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PATNA SERIES

CONTAINING

CASES DETERMINED BY THE HIGH COURT AT PATNA

AND BY THE SUPREME COURT ON APPEAL FROM HIGH COURT

REPORTED BY

Shyameshwar Dayal, M.A., B.L. (Reporter)

R. Dayal, M.A.,B.L. (1st Assistant Reporter)

Gajendra Narayan, M.A., B.L. (2nd Assistant Reporter)

PATNA

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BIHAR REORGANISATION ACT, 2000—Contd.

Held, further, that all such proceedings, though relating to the territories of Jharkhand, the institution of which in courts remaining in the truncated State of Bihar was lawful and valid because of the nature of offences or because of a part of the cause of action had arisen outside those territories will not be covered by section 89 (1) and shall therefore continue to be tried by the respective courts of Bihar.

Held, also, that the fountainhead of the conspiracy and of the criminal acts flowing from the conspiracy, was at Patna, part of the alleged offences, rather a substantial part of the alleged offences were committed at Patna and as such the special court at Patna equally had jurisdiction to try cases. Consequently it is held that these cases do not relate exclusively to the territory now-forming part of the State of Jharkhand and, therefore, these cases cannot be said to have been transferred to the Court in Jharkhand as provided under section 89 (1) of the Bihar Reorganisation Act, 2000. These cases will, therefore, continue to proceed before the Special Judge at Patna.

Per Nagendra Rai, J.

Held, that the word "exclusively" used in section 89 of the Reorganisation Act has to be given a wider meaning. If the offences have been committed in different terriories, part of which now falls in the State of Jharkhand and part of which also falls in the State of Bihar then under the law, the cases may be tried by the courts located at the places falling within the territories of both the States. If the cases can be tried by the Courts situate in both the States then there will be no use of transfering the cases from the courts falling within the territory of one State to the court falling within the territory of other State. The word "exclusively" used in section 89 of the Reorganisation Act means exclusion of all others. only those cases which exclusively belong to the territory of the State of Jharkhand shall alone be transferred. If place of crime of a particular case or proceeding falls in territory of State of Bihar as

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essence of the contract, but the agreement shall have to be considered in its entirety and on proper appreciation of the intent and purport of the clauses incorporated therein. The statement of facts and the relevant terms of the Agreement ought to be noticed in its proper perspective so as to assess the intent of the parties. The Agreement must be read as a whole with corresponding obligations of the parties so as to ascertain the true intent of the parties.

Held, that the Port of Discharge has not been named in the instant case nor the Surveyor has been appointed without whose certificate question of any payment would not arise and time cannot be said to be the essence of contract in such a case.

Held, further, that by reason of the non-fulfilment of the three conditions of the Agreement, question of time being the essence of the contract would not arise and, as such, delivery was to be expected within a reasonable time but before the expiry of the reasonable time diverse letters were sent asking for details but the buyer maintained total silence when there was a duty for it to speak. The finding of the Appellate Court (Division Bench) of the High Court that the contract stood extended upto 14th/15th October, 1989 does not have any factual support and as such is totally unwarranted and cannot be sustained. For the same reason the finding of Appellate Court as regard the issue of law, warranting intervention of the High Court vis-a vis the Award, cannot be sustained.

Held, further, that time being the essence of the contract does not arise in the contextual facts and more so by reason of the facts that the cargo was a cargo afloat on the High Seas.

Held, also, that Single Judge of the Delhi High Court came to a correct conclusion that the findings of the Arbitrators in regard to the extention of delivery period and failure to fix the fresh date has resulted in breach of the contract on the part of the Government and the same being purely based on appreciation of

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material on record, by no stretch it can be termed to be an error apparent on the face of the record entitling the court to interfere. The Arbitrators have in fact come to a conclusion on a closer scrutiny of the evidence in the matter and re-appraisal of evidence by the court is unknown to a proceeding under section 30 of the Arbitration Act, 1940. Re appreciation of evidence is not permissible and as such this court is not inclined to appraise the evidence save and except the one pertaining to the issue, time being the essence of the contract.

Held, also, that the issues raised in the matter on merits relate to default, time being the essence of the contract and quantum of damages-which are all issues of fact, the Arbitrators are within their jurisdiction to decide the issue as they deem it fit. Courts have no right or authority to interdict an award on a factual issue and on this score the Appellate Court (Division Bench) has gone totally wrong and thus exercised jurisdiction which it did not have. The exercise of jurisdiction is thus wholly unwarranted and the High Court has exceeded its jurisdiction.

M/s Arosan Enterprises Ltd. v. *Union of India and Anr.* (2001) I.L.R. 80 (2), Pat.

Customs Act, 1962 as amended in 1991, section 27—principle of unjust enrichment incorporated in section 27, whether applicable in respect of imported raw material captively consumed in the manufacture of final product.

Where at the time of import of copper scrap the respondent sought exemption from payment of additional customs duty viz countervaling duty (CVD) which was available under customs Notification No. 35/81 CE dated 1.3.1981 but at the time of clearance this duty was paid and subsequently, the respondent filed an application for refund of additional customs duty paid at the time of import of copper scrap claiming benefit under the aforesaid notification of 1.3.1981, which was rejected by the Assistant Collector Customs holding that the copper scrap was correctly assessed to CVD which

CUSTOMS ACT, 1962—Concld. Page

was reversed by High Court of Bombay which allowed the writ application of respondent;

Held, that the High Court has not correctly interpreted the relevant provisions of the Customs Act, 1962 as amended in 1991, and the principle of unjust enrichment incorporated in section 27 of the Customs Act, 1962 would be applicable in respect of imported raw material captively consumed in the manufacture of final product.

Union of India and ors. v. *Solar Pesticide Pvt. Ltd and another* (2001) I.L.R. 80 (2) Pat. 48

Dismissal—order of—passed by Superintendent of Police, after enquiry officer in departmental proceeding found the charges against the petitioner proved—acquittal by Sessions Court in Criminal case—whether the order of punishment of the petitioner could be set aside.

The petitioner, a writer constable in police station was charged of raping an unmarried girl and a departmental proceeding was initiated against him and the enquiry officer after recording evidence of the girl and other witnesses came to a finding that the charge against the delinquent was proved and the Superintendent of Police passed the final order of dismissal against him which was confirmed in appeal. The criminal case against the petitioner ended in his acquittal as the case was closed without the victim girl having been examined.

It is well settled that if the finding of departmental enquiry is based on appreciation of evidence, in exercise of its writ jurisdiction, the High Court should not interfere with the said finding of fact.

Held, that the disciplinary proceeding or the order of punishment of the delinquent cannot be set aside even on decision of Sessions Court acquitting the delinquent.

Ram Kishore Singh v. *State of Bihar & ors.* (2001) I.L.R. 80 (2) Pat. 67

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Persons With Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995—sections 18 and 19—State directed to constitute State Co-ordination Committee and State Executive Committee in the light of sections 18 and 19 and to make amendment in section 61 of Bihar State Universities Act, 1976 and section 58 of Patna University Act, 1976, incorporating provisions regarding reservation for persons with disabilities—whether duty cast on State under the Disabilities Act to reserve at least 3 per-cent seats for such candidates—Vice Chancellor Patna University and Principal Patna College directed to consider the case of petitioner and other candidates with disabilities for admission in B.A. (Hons) Part I Course,in anticipation of amendments in section 61 of Bihar University Act and section 58 of the Patna University Act and Regulations to be framed pursuant to the amendments.

The State Government is directed to immediately take necessary steps for constituting State Coordination Committee as well as State Executive Committee, as provided in sections 18 and 19 of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 hereinafter referred to as the Disabilities Act, and provide necessary infrastructure to them and make them functional in true sense. The State will also take necessary steps to bring about necessary amendments in section 61 of the Bihar State Universities Act, 1976 and section 58 of the Patna University Act, 1976, incorporating provisions regarding reservation for the persons with disabilities.

Held, that a duty is cast on the State under the Disabilities Act to reserve at least 3 per cent seats for candidates with disabilities.

Held, further, that the respondents, particularly the Vice Chancellor, Patna University and Principal, Patna College are directed to consider the case of the petitioner and other disabled candidates who had applied for admission pursuant to notice dated 10.1.2001 and in respect to whom the list was notified on 18.1.2001.

PERSONS WITH DISABILITIES (EQUAL OPPORTUNITIES, PROTECTION OF RIGHTS AND FULL PARTICIPATION) ACT, 1995—Concld. Page

SERVICE—Concld. Page

SUIT—Concld. Page

SUPREME COURT

*Before B.N. Kirpal and Umesh C. Banerjee, JJ.**

1999

September, 16.

*M/s. Arosan Enterprises Ltd.***

v.

Union of India & Anr.

Contract—when time becomes the essence of the contract—the cargo was afloat on High Seas—whether time could be essence of the contract—issues raised in the matter on merits relating to default, time being essence of the contract and quantum of damages being matters of fact, whether lie within the jurisdiction of the Arbitrators—Court, whether could interdict an award on factual issues.

Law is well settled that when the contract itself provides for extention of time, the same cannot be termed to be the essence of the contract and default in such a case does not make the contract voidable.

Mere fixation of a period of delivery or a time in regard thereto does not by itself make the time as the essence of the contract, but the agreement shall have to be considered in its entirety and on proper appreciation of the intent and purport of the clauses incorporated therein. The statement of facts and the relevant terms of the Agreement ought to be noticed in its proper perspective so as to assess the intent of the parties. The Agreement must be read as a whole with corresponding obligations of the parties so as to ascertain the true intent of the parties.

Held, that the Port of Discharge has not been named in the instant case nor the Surveyor has been appointed, without whose certificate question of any payment would not arise and time cannot be said to be the essence of contract in such a case.

Held, further, that by reason of the non-fulfilment of the three conditions of the Agreement, question of time being the essence of the contract would not arise and, as such, delivery was to be expected within a reasonable time but before the expiry of the reasonable time diverse letters were sent asking for details but the buyer maintained total silence when there was a duty for it to

* In the Supreme Court of India.

** Civil Appeal Nos. 8010 of 1995 with Civil Appeal No 8011 of 1995 arising out of the judgment of Delhi High Court.

speak. The finding of the Appellate Court (Division Bench) of the High Court that the contract stood extended up to 14th/15th October, 1989 does not have any factual support and as such is totally unwarranted and cannot be sustained. For the same reason the finding of Appellate Court as regard the issue of law, warranting intervention of the High Court vis-a vis the Award, cannot be sustained.

Held, further, that time being the essence of the contract does not arise in the contextual facts and more so by reason of the facts that the cargo was a cargo afloat on the High Seas.

Held, also, that the Single Judge of the Delhi High Court came to a correct conclusion that the findings of the Arbitrators in regard to the extention of delivery period and failure to fix the fresh date has resulted in breach of the contract on the part of the Government and the same being purely based on appreciation of material on record by no stretch it can be termed to be an error apparent on the face of the record entitling the court to interfere. The Arbitrators have in fact come to a conclusion on a closer scrutiny of the evidence in the matter and re-appraisal of evidence by the court is unknown to a proceeding under section 30 of the Arbitration Act, 1940. Re-appreciation of evidence is not permissible and as such this court is not inclined to appraise the evidence save and except the one pertaining to the issue, time being the essence of the contract.

Held, also, that the issues raised in the matter on merits relate to default, time being the essence of the contract, and quantum of damages-which are all issues of fact, the Arbitrators are within their jurisdiction to decide the issue as they deem it fit Courts have no right or authority to interdict an award on a factual issue and on this score the Appellate Court (Division Bench) has gone totally wrong and thus exercised jurisdiction which it did not have. The exercise of jurisdiction is thus wholly unwarranted and the High Court has exceeded its jurisdiction.

Case laws reviewed.

Appeal against the judgment of Delhi High Court.

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

BANERJEE, J.

These two Appeals by the grant of Special Leave and arising out of the Judgment of the Delhi High Court focus two singularly

singular questions pertaining to (i) the time being the essence of the contract and (ii) authority of the High Court in the matter of interference with an Arbitral Award under the Repealed Act of 1940 (The Arbitration Act, 1940).

For effectual disposal of these two question, noticed above, reference to certain factual details in this judgment is inevitable and adverting thereto it appears that on October 4, 1989 Union of India floated an invitation to tender for purchase of sugar to meet the urgent requirement of anticipated scarcity in the Indian market during the Dussehra and Diwali festivals in November, 1989 which however, and without much of a factual narration, culminated in an Agreement dated 24th, 25th October 1989 with M/s. Arosan Enterprises, being the Appellants herein, for the supply of 58000 metric tonnes of sugar. The Contract as above inter alia contained the following terms :

(a) That the claimant shall supply 58,000 M.T. of sugar (net weight plus minus 5% at sellers option).

(b) That the claimant shall arrange shipment of entire quantity of the contracted sugar so as to reach Indian Ports not later than 31st October, 1989, shipment within the contracted delivery period was to be the essence of the contract.

In case of delay the seller was to be deemed to be in contractual default with a right to the buyer to cancel the contract. The buyer could however extend the delivery period at a discount as may be mutually agreed between the buyer and the seller.

(c) That price payable was to be U.S. Dollar 480 per metric tonne.

(d) That the seller had to establish an unconditional irrevocable performance guarantee in favour of the buyer by any Indian Nationalised Bank at New Delhi for 10% of the total contract value of the maximum guaranteed quantity to be shipped within 7 days of the contract.

(e) That the payment was to be made to the seller by irrevocable letter of credit (L/C) covering 100% value of the contract quantity. The L/C was to be established by the buyer within seven days of the receipt of an acceptable performance Bank Guarantee.

(f) The performance Bank guarantee (PBG) was to be by any Indian Nationalised Bank at New Delhi and was to be kept valid for a minimum period of ninety days beyond the last date of contract shipment period."

The factual score further depicts that on 24th October, 1989, itself the appellant did furnish a performance bank guarantee for $ 29,28,000 and upon bank guarantee being furnished, the Government of India assigned the contract to the Food Corporation of India (FCI) under clause 20 of the Agreement. FCI also in its turn opened a Letter of Credit for the full value of the contract though, however, as the records depict that while on 26th October, 1989, the Letter of Credit was opened by FCI but its authentication was not effected within the delivery date i.e. 31st October, 1989.

Be it noted that in terms of the payment clause, the payment was to be made by the buyer by way of irrevocable letter of credit covering 100% of the contract quantity and letter of credit was to be established by the buyer within seven days from the receipt of performance bank guarantee and it is upon completion of the period of 7 days from the date of acceptance of the performance bank guarantee, the letter of credit should have been authenticated and that was to be effected by about 31st October, 1989. In the contextual facts the authenticated bank guarantee was effected only on 2nd November, 1989 i.e. after the expiry of the date of the delivery-It is on this score detailed submissions have been made by both Mr. Rohtagi appearing in support of the appeal and Mr. Dholakia appearing for FCI and Mr. K.N. Rawal, the learned Addl. Solicitor General for the Union of India and it is in this perspective certain further factual details would be of some assistance.

The telex messages from Food Corporation of India dated 3rd, 7th and 8th November, 1989 go to show that in fact there was the anxiety of the buyer to obtain the goods and it is on these anxious inquiries, Mr. Rohtagi contended that the time for delivery obviously stands extended and the essence of the contract been given a go-by.

The facts further depict that while the correspondence were had between the parties as regards the delivery schedule, Government of India by a letter dated 8th November transmitted an intimation which was despatched on 9th November, 1989, canceling the contract at the risk and cost of the appellant herein.

Subsequently, however, on 11th November, 1989, the Government of India unilaterally by its letter withdrew the letter of cancellation and on 15th November, 1989 the appellant informed the FCI that by reason of the cancellation, the cargo arranged already, has gone out of control and that a new cargo was being arranged by reason wherefor FCI was asked to fix a new delivery date and consequently steps would be taken in regard thereto. Needless to refer here that the letter of withdrawal of cancellation, however, did not contain any fixed date or new date of delivery. There was, however, as the records depict, total silence from FCI, and consequently, the appellants on 24th and 30th November, 1989 further reminded the corporation to fix the delivery date and take necessary steps to effect the payment under the law of trading. Significantly, both FCI and Government of India maintained a total silence in regard thereto inspite thereof.

On the factual matrix it further appears that subsequently a meeting was held between the claimants and the Union Minister for Food and Civil Supplies wherein it was agreed that on the claimants paying a sum of Rs. 5 lakhs towards the expenses incurred by the Government in opening the letter of credit and claimants giving up any claim for damages, the performance bank guarantee would be released—this aspect of the matter has however been very emphatically disputed by respondents and both the learned senior Advocates appearing on behalf of the respondents contended that the Court would not be justified in assessing this aspect of the matter to be of any relevance in the contextual facts. We shall refer to this aspect of the matter later more fully in this judgment but to complete the factual score, it appears that on 25th January, 1990 the Government of India cancelled the contract on the ground that the seller had failed to fulfill its contractual obligations within stipulated time which was mentioned to be on 31.10.89 and the performance bank guarantee of the claimants was also forfeited by FCI.

It is by reason of such a forfeiture, however, that the matter was referred to arbitration in terms of the arbitration clause in the agreement between the parties. There being however, no dispute, as regards the arbitration clause, we deem it convenient not to set out the same in extenso and suffice it would be further to note that Sri Justice S.N. Shankar, the former Chief Justice of the High Court of Orissa and Sri K.C. Diwan, an Advocate were appointed as Arbitrators in terms therewith and who in their turn made and

published their award to the effect that the claimants were entitled to the refund of the performance bank guarantee amount of $ 29,28,000. The claim of the claimant-appellant herein, however, on account of interest was rejected. It is this Arbitral award which was challenged before High Court and the learned Single Judge found that FCI's letter dated 8th November, 1989 clearly depicted that they were still interested in taking delivery of the goods and therefore the clamant was justified in asking for fixation of a fresh delivery date. The learned Single Judge further found that the findings of the Arbitrators in regard to extention of the delivery period and failure to fix the fresh date has resulted in breach of the contract on the part of the Government and the same being purely based on appreciation of materials on record, question of interference therewith would not arise since by no stretch it can be termed to be an error apparent on the face of the record. The award, therefore, was sustained by the learned Single Judge. In an appeal therefrom however, the finding of the Single Judge was reversed and the Bench of the Delhi High Court dealing with the Appeal in question recorded that the buyer, being the Appellant herein, had in fact impliedly accepted 14/15th November, 1989 as the new date of delivery by which the seller was bound to deliver and the failure of the seller to supply by the said date constituted a breach of contract justifying the cancellation and thus, set aside the judgment and order of the learned Single Judge as also the arbitral award. The Bench further ordered that the findings of the Arbitrators to the effect that the buyer was obliged to fix fresh dates of delivery was an error of law on the face of the record and as such there was a breach committed by the seller. It is against this order of the Division Bench of the High Court that a Special Leave Petition was filed before this Court and this Court by an order dated 4th September, 1995 granted special leave in pursuance whereof this matter has come up for final disposal before this Bench.

Turning now on to the issues as noticed above namely, whether time was the essence of the contract or not, it would be convenient to note the relevant extracts of the Arbitral award pertaining to the issue in question. The Arbitrators, inter alia, found :

> "The withdrawal of the letter of cancellation (vide Ex. A.21) had the effect of reviving the original contract dated 24/25 October, 1989 with all its terms except that sugar had to be

delivered by 31 October, 1989. Stipulation in clause 3 of the contract that shipment with contract delivery period is of the essence of the contract" also stood revived. Letter of Credit had been, established on the basis of the original contract which stipulated a fixed time for delivery but as no time for delivery was fixed in the letter withdrawing the cancellation (Ex. A-2,1). the claimants naturally felt concerned and repeatedly requested the respondent to do the needful.

.....

Evidence adduced thus clearly shows that the Respondents sent no reply whatever to the request of the claimants asking for specification of the delivery time and for the needful being done in regard to L/C in the changed circumstances after the withdrawal of the letter of cancellation. On the contrary, all of a sudden they cancelled the contract again by the letter dated 25.1.1990 Ex. A 36. In our view, this conduct of the respondents was unjustified and illegal in the facts of this case.

.....

Then again it would be seen that the ground of cancellation taken in the letter of second cancellation Ex. A 36 is the same as had been taken earlier in letter Ex. A 17, namely failure to fulfill the contractual obligation within the stipulated time of 31st October, 1989. The respondents had already waived this ground. They were precluded from canceling the contract on the same ground again after its revival. The cancellation by Ex. A 36 thus on a non-existent ground and illegal."

.....

The Arbitrators further held that

"We further find that L/C opened by the respondents was with reference to the contract which stipulated a fixed time for delivery (namely 31st October, 1989) but after revival of the contract the position had changed materially. The original contract had been cancelled and this cancellation had been withdrawn and in the contract that stood after withdrawal of the cancellation no time for delivery was stipulated. It was incumbent on the respondents to apprise this position to the Bank and make suitable changes in the L/C. The claimants could receive from the Bank, the

amount secured by L/C for their benefit only after satisfying the bank, that they had shipped the contracted sugar in accordance with the terms of the contract. There is nothing on the record to show that the respondents took any steps to inform the Bank of the changed position so that shipping documents presented by the claimants after 31st October, 1989 could be examined by the bank in the light of the new situation."

.....

The argument is without merits. If the contract was revived on the understanding why was not this fact communicated to the claimants in reply to their persistent queries about the date of delivery and why was the L/C not suitably modified and the bank issuing the L/C informed accordingly. In fact, there is no foundation in the pleadings for such a plan.

.....

Admittedly in spite of these requests of the claimant for extension of delivery period no fresh delivery date was notified by the respondents. Thus the extension of delivery period was never granted nor intimated to the supplier/claimant."

.....

The Arbitrators therefore came to a conclusion that there is a breach of a contract committed by the respondents herein and consequently forfeiture of the performance bank guarantee was illegal and not sustainable. The learned Single Judge in the application for setting aside the award was pleased to record.

"The cancellation of the contract on 25.1.1990 on the basis of non-delivery of material by 31st October, 1989 was usually misconceived, untenable and illegal because 31st October, 1989 had admittedly ceased to be delivery date..... It appears that the argument that 14th November, 1989 or 15th November, 1989 were the fresh delivery dates is an after-thought. If the respondents believed that these were the delivery dates, nothing prevented them from saying so at the relevant time. The claimant repeatedly asked them to fix fresh delivery date. Respondents could reply that these were the dates."

.....

These show that the original delivery date of the contract had become part of the letter of credit. Unless the same was modified and the modified date had been notified to the banks, the banks would be paying under the credit at their own risk. No bank would be willing to take such a risk. The result that follows is that the payment to the supplier/ claimant would have been in jeopardy unless the letter of credit was amended. The intention in the original contract was that the supplier should get immediate payment through irrevocable letter of credit. Without amendment of the letter of credit, the said intention of the contract could not be fulfilled. The supplier was justified in ensuring that he would get the payment for the material supplied by him before the supplies were made."

In the facts of the matter under consideration the learned Single Judge found that FCI by its letter dated 8th November, 1989 clearly depicted in no uncertain terms that were still interested in taking delivery of the goods and which as a matter of fact according to the learned Single Judge changed the entire complexion of the matter. The other issue in which the learned Single Judge delved into is in regard to the Court's authority of interference vis-a-vis award—this aspect of the matter would be dealt with later in this judgment alongwith the second issue, as such we refrain ourselves from making any comment thereon at this juncture.

Turning attention on to the first issue, the Division Bench of the High Court proceeded mainly on certain presumptions to wit :

(i) the telex message from the seller dated 8.11.89 was sent to the buyer after receipt of the cancellation and thus constituted a representation against the cancellation and it was pursuant to this representation that the buyer had issued the letter dated 11th November, 1989 withdrawing the letter of cancellation.

(ii) the presumption of the High Court went also on to the effect that the buyer had therefore impliedly fixed 14th/15th November, 1989 as the new date of delivery by which time, the seller was bound to deliver and the failure of the seller to supply by the said date constituted the breach of contract justifying the cancellation in January 1990.

These presumptions of the High Court in our view are wholly unwarranted in the contextual facts for the reasons detailed below but before so doing it is to be noted that in the event the time is the essence of the contract, question of their being any presumption or presumed extension or presumed acceptance of a renewed date would not arise. The extension if there be any, should and ought to be categorical in nature rather than being vague or in the anvil of presumptions. In the event the parties knowingly give a go by to the stipulation as regards the time—the same may have two several effects : (a) parties name a future specific date for delivery and (b) parties may also agree to the abandonment of the contract–as regards (a) above, there must be a specific date within which delivery has to be effected and in the event is no such specific date available in the course of conduct of the parties, then and in that event, the courts are not left with any other conclusion but a finding that the parties themselves by their conduct have given a go by to the original term of the contract as regards the time being the essence of the contract. Be it recorded that in the event the contract comes within the ambit of Section 55, the remedy is also provided therein. For convenience sake Section 55 reads as below :

> "55. When a party to a contract promises to do a certain thing at or before a specified time, or certain things at or before specified times, and fails to do any such thing at or before the specified time, the contract, or so much of it as has not been performed, becomes voidable at the option of the promisee, if the intention of the parties was that time should be of the essence of the contract.
>
> If it was not the intention of the parties that time should be of the essence of the contract, the contract does not become voidable by the failure to do such thing at or before the specified time; but the promisee is entitled to compensation from the promisor for any loss occasioned to him by such failure.
>
> If, in case of a contract voidable on account of the promisor's failure to perform his promise at the time agreed, the promisee accepts performance of such promise at any time other than that agreed, the promisee cannot claim compensation for any loss occasioned by the non-performance of the promise at the time agreed, unless at the time of such acceptance, he gives notice to the promisor of his intention to do so."

Incidentally the law is well settled on this score on which no further dilation is required in this judgment to the effect that

when the contract itself provides for extension of time, the same cannot be termed to be the essence of the contract and default however, in such a case does not make the contract voidable either. It becomes voidable provided the matter in issue can be brought within the ambit of the first paragraph of Section 55 and it is only in that event that the Government would be entitled to claim damages and not otherwise.

In Pollock & Mulla's Indian Contract & Specific Relief Acts, three several cases have been very lucidly discussed, where time can be termed to be the essence of contract :

"1. Where the parties have expressly stipulated in their contract that the time fixed for performance must be exactly complied with.

2. Where the circumstances of the contract or the nature of the subject matter indicate that the fixed date must be exactly complied with and

3. Where time was not originally of the essence of the contract, but one party has been guilty of undue delay the other party may give notice requiring contract to be performed within reasonable time and what is reasonable time is dependant on the nature of the transaction and on proper reading of the contract in its entirety."

In the contextual facts, the Division Bench relied on the Telex messages of the seller, as noticed above, as a representation against cancellation but the fact remains that there was in fact a definite indication of expression of stand of the Government as regards the withdrawal of the letter of cancellation. The issue arises as to the true effect of the withdrawal of the cancellation. Incidentally on the factual score it appears that after withdrawal of the first letter of cancellation the Government again for the second time canceled the Agreement by a letter dated 25th January, 1990 to the following effect :

1. "Your attention is invited to the contract mentioned above for supply of 58000 MTs of imported sugar, Clause 3 whereof stipulates that the seller shall arrange shipment of the entire quantity so as to reach Indian ports, basis coast as per Clause 4(1) ibid not later than 31st October, 1989.

2. As you have failed to fulfil the contractual obligation within stipulated time and the time being the essence

of the contract, the contract is hereby cancelled at your risk and cost.

3. The performance Bank Guarantee tendered with reference to the above contract is also forfeited for the reasons mentioned above."

There is therefore, a cancellation of an agreement which once stood cancelled and withdrawn : can it be termed to be an otherwise valid termination after recalling of the letter of cancellation in the month of November, 1989. The High Court has dealt with the entire correspondence in extenso between the parties during this interregnum and as such we refrain ourselves from dealing with the same in detail, suffice it to record that as a matter of fact from the date of recalling of the cancellation letter, there were consistent reminders about the dispatch instruction, about the arrival of vessels and as to the port of landing which were for the Respondents herein, to fix, in terms of the Agreement but there was a total silence from the Respondent's end. Admittedly and there cannot possibly be any doubt as regards the cancellation of Agreement on the expiry of the time if the time is treated to be the essence of the contract, but in the contextual facts when as a matter of fact, there was a letter of cancellation in terms of the contract and assuming by reason of failure to supply as per the Agreement between the parties—but that cancellation stands withdrawn. There is, therefore, a waiver of the breach if there be any as regards non-performance of the contract and it is on this score that the High Court has gone wrong on the issue of duty to speak and it is on this score that the presumption of the High Court to the effect that the cancellation was on the representation of the seller, is totally unwarranted. Fixation of a future date of performance in the absence of any evidence by the Appellate Court, is not only unjustified but wholly untenable in law. Court cannot possibly fix a date on its own for performance of the contract. It is thus necessary to detail out herein below the observations of the Appellate Court on this count. The Appellate Court in paragraph 29 of the judgment observed as below :

"29. The delivery was to be effected by 31st October, 1989. On the representation of the seller as contained in their messages dated 8th and 9th November 1989 the cancellation was withdrawn. That is the only conclusion possible. Any other conclusion will be wholly erroneous. We therefore, cannot accept the submission that the withdrawal of

cancellation was not on the representation of the seller. On this view the respondents were bound in law to accept delivery if effected by 14th/15th November, 1989. It is implicit that the buyers had consented to take delivery by 14th/15th November, 1989. The contention of learned counsel for the seller that the mention of 31st October, 1989 by the respondents in letter dated 25th January, 1990-also shows that the respondents did not treat 14th/15th November 1989 as the extended delivery date cannot be accepted. Since delivery was not made at all, the mention of 31st October, 1989 in the letter of cancellation (25th January, 190) by itself would not show that the buyer did not treat 14th/15th November, 1989 as delivery date. It thus cannot be said that the cancellation was on non-existent grounds. The contract also stipulates that the buyer may extend the delivery period at a discount as may be mutually agreed to between buyer and seller. In this state of affairs the further contention that the supply could not be made by 14th/15th November, 1989 on accepted of non amendment of the delivery period in the contract and non amendment of letter of credit cannot be accepted. This plea is clearly an after thought. Our attention has not been drawn to any legal proposition which casts an obligation. under these circumstances, on the buyer to fix a fresh date of delivery. The effect of accepting the contention of the seller would be that prior to 8th November, 1989. on the facts and circumstances of the present case, the breach was on the part of the seller but the buyer having withdrawn the cancellation and not having specified the fresh date of delivery, 31st October, 1989 having already passed, the breach would be on the part of the buyer. The contention on the face of it is fallacious. It has to be rejected."

In paragraph 30 of the judgment the Bench observed :

"30. Apart from the urgent need for supply of sugar, otherwise too, in commercial transaction of this nature, in law, ordinarily time is of essence (See; *M/s China Cotton Exporters* Vs. *Beharilal Ramcharan Cottom Mills Ltd.* AIR 1961 SC 1295), Further, in the present case, the contract itself stipulates that the supply within the contracted delivery period was to be the essence of the contract. In this view, the delivery of sugar firstly before 31st October, 1989 and

later by 14th/15th November, 1989 was of essence and non supply within the aforesaid periods by the seller would show that the seller is in breach of the contract. The buyer having withdrawn the cancellation of the contract on seller's representation that the delivery will be made by 14th/15th November 1989 could not have refused to accept delivery within the said period. It is also not possible for us to accept the contention that the cancellation was not withdrawn on the representation of the seller. On account of non-supply of sugar upto 8th November, 1989 and even failure to supply the shipping particulars the contract was cancelled by the buyer. Thereupon the seller supplied the shipping particulars and made a representation that the supply would be made on or before 14th/15th November, 1989. Under these circumstances the cancellation of the contract was withdrawn. The letter dated 11 November, 1989 withdrawing the cancellation states that on reconsideration of the matter the cancellation is withdrawn. In the letter dated 11th November, 1989 the absence of specific reference to the representation of the seller that the delivery would be made by 14th/15th November, 1989. Under these circumstancs, is of no consequence. As already noticed above, the letter dated 11th November, 1989 was personally handed over to the representative of the seller. On receipt of that letter the seller did not write to the buyer to specify the fresh date of delivery or to ask for amendment of the letter of credit. The next letter thereafter is dated 15th November, 1989. The seller did not say in this letter that pursuant to what had been stated by it in message dated 8th November, 1989 the Ships had entered Indian waters and as such the buyer should incorporate fresh date of delivery and amend the letter of credit so that shipping documents could be furnished by seller to the buyer and that without these amendments the bank may not pay the amount covered by the letter of credit. On the other hand, the seller in the letter dated 15th November, 1989 stated that the cargo had gone out of its control and fresh cargo would be arranged which will be arriving at Indian port within a few days. The seller asked for minimum 15 days time to supply the cargo and requested for delivery period being extended upto 30th November, 1989 with consequential

amendments in the letter of credit for acceptance of the documents. The buyer was not obliged in law to extend the delivery period. The silence on the part of the buyer by not sending reply to the letter dated 15th November, 1989 and also not sending any reply to the subsequent letters dated 20th November 1989, 24th November, 1989, 4th December, 1989 and 20th December 1989 only shows that the buyer was not willing to extend delivery period after 15th November, 1989. The sugar was required for the urgent need of Dussehra Diwali festivals of November, 1989 and the supply not having been made till 14th/15th November, 1989 the buyer was justified in not extending the delivery period.

Turning now on to the issue of duty to speak, can it be said that silence on the part of the buyer in not replying to the letters dated 15th November, 1989, 20th November, 1989, 24th November, 1989, 4th December, 1989 and 20th December, 1989 only shows that the buyer was not willing to extend the delivery period after 15th November, 1989—the answer cannot but be in the negative more so by reason of the fact that fixation of a second delivery date by the Appellate Bench of the High Court as noticed above cannot be termed to be in accordance with the law. There was, in fact, a duty to speak and failure to speak would forfeit all the rights of the buyer in terms of the Agreement. Failure to speak would not, as a matter of fact, jeopardise the sellers interest neither the same would authorise the buyer to cancel the contract when there has been repeated requests for acting in terms of the agreement between the parties by the seller to that effect more so by reason of a definite anxiety expressed by the buyer as evidenced in the intimation dated 8th November, 1989 and as found by the Arbitrator as also the Learned Single Judge.

As noticed above, the entire judgment of the Appellate Bench proceeds on the basis of certain presumptions, we are afraid however that reliance thereon cannot but be termed to be fallacious for inter alia the reasons mentioned herein below :

(a) The first letter of cancellation of contract was received by the seller on 9th November, 1989 after issuance of both the seller's telex dated 8.11.89 and 9.11.89 to the buyer and therefore the same could not amount to representations against the cancellation as is being held by the Appellate Court.

(b) The observation of the Appellate Bench pertaining to the amendment of the delivery date in the letter of credit (i.e. upto 29th January, 1990) does seem to be erroneous in the contextual facts of the matter under consideration. The date of delivery was specific in the letter of credit itself and in the event of non-delivery within the period, there might be some complications and as such request for extension of delivery date was made tough however, without any response from the buyer's end, when, in fact, the conduct itself shows that the delivery date as mentioned in the letter of credit was not adhered to and the parties were ad-idem on the score of extension.

(c) The letter of withdrawal of cancellation in any event does not refer to any representation and nor does it fix any date of delivery as has been so thought of by the High Court. The Appellate Court's presumption as to the fixation of the delivery date being 14th/15th November, 1989 in the normal course of event and had it been so, there would have been an express intimation from the buyer of such a specific extension.

(d) Diverse intimations as noticed above from the seller's end to the buyer, went unattended and not one letter was sent in reply thereto recording therein that 14th/15th November, 1989 ought to be the fresh date of delivery.

(e) When the contract was finally cancelled on 25th January, 1990, the Respondents stand was that the delivery date breached by the claimant was 31st October, 1989and not 14th/15the November, 1989, as has now been fixed by the Appellate Bench of the High Court.

(f) The Appellate Bench, in fact, has not been able to appreciate the importance of the date of delivery in the letter of credit specially in an international commercial contract, since without the date of delivery being altered in the letter of credit itself and the bank being informed accordingly, question of release of any amount to the seller by their bank would not arise.

(g) The Appellate Bench as a matter of fact has gravely erred in having an implied delivery date when the

parties in fact did not stipulate at any point of time such a date.

Let us now at this juncture consider this aspect of the matter in slightly greater detail . The irrevocable letter of credit was issued by the Indian Overseas Bank Janpath favouring the Appellant herein for $ 27,840,000 drawn on applicants for credit at site for 100% invoice value covering shipment of 58000 million tonnes net weight, plus/minus 5% to be packed in Polylined jute bags of 50 kgs net weight accompanied by the following documents". The letter of credit by itself records that the name of the Indian Port would be advised by the Government by means of an amendment to the credit and it further records that the credit is valid for negotiation upto three months from the date of letter of credit subject to negotiation within 21 days from the date of report of Independent/Joint Surveyor referred to in clause 5 of the documents. These documents include inter alia the following :

(a) Beneficiary certificate to the effect that all the terms and conditions of the contract dated October, 24, 1989 and its annexures between beneficiary and the applicants for the credit, have been fully complied with-one original and two copies.

(b) Certificates of inspection of quality, weight and packing in original and 5 copies; at the ports of discharge signed and issued by the applicants for the credit at the cost of the beneficiary, based on minimum 5 random sampling and 5 check weightment certifying (a) quality.

(c) Photocopy of the signed contract between beneficiary and applicants for the credit.

(d) Documents with discrepancy should not be negotiated without banks prior approval.

Incidentally, be it noted that the contract itself envisaged appointment of a Surveyor. Clause 9 of the Agreement provides :

"9. **Inspection/survey at load port (s)**

The quality, quantity and packing at the load port (s) shall be supervised and certified by independent surveyors nominated by the Buyer at Sellers cost. The certificate of such nominated surveyors based on not less than 5 random sampling and 5 check weighment shall be final. The report of such surveyors shall, inter-alia, cover the following.

