allowances is a

consequence of the petitioners holding the office. Since they had no right to hold office afer attaining the age of 60 as the law was amended, they cannot claim pay and allowances for the remaining period.

30. Mr. Mukherjee then urged relying upon a decision of the Supreme Court, reported in *S. Sundaram* Vs. *V. R. Pattabhiraman* (1) that a proviso may serve four different purposes, as held by the Supreme Curt. He relies upon the passage in the judgment which reads thus :

"We need not multiply authorities after authorities on this point because the legal position seems to be clearly and manifestly well established. To sum up, a proviso may serve four different purposes :

(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 make the enactment workable.

(3) it may be so 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 provision.

No exception can be taken to the broad submission urged by counsel for the petitioners, but his further contention that the proviso in question, namely, third previso of section 64 of the Patna University Act lays down a condition precedent for the application of the main part of the section, cannot be accepted. We have already held that the third proviso is only an enabling provision and to some extent it also clarifies that reappointment shall not be treated on the same footing as extension of service.

(1) (1985) A. I. R. (S. C.) 582.

Whereas extension of service is prohibited, reappointment is permissible, subject to the fulfilment of conditions under the third proviso. No doubt, a proviso may serve four different purposes, but if we may add with respect, the same proviso may serve more than one purpose. As we have held earlier, the third proviso is of composite nature serving more than one purpose. It lays down an exception to the rule against extension of service of teachers. It also enables the University to reemploy teachrs and also lays down the conditions for the exercise of that power. We have negatived the contention that the main part of the section will not operate unless the third proviso is complied with. We have already held that the third proviso only enables the appropriate authority to frame statutes in conformity with the UGC guidelines for reappointment of teachers till they attained the age of 65 years. It does not confer any right on a teacher to claim reappointment as a matter of right. It is equally open to the authority not to frame statutes for reemployment, because that is a matter of policy. In fact, the third proviso does not deal with the subject with which the main part of the section is concerned, namely, reduction of age of retirement of teachers and, therefore, it cannot be said that it provides for a condition precedent to the exercise of authority under the main provision. Indeed the main part operates by its own force as law, and is not dependent upon the doing of anything by anyone. The third proviso does not, therefore, control the operation of the main part of the section.

31. We have also held that no rights accrued to the petitioners under the earlier Ordinances, whereby they could as a matter of right continue in service till they attained the age of 62 years. It is no doubt true that the earlier Ordinances permitted the teachers to superannuate at the age of 62, but no right had accrued to the petitioners, and the right which they could claim under the earlier Ordinances continued only as long as the said Ordinances were not substituted by an Act or by subsequent Ordinances. We have earlier referred to the decision of the Supreme Curt in *Sakha Ram* Vs. *Manik Chand* (supra) in

which it is held that the mere right, existing at the date of a repealing statute to take advantage of the provision of the statute repealed, is not a right accrued.

32. Equally futile is the submission urged by him that the third proviso vests unbridled power in the University in the sense that no time limit has been prescribed for framing of the statute. If the framing of the statute is delayed, many teachers who may retire in the meantime may be depprived of the benfit under the third proviso. The submission proceeds on the basis that the retired teachers of the Universities have a right of reemployment, when there is no such right. It also proceeds on the erroneous assumption that the competent authority is bound to frame statutes for reemployment. Since that is a matter of policy, statutes may not be framed at all, if as a matter of policy the University decides that it shall not reemploy teachers after retirement. However, if as a matter of policy a decision is taken that reemployment should be allowed, it must act in accordance with the third proviso by framing statutes in conformity with the UGC guidelines. For the exercise of the power to reemploy, sufficient guidelines have been incorporated in the proviso by framing statutes in conformity with the UGC guidelines. For the exercise of the power to reemploy, sufficient guidelines have been incorporated in the proviso itself.

33. Mr. Ravi Shankar Prasad appearing on behalf of the petitioners in C. W. J. C. No. 13131 of 1992 relying upon the decision of the Supreme Court, reported in AIR 1992 SC 165, submitted that the type of work done by a teachers of the University are somewhat similar to the duties performed by Judges . Their life expectancy is more having regard to the nature of job performed by them. their work is of intellectual nature and, therefore, should be theated differently as was done in the case of Judges. In our view, the submission cannot be accepted even if all that is said by Mr. Prasad is accepted, the fact remaine that while other employees of the Government retire at the age of 58, even under the amended statute the teacher

of the University and college shall retire at at the age of 60. Even with regard to members of judicial service the Supreme Court granted the benefit of extension of service only to such of them as were found suitable for grant of such extension as they could serve till they attained the age of 60. The judicial officers to whom such benefit is granted are first subjected to screening by a special committee appointed by the Chief Justice of the High Court having regard to thier continued utility and other consideration enumerated in the decision, and extension of two years service can be granted only to these judicial officers who are found worthy of such extension. So far as teachers are concerned, their ag e of superannuation has been fixed at 60 and they cannot, therefore , claim anything more.

34. Counsel for the petitioners in the other writ petitions adopted the arguuments advanced by Mr. Mukherjee.

35. Counsel for the petitioners in C. W. J. C. No. 440/93 submitted that power of syndicate with regard to appointment etc. of teachers was vested in the Vice Chancellor by the Ordinance which had lapsed. He could not, therefore, exercise powers to remove a teacher of the University. The submission is misconceived, because the Vice Chancellor did not purport to remove any one from service, but only issued an order declaring that the teachers in question had retired in view of the provision of law. In C. W. J. C. No. 2286 of1993 it was urged by counsel appearing on behalf of the petitioners that even if the amended Act purported to reudece the age of retirement, the Act must net apply to persons who were in service as per the agreement so reached between the teachers and the Government. He further submitted that those whose services had been abruptly terminated by retirement should be suitably compensated in public interest. Both the submissions have no force. The amended sections 64 and 67, as the case may be, do not make any distinction between the teachers appointed after a particular date and those appointed before that date. The law applies to all teachers in the service of the University and, therefore, it would

be unreasonable to make further classification by judicial determination. That is not permissible. This conclusion is also supported by the principles laid down in AIR 1992 SC 1277. So far as the claim for compensation is concerned, there is no question of any compensation being paid to the teachers, who retire from service as a result of reduction of age of retirement. They will be entitled to such post retirement benefits as they are entitled in law.

36. So far as the challenge to the order of the Vice Chancellor is concerned, in C. W. J. C. No. 12685/92 it was contended by Mr. Mukherjee that the Vice Chancellor had issued a notification retiring the teacher by issuance of a notification dated 9-12-1992 on the ground that the Ordinance having lapsed on 15th August, 1992, the original section 64 of the Patna University Act, 1976, became automatically operative. The question is only academic having regard to the fact that the legislature passed a law with effect from 16th August, 1992, fixing the age of retirement of University and college teachers at 60. Since the law is deemed to have come into effect on 16th August, 1992, we must imagine that the law existed when the Vice Chancellor issued a notification on 9-12-1992. We have held the amendments to be valid and, therefore they operated against the teachers of the University and Colleges, who were in service on the date on which the Acts came into force. The Acts, however, only operated against those in service and did not purport to effect the completed transactions so as to deprive the teachers of the benefits which had already accrued to them under the lapsed Ordinances. In this sense the amending Acts are not retrespective in their operation.

37. Having considered all the submissions urged before us on behalf of the petitioners, we are of the view that none of them can be accepted. The writ petitions, therefore, fail and are, accordingly, dismissed. There will be no order as to costs.

R. D. Applications dismissed.

CIVIL WRIT JURISDICTION

Before Bisheshwar Prasad Singh, J.

1995.

September, 1.

Reyasat Ali Khan.*

v.

The State of Bihar through the Secretary, Law Department

Code of Criminal Procedure, 1973 (Central Act no. II of 1974), section 24 sub-sections (4) and (5)— provisions of—respondent no. 5, whose name did not find place in the panel prepared by the District Magistrate in consultation with the Sessions, Judge in accordance with the provisons of sub-section 4) of section 24, appointed as Public Prosecutor— validity of— section 24 sub-section (5)— no person to be appointed as a Public Prosecutor by the State Government if his name does not find place in the panel sent by the District Magistrate.

The term of office of Public Prosecutor, Bhagalpur had come to an end in June, 1988. The District Magistrate Bhagalpur in consultation the District and Session, Judge of the District sent a panel of names for appointment of Public Prosecutor with his recommendation to the State Government but instead of making apppointment from that panel, the State Government called for fresh recommendation from the District Magistrate in consultation with the Session Judge, persuant to that eleven names were again recommended by the District Magistrate in consultation with the Sessions Judge by his letter dated 13.4.1991. The State Government took no action and again by letter dated 20.4.1992 the District Magistrate was asked to send another frsh panel in consultation with the Sessions Judge. The District Magistrate again sent a panel of ten name in consultation with the Sessions Judge by his latter dated 21.9.1992 yet the State Government did not find it possible to take a decision in the matter of

* Civil Writ Jurisdiction Case No. 3743 of 1993. In the matter of an application under Articles 226 and 227 of the Constitution of India.

appointment of Public Prosecutor. Instead of appointing one of the persons from amongst the panel sent by the District Magistrate, the Secretary, Department of Law wrote to the District Magistrate stating that he had been directed to seek his opinion in consultation with the Sessions Judge with regard to the appointment of respondent no. 5 as Public Prosecutor, upon which the name of respondent no. 5 was sent to the State Government by the District Magistrate by his letter dated 11.4.1993 enclosing there with the recommendation of the Sessions Judge in which the Sessions Judge had stated that he had no occasion to see the work of respondent no. 5 in his court but he had no objection if the State Government wanted to appoint him as Public Prosecutor, District Magistrate stated that he agreed with the recommendation of the Sessions Judge. Thereafter by the impugned order dated 22.4.1993 the State Government appointed respondent no. 5 as Public Prosecutor of Bhagalpur.

Held, that having regard to the provisions of section 24 of the Code of Criminal Procedure, 1973 hereinafter referred to as the Code, the writing of the letter by the law Secretary seeking opinion of the District Magistrate regarding the appointment of respondent no. 5 as Public Prosecutor was highly improper. Section 24 sub-section 4 of the Code vests in the District Magistrate the power to prepare a panel in consultation with the Sessions Judge of the District on the basis of his opinion. In preparation of the panel the State Government has no role to play. Such a provision has been delabrately in-corporated to exclude interference in the matter of preparation of the panel. Sub-section (5) of section 24 of the Code provides the State Government shall not appoint any one as Public Prosecutor, unless his name appears in the panel of names prepared by the District Magistrate in consultation with the Sessions Judge. The law, therefore, clearly demarcates the two domains by providing that the District Magistrate in consultation with the Sessions Judge shall prepare the panel, and after such a panel is received by the State Government it may appoint a Public Prosecutor, but

it cannot appoint a person as a Public Prosecutor unless his name appears in the panel sent by the District Magistrate under subsection (4) of section 24 of the Code. The discretion of the State Government is only with regard to the choice of the candidate whose name is included in the panel, and it cannot appoint a person as Public Prosecutor, if his name is not included in the panel.

Held, further, that the letter of the Law Secretary seeking opinion of the District Magistrate in consultation with the Sessions Judge with regard to the appointment of respondent no. 5 as Public Prosecutor amounts to an unwarranted interference by the Law Secretary in the discharge of statutory duties by the District Magistrate under section 24 (4) of the Code.

Held, also, that the appointment of respondent no. 5 contained in Annexure 1 and 2 are quashed.

Mohanjee Upadhyay v. *State of Bihar* (1) followed.

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

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

: *M/s Rajendra Prasad Singh (Sr. Adv.) & Ambar Nath Banerji* in the petitioner

: *Mr. S. Z. Rahman (G. P. 7)* for the State

: M/s Shakeel Ahmad Khan & Abul Kalam for respondent no. 5.

B. P. Singh J. The petitioner herein has challenged the legality and validity of the two orders, Annexures 1 and 2, dated 22nd April, 1993 and 29th July, 1993 respectively, whereby respondent no. 5 herein was appointed initially as Public Prosecutor incharge on temprary basis-vide Annexure-1, and thereafter appointed as the Public Prosecutor for the district of Bhagalpur for a period of three years with effect from the date on which he assumed charge as Public Prosecutor Incharge-vide Annexure-2.

(1) (1994) 1 P. L. J. R. 565.

2. The challenge to the appointment of respondent no. 5 is mainly on two grounds. Firstly, it is contended that the District Magistrate in consultation with the District Judge of Bhagalpur did not include the name of respondent no. 5 in the panel of names of persons, who, in his opinion were fit to be appointed as Public Prosecutors and, therfore, the State Government could not, in view of the provisions of section 24 5) of the Code of Criminal Procedure appoint respondent no. 5 as the Public Prosecutor for the district of Bhagalpur.

It is secondly contended that the appointment of respondent no. 5 is malafide, inasmuch as it is by way of political patronage, rather than on considerations relevant for the appointment of a Public Prosecutor under section 24 of the Code of Criminal Procedure.

3. The facts of the case in so far as they are relevant, are not in dispute. The petitioner herein was appointed as the Public Prosecutor for the district of Bhagalpur on 1st June, 1985, but even though his tenure came to an and after three years. as required, he performed the duties of that office till 24th April, 1993, when Annexure-1 was issued. A letter was addressed to the District Magistrate, Bhagalpur by the Secratary Incharge, Department of Law of the Government of Bihar dated 22-4-1993 bringing to the notice of the District Magistrate that the term of appointment of the present Public Prosecutor had come to an end in June, 1988. The Government had decided to appoint respondent no. 5, Sri Md. Wasil Khan, Advocate, an Additional Public Prosecutor, to take charge of the post of Public Prosecutor till a regular Public Prosecutor was appointed for the district. The appointment of the petitioner, who was then functioning as a Public Prosecutor was to come to an end automatically with effect from the date on which respondent no. 5 took charge of the office of Incharge Public Prosecutor.

The facts which preceded the issuance of Annexure-1 are as follows : By letter dated 9th July, 1990 the Secretary of the Department of Law wrote to the District Magistrate, Bhagalpur,

intimating that the Government proposed to appoint a Public Prosecutor for the district of Bhagalpur, and in that connection it had decided to obtain the recommendatioon of the local authorities recommending the names of 11 advocates for appointment to the post of Public Prosecutor. In view of this decision it was not possible to make an appointment on the basis of the earlier recommendation. The District Magistrate was, therefore, requested to recommend the names of 11 candidates with their biodata after consultation with the District and Sessions Judge. The District Magistrate was also required to give his clear opinion with regard to the ability, industry, reputation and prestige at the Bar of the persons whose names were recommended. The aforesaid communication has been annexed as Annexure-4 to the writ petition. The additional Secretary, Government of Bihar also wrote to the District and Sessions Judge, Bhagalpur, to submit his proposal to the District Magistrate, Bhagalpur, so that the District Magistrate could made his recommendation to the Government for appointment of a Public Prosecutor. The District Judge, Bhagalpur, by his letter dated 30th March, 1991, addressed to the District Magistrate, Bhagalpur (Annexure-6) suggested a panel of 11 names for appointment of Public Prosecutor in order of preference, keeping in view the guidelines given from time to time. From the aforesaid letter it appears that the name of the petitioner was recommended at serial no. 1 in order of preference. The name of respondent no. 5 does not find place in the list submitted by the District and Sessions Judge, Bhagalpur. After receiving the panel of 11 names from the District and Sessions Judge, Bhagalpur, the District Magistrate, Bhagalpur by his letter dated 13-4-1991 (Annexure-7) recorded his agreement with the recommendation of the District and Sessions Judge, and forwarded the said panel to the State Government along with the biodata of the persons recommended.

4. Despite the submission of the panel by the District Magistrate in consultation with the District Judge containing

11 names, the State Government did not take any action in the matter, and it was only after about a year, on 20th April, 1992, that the secretery, Department of Law, intimated to the District Magistrate, Bhagalpur, that the Government had not been able to take a decision with regared to the appointment of Public Prosecutor for the district and, therefore, he was requested to again recommend 11 names of advocates with thair bio-data for appointment of Public Prosecuter. The last line of the letter mentioned that while making the recommendation, his opinion with regard to Sri Yudhistir Mandal, Advocate, may also be sent. Once again the District and Sessions Judge, Bhagalpur, suggested a panel of 10 names to the District Magistrate, Bhagalpur for appointment of public prosecuter. Once again the District and Sessions Judge (different from the one who had earlier prepared a panel of 11 names) recommended the petitioner at serial no. 1 in order of preference. The name of respondent no. 5 was not included in the panel prepared by the District and Session Judge, but the name of Sri Yudhistir Mandal was included in the list at the serial no. 7. The letter of the District and Sessions Judge has been annexed as Annexure-9. After receipt of the panel proposed by the District and Sessions Judge, Bhagalpur, the District Magistrate, Bhagalpur, recording his agreement with the suggestion of the District and Sessions Judge, recommended the said names to the Government for the appointment of Public Prosector for the district of Bhagalpur. The letter containing the recommendation of the District Magistrate has been annexed as Annexure-10. Though the District Magistrate made his recommendation on 21-9-1992, the Government did not take any action and it was only on 25th Fabruary, 1993. that the secretary , Department of law wrote to the District Magistrate , Bhagalpur by name stating that he had been disrected to request him to submit his comments about Sri. Md. Wasil Khan (respondent no. 5 herein) in connection with the appointment of Public Prosecuter. The District Magistrate was requested to send his comments after consultation with the District and Sessions Judge, Bhagalpur

through the Special Messenger deputed for this purpose. The communication was to be treated as most urgent. The aforesaid letter of the Secretary, Department of law is Annexure-11. to the writ petition. A similar letter was again written to the District Magistrate, Bhagalpur, by the name on 2nd March, 1993, by way of reminder, and a copy thereof was endorsed to the District and Sessions Judge, Bhagalpur, with a request that he may give his comments on the subject. The aforesaid letter has been marked as Annexure-12.

5. On 20th March, 1993, the District and Sessions Judge, Bhagalpur wrote to the District Magistrate, Bhagalpur , on the subject of appointment of Public Prosecutor by reference to the memo endorsed to him dated 2nd March, 1993. Since the letter of the District and Sessions Judge, Bhagalpur is of considerable significance, the relevant part of the same is reproduced below:

"With reference to your memo no. 258 dated the 2nd March 1993 regarding my opinion for appointment of Sri Washil Khan, Advocate as Public Prosecutor of Bhagalpur, I have to inform that although I have no. occasion to see the work of aforesaid Sri Md. Washil Khan as advocate in my Court, but I have no objection if the Government wants to appoint his as Public Prosecutor."

[On receiving the letter of the District and Sessions Judge, the District Magistrate, Bhagalpur wrote to the Secretary, Department of Law (Justice) and while enclosing therewith the recommendation of the District and Sessions Judge, also submitted the biodata of respondent no. 5. In the last sentence of the aforesaid letter he stated the he agreed with the recommendation of the District and Sessions Judge with regard to the appointment of Sri. Md. Wasil Khan as Public Prosecutor. The letter of the District Magistrate (Annexure-14) is dated 14-1993. It was thereafter that the impugned order (Annexure-1) was issued on 22nd April, 1993 appointing respondent no. 5, Sri Md. Washil Khan, Advocate, as Public Prosecutor incharge on temporary basis till the selection of a regular Public Prosecutor. Resspondent no. 5 thereafter took charge Public Prosecutor.]

6. After about three months on 29-7-1993 the Secretary, Depatment of Law communicated to the District Magistrate, Bhagalpur, the decision of the Government appointing respendent no. 5 as the Public Prosecutor for the district of Bhagalpur, for a period of three years commencing from the date on which he took charge as public prosecutor incharge, with a probationary period of one year.

7. Section 24 of the Code of Criminal Procedure lays down the procedure which has to be followed in the matter of appointment of a public prosecutor for a district. Sub-section (4) and (5) of section 24 of the Code of Criminal Procedure provide as follows:

> "(4) The District Magistrate shall, in consultation with the Session Judge, prepare a panel of names of persons, who are, in his opinion, fit to be appointed as Public Prosecutors of Additional Public Proscutors for the district."
>
> (5) No person shall be appointed by the Satate Government as the Public Prosecutor or Additional Public Prosecutor for the district unless his name appears in the panel of names prepared by the District Magistrate under sub-section (4)."

8. Sub-section (4) casts a duty upon the District Magistrate to prepare a panel of names of persons, who, in his opinion, are fit to be appointed as Public Prosecutors in consultation with the Sessions Judge. The sub-section obliges the District Magistrate to hold consultation with the Sessions Judgs and to pepare a panel of names. The persons whose names are to be included in the panel must be persons who, in his opinion, are fit to be appointed as Public Presecutors. In the performance of his statutory duty the District Magistrate must record his opinion about the fitness of the person recommended. In doing so, apart from consultation with the Sessions Judge, he is not to be influenced by extranecus consideration. It is his independent opinion which is to be the basis for his recommendation, and not the opinion of any other person, or an opionion procured from him under some pressure of influence. The express words

of the sub-section, and its insistence upon the District Magistrate acting in consultation with the Session Judge, clearly spells out the policy of law to select the best person available for appointment as Public Prosecutor. The appointment of a Public Prosecutor is to be made on consideration of merit, and fitness of person for appointment as Public Prosecutor must be understood accordingly.

The power to appoint a Public Prosecutor vests in the State Government, but this is subject to the condition imposed by sub-section (5) that no person shall be appointed by the State Government as the Public Prosecutor for a district unless his name appears in the panel of names prepared by the District Magistrate under sub-section (4). It is no doubt true that it is the discretion of the State Government to select one of the name from the panel submitted by the District Magistrate in consultation with the Sessions Judge, for the purpose of appointment of a Public Prosecutor. The choice of the Government, however, is limited to the names included in the panel, and as noticed earlier, the names included in the panel must be of meritorious persons, who, in the opinion of of District Magistrate, are fit for appointment as public prosecutor. The importance of the office of the public prosecutor cannot be overemphasised, and it been highlighted in several decisions of this Court as well as the Supreme Court that the Public Prosecutor must be a person of high merit, fair and objective, because upon him depends to a large extent the administration of criminal justice. That is why, even the State Government in its letter calling for a panel of names from the District Magistrate referred to ability, industry, reputation and prestige at the Bar, as being relvevant considerations on the basis of which the District Magistrate was required to submit a panel of names. It cannot be disputed that the office of the Public Presecutor is a public office and the incumbent has to discharge starutory duties. Obviously, thereafter, the person appointed as Public Proscutor must be one, who is not only

able and efficient, but also enjoys a reputation and prestige which justify his appointment as Public Presecutor. The scheme of section 24 of the Code of Criminal Procedure ensures the selection of an able Public Prosecutor by providing for a panel being prepared by the District Magistrate in consultation with the Sessions Judge, and limiting the choice of the State Government to advocates whose names appear in the panel. Obviously, in making his recommendation in consultation with the District and Sessions Judge, the District Magistrate is not expected to act on extraneous consideration, and it is expected that the names recommended by the District Magistrate are of persons who command respect and enjoy a reputation for their ability and industry. Since the selection by the State Government is confined to the names recommended by the Disrict Magistrate, extraneous considerationns, such as political, are out of question.

9. The facts of this case tell a sorry tale. The term of the office of Public Prosecutor had come to an and in June, 1988. It appears from the letters of the Secretary, Department of Law (Annexure-4) dated 9-7-1990 that the District Magistrate had earlier sent a penal of names with his recommendation to the State Government, but instead of makinng an appointment from that panel, the State Government decided to call for fresh recommendation by the District Magistrate in consultation with the Sessions Judge. Pursuant to Annexure-4, 11 names were again recmmended by the District Magistrate in consultation with the Sessions Judge- vide his letter (Annexure-7) dated 13-7-1991. Surprisingly, the Government took no action again by letter dated 20th April, 1992-vide Annexure-s, the District Magistrate was required to submit of yet another fresh panel again in consultation with the District and Sessions Judge. The District Magistrate once again submitted a fresh panel of 10 names under cover of his letter (Annexure-10) dated 21-9-1992. Apparently, three panels were submited by the District Magistrate, Bhagalpur in consultation with the

Sessions Judge, Bhagalpur , and yet the Government did not find' is possible to take a descision in the matter. What is, however, surprising is that rather than appointing one of the persons whose name was included in the panel by the District Magistrate , the Secretary, Department of law wrote to the District Magistrate stating that he had been directed to seek his opinion in consultation with the District and Sessios, Bhagalpur , with regard to the appointment of respondent no. 5 as Public Prosecutor. In my view, having regard to the provisions of section 24 of the Code of Criminal procedure, the writing of such a letter by the law Secretary to the District Magistrate was highly improper . The statute vests in the District Magistrate the power to prepare a panel in consultation with the Sessions Judge of the district on the basis of his opinion. In the preparation of the panel the State Government has no role to play. Such a provision has been deliberately incorporated to exclude interference in the matter of preparation of the panel. This is further reinforced by sub-section (5) which in terms provides that the State Government shall not appoint anyone as the Public Prosecutor of unless his name appears in the panel of name prepared by the District Magistrate in consultation with the Sessions Judge. The law, therefore, clarly demarcates the two domains by providing that the District Magistrate in consultation with the Sessions Judge shall prepare the panel, and after such a panel is received by the State Government , it may appoint a Public Prosecutor, but it cannot appoint a person as a Public Prosecutor unless his name appears in the panel prepared by the District Magistrate under sub-section (4) . The discretion of the State Government is only with regard to the choice of the candidate whese name is included in the panel. and it cannot appoint a person as Public Prosecutor, if his name is not included in the panel. This reinforces my conclusion that in the matter of recommendation; the State Government has no role to play. It is also not as if the Law Secretary, who happens to be a senior District Judge, wrote to the Distict

Magistrate of his own an the basis his personal knowlege. The letter clearly mentioned that he had been directed to seek the opinion of the District Magistrate with regard to the appointment of raspondent no. 5 as Public Presecutor. The letter amonts to an unwarraned interference by the Law Secretory in the discharge of statutoty duties by the District Magistrate under section 24 (4) of the Code of Criminal Precedure.

10. The letter of the Law Secretary cannot be said to be an innocent preposal of the Law Secretary. In fact, the District Judge to whom a copy of the letter was endorsed understood what it meant. He observed that he had no objection if the Government wanted to appoint him as Public Prosecutor. The significance of such communications must be understood not in the light of what they contain, but the effect that they have on persons who are required to act in furtherance thereto. Where as the law provides that the State Government may appoit a Public Presecutor from the panel prepared by the District Magistrate in accordance with sub-section (4) of section 24, the aforesaid letter of the Law Secretary was in effect an attempt to procure a recommendation which must be depricated in the strongest terms. The office of Public Prosecutor must be offered to a deserving Advocate and should not be procured by an Advocate. Political consideration and favouritism cannot be allowed to interfere with the statutory duty of the Distrit Magistrate to prepare a panel of names of persons who in his opinion are fit for appointment.

11. Counsel for the petitioner has rightly placed reliance upon a judgment of this Court by a Division Bench *See Mohan Jee Upadhyay vs. State of Bihar*(1) wherein in similar circumstances a question arose before the Court as to whether the recommendation made by the District Magistrate was a valid recommendation having regard to the provision of section 24 of the Code. In that case it was found that the name of respondent no. 8 was included in the list and recommended

(1) (1994) I. P. L. J. R. 565.

by the District Magistrate on extraneous consideration because the State Government imposed its preference in favour of respondent no. 8 upon the statutory authorities. It was, therefore, held that such recommendation could not be said to be free from influance and pressue of the State Government. In fact, the District Magistrate abdicated his independent assessment and was forced to include to name of respondent no. 8 in order to oblige the State Government. The Court took the view that the District Magistrate in consultation with the Session Judge is requied to prepare a panel of names of persons, who are in his opinion, fit to be appointed as Public Prosecutors. Such opinion, which is mandatory in nature, must be free from bias and influence. The 'Opinion' meentioned in sub-section (4) of section 24 of the Code must be free from any pressure or influence and such recommendation on the basis of the opinion of the authorities must be considered as statutory in nature. Therefore, no deviation to such mandatory provision can be permitted. This Court, therefore, held that that the recommendation of the name of respondent no. 8 in the Panel prepared by the District Magistrate was illegal and the respondents were restrained from considering the name of respondent no. 8 on the basis of such recommendation.

12. The view that I have taken is consistent with the law as declared by a Division Bench of this Court which is a binding precedent.

13. What, however, is significant is the fact that despits letter of the Law Secretary, the District Judge did not recommend the name of respondent ni. 5 for appointment as Public Prosecutor. He made it clear that he had no. occasion to watch the performance of respondent no. 5 and without recommending his name for inclusion in the panel, he observed that he will have no objection if the Government wanted to appoint him as Public Prosecutor. The letter of the District Magistrate (Anexure-14) dated 4-4-1993 does not take

the matter further. It was open to the District Magistrate to give his own opinion with regard to the fitness of respondents ni. 5 for appointment as Public Prosecutor, but the he also did not recommend the name of respondent ni. 5 for inclusion in the panel. He merely forwarded the letter received from the District & Sessions Judge, and agreed with him. In effect, even the District Magistrate had no. independent opinion to give with regard to respondent no. 5 on the basis on his personal knowledge, and he merely endorsed the view of the District Judge that he had no objection to the appointment of respondent no, 5 as a Public Prosecutor. He, therefore, did not make a recommendation on the basis of his opinion as required by law. In my view, on a fair reading of the letter of the District and Sessions Judge (Annexure-13) dated 20th March, 1993 and of the District Magistrate (Anexure-14) datd 14-4-1993, it cannot be said that the District Magistrate recommended the name of respondent no, 5 far inclusion in the panel already submitted by him. Obviously, the District Magistrate had to prepare a panel of persons, who in his opinion were fit to be appointed as Public Prosecutors. Since he agreed with the letter of the District and Sessions Judge, he could not express any opinion about respondent no. 5 and , therefore, could not have included his name in the panel. The statute requires that only those persons must be included in the panel who in the opinion of the District Magistrate were fit to be appointed as Public Proseutor. The recommendation of a name by inclusion in the panel is an affirmative act of the District Magisrate by which he conveys that in his opinion the person whose name is included in the panel is fit for appontment as Public Prosecutors. The negative act of saying that he had no objection to, the appointment if the Government so desired, does not amount to a recommendation by the District Magistrate in consultation with the Sessions Judge, nor does it amount to inclusion of the name in the panel already suggested by him. The inclusion of the name in the panel must be preceded by application of mind by the District Magistrate to relevant

consideration for the formation of an opinion. This duty is cast upon the District Magistrate by law, and unless he says affirmatively that in his opinion the person concerned is fit to he appointed as Public Prosecutor, his saying that he has no objection, does not amount to a recommendation or even an exercise of authority under section 24 (4) of the Code. The attempt of the Law Secretary, therefore, to get a positive recommendation from the District Magistrate in consultation with the Sessions Judge did not succeed, and from Annexures 13 and 14 it is crystal clear taht neither the District and Sessions Judge nor the District Magistrate recommended the name of respondent no. 5 for inclusion in the panel, because as I have held earlier the requirement of sub-section (4) of section 24 are not met by saying that he had no objection to the appointment of a persticular person, if the Government so desired. The sub-section casts a duty upon him to affirmatively recommend by including in the panel persons who, in his opinion, are fit for being appointed as Public Prosecutors. If the District Magistrate or the Sessions Judge had no opinion about an Advoocate, since they had no occasion to watch the performance of the said Advocate, they could not have possibly recommended his name for inclusion in the panel. In my view, therefore, the appointment of respondent no. 5 by issuance of the letter (Annexure-2) is in breach of the mandatory provision sub-section (5) of section 24 of the Code of Criminal Procedure. Since the name of respondent no. 5 was not included in the panal prepared by the District Magistrate in consultation with the Session Judge, the State Government could not have appointed him 5 the Public Prosector.

14. Counsel for respondent no. 5 submitted that deserving advocates may at times be missed by the Sessions Judge or the District Magistrate. Insuch a case it may be open to any person to bring this fact to the notice of the Government. In such a situation if the State Government requires the District Magistrate to send his opinion about a particular person to the Government in consultation with the District and Sessions

Judge, it cannot be said that any illegality has been committed. It is not necessary for me to make any general observation with regard to such matters, because much will depend on the facts and circumstances of the case. In such cases it may, perhaps, be proper for the person concerned to bring this fact to the notice of the Sessions Judge or the District Magistrate so that they may, if so advised, consider the case of such on Advocate and may ultimately include or not include his name in the panel. However, when such recommendation is called for from the District Magistrate by the Government it has a different effect, and tends to interfere with the statutory duty of the District Magistrate under sub-section (4) of section 24 of the Code. In any event, in the instant case, I have come to the conclusion that despite the letter of the Law Secretary, the Sessions Judge did not approve of the proposal, nor did the District Magistrate. Both of them simply stated that they did not know anything about the advocate conserned, but had no objection if the State Government wanted to appoint him as Public Prosecutor. It cannot be said, therefore, that the District Magistrate purported to include his name in the panel on the basis of his opinion that the said Advocate was fit to be appointed as Public Prosecutor, as is the requirement of sub-section (4) of section 24 of the Act.

15. This, however, brings me to the question as to what relief should be granted inthe instant writ petition, Respondent n. 5 has been appointed as Public Prosecutor for a term of three years, with effect from the date on which he assused charge of his office as Public Prosecutor Incharge which was sometime in the month of April 1993. It was submitted on behalf of the respondents that his term, therefore, will come to an end in or about April 1996. He has, therefore, only about eight months left to complete his tenure. In these circumstances, it may not be proper to quash his appointment.

The submission appears to be attractive but ignores the realities. From our experience we can say that even after the expiry of the term for which the Public Prosecuter is appointed

prompt steps are not taken to appoint a new Public Presecutor, and sometimes the Public Prosecutor in permitted to continue for years together before a regular appointment is made. In the instant case itself the petitioner, who was appointed in the year 1985 for a term of three years continued till 24th April 1993. It is, therefore, not known whether any Public Procecutor will be oppointed on the expiry of the term of rspondent no. 5 or whether he may be continued for several years thereafter. The impugned order was passed on 29th July, 1993, and the petitioner moved this Court on 30th August, 1993. Thepetitioner filed the writ petition promptly and cannot be said to be guilty of delay in moving this Court.

16. In these circumtances, therefore, I am left with no option but to quash the appointment of respondent no. 5 as communicated by the latter (Annexure–2). However, in the larger interest of justice so that the State has sufficient opportunity to appoint a Public Prosecutor in occurdance with law, respondent no. 5 is permitted to continue an Public Proscuter for a period of three months. In the meantime, the State Government must take necessary steps, and appoint a Public Prosecutor in accordance with law. Respondent no. 5 shall continue to function as Public Prosecutor for a period of three months or till such time the Public Prosecutor is appointed by the State Government, whichever is earlier. This writ petition is, accodingly, allowed, but there will be no order as to costs. Let a copy of this judgement be given to S. C. 7.

R. D. Application allowed.

DEATH REFERENCE

Before Naresh Kumar Sinha and Pramod Kumar Sarinn, JJ.

1995

September, 25.

Md. Rafique. and ors.*

v.

The State of Bihar.

Criminal Trial—identification by hearing voice— value of— expression 'short size', by prosecution witnesses regarding one of the ascused without giving his height— effect of— observation of Sessions Judge made at the time of examination of accused no. 2, Md Nasim under section 313 of Code of Criminal Procedure, 1973, whether connects him as being the person in company of accused no. 1 Md Rafique— search— Video Cassette Recorder recovered from the house of Md. Nasim from under the earth on the information given by Md. Nasim— Sessions Judge while awarding sentence referred to only aggravating circumstances— mitigating circumstances, whether to be given due weight and balanced in awarding sentence— award of death sentence on accused no. 1 Md. Rafique, whether deserves to be commuted to imprisonment for life— Code of Criminal Procedure, 1973 (Central Act no. II of 1974)— Section 313.

The identification by hearing the voice of the accused is an identification which is very weak identification. More over the witness was hearing noise coming from the room, in such circumstances, it may be doubtful whether she was in a position

* Deach Reference No. 3 of 1994. With Criminal Appeal No. 519 of 1994. Criminal Appeal No. 527 of 1994. and Criminal Appeal No. 576 of 1994. D. R. No. 3/94 : Reference made by Sri Braj Kishore Thakur, Sessions Judge, Bhagalpur

Cr. A. No. 519/94 Against the decision of Sri Braj Kishor Thakur,

Cr. A. No. 526/94) Sessions Judge, Bhagalpur in Sessions Trial.

Cr. A. No. 576/94) No. 37/94 passed on 5th/6th of October, 1994.

to distinctly hear the voice so as to identify that it was of accused Md. Rafique.

The expression short size is a loose expression and is largely a matter of inference unless supported by detail such as height. Since none of the prosecution witnesses including P. Ws 6 and 10 had given the height of the person whom they have described as a short statured person, the observation of the Sessions Judge made at the time of examination of the accused under section 313 Code of Criminal Procedure, 1973, would not necessarily connect this accused no. 2 Md. Nasim as the person seen in the company of Md. Rafique accused no. 1 on the date of occurrence. Even if it is considered for the sake of argument that P. W. 7 had heard Md. Rafique name his companion as Md. Nasim, that would not necessarily mean that it was Md. Nasim accused no. 2 who was named by Md.Rafique.

The house of accused no. 2 Md. Nasim was raided immediately after the occurrence on the information given by accused no. 1. Md. Rafique. Md. Nasim was not in his house and the video Cassette Recorder was also not recovered. But subsequently Md. Nasim was arrested and the Video Cassette Recorder was recorded on the information given by him after digging out the earth fromin-side his house in the presence of witnesses.

Held, since the Video Cassette Recorder stolen in the occurrence was recovered from inside the house of Md. Nasim only after it was dugged out from inside the earth, it is strongly suggestive of the fact that as claimed by the prosecution that the reservery was made on the basis of the information received from Md. Nasim.

The Session Judge while awarding death sentence has only referred to the aggravating circumstances. There are eartain mitingating circumstances which have got be considered and given due weight. While balancing the mitigating circumstances and the aggrivating circumstances the scale stightly tilts in favour of the former.

Held, that in the instant case it cannot be said with

certainity that the circumstances of the crime are such that there is no alternative but to impose death sentence. Hence, the death sentence passed against the accused no. 1 Md. Rafique deserves to be commuted to imprisonment for life.

Held, further, that Md. Nasim is acquitted of the charges under section 302/34 and 380 of the Panel Code, 1860, and his conviction for said offences are set aside. His conviction under section 411 of the Panel Code is upheld and he is sentenced to undergo regorous imprisonment for three years.

Death reference made by the Session Judge Bhagalpur and appeals by the accused.

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

: Mr. Diwakar Karn, Mr. Bimlendu Mishra for the appellants

: Mr. Aswini Kumar Sinha for the State.

: Mr. Lala Kailash Bihari Prasad, Mr. Krishna Mohan, Mr. Sirus Lall, Mr. Manoj Kumar Advocates. in the informant.

Naresh Kumar Sinha, J. The death reference, the joint jail appeal by the two appellants as also their separate criminal appeals arise out of the judgement and order dated 5th/6th October, 1994 passed by the learned Sessions Judge convicting them under section 303/34 of the Indian Penal Code (For Short 'I. P. C.') and sentencing both the appellants to death. Md. Rafique, appellant no. 1 was, however, acquitted of the charge under section 380 I. P. C. Md. Nasim appellant no. 2 was also convicted for the offences under sections 380 and 411 I. P. C. but no separate sentence was passed against him. The death reference for confirmation of the death sentence as also the three criminal appeals have been heard together and are being disposed of by this common judgement.

2. The prosecution story, as unfolded in course of trial, is that the informant Dr. Liu Minchu P. W. 11 and his father Dr. Liu Hshin P. W. 8 are dentists and have their dental clinic in Mohalla Sujaganj of Bhagalpur Town Mrs. Jonny Liu P. W. 9 wife of the

informant runs a beauty parlour which is near the clinic. As usual on the fateful day of 10th December, 1993 at about 9–9–.30 a.m. all three left their house in Mohalla Sarai within kotwali Police Station by car for their clinic/beauty parlour. The informant's mother Mr. Wei Shen Chi P. W. 7, his son Liu Tafu (9 1/2 years) and daughter Lie Ailin (7 1/2 years) were left in the house in the care of two maid servants Urmila Devi (P. W. 6) and Noori (P. W. 10) Noori who heard the shouts of the giri that Rafique uncle had gone mad and was assaulting Tafu, came out and saw Rafique assaulting the boy. She saw one more person with Rafique whom she could not recognize. When P. W. 10 remonstrated. Rafique assaulted her on the back of her head whereupon she fell down unconscious. At about 7–7 .30 p.m. Liu Ailin went to her grand-mother P. W. 7 and complained that Rafique uncle, A-1 had gone mad and was assaulting Tafu and Noori Mausi P. W. 10. Against the advice of her grand-mother, Ailin went back never to return. At about 7–7 .30 p.m. P.Ws. 8, 9 and 11 as usual returned home from work. As soon as they opened the shutter of the garage for keeping the car, they heard the shouts of P. Ws. 7 and 10 and when all three rushed up-stairs, they saw the children lying injured on the ground in the study room. A V. C. R. was found missing from the dinning room. Both the injured were taken to hospital where they were pronounced dead and the dead bodies were then brought back to the house.

3. Devashrai Singh P. W. 13, S. I. of Police, received a telephonic message about the occurrence from an unknown person at 8.45 p.m. He came to the house of the informant P. W. 11 and recorded his fardbyan, Ext. 4 at 9 p.m. The fardbayn contains a description of the occurrence as also the allegation that Rafique, A–1 who had been previously employed as a car driver had been removed for not driving the vehicle properly. The informant had recently purchased a Maruti van and had refused to re-employ A-1 despite his repeated request. On a day prior to the occurrence, the informant had told A-1 in clear terms that he would not employ him and A-1 thereafter had left

the place holding out threats. On the basis of the fardbyan, a formal F. I. R Ext. 6 was drawn registering a case under section 302, 380, 460/120 B I. P. C. against appellant no. 1 and some unknown parsons. P. W. 13 took up the ivestigation of the case. He went up- stairs through the stairs where there is a room constructed like verandah towards east which faces west and found copious blood at two diffrerent places on the room . He also found a wooden broken chair scattered at the place of occurrence. He found the dead bodies of the two children smeared with blood kept inside the Dicky of the van. After directing a Hawildar to keep watch on the dead bodies, the Investigating officer raided the house of Md. Rafique, A-1 the same night at 12.30 hrs. and arrested him. On the infrmation given by A-1 that the V. C. R. was in the house of Md. Nasim A-2, the Investigating Officer raided the house of A-2 but he was not found there. The Investigating officer recorded the Statement of witnesses. He, however, appears to have held inquest on the dead bodies on the morning of 11.12.1993 at 7 at 8. a. m. first on the body of the boy and thereafter on the body of the girl and prepared their Inquest Reports Exts. 1 and 1/1 in the presence of Binod Bhiwaniwala P. W. I. and Atma Ram Sah P. W. 2. The Investigating Officer also seized blood clots and broken pieces of chair from the P. O. vide seizure list, Ext. 2 in the presence of Pitambar Sharma P. W. 3 and Nandlal Bijwani P. W. 5. Both the dead bodies were sent for post mortem examination at 7.45 a. m. Dr. H. I Ansari P. W. 4 performed the autopsy on the two dead bodies at 11-11.30 a. m. on that very day and prepared the post Mortem Report Exts. 3 and 3/1. The Investigating officer got the statement of P. W. 10, the only eye withness to the murder, recorded by a, Judicial Magistrate under section 164 of the Code of Criminal Procedure. After Md. Nasim, A-2 surrendered in the Court, he was taken on police remand on 29.12.1993 and upon information given by him, the V. C. R stolen in course of the occurrence, was recovered from his house on 30.12.1993 at 6.15 P. M. in the presence of Jamal Mistri (not examined) and Md: Israfil who was examined as D. W. I. The Investigating

officer produced 7 pieces of chairs seized from the place of occurrence, marked Exts. I to I/6. He also produced blood of the deceased children seized from the place ofoccurrence and kept in a pot, Ext. II. The V. C. R. recoverd from the house of A-2 was also produced and marked Ext. III. After completion of investigation, the Inverstigating Officer charge-sheeted both the appellants under sections 302,380, 460 and 411/120B I. P. C.

4. The prosecution examined 13 witnesses in all to prove its case. Binod Bhiwaniwala P. W. I, and Atma Ram Sah P. W. 2 are the two witnesses to the inquest held on the bodies of the deceased out of whom, P. W. 2 was tendered Pitambar Sharma P. W. 3 and Nandlal Bijwani P. W. 5 are the seizure list witnesses. P. W. 3 had also seen refique A-1 coming from the side of Khalifaganj at about 5-5.45 p. m. on the date of the occurence. Dr. H. I. Ansari P. W. 4 held autopay on the bodies of the deceased children. PW.6 Urmila Devi, a maid servant of the informant was not present in the house at the time of the occurence but had seen Rafique along with a short statured man at 5.30 p. m. at Mandroze Chowk when she had gone out for a work. She had also seen them walking at the back side of the house of the informant when she left the house for the beauty parlour. P. W. 7 Mrs. Wei Shen Chi, the grand-mother of the deceased children and Noori P. W. 10, the other maid servant of the informant, were present in the house at the time of occurrence. Dr. Liu Hshim Shing P. W. 8, the grand-father, Mrs. Jonny Liu P. W. 9, the mother and Dr. Liu Minchu P. W. 11 the father of the deceased children had reached the P. O. house in their Maruti Van at 7-7.30 p. m. and on going up-stairs, had found both the children lying injured. Laxi Kant Sharma P. W. 12 is a photographer who had taken photographs of the dead children as also of the place of the occurence. Devashrai Singh P. W. 13 is the Investigating officer. Both the appellants have denied their complicity in the crime. Appellant no. 1 claims to have been falsely implicated as he had objected to the illicit relationship the informant was having with a

woman. Appellant no. 2 denied that he was a participant in the crime and that stolen V. C. R. was recovered from his house. Three defence withnesses were examined . Md. Isafil D. W. I denied that the house of Md. Nasim, appellant no. 2 had been searched in his presnce. Md. Farooque, D. W. 2 simply stated that appellant no. 1 drove the jeep which belonged to his (A-1) brother. Md. Iqbal D. W. 3 was examined to say that the V. C. R had been planted by the police and therafter, its recovery was shown.

5. The learned Session Judge rejected the defence plea of false implication, accepted the prosecution case as proved and convicted and sentenced both the appellants in the manner indicated above.

6. That the two deceased children susained ante morem injuries in side their house on the date of occurrence and died, has not been seriously disputed. There is also overwhelming evidence to prove this fact. It is the consistent evidence of P. Ws. 9, 10 and 11 that when they reached their home at 7-7:30 P. M. on the date of the alleged occurrence, they heard the shouts of P. Ws. 7 and 10 and after going up-stais, they found both the children lying injured in their study room on the first floor of the house . The Investigating officer, P. W. 13 in course of the inspection of the P. O. , had found blood on two different places in huge quantity and had also found broken pieces of wooden chair scattered there. The Investigating officer had also held inquest on both the dead bodies in the presanc of the witnesses. It may be mentioned that the dead bodies were not found at the P. O. for both the injured children had been removed by their parents to the hospital where they were declared dead. Both the dead bodies were thereafter, brought to the informants house and were lying in the dicky of the Maruti Van. The doctor, P. W. 4, held the autopsy on the dead bodies on 11.12.1993 at 11-11.30 a.m and found the following injuries on the dead body of the body Liu Tafu :-

(i) Lacerated wound on right side frontal area of head in 1/4 X 1/4 ".

(ii) Lacerated wound on right side forahead in 1/2 X1/2,

(iii) Bruise on right side of the face in 11/2 "X1" reddish in colure ,

(iv) Bruise on right side, medial part of thigh, in 2"X1 12/2 ".

(v)Bruise on left side neck iregular in shape, in 21/2 "X3/4",

(vi) Bruise on left side of groin in 21/2 "X1/2". on dissection of head and neck skull bone was found fractured into several pieces and a portion of the brain showed intra cerebral haemmorhage.

7. On the body of the girl, Ailin (71/2 years), P. W. 4 found the following ante mortem injuries :

(i) Lacerated wound in 51/2" X bone deep on left side of head :

(ii) Lacerated wound in 6"X11/2"X bone deep on left side of face upto left tempralare of head;

(iii) Bruise on right upper arm inw 1"X1/2.

On dissection of body cavities skull bones were found broken into several pieces and portion of brain tissues in the left side had intra-cerebral haamorrhage. The injuries on both the deceased were described as grievous and fatal and sufficient to cause death in the ordinary course of nature. The doctor opined that the injurise have been caused by heavy , hard and blunt weaspon. The opinion of the doctor that the time since death was about 12 to 18 hours from the time of examination fits in with the prosecution case that the occurrence took place in the evening of 10th December , 1993. P. W. 12 photographed the dead bodies before the post mortem xamination as also of the place of occurenc. The negatives have been marked Exts. IV to IV/2 and the prints Exts. V/2. Though the defence

suggested to P. W. 12 that he was a friend of the informant and had deposed falsely, there is nothing to disbelieve the photographs of the deceased children as also of the place of ocurrence which go to support the prosecution case both with regard to the presence of injuries on the bodies of the deceased children as also the presence of the copious blood at the P. O. Thus, there is overwhelming evidence on the record that both the deceased children were assaulted and killed in side their house on the date of occurrence.

8. The prosecution case, in a way, rests on the evidence of P. W. 10 the maid servant who heard the shouts of the girl that "Mausiji" Rafique uncle had gone mad and that Rafique uncle was assaulting Tafu,. It has come in evidence that the girl called P. W. 10 as Mausi and appellant no. 1 used to be described as Rafique uncle by the deceased. It is the specific evidence of P. W. 10 that she was with P. W. 7, the mother of the informant who is a paralytic and cannot move. After hearing the shouts of the girl, P.W. 10 had come out and had seen Rafique assaulting Tafu and when she told Rafique that he was behaving in such a way at the house of a respected person, Refique had assaulted her also and she fell down unconscious. P. W. 10 claims to have seen one more person with Rafique whom she could not recognize. According to p. W. 10, it was only after she regained her consciouness that she and Mummi, P. W. 7 had started shouting and it was only after a long time that the informant, his wife and father came. P.W. 10 claim that the children were assaulted with Chair and had pointed out to the pieces of chair marked Exts. 1 to 1/6. The evidence of the only other witness who was present in the house at the time of the occurence I. e. of P.W. 7, grand-mother of the children, is that her gand-daughter, Ailin (deceased) came and told her that Refique uncle was behaving like a mad man and was assaulting Tafu and Noori Mausi. She also told her (P. W.7) that there was also a short statured man along with Rafique. P. W. 7 claime that Ailin went away after saying all

this and she heard the sound of smashing coming from the outer room, the room in which the children used to study. The children were heard crying "Mausi o Mausi" P. W. 7 then claims to have heard the voice of Rafique asking Nasim (A-2) to depart as the work had been finished. She also saw two persons going out from the open door but did not recognize them. P. W.7 could not go to the rescue of her grand children as she was struck with paralysis and could not stand-up. That P. W. 7 is a paralytic, is not disputed and as noted by the trial judge, she had been brought to the court to depose as a witness in a wheel chair. The testimony of P.Ws. 7 and 10, if read together, go to show that the deceased boy was being subjected to assault in the room and the deceased girl had shouted that Mausiji, (P. W. 10) Rafique uncle had gone mad and was assaulting Tafu. It was on hearing the shouts of the girl that P. W. 10 went to the P. O. room and found Rafique assaulting Tafu by means of chair. The evidence of both P. Ws. 7 and 10 read together in their true perspective, discloses that the deceased girl had gone to her grand-mother P. W.7 only after P. W 10 came to the P. O. room on hearing her shouts and Rafique had assaulted her Mausi (P. W.10) also. This is evident from the evidence of P. W. 7 that her grand-daughter came and told her that Rafique was behaving like a mad and was assaulting both Tafu and Noori Mausi. The deceased girl left her grand-mother and went back to the room where her brother and P. W. 10 were being assaulted and she too was assaulted. Since P. W. 10 as a result of assault on the back portion of her head, had fallen down unconscious, she could not witness the assault on the deceased girl.

9. The evidence of P. W. 7 that she had narrated all that heppened to her husband P. W. 8, is fully corroborated by the evidence of P. Ws. 8, 9 and 11 who met her soon-after they returned home and saw the two children lying injured in the study room. P. W. 3 had also seen Md. Rafique coming from the side of Khalifabad at 5 .45 pm on the date of the occurrence.

However, the aforesaid statement to loses all its significance in view of his statement in the cross-examination that the house of the informant was about 1 km. west of the place where he met Rafique. P. W. 6 had, however, seen Md. Rafique and one short statured man talking at a betel shop at Mandroze chowk at about 5.30 p. m. while she had gone out to get wheat grinded. She had returned to the house and while leaving the house for going to the beauty Parlour, she had seen Rafique and one short statured man walking at the back side of the informant's house.

10. Learned Sessions Judge appears to have mis-quoted P. W. 10 that she stated that while she was serving the informant's mother, his daughter (Ailin) came running towards her and said that Rafique uncle has turned mad and he is beating Tafu that she (P. W. 10) went to that place and saw that Rafique was assaulting Tufu. P. W. 10 had no-where stated that Ailin had come to her and made the statement. Her evidence was that she had heard the shouts of the girl that Rafique had gone mad was assaulting Tafu. It was after hearing the shouts that P. W. 10 had gone in side the room and seen Rafique assaulting Tafu and a ahort statured person present there.

11. Learned Sessions Judge has relied upon the evidence of P. W. 10 and observed that the defence was unable to take anything in the cross-examination of the witness to shake her credibility. The learned Sessions Judge had also observed that the accused Md. Rafique had also served with the family of the informant for some time and it was quite natural for Noori (P. W. 10) to recognise him. It is significant to note that the only other person P. W. 7 present in the house at the time of the alleged occurrence, did not refer to the presence of Noori in side the house at the time of the occurrence. However such an omission in the testimony of P. W. 7 is not of much significance for the reason that the presence of Noori in side the house at the time of the occurence is proved by other evidence on the record. P. W. 6 who appears to have left the house shortly before the alleged occurrence, stated that she had got the door of the

house closed by Noori . The presence of Noori in side he house at the time of the occurrence is also proved by the shouts of the girl Ailin that Mausiji, Rafique uncle had gone mad. Since Noori used to be called Mausi by Ailin, "Mausi" obviously meant Noori. This is further re-enforced by the evidence of P. W. 7 that Ailin came and told her that Rafique uncle had gone mad and was assaulting Tafu and Mausiji. The evidence of P. Ws. 8,9 and 11 that when they reached the P. O., they heard P. W. 7 and Noori shouting whereupon they went up-stairs, also points to the presenc of Noori in the house. These witnesses had also found Noori along with the mother in side the house. It appears that neither the informant nor his father or wife stated that Noori described what she had seen in side the room. She being the only eye witness to the actual assault, one could expect her to describe the incident to the childrens father and mother. It appears that the witnesses were not cross-examined on these lines to impeach the credibility of Noori. However, even if the defence would have made any such attempt, it would not have been enough to discredit her testimony. It is in the evidence that P. W. 7 had told her husband P. W. 8 who was also accompanied with his son and daughter-in-law, that Ailin had told her, namely, that Rafique had gone mad and was assauting Tafu and Mausiji. Since the story had already been divulged to the information, his father and wife by the informant's mother, no importance was attached to the fact whether or not Noori had also narated what she had seen to P. Ws. 8,9 and 11.

12. Noori P. W. 10 in her cross -examination admitted that she remained two days in the Police Station where she had been brought from her house and the Sub-inspector of Police, during the said period, had abused her. The learned Sessions Judge did not consider it worth while to refer to this admission on the part of the witnesses while scrutinising her evidence. Noori being the sole eye witness of the occurrence, her testimony required to be strictly scrutinised and mere observing that there was nothing in her cross-examination to

discredit her testimony, was not enough. Noori being the only maid servant, P. W. 6 the other maid sarvant having left the house prior to the occurrence. with the two children and a paralytic grand-mother who was unable to walk, the police in their wisdom might have thought it necessary to interrogate the witness. Since there is no evidence on the record that Noori was, at nay stage, made an accused in the case, there is no reason to believe that the police had taken her into custody. Only because the police had interrogated her and even assuming that the claim of the witness was true that the Sub-Inspector had also abused her, there is nothing to suggest that any kind of pressure was put on the witness to make a particular satement. The name of Rafique as an assailant had already been disclosed in the fardbyan which was lodged on the very night of the occurrence. There is, therefore, nothing even to create a suspicion that Noori was pressurised into making any statement which disclosed the name of Rafique as the assailant of the deceased children. Only because the police had questioned or interrogated Noori, is not in itself sufficient to draw any presumption that she was pressurised into making any statement. Not only that there is no evidence on the record that Noori was pressurised into making any statement, she was, in fact, produced before the Magistrate whom she decribed as Hakim before whom she made a staument. The witness, in fact, denied the defence suggestion that she was implicating Rafique on the instigation on others. It is significant that when Noori deposed as witness in the Sessions Court, she had ceased to be a maid servant of the informant. She had left the job after the children were murdered. It could not therefore be argued that she was under the influence of the informant and had deposed falsely at his instance.

13. With regard to the cmpetence of Noori P. W. 10 to identify Rafique, all that the learned Sessions Judge observed was that as the accused Md. Rafique had also served with the

family for some time, it was quite natural for Noori to recognise him. The evidence on the record is that Md. Rafique had ceased to be the driver of the informant more than six months before the alleged occurrenc and Noori had been employed as a maid servant only three months prior to the occurrence. Since both Noori and Md. Rafique were not under the employment of the informant during any period of time, an inference could not be drawn that Noori was for that reason knowing Rafique from before. The identification of Md. Rafique Noori cannot be disbelieved for this reason alone. No one has disputed the competence of Noori to identify Rafique. It is on the record that Rafique, even after leaving the job, had been in contact with the informant's family. One month before the alleged occurrence, the informant had purchased a Maruti Van and Md. Rafique had approached him and his father on seveal occasions for his re-emloyment as driver. The deceased children were well known to Md. Rafique whom they called as Rafique uncle. Both Md. Rafique and Noori were residents of the same police Station of the town. In course of her evidence, Noori has referred to Rafique and also identified him in the dock. At no stage, the defence questioned her competence to identify Rafique by suggesting that she did not know him from before. As a matter of fact, even in course of hearing of the appeal, no argument has been advanced challenging the competency of Noori to identify Md. Rafique.

14. The witness, P. W. 10 claimed that on her protest, Rafique assaulted her with something on the back portion of her head due to which she fell down and became unconscious. There is nothing on the record to suggest that she had sustained any injury which had necessitated any treatment by any doctor. She, on her own admission, does not appear to have remained unconacious for very long. Her evidence is that after regaining her senses, she and Mummi P. W. 7 started shouting . In any view of the matter, the abseence of any medical evidence to prove that the witness sustained any injury on the back

portion of her head, is not enough to disbelieve her claim that she witnessed the occurrence when there was overwhelming evidence on the record that she was present in side the house at the time of the occurrence. The witness was a lady and may have fallen down after receiving a blow on the back portion of her head and may have lost her senses largely on account of nervousness, due to shock than on account of any serious injury sustained by her.

15. The trial Court relied upon the statement of P. W. 7 that she heard Rafique call Nasim saying that they should depart as the work had been done. On the evidence on the record, the room of P. W. 7 was only 10 ft. away from the room where the alleged ocurrence took palce. There is evidence that Md. Rafique during his employment as the driver of the informant, had on occasions stayed in the house. He had worked at the place of the informant for almost a year. In the circumstances, there was every reason to believe that P. W. 7 was competent enough to identify Md. Rafique by his voice. However, such identification in its nature is a very weak identification. Moreover, the witness was hearing noise coming form the room and in such circumstance, it may be some-how doubtful whether she was in a position to distinctly hear the voice so as to identify that it was of Md. Rafique. The trial court was, thus, not right it its conclusion that the identification of Md. Rafique by voice by P. W.7 was a strong piece of evidence against him to support his participation in the crime. The voice identification needs to be rejected for another reasons also. P. W. 7 was a paralytic patient. In other words, she was not a healty person. Md. Nasim was not known to her from before. In the particular circumstance of the case including the fact that noise was coming from in side the room, the claim of P. W. 7 that she heard Rafique call the name of Nasim is something which cannot be accepted on its face value. In any case, it was some-what uncertain as to the exact words Rafique said which

the lady could over-hear. The trial Court, while considering the circumstances appearing against Md. Rafique, appears to have ignored an important piece of evidence, namely, that as per evidence of P. W. 7, Ailin had told her grand-mother that Rafique is behaving like a mad and assaulting Tafu and Noori. As already mentioned earlier, Ailin was well known to Rafique whom she called as Rafique uncle. Soon after making statment to the grand-mother, Ailin died as a result of assault on her own person. What Ailin told her grand-mother, fully corroborated the prosecution case that Rafique had assaulted Tafu and Noori also after she went and protested over his act.

16. Another circumstance relied upon by the trial Court against Md. Rafique is the recorvery of the stolen V. C. R. Ext. III from the house of Md. Nasim. Md. Rafique is said to have given information to the police regarding the possession of the V.C.R. stolen from the house of the informant at the time of the occurrence. On the evidence on the record, the stolen V. C. R. was not recovered from the hosue of Md. Nasim (A-2) immediately after the occurrence. If the aprosecution case is to be believed, the V. C. R. was recorvered on 30.12.1993 from the house of A-2 from a place said to have been pointed out by him. Thus, it is not the prosecution case that the information given by Md. Rafique led to the recorvery of the V. C. R. In the circumstance, any statement made by Md. Rafique, who was accused and in the custody of the police regarding the stolenV. C. R. was wholly in-admissaible. If the stolen V. C. R. was recovered on the basis of the information given by Md. Nasim, it follows as a matter of course that the recovery was not made on the basis of the information given by Md. Rafique. The trial court was, thus clearly in error in relying upon the aforesaid circumstance of recorvery of the stolen V. C. R. for connecting Md. Rafique with the commission of the murder on the reasoning that otherwise there was no alternative explanation for his knowledge to know about the existence of that V. C.

R in the house of accused Md. Nasim. That Rafique was seen in the company of short statured man on the back side of the house of the informant by P. W. 6 shortly before the occurrence, was rightly relied upon by the trial Court as a circumstance appearing against him. From the evidence of P. W. 6 it is obvious that she had left the informant's house shortly before the occurrence. It is in the evidence of the informant that the gate in rear side of the house was found opened a circumstance strongly suggestive of the fact that the assailants entered the house from the rear door. P. W. 6 was in the employment of the informant from a pretty long time and his competency to identify Md. Rafique was bayond doubt. If Md. Rafique and a short statured man was found loitering on back side of the house of the informant, it was a circumstance strongly suggestive that Rafique was waiting for P. W. 6 to leave the house. It is not the record that P. W. 6, the other maid servant of the house, used to leave the house in the evening everyday. Since Md. Rafique had remained in the employement of the informant as his driver for a considerable time, he must be presmed to have knowledge of all this. Both P. W. 10 in her evidence and the deceased children Ailin, in her last words to her grand-mother, had stated about Md. Rafique and short statured man along with him. Thus, the statement of P. W. 6 that she saw Md. Rafique in the company of a short satured man in the rear side of the informants house, clearly points to the involvement of Md. Rafique in the crime.

17. Learned counsel appearing for Md. Rafique, A-1 argued that the prosecution case ought to be rejected out-right for the reason that the place of occurrence had not been established and that there was inconsistency in the testimony of the witnesses with regard to the time when it took place. So far the place of occurrence is concerned there appears to be no inconsistency in the ividence of the witnesses. There is over whelming evidence on the record including objective

findings of the Investigating Officer P. W. 13 that the assault took place in the study room on the first floor of the house. It is ture that some of the witnesses including the Ivestigating Officer made statement that the P. O. was on the ground floor. The confusion in describing the P. O. with referenc to the floor of the house, appears to have been caused on account of the fact the house of the informant which faces north, is a three storey building from the front and second storey building from the rear. Towards north, there is a garage on the ground and a stair-case leads to the first floor which has also been described as a ground-floor. Only because some witnesses referred to the P. O. as the first floor and some as ground floor, on account of the construction of the house which had a look of three storey building from the front and a two storey building from rear, is of no significance. With regard to the criticism that the prosecution evidence was not consistent with regard to the time, all that needs to be said is that the occurrence took place round about 7-7. 30 p. m. The witnesses had given the time without claiming that they were doing so with mathematical precision. Moreover, going by experience, the timings given withnesses are generally their own estimate of time. In the instant casse, the evidence of P. W. 7 is that Ailin had told her about Rafique going mad and assaulting Tafu and Mausiji at about 7-7.30 p. m. So is the evidence of P. W. 8, 9 and 11 that when they reached their home at 7-7.30 p. m. they heard shouts of P. Ws. 7 and 10 and going up-atairs, found the two children lying injured. Thus, the time of the occurrence is almost round about that time that is near about 7.30 p. m.

18. Learned counsel appearing for Md. Nasim A-2 argued that there was complete absence of any legal and satisfactory evidence on the record that Md. Nasim had participated in the murder. It may be recalled that the evidence on the record is that a short statured person was seen loitering with Md. Rafique on the back side of the house of the

informant prior to the occurrence and had also been seen with Md. Rafique in the P. O. room both by Noori P. W. 10 also Ailin who reported the fact t her grand -mother P. W. 7 P. W.7 had also heard Md. Rafiqe call the name of Md. Nasim while asking him to leave the scene of occurrence as the work had been done. As already observed earlier, this part of the testimony of P. W. 7 has been found not to be reliable. What is significant is that P. W. 10 had seen the short statured man present in side the room and P. W. 6 had seen the short statured man in the back side of the house of the informant. There is no evidence on the record that any test identification parade was held to enable P. Ws. 6 and 10 to identify the short statured person whom they had seen. P. W. 10 did not identify the short statured person who was present in the dock along with Md. Rafique on 15.7.1994 when she deposed as a withness in the case. P. W. 10 had on that day, identify Md. Rafique only. The learned Sessions Judge, while examining Md. Nasim under section 313 cr. P. C., had appended a certificate after recording his statement that this accused Md. Nasim is a man of short size as it appears from his physical appearance. The learned Sessions Judge did not mention the heigh of appallant no. 2 on the basis of which he has described him as a man of short size. Moreover, Md. Nasim had appeared as an accused in the case and none of the prosecution witnesses had chosen to describe him as a man of short size. The expression "short size" is a loose expression and is largely a matter of inference unless supported by detail such as height. Since none of the prosecution witnesses including P. Ws. 6 and 10 had given the height of the person whom they have desribed as a short statured person, the observation of the learned Sessions Judge made at the time of the examination of the accused under section 313 Cr. P. C., would not necessarily connect the appellant as the person seen in the company of Md. Rafique on the date of the occuence. Even if it is considered for the sake of argument that P. W. 7 had heard Md. Rafique name his companion as

Md. Nasim, that would not necessarily mean that it was Md. Nasim A-2 who was named by Md. Rafique. It is no-body's case that in the town of Bhagalpur, the appellant was the only man with the name of Md. Nasim.

19. There is ample evidence on the record that the V. C. R. Ext. III had been stolen from the house of the informant on the date of the occurrence. The informant had identified the V. C. R. after its recorvery. The house of Md. Nasim was raided immediately after the ocurrence. He was not found in side the house and the V. C. R. was also not recocered. The appellant was subsequently arrested and the V. C. R was recovered on the basis of information given by him, from his house at 6.15 p. m. on 30.12.1993 in the presence of the witnesses, namely, Jamal Mistry and Md. Israfil. The Investigating Officer P. W. 13 recoverd it after digging the ground of Nasim's house and the V. C. R. was found kept in side the checkered plastic bag wrapped in an old checkered Lungi. He prepared the seizure list Ext. 5 whereupon Israfil affixed his thumb impression and the other Seizure list witnesses, Jamal Mistiry put his signature. The prosecution did not produce Md. Jamal to prove the recovery and Md. Israfil appeared as D. W. 1 and denied that the house of Nasim was searched in his presence. What is significiant is that D.W. 1 admitted having given his thumb impression as also the fact that Jamal had put his signature on a paper. It may be mentioned that the informant P. W. 11 had already stated in his evidence that Jamal Mistry and Md. Israfil D. W. 1 had refused to depose out of fear of the accused persons. It was argued on behalf of the appellant that the police had planted the V. C. R. and then given a show of its recovery. As rightly observed by the trial Court, such a suggestion was not given to the Investigating Officer P. W. 13 who made the recovery. Since the V. C. R. was recovered from in side the house of the appellant, only after it was dugged out from in said the earth, it is strongly suggestive of the fact that as claimed by the prosecution, the recovery was made on the

basis of the information received from the appellant. Section 27 of the Indian Evidence Act provides that when any fact is deposed to as discovered in-consequence of information received from a person accused of any offence, in the custody of a Police Officer, so much of such information, whether it amount to a confession or not are related distinctly to the fact thereby discovered, may be proved. "As already observed earlier, there is no dispute with regard to the identity of the V. C. R. recoverd. The informant gave its number as NV-730 EN and its Make as that of National company. This is the description of the V. C. R. given by the Investigating Officer who recovered it from the house of the appellant no. 2. The allgation that the police had planted the V. C. R. in the house of the appellant, if believed, would suggest that the stolen V. C. R. had first had been recovered from some-where before it was so planted. There is nothing on the record to even create a suspicion that the V. C. R had been recovered by the police earlier from some-where else. It is true that the house of Md. Nasim had been raided soon-after the occurrence and V. C. R was not recovered. It is no-body's a case that when the house of the appellant was raided, any search was conducted for the V. C.R after digging any place in the house of appellant -2. There is also no evidence on the record that the stolen V. C. R. had been concealed in the house of appellant-2 immediately after the occurrence. What is significant is that the stolen V. C. R. was recovered from the house of appellant-2 on 30.12.1993 on the basis of information given to the police by Appellant -2 and the information which led to its recovery, was admissible under section 27 of the Indian Evidence Act.

20. The question is whether the recovery of the stolen V. C. R. from the house of A-2 on the basis of information given by him was a circumstance which would connect him with the murder of the children from whose house the V. C. R. was stolen at the time of the alleged occurrrence? The trial court, appars to have relied upon the circumstance as well as the other circumstances to connect A-2 with the murder. Illustration (a)

to section 114 of the Indian Evidence Act provides that the Court may presume that a man who is in the possession of stolen good soon after the theft is either the thief of has reveived goods knowing them to be stolen, unless he can account for his possession. In other words, no presumption can be drawn from the recovery of the stolen V. C. R. that A-2 had participated in the murder of the children in course of which the V. C. R. was stolen. It is true that A-2 was found in the possession of the stolen V. C. R. some 20 days after it was stolen. The V. C. R. was found concealed beneath the earth and was recovered under circumstances strongly suggestive of the fact that A-2 had received the V. C. R. knowing it to be stolen. Such a presumption can easily be drawn in the facts and circumstances of the case, as A-2 made no attempt what soever to account for its possession. The trial Court convicted A-2 for offence under section 302/34 I. P. C. as also for the offence under section 380 and 411 I. P. c. . For reasons already mentioned, A-2 could not be convicted for the murder of the children and his conviction under section 302/34 I. P. C. cannot be sustained. However, the trial Court was in error in convicting A-2 for both the offences under sections 380 and 411 I. P. C. although it did not pass any separate sentence against him for each of the two offences in view of the death sentence awarded to him for the offence under section 302/34 I. P. C. Appellant no. 2 being in possession of the stolen V. C. R. could be presumed to be either thief or having received it knowing it to be stolen. If he was presumed to be a thief and convicted for the offence under section 380, he could not be presumed to have received the V. C. R. knowing it to be stolen so as to make him liable under section 411 I. P. C. Appellant-2 could be convicted either under section 380 or 411 IPC and not for both the offences in respect of possession of one and the same item stolen property namely the VCR. Since the V. C. R. was recovered 20 days after the occurrence and there is nothing on the record to suggest as to how A-2 came in its possession before he concealed it in his house, it would be safe

to presume that he had received V. C. R. knowing it to be stolen. Thus, while the conviction of of A-2 under section 411 I. P. C. is up-held, the one under 380 I. P. C. is set aside.

21. So far Md. Rafique A-1 is concerned, he has been convicted under section 302/34 I. P. C. and sentence to death. Although A-2 has not been proved to be the short statured person who was found in the company of A-1 at the time of the occurrence, the presence of another man as companion of A-1 at the time of the murder, cannot be ruled out his conviction can be sustained under section 302/34 I. P. C. It was argued on behalf of A-1 that he had been falsely implicated by the informant who felt annoyed for his having cmplained to the informant's wife that the informant was having illicit relationship with Manju Begam. A- 1 admitted in his examination under section 313 Cr. P. C. that he had been employed as a driver by the informant. He however denied that he had been removd from the service contending that he had himself the job. A-1 denied that he ever apporached the informant or his father for being re-employed as a driver. There is ample evidence on the record that A-1 had approached the informant and his father on several occasions for being re-employed as a driver after the informant, some month prior to the occurrenc, had purchased a Maruti Van. The informant had earlier possessed a Fiat car which he had since disposed of before purchasing the Van. A day prior to the occurrence, the informant's father had finally turned down the request of A-1 to be employed as a driver and A-1 is said to have left the place holding out threats. The informant has denied any relationship with Manju Begam. The evidence on the record is that Manju Begam was employed in the beauty parlour of the informant's wife from 1992-94. Since Manju Begam continued to be in the employment of the innformant's wife, who was running the beaty parlour, even after A-1 was removed from service, it follows with the story that the informant was having any illicit relationship with Manju Begam, was not true. If any

such illicit relationship is accepted in between the information and Manju Begam, the informant's wife was most unlikely to tolerate it and would not have retained the services of Manju Begam in the beauty parlour. The informant and his father had already removed appellant no. 1 from his service as the driver and reason have been given for his removal. One such reason being that he did not drive properly or clean the car. A-1, after removal from his service and on being refused re-employment as a driver, had reasons to have some grudge against the informant. There could be no motive what soever for the informant to falsely inplicate him in the case of murder of their children. At any rate, the prosecution which pleaded a possible motive for A-1 to commit the murder of the informant's children, has adduced satisfactory evidence in proof there of. otherwise also, the prosecution case. insofar A-1 is concerned could not be disbelieved for absence of any motive or adquate motive to commit the murder. The evidence against A-1 pointing to his active participation in the murder of two children, is not based only on circumstantial evidence but on the evidence of an eye witness, P. W. 10 although she actually saw the assault by A-1 only on the boy and not the girl.

22. The apex Court, while dealing with a case in which the conviction was based on the testimony of a 'single eye witness, in *Anil Phukan* vs. *State of Assam*, A. I. R. 1993-SC-1462, had observed :

"- - -- Indeed, conviction can be based on the testimony of a single eye-witness and there is no rule of law or evidence which say to the cntrary provided the sole witness passes the test of reliability. So long as the single eye-witness is a wholly reliable witness, the Courts have no difficulty in basing conviction on his testimony alone. However, where the single eye-witness is not found to be a wholly reliable witness, in the sense that theren are some circumstances which may show that he could have an interest in the prosecution, then the Courts generally insist upon some independant corroboration

of his teatimony,in material particular, before recording conviction. It is only when the Court find that the single eye-witness is a wholly un-reliable witness that his testimony is discarded in to to and no amount of corroboration can cure that defect."

While dealing with the evidence of P. W. 10 in the instant case, a number of circumstances including the medical evidence and the objective findings of the Investigating Officer have been referred to which corroborate the testimony of the solitary eye witness. P. W. 10 appears to be a natural, competent and reliable witness. She was not related with the deceased and there was no evidence that she had any enemity what soever with A-1. She had stood the test of cross-examination and her evidence corroborated by number of circumstance on the record, was sufficient to up-hold the conviction of A-1 for the murder of two children which murders he committed along with another in furtherance of common intention of both. The learned Sessions Judge was thus, right in convicting Md. Rafique A-1 under section 302/34 I. P. C. and the said conviction on the facts and cirumstances of the case, has got to be up-held and it is ordered accordingly.

23. Should the death sentence passed against A-1 Md. Rafique be affirmed and the death reference made by the learned Sessions Judge accepted ? The reason that weighed with the trial Court in awarding extreme penalty in law were that the two innocent children had given absolutely no provocation to accused to murder them. The appellant who bore a grugde against the informant planned to take revenge by murdering his children and for that puupose chose a time when the grand-father and the parents of the children would be away from the house.

The manner in which the murders were committed, was described by the learned Session Judge as brutal which was evident from the fact that the skulls of the two victims were factured and the chairs with which they were hit, had broken

into pieces. The frial Court also referred to the constitution Bench decision of the apex Court in *Bachan Singh* vs. *State of Punjab* (1) that death sentence should be awarded in the rarest of rare cases and its elucidation by the Court in *Machhi Singh* vs. *State of Punjab*, (2). In *Machhi Singh's* case (supra) the apex Court referred to the guidelines indicated in *Bachan Sinngh's* case (supra) and observed that the following propostions emerged from that case

(i) The extreme penalty of death need not be inflicted except in gravest cases of extreme culpability;

(ii) Before opting for the death penalty the circumstance of the 'offender' also required to be taken into consideration along with the circumstances of the crime;

(iii) Life imprisonment is the rule and death sentence is an exception. In other words death sentence must be imposed only when life imprisonment appears to be an altogether inadequate punishment having regard to the ralevant circumstances of the crime, and provided, and only provided, the option to impose sentence of imprisonment for life cannot be conscientiously exercised having regard to the nature and circumstances of the crime and all the relevant circumstances;

(iv) A balance sheet of aggravating and mitigating circumstnces has to be drawn up and in doing so the mitigating circumstances has to be accorded full weightage and a just balance has to be struck between the aggravating and the mitigating circumstances before the option is exercised.

Their lordship then proceeded to observe that in order ot apply these guide-lines, inter-alia, the following questions may be asked and snswered;-

(a)"Is there something uncommon about the crime which renders sentence of imprisonment for life inadequate and calls for a death sentence ?

(1) (1980) A. I. R (S. C.) 898

(2) (1983) A. I. R. (S. C.) 957

(b) Are the circumstances of the crime such that there is no alternative but ot impose death suntence even after according maximum weightage to the mitigating circumstance which speak infavour of the offender."

24. The learned Session Judge, while awarding the death sentence, has only referred to the aggravating circumstances which, in fact, do exist. However, there are certain mitigating circumtances which have got to be considered and given due weight. On the evidence accused, appellant was seen assaulting the boy only. There is no direct evidence as to who whether appellant or his short statured companion assaultd and killed the girl. The appellant had gone to the house of the informant. There is no evidence that either the appellant or his companion used any weapon. Both the children were assaulted by means of chairs which were at the P. O. it self, one does not know for certain whether the active role in killing the girl was played by the appellant or his companion whose identity could not be established. If any benefit has to be given on this score, it has to go in favour of the appellant. Another mitigating circumstance which cannot be lost sight of is that the girl was allowed to go out of the room where the murder was committed while her brother was being assaulted. It is in the evidence of the girl's grand-mother that she had advised her not to go back. If the appellant and his companion had planned to murder both the children, it was most unlikely that they would have permitted the girl to leave the room after the appellant began assaulting the boy. While bvalancing the mitigating circumstance and the aggravating circumstances the scale slightly tilts in favour of the former. In view of all this, it cannot be said with certainity that the circumtances of the crime in the present case are such that there is no alternative but to impose the death sentence. Thus, the death sentence passed against the appellant deserves to be commuted to imprisonment for life.

25. For the reasons already mentioned the conviction of

appellant no. 1 Md. Rafique under section 302/34 I. P. C. is affirmed and the death sentence is commuted to imprisonment for life. The death reference is thus not accepted Appellant no.2 Md. Nasim is acquitted of the charges under sections 302/34 and 380 I. P. C. and his conviction for the said offences are set a side. His conviction under section 411 I. P. C. is up-held and he is sentenced to under to rigorous imprisonment for three years. Subject to the aforesaid modifications, the criminal appeal filed by appellant no.2 Md. Nasim, is also dismissed. The death reference and the three criminal appeals are disposed of accordingly.

P. K. Sarin J. I agree

Order accordingly

R. D.

FULL BENCH

Before Bisheshwar Prasad Singh &S. N. Jha a Dharmpal Singh, J. J.

1995

January, 31.

Prayag Gope.*

v.

Mrs. Ethal Smart & ors.

Succession—property inherited by Christian convert daughter of Hindu— Christian daughter dying in 1955, before the coming into force of Hindu Succession Act, 1956— whether property inherited by the Christian daughter will pass to the reversioners of her father on her death.

One of the two daughters of a Hindu adopted Christianity as her religion in December, 1891 and married a christian. In 1926 the father died and the two daughters' inherited the properties left by the father. The Christian daughter filed Title Suit no. 1 of 1927 and obtained a decree for partition of the estate left by her father and the properties were partitioned in equal shares. The Christian daughter died in 1955 before the Hindu Succession Act, 1956 Came into force. Dispute arose between children of the Christian daughter and the Hindu daughter for the properties left by the christian daughter, the Hindu daughter claiming that as the Christian daughter, had only a limited estate, on her death, the properties must rerent to the reversioners and as such she was entitled to the said properties. She filed Title suit no 58 of 1963 for declaration of titles and recovery of possession of the said properties left by her christian sister which was decreed but reversed on appeal whereupon this second appeal was filed.

*Appeal from the Appellate decree No. 101 of 1979. Against the Judgement and decree dated 2nd of December, 1978, passed in Title Appeal No. 36 of 1969, by Shri Radha Sharan Pd. 5th Addl. District Judge, Santhal Pargana Dumka.

Held, that the property inherited by a Christian convert daughter estate, as a daughter estate, which is a life estate, from a Hindu father by virtue of caste Disabilities Removal Act, 1850, on her death, prior to the coming into force of Hindu Succession Act, 1956, will pass to the reversioners of her father and not to her own Christian progeny under the Indian Succession Act.

*Appeal from the Appellate decree No. 101 of 1979. Against the Judgement and decree dated 2nd of December, 1978, passed in Title Appeal No. 36 of 1969, by Shri Radha Sharan Pd. 5th Addl. District Judge, Santhal Pargana Dumka.

Held, further, that the law laid down on the point in *Khunni Lal* v. *Kunwar Govind Krishna Narain* (1) is not conflict with the decision in *Fakeer Bux* v. *Saira Begum* (2) "*Matingni Gupta* v. *Ramratan Roy* (3) and *Miter Sen Singh* v. *Mdqbul Hasan Khan* (4).

Case laws discussed.

Appeal by the plaintiff.

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

M/s Ranjit Sahany, Ashok Priyadarshi for the appellents

M/s Shashi Nath Thakur, N. K. Aikat, Ajit Kumar & Nagendra Pd. Sinha for the respondents.