"Load ports in Clause 9 above was subsequently amended to the port of discharge, the clause however, envisages the appointment of an independent Surveyor nominated by the buyer at the sellers cost and report of the surveyor is of considerable importance since the contract itself provides the far of activities of the Surveyors and the coverage under the Certificate and the same are :

(i) Cleanliness and fitness of the holds of vessel for receiving sugar prior to commencement of loading;
(ii) Quality and specifications;
(iii) Weight gross and net;
(iv) Packing
(v) Total number of bags.
(vi) Arkings
(vii) Date of commencement and completion of leading
(viii) Radioactivity-free certificate
(ix) Current crop of country of origin, mentioning crop years.
(x) Load Rate
(xi) LOA/BEAM and
(xii) Arrival Draft"

Whilst on the subject of documentary evidence and the presumption of the Appellate Bench as regards the fixation of date of delivery, it would be convenient to note Shipment as also Price Clause in the Agreement. The Shipment Clause reads as below :

"3. ***Shipment Period*** **:** Sellers shall arrange shipment quantity so as to reach Indian Ports basis coast as per Clause 4(i) not later than 31st October, 1989. Date of tendering notice of readiness of the vessel as per clause 13(vii) here of shall be the date of delivery period. Shipment within contract delivery period is of the essence of this contract. In case of any delay in reaching the shipments before the delivery period at Indian Port, it is clearly understood that except for the reasons of force majeure, the seller will be deemed to be in contractual default and the buyer will have the absolute right to cancel the contract at the cost and risk and responsibility of the seller and claim for damages, costs, losses, expenses to from the seller. The Buyer, may however, extend the delivery period at a discount as may be mutually agree to between

the Buyer and the Seller. Any cargo(es) under-loading/afloat on the date of this contract cannot be supplied."

The Price Clause reads as below :

"4. ***Price***

I. In polylined jute bags, per metric tonne net weight, cost, insurance and freight, free out, one safe Indian port at Buyer's option.

US 480.00 PMT

(US DOLLARS FOUR HUNDRED EIGHTY ONLY) PER M.T.

In case sugar is shipped in Polylined polypropylene bags, the above price will be subject to a discount of US 2.00 per metric tonne net weight of full cargo. The above price is based on discharge at one safe Indian port at Buyer's option, on the west Coast if the vessel carrying sugar is coming from the West of India, or on the East Coastal vessel carrying sugar is coming from the East of India for this purpose. Tuticorin will be considered as a West Coast Indian port.

II. ***Opposite Coast Discharge***

The Buyer has the option to discharge the sugar at a port on the coast other than the basis coast as per Clause 4(1) above by paying additional charges @ US$ 1.50 on the net weight of the full cargo.

III. ***Two Port Discharge***

Buyer has the option to discharge the sugar at two ports on any one coast for which the Buyer shall pay additional charges US $ 1.50 PMS on the net weight of full cargo. In case the second discharge port is Calcutta or Haldia, the Buyer shall pay additional charges US $ 2.00 PMS on the net weight of full cargo instead of US $ 1.50 PMS. For discharge at two ports on the coast other than the basis coast as per Clause No. 4 (1) above, the additional charges for two port discharge payable under this clause shall be over and above that payable under Clause No. 4 (ii) above."

It needs to be noted here that the Clause as regards any cargo being under-loading/afloat on the date of the contract has been subsequently deleted. The contract term as regards the

:riod expressly provide thus that the Shipment should
ı ports not later than 31st October, 1989 but the issue
in the contextual facts time was the essence of the
d in the event the answer is in the affirmative, then and in that event whether there was subsequent extension of time and what is the effect therefor. Herein before in this judgment we did refer to the effect of subsequent extension, but the issue as regards the factum of the time being the essence of the contract was left to be dealt with at the later stage and as such, it would be convenient to note the same at this juncture. Clause 3 of the Agreement namely the Shipment period expressly records that Shipment within contract delivery period was of the essence of the contract and it was clearly understood between the parties that except for reasons of force majeure the Seller would be deemed to be in default and buyer would have the absolute right to cancel the contract at the cost, risk and responsibility of the seller. This particular clause however itself provided that the buyer may however extend the delivery period at a discount to be mutually agreed to between the buyer and the seller the contract therefore, envisaged specifically an extension of the period on a mutually agreed term. The Price Clause also is of some relevance in the matter of appreciation of the Agreement between the parties vis-a-vis the time. Clause 4 (ii) records that the buyer had the option to discharge the sugar at a port on the coast, other than the basis coast by paying additional charge and in terms of Clause 4(iii) the buyer had the option to discharge the sugar at two ports upon payment of additional charge. It is therefore, apparent that different rates have been provided for different ports and specific naming of the port is thus required before delivery is expected in the matter. On the wake of this factual detail as appears from the record and by reason of non-fulfilment of the buyers obligations in terms of the agreement, can it be said that the time was the essence of the contract ? In our view the answer to this all important question is in the negative. The contract itself provides reciprocal obligations and in the event of non-fulfilment of some such obligations and which have a direct bearing onto them-strict adherence of the time schedule or question of continuing with the notion of the time being the essence of the contract would not arise. The obligations are mutual and the terms of the agreement are inter-dependent on each other.

Incidentally, paragraph 761 of Halsbury's Laws of England (4th Ed : Vol. 41) seems to be very apposite in this context. The passage reads as below :

> "761. ***Place of Delivery uncertain.*** Where the place of delivery is not indicated by the contract, and is within the option of the seller or of the buyer respectively, it is a condition precedent to the liability of the buyer or of the seller respectively to accept or to deliver the goods that he should receive notice of the place of delivery."

If any credence is to be given to the above noted passage in Halsbury's Laws England being read with the terms of the contract, we do not find any justification for the Appellate Bench of the High Court to come to a conclusion that in fact time was the essence of the contract, since the condition precedent has not yet had taken place, neither the requirement of appointment of Surveyor has been complied with : the contract ought to be read with the time clause but subject however to certain other conditions. The essential point is that the seller must be instructed in accordance with the terms of the contract as to the way in which he can perform his duty in terms of the agreement and effect delivery upon the goods being put on board—In the event the Port of Discharge in not named-can the goods be put on board or can the seller be made responsible for his failure to put the goods on board ? The answer cannot but be in the negative. In the contextual facts, the goods were on the high seas and to be diverted to the Ports of India, shortly, as such nomination of the port, was an essential requirement, in order to make the seller liable for breach and entitlement of the buyer to claim damages. In this context a passage from Benjamin's Sale of Goods Act (4th Edition) seems to be rather appropriate : Paragraph 20-040 reads as below :

> "The essential point is that the seller must be instructed, in accordance with any relevant terms of the contract, as to the way in which he can perform his duty to put the goods on board. If no shipping instructions are given, or if shipping instructions are not given within the time allowed by the contract the seller is not liable in damages for non-delivery, and the buyer is liable in damages for non-acceptances."

Mere fixation of a period of delivery or a time in regard thereto does not by itself make the time as the essence of the

contract, but the agreement shall have to be considered in its entirety and on proper appreciation of the intent and purport of the clauses incorporated therein. The state of facts and the relevant terms of the Agreement ought to be noticed in its proper perspective so as to assess the intent of the parties. The Agreement must be read as a whole with corresponding obligations of the parties so as to ascertain the true intent of the parties. In the instant case, the Port of Discharge has not been named neither the Surveyor is appointed—without whose certificate question of any payment would not arise—can it still be said that time was the essence of the contract, in our view the answer cannot but be a positive 'No'.

Mr. Dholakia, the learned Senior Advocate as also Mr. Rawal, the learned Additional Solicitor General appearing for FCI and Union of India respectively, strongly contended that the express words to the effect that the delivery ought to be effected by 31st October, 1989 ought to be taken with proper sanctity and the party be held responsible for not effecting delivery within the time stipulated in the Agreement and in this context strong reliance was placed on the decision of this Court in the case of *China Cotton Exporters* vs. *Biharilal Ramcharan Cotton Mills Ltd.* (1). We are afraid however, that reliance on the decision of this Court in *China Cotton Case* (supra) is totally misplaced. This Court in the above noted decision was considering the true effect of the word "therefore", which is totally absent here. For convenience sake however, paragraph 6 of the judgment is noted herein below :

> "6. We find thus that whatever may have been said earlier in the printed portion of the contract the parties took care, after specifying "October/November, 1950" as the date of shipment to make a definite condition in the remarks column, on the important question whether the shipment date was being guaranteed or not and if so, to what extent. The words are : "This contract is subject to import licence, and therefore the shipment date is not guaraneed." Remembering as we must, that in commercial contracts, time is ordinarily of the essence of the contract and giving the word "therefore" its natural, grammatical meaning, we must hold that what the parties intended was that to the extent that delay in shipment stands in the way of keeping

(1) (1961) A.I.R. (S.C.) 1295

to the shipment date October/November, 1950, this shipment date was not guaranted; but with this exception shipment October/November, 1950, was guaranteed. It has been strenuously contended by the learned Attorney-General, that the parties were mentioning only one of the many reasons which might cause delay in shipment and the conjunction "therefore" was used only to show the connection between one of the many reasons—by way of illustration and a general agreement that the shipment date was not guaranteed. We do not consider this explanation of the use of "therefore" acceptable. If the parties intended that quite apart from delay in obtaining import licence, shipment date was not guaranteed, the natural way of expressing such intention—an intention contrary to the usual intention in commercial contracts of treating time as the essence of the contract—would be to say : "This contract is subject to import licence and the shipment date is not guaranteed." There might be other ways of expressing the same intention, but it is only reasonable to expect that anybody following the ordinary rules of grammar would not use "therefore" in such a context except to mean that only to the extent that delay was due to delay in obtaining import licence shipment time was not guaranteed.

The decision in *China Cotton Exporter's* (supra) cannot possibly thus lend any assistance in the contextual facts of the matter in issue. The facts being, totally different and is thus clearly distinguishable. Further reliance was placed by the Respondent in the decision of this Court in the case of *I.T.C. Ltd.* vs. *Debt Recovery Appellate Tribunal and Others* (1) (1998) (2) SCC 70) wherein this Court relying upon the decision in the case of *U.P. Co- operative Federation Ltd.* v. *Singh Consultants & Engineers (P) Ltd.* (2) observed in paragraph 17 of the report as below :

> "17. It is now well settled that the question whether goods were supplied by the appellant or not is not for the Bank. This point has already been decided by the decision of this Court in *U.P. Coop. Federation case* referred to above. In that case it was stated (at p. 193) by Jagannatha Shetty, J. as follows : (SCC para 45)

(1) (1998) 2 S.C.C. 70.
(2) (1988) 1 S.C.C. 174.

"The bank must pay if the documents are in order and the terms of credit are satisfied. The bank, however, *was not allowed to determine whether the seller had actually shipped the goods or whether the goods conformed to the requirements of the contract.* Any dispute between the buyer and the seller must be settled between themselves. The courts, however, carved out an exception to this rule of absolute independence. The courts held that if there has been 'fraud in the transaction' the bank could dishonour beneficiary's demand for payment. The courts have generally permitted dishonour only on the fraud of the beneficiary, not the fraud of somebody else."

(emphasis supplied)

It will be noticed from the italicised underlined portion in the above passage that there will be no cause of action in favour of the bank in cases where the seller has not shipped the goods or where the goods have not conformed to the requirements of the contract. The Bank, in the present case before us, could not, by merely stating that there was non-supply of goods by the appellant, use the words "fraud or misrepresentation" for purposes of coming under the exception. The dispute as to non-supply of goods was a matter between the seller and buyer and did not, as stated in the above decision, provide any cause of action for the Bank against the seller."

Reliance was also placed to the Law of Bankers Commercial Credits by Gutteridge and Megrah wherein the authors stated that :

"Banks issuing irrevocable credits subject to the Uniform Customs are not concerned with the sales contract or the goods; if it were otherwise credit business would be impossible. In law the credit contract stands by itself and is not to be interpreted to the point of amendment or augmentation by reference to the contract of sale or to any external document."

The authors further laid emphasis on the General Provision © of the Uniform Customs which states that :

"(c) Credits, by their nature, are separate transactions from the sales or other contracts on which they may be based and banks are in no way concerned with or bound by such contracts."

Further emphasis was also laid by authors on Article 8(a) which provides that :

"(a) In documentary credit operations all parties concerned deal in documents and not in goods."

Relying on the above, it was contended that the plea as raised by the Appellant that the amendment to the letter of credit is a requirement in order to obtain payment cannot but be termed to a myth and as such should not be relied upon–while it is true that the documents by themselves make and create a separate agreement with the Bank, and the Bank cannot possibly raise any dispute in regard thereto as to whether the goods are actually been supplied or not, but two factors ought to be kept in mind apart from what we have stated herein before in this judgment. The first being, to facilitate payment it is better to have the extended delivery date on the latter of credit itself by way of an amendment, so as to avoid any future complication. This is not a rule of law or a requirement of law but a matter of prudence. The second aspect is the counter guarantee of the Nova Scotia Bank. The counter guarantee also stipulates the delivery date and in the event of some queries raised in regard thereto, the party in whose favour such a letter of credit stands, would be put to unnecessary and frivolus litigation for no fault of the beneficiary. As noticed above it is not a requirement of law but a matter of prudence. No exception can possibly be taken to the views expressed by this Court in *ITC's case* or the statement in the Law of Bankers Commercial Credits. Be it further noted that substance of both citations noticed above is the enforceability of the letter of credit by way of a separate transaction, in any event, that would mean and imply litigation in the event of there being any issue raised as regards the delivery period. Parties ought not to be allowed to be plunged into litigation, as such both the citations do not have any relevance apropos the submission made by the Appellants herein. Apart therefrom and in any event in the matter of compliance of the terms and conditions of letter of credit, reference of a delivery date is a requirement since the original contract stood incorporated in the letter of credit itself and the delivery date being shown therein as 31st October, 1989. The requirement of a certificate that original contract has been fully complied with, makes it necessary that the delivery for the purpose of the contract had to be extended since the original date by reason of efflux of time has

lapsed. The learned Single of the High Court looked at the matter from another point of view as well and he observed :

> "Looking at it from another angle, if amendment in the letter of credit was not necessary, the respondents should say so in reply to the various letters of the claimants in this connection ....."

Whether the Respondents should have said it or not as observed by the learned Single Judge, but the fact remains that there was total silence and nothing prevented them from stating that such an endorsement either is or is not required but as noticed above, the Respondents herein has maintained delightful silence on that score.

In the premises it would thus be safe to conclude that by reason of the non-fulfillment of the three conditions as noted above, question of time being the essence of the contract would not arise and as such delivery was to be expected within a reasonable time but before the expiry of the reasonable time, diverse letters were sent asking for details but the buyer maintained total silence when there was a duty to speak as noted above. The Appellate Court's finding that the contract stood extended upto 14th/15th October, 1989 does not have any factual support and as such totally unwarranted and thus cannot be sustained. For the self—same reason the finding of the Appellate Court as regards the issue of law, warranting intervention of the High Court vis-a-vis the award, cannot also be sustained. This is apart from the fact that it is a factual issue upon proper reading of the material documents on record. In any event upon coming to a conclusion that facts out in the judgment (under Appeal) unmistakably record that a new date of delivery is available on record—Question of the same being an issue of law does not arise in the facts of the matter under consideration. The letter of the Government of India dated 11.11.89 stated that the matter has since been reconsidered and the letter of cancellation stands withdrawn though however, without prejudice to rights and contentions of the Government but there was as a matter of fact, reconsideration of the entire issue and it is only on that basis that the letter of cancellation was withdrawn. The facts depict that on 15th November, 1989, an intimation was sent by the Appellants to FCI stating that due to the cancellation, the cargo already arranged for, has gone out of control and a new cargo was being arranged.

In the same letter the Appellant further asked for fixation of a new date of delivery and to make consequential amendment for acceptance of documents under the letter of credit by the Bank but no reply is sent. Letters of reminders have been sent again on 20th November, 1989, 24th November, 1989 but without any response whatsoever and subsequently the cancellation came in January, 1990 as noticed above, forfeiting the performance Bank Guarantee by FCL In that view of the matter, question of the time being the essence would not arise in the contextual facts. More so by reason of the fact that the cargo was a cargo afloat on the High seas.

Turning attention on to the other focal point, namely the interference of the court, be it noted that Section 30 of the Arbitration Act, 1940 providing for setting aside an award of an arbitrator is rather restrictive in its operation and the statute is also categorical on that score. The use of the expression 'shall' in the body of the Section makes it mandatory to the effect that the award of an arbitration shall not be set aside excepting for the grounds as mentioned therein to wit : (i) arbitrator or umpire has misconducted himself; (ii) award has been made after the supersession of the arbitration or the proceedings becoming invalid; and (iii) award has been improperly procured or otherwise invalid.

The above noted three specific provisions under Section 30 thus can only be taken recourse to in the matter of setting aside of an award. The legislature obviously had in its mind that the Arbitrator being the judge chosen by the parties, the decision of the Arbitrator as such ought to be final between the parties.

Be it noted that by reason of a long catena of cases, it is now a well settled principle of law that reappraisal of evidence by the court is not permissible and as a matter of fact exercise of power by the Court to reappraise the evidence is unknown to a proceeding under Section 30 of the Arbitration Act. In the event of there being no reasons in the award, question of interference of the court would not arise at all. In the event, however, there are reasons, the interference would still be not available within the jurisdiction of the Court unless of course, there exist a total perversity in the award or the judgment is based on a wrong proposition of law; In the event however two views are possible on a question of law as well, the Court would not be justified in interfering with the award.

The common phraseology 'error apparent on the face of the record' does not itself, however, mean and imply closer scrutiny of the merits of documents and materials on record : The court as a matter of fact, cannot substitute its evaluation and come to the conclusion that the arbitrator had acted contrary to the bargain between the parties. If the view of the arbitrator is a possible view the award or the reasoning contained therein cannot be examined. In this context, reference may be made to one of the recent decision of this Court in the case of *State of Rajasthan* v. *Puri Construction Co. Ltd.* (1) wherein this court relying upon the decision of Sudarsan Trading Co.'s case (*Sudarsan Trading Co.* v. *Government of Kerala and Anr.* (2) observed in paragraph 31 of the Report as below :-

> "A court of competent jurisdiction has both right and duty to decide the lis presented before it for adjudication according to the best understanding of law and facts involved in the its by the judge presiding over the court. Such decision even if erroneous either in factual determination or application of law correctly, is a valid one and binding inter part. It does not, therefore, stand to reason that the arbitrator's award will be per se invalid and inoperative for the simple reason that the arbitrator has failed to appreciate the facts and has committed error in appreciating correct leal principle in basing the award. An erroneous decision of a court of law is open to judicial review by way of appeal or revision in accordance with the provisions of law. Similarly, an award rendered by an arbitrator is open to challenge within the parameters of several provisions of the Arbitration Act. Since the arbitrator is a judge by choice of the parties and more often than not a person with little or no legal beckground, the adjudication of disputes by an arbitration by way of an award can be challenged only within the limited scope of several provisions of the Arbitration Act and the legislature in its wisdom has limited the scope and ambit of challenge to an award in the Arbitration Act. Over the decades, judicial decisions have indicated the parameters of such challenge consistent with the provisions of the Arbitration Act. By and large the courts have disfavoured interference with arbitration award

(1) (1994) 6 S.C.C. 485.
(2) (1989) 2 S.C.C. 38.

on account of error of law and fact on the score of misappreciation and misreading of the materials on record and have shown definite inclination to preserve the award as far as possible. As reference to arbitration of disputes in commercial and other transactions involving substantial amount has increased in recent times, the courts were impelled to have fresh look on the ambit of challenge to an award by the arbitrator so that the award does not get undesirable immunity. In recent times, error in law and fact in basing an award has not been given the wide immunity as enjoyed earlier, by expanding the import and implication of "legal misconduct" of an arbitrator so that award by the arbitrator does not perpetrate gross miscarriage of justice and the same is not reduced to mockery of a fair decision of the lis between the parties to arbitration. Precisely for the aforesaid reasons, the erroneous application of law constituting the very basis of the award and improper and incorrect findings of fact, which without closer and intrinsic scrutiny, are demonstrable on the face of the materials on record, have been held, very rightly, as legal misconduct rendering the award as invalid. It is necessary, however, to put a note of caution that in the anxiety to render justice to the party to arbitration, the court should not reappraise the evidences intrinsically with a close scrutiny for finding out that the conclusion drawn from some facts, by the arbitrator is, according to the understanding of the court, erroneous. Such exercise of power which can be exercised by an appellate court with power to reverse the finding of fact, is alien to the scope and ambit of challenge of an award under the Arbitration Act. Where the error of finding of facts having a bearing on the award is patent and is easily demonstrable without the necessity of carefully weighing the various possible viewpoints, the interference with award based on erroneous finding of fact is permissible. Similarly, if an award is based by applying a principle of law which is patently erroneous, and but for such erroneous application of legal principle, the award could not have been made, such award is liable to be set aside by holding that there has been a legal misconduct on the part of the arbitrator. In ultimate analysis it is a question of delicate balancing between the permissible limit of error of law and

fact and patently erroneous finding easily demonstrable from the materials on record and application of principle of law forming the basis of the award which is patently erroneous. It may be indicated here that however objectively the problem may be viewed, the subjective element inherent in the judge deciding the problem, is bound to creep in and influence the decision. By long training in the art of dispassionate analysis, such subjective element is, however, reduced to minimum. Keeping the aforesaid principle in mind, the challenge to the validity of the impugned award is to be considered with reference to judicial decisions on the subject."

It is on the basis of this well settled proposition that the learned Single Judge came to a conclusion that the findings of the Arbitrators in regard to the extension of delivery period and failure to fix the fresh date has resulted in breach of the contract on the part of the Government and the same being purely based on appreciation of material on record by no stretch it can be termed to be an error apparent on the face of the record entitling the court to interfere. The Arbitrators have, in fact, come to a conclusion on a closer scrutiny of the evidence in the matter and re-appraisal of evidence by the court is unknown to a proceeding under Section 30 of the Arbitration Act. Re-appreciation of evidence is not permissible and as such we are not inclined to appraise the evidence ourselves save and except what it noticed herein before pertaining to the issue as the time being the essence of the contract. In this context, reference may be made to a decision of this Court in the case of *M. Chellappan* vs. *Secretary, Kerala State Electricity Board and Another* (1), Mathew, J. speaking for the Three Judge Bench in paragraphs 12 and 13 observed as below :

"12. The High Court did not make any pronouncement upon this question in view of the fact that it remitted the whole case to the arbitrators for passing a fresh award by its order. We do not think that there is any substance in the contention of the Board. In the award, the umpire has referred to the claims under this head and the arguments of the Board for disallowing the claim and then awarded the amount without expressly adverting to or deciding the question of limitation. From the findings of the umpire under this head it is not seen that these claims were barred

(1) (1975) 1 S.C.C. 289.

by limitation. No mistake of law appears on the face of the award. The umpire as sole arbitrator was not bound to give a reasoned award and if in passing the award he makes a mistake of law or of fact, that is no ground for challenging the validity of the award. It is only when a proposition of law is stated in the award, and which is the basis of the award, and that is erroneous, can the award be set aside or remitted on the ground of error of law apparent on the face of the record.

Where an arbitrator makes a mistake either in law or in fact in determining the matters referred, but such mistake does not appear on the face of the award, the award is good notwithstanding the mistake, and will not be remitted or set aside.

The general rule is that as the parties choose their own arbitrator to be the judge in the disputes between them they cannot, when the award is good on its face, object to his decision, either upon the law or the facts. (see *Russell on Arbitration*, 17th ed...p. 322).

13. An error of law on the face of the award means that you can find in the award or a document actually incorporated thereto, as for instance, a note appended by the arbitrator stating the reasons for his judgment, some legal proposition which is the basis of the award and which you can then say is erroneous (see Lord Dunedin in *Champsey Ehara & Co. Jivrai Baloo Co.)* In *Union of India* v. *Bungo Steel Furniture Pvt. Ltd.* this Court adopted the proposition laid down by the Privy Council and applied it. The Court has no jurisdiction to investigate into the merits of the case and to examine the documentary and oral evidence on the record for the purpose of finding out, whether or not the arbitrator has committed an error of law."

In any event, the issues raised in the matter on merits relate to default time being the essence, quantum of damages—these are all issues of fact, and the Arbitratros are within their jurisdiction to decide the issue as they deem it fit—the Courts have no right or authority to interdict an award on factual issue and it is on this score the Appellate Court has gone totally wrong and thus exercised jurisdiction which it did not have. The exercise of jurisdiction is thus wholly unwarranted and the High Court has

thus exceeded its jurisdiction warranting interference by this Court. As regards issues of fact as noticed above and the observations made herein above obtains support from a judgment of this Court in the case of *Olympus Superstructures Pvt. Ltd.* v. *Meena Vijay Khetan & Ors.* (1).

Before we conclude one significant feature ought to be noticed Admittedly, a meeting was held between the claimants and the Minister of Food and Civil Supply and according to the claimant, it was agreed that on the claimants paying a sum of Rs. 5 lakhs towards expenses incurred by the Government in opening the Letter of Credit and on the claimants giving up any claim for damages, the Performance Bank Guarantee would be released. While some discrepancy arise pertaining to the meeting in regard to the above subject but the subsequent evidence disclosed as appears from the record of the Arbitrators that the Appellants herein purchased a Bank Draft for Rs. 5 lakhs from the State Bank of India and took it to the office of Government of India on 27th November, 1989 but it was not accepted. The Arbitrators as appears summoned relevant file of the Government which was produced and the reasoned award contain the following.

> "During the cross examination of Shri S.K. Swamy the note made in this file by the Minister referred to by S. Santokh Singh was vertabim repeated in the question but to the witness Shri Swamy on 8th May, 1991. How the claimants got the verbatim text of this note, if the file was privileged is not clear, but what we found was that the note of the Minister on the file was exactly in the same words as the question put to Mr. Swamy in his cross examination dated 8.5.91. All facts by S. Santokh Singh are mentioned in this note. This part of the statement of S. Santokh Singh is thus sufficiently corroborated by this note and S. Santokh Singh has also produced the draft for Rupees five lakh mentioned by him in his statement."

This aspect of the matter has also been totally overlooked by the Appellate Bench of the High Court. Needless to record that two Arbitrators Hon'ble Mr. Justice S.N. Shankar, a retired Chief Justice of the Orissa High Court and Shri K.C. Diwan, Senior Advocate upon appraisal of evidence and have considered the matter in its entirety and in proper perspective. As such, the

(1) (1999) 5 S.C.C. 651.

question of interference with the Arbitral Award does not and cannot arise. In that view of the matter, these Appeals succeed. The order of the Appellate Bench of the High Court stand set aside and the order of the learned Single Judge of the Delhi High Court stands restored. Each party however to bear its own cost.

R.D. *Appeals allowed*

SUPREME COURT

*Before Jagannadha Rao and M.B.Shah, JJ.**

1999

November, 2.

*Ajit Chopra.***

v.

Shri Sadhu Ram & Ors.

Suit—for eviction—High Court in revision application while confirming the finding of Rent Appellate authority by order dated 19.9.1958 putting its seal of approval that relationship of landlord and tenant existed from 1955, till 19.9. 1958 and thereafter the tenant was a licensee for three months i.e., till 19.12.1958, second suit for eviction filed on 5.6.1970 being within 12 years was in time and there was no adverse possession of the tenant—the second suit, whether was for execution of the eviction order passed in the first rent control case—the bar under section 47, Code of Civil Procedure, 1908, whether applicable—judgement and decree passed in the previous suit for eviction, whether would bar a fresh suit for recovery of possession.

Where High Court in revision confirmed the finding of the Rent Appellate Authority on 19.9.1958, the High Court put its seal of approval that the relationship of landlord and tenant existed from 1955 till the date of disposal of the revision application;

Held, that the respondent was tenant upto 19.9.1958 when the revision was disposed of and, thereafter, the respondent was a licensee for a period of three months from 19.9.1958 granted by the High Court to the defendant-tenant to vacate. The tenant was in the position of a licensee as per the permission of the High Court, i.e. upto 19.12.1958 and not as a trespasser. The adverse possession, if any, could not have started before 19.12.1958. The suit filed on 5.8.1970 was well within 12 years. The adverse possession did not start earlier.

Where first eviction case was filed by the purchaser in 1969, the respondent tenant filed a counter affidavit stating that he was the owner of the premises and had prescribed title by adverse possession;

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* In the Supreme Court of India.

** Civil Appeal No. 755 of 1997. (From the judgment and order dated 29.10.1991 of the Himachal Pradesh High Court in S.A. No. 70 of 1977).

Held, that the present suit is not one for execution of the eviction order passed in the first rent control case. The High Court was wrong in treating the instant suit as one "virtually execution of the order of eviction passed in the earlier rent control case, hence the bar under section 47 of the Code of Civil Procedure, 1908 cannot apply.

Held, further, that the judgment and decree which was passed in a previous suit under the Rent Control Act by which it was held that respondent was tenant and that he was required to vacate the premises on or before 19.12.1958, would not bar a fresh suit for recovery of possession from the tenant as the tenant had not acquired title over the property by adverse possession.

Kutti Ali v. *Chindan and Anr (1)*

Amina v. *Ahmad (2)*—held to be correctly decided.

Appeal by legal representative of the original plaintiff.

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

Seeraj Bagga, Ms. Shureshtha Bagga, Advs, for the appellant.

Atul Sharma, V. Balaji, E. C. Agrawala, Advs. for the Respondents.

M. JAGANNADHA RAO, J.

The appellant is the legal representative of the original plaintiff Sri R.C. Chopra in the suit bearing Suit No. 25/1 of 1970 on the file of the Senior Sub-Judge, Simla District, Simla, in the State of Himachal Pradesh. The present suit was filed by the said Sri R.C. Chopra for possession and Rs. 610/- as past mesne profits. The trial Court decreed the suit on 30.11.1976 for possession but refused to pass a decree for mesne profits. The defendant appealed before the District Court, Simla which dismissed the appeal by judgment dated 23.7.1977. On further appeal by the defendant in R.S.A. No. 70 of 1977, learned Single Judge of the High Court of Himachal Pradesh, by judgment dated 29.10.91 allowed the appeal, set aside the judgments of the lower Courts and dismissed the suit on a new question, namely that the present suit was not maintainable in view of Section 17 of the Code of Civil Procedure, as it stood before the 1976 Amendment. The plaintiff dies on 22.10.85, during the pendency of the Second

appeal. The appeal by Special Leave has been preferred by the plaintiff's legal representatives.

The property in question belonged originally to one Dewan Chand Bhatia of Simla and the present plaintiff Sri R.C. Chopra purchased the same on 18.6.1957 by way of a registered sale deed. It appears that the plaintiff's vendor Sri Bhatia granted a lease in favour of the respondent-defendant on 10.2.1952. Later, Sri Bhatia filed an eviction petition on 19.7.1955 under Section 13 of the East Punjab Urban Rent Restriction Act, 1949 on various grounds. The respondent denied the relationship of landlord and tenant. The said contention of the tenant was accepted and the eviction case was dismissed by the Rent Controller, Simla on 25.9.1958. The landlord Bhatia's appeal before the Appellate Authority succeeded and appeal was allowed on 30.9.57 holding respondent was a tenant and that grounds existed for his eviction. (It was during the pendency of that first appeal that the present plaintiff purchased the property from Sri Bhatia on 18.6.1957, subject to the decision of the appeal). The respondent-tenant filed a revision in the High Court on 2.1.1958 contending that he was not a tenant and seeking stay of dispossession which was granted on 15.1.1958. Ultimately, the revision was dismissed by the High Court on 19.9.1958 holding that the respondent was a tenant. Three months time was granted for vacation of the premises. The eviction order was not executed for quite some time but the present suit was filed by the appellant (purchaser from Mr. Bhatia) within 12 years from 2.1.1958, the dismissal of the tenant's revision.

It is the case of Sri R.C. Chopra, the present plaintiff that as a purchaser from Sri Bhatia, by sale deed dated 18.6.1957 he tried to evict the respondent but that the respondent entreated that he be not evicted. The present plaintiff was in Government service and was at Bombay and was being transferred from place to place. Therefore, it is said, the plaintiff agreed afresh to allow the respondent to continue as his tenant. But, it is said, the respondent was not paying rent and this led to the appellant giving a notice on 24.7.1969 to the respondent for eviction and demanding arrears of rent. There was no reply from the respondent.

At that stage i.e. after 24.7.1969, admittedly, Sri R.C. Chopra the present plaintiff filed a fresh eviction petition against the respondent, under the East Punjab Rent Restriction Act, 1949.

In that eviction case, the respondent filed a counter contending that he was *not a tenant*, and that he was not liable to pay any arrears of rent and that he *had acquired title by adverse possession*.

The present suit for possession based on title was therefore filed on 5.8.1970 and also seeking Rs. 610/- as compensation for use and occupation. The respondent filed written statement claiming adverse possession on the lines of his counter in the second eviction petition. The appellant filed *replication* on 28.10.1970. The appellant amended the plaint claiming compensation for a period of 3 years from 3.8.70 to 3.8.73. The trial Court and the first Appellate Court, decreed eviction and rejected the plea of adverse possession because the suit filed on 5.3.1970 was within 12 years from 19.9.1958, on which date the earlier Rent Control Case between the respondent and the plaintiff's vendor, Sri Bhatia was concluded by way of dismissal of the tenant's revision.

On appeal by the defendant, the High Court of Himachal Pradesh, raised a new point which was not raised in the lower courts and held that the present suit was one, *"in reality"*, in the nature of execution of the earlier eviction order in the rent control case filed by Mr. Bhatia before the Rent Controller and that therefore, this suit stood barred by Section 47 of the Code of Civil Procedure since all matters concerning the exacution, satisfaction and discharge of the previous suit were to be agitated in the execution proceedings in the previous eviction matter and not by a separate suit.

In this appeal before us by Sri R.C. Chopra's legal representatives, their learned counsel contended that the point under Section 47 of the Code of Civil Procedure was not raised in the lower Courts, nor in the grounds of Second appeal and that the High Court ought not to have allowed the said question in the Second Appeal. It was argued that the suit was not "in reality" one in the nature of execution of the earlier order of eviction in favour of the plaintiff's vendor, Sri Bhatia in the rent control case and was not barred. It was argued that this suit was based upon a fresh cause of action, namely, the denial of Mr. Chopra's in the counter filed in the second eviction case of 1969. Assuming that the adverse possession started, it could not have started earlier than 19.9.1958 when the tenant-respondent's revision in the earlier eviction case was dismissed. The present suit, it is pointed out has been filed within 12 years from 19.9.1958 on 5.8.1970.

On the other hand, learned counsel for the respondent, contended that the question of adverse possession of limitation of 12 years apart, the basic objection was that the suit was not maintainable in view of Section 47 CPC inasmuch as this suit was in the nature of execution of the earlier eviction order obtained by the plaintiff's vendor, Sri Bhatia, against the respondent in the rent control case. The limitation, it was said started from the date of purchase by the plaintiff Sri R.C. Chopra on 18.7.57 because Sri Chopra did not get himself impleaded as a co-plaintiff in the earlier eviction case filed by Sri Bhatia. It was contended that in any event, the decree for eviction in the earlier case became executable even as on 30.9.57 when the Rent Appellate Authority allowed Sri Bhatia's appeal and ordered eviction. The plaintiff could exclude only the period from 15.1.58 to 19.9.58 when the respondent obtained stay of eviction from the High Court. Therefore, the present suit was both not maintainable and was also barred by time.

On the above contentions, the following points arise for consideration :

(1) was the High Court right in entertaining a new point for consideration in the Second appeal and treating it as a 'substantial question of law' and allowing the appeal on that ground ?

(2) Did limitation start against the appellant from 18.7.57 when plaintiff purchased from Sri Bhatia or from 3.9.57 when the Rent Appellate Authority, in the earlier case ordered eviction in favour of Sri Bhatia ?

(3) In any event, was the present suit *"in reality"* one in the nature of execution of the first rent control eviction order obtained by the plaintiff's vendor Sri Bhatia against the respondent and was it therefore barred by Section 47 CPC ?

(4) If the order for eviction in the rent control case was not executed within limitation, could a fresh suit lie for eviction and was it be barred by Section 47 CPC ?

POINT NO. 1

Learned counsel for the appellant placed reliance on the decision of this Court in *Kshitish Chandra Purkait* Vs. *Santosh Kumar Purkait and Ors.* (1) to say that under sub-clause (5) of Section 100 of the Code of Civil Procedue, as amended in 1976, the Second Appellate Court could not have taken up a new

(1) (1997) 5 S.C.C. 438.

question of law without stating whether it was a substantial question of law.

We do not think it necessary to decide this point because we feel that this appeal can be disposed of in favour of the appellant on Points 2, 3 and 4, even assuming that the point raised by the High Court under Section 47, C.P.C. is a substantial question of law.

POINT NO. 2 :

We shall here assume that after the dismissal of the revision petition on 19.9.58 of the respondent, there was no fresh lease between the present plaintiff and the respondent in 1959 even though it was so contended in the present plaint.

In our view, during the period of 3 months from 19.9.58 granted by the High Court in the rent control case to the respondent to vacate, the respondent was in the position of a licensee as per the permission of the High Court i.e. upto 19.12.1958 and not as a trespasser.

In the earlier Rent Control case filed by the present plaintiff's vendor, Sri Bhatia on the basis of tenancy, even though the said relationship was denied by the respondent and the Rent Controller accepted that plea of the tenant, the Rent Appellate Authority declared that there was in fact, a relationship of landlord and tenant between the parties and ordered eviction on 30.9.57. In our view, the said declaration as to the nature of the relationship between Sri Bhatia and the respondent would be effective from the date of filing of the eviction case on 19.7.55 by Sri Bhatia. Hence, there could not be any adverse possession from 19.7.1955 merely because the respondent denied his relationship as tenant from 1955 in the first eviction case. When the High Court in revision confirmed the said finding of the Rent Appellate Authority on 19.9.58, the High Court too put its seal of approval that such a relationship of landlord and tenant existed from 1955 till the date of disposal of the revision petition. We are, therefore, clearly of the view that the respondent was a tenant upto 19.9.1958 when the revision was disposed of and, that thereafter the respondent was a licensee for a period of 3 months upto 19.12.1958. The adverse possession, if any, could never have therefore started before 19.12.1958. The suit filed on 5.8.1970 was in time.

It was, however, argued for the respondent that the relationship of landlord and tenant stood determined on 30.9.57,

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another case, the Appellate Authority may do so and in yet another case the revisional authority may pass the eviction order. It may also be that, in a particular case, there is a remand order at some stage and the authority to which the matter is remanded might come to a conclusion different from the one it arrived at before remand. Throughout the proceedings, the relationship as tenant continues till the eviction order; is passed by the appellate or statutory revisional authority. The relationship does not go on oscillating during the pendency of the proceedings depending upon whether eviction is granted or not in between. In that view of the matter, the contention for the tenant that the relationship of landlord and tenant came to an end on 30.9.1957 when the landlord's appeal was allowed by the appellate authority and that there was no such relationship during the pendency of the tenant's statutory revision till 19.9.1958, must stand rejected.

We finally come to the contention that at any rate the respondent's adverse possession started as against Mr. Chopra (purchaser from Mr. Bhatia) from the date of sale by Sri Bhatia to the plaintiff on 18.7.57, inasmuch as Sri R.C. Chopra did not get impleaded in the first eviction case soon after his purchase. We are unable to agree. Mr. Chopra's purchase was subject to the result of the litigation between the vendor Sri Bhatia and the respondent. That would mean that the plaintiff's right to possession of the property purchased, was by agreement with the vendor, dependant upon the result of the pending proceeding and the plaintiff had no immediate right to possession. The defendant continued to be in the position of a tenant vis-a-vis the vendor and vis-a-vis the premises even after the plaintiff's purchase. If the respondent was a tenant of the premises till the revision was disposed of, he could not claim that he was in adverse possession against Mr. Bhatia or against Mr. Bhatia's vendee when the latter had no right to immediate physical possession. Therefore, this contention of the respondent, cannot, be accepted.

Thus, even if the respondent's adverse possession started on 19.12.1958, when the three months time granted by the High

Court expired, or even if it be that the adverse possession started on 19.9.58 when the revision was rejected, the suit for possession filed on 5.8.70 was well within 12 years. The adverse possession did not start earlier. Point 2 is decided in favour of the appellant.

POINT 3 :

We next come to the question whether the suit was not maintainable under section 47 CPC as held by the High Court for the first time in Second Appeal.

The suit having been filed on 5.8.1970, before the Amendment of the Civil Procedure Code under Central Act 54 of 1976, we go by the unamended section 47. That section read as follows :

> 47. Question to be determined by the Court executing decree :—
>
> (1) All questions arising between the parties to the suit in which the decree was passed or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the court executing the decree and not by a separate suit.
>
> (2) The Court may, subject to any objection as to limitation or jurisdiction, treat a proceeding under this section as a suit or a suit as a proceeding and may, if necessary, order payment of any additional court fees.
>
> (3) Where a question arises as to whether any person is or is not the representative of a party, such question shall, for the purposes of this section, be determined by the court.
>
> Explanation : For the purposes of this section plaintiff whose suit has been dismissed and a defendant against whom a suit has been dismissed, are parties to the suit."

It will be noticed that under sub-clause (1), all questions arising between the parties to the suit in which decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall have to be determined by the Court executing the decree and not by a separate suit.

The High Court observed : "Reading of the entire plaint would show that plaintiff claimed a decree for possession by *"virtually"* praying to *enforce* the order of ejectment and on the basis of the plea of defendant being a tenant in the premises by virtue of a fresh contract of tenancy". This view, in our opinion, cannot be accepted. The plaint states in para 8 as follows :

> "That the defendant did not care to pay any rent of the said quarters to the plaintiff taking undue advantage of the

plaintiff's absence from Simla because the plaintiff was in Government service in Maharashtra State. *The plaintiff initiated proceedings for ejectment of* the defendant from the said quarters under section 13 of the East Punjab Act No. III of 1949, on the ground of non-payment of rent in respect of the said quarters before the Learned Rent Controller, Simla and *in the said proceedings the defendant has set up a false and frivolous plea of ownership of the said quarters by adverse possession.* The plaintiff has, therefore, thought it advisable to file a suit for possession of the said quarters by ejectment of the defendant therefrom, whose occupation thereof till 13-11-1958 is established as a tenant therein by judicial findings which are binding on the defendant."

The defendant admitted in para 3 of his written statement in the present suit as follows :

"para 8 of the plaint is also emphatically denied except the pendency of the ejectment proceedings and the *reply submitted thereto* by the replying defendant"

From the aforesaid averments in para 8 of the plaint, it is obvious that the plaintiff referred to the fresh eviction case filed by Mr. Chopra in 1969 the present plaintiff, after the legal notice dated 24.7.1969. It was in that fresh rent control case that the respondent filed a counter stating that he was the owner of these four quarters and that he had prescribed title by adverse possession. This plea of the plaintiff was indeed admitted in para 8 of the present written statement. Thus, the present suit is not one for execution of the eviction order passed in the first rent control case.

In our view, the High Court was, therefore, wrong in treating the present suit as one 'virtually' for execution of the order of eviction passed in the earlier rent control case. Hence the ban under section 47 cannot apply. Point 3 is decided in favour of the appellant.

Point 4 :

This point is crucial to the case. Now, if a suit for possession is decreed and the decree-holder gets possession and thereafter there is a fresh dispossession, there is no difficulty in holding that a fresh suit is maintainable for ejectment, because the fresh trespass creates a fresh cause of action. This principle is stated in *Dhanraj Singh and Ors.* Vs. *Mt. Lakrani Kuar* (1) referred to by the

(1) (1916) A.I.R. (All.) 163.

learned Single Judge in the judgment under appeal. But that is not the only situation in which it can be said there will be a fresh cause of action. There can be other situations where a fresh cause of action arises.

Where an earlier decree based on title for ejectment is not executed in time but a fresh suit is however filed on the same basis against the same defendant for ejectment relying on the earlier judgment, it has been held that a second suit does not lie. This is based on the principle that no second suit lies merely on the basis of an earlier judgment if the time for execution of the earlier decree has become barred. The cases relied up by the High Court in *Ramanand and Ors.* Vs. *Jai Ram and Ors.* (1), *Sovani Jena* Vs. *Bhima Ray* (2), *Mal Singh Bika Singh and Ors.* Vs. *Mohinder Singh Mehar Singh* (3) belong to this category. But, in the present case, they are distinguishable. The plaint before us is not based on the decree obtained in the first eviction case filed under the Rent Control law. We may add that *Chhagan Lal* Vs. *The Indian Iron and Steel Co. and Ors.* (4) also belongs to this category.

We shall next turn to cases more directly in point. These are where the earlier suit is based on the relationship of landlord and tenant and the latter suit is based on title. In *Kutti Ali* Vs. *Chindan and Anr.* (5) the earlier suit of 1990 was brough by the landlord against the defendant, on the basis of a lease. The decree was allowed to become time barred as no execution petition was filed within 3 years. A fresh suit was filed in 1898 on the basis of title for eviction The Division Bench held : "The defendants being tenant in 1890 cannot have acquired a prescriptive title in 1898 when this suit was brought. The plaintiff is, therefore, entitled to recover the land upon his *title* independently of any letting by him". Omission to sue on title in the earlier suit was not (constructive) *res judicata.*

This judgment, in *Kutti Ali* unfortunately, suffered several ups and downs. In a Full Bench of five Judges in *Vedapuratti* Vs. *Vallabha Valiya Raja and Ors.* (6) the above case was held to be wrongly decided. In that case the first suit for redemption of a

(1) (1921) A.I.R. (All.) 369.
(2) (1922) A.I.R. (Pat.) 407.
(3) (1970) A.I.R. (P. & H.) 509.
(4) (1979) A.I.R. (Cal.) 160.
(5) (1900) I.L.R. 23 (Mad.) 629.
(6) (1902) I.L.R. 25 (Mad.) 300.

mortgage was decreed but execution got barred by time and a second suit for redemption was held not maintainable. Then came *Mayankutti* Vs. *Kunhammad and Ors.* (1) (a case relied upon in the judgment of the High Court now in appeal before us). There the plaintiff's father had sued the defendant on a lease deed and obtained a decree for possession directing payment of compensation under the Malabar Compensation for Tenants Improvements Act. The execution got barred by time and then a fresh suit was filed on the genuine title. The suit was held barred following the Full Bench in *Vedapuratti* and dissenting from *Kutti Ali*. One peculiar feature of this case which makes it distinguishable is that the Malabar Act Section 5 stated that, notwithstanding, the determination of the tenancy, the tenant was entitled to remain in possession until evicted in execution of the decree and Section 6(4) stated that every matter arising under Section 3 was to be deemed to relate to execution. That would mean the statutory tenancy continued even after the eviction order till the compensation for improvement was paid to the tenant.

But after *Raghunath Singh and Ors.* Vs. *Hansraj Kunwar and Ors.* (2) was decided by the Privy Council, *Vedapuratti* stood impliedly overruled. Their Lordships held in that case that when execution of a decree for redemption was allowed to get barred, a fresh suit would lie. The important principle laid down by Lord Russell of killowen in regard to the right to redeem was that the "right was not barred by res judicata". It meant that the Full Bench case in *Vedapuratti* which overruled *Kutti Ali* was no longer good law. This position became clear when a similar question arose before a Full Bench of the Madras High Court in *Viroopakshan* Vs. *Chambu Nayar and ors.* (3). That was again a case of a second suit for redemption, the execution in the first suit having become barred. Varadachariar J (as he then was), after referring to the decision of the Privy council observed that the Full Bench decision in *Vedapuratti* was no longer good law and a second suit lay "*unless*.....the right of redemption has been *extinguished* in one of the modes contemplated by the statutes and that the mere fact that a decree for redemption obtained on a former occasion has not been executed *will not prevent* the mortgagor from maintaining a subsequent suit for redemption". The result was

(1) (1918) I.L.R. 41 (Mad.) 641.
(2) (1934) I.L.R. 56 (All.) 561.
(3) (1937) I.L.R. (Mad.) 545.

that with the overruling of *Vedapuratti*, the decision in *Kutti Ali* revived. To the extent *Mayankutti* Vs. *Kunhammad* (1917 ILR (41) Mad. (41) (Which was relied upon by the High Court in the judgment under appeal before us) dissented from *Kutti Ali*, the said dissent would therefore no longer hold good. That is how, *Kutti Ali* still remains and governs the situation on the facts before us.

The facts before us are again similar to those in *Amina* Vs. *Ahmad* (1). That decision is similar to *Kutti Ali* and the said ruling was followed. There the first suit was for eviction solely based on tenancy and the execution was allowed to become time barred as in the case before us. The second suit for eviction based on title was held maintainable and not barred. Satyanarayana Rao, J. observed :

> "On the principle of the decision in *Kutti Ali* vs. *Chindan*, I think that the second suit based on *title* is not barred.....A suit based on tenancy is very narrow in its scope and it is unnecessary very often for the plaintiff landlord to plead his title; it is enough for him in such a suit to prove the lease and the tenancy and that it was validly terminated."

In that case too, the fresh suit was filed within 12 years from the date fixed in the earlier compromise decree. The possession during the period granted under the compromise was treated as permissive.

A similar situation arose again in *Madhavan Variar* vs. *Chathu Nambiar* (2) before Satyanarayana Rao and Viswanatha Sastri, JJ. They observed (p. 504) that "as the cause of action in the present suit was different from the cause of action in the earlier suit, the decision in *Mayan Kutti* vs. *Kunhammad*, had no application".

In our view, the decision in *Kutti Ali* and in *Amina* are directly in point and are correctly decided. Both relate to an earlier suit based on a lease when the execution of the decree was time barred and the second suit was based on title. The second suit was held neither barred by section 47 CPC nor by section 11 CPC. So far as mortgage cases are concerned, the position stood settled long back by the decision of the Privy Council in *Raghunath Singh's* case as explained in the Full Bench in *Viroopakshan*. In fact, this Court approved the Privy Council Judgment in Raghunath Singh and held that a second suit for redemption was maintainable

(1) (1949) 1 M.L.J. 465.

(2) (1950) 2 M.L.J. 501.

r redemption stood barred by limitation.
nda Patil and Ors. Vs. *Shripal Balwant*
ganlal Vs. *Jaiswal Industries, Neemach*
s Singh and Anr. Vs. *Guran Ditta Singh*
igly hold on the above line of cases that
arred by Section 11 or Section 47 of the

above discussion, covered all the cases,
ourt in the judgment under appeal except
Desai Vs. *Shripad Baji Carware* (4). That
arly distinguishable because in the first
decree for redemption which stood barred by time for execution purposes, it was also stated that the plaintiff's "right to redeem shall be for ever barred". In fact, in that case, on that ground the High Court distinguished *Ramji* Vs. *Pandharinath* (5) where there was no such clause. In *Ramji*, second suit for redemption was held maintainable as in the Privy Council case and *Vedapuratti* of the Madras High Court was clearly dissented. Hence *Dinu Yesu Desai* is clearly distinguishable and does not apply. In principle, if the second suit in redemption cases is maintainable *"unless the right to redeem itself stood barred"*. on the same parity of reasoning, the second suit on title (where the earlier decree on lease stood barred) would be maintainable *"unless the title itself stood barred"*.

As stated under Point 2, the second suit on title was filed on 5.8.70 within 12 years of the commencement of the adverse possession on 19.12.58 i.e. before 19.12.70. The High Court was in error in holding the suit was not maintainable.

The result is a judgment and decree, which was passed in a previous suit under the Rent Control Act by which it was held that respondent was tenant and that he was required to vacate the premises on or before 19.12.1958, would not bar a fresh suit for recovery of possession from a tenant. Reason being that the tenant has not acquired title over the property by adverse possession. It is true that the appellant could have executed the decree passed in the said suit. He had not executed the same on the alleged ground that there was a fresh agreement of tenancy. Whatever

(1) (1988) 3 S.C.C. 298.
(2) (1989) 4 S.C.C. 344.
(3) (1991) 2 S.C.C. 523.
(4) (1918) A.I.R. (Bom) 34
(5) (1918) I.L.R. 43 Bom. 334.

may be the position, after lapse of three years it was not open to the appellant to file an application for executing the said decree under the Limitation Act, 1908. Still there is no bar under the Rent Act or under the Limitation Act, 1908. Still there is no bar under the Rent Act or under the Code of Civil Procedure for filing a suit for recovery of possession from the tenant, who had failed to deliver the possession on the basis of a decree passed against him. Unless, the defendant-tenant establishes that he has become owner of the suit property by adverse possesion, the suit filed by the owner on the basis of his title cannot be dismissed despite the fact that application for the execution of the decree passed under the Rent Act was barred after lapse of three years. The title of the plaintiff over the suit property was not extinguished (i) by the act of the parties including adverse possession, (ii) by the decree of the Court or (iii) by not executing the decree which was passed in a previous suit. If there is any agreement between the parties after passing of the decree, permitting the tenant to continue in the premises, he may either be a tenant, licensee or a trespasser. Presuming that no fresh tenancy was created or license was granted then also respondent has failed to acquire title by adverse possession on the date of the suit i.e. 5.8.1970, because as per the decree he was entitled to occupy the premises up to 19.12.1953 as tenant. By lapse of time, plaintiff has lost right to execute the previous decree as it became time-barred but has not lost the title. Unless the title is extinguished, second suit by the owner if filed within period of limitation is not barred.

We allow the appeal and restore the decree of the eviction as granted by the trial Court and as affirmed by the first appellate Court. There will be no order as to costs in this appeal.

R.D.

Appeal allowed

SUPREME COURT

*Before B.N. Kirpal, D.P. Mohapatra and R.P. Sethi, JJ.**

2000

February, 4.

*Union of India and others.***

v.

Solar Pesticide Pvt. Ltd. and Another.

Customs Act, 1962 (Central Act no. LII of 1962) as amended in 1991, section 27—principle of unjust enrichment incorporated in section 27, whether applicable in respect of imported raw material captively consumed in the manufacture of final product.

Where at the time of import of copper scrap the respondent sought exemption from payment of additional customs duty viz countervaling duty (CVD) which was available under customs Notification No. 35/81 CE dated 1.3.1981 but at the time of clearance this duty was paid and subsequently, the respondent filed an application for refund of additional customs duty paid at the time of import of copper scrap claiming benefit under the aforesaid notification of 1.3.1981, which was rejected by the Assistant Collector Customs holding that the copper scrap was correctly assessed to CVD which was reversed by High Court of Bombay which allowed the writ application of respondent;

Held, that the High Court has not correctly interpreted the relevant provisions of the Customs Act, 1962 as amended in 1991, and the principle of unjust enrichment incorporated in section 27 of the Customs Act, 1962 would be applicable in respect of imported raw material captively consumed in the manufacture of final product.

Solar Pesticides (India) Limited vs. *Union of India.* (1)— overruled.

Bhadrachalam Papaperboards Ltd. v. *Govt of Andhra Pradesh.* (2)— distinguished.

Case laws discussed.

Appeals against the judgment of Bombay High Court.

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* In the Supreme Court of India.

** Civil Appeal No. 921 of 1992 with Civil Appeal Nos. 5688-89/95, 1565, 2711, 4381, 5407-09 6261 and 6113 of 1999, 16890, 16894, 16885 of 1996 and WP (C) No. 189 of 1993.

(1) (1992) 57 E.L.T. 201

(2) (1999) 106 E.L.T. 290 (S.C.)

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

KIRPAL, J.

Whether the doctrine of unjust enrichment is applicable in respect of raw material imported and consumed in the manufacture of a final product is the question which arises for consideration in these appeals.

In order to decide the aforesaid issue, we need refer to the facts in the case of Civil Appeal No. 921 of 1992 filed by the Union of India against Solar Pesticide Private Limited (hereinafter referred to as 'the respondent'). The respondent imported copper scrap for use as a raw material in the manufacture of copper oxychloride. At the time of import of copper scrap the respondent sought exemption from payment additional customs duty (also known as countervalling duty or CVD) which was available under the Customs Notification No. 35/81 CE dated 1.3.1981. At the time of clearance this duty was paid, subsequently, the respondent filed an application for refund of additional customs duty paid by it at the time of import of copper scrap claiming benefit under the aforsaid exemption Notification of 1.3.1981. The Assistant Collector of Customs, by order dated 16.2.1985, rejected the claim and held that the imported copper scrap was correctly assessed to CVD @ Rs. 3,300/- per M.T.

Three years after the rejection of the said claim, a writ petition was filed by the respondent in the Bombay High Court. It was claimed therein that the aforesaid exemption Notification gave complete exemption from payment of excise duty of copper for use in the manufacture of chemicals, Hence, when copper scrap was imported for use in the manfacture of chemicals, additional customs duty (countervalling duty) could not be levied on copper scrap so imported.

The High Court accepted this contention and came to the conclusion that the refund application of the respondent had been wrongly rejected. The High Court then considered the contention raised on behalf of the customs authorities that the claim for refund will have to be decided keeping in view of the amendments which had been carried out in 1991 to the Customs Act, 1962 (hereinafter referred to as 'the Act'). It was submitted that with the introduction of sub-section 2 of section 27 of the Act, a claim for refund could be entertained if the importer was able to prove that

he had not passed on the incidence of such duty to any other person. In other words, the submission was that the refund of duty, the incidence of which has already been passed on to other person, would result in unjust enrichment and in view of the amendments made in the Act, such unjust enrichment is not permissible.

The amendments which were made in the Act, inter alia, sought to provide that the manufacturer or importer of goods shall not be entitled to refund of duty of excise or, as the case may be, the duty of customs, if he has already passed on the incidence of such duty to the buyer. The burden of proof that the incidence of the duty has not been passed on to the buyer shall be on the person claiming the refund. The High Court, on interpreting Sections 27, 23C and 28D of the Act, came to the conclusion that the question of unjust enrichment would not arise in the case of captive consumption of the imported raw material. According to it, the question of unjust enrichment would arise under the amended Act when refund is asked for by a person who has sold the imported goods and in the process, had directly passed on the burden of duty to the buyer. This, according to the High Court, was clear from clauses (a), (b) & (c) of the proviso to Section 27(2) read with the presumption contained in Section 28D of the amended Act.

In this appeal, there is no dispute with regard to the question as to whether the respondent was entitled to get the benefit of the exemption notification with regard to the payment of the countervailing duty. We, therefore, proceed on the assumption that the decision of the High Court that the respondent was entitled to the said benefit was correct and it would normally be entitled to refund of the said duty which it had paid.

On behalf of the appellant, the learned Attorney General contended that a Nine Judges Bench of this Court in *Mafatlal Industries Ltd.* Vs. *Union of India* (1) has upheld the validity of the amended Section 27 of the Act. He submitted that the perusal of sub-section 2 of Section 27 of the Act shows that onus was on the importer to prove that he had not passed on the incidence of duty to any other person before he could claim refund of the amount of duty paid by him.

Learned counsel appearing on behalf of the respondent in this appeal, however, contended that sub-section 2 of Section 27

1) (1997) 5 S.C.C. 536.

of the Act cannot be read in isolation. The said provision has to be read with Sections 28C and D of the Act and the principle of unjust enrichment could not apply in the case of captive consumption of the imported raw material.

Before considering the rival contentions it is necessary to refer to the relevant provisions of the Act after its amendment in 1991. Section 27, 28C and 28D read as under :

"27. Claim for refund of duty :- (1) Any person claiming refund of any duty—

(i) paid by him in pursuance of an order of assessment, or

(ii) borne by him, may make an application for refund of such [duty and interest, if any, paid on such duty] to the [Assistant Commissioner of Customs-

(a) in the case of any import made by any individual for his personal use or by Government or by any educational, research or charitable institution or hospital, before the expiry of one year.

(b) in any other case, before the expiry of six months, from the date of payment of [duty and interest, if any, paid on such duty] [in such form and manner]as may be specified in the regulations made in this behalf and the application shall be accompanied by such documentary or other evidence (including the documents referred to in section 28C) as the applicant may furnish to establish that the amount of [duty and interest, if any, paid on such duty] in relation to which such refund is claimed was collected from, or paid by, him and the incidence of such [duty and interest, if any, paid on such duty]had not been passed on by him to any other person.

Provided that where an application for refund has been made before the commencement of the Central Excises and Customs Laws (Amendment) Act, 1991, such application shall be deemed to have been made under this sub-section and the same shall be dealt with in accordance with the provisions of sub-section (2) :

Provided further that the limitation of one year or six months as the case may be, shall not apply where any [duty and interest, if any, paid on such duty] has been paid under protest.

[Provided also that in the case of goods which are exempt from payment of duty by a special order issued order sub-section (2) of section 25, the limitation of one year or six months, as the case may be, shall be computed from the date of issue of such order.]

[Explanation 1.]–For the purpose of this sub-section, "the date of payment of [duty interest if any, paid on such duty], in relation to a

person, other than the importer, shall be construed as "the date of purchase of goods" by such person.

[Explanation II.–Where any duty is paid provisionally under section 18, the limitation of one year or six months, as the case may be, shall be computed from the date of adjustment of duty after the final assessment thereof.]

(2) If, on receipt of any such application, the [Assistant Commissioner of Customs is satisfied that the whole or any part of the [duty and interest, if any, paid on such duty] paid by the applicant is refundable, he may make an order accordingly and the amount so determined shall be credited to the Fund :

Provided that the amount of [duty and interest, if any, paid on such duty] as determined by the [Assistant Commissioner of Customs] under the foregoing provisions of this sub-section shall, instead of being credited to the Fund, be paid to the applicant, if such amount is relatable to.

(a) the [duty and interest, if any paid on such duty] paid by the importer, if he had not passed on the incidence of such [duty and interest, if any, paid on such duty] to any other person;

(b) the [duty and interest, if any, paid on such duty] on imports made by an individual for his personal use;

(c) the [duty and interest, if any, paid on such duty] borne by the buyer, if he had not passed on the incidence of such [duty and interest, if any, paid on such duty] to any other person.

(d) the export duty as specified in section 26;

(e) drawback of duty payable under sections 74 and 75;

(f) the [duty and interest if any, paid on such duty] come by any other such class of applicants as the Central Government may, by notification in the Official Gazette strictly.

Provided further that no notification under clause (1) of the first proviso shall be issued unless in the opinion or the Central Government the incidence of [duty and interest, if any paid on such duty] has not been passed on by persons concerned to any other person.

28C : Price of goods to indicate the amount of duty paid thereon. Notwithstanding anything contained in this Act or any other law for the time being in force, every person, who is liable to pay duty on any goods shall, at the time of clearance of the goods prominently indicate in all the documents relating to assessment

sales invoice and other like documents, the amounts on such duty which will form part of the price at which such goods are to be.

28D. Presumption that incidence of duty has been passed on to the buyer :— Every person who has paid the duty on any goods under this Act shall, unless the contrary is proved by him, be deemed to have passed on the full incidence of such duty to the buyer of such goods.

The validity of Section 27 of the Act and the interpretation of the same came up for consideration before this Court in *Mafatlal's* case (supra). While upholding the validity at page 631. It was observed that "the situation in the case of captive consumption has not been dealt with by us in this opinion. We leave that question open". It is this question which has now come up for consideration in the present appeals.

The first proviso to Section 27(1) deals with cases where application for refund had been made before the commencement of the Central Excise and Customs Laws (Amendment) Act, 1991. According to this proviso, such an application for refund shall be dealt with in accordance with the provisions of sub-section (2). In the present bunch of cases, we are concerned with the import of raw material where payment of duty had been made and applications for refund were made prior to the commencement of the Amendment Act, 1991. All such applications are required to be dealt with in accordance with the provisions of sub-section (2) of Section 27 of the Act.

Sub-section (1) of Section 27 of the Act provides for making of a claim for refund of duty, in certain cases duty and interest, and the period of limitation within which such a claim has to be made. This sub-section, inter alia, provides that the applicant will have to establish that the amount of duty and interest in relation to which the refund is claimed was collected from, or paid by, him and the incidence of the duty and interest, if any, had not been passed on by him to any other person. Sub-section (2) of Section 27, which applies in the present case, provides that if the Assistant Commissioner is satisfied that whole or any part of the duty/or interest is refundable, then an order shall be made accordingly to that effect and the amount so determined shall be credited to the fund. The word "fund" means, according to Section 2 (21A) of the Act, the Consumer Welfare Fund established under Section 12C of the Central Excises and Salt Act, 1944.

Clause (a) of proviso to sub section (2) of Section 27 of the Act however stipulates that the amount of refund which is found due will not be credited to the fund and shall be paid to the applicant, inter alia, if such an amount or refund is relatable to the duty and interest which has been paid by the importer and if he had not passed on the incidence of the same to any other person. In other words if it cannot be shown that the duty, in respect of which refund is claimed, had not been passed on to any other person then in such an event the amount of refund due will be credited to the fund.

Sections 28C and D of the Act have been included in the new Chapter VA whose heading is "indicating amount of duty in the price of goods etc. for the purpose of refund". Section 28C makes it obligatory on other person who is liable to pay duty on any goods to, at the time of clearance of goods, indicate in the documents relating to assessment, sales invoice and other like documents the amount of such duty which will form part of the price on which such goods are to be sold. Section 28D contains a presumption that incidence of duty has been passed on to the buyer, but this presumption is rebutable. In the absence of proof of such duty not having been passed on to the buyer, Section 28D provides that the amount of duty, in respect to which refund is claimed, was collected or paid by him and incidence of such duty had not been passed on by him to any other person.

The use of the words "incidence" of such duty....." is significant. The words "incidence of such duty" mean the burden of duty. Section 27(1) of the Act talks of the incidence of duty being passed on and not the duty as such being passed on to another person. To put it differently the expression "incidence of such duty" in relation to its being passed on to another person would take it within its ambit not only the passing of the duty directly to another person but also cases where it is passed on indirectly. This would be a case where the duty paid on raw material is added to the price of the finished goods which are sold in which case the burden or the incidence of the duty on the raw material would stand passed on to the purchaser of the finished product. It would follow from the above that when the whole or part of the duty which is incurred on the import of the raw material is passed on to another person then an application for refund of such duty would not be allowed under Section 27 (1) of the Act.

Section 27(2) of the Act, as already noticed, deals with the cases where application for refund had been made prior to the amendment of the Act in 1991. Sub-section (a) of the proviso is similar to the provisions contained in Section 27(1) of the Act i.e. refund of duty paid by the importer will be allowed if he had not passed on the incidence of such duty to any other person. Section 28C of the Act would have reference to those goods which are cleared and would undoubtely have no application to the cases of the captive consumption. It is respect of those goods which are cleared that Section 28C requires a person clearing the goods to indicate the amount of duty paid thereon which form part of the price at which such goods are to be sold. It is not possible to accept the contention that because Section 28C of the Act cannot be applied in the cases of goods imported for captive consumption, therefore, the principle of unjust enrichment would not be applicable in such cases. As we have already indicated, Section 27 of the Act has been re-cast with the amendments made in 1991 and the said section does not necessarily have to be read in conjunction with Sections 27C and D of the Act. If the incidence of duty paid on the imported raw material has not been passed on to any other person, then by virtue of proviso to Section 27(2) of the Act in the case where application for refund had been made prior to 1991, refund due on the duty paid would be given to the applicant.

Even though in *Mafatlal's case* (supra) the question with regard to captive consumption was left open, this Court was called upon to interpret Section 27 of the Act. After discussing and deciding the various contentions which had been raised, the majority judgment of Jeevan Reddy, J. under para 108 at page 631 for the sake of convenience set out the propositions which flowed from the judgment, With regard to claim for refund, at page 633 it was observed as follows :

> "(iii) A claim for refund, whether made under the provisions of the Act as contemplated in Proposition (i) above or in a suit or writ petition in the situations contemplated by Proposition (ii) above, can succeed only if the petitioner/ plaintiff alleges and establishes that he has not passed on the burden of duty to another person/other persons. His refund claim shall be allowed/decreed only when he establishes that he has not passed on the burden of the duty or to the extent he has not so passed on, as the case may be. Whether the claim for restitution is treated as a

constitutional imperative or as a statutory requirement it is neither an absolute right nor an unconditional obligation but is subject to the above requirement, as explained in the body of the judgment. Where the burden of the duty has been passed on, the claimant cannot say that he has suffered any real loss or prejudice. The real loss or prejudice is suffered in such a case by the person who has ultimately bome the burden and it is only that person who can legitimately claim its refund. But where such person does not come forward or where it is not possible to refund the amount to him for one or the other reason, it is just and appropriate that that amount is retained by the State i.e. by the people. There is no immorality of impropriety involved in such a proposition.

The doctrine of unjust enrichment is a just and salutary doctrine. No person can seek to collect the duty from both ends. In other words, he cannot collect the duty from his purchaser at one end and also collect the same duty from the State on the ground that it has been collected from him contrary to law. The power of the Court is not meant to be exercised for unjustly enriching a person. The doctrine of unjust enrichment is, however, inapplicable to the State. State represents the people of the country. No one can speak of the people being unjustly enriched."

We are of the opinion that the aforesaid observations would be applicable in the case of captive consumption as well. To claim refund of duty it is immaterial whether the goods imported are used by the importer himself and the duty thereon passed on to the purchaser of the finished product or that the imported goods are sold as such with the incidence of tax being passed on to the buyer. In either case the principle of unjust enrichment will apply and the person responsible for paying the import duty would not be entitled to get the refund because of the plain language of Section 27 of the Act. Having passed on the burden of tax to another person, directly or indirectly, it would clearly be a case of unjust enrichment if the importer/seller is then able to get refund of the duty paid from the Government not withstanding the incidence of tax having already been passed on to the purchaser.

Learned Counsel for the respondent had also contended that in cases of captive consumption of imported goods, it would be impossible for the assessee to establish whether the duty

component has been passed on to the buyers of the finished products or has been borne by the importer himself. Difficulty in proving that the incidence of the duty borne by the importer has not been passed on to the purchaser of the finished product can be no ground for interpreting Section 27 differently. It is not possible that in no case will an importer not be able to prove that the incidence of the duty imposed on the imported raw material has not been passed on to any other person. In fact in Civil Appeal No. 4381 of 1999 filed by the Commissioner of Customs against M/s. Surya Roshini Limited the importer had produced certificate from the Chartered Accountants giving details of costing of the final product and the Commissioner (Appeals) found as a fact that the component of excess customs duty paid on the imported raw material had not gone into the costing of the finished product. Without going into the correctness of this finding we wish to emphasize that even in cases of captive consumption, it should be possible for the importer to show and prove before the authorities concerned that the incidence of duty on the raw material, in respect of which refund is claimed, has not been passed on by the importer to any body else.

The High Court in considering the question of the applicability of the doctrine of unjust enrichment had relied upon the decision of this Court in *HMM Limited & Anr.* Vs. *Administrator, Bangalore City Corporation, Bangalore and Anr.* (1). That case pertained to the lavy of octroi on goods on their entry into the city limits. Octroi had been collected on the said goods even though there was no use or consumption within the Minicipal limits. This Court held that the amount of octroi paid was refundable. In this context a contention had been raised on behalf of the Corporation that refund could not be given because there was a possibility of undue enrichment of the claimant. This Court did not accept this contention and came to the conclusion that octroi was a duty on the entry of raw material which was payable by the producer or manufacturer. It was not the duty on going out of the finished products in respect of which the duty might have been charged or added to the costs passed on to the consumers. This Court then concluded that "in such a situation, no question of 'undue enrichment' can possibly arise in this case". This decision is thus clearly not applicable in the present case where the question of unjust enrichment does arise.

(1) (1989) Supp. 1 S.C.R. 353.

In *Sate of Rajasthan and others* Vs. *Hindustan Copper Limited* (1), this Court accepted the averment made in the affidavit on behalf of the assesee to the effect that the excess duty paid on rectified spirit, in respect of which refund was claimed, had not been passed on to any consumer of the final product. It is in view of this that this Court held that the principle of unjust enrichment did not apply. Lastly, our attention was drawn to the case of *Bhadrachalam Paperboards Ltd.* Vs. *Govt. of Andhra Pradesh* (2). In this case claim was made for refund of sales tax which had erroneously been paid. The High Court had denied the refund as it was of the view that the assessee must have passed on the burden to the consumer, thereby applied the principle of unjust enrichment. Allowing the appeal of the assessee, this Court held that the High Court was not right in presuming that the burden of tax had been passed on to the customer. This Court further held on facts that the question of appellant therein passing on the tax liability to the consumer did not arise. This case, therefore, can be of no assistance to the respondent.

For the aforesaid reasons, we hold that the High Court has not correctly interpreted the relevant provisions of the Customs Act and, in our opinion, the principle of unjust enrichment incorporated in Section 27 of the Act would be applicable in respect of imported raw material and captively consumed in the manufacture of a final product. Whether the incidence of the duty had been passed on to the consumer was not decided by the High Court in *Solar Pesticide's case* (supra) because in its opinion the principle of unjust enrichment could not apply to the cases of captive consumption. In the case of *Solar Pesticide Pvt. Ltd.* therefore, we do not go into this question whether the incidence of duty had not been passed on by the respondent. This appeal is, accordingly, allowed and the impugned judgment of the High Court is set aside, the effect of which be that the writ petition filed by the Solar Pesticide Pvt. Ltd. stands dismissed. Writ Petition (C) No. 189 of 1993 filed by M/s Solar Pesticides Private in this Court also stands dismissed. No costs.

Civil Appeal No. 4381 of 1999

In the above-noted matter the respondent had imported prime quality hot rolled steel in colls on which duty was paid. A claim was made for the refund of the duty on the basis of the

(1) (1998) 9.S.C.C. 708.
(2) (1999) 106 E.L.T. 290 (S.C.)

classification of the goods. Ultimately the respondent succeeded and the Collector (Appeals) Bombay directed the refund of the excess duty paid. 13 applications for refund were filed and the Assistant Collector grouped them as follows.

(i) Claims based on bill of entries at serial number 1-6 in the list which were received by the department on 22.6.1989.

(ii) Claims relating to bills of entries at serial numbers 7-9 and

(iii) Claims arising out of rest of the 4 bills of entries.

With regard to the first category the Assistant Collector held that the claims were barred by limitation. Claims falling under the second category were held by him to be not maintainable in view of the principle of unjust enrichment and the claims made under the third category were held to be pre-mature. Before the Assistant Collector, the respondent had produced a certificate from its Chartered Accountant in an effort to show that the duty, in respect of which refund was being claimed, had not been passed on to their customers of finished products. The Assistant Collector, however, came to the conclusion that the said certificate did not establish that the duty had not been passed on to the customers.

The Collector (Appeals) set aside the order of the Assistant Collector and directed the refund of duty amount of Rs. 85,71,688.34. In arriving at this conclusion the Collector (Appeals) accepted the certificate produced by the respondent from their Cost Accountant who had certified that the respondent had not included the excess duty amount, in respect of which refund was being claimed, in the costing of their finished products. The Collector (Appeals) having accepted the said certificate allowed the refund.