B. P. Singh, J. Since questions which appeared intricate and of public importance arose in this Second Appeal, the appeal has been referred by a Division Bench to the Full Bench for an authoritative decision. The two questions formulated by the referring Bench are the following :—

(a) Whether the property, inherited by a Christian convert daughter from her deceased Hindu father by virtue of Caste Disabilities Removal Act 1850 on her death prior

(1) 38 I. A. 87
(2) (1972) A. I. R. (All.) 475
(3) I. L. R. 19 Cal. 209
(4) (1950) A. I. R. (P. C.) 251.

to Hindu Women's Right to Property Act will pass to the reversioners of her father or to her own Christian progeny under the Indian succession Act ?

(b) Whether the law laid down in the cases of *Fakeer Bux* v. *Saira Begum* (1) *Mathungin Gupta* v. *Ramratan Roy* (2) and *Miter Sen Singh* v. *Maqbul Hasan Khan* (3) is in conflict with the views expressed by the Privy Council in *Abraham* v. *Abraham* (4) *Khunni Lal* v. *Kunwar Govind Krishna Narain* (5) and *Karimuddin* v. *Govind Krishna* (6).

(It appears that by inadvertance the Hindu Women's Right to Property Act has been mentioned in the question, instead of Hindu Succession Act, 1956)

2. The aforesaid two questions arise in the second appeal pending before this Court. The facts, so far as they are relevant for decision on the questions formulated, are not in dispute, I may briefly notice the material facts. Tilak Mahto, a Hindu Governed by Mitakehara School had two daughters Parbatia and Rupia. Prabatia adopted Christianity as her religion in December 1891, and thereafter on 15th December, 1891 she married one Mr. A. R. Hills. Tilak Mahto died before survey in the year 133 B. C. (corresponding to years 1926–27). His two daughters inherited his properties. Though some of the lands were recorded exclusively in the name of Parbatia, and some were recorded jointly in their favour, Parbatia, the Christian daughter, filed title suit No. 1 of 1927 and obtained a decree for partition of the estate

(1) (1972) A. I. R. (All) 475.

(2) I. L. R. 19 Cal. 289

(3) (1930) A. I. R. (P. C.) 251.

(4) 9 Moors Ind. App. 195.

(5) 38. I. A. 87.

(6) 36. I. A. 188.

left behind by her father. The suit was decreed, and both the daughters were declared to be entitled to equal shares in the properties left behind by their father. In that suit Parbatia claimed her share basing her claim on the provisions of the Caste Disabilities Removal Act 1850 (Act XXI of 1850) contending that her conversion of Christianity did not affect her right to inherit the property left behind by her father. Parbatia died in the year 1955 before the "Hindu Succession Act 1956 came into force.

3. After the death of Parbatia a dispute arose between the children of Parbatia (Mrs. Hills) and Rupia the Hindu daughter. While the former contended that the property inherited by Parbatia (Mrs. Hills) would be governed by the provisions of the Indian Succession Act, so that after the death of Parbatia (Mrs. Hills) they were entitled to inherit the same, the latter contended that Parbatia (Mrs. Hills) had only a limited estate in the properties inherited from her Hindu Father, and therefore as a consequence, upon her death the properties must revert to the reversioners, and she being one of the heirs and reversioner was entitled to the said properties. The dispute led Rupia, the Hindu daughter, to file title suit No. 58 of 1963 for declaration of title and recovery of possession of the suit properties from the Christian heirs of Parbatia (Mrs. Hills). Rupia died during the pendency of the suit, and her adopted son Murli Gope was substituted as the plaintiff.

4. The trial court decreed the suit holding that upon the death of Parbatia (Mrs. Hills) who held a limited estate, the properties would revert back to the heirs of her father namely Rupia. Consequently Rupia and after her, her heirs were entitled to claim right title and interest in the suit properties. The decree of the trial court was challenged in appeal. The appellate court set aside the decree holding that the property inherited by Parbatia (Mrs. Hills) from her Hindu father became her absolute property and constituted her absolute estate. The devolution of interest in those properties was therefore governed by the provisions of the Indian Succession Act. Consequently her

absolute interest in those properties devolved upon her heirs namely her children.

5. Aggrieved by the judgement and decree of the appellate court, a second appeal has been preferred before the High Curt by the plaintiff, in which the two questions referred to the Full Bench have arisen for consideration. Earlier, a learned Single Judge of this Court, having regard to the importance of the questions involved, referred the Second Appeal to a Division Bench for hearing.

6. At the hearing of this reference, learned counsel for the parties did not dispute the legal position that under the Hindu law, as it existed at the relevant time, upon the death of the father the daughters acquired what was known as the daughter's estate, a life estate, in the properties left behind by their father, with a right of survivorship inter-se. Upon the death of the daughters, the property reverted to the reversioners, namely the heirs of the deceased father. It was also not disputed that if the holder of the limited estate continued in possession of the estate till the coming into force of the provisions of the Hindu Succession Act, 1956, subject to the fulfilment of the conditions laid down in section 14 thereof, the limited estate was enlarged into an absolute estate of the female heir.

7. It was also not disputed before us that under the Hindu law the consequence of apostasy was that the convert lost all his rights in the Hindu family, and there was severance of status as a member of the family;

8. The real dispute between the parties before us is as to the effect of the provisions of the Caste Disabilities Removal Act 1850. While the plaintiff/appellant contends that the aforesaid Act permitted the convert to enjoy the same rights as he would have enjoyed, had he not been an apostate, the defendant respondents contend that the Act had the effect of separating the converted member from the rest of the family along with the share of properties to which he or she was entitled, which

property he or she enjoyed as his or her absolute estate governed by the law to which he or she was subject after conversion. The plaintiff therefore contends that not withstanding the provisions of the Act, Parbatia took only a life estate in the properties allotted to her share after her father's death, and consequently upon her death the properties must revert to the reversioners. The defendants/respondents would urge that the properties inherited by Parbatia became her absolute property, and since she was convert to Christianity, the properties upon her death, would devolve in accordance with the provisions of the Indian Succession Act.

9. It, therefore, becomes imperative to notice the provisions of the Caste Disabilities Removal Act 1850 (hereinafter referred to as the Act') which is in short Act containing a preamble and only two sections. The preamble states :—

Preamble.

> "WHEREAS it is enacted by section 9, Regulation VII, 1832 of the Bengal Code, whenever in any civil suit the parties to such suit may be of different persuasions, when one party shall be of the Hindu and the other of the Muhammadan persuasion, or where one or more of the parties to the suit shall not be either of the Muhammadan or Hindu persuasions the laws of those religions shall not be permitted to operate to deprive but for the operation of such laws, they would have been entitled", and whereas it will be beneficial to extend the principle of that enactment throughout (India); It is enacted as follows;

Section 1 provides as follows :—

> 1. "Law or usage which inflicts forfeiture of, or affects, rights on change of religion or less of caste to cease to be enforced— So much of any law or usage now in force within India as inflicts on any person forfeiture of rights or property, or may be held in any

way to impair or affect any right of inheritance, by reason of his or her renouncing, or having been excluded from the communion of, any religion, or being deprived of caste, shall cease to be enforced as law in any court."

10. A bare perusal of the section leaves no room for doubt that the substantive law which applied to the convert, and which inflicted on him forfeiture of rights or property on impaired or affected any right of inheritance by reason of his or her renouncing or having been excluded from the communion of any religion, or depriving him of caste, was not entirely abrogated. The section begins with the words "So much of any law or usage now in force", which makes it clear that only that part of the substantive law or usage by which he was governed and which inflicted upon the convert the consequence or consequences mentioned in the section, would not be enforced as law in any court. In other words, if any law or usage inflicted on any person forfeiture of rights or property or impaired or affected any right of inheritance by reason of his renouncing any religion, the offending part of the personal law shall cease to be enforced as law. As a consequence a convert did not incur for feiture of his rights and property by reason of conversion. By operation of the aforesaid Act, he continued to enjoy the same rights in property under the personal law as he or she would have enjoyed, had he or she not converted himself or herself to any other religion. In concrete terms, applying the principles to the facts of this case, if a Hindu converted himself to Christianity and the Hindu law provided as a consequence that he shall forfeit his right to inherit the properties of his father or mother, the disability or forfeiture was not to be enforced, and he or she would inherit in the same manner as he or she would have under the Hindu law, had he or she not changed his or her religion. The substantive law with regard to the nature and extent of interest which would devolve upon him, or which he may inherit remained unaffected. If under the Hindu law a Hindu was entitled to an absolute estate, he

would acquire an absolute estate, not-withstanding his conversion to Christianity. Similarly if the convert acquired only a limited estate under the Hindu law, he would acquire only a limited estate, and the Act would not operate to enlarge that limited estate into an absolute estate. In other words, the effect of the Act not to enlarge the converts interest in any property or to get rid of any condition of restriction to which it was originally subject. The Act does not purport to affect the substantive law, but merely laid down a rule under which the court might refuse to enforce the consequences of apostasy, in so far as they related to the forfeiture of right or property, or impaired or effected any right of inheritance.

11. As to what is the effect of the said Act on the rights of the apostate came up for consideration, before the Privy Council in *Khunni Lal* v. *Kunwar Gobind Krishna Narain* (supra) Their Lordships after considering the rule laid down in section 9 Regulation VII of 1832 and the provisions of the Act, noticed that the Act had the effect of extending the principles of section 9 of Regulation VII f 1832 and the Bengal Code throughout the territories subject to the Government of the East India Company. It was then observed:-

> "The intention in both enactments is perfectly clear; by declaring that the Hindu or Mahomedan law shall not be permitted to deprive any party not belonging to either of those persuasions of a right to property, or that any law or usage which inflicts forfeiture of rights or property by reason of any person renouncing his or her religion, shall not be enforced, the legislature virtually set aside the provisions of the Hindu law which penalizes renunciation of religion or exclusion from caste."

A Full Bench of the Madras High Court in A. I. R. 1921 Madras 224 *(Paru* v. *Raman Nambiar)* considered the authorities and held that the effect of the Act would appear to be that a

converts interest in the tarwad is unaffected by his conversion, but at the same time the Act did not enlarge the convert's interest in any property, or get rid of any condition or restriction to which it was originally subject. Conversion to Christianity did not give a member of a tarwad a right to a partition of tarwad property which was impartible under Marumakkathyam Law. The argument that conversion severs the coparcenary and that consequently gives rise to a claim for partition and separate enjoyment, was rejected. In this connection it was observed :

> "Where under the law governing the parties it is open to any one member to resist a partition it is difficult to see how his right can be taken away because another member chooses to change his religion. The application of Act XXI of 1850 would in effect enlarge the right of the convert and out down the rights of the remaining members of the tarwad, a result which is unwarranted by the Act."

13. The provisions of the Act again came up for consideration before the Privy Council in Miter Sen Singh v. Maqbul Hassan Khan (supra) though in a different context. The question before their Lordship was whether the Act protected only the interest of the apostate or whether it had a wider aplication. Their lordship approved of the narrower view and observed :-

> "On the other hand, there has been another line of decisions which is exemplified by the case of Vaithilinga Odayar v. Adyyathoral Odayar (1) which taken the narrower view, the view, which, in their lordships' opinion is the correct view, namely, that the section in terms only applies to protect the actual person who either renounces his religion or has been excluded from the communion of any religion or has been deprived of caste. It is intended to protect such a person from losing any right or property or of succeeding as heir. It appears to their lordship that

when the act is looked at that is the only reasonable construction that can be put upon it."

. Their Lordships therefore held that when once a person has changed his religion and changed his personal law, that law will govern the rights or succession of his children. In the instant case as well, if Parbatia the apostate, was entitled to an absolute estate under the Hindu law, it could not be disputed that estate would have devolved upon her heirs in accordance with the law by which she was governed after conversion, namely the Indian Succession Act. The difficulty has arisen because she inherited only a life estate, which was never enlarged into an absolute one. Upon her death therefore, the limited estate reverted to the heir of her father, namely her sister Rupia, who also had a right to succeed by survivorship.

14. There is then the decision of Allahabad High Court in A. I. R. 1972 Allahabad, 475 (*Fakeer Bux* v. *Smt. Saira Begum*). In that case the plaintiff claimed absolute title to the property in question based on a sale-deed dated 14.10.1957 executed in her favour by Shrimati Dhanki mother of the defendant. Since Smt. Dhanki renounced Hindu religion and embraced Islam, and inherited the property after her conversion, a question arose as to the nature and extent of title and right which could be, and has been, conveyed to her by Smt. Dhanki, and whether she was entitled to possession by evicting the defendant from the house. After noticing the provisions of the Act, their lordships held :-

"Both the parties agree, and the provisions of Act XXI of 1850 in that behalf are also clear, that Smt. Dhanki being Tirhoo's daughter inherited the house in the same legal capacity and manner as she would otherwise have done had she not renounced Hindu religion. EX hypothesi, she took only a limited estate when succeeding as Tirhoo's daughter, even though she then was a Muslim. But for the statute in question, she undoubtedly would have been wholly excluded from inheritance. The Act does not make any

inroad into nor has the effect of amending or altering the personal law of inheritance to which the convert was amenable prior to his or her Conversion. It does not contain any provision, express or implied, enlarging or converting a limited estate inherited or inheritable under the Hindu law into full or absolute ownership as a result or in consequence of the conversion of the person concerned to another religion. It does no more than prevent divestment or deprivation on previously acquired or vested rights of property on account of apostasy, and secure to the convert such legal right to inheritance as he or she was possessed of prior to conversion, by a legislative mandate that no provision for Consfiscation or forfeiture of such rights consequent upon renunciation of religion shall be enforced in any court. Such protection and benefit extend also to outcastes and persons ex-communicated person only and not to his or her issues. An issue of such person, conceived and born subsequently, is not a convert, outcast of ex-communication person within the meaning of the Act. Congenitally, he or she belongs to the faith of parent concerned and is governed by the same personal law by which such parent is then governed."

The aforesaid decision of the Allahabad High Court fully supports the submission that the Act does not either enlarge or convert a limited estate inherited by a convert into full or absolute ownerships. It only removes the disability or forfeiture which the convert would have otherwise incurred under the Hindu Law, namely complete exclusion from inheritance. In the instant case we are not concerned with the other question decided in the aforesaid decision that in such a case the convert could not claim benefit of section 14 of the Hindu Succession Act, since the same applies only to Hindus and she was a Muslim when the Act came into into force.

16. Counsel for the respondents submitted that after the death of their father Parbatia filed a partition suit to get the estate partitioned. The suit was decreed and a partition was affected. According to him by reason of the partition, the limited estate got enlarged into an absolute estate. The submission must be stated to be rejected. The decrees passed by a Civil Court partitioning the estate and demarcating the shares of the two daughters for their separate and convenient enjoyment of the estate, could not and did not change the nature of the estate inherited by them. If the estate was a limited estate, it continued to be so even after partition. Counsel for the respondents referred to the decisions reported in A. I. R. 1930, Privy Council, 40 A. I. R. 1934 Madras 327, A. R. I. 1932 Oudh, 85, A. I. R. 1930, Allahabad, 341. I have carefully considered those decisions but I find nothing in those decisions which may support the plea of the respondents. If at all the observation in the Allahabad decision support the case of the appellant.

17. Having regard to the provisions of the Act and the decisions on the subject, I am of the view that the first questions must be answered in favour of the appellant, and it must be held that after the death of the Christian convert daughter the property inherited by her will pass to the reversioners of her father.

18. The second question referred for the opinion of this Bench proceeds on the asumption that all the decisions referred to therein decide the same question of law and there is conflict between the two sets of decisions, Obviously the question of conflict or inconsistency will arise only if the decisions relate to the same question of law. If they do not, the question of conflict does not arise at all.

19. I have earlier referred to the law as laid down in *Fakeer Bux* v. *Saira Begum* (supra). That was indeed a decision interpreting the provisions of the Act, and I have respectfully agreed with the law laid down by their lordships of the Allahabad High Court. The decision of the Calcutta High Court in *Matungini*

Gupta v. *Ramratan Roy* (supra) dealt with a question arising under the Hindu Widows Marriage Act 1856. It does appear from the report that their Lordships approved of the law as stated by wison J. in his referring order that the casts Disabilities Removal Act, 1850 did not affect that case, and that by virtue of that Act a change of religion does not cause any forfeiture of property, and therefore the widows adjuration of Hinduism did not deprive her of her estate, but neither could it enlarge it nor get rid of any condition or restriction to which it was originally subject.

20. It is, therefore apparent that the observations in the Judgment are consistent with the view that has been subsequently reiterated in the Allahabad decision as to the consequence that followed by operation of the provisions of Caste Disabilities Removal Act.

21. The decision of the Privy Council in *Mitar Sen Singh* v. *Maqbul Hassan Khan* and others, (supra) did consider the provisions of the Act and held that they only apply to protect the actual person who either renounced his religion or had been excluded from the communion of any religion, or had been deprived of his caste. But once a person had changed his religion and changed his personal law, that law will govern the rights of succession of his children. This view is also consistent with the view taken in the Allahabad decision.

22. The first decision in the other set of cases referred to in the order of reference is *Abraham* v. *Abraham*. That decision does not at all deal with the provisions of the Caste Disabilities Removal Act. The dispute in that case was between the heirs of a deceased Christian and his brother. Their Lordships clearly held that the parties were not governed by the Hindu law and therefore it was unnecessary to go into that question. The parties in that case descended from a family of Hindus, but their ancestors for several generations has embraced Chriatianity. At the time the dispute arose, the contestants were Christians and it was found that Hindu law did not apply to them, and all the properties in dispute were acquired after conversion. The

decision is an authority for the proposition that the profession of Christianity releases the convert from the trammels of the Hindu law, but it does not necessity involve any change of the rights or relations of the convert in matters with which Christianity has no concern, such as his rights and interests in, and his powers over, property. The convert, though not bound as t such matters, either by the Hindu law or by any other positive law, may by his course of conduct after his conversion have shown by what law he intended to be governed as to these matters. Their lordships found that the parties in that case were not governed by the Hindu law and that the case felt to be decided according to regulation which prescribed that the decision shall be according to equity and good conscience.

23. In Karimuddin v. Gobind Srishna Narain (XXXVI Indian Appeal 138) the privy council was not called upon to consider the provisions of the Act, and therefore, there is no discussion whatsoever in the judgement touching upon the question arising in the instant second appeal. The question that arose in that case was whether Rani Mewa Kuer (mother of the plaintiffs) has conveyed an absolute title to Jai Chandra Rai who had got the property sold in satisfaction of a decree obtained by him against Rani Mewa Kuer, for money advanced by him to her mother for family purposes. The defendants in the suit were the purchasers of the property from Jai Chand Rai, who claimed an absolute interest in the property purchased.

Their Lordships held that though Mewa Kuer had succeeded only to a daughter's estate, which was a limited estate, the alination by her to Jai Chand Rai was justified in the facts of the case, since the debt had been incurred for the purpose. The objects justified the incurring of debt by a Hindu widow and alienating a sufficient amount of the property to discharge it.

It will thus appear that the decision of the Privy Council did not at all deal with the provisions of the Act, and therefore no question of conflict of opinion arises.

24. So far as the judgement of the Privy Council in *Khunni*

Lal v. *Gobind Kirshna Narain* (supra) is concerned, I have earlier in this judgement quoted the observations of the Privy Council in so far as they relate to the provisions of the Act. The view which found favour with the Privy Council is perfectly consistent with the view expressed by the Allahabad High Court in *Fakeer Bux* (supra) and not inconsistent with the decision of the Privy Council in *Miter Sen Singh* (supra).

25. Having considered the provisions of the Act and the authorities on the subject, I would answer the two questions in the following terms :

(a) The property inherited by a Christian convert daughter as a daughter estate, which is a life estate, from her deceased Hindu father by virtue of Caste Disabilities Removal Act, 1850, on her death prior to Hindu Succession Act 1956, will pass to the reversioners of her father and not to her own Christian progeny under the Indian Succession Act.

(b) The view expressed in Khunni Lal v. Gobind Krishna Narain (38 I. A. 87) is not in conflict with the decisions in Fakeer Bux v. Saira Begum (A. I. R. 1972 Allhabad 475) Matingini Gupta v. Ramaratan Roy (I. L. R. 19 Calcutta 209) and Miter Sen Singh v. Maqbul Hasan Khan (A. I. R. 1930 P. C. 25). The other decisions referred to in the question, do not deal with the same question and therefore no question of conflict arises. However, some general observations made in those decisions are not inconsistent with the decisions above referred.

In the view I have taken, this appeal must be allowed. Accordingly the judgement and decree passed by the 5th Addl. District Judge, Santhal Pargana Dumka in Title Appeal No. 36 of 1976 is set aside, and the judgement and decree of the Court of Subordinate Judge, Deoghar (camp Jamtara) in Title Suit No. 58 of 1963, is restored. The parties shall bear their respective costs in this appeal.

S. N. Jha, J I agree

Dharmpal Sinha, J I also agree.

R. D. Appeal allowed

CIVIL WRIT JURISDICTION

Before Bisheshwar Prasad Singh and Naresh Kumar Sinha, JJ.

1995

August, 1

Rajendra Prasad Mehta.*

v.

The State of Bihar through Secretary, Public Health Department & another.

Appointment—Public analyits and Joint Food Controller not made—effect of—Constitution of India—Article 226—writ of Quo warranto— issuance of.

The post of Senior Chemist has been lying vacant since 1977, this is most unfortunate as many as 9 posts of Public Analyst have been lying vacant. The continuance of vacancies for long period is somewhat paradoxical in a society where large number of educated persons with high qualification seek employment. It also disturbs the morale of the officers holding inferior posts, who cherish the hope of being promoted t higher posts in due course. Vacancies exist in higher posts, but are not filled up and consequently they continued to stagnate in lower cadres. Apart from these consequences, Public interest obviously suffers if a post remains vacant for long. Even if a person is put in additional charge of the post, public interest still suffers because a person incharge of more than one post may not be able to discharge the duties either efficiently and effectively. The practice, therefore, of con nuing vacancies for long periods and providing a stop gap arrangement by putting other officers incharge of such post temporarily must be discontinued if necessary, rules should be farmed for regulating the exercise of such power by the State authorities no officer should hold

* Civil Writ Jurisdiction Case No. 6086 of 1993. In the matter of an application under Articles 226 & 2277 of the constitution of India.

additional charge of any other post for a period exceeding three months.

Held, issuance of writ of Quo warranto not warranted but direction issued to the State of Bihar to take immediate steps for appointment to the post of Joint Food Controller if the post of Joint Food Controller is not filled up within the period of four months from the date of the receipt of copy of this order respondent no.2 should be relieved of the additional charge of the Joint Food Controller.

Application under Article 5226 and 227 of the Constitution of India.

The fasts of the case material to this report are set out in the judgment of Bisheshwar Prasad Singh, J.

: M/S B. C. Ghosh & M. K. Khare for the Partner

: M/S Jawahar Pd. Karan & Dhirendra Nr. Mallik for the state.

: Mr. Kamla Pati Singh for Respondent No 2

B. P. Singh, J. The petitioner herein claims to be a public worker, and vitally interested in the maintenance of public health and supply of unadulterated food and drug in the State of Bihar. He is disturbed by the fact that rules and norms, which have been laid down for effective implementation of the policy to prevent supply of adulterated and substandard food and drug, not being followed by the State of Bihar particularly on account of the fact that the work of analysing the food items and drugs sold in the State of Bihar to Consumers is not done by person duly qualified to do so and /or posts are lying vacant. In any event, the indifference shown by the State authorities in making appointment to the posts when they fall vacant, and entrusting the same person with the responsibilities of several posts, results in ineffective administration of the policy. He has, therefore, prayed that respondent no.2. who is one such person holding several posts, even though not qualified to hold some of

them should be called upon by a writ of *quo warranto* to disclose the authority under which he held so many posts, some of them being posts for which he does not possess the necessary qualification.

2. According to the writ petitioner, respondent no. 2 holds the following posts :

1. Public Analyst
2. Joint Food Controller
3. Deputy Director, Food
4. Deputy Chemical Analyst
5. Officer in Charge of Food and Drug Laboratory, Agamkuan, Patna
6. Discharging the duties of Senior Chemist in the Public Health Department of the Government of Bihar.

3. The case of the petitioner is that respondent no. 2 is holding all these posts and responsibilities simultaneously with the result that he is not in a position to render any service whatsoever in any of the capacities which he holds. The petitioner states that respondent no. 2 is a very resourceful person and manipulates things in such a manner that he has a stranglehold over the entire machinery in the State with regard to food and drug analysis.

It is the case of the petitioner that one post of Medical officer was surrendered with a view to create the post of senior Chemist in the Department. The post of Senior Chemist was promotional post foro Assistant Chemical Analyst, An advertisement was issued for appointment to the post of Senior Chemist in May 1966, but surreptitiously an advertisement was issued in July 1966 for the appointment of Senior Chemist on temporary basis. Even though respondent no. 2 did not possess the requisite post Graduate qualification in Food Analysis, he was selected for appointment to the post of Senior Chemist in temporary capacity. One Mr. Alam, who was at the relevant time

holding the post of Assistant Chemical Analyst, should have been appointed as Senior, but his case was not considered. He resigned in protest. Thereafter respondent no.2 managed to get himself appointed as Deputy Chemical Analyst in the Food and Drug Laboratory, agamkuan, Agamkuan. This was done without following the procedure for appointment to a gazetted post. Thereafter, he was again appointed as Deputy Director. Food again without following the legal procedure. In a like manner, he was also appointed as Joint Food Controller.

4. On 29th January, 1974, respondent no. 2 was appointed Public Analyst under section 8 of the prevention of Food Adulteration Act along with one Dr. M. N. Saran. This was done despite the fact that there was only one post of Public Analyst and after retirement of the aforesaid Dr. Saran this post was continued to be held by respondent no. 2

On 12th February 1988 respondent no.2 was appointment by promotion as Deputy Director of Food and Drug Analysis, and also held the post of Public Analyst. In this manner respondent no. 2 has been holding the charge of several posts and runs the entire show in the Food and Drug Laboratory at Agamkuan. Persons who are qualified for being appointed against some of the posts held by him have been stagnating in lower posts, where as respondent no. 2 has been favoured with several appointments. It is, therefore, submitted that the petitioner is the an usurper of public post, and in law cannot hold several posts at one and that same time. The State must take necessary steps to fill up the posts temporarily held by respondent no.2 in one or the other capacity.

5. Respondent no. 2 has be filed a counter-affidavit controverting the allegations made in the writ petition. His case is that he was originally appointed as Senior Chemist in the year 1967, which is a senior Class II gazetted post under the Health Department. This appointment was made on the basis of the recommendation of the Bihar Public Service Commission against Advertisement No. 117 of 1966. Respondent no. 2 has produced

his letter of appointment as Annexure–A. He was confirmed in the said post with effect from 1–3–1969, and the notification confirming him has been produced as Annexure–B.

Respondent no. 2 further states that he was appointed as Public Analyst under section 8 of the Prevention of Food Adulteration Act, 1954 with effect from 29–1–1974 in his capacity as Senior Chemist. In the year 1977 he was transferred to the post of Deputy Chemical Analyst since the posts of Senior Chemist and Deputy Chemical Analyst carried the same pay scale. Even while functioning as Deputy Chemical Analyst he was appointed as Public Analyst under section 8 of the Prevention of Food Adulteration Act in his capacity as Deputy Chemical Analyst. The petitioner was thereafter promoted to the Class I pay scale with effect from 1–4–1981 by way of time bound promotion on the recommendation of the Bihar Public Service Commission. It is asserted that for some time he held the additional post of Chemical Analyst-cum-Public Analyst, but he is not holding that post any more. Thereafter on the recommendation of the Bihar Public Service Commission in the year 1988 he was promoted to the post of Deputy Director-cum-Public Analyst in senior Class I pay class. It is, however, admitted that he has ben authorised to perform the duties of Joint Food Controller in adition to his own duties as a Deputy Director-cum-Public Analyst in his own pay scale. He claims that he is the only person in Bihar who holds the requisite qualification for the post of Joint Food Controller, and he is a considerably senior officer entitled to be considered for appointment against that post.

6. The respondent no. 2 claims that he obtained a high second class in M.Sc. (Chemistry) from the Patna University. He also claims to have undergone training in technical subjects, and has acquired good experience to perform the duties of the post to which he has been appointed. He has published scientific papers, which have been published in journals of repute. He, therefore, submits that the allegation made against him that he is holding several posts at the same time is not correct. He also

submits that he is presently holding the post of Deputy Director-cum-Public Analyst, and has been authorised to perform the duties of Joint Food Controller in his own pay scale, in addition to his other responsibilities. This is a stop-gap arrangement since the post of Joint Food Controller is yet to be filled up in a regular way, and respondent no. 2 being the senior most officer with requisite qualification has been authorised to perform the duties of that post till the post is filled up on regular basis. He also submits that his appointment to the posts held by him, whether by promotion or direct recruitment was the done after following the normal procedure, and on the advice of the Bihar Public Service Commission wherever required. He cannot, therefore, be characterised as an usurper. He does not hold the post of senior Chemist, which post he held initially till he was promoted to a higher post and, therefore, it is not correct to say that he is holding the post of Senior Chemist. The post of Public Analyst held by him is by reason of his being Deputy Director in the Health Department, Government of Bihar. The appointment under section 6 of the Prevention of Food Adulteration Act is made having regard to the necessary qualification, and qualified officer of the Government is designated or appointed as Public Analyst. There is, therefore, no illegality/irregularity in the appointment of the petitioner as Deputy Director-cum-Public Analyst. He further asserts that he is not in any Manner concerned with the analysis of drugs, and it is the State Drug Controller, who is the concerned authority in regard to analysis of drugs. It is, therefore, submitted that though an impression has been sought to be created by the petitioner that the respondent no. 2 is holding several posts at one and the some time, that is not correct. No doubt, the petitioner started as a Senior Chemist, but after being granted due promotions from time to time he now holds the post of Deputy Director in the Department of Health, and having regard to his qualifications he has been entrusted with the responsibilities and duties of the office of Public Analyst under section 8 of the Prevention of Food Adulteration Act. He is no doubt discharging the duties of Joint Food

Controller as the stop gap arrangement till regular appointment is made to the said post.

7. In his rejoinder the petitioner has, in fact, challenged the appointment of respondent no. 2 as Senior Chemist, and has also questioned the time bound promotion granted to him. He has raised a further question as to why the post of Senior Chemist, which was at one time held by the petitioner is not being filled up. It is not open to the petitioner in this proceeding to question the appointment of respondent no. 2 against the posts which he had held in the past on the ground that he did not possess the requisite qualification or that he was not suitable for appointment. From the counter-affidavit filed on behalf of respondent no. 2, and also supported by the State, it is apparent that the statement of fact in the writ petition that he does not have the requisite post graduate qualification does not appear to be accurate. In any event, respondent no. 2 was duly appointed and whenever necessary Bihar Public Service Commission was consulted. The respondent no. 2 has produced his letter of appointment and, therefore, discharged the onus cast upon him. Respondent no. 2 has filed a reply to the rejoinder filed by the petitioner to which the petitioner has replied. It is not necessary to refer to those rejoinders, because they contain matters which are not relevant having regard to the scope of the instant writ petition.

8. In its counter-affidavit it has been Stated by the state that respondent no. 2 holds the substantive post of Deputy Director-cum-Public Analyst (Food), and has been authorised to perform the duties of Joint Food Controller on the basis of seniority, in addition to his own duties in his own pay scale till such post is filled up on regular basis. A copy of the notification to this effect has been annexed as Annexure-A to the counter-affidavit. The allegation that the respondent no. 2 interferes with the work of Chemical Analyst is not true, because the work of Chemical Analyst has been entrusted to the Senior Chemist, who is not under respondent no. 2. So far as the Assistant

Chemical Analyst is concerned, that is a non-gazetted post under respondent no. 2 and obviously, therefore, the incumbent of that post has to work under respondent no. 2. The case of respondent no. 2 with regard to his appointment against the post of Senior Chemist on the recommendation of Bihar Public Service Commission has been supported by the State. The State has also supported the case of respondent no. 2 in regard to his appointment as Deputy Chemical Analyst-cum-Public Analyst, and thereafter his subsequent promotion as Deputy Director-cum-Public Analyst. It has also been reiterated that drug analysts is not within the charge of respondent no. 2, and the petitioner at the instance of interested parties appears to have made an incorrect statement.

9. In the supplementary affidavit filed on behalf of the petitioner on 7.2.1994 it was stated that in several documents respondent no. 2 was described as Deputy Director-cum-Public Analyst, Food and Drug Laboratory, Agamkuan, Patna, and at some places he was decried as Public Analyst-cum-Chemical Analyst, Combined Food and Drug Laboratory. Respondent no. 2 has also been signing documents as officer in Charge, Bihar State Drug Control Laboratory.

10. Respondent no. 2 has filed on affidavit on 25-8-1992 clarifying that he holds the substantive post of Deputy Director-cum-Public Analyst with effect from 12-2-1988. In such capacity he has to supervise the work of other Analysts, and at times has to analyse the samples himself and send reports. In case of doubt food samples analysed by the Public Analyst in the district laboratories are sent to the Combined Food and Drug Laboratory, Agamkuan, Patna. The Deputy Director is, therefore, also appointed Public Analyst under section 8 of the Prevention of Food Adulteration Act. The post has been redesignated as Deputy Director-cum-Public Analyst. The designated sanctioned posts are in the lower pay-scale of Rs. 2000/- to Rs. 3800/, but the post of Deputy Director-cum-Public Analyst is in the pay scale of Rs. 3,000/- to Rs. 4,500/- The posts, which were

sanctioned previously are designated as Chemical Analyst, Deputy Chemical Analyst and Senior Chemist. Such officers were appointed as Public Analyst under the prevention of Food Adulteration Act. Later on, new posts were created and designated as Public Analyst. There were 12 sanctioned posts of Public Analyst in the scale of Rs. 2000/- to Rs. 3800/- Persons who hold the posts of Chemical Analyst and Deputy Chemical Analyst are also Public Analyst in view of the powers vested in them under section 8 of the Prevention of Food Adulteration Act. Out of 12 posts of Public Analyst, 9 are lying vacant, and 8 posts were in the process of being advertised through the Bihar Public Service Commission. As regards the remaining vacant posts, the recommendation of the Bihar Public Service Commission has already been obtained. The post of Deputy Chemical Analyst has been lying vacant since long and the proposal for filling up the said post is under active consideration of the Government for which the recommendation of the Bihar Public Service Commission has already been obtained. Respondent no. 2 does not hold that post. There is no such post as officer in Charge, Combined Food and Drug Laboratory. It is further stated that no post of Senior Chemist exists at present in the Combined Food and Drug Laboratory, Agamkuan, Patna. The post of Senior Chemist as well as other posts exists in the Principal Health Laboratory under the Director, Public Health Institute, Patna. Though there is no sanctioned post of officer in Charge in the Combined Food and Drug Laboratory, Agamkuan, Patna, the senior most officer is loosely described as officer in Charge. Food Laboratory and Drug Control Laboratory are two sections of the Combined Food and Drug Laboratory at Agamkuan, Patna.

11. I may observe that large number of affidavits have been filed by the petitioner as well as respondent no. 2 with the result the real issue involved in the writ petition has got blurred on account of so many other disputes raised by the petitioner and replied to by respondent no. 2. This writ petition is mainly concerned with two issues. Firstly, whether respondent no. 2 is holding a large number of posts simultaneously without having

the requisite qualification for some of the posts held by him. Secondly, whether respondent no. 2 has lawful authority to hold the post held by him.

12. So far as these two questions are concerned, having gone through the pleadings of the parties which is rather confusing, it is at least clear that the petitioner presently holds the post of Deputy Director-cum-Public Analyst, Food. He has been duly appointed to the said post. He has produced necessary poof of his appointment duly in accordance with law. There is, therefore, no question of issuance of *quo warrant* against respondent no. 2. It has also been clarified that though he had held lower posts in the past, he has been promoted from time to time and does not hold all the posts simultaneously. In the past he had held the posts of Senior Chemist and Deputy Analyst, but upon promotion as Deputy Director-cum-Public Analyst he does not hold those posts. Only for a short duration he had held the post of Chemical Analyst-cum-Public Analyst. but he does not hold that post any more. He is only additionally performing the duties of Joint Food Controller in his own pay scale pending regular appointment to that post.

13. However, having noticed the facts which have been brought on record, I consider it necessary to make some observations with regard to the continuance of vacancies for long in the Departments of the Government. Very often the same officer is burdened with the responsibilities of other posts till a person or persons are appointed to hold those posts. This practice is clearly contrary to public interest. Where posts have been sanctioned by the State Government it must be presumed that the State having considered the necessity of creating a post on whole time basis, created such a post. If the same person is required to hold additional charge of several posts, obviously he is not in a position to discharge effectively and efficiently the duties of any of the posts held by him. This obviously affects public interest, particularly in cases like the present one where the technical qualification and skill are needed to perform the

duties of the office. Any lapse on the part of the Department may adversely affect public health. It is, therefore, not desirable that in such institutions the person should be asked to hold charge of any other post for a sufficiently long period. Administrative reasons and exigencies of the situation may at times compel the Government to make stop gap arrangement, but such stop gap arrangement should not be continued too long and should not become the rule. In the instant case for instance the petitioner has been holding additional charge of the post of Joint Food Controller. It is not in dispute that the post of Joint Food Controller has not been filled up in regular manner. It may be, as contended by respondent no. 2, that he is eligible and qualified for appointment to the post. If that is so, when regular appointment is made, he may also be considered for appointment, but that does not justify his continuance for such a long period as Joint Food Controller. The process of appointment does consume considerable time, but that should be taken into account by the concerned authorities, who should initiate the process of appointment much earlier so that the appointment is made by the time the incumbent of the post retires. Similarly, a grievance has been made in the instant writ petition that since the year 1977 the post of Senior Chemist has been lying vacant. Respondent no. 2 has asserted that there is no such post under him, and that such post exists in a different organisation. If it is true that the post of Senior Chemist has been lying vacant since 1977, this is most unfortunate. Similarly, from the affidavit of respondent no. 2 we find that as many as 9 posts of Public Analyst have been lying vacant, but it is also stated that steps have been taken for filling up those posts. The continuance of vacancies for long periods is somewhat paradoxical in a society where large number of educated persons with high qualification employment. It also disturbs the morale of the officers holding inferior posts, who cherish the hope of being promoted to higher posts in due course. Vacancies exist in higher posts, but are not filled up and consequently they continue to stagnate in lower cadres. Apart from these consequences, public interest obvi-

ously suffers if a post remains vacant for long. Even if a person is put in additional charge of the post, public interest still suffers because a person incharge of more than one post may not be able to discharge the other efficiently and effectively. The practice, therefore, of continuing vacancies for long period and providing stop gap arrangement by putting other officers in charge of such posts temporarily must be discontinued. If necessary, rules should be framed for regulating the exercise of such power by the State authorities. No officer should hold additional charge of any other post for a period exceeding three months. Similarly, no vacancy should be permitted to exist for more than a reasonable period, much depending on the nature of the post and the procedure for appointment.

14. In these circumstances, this writ petition is disposed of with a direction to the respondent-State of Bihar to take immediate steps, if not already taken, for appointment to the post of Joint Food Controller. The appointment should be made within a period of four months from the date of receipt of a copy of this order by respondent no. 1. Similarly, other posts, if lying vacant, such as posts of Public Analyst etc. should also be filled up within the same period. If the post of Joint Food Controller is not filled up within the period of four months from the date of receipt of a copy of this order by respondent no. 1, respondent no. 2 should be relieved of the additional charge of the office of Joint Food Controller. This is on the assumption that the post of Joint Food Controller has not been regularly filled up. Respondent no. 2 has produced evidence in support of his appointment as Deputy Director-cum-Public Analyst. I find that he lawfully holds that office having been duly appointed by the competent appointing authority. No question of issuance of quo warranto arises in this case.

15. This writ petition is disposed of with the above observations and directions.

N. K. Sinha, J. I agree

S. D. Order accordingly

CIVIL WRIT JURISDICTION

Before Bisheshwar Prasad Singh and Aftab Alam, JJ.

1995

September, 1

Vimal Kishore Rai.*

V.

The State of Bihar & others.

Service— appointment made in breach of statutory rules, law or constitutional provisions, whether can be regularised.

It is well settled that an irregular appointment may be regularised, but an appointment made in breach of statutory rules, law, or the constitutional provisions is irregular, but illegal and void. An illegal or void act cannot be regularised. Regularisation does not connote permanency and, therefore, no person who claims to have been regularised, can claim that he has been confirmed in service, where regularisation is permissible, the section which was irregular is cured, but the nature of appointment remains the same. A temporary employee irregularly appointed does not bemome a permanent employee merely because his services are regularised by Conforming to some matter relating to procedure, not going to the root of the matter, which was not complied earlier at the time of his appointment.

Held, that the writ-petitioner can be granted no relief. He secured an appointment by illegal means. This can be taken judicial notice of, because all the rules, directions and Constitutional provisions were thrown to the wind when he was appointed. The interestedness of the appointing authority is obvious from the fact that soon after his appointment, only a few months later, he purported to regularise the services of the writ-petitioner. This gives further proof of the malafide intention of the appointing authority. The writ-petitioner was in *pari delicto*,

* Civil Writ Jurisdiction Case No. 10889 of 1992. In the matter of an application under Articles 226 & 227 of the Constitution of India.

and, therefore, cannot claim any sympathy by saying that he is not to blame.

Case Laws discussed.

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

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

Mr. Siya Ram Sahi for the petitioner

Mr. J. P. Karn for the State.