The Revenue filed an appeal before the Tribunal. The appeal was dismissed by the Tribunal by following the decision of the Bombay High Court in *Solar Pesticides (India) Limited* Vs. *Union of India* (1), a decision, which we have now held was not correct. The Tribunal did not go into the question whether in fact there would be unjust enrichment in the event of refund being ordered to be paid. This question requires adjudication by Tribunal. For the reasons stated above, the decision of the Tribunal in Solar Posticides (India) Limited that the principle of unjust enrichment does not apply to the cases of captive consumption is obviously

(1) (1992) 57 E.L.T. 201.

incorrect. We, therefore, allow this appeal, set aside the judgment of the Tribunal and direct it to decide the appeal of the Revenue afresh on the question as to whether the principle of unjust enrichment would, on facts, apply or not.

Civil Appeal No. 2711 of 1999

In view of the decision of this Court in Civil Appeal No. 921 of 1992, we allow this appeal, set aside the judgment of the Tribunal and direct it to decide the appeal of the Revenue afresh on the question as to whether the principle of unjust enrichment would, on facts, apply or not.

Civil Appeal No. 6113 of 1999

In a claim for refund of duty, the respondent raised two contentions. Firstly that the duty had not been passed on to the consumer and the principle of unjust enrichment did not apply. The second contention was that in any event, in view of the decision of the Bombay High Court in the case of *Solar Pesticides (India) Limited* Vs. *Union of India.* (Supra) the principle of unjust enrichment was not applicable in cases of captive consumption. Neither the Assistant Commissioner nor the Commissioner (Appeals) accepted any of the two contentions. It was held that the respondent had failed to prove that the incidence of duty in respect of the imported goods had not been passed on.

On appeal filed by the assessee, the Tribunal allowed the same following the decisions of the Bombay High Court in *Solar Pesticides (India) Limited* Vs. *Union of India* (Supra), which we have now held is not a good law. The Tribunal did not decide as to whether the assessee had passed on the incidence of duty to the consumer. That contention would require consideration. Accordingly, we allow this appeal, set aside the judgment dated 6.7.1999 of the Customs, Excise and Gold (Control) Appellate Tribunal, New Delhi and direct it to decide the appeal by the assessee afresh on the question as to whether the incidence of duty on the imported raw material had been passed on by the importer to any other person.

Civil Appeal Nos. 5688-89/1995.

In view of the decision of this Court in Civil Appeal No. 921 of 1992, this appeal is allowed.

Civil Appeal Nos. 16890, 16894 and 16885 of 1996

In view of the decision of this Court in Civil Appeal No. 921

of 1992, these appeals are allowed, judgments of the High Court are set aside the result of which is that the writ petitions filed by the respondents stand dismissed.

Civil Appeal No. 1565 of 1999

The Tribunal upheld the order of the Collector (Appeals) following the decision of Bombay High Court in *Solar Pesticides (India) Limited* Vs. *Union of India* (supra). In view of the decision of this Court in Civil Appeal No. 921 of 1992, this appeal is allowed, judgment of the Tribunal is set-aside. Inasmuch as the Tribunal did not go into the question as to whether excess duty had been passed on or not, the Tribunal should decide the appeal afresh.

Civil Appeals No. 5407-5409 and 6251 of 1999

The Tribunal, following the decision of the Bombay High Court in *Solar Pesticide's* case (supra) had allowed payment of refund on the ground that the principle of unjust enrichment does not apply in the case of captive consumption. In view of our decision in Civil Appeal No. 921 of 1992, where the decision of the Bombay High Court has been reverted, these appeals of the Revenue are allowed, No costs.

R.D.

Order accordingly

CIVIL WRIT JURISDICTION

*Before M.Y. Eqbal, J.**

1999
May, 5.

*Abdul Jalil Beg.***

v.

The State of Bihar and ors.

Bihar Board's Miscellaneous Rules, 1958—Rule 168—provisions of—explanation was asked for from the petitioner for not placing the files before the authority and he submitted detailed reply—order passed against him of stoppage of one increment with cumulative effect—provisions of Rule 168 of Bihar Board's Miscellaneous Rules, 1958, whether complied with.

Where the petitioner a stenographer was asked to explain by letter dated 19.7.1989 as to why he did not place the files and kept the files with him and he admitted to have filed a detailed reply to the said allegation and the Deputy Commissioner, Palamau by his order dated 1.8.1990 stopped one increment payable to the petitioner with cumulative effect;

Held, that Rule 168 of the Bihar Board's Miscellaneous Rules, 1958 have been fully complied with by the respondent authority before passing the impugned order of stoppage of one increment of the petitioner with cumulative effect.

Application under Article 226 of the Constitution of India.

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

Mr. Ram Kishore Prasad for the petitioner.

JC to GA for the respondents.

M.Y. Eqbal, J. In this writ application the petitioner has prayed for quashing the order passed by the respondent no. 2. Deputy Commissioner, Palamau at Daltonganj, vide Memo No. 1134/Estt. dated 1.8.90 and also the order dated 21.11.96 passed by the Commissioner in Service Appeal No. 4/94, whereby one increment payable to the petitioner has been stopped with comulative effect.

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* Sitting at Ranchi Bench.

** Civil Writ Jurisdiction Case No. 3296 of 1997 (R). In the matter of an application under Article 226 of the Constitution of India.

2. The brief facts of the case is that the petitioner is working in the post of Stenographer in the Palamau Collectorate and according to the petitioner, he has been performing his duty very diligently without any laches and negligence. It is stated that all of a sudden the petitioner was asked an explanation by the Subdivisional Officer, Latehar, vide letter dated 19.7.89 for not putting up some files, for which the petitioner said to have been responsible. The petitioner filed a detailed reply on 22.7.89 to the Subdivisional Officer, Latehar and he further submitted the detailed facts and circumstances for non-submission of the concerned files. It is further alleged by the petitioner that the Subdivisional Officer Latehar was biased against him, although the petitioner was working under Deputy Collector Incharge, Garhwa but the Sub-divisional Officer complained to the Deputy Collector, Palamau by making false allegation against him. It is stated that the Deputy Commissioner, Palamau did not call any report from the concerned officer where the petitioner was posted and after considering the reply of the petitioner the Deputy Commissioner Palamau passed the impugned order for stopping of one increment with cumulative effect. The petitioner filed an appeal before the Commissioner, Palamau Division, Daltonganj but the Commissioner dismissed the appeal and confirmed the order passed by the Deputy Commissioner.

3. A counteraffidavit has been filed on behalf of the respondents stating, inter alia, that the petitioner was found careless and guilty of keeping some important files with him instead of placing it before the S.D.O., Latehar. It is stated that an explanation was called for from the petitioner and he was given reasonable opportunity to submit his reply which he submitted but the same was found totally unsatisfactory by the Deputy Commissioner. It is further stated that the petitioner was also having responsibility for placing the files for orders after the order of LRDC, Latehar before S.D.O., Latehar but he kept the files with him. It is further stated that the SDO, Latehar was not biased against him rather he was fully aware with the facts of the case.

4. I have heard Mr. Ram Kishore Prasad, learned counsel for the petitioner and JC to GA.

5. Mr. Ram Kishore Prasad, learned counsel, very vehemently attacked the impugned order as being illegal and violative of principle of natural justice. According to the learned counsel, the impugned order of punishment by way of stoppage of one increment

without initiating a regular departmental proceeding is wholly illegal, arbitrary and malafide. The learned counsel further submitted that the Deputy Commissioner ought to have given reasonable opportunity of hearing to the petitioner before passing the impugned order. In this connection, learned counsel drawn my attention to Rule 166 of the Bihar Board's Miscellaneous Rules, 1958 (hereinafter referred to as 'the Rules) I do not find much force in the submission of the learned counsel. Rule 166 of the Rules does not apply in the facts and circumstances of the case. Rule 166 provides that no order of dismissal, removal or reduction in rank shall be passed by a Government servant without informing him in writing of the grounds on which it is proposed to take action and he should be afforded a reasonable opportunity of defending himself. It further provides that the grounds on which it is proposed to take action shall be reduced to the form of a definite charge or charges which shall be communicated to the petitioner charged together with a statement of allegation on which each charge is based. Rule 167 further lays down the procedure for conducting a departmental proceeding before passing an order of dismissal, removal or reduction in rank. In fact, in the instant case, Rule 168 applies, which reads as under :—

"168. (a) Censure, withholding of increments, etc. and recovery from pay.– Without prejudice to the provisions of rule 166 no order imposing the following penalties viz :–

(a) censure,

(b) withholding of increments or promotions including stoppage at an efficiency bar,

(c) recovery from pay of whole or part of any pecuniary loss caused to Government by negligence or breach of order or (other than an order based on facts which have led to his conviction in a criminal court or by a Court Martial, or an order superseding him for promotion to a higher post on the ground of his unfitness for the post).

on a Government servant, shall be passed unless he has been given an adequate opportunity of making a representation that he may desire to make and such representation, if any has been taken into consideration before the order is passed :

Provided that the requirements of this paragraph may, for sufficient reasons to be recorded in writing, be waived where there is difficulty in observing them and where they can be waived without injustice to the officer concerned.

Note-The full procedure indicated in clause (i) and (ii) of rule 166 need not be followed in such cases. It will be sufficient if the officer concerned is given an opportunity of explaining the charges against him and the explanation so submitted is taken into consideration before orders are passed."

5. It is, therefore, clear that no order imposing minor penalties like censure, withholding of increment or recovery of pecuniary loss caused to the Government by negligence or breach of order shall be passed unless the Government servant has been given adequate opportunity of making a representation and without considering the representation that may be filed by the said Governement servant. Even this opportunity of filing representation can be waived where there is difficulty in observing the rule. In the notes of the said rule it has been specifically mentioned that in such a case rule 166 need not be followed. In other words, there is no need of giving opportunity of filing reply or representation in certain circumstances before passing the order of stoppage of increment. I am, therefore, of the definite opinion that in case of imposing minor penalties as contemplated under Rule 168 against a Government servant, a regular departmental proceeding is not required to be initiated as contended by the learned counsel appearing for the petitioner.

6. Coming back to the instant case, the petitioner himself admitted that the petitioner was asked for explanation vide letter dated 19.7.89 for not placing the files and keeping the files with him. The petitioner further admitted that he filed a detailed reply to the said allegation levelled against him. However, the petitioner contended that the Deputy Commissioner before passing the impugned order has not applied his mind.

7. From perusal of the order of the Deputy Commissioner it appears that the Deputy Commissioner has passed a detailed order and has taken into consideration the explanation submitted by the petitioner. The Deputy Commissioner further considered all facts and circumstances of the case under which he was found guilty of charges levelled against him. The Commissioner in appeal also re-appreciated the facts and evidence on record and found that the charges levelled against the petitioner were clear and there was full application of mind by the Deputy Commissioner. I do not find any reason to differ with the findings arrived at by the Deputy Commissioner and the Commissioner in passing the impugned order.

8. As noticed above, Rule 168 of the Rules has been fully complied with by the respondent-authority before passing the impugned order. In that view of the matter, I do not find any merit in this writ application, which is accordingly dismissed.

R.D. *Application dismissed.*

CIVIL WRIT JURISDCTION

*Before M.Y. Eqbal, J.**

1999

July, 1.

*Ram Kishore Singh.***

v.

State of Bihar & ors.

Dismissal—order of—passed by Suprintendent of Police, after enquiry officer in departmental proceeding found the charges against the petitioner proved—acquittal by Sessions Court in Criminal case—whether the order of punishment of the petitioner could be set aside.

The petitioner, a writer constable in police station was charged of raping an unmarried girl and a departmental proceeding was initiated against him and the enquiry officer after recording evidence of the girl and other witnesses came to a finding that the charge against the delinquent was proved and the Superintendent of Police passed the final order of dismissal against him which was confirmed in appeal. The criminal case against the petitioner ended in his acquittal as the case was closed without the victim girl having been examined.

It is well settled that if the finding of departmental enquiry is based on appreciation of evidence, in exercise of its writ jurisdiction, the High Court should not interfere with the said finding of fact.

Held, that the disciplinary proceeding or the order of punishment of the delinquent cannot be set aside even on decision of Sessions Court acquitting the delinquent.

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 M.Y. Eqbal, J.

Mr. M.M. Prasad for the petitioner.

JC to GP I for the State.

M.Y. Eqbal, J. In this application the petitioner has prayed for quashing the order of dismissal passed by the respondent no.

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* Sitting at Ranchi Bench.

** Civil Writ Jurisdiction Case No. 2303 of 1991 (R). In the matter of an application under Articles 226 and 227 of the Constitution of India.

3. Superintendent of Police, West Singhbhum, Chaibasa and also for setting aside the order passed by the respondent no. 2, Deputy Inspector-General of Police, South Chotanagpur Range, Ranchi in appeal filed by the petitioner against the order of dismissal of his service.

2. The petitioner was charged with the offences of committing rape on Sukarmani Ho, an unmarried girl of the same police station. The charge against the petitioner was that while he was posted as writer constable at Dumaria Police Station on 26.5.86 he started dragging away Sukarmani Ho at about 7.30 PM, who was returning from Dumaria hat along with his aunt Mangali Ho and sister-in-law, Bilmati Ho. When she tried to raise alarm the petitioner shut her mouth and lifted her to a nearby bush and committed rape on her. A criminal case was also registered under Sections 366/376 IPC being Dumaria P.S. Case No. 9 of 1986. A departmental proceeding was initiated and the enquiry officer, after recording the evidence of the witnesses, came to a finding that the charge levelled against the petitioner was proved. On the basis of the finding of the enquiry officer the Superintendent of Police, Chaibasa passed the final order of dismissal of the services of the petitioner. A copy of the impugned order has been annexed as Annexure 1 to the writ application. The petitioner then preferred an appeal before the respondent no. 2, which was also dismissed.

3. Mr. M. M. Prasad, learned counsel appearing for the petitioner, assailed the impugned orders as being illegal and wholly without jurisdiction. Learned counsel firstly submitted that the enquiry was conducted ex parte and neither the memo of charge nor any notice of the departmental proceeding was ever issued or served on the petitioner. Learned counsel further submitted that even the memo of the enquiry report was not supplied to the petitioner nor a second show cause notice was issued before passing the order of dismissal. Learned counsel then submitted that although a criminal case was registered under Section 366/376 IPC but from perusal of the same it would appear that no case under Section 376 IPC was made out rather it was a case under Section 354 IPC. Learned counsel lastly submitted that the petitioner was ultimately acquitted in the criminal case by the learned Assistant Sessions Judge, Ghatshila in Sessions Trial No. 30/96. A copy of the said judgment has been attached and marked as Annexure 1/B to the supplementary affidavit filed by the petitioner on 24.6.99.

4. In the counter affidavit filed by the respondents, it is stated that after committing the offence of rape on 26.5.86 the petitioner proceeded on leave from 27.5.86 and he remained absent from his duty till 3.2.87. It is further stated that the petitioner intentionally left the place just after a day of occurrence knowing about the seriousness of the offence and the violent move of the public against him due to his misconduct. The respondents further stated that the departmental proceeding was drawn and efforts were made by the conducting officer to serve the copy of the charge and the statement of allegations but the same could not be served as the petitioner was absent from his duty and was not available at the head quarter. The respondents have filed copies of the memo of different dates in support of the fact the efforts were made for serving the chargesheet and the notices regarding the departmental proceeding. Lastly it is stated in the counter affidavit that several intimations were sent to the petitioner through the respondent no. 4 where he was posted by wireless message and registered post to attend the proceeding on the date fixed and to submit his explanation and to cross examine the prosecution witnesses but the petitioner never appeared before the conducting officer.

4. From perusal of the impugned order of dismissal, it appears that in the departmental proceeding the victim girl Sukarmani Ho was examined. Besides her, Mangli Ho and Gangadhar Ho and the then officer-in-charge of Dumaria and one more officer Shiv Kumar Singh were examined. The Disciplinary authority, after considering the evidences of the above named witnesses, found that the charge levelled against the petitioner was conclusively proved. There is no material before me to disbelieve the finding arrived at by the enquiry officer, on the basis of which the impugned order was passed by the concerned respondent.

5. It is well settled that if the finding of the departmental enquiry is based on appreciation of evidence then this Court, in exercise of writ jurisdiction, should not interfere with the said finding of fact. In this connection reference may be made to the judgment of the Supreme Court in the case of *B.C. Chaturvedi* vs. *Union of India & ors* (1996) I UJ (SC) 80.

6. Learned counsel for the petitioner put reliance on the judgment of acquittal passed by the Additional Sessions Judge in sessions trial. From perusal of the judgment, it appears that only

the mother of the victim girl was examined as prosecution witness no. 1 but she was declared hostile. It does not appear from the judgment that prosecution side took any step for the examination of other prosecution witnesses including the victim gril, the doctor and I.O. rather from the judgment it appears that the Sessions Court closed the evidence and passed the judgment holding that charges have not been proved. Even if there be any finding of the Sessions Court, the disciplinary proceeding or the order of punishment cannot be set aside. Be that as it may it is a sorry state of affairs that a police officer, who is protector of the society, committed such type of offence in or near his police station. The conduct of the petitioner of taking leave after commission of the offence and remained absent for six months itself proves the guilt against him.

7. Having regard to the entire facts of the case and the totality of the circumstances, I am of the opinion that the order of punishment passed by the respondent authority needs no interference by this Court. This writ application is, therefore, dismissed.

R.D. *Application dismissed.*

REVISIONAL CRIMINAL

Before G.S. Chaube, J. *

1999

September, 9.

*Parwej Alam.***

v.

The State of Bihar.

Code of Criminal Procedure, 1973 (Central Act No. II of 1974), section 227—discharge—accused charged under sections 224, 324, 307, 332, 333, 353, 379 and 427 read with section 511 of the Penal Code, 1860 and section 27 of the Arms Act, 1959—unless it is proved the accused was of unsound mind and was incapable of committing any crime he could not get the benefit of section 84 of the Penal Code, 1860—accused whether could be discharged—crucial point of time for ascertaining the state of mind of the accused is the time when the offence was committed.

Held, that unless it is established by evidence that in fact an accused charged with crime was suffering from any mental disease, he cannot expect his discharge. It is settled that to establish that an act is not an offence under section 84 I.P.C. it must proved that at the time of the commission of the act, the accused by reason of unsoundness of mind was incapable of either knowing the nature of the act or that the act was either wrong or contrary to law.

Held, further, that this plea can be decided at the trial stage on the basis of evidence.

An application under sections 397 and 401 of the Code of Criminal Procedure by the accused.

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

M/s. M.K. Dey, B.V. Kumar and *D.K. Laik*, Advocates for the petitioner.

None for the State.

G.S. Chaube J. The sole petitioner has come to this court challenging the order dated 25.11.1998 of the First Assistant

* Sitting at Ranchi Bench.

** Criminal Revision No. 400 of 1998 (R). Against the order dated 25.11.1998 passed by the First Assistant Sessions Judge, Giridih, in Ahilyapur P.S. Case No. 73/97, S.T. No. 135/98.

Sessions Judge of Giridih made in Sessions Trial No. 135 of 1998 declining to discharge him under section 227 of the Code of Criminal Procedure on the ground that being a person of unsound mind, he was uncapable of committing any crime as provided under section 84 of the Indian Penal Code.

2. Short facts of the case are that in the night between 9.12.1997 and 10.12.1997 the officer incharge of Tarstand Police Out Post within Ahilyapur Police Station in the district of Giridih arrested the petitioner under section 42 read with section 409 Cr. P.C. He brought the petitioner to the Out Post and started interrogating him. At about 1.00 a.m. he felt call of the nature. Therefore, leaving the petitioner inside the Out Post with a constable to watch him, he went out. In the meantime, the petitioner picked up the service revolver of the said officer-incharge which had been left on the table, and fired at the constable causing gun-shot injury to him. On the alarm raised by the constable, the officer incharge of the Out Post and some others arrived. There was an attempt to persuade and disarm the petitioner, but the petitioner went on shooting from the firearm causing injuries to some others. Ultimately, he was overpowered when shot at causing injuries to his lower limbs. Inside the Out Post, the petitioner was found using yet another country-made pistol which had been kept in safe custody. He was also found burning and thereby destroying currency notes worth Rs.16,000/- which had been kept by the officer in charge concerned and the constable in their respective boxes the locks of which the petitioner had opened by using keys there of which were easily available inside the Out Post. Consequently, the officer incharge of the Taratand Out post submitted a written information report to the officer incharge of Ahilyaur P.S. disclosing commission of offences under sections 224/ 324/ 307/ 353/ 332/ 333/427/379 read with section 511 of Indian Penal Code and section 27 of the Arms Act. Investigation followed and on completion thereof, chargesheet showing commission of the said offences was submitted and cognizance taken. In due course, the case was committed to the court of sessions and made over to the first Assistant Sessions Judge for trial.

3. It appears that on being injured before he was overpowered, the petitioner was sent to a hospital at Giridih; from there he was sent to RMCH, Ranchi for treatment, while in judicial custody. He was suspected to be of unsound mind. Therefore, he

was sent to Ranchi Institute of Neuropsychiatry and Allied Sciences (RINPAS) at Ranchi. There he was treated for schizophrenia. After being cured of his mental illness the petitioner was transferred to judicial custody and when it came for framing of charge (s) to commence trial, a bid was made by, and on behalf of, the petitioner to secure his discharge in accordance with the provisions of section 227 of the Code of Criminal Procedure. However, the first Asstt. Sessions Judge, Giridih, declined to discharge the petitioner on the ground that there was sufficient material for presuming that he committed offences under sections 224/ 324/ 307/ 353/ 323/ 333/ 427/ 379 read with section 511 of Indian Penal Code. Hence, this application.

4. Mr. M.K. Dey, learned counsel for the petitioner submitted that since the conduct of the petitioner at the time of the alleged occurrence disclosed that, in all probability, he was suffering from some mental disease, he was protected by section 84/IPC. There fore, it was a fit case for discharge of the accused person under section 227 of the Code of Criminal Procedure.

5. As usual, nobody is present on behalf of the State to refute the contention. However, on going through the impugned order and the lower court records, I find that there was little scope for the First Assistant Sessions Judge of Giridih for discharging the petitioner who was accused before him. Undisputed facts are that the petitioner was apprehended by the officer incharge of Taratand Out Post suspecting that he was likely to commit some cognizable offence and was brought to the Out Post for introgation. The petitioner picked up the service revolver of the officer and shot at the constable who was keeping watch on him. He also fired some shots causing gunshot injuries to some others, and was, ultimately, overpowerred by causing gunshot injury to him. It is said that whatever he did was with a view to escape from police custody. The petitioner was also found to have destroyed currency notes worth several thousands which had been kept inside by the occupants of the Out Post. Therefore, on the facts stated and materials collected in support thereof, one can safely presume that the petitioner committed offences with which he had been charged. Section 84/IPC lays down that nothing is an offence which is done by a person who, at the time of doing it by reason of unsoundness of mind is incapable of knowing the nature of the act or that he is doing what was either wrong or contrary to law. It has been submitted by the learned counsel for the petitioner that the facts

and circumstances attending the occurrence clearly show that the petitioner was of unsound mind at the particular time and this fact was further supported by the medical evidence. On this ground it has been submitted that since the petitioner was incapable of committing the crime due to unsoundness of his mind, he cannot be proceeded against for commiting the crime alleged. However, crucial point of time for ascertaining the state of mind of the accused is the time when the offence was committed. Whether the accused was in such a state of mind so as to be entitled to the benefit of section 84/IPC can only be established from the circustances which preceded, attended and followed the crime. In other words, unless it is established by evidence that, in fact, an accused charged with crime was suffering from any mental disease, he cannot expect his discharge. It is settled that to establish that an act is not an offence under section 84/IPC it must be proved that at the time of the commission of the act, the accused by reason of unsoundness of mind was incapable of either knowing the nature of the act or that the act was either wrong or contrary to law. Law presumes every person of the age of discretion to be sane unless contrary is proved. Therefore, in my opinion, it would be most dangerous to admit the plea of insanity at the stage of framing charge upon arguments, derived merely from the conduct of the accused attending the crime or subsequent thereto, because the possibility of the crime having been committed during lucid interval cannot be ruled out. Therefore, simply because at the subsequent stage the petitioner was found to be suffering from schizophrenia and was treated for the same, he was not entitled to be discharged. Only if in course of trial, it is found that at the time of commission of the offence, he was suffering from unsounness of mind, he may plead for his acquittal taking refuge to the provisions of section 84 of the Indian Penal Code.

6. In the result, this application fails and is here by dismissed.

S.D. *Application dismissed*

CIVIL WRIT JURISDICTION

*Before M.Y. Eqbal, J.**

1999

October, 4.

*Gunjan Mukherjee.***

v.

Union of India and others.

Constitution—Articles 12 and 226 —whether Central Fuel Research Institute a wing of Council of Scientific and Industrial Research is an 'Authority" within the meaning of Article 12 of the Constitution—whether respondents were justified in supplying the question set with answer-sheets for mechanical engineering instead of Environmental Engineering—maintainability of.

Held, that in the light of the principles laid down by the Apex Court in *Ajay Hasia's* case (1) and *Ramchandranan Iyer's* Case (2) and also regard being had to the facts stated by the petitioner in the writ petition and the Supplementary affidavit, Central Fuel Research Institute which is a wing of Council of Scientific and Industrial Research is an 'Authority' within the meaning of Article 12 of the Constitution and consequently the writ application filed by the petitioner is maintainable.

Held, further, that the advertisement clearly specified the academic background expected of the applicants to be not civil engineering. However, an opportunity was extended to the candidates of civil engineering by granting them permission to appear in the written test. Therefore, there does not appear any malafide intention on the part of the respondents in supplying question set with answersheet of mechanical engineering to the petitioner.

Case laws discussed.

An application by an examinee.

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

M/S Ram Balak Mahto, Sr. counsel, *M.M. Banerjee and S.K. Laik* for the petitioner.

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* Sitting at Ranchi Bench.

** C.W.J.C. No. 2762/1998 (R). In the matter of an application under Article 226 of the Constitution of India.

(1) (1981) A.I.R. (S.C.) 487.

(2) (1984) A.I.R. (S.C.) 541.

Mr. A.K. Trivedi, S.C.C. for the respondents.

M.Y. Eqbal, J. In this writ application the petitioner has prayed for issuance of an appropriate writ directing the respondents to forthwith take written examination of the petitioner in the branch of Civil Engineering after declaring that the examination held by the respondents for recruitment is illegal, arbitrary and mala fide. Further declaration has been sought for to the effect that the action of the concerned respondent in giving the question paper of Mechanical Engineering to the petitioner in the written examination was mala fide.

2. Petitioner's case is that he is a graduate in Engineering having passed Bachelor of Engineering examination with Civil Engineering in first class in the year, 1998. The petitioner has a good academic back ground with 80.5% marks in matriculation examination and 80·5% in Intermediate Science examination. In the year 1998 an advertisement was published in the Employment News in the month of July, 1998 regarding recruitment in the vacant post of group IV (i) in Central Fuel Research Institute, Dhanbad in which the candidates, inter alia, with qualification of Ist class Bachelor of Engineering with not less than 65% marks were made eligible to apply for the aforesaid vacant posts. It is stated the advertisement did not specify the names of the particular discipline as a condition precedent for the eligibility. However, the advertisement stated that Candidates for Scientific (Group IV) need to have impressive academic background in applied Science or in chemical, mechanical, mineral or Environmental disciplines. Thus advertisement on the whole was not specific on the point of disciplines of Engineering faculty. Pursuant to the aforesaid advertisement the petitioner applied in proper form prescribed in the advertisement specifying, inter alia, his qualification as Bachelor of Engineering (civil) Ist class in Civil Engineering with 69.3% marks. The application was scrutinised by the authorities and admit card was issued in favour of the petitioner along with instructions contained therein by respondent no. 3, Controller of Administration. The instructions mentioned that the written test will be on the pattern of GATE without specifying the disciplines which are to be covered under it. It is contended that the instructions were not complied in all respect as the same did not mention as to whether there would be seperate groups of questions for seperate disciplines to be answered by the candidates of respective disciplines.

Petitioner's further case is that as per syllabus prescribed for GATE examination, question of Environmental are exclusively asked in the Civil Engineering category of the GATE Examination. In GATE there is no separate paper of environmental engineering. The petitioner alleged that he was expecting that the questions on Environmental Engineering would be allotted to him which would justify the GATE pattern and accordingly he was prepared for the same. The petitioner accordingly appeared on the scheduled date in the examination in the centre, namely, Father Agnel School, Gautam Nagar, New Delhi. It is stated that when he sat in the examination, he found that the question set with answer sheets for mechanical engineering were given to him for answer. The petitioner never expected such a situation and was bewildered. It is stated that in GATE paper Environmental Engineering is not included under Mechanical Engineering. The petitioner protested to the invigilator about the set of questions given to him. The invigilator expressed his inability to intervene in the matter. Petitioner's case is that he learnt from the candidates that separate group of question papers have been set including the questions of Environmental Engineering but the petitioner has been deprived of the opportunity to appear in his own subject as the said set of questions were not given to him for answer although the same was very much in existence and question set of Environmental Engineering were distributed to some candidates. The petitioner, therefore, claims that respondent nos. 2 to 4 have acted in a most discriminatory, arbitrary and erratic manner in shutting the opportunity to the petitioner to appear in the interview in order to favour candidates of their choice for oblique motive or reasons.

3. In the counter affidavit filed by the respondents, besides taking preliminary objection with regard to the maintainability of the writ application, it is inter alia, stated that the advertisement clearly spells out that the persons having impressive academic background applied science, chemical, mechanical, Mineral and Environmental Engineering were needed. Accordingly test papers were set in the disciplines of applied sciences, chemical engineering, Electrical and Electronics Engineering, Environmental Engineering, Mechanical Engineering and Mineral Engineering. The test papers were based on the structure and syllabi of GATE. It is stated that the GATE paper is set for a duration of three hours and consists of mostly multiple choice questions and some questions involving

elaborate calculation steps. For the CFRI test papers all questions were of multiple choice type with one correct answer for each question. It is stated that the advertisement clearly specified the academic background expected of the applicants. Civil Engineering background had not been asked for. An opportunity had thus been extended to the candidates of Civil Engineering by granting them permission to appear in the written test and, therefore, there cannot be any element of mala fide intention. It is stated that the Environmental Engineering is an inter-disciplinary field. The subject related to Environmental science and Engineering are prescribed as elective course by many universities for the disciplines of civil, mechancial, chemical and applied science etc. Thus the questions related to environmental engineering find place in many disciplines.

4. I have heard Mr. Ram Balak Mahto, learned Sr. counsel appearing on behalf of the petitioner and Mr. A.K. Trivedi, learned S.C.C.G.

5. Learned counsel appearing on behalf of the respondents has vehementally argued on the preliminary objection taken by the respondents that Central Fuel Research Institute is not a State within the meaning of Article 12 of the Constitution and, therefore, no writ lies against C.S.I.R. or its constituent Institutes. In this connection learned counsel heavily relied upon a direct decision of the Supreme Court in the case of *Sabhajit Tewary* V. *Union of India and others* reported in AIR 1975 S.C.1329.

6. I will first deal with the preliminary objection raised by the learned counsel for the respondents as to whether Council of Scientific & Industrial Research is a State within the meaning of Article 12 of the Constitution and, therefore, the writ petition is not maintainable. In this connection I would like to refer and quote the extract of the advertisement issued by the respondent-Central Fuel Research Institute, Dhanbad of appointment of technical persons in the Institute which reads as under :—

"CENTRAL FUEL RESEARCH INSTITUTE, DHANBAD BIHAR, 828 108

(CSIR Ministry of Science & Technology, Govt. of India CAREER OPPORTUNITY FOR RESEARCH DEVELOPMENT, DESIGN & ENGINEERING PROFESSIONALS)

Advertisement No. R/E/1/1998.

CENTRAL FUEL RESEARCH INSTITUTE (CFRI) is a premier R & D Centre of the Government of India within the Council of

Scientific & Industrial Research. It is India's leading and largest centre in Coal Science and Technology. It is the first Government R & D Organisation to have acquired ISO 9001 certification. Its main campus is in Dhanbad, Bihar and out station units are situated at Nagpur, Bilaspur, Ranchi and Raniganj. The Institute is actively promoting joint technology programmes with industry in coal preparation and Carbonisation. Energy Resources assessment Sold and liquid Fuels, Energy Efficiency and Wasle Management it is intended to intensify activities in the areas of environmental impact assessment and energy efficiency studies New areas of research could also be opened up depending upon the expertlise and its need for the country."

In the counter affidavit no facts and materials have been disclosed to show that the respondents-Institute is not a State within the meaning of Article 12 of the Constitution save and except the respondents only relied upon the decision of the Apex Court in the case of *Sabhjit Tewary* V. *Union of India and ors.* (1).

7. On the other hand, in the supplementary affidavit filed by the petitioner it is, inter alia, stated that the memorandum of Association of the Council of Scientific & Industrial Research Institute would reveal that the object of the council is to implement and give effect to the resolution moved by the Hon'ble Dewan Bahadur Sir A. Ramaswami Mudaliar, Hon'ble Member of the Department of Commerce of the Govt. of India and passed by the Legislative Assembly on the 14th November, 1941 and accepted by the Govt. of India. The Assembly recommended to the Governor General in Council that a fund called the Industrial Research Fund be constituted for the purpose of fostering industrial development in this country and that provision be made in the Budget for an annual grant of rupees ten lakhs to the Fund for a period of five years. The object of the Council being scientific and industrial/applied research of National importance, its major activities are research and development projects sponsored by industrials in the public/private sector and others. Its further object is of research and development of and continuous improvement of indegenous technology and adaptation and development of imported technology. Various other objects have been mentioned in the supplementary affidavit including arrangements with foreign scientific agencies and institutions for exchange of scientists, study tours, training in specialised areas of

(1) (1975) AIR. (SC.) 1329

science and technology conducting joint projects, providing technical assistances in the establishement of scientific institutions and for other matters. The memorandum further provides that the society has to maintain proper and annual account including the balance sheet in such form as may be prescribed by the Central Govt, in consultation with the Controller and Auditor General of India. The accounts of the Society is to be audited only by the Controller and Auditor General. It is provided that the conditions of service of officers and staff of the society is to be governed by the Central Civil Services (Classification, Control and Appeal) Rules and the Central Civil Services (Contract) Rules.

8. In *Sabhajit Tewary's* case the Apex Court took the view that since the Council of Scientific Industrial Institute (CSIR) is a society registered under the Societies Registration Act, it does not have a statutory character like the Oil and Natural Gas Commission or the Life Insurance Corporation or Industrial Finance Corporation. It is a Society incorporated in accordance with the provisions of the Societies Registration Act. Their Lordships, therefore, held that CSIR being a society registered under the Societies Registration Act, cannot be held to be a department of the Government and is a State or Authority within the meaning of Article 12 of the Constitution of India.

9. In the case of *Ajay Hasia* V. *Khalid Mazid* reported in AIR 1981 SC 487 the question which fell for consideration was as to whether a Society registered under the Societies Registration Act is an 'Authority' falling within the definition of State within the meaning of Article 12 of the Constitution. In that case the writ petitioner challenged the validity and admission made in the Regional Engineering College, Shrinagar which is one of the colleges in the country sponsored by the Govt. of India. The college was established and its administration and management was carried on by the Society registered under the Jammu & Kashmir Societies Registration Act, 1898. Answering the question their lordships held as under :-

> " We may point out that it is immaterial for this purpose whether the Corporation is created by a Statute or under a Statute. The test is whether it is an instrumentality or agency of the Government and not as to how it is created. The inquiry has to be not as to how the juristic person is born but why it has been brought into existence. The Corporation may be a statutory Corporation created by a

Statute or it may be a Govt. company or a Company formed under the Conpanies Act, 1956 or it may a society registered under the Societies Registration Act 1860 or any other similar statute. Whatever be its genetical origin, it would be an 'authority' within the meaning of Article 12 if it is an instrumentality or agency of the Government and that would have to be decided on a proper assessment of the facts in the light of the relevant factors. The concept of instrumentality or agency of the Government is not limited to a Corporation created by a Statute but is equally applicable to a Company or Society in a given case, it would have to be decided on a consideration of the relevant factors, whether the Company or Society is an instrumentality or agency of the Government so as to come within the meaning of expression 'authority' in Article 12.

It is also necessary to add that merely a juristic entity may be an 'authority' and, therefore, 'State' within the meaning of Article 12, it may not be elevated to the position of 'State' for the purpose of Arts. 209, 310 and 311 which find a place in Part XIV. The definition of 'State' in Art. 12 which includes an 'authority' within the territory of India or under the control of government of India is not limited in its application only to part III and by virtue of Article 36, to part IV, it does not extend to other provisions of the Constitution and hence the juristic entity which may be 'State' for the purpose of part III and IV would not be so for the purpose of part XIV or any other provisions of the Constitution. That is why the decision of this court in *S.L. Agrawal* V. *Hindustan Steel Ltd.* (1970) 3 SCR 363 ; (AIR 1970 SC 1150), and other case involving the applicability of Article 311 have no relevance to the issue before us".

10. Their lordships notice the earlier decision rendered in *Ajay Hasia's* case (supra) and observed that the test which the court applied for determining this question was the same as the one laid down in the *International Airport Authority's* case and approved by their lordships, namely, whether the Council was an instrumentality or agency of the government. Their lordships observed that the implicity assented to the proposition that if the Council were an agency of the government it would undoubtedly be an 'Authority'. But, having regard to the various features enumerated in the judgement, the court held that the council was

not agency of the Government and hence could not be regarded as an 'Authority'.

11. Again the decision in the *Sabhajit Tiwary's* case (supra) has been considered by the Apex Court in the case of *P.K. Ramchandranan Ayer* V. *Union of India and others* reported in AIR 1984 S.C. 541. Their lordships have held :-

> "Much water has flown down the Jamuna since the dicta in Sabhajit Tiwary's case and conceding that it is not specifically overruled in later decision, its ratio is considerably watered down so as to be a decision confined to its own facts. The case is wholly distinguishable on the facts apart from the later indicia formulated by the court for ascertaining whether a body is 'other authority' within the meaning of Article 12. A mere comparison of the history of ICAR as extensively set out hereinbefore and the setting up of CIIR would clearly show that ICAR came into existence as a department of the Government, continued to be an attached office of the Government even though it was registered as a society and wholly financed by the Government and the taxing power of the State was invoked to make it financially viable and to which independent research institutes set up by the Government were transferred. None of these features was present in the case of CSIR and, therefore, the decision in Sabhajit Tewary's case would render no assistance and would be clearly distinguishable.

12. In the light of the principles laid down by the Apex Court in *Ajay Hasia's* case (supra) and *Ramchandranan Iyer's* case (supra) and also regard being had to the facts stated by the petitioner in the writ petition and the supplementary affidavit, I am of the opinion that the respondents, namely, Central Fuel Research Institute which is a wing of Council of Scientific and Industrial Research is an 'Authority' within the meaning of Article 12 of the constitution and consequently the writ application filed by the petitioner is maintainable.

13. The next question then falls for consideration is whether the respondents were justified in supplying the question set with answersheets for mechanical engineering instead of supplying question of Environmental Engineering. From perusal of advertisement (annexure 2) it appears that it has been clearly stated that the respondent-Institute peeds highly motivated and competent professionals and support technical personnel to work

on the frontier technology development and applications in the energy/resources industry focussing primarily on coal, steel and power sectors. Candidates for scientific (Group IV) need to have impressive academic background in applied science or in chemical, mechanical, mineral or environmental engineering disciplines and preferably relevant professional experience, Chemestry Graduates with molecular modeling experience and engineers with design, scale up, modeling and computer application, technology commercialisation project management, marketing and business development interests were especially made eligible to apply for the said post. It is, therefore, clear that persons having impressive academic background in applied science, chemical, mechanical, mineral and environmental engineering were needed.

14. From perusal of the counter affidavit it appears that the test papers were set in the following disciplines :-

(i) Applied Sciences.

(ii) Chemical Engineering.

(iii) Electrical and Electronics Engineering.

(iv) Environmental Engineering.

(v) Mechanical Engineering. and

(vi) Mineral Engineering.

15. It further appears that the advertisement clearly specified the academic background expected of the applicants. Civil engineering background had not been asked for. However, an opportunity was extended to the candidates of civil engineering by granting them permission to appear in the written test. It, therefore, does not appear any mala fide intention on the part of the respondents in supplying question set with answersheet of mechancial engineering to the petitioner. Although in para 21 of the writ petition the petitioner has stated that he learnt from the candidates that separate group of question papers have been set including the question of environmental engineering but this fact is not supported by any document nor the statement has been correctly affidavited. Moreover, the respondents have denied and disputed the statement and very categorically explained it in para 5 of the counter affidavit.

16. Having regard to the entire facts and circumstances of the case the relief sought by the petitioner cannot be granted in this writ application. The writ application is, accordingly, dismissed.

S.D.

Application dismissed.

MISCELLANEOUS CRIMINAL

Before Deoki Nandan Prasad, J.

2000

August, 22.

*Firoz Ahmad and anr.***

v.

The State of Bihar and anr.

Railway Protection Force Act, 1957 (Central Act no. XXIII of 1957), section 20 (3)—whether applicable where the Officers of Railway Protection Force had committed the acts of theft and assault while conducting search and seizure in business premises of the complainants—whether sanction of superior officer was essential for the prosecution of the accused persons.

The Chief Judicial Magistrate took cognizance after enquiry by Judicial Magistrate against the accused Officers of Railway Protection Force under sections 380, 452, 384, 504 and other sections of the Penal Code, 1860 for forcibly searching the business premises of the complainants and assaulting, abusing and snatching money from their pocket. The accused-petitioners took the plea that the cognizance taken against them was bad for want of sanction for their prosecution as they were government servants and had acted in discharge of their official duties.

Held, that the allegations as levelled in the complaint primafacie establishes and constitutes the offences about assault, abusing and theft. In order to attract the provisions of section 20 (3) of the Railway Protection Force Act, 1957, there must be direct and reasonable nexus between the criminal act attributed to the accused and the official discharge of the duty. The act of committing theft and assault cannot be said to have been done in discharge of official duty and as such the prosecution without previous sanction of sanctioning authority is essential.

Held, further, that it cannot be said that the petitioners-accused were in any way connected with discharge of their official duty for the alleged offences.

Case laws discussed.

Applications by accused persons.

** Sitting at Ranchi Bench.

Criminal Misc No. 5311 of 1995 and Cr. Misc. No. 36 of 1995 (R). In the matter of an application under section. 482 of the Code of Criminal Procedure. In Cr. Misc No. 36 of 1995 (R).....S.N. Singh and anr. ....Petitioners.

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

M/S *M.M. Banerjee, B. Chatterjee* and *S.K. Laik* Advocates for the petitioners.

Shri T.R. Bajaj, Advocate for the State.

D.N. Prasad : J; Both the above cases heard together as the matter involved are similar in nature and both the petitioners are involved in both the cases which are being disposed of by this common judgment.

2. The petitioners filed the application under Section 482 of the Code of Criminal Procedure for quashing the entire criminal proceeding initiated against the petitioners including the order dated 2.11.1995 passed in Complaint Case No. 287 of 1995 and the order dated 1.11.1995 passed in Complaint Case No. 352 of 1995 by the Chief Judicial Magistrate, Ranchi whereby and whereunder the Judicial Magistrate took cognizance by an order dated 28.11.1995 and 21.11.1995 holding primafacie case made out against the petitioners under Sections 380/452/384/504 and other offences of the Indian Penal Code.

3. Brief facts of the prosecution case as stated in Cr. Misc. No. 5311 of 1995 (R) is that on 8.11.1995 at about 10 A.M. two officers and four constables of R.P.F. in their official dresses came to complainants part of office-cum-godown on a Jeep bearing registration No. BRA 8657. The names of two officers were disclosed by their name plates on their official dress as petitioner Nos. 1 and 2. The petitioner Nos. 1 and 2 told the complainant that they would take search of his godown whereupon the complainant asked them inrespect of search warrant against on which both the petitioners annoyed and catching the complainant's Collar and pushing him to the inner part of the godown and told him that he has no business to ask this question and they would take search without warrant. The complainant requested them politely to give in writing the goods or materials in respect of which they want to see the relevant purchase documents for their verification. Thereafter both the accused persons assaulted complainant with slaps, fists and forced the complainant to open the almirrah. Thereafter the petitioner no. 2 took a sum of Rs. 2100/- kept in the almirrah cash box and a file containing photo copy of purchase S.R.O. and photo copy of papers concerning

purchase from other parties. The informant also forced the petitioners to sign four sheets of blank papers putting two carbon papers under each of them and accused No. 1 also took out a sum of Rs. 900/- from complainant's pocket and golden chain from the neck while the accused No. 2 took out complainant's watch from his wrist. Accordingly the complaint petition was filed before the court of Chief Judicial Magistrate, Ranchi who examined the complainant on 14.8.1995. Thereafter one P.W. Sheo Kumar-Sinhania was also examined by the Chief Judicial Magistrate and the case was transferred to the court of Shri S.K. Upadhayaya Juducial Magistrate, Ist Class, Ranchi who examined the witnesses. After inquiry, the learned Magistrate took cognizance for the offences as stated above.

4. The allegation as made out in Criminal Misc. No. 36 of 1995 (R) is that on 18.11.1995 the petitioners took search of godown of M/S Ashok Kumar Sahu, for which a case being No. 16/95 was registered illegally but again on 14.8.1995 the petitioners/accused persons took search of godown of the complainant near M.M. Enterprises, Hazaribagh Road, Ranchi and said re-rolling Mill on the basis of same very search warrant dated 3.8.1995 and seized illegally and wrongfully 11 pieces of cut pieces rail scrap seize 2' to 5' in length and a false case being R.P.F. Case No. 17/95 was filed. Consequent upon a release petition filed on behalf of the complainant. The complainant also objected against illegal seizure by the accused and when the complainant objected, the accused persons/petitioners assaulted the petitioner no. 1 and took out a sum of Rs. 1700/- from the pocket of one Shankar Bharti who was arrested unlawfully without his fault. Again the accused persons visited the re-rolling Mill without any search warrant and illegally seized 18 pieces of cut piece scrap and the accused lodged another case being R.P.F. No. 19/95 against the complainant and his son Rajesh Kumar Bhatia. The Chief Judicial Magistrate examined the complainant on oath on 1.11.1995 and thereafter ordered that the case be transferred to the court of Shri Auit Kumar, Judicial Magistrate, Ist Class, Ranchi for inquiry. After inquiry, the learned Judicial Magistrate took cognizance against the petitioners for the offence under sections 380/452/ 384/219/ 323 and other sections of the Indian Penal Code.

5. Mr. M.M. Banerjee, learned counsel appearing on behalf of the petitioners submitted that both the complainants are involved in serveral cases in respect of theft of Railway property

and the cases are pending against them and the petitioners are the officials of R.P.F. and they had conducted the raid on the basis of search warrant but without complying Section 20 (3) of the Railway Protection Force Act, 1957, the order taking cognizance against the petitioners is illegal. It is also submitted that not a single document in connection with the articles alleged was produced by the complainant during the raid and the petitioner no. 1 gave several notices to the opposite party No. 2/complainant to produce relevant papers/documents but they (complainant) failed to produce any document what-so-cver in support of genuiness or ownership of the articles. It is further argued that both the petitioners are in Central Govt. Services and as such sanction under section 197 (2) Cr. P.C. is essential for prosecution against the petitioners but there is no sanction in the instant cases. The raid was conducted by the petitioners also covered within their official duties and the whole allegation has been made falsely against the petitioners after thought. The learned counsel also placed reliance in the case reported in 1999 (3) P.L.J.R. page 942 and 1996 (1) All P.L.R. page 199.

6. On the other hand Mr. T.R. Bajaj, the learned counsel appearing on behalf of the opposite parties contended before me that the Railway Protection Force has no authority to conduct the raid in the godown of the complainant and commit theft of cash. It is also submitted that no any search document whatsoever was produced at the relevant time and the petitioners forcibly entered into the godown of the opposite party and committed theft of money as well as they assaulted the complainant murcilessly which does not come in the purview of their official duty. It is further argued that the whole story as made out by the petitioners itself falsified from the report submitted by the petitioners being Annexures 2 and 3 of this petition as well as the search made on 11.8.1993, no case was registered against the petitioner on the same day rather the case was registered on 13.5.1995 being Case No. 16/95. The whole story about conduct of search also falsified from their own statements that no copy of search list was handed over to the complainant when admittedly they were present at the spot on 11.8.1995 but the copy was handed over to one Mangra Lohara on 13.8.1995 who is said to be labourer as well as there is no cogent reason as to why he (Mangra Lohara) was arrested on 13.8.1995 when the raid was conducted on 11.8.1995. It is also submitted that there is no illegality in the impugned order to be

enterfered at this stage. It is also submitted that the similar application under section 482 Cr. P.C. was filed earlier in similar nature of case and this court already dismissed the application vide Cr. Misc. No. 2341 of 1990 (R).

7. In order to appreciate the rival contentions of the learned counsel for the opposite parties, it is desirable to quote Section 20(3) of Railway Protection Force Act, 1957 which reads as follows :

"Protection of Acts of members of the Force :

"(1) In any suit or proceeding against any superior officer or member of the Force for any act done by him in the discharge of his duties, it shall be lawful for him to plead that such act was done by him under the orders of a competent authority :

(2) Any such plea may be proved by the production of the order directing the act, and if is so proved, the superior officer or member of the Force shall thereupon be discharged from any liability in respect of the act so done by him, notwithstanding any defect in the jurisdiction of the authority which issued such order :

(3) Notwithstanding anything contained in any other law for the time being inforce, any legal proceeding, whether civil or criminal, which may lawfully be brought against any superior officer or member for anything done or intended to be done under the powers conferred by, or in pursuance of, any provision of this Act or the rules thereunder shall be commenced within three months after the act complained of shall have been committed and not otherwise; and notice in writing of such proceeding and of cause thereof shall be given to the person concerned and his superior officer at least one month before the commencement of such proceeding."

8. There is specific allegation against both the petitioners that they abused the complainant and also assaulted with fist and slaps and they also committed theft of Rs. 2100/- and Rs.900/- along with golden chain, wrist watch etc. The witnesses also supported the case during inquiry before the Magistrate. It is evident that the raid was conducted on 11.8.1995 but admittedly the case against the complainant was registered on 13.8.1995 being Case No. 16/95 (Vide Cr. Misc. No. 5311 of 1995). It further appears that one Mangara Lohar was arrested on 13.8.1995 and the copy of the seizure said to have been handed over to Mangara though the complainant Ashok Kumar Sahu was present at the spot on 11.8.1995 during the search but no reason assigned as to

why the copy of the same was not handed over to the complainant on the same day and why the case was not registered on the same day. Annexure-3 is dated 16.8.1995 the accused Mangara-Lohra was forwarded to the court on 13.8.1995 (Annexure-2).

9. As regards Criminal Misc. No. 36/95 (R), it is evident that the raid was conducted on 14.8.1995 and seizure was also made on the same day but the report was submitted on 16.8.1995 and one accused Shankar Bharti was forwarded in the said case.

10. Learned counsel appearing for the petitioners submitted that this stage that the opposite parties also involved in several cases in connection with theft of railway articles but that much cannot falsify the prosecution case totally. The allegations as levelled in the complaint prima facie establish and constitute the offences about assault, abusing and theft. It is well settled that in order to attract the provisioin of Section 20(3) of the Railway Protection Force Act, there must be direct and reasonable nexus between the criminal act attributed to the accused and the official discharge of the duty. The act of committing theft and assault cannot be said to have been done in discharge of official duty and as such the prosecution without previous sanction of the sanctioning authority is not essential.

11. It is also settled that in case of negligence of public officer in discharge of his duty, there is no bar in lodging prosecution and sanction is not required (Reference be made in A.I.R. 1997 S.C. page 2102). Moreover the protection under the Act is not absolute and has been confined with respect to any act done in discharge of official duty.

12. Thus in that view of the matter, it cannot be said that the petitioners/accused were in any way connected with the discharge of their official duty for the alleged offence.

13. From the allegation made out in the complaint petitions, it appears that in course of raid, the members of raiding party including the petitioners assaulted, abused and also took away money. In the instant cases, the Magistrate considered entire allegation made in the complaint petition and gone through the evidence both oral and documentary and took cognizance therefore, this Court in exercise of power under section 482 Cr. P.C. should not interfere with the said order.

14. The facts of the cases relied upon by the learned counsel for the petitioners are also distinguishable. As the

Complaint case was filed lateron but in the instant case the Complaint case was filed on the same day i.e. 11.8.1995 on which the raid was made and the petitioners lodged the case after much delay. There is also nothing to show that the Complaint is malafide and with oblique motive. Moreover on the same score this Court dismissed the application under section 482 Cr. P.C. vide Cr. Misc. No. 2341 of 1990 (R).

15. This Court at this stage has to proceed entirely on the basis of the allegations made in the complaint and if the allegations made in the complaint primafacie, discloses commission of an offence, this Court should be reluctant to interfere (Reference be made (1999) S.C.C. page 728)

16. Considering the whole facts and circumstance , coupled with the discussions made above, I do not find any merit in both the applications. In the result, both the applications namely Cr. Misc. No. 5311 of 1995 (R) and Cr. Misc. No. 36/95(R) are hereby dismissed.

17. It is needless to say that the trial court should not be influenced by any of the observation made in this order and the case will be disposed of on its own merit in accordance with law.

However, the petitioners may raise all those points before the trial court at the time of framing of charge which will be considered by the court below on its own merit.

G.N. *Application dismissed.*

CIVIL WRIT JURISDICTION

*Before M.Y. Eqbal, J.**

2000
October, 17.

*Parmila Kumari and Ors.***

v.

The State of Bihar and others.

Appointment—petitioners appointment made in 1996 on the basis of decision of District Education Establishment Committee, whether could be reopened and cancelled by Director Primary Education without there being any direction to reopen the matter.

Where the writ petitioners were appointed in 1996 by a decision taken by the District Education Establishment Committee on the basis of direction issued by the High Court in earlier writ petition.

Held, that there being no direction to the Director Primary Education to reopen the case of the petitioners, and cancel the appointment made in 1996, the impugned order cancelling the appointment cannot be sustained in law.

Applications under Article 226 of the Constitution of India.

The facts of the cases material to this report are set out in the judgment of M.Y. Eqbal, J.

M/S Ganesh Prasad Singh, Ganga Pd Roy, Sr. Advocates, with *Jawahar Prasad & M.K. Mishra* for the petitioners.

M/S M. S. Anwar, G.P. 1, *A. Saya*, G.A. with *Arvind Kr. Mehta, Rajesh Kr, R.N. Sahay, M.K. Roy, Ravindra Pd, J.P. Sinha, P. Vidyarthi, Mrs. Ritu Kumar, R.K. Merathia*, G.P. 2 with *R.A. Choubey, K.K. Jaipuriar* and *Manoj Prasad* for the respondents.

M.Y. Eqbal, J. In all these writ applications since the petitioners are aggrieved by an order dated 2.2.2000 passed by respondent no. 2, the Director, Primary Education Department,

* Sitting at Ranchi Bench.

** Civil Writ Jurisdiction Nos. 801, 826, 770, 964, 948, 1047 and 1042 of 2000.
In the matter of writ applications under Article 226 of the Contitution of India.
In C.W.J.C. No. 826/2000R.....Ram Naresh Pandey.....Petitioner.
In C.W.J.C. No. 770/2000R.....Prabha Kumari.....Petitioner.
In C.W.J.C. No. 964/2000R.....Dinesh Kr. Pandey & Ors.....Petitioners.
In C.W.J.C. No. 948/2000R.....Arti Kumari & Ors.....Petitioners.
In C.W.J.C. No. 1047/2000R.....Kumari Suman & Ors.....Petitioners.
In C.W.J.C. No. 1042/2000R. Smt. Hemkanta & Ors.....Petitioners.

Secondary, Primary & Adult Education, Bihar, Patna and as similar question of law and facts are involved in all these writ applications, the same have been heard together and are being disposed of by this common judgement.

2. There are altogether 16 writ petitioners who have challenged the aforesaid order whereby the Director, Primary Education held their appointments as illegal and directed the Deputy Commissioner, Dhanbad and the District Superintendent of Education, Dhanbad to issue showcause notices against these petitioners and terminate their services.

3. In order to appreciate the cases of the petitioners, it is necessary to state in brief, their cases seperately :

CWJC No. 801/2000R :

The petitioner was appointed as an Assistant teacher in Middle school, Hirapur, Dhanbad on the basis of judgement and order passed in CWJC No. 1153/90 (R) and CWJC No. 2326/96(R). On the basis of the said judgements the District Education Establishment Committee, Dhanbad passed resolution for appointment of the petitioner on 29.10.96. Petitioner's case is that though she was much above in the panel list but she was not given appointment on the basis of being resident of outside of the district of Dhanbad. It is contended that the action of the respondents in holding the appointment of this petitioner as illegal and mala fide, cannot be sustained in law in view of the fact that there was no direction for holding inquiry with regard to her appointment which was made pursuant to the judgement passed by this court.

CWJC No. 826/2000R :

In this writ petition the petitioner's case is that although he was above the persons having been appointed in the merit list, he was not given appointment on the basis of being the resident of out side of the district of Dhanbad. It is contended that it was only after the judgement delivered in CWJC No. 2326/96 (R) and MJC 382/96 (R), the Establishment Committee took a decision or appointment of the petitioner and accordingly appointment letter was issued on 14.11.96.

CWJC No. 770/2000R :

In this writ application petitioner's case is that she was appointed as an Assistant teacher on the basis of the judgement

passed in CWJC No. 3699/95 (R). On the basis of the said judgement the Dist. Establishement Committee passed order for appointment of the petitioner on 29.10.96. It is stated that the order of appointment was passed by this court after considering the rules, 1991 and 1993.

CWJC No. 964/2000R :

In this writ petition, petitioners' case is that they were appointed on the basis of judgement passed in CWJC No. 1284/96(R) dated 21.8.96. It is stated that on the basis of the order passed in the aforesaid writ petition and the order passed in CWJC No. 2326/96(R) along with MJC 382/96(R), the District Education Establishment Committee, Dhanbad passed orders for appointment of the petitioners on 29.10.96 and accordingly appointment letters were issued to the petitioners on 14.11.96 It is stated that while taking decision for appointment, rules, 1991 and 1993 were fully considered by the court as also by the Establishment Committee.

CWJC. No. 948/2000R :

In this writ application, petitioners' case is that they were appointed on the basis of the judgement passed by this court in CWJC No. 3011/95 (R) and 3699/95(R) dated 4.7.96. It is stated that as per the direction of this court in the judgement aforesaid, the Dist. Education Establishment Committee, Dhanbad took a decision on 29.10.96 for appointment of the petitioners and accordingly, appointment letters were issued on 14.11.96 after following and fully considering the provisions of Rules, 1991 and 1993.

CWJC No. 1047/2000R :

In this writ petition, there are six petitioners who were also appointed in November, 1996 as Assistant teachers on the basis of judgement and order passed in CWJC Nos. 2225/89 (R), 2028/89(R), 2111/89(R), 191/90(R) and 1284/86(R). It is stated that on the basis of the said judgements, the Dist. Education Establishment Committee, Dhanbad passed order for appointment on 29.10.96 considering the provisions of Rules, 1991 and 1993.

CWJC No. 1042/2000 (R) :

In this writ application, these two petitioners claimed to have been appointed as Assistant teachers on the basis of the

judgement dated 4.7.96 passed in CWJC No. 3699/95 (R). It is stated that on the basis of the said judgement, the Dist. Education Establishment Committee, Dhanbad passed order of appointment on 29.10.96 considering the relevant provisions of Rules, 1991 and 1993.

4. Mr. Ganesh Prasad Singh, learned counsel for and on behalf of the petitioners assailed the impugned order as being illegal and wholly without jurisdiction. Learned counsel firstly submitted that this court never directed the concerned respondents to make inquiry with regard to the validity of the appointment of the petitioners and, therefore, the concerned respondent, namely, the Director, Primary Education had no jurisdiction to declare the appointment of the petitioners as illegal when the petitioners were appointed pursuant to the direction passed by this court in different writ petitions filed by the petitioners. Learned counsel after apprising this court with the facts of the cases of the petitioners submitted that it was only after a specific direction was issued by this court in CWJC No. 2326/96 (R) and MJC 382/96 (R), the District Education Establishment Committee considered the cases of all the 16 petitioners and came to a decision that they were entitled to be appointed from the panel. Accordingly, letters of appointment were issued to the petitioners on 29.10.96 and pursuant to that they joined their services. Mr. Singh learned counsel has drawn my attention to all the decisions time to time passed by this court and the Supreme Court and submitted that the petitioners case is not squarely covered by those judgements where by the concerned respondents were directed not to make any appointment. Learned counsel further submitted that in the judgement passed by this court on 28.2.2000 in Mathura Prasad Dhibar's case (CWJC 2736.98 (R), this court never issued any direction to the respondents to reopen the cases of these petitioners and to find out whether their appointment is in accordance with law. On the contrary, Mathura Prasad Dhibar' case the petitioners questioned the decision of the District Education Establishment Committee, Dhanbad dated 14.7.98 whereby their claim for appointment on the post of Assistant teachers was rejected. Learned counsel lastly submitted that in the judgement of Mathura Prasad Dhibar's case these petitioners were neither parties nor was there any direction to re-consider their cases and to find out whether their appointments was legal and valid. Learned counsel, therefore, submitted that the impugned order is illegal, arbitrary and mala fide.

5. On the other hand, learned Govt. Advocate submitted that, as a matter of fact no direction was ever issued by this court for appointment of these petitioners, rather, in all the cases this court directed the respondents to consider the cases of the petitioners in the light of the rules, 1991 and 1993. Learned counsel submitted that, as a matter of fact, the petitioners were appointed in contravention of rule, 1991 and appointment letters were issued for the first time in 1996. Learned counsel then submitted that pursuant to the direction of this court in Mathura Prasad Dhibar's case, the Director, Primary Education examined the entire cases including the cases of the petitioners after giving them show cause notice and found that they were appointed in contravention of the rules. The Director, Primary Education, therefore, rightly passed the impugned order.

6. Before appreciating the rival contentions of the learned counsel for the parties, it would be useful to state, in brief, the relevant facts and the basis of the claims made by various persons whose names were empanneled in the list prepared in 1998 for appointment of Assistant teachers in different schools in the State of Bihar.

It is undisputed that originally panels were prepared districtwise for appointment of Assistant teachers in primary schools in different districts in the State of Bihar. Said panel was challenged before this court in the case of *Anil Kumar Vs. Chief Secretary* (1). This court declared the panel prepared on the basis of residence in a particular district, as unconstitutional. This court, however, directed that the appointments already made from those panels should not be disturbed. The State-respondent was restrained from making any further appointment from the panels prepared for the different districts. After the said judgement, vide circular dated 2.7.89, the State Govt. issued several instructions regarding appointment of primary teachers. According to the said instructions, it was directed that those candidates who have already been appointed from the panel, would continue in service. It was further directed that for the preparation of panels for appointment of teachers, date should be collected from the office of Directorate of Primary Education, and a fresh advertisement shall be issued for appointment and those candidates who are already in the panel, will also be covered by the application. Aggrieved by the said decision of the Government many persons

(1) (1987) P.L.J.R. 846.

whose names appeared in the panel, moved this court and the matter ultimately went to the Supreme Court.

7. The Supreme Court disposed of several civil appeals by a common judgment in the case of *Sabita Prasad & ors* vs. *State of Bihar & ors* (1) Some of the civil appeals was allowed by the Supreme Court on concession that the State Government will reconsider the case of all such persons.

8. It appears that again various persons filed writ petitions before this Court claiming their appointment on the basis of the judgment of the Supreme Court in *Sabita Prasad's case*. A Bench of this Court disposed of all those writ applications by a common judgment rendered in the case of *Binod Kumar Tiwari* vs. *State of Bihar* (2). This Court held that the direction was issued by the Supreme Court in *Sabita Prasad's case* on the basis of concession made by the State counsel and, therefore, that cannot be the basis for giving appointment of all the persons who were not parties to the Supreme Court. This Court, however, directed the Director, Primary Education to dispose of all pending claims. A further direction was made to advertise the vacancies, get fresh panel prepared in accordance with law and make the appointment.

9. Learned Government Advocate, relying upon these two decisions namely, the decision of the Supreme Court in *Sabita Prasad's* case and the decision of this Court in *Binod Kumar Tiwari's* case (supra), submitted that by the impugned order the services of the petitioner were rightly terminated/cancelled. Learned Government Advocate further contended that the impugned order was passed in terms of the direction of this Court in *Mathura Prasad Dhibar's case* (CWJC No. 2736/98 (R).

10. In the light of the facts stated hereinabove, the only question falls for consideration is whether the impugned order passed by the respondent terminating/cancelling appointment of the writ petitioners is in accordance with the direction of this Court in *Mathura Prasad Dhibar's* case (supra). First of all I will examine the decision rendered by this Court in *Mathura Prasad Dhibar's* case.

11. It appears that Mathura Prasad Dhibar and ten others for the first time moved this Court in 1997 by filing CWJC No. 2603/97 (R) seeking a mandamus directing the respondents to appoint them on the post of Assistant teachers on the basis of

(1) (1994) 1 P.L.J.R. 62 (S.C.)
(2) (1995) 2 P.L.J.R. 273.

panel prepared in 1988-89. The writ application was disposed of with a direction to those petitioners to file representation before the respondents which shall be considered in accordance with law. The respondents accordingly considered their representations and rejected the same by taking a decision on 14.7.98. Those petitioners challenged the said decision dated 14.7.98 by filing CWJC No. 2736/98 (R). The said writ application was dismissed following the decision of the Division Bench in *Ramjee Tiwari's* case (1) Paragraphs 8, 9, 10 and 11 of the judgment rendered by this Court in *Mathura Prasad Dhibar's* case (supra) in worth to be quoted hereinbelow :—

"8. I have gone through the judgements of the two Division Benches of this court in the case of *Ram Krishna Das and others* (supra) and *Surendra Kumar Singh* (supra). I have also taken note of the judgment of another Division Bench of this court in the case of *Ramjee Tiwary and ors* v. *State of Bihar and ors* reported in 1996 (1) All P.L.R. 273. In *Ramjee Tiwary's* case the Division Bench discussed the reasonings of filing of various writ petitions seeking appointment out of the panel prepared in 1985 and observed as under :—

"The findings can be summarised as follows :—

(i) After unexplained long delay, no direction can be given to make appointment of petitioners (appellants herein) out of a panel which was prepared a long back (1985/1988).

(ii) The decision in the case of Sabita Prasad (supra) having been rendered in concession is applicable inter-parte alone.

(iii) All pending claims are to be decided on the basis of the observations aforesaid, but where there is a specific order of the Patna High Court or the Supreme Court, the decision is to be taken by the respondents (Director, Primary Education), in the light of such decision and direction by the Courts."

9. Their lordships further held :—

"Now the next question is as to what will happen with respct to the persons in favour of whom already one or other directions have been given either by this court and/

(1) (1996) 1 All P.L.R. 273.

or by the Apex Court. The learned Single Judge has taken due consideration of such situation and had made clear that the claim of such persons should not be rejected on the ground of delay, where there is a specific order of this court of the Supreme Court, which will be evident from paragraph 11 of the judgment.

The aforesaid fact and ratio is also applicable in the case of other appellants, namely, Sheo Kumar Prasad Yadav and others. In their case, delay is to be counted from the date when the first appointment was made in the year, 1988. So far as the stand of these appellants that they earlier moved before this court by filing writ petition in the year, 1993 is concerned, according to me, the aforesaid submission has got no substance. This court never passed any specific order and/or direction in favour of the appellants, Sheo Kumar Prasad Yadav and others, for consideration of their appointments out of 1985 advertisement. Such being the position the case of these appellants, Sheo Kumar Prasad Yadav and others is also to under go the test of delay."

10. In the instant case, admittedly for the first time the petitioners approached this court in 1997 i.e. after 12 years from the date when the panel was prepared by filing CWJC No. 2603/97R. In the said writ petition this court observed that no mandamus can be issued directing the respondents to give appointment to the petitioners but a direction was issued to the petitioners to file a representation which shall be considered by the respondents-authorities in the light of the Appointment Rules, 1991 and 1993.

11. In my opinion, therefore, the ratio decided by this court in *Ramjee Tiwary's case* fully applies in the present case. Moreover, I am of the view that the petitioners are not entitled to the relief sought for the reason that giving such relief will amount to giving life to a dead horse."

12. Now, in the light of ratio decided by the Supreme Court and this Court quoted hereinabove, I shall examine the case of these writ petitioners.

(i) In CWJC No. 801/2000 (R) the writ petitioner namely Smt. Parmila Kumari applied for the post of Assistant Teacher and her name appeared in serial no. 24 in the panel prepared in 1989

but she was denied appointment on the ground that she could not produce the permanent residential certificate of the district of Dhanbad. The petitioner immediately challenged the action of the respondents in not appointing her on the ground of want of residential certificate by filing CWJC No. 1153/90 (R). The writ application remained pending for a long time on the ground of pendency of other writ applications of similarly situated persons. The said writ application being CWJC No. 1153/90 (R) was disposed of on 11.12.95 by this Court with a similar direction to the State Government to consider the case of the petitioner for appointment as primary school teacher since the persons below in the panel had already been appointed. When no action was taken by the authorities pursuant to the judgment and order dated 11.12.95 the petitioner filed contempt petition being MJC No. 382/96 (R). In the meantime the claim of the petitioner was rejected by the Director, Primary Education, vide order dated 20.3.96 and the same was challenged by the petitioner by filing CWJC No. 2326/96 (R). Both the writ application and contempt petition being CWJC No. 2326/96 (R) and MJC No. 382 (R) were and disposed of by a Bench of this Court on 22.8.96. It was held that under Rule, 1991 since an establishment committee has been constituted in each and every district for consideration of the appointment of primary school teachers, the Director, Primary Education had no authority to pass order on the representation of the petitioner. This Court accordingly directed that the representation of the petitioner shall be considered by the district establishment committee and the same shall be disposed of by giving personal hearing to the petitioner. The District Establishment Committee accordingly considered the case of the petitioner along with others and the Committee found that the petitioner was illegally denied appointment on the ground of non-submission of residential certificate. Accordingly, the District Education Establishment Committee, Dhanbad passed a resolution dated 29.10.96 for appointment of the petitioner. A copy of the decision of the Establishment Committee has been Annexed as Annexure 3 to the writ application. It appears that on the basis of the resolution passed by the District Establishment Committee respondent no. 5, the District Superintendent of Education issued appointment letter no. 4879 dated 14.11.96 and the petitioner was appointed in the middle school Hirapur, Dhanbad. Pursuant to that, the petitioner joined the school and has been working since

then. It is worth to mention here that the decision of the District Education Establishment Committee, on the basis of which this writ petitioner was appointed in 1996, was not the subject matter of the writ petition filed by *Mathura Prasad Dhibar and others* (CWJC No. 2736/98 (R). It appears that there is a reference of the decision of the District Establishment Committee in the counter affidavit filed by the respondent -State alleging that the decision of the District Establishment Committee was not found correct. While dismissing the writ petition filed by Mathura Prasad Dhibar and others, this Court never issued any direction to the respondents to reconsider the appointment of the present writ petitioner and to cancel the same and such direction was rightly not issued as the present writ petitioner was not a party in CWJC No. 2736/98 (R). In spite of the fact that there was no such direction to the Director, Primary Education in the judgment of *Mathura Prasad Dhibar's case* (CWJC No. 2736/98 (R), it is rather surprising as to how the Director, Primary Education, on the basis of aforesaid order, re-opened the case of the present writ petitioner, who was appointed in 1996 by a decision taken by the District Education Establishment Committee on the basis of direction issued by this Court in the judgment referred to hereinabove. In my opinion, therefore, the case of the present writ petitoner is neither similar to the case of Mathura Prasad Dhibar and others nor there was any direction to the Director, Primary Education to re-open the case of the present writ petitioner and to cancel her appointment made in 1996. In that view of the matter, in my opinion, the impugned order cancelling the appointment of the petitioner cannot be sustained in law.

(ii) ***CWJC No. 826/2000 (R) and 1047/2000 (R)***

The case of the present writ petitioners is also similar to that of the case of Parmila Kumari (CWJC No. 801/2000 (R). These writ petitioners were also placed in the merit list but were not given appointment on the basis of being residents of outside the district of Dhanbad and as such, they filed CWJC No. 2122/89 (R) and CWJC No. 2028/89 (R). The said writ applications were disposed of along with other writ petitions being CWJC Nos. 1918/89 (R) and 2111/89 (R). The Division Bench comprising the then Hon'ble Chief Justice disposed of all these writ applications by passing the following order :—

"The petitioners in these four writ applications belong to Dhanbad district and were candidates for appointment of

primary teachers who were empanelled and even though persons below them in the panel were appointed, they could not be appointed because of the Government Circular dated 2.7.1989. Their cases are fully covered by the decision of this Court delivered today in respect of teachers of Ranchi district. It is not disputed by the State that persons below these petitioners from the panel were appointed as primary school teachers.

2. We, accordingly, dispose of these applications with a direction to the appropriate authority under the 1991 Rules to consider the cases of these petitioners and pass appropriate orders for their appointment against the existing vacancies or if there is no vacancy, against the future vacancies and in case they have been age barred, in relaxation of their age.

3. The writ applications are disposed of accordingly. There will be, however, no order as to costs."

It appears that in terms of the direction of the Division Bench of this Court the case of the petitioners along with other similarly situated persons were considered by the Director, Primary Education, who finally rejected their claim. However, the said order of Director was challenged by the writ petitioners along with others in CWJC No. 2326/96 (R) which was disposed of along with MJC No. 382/96 (R) on 22.8.96. Pursuant to that judgment and order the District Establishment Committee considered the case of petitioners and others and took a decision for their appointment. Consequently appointment letter was issued on 14.11.96 and petitioners joined the school and have been working since then. It is, therefore, clear that the case of these petitioners is exactly similar to the case of *Parmila Kumari* (CWJC No. 801/2000 (R). In that view of the matter, I am of the opinion that the cancellation/ termination of the appointment of these petitioners is also illegal and without jurisdiction and the same cannot be sustained in law.

(iii) ***CWJC Nos. 770 and 948 of 2000 (R)***

The petitioners of these two writ applications were also appointed on the basis of judgment and order dated 4.7.96 passed in CWJC No. 3011/95 (R) and CWJC No. 3699/95 (R). In terms of the said judgment the District Education Establishment Committee, Dhanbad took a decision for appointment of these petitioners and accordingly appointment letters were issued and

the writ petitioners joined the school in 1996. Neither the judgement passed by this Court nor the decision of the Establishment Committee was ever challenged by the respondents and it was only on the basis of the judgment in *Mathura Prasad Dhibar's* case, the appointments of the petitioners have been illegally cancelled. In my opinion, therefore, the impugned order of cancellation of appointment of these petitioners is also illegal and without jurisdiction.

(iv) ***CWJC No. 964/2000 (R)***

The present petitioners filed CWJC No. 1284/96 (R) which was disposed of on 21.8.96 in terms of the judgment and order passed in CWJC No. 1321/89 (R) and other analogous cases on 28.7.95. The Division Bench comprising of the then Hon'ble Chief Justice disposed of CWJC No. 1321/89 (R) and other analogous cases by passing a reasoned judgment on 28th July, 95. The operative portion of the judgment reads as under :-

> "Now that the new Rules have come into existence since 1991 and since the State does not dispute the assertions made in these applications that persons below them from the panel have been appointed, following the direction of the Supreme Court in case of teachers of Nalanda District, we would dispose of these applications by requiring the State of Bihar to consider the cases of these petitioners for appointment as primary school teachers since persons below them from the panel had already been appointed and, if necessary, in relaxation of the age bar against the existing vacancies and if there is no vacancy, against the future vacancies. The appropriate authority under 1991 Rules may consider the cases of these petitioners and pass appropriate orders in accordance with law.
>
> These writ applications are, accordingly allowed with the aforesaid directions. There will be, however, no order as to costs."