B. P. Singh J. This is yet another case of an appointment made in utter disregard of law and on extraneous consideration. The appointing authorities of the State of Bihar, particularly when they are about to superannuate, make large scale appointments, not only in utter disregard of the constitutional mandate and the rules and the laws framed, but also against express prohibition by the State Government. The misuse of the power has attained dangerous proportions and, therefore, instead of disposing of this writ petition, as we have disposed of so many others, by a short order, we decided to analyse the problem in the proper perspective, and to lay down the guidelines consistent with law, which to us appears imperative if a semblance of discipline has to be restored in the matter of appointments in this State. The impunity with which the law is disregarded is only matched by the ingenuity of the appointing authorities. The *moods operand* adopted by them renders the constitutional mandate under Article 16 of the Constitution otiose, and all the rules, regulations, instructions and directions issued by the State Government are made to appear as trivial things of no consequence. It cannot be said in this design the beneficiaries are not at fault, because the appointing authorities and the appointees are always in *pari delicto*. The normal device followed in such cases is to make an appointment on daily wage basis, continue the appointment for some more time, and then to regularise the services of the appointee on the ground that he has

worked for a few months or years. Obviously, in making such appointments no need is felt for complying with the requirement of advertisement/selection process, selection committees etc., and in all such cases appointments are made on personal approaches made by the candidates. By regularisation is meant confirmation in service, and it is seriously urged before us that since the services have been regularised, the appointees become permanent Government servants. Such appointments are granted and accepted in the hope that before the illegality is detected, several months or years may have passed, and on the basis of such service rendered an argument based on equity and interest of justice can always be advanced before a Court, if challenged, in the hope that the Court will be kind and generous enough to condone the illegality, if any, and to protect the interest of the persons so appointed by directing the authorities to continue them in regular service. The result is that despite numerous judgments and orders of the Supreme Court and this Court, this illegal "business" of granting illegal appointments has prospered, and so have the appointing authorities. The major sufferers of this tragedy are those citizens who are innocent and resources even if more capable, competent and honest, and who have nothing to offer in exchange for the appointment. The Constitution does not guarantee employment to every citizen, but even the limited right of being considered for appointment is denied to the law abiding citizens, who wait for an advertisement to be issued, so that in response thereto they may have a chance of proving their merit and competence. The other unfortunate aspect of the matter is that while in many cases illegal appointments, when detected, are cancelled, the main culprit, namely, the appointing authority goes scot free.

2. The facts of the case in hand amply demonstrate the state of affairs as they exist. The petitioner has impugned the order terminating his appointment on the ground that it was illegally made. In fact, the letter of appointment and the subsequent letter regularising his services, appear to be fabricated

documents, because it appears that the memo numbers and dates mentioned therein are fictitious when compared with the records maintained in the office. We may ignore this aspect of the matter, but the facts which are undisputed speak for themselves. The petitioner claims that he was appointed as a Non-Medical Assistant on daily wages by letter bearing no. 1233 dated 20th September, 1989, issued under the signature of the Civil Surgeon-Chief Medical Officer, Deoghar, respondent no.4 herein. He was posted to work at Mohanpur Health Centre where he joined on 22th September, 1989. Only six months later the petitioner filed a representation on 27th March, 1990, stating that he had been working as a daily wage employee on the post of Non-Medical Assistant since 22-9-89 and, therefore, his services may be regularised against the vacant post of Non-Medical Assistant. A few days later respondent no. 4, Civil Surgeon, by letter no. 432 dated 2-4-1990 regularised the petitioner against the post of Non-Medical Assistant and directed him to submit his joining report along with the health certificate. Pursuant to the said order the petitioner gave his joining report and continued to work as a regular employee. He worked at different stations as and when required. He was, however, aggrieved by the fact that since the date of his regularisation i.e., 2-4-1990 he was not being paid his salary. The Civil Surgeon (respondent no. 4) no doubt directed the Incharge Medical Officer, Primary Health Centre, Mohanpur to pay to the petitioner his salary, but despite that, the petitioner was not paid his salary though he had been confirmed against the post by the competent authority. This compelled the petitioner to move the High Court by filing a writ petition being C.W. J. C. No. 974 of 1991. The order passed in the said writ petition has been annexed as Annexure-8. This Court noticed that a similar grievance had been raised by the petitioners in C. W. J. C. No. 3025 of 1991, disposed of on 17-9-1991, and this Court had directed the Commissioner-cum-Principal Secretary, Department of Health (Family welfare), Government of Bihar to examine the validity of all appointments made by Dr. M. P. Lal

the then Civil Surgeon-cum-Chief Medical Officer, Deoghar, who had recently retired, and in respect of whom, there were serious allegations of making illegal and irregular appointments on mass-scale during the last phase of his tensure of service. The Court had also directed that in such cases, the person who makes the appointment is the real wrong doer, and that the authority should first consider the question of taking appropriate action against the appointing authority. The writ petition filed by the petitioner was also disposed of in the same terms, but with the observation and direction that the petitioner will continue to be paid salary in respect of the post against which he was appointed till such time a final decision was taken in regard to cancellation of his appointment in accordance with law.

3. It is the case of the petitioner that during the pendency of the aforesaid writ petition, which was disposed of on 30th September, 1991, the petitioner was served with a show cause notice dated 20th September, 1991, to which the petitioner replied by stating that he had initially been appointed on daily wages, and subsequently his services have been confirmed. Since his writ petition was pending before this Court he did not submit a detailed reply. Again a show cause notice was served on the petitioner on 30th March, 1992, asking him to submit a detailed show cause along with a photostat copy of the document regarding his educational qualification. The petitioner filed his show cause on 1-4-1992 along with the relevant documents including the order whereby he was appointed on daily wages, and the order dated 2-4-1990, whereby his services were regularised. He also submitted documents relating to his educational qualification.

4. On 25-9-1992 a letter was issued by respondent no. 3, the Joint Secretary in the Department of Health addressed to the Civil Surgeon (respondent no. 5) and on the basis of that letter the services of the petitioner have been terminated. A copy of the letter of the Joint Secretary has been annexed as Annexure-13 to the writ petition. Pursuant to the letter (Annexure-13)

respondent no. 4, the Civil Surgeon, issued a letter dated 13-10-1992 terminating the appointment of the petitioner on the ground mentioned in the said letter, which is Annexure-14 to the writ petition. The aforesaid order of termination refers to the show cause notice issued to the petitioner, and further mentions the fact that the matter was enquires into in the light of the relevant rules, regulations, circulars applicable to appointments made against Class III and Class IV posts. It had been found that the appointment of the petitioner by the then Civil Surgeon, Dr. M. P. Lal had been made in complete disregard of all the rules, regulations and directions and in complete disregard of the procedure prescribed for such appointments. The petitioner had been appointed on 20-9-1989 on daily wages when there was a clear direction from the Chief Secretary, Government of Bihar by his letter no. 7639 dated 11-6-1986 directing that no appointment had been made by Dr. Lal one year before his retirement, when according to the order of the Bihar Government dated 12-7-1985, there was a clear direction not to make appointments within two years of the date of retirement. It was also found that the letter of appointment on daily wage basis bearing Memo No. 1233 dated 20-9-1989 as well as the order of regularisation bearing letter no. 432 dated 20th April, 190, had not been issued from the office of the Civil Surgeon, because according to the record maintained in the office of the Civil Surgeon, the letters bearing those Memo numbers and dates had been issued to different authorities and were not letters of appointment or regularisation, as claimed by the petitioner. Having regard to these facts the show cause submitted by the petitioner was not found to be satisfactory and consequently his services were terminated. The petitioner has attacked the order of termination (Annexure-14) on various grounds, but the petitioner does not assert in his writ petition that any procedure was followed in making the appointment. It is not his case that the vacancy was notified in any manner whatsoever, and that applications were invited from eligible candidates, and that such candidates were subjected to a process of selection, and appointments made on

the basis of their relative merit. While we find no reason to ignore the other grounds mentioned in the impugned order (Annexure-14) which led to the termination of appointment of the petitioner, we are rearly concerned about the manner in which appointments are made without following any procedure whatsoever.

5. In the counter-affidavit filed on behalf of the State it has been asserted that pursuant to the order of the High Court ample opportunity was given to the petitioner to submit his show cause. In fact two notices were issued to the petitioner, and thereafter a detailed enquires was mad and a report submitted to the State Government. The matter was further scrutinised at the State Government level, and finding the appointment to be illegal, the Government communicated its decision through the Joint Secretary, Health Department by letter 25-9-1992 (Annexure-13). Consequent the Civil Surgeon issued the order terminating the services of the petitioner (Annexure-14). It is also stated that initial order appointing the petitioner as Non-Medical Assistant on daily wages as also the letter regularising his services were not issued from the office of the Civil Surgeon, Deoghar, because those Memos related to other persons and were issued in relation to other matters. Neither of them was issued in connection with the appointment or regularisation of the services of the petitioner. Further, the Chief Secretary, Government of Bihar vide his letter no. 7939 dated 11-6-1986 has completely banned appointment on daily wage basis. Despite this the then Civil Surgeon not only appointed the petitioner on daily wage basis, but also purported to regularise his services within six months. Moreover, in the matter of appointment to such posts, the appointing authority had to act on the recommendation of the Appointment Committee comprising Deputy Director, Tuberculosis, a Medical Officer belonging to Scheduled Caste or Scheduled Tribe, State Leprosy Officer and Assistant Director, Filaria. The appointment could be made only against a sanctioned post. No such committee was ever constituted nor has the committee any occasion to make its recom-

mendation. There were only two sanctioned posts of Non-Medical Assistant, but the petitioner was illegally appoint against a third post. It is also asserted that the appointment was made in complete violation of the Circulars of the Government in the Department of Personnel and Administrative Reforms and no advertisement whatsoever was made for the purpose of appointment. The action of the Civil surgeon was in complete violation of the principles laid down in Articles 14 and 16 of the Constitution of India. Not only was the Civil Surgeon required to call for names from the Employment Exchange, but he was required to publish advertisement in the daily newspaper notifying the vacancies and prescribing the requisite qualification. The petitioner was a backdoor entrant in the service and was, therefore, not entitled to any relief from this Court.

6. The petitioner has filed a rejoinder, which contains a lot of argumentative matter, but the fact that the vacancies were not notified, and that the candidates were not subjected to any process of selection, has not been denied by him even in the rejoinder. On such facts it is quite apparent that the appointment of the petitioner suffered from many infirmities, and what is quite patent is that the appointment was made clearly in breach of Articles 14 and 16 of the Constitution of India and was, therefore, not an irregular appointment but an illegal appointment which by reason of being in breach of the constitutional mandate was void, Obviously, therefore, the petitioner cannot be granted any relief by this Court in exercise of its writ jurisdiction because that would amount to perpetuating an illegality, This apart, the petitioner has no right which can be enforced, since his purported appointment and regularisation were void.

7. In very large number of cases this Court has come across appointments made by the appointing authorities in breach of directions issued by the State Government. Even when the State Government issues an order directing the appointing authorities not to make appointments on daily wage basis, the appointing authorities still persist in making large scale ap-

pointments on daily wage basis. Such appointments are made without asking for names from the Employment Exchange. No advertisement is issued in local dailies, nor is any publicity given to the vacancies so as to enable the eligible candidates to apply for appointment. In some cases it is said that the vacancies were notified on the Notice Board of the office of the appointing authority, but it would be difficult in such cases to produce any proof of that fact. It appears that such notices are noticed only by the applicants, who are appointed, and by none else. In large number of cases, where appointments are made for a short duration, which provides an excuse for not resorting to the normal procedure, those appointments are continued by grant of successive extensions from time to time. Ultimately, the demand of the appointee for regularisation is conceded, as he is regularised.

8. It has always been a matter of Concern as to why the appointing authorities make such appointments completely disregarding the law including the constitutional provisions. In one of earlier decisions one of us (B. P. Sinha, J.) in *Mahendra Ram* vs. *Deputy Commissioner, Palamau (1989 B. L. T. 27)* observed :

"where a constitutional mandate is breached, it matters little who is at fault. The action must be declared to be invalid. In cases of the nature with which I am concerned in the instant case, it may not be correct to say that the appointee is not at fault. Such appointments are not offered but are procured and I need not comment about the considerations which go into the matter."

9. The Supreme Court in *Delhi Development Horticulture Employees' Union* vs. *Delhi Administration (1992) (4) SCC 997)* in clear and unequivocal terms this phenomenon and observed that the courts should take judicial of the fact that such employment is sought and given directly for various illegal considerations including money. The Court observed :

"Apart from the fact that the petitioners cannot be

directed to be regularised for the reasons given above, we may take note of the pernicious consequences to which the direction for regularisation of workmen on the only ground that they have put in work for 240 or more days, has been leading. Although there is an Employment Exchange Exchange Act which requires recruitment on the basis of registration in the Employment Exchange and the persons registered in the Employment Exchanges, and to employ and get employed directly those who are either not registered with the Employment Exchanger or who though registered are lower in the long waiting list in the Employment Register. The courts can take judicial notice of the fact that such employment is sought and given directly for various illegal considerations including money. The employment is given first for temporary periods with technical breaks to circumvent the relevant rules, and is continued for 240 more days with a view to give the benefit of regularisation knowing the judicial trend that those who have completed 240 or more days are directed to be automatically regularised. A good deal of illegal employment market has developed resulting in a new scourge of corruption and frustration of those who are waiting at the Employment Exchanges for years. Not all those who gain such backdoor entry in the employment are in need of the particular jobs. Though already employed elsewhere, they join the jobs for better and secured prospects. That is why most of the cases which come to the courts are of employment in government departments, public undertakings or agencies. Ultimately it is the people who bar the heavy burden of the surplus labour. The other equally injurious effect of indiscriminate regularisation has been that many of the agencies have stopped undertaking casual or temporary if those who are employed on such works are required to be continued for 240 or more days they have to be absorbed as regular employees although the works are time-bound and there is no need of the workmen beyond the completion of the works undertaken. The public interests are thus jeopardised on both counts."

10. The other question to which we must address our-

selves is to the meaning to be given to the term 'regularisation'. It is a misconception that an illegality can regularised. It is well settled that what can be regularised is that which is irregular, and not which is illegal and void. It equaly well-settled that regularisation does not connote permanency. I may only refer to two decisions of the Supreme Court. In *R. N. Nanjundappa vs. T. thimmaish (1972 SC 1767)*, the Court observed :

"Counsel on behalf of the respondent contended that regularisation would mean conferring the quality of permanence on the appointment where as counsel on behalf of the State contended that regularisation did not mean prominence but that it was a case of regularisation of the rules under Article 309. Both the contentions are fallacious. If the appointment itself is in infraction of the rules or if it is in violation of the provisions of the constitution, illegality cannot be regularised. Ratification or regularisation is possible of an act which is within the power and provine of the authority but there has been some non-compliance with procedure or manner which does not go to the root of the appointment. Regularisation cannot be said to be a mode of recruitment. To accede to such a proposition would be to introduce a new head of appointment in defiance of rules or it may have the effect of setting at naugget the rules".

11. *In B. N. Nagarajan and others vs. State of Karnataka and others (AIR 1979 SC 1676)* it was held :

"It was argued that the regularisation of the promotion gave it the colour of permanence and the appointment of the promotes as Assistant Engineers must therefore be deemed to have been made substantively right from the 1st of November, 1956. The argument however is unacceptable to us for two reasons. Firstly the words 'regual' or 'regularisation' do not connote permanence. They are terms calculated to condone any procedural irregularities and are meant to cure only such defects as are attributable to the methodology followed in making the appointment. They cannot be construed so as to convey an idea of the nature or tenure of the appointments."

12. Obviously therefore, there can be no regularisation of the services of a person whose appointment initially was not merely irregular, but illegal, being in contravention of the provisions of the rules, the law or the constitutional mandate. Such person, therefore, cannot claim regularisation. The aforesaid two decisions of the Supreme Court have held the field so far, and no decision has been brought to our notice which takes a contrary view. Indeed, in a recent decision, reported in *AIR 1995 SC 586 (V. Shreenivas Reddy Vs. Goveernment of Andhra Pradsh* the Supreme Court referred to the aforesaid two decisions and relied upon them. It is, therefore, well-settled that an appointment made in breach of the rules, the laws or the principles enshrined in Articles 14 and 16 of the constitution is illegal and void, and that cannot give rise to a claim for regularisation. This has been reaffirmed in a decent decision of the Supreme Court *State of Haryana Vs. Peyare Singh (AIR)* 1992 SC 2130). The Court observed :

"Now coming to the direction that all those ad-hoc/ temporary employees who have continued for more than an year should be regularised, we find it difficult to sustain it. The direction has ben given without reference to the existence of a vacancy. The direction in effect means that every ad hoc/ temporary employee who had been continued for one year should be regularised even though (a) no vacancy is available for him-which means creation of a vacancy (b) he has not sponsored by the Employment Exchange nor was he appointed in pursuance of a notification calling for applications which means he had entered by a back-door (c) he was not eligible and/or qualified for the post at the time of his appointment (d) his record of service since his appointment is not satifactory. These are in addition to some of the problems indicated by us in para 12, which would arise from giving of such blanket orders. None of the decisions relied upon by the High Court justify such wholesale, unconditional orders."—Thirdly, even where an ad hoc or temporary employment is necessitated on account of the exigencies of administration, he should ordinarily be drawn from the employ-

ment exchange unless it cannot brook delay in which case the pressing cause must be stated on the file. If no candidate is available or is not sponsored by the employment exchange, some appropriate method consistent with the requirements of Article 16 should be followed. In other words there must be a notice published in the appropriate manner calling for applications and all those who apply in response thereto should be considered fairly."

13. In another recent decision of the Supreme Court, reported in *1994 (2) SCC 630 (J & K Public Service Commission* Vs. *Dr. Narinder Mohan)* the Court after considering large number of decisions of the Supreme Court held that the rules, instructions and procedure relating to recruitment should be just and fair conforming to Articles 14 and 16 of the Constitution. Opportunity has to be given to eligible persons by inviting applications through public notification and recruitment should be according to the valid procedure. It was, therefore, held in that case that the power of regularisation exercised by the Government was ultra virus the recruitment rules. The Government had no power to make regular appointments under the recruitment rules without selection by the Public Service Commission. The Court observed :

"Moreover the proviso to Article 320 (proviso to Section 133 of J & K Constitution), though gives power to the State Government to specify case or class of cases in respect of which consultation with the PSC may be dispend with still the recruitment shall be in compliance with either or the Article 320 (1) and Section 133 (1) of the J & K Constitution or by duly constituted body or authority. The rules or instructions should be in compliance with the requirements of Articles 14 and 16 of the Constitution. The procedure prescribed shall be just, fair and reasonable. Opportunity shall be given to eligible persons by inviting application through the public notification and recruitment should be according to the valid procedure and appointment should be of the qualified persons found fit for appointment

to a post or an office under the State. therefore, it must be held that power of relaxation exercised by the Government is ultra virus the Rules and the High Court is right in holding that Government cannot relax the rules of recruitment to be made by the PSC. Government have no power to make regular appointment under the rules without selection by the Public Service Commission under Section 133 (1) read with Rule 5 and Schedule III of the Rules.

The next question is whether the direction given by the High Court to regularise the services of the respondents is valid in law. It is true that the ad hoc appointees have been continuing from 1986 onwards but their appointment are de horse the Rules. Rules prescribe only two modes of recruitment, namely, direct recruitment or promotion by selection. A regards the lectures are concerned, it is only by direct recruitment. The mode of recruitment suggested by the High Court, namely, regularisation by placing the service record of the respondents before the PSC and consideration thereof and PSC 's recommendation in that behalf in only a by hybrid procedure not contemplated by the Rules. Moreover, when the Rules prescribe direct recruitment, every eligible candidate is entitled to be considered and recruitment by open advertisement which is one of the well accepted modes of recruitment. Inviting application for recruitment to fill in notified vacancies is consistent with the right to apply for, by qualified and eligible persons and consideration of their claim to an office or post under the State is a guaranteed right given under Articles 14 and 16 of the Constitution. The direction, therefore, issued by the Division Bench is in negation of Articles 14 and 16 and in violation to the statutory rules. The PSC cannot be directed to devise a third mode of selection as directed by the High Court, nor be mandated to disobey the Constitution and the law."

14. It therefore , appears to be well-settled that an irregular appointment may be regularised, but an appointment made in breach of statutory rules, law, or the constitutional provisions is not irregular, but illegal and void. An illegal or void act cannot

be regularised. Regularisation does not connote permanency and, therefore, no person who claims to have been regularised can claim that he has been confirmed in service. Where regularisation is permissible, the action which was irregular is cured, but the nature of the appointment remains the same. A temporary employee irregularly appointed does not become a permanent employee merely because his services are regularised by conforming to some matter relating to procedure, not going to the root of the matter, which was not complied earlier at the time of his appointment.

15. The decisions if the Supreme Court above noticed confirm our view that the petitioner can be granted no relief whatsoever. He secured an appointment by illegal means. This can be taken judicial notice of, because all the rules, directions and the Constitutional provisions were thrown to the wind when he was appointed. The interestedness of the appointing authority is obvious from the fact that soon after his appointment, only a few months later, he purported to regularise the services of the petitioner. This gives further proof of the malafide intention of the appointing authority. The petitioner was in *pari delicto* and, therefore, cannot claim any sympathy by saying that he is not to blame.

16. In cases where an appointment is found to have been illegally made, the courts quash the appointment and, therefore, the appointee suffers the consequence. However, the real quietly person, namely, the appointing authority goes scot free. The result is that even though large number of such appointment have been quashed by courts, the appointing authorities have showed total indifference to the orders by the courts, and they continue to make such appointments. It is a well-known fact, so far as this State is concerned, that appointment in majority of cases has to be bought. The ordinary citizen who has concern for the law and morality, must suffer, even if in terms of capability and merit he is far superior to the unscrupulous ones, who manage the appointments, we have, therefore, felt the need to

issue some direction in this regard, so that the appointing authorities, who are primarily guiety in such matters, and who exploit the job seekers taking advantage of their hardship, are equally punished when such illegal appointments are brought to the notice of the Government. I, therefore, direct that in each and every case where an appointment is said to have been illegally made, in the sense that the rules governing the appointment have not been followed, and the appointment is made by flouting the law in such a manner that the motive of the appointing authority becomes suspect, simultaneously with the cancellation of such illegal appointment, action must be initiated against the appointing authority, and in appropriate cases they should be immediately suspended pending departmental proceeding. If such action is not taken, courts will doubt the genuineness of the reason shown by the Government for cancellation of such appointment. I direct that this should be complied with by the Government in each and every case where an appointment is sought to be cancelled on the ground that it was illegally made in circumstances which give rise to a suspicion that the appointment was made on extraneous consideration, including money.

17. The other aspect of the matter which also requires prompt attention by the Government is the rampant practice of appointing persons on ad-hoc, short term or temporary basis, which appointments are thereafter continued by grant of extension from time to time. Ultimately, a proposal is made for regularisation of such appointment. Where such appointments initially made are not in according with the rules and/or Circulars of the Government or in breach of the principles enshrined in Articles 14 and 6 of the Constitution of India, they cannot obviously be regularised. However, there appears to be no sense behind continuing such employees on temporary basis for such long periods. If there is a permanent need for a post, such a post should be sanctioned and filled up in accordance with law on substantive basis. With a view to prevent recurrence

of such things in future, I am of the view that the Government must frame appropriate rules where ever necessary to deal with such appointment, and put a time limit beyond which such appointments shall not continue. However, framing of rules may take time and I, therefore, direct by this order as follows:

(1) Subject to any rules framed or to be framed by the Government, where the exigencies of service or other pressing causes justify an appointment on temporary basis, such appointment shall not be made for a period more than three months from the date of appointment, and the letter of appointment shall contain a clear condition that the appointment is purely temporary and will stand terminated on the expiry of the period mentioned in the letter of appointment. It should further contain a condition that the appointee shall have no right to claim permanency in service or to claim regularisation on the basis of such temporary appointment.

(2) If for any valid reason, on the expiry of the initial tenure of appointment, need is felt for continuing the appointment, the appointment authority may do so after recording its reasons in writing. Such extension shall not be for a period more than three months, and subject to the same terms and condition as the initial appointment.

(3) If after six months it is still felt that the appointment should be continued for any valid reason, the appointing authority must seek the prior written approval of the State Government before granting any further extension or extensions. If the State Government is satisfied, then it may permit extension of service for such period as it may deem fit, but subject to the same terms and conditions as the initial appointment. Such approval must be communicated to the appointing authority by an officer not below the rank of a Deputy Secretary to the Government of Bihar. In the absence of Government's approval, the temporary appointment shall terminate.

18. These directions shall be complied by the State of Bihar, and all the appointing authorities of the State of Bihar till such time appropriate rules are framed by the Government in

this regard, in case no rules exist on the subject.

19. With these observation and directions this writ petition is dismissed.

20. Let a copy of this order be sent to the Chief Secretary, Government of Bihar for necessary action. He shall communicate this order to all heads of the Department and district authorities, and report compliance to this Court within two months from the date of receipt of a copy of this judgment.

Aftab Alam. J, I agree

R. D Application dismissed.

APPELLATE CRIMINAL

Before S. K. Homchaudhuri and Narayan Roy, JJ,

1995

September. 13

*Bishwanath Singh.**

v.

The State of Bihar

Criminal Trial—non—production of means of identification and non-production of bullet which was found inside the body of the deceased of bullet which was found inside the body of the deceased during post-mortem—whether necessary to test the varacity of the oral testimonies of prosecution witnes—non—production, whether casts doubt on the prosecution case—Code of Criminal Procedure, 1973 (Central Act, No, II of 1974), Section 313—materials circumstances, not put to the accured during examination under section 313—effect of.

Production of material object, viz. the means of identification, the bullet which hit and killed the deceased and was found inside high body during the post-mortem as well as drawing up a sketch-map of the place of occurence before the court are not empty formalities, but are necessary to test the varasity of the oral testimonies. Withholding production thereof without any reasonable ground may cast a doubt on the prosecution case and such omission may cause aberration in course of justice.

In the instant case the only means of identification of the appellant along-with other accused was the torch of prosecution witness no. 4. There was no difficulty I producing the same if it was there. There is no eye-witness to the act of firing. The appellant is sought to be convicted on the evidence that he was seen dragging the body of Nand Kishore Jha (deceased) with a

*Criminal appeal No. 217 of 1993. From the judgment and order dated 5.3. 93 and 6.3.93, passed by Shri Philip Topno, Addl, Sessions Judge, V, Begusarai, in Sessions Trial No. 47 of 1989.

pistol in this hand along with others and the deceased made a dying declaration that the appellant shot at him Undisputedly the bullet was found inside the body of the deceased during the post-mortem examination and was handed over to the Police. As such before concluding that it was the appellant who killed a decaased by shooting him down, with Pistol, it was necessary to as certain that the bullet found inside the body of the deceased was of a pistol and not of other fire arms. Non-production of the bullet may give rise to a presumption that had the bullet been produced it would have been found that the same was not of pistol but of other fire arm.

Held, that it is well settled that any material circumstance appearing against the accused should be put to him when examined under section 313 of the Code of Criminal Procedure, 1973 hereinafter referred to as the Code, and that in case the material circumstances which appears against the accused is not put to him during the examination under section 313 of the Code, the said circumstance cannot be taken into consideration to convict the accused. In the instant case the act of absconding by the accused was not put to him while he was examined under section 313 of the the Code.

Held, further, that the prosecution has failed to establish the charge against the appellant beyond reasonable doubt.

Matru v. *State of U. P. (1)*—followed.

Appeal by the accused.

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

S.K. Homchaudhuri, J. This appeal is directed against the judgment and order of conviction and sentence dated 5.3.1993 and 6.3. 1993 respectively passed by the learned 5th Additional Sessions Judge, Begusarai, in Session Trial No. 47 of 1989. By the impugned judgment, the learned Additional Sessions Judge has convicted the accused-appellant under section 302 of the

(1) (1971) A. I. R. S. C. 1050

Indian Penal Code (in Short I. P. C.) and sentenced him to undergo rigorous imprisonment for life.

2. The prosecution case, as disclosed in the Fardbeyan of the father of deceased, Laddu Lal Jha (P. W. 4) recorded on 31.1.1983 at 8.15 A. M. at his residence by the police, is that on 30.1.1986 aroud 9.00 P.M. the informant went towards east of his house in his mango orchard and bamboo-clumps to ease with a torch and a lota (water-pot) in his hand and as soon as he set on ground for easing, he heard a loud sound of firing. He hurriedly eased and stood up and from eastern side he heard the cry 'Bachao' 'Bachao' (save-save) of his son. He rushed towards that direction by flashing the torch and the informant saw that accused-appellant Bishwanath Singh and other accused, namely, Guttur Das, Baiju Das and 2-3 other were dragging his son Nand Kishore Jha (deceased) from the field of Madan Mohan Singh of his village. The informant raised alarm and attracted by his alarm and sound of firing, Ganga Rai (P.W. I.) Mahesh Chandra Mahto (P. W. 2) and Dund Bahadur Singh (P. W. 3) came running and saw and heard about the occurrence. The accused persons thereafter fled away towards south -each. The informant saw a pistol in the hand of appellant Bishwanath Singh but he could not see as to what weapons the other accused persons were holding. When the accused persons fled away, the informant reached near his son in the wheat field of Rameshwar Singh and saw injury on his left rib, there was bleeding from the wound. He found injuries on the other parts of the body of his son. His son after telling that Bishwanath Singh had fired at him, died. Further case of the prosecution is that the deceased was the Mukhiya and was bitterly opposed to the criminals of his Grampanchayat. He helped the police officials of Samastipur District in a raid, in which Ghuttur Das etc. were arrested with pistol and cartridges. After coming out of jail Ghuttur Das was telling in the village that Nand Kishore Jha (deceased) got them caught and set them to jail. Fearing that the criminal might take away the dead body, the same was brought from the field to the

door of the house in the night.

The Officer-in-charge of Bachchawara P. S. having heard rumour that the Mukhiya Nand Kishore Jha had been killed, came to the residence of the informant on 31.1.1986, and recorded the fardbeyan. He prepared Inquest report and sent the dead body for post-mortem. On the basis of the Fardbeyan, forming part of the F. I. R, Bachhawara P. S. Case No. 7 of 1986 under section 302/34 I. P. C. was registered against the appellant, accused Guttar Das, Birju Das and 2-3 other unknown accused. During investigation, accused Guttar Das could only be apprehended. The appellant Bishwanath Singh and Birju Das were shown as absconders. Cognisance of the offence against accused persons was taken on 1.12.1986 and the case was committed to the court of Sessions Judge on 8.2.1990 by the learned Sub-Divisional Judicial Magistrate, Begusarai. The trial of appellant and accused Birju Das was separated. Accused Guttar Das, who was arrested, was put on trial and by judgment dated 6.9.1991, he was convicted under section 302/149 I. P. C. When the trial of accused Guttar Das was at the concluding stage, the police submitted a report to the effect that appellant Bishwanath Singh, who was absconding, was arrested in connection with Bidyapati P. S. Case No. 26 of 1991 under section 302 I. P. C. and was in custody at Samastipur Jail. Accused Birju Das till the date of passing the impugned judgment could not be arrested. The learned Sessions Judge on perusal of the materials on records framed charge under section 302 I. P. C. against the accused Bishwanath Singh after he was produced before his court from the Jail Hajat. The accused appellant not having pleaded guilty, the case was tried .

3. To bring home the charge against the accused, the prosecution examined six witnesses, out of whom P. W. 5 Udan Kanti is the Investigating Officer and P. W. 6 Dr. R. R. Prasad is the Medical Officer, who held the post -mortem on the dead body of the deceased. P.W.4 Laddu Lal Jha is the informant , P. Ws. 1,2, and 3, namely, Ganga Rai, Mahesh Chandra Mahto and

Daud Bahadur Singh are the persons, who said to have seen dragging of the deceased by appellant, along with other accused persons in the flash of the torch light of P. W. 4.

4. P. W. I, Ganga Rai, has deposed that on 30. 1. 1986 around 9 P. M., he was returning to his house at Go petal from Laxman Toli and when he reached near the orchard of Laddu Lal Jha, he heard sound of firing. Besides, he heard the cry 'Bachao'-'Bachao' (save-save) of Nand Kishore Jha. He rushed in that direction and after advancing a little further, he saw Laddu Lal Jha (P. W. 4), Mahesh Chandra Mahto (P. W. 2), Vishundeo Singh (not examined) and Daud Bahadur Singh (P. W.3) running in the same direction. After going for some distance ahead, they saw in the flash of torchlight of Laddu Lal Jha, that accused appellant Bishwanath Singh, accused Ghuttar Das, Birju Das and two-three unknown persons were dragging Nand Kishore Jha (deceased) towards souh-east. They also saw a pistol in the hand of the appellant Bishwanath Singh. When they reached near, the accused persons fled away towards south-east leaving Nand Kishore Jha in wheat field of Binod Singh. On reaching Nand Kishore Jha they saw bullet injury on his left chest. Nand Kishore Jha said that Bishwanath Singh had fired shot at him and immediately thereafter died. They brought the dead body on a cot to the door of Laddu Lal Jha (the informant), fearing that the dead body might be taken away by the accused persons. He further deposed the deceased Nand Kishore Jha was the Mukhiya of the village panchayat and was an active member of the Communist Party. About a month before the occurrence, the police of Mohiuddinagar Police Station and the police of other places had raided the house of accused Ghuttar Das and Parikhan Yadav and they were caught in that raid. Nand Kishore Jha had helped the police in that raid. After accused Ghuttar Das was released from jail, he heard Ghutar was saying that he would not spare Nand Kishore Jha and kill him. The appellant Bishwanath Singh had been a member of the same gang. Appellant Bishwanath Singh is a resident of Chamtha Panchayat

itself. Nand Kishore Jha (deceased) was opposing the criminal activities of the appellant Bishwanath Singh. In cross-examination he deposed that in that evening he went Laxan Tal to visit his ailing Mamera Bahnoi (maternal sister's husband) Padarath Rai.

5. P. W. 2, Mahesh Chandra Mahto, has deposed that on the night of occurrence around 9 o'clock after taking medicine from the house/shop of Dr. Suresh Prasad Singh, he was returning home and when he reached near the orchard of Laddu Lal Jha, he heard a sound of gun fire and the cry 'Bachao'-'Bachao' (save-save) of Nand Kishore Jha. He rushed towards east from where the sound of "Bachao-Bachao" came and found that Laddu Lal Jha (P. W. 4), Ganga Ram (P. W. I), Bishundeo Singh and Dunda Bahdur Singh (P. W. 3) were also running towards the same direction. He saw in the flash of the torch of Laddu Lal Jha that the appellant Bishwanath Singh, accused Ghuttar Das, Birju Das and two-three other unknown persons were dragging Nand Kishore Jha and after leaving him in the wheat field of Binod Singh they ran away towards south-east. He also saw a pistol in the hand of the appellant. When they reached near Nand Kishore Jha they saw that he was injured and a hole was caused by a hit of bullet on the left rib of Nand Kishore. Nand Kishore Jha told them that Bishwanath Singh had fired the Shot at him saying that he died. They took the dead body at the door of Laddu Lal Jha fearing that the dead body might be taken away by the accused. He also deposed that Nand Kishore Jha was the Mukhiya of Chamtha Grampanchayat and the leader of the Communist Party. One and a half month prior to the occurrence, the police had raided the house of accused Ghuttar Das and Ram Parikshan Yadav and arrested Ghuttar Das. Nand Kishore Jha had helped the police in the raid as both of them were thieves and dacoits. After accused Ghuttar Das got released from the jail he started saying that he would not spare Nand Kishore Jha and would kill him. There is a gang of accused Ghuttar Das, appellant Bishwanath Singh, Birju Das and others. Nand Kishore

Jha used to oppose their criminal activities.

6. P. W. 3, Dund Bahadur Singh, has deposed that the occurrence took place about six and half years ago. The day was Thursday and he was at the front door of his house at 9 o'clock in that night and he heard sound of gun shot from the east. He also heard the scream "Bachao-Bachao" (save-save) of Mukhiya Nand Kishore Jha. He rushed in that direction and on the way he met and joined P. W. 4, Laddu Lal Jha, P. W. 2 Mahesh Chandra Mahto,Bishnu Deo Singh (not examined) and P. W. I Ganga Roy, who were also rushing to the direction from which cry came. He saw that accused Ghuttar Das,Birju Das, appellant Bishwanath Singh and 2-3 unknown persons were dragging Mukhiya and Kishore Jha toward south-east. He recognised them in the flash of the torch of Laddu Lal Jha. Accused persons there upon left the dead body of Nand Kishore Jha in the wheat field of Binod Sing hand fled away torwards south-east. They went to the field of Binod Singh and saw Nand Kishore Jha in the pool of blood. Nand Kishore told them that Bishwanath Singh had fired at him and saying that he died. He further deposed that one or half a month prior to this occurrence, the police had raided the place of Ghuttar Das and had taken accused Ghuttar Das into custody. Appellant Bishwanath Singh was a member of that very gang.

7. P. W. 4, Laddu Lal Jha (the informand) has deposed that on 30.1.1986, at around 9 O'clock in the night, he had gone to ease himself in his orchard to the east of his house. At that time he heard horrible sound of firing towards east and also heard the cry "Bachao-Bachao" (save save) raised by his son Nand Kishore Jha. He got up after easing and ran towards the place from where the sound came. He had a torch in his hand. When he was running, Bishundeo Singh, Ganga Rai (P. W. I), Mahesh Chandra Mahto (P. W. 2) and Dund Bahadur Singh (P. W. 3) also came there running behind him. In the flash of the torch, he saw that accused Ghuttar Das, Birju Das, appellant Bishwanath Singh and 2-3 other unknown persons waer dragging and taking away

his son, Nand Kishore Jha towards south-east. Appeallant Bishwanath Singh had a pistol in his hand and he threatened them and asked them to go back. Thereafter leaving his son in the wheat field of Rameshwar Singh and Binod Singh they fled away towards south-east. He along with other persons went near Nand Kihsore Jha and found him besmerged with blood and also saw a hole caused by bullet in his left rib. He was restless and stated that Bishwanath Singh shot at him and soon thereafter died He identified appellant as the same Bishwanath, whom he had seen in the torch light and whose name was stated by his son. He having feared that the criminal might be able to remove the dead body, put the dead body on a cot and brought the same to the door of his house. He further deposed that his son, Nand Kishore Yadav was Mukhiya of the Gram Panchyat and was also an active member of the Communist Pary, About one month before the occurrence, the Police had reided the place of accused Ghuttar Das and Prikshan Yadav, in which accused Ghuttar Das was caught. His son had helped police in the raid. After ten to fifteen days, accused Ghutar Das was released from the jail and he used to say that Nand Kishore Jha had got him apprehended and that he would kill him. Appellant Bishwanath Singh was a member of the gang of accused Birju and accused Ghuttar Das. His son used to oppose the appellant Bishwanath Sigh because he also used to commit crime.

8. P. W. 6 Dr. R. R. Prasad , Medical Officer, has deposed that he help the post-mortem examination over the dead body of Nand Kishore Jha (deceased) at 2. 15 P. M. on 31. 1. 1986 and he found the following injuries.

(i) One bullet injury 2" X 2" clean circular punched out appearance situated on the upper part of front of left side of chest just below medical side of left clavicle. The subcuteneous tissues were extensively lacerated and extensively ecchymosed. The upper part of body of sternum on the left side commutted and splintered (fractured)

(ii) On further dissection, the left lung was found dam-

aged and on further tracing, the bullet had passed through 5th dorsal vertebra to which it has splintered and passed through and through and the bullet was lodged behind left scapula in the subcuteneous tissues, which was removed, preserved in a sealed vial and handed over to the constable who had accompanied the dead body. The back portion of the bullet was disfigured (flatened and broadened). The left 3rd to 5th ribs were fractured-splintered and commutted (rest of bones missing). The internal juglar veins left side were damaged and ruptured, on dissection, front of what and back were bruised and ecchymosedin large area.

The cause of death, in his opinion, was due to extensive haemorrhage and shock as a result of bullet injury fired from a very close range. The dead body, clothes etc., were handed over to the constable accompanying the dead body. Time elapsed since death to post mortem examination was between 12 to 24 hours."

P. W. 5 Udhan Kant is the Investigating Officer. He deposed that he inspected the place of occurence. He found the place of occurrence was the ridge which ran from Gope Tola to Laxuman of Village Ghamtha and situated at a distance of two hundred yards east of the house of the informant. He found considerable amount of blood at one place on the ridge. The wheat field of Rameshwar Singh was situated in the north side of the ridge while the Arhar field of Madan Mohan Singh was situated in the South of the ridge. The field of Madan Mohan Singh was about one Bigha. In the Arhar field of Madan Mohan Singh he found the plants pressed on account of sitting of men. He found that mango orchard and bamboo clumps where the informent stated have gone for easing in the night of occurrence, was at a distance of about 100 yards from the place of ridge where he found considerable amount of blood. He found trail of blood and sign of dragging up to a distance of 8 yards from that place of the ridge thereafter trail of blood and sign of dragging upto 14 yards towards South to the field of Akal Das and from southern ridge

of the said field from west to east there was trail of blood and sign of dragging upto a distance of 15 yards. From there towards east he found trail of blood and sign of dragging for a distance of 8 yards upto the field of Suendra Singh and therefrom further trail of blood and sign of dragging upto 8 yards. Thereafter along the earthern boring canal between Mishri Rai and Surendra Singh he found trial of blood and sign of dragging upto 20 yards towards south and from there he found sign of dragging up the field of Binod Singh through the canal and sign of dragging upto 25 yards in the field of Binod Singh. The dead body was left in the field of Binod Singh. He found wheat crop trampled there in round manner covering about 5 sq. ft. He also found flour oil Mill of Surendra Singh was at a distance of 125 yards from that place.