Subsequently, a Bench of this Court again issued necessary direction while disposing of several writ applications and contempt applications and accordingly the District Education Establishment Committee, Dhanbad passed order for appointment on 29.10.96. Consequently, the District Superintendent of Education, Dhanbad issued appointment letter to the petitioners on 14.11.96 and these petitioners are working as assistant teachers in the Middle School

of Dhanbad. In my opinion, therefore, the case of these petitioners are also similar to that of the case of *Parmila Kumari* (CWJC No. 801/2000 (R). In my opinion, therefore, the cancellation/termination of appointment of these petitioners is also illegal and without jurisdiction.

(v) ***CWJC No. 1042/2000 (R)***

These two petitioners have also been appointed as assistant teachers on the basis of the judgment dated 4.7.96 passed in CWJC No. 3699/95 (R). The said writ application being CWJC No. 3699/95(R) was disposed of in terms of the judgment passed by this Court on 28.7.95 in CWJC No. 1918/89 (R). The case of the present writ petitioners, in my opinion, is also similar to that of CWJC No. 801/2000 (R). Hence the cancellation/termination of the appointment of these petitioners is also illegal and wholly without jurisdiction.

13. Having regard to the entire facts and circumstances of the case and the law discussed hereinabove, all these writ applications are allowed and the impugned orders passed by the Director, Primary Education cancelling/terminating the appointment/services of these petitioners are quashed. However, there shall be no order as to costs.

R.D.

Applications allowed

TEST SUIT

Before S.N. Jha, J.

2001

February, 5.

*Vikas Singh & ors.**

v.

Devesh Pratap Singh.

Succession Act, 1925 (Central Act no. XXXIX of 1925)—grant of Letters of Administration—petitioners having proved the due execution of will by testatrix in sound state of mind, there being no suspicious circumstances, whether entitled to grant of Letters of Administration.

Held, that the petitioner having proved the will and its due execution in a sound State of mind by the testatrix and there being no suspicious circumstances surrounding the execution of the will, the petitioners are entitled to grant of Letters of Administration.

Held, further, that the Letters of Administration of the will of the testatrix dated 22.8.1986 be granted in favour of the petitioners on payment of due court-fee and furnishing inventory and accounts within the stipulated period under section 319 of the Succession Act, 1925.

Case laws discussed.

Application under section 278 of the Succession Act 1925 for grant of Letters of Administration.

The facts of the case material to this report are set out in the judgement of Sachchidanand Jha, J.

S.N. Jha, J.—This is a petition under section 278 of the Indian Succession Act (in short 'the Act') for grant of Letters of Administration of the will of Smt. Kamleshwari Devi, resident of Boring Canal Road, Patna. The petition was earlier registered as Testamentary Case No. 3 of 1991. After the Objector entered caveat it was converted into a suit and re-registered as Testamentary Suit No. 3 of 1996.

2. The case of the petitioners, who are the grand sons of Smt. Kamleshwari Devi (hereinafter called the testatrix) and beneficiaries of the disposition, is that the testatrix was the absolute owner of land bearing plot nots. 172, 173, 174, 175 of

* Testamentary Suit No. 3 of 1996.

Khata nos. 115/588 and 14 of village Dujra, Thana Digha (now known as Boring Canal Road within Buddha Colony Police Station, Patna town), purchased by her from her streedhan on 3.6.53. After the purchase she got her name mutated in the revenue records. From her savings and streedhan she constructed a double storied house which was numbered as holding no. 494/414 B in the municipal records. She paid land revenue and municipal taxes to the State of Bihar and the Patna Municipal Corporation. On 22.3.86 she executed her last will at her aforesaid residence in the presence of her relatives and the attesting witnessses, namely, Dr. Birendra Prasad Sinha and Dr. Vijayee Singh. The attesting witnesses are also close relatives being respectively the grand son-in-law and husband of the niece of the testatrix. The husband of the testatrix Bisheshwar Prasad Narain Singh died on 31.1.87. The testatrix also died soon after on 31.3.87. The petitioners along with their father performed the last rites and Shradh. After the death of the testatrix the petitioners came in possession of the house and the land, got their names mutated in the records of the State and the Patna Municipal Corporation and are paying land revenue and taxes to them.

3. Caveat was filed by Devesh Pratap Singh objecting to the grant of the Letters of Administration. It is worth mentioning here that the testatrix had two sons, namely, Suresh Pratap Singh and Devesh Pratap Singh and a daughter, namely, Smt. Abha Singh. The petitioners herein are the sons of Suresh Pratap Singh. Considering that the objector being son was a direct heir and had heritable interest in the estate of the testor, his locus standi thus not being questioned, caveat was allowed and the proceeding was converted into suit, as indicated at the outset. At the stage of evidence he examined 7 winesses including himself, and also produced some documents.

4. The case of the objector is as follows. The petition is not maintainable as the Court has jurisdiction to grant probate or letters of administration of a will whereas the so called disposition is not a will at all, nor a document of transfer or bequeath. It is merely a wish or desire of Smt. Kamleshwari Devi to give the property to the petitioners. It is said that Smt. Kamleshwari Devi was seriously ill since 1980. She was mentally and physically very weak and incapable of under-standing, she was not in a sound state of mind to execute any type of document much less a will. It is also said that the document in question, alleged to be will is

forged, fabricated and manufactured. The further case of the Objector is that the property did not exclusively belong to Smt. Kamleshwari Devi. She had, in fact, no property of her own. Whatever property she and/or the father has left behind is joint family property in which the Objector has share.

5. Before I enter upon the real issues involved in the case I wish to dispose of the two objections relating to the exclusive ownership of the testatrix and the nature of the document, which is the subject matter of the proceeding. As regards the former, the scope of proceeding for grant of Probate or Letters of Administration stands well settled by judicial pronouncements. The jurisdiction of the court is limited to finding out if the will was duly executed, is the genuine and last will of the testator/testatrix, executed by her in a sound state of mind and with full understanding. The question as to ownership of the property lies outside the scope of the proceeding. Counsel for the Objector referred to section 59 of the Act. He submitted that the use of the words "his property" in that section indicates that the person can make a will with respect to his own property and, therefore, when-ever dispute is raised in that regard the Court has jurisdiction to decide the same. The submission, in my opinion, is wholly misconceived and reference to section 59 is totally misplaced. From perusal of the provisions of section 59 and Explanations appended thereto it is clear that what the section deals with is the testamentary capability of the person to execute a will. The main section lays down that every person of sound mind not being minor may dispose of his property by will. Ex-planation I clarifies that a married woman may also dispose of any property which she could alienate during her lifetime. As per Explanation II even a deaf or dumb or blind may also execute a will if they are able to know what they are doing by it. According to Explanation III even an insane person can make a will at a time when he is not of unsound mind. Explanation IV prohibits a person who is not in a sound state of mind—whether un soundness of mind is result of intoxication or illness or any other cause—if the person does not know what he is doing. The object of the provisions of section 59 be comes further evident from the illutration appended to it.

6. Whether a person was incapable of executing a will by reason of any physical and/or mental incapacity is certainly a relevant point and, in fact, the most relevant point which is to be decided in Probate/Letters of Administration proceeding and in

this case also I would deal with this aspect later in this judgment. As regards the use of the words "his property", it is clear and, if I may say so, implicit that a person can execute a will, like any transfer deed, only with respect of his own property and not someone else's property and, therefore, nothing much turns on use of those words in section 59 as to confer jurisdiction on the probate Court to decide any dispute relating to title, ownership etc. of the testator/testatrix in the property which is the subject matter of the will. It is settled legal position that it is not the duty of the probate Court to consider any issue as to title of the testator to the property with which the will propounded purports to deal or to the disposing power the testator may have possessed over such property or as to the validity of the bequest made. See, for example, the case of *Kashi Nath* vs. *Dulhin* (1). Proceeding for grant of probate or latters of administration is not suit in the real sense, it only takes the "form" of a regular suit according to the provisions of the Code of Civil Procedure, "as early as may be"—vide section 295 of the Act. Reference may be made to a Division Bench decision of this Court in *Sidhnath Bharti* vs. *Jai Narayan Bharti*, 1994 (1) PLJR 644, a Full Bench decisioin of the Allahabad High Court in *Panzy Ferondes* vs. *M.F. Queoros*, AIR 1963 Allahabad 153, and a Division Bench decision of the Calcutta High Court in *Batai Lall Banerjee* vs. *Debaki Kumar Ganguly*, AIR 1984 Calcutta 16. The grant of probate or letters of administration is decisive only of the will propounded and not of the title etc, of the testator to the property. As the issues relating to title, ownership etc. are not to be gone into in such proceeding, it follows that even a favourable decision in favour of the petitioner/plaintiff granting probate or letters of administation in his favour does not operate as res judicata in any future suit which the Objector is at liberty to bring seeking declaration of his right, title, interest etc, in the property. In the above premises the objection of the objector as to disposing capacity i.e. ownership of the testatrix is rejected.

7. The objection that the document in question containing the impugned disposition is not a will but merely a wish or desire of the testatrix to give the property to the petitioners in future seems to have been taken, if I may say so, for the sake of objection. A bare perusal of the contents of the disposition, the original of which is on the record as Ext. 1 and photo copy is Annexure-1 to the petition, does not bear this out. The disposition

(1) (1941) A.I.R. (Pat.) 475.

is captioned in clear words as "Wasiyat-nama (Will)", and the recitals thereof also leave no room for doubt that testatrix intended to give the property to the petitioners as a bequest after her death. Transiated into English (by me), the recitals are as under :

Will dated 28.8.86

It is my desire that I give my house which is known as Kamla Niwas and which stands on Boring Canal Road, Patna and along with house Kamla Niwas the land and the entire compound to my grand sons Vikas Singh and Vivek Singh, who are sons of my elder son Suresh Pratap Singh after my life, and the said grand sons will have the right. They will become its full owners and after any death they will get the house and the land recorded in their names in the Government offices and in the municipality and keep the same in their possession. Let it be understood that they will not sell the property.

8. Section 2(h) of the Act defines 'will' to mean "the legal declaration of the intention of a testator with respect to his property which he desires to be carried into effect after his death". As interpreted by Courts the characteristics of a will are that (a) there should be a disposition of the property, (b) which takes effect after the death of the executant and (c) such disposition is irrevocable. There is nothing in the above recitals to suggest anything lacking so as to create doubt about its not being a will. In this connection reference may be made to section 74 of the Act which says, "it is not necessary that any technical words or terms of art be used in a will, but only that wording be such that intention of the testator can be known therefrom". I may also usefully refer to the following observations of the Supreme Court in Veeraitalingam vs. Ramesh, AIR 1990 Supreme Court 2201 :—

"It is well settled that a court while construing a will should try to ascertain the intention of the testator to be gathered primarily from the language of the document; but while so doing the surrounding circumstancs; the position of the testator, his family relationship and the probability that he used the words in a particular sense also must be taken into account. They lend a valuable aid in arriving at the correct construction of the will. Since these considerations are changing from person to person, it is seldom profitable to compare the words of one will with those of another or to try to discover which of the wills upon which the decisions have been given in reported cases, the disputed will

approximates closely. Recourse to precedents, therefore, should be confined for the purpose of general principle of construction only, which by now, are well settled. There is still another reason as to why the construction put on certain expressions in a will should not be applied to a similar expression in the will under question for a will has to be considered and construed as a whole, and not piecemeal. It allows that a fair and reasonable construction of the same expression may vary from will to will. For these reasons it has been again and again held that in the matter of construction of a will, authorities or precedents are of no help as each will has to be construed in its own terms and in the setting in which the clauses occur [See Ramachandra Shenoy vs. Mrs. Hidia Brite, (1964) 2 SCR 722 at p. 736 : (AIR 1964 SC 1323 at pp. 1328-29)."]

I have no doubt in my mind that the abovementioned recitals do convey clear intention of the testatrix to give property absolutely and finally to the petitioners effective after her death. I, therefore, hold that the impugned document conforms to the description of will and the proceeding is thus maintainable, the objection of the Objector in this regard also is accordingly rejected.

9. Before moving to the issue involved, I consider it appropriate to mention that though, as noted above, the Objector has characterised the impugned document as being "forged, fabricated and manufactured", he has not denied the genuineness of the signature of the testatrix on the impugned document. It may be stated here that in the light of the said objection of the Objector an application was filed by the petitioners for comparison of the signature of the testatrix on the will with her admitted signature, which was objected to by the Objector on the ground that no such plea had been taken by the detendant in the written statement. On behalf of the petitioners it was submitted that the averment occurring in paragraph 9 of the written statement that "a forged and fabricated document has been manufactured alleging to be will" is capable of two meanings. However, if the defendant takes a definite stand and does not deny the signature on the will it may not be necessary for the plaintiff to get the signature compared. In response to this Counsel for the Objector made categorical statement that he does not deny the genuineness of the signature of the testatrix on the will. It would be appropriate to quote the relevant part of the order dated 3.10.97 in this connection as under :

"In the present proceeding this Court is primarily concerned with the genuineness of the signature of the testatrix on the

impugned will. I, therefore, also wanted to know whether the defendant denies the genuineness of the signature of the testatrix on the will. It hardly need be emphasised that in case of any controversy in that regard, genuineness of the signature on the will is to be compared with any admitted signature of the testatrix. Mr. Devendra Kumar Sinha, counsel for the defendant stated that in the written statement no such stand has been taken by the defendant. Mr. Singh, counsel for the plaintiffs, referred to paragraph 9 of the written statement wherein it has been stated that "a forged and fabricated document has been manufactured alleging to be will". He submitted that the aforesaid statement is capable of two meanings. He stated that in case the defendant takes a definite stand and does not deny the signature on the will, it may not be necessary for the plaintiffs to get the signature on the aforesaid Power of Attorney to be compared by Handwriting Expert, but, in such a case the stand of the defendant may be recorded to avoid any complication in future.

The statement of Mr. Devendra Kumar Sinha that the defendant does not deny the genuiness of the signature of the testatrix on the impugned will is, accordingly, recorded."

The signature of the testatrix on the will not being in dispute the genuineness of the document, as such, cannot be disputed, moreso when there is no challenge to the signatures of the attesting witnesses and/or the handwriting of Visheshwar Pratap Narain Singh, the hunsband of the testatrix, who had scribed the will. The only thing to be seen is whether the will was duly executed in the prescribed manner, and secondly, whether the testatrix was in a sound state of mind and voluntarily executed the will with due awareness and understanding.

10. The mode of execution of will has been laid down in section 63 of the Act which may be quoted as under :

"Every testator, ..., shall execute his will according to, the following rules.

(a) The testator shall sign or shall affix his mark to the will, or it shall be signed by some other person in his presence and by his direction.

(b) The signature or mark of the testator, or the signature of the person signing for him, shall be so placed that it shall appear that it was intended thereby to give effect to the writing as a will.

(c) The will shall be attested by two or more witnesses, each of whom has seen the testator sign or affix his mark to the will or

has seen some other person sign the will, in the presence and by the direction of the testator or has received from the testator a personal acknowledgment of his signature or mark, or of the signature of such other person; and each of the witnesses shall sign the will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary."

The ingredients of the Section, it would appear, are, firstly, that the testator should sign or put his mark on the will, or direct other person to sign it in his presence, for example, in case of disability on his part to do so; secondly, such signature or mark must be so placed as to appear that thereby he intended to write a will and, thirdly that it should be attested by at least two witnesses, each of them having seen the testator sing or put his mark on the will or the will or some other person sign the will, in presence of and on the direction of the testator. Such attestation by the witnesses must also be in presence of the testator.

11. In the present case the attesting witnesses are Dr. Virendra Prasad Sinha and Dr. Vijayee Singh. Dr. Vijayee Singh has sworn an affidavit enclosed as Annexure-3 to the petition stating as follows :—

"That I am one of the attesting witnesses to the will executed by late Kamleshwari Devi on twenty second day of August Nineteen eighty six (22.08.1986).

That late Kamleshwari Devi, testator, signed the will in my presence and also in presence of Dr. Birendra Prasad Sinha, residing (at present) at Kanpur Medical College, Kanpur.

That the deponent and Dr. Birendra Prasad Sinha also signed as witnesses to the will after the testator signed the will."

The above affirmation substantially satisfies the provisions of section 281 of the Act which lays down the manner of verification of petition for Probate by "at least one of the witnesses to the will". For the sake of convenience the format of verification contained in the section may be quoled as under :

"I (C.D.) one of the witnesses to the last will and the testament of the testator mentioned in the above petition, declare that I was present and saw the said testator fixed his signature (or mark) thereto (or that the said testator acknowledged the writing annexed to the above petition to be his last will and testament in my presence)."

12. Dr. Virendra Prasad Sinha, the other attesting witness has also made a similar affirmation, marked Annexure 2 in identical language. He has, in fact, further pledged his oath by deposing in Court as P.W. 2 to support the petitioners' case. He stated that at the time of the execution of the will he lived in the disputed house i.e. Kamla Niwas (He is, it may be recalled, grand son-in-law of the testatrix). On 22.8.86 his grand father-in-law V.P.N. Sinha i.e. testatrix's husband, called him downstairs and informed that his wife i.e. the testatrix wanted to execute a will. The will was scribed in his presence by said V.P.N. Sinha on the dictation of the testatrix. After the will was scribed the testatrix went through its contents and then put her signature making endorsement to the effect that she had read the contents. The signature was put by her in his presence. On her request he also put his signature with endorsement that she (testatrix) had signed in his presence in full sound mind. P.W. 2 identified the will, which had already been proved by P.W. 1 earlier as Ext. 1, as the will which had been executed by the testatrix. He also proved his signature and endorsement. He further proved the signature and endorsement by Dr. Vijayee Singh. Nothing has been elicited from him in cross-ex-amination to create doubt about the veracity of his evidence and the attestation of the will by him. It was submitted that P.W. 2 did not claim to have signed the attestation in the presence of the testatrix. The submission is contrary to the record. In his examination-in-chief he specifically stated that it was on request of the testatrix that he put his signature, and it anything was missing in his evidence it came in the cross-examination when in response to a question the witness stated that it was on being asked by the testatrix that he put his signature on the will. He also stated, in cross-examination, that every body had put his signature in his presence. He further clarified in cross-examination, that the testator stated that she wanted to execute a will and on her instruction and dictatioin V.P.N. Sinha i.e. her husband scribed the will. The evidence of P.W. 2 Dr. Virendra Prasad Sinha fully satisfies the ingredients of section 63 of the Act, and I have no hesitation in holding that the petitioners have succeeded in proving the will and its due execution.

13. The will, in fact, has been proved not only by the attesting witness i.e. Dr. Virendra Prasad Sinha and the beneficiaries i.e. the petitioners as P.W. 1 and P.W. 4 but also by Smt. Abha Singh the daughter of the testatrix and the sister of the

petitioners' father and the Objector, as P.W. 3. Being equally related to them her evidence has great significance. In fact, in her cross-examination she stated that she has equal love and affection for both the brothers. Nonetheless, she in clear words identified the will, after looking into the same with the help of magnifying glass, as the will which her mother had executed in favour of her two nephews—Vikas Singh and Vivek Singh. She further stated that at the time of the execution of the will she was in a sound state of mind and body; before she executed the will she had expressed her intention to execute will in favour of the grand sons with respect to her personal property. Such unequivocal affirmation of the petitioners' case by P.W. 3 goes a long way in proving the case propounded by them. Counsel for the petitioners, rightly did not miss the opportunity to submit that P.W. 3 was a natural heir of the testatrix, and had the impugned will not been executed by her, she too would have interest in the property. The fact that she had otherwise heritable interest in the property but still she came forward to prove the will demonstrates the veracity of the petitioners' case, I find substance in the submission.

14. Having held that the petitioners have succeeded in proving due execution of the will the issue which next arises for consideration is as to whether the will was executed in sound state of mind. I have already referred to above, briefly, the evidence of no less than P.W. 3 Smt Abha Singh in this regard. The petitioners as P.W. 1 and P.W. 4 unequivocally said so in their evidence. Equally significant is the evidence of P.W. 2 Dr. Virendra Prasad Sinha who besides being attesting witness is also a doctor by profession. Another doctor, namely, Dr. Lalit Kumar, not related to the family, has also said so as P.W. 5. He has stated that he had occasions to meet and see Smt. Kamleshwari Devi during 1983-84 as he was batch-mate of her grand son-in-law Dr. Sanjay Kumar Roy. During that period he saw the testatrix about 10-12 times. Her mental conditions was sound . She always asked the servant to bring refreshment for him whenever he went there. Her physical condition was also fine except that she used to limp while walking. A question was put to him in cross-examination as to whether a neurologist can assess the mental condition of a person to which the answer was that on the basis of teaching imparted at the MBBS level every doctor can assess the mental condition of a person. Precious too little was elicited on behalf of the Objector in the cross-examination of these witnesses.

15. The thrust of the Objector's case. If I may say so, has been that the property did not exclusively belong to the testatrix. There is not much in the evidence led by him to create doubt about the soundness of mind of the testatrix. Out of seven witnesses examined by him including himself, namely, D.W. 1, D.W. 4, D.W. 5 and D.W. 6 spoke only about purchase of land and construction of the house 'Kamla Niwas' i.e. regarding ownership. Even the Objector as D.W. 1 did not say a word in his examination-in-chief about the mental condition of the testatrix. D.Ws. 2, 3 and 7 spoke about illness, but the thrust of their evidence too is that the house did not belong to the testatrix. On the point of illness all that D.Ws. 2 and 3 said was that the testatrix had suffered paralytic stroke in 1980 whereafter she was bed-ridden. When they last met her in 1987, she was unable to recognise. They said nothing about the condition at or about the time when the will was executed on 22.8.86. D.W. 7 stated that the testatrix had suffered the stroke in 1970 and thereafter she lived at Varanasi.

16. On the point of proof in testamentary cases I am tempted to refer to a passage from the decision in the case of *Surendra Pal* vs. *Dr. (Mrs.) Saraswati Arora*, AIR 1974 Supreme Court 1999, relating to burden of proof in Probate proceeding. Thus said their Lordships,

"The propounder has to show that the will was signed by the testator, that he was at the relevant time in sound disposing state of mind, that he had understood the nature of disposition, that he put his signature to the testament of his own free will and that he had signed it in the presence of the two witnesses who attested it in his presence and in the presence of each other. Once these elements are established, the onus which is placed on the propounder is discharged."

The Court clarified that if there are suspicious circumstances the onus may still be on the propounder to explain them to the satisfaction of the Court but if the caveator alleges undue influence, fraud and coercion, the onus is on him to prove the same. Continuing, their Lordships observed,

"If the caveator does not discharge the burden which rests upon him in establishing the circumstances which show that the will had been obtained by fraud or undue influence, a probate of the will must necessarily be granted if it is established that the testator had full testamentary capacity and had, in fact, executed it validly with a free will and mind."

17. On behalf of the Objector certain circumstances were cited which, according to him, create doubt about the genuineness of the will.

(i) The date "22.8.86" appears above the signature in the will.

(ii) Though as per evidence of the petitioners' witnesses the testatrix used to sign in English, but the signature on the will is in Hindi.

(iii) Neither Dr. Vijayee Singh nor father of the petitioners Suresh Prasad Singh was examined.

(iv) No provision was made by the testatrix for her second son i.e. Devesh Pratap Singh, the Objector, and/or his children.

(v) Above all, admittedly the testatrix was not keeping good health after 1980 and the couple started living at Varanasi.

(vi) Both the testatrix and her husband according to the petitioners' case lived at Varanasi—how and why came to Patna on or about 22.8.86 to execute the will.

18. As regards the first objection it is true that normally the maker of the document mentions the date below the signature. In the present case, as noted above, the will was scribed by the husband of the testatrix. Thereafter, as P.W. 2 stated, she went through the contents and made endorsement to the effect "Isko pura parhkar da, kiya". The date 22.8.86 has been mentioned in continuation in the same line. Below the said endorsement and the date the testatrix affixed her signature. It is significant that the date 22.9.86 (sic) has been mentioned not only by the testatrix but also by the two attesting witnesses. In fact, the caption also mentions the same date while describing the document as "will dated 22.8.86". Therefore, nothing turns on the fact that instead of below, the date appears above the signature.

19. As regards the second objection, power of attorney (Ext. 9) has been brought on record to show that sometimes the testatrix used to sign in Hindi also. That apart, to me it appears the fact the language of the will was Hindi, the testatrix might have considered it appropriate to affix her signature in the same language/script. In my view of the matter, the genuineness of the signature not being under challenge the question as to whether she should have affixed her signature in Hindi or English is of no consequence at all.

20. I do not also find any substance in the third objection. The case of *RodaFramroze Mody* vs. *Kanta Varjivandas Saraiya*,

AIR 1946 Bombay 12, was cited in this connection. It was observed in that case that though one attesting witness is sufficient the words "at least" suggest that he evidence of more witness may be required. This undoubtedly is so depending on the facts of the case. If circumstances surrounding execution of the will are not above board and the credentials of the sole attesting witness are doubtful, no doubt, the Probate Court is entitled to call upon and expect the propounder of the will to examine more witnesses to corroborate the evidence of the sole attesting witnesses. There, however, cannot be any hard and fast rule on the point. It would depend on the facts and circumstances of each case. In the matter of proof what is important is the quality of evidence and not its quantity. With the examination of Dr. Virendra Prasad Sinha the requirement of law stands satisfied, and there being no such suspicious circumstances creating doubt about the veracity of the will or the petitioners' case, I do not think any adverse Inference should be drawn for not examining Dr. Vijayee Singh, the other attesting witness, who has affirmed the facts relating to attestation by swearing affidavit for which, if the evidence is found to be false, he may be prosecuted under section 282 of the Act. As regards Suresh Pratap Singh, the petitioner's father, since he played no role in the execution of the will, his examination as a witness was hardly required.

21. The submission that no provision was made by the testatrix for the Objector and/or his children at the first instance looks attractive but has no substance. In some cases, in the facts and circumstances, the Courts have drawn adverse inference from omission to make provisions for particular members of the family, for example, where property is given to some relation or outside without making provision for the wife or the children. Doubt may arise as to the or genuineness of the disposition, in cases where failure to make such provision makes a particular member of the family destitute or something of that kind. But where as between two sets of heirs, the testator prefers one of them, position will be different. After all, the very object of executing will is to give the property to particular person/persons to the exclusion of or in preference to other heirs who may but for the such disposition would have interest in the property and in case of intestate death of the testator/testatrix, would have share in it. Counsel submitted that in such cases the court should see it the reasons for excluding a natural heir have been assigned or not, and where

they are not, adverse inference should be drawn. He relied on *Smt. Rajeshwari Rani Pathak* vs. *Smt. Niraja Guleri*, AIR 1977 Punjab & Haryana 123. That case was decided on its facts. As a matter of fact ratio of the decision so far as this point is concerned, is that if the will contains reasons for depriving some heir, it is a material consideration to uphold genuineness and validity of the will. In the present case, though it is not specifically said so, the will provides an inkling as to why the testatrix bequeathed the property to the petitioners. The reason seems to be that the Objector has only daughters. Though daughters have been brought at par with the sons in the matter of succession on the death of their father or mother, traditionally the sons have an edge over the daughters in the matter. Perhaps, the testatrix for this reason did not want her property to be shared by the Objector upon whose death, else, it would have been shared by his daughters. She wanted it to remain in her own family which could be possible only if sons of the other son had inherited it. The use of the words "apne pote Vikas Singh aur Vivek Singh...unko apne zindagi ke bad de dun aur un poton ko hak hoga", signify the intention of the testatrix. In these premises the fact that the testatrix did not make any provision for the Objector or his daughters does not appear to be of much significance. It would not be out of place to mention that the from the letters brought on record as Exts. 15 and 16 it appears that the relationship of the Objector with his mother i.e. testatrix was not very cordial. In one of the letters Ext. 16, in fact, he seems to have expressed his desire, out of anguish, to leave Kamla Niwas, if his stay in the house was not liked by her.

22. The objection as to the testatrix keeping indifferent health does not also have much substance in the facts and circumstances. I have already dealt with this aspect earlier. I may add, in fairness to the petitioners, that heavy reliance was placed by them on the fact that the testatrix used to operate bank accounts her-self. A bunch of Pass books and counterfoils of cheques have been brought on record as Ext. 5 series. It was pointed out that one such withdrawal was as late as on 19.3.86 (Ext. 5/5). It was submitted that as against the evidence adduced by the petitioners, no positive evidence has been adduced by the Objector regarding mental condition, or lack of disposing capacity, of the testatrix at the time of execution of the will.

23. In this connection I would like to mention that as per section 59 which has already been referred to above, even a

person who is ordinarily insane is competent to execute a will at a time when he is of sound mind. What is important is not the illness of the testator or testatrix but her power of understanding. A person may be physically ill but he may be mentally sound. Nothing has come in evidence—either in the cross-examination of the petitioners' witnesses at the instance of the Objector or in the evidence of the Objector witnesses—to suggest that the testatrix suffered from any un-soundness of mind, much less on or about 22.8.86 when she executed the will. She might have been living at Varanasi for sometime in the past but, as stated by P.Ws, she often came to Patna, the place of her permanent residence. If she decided to execute the will during one such stay it cannot be said to be a circumstance creating suspicion about its genuineness.

24. One of the most important features of the present case is that the Objetor does not dispute the genuineness of the signature of the testatrix on the will. His objection as to ownership of the property, as noted hereinabove, being only peripheral, having admitted the genuineness of the signature of the testatrix on the will, the Objector can resist the grant of Letters of Administration only if he was able to show that the execution was not voluntary—that it was the result of fraud, coercion, undue influence or the like. No such case has been pleaded by the Objector. As laid down in the case of *Surendra Pal* vs. *Dr. (Mrs.) Saraswati Arora (supra)*, even if such case had been pleaded by him, the burden of proof would have been upon him to establish that the will had been obtained by fraud, undue influence or coercions etc. It is significant to point out that the propounders of the will i.e. the petitioners did not apparently play any role in the execution of the will. They came to know about it later from their grand mother i.e. testatrix during Dussehra i.e. sometime in the month of October in 1986. His grand father had the custody of the will in the meantime. These replies came in cross-examination of P.W. 1.

25. Before I close the discussion, I must refer to few other decisions cited on behalf of the Objector. *A. Raghavamma & anr.* vs. *A. Chanchamma & anr.*, AIR 1964 Supreme Court 136, was cited on the point that the will could not be executed with respect to undivided share of the joint family property. Though, as observed above, in the present proceeding this Court is not called upon to go into and decide the qustion of ownership of the property, the decision has no relevance in the present case for the

reason that the case related to a will executed by member of undivided co-parcener, whereas inthe presnt case the testatrix being a female was not member of the co-parcenery. Besides the suit itself was for possession and not one for grant of Probate/ Letters of Administration. *S. Pachaksharamma* vs. *Chimmabhayi*. AIR 1967 Supreme Court 207, was relied upon on the point of the nature of the document. In that case the plaintiff had instituted a suit both as adopted son and as persona designata on the basis of a will. The trial court dismissed the suit on both the grounds. The lower appellate court and, later, the High Court rejected his case based on adoption but held the plaintiff entitled to the reliefs on the basis of will. The Supreme Court held on construction of the will that it was merely a direction to the defendant to adopt the plaintiff and did not amount to any disposition of the property. As a matter of fact, in *Ram Nath Das* vs. *Ram Nagina Choudhary & ors.* AIR 1962 Patna 481, another decision relied upon on behalf of the Objector, a Division Bench of this Court laid down that the document to be called will must be with respect to disposition of the property i.e. the declaration of the testator must be with respect to some property. In that case the Court held on construction of the document that by it the maker had merely appointed his successor, he did not make any disposition of the property.

26. The objections of the Objector having thus been considered and the petitioners having been held to have proved the will, its due execution, in a sound state of mind by the testatrix, in the absence of any suspicious circumstance surrounding the execution, the petitiones must be held entitled to grant of Letters of Administration.

27. In the result, the petition is allowed. Let Letters of Administration of the will of Smt. Kamleshwari Devi dated 22.8.86 be granted in favour of the petitioners on payment of due court fee, if not already paid and on their furnishing inventory and accounts within stipulated period under section 319 of the Act. The parties will bear the costs of the proceeding.

S.D.

Application allowed.

REVISIONAL CRIMINAL

Before Mrs. Indu Prabha Singh, J.

2001

February, 13.

*Ram Nandan Sao.**

v.

The State of Bihar and anr.

Code of Criminal Procedure, 1973— (Central Act no. II of 1974) section 125—Order for payment of maintanance, legality of—the section whether a penal section—word "offence" as defined under section 40 of the Penal Code, 1860, whether not applicable in case of default in payment of maintenance.

Held, that order for payment of maintenance by petitioner to opposite party no. 2, under section 125 of the Code of Criminal Procedure, 1973 is correct both on facts and law and the same cannot be disturbed.

Held, further, that section 125 of the Code of Criminal Procedure, 1973 is not a penal section and the word "offence" as defined in section 40 of the Penal Code 1860 can not be applicable in case of default in payment of maintenance.

Case laws discussed.

Applications by petitioner

The facts of the cases material to this report are set out in the judgement of Mrs. Indu Prabha Singh, J.

Mr. R.P. Singh & Mr. Sanjay Kumar Singh for petitioner.

Mr. Praveen Kumar Singh for the state.

Mr. Rudradeo Kumar Sinha, A.P.P. for the state.

Criminal Revision No. 28 of 1999

Mrs. I.P. Singh, J. This application in revision filed under sections 397 and 401 of the Code of Criminal Procedure, 1973 (in short 'the Code') is directed against the order dated 8.12.1998 passed in Case No. 59M/85 by Shri R.P.S. Singh, J.M. Ist Class, Lakhisarai as also for quashing the entire proceeding of Case No. 59M/85.

* Criminal Revision No. 28 of 1999 with Criminal Misc. No. 6579 of 1992. Against the order dated 8.12.1998 passed by Shri R.P.S. Singh, J. M. Ist Class, Lakhisarai in Case No. 59M/85 and in the matter of an application under section 482 of the Code of Criminal Procedure.

Criminal Misc. No. 6579 of 1992.

So far as Criminal Misc. No. 6579/92 filed u/s 482 of the Code is concerned, it is directed against the order dated 23.3.92 passed in Cr. Rev. No. 144 of 1991 by Sri Ram Prabodh Singh, II Addl. Sessions Judge, Munger by which he confirmed the order and judgment dated 3.4.1991 passed by Shri Ravindra Patwari, J.M. Ist Class, Munger U/s 125 of the Code. Both these cases were heard analogous and this judgment will govern both of them.

2. The petitioner in Criminal Revision No. 28 of 1999 is husband and opposite party no. 2 has claimed to be his first wife. It appears that opposite party no. 2 filed Complainat Case No. 159 (C) of 1982 against the petitioner for his prosecution under section 494 of the Indian Penal Code claiming therein that he was the first wife of the petitioner. She has filed another Case No. 59M/85 against the petitioner under section 125 of the Code for her maintenance claiming therein also that she is wife of the petitioner. So far as Complaint Case No. 159 (c)/82 is concerned the petitioner was acquitted by Shri P.K. Dubey, Magistrate Ist Class by judgment dated 8.5.1985 holding that opposite party no. 2 had failed to prove her marriage with the petitioner. Against this judgment of acquittal oppsite party no. 2 had filed Cr. Appeal No. 15/85 in this Court which was dismissed by A.N. Chaturvedi, J. on 2.7.1996 holding therein that the evidence on record did not prove beyond doubt that opposite party no. 2 is the first wife of the petitioner. Aggrieved by this order opposite Party no. 2 filed S.L.P. (Cri) No. 3174/96 before the Hon'ble Supreme Court before which the parties reached a settlement and the respondents (present petitioner) was directed to pay a sum of Rs. 15,000/- to the present opposite party no. 2 who was the petitioner before the Hon'ble Supreme Court. By order dated 5.12.1997 the Hon'ble Supreme Court dismissed this S.L.P. (Cri) as withdrawn.

3. So far as Case No. 59M/85 is concerned this was brought under section 125 of the Code by opposite party no. 2 claiming herself to be wife of the petitioner. Shri Rabindra Patwari Judicial Magistrate, Ist Class by his order dated 3.4.1991 allowed this petition for maintenance of opposite party no. 2 and directed the petitioner to pay her a sum of Rs. 300/- per month by way of her maintenance. The petitioner filed Cr. Revision No. 144/91 before the court of Session against this judgment of the learned Judicial Magistrate. It was heard and disposed of by Shri Ram

Prabodh Singh, 2nd Addl. Session Judge, Munger who by his order dated 23.3.1992 dismissed the revision application and confirmed the order passed by the learned Magistrate. After dismissal of this revision application the petitioner filed Cr. Misc. No. 6579 of 1992 before this Court. It was, however, dismissed as not pressed by an order dated 23.2.1998. An application for its restoration (Cr. Misc. No. 13424 of 1998) was filed against this order of dimissal. This restoration petition was, however, dismissed for default on 13.11.1998 on account of peremptory order passed by this Court on 6.11.1998. Subsequently another restoration petition (Cr. Misc. No. 23124 of 2000) was filed for restoration of Cr. Misc. No. 13424/98 as also for the restoration of Cr. Misc. No. 6579 of 1992. By order dated 7.11.2000 Cr. Misc. No. 6579/1992 was restored to the file. From the record it appears that this criminal misc. case was heard alongwith present Criminal Revision No. 28/1999 by this Court on 3.1.2001 and this judgment will govern both of them.