10. The appellant was examined under section 313 Cr. P. C. by the learned Sessions Judge. The appellant denied the allegation that he killed the deceased Nand Kishore Jha as alleged. The appellant stated that he was at Allahabad in the night of occurrence and he has wrongly been implicated. He stated that he came in contact with the deceased as he was a leader of the Communist Party and he was the captain of the Football Team of the Village.A tournament started in the Village and the work for the same was entrusted to him, In order to raise fund, as per advise of Nand Kishore Jha and the local M. L. A., Awadhesh Rai, he asked contribution from the then Mukhiya, who was the biggest landlord and the richest person in the Village along with other sportsmen but the then Mukhiya refused to make any contribution. He scolded the Mukhiya. He did not know that in the meantime, Nand Kishore Jha and Awadhesh Rai went to the then Mukhiya and asked him not to give any contribution. Thereafter 2-3 false cases are egistered against him. In his defence he examined two witnesses.

11. D. W. I. Pralyankar Kumar Singh, had deposed that he was attached with the Communist Party from 1983 to 1985. He knew the appellant Bishwanath Singh, standing in the

dock, who was also attached with the Communist Party before 1983. Having felt that the persons leading the party, were blackmailing and misleading him, he left the party. Appellant Bishwanath Singh also left the party for the same reason. When some one leaves the Communist Party, other members of the Party harass him in several ways . He had good relation with Nand Kishore Jha (deceased) even after leaving the party . He had a talk with deceased Nand Kishore Jha on 28.1.86-2 days before his murder and Nand Kishore did not tell him that appellant had given him threat of any kind. He had seen the land of Dashrath Singh , who was a Bhaginman (son of a village daughter) of his village. The member of the Communisty Party wanted to rehabilitate the people of Bind Tola, who had been displaced by the Ganga which was opposed in Chamtha. Appellant Bishwanath Singh also contended in opposition that when Dashrath Singh himself was ready to give ten kathas of land then they should be rehabilitated on that ten kathas land only without taking other part of land. The party wanted to rehabilitate them in the whole plot. He deposed that witnesses Ganga Rai (P. W. I.), Mahesh Chandra Mahton (P. W. 2.) Dund Bahadur Singh (P. W. 3.) and Laddu Lal Jha (P. W. 4) were known to him and all of them were members and workers of Communist Party . Laddu Lal Jha (P. W. 4) became member of this party after the occurrnce. A. murderous attack was made on him in the year 1983. He did not mention the name of Bishwanath in the incident but when he obtained the copy of that case, he came to know that Bishwanath was named as one of the persons against whom he had lodged the case although he had got no enmity with him. He thought that out of animosity, the party-men had got his name entered fraudulently. He knew accused Ghuttar Das, who is his co-villager. He had no concern with Bishwanath Singh in any way. He further deposed that Bishwanath Singh had wrongly been made accused in the murder case of Nand Kishore Jha.

12. D. W. 2. Vinod Prasad Singh, has deposed that he

was attached to the communist Party till Nand Kishore Jha was alive he gave coontribution and was granted receipt thereof. In that night of occurrence, after taking dinner at about 10.25 P. M. he came out at the Darwaja and engaged in talking, at that time a person reached there from the east direction and told that cap and shoe of Mukhiyajee were lying and the people said that Mukhiyajee had been killed and his dead body was taken away. Taking his two dogs, he near the Mill of Rameshwar Singh and the dogs thereafter reached near the dead body of Mukhiyajee after sniffing. He and other persons also reached there. The people started abusing appellant Bishwanath Singh. Pramod Singh had already reached there before his arrival, who is now dead. In cross-examination, he said that the dead body was recovered from the field of Rameshwar Singh and Binod Singh. After killing Mukhiya, his dead body was dragged along the ridges. There was mark of this but the blood-stain was not visible in the night. He further deposed that he and the father of Nand Kishore Jha carried the dead body to house of Nand Kishore Jha and kept the body at the Darwaja. He has further deposed that the Sub-Inspector of Police reached the house of the deceased next morning. Laddu Lal Jha gave statement before the S. I. of Police. He did not hear what talk was going on between the S. I. of Police and Laddu Lal Jha. The S. I. of Police did not ask him anything. He and appellant Bishwanath belong to the same caste. But he was not on visiting term. He did not know whether Bishwanath Singh was inimical towards the deceased Nand Kishore Jha. Bishwanath Singh is his Bhauja (sister's son). He had denied the suggestion that because of the fact that Bishwanath Singh is his Bhaja he deposed falsely in order to save him.

13. The learned Additional Session Judge, after perusal of the materials on record, held that the prosecution has been able to establish the charge against the appellant beyond all reasonable doubt and, accordingly, by the impugned judgment and order convicted him under section 302 I. P. C. and

sentenced him to undergo rigorous imprisonment for life.

14. We heard learned counsel for the appellant and the learned public prosecutor for the State.

15. Learned counsel for the appellant submitted that in this case there is no eye witness to the killing of Nand Kishore Jha (deceased) by fire-arm. The conviction had been founded on the basis of the parrot like statements of P. Ws. I, 2, 3, and 4 that in the night of occurrence arout 9.00 P. M. on hearing the sound of gun-shot and cry of 'Bachao-Bachao' of Nand Kishore Jha, each of them rushed towards the direction from where the sound was coming and in the flash of the torch of P. W. 4, they saw the appellant Bishwanath Singh, accused Guttar Das and Birju Saha and 2-3 others were dragging the body of Nand Kishore Jha and the appellant had a pistol in his hand and thereupon the accused persons went away leaving the body of Nand Kishore. After reaching near Nand Kishore they found that he was seriously injured by the gun shot and was bleeding profusely and that Nand Kishore just after telling that Bishwanath Singh had fired at him died.

16. Learned counsel for the appellant had drawn my attention to the evidence of P. W. 5, the Investigation Officer and submitted that P. W. 5 after making inspection located the place of occurrence to be ridge by the side of the Arhar field of Madan Mohan where he found considerable quantity of blood. He also found that the body of the deceased was left in the wheat field of Binod Singh after dragging the same from the place of occurrence for about 100 yards in a zig-zag way. P. W. 4 in the Fardbeyan recorded in the following morning stated that after reaching the place where from the cry of the deceased 'Bachao-Bachao' came, he in the flash of his torch saw that appellant Bishwanath Singh, accused Guttar Das, Birju Saha and 2-3 unknown persons were dragging the body of the deceased in the field of Madan Mohan of his village and he raised alarms and attracted by the alarm and the sound of firing P. W. s. 1,2 and 3 came to that place and they saw the appellant and other

dragging the deceased and the accused persons thereupon left the body of Nand Kishore fled away. But from the statement of the Investigating Officer it is apparent that from the border of the field of Madan Mohan the body of the deceased was dragged for about 74 yards upto the field of Binod Singh where it was left. Learned counsel for the appellant has submitted that dragging of the body of the deceased in a zig-zag way for more than 74 yards from the field of Madan Mohan upto the field of Binod naturally took some time. P. Ws. 1, ,2, 3 and 4 have not deposed that after seeing that the body of deceased Nand Kishore being dragged by the appellant and other accused persons they pursued dragging from the field of Madan Mohan to Binod Singh by flashig torch till the same was left by the accused. According to the learned counsel for the appellant it is highly improbable that the informant along with others would have followed the dragging of the dead body of the decased Nand Kishore for 74 yards or more from the field or Madan Mohan upto the field of Binod Singh flashing the torch inasmuch as accused appellant could not have given opportunity to them to be recognised and identified by them in the flash of torch light for a consideratble period. The learned counsel for the appellant submitted that the only source of identification was the torch but that was neither seized or produced before the court. The bullet which was found in the body of the deceased in course of postmortem has also not been produced before the court and exhibited. No sketch-map of the place of occurrence has been drawn or filed. The blood-stained earth, which was found by the Investigating Officer was not sent for chemical examination. Learned counsel for the appellant submitted that withholding of material object of identification, namely, torch light, the only source of identification, the bullet as well as the improbablity of pursuing dragging of the body of the deceased by the accused for about 74 yards and more from the field of Madan Mohan to the field of Binod Singh cast a serious doubt on the story of prosecution case, introduced by the parrot like statement of P. W. I, P. W. 2, P. W. 3 and P. W.

4 who are interested witnesses. Learned counsel for the appellant further submitted that unshaken evidence of D. W. I is that the appellant has been falsely implicated because the Mukhiya and the local M. L. A. and other local Communist Party leader bore grudge against him. And the statement of D. W. 2 on oath that before the dead body was traced out by the dog nobody knew where the dead body was left, inspires confidence.

17. The learned public prosecutor submitted that commission on the part of the prosecution to produce the object of identification, i. e, torch light. bullet found in the body of deceased and failure to draw sketch-map of the place of occurrence, cannot throw the prosecution out of the court, if consistent and unshaken evidence of P. Ws. 1, 2, 3, and 4 are believed. The dying declaration of the deceased made before informant and P. Ws. 1,2 and 3 that the appellant shot at the deceased, is corroborated by the postmortem report. Consistent evidence of P. Ws. 1, 2, 3 and 4 is that in the flash of torch they saw the appellant had a pistol in his hand while along with other accused he dragged Nand Kishore Jha. The cross examination did not at all shake the testimonies of the witnesses. Learned Public Prosecutor submitted that the statement made in the Fardbeyan by the informant, is not evidence. P. W. 4 is the father of the deceased and was 70 years old at the time of occurrenc. It is quite unlikely that he would implicate the appellant falsely stating that he saw him dragging Nand Kishore Jha along with others holding pistol in his hand. Leaned Public Prosecutor further submitted that abscondig of the appellant soon after the incident for a period of seven years is an incriminating circumstance against him which lends support to the prosecution case.

18. I have considered the submission made on behalf of the appellant and on behalf of the State and have also perused the materials on record. The contention of the learned Public Prosecutor that non-production of the torch-the object of identification and the bullet found in the body of the deceased

in the course of postmortem as well as non-preparation of sketch map of the place of occurrence may not throw the case of the prosecution out of court, may be correct. But production of material object, namely, the means of identification, the bullet which hit and killed the deceased and found inside his body during the postmortem as well as drawing up a sketc-map of the place of occurrence, before the court are not empty formalities but are necessary to test the varacity of the oral estimonise. Withholding production thereof without any reasonable ground may cast a doubt the prosecution case and such omission may cause aberration in course of justice. In the instant case the only mean of identification of the appellant along with other accused was the torch of P. W. 4. There was no difficulty in producing the same if it was there. In the instant case there is no eye witness to the act of firing. The appellant is sought to be convicted on the evidence that he was seen dragging the body of Nand Kishore Jha with a pistol in his hand along with others and the deceased made a dying declaration that the appellant shot at him. Undisputedly the bullet was found inside the body of the deceased during postmortem examination and was handed over to the police. As such before concluding that it was the appellant who killed the deceased by shooting him down with pistol, it was necessary to ascertain that the bullet found inside the body of the deceased was of a pistol and not of other fire arms. Non-production of the bullet may give rise to presumption that had the bullet been produced it would have been found that same was not of pistol but of other fire arm.

As narrated above , P. W. 4, in the Fardbeyan stated that after reaching the place from the cry of 'Bachao-Bachao' of his son came, in the flash of his torch he saw the appellant and others were dragging the body of his son Nand Kishore Jha from the field of Madan Mohan Singh and attracted by the alarm and gun shot P. Ws. 1,2 and 3 came to the spot in his evidence P. W. 4 has not stated the place where he first saw the accused appellant and others dragging the body of his son. Moreover he

deposed that while he was running in direction from where the cry of his son came P. Ws. 1,2 and3 also came running behind him. P.Ws1,2 and 3 deposed in one voice that being attracted by the alarm as well as cry 'Bachao-Bachao' of the deceased they ran towards the direction and joined P. W. 4 while he was running in that direction P. Ws. 1, 2, and 3, however deposed that each of them after advancing a little, found P. W.4 and too other P. Ws. Were rushing in the direction from where cry came. Thus, according to P. Ws. 1,2 and 3 each of them was the last person to join, P. W. 4 and others in the run. From the evidence of P. W. 5, the Investigation Officer, it is apparent that the body of Nand Kishore Jha was dragged in a zig-zag way for more than 74 yards from the boundary of the field of Madan Mohan Singh till it was left in the field of Binod Singh. Learned Public prosecutor submitted that none of the withnesses has deposed before the court that the dragging of the body of the deceased was first seen in the field of Madan Mohan and that the statement made by the the P. W. 4 in the Fardbeyan is not evidence. But departure from the statement made in the Fardbeyan shakes the credibility of the evidence of the informant as well as the case of the prosecution. That apart, as already observed none of the witnesses including P. W. 4, have mentioned the place where they first saw dragging of the body of Nand Kishore Jha by the appellant and others. As such there is force in the submission of learned counsel for the appellant that the story that P. Ws. 1, 2, 3 and 4 saw the appellant dragging the body of Nand Kishore Jha with others and that Nand Kishore Jha made dying declaration that appellant shot at him becomes doubtful, inasmuch as it is highly improbable that P. Ws. 1, 2, 3 and 4 would have pursued act of dragging of the body of Nand Kishore Jha the appellant and others in a zig-zag way for more then 74 yards by flashing torch light from the field of Madan Mohan Singh till they left the body in the field of Binod Singh.

19. The act of absconding on the part of the appellant no doubt relevant fact to be considered with other evidences but the act of absconding by the appellant may not by itself lead

to the conclusion of guilty mind. In this connectio it is appropriate to refer to the obsevation of Hon'ble Supreme Court made in the judgment passed in the case of Matur v. State of U. P. reported in A. I. R. 1971 S.C. 1050. In para 15 of the said judgmnt Hon'ble Supreme Court amongst others held as follows-

"Mere absconding by itself does not necssarily lead to a firm conclusion of guilty mind. Even an innocent man may feel panicky and try to evade arrest when wrongly suspected of a grave crime : such is the instinct of sell-preservation. The act of absconding is no doubt relevant piece of evidence to be considered along with other evidence but its value would alway depend on the circumstances of each case. Normally the Courts are disinclined to attach much importance to the act of absconding, treating it as a very small item in the evidence for sustaining conviction. It can scarcely be held as a determining link in completing the chain of circumstantial evidence which must admit of no other reasonable hypothesis then that of the guilt of the accused."

It is well settled that any material circumstance appearing against the accused should be put to him when examined under section 313 Cr. P. C., and that in case the material circumstance which appears against the accused is not put to him during the examination of section 313 Cr. P. C., said circumstance cannot be taken into consideration to convict the accused. In the instant case the act of absconding was not put the appellant while he was examined under section 313 Cr. P. C.

20. For the reasons stated above, I am constrained to hold that the prosecution has failed to eastablish the charge against the appellant beyond reasonable doubt. The appeal is, therefore, allowed. The impugned judgment of conviction and order of sentence are set aside and the appellant is acquitted of the charge. The appellant . Bishwanath Singh shall be released forthwith provided he is not required to be detained in connection with any other cases.

Narayan Roy, J. I agre

R. D. Appeal allowed

CIVIL WRIT JURISDICTION

Before Sudhansu Jyoti Mukhopadhaya, J.

1995

Novembe,13

Daya Nath Singh.*

V.

The Bihar State Electricity Board and othere.

Service—standing order no. 642 date 29th July, 1983, whether vests power in the Chairman of the Bihar State Electricity Board to suspend any employee of the Bihar State Electricity Board in contemplation of departmental proceeding—standing order no. 642 dated 29th July, 1983, whether a service Regulation framed by the Bihar States Electricity Board in term of section 79 (c) of the Electricity (supply) Act, 1948-Elecricity (supply) Act, 1948 Central Act no. LIV of 1948)—section 79 (c).

The writ-petitioner while he was posted as General Manager Cum Chief Engineer in Tirhut Area Electricity Board was suspended in contemplation of departmental proceeding by order dated 22.8.1995 on the orders of the Chairman Bihar State Electricity Board hereinafter referred to as the Board. The writ-petitioner alleged that his appointing authority being the Board, the Chairman has no jurisdiction to suspend an officer of his rank.

Held, that the Chairman of the Board had got jurisdiction to suspend an employee like the writ-petitioner, in contemplation of a departmental proceeding and for such suspension no approval is to be taken from the Board.

It is evident from paragraph 4 of the standing order no. 642 dated 29th July, 1983 that Rule 49-A of the Civil Service (Classification, Control and Appeal) Rules, 1930 has been

* Civil Writ Jurisdiction case No. 6608 of 1995. In the matter of an application under Articles 226 and 227 of the Constitution of India.

adopted. Power has been vsted not only with the appointing authority and / or to the Board but also to the Chairman of the Board to suspend any employee of the Board even in contemplation of departmental proceeding.

From a plain reading of standing order no. 642 dated 29th July 1993, it is manifest and clear that said standing order cannot be construed to be standing order issued under the Industrial Disputes Act, 1947, but is a Service Regulation framed by the Board in terms of section 79 (c) of the Electricity (Supply) Act, 1948.

Ajoy Kumar Prasad V. Bihar State Electricity Board and ors, (1)—followed.

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

The facts of the case material to this report are set out in the judgment of Sudhansu Jyoti Mudhopadhya, J.

Mr. Rajendra Prasad Singh, Sr. Advocate, Mr. Sanjay Kumar Singh, Advocate, Mr. Sunil Kumar Singh, Advocate, Mr. Manoj Priyadershi, Advocate and Mr. Ajay Kumar Singh, Advoce, for the petitioner

Mr. Ajoy Kumar Thakur, Advocate fore the Board.

ORDER

S. J. Mukhopadhaya, J.

The ptitioner has challenged the order dated 22nd or August, 1995 as contained in Annexure-1, by which he has been suspended in contemplation of a departmental proceeding.

2. The petitioner was posted as General Manager-cum Chief Engineer in the Tirhut Area Electricity Board, Muzffarpur, under the juriadiction of the respondent-Bihar State Electricity Board (hereinafter referred to as the 'Board'). While the

(1) (1995) C. W. J. No. 584 of 1993 (R) dispoed of on 23.3.1995

petitioner was so posted he was suspended by the impunged order, as contained in Annexure-1.

3. When the case was taken up, counsel for the petitioner assailed the impugned orrder of suspenssion s (Annexure-1) on two greunds, namely, (a) the impugned order dated 22nd of August, 1995 (Annexur-1) has not been stated therein that the same has been issued by the Board, and (b) the impugned order of suspension dated 22nd of August, 1995 even if issued by the order of the Chairman of the Board, the Chairman of the Board having no Jurisdiction to suspend an officer of the rank of Genral Manager-cum-Chief Engineer. The impugned order (Annexure-1) is without jurisdiction.

4. The counsel for the petitioner also relied on different Annexures enclosed wih the writ petition, includig the Standing Orders to show the duties and responsibilities of General Manager-cum-Chief Engineer and other employees of the Board.

5. A Counter affidavit has been filed by the resspondents. In their counter affidavit it has been stated that during the pendency of the writ petition a departmental proceeding has also been initiated against the petitioner and the charge-sheet has been issued vide one resolution dated 23rd of September, 1995 (Annexure-B-3) to the counter affidavit). At the first instance when the case was earlier taken up, counsel for the Board submitted that the order of suspension has been issued by the order of the Chairman of the Board. The same has been issued in anticipation of approval by the Board. One notification No. 109 dated 16th of September, 1992 (Annexure-B-4 to the counter affidavit) has been enclosed by the respondents. It was contended by the counsel for the Board that in pursuance of the said notification dated 16th of September, 1992, issued in terms with Rule 79 (R) of the Electricity (Supply) Act, 1948, the power has been vested with the chairman of the Board to suspend any employee of the Board, in anticipation of approval by the Board.

6. The counsel for the petitioner also attacked the notifica-

tion no. 109 dated 16th of September, 1992) (Annexure-E-4) and contended that by virtue of the aforesaid notification, no power has been deligated to the Chairman of the Board to suspend an employee like the petitioner in anticipation of approval of the Board. According to him the notification dated 16th of Septmber, 1992 (Annexure-B-4) is not at all applicable in the matter suspension of an employee of the Board.

7. This Court by its earlier order directed the counsel for the Board to Produce the relevant file relating to suspension of the petitioner. The came was Produced by the counsel for the Board at the time of hearing of the case at the stage of admission. I have already gone through the said file relating to suspension of the petitioner.

8. From perusel of the said file it is clear that though noting was routed from the lower stage to take appropriate disciplinary action against different officials /Engineers, who were posted in Tirhut Area Electricity Board, Muzaffarpur, for certain acts of omission and commission, the matter ultimately reached at the stage of Secretary and Member (Administration) of the Board. The Member (Administration) of the Board vide his noting recommended to suspend a number of officials/Engineers. He also recommended to ask explanation and to take suitable action on the petitioner. Thereafter when the file reached before the Chairman of Board, he approved the noting of the Member (Administration) and ordered to suspend the erring officials / Engineers, including the petitioner. It is on that basis the impugned order of suspension dated 22nd of August, 1995 (Annexure-1) has been issued.

9. At this stage it is to be taken into note that the 'Board' consist of the four following members -

(a) Chariman,

(b) Member (Administation),

(c) Member (Finance)

(d) Member (Technical) and

The aforesaid Chairman and Member are employed in the Board. Apart from the aforesaid four Chairman/ Members, there are three more Ex-officio Members, who are State Government employees, like Secretary, Electircity Department etc.

As the order of suspension (Annexur-1) was issued only on the direction of the Chariman and Member (Administration) of the Board, it was Containded by the counsel for the petitioner that the order of suspension (Annexure-1) is not an order of the Board. It was in this background stand was taken by the Board in their counter affidavit that the said order (Annexure-1) should be construed as order of the Chairman, issued in anticipation of approval of the Board.

It has been stated by the counsel for the Board and accepted by the counsel for the petitioner that sussequeently the order of suspension has been approved by the full Board vide its meeting dated 14th of September, 1995. In the said meeting the following persons / members were pesent:-

(1)S. P. Kochar—As Chairman

(2)S. P. Seth—As Member (Administration)

(3)C. N. Rai Yadav—As member (Technical)

(4)V. S. Dubey — As Ex-officio Member

(5)A. K. Upadhyay—Ex-officio Member.

It the time of argument, on the last date of hearing the counsel for the Board also produced one Standing Order No. 642 dated 29th of July, 1983. He also placed reliance an one unreported decision given by a Division Bench of this Court in the case of *Ajoy Kumar Prasad vs. Bihar State Electricity Board and otheres (1)*

10. In the aforesaid backgrund the counsel for the petitioner made the following submissions:-

According to him the Board has framed one Regulation known as 'Bihar State Electricity Board Service regulation,

(1) (1995) C.W.J.C. No. No 584 of 1993 (R) dispond fon 23.3.1995.

1976'. The same has been framed in terms with Section 79 (c) of the Electricity (Supply) Act, 1948. It was contended that the said 1976 Regualtion baing sitlent with respect to suspensions of an employee, like the petitioner, in contemplation of a departmental proceeding, the respondents had no jurisdiction to suspend the petitioner. The sounsel for the petitioner relied on the decision of the Supreme Court given in the Case of *Baradakanta Mishra vs. High Court of Orissa and other, reported in A. I. R. 1976 S. C. 1899* as well the case of *Tej Pal Singh* vs. *State of U. P. another reported* in I.L.R. 1986 S. C., 1814. It was submitted that though the inherent power may be there with the appointing authority, i. e. the Board to suspend the petitioner, but in that case they may not take work from him but will have to pay the full salary in his favour.

It was also urged that in any case, the Board have not issued he impugned Annexure-1, the same is without jurisdiction, having been issued by the order of the Chairman of the Board. The impugned Annexure-1 being without jurisdictions and illegal, such illegal order cannot be confirmed/approved even by the Board as they have done vide their resolution dated 14th of September, 1995.

11. So far as the natification no. 109 dated 16th of September, 1992 (Annexure-B-4) is concerned; it was submittd by the counsel for the petitioner that the power deligated to the Chairman by the Board under the said provision is in terms with Section 79 (K) of the Electricity Supply) Act, 1948. According to him as section 79 (K) of the Electricity (Supply) Act 1948 does not stipulate anything relating to suspension, the notification dated 16th of September, 1992 (Annexure-B-4) cannot be construed to be an instrument delegating such power of suspension to the Chairman of the Board. He placed reliance on section 79 (C) as well as Section 79 (K) of the Electricity (Supply) Act, 1948 and conteneded that at best Regulation can be framed thereunder by the concerned authority, but the power to suspension cannot be delegated under the aforesaid provisions.

12. So far as the Standing Order No. 642 dated 29th of July, 1983 as well as the unreported decision of a Division Bench of this Court given in the case of Ajoy Kumar Prasad (Supra) are concerned, as produced by the counsel for the Board before this Court, counsel for the petitioner submitted that the same are not applicable in the case of the petitioner. According to him the Standing Orders are issued as an instrument in terms with the Industrial Disputes Act, 1947. Such Standing Orders are applicable with respect to such employees of the Board, who are workmen and are guided by the Industrial Disputed Act, 1947. It was contended that the petitioner being an officer of the rank of General Manager-cum-Chief Engineer, he is not guided by aforesaid Standing Order dated 29th of July, 1983. According to him, it is only by virtue of service regulation framed under Section 79 (C) of the Electricity (Supply) Act, 1948, any condition of service can be laid down with respect to the petitioner. Further according to him, 1976 Regulation having been framed under section 79 (C) aforesaid, and no power having been deligated to the Chairman of the Board by the said Regulation, the Chairman had no jurisdiction to suspend the petitioner. So far as the unreported decision given by a Division Bench of this Court in the case of *Ajoy Kumar Prasad* (Supra) is concerned, it was submitted that as he was guided by the Standing Order, the said decision may be correct, so far as Ajoy Kumar Prasad is concerned, but cannot be made applicable in the case of the petitioner.

13. As stated above, the counsel for the Board reiterated his argument. According to him the power is vested with the Chairman of the Board, both vide notification No. 109 dated 16th of September, 1992 (Annexure-B-4) as well as by Standing Order No. 642 dated 29th of July 1983. He placed reliance on the decision given by a Division Bench of this Court in the case of *Ajoy Kumar Prasad* (Supra).

14. Admittedly, the impugned order of suspension, as contained in Annexure-1 cannot be construed to be an order

issued by the respondent Board. The counsel for the Board has also accepted that this order has been issued in fact by the order of the Chairman of the Board. Fur-ther, admittedly the same (Annexure-1) has been approved by the full Board vide its meeting dated 14th of September, 1995. In this background, it is to be tested as to whether the Chairman of the Board had jurisdiction to suspend an officer of the rank General Manager-cum-Chief Engineer or not.

So far as the notification. 109 dated 16th of September, 1992(Annexures P-4) is concerned, admittedly the same has been issued in terms with section 79 (K) of the Electricity (Supply) Act, 1948. In this background, whatever power that has been delegated to the Chairman by the said notification can be construed to be such power as can be exercised under section 79 (K) of the Electricity (Supply) Act, 1948. As Section 79 (K) of the said Act does not stipulate anything relating to condition of servoce and / or suspension, it cannot be accepted that the Chairman of the Board has been clothed with the power to suspend its employee, like the petitioner by virtue of the aforesaid notification dated 16th of September, 1992 (Annaxure-B-4). In this view, the contention of the petitioner is accepted to that extent and the submission made by the counsel for the Board is rejected.

15. So far as the Standing Order No. 642 dated 29th of July, 1983 is concerned, according to me, the submissions made by the counsel for the petitioner is incorrect. It will be evident from paragraph 4 of the Standing Order No. 642 date 29th of July, 1983 that the Rule 49-A of the Civil Services (Classification, Control and Appeal) Rules. 1930 has been adopted. Power has been vested not only with the appointing authority and/or to the Board but also to the Chairman of the Board to suspend any employee of the Board even in contemplation of a departmental proceeding. It will be further evident from paragraph- 6 of the said Standing Order no. 642 dated 29th of July. 1983, that the said standing order had been issued under the provisions of Section 79 (C) of the Electricity (Supply) Act, 1948. From the plain reading of the aforesaid Standing Order No. 642 date 29th

of July, 1983 it is manifest and clear that the said standing order cannot be construed to be an standing order issued under the Industrial Distptes Act, 1947, but is a 'Service Regulation' framed by the Board in terms with Section 79 (C) or the Electricity (Supply) Act, 1948. It has bee accepted by the counsel for the petitioner that the petitioner is guided by the Service Regulation of 1976, framed under section 79 (C) aforesaid. Such being the position if 1976 Service Ragulationis all in the metter of Suspension in centemplation of a departmental proceeding, It is laways open to the Board to supplement the same by issuing supplementary Service regulation under Section 79 (C) of the said Act, as done by Standing Order No. 642 dated 29th of july, 1983. This fact has already been taken into consideration by a Division Bench of this Court in the case of *Ajoy Kumar Prasad* (Supra). In the said decision this Court further held that Rule 96 of the Bihar Service Code having been adopted by the Board, there being specific rule, on suspension the Board's employes are entitled for only subsistence allowance and not the full salary. In the said decision this court also took into note that when the regulation was framed on 29th of july, 1983 there was no provision to notify the same in the gazette, which provision was framed subsequently in the year 1984 and thereby upheld the validity of regulation framed vide standing order dated 29th of July, 1983.

16. For the reasons stated above. I hold that the Chairman of the Board has got jurisdiction to suspend an employee, like the petitioner, in contemplation of a departmental proceeding and for such suspension even no approval is to be taken from the Board. The impugned order of suspension dated 22nd of August, 1995 (Annexure-1) having been issued by the order of the Chairman of the Board, I find no illegality in the said order.

17. Accordingly, there being no merit in the writ application, I dismiss the case.

R. D. Application dismissed.

LETTERS PATENT

Before B. L. Yadav and Shashank Kumar Singh, JJ.

1995

November, 15

Chandra Mohan Jha & another.*

v.

Awadh Kishore Sharma and ors.

Letters Patent of the Patna High Court—clause 10—appeal under, whether maintainable against order which is not 'judgment' as occuring in clause 10.

On a plain reading of the last three paragraphs of the impugned order, it can not be said that the effect of the order in the proceeding is to put an end to the said proceeding, so far the court passing the impugned order is concerned. The effect of such order is also not that the proceeding will end if the impugned order is not complied with. The impugned order cannot be said to be a decree which finally concludes/terminates the proceeding.

Held, that analysing the true nature of the impugned order, it can not be said to be a judgment within the meaning of the word 'Judgment' occuring in clause 10 of the Letters patent of the Patna High Court. This Letters patent Appeal, is consequently not maintainable Case laws discussed.

Appeal under clause 10 of the Letter Patent of the Patna High Court.

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

*Letters Patent Appeal No. 674 of 1995. Against the order 11.7.1995 passed by Hon'ble Mr. Justice Radha Mohan Prasad in M. J. C. No. 933 of 1994.

Against the order dated 11.7.1995 passed by Hon'ble Mr. Justice Radha Mohan Prasad in M. J. C. No. 933 of 1994.

Mr. J. P. Shukla, Sr. Advocate for the appellants.

Mr. Rameshwar Prasad, A. G.

Mr. K. P. Yadav, S. C. 6. for the State

M/s Umesh Prasad Singh, Sr. Advocate

Birendra Kant Choudhary and Bipin Bihari Singh, Advocates, for the respondents,

Shashank Kr. Singh, J. The instant appeal has been filed under clauss-10 of the Letters Patent of the Patna High Court against the order dated 11.7.95 passed by a learned single judge in an application filed under Article 215 of the Constitution of India bearing M. J. C. No. 933/94.

2. Respondent No. 1 in the instant appeal filed a writ application being C. W. J. C. No. 11754/92 for issuance of a writ , order /direction commanding the respondents to the writ application for refund of the dearness allowance deducted from salaries of the employees from 1.1.1979 to 28. 2. 1990, for payment of Group Saving General Life Insurance policy monthly premium from 1990, the Group Gratuity premium of L. I. C. from 1990, the interim relief from 1.1.1988 instead of 1.1.1988; the enhanced allowance of House rent from 1.12.1986 instead of 30.6.92 and further arrears of salary on the basis of 5th pay revision from 1.3.1989 along with dearness allowance from July, 1991.

3. The aforesaid writ application was contested by the Respondent-Corporation by filing a counter-affidavit on behalf of the Chairman as well as the Managing Director of the Corporation No. counter-affidavit was filed on behalf of the State of Bihar and /or Agriculture Production Commissioner or the Finance Commissioner, who were respondent Nos. 1,2 and 5 respectively in the said writ application the inspite of sufficient

opportunity granted by the court of sufficient opportunity granted by the Court and their being represented through counsel.

4. In the return filled on be half of the Corporation the claims regarding payment of salary up-to date, deferred dearness allowance from 1.3.79 to 28.2.90 and group saving linked Insurance from 1990 onwards were not disputed-similarly, with regard to other claims viz enhanced house rent allowance, dearness allowance and interim relief were also not disputed. The Corporation disputed only with regard to the date of implementation. It was also not disputed that no salary had been paid right from November, 1992 to the employees of the Corporation.

5. The only stand taken by the Corporation for not discharging its legal duty and obligation by making payment of the lawful dues to the employees of the Corporation was non-availability of funds.

6. It was submitted on behalf of the Corporation that the Corporation and been taking all possible steps to apprise the state Government with regard to its financial condition and for grant of fund but till today no fund could be made available by the State Government and. as such, the Corporation is not in a position to make payment of the aforesaid dues to its employees.

7. The learned single Judge by order dated 19.4.1994 allowed the aforesaid writ application and directed the State of Bihar, Agriculture Production Commissioner and the Finance Commissioner, Respondent Nos. 1.2 and 5 respectively to the said writ application to forthwith release the fund, it there is any liability of the State for the same to the Corporation so that lawful dues payable to the employees of the Corporation could be made. Further this Court directed the Chairman and the Managing Director of the corporation, Respondent Nos. 3 and 4 to the said writ application to pay all the lawful dues payable

to the corporation within one month from the date of judgment order.

8. The writ petitioners, thereafter, filed a representation along with a copy of the aforesaid judgment and order for necessary compliance. When no action was taken by the Respondent-State of Bihar and its Officers, the writ petitioner again moved this court by filing an application under Article 215 of the Constitution of India for initiating a proceeding for contempt against the opposite parties for disobedience of the order passed by this Court in the aforesaid writ application hearing C. W. J. C. No. 11754/92, which was registered as M. J. C. No. 933 of 1994.

9. The learned Single Judge, after hearing the petitioners of the said contempt application, issued notices to the opposite parties of the said contempt application. Show cause was filed on behalf of the opposite parties.

10. After hearing the counsel for the parties, the learned single judge under order dated 11th July, 1995 held that the State authorities did not act fairly and their intention was not to comply with the direction of this Court passed in the aforesaid writ application, which amounts to a gross contempt. However, in the facts and circumstances of the case, the learned Single judge by way of last chance gave opportunity to the contemner, Sri C. M. Jha, who was opposite party no.1 (Appellant No.1 herein), sachchida Nand Sinha, who was opp. party no. 2 (appellant no.2 herein) and the other opposite parties to purge themselves of the contempt by complying with the direction given in the said writ application and to report the same with in a week failing which, necessary order imposing punishment would be passed against them. Accordingly, the learned single Judge adjourned the aforesaid M.J.C. application to 18th of July, 1995 and directed all the contemners to appear in person in Court.

11. Aggrieved by the aforesaid order dated 11th of July, 1995, opp. party nos. 1 and 2 of the said contempt application

preferred the instant appeal.

12. Originally the appellants filed the instant appeal under section 19 of the Contempt of Court Act, 1971, which was registered as Contempt Appeal No. 280/95.

Subsequently they amended the memorandum of appeal by converting the aforesaid contempt appeal as a Letter Patent appeal under clause 10 of the Letters Patent of Patna High Court. Accordingly, Letters Patent Appeal No. 674/95 was registered.

13. At the time of hearing of the instant appeal, an objection was raised on behalf of the Respondents that the present appeal is not maintainable and, as such, the same is fit to be dismissed on that count along. The aforesaid objection regarding non-maintainability of the appeal was contested by the appellants. According to the learned counsel appearing on behalf of the appellant, the appeal was maintainable.

14. Thus the first question to be decided is as to whether this appeal is maintainable or not. In other words the question is as to whether the appeal lay against the order dated 11th July, 1995 in the said M. J. C. 933/94.

15. The instant appeal has been filed under clause 10 of the Letters Patent of the Patna High Court and not an appeal under section 19 of the Contempt of Court Act but we are conscious of the view that it is by now well-known that levelling of a petition is not very relevant. It is to be seen, as to whether the appeal is maintainable either under clause-10 of Letters patent jurisdiction or under Section 19 of the Contempt of Court Act.

16. Firsts take up an to whether an appeal lay under section 19 of the sub section (1) of the Contempt of Court Act against the aforesaid order dated 11th of July, 1995 or not? sub Section (1) of Section 19 provides for an appeal against any order or decision, which runs thus.

"19 (1) An appeal shall lie as of right from any order of decision of High Court in the exercise of its jurisdiction to punish for contempt-

(a) where the order or decision is that of a single judge, to a Bench of not less than two Judge of the Court

(b) where the order or decision is that of a Bench, to the Supreme Court,

Provided that where the order or decision is that of the Court of the Judicial Commissioner in any Union territory, such appeal shall lie to the Supreme Court."

From perusal of the aforesaid provision, it is manifest that an appeal lies under section 19 (1) of the Act against an order or decision of a High Court concluding the contempt proceeding . The concluding stage is the stage contemplated by clause (d) of section 14 of the said Act where the Court exercises the jurisdiction to make an order for punishment or discharge of the present accused or contempt. It is to that stage of the exercise of jurisdiction that sub-section (1) section 19 refers.

Sub-Section (1) of Section 19 of the Contempt of Courts Act provides for an appeal against a decision of the High Court in exercise of its jurisdiction to punish for contempt. Consequently, as appeal would lie only when the jurisdiction to punish for contempt has been exercised and the contemmner has been punished. The aforesaid view finds support from yet another angle. Sub section (2) of section 19 of the Act gives power to the appellate court to stay the execution and suspend the sentence. The contingency enumerated under sub section (2) of section 19 of the Act would only arise in case where a person has been found guilty of contempt and has been punished.

17. Prior to final conclusion of the proceeding in our opinion an appeal is not maintainable under section 19 (1) of the said Act.

18. The learned single Judge by the impugned order has only held the contemners did not act fairly and their intention

was not to comply with the direction of this court given in the said writ application, which amounts to gross contempt, but at the same time and by the same order, the learned single judge adjourned the matter to 18th July, 1995 and gave opportunity to the contemners to purge the contempt by complying with the said direction of this Court in the said writ application.

19. From a plain reading of last three paragraphs of the impugned order, it is manifest that the learned single Judge till then has not exercised jurisdiction to make an order for punishment or discharge of the present accused of contempt. That state was still to come, Since the same has not reached, in my opinion, an appeal under section 19(1) of the Act will not lie.

20. A Division Bench of the Allahabad High Court in the case of Kuldip Nr. Lal. v. Mahendra Pal Jain & another (1984 Cr-Law Journal-1243) held that an appeal would lie only when the jurisdiction to punish for contempt has been exercised and the view of the Punjab and Haryana High Court in the case of R. P. Bhardwaj & another-v. Smt. Kiran Aggrawal and others, reported in 1989 Cr. L. W. Jounrnal-481. In the case of L. D. Khanna and ors-v-M/s Chohan Huhtameki (india) Pvt. Ltd. Chamtaghat and others (1977) Cr. Law journal-1530), R.S. Pathak, the then Chief Justice of Himachal Pradesh High Court also held the same view. in A.I. R. 1976 S. C 1206 (Sarada Patna Mishra-vrs- Orissa High Court), the Supreme Court held that only those orders or decisions in which some point is decided or finding is given *in the exercise of jurisdiction the High Court to punish for contempt* are appellants under section 19 of the Act.

21. In view of the several judicial pronouncements I hold that an appeal under section 19(1) of the Act is not maintainable against the impugned order.

22. The next point is as to whether this appeal is maintainable under clause 10 of the Letters Patent jurisdiction or not. clause 10 of the Letters Patent of Patna High Court run thus :

"10. And we do further order in that an appeal shall lia to the said High Court of Judicature at Patna from the judgment (not being a judgment passed in the exercise of appellate jurisdiction in respect of a decree or order made in the exercise of appellate jurisdiction by a Court subject to the Superintendence of the said High Court, an not being an order made in the exercise of revisional jurisdiction, and not being a sentence or order passed or made in the exercise of the power of superintandence under the provisions of section 107 of the Government of India Act, or in the exercise of criminal jurisdiction of one Judge of the said High Court or one Judge of any Division Court, pursuant to Section 108 of the Government of India Act, and that notwithstanding anything hereinbefore provided an appeal shall lie to the said High Court from a Judgment of one judge of the said High Court or one judge of any Division Court, pursuant to section 108 of the Government of India Act, made on or after the first day of February. One thousand nine hundred and twenty nine, in the exercise of appellate jurisdiction in respect of a decree or order made in the exercise of appellate jurisdiction by a Court subject to the superintandece of the said High Court, where the judge who passed the judgment declares that the case is a fit one for appeal, but that the right of appeal that the right of appeal from other judgments of Judges of the said High Court or of such Division Court shall be to us, our Heirs or successors in or their Privy Council, as hereinafter provided".

From a plain reading of the aforesaid clause 10 of the Letters patent of the High Court which is similar to clause-15 of the Letters Patent of the Calcutta Bombay and Madras High Courts will be manifest that an appeal lay only if the order in question can be held to a judgment within the meaning of clause-10 of the Letters Patent. Thus it seen is to whether the impugned order can be said to be judgment within the meaning of the Letters Patent of this Court or not.

23. Thus are numerous decisions showing a great diver-

gence of Judicial opinion on the meaning and interpretation of the word "Judgment" in different clauses of the letters Patent of the High Court. In one of the leading cases. The Justices of the Peace for the Town of Calcutta-vrs-The Oriental Gas Company Limited (17, Sctherland-354) Couch Chief Justice held that the judgment in clouse-15 means a decision which affects the merits of the questions between the parties determining some right or liability.

24. Subsequently in another celebrated decision rendered by sir Arnold White Chief justice, in the case of Tulze Ram now-Vrs- Algepps Chettier reported in I. L. R. 35, Madraas-1, held as follows :

"The test seems to me to me to be in what is the form of the adjudication but what is its affect in the suit or proceeding in which it is made. If its effect, whatever its form may be and whatever be the nature of the application on which it is made is to put an end to the suit or proceeding so far as the court before which the suit or proceeding is pending is concerned or if is affected, if it is not complied with, is to put an and to the suit or proceeding think the adjudication is a judgment within the meaning of the clause and adjudication on an application, which is nothing made than a step towards, obtaining a final adjudication in the suit is not, in my opinion, a judgment within the meaning of letters patent".

Sir John Moge in the case of Sewak Jeran Chod Bhogi Lal-vrs The Decor Temper Committee reported in A. R. 1915 Privy Council-155 held that the term judgment, in the letters patent of the High Court means in Civil cases a decree and in judgment in the ordinary sense. Similarly, Sir Arthur page, Chief Justice of the Rangoon High Court in the case of Daya Bhai Jeevan Das-vrs A. M.M. murugappn Chattiur reported in A. I. R. 1935, Rangoon-267 (F. D.) observed as follows-

"I am of the view that in the letters Patent of the High Court the word 'Judgment' means and is a decree in a suit by which the

rights of the Parties at issue in the suit are determined".

Although the true interpretation of the word judgment again erase for consideration in the case of Ashumti Davi Vr. Kr. Rupendra Deo report in A. I. R. 1953 S. C. 198, but the Supreme Court refrained from giving an e-xhaustive definition of the 'judgment' as used in letters patant.

This court in the case of Govind Lal- vrs. Administrator of Bihar reported in A. I. R. 1955 Patna-56 agreed with the view deferred to by Sir Arthur page, chief Justice of Rangoon High Court in the case reported in A. I. R. 1935 (supra). This court held that the aim of 'judgment' in the letters patent Appeal of the High Court means decree and not order.

The term judgment has been defined in the Civil Procedure Code but that definition does not apply to he work as occurring in letters patent. The language of Letters Patent is not the language of the Indian Legislature but the language of English lawyer as it was used amongst them.

Again in the case of State of Uttar Pradesh and others-vrs. Dr. Vijay Anand Maharaj Reported in A. I. R. 1967 S. C. 946, the question arose about scope of the expression judgment occurring under clause-15 of the letters Patna in the High Court of Calcutta, Bomaby and Madras. The Supreme Court after considering various judgment of different Courts held that the definition given by the Madras High Court in the report reported in I. L. R. 1935 Madras (1) (supra) is wider than that given by the Calcutta High Court in the case reported in W. Bengal-433 (supra). However, the decision or no give a definition of its own.

25. In my opinion the test laid down by the Madras High Court as well as the Rangoon High Court and the Privy Council referred to above is correct interpret of the word 'judgment' occuring in clause-10 of the letters Patent of this Court.

26. Keeping in view the aforesaid decision correct scope and definition of the word 'judgment' it is to be seen as

to whether the impugned order is a judgment with the aforesaid meaning of clause-10 of the letters Patent of this court or not.

27. On a plain reading of the last three paragraphs of the impugned order, it cannot to said that the effect of the order in the said proceeding is to put an and to the said proceeding, so far the Court passing the impugned order is concerned. Over and above the affect of such order is also not that the said proceeding will and, if the impugned order is not complied with. The said order cannot be said to be decree which finally concludes / terminates the proceeding.

28. Analysing the true nature of the impugned order vis-a-vis the test laid down by the Madras High Court, in my opinion, the impugned order cannot be said to be a 'judgment' within the meaning of word 'Judgment' as occurs under clause 10 of the Letter Patent of this Court.

29. Consequently, the letters Patant appeal is not maintainable against the impugned order.

30. Learned Counsel for the appellants to buttress his submission that the appeal under clause 10 of the Letters Patna is maintainable has referred to decisions of the Supreme Court reported in A. I. R. 1978, S. C. 1014, A. I. R. 1971, S.C.2337, A. I. R. 1970, S. C. 1350 and A. I. R.1955. S. C. 507.

3. In the case of A. I. R. 1978 S. C. 1014 (Supra) the Supreme Court held that under sub section (IX of Section 19 of the Act, an appeal shall lie to the Supreme Court as a matter of right for any order or decision of a Bench of the High Court, if the order has been made in the exercise of its jurisdiction to punish for the contempt.

32. I have already held earlier that since by the in impugned order, the learned single Judge has not exercised his jurisdiction to punish for contempt, an appeal under section 19 (1) of the Act is not maintainable. in my view the aforesaid decision does not help the appellants.

33. The another decision reported in A. I. R. 1971, S. C.

2337, in which the scope or an a order under order-31 Rule 90 was the subject matter of consideration and in my view the ratio descerdes has got he bearing so far as the instant matter is concerned.

34. The other tow decisions relied upon by the learned counsel for the appellant, i. e., A. I. R. 1970, S. C. 1350 (supra) and A. I. R. 1955, S. C. 507, were regarding order arising Act of companies Act and in that connection the Supreme Court held in those cases that the orders were appealable in the facts and circumstances of the case. None of the aforesaid tow decision help the appellants.

35. In view of the aforesaid finding, I am of the view that the impugned order is not a judgment and, a such, the appeal filed under clause 10 of the Letters Patent of the Patna High Court is not maintainable.

36. Accordingly, I hold that this appeal is not maintainable and the same is dismissed. Since I have held that the appeal in not maintainable, it is not necessary for me to give any opinion on the merit of the case.

37. It is needless to say that the interim order passed on 14.7.95 shall automatically stand vacated. The

38. As pursuant to the order of the learned single Judge dated 11th July, 1995, the appellants were directed to appear in person in court on 18th July, 1995, as such, it M. J. C. no. 933/94 be placed before the learned Single Judge for passing appropriate orders.

S. L. Yadav, J. I agree

R. D. Appeal petitioner

CIVIL WRIT JURISDICTION

Before Choudhary S. N. Mishra, J.

1994

November,24

Dr. Indra Shekhar Thakur.

v.

The State of Bihar and orthers.*

Appointment to the post of Assistant Professor in General Surgery—two years teaching experience gained by the writ-petitioner in King George Medical College, Lucknow, whether to be counted for the purpose of appointment to the above post—acceptance of research paper submitted by the writ-petitioner, before the last date for filing of application for the above post, whether the petitioner eligible for the points claimed by him for that—whether writ-petitioner entitled to two point for obtaining Ph. D. Decree on the parity of reasoning as for research papers—clause 3 (ga) of the advertisement for the post—inter-pretation of.

The writ-petitioner took admission in Master in General Surgery Course in King George Medical College, Lucknow after obtaing permission from State Government. He worked in Residency Scheme in the said college with effect from 17.8.1985 to 29.10.1987 and as a Residency fllow, rendered teaching work for more then two years and in token of having rendered teaching work, was granted a certificate to that effect by the Head Department of General Surgery, of the Said College.

Held, that the teaching experience gained by the writ-petitioner in King George Medical College, Lucknow is to be counted for the purpose of consideration for appointment to the post of Assistant Professor in Medical College in the State of Bihar.

Dr. S. K. Verma v. The State of Bihar (1) and Dr. Ashim Kumar Bose v. Union of India and ors. (2)—followed.

* Civil Writ Jurisdication Case No. 3459 of 1994. In the matter of an application under Articles 226 and 227 of the Constitution of India.

Where by an advertisement issued on 25.7.1992 the State of Bihar called for applications for appointment to the post of Assistant Professor General Surgery/Registrar General Surgery in Medical College in Bihar fixing the last date of application to be 31.8.1992 but the cut of date for fixing the qualification of a candidate was 31.1.1992;

Held, that it is manifest from a perusal of clause 3(ga) of the advertisement that if research paper submitted by applicants is accepted for publication, the candidate is eligible to submit the acceptence report till the last date of submission of application ie, 31.8.1992. It is admitted position that all the research papers authered by the writ-petitioner were accepted for publication and published before the date of filing of application. The writ-petitioner admittedly annexed the certificate showing the acceptance of the said research papers for publication along with the application and, accordingly the writ-petitioner is eligible for the points claimed by him in this regard. The reasons assigned for not allowing the point against publication of research paper in the journals are fallacious and bereft of any any substance.

Ashok Kumar Sharma and ors. v. Chandra Shekhar and ors. (3) relied on.

Dr. Rita Sinha v. State of Bihar and ors. (4) and

Dr. Anil Kumar Sinha v. State of Bihar and ors. distinguished.(5)

The writ-petitioner submitted his thesis for Ph. D. on 1.11.1991 which was approved on 25.1.1992 and also approved by the External Examiners on 31.1.1992 ie. on the cut off date fixed for acceptence of qualification although the Ph. D. Decree

(1) (1992) 1 P. L. J. R. 657.

(2) (1983) A. I. R. (S. C.) 509.

(3) (1993) Supp.2 S.C.C 611

(4) (1990) 21 P L J R 243

(5) (1990) 1 P. L. J. R. 124

was awarded on10.4.1992

Held, that, on the parity of reasoning as stated in acceptence of research papers of the writ-petitioner, the writ-petitioner is entitled for 2 points for having acquired the Ph. D. decree in terms of advertisement.

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 Choudhari S. N. Mishra J.

Mr. P.K. Shahi, Advocate Forthe petitioner.

Mr. J. P. Karn, S.C. VII, *Mr. D. N. Mallik*, J. C. to S. C. VII for the State.

Mr. Tej Bahadur Singh, Advcate. *M. Anil Kr. Upadhyay*, Advcate or the intervenor.

Mishra, J. In this writ application the petitioner has prayed for the following relief, To issue an appropriate writ/order/direction commanding the respondents to consider the application of the petitioner for appointment to the post of Assistant Professor/Registrar, General Surgery against 1992 panel in accordance with the criteria laid down and notified in the advertisement no. 1997 (Swasth)-105 published in the Patna daily edition of 'Hindustan Times' on 25.7.1992 and to command the respondents to allow the petitioner the benefit of adding 12 points for publication of Journal, 2 points for ph. D., 2 additional points for teaching experience as envisaged in the cirteria duly notified by the respondents."

2. In order to appreciate the points raised by the respective parties, it is necessary to state some relevant facts The petitioner passed the M. B. B. S. examination in the year 1981 and secured 55.70% marks and distinction in Surgery, Pharmacology and Preventive Social Medicine. After obtaining the M. B.

B. S. degree he was appointed as Assistant Civil Surgeon by the order dated 4.8.1983. The petitioner thereafter applied for admission in M. S. General in any College out side the State of Bihar and after obtaining permission having been granted by the State, the petitioner took admission in M. S. General Surgery in King George Medical College, Luknow. He worked in Residency scheme in the said College with effect from 17.8.1985 to 29.10.1987 and as a Residency fellow he rendered teaching works for more than two years. In token of having rendered the teaching work for the aforesaid period, a certificate was granted by the Head of the department, General Surgery, King George Medical College, Lucknow, copy of which has been made Annexure-5 to this writ application. After completing the post graduate courses and the Residency in the aforesaid college at Lucnow, the petitioner Joined the State Health Service which was accepted by the State-respondent vide Memo No. 237 (3) dated 18.3.1988 with effect from 30.0.1987, copy of which has been made Annexure-6 to this writ application. The petitioner worked from 17.6.1988 to 27.9.1988 as Civil Assistant Surgeon, Primary Health Centre in the district of Madhubani. The petitioner worked as Tutor in the department of Pharmacology and also trainee Medical offacer in the department of Anesthesis, D. M. C. H. Darbhanga. Pursuant to the advertisement publicshed in the year 1997, the petitioner was selected and posted as Resident Surgical officer, department of Surgery, P. M. C. H. on 19.5.90 and since then he is working in the said hospital. Before joining the post of Resident Surgical Officer, the petitioner got himself registered for ph. D. in Surgery in L. N. Mithila University. He completed this course and submitted his thasis on 1.11.1991. His thesis was duly approved both by the External examinars as well as the Internal Examiners on 25.1.1992 respectively and finelly the petitioner was awarded a degree of ph. D on 10.4.1992. The receipt showing submission of thesis on 1.11.1991 is made Annexure-7 to this writ application. Seven

research papers of the petitioner were published in journals of the State and Indian Medical Journal, the details whereof are as follows :-

SL. No.	Name of Rearch Articles Published	Name of the Journal	Date of acceptance & volumme no. of Journal in which published.
I.	Observation on Appendicectomy	The Patna Journal of Medicine	12.5.92 No.66(5)126-127
II.	Observatin the Surgical Management of Sigmoid voluvlues with special reference to the single layer serosubmucosal Anastomosis.	–do–	12.5.92 66(7)146-147
III.	Typhoid Perforation- (A clinical study of prognostic Factors)	Indian Medical Journal	7.2.92 Vol. 86 30.3.92
IV.	Hydr. ased cyat	–do–	7.2.92 Vol. 86 4.4.92
V.	Malignant Lymphome of the chest wall.	–do–	7.2.92 vo. 86. 4.4.92
VI.	Chycolymphatit Nasentric Cyst children	–do–	7.2.92 vol. 86.5.5.92
VII.	Observation n Serum copper levels in Mal ignant condition of the body	–do–	7.2.92 vol. 86 6.6.92

The aforesaid facts have not been denied either by the State-respondent or by the intervenor.

3. The State-respondent through advertisement invited application for preparing a panel for appointment to the various teaching posts in the different Medical colleges of the State including Assistant professor/Registrar, General Surgery, A copy of the aforesaid advertisement is made Annexure-1 to this writ application. Pursuant to the said advertisement /notice (Annexure-1) the petitioner applied for the post aforesaid claiming the following points in terms of Annexure-1.

M. B. B. S.-65.70% and above-	4 points.
Subject paper (General Surgery) 75.01% &above	5. Points.
Honours. (General Surgery, Pharmacology & P. S. M.)-	4. Points.
Rural Service-	3 Points.
Teaching experience-	3 points.
post Graduation (M. S. General Surgery & ph. D. (Surgery)-	6 points.
Publication of Journal-	12 points.
	37 points.

4. It may be mentioned here that the advertisement publication in the news paper dated 30.8.92, copy of which has been made Annexure-12 to the writ application, whereby it has been provided that the candidates should possess three years teaching experience in the subject concerned for the post of Assistant professor. The application received pursuant to the advertisement (Annexure-1) were processed in the department of health and the provisional panel of the applicants for the post of Assistant professor and Registrar was circulated for the purpose of inviting objection. The petitioner's name was not included as eligible candidates in the panel for the post of Assistant professor. However, in the provisional panel of Registrar the petitioner's name was at serial no. 10 allowing total 21 points to him. Copy of the provisional panel of Assistant profes-

sor and Registrar, General Surgery have been made Annexures-8 & 9 to this writ application. The petitioner, accordingly, filled two separate objection, one against exclusion of the name in the panel of Assistant professor and other objection regarding not allowing him the points for his teaching experience, ph. D. degree for he post of registrar, General Surgery. The representations filed by the petitioner (Annexures 10 & 11) were rejected whereby the petitioner was not allowed points for his teaching experience in King George Medical College, Lucknow, Ph.D.. degree and publication of journals. The said representations filed by the petitioner (Annexures 10 & 11), as stated above, were finally rejected by the Minister Incharge of the department by his order date 23.3.94 (Annexure-13)

5. Counter affidavit has been filed behalf of the respondent State wherein, inter alia, it is stated that the petitioner did never submitt his claim in the manner in which he made prayer in the present writ application. It is further stated that the teaching experience acquired by the petitioner at King George Medical College, Lucknow, is not permissible to be count in terms of the criteria laid down by the State Government for the post of Assistant professor. It is further stated the petitioner was during the course of P. G. studies at Luknow in the panel of 1987 and 1991. It is stated that some of the candidates were allowed the benefit of point on the basis of qualification and other achievements acquired by them after cut off date. It has also been stated that another doctor one Dr. Viney prasad was allowed teaching experience acquired by him out side the State during the P. G. studies. As regards points for publication of research papers in the journals, it is stated that the petitioner is not eligible for publication as Principal author, were published after cut off date. Similarly it is stated that the petitioner is not entitled for any additional points for having ph. D. Degree which he acquired after cut off date.

6 On a prayer made by the intervenor by filling a petition, this court by its order dated 6.5.94 has directed the

intervenor to be impled as party respondent in this case and, accordingly, he has filed counter affidavit almost in the same line as of State-respondent. The apprehension of the intervenor is that since his name finds place at serial no. 1 in the provisional panel for the post of Assistant Professor having allowed 36 points in total, his position may be reduced if the petitioner's prayer is allowed and on that apprehension he has filed the intervenor application.

7. The petitioner filed reply to the counter affidavit both by the State as well as the intervenor disputing the averment made in those counter affidavits which are contrary to the stand taken by the petitioner in the main writ application and further it is stated that in terms of the recommendation of the Medical Council of India the teaching experience accuired by the petitioner in the King George Medical College, Lucknow, is to be counted in terms of the criteria laid down by the Medical Council of India. The extract of recommendation of the Medical Council of India is made Annexure-15 to the reply to the counter affidavit, which reads as follows :-

"The teaching experience of postgraduate students who are (1) holding teachin appointments, or (2) holding beds under their charge; or (3) doing tutorial work, may be considered as teaching experience for purposes of appointment of lecturers in Medical College. "Lacturers are equivalent to Assistant Professors.

In short it is stated that according to the terms of the advertisement (Annexure-) although for the post of registrar, no point is admissible for publication of journal where as such point is available only for being considered for the post of Assistant Professor. The petitioner having applied for both the posts, is therefore, entitled for total 25 points for the post of Registrar and 37 pointed for the post of Assistant professor.

8. On the basis of the aforesaid pleadings learned counsel for the petitioner has submitted that admittedly the petitioner acuried such required teaching xperience in course of

P. G. studies as well as residency schme has to be counted for the purpose of preparing panel for the appointment of Assistant Professor, in terms of the advertisemens (Annexure-1) as also in terms of the regulation framed by the Medical Council of India. Learned counsel submits, in course of argument, that it is not the requirement in terms of Annexure-1 that the teaching experience must be required while posted against teaching based cadre. Such teaching experience acquired in any recongised Medical colleges will have to be teken into consideration for the purpose of such appointement. The King George Medical college, Lucknow, is one of the recongnised medical college where the petitioner has rendered teaching work as residency, cannot be deprived of such teaching experience. In support of his contention learned counsel has relied upon a Division Bench decision of this Court in a case *Dr. S. K. Verma vs. State of Bihar* (1) reported in 1992 (1) PLJR 657, wherein their Lordships after taking into consideration the law laid down in the case of *Dr. Ashim Kr. Bose.* vs. *Union of India and others* (2) reported in 1983 SC 509, has held that there is no difference as to whether the teaching experience acquired on regular appointment or in any manner in a teaching hospital actual teaching experience acquired, in such teaching hospital has to be taken into consideration for computing actual teaching experience accquired by the candidate.

9. Learned counsel appearing on behalf of the State has submitted on the basis of the pleadings aforesaid that the teaching experience acquired by the petitioner from the King George Medical College, Lucknow cannot be counted for the purpose of preparing the panel for appointment on the post of Assistant Professor, as the same is not in accordance with the rules framed by the State Government. He has relied upon the various clauses of the advrtisement (Annexure-1) and similarly he submits that the petitioner is also not entitled any point for

(1) (1992) (1) P. L. I. R. 657

(2) (1983) S. C. 509.

publication of his research in the journals as well as the ph. D. degree were published and obtained after cut off dates.

10. The learned cansel for the intervenor, on he other hand, submitted that the petitioner is not entiltled for the additional points as he was not appointed against a regular teaching post, inasmuch as in Bihar such points are allowed only if he\she holds regular teaching point.

11. The question that falls for consideration is whether the petitioner is entitled, for points for the teaching experience which he has gained at Lucknow Medical College. In this connection it may also be mentioned here that the petitioner was an applicant for the point of Residency Surgical Officer angianst 1987 panel where he was allowed two points against the teaching experience and similarly in the year 1991 also he was the applicant for the post of Renistrar, General Surgery wherein he was allowed two points against teaching experience. From the pleadings it appears that in a similar situation the other docors were allowed such benefits who obtained the teaching experience in a similar situation outside the State of Bihar.

12. After taking into cnsideration all the submission advanced on behalf of the petitioner as well as the State counsel and intervenor and also on relying the aforesaid decisions, I am of the definite view that the teaching experience, gained by the petitioner in King, George Medical College, Lucknow is to b counted for the purpose of consideration of appointment on the post of Assistant Professor. Having heard the parties, and the material available on the record, it is difficult to support the action taken by the repondent in holding that the teaching experience gained by the ptitioner in King George Medical College, Lucknow cannot be taken into cocideration. This view of mine is also surpported by the decision of this Court. in the case of *Dr. S. K. Verma* vs. *State of Bihar* (supra).

Publication of research papers in Journal 12 points.

How coming to the publication f seven research papers in

Journals of the State and Indian Medical Journals, it is submitted on behalf of the counsel for the petitioner that the petitioner made valuabble contribution and his seven papers were published in jornals of the State as well as in the Indian Journal, details whereof have been already mentiongd in the aforementioned paranraphs. Learned Counsel, accordingly, submitts that the petitioner is enntitled for 12 points in terms of the criteria laid down in Annexure-1 to the application. As against this, the learned counsel for the in tervonor submitts that claim for 12 points for publication of reasearch papers in the journal is misconceived inasmuch as the papers published after cut off date are not to be taken into consideration for preparing the panel for appointment on the post of Assistant professor. In order to appreciate the points raised by the parties it is relevant to mention relevant dates for the pepose of deciding the points in is issue. There are two cut off dates mentioned in the advertisement, one is for filing application and other for the qualification, namely, 31,8,92 in the date for making application for appointment on the post of Assistant professor and the other cut off date 31,1,92 was date for fixing the qualification of the candidates. It is a submitted that before the data of filling of the application in terms of Annexre-1 the research papers authored by the petitioner were accepted for publication. The different dates by which the papers were accepted for publication have been mentioned in paragraph-15 of the petition, which go to show that all those papers were accepted before the date of filing of the application, as submitted by the learned counsel for the petitioner. The learned counsel on behalf of the State as well as the intervenor submits that since the research papers were not published before the date fixed for accepting the qualification of the candidates, the benefits for publication of research papers cannot be allowed to the petitioner. In support of his contentiongd learned counsel refered to clause 15 of Annexure-1 and submits that the cut off date fixed for accepting the qualification of the candidates is 31.1.92, beyond that any qualification acquired by the candidates could not be takn into consideration. Learned counsel for the petitioner, on the other hand, relied upon clause

3 (ga) of Annexure-1. It is manifast from perusal of clause 3(ga) that if such research paper is accepted for publication the candidate is eligible to submit the acceptance report till the last date of submission of application, ie. 318.92. It is admitted position that all the research papers authred by the petitioner were accepted for publication before the date of filing application and also finally published before the said date. The petitioner admittedly annexed the certificate showing the acceptance of the said research papers for publication along with the application, and accordingly the petitioner is eligible for the points as claimed. On the basis of, the submissions raised by the counsel for the parties. I have considered both the clauses, namely, 3 (ga) and 15 of Annexure-1. It appears to me that clause 3 (ga) has an overriding effect as it specifically deals with the publication of Journal where as clause 15 lays down general terms and conditions and accordingly the provision contained in clause 3 (ga) will prevail over clause 15. The reasons assigned for not allowing the points against publication of research papers in the journals are fallacious and bereft of any substance contrary to the provision of Annexure-1. learned counsel appearing on behalf of the patitioner ralied upon a decision in a case of *Ashok Kumar Sharma and others* vs. *Chandra Shekher and others* (1) reported in 1993 Suppy, vol 2 S. C. C. page 611. Somewhat similar question came up for decision before the Apex court. The question falls for consideration before their lordship was whather or not candidates who were fully qualified to be appointed as Junior Engineers on the date of interview but whose results has not been declared on the date of submission of their application/ were entitled to be considered for appointment to the post of Engineers. Their lordships after taking into consideretion all aspects of the matter have held as follows :-

"That fact is that the appellants did pass the examinations and were fully qualified for being selected prior to the date of intexview. By allowing the appellants to sit for the interview and by their selection on the basis of their comparative merits, the

1. (993) Supp 2 S. C. C. 611

recruiting authority was able to get the best talents available. It was certainly in the public interest that the interview was made as broad based as was possible on the basis of qualification. The reasoning of the learning single Judge was thus based on sound principle with reference to comparatively better candidates who were fully qulification on the date of selection were not regested, notwithstanding that the result of the examinations in which they had appeared had been deleyed for no fault of theirs. The appellants were fully qualified on the dates of the interview and principle of Rule 37 in the State of Jammu & Kashmir, we are of the opinion that the technical view adopted by the learned Judges of the Division Bench was incorrect and the view expressed by the learned single Judge was, on the facts of this case, the correct view. Accordingly, we set aside the impugned judgment of the Division Bench and restore that of the learned single Judge. In the result, we uphold the results announced by the recruiting authority. The appeal is allowed in the above terme. However, we make no order as to costs."

Learned counsel for the intervenor, on the other hand, had relied upon a decision in the case of *Dr. Rita Sinha* vs. *State of Bihar* (1) reported in 1990 (2) PLJR 243 and also in the case of *Dr. Anil Kumar Sinha* v. *State of Bihar* (2) reported in 1990 (1) PLJR124. In suport of his submission that since the date of eligibility fixed i. e. 31.1.91, the petitioner has righlty been denied the points as claimed by him on this issue. There decisions, my view do not deal with the point involved.

I have heard learned counsel for the petitioner, State as well as the intervenor and after going through the relvent clauses of Annexure-, I am of the view that the petitioner is entitled for the apoints as claimed by him on this head. This view of mine is also supported by the law laid down in the *Ashok Kumar Sharma's* case (supra).

14. ph.D.–2 Points.

The petitioner claiming two point for having ph. D. degree which have not been allowed on the same ground as has been centioned while dealing with the points relating to publication of

(1)(1990) (2) PLJR243

(2) (1990) (1) P. L. J. R. 124

research papers, in as much as the petitioner acorded ph. D. degree after 31.1.97 i. e. after cut off date fixed for acception the qualification. In this connection statement made in paragraph 14 of the with application is relevant where from it appears that the petitioner submitted his thesis on 1.11.91, which was approved on 25. 1.92 and also approved by the External Examiners on 31.1.92 i. e. on the cut off fixed for acceptance qualification. Although the ph. D. degree was awarded on 10.4.92. This statement has not been denied either by the State or by the intervenor. Accordingly, learned counsel for the petitioner felying on the aforesaid Ashok Kumar Sharma's case (supra), submits that the petitioner is entitled for 2 points as claimed by him on this head. Learned counsel for the intervenor, with reference to the statement made in paragraph 14 of the counter affidavit, submits that actually ph. D. degree was confined & after cut off date for acception the qualification and as such the petitioner is not entitled for any point fo having acqured ph. D. degree after cut off date.

After having heard learned counsel for the parties and after having relied on the law laid down by the Apex court in the *Ashok Kumar Sharm's* case (supra) and also the reasons assioned while dealing with publication of research papers. I am of the view that the petitioner is entitled for 2 points for having acquired the ph. D. degree in terme of Annexure-1 aforesaid.

15. According, it is held that the petitioner is entitled for the points for teaching experience, publication of Journals and having ph. D. degree, which have been illegally and arbitrarily refused to him while preparing teh provisional list for appointment on the post of Assistant Professor. Let, therefore, a writ of mandamag be issued direction the respondents to reconsider the case of the petitioner in the light of the observations / direction as above.

16. In the result, this writ application is allowed but in the facts and circumstances of this case, there shall be no order as to coats.

R. D. Application allowed.

REVISIONAL CIVIL

Before Narayan Roy, J.

1994

1994 Desember, 5.

Most Bibi Hassan Bano*

v.

Ram Tawakya Sharma and another.

Code of Civil Procedure, 1908 (Central Act no. v of 1908) Order 26 Rule 1 read with section 132—provisions of—materials on record disclosing that the lady appared before Public and mixed with people, whether entitled to the issuance of commission for her examination as a witness in the suit.

Where the petitioner filed application under Order 26 Rule 1 of the Code of Civil Procedure, 1908, hereinafer referred to as the Ccode, read with section 151 of the Code for issuance of commission for her examination in the suit as a witness, at her residence as she was pardanashin lady and was 60 years old and was not keeping good health:

Held, that there were materials on record to show that the petitioner being a paradanashin lady appeared before public and was mixing with common people and in such circumstances her application under Order 26 rule 1 of the Code for issuance of Commission is not bonafie and as such she can not claim the benefit euvisaged under Order 26 rule 1 read with section 132 of the code as a matter of right.

Case laws discussed.

Application by the defendant.

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

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* Civil Revision no. 1255 of 1994. In the High Court of Judicature at Patna.

6. 5-12-94

Upon notice to other side, this civil revison application has been listed under the hearing for admission for final disposal.

Heard Mr. Ram Balak Mahto, learned senior counsel appearing on behalf of the petitioner, leand Mr. T. K. Jha, learned Senior Counsel appearing on behalf of opposite party no. 1.

This civil revision application is directed against the order dated 12-7-1994, by which the learned subordinate Judge has rejected the petition filed on behalf of the petitioner under order 26 Rule 1 of the Code of Civil Procedure (hereinafer referred to as the Code) for examination on commission.

The short facts giving rise to this civil revision application are as under:-

The plaintiff- opposite party no. 1 filed Title suit no. 70 of 1992 in the court of subordinate Judg 1, Patna city, for secific performance of contract for sale of the land in question on the basis of dead of agreement dated 10-8-1990, executed by defendant no. 1-petitioner in favour of the plaintiff.

The defendant no. 1-petitioner is the owner of the suit land and it appears that she had agreed to sell the land in question to the plaintiff a the rate of Rs. 16, 500/-per ketha and in consideration whereof the plaintiff paid Rs. 11,101 /-only as earnest money to the defandant no. 1.

Thefeafter, an agreement for sale dated 10-8-1990 was executed in favour of the plaintiff by the defendant no. 1 incorporating therein certain terms and conditions. The plaintiff, as it appears from the plaint, thereafter, showed his willingness to perform his part of the obligetion under the contract, but the defendant no. 1 for one reason or the other avoided to execute the sale-dead and it was for this reason that the present suit for specific parfrmance was filed.

After filling of the suit, defentdent no. 1 entered into

appearance through her attorney and filed her written statement stating therein that she had agreed to sell the land in dispute to the plaintiff opposite party no-1 and the plaintiff was required to pay entire consideration money as agreed upon within a period of one year of the execution of the deed f agreement for sale and upon payment of the entire consideration money the defendant no. 1 would execute a registered sale-deed or deeds in favour of the plaintiff, but after the expiry of the stipulated period the defendant no. 1 gave notice dated 10-7-1991 to the plaintiff by registered post informing the time limit and essence of contract and informed the plaintiff that the time will not be extended any more.

The plaintiff filed a petition in the court below praying therein to direct the defendant no. 1 to begin the evidenc first. Before as order was passed upon the.

Petition filed on behalf of the plaintiff for adducing evidence by the defandant no. 1, the petitioner filed a petition in the court below on 7-7-1994 under order 26 Rele 1, read with section 151, of the code for issuance of commission for her examination, at her residence on the ground she is a pardanashin lady aged about 60 years and she is not deeping good health.

The petition filled by defendant no. 1 dated 7 1994 has been ejected by the impugned order dated 12-7-1994.

Mr. Ram Balak Mahto, the learned counsel appearing on behalf of the petitioner, submitted that since the petitioner is a pardamashin lady, aged about 60 years, and she is not keeping good health, her prayer for issuance of commission for her examination at her residence could not have been rejected by the learned court below. He further submitted that when the petitioner by filling her petition under order 26 Rule 1 of the Code made out a ground that she is a pardannashin lady, the court below should have directed for issuance of commission for her examination at her residence. Mr. Mahto further submitted that a woman who according to the customs and manners of the class or section or community to which she belogs, ought not to be

compelled to appear in public and the petitioner being a pardanashin lady belonging to a partiicular community, could have been examined on commission. Mr. Mahto has led stress on section 132 (1) of the Code and has submitted that section 132 of the Code. recognises the right of a pardnanashin lady, who according to the customs can claim the privilege of being examined on commission and, acordingly, the petitioner could have been exempted by the learned court below in exercise of its power under section 132 (1) of the Code from giving evidence in court and she should have been allowed to be exaimined on commission in terms of Order 25 Rule 1 of the Code. In support of his proposition, Mr. Mahto has placed reliance upon a decision in the case of *Ramkali* Kuer- *vrs- Chhathu Singh* (1)

Mr. T. K. Jha, the learned counsel appearing on behalf of the opposite party no, 1, submitted that the learned court below has rightly refused to issu commission for examination of the petitioner at her residcnce. In this case, a counter-affidavit has been filed on behalf of opposite party no. 1. Mr. Jha further contended that there is no proper prayer in terms of Order 26 Rule 1 of the Code made on behalf of the petitioner and the petitioner has neither been affidavited nor verified and, therefore, the learned court below has rightly refused to accept the prayer of the petitioner. Mr. Jha has drawn my attention the petition filed on behalf of the petitioner under order 26 Rule 1 of the Code, which has been marked as Annexure-A to the counter-affidavit.

Mr. T. K. Jha, the learned counsel for the petitioner, has further submitted that the petitioner is not a pardanashin lady and she is appearing in public and mixing with common people, openly. In this context he has drawn my attention to the document, which has been marked as Annxeure-B to the counter-affidavit. Annexure-B is a report submitted in the court below in Misc. Case no. 7/1973-74 by the Amin showing that the delivery of possession of the land in question has been effected

(1) (1961) A. L. R. (P. R.) 210

in presence of Bibi Hassan Bano (petitioner) from Annexure-B of the counter-affidavit it appears that the petitioner herself had appeared on the spot along with the persons of the locality for takig delivery of possession and delivery of possession was effected in her presence on the spot.

Mr. T. K. Jha, therefore, contended that the petitioner is not fulfilling the requirements as laid down under section 132 of the Code and, there fore, the provision of order of 26 Rules 1 and 4 of the code is not attracted. In support of his proposition, Mr. Jha has placed reliance upon the decisions in the cases of *Md. Ismail* vrs. *Wazir BiBi Saheba* (1) and *Jaya Shanker Mills (Barsi)* Ltd-vrs.- *Hazi Zararia Hazi Ebrahim* (2).

In the case of *Ramkali Kuer* (Supra), as relied upon by the learned counsel appearing on behalf of the petitioner, it has been held that a woman belonging to a particular community, custom and manner ought not to be compelled to appear in public and she can be examined on commission. It has further been held that issue of commission is a matter of judicial discretion of the court depending on the facts of each case and a commission ordinarily should be issued for the examination of pardanashin lady unless her application for commission is malabide or would amount to an ause of the process of the court or it may resut in manifast in Justice to any party or for any other valid reasns.

From the facts of this case, it appears that neither there is a proper petition on behalf of the petitioner for issuance of a commission for her examination at her residence nor the petitioner has spelled out the truth that she is a pardanashin lady and she is not appearig in public From the documents bought on record it appears that she had, occasion to appear in public.

In the case of Md. Ismail (supra), as relied upon by the learned counsel appearing on behalf of opposite party no. 1, it has been observed that when a lady submits to an examination on commission she also submits to appearance though under a

(1) (1951) A. I. R. (Med) 311

(2) (1962) A. I. R. (A. P) 435.

parda before the commissioner appointed to take her evidence, a counsel on either side and the parties, it is clear that she is willing to give evidence before strangers. If so, why she should refuse to give evidence out side her residence before the same person as in an examination except that the trial judge would take the place of the commissioner, and thus she cannot decline to be examined at any place other than her own choice. It has, therefore, been held the there is virtually no differrence between the examination in the court and an examination on commission.

In the other case relied upon by Mr. T. K. Jha, the learned counsel appearing for the opposite party no. 1, reported in A. I. R. 1962 Andhra Pradesh 35 (supra), it has been held that the under Order 26 Rule 4 of the code is discretionary, and not be claimed as a matter of right.

It is well settled that discretion conferred on courts of justice is certainly discretionry which has to be exercised judiciously and not arbitrarily. However, the descretion has to be exercised in the particular facts and circumstances of the case and no hard and fast rules of universal application can possibly be laid down. The person invoking exercise of discretion must bonafide in making such application. In exercise of discretion the conduct of the parties has also to be kept into consideration. I have already indicated above that there are materials on record to show that the petitioner, being a pardanashin lady appears before public and is mixing with the common people and in such a circumstance her application made under order 26 Rule 1 for issuance of commission does not appear to bonafide and as such she cannot claim the benefit as envisaged under Order 26 Rule 1, read with section 132, of the Code as a matter of right and, in that view of the matter, the submissions made on behlaf of the petitioner cannot be acceded to.

In the instant case I find that though the court has refused the prayer of the petitioner for her examination on commission has directed that in case the petitioner wants to avoid public

gaze, she can be examined in the chamber of the court of even in the closed, court-room by excluding the outsiders. This direction, in my opinion, is justified and the court below has done so keeping into consideration the fact that the demeanour and gesture of the withness may be marked by the court.

Thus I find that the court below has exercised its discretion ratonally and has refused to issue commission for the examination of the ptitioner.

Having heard the learned counsels for the parties and considering the facts and circumstances of the case in my opinion, the order impugned suffers from no infirmity and it should not be interfered with.

In the result, this application is dismissed, but without cost.

Before parting with this order it is directed that the patitioner should make herself available before the court for examination, either by appearing in person or through her attorney, on the date next fixed in the suit and the learned court below shall fix a date for her examination after giving a short notice to the plaintiff and the petitioner will be examined in the chamber of the court, as already directed by the court below.

R. D. Application dismissed

MISCELLANEOUS CIMINAL

Before Shashank Kumar Singh, J.

1995

March 3

Vivek Bhargava & others

v.

The State of Bihar

Code of Criminal Procedure, 1973 (Central Act no. II of 1974) section 205—representation of accused through his lawyer—grant of.

As the petitioners are being prosecuted as partners of a firm and have not indulged in any act in their individual capacity and also the fact that the actual agreement was between the State Government and a firm based in United Kingdom and also taking into consideration that one of the partners is an old and infirm man who has undergone open heart surgery, as such, the spcial Judge should have granted benefit to him under section 205 of the Code of Criminal Procedure, 1973 allowing him to be represented through his counsel.

Case laws discussed.

Application by accusd.

The facts of the cases material to this report are set out in the judgment of Shashank Kumar Singh, J.

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* Criminal Miscellanous case no. 357 of 1993. With Criminal Miscellaneous Case no. 2206 of 1993.

In Cr. Mise. no. 2193 of 1993—Satya Prakash Bhargava—Petitioner.

In Cr. Misc. no. 2206 of 193—Pramod Bhargava—Petitioner.

Against the order dated 2-12-1992 passed by special Judge, (Vigilance), South Bihar, Patna in special case no. 100/90 arising out of vigilance P. S. case no. 54/1990.

M/s S. N. P. Sinha, Senior Advocate and *Shyam Kishore Sharma*, Advocate, fore the petitioner all cases.

: *Sri B. P. Pandey*, Senior Advocate, Public Prosecutor Special Vigilance) for State in all the cases.

Shashank Kumar Singh, J., These application arise out of the same order, as such, with the consent of the parties they have been heard together and are being disposed of by a common order and judgement.

2. Present applications have been filed for quashing the order dated 2.2.1992 passed in special case no. 100 of 1990 arising out of vigilance P. S. case no. 54 of 1990 pending in the court of special judge (vigilance), South Bihar, Patna whereby learned special judge has been pleased to reject the applications of the petitioners under section 205 of the Code of Criminal Procedure, 1973 hereinafter to be referred to as 'the Code') for allowing them to be represented through their counsel during the trial and has also directed for issuance of warrant of arrest against them.

3. Learned counsel appearing for the petitioner has tried to impress upon this court, by going into the merit of the case, stating therein, that the petitioners' firm were only acting as agent and were commission holder and the actual agreement was entered into by the firm which is based in the United Kingdom and the State Government and the present firm of which the petitioners are partners only imparted training to the persons who were to only impated training to the persons who were to inject the medicine and in lieu thereof were to receive 5% as commission. As such, according in the facts of the case, no criminal case at all is made against them.

4. To my mind, at this stage I am not required to enter into the merit of the prosecution case as it had not been challenged before this court and the same is subject matter of trial before the special court and the same can be adjudicated at the proper moment by the competent court. The only point which has to be seen here is that as the petitioners have moved for

exemption from personal appearance under section 205 of the Code whether they should have been granted banefit under the said section by the learned Special court or not and as to whether the Special judge has erred in refusing the petitioners' benefit section 205 of the Code.