4. From the aforesaid it would appear that the order for maintenance passed by the learned Judicial Magistrate in Case No 59 (M)/1985 was confirmed by the learned Addl. Sessions Judge in Criminal Revision No. 144/91. It is this order which has been now challenged before this Court in Cr. Misc. No. 6579/92 and is pending disposal.

5. So far as Complaint Case No. 159 (c)/1982 is concerned it appears that it was filed for the prosecution of the petitioner under section 494 of the Indian Penal Code which ended in his acquittal by the judgment dated 8.5.1985 passed by the Magistrate Ist Class. Against this judgment of acquittal Cr. Appeal No. 15/85 was filed and heard by this Court which was dismissed by the order dated 2.7.1996 passed by A.N. Chaturvedi, J. Thus while on one hand there is an order of maintenance in favour of opposite party no. 2 under section 125 of the Code on account of her claim of being lawfull wife of the petitioner, her allegation of second marriage by petitioner filed under section 494 of the Indian Penal Code has failed.

6. It has been seriouosly argued before me on behalf of the petitioner that since his prosecution under section 494 of the Indian Penal Code at the instance of opposite party no. 2 has failed and since this Court in Cr. Appeal No. 15/85 has held that the evidence on record did not prove the charge under section 494 of the Indian Penal Code beyond all reasonable doubts against the present petitioner he can not be asked to pay maintenance to

opposite party no. 2 since as per the judgment of acquittal passed by Shri P.K. Dubey, Judicial Magistrate, Ist Class, Munger in Complaint Case No. 159(c)/82 confirmed by this Court in Cr. Appeal No. 15/85 opposite party no. 2 has failed to prove that she is the legally married wife of the petitioner and accordingly she is entitled to maintenance. In other words the thrust of the argument advanced on behalf of the petitioner is that since opposite party no. 2 has failed to bring home the charges under section 494 of the Indian Penal Code against the petitioner she is not entitled to get any maintenance from him, in asmuch as her claim for maintenance would be barred by the principle of estoppel. This brings us to the consideration of question whether the claim for maintenance of the petitioner allowed by the two courts can be said to be barred by estoppel on account of the judgment of acquittal passed by the Judicial Magistrate as also by this Court in a charge under section 494 of the Indian Penal Code levelled against the petitioner. It has been seriously argued before him that by virtue of the principle of estoppel the opposite party no. 2 is not entitled to get any maintenance on the grounds mentioned above. In this connection my attention has been drawn to the impugned order dated 8.12.1998 passed by the Judicial Magistrate. From this order it appears that the learned Magistrate has taken into account the facts and circumstances of this case and had directed the opposite party no. 2 to submit before the Court her total claim for her maintenance as directed by the two courts.

7. At the time of hearing learned counsel for the petitioner has placed reliance of section 300 of the Code which corresponds to section 403 of the Old Code. This section runs as follows :—

"300—Person once convicted or acquitted not to be tried for same offence : (1) A person who has once been tried by a Court of competent jurisdiction for an offence and convicted or acquitted of such offence shall, while such conviction or acquittal remains in force, not be liable to be tried again for the same offence, nor on the same facts for any other offence for which a different charge from the one made against him might have been made under sub-section (1) of Section 221, or for which he might have been convicted under sub-section (2) thereof.

(2) A person acquitted or convicted of any offence may be afterwards tried, with the consent of the State Government, for any distinct offence for which a separate charge might have been made agaisnt him at the former trial under sub-section (1) of Section 220.

xxx xxx xxx xxx xxxx

(6) Nothing in this section shall affect the provisions of Section 26 of the General Clauses Act, 1897 (10 of 1897), or of Section 188 of this Code."

Explanation :— the dismissal of a complaint, or the discharge of the accused, is not an acquittal for the purposes of this section.

8. From a perusal of section 300 of the present Code which corresponds to section 403 Old Code it would appear that its provision could be attracted only in a case when a person has been convicted or acquitted of the charge for having committed an offence in which case he shall not be tried again for the same offence. Section 26 of the General Clauses Act as referred to above runs as follows :

"26. Where an act or omission constitutes an offence under two or more enactment then the offender shall be liable to be prosecuted and punished under either or any of those enactment but shall not be liable to be punished twice for the same offence."

So far as section 188 of the Code is concerned it does not apply to the facts of the present case as it provides for the procedure for the trial of the offence committed outside India.

9. In this connection a reference also be made to Article 20 (2) of the Constitution of India which also makes a provision for a bar against the second prosecution in analogous cases. It run as follows :—

"Article 20 (2)—No person shall be prosecuted and punished for the same offence more than once."

10. A bare reading of section 300 of the Code shows that it relates to the offences and reference to the conviction or acquittal of same offence. The word offence has not been defined in the Code, however, it has been defined in section 40 of the Indian Penal Code, which runs as follows :—

"Offence" :-Except in the Chapters and sections mentioned in clauses 2 and 3 of this section, the word "offence" denotes a thing made punishable by this Code.

In Chapter IV, Chapter V-A and in the following sections, namely, Sections 64, 65, 66, 67, 71, 109, 110, 112, 114, 115, 116, 117, 187, 194, 195, 203, 211, 213, 214, 221, 222, 223, 224, 225, 327, 328, 329, 330, 331, 347, 348, 388, 389 and 445 the word "offence" denotes a thing punishable under this Code, or under any special or local law as hereinafter defined. And in Sections 141, 176, 177, 201, 202, 212, 216 and 441 the word

"offence" has the same meaning when the thing punishable under the special or local law is punishable under such law with imprisonment for a term of six months or upwards, whether with or without fine."

From the above definition of the word "offence" it becomes clear that it denotes a thing made punishable by I.P.C. The sections referred to in its clauses 2 and 3 are the sections of the Indian Penal Code and not of the Code of Criminal Procedure. Section 125 as mentioned in second clause refers to section 125 of the Indian Penal Code and not to section 125 of the Code of Criminal Procedure, and the offence mentioned in section 125 is waging war against any Asistic Power in alliance with the Government.

11. As per section 2(y) of the Code the words and expression used in the Code but not defined in it but define in the Indian Penal Code have the meaning respectively assigned to them in that Code. From the aforesaid it would appear that an offence as mentioned in section 300 of the Code denotes a thing made punishable by the Indian Penal Code. It is on this account that section 300 of the Code provides that the person once convicted or acquitted is not to be tried again for the same offence.

12. In view of the aforesaid meaning of the word "offence" as used in section 300 of the Code I will now proceed to examine whether the provisions of this section will be applicable on the facts of the present case. It may be stated here that while section 494 of the Indian Penal Code is punishable with imprisonment for a term which may extend to 7 years and shall also be liable to fine there is no punishment prescribed in section 125 of the Code. As a matter of fact section 125 of the Code provides for order for maintenance to the wifes, children and parents. It empowers the Magistrate to order any person to make monthly allowances for the maintenance of his wife or child or father or mother at such monthly rate not exceeding Rs. 500/- in the whole. This is not a penal section and the word "offence" as noticed above can not be applied to a person who has been ordered to pay maintenance to the persons noted above. It is only in sub-section 3 of section 125 of the Code that a provision is made for issuing a warrant for levying the amount due in the manner provided for levying fines and only if the allowances remains unpaid then such person may be sentenced to imprisonment for a term which may extend to one month or until payment of allowance is made. This provision can not be said to be a penal provision as no punishment as such is prescribed to the person ordered to pay maintenance. In this view

of the matter any failure on the part of the person to pay maintenance as per section 125 of the Code will not come within the definition "offence" since it can not be said to be made punishable under Indian Penal Code. From the aforesaid discussion it becomes clear that the provisions of section 300 of the Code would not be attracted unde the facts and circumstances of this case inasmuch as it simply provides that once a person has been convicted or acquitted by a court of competent jurisdiction he can not be tried for the same offence twice. Here in the case of an order under section 125 of the Code the question of any conviction or acquittal for an offence as defined in section 40 of the Indian Penal Code will not arise. Hence properly speaking the provisions of section 300 of the present Code corresponding to section 403 of the Old Code would not be attracted under the facts and circumstances of this case. In view of above I will now proceed to refer to the decisions cited by the learned counsel for the petitioner.

13. I will firstly refer to the case of *Manipur Administration, Manipur* Vrs. *Thokchom Bira Singh* (1) In this decision the rule as to issue estoppel have been explained. It has been held in this decision that the rule of issue estoppel in a criminal trial is that where an issue of fact has been tried by a competent court on a former occasion and a finding has been reached in favour of an accused, such a finding would constitute an estoppel or res-judicata against the prosecution not as a bar to the trial and conviction of the accused for a different or distinct offence but as precluding the reception of evidence to disturb that finding of fact, when the accused is tried subsequently even for a different offence which might be permitted by the terms of Section 403 (2) of the Old Code. This rule only precludes evidence being led to prove a fact in issue as regards which evidence has already been led and a specific finding recorded at an earlier criminal trial before a court of competent jurisdiction. In the present case as noticed above the provisions of section 408 of the Old Code corresponding to section 300 of the Code are not attracted and will not apply inasmuch as a case under section 125 of the Code is not a trial of any person in which any punishment is prescribed. Hence this decision is hardly of any help to the petitioner.

14. In this connection a reference may also be made to the case of *Kharkan and others* V. *State of Uttar Pradesh* (2) This case

(1) (1965) A.I.R. (S.C.) 87.
(2) (1965) A.I.R. (S.C.) 83.

also relates to section 403 of the Old Code. According to this decision the plea of autrefois acquit will arise when a person is tried again for the same offence or on the same facts for any other offence under the conditions attracting sections 236 or 237 of the Old Code. It has further held that the reasoning of the judgment of acquittal will not be admissible as evidence in the subsequent case. In peragraph 11 of this judgment it has been held as follows :—

> 11. "It was contended by Mr. Tewatia that the earlier judgment involved almost the same evidence and the reasoning of the learned Judge in Puran's case destroys the presecution case in the present appeal. He attempted to use the earlier judgment to establish this point. In our opinion he cannot be allowed to rely upon the reasoning in the earlier judgment proceeding as it did upon evidence which was separately recorded and separately considered..... The earlier judgment is no doubt admissible to show the parties and the decision but it is not admissible for the purpose of relying upon the appreciation of evidence."

This decision clearly shows that the earlier judgment was admissible to show that the parties under the decision but it was not admissible for the parties to rely upon the appreciation of evidence.

15. The other decision relied upon on behalf of the petitioner is the case of *Lalta & others* Vrs. *State of U.P.* (1) This case also relates to section 403 of the Old Code. It has simly held that where an issue of fact has been tried by a competent court on a former occasion and a finding of fact has been reached infavour of the accused such a finding would constitute an estoppel or res judicata against the prosecution, not a bar to the trial and conviction of the accused for a different offence but as precluding the reception of evidence to disturb that finding of fact when the accused is tried subsequently even for a different offence which might be permitted by the terms of section 403(2) of the Old Code. This decision is also of non help in the present case since as already pointed out above the proceeding under section 125 of the Code is not a trial for any offence within the meaning of word "offence" as appearing in section 40 of the Indian Penal Code. Hence this decision is also not applicable to the facts of the present case.

(1) (1970) A.I.R. (S.C.) 1381.

16. Learned counsel for the petitioner has also placed reliance in the case of *Masud Khan* Vrs. *State of Uttar Pradesh* (1). In this decision also the question of principle of estoppel has been considered as provided by section 115 of the Evidence Act. It has been held that the principle of issue estoppel is simply this and where an issue of fact has been tried by a competent court on a former occasion and a finding has been reached infavour of an accused, such a finding would constitute an estoppel or res-judicata against the prosecution not as a bar to the trial and conviction of the accused for a different and distinct offence but as precluding the reception of evidence to disturb that finding of fact when the accused is tried subsequently even for a different offence which might be permitted by law. This case related to Foreigners (internment) Order 1962. The applicant in the said case could not discharged the burden showing that he is not a foreigner and it was held that he was liable to be dealt with under paragraph 5 of the said order. It was, however, held by the Hon'ble Supreme Court that action prescribed in paragraph 5 of this order was not criminal in nature and even if the petitioner was acquitted for the prosecution under section 14 of the Foreigners Act subsequent action against him in connection with the Foreigners Order was not barred by issue estoppel. This decision is, therefore, of no help to the learned counsel for the petitioner.

17. From the discussions of these decisions it would appear that what is barred under section 403 of the Old Code or section 300 of the New Code is the subsequent trial of any person for the same offence if earlier he has been tried and acquitted or convicted for the same offence. The ratio of these decisions will not apply to the facts of the present case inasmuch as the proceeding under section 125 of the Code is not with respect to any offence for which a person can be convicted under the provision of the Indian Penal Code or any other law.

18. In this connection a reference may be made to the case of *Anil Behari Ghosh* V. *Smt. Latika Bala Dassi and other* (2). In the said case one Charu Chandra Ghose was convicted of murder by the sessions court. It was held by the Hon'ble Supreme Court that though the judgment is relevant only to show that there was a trial resulting in the conviction and sentence of Charu to the transportation for life. It was not the evidence of the fact that Charu was the muderer.

(1) (1974) A.I.R. (S.C.) 28.
(2) (1955) A.I.R. (S.C.) 566.

19. The question involved in the present case had come up for consideration before me in the case of *Samir Mandal* Vrs. *The State of Bihar & ors.* (1). Here also similar question was under consideration, namely, that if a person is acquitted of the charge under section 494 of the Indian Penal Code can he be asked to pay maintenance to his wife under provisions of section 125 of the Code. It was held that in such a situation the wife was entitled for maintenance notwithstanding the fact that her case brought against the petitioner for an offence under section 494 of the Code ended in acquittal.

20. From the detailed discussions made above it becomes clear that there is no merit in Cr. Revision No. 28/99 which is, accordingly, dismissed and the impugned order dated 8.12.1998 passed is Case No. 59-M/85 by Shri R.P.S. Singh, Judicial Magistrate, Ist Class is confirmed. So far as Cr. Misc. No. 6579/92 is concerned it is clear that the learned Judicial Magistrate had passed an order of maintenance against the present petitioner which has been confirmed on appeal and against which this Misc. case has been filed. In this misc. case the plea of estoppel was raised before this Court but finally it was dismissed as not pressed on 23.2.1998. Though subsequently it has been restored and though both the parties have been heard on its merit. It is clear that the findings arrived at by two courts below with respect to payment of maintenance to opposite party no. 2 by the present petitioner are correct both on facts and law and, therefore, they cannot be disturbed. Cr. Misc. No. 6579/92 is, therefore, also dismissed.

R.D.

Application dismissed

(1) (2000) 1 P.L.J.R. 1034.

CIVIL WRIT JURISDICTION

Before Sachchidanand Jha, J.

2001

April, 4.

Anant Kumar.

v.

The State of Bihar & Ors.

Persons With Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 (Central Act No. 1 of 1996) —sections 18 and 19—State directed to constitute State Co-ordination Committee and State Executive Committee in the light of sections 18 and 19 and to make amendment in section 61 of Bihar State Universities Act, 1976 and section 58 of Patna University Act, 1976, incorporating provisions regarding reservation for persons with disabilities—whether duty cast on State under the Disabilities Act to reserve at last 3 per cent seats for such candidates—Vice Chancellor Patna University and Principal Patna College directed to consider the case of petitioner and other candidates with disabilities for admission in B.A. (Hons) Part I Course in anticipation of amendments in section 61 of Bihar University Act and section 58 of the Patna University Act and Regulations to be framed pursuant to the amendments.

The State Government is directed to immediately take necessary steps for constituting State Coordination Committee as well as State Executive Committee, as provided in sections 18 and 19 of the Persons With Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 hereinafter referred to as the Disabilities Act, and provide necessary infrastructure to them and make them functional in true sense. The State will also take necessary steps to bring about necessary amendments in section 61 of the Bihar State Universities Act, 1976 and section 58 of the Patna University Act, 1976, incorporating provisions regarding reservation for the persons with disabilities.

Held, that a duty is cast on the State under the Disabilities Act to reserve at least 3 per cent seats for candidates with disabilities.

Held, further, that the respondents particularly, the Vice Chancellor, Patna University and Principal, Patna College are,

Civil Writ Jurisdiction Case No. 2089 of 2001. In the matter of an application under Article 226 of the Constitution of India.

directed to consider the case of the petitioner and other disabled candidates who had applied for admission pursuant to notice dated 10.1.2001 and in respect to whom the list was notified on 18.1.2001, afresh for their admission in B.A. (Hons) Part I Course in anticipation of the amendments in the Bihar State Universities Act and Patna University Act and regulations to be framed pursuant to the direction of the Vice-Chancellor, within two weeks. The petitioner and other willing disabled candidates shall be admitted notwithstanding that the total number of sanctioned seats which might have already been filled up and their admission will be in the particular category to which they belong ie, Scheduled Caste/Scheduled Tribe/Backward Class category or unreserved category as the case may be.

Case laws reviewed.

Application under Article 226 of the Constitution of India.

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

Mr Manoj Tandon for the Petitioner.

Mr Ramesh Kumar Dutta for the State.

Ms. Sheema Ali Khan for the Patna University.

M/s Ram Balak Mahto and *Shivendra Kishore* for the Chancellor.

S.N. Jha, J. In this writ petition the petitioner has raised an issue of far reaching importance relating to implementation of The Persons With Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 (Act 1/96) (hereinafter called "the Disability Act") in the matter of admission in educational institutions in the State of Bihar. In particular, he seeks direction for his admission in the B.A. (Hons) Part I course in 2000-2003 session in Patna College, Patna in the disabled category.

2. The case of the petitioner is that he is a disabled person having more than 60 per cent disability as certified by the Medical Board, Vocational Rehabilitation Centre for Handicapped, an authority of the Government of India, Ministry of Labour. He has also good academic record having passed the Matriculation examination with 74 per cent marks and the Intermediate examination with 68.3 per cent marks. He applied for admission in B.A. (Hons) Part I course in Patna College pursuant to

advertisement issued by the College on 14.9.2000. On account of the strike which continued for a long period the list of selected candidates was notified only on 12.12.2000. The name of the petitioner was not there. He made enquiry from the College authorities and came to learn that list of disabled candidates would be notified separately later as Medical Board was to be constituted to ascertain the disability and the process was on. Subsequently on 10.1.2001 a notice was published on the notice board of the College asking the disabled candidates to appear before the Chief Medical Officer, Patna University at the Central Dispensary of the University for their physical examination. The petitioner along with other candidates appeared and was found to be physically handicapped. Thereafter on 18.1.2001 list of disabled candidates was notified. The list mentioned the names of only two candidates. Meanwhile the petitioner had served legal notice on the Principal, Patna College, with a copy to the Vice-Chancellor, Patna University, giving reference inter alia to the provisions of Section 39 of the Disabilities Act and the obligation of the University/College to admit adequate number of disabled candidates in the disabled category under that Act. It was pointed out that total number of seats in B.A. (Hons) Part I course in the college being 400, in terms of the provisions of the Act, at least 12 seats were required to be reserved for the disabled candidates. However despite pointing out the provisions of the Disabilities Act and the obligation of the authorities to follow them, only two disabled candidates were notified for admission on 18.1.2001. On 5.2.2001 the petitioner's lawyer received reply from the Principal of the College stating that till date the College had not received any communication from the University regarding reserving 3 per cent seats for the disabled candidates in admission in different courses. The Principal however stated in his letter that position of the petitioner in the merit list in the disabled category was eighth. According to the petitioner, since at least 12 seats were/are required to be reserved for the disabled candidates, there being no dispute about his disability within the meaning of the Disabilities Act, he is entitled to direction upon the concerned authorities to admit him against one of the 12 seats in the college/course.

3. In its counter affidavit sworn by the Registrar, the Patna University has referred to Clause 8 of the 'General Ordinance for Admission to the various Courses of Studies' dated 28.8.99 conferring power on the Vice Chancellor "to relax any criteria and

increase seats beyond the usual number of seats by 1% each with the approval of the Chancellor in the case of students suffering from (i) low vision, (ii) hearing impairment, and (iii) Locomotor disability or cerebral palsy. The affidavit categorically states that the Patna University has so far not incorporated any part of the Disabilities Act in the said 'General Ordinance for Admission' dated 28.8.99.

4. The State of Bihar has also filed counter affidavit sworn by the Joint Secretary, Higher Education Department, stating that by Resolution No 251 dated 18.10.2000 the State Government has already decided to provide reservation upto 3 per cent in appointment to government service. So far as admission is concerned Section 61 of the Bihar State Universities Act, 1976 and the corresponding Section 58 of the Patna University Act, 1976 contain provisions for reservation for candidates of Scheduled Castes to the extent of 14 per cent, Scheduled Tribes to the extent of 10 per cent, Extremely Backward Class to the extent of 14 per cent, Backward Class to the extent of 10 per cent and Women of Backward Class to the extent of 2 per cent i.e. 50 per cent in all. However the government has already initiated steps to provide reservation to the disabled/handicapped candidates in admission on the same line as in matter of appointment under Resolution No. 251 dated 8.10.2000 (Supra) but this requires amendment in the relevant sections of the University Acts for which some formalities have to be observed which is likely to take about four months time. It is thus submitted that the grievance of the petitioner is likely to be redressed shortly.

It has further been stated in the State's counter affidavit that the reservation for disabled/handicapped candidates will be within the quota already provided to the particular category i.e. scheduled castes, scheduled tribes etc. categories and they will be allowed the benefit of reservation within the quota meant for the particular category to which they belong, as provided in Sections 61/58 of the Universities Act/Patna University Act.

5. Considering the significance of the issue involved this Court by order dated 19.2.2001 issued notice to the Chancellor of the Universities. It may be pointed out that any direction to implement the provisions of Disabilities Act would concern not only the Patna University but other Universities as well and the Chancellor being the fountain-head of all the Universities it was

considered necessary to ascertain his views. The Chancellor has since filed a counter affidavit sworn by the Deputy Secretary. The Affidavit states that the Chancellor having regard to the provisions of the Act and the objects to be achieved, is of the firm view that the State Government should, as soon as possible constitute a State Co-ordination Committee under Section 13 of the Act and further constitute State Executive Committee under Section 19 of the Act so that the objects can be fully achieved. The obligation of the State Government to ensure implementation of the Act particularly in the light of the provisions of Section 26 and 27 has been highlighted and it has been stated that in order to give full effect to the Disabilities Act and to achieve the objects, the State Government is required to prepare a comprehensive educational scheme, and in particular, as soon as possible, make provisions for : (a) Constituting an appropriate forum for redressal of the grievance of the parents regarding placement of their children with disabilities; (b) Making suitable modification in the examination system to eliminate purely mathematical questions for the benefit of blind students and students with low vision; and (c) Restructuring the curriculum for the benefit of students with hearing impairment. Further, the State Government is also required to formulate schemes and provide funds by law or by executive order for all educational institutions.

6. Coming to the issue of reservation of seats in the educational institutions at degree and master's level including those imparting technical education, it has been stated that unless the basic facilities are made available at the level of primary, secondary and intermediate education, reserving seats at the University level with which alone the Chancellor is concerned, may be futile because the disabled students within the meaning of the Disability Act may not be available to receive education at the degree/master's level or in technical institutions. Nonetheless, it has been stated that for persons suffering from the disabilities of 'leprosy cured' and 'locomoter disability' the Chancellor proposes to issue direction to reserve 1 per cent seat. Further 1 per cent seat is proposed to be reserved for persons suffering from 'low vision' and 'hearing impairment'. It may be mentioned here that in the affidavit, para 13 also refers to 'mental retardation' as a disability for which 1 per cent seat is proposed to be reserved along with 'low vision' and 'hearing impairment' but in course of hearing Shri Ram Balak Mahto appearing for the Chancellor

stated that it was a clerical mistake, and in the opinion of the Chancellor 'mental retardation' is a type of disability which does not justify giving the person concerned any benefit of reservation in admission in educational institutions.

7. From the stand of the respondents, including the Chancellor, the following position emerges. There is no reservation for the disabled candidates within the meaning of the Disability Act in the Universities as of date. The Vice-Chancellor of the Patna University has power to "relax" the laid down criteria and increase the seats beyond the sanctioned seats by 1% with the approval of the Chancellor in the case of candidates suffering from 'low vision' or 'hearing impairment' or 'locomoter disability' or 'cerebral palsy' but conferring the power to relax the criteria and increasing number of seats is quite different from reserving the seat for candidates suffering from the disabilities. Even that power to relax and increase the number of seats is limited to 1 per cent of the total number of sanctioned seats. As a matter of fact, as noted above, there is clear averment in para 3 of the affidavit of Patna University that the University has not incorporated any part of the Disability Act in the 'General Ordinance for Admission to the Various Course of Studies' in the University.

8. The Chancellor no doubt seems to have realised though belatedly, the importance, in fact, the obligation to implement the Disability Act, and virtually an undertaking has been given to reserve 2 per cent for leprosy cured and locomoter disability and the other 1 per cent for those suffering from low vision and hearing impairment, but the undertaking clearly falls short of requirement of law to reserve "at least" 3 per cent seats. Besides making reservation for the candidates suffering from leprosy cured and locomoter disability or low vision and hearing impairment treating them as two separate categories also does not seem to be in accordance with the provisions of Disability Act. I shall advert to this aspect later again in this judgement.

9. The State Government also does not deny the fact that the Disability Act has not been implemented in the State of Bihar and that there is no choice but to implement the same. The only point made out in the affidavit is that the disabled candidates have to be admitted against the seats already reserved for the candidates of the reserve categories to which they belong, that is to say, within the reservation already provided to the Scheduled

Caste, Scheduled Tribes, Backward Class etc. Thus a disabled SC candidate will be admitted against the seats reserved for the Scheduled Caste category, a disabled ST candidate will be admitted against a seat meant for Scheduled Tribe category and so on. But making such reservation requires amendment in the two University Acts namely the State Universities Act and the Patna University Act in Sections 61 and 58 respectively thereof. Steps are afoot to bring about suitable legislation on the same lines on which reservation has been provided to the reserved category candidates in the matter of employment under Resolution no. 251 dated 18.10.2000 up to 3 per cent.

10. At this stage it would be useful to notice some of the provisions of the Disability Act as under :—

"The term person with disability' has been defined under Section 2(t) of the Act to mean "a person suffering from not less than forty per cent of any disability as certified by a medical authority". Term 'disability' has been defined under Section 2(i) to mean "(i) blindness; (ii) low vision, (iii) leprosy-cured; (iv) hearing impairment; (v) locomotor disability; (vi) mental retardation; (vii) mental illness". These terms have been separately defined in different clauses of the definition Section i.e. Section 2. For the purpose of this case it is not necesary to notice their definitions. Chapter II of the Act provides for constitution of Co-ordination Committee by the Central Government while Chapter III provides for constitution of State Co-ordination Committee and State Executive Committee by the State Government. Chapter IV contains provisions relating to prevention etc of disabilities. Chapter V deals with education while Chapter VI deals with employment. It is not necessary to refer to the rest of the Act.

11. The provision which deserves special and pointed attention is the one contained in Section 39 of the Act. Section 39, in fact, if I may say so, is the soul of the Disability Act without which the Act would be incomplete and falling short of achieving the desired objectives. The condition of 'persons with disability' cannot be improved without making provisions for their education. Without education they cannot secure employment, join the mainstream of the society and make themselves useful. In fact then alone they can make their life and the very existence meaningful. Section 39 reads as under :—

"All Government educational institutions and other educational institutions receiving aid from the Government, shall reserve not less than three per cent seats for persons with disabilities."

There cannot be any dispute, nor there is any, that the legislative mandate contained in the above provision, which could not be couched in more clear words, obliges all Government educational institutions or other educational institutions receiving aid from the Government to reserve seats for the persons with disabilities and such reservation must be of at least 3 per cent seats. In this view of the matter, the stand of the Chancellor that he proposes to issue direction to reserve 2 per cent seats for candidates possessing certain types of disability cannot be said to be in accordance with the Disability Act. Besides, the categorisation of the disabilities and making separate reservation for candidates with those disabilities as proposed by the Chancellor, also does not seem to be in accordance with law. But before I deal with that aspect, I would like to refer to the preamble of the Act. Though the preamble strictly speaking is not part of the Act, at the same time it may be looked into in order to understand the aims and objects for which the Act is enacted as an aid to interpretation of provisions of the Act. The preamble refers to the Proclamation on the Full Participation and Equality of the People with Disabilities by Economic and Social Commission for Asia and Pacific Region in its meeting held in December 1992. It states :

"AND WHEREAS India is a signatory to the said proclamation;

AND WHEREAS it is considered necessary to implement the proclamation aforesaid;

Be it enacted by Parliament in the Forty-sixth year of the Republic of India....."

12. Shri Ram Balak Mahto, learned counsel for the Chancellor, pointed out that Disability Act has been enacted in exercise of legislative power conferred upon the Parliament under Article 253 of the Constitution which lays down, "Notwithstanding anything in the foregoing provisions of this Chapter, Parliament has power to make any law for the whole or any part of the territory of India for implementing any treaty, agreement or convention with any other country or countries or any decision made at any international conference, association or other body".

In this connection submission of the counsel for the State was

that the Act has been enacted under the general legislative power conferred on the Parliament under Article 245 and not under Article 253. He referred to entries 13 and 14 of List I of the Seventh Schedule to the Constitution. The submission of the State counsel, in my opinion, is beside the point and it is unnecesary to go into the same. I would nonetheless observe that the legislative power of the Parliament is not in dispute and so far as exercise of power is concerned, when special provision has been made conferring power on the Parliament to make law for implementing any treaty, agreement or convention or decision at any international conference etc. The enactment would fall under Article 253 of the Constitution. The preamble specifically mentions that Act was being enacted to implement the proclamation i.e. the decision arrived at an international conference. So far as entries 13 and 14 of List I are concerned they merely empower the Union to participate in international conference and implement the decision made there and enter into treaty and agreement with foreign countries and implement such treaties and agreements respectively.

13. While making general observations reference may also be made to Directive Principles of State Policy in Part IV of the Constitution, particularly Article 41 which lays down :—

"The State shall, within the limits of its economic capacity and development, make effective provision *for securing the right to work, to education* and to public assistance *in cases of unemployment*, old age, sickness and disablement, and in other cases of undeserved want." (emphasis added)

Shri Ram Balak Mahto, rightly, if I may say, submitted that what was earlier envisaged as 'object' of State Policy has now been converted into an 'obligation' of the State. By virtue of the provisions of Article 41 the State was supposed to frame its policy for securing right to education, amongst other things, to persons with disability. A duty is now cast on it under the Disability Act to reserve at least 3 per cent seats for the candidates with disabilities.

14. Now adverting to the stand of the Chancellor, as already observed above, the proposed reservation of 1% of the seats for 'Leprosy Cured' and 'Locomoter Disability' and another 1% of the seats for 'Low Vision' and 'Hearing Impairment' treating them as two separate categories, is not in accordance with law. It is true that all types of disabilities falling within the definitioin under

Section 2(t) of the Act may not qualify for the benefit of reservation in the matter of admission at the degree/master's level; for example, persons suffering from mental retardation or mental illness i.e. lunacy for whom different kinds of facilities are needed, as envisaged in the Disability Act itself, and they thus may not be said to be fit persons to claim benefit of reservatin in the matter of education, there can be no justification to treat the disabilities with respect to which the Chancellor proposes to provide for reservation in separate categories. As all types of disabilities have been mentioned together as one category, I am of the view that the proposed reservation has to be made with respect to them without making any categorisation. In other words, 3% seats to be reserved for them may be filled by persons suffering from 'Low Vision' or 'Leprosy Cured' or 'Hearing Impairment' or 'Locomoter Disability' as the case may be. Where the number of candiates is more than the number of reserved seats selection may be made on the basis of marks. In any view, the proposed reservation to the extent of 2% seats would clearly be short of the requirement. To this extent the affidavit of the Chancellor is rejected. He should make suitable modification' in the proposed regulation for implementing the provisions of the Disability Act in the light of foregoing observations.

15. The stand of the State that reservation of seats for the disabled person can be only against the quota of seats reserved for particular category of reservation is approved. The stand seems to be in accordance with the decision of the Supreme Court in *Indra Sawhney* Vs. *Union of India & ors* (1) The passage occurring at page 566 of the report as under would bring home the point :

> "A little clarification is in order at this juncture : all reservations are not of the same nature. There are two types of reservations which may, for the sake of convenience, be referred to as 'vertical reservations' and 'horizontal reservations]. The reservations in favour of Scheduled Castes, Scheduled Tribes and other backward classes (under Article 16(4) may be called vertical reservations whereas reservations in favour of physically handicapped (under clause (1) of Article 16) can be referred to as horizontal reservations. Horizontal reservations cut across the vertical reservations what is called inter-locking reservations. To be more precise, suppose 3% of the vacancies are reserved in favour of

(1) (1993) A.I.R. (S.C.) 477.

physically handicapped persons; this would be a reservation relatable to clause (1) of Article 16. The persons selected against this quota will be placed in the appropriate category; if he belongs to S.C. category he will be placed in that quota by making necessary adjustments; similarly, if he belongs to open competition (O.C.) category, he will be placed in that category by making necessary adjustments. Even after providing for these horizontal reservations, the percentage of reservations in favour of backward class of citizens remains–and should remain–the same. This is how these reservations are worked out in serveral States and there is no reason not to continue that procedure."

16. This is however only one aspect of the matter. As submitted by Shri Ram Balak Mahto, the Disability Act cannot be fully implemented and the fruits thereof cannot be enjoyed by the disabled persons unless the State Co-ordination Committee and the State Executive Committee under Sections 18 and 19 of the Act are constituted. The State Co-ordination Committee is supposed to review and co-ordinate the activities of all the Departments of the Government and other Governmental and non-Governmental Organisations dealing with the matters relating to disabled persons, develop state policy with respect to disabled persons, advise the State Government on formulation of policies, programmes, legislation and projects with respect to persons with disabilities, take steps to ensure barrier free environment in public places, work places, public utilities, schools and other institutions and so on. The decision of the State Co-ordination Committee is to be carried out by the State Executive Committee. Simply making reservation in the matter of admission or employment without providing coincidental facilities to the persons suffering from disabilities, in my opinion, will not serve the object of reserving seats or posts in the matter of admission or employment as the case may be. From decision in *Javed Abidi* Vs *Union of India & ors* (1) it appears that the Court in view of the grievance of the petitioner that neither Central Government nor the State Government had constituted Central Co-ordination Committee and the State Co-ordination Committees, issued notice to all the State Governments and the Union Territories. From the affidavits filed by them the Court found that Central Co-ordination Committee as well as the State Co-ordination Committees had been constituted

(1) (1999) A.I.R. S.C. 512.

in "most of the States". Perhaps, Bihar was one of the State in which the Committee had not been constituted. In any case, no such statement has been made in the counter affidavit of the State. I would be failing in my duty if I do not take this opportunity to direct the State Government to immediately take necessary steps for constitution of the State Co-ordination Committee as well as State Executive Committee, provide necessary infrastructure to them and make them functional in true sense. The State will also take necessary steps to bring about necessary amendments in Section 61 of the Bihar State Universities Act and Section 58 of the Patna University Act incorporating provisions regarding reservation for the persons with disabilities.

17. Having thus made general observation and given direction regarding implementation of the Disability Act, what remains to consider is the case of the petitioner. From the letter of the Principal, Patna College, dated 5.2.2001 enclosed as Annexure 6 to the writ petition, it appears that though disability of the petitioner entitles him to admission in the disabled category, he is placed at serial no. 8 in the merit list on the basis of marks. 12 candidates in all had applied for admission in that category. There being no dispute about the total number of seats in B.A. (Hons.) Part I course being 400, had 3% seats been reserved for the disabled candidates, the petitioner in the ordinary course would have been admitted. Considering that the proposed amendments in the Patna University Act or the State Universities Act may take time, and the proposed directive of the Chancellor (after necessary modifications as suggested above) to the Universities to make regulations may also take time, it would not be fair to keep admission of the petitioner pending. Though other disabled candidates who had applied along with the petitioner for admission have not approached this Court I do not think it would be proper to deny them the benefit of this order considering that some of them were placed above the petitioner in the merit list. I would accordingly direct the respondents, particularly, the Vice Chancellor, Patna University and the Principal, Patna College to consider the cases of the petitioner and other disabled candidates who had applied for admission pursuant to notice dated 10.1.2001 and in respect to whom the list was notified on 18.1.2001, afresh for their admission in the B.A. (Hons.) Part I course in anticipation of the amendments in the Universities Act and the regulations to be framed pursuant to the directive of the Chancellor. This should

be done within two weeks. In order to remove any doubt I would clarify that the petitioner and others willing disabled candidates shall be admitted notwithstanding that the total number of sanctioned seats might have already been filled and further, their admission will be in the particular category to which they belong i.e. SC/ST/Backward Class cateegory etc. or un-reserved category, as the case may be.

18. In the result, this writ petition is allowed with the observations and directions mentioned above. There will be no order as to costs.

R.D. *Application allowed.*

CIVIL WRIT JURISDICTION

Before Sachchidanand Jha and Mrs. Indu Prabha Singh, JJ.

2001
April, 4.

*Dr. Anirudh Mishra.**

v.

The State of Bihar and ors.

Service—whether in Inter-se seniority in merged gradation list the criteria of date of entry in service or pay scale is to be followed—circular no. 15784 of the Personnel Department dated 26.8.72 lays down principles for fixation of inter-se seniority in the State Services in cases of direct recruitment vis-a-vis promotion/ merger.

Circular no. 15784 of the Personnel Department dated 26.8. 1972 lays down principles for fixation of inter-se seniority for fixation of direct recruitment, promotion, vis-a-vis promotion merger.