5. Vivek Bhargava (petitioner in Cr. Misc. no. 357 of 1993), Satya Prekash Bhargava (petitioner in Cr. Misc. no. 2198 of 1993) and Pramod Bhargava (petitioner in Cr. Misc. no. 2206 of 1993) who are the Partners of the firm namely M/s Industrial Medical Engineers, Caxton House, New Delhi, filed a petition before the special judge (vigilance), South Bihar, Patna in Special Case no. 100 of 1990 arising out of vigilance P. S. case no. 54 of 1990 under section 420, 467, 468, 468, 471, 471A read with section 109 and 120 B of the Indian Penal Code and section 13 (2) and 13 (1) (d) and 15 of the Prevention of Corruption Act, 1988. In their petition for exemption from personal attendance, it had been contended that the petitioner Satya Prakash Bhargava has been suffering from heart disease and he had under gone by-pass surgery and it would be very difficult and hazardous for him to attend the Court. As regards others namely Vivek Bhargava and Pramod Bhargava, it was contended that the former was incharge of the account and administration and marketing affairs while the latter were the managing partners and they have to travel throughout the world in connection with business affairs and as such, personal appearance in the court would entail tremendous difficulties and hardship on their part and by which they would be adversely affected and the interest of the company would also be jeopardized. It was further contended that the petitioner undertake to appear in person in Court whenever directed by the Court after Commencement of the trial.

6. In the present case, learned Special Judge in his order dated 2.12.1992 has stated that though benefit of section 205 of the Code has to be liberally extended in trivial and techincal cases, and to such accused persons who are ladies, old and sickly persons, workers in factories, daily wage earners, other

labourers and busy business people, but as the present case was not f a trivial and technical nature and as the petitioners were alleged to be involved in a big racket or scandal as they had hatched up a conspiracy with the officers of the Health Department of the State of Bihar to cause wrongful loss to the State and wrongful gain to themselves, as such, their prayer for exemption under section 205 of the Code was refused.

7. Being dissatisfied with and aggrived by the aforementioned order, petitioners have moved the present applications. It has been stated by learned counsel that though petitioners were partners of Industrial Medical Engineers, registered at Delhi and were operating not only throughout this country but also operating in other parts of the world and specially as one of the partners Satya Prakash Bhargava was an old and sick man and had under gone by-pass surgery, as such, the trial Court should have exercised its discretion in favour of the petitioners, as has been held by this Court and other Courts that the said section should be extended liberally, and should have granted exemption to the petitioners to appear through lawyer, specially, in view of undertaking of the petitioners that in course of the trial if the personal appearance was required they would make themselves available if and when directed.

8. In support of his contention, learned counsel for the petitioners has relied upon a Judgment of Kerala High Court in the case of *Helen Rubber Industries Kottayam and others* vrs *State of Kerala and others* (1) reported in 1973 Cr. L. J. 262. Though, the present decision is of single Judge in which the learned Judge has held as follows:-

".....when the accused are women labourerrs, wage earners and other busy men, Courts should as a rule grant exemption from personal appearance. Courts should see that undue harassment is not caused to the accused appearing before them ....."

(1) (1973) Cr. L. J. 262

9. Reliance has also been made on a case reported in 1979 B. B. C. J. 437. *(Ravi Singh and another vrs State of Bihar 1.)*. In the said case it has been held as follows:-

"An order refusing permission under section 205 of the Code can, in appropriate cases, be agitated under the inherent powers of the High Court and the said power of the High Court can be exercised against an interlocutory orders also and the High Court can interfere in a situation which is an abuse of the process of the Court or for securing the ends of Justice."

10. Reliance has also the been made on a case reported in 1984 P. L. J. R. 169 *(S. C. Jain vrs State of Bihar)*. In the said case, the Magistrate though earlier had allowed the examption to the petitioner of that case under section 205 of the Code and as such, the petitioner of the said case was appearing through his counsel. On 16.5.1981, when the counsel for the petitioner filed Hazri and he was informed by the Bench clerk that the case has been adjourned to 27.6.1981. On that date when the counsel for the petitioner went to the Court to file Hazri, he was informed by the Bench clerk that the cese was fixed for explaining the accusation to the accused in person and as such, when on 27.6.1981, a petition was filed by the counsel for the petitioner through his lawyer to explain the accusation, the same was rejected asking for the personal appearance of the petitioner and it was stated that if he does not appear on the next day, the earlier order of his examption for the personal appearance under section 205 of the Code would be cancelled and warrant of arrest issued.

This Court interfered in the said order and quashed the same as the petitioner of that case was already represented through lawyer and accusation could have been explained to him, as he was representing his client.

11. That learned counsel appearing for the vigilance department, on the other hand, has stated that in case were the punishment was of five years and more, no exemption under

(1) (1979) B. B. C. J. 437

section 205 of the Code can be granted. In this regard, he has relied upon a case reported in A. I. R. 1969 Mysore 95 (*Jagadguru Sachidanand Shankarabharti Swami of Sri Kudli Sringeri Mutt vts State of Mysore (1)* in which it has been held that where the offences alleged againt accused are of a serious nature involving moral turpitute and punishment with imprisonment for some length, if the allegations are established by the prosecution, then, the question of status of accused while granting exemption cannot be considered.

12. As such, according to learned counsel appearing for the vigilance department in the present case though one of petitioners is old and all of them were partners of M/s Industrial Medical Engineers based outside Bihar still as the offence alleged are serious in nature, they cannot be allowed to get benefit under section 205 of the Code.

13. In the facts of the case, taking into consideration the argument of learned counsel for the petitioners and the learned counsel for the vigilance department and the case relied on by them and specially in the facts of the case, as the petitioners are being prosecuted as a patners of a firm and have not indulged in any act in their individual capacity and also the fact that the actual agreement was between the State Government and a firm based in united Kingdom and also taking into considration that one of the petitioners Satya Prakash Bhargava is conserned as he is an old and infirm man who has undergone open heart surgery, as such, I am of the view that the Special Court should have granted benefit to his at least under section 205 of the Code.

In the result his application succeds, Cr. Misc, no: 2198 of 1993 is allowed and the impugned order passed by the special judge dated 2.12.1992 directing for his personal appearance as well as warrant of arrest issued against him are quashed and the Court below is directed to grant examption to the petitioner under section 205 fo the Code.

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(1) (1969) A. I. R. (Mys.) 95

14. As far as other two applications i. e. Cr. Misc. no. 357 of 1993 and Cr. Misc. no. 2206 of 1993 are concerned, the petitioner of those Cr. Miscellaneous petitioners namely Vivek Bhargava and Pramod Bhargava, to my mind to meet the ends of Justice, specially taking into consideration that they are partners of the Firms, a busy body, who have to travel throughout the world, they are directed to appear before the Special Judge, (Vigilance), South Bihar, Patna within two weeks from today, in pursuance of order dated 2.12.1992 passed in Special Case no. 100/90 and if they appear before the said Court, learned Court shall enlarge them on bail on furnishing bail bond to its satisfaction and shall pass other necessary orders as required. The warrant of arrest issued against them is stayed till that date.

15. It is however, made clear that the abovementioned directions are subject to the undertaing to be given by the petitioners of all the three Applications i. e. Cr. Misc. no. 357 of 1993, Cr. Misc. no. 2198 of 1993 and Cr. Misc. no. 2206 of 1993 before the trial Court that they will make themselves available in person if and when required by the Court.

16. All the three applications are disposed of with the direction and observation made above. Parties to bear their own cost.

R. D Order accondingly.

CIVIL WRIT JURISDICTION

Before Sudhansu Jyoti Mukhpadhaya, J.

1995
July 3

Megh Nath Ram

v.

Union of India and others.

Central Administrative Tribunal Act, 1985 (Central Act no. XII of 1985) section 28—ambit of—matter relating to recruitment in Indian Civil Service or Indian Police Service, whether to be decided by Central Administrative Tribunal—High Court, Jurisdiction of.

Any relief sought by a party in a writ petition is to be read along with the cause of action. This Court, without any cause of action on the part of the writ-petitioner cannot direct the State Government to send the integrity certificate of the writ-petitioner to the Union Public Service Commission. Such direction can be given only after going through the cause of action of the party concerned. In the instant case the cause of action of the writ-petitioner is consideration of his case for appointment/promotion to the post in Indian Police Service. Hence it is manifest and clear that the writ-petitioner has moved the High Court for a direction to sent his integrity certificate for the purpose of consideration of his case for appointment /promotion to the post of Indian Police Service, ie, a matter relating to recruitment

Held, that the matter relating to recruitment in the Indian Police Service is now vested with the Central Administrative Tribunal and not with the High Court. The moment the prayer linking with the character roll and/or integrity certificate is to be made, which has a direct nexus with recruitment in the Indian Civil Service/Indian Police Service, in that case the High Court will cease to have such jurisdiction in terms of section 28 of the Central Administrative Tribunal Act, 1985.

Civil Writ Jurisdiction Case No. 4052 of 1995. In the High Court of Judicature at Patna.

Case law 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 Sudhansu Jyoti Mukhopahaya, J.

S. J. Mukhopaheya J. The petitioner has filed this writ petition for direction on the respondents to send the integrity certificate of the petitioner to the Union Public Service Commission for consideration of his case for appointment by promotion in the cadre of Indian Police Service.

When the case was taken up, the counsel appearing on behalf of the respondent-State as well as the counsel appearing on behalf of the respondent-Union of India raised preliminary objection relating to maintainability of the writ petition on the ground that the matter relating to appointment/promotion in the Indian Police Services is now vested with the Central Administrative Tribunal and that this Court has got no jurisdiction to pass any order.

Mr. Ganesh Singh, Sr. Advocate appearing on behalf of the petitioner submitted that he is pressing only the prayer for direction on the respondent-State of Bihar for sending the integrity cetificate of petitioner to the Union Public Service Commission. It was submitted that the rest of the prayer made in the writ petition is not being pressed by him. He has further drawn my attention towards two of the judgments/orders of this Court, one passed in the case of *Ganesh Prasad Yadav* V. *The State of Bihar and others* by a Division Bench of this Court on 18th of August, 1989 in C. W. J. C. No. 1571 of 1988 and another in the case of *Bhgagwan Prasad Sinha* v. *The State of Bihar and others*, passed by a learned Single Judge of this Court on 19th of December; 1990 in C. W. J. C. No. 5177/89. It was submitted by the counsel for the petitioner that in the aforesaid two cases, while the matter relating to adverse remarks was in disputed, direction has been given to the Selection Committee for consid-

eration of cases of those petitioners for appointment/promotion to the post in Indian Police Service. It was contended by the counsel for the petitioner that the writ is maintainable.

In the case of *K. Narayanan and others* V. *State of Karnataka and others* as reported in *1994 Supplementary, (1) S. C. C. page 44* the Supreme Court while dealing the definition relating to recruitment held as follows:-

"—6. Article 309 of the Constitution empowere the appropriate legislature to frame rules to regulate recruitment to public services and the post 'Recruitment' according to the dictionary means 'enlist'. It is a comprehensive term and includes any method provided for inducting a person in public service. Appointment, selection, promotion, deputation are all well-known methods of recruitment. Even appointment by transfer is not unknown."

It will be evident from the Central Administrative Tribunal Act, 1985, Section 14 there in, that the matter relating to appointment to the post in Indian Civil Services, which includes Indian Police Service, the power has been vested with the Central Administrative Tribunal. Section 28 of the Central Administrative Tribunal Act reads as follow:-

"—S. 28-Exclusion of jurisdiction of Court except the Supreme Court under Art. 136 of the Constitution:- On and from the date from which any jurisdiction, power and authority becomes exercisable under this Act by a Tribunal in relation to recruitment and matter concerning recruitment to any sevice of post or service matters concerning members of any service of person appointed to any service or post, no Court except-

(a)the Supreme Court; or

(b) any Industiral Tribunal, Lebour Court or other authority constituted under the Industrial Disputes Act, 1947 (14 of 1947), or any other corresponding law for the time being in force shall have, or be entitled to exercise any jurisdiction, power or authority in relation to such recruitment or matters concerning such recruitment of such service matters....."

In the case of *Union of India and others* V. *Baleshwar Singh*, reported in 1994 Supplementary (2) S. C. C., page 587, the Hon'ble Supreme Court held as lows:-

"—S. Section 28 of the Administrative Tribunals Act, 1985 in terms states that on and from the date from which any jurisdiction, power and authority becomes exercisable under this Act by a Tribunal in relation to recruitment and matters concerning recruitment to any service or post or service matters concerning members of any service or persons appointed to any service or post, no Court except-(a) the Supreme Court; or (b) any Industrial Tribunal, Labour Court or other authority constituted under the Industrial Disputes Act, 1947 or any other corresponding law for the time being in force, shall have, or—be entitled to exercise any jurisdiction, powers or authority in relation to such recruitment or matters concerning such recruitment or such service matters.

5. In view of this legal position, there can be no dobt that the High Court does not have jurisdiction in matters of the type referred to in the section. The learned counsel for the respondent was not in a position to point out how the High Court could exercise jurisdiction in regard to a service matter. We therefore, think that the preliminary contention raised by the learned counsel for the Union of Indian must be accepted. We accept the same and set aside the impugned order of the High Court and dismiss the writ petition, but in the facts and circumstances of the case we permit the respondent to approach the Tribunal, if so advised, with a fresh petition with in 15 days from today where-upon the Tribunal will consider the matter on merits without being influenced by the observations of the High Court in the impugned matter on merits. The appeal will stand allowed accordingly with no order as to costs—"

From the aforesaid decision of the Supreme Court and the provisions of law stated above, it will be manifest and clear that

the matter relating to recruitment in Indian Civil Services, including that in the Indian Police Services, is now vested with the Central Administrative Tribunal and not with this Court.

So far as the argument, as has been advanced by the counsel for the petitioner that he is only praying for a direction on the respondent-State of Bihar to send his integrity certificate to the Union Public Service Commission of India, such submission cannot be accepted. Any relief sought for by a party in a writ petition is to be read along with the cause of action. This Court, without any cause of action on the part of the petitioner, cannot direct the respondent-State to send the integrity certificate of the petitioner to the Union Public Service Commission. Such direction can be given only after going through the cause of action of the party concerned. In the present case, the cause of action of the petitioner is consideration of the case of petitioner for appointment / promotion to the posts in Indian Police Service. Therefore, it is manifest and clear that the petitioner has moved this Court for a direction to send the indegrity certificate of the petitioner, for the purpose of consideration of his case for appointment / promotion to a post in the indian Police Service, i. e. a matter relating to recruitment.

So far as the cases referred by the petitioner in the case of *Ganesh Prasad Yadav* Vs. *The State of Bihar and others*, passed in C. W. J. C. No. 1571/88 and the case of *Bhagwan Pasad Sinha* V. *The State of Bihar and others*, passed in C. W. J. C. No. 5177/89 are concerned, the petitioner cannot derive any benefit out of the same. In none of the aforesaid two cases any party objected relating to the jurisdiction of this Court under writ jurisdiction to give any direction the matter of recruitment in Indian Civil Services / Indian Police Service. It is for the said reason, no decision has been given by this Court in the afore said two writ petitions, discussing the jurisdiction of this Court. For the said reason I hold that the decision given in the aforesaid two cases are res-intra and judgment in percurium, which cannot be made applicable in the case of the petitioner.

In a given case, a person may move before this Court taking grievance against the character roll and / or the integrity certificate, but such grivenance is to be tested taking into account the cause of action of such person. If a person challeges his adverse character roll and / or integrity certificate before this Court, which has got nothing to do with the matter of recruitment in the Indian Civil Services, in such ease, this Court may have jurisdiction to pass any order under the writ jurisdiction. But the moment such prayer linking with the character roll and / or integrity certificate is to be made, which has direct nexus with recruitment in the Indian Civil Services, in that case this Court will cease to have such jurisdiction in terms with section 28 of the Administrative Tribunal Act, 1985.

For the peasons stated above, I hold that the writ petition is not maintanable before this Court any thereby I dismiss the same. However, it is made clear that I have not gone on the merit of the writ application. The petitioner / is so advised, he may move before the appropriate forum/Central Administrative Trubunal.

R. D. Application dismissed.

REVISONAL CIVIL

Before Ram Nandan Prasad, J.

1995

July, 21

Ram Kumari Devi and another.*

v.

Mahabir Prasad Tibriwal and others.

Bihar Building (Lease, Rent and Eviction) Control Act, 1982 (Bihar Act no. IV of 1983) section 11 (c) Proviso—ambit of—no finding recorded by trial Court on the question of partial eviction—effect of.

It is manifect from a reading of proviso to section 11 (c) of the Bihar Building (lease, Rent and Eviction) Control Act, 1982 that the Court has to consider with regard to partial eviction which can be done only by recording a finding on the question. Recording of finding on the question of partial eviction is a statutory requirement which arises only when a landlord succeds in proving his requirement for obtaining an order of eviction.

As no finding was recorded by th trial Court on the question of partial eviction the case was remitted to the trial Court for recording a finding on the question of partial eviction.

Krishna Murari Prasad v. *Mitar Singh (1)*—followed.

Application by the defendant.

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

M/s Prabhat Verma, S. R. Sharma and M/s. Pushpa Sinha of the petitioner

M/s Mihir Kumar Jha and Pradeep Paul for the opposite party.

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* Civil Revision No. 1312 of 1991. Against the order dated 17th May. 1991 passed in Title Eviction) Suit no. 2 of 1939 by Sri Udai Kant Thakur, Sub-Judge, Pakur (Sahebganj).

(1) (1994) I. L. R. 87

R. N. Prasad, J. This application in revision is directed against the order dated 17.5.1991 passed in Title Eviction Suit No. 2 of 1989 whereby the suit was decreed on the ground of persenal necessity.

2. Learned counsel for the defendants-petitioner at the very outset contended that the finding on the question of partial eviction in the case of a suit for eviction on the ground of personal necessity is must but the trial Court has not recorded any finding on the question of partial eviction.

3. Learned counsel for the oppsite party also admitted that no findind has been recorded by the trial Court on the question of partial eviction. He, however, contended that in a case where there is no pleading in the written statement with regard to the patial eviction the Court is not required to record its finding on the question of partial eviction. He relied upon an unreported decision of a single Bench of this Court passed in C. R. No. 2142 of 1993 *(Most. Mehrunnisa* vs. *Bhola Mahto)* disposed of on 17.11.194 wherein it has been held that if there is no pleading by a tenant that his need would be satisfied by partial eviction the Court is not required to record any finding on the question of partial eviction suo motu.

4. The proviso to section 11 (c) of the Bihar Buildings (Lease, rent and Eviction) Control Act, 1982 say that where the Court thinks that reasonable requirement of such occupation may be substantially safisfied by evicting a tenant from a part only of the suit premises and allowing a tenant to continue with the occupation of the rest of the premises and the tenant agrees to such occupation, the Court shall pass a decree accordingly. It is manifest from the aforesaid provision that the Court has to consider with regard to partial eviction which can be done only by recording a finding on the question. Recording a finding on the question of partial eviction is a statutory requirement which arises only when a landlord succeeds in proving his requirement for obtaining an order of eviction.

5. In the case of *Krishna Murari Prasad* vs. *Mitar Singh* (1) the apex Court while considering the scope of the aforesaid provision has held that the question of partial eviction is a question of fact in each case, and it is a statutory requirement. The inquiry has to be made by the Court after reaching the conclusion that the landlord's requirement for occupation of the premises as set up by him has been made out. Accrdingly, the apex Court remitted the case to the trial Court for recording a finding on the question of partial eviction.

6. In the instant case, it is an admitted position that no finding has been recorded by the trial Court on the question of partial eviction. The decision relied upon by the learned counsel for the opposite party, in my opinion, does not stand to his rescue in view of the decision of *Krishna Murari's* case (supra) of the apex Court which is binding on the Courts of law. No other point was raised by the learned counsel for the petitioners on any other finding of the trial Court and hence the other finding of the trial Court are affirmed

7. This application is, accordingly allowed to the extent indicatd above and the case is remitted to the trial Court for recording a finding on the question of partial eviction. The parties shall be at liberty to lead evidence in support of their case only on the question of partial eviction

G. J. Order accordingly.

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(1) (1994) I. P. L. J. R. 87

CIVIL WRIT JURISDICTION

Before B. L. Yadav and Amir Das, JJ.

1995

August,29

Vijay Kumar Chudhary.*

v.

The State of Bihar & others.

Natural Justice—principles of, whether vilated—wirt-petitioner given opportunity of hearing and 12 dates were fixed in the deprtmental proceedings, but not availed by him.

Where from, a perusal of impugned order it is clear that as writ-petitioner was given opportunity of hearing but he did not appear of support his case.

Held, that, it cannot be said that the writ-petitioner was deprived of the opportunity of hearing or that the principle of natural justice was not followed.

Held, further, that no factual foundation was laid to show that the copy enquiry report was not served on the writ petitioner when explanation was called from him against the proposed punishment.

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. L. Yadav, J.

Messrs Madan Mohan Prasad and Madhusudan Kumar for the petitioner

Mr. Chandra Shekhar. for the respondents.

B. L. Yadav. J, By the instant writ petition under Articles 226/227 of the Contitution of India the petitioner has sought of the quashing the order of the State of Bihar constained in Memo

* Civil writ jurisdiction Case 1571 of 1991. In the matter of an application under Articlee 226 and 227 of the Cns-titution of I: ."a.

No. 610 dated 18.1.1991 (Annexure-2) dismissing the appeal of the petitioner filed against the order of petitioner's removal from service dated 10.5.1989/12.5.1989 (Annexure-1) on the ground of certain charges pertaining to misconduct of the petitioner having been proved against him.

2. The factual matrix of the case is that the petitioner was appointed as Assistant Sub-Inspector of the rank of Inspector and joined that post on 13.11.1979 and later on as Officer Incharge of Pothia Police Station of Purnia District (now Kishanganj) in March. 1979 and there certain allegations were made against his conduct. Charges against him were that he used to curtail certain amounts from the Travelling amount of Ramdeo Singh (Arakshi no. 1057), Bharat Tiwary (Arakshi No. 232) and Ram Prasad Yadav Arakshi No. 94) and got signaturs on full payment. Enquiry was made and charges against the petitioner were , prima facie, found to be true and thereafter full fledgewd departmental proceedings were initiated against him and the charges having been proved. The petitioner was removed from service. Agreeing with the report of the Superintendent of Police, Purnia and the Deputy Superintendent of Police, Saharsa recommendation was made to the effect that the petitioner be removed from service. Against the said proposed punishment show cause notice was issued and explanation was demanded from the petitioner and he submitted his explanation, and alleged that the opportunity of examining any witness was not afforded to the petitioner nor full opprtunity was given to him, but the perusal of the ordersheet indicates that the proceeding were conducted on 12 days and information having been given to him, the petitioner did not appear. Consequently by the impugned order dated 12.5.1989 (Annexure-1) the petitioner was removed from service. Against that he preferred an appeal which was also dismissed by the order dated 18.1.1991 (Annexure-2). Against these impugned orders the present writ petition has been filed.

5. The learned counsel for the petitioner urged that the

impugned order is violative of the principle of natural justice and that the copy of the enquiry report was not furnished to the petitioner when the explanation was demanded against the proposed punishment and hence the entire proceeding is vitiated. Reliance was placed on *Union of India & other* vs. *Mohd. Ramzan Khan* (1)

4. The learned counsel for the respondents, including the State of Bihar was given opportunity to file counter affidavit, but no counter affidavit was filed. As the facts are clear we proceed to decide the case on its merit without counter affidavit. We may, however, indicate our displeasure that after expiry of more than four year of the filing of the writ petition no counter affidavit having been filed, indicates that there is gross negligence on the part of the State in the conduct of cases. It is for the State to see in the matter that the cases on behalf of the State are properly conducted by the State counsel in each case and where necessary counter affidavits are filled.

5. In the instant case there are two points which fall for our consideration. The first whether the impugned order are against the principle of natural justice and whether the copy of the enquiry report was supplied to the petitioner when teh explanation was called from him against the proposed punishment.

6. We are conscious that there are plethora of decisions commencing from *Dr. Bentley's* case (2) and ending with some very recent case which establish that although there are no prohibitive words in the statute requiring that the party shall be heard, yet the principle of "Audi Alteram Partem" does require that no one shall be condemned unheard, the corollary of which is that he or she should be given reasonable notice of the nature of the case to be met. (See *Errington* vs. *Minister of Health* (3) and *John* v. Rees (4)

(1) (1991) A. I. R. (S. C.) 471
(2) (1723) 1 Ster. 557
(3) (1935) 1 K. B. 249
(4) (1970) ch. D. 345

7. Not doubt natural justice is the great humanising principle intended to invest the law with fairness and to secure justice and over the year it has grown into widely pervasive rule affecting large areas of administrative action.

8. In *Cleveland Board of Eduction* vs. *James Lowder Mill* (1) it was held "as essential principle of due process is that a deprivation of life, liberty or property, be preceded by notice and opportunity of hearing appropriate to the nature of case (see *Mullana* vs. *Central Honover Bank & Trust* (2). We have described that the root requirement of the due process clause is that an individual be given an opportunity for a hearing before he is deprived of any significant property or right. (See *Boddie* vs. *Connecticut* (3) ."

9. In continuity with the first doctrine on the natural justice there is another doctrine "QUI ALIQUID STATUE RIT PARTE INALIDITA ALTERA ACQUUM LICET DIXERIT HALID ACQUUM FACERIT."There is a third rule "MIMO DEBE ESSE JUDEX IN PROP RIA, with which connotes that no one shall be a judge in his own cause.

10. In our opinion, where the statute is silent regarding observance of this rule, if shall be read into the Statute as an inbuilt provision. The rule must be held to be a nexessary postulate in al cases where a decison is to be taken affecting a person's right or intrest,. (See *S. N. Kapoor* vs. *Jagmohan* (4) and *Swadeshi Cotton Mills* vs. *Union* (5) but the principle of natural justice need not be stressed too far and need not be exploited as a purely technical weapon to undo a decision which does not in reality cause a substantial injustice. (See *R. v. Secretary of State for Home Department*) (6)

(1) 470 U. S. 532, 84 L. Ed 493, 503

(2) 339 U. S. 306, 94 L. Ed. 865

(3) 401 U. S. 371, 28 L. Ed. 2rd. 113

(4) (1981) A. I. R. (S. C.) 136

(5) (1981) A. I. R. (S. C. 818

(6) (1993) 3 All. E. R. 796

11. In *Ravi S. Naik* vs. *Union of India and others* (1) it was held that the principle of natural justice have an important place in modern administrative law. They have been defined to mean "fair play in action" (See *Smt. Meneka Gandhi* vs. *Union of India* (2). These rules constitute a basic element of a fair hearing, having their roots in innate sense of human for fair play and justice which is not reserve of any particular race or country but is shared in common by all means.

12. In the instant case with profound regards, in our opinion, as pointed out in the aforsaid authorites that the principle of natural justice is humanising factor and whenever rights and interest of the parties are being decided, they must be afforded a fair play in action, but in the instant case just a look at the impugned order Annexure-1) it is indicated that in as much as 12 dates were fixed for the departmental proceeding and the petitioner was given opportunity of hearing but he did not appear to support his case. Consequently it cannot be said that he was deprived of the opportunity of hearing or that the principle of natural justice was not followed.

13. As regards the second question, suffice it to say that nothing has been said that the copy of the enquiry report was not given to the petitioner while second show cause notice was given to him. Memo of appeal has also not been filed by him indicating that the copy of the enquiry report was not supplied to him. If this was a fact, the learned counsel for the petitioner ought to have filed memo of appeal so as to indicate what were the grounds taken, and by a perusal of the same we would have been in a position to ascertain whether the copy of the enquiry report was served on the petitioner or not.

14. From perusal of the appellate order it does not appear that the copy of the enquiry report was not served upon the petitioner.

15. No doubt, the *Union of India and others* vs. *Mohd.*

(1) (1994) 1 Judgment Today 551 (S. C.)

(2) (1978) 2 S. C. R. 621

Ramzan Khan (Supra) was a case where the Apex Court pointed out that in quasi-judicial proceeding the principle of natural justice are attracted and the delinquent officer must get the copy of the report against him even after Amendment of Articl 311 by 42nd Amendment Act. We have profound regareds of the observations and the dictum laid down by their Lordships of the Supreme Court, but there if nothing in the instant case to indicate whether the copy of the enquiry report was not served on the petitioner. Under these circumstances we are constrained to observe that no factual foundation has been laid to show that the copy of the enquiry was not served on the petitioner.

16. In view of the premises aforesaid, we do not find any merit in this writ petition and the same is, accordingly, dismissed, but in the circumstances of the case there shall be no order as to edsts.

Amir Das, J. I agree.

R. D. Application dissmissed.

CIVIL WRIT JURISDICION

Before Narayan Roy, J.

1995

September, 21

M. Mansoor Alam.*

v.

Union of India and others.

Constitution of India—Articles 12, 226 and 227—power of High Court to review administrative action—Court, whether to see that the act of administrative authorities, who are State instrumentalities under Article 12 of the Constitution have acted fairly and reasonaly—Oil Selection Board selecting respondent no. 5 for grant of retail outlet dealership of Hindustan Petroleum Corporation and the Hindustan Petroleum Corporation granting dealership to Respondent no. 5—effect of.

Hindustan Pwtroleum Corporation Ltd. hereinafter called the Corporation by an advertisement called for application for awarding of retail outlet dealership of the Corporation at Jokihat in the District fo Araria, the minimum qualification was laid down as matriculate. After holding interview the Oil Selection Board selected Respondent no. 5 for grant of dealership and the Corporation granted dealership to respondent no.5.

Held, that so far as the eligibility of the respondent no.5 is concerned, it has been found to be befitting the advertisement.

Held, further that the power of the High Court under Articles 226 of the Constitution of India to review the administrative action is well defined and it cannot act as an appellate authority nor it can put itself in the place of administrative authority exercising the powe. vested in law. The Court has only to see to whether the acts of the authorities, who are State Instrumentalities under Article 12 of the Constitution of India, have acted fairly and reasnably.

*C.W. J. C. No. 2953 of 1995. In the High Court of Judicature at Patna.

The function of the Oil Selection Board is nether judicial not adjudicatory. It is purely administrative and there is no rule or regulation which requires the Oil Selection Board to record reasons and in absence of any such legal requirements, the selection made without according reasons cannot be found fault with.

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

The facts fo the case material to this report are set out in the judgment of Narayan Roy, J.

M. Manzoor Alam & anr. v. *Union of India and other (1995) I. L. R. 74. Pat*

Narayan Roy J. By these two writ applications a common prayer has been made for issuance of a writ of certiorari for quashing the selection of respondent no. 5 in both the cases in awarding of a retail out let dealership of Hindustan Petroleum Corporation Limited at Jokihat, District Araria on the recommendation of the Selection Board (Bihar), Patna, and for issuance of a writ of mandamus to grant letter of intent in favour of the petitioners for retail outlet dealership at Jokihat, which has been illegally denied to them. Therefore, these two writ applications have been heard together and are being disposed of by this common order.

Heard counsel for the parties.

It appears that the Hindustant Petroleum Corporation Limited, respondent no.2 had issued an advertisement in the daily newspaper "Nav Bharat" on 21.1.1993, as contained in Annecure-1 to both the writ applications, inviting applications for grant of retail outlet dealership at Jokihat, District Araria. Pursuant to the advertisement, these two petitioners, along with others, including respondent no. 5, applied for the dealership of retail outlet. The petitioners and respondent no. 5 along with other were interviewed by the oil Selection Board, respondent no.

(1) (1971) A. I. R. S. C. 1050

4. on 30.6.1994 for the award of largessee. Thereafter, a merit list was prepared, in which respondent no. 5 was shown at SL. no. I and the petitioner Md. Irshadur Rahman of C. W. J. C. No. 10256 of 1994 was shown at SL. no.2 and since respondent no.5 was at SL. no.1 he was finally selected and the letter of intent was issued in favour of respondent no.5.

It has commonly been urged by the learned counsel appearing on behalf of the petitioners that the oil Selection Board, respondent no. 4, has not acted in selecting respondent no. 5 for the dealership as per the terms of the advertisement, as contained in Annexure-1, and they have acted unreasonably and arbitrarily in ignoring the case of the petitioners, who were eligible for the dealership license.

It has been urged that petitioner Md. Manzoor Alam of C. W. J. C. No. 2953 of 1993 was an unemployed Engineering Graduate and as per the clause 3 (a) (ii) of the advertisement if the selection was to be made from amongst the unemployed graduates, then peference would be given to unemployed Engineering Graduates. So far as the case of this petitioner is concerned, since he was an unemployed Engineering Graduate he should have been given preference.

It has also been urged on behalf of the petitioners that since it was a case of grant of largess, the authorities concerned being State under Article 12 of the Constitution of India, were expected to act reasonably and should not have selected responsdent no.5 when the petitioner were better qualified and were in viable position to run the dealership in question. It has also been urged that the oil Selection Board, respondent no.4 has not assigned any reason as to on what ground the petitioners have been disqualified for grant of the largess.

In these cases, counter-affidavits have been filed on behalf of respondent no.5 and also on behalf of respondent nos. 2 to 4.

The learned counsel appearing on behalf of respondent no.5 and the respondent nos. 2 to 4 submitted that the selection of respondent no.5 is not arbitrary nor it is in violation of the

terms of the advertisement, as contained in Annexure-1, and the authorities have acted reasonably and in public interest. It has also been submitted that respondent no.5 was shown at SL. no. 1 in th panal, whereas petitiners Md. Irshadur Rahman of C. W. J. C. No. 10256 of 1994 was shown at SL. No. 2, whereas petitioner of another writ application, namely, Md. Manzoor Alam was no: even empaneled. It has also been submitted that respondent no. 4, the Oil Selection Board, in all respect found respondent no. 5 fit and viable for running the dealership and, accordingly, the dealership was granted in his favour. It has also been submitted that for grant of licence the Board is not required to assign reasons.

From the pleadings of the parties, both in the writ applications as well as in the counter-affidavits, it appears that the petitioners were duly interviewed by the oil Selection Board and the Board on close scrutiny of the matter found the respondent no.5 fit and viable for the dealership licence. There is nothing on record to show from the side of the petitioners that they have ever made any complaint against the action of the Board to the authorities concerned.

Now coming to the advertiserent, as contained in Annexure-1, it appeares that minimum qualification for the applicant was matriculate and its equivalant degree from a recognised institution. However, in Clause 3 (a) (ii) of the advertisement it has been mentioned that if the selection is to be made from amongst the unemployed grauates, preference shall be given to unemployed Engineering Graduates.

Since the minium qualification has been laid down in the advertisement as matriculate and the selection has not been made from amongst the unemployed graduates as it appears from the facts of this case, and since the respondent no. 5 was matriculate it cannot be said tha that selection has been made in contravention of the advertisement as contained in Annexure-1.

Now the question to be decided in this case, as to whether

the selection of respondent no.5 as a dealer of the retail outlet is arbitrary and unreasonable. The Oil Selection Board, respondent no. 4, is an independent Body constituted by the Ministry of Petroleum and Natural Gas, Govt. of India, consisting of a retired High Court Judge as its Chairman and two members. The Board is entrusted with the work of seledction of the candidates, for selecting dealrship, distributors etc. for the public Sector oil companies. The Board after close scrutiny of the respective cases of the candidates asked the eligible candidates to appear for interview and after taking interview the Selection Board prepares a panel for eligible candidates for grant of dealership licence.

It has been settled by Catena of decisions by the appex Court that the State and it instrumentalities, which are the State within the meaning fo Article 12 of the Constitution, while awarding contract or distributing largess must act in a fair and reasonable manner and their action or the procedure followed by them must be teasted on the touch stone of reasonableness and public interest, and the same must the meet the requirement of Aricle 14 of the Constitution of India.

In *M/s Kasturi Lal Lakshmi Reddy*-vrs *The State of Jammu and Kashmir and another* (1) reported in A. I. R. 1980 Supreme Court 1992, it has been held as under :

"11. So far as the first limitation is concerned. It flows directly from the thesis that unlike a private individual the State cannot act as it pleases in the matter of giving largess. Though ordinarily a private individual would be guided by economic considerations of self gain in any action taken by him, it is always open to him under the law to act contrary to his self interest or to oblige another in entering into a contract, or dealing with his property. But the Government is not free to act as it likes in granting largess such as awarding a contract or selling or leasing out its property. Whatever be its activity, the Government is still the Government and is, subject to restraints inherent in its

(1) (1980)A. I. R. (S. C) (1992)

position in a democratic society. The constitutional power conferred on the Government cannot be exercised by it arbitrarily or capricioulsy or in an unprincipled manner, it has to be exercised for the public good. Every activity of the Government has a public element in it and it must, therefore, be informed with reason and guided by public interest, be informed with reason and guided by public interest. Every action taken by the Government must be in public interest, the Government cannot act arbitrarily and without reason and if it does, its action would be liable to be invalidated. If the Government awards a contract or leases out or otherwise deals with its property or grants any other largess, it would be liable to be tested for its validity on the touch stone of reasonableness and public interest and if it fails to satisfy either test, it could be unconstitutional and invalid."

In the light of the aforesaid legal proposition, now it has to be decided in this case as to whether the corporation has acted arbirarily in the matter of selection of respondent no. 5 as a dealer.

From the facts of the case, it appears that the petitioners, viz-a -vis, respondent no.5 wege interviwed by the oil Selection Board and in the panal the name of respondent no.5 was shown at SL. no. 1. where as the name of petitioner Md. Irshadur Rahman has been shown at SL. no.2 and the another petitioner has not been empeneled.

So far as the eligibility of respondent no.5 is concerned, that is also have been found befitting with the advertisement. There is nothing on record to show that the petitioners and had ever complained about the act of Board nor there is anything to show on behalf of the petitioners that they were in a better positions than respondent no.5 for grant of dealership. More so, the power of the Court to review the administrative action is well defined and is can not act as an applellate authority nor it can put itself in place of administraive authority exercising the power vested in law. This Court has only to see as to whether the acts of the authorities, who are State instrumentalities under Article 12 of

the Constitution, have acted fairly and reasonably.

On close scrutiny of the facts, it appears to me that respondent no. 5 has been found to be a fit and viable for running the dealership in comparison to the ptitioners and since he was at SL. no. 1 in the panel, he was to be selected. I also find that the petitioner Md. Manzoor Alam, who claims to be an unemployed Engineering graduate has not even been found for empanelling him by the Board and since respondent no.5 was possessing the minimum qualification as required by the advertisement, as contained in Annexure-1, it cannot be said that the oil Selection Board has acted unreasonably and arbitrarily.

I have already indicated above that there is nothing on record to show that the selection was arbirrary or whimscical and the Selection Committee did not act fairly towards a particular candidate and on the contrary I find that the petitioner Md. Irshadur Rahman was placed at SL. no.2 in the panel and the another petitioner was not even empanelled. That by itself indicates that there was a proper consideration of their case and they have been treated fairly. Particularly in this case, I find that that the Selection Committee consisted of experts in the subject for selection, including a retired High Court Judge as its Chairman and they were men of high status and also of unquestinable impartiality. Therefore, the Court should be slow to interfer with their opinion. In this conection reference can be made to the case of *National Institute of Mental Health and Neuro Sciences* vrs-*K. K. Raman and others* (1) reported in A. I. R. 1992 Supreme Court 1806.

In the submission of the learned counsel appearing on behalf of the petitioners that no reason has been assigned while selecting respondent no.5 and rejecting the case of the petitioners in my opinion, there is no force in it. It is settled by the apppex Court in the case of *National Institute of Mental Health and Neureo Sciences* (Supra) that the Selection Committee takes interview of the condidates, makes statement or their relative

(1) (1992) A. I. R. (S. C.) 1806

merits and recommends a panel of names for appointment and the function of the Selection Committee is neither Judicial nor adjudicatory. It is purely administrative and there is no rule or regulation which requires the Selection Committee to record and in absence of any such legal requirement, the selection made without recording reason cannot be found fault with.

For the reasons afrementioned, I find no merit in these two writ applications, which are, accordingly, dismissed. No order as to costs.

R. D. Application dismissed

CIVIL WRIT JURISDICTION

Before B. L. Yadav and Shashank Kumar Singh, JJ.

1995

November, 6

Ratnesh Kumar Singh.*

v.

The State of Bihar and others.

Public Interest Litigation petition—filed by an advocate—whether maintainable in respect of individual dispute.

Where the writ petitioner, an advocate of the Court filed a writ application as public Interest Litigation, claiming therein that the examinees for admission in the Techical Institutions (Medical/Engineering) and other competitive examination may be allowed choice examination centre residencial centre in respect of subsequent year when examination had already been held in May-June, 1995;

Held, that the dispute involved in the instant case is an individual dispute for which the students or their parents would have come forward and filed writ application. The present application in the form of Public Interest Litigation is not maintaibable.

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 B. L. Yadav, J.

Mr. R. K. Singh foe the Petitioner in person

Mr. Yugal Kishore (S. C.7) for the respondents

B. L. Yadav. J. Whether the present writ petition filed by Shri Ratnesh Kumar Singh, an Advocate of this Court. as Public Interest Litigation (for short "P. I. L.") is maintainable; and

* Civil Writ Jurisdictio Case No. 7223 of 1995. In the matter of an application under Articles 226 and 227 of the Constitution of India.

whether the relief claimed that the examinees may be allowed choice examination centre /residential centre in the various Entraance Examinations for Admission in the Technical Institution (Medical/Enginerring etc.) and other competitive examination can be allowed, particularly in respect of subsquent year when the examination has already been held in May-June, 1995, are short but significant questions for our determination in the present writ petition filed under Articles 226/227 f the Constitution of India.

2. We are conscious that the facts form raw material out of which finished product of judicial findings is fabricated after processing through established legal principles, as in life so in law. It is as fatal, at the same time cowardly not to bring full facts because they are not to our taste. Factual foundation of the petition appears, therefore, to be imperative. By the instant writ petition relief has been sought for issuance of a writ in the nature of mandamus directing the respondents not to cause harassment to a number of candidates appearing in the various entrance examination for admission in Technical Institutions (Medical/Engineering etc.). The respondents conduct the examinations for selecting candidates for admission in the Technical Institutions, The Centres for holding such examinations are fixed arbitrarily at a considrable and inconvenient distance, particularly to the girl students. The principal prayer is that the respondents be directed to hold examinations on the choice centres of the examinaee. The petitioner being an Advocate has, however, no where averred in the petition as to how he is interested in the welfare of the examinees. Even after residential centres are not allowed to hold examination, there has been no noticeable reforms in the matters of unfair means and/or leakage of question papers etc. The policy of the Government is in violation of the Bihar Cnduct of Examination Act, 1981.

3. By a supplementary affidavit it has been averred in paragaph 4 that the "petitioner is also the guardian of the examinees." The simple meaning of this sentence that "the

petitioner is the guardian of all examinees" apparing in such examination. It is in fact surprising as to how an Advocate of this Court can be guardian of the examinees, without indicating the names of the students under his guardianship. The expression is to vague to be appreciable.

4. On behalf of the petitioner it was urged that the order for fixing centres for examination at distance places has adversely affected the legal and fundamental rights of the students appearing for Technical Examinations concluded in May-June, 1995.

5. The learned counsel for the respondents raised a preliminary objection that the present P. I. L. would not be maintainable, as the same has not been filed by the aggrieved person or by any of the examinees or his/her natural or legal guardian. The petitioner being an Advocate, belongs to the noble profession of law but has not specifically stated as to how he is interested in the welfare of the examinees, except a bald averment in the supplementary affidavit that he is guardian of all the examinees. It was also urged that the examination for 1995 for which the relief was sought, has aleady been held in May-June, 1995 and no relief for future examination has been claimed. The preliminary objection raised, was refuted on behalf of the petitioner, and the petitioner as P. I. L. is maintainable and reliance was placed on *State of Himachal Pradesh* vs. a *parent of a Student of Medical College, Shimla& others* (1) *and S. P. Gupta* vs. *Union of India and another* (2) and on *Rural Litigation and Entitlesment Claim* vs. *State of U. P.* (3).

6. On behalf of the resondents reliance was placed on a Division Bench case of this Court in *Arijit Dutta* vs. *Union of India* (4) and on *Dr. Nandjee Singh* vs. *P. G. Medical Students Association and others (5)*..

(1) (1985) A. I. R. (S. C.) 910

(2) (1981) supp S. CC 87

(3) (1988) Judgement Today (3) (S. C.) 787

(4) (1994) 2 BLJ. R. 839

(5) (1993) A. I. R. (SC) 2264

Having scrutinised the submissions of the learned counsel for the parties the main questions are, as to whether the present petition in the form of P.I. L. is maintainable and as to whether in absence of any prayer in the relief portion for future examination (after May-June, 1995), can the relief be granted in respect of the future examinations.

8. As regards the first question, the present petition was filed as P. I. L. by an Advocate of this Court and the relief was claimed for the benefit of the students who appeared at the various entrance examinations for admission in the Technical Institution (Medical/Engineering etc). The petitioner has not shown any relationship with the students. By a sumplementary Affidavit, however, has just been stated that the students are under his guardianship, wihout stating specifically as to who are the students under his guardianship Such vague averments cannot be appreciated. He who seeks equity must do equity. He must come with clear averment that the petitioner is also the guardian of the examinees. The aggrieved persons were the students but none of the students has come forward. The vague statement that the petitioner is guardian of the students cannot be accepted for want of precision. No doubt in *S. P. Gupta's* case (supra) Hon'ble Bhagwati, J. dealing with the question about the locus standi or standing in P. I. L. On the preliminary question being raised by the respondents, ruled as follows:-

"Where a legal, wrong or a legal-injury is caused to a person or to a determinate class or persons by reason of violation of any constitutional or legal right or any burden is imposed in contravention of any constitutional or legal provision or without authority of law or any such legal, wrong or legal injury or illegal burden is threatened and such person or determinate class of person is by reason of poverty, helplessness disability or socially or economically disadvantaged position, unable to approach the Court for an appropriate direction, order of writ in the High Court under Aritcle 226, and in case of breach of any juusteciable right or such person or diterminate class of person in the supreme

Court under Article 32 seeking judicial redress for the legal wrong, or injury caused to such person or determinate class of persons. Where the affected persons are really helpless, the Supreme Court will not insist on a regular writ petition to be filed by the public-spirited individual, espousing their cause and seeking relief for them. The Court will really respond even to a letter addressed by such individual acting pro bono publico, despite the fact that formal rules exist with regard to filing of petitions under Article 32."

The aforesaid observation under paragraph 17 of the aforesaid decision have to be taken in the matter of locus standi as also it is indicated to the effect that in such matters a Court has to scrutinise to ascertain whether there was any helplessness or disability on the part of persons aggrived or not and whether it was bona fide . The following observations in *S. P. Gupta's* case (supra) also appear to be imperative :-

"But the individual who moves the Court for judicial redress in cases of this kind, must be acting bona fide with a view to vindicating the cause of justice and if he is acting for personal gain or private profit or out political motivetion or some other oblique consideration, the Court should not allow itself to be activised at the instance of such person and must reject his application at the threshold, whether it be in the form of a letter addressed to the Court or even in the from of a regular writ petition filed in Court."

9. From the aforesaid observation of their Lordship of the Apex Court in *S. P. Gupta's* case it is manifest that the bona fide of the petitioner in a P. I. L. has to be ascertained by the Court and it has to be also ascertained whether the petitioner was acting bona fide and the Court has to be satisfied that the petition has been filed bona fide and not with an oblique motive as emphasised by the Appex Court Even in the matter of the letter addressed by any person for treating it to be a writ petition precaution has to be taken as to whether it is bona fide or not. In the aforesaid case Shri S. P. Gupta was an Advocate practising

in Allahabad High Court and he was interested in the working of the judiciary. In that view of the matter the petition on his behalf was treated to be maintainable; whereas in the instant case the facts entirely different.

10. In the *State of Himachal Predesh* vs. *Parent of a Student of Medical College, Shimla & others* (supra) no doubt, a letter addressed to a judge of the High Court was treated to be a regular writ petition and was decided on merits, but that was a letter written by a parent of the student. In the instant case also, the parent of any student could have filed such writ petition or any student himself could have come here. Consequently, that case has to be confined to the particular facts of that case and the ratio in respect of th maintainablity of the wirt petition cannot be extended to the present writ petition. The case in *Rural Litigation and Entitlement Claim* vs. *State of U. P.* (Supra) was bassed on different facts inasumch as no individual dispute could be raised in that case.

11. The recent decision unless it apperars to be bona fide and genuine need not be encouraged as that hampers the cause of ther taditional litigants including writ petitions for individual grievances either in connection with violation of fundamantal rights of otherwise. Certain limitations have been imposed by the Supreme Court and other Courts on entertaining P.I. L. and they appear to be appreciable in the circumstances of the case.

12. In *Dr. Nandjee Singh* vs. *P. G. Medical Students Association and others* (supra) Apex Court has clearlyindicated and declared the law on the subject very precisely under paragrap 12 at page 2267 as follows :-

" 12. The facts narrated above would reveal that this was a dispute relating to an individual and turned on the facts. There was no question of law involved in it. We have, therefore, not understood how the resondent-Association could convert an individual dispute into a public interest litigation. We are of the view that cases where what is strictly an individual dispute is sought to be converted into a public interest litigation should not

be encouraged. The pesent proceeding is one of the kind. The learned counsel appearing for the respondent-State wanted to support the respondent-Association. We did not think it necessary to hear the State since the dispute was essentially with regard to the interpretation of the facts relating to the training of an individual medical officer, viz. the appellant. The University had on the facts of the case accepted the contention of the applellant that he had complted 3 year's taining. We have not been able to understand as to what stake the State has in denying the said factual position."

13. Under Ariticle 141 of the Consititution the law declared by the Supreme Court is binding. There may be earlier declaration of the law by the Apex Court and the same law may be declared subsequently from time to time. In such a delicated situation, as matter of fact, a judicial embarrrassment is created as to whether to accept the recent declaration of law or the old one. But nonetheless every decision in respect of declaration of law is binding. In our connsidered opion its recent declaration of law that has to be preferred than the earlier one. In *Dr. Nandjee Singh's* case (supra) what has been emphasised is that where an individual dispute can be raised, in that event P. I. L. should not be encouraged. Whether the appellant in that case had undergone necesary training for two year and has not done housemanship in General Medicine for one year and whether the appellant was posted in any of the teaching place in the Medical College was a question to be decided and for such cause of action why should the P. G. Medical Students Assiciation come forward for the benefit of the appellant *(Dr. Nandjee Singh)*. It was held by the Apex Court that where individual dispute can be raised there need not be any P. I. L. That decision has been followed by a Division Bench of this Court in *Avijit Dutta* vs. Union of India (supra) and in our opinion very correctly. In earlier Division Bench case in *Dr. Taj Singh Lakshmana* vs. *State of Bihar and others* (1) we have taken the similar view.

(1) (1995) 2 P. L. J. R 268

14. In our considered opinion P. I. L. is not to be taken lightly nor the same need be encouraged. It has become luxary litigation filed by a particular petitioner with oblique motive in one form or the other. We must have positive check on the free flow of such litigation. There is a negative approach to the problem and is that the Court functions to deal with traditional litigation in the form of First Appeal, Second Appeal and other different cases filed in the High Court. Those disputes remain pending for long and same time by encouraging P. I. L. this Court would be assuming to usurp the administrative and executive functions of the State. In this connection the view we are taking, finds support from the following observations of their Lordship of the Apex Court in *Sachidanand Pandey & another* vs. State of West Bengal & others (1) (paragraph 59 page 334) as follows :-

..... Public interest litigation has now come to stay. But one is led to think that it posed a threat to Court and public alike. Such cases are nor filed without any rhyme or reason. It is, therefore, necessary to lay down clear guidelines and to outline the corect parameters for entertainment of such petition. If Courts do not restrict the free flow of such cases in the name of public interest litigation, the traditional litigation will suffer and the Courts of law, in stend of dispensing justice, will have to take upon themselves administrative and executive function."

15. In our opinion, the dispute involved in the present writ petition is an individual dispute for whicht he students or their parents would have come forward and filed writ petition. In the circumstances, in our opinion, the present petition in the form of P. I. L. is not maintainable.

16. Reverting to the next question, suffice it to say that the relief has been claimed in the present writ petition of the Examination Centres of the students for their admission in the Technical Institution and though the examination have already been held in May-June, 1995, as is clear from the Admit Cards (vide Annexurs 1/A, 1/B, 1/C and 1/D to the writ petition), nor

(1) (1997) 2 S. C. C. 275

the relief has been claimed for future examination. In case the relief was claimed only for the examination held in May-Jun, 1995 and that period is over, that would not be justified in grantig a relief, which has become infructuous and not maintainable, nor it appears to have been filed bona fide.

17. The above direction of the Apex Court in (1987) 2 S. C. C. 295 (supra) in paragraph 59 and its other decisions are substantially declarations of law to be followed by the High Court. We have to be conscious in entertaining P. I. L. and we must ascertain whether it is genuine, bona fide and unavoidable litigation, otherwise traditional litigation of the High Court would suffer and this Court would usurp the function of the administrative and executive. In the back draw of the aforesaid legal postion we have no option but to hold that the present writ petition in the from of P. J. L. is not maintainable. Hence the present writ petition fails and the same is dismissed, but there shall be no order as to coste.

Shashank Kumar Singh. J. I agree.

R. D

Application dismissed .

CIVIL WRIT JURISDICTION

Before Sudhansu Jyoti Mudhopadhaya, J.

1995

November, 13

*Basudeo Prasad & Another.**

v.

The State of Bihar & Anr.

Service—Excise Clerks on passing departmental examination promoted as Such Inspector Excise on recommendation of Departmental Promotion Committee— subsequently promotion cancelled as they were found to be not eligible for promotion being over-age—legality of.

The writ petitioners, who were initially appointed as Excise Clerk, passed the departmental examination and were recommeded by Departmental Promotion Committee and were consequently promoted to the next higher post of Excise Sub Inspector. Subsequently, a show cause notice was issued to them to show cause as the why their promotion be not cancelled as on the date of promotion they were more than 35 years of age due to which they were not eligible for promotion. On cause being shown, the promotion of writ-petitioners were cancelled.

Held, that as on the date on which the cases of writ petitioners were considered by the Departmental Promotion Cmmittee, they were not eligible for their promotion, being over-age and as such there is no illegality in the impugned order cancelling their promotion.

Arun Kumar and anr. v. The State of Bihar and ors. (1)—followed.

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

The facts of the case material to this report are set out

* C. W. J. C. No. 3859 of 1995. In the matter of an application under Articles 226 and 227 of the Constitution of India.

(1) (1995) C. W. J. C. No. 3821 of 1995 disposed of on 25.9.1995.

in the judgment of Sudhansu Jyoti Mukhopadhaya, J.

M/s Pramod Kumar Makey and Sunil Kumar Singh. for the petitioner

Mr. Rajendra Prasad, S. C. I. for the respondent.

S. J. Mukhopadhaya, J. The petitioners have challenged the order dated 25th May, 1995 as contained in Annexure-1 by which the promotion which were earlier granted to the petitioners to the post of Exise Sub-Inspector have been hled to be illegal and there by while cancelling such order of promotion of petitioners, the petitioners have been reverted to their respective substanlise post of Excise Cleark.

2. The brief facts of the case are, as follows :

The petitioners were originally appointed against the post of Excise Clerk. Certain percentage of the higher post of Excise Sub-Inspector are marked to be filled up by promotion from amongst the Excise Clerk. Under the statutory rule person below 35 years of are and who have already passed the requisite departmental examination are eligible for such promotion to the higher post Excise Sub-Inspector. The date of birth of petitioner no. I Basudeo Prasad is 2nd April, 1948, whereas the date of birth of petitioner no.2 , Shambhu Shran Sinha is 5th January 1950. Both the petitioners passed the requisite department examination which petitioner no. 1 passed in June 78, wher petitioner no.2 passed the same in August, 1992. The initial date of appointment of petitioner no. 1 to the post of Excise Clerk is 6th September, 1974 whereas the initial date of appointment of petitioner no.2 is 5th June, 1978.

Admittedly, for promotion to the next higher post of Excise Sub Inspector, minimum qualifying service of seven year is essential, apart from th eligibility criteria of passing of department examination and 35 years of maximum age. Both the petitioner having more than 7 years of experience and having passed the departmental examination by August, 1982 and being below 35 years fo age, were eligible for promotion to the

next higher post of Excise Sub-Inspector since August, 1982. The cases of petitioners were considered for promition to the higher post of Exise Sub-Inspector and having been recommended by the Departmental Promotion, Committee they were promoted to the higher post of Excise Sub-Inspector, vide Memo No.5289 dated 18th Novermber, 1987, as contained in Annexure-2. Such promotion of petitioners to the higher post of Exise Sub-Inspector was made on provisional basis.

While the petitioners were so performing their duties against the higher post of Excise Sub-Inspector, the Respondents issued a show cause notice to the petitioners, vide a common letter dated 28th October, 1994 (Annexure-3). It was alleged therein that as on the date of promotion of the petitioners given vide Memo dated 18th Novermber, 1987 (Annexure-2), the petitioners were more than, 35 years of age and thereby the petitioner were not eligible for such promotion. The petitioners were asked to show cause as to why the promotion of petitioners given to the higher post of Excise Sub-Inpector be not cancelled. The petitioners having received the aforesaid show cause notice dated 28th october, 194 (Annexure-3), submitted their show cause reply. Show cause reply of petitioner no.1, Basudeo Prasad is dated 25th Noverber, 1994, which has been annexed and Annexue-5. The other show cause reply filed by ptitioner no.2 Shambhu Sharan Sinha is dated 28th November, 94, and the same has been annexed as Annexure-4. In the show cause reply, the petitioners denied the allegations. The show cause reply of petitioner no.2 Shambhu Sharan Sinha is a detailed one. Therein, he has given the details of number of posts which were vacant in different years and the total quota of such posts of Excise Sub-Inspector, which were to be filled up by promotion from amongst the Excise Clerk. Therein the petitioners have shown the date of both the petitioners and others who were promoted vide notification dated 18th November, 1997 (Annexure-2). According to the petitioners, the process of selection for promotion starting from the date the examination for such

promotion was canducted. Both the petitioners being below 35 years of age at the time of passing the departmental examination, they were rightly promoted vide Notification dated 18th November, 1987 (vide Annexure-2). After such show cause reply of the petitioners, the respondents have come out with the impugned order dated 25th May, 1994 (Annexure-1), rejecting the repesentations of the petitioners, and thereby cancelling the promotion orders of the petitioners. It has been shown therein that the petitioners being more than 35 year of age as on the date of promotion (as on 18th November, 1987), their promotion to the higher post of Excise Sub-Inspector were illegal. The petitioners have been reverted to their substantive post Excise Clerk.

3. The counsel for the petitioners submitted that the petitioners became eligible for promotion, as back as, in August, 1982. According to him, the process of selection of promotion to the higher post of Exise Sub-Inspector starts from the date the Respondent conduct. such examination. The petitioners being within 35 years of age, by the time they passed the requisite departmental examination, they were rightly promoted to the post of Excise Sub-Inspector. The counsel for the petitioners further submitted that the petitioners though become eligible for such promotion, as back as, in August, 1982, the Notification of promotion was issued on 18th November, 1987 (vide Annexure-2). According to him, for the laches on the part of the Respondent in issuing the Notification of promotion, the petitioners cannot suffer. It was further contended on behalf of the petitioners that the cut-off date to find out as to whether person is below 35 years of age of not, is to be construed the date of departmental examination and not the date of issuance of Notification of promotion. He also relied on the rule prascribed for such promotion to the post to Excise Sub-Inspector.

The counsel for the petitioers further relied on the decision of the Supreme Court given in the case of *Roshan Lall and others*

(1) (1981)A. I. R. (SC.)597 SC

vs. *the International Airport Authority of India and others* (1) as reported in A. I. R. 1981 S. C. 597. It was submitted by the counsel for the petitioners that the petitioners having been promoted to the higher post of Excise Sub-Inspector, as back as, in November, 1987, after much delay of more than seven years, it was not open for the respondents to question the legality of such promotion. The counsel for the petitioners also relied on the decision of the Supreme Court given in the case of *Kusheshwar Dubey* vs. *Bharat Cooking Coal Limited* (1) as reported in 1989 P. L. J. R. I (S. C.),

The counsel for the petitioners further submitted that the petitioner no. 1 was, in fact, earlier promoted by way of stop gap arrangement to the post of Excise Sub-Inspector by one order dated 16th July, 1983 (Annexure-6). Such promotion was granted with stipulation that whenever the post of Excise Sub-Inspector, which was meant for direct recruit, will be filled up on the recommendation of Bihar Public Service Commission, the petitioners will have to be reverted. Subsequently, after the recommendation of the Bihar Public Service Commissio, when direct recruitment of Excise Sub-Inspector was made, by one common order dated 26th December, 1983 (Annexure-7), the petitioner no. 1 was rverted to the original post of Excise Clerk.

4. A Counter affidavit has been filed on behalf other Respondent. The counsel for the State submitted that though the petitioners become eligible for promotion to the post of Excise Sub-Inspector, as back as, in the year, 1982, the fact remains that they were not promoted to the higher post at that point of time on regular basis. According to him, though the petitioner no. 1 was granted promotion by way of stop gap arrangement in July, 1983, but he was reverted in December, 1983 itself, when regular direct recruitment had been made.

According to the State counsel the cut-off date to find out as to whether a person is below 35 years of age or not, and thereby is eligible for promotion or not is to be construed on the

(1) (1989) P. L. I. R. (S. C)

basis of date of Notification of promotion, and not on the basis of date of passing the department examination. It was contended that the petitioners having been promoted to the post of Excise Sub-Inspector in November; 1987, and admittedly they beig more than 35 years of age as in November, 1987, they were wrongly promoted, being not eligible. It was contended that the impugned Annexure-1 dated 25th May, 1995, has been rightly issued by the Respondents.

5. A Bench of this Court in the case of *Arun Kumar and another* vs. *the State of Bihar and others* (1) passed in C. W. J. C. No. 3821 of 1995, disposed of on 25th September, 1995, took into note the relevant rules for promotion to the post f Excise Sub-Inspector. By the aforesaid judgment given in the case of *Arun Kumar* (supra), this Court held that the cut-off date to find out as to whether a person is below 35 years of age or not is the date of 'selection', i. e. the date when to the Departmental promotion committee considered the cases of promotion.

6. Admitttedly, the petitioners became over-age since the year 1984-85. The petitioner no. I become more than 35 years of age as on 3rd of April, 1983 and the petitioner no.2 become more than 35 years of age as on 6th January, 1985. Admittedly, it is not the case of the petitioners that their cases for promotion to the post of Excise Sub-Inspector were considered prior to the aforesaid dates i. e. prior to 3rd of April, 1983, in the case of petitioner no. 1, and prior to 6th of January, 1985, in the case of petitioner no.2. The cases of petitioners were considered much after the same and were promoted vide common Notification dated 18th November, 1987 (vide Annexure-2).

7. Such being the position, according to me, the date on which the cases of petitioners were considered by the Departmental Promotion Committee, they were not eligible for such promotion, being over-age. In this background, I find no illegality in the impugned order dated 25th May, 1995, as contained in Annexure-1.

8. The writ petition is dismissed accordingly.

R. D. Application dismissed

(1) (1995) Cl W. J. C. No 3821 & 1995 dispondent on 25.9.1995

CIVIL WRIT JURISDICTION

Before Sudhansu Jyoti Mukhpadhaya, J.

1995

November 14.

*Rajendra Prasad Sahu and ors.**

v.

The State of Bihar and others.

Notification issued by Administrative Reforms Department carving out new Divisions, whether automatically makes a change with respect to Divisions as mentioned in the Bihar Nationalised Secondary School (Service Condition) Rules, 1983—District of Khagaria and the schools situated therein, whether included in Kosi Division after notification made in that regard by Human Resources Development Department by notification dated 18th July, 1990—writ-petitioners posted in district of Khagaria, after it was included in Kosi Division tansferred to Saharsa, legality of—writ-petitioners posted in the District of Begusarai, continue to be in Darbhanga, Divisional Cadre—his transfer within Darbhanga Division is not illegal—Human Resources Development Department not having created Munger Division—effect of.

Whenever any notification is issued from the Personnel and Adminstrative Reforms Department of the State of Bihar, makig a change in one or other way with respect to Division created by the Personnel and administrative Reforms Department, the same automatically does not make a change with respect to the Division for the purpose of Human Resources Development Department, including the Divisions as mentioned in the Bihar Nationalised Secondary School (Service Condition) Rules, 1983, hereinafter referred to as the Reules.

*C. W. J. C. No. 6750 of 1995, with C. W. J. C. No. 7328 of 1995, with C. W. J. C. No.5203 of 1995. In the matter of application under Articles 226 & 227 of the Constitution of India.

In C. W. J. C. No. 7328/95.....Ramadhin Pandit.....Petitioner.

In C. W. J. C. No. 5203/95.....Balmiki Roy.....Petitioner.

Held, that when the notification dated 10th January, 1990 was issued from the Personnel and Adminstrative Reforms Department Khagaria District automatically did not come out of Bhagalpur Division and was not placed within the Kosi Division, with respect to Human Resources Development Department. But when the notification was issued by the order of Governor of Bihar on 18th July, 1990 which was issued from he Human Resources Development Department, the district of Khagaria and the school situated therein were taken out of Divisional Cadre of Bhagalpur and were placed under the Divisional Cadre of Kosi Division. The writ-petitioners, who were posted in the schools situated in the district of Khagaria, since 18th July, 1990, were placed in the Divisional Cadre of Kosi Division.

So far as the other writ-petitioner is concerned, he was posted in a school in the district of Begusarai. As the District of Begusarai was within the Darbhanga Division since 26th September, 1983, he continuned to remain as a member of Darbhanga Dvisional Cadre since then.

Held, further unptill now no new Division like Munger Division has been created for the purpose of the Rules and the teachers of the Human Resources Development Department, the writ-petitioner cannot derive any benefit out the Notification dated 22nd April, 1992.

The writ-petitioner who were posted in the district of Khagaria and were placed under the Divisional Cadre of Kosi Division by virtue of Notification issued on 18th July, 1990, issued by the Human Resources Development Department, hence since 18th July, 1990, the writ-petitioners are members of Kosi Divisional Cadre. They have been transferred to Sharsa by the impunged orders which is also within Kosi Division and as such there is no illegality in the Notification transferring them.

The other writ-petitioner, who was posted in Begusari district and was originally in the Darbhanga Division, there being no new cadre of Munger Division, in the Human Resurces Development Department, he is still in the Darbhanga Division.

By the impugned order, he having been transferred to a school within the Darbhanga Division, there is no illegality in the impugned transfer order.

Applications under Articles 226 and 227 of the Constituation of India.

The facts of the cases material to this report are set out in the judgment of Sudhansu Jyoti Kukhopadhaya, J.

Mr. Taj Bahadur Singh & Mr. Ram Kishore Singh, Advocates. for the petitioners in C. W. J. C. 6750 of 1995

Mr. Ram Kishore Singh, Advocate . for petitioners C. W. J. C., 7326 of 1995

Mr. Ram Sumiran Singh, Advocate. for the petitioner W. J. C. 5203 of 1995

Mrs. Seema Ali Khan, S. C. IX. for the State in all writ petition.

S. J. Mukhopadhaya, J. In all the three writ petitioners, common point of law is involved and for the said reason, they are being disposed of by this common order.

2. In these three different orders of transfer. petitioner Rajendra Prasad Sahu has challenged the order dated 30th June 1995 (Annexure-1 to his writ petition), by which he has been transferred from the post of Assistant leacher, High School, Haripur, Khagaria to the post of Assistant Teacher in one Manohar High School, Saharsa. Petitioner Ramahin Pandit has challenged the order date 27th June 1995 (Annexure-1) to his writ petition), by which he has been transferred from the post of Assistant Teacher, High School, Baisa, Khagaria to the post of Assistant Teacher, Girls School, Parri Chainpur, Saharsa. Petitioner Balmiki Roy has challenged the order dated 29th June 1995 (Annexure-3 to his writ petition). by which he has been transferred from the post of Assistant Teacher Mahatma Gandhi High School, Bihta, Begusarai to the post of Assistant Teacher, Bithan, Samastipur.

3. According to the petitioners , they have been transferred

out of their divisional cadre to another division without their consent which is violative of Article 14 of the Constitution of India as well as 'Bihar Nationalised Secndary Schools (Service Condition) Rules 1983 ('the 1983 Rules' for short). It has been stated that petitioner Rajendra Prasad Shau and Ramadhin Pandit, have been transfered from their divisional cadre of Munger division to the other divisional cadre of Kosi division, Saharsa. With respect to Balmiki Roy. it has been alleged that he has been transferred from Munger divisional cadre to the divisional cadre of Darbhanga division.

4. For the purpose of appreciation of these cases, certain relevant facts are essential to be taken into considration. They are as follows :-

All the petitioners were in different Schools which were taken over by the State Government in pursuance of Bihar Non-Government School (Taking Over of Management & Control) Act, 1981 (Act 33 of 1982). The respondent State framed Rules in the yaar 1983 which was published in the Gazette on 26th September 1983, in terms with Sections 9 and 15 of the Act aforesaid commonly known as 'Bihar Nationalised Scondary School (Service Condition) Rules, 1983 (the '1983 Rules' for short). Under Rule 6 of the 1983 Rules, Cadres of teachers were created. The cadre of teachers of Subordinate cadre and Selection Grade was so created in the divisional level. Under Rule 12 of the 1983 Rules, it was laid down that a teacher can be transferred by the Controlling Officer in his divisional cadr. Rule was amended vide Notification dated 28th April 1988 by which it was laid down that the tansfer of Assistant Teachers is to be made by committee constituted at the divisional leval under the Chairmanship of Regional Deputy Director of Education of the Division. In terms with the said 1983 Rules, no teacher is to be posted in his /her own district. Rule 12 (Ja) stipulates transfer from one divisional cadre to another divisional cadre only on the request of Assistant Teacher after loosing his sanierity.

5. According to the ptitioners, the district of Khagaria was

within the Bhagalpur division when the 1983 Rules came into effect on 26th September 1983.The district of Samastipur was within the Darbhanga division at that point of time on 26th September 1983. The respondent State by its Notification issued from the Personnel and Administrative Reforms Department dated 22nd April 1992 (Annexure-C to the counter affidavit of C. W. J. C. No. 6730 of 1995) , reorganised the divisions. A new division, namely, Munger Division, was constituted, after carving out different districts from the earstwhile division. The district of Khagaria, which was within Bhagalpur division, was taken out and placed under the newly created Munger division. By the said Notification dated 22nd April 1992 (Annexure-C).

With regard to Samastipur district, it is stated that the same was bifurcated in two districts, namely, Samastipur district and Begusarai district. Both the districts aforesaid, after notification, were within the Darbhanga Division. It is stated that view notification dated 22nd April 1992 (Annexure-C). Begusarai district was taken out of Darbhanga Division and was placed under Munger Division.

6. Counsel for the petitioners submitted that by virtue of Notification (Annxure-C), the Khagaria district having been placed and under Munger division, petitioners Rajendra Prasad Sahu and Ramadhin Pandit, both of whom were working in school in the district of Khagaria, stood transferred in the namly created Munger division. It is contended that in terms with 1993 Rules, the cadre of these two petitioner being divisional cadre of Munger division, since 22nd Apil 1992, they cannot be transferred out side Munger division, as has been done by the impunged orders of transfer in their respective cases. It is in this background, they have challenged their Notifications of transfer (Annaxure-1 each in their respective cases) on the ground that such transfer has been made in violation of 1983 Rules, out side their divisional cadre of Munger division, without their option and they having been thrown out of their cadre. Notification of tranfer are also violative of Article 14 of the Constitution of India.

It was submitted that the aforesaid two petitioners had right to remain in their parent cadre, namely, Munger division cadre.

7. With respect to the petitioner Balmiki Roy, it was Contended by his counsel that the Mahatma Gandhi High School, Bihat was in the district of Begusarai, Since 22nd April 1992, by virtue of Annexure-C aforesaid, the district of Begusarai having been placed Munger division, he ceased to be a member of cadre of Darbhanga division. It was submitted that since 22nd April 1992, the petitioner Balmiki Roy having become a member of newly created Munger division, this petitioner cannot be transferred out of Munger divsion, as has been done by the impugned orders, as contained in Annexure-3 to his writ petition. Counsel for the petitioner made similar submission in the cases of Balmiki Roy, as has been made with respect to tow other petitioners.

8. A counter affidavit has been filed in the case of Rajendra Prasad Sahu (C. W. J. C. No. 6750 of 95). Another Counter affidavit had also been filed in the case of Balmiki Roy (C. W. J. C. No. 5203) of 1995). A common point has been taken in both the counter affidavit by the State. It is for the said reason, I am referring the counter affidavit filed in the case of Rajendra Prasad Sahu (C.W. J. C. No.6750/95).

9. According, to the counsel for the State Khagaria district was in the divisional cadre of Bhagalpur division as on 26th September 1983. when the divisional cadre was created. The Personal and Adminitrative Reforms Deparement of the State of Bihar, vide one Notification dated 10th January 1990, carved out Khagaria district out of Bhagapur division and placed the same within the Kosi division. The Notification dated 10th January 1990 has been enclosed as Annexure-A to the counter affidavit. It was stated that subsequently, Human Resources Development Department, the parent department of the petitioners, vide Notification dated 18th July 1990 (Annexure-B to the counter affidavit), took into note the Notification issued from the Personnal and Administrative Department dated 10th Janu-

ary 1990 (Annexure-A). The Human Resources Development Department of the State of Bihar also carved out the Schools which were situated in the Khagaria district out of Bhagalpur division and placed under the jurisdiction of Kosi division. Such specific Notifiction having been issued from the Human Resouces Development Department on 18th July 1990 (vide Annexure-B), the Schools situated in the district of Khagaria were taken out of Bhagalpur division, and were merged with the Kosi division since 18th October 1990. It is contended by the counsel for the state that in the aforesaid background, the petitioners Rajendra Prasad Sahu and Ramadhin Pandit , who were posted in two different School in the Khagaria district, they were placed and taken in the Kosi divisional cadre since 18th July 1990.

So far as the Notification issued on 22nd Aplil 1992 (Annexure-C) is concerned, by which the new Munger division was created, it was submitted by the counxure-C) having been issued from the Personal and Administrative Reforms Department of the State of Bihar, the same autometically does not apply in the Human Resources Devlopment Department. According to the counsel for the State, till a proper Notification, like Notification dated 18th July 1990 (Annexure-B) is issued from the Human Rescurces Development Department, adopting the bifurcation made by the personal and administrative Reforms Department, for the purpose of divisional cadre of Human Resources Development Department, it cannot be construed that the Khagaria district was placed within the newly created Munger divisional cadre. It was submitted that if a proper notification is issued from the Human Resources Development Department in terms with Notification of Personnal and Adminitrative Reforms Department, dated 22nd April 1982 (Annexure-C), only then a newly created Munger divisional cadre can be stated to have been constituted and in absences of th same, it cannot be presumed any existence of nemly created Munger divisional cadre for the purpose of employees of Human Resources Development Department.

It was further contended by the counsel for the State while frefering to different orders, as contained in Annexure-D series, which are dated 20th September 1993,5th September 1994, 20th August 1994 and 5th September 1994, even after 22nd April 1992 (after issuance of Annexure-C), the Human Resources Development Department has not taken into cognizance the newly created Munger divisional cadre, as created by Personnal and Administrative Reforms Department. They have treated the divisonal cadre, as was existing after 18th July1990 (after issuance of Annexure-B) and thereby the Khagaria district having been treated whin the Kosi division, different Notification were issued from Kosi division granting promotion to different Assistant Teachers to higher grades who were posted in the Khagaria district. It was submitted that the teacher on one hand cannot derive benefit to promotion by treating them as a member of Kosi division and on the other hand, the teacher of the said Khagaria district cannot contend that they belong to Munger division since 1992 for the purpose of challenging the Notification of transfer.

10. With respect to Balmiki Roy, counsel for the State sumbitted that the Mahatma Gandhi High School Bihta where this petitioner was functioning, is situated in the district of Begusarai. The said district of Begusarai being within the Darbhanga division, since the creation of the cadre made in the year 1983, the same still remains within the Darbhanga division. It was submitted that whatever bifurcation of Begusarai district that has been made by the Personnal and Administrative Department,vide Notification dated 22nd April 1992 (Annexure-C), is not applicable for the purpose of deciding divisional cadre in the Human Resources Development Department of the State of Bihar. It was submitted that the petitioner BalmiKi Roy was originally in he Darbhanga divisional cadre, and in the eye of law, there being newly created Munger Division for the purpose of Human Resources Development Department, it cannot be construed that petitioner Balmiki Roy was ever taken in any so

called Munger division. It was submitted that is noting like Munger divsion at present with respect to Human Rescurces Development Department of the State of Bihar 1.

11. Before giving my finding I will like to discuss certain facts which are known to the employees of the State, which has come to my notice in different cases :-

There is no definition of any 'division' laid down under any Rule, Guide-Line and/or Circular of the State of Bihar, Even under the 1983 Rules, issued by the Human Rescurces Development Department, no definition of 'divisional cadre' has been given therein. Different Department of the State of Bihar,for the purpose of their administrative control, have constituted divisions, carving out and placing of different areas wihin a particular division. For example, Personnal and Administrative Department, for the puppose of their administration, has created different divisions out of different district. Separate Revanue divisions have also been created by different Departments, according to their administrative exigencies consisting of one or other districts. The water Resources (Irrigation) Department has got its sepatate revenue divisions consisting of different districts, whereas the Revanue and Land Reforms Department of the State of Bihar has its its own revenue divisions. The Engineering Departments, like Road Construction Department / Building Construction Department, Public Health & Engineering Department etc., they have created their own divisions, taking into account their administrative exigencies, out of one or the other district. So far as the Human Resource Development Department is concerned, there is no such creation of saparate division speifying one or the other district therein. It is only by 1983 Rules, divisional cadres have been created without any definition /speification of disticts.

Both, counsel for the State as well as counsel for the petitioners, have accepted that since the divisional cadres were created under the 1983 Rules on 26th September 1983 by the Human Resources Development Department for the purpose of

their administrative need they are following the created Division of Personal and Adminisrative Department.

12. In the aforesaid background. It can sefly be held that when the divisional cadre was created by Human Resourcee Development Department, vide 1983 Rules, on 26th September 1883, such divisional cadre included such districts, as were included for the purpose of divisions created by the Personnel and Administrativ Reforms Department at that point of time. In the background. I hold that as on 26th June 1983, when the 1983 Rules were framed, the district of Khagaria was in the divisional cadre of Bhagalpur division. I further hold that as on 26th September 1983, the district of Begusarai was in the Darbhanga division, for the purpose of divisional cadre under the Human Resources Development Department :

13. So far bifurcation of divisional cadre of Human Resources Development Department is concerned, as created vide 1983 Rules, according to me, there cannot be automatic blfurcation/bifurcation of jurisdiction of such a divisional cadre. The 1983 Reles were framed by the order of the Governor of Bihar from its Human Resouces Development Department. If any change is to be made in the said 1983 Rules, for the purpose of changing the definition of 'divisional cadra' and/or bifurcation of such divisional cadre of Human Resources Development Department. It is only the Human Resources Development Department which can issue appropriate notification carving out and/or creation one or other divisional cadre by taking out or amalgamating one or other districts from one or other divisions, which Notification can only be issued by the order of Governor of Bihar from its Human Resources Development Department. In the aforesaid background, I hold that whenever any Notification is issued from the Personnal and Administrative Reforms Department of the State of Bihar making a change in one or other way with respect to divisions created by thePersonnal and Administrative Department, the same automatically does not make a change with respect to the divisions for the purpose of

Human Resorces Department Department, including the divisions as mentional in the 1983 Rules. It is for the said reason I hold that when the Notification dated 10th January 1990 (Annexure-A) was issued from the Personnal and Administrative Department,the Khagaria district automatically did not come out of Bhagalpur division and was not placed within the Kosi division, with respect to the Human Resources Development Department. But when the Notification was issued by the order of Governor of Bihar on 18th July 1990 (Annexure-B), which was issued from the Human Rescurces Development Department, the district of Khagaria and the School situated therein were taken out of divisional cadre of Bhagalpur and were placed under the divisional cadre of Kosi division. The petitioner Rajendra Prasad Sahu and Remadhin Pandit who were posted in the Schools situated in the district of Khagaria , since 18th July 1990, they were placed in the divisional cadre of division.

14. So far as petitioner Balmiki Ram is concerned. As the district of Begusaria was within the Darbhanga division since 26th September 1983, he continued to remain as a member of Darbhanga Divisional Cadre Since then.

15. So far as the Notification dated 22nd April 1992 (Annexure-C) is concerned, the same has been issued from the Personnal and Administrative Reforms Department. Accordingly, as I held in the preceding paragraph, the same automatically does not affect in one or other way, the divisional cadre of Human Resources Development Department. There being no separate Notification issued from the Human Resources Development Department (by the order of Governor of Bihar) by virtue of Personnal and Administrative Reforms Department's Notification 1983 Rules cannot be amended. In this background. I hold that till date no new division like; Munger division has been created for the purpose of 1983 Rules and teachers of Human Resources Development Department,—the petitioners, cannot darive any benefit out of Notification dated 22nd April 1992 (Annexure-3).

16. Petitioners Rajendra Prasad Sahu and Ramadhin Pandit were posted in the district of Khagaria and were placed under the divisional cadre of Kosi division by virtue of Notification issued on18th July 1990 (Annexure-B), issued fromthe Human Resources Development Department, so I hold that since 18th July 1990, the aforesaid two petitioners are members of Kosi divisional cadre. These two petitioner having been transferred to Saharsa by the impugned Annexure-1 respectively to their writ petitions which is also wihtin the Kosi division, I find no illegality in such Notifications.

17. So far as petitioner Balmiki Roy is concerned, as he was posted in Begusarai district and was originally in the Darbhanga division, there being no new cadre of Munger division, in the Human Resources Development Department, I hold that he is still in the Darbhanga Division and by the impugned Annexure-3, he having been transferred to a school within the Darbhanga division,I find no illegality with respect to the said transfer order.

18. So far as one of the grivances of the petitioners that their seniority will be affected is concerned, I find no merit in such contention. If the petitioners can presume that they automatically stood transferred under the under Munger division by virtue of Notification dated 22nd April 1992, and thereby their seniority does not affect on transfer to so called Munger division. I do not understand if they are placed in another division by virtue of bifurcation, how they can raise such objection. In any case, as placement of petitioners Rajendra Prasad Sahu and Ramadhin Pandit in the Kosi division was made as back as on 18th July 1990 and such Notification was issued by the respondents, these petitioners will not loose their seniority which is to be counted from the date of their initial appointment in the grand. Further, the aforesaid two petitioners having been placed in the Kosi divisional cadre on 18th July

1990, since than, they ceased to be a member of Bhagalpur divisional cadre and cannot raise any grivance at this belated stage.

So far as petitioner Balmiki Roy is concerned, I have held that he still continues in Darbhagna Division. Hence, there is no question of affecting his seniority.

17. For the reasons stated above, I find no merit in these writ petitioners. The writ petitioner are dismissed.

R. D. Application dismissed.

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স্থা পত-১৯১৬