Held, that where appointment/promotion/merger takes place, the determining factor of seniority would be the pay drawn by the person, ie, if he was drawing pay in the higher scale or drawing higher pay in the same scale.

Held, further, that the petitioner at the time of merger held the post of Deputy Superintendent, Government Ayurvedic College and Hospital, Patna in the Scale of Rs. 415-745. The posts held by respondents concerned were in the scale of 249-460, hence they cannot be treated to be senior to the petitioner merely on the ground that they were appointed earlier in point of time.

Held, also that the crieteria laid down in paragraph 1 (kha) of the impugned resolution dated 19.8.96 fixing seniority on the basis of the date of first joining, ie. date of entry in the service, must be held to be arbitrary and therefore violative of Article 14 of the Constitution of India.

Case laws considered.

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 Sachchidanand Jha, J.

* Civil Writ Jurisdiction Case No. 2353 of 1987, in the matter of an application under Articles 226 and 227 of the Constitution of India.

M/S Kamal Nayan Choubey, Dharnidhar Mishra, Binay Kant Mani Tripathi & Sanjay Kumar Pandey for the petitioner.

Mr. Anil Kumar Verma, JC to GA for the State.

Mr. Ashok Kr. Singh for respondent 44.

S.N. Jha & Mrs. I.P. Singh, JJ. The dispute in this writ petition relates to seniority. The petitioner seeks quashing of the impugned gradation lists in which he has been placed below the respondents. The gradation lists referred to in the petition are dated 2.10.80 contained in Annexure-8, 15.5.81, contained in Annexure-10, 20.1.84 contained in Annexure-12 and 31.3.987 contained in Annexure-14. During the pendency of the case a revised gradation list was published on 19.8.96 vide Annexure-24. The petitioner seeks quashing of the said gradation list by amendment.

2. As the earlier gradation lists have been revised and stand merged in the gradation list dated 19.8.96, it is not necessary to refer to the inter se seniority of the parties in the earlier lists. It may be mentioned at the outset that out of 40 private respondents originally impleaded in the case, 27 appear to have retired from service during the intervening period on reaching the age of superannuation and therefore, the dispute relating as to seniority is now confined to between petitioner on the one side and respondent nos. 21, 22, 25, 26, 27, 30, 31, 32, 34, 36, 38, 42 and 44 on the other. 15 more persons were sought to be added as respondents vide I.A. no. 3942/97 after the revised gradation list dated 19.8.96 was published, but the same was not even referred to at the time of hearing.

3. From the body of the resolution dated 19.8.96 under which the gradation list was finalised and published, it appears that the State Government evolved two-fold criteria for fixing inter se seniority. In cases where appointments were made from different sources and not in the same transation, or from a common list after comparative assessment of the merit of the persons concerned, their seniority was determined on the basis of the date of first joining i.e. date of entry in the service. With respect to those who were appointed pursuant to selection by the selection Committee of the Department, their seniority was fixed on the basis of merit position in the select list.

4. Shri Kamal Narayan Choubey submitted that the petitioner was appointed on the post of Deputy Superintendent, Government

Ayurvedic College, Patna in the scale of Rs. 415-745 but by reason of merger of administrative and teaching posts and provision for a common scale of pay the petitioner has been placed below the persons who in the lower scale of Rs. 296-430 on the basis of date of appointment. He submitted that where appointment is made from different sources, on merger of posts the date of entry in service should not be treated as the criterion for determining seniority specially when the posts carried different scales of pay. He pointed out that while in the earlier gradation lists, the petitioner was placed at Sl. No. 41, in the revised gradation list dated 19.8.96 his position slided down to Sl. No. 51 on account of wrong fixation of seniority. In support of the contention, he placed reliance on *Om Prakash Sharma and ors.* Vrs. *Union of India and ors* (1) and *Bihar State Text Book Publishing Corporation* Vrs. *Basudeo Singh and others* (2)

5. The submission of the counsel, in our opinion is well founded and finds support from circular no. 15784 of the Personnel Department dated 26.8.72. The said circular lays down general principles for fixation of inter se seniority in the State Services in cases of direct recruitment, promotion, direct recruitment vis-a-vis promotion, merger etc. Before referring to the relevant paragraph of the Circular, it may be useful to refer to its introductory part so far as relevant, as under :—

> ".....Wherever separate cadre or groups of posts are amalgamated to form a single cadre, inter-se seniority of incumbents coming from different source is required to be refixed....."

The principle laid down for fixing seniority in such cases as contained in sub-para (ii) read with sub-para (iv) as under :

> "(ii) Where officers serving within the department but in different posts are recruited at the same time by direct appointment, their inter-se seniority will be determined according to sub-para (iv) below irrespective of the date of their joining the posts to which they are appointed."
>
> (iv) Where officers are promoted to a service at the same time but from different services, their inter-se seniority is fixed according to the following.
>
> (a) ... ...
>
> (b) ... ...

(1) 1985 AIR. SC 1276
(2) (1996) (2) PLJR. 11

(c) Where no such order of merit is fixed, persons who had drawn higher pay, or pay in a higher scale in the lower posts from which they are promoted shall rank senior to another person who had drawn lesser pay, or pay in lower scale. In case the pay scales are identical persons who had drawn higher pay shall rank higher. If two such persons had been drawing pay at the same stage in the identical time scale of two different service their seniority on promotion shall be determined according to age.

6. Sub-para (ii) in terms refers to appointment and sub-para (iv) in terms refers to promotion–both from different sources. But a combined reading of the two, in context, makes it clear that the principle as laid down therein would govern cases of merger of different posts. It would make little difference whether it is a case of appointment or promotion to the post from different sources or different posts are merged. Where such appointment/promotion/merger takes place, the determining factor of seniority would be the pay drawn by the person. If he was drawing pay in the higher scale or drawing higher pay in the same scale, he would rank senior to the person who was drawing pay in the lower scale or lower pay in the same scale. To the same effect was the earlier circular of the Appointment Department (now known as Personnel Department) no. A-3650 dated 6.4.56. So far as relevant, it may be quoted as under.

"(3) (a) Where no such order of merit is fixed, a person who had drawn higher pay or pay in a higher scale, shall rank senior to another who had drawn lesser pay, or pay in a lower scale.

(b) If persons belonging to different services having identical scales of pay are promoted to another service at the same time, a person who had drawn higher pay shall rank higher. If two such persons had been drawing pay at the same stage in the identical time scale of the two services, their seniority on promotion shall be fixed according to age."

The decision of this Court in *Bihar State Text Book Publishing Corporation* Vrs. *Basudeo Singh* (supra) is also to the same effect. The Court stated as under :—

"I hold that earlier date of initial appointment to lower grade/grades has got no nexus, for the purpose, of determination of seniority in the higher grade, except where

the date of entry in the higher grade is the same. It is for the said reason, I hold that the ratio laid down by the learned Single Judge that the date of initial appointment in the Corporation will be the criteria for determination of seniority as completely against the law, the same being violative of Articles 14 and 16 of the Constitution of India."

7. At this stage we may mention that though quite a number of private respondents have entered appearance through counsel and filed counter affidavits, none of them except respondent no 44 appeared at the time of hearing of the case. The State counsel also did not render any assistance to the Court whatsoever. He said that he did not have file of the case. All that counsel for respondent no. 44 said was that the appointment of the petitioner was ad hoc and not as per the prescribed procedure. We therefore, considered the case of the petitioner virtually ex parte. Regretfully, the submissions of the counsel for the petitioner too were rather sketchy. We looked into the counter affidavit of the State of Bihar and found that the same was filed in 1988 much before the finalisation of the revised gradation list of 1996. In the absence of proper assistance from the parties and their counsel we felt little handicapped. However, on the basis of what has been conveyed to us on behalf of the petitioner it appears that the petitioner at the time of merger held the post of Deputy Superintendent, Government Ayurvedic College and Hospital, Patna in the scale of Rs. 415-745. If it is a fact that the posts held by respondents concerned were in the scale of 249-460, they can not be treated to be senior to the petitioner merely on the ground that they were appointed earlier in point of time. It is well settled that in the absence of statutory rules, the criteria, procedure of appointment, promotion, seniority etc. can be laid down by executive instructions. Reference may be made to the well known case of *Sant Ram Sharma* Vs. *State of Rajasthan* (1) Viewed in the light of the circular dated 26.8.72 (supra), there appears little room for doubt that where the appointment or promotion is made from two sources or posts are merged, the person getting pay in the higher scale or higher pay in the same scale, must be treated as senior to his counter part getting pay in the lower scale or lower pay in the same scale. We would therefore, without going into individual cases, observe that if the case of the petitioner that at the time of merger he was getting pay in the higher scale than the respondents is true, he

(1) (1967) AIR. (SC) 1910

must be treated senior to them. In any view, the criterion laid down in paragraph 1 (Kha) of the impugned resolution dated 19.8.96 fixing seniority on the basis of the date of first joining i.e. date of entry in the service, must be held to be arbitrary and therefore, violative of Article 14 of the Constitution of India. To this extent, the impugned gradation list cannot be sustained.

8. We accordingly direct the State Government to re-fix the seniority of the petitioner vis-a-vis the respondents in the light of circular No. 15784 dated 26.8.72 and, further, in the light of the observations made hereinabove and consider the case of the petitioner, and/or others for promotion to the higher post accordingly.

9. In the result this writ petition is allowed in the manner indicated above, without any order as to costs.

S.D. *Application allowed.*

FULL BENCH

Before Negendra Rai, Aftab Alam and Shiva Kirti Singh, JJ.

2001
May, 4.

*The C.B.I. (AHD), Patna.**

v.

Braj Bhushan Prasad and ors.

Bihar Reorganisation Act, 2000 (Central Act No. XXX of 2000), section 89 (1)—upon creation of the State of Jharkhand, every proceeding pending before a court in Bihar shall stand transferred to the corresponding court in Jharkhand *if it is a proceeding relating exclusively to the territory of Jharkhand*—interpretation of—sub-section (2) of Section 89—if a question arises as to whether any proceeding should stand transferred under sub-section (1), it would be referred to Patna High Court for decision—Reference by the Standing Committee of Patna High Court and by the trial court—maintainability of—36 cases in which C.B.I. submitted charge-sheets in Bihar, whether could be transferred to Jharkhand State—jurisdiction.

Per Curium

Where in 36 cases which is commonly known as the Animal Husbandry scam case, C.B.I. had already submitted charge-sheets after the conclusion of investigation and in respect of which the parties are in dispute as to whether these cases would stand transferred to Jharkhand State by virtue of section 89 (1) of the Bihar Reorganisation Act, 2000.

Held, that there is no basis in law to hold that a reference under section 89 (2) of the Bihar Reorganisation Act, 2000, hereinafter referred to as the Reorganisation Act, can be made in no other way but by an order passed by the trial court. That the reference made on the basis of a resolution of the Standing Committee is a perfectly valid reference and there is no reason for this court not to answer the reference. It is true that *ordinarily* a dispute arises between the parties in course of the proceeding before the trial court and ordinarily a reference is made by an order passed by the trial court but what might happen ordinarily cannot be held to be the only legal and valid courses. Section 89 (2) of the Act does not lay down any

* Criminal Reference Nos. 1 and 2 of 2001.

particular manner in which a reference is to be made. There is no legal bar precluding the Standing Committee from taking the decision that the issue in dispute should be decided by the judicial side of the High Court and making a reference accordingly.

Per Aftab Alam and Shiva Kirti Singh, JJ : (Nagendra Rai, J Contra)

Held, further, that all such proceedings, though relating to the territories of Jharkhand, the institution of which in courts remaining in the truncated State of Bihar was lawful and valid because of the nature of offences or because of a part of the cause of action had arisen outside those territories will not be covered by section 89 (1) and shall therefore continue to be tried by the respective courts of Bihar.

Held, also, that the fountainhead of the conspiracy and of the criminal acts flowing from the conspiracy, was at Patna, part of the alleged offences, rather a substantial part of the alleged offences were committed at Patna and the special court at Patna equally had jurisdiction to try cases. Consequently it is held that these cases do not relate exclusively to the territory now-forming part of the State of Jharkhand and, therefore, these cases cannot be said to have been transferred to the Court in Jharkhand as provided under section 89 (1) of the Bihar Reorganisation Act, 2000. These cases will, therefore, continue to proceed before the Special Judge at Patna.

Per Nagendra Rai, J.

Held, that the word "exclusively" used in section 89 of the Reorganisation Act has to be given a wider meaning. If the offences have been committed in different territories, part of which now falls in the State of Jharkhand and part of which also falls in the State of Bihar then under the law, the cases may be tried by the courts located at the places falling within the territories of both the States. If the cases can be tried by the Courts situate in both the States then there will be no use of transferring the cases from the courts falling within the territory of one State to the court falling within the territory of other State. The word "exclusively" used in section 89 of the Reorganisation Act means exclusion of all others. only those cases, which exclusively belong to the territor of the State of

Jharkhand shall alone be transferred. If place of crime of a particular case or proceeding falls in territory of State of Bihar as well as the territory of Jharkhand State after the appointed day then if the case/proceeding is pending in the court falling in the territory of State of Bihar, the said case cannot be transferred to the Court in the State of Jharkhand for the simple reason that it cannot be said that the proceeding relates exclusively to the territory of State of Jharkhand.

Held, further, that from a perusal of the F.I.Rs., materials collected during investigation and the voluminous charge-sheets in the 23 cases incorporated in paragraph 105 of this judgement, it is clear that there is no allegation in the aforesaid cases that the conspiracy, alleged to have been hatched up, was either entered into at Patna or at any place falling in the State of Bihar. The materials show that there is specific statement with regard to the allegation of commission of the offences at places, which fall within the territory of Jharkhand State. In the 23 cases mentioned in paragraph 105, aforesaid, no part of occurrence had taken place within the territory of State of Bihar and as such shall stand transferred to the State of Jharkhand in terms of the provisions contained in section 89 (1) of the Bihar Reorganisation Act, 2000.

Held, also, that as regards remaining 13 cases as mentioned in paragraph 106 of this judgement, on perusal of the materials available on the record, it is clear that either there is allegation that the conspiracy had taken place at Patna or part of the substantive offences are alleged to have taken place in Patna, Bhagalpur and other places falling within the State of Bihar and as such those cases cannot be said to be related exclusively to the territory of State of Jharkhand and as such the said cases, cannot be transferred in terms of the provisions contained in section 89 (1) of the Reorganisation Act.

Case laws discussed.

References under section 89 (2) of the Bihar Reorganisation Act, 2000.

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

Mr. Rakesh Kumar & Mr. Manoj Kumar and *Mr. Arvind Kumar*, Advocates in both the cases for the C.B.I.

For the O. Parties : Mr. P.N. Pandey, Mr. Rana Pratap Singh, & Mr. Ganesh Pd. Singh, Sr. Advocates, with Messrs Chitranjan Sinha, Jitendra Singh, Binod Shankar Tiwary, Nitayanand Jha, Anand Kumar Ojha, Rajiv Ranjan, Raj Kishore Singh, Manoranjan Sinha, Pradeep Kr. Tiwary, Raj Kumar Sahay, Vijay Kr. Sinha, Binay Kumar, Arvind Pd. Singh, Bipin Kumar Sinha, Rajeev Ranjan, Pramod Kumar, Manish Kumar, Prakash Chandra, Pawan Kumar Choudhary, S.K. Pandey, Sanjay Kumar, Shree Kant Pandey, Rajendra Narain, Prakash Kr. Sahai, Raj Kishore Sinha, Anju Narain, Prabhat Kumar, Anirban Kundu, Suraj Narain Yadav, Niraj Kumar Srivastava, Akhileshwar Prasad, Arjun Singh, Binod Kumar No. 3, Rajesh Kumar, Anup Kumar Sinha for the opposite parties.

Aftab Alam. J. These two proceedings before the Full Bench are on reference made under section 89 (2) of the Bihar Reorganisation Act, 2000. The object of the reference is to determine whether by virtue of section 89 (1) of the Act the criminal cases, commonly known as the Animal Husbandry Scam cases, stand transferred to the court in Jharkhand, the newly created State of Jharkhand, or whether those cases would continue to proceed before the Special Court at Patna where they were instituted and where they have been hitherto proceeding. According to Section 89(1) of the Act, upon the creation of the State of Jharkhand, every proceeding pending before a court in this State shall stand transferred to the corresponding court in Jharkhand *if it is a proceeding relating exclusively to the territory of Jharkhand.* Sub-section (2) of Section 89 provides that if a question arises as to whether any proceeding should stand transferred under sub-section (1), it would be referred to the Patna High Court and the decision of this court would be final.

2. It is well known that by an order passed by a bench of this court the investigation of all the Animal Husbandry cases was made over to the Central Bureau of Investigation (C.B.I. for short). Further, by an order passed by the Supreme Court the investigation by the C.B.I. was put 'under the over all control and supervision' of a bench of this court. The matter, thus, periodically comes before the monitoring bench of this court. On one such occasion the matter came up before the monitoring bench on 10.11.2000, that is to say, five days before

the new State of Jharkhand was to come into being under the Bihar Reorganisation Act. On that date the monitoring bench recorded an order simply adjourning the matter to 12.1.2000 with the direction to the agency to file the progress report as usual. The C.B.I. then filed a petition before the Supreme Court seeking clarification of its order dated 19.3.1996 consequent upon reorganisation of the State of Bihar and stating that the petition was being filed 'pursuant to the oral observation made by the monetoring bench of the Patna High Court, monitoring the animal husbandry department scams whereby the Bench on 10.11.2000 directed the Central Bureau of Investigation to seek the clarification from the Hon'ble Court, the order of this Hon'ble Court dated 19.3.1996 with regard to further monitoring'. In paras 6 and 7 of that petition it was represented before the Supreme Court as follows :

> "6. It is submitted that out of the 61 cases registered by Central Bureau of Investigation (C.B.I.) so far 52 *cases stand deemed to be transferred* to the corresponding courts in the new State of Jharkhand.
>
> "7. Thus, the monitoring bench has sought clarification as to whether the monitoring bench still have jurisdiction to monitor the investigation of *the aforesaid 52 cases* also or a separate monitoring bench will have to be constituted by Hon'ble High Court of Jharkhand for the aforesaid period."

3. It will be appropriate to indicate here that at that time out of the 52 cases which according to the C.B.I. stood transferred to Jharkhand by virtue of section 89 (1) of the Act, in 35 cases the Special Court at Patna had already passed orders taking cognizance on the basis of charge-sheets submitted by the C.B.I., in one case though charge-sheet was submitted by the C.B.I. the court was yet to take cognizance and in the remaining 16 cases the C.B.I. was yet to submit charge sheets.

4. The petition filed by the CBI was disposed of by the Supreme Court by order, dated 13.12.2000 and from that order it appears that when the petition was taken up a dispute was raised on behalf of some of the accused, atleast in respect of the number of cases suggested by the CBI as having stood transferred to Jharkhand. It will be useful to reproduce here

portions of the order of the Supreme Court in so far as relevant for the present :

> "It was the stand of the CBI that out of 61 cases registered by the CBI, so far 52 cases stood transferred under section 89(1). Mr. B.B. Singh, learned counsel appearing for Mr. Lalu Prasad Yadav submitted that the said figure is not correct at all. We do not think it necessary to decide that dispute, for section 89(2) provides a machinery to decide whenever any question arises as to whether any proceeding should stand transferred under sub-section (1) or not. We leave that dispute to be determined in accordance with the sub-section.
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> ".....
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> ".....
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> ".....
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> "An apprehension is expressed by Mr. Kapil Sibbal, learned Senior counsel appearing for the respondents that cases which have not really been transferred in accordance with section 89 (1) might as well figure in the list as having been transferred. To alleviate the said apprehension, Mr. Harish Salve, learned Solicitor General submitted that a list has already been prepared showing the cases which are falling within the ambit of Section 89(1) of the Act and a copy of the said list will be supplied to Mr. Chitaranjan Singh, Advocate who is present today."

5. Following the order passed by the Supreme Court, the D.I.G. of Police, CBI, Patna Region, Patna addressed a letter, dated 30.11.2000 to the Registrar General of this court, practically asking him to have the records of the 52 cases (a list of which was appended to the letter), pending before the designated court at Patna, transferred 'to the court of existing Special Judge, CBI Cases, Ranchi as stop gap arrangement till the creation of designated court (s) at Ranchi for the exclusive trial of AHD cases'. A list of the 52 cases, which according to the CBI 'stand transferred to the court (s) located in the State of Jharkhand' was also handed over to Shri C.R. Sinha, Advocate for one of the accused in those cases along with the letter of the S.P., CBI (AHD) Patna, dated 14.12.2000. Shri

Sinha by his letter, dated 18.12.2000 addressed to the Registrar General of this court disputed the stand of the CBI and stated that in the light of the charge sheets no case of the AHD Scam was exclusively triable in Jharkhand and no case was, therefore, required to be transferred to that State.

6. The matter came up for consideration before the Standing Committee of the High Court on 5.1.2001. It was evident to the Standing Committee that a dispute had arisen on the issue whether or not the 52 cases mentioned in the list appended to the letter of the D.I.G, CBI, dated 30.11.2000 were covered by section 89(1) of the Act and, therefore, stood transferred by operation of law to the State of Jharkhand. The way to resolve such a dispute was provided in sub-section (2) of section 89 and this fact was also clearly noticed by the Supreme Court in its order dated 13.12.2000. The Standing Committee, therefore, resolved to refer the matter for a decision to the judicial side of the court. This gave rise to the proceeding registered in the court's office as Criminal Reference No. 01/ 2001 which was taken up when the Full Bench assembled for the first time on 12.1.2001. On that date the Full Bench was informed that the issue under reference was also under consideration by Special Judge (CBI), AHD, Patna and the hearing before the trial court was likely to conclude shortly. On that date the Full Bench directed for issuance of notice to the parties concerned and adjourned the hearing, allowing time to the parties to file paper books etc.

7. Around the same time while the C.B.I. gave its letter to the Registrar General of this Court, a petition was filed before the Special Judge, C.B.I. (AHD Cases), Patna on 3.1.2001 making a prayer to transfer the case records of the 52 cases to the court of Special Judge, CBI, Ranchi. Before the Special Judge 48 out of 51 accused filed separate petitions, raising objections to the prayer made on behalf of the prosecution. The trial court heard the parties in R.C.No. 20A/96 : Special Case No. 22/96. It may be stated here that in Special Case No. 22/ 96 the trial had started after framing of charges against the accused and 39 prosecution witnesses were already examined by that time. The trial court disposed of the petition filed by the prosecution by order dated 17.1.2001. In paragraph 14 of the order the trial court recorded its finding :

".....that instant proceeding does not fall into the category of proceeding relating exclusively to the territory of State of Jharkhand. The document of prosecution itself goes to cut the root of the prayer of the prosecution. The prosecution has failed to make out a clear case to attract the word 'exclusively'. Thus the prosecution has got no legs to stand upon."

8. However, a dispute had arisen on the issue whether those cases stood transferred by virtue of section 89(1) and as any decision on that dispute could only be made by the High Court in terms of section 89(2) of the Act, the trial court referred the issue in dispute to the High Court. This gave rise to Criminal reference No. 02/2001 which also came up before the Full Bench hearing the matter and joined the earlier reference made at the instance of the Standing Committee of the High Court.

9. In these facts and circumstances Mr. Jitendra Singh, counsel appearing for one of the accused (namely, Dr. K.N. Prasad) sought to raise some preliminary objections. Mr. Singh submitted that this Full Bench should decline to answer the reference or in any event it should answer the refernece only in respect of Special Case No. 22/96 in which the reference was made by the trial Court. Learned counsel submitted that Criminal Reference No. 01/2001 made at the instance of the Standing Committee of this court was no reference in the eyes of law and the Full Bench was, therefore, obliged not to answer the 'reference'. Learned counsel maintained that the only way a reference could come to this court under section 89(2) of the Act was on the basis of an order made by the trial court before which alone a question could arise at the first instance.

10. I am unable to accept the submission. There is no basis in law to hold that a reference under section 89(2) of the Act can be made in no other way but by an order passed by the trial court and I have not the slightest doubt that the reference made on the basis of a resolution of the Standing Committee is a perfectly valid reference and there is no reason for this Court not to answer the reference. It is true that *ordinarily* a dispute arises between the parties in course of the proceeding before the trial court and ordinarily a reference is made by an order passed by the trial court but what might happen ordinarily

cannot be held to be the only legal and valid course. Section 89(2) of the Act does not lay down any particular manner in which a reference is to be made. Hence, there was no legal bar precluding the Standing Committee from taking the decision that the issue in dispute should be decided by the judicial side of the Court and making a reference accordingly.

11. As regards the other reference coming on the basis of the order passed by the trial court it may be noted that though after hearing the parties the trial court passed the order in the records of Special Case No. 22/96, the petition filed on behalf of the prosecution was in respect of all the 52 cases. Hence, I am satisfied that though the trial court recorded the reference order in Special Case No. 22/96, it would relate to all the cases for the transfer of which the prayer was made in the petition filed by the prosecution. I thus find no substance in this objection raised by Mr. Singh.

12. Mr. Singh then raised another objection stating that in the State of Jharkhand there was no Court, corresponding to the Special Court, CBI (AHD), Patna and the cases therefore could not be transferred as provided under section 89(1) of the Act. Mr. Singh pointed out that in the letter of the D.I.G., CBI, dated 30.11.2000, addressed to the Registrar General of this court, it was stated that it seemed imperative to transfer the case records" to the court of existing Special Judge, CBI Cases, Ranchi *as stop gap arrangement till the creation of designated court (s) at Ranchi for* the exclusive trial of the AHD cases". According to Mr. Singh this amounted to an admission that at least for the present there was no court in Ranchi corresponding to the designated court at Patna and, therefore, according to the submission, the provisions contained in section 89(1) of the Act were unworkable and unenforceable.

13. I am satisfied that the objection raised by Mr. Singh does not constitute a ground to decline to answer the reference and to reject it on the threshold. It may, however be stated here that the question regarding the appropriate court where these cases could be instituted and tried has been dealt with in greater detail in the latter part of this judgment.

14. At this stage it would be appropriate to refer to another controversy arising in course of hearing of the reference. That controversy arose due to certain development taking place

before the monitoring bench. As noted above, the investigation of the cases arising from the Animal Husbandry Scam was being conducted by the CBI under the over all control and supervision of a bench of this court. Consequent upon the division of the State and after the order, dated 13.12.2000 passed by the Supreme Court (referred to hereinabove) the monitoring becnh considered the question as to which of the cases, still under investigation, it would continue to monitor. At that stage the position was that out of the total cases registered, charge sheets were yet to be filed in 24 cases. In other words, in 24 out of the total number of cases investigation remained inconclusive. The monitoring bench took the view that on the basis of the order passed by the Supreme Court it was required to over-see and control the investigation and once the investigation in a case was over that case went beyond its purview and into the realm of trial. The issue of transfer of cases in which investigations were completed, charge-sheets were submitted and orders of cognizance were passed by the trial court were thus not the subject matter of consideration by the monitoring bench and the issue of their transfer to the court in Jharkhand would abide by the decision by this Full Bench. The monitoring bench would only consider which of the cases, still under investigation, it would continue to monitor and which of the cases, still under investigation, it would stop monitoring. The accused felt that an order by the monitoring bench that it would stop monitoring certain cases, in practical terms, would amount to transfer of those cases to Jharkhand and it was perhaps contended on their behalf that all the 52 cases, of which a list was submitted by the C.B.I, whether under investigation or whether at the stage of trial, should be considered on the issue of their transfer to Jharkhand in one package and at the same time. On 7.2.2001 the monitoring bench passed the order on the question as to the cases which it would continue to monitor and the cases which it would not monitor any longer. A copy of that order was produced before this Full Bench in course of hearing of this reference. In that order the monitoring bench divided the cases in two categories, one in which the investigation was still incomplete and charge-sheet was not submitted and the other in which investigation was over and charge-sheet was submitted. The monitoring

bench held that investigation of an offence was not a proceeding within the meaning of Section 89(1) of the Act and, therefore, the cases in the first category were not covered by section 89(1) of the Act and it was cases only in the second category which were covered by section 89(1) of the Act and the issue of transfer of those cases will abide by the decision of this Full Bench. In that regard the monitoring bench went on to clarify as follows :

> "We may observe that by our present order what we are considering is not transfer of cases, as such, we are concerned only with the monitoring of the investigation."

15. The monitoring bench further went on to say as follows :

> "The C.B.I. has furnished list of cases, investigation of which, according to it, is to be monitored by the Patna High Court, and Jharkhand High Court respectively. The basis of identification being the place of occurrence. The cases having places of occurrence at Patna or other places within the territorial jurisdiction of this court have been mentioned in one category, while those whose places of occurrence are at Dumka, Chaibasa, Ranchi and other places within the territorial jurisdiction of Jharkhand High Court have been mentioned in the second category. In our opinion, since the jurisdiction of this Court is limited to the control and supervision of investigation upto the stage of submission of charge-sheets, and we are not concerned with the question of transfer of cases i.e. proceedings after submission of charge sheets, *it would be appropriate to confine ourselves to the cases which were instituted by the State police at the police stations, within the territorial jurisdiction of this Court. In other words, the place of institution of the cases should determine the jurisdiction of the monitoring bench.*"
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> ".....Thus, the jurisdiction of this Bench will henceforth be limited to the cases which were originally instituted by the State Police at Police Stations falling within the territory of the truncated State of Bihar as well as the cases later instituted by the C.B.I. on its own on the basis of preliminary inquiry at its Patna Bench, in which place of occurrence falls within the truncated State of Bihar wholly or partly. C.B.I. shall identify those

cases and submit progress reports regarding those cases as before by the next date.

We again clarify that so far as transfer of proceeding after submission of charge sheets is concerned it would abide by the principles laid down by the Special Bench."

16. It is thus to be seen that the monitoring bench meticulously confined itself to stating which of the cases, still under investigation, it would continue to monitor and which of the cases it would not monitor any longer. The monitoring bench did not say anything about the cases, still under investigation, which it declined to monitor any longer.

17. That order was passed by the monitoring bench on 7.2.2001 and on that date itself Mr. Rakesh Kumar, counsel for the C.B.I. submitted before this Full Bench that though the reference was for 52 cases of which the list was submitted by the C.B.I. he would confine his prayer for transfer only in respect of 36 cases (in which charge-sheets were already submitted). This caused considerable resentment amnong the counsel appearing for the different sets of accused. It was pointed out that the order passed by the monitoring bench, releasing certain cases (which were still under investigation) from its monitoring was plainly being taken by the C.B.I. as an order of transfer of those cases to Jharkhand. It was submited that in doing so the C.B.I. was trying to over-reach this Full Bench before which the entire matter was open in respect of all the 52 cases of which the list was given by the C.B.I. The counsel made the grievance that the observation made by the monitoring bench in its order, dated 7.2.2001 that cases still under investigation were not covered by section 89(1) of the Act tended to take all those cases out of the purview of the Full Bench. In other words, the scope of the reference before the Full Bench was sought to be circumscribed even before the Full Bench got an opportunity to hear the parties on the question whether or not cases which were still under investigation were covered by the expression 'proceeding' used in section 89 (1) of the Act. Counsel after counsel appearing for the different sets of accused urged that the Full Bench should decide for itself whether or not section 89(1) will take into its sweep cases still under investigation and a number of counsel sought to advance submissions that a case under investigation was as much a

'proceeding' as a case in which investigation was concluded and for the purpose of section 89(1) it would be quite unreasonable and unwarranted to categorise cases on the basis whether investigation had concluded or not.

18. The counsel were not exactly disallowed but they were certainly discouraged from making submission on the question whether the expression "proceeding" used in Section 89(1) of the Act would also include a case at the stage of investigation. This is because in the facts and circumstances as stated above, I am clearly of the view that this question does not require to be decided in this reference. The position, as I see it, is like this. The C.B.I. though having given a list of 52 cases now wishes to confine its prayer for transfer of cases to the State of Jharkhand. only in respect of 36 cases. The different sets of accused oppose the prayer. The parties are, thus, in dispute in respect to those 36 cases only. As regards the remaining cases, still under investigation, those were subject to the control and supervision of the monitoring bench of this court. The monitoring bench is in control and supervision of the investigation on the basis of the directions given by the Supreme Court. It is, therefore, not for this Full Bench to make any comment, much less to sit in appeal on an order passed by the monitoring bench, releasing some of the cases under investigation from its supervision and control.

19. Moreover, as noted above, the monitoring bench has taken care not to say anything in respect of the cases which it released from monitoring. In case any of the accused are aggrieved by any action of the C.B.I. purporting to act on the basis of that order, such as submitting the final report in those cases before a court which according to the accused may not be the appropriate court, it will always be open to the person aggrieved to seek relief (s) in accordace with law. But this Full Bench will certainly decline to enter into that controversy and to record a finding or issue a direction requiring the monitoring bench to continue to keep under its supervision and control the cases which it has released from monitoring by its order, dated 7.12.2000.

20. I will, therefore, proceed to examine only the 36 cases in which the C.B.I. has already submitted charge-sheets after the conclusion of investigation and in respect of which the

parties are in dispute as to whether these cases would stand transferred to Jharkhand by virtue of Section 89(1) of the Act.

21. The answer to the question whether these 36 cases should stand transferred under Section 89(1) naturally demands a correct understanding of that Section and it is now time to take a look at Section 89 of the Act :

Transfer of pending proceedings.—

(1) Every proceeding pending immediately before the appointed day before a Court (other than the High Court), Tribunal, authority or officer in any area which on that day falls within the State of Bihar shall, if it is a proceeding relating exclusive by to the territory, which as from that day is the territory of Jharkhand, State, stand transferred to the corresponding court, tribunal, authority or officer of that State.

(2) If any question arises as to whether any proceeding should stand transferred under sub-section (1), it shall be referred to the High Court at Patna and the decision of that High Court shall be final.

(3) In this Section.–

(a) "proceeding" includes any suit, case or appeal; and

(b) "corresponding court, tribunal, authority or officer" in the State of Jharkhand, means–

(i) the court, tribunal, authority or officer in which or before whom, the proceeding would have laid if it had been instituted after the appointed date; or

(ii) in case of doubt, such court, tribunal, authority or officer in that State, as may be determined after the appointed day by the Government of that State or the Central Government, as the case may be, or before the appointed day by the Government of the existing State of Bihar to be the corresponding court, tribunal, authority or officer.

22. For an easy understanding I propose to reduce Section 89(1) as follows :

"Every proceeding pending .....before a court.....within the State of Bihar shall, if it is a proceeding relating exclusively to the territory.....of Jharkhand State, stand transferred to the corresponding court.....of that State."

23. Much arguments were made by Counsel appearing for the parties on the meaning of the expression a proceeding relating exclusively to the territory of Jharkhand. State, occurring in section 89(1) of the Act. Mr. Rakesh Kumar, counsel for the CBI submitted, with reference to the Black's Law Dictionary, that 'larger portion' and 'substantially' were also among the different meanings of the word exclusive and, according to him, it was in that sense that the word exclusive, used in the section, was to be understood. Mr. Jitendra Singh, and other counsel appearing for the accused, on the other hand, maintained that the word exclusive appearing in section 89(1), meant 'to the exclusion of all other' and further submitted that giving to the word exclusive, the meaning suggested by Mr. Rakesh Kumar will only add to the uncertainty and confusion, as a question would then arise in the facts and circumstances of a given case what might make 'larger portion' and what might comprise 'substantially'. Though between the two stands I find the one being espoused by Mr. Singh to be on firmer grounds, I cannot help but feel that these submissions only scratch the surface and do not get to the root of the issue. I think that labouring over the meaning of the word exclusive would be hardly of any help unless one clearly understands how can a proceeding be said to relate to a territory. In this regard a suggestion was made at the bar that the proceeding would relate to the territory where the occurrence took place (in a criminal case) and where the disputed property was situated (in a civil case). But to make the place of occurrence or the citus of disputed property as the basis for judging whether a proceeding relates to a territory does not appear to me to be quite satisfactory as that would put the co-relation between the proceeding and the territory within unduly narrow confines. In criminal matters the place of occurrence is known definitely only in certain kinds of offences, whereas in many kinds of offences the place of occurrence may be either unknown or uncertain or at more places than one. In civil matters similarly, the test based on the citus of the disputed property would fail to account for a very large number of civil litigation relating to contracts and other civil rights. Any direct nexus between territory and cases, either under civil law or under criminal law would be established only in a limited number of cases. And I,

therefore, feel that a more satisfactory test must be found out for determining whether or not a proceeding relates to a territory.

24. Having given my anxious consideration to the matter I feel that the co-relation between a territory and a proceeding can be satisfactorily understood in the context of the Act only with reference to courts' jurisdiction. That is to say, a proceeding can be said to relate to a territory if the court established in that territory would have jurisdiction to try that proceeding under the relevent procedural laws. Consequently, a proceeding can be said to relate exclusively to a territory if the court in that territory would have the exclusive jurisdiction to try that proceeding.

25. Having understood how a proceeding can be said to relate to a territory, I would further venture to say that the key to understand the true import of Section 89(1) lies in understanding what is unsaid and only implicit in that section. What is implicit in Section 89(1) is that even in the unified State of Bihar it was possible that proceedings relating exclusively to the territory now forming the State of Jharkhand could be instituted in courts outside that territory and as a consequence on the date the new State came into being, certain proceedings relating exclusively to the territory of the new State may be found lying in courts which as a result of the division of the State may stand denuded of their jurisdiction to try those proceedings any longer. Section 89(1) was, therefore, clearly intended to take care of cases which were instituted in courts beyond the territories to which the proceedings related in deviation of the normal rule of procedure which requires that a proceeding relating to a certain place should be instituted in the court at that place.

26. A question, therefore, arises under what circumstances a proceeding relating to a territory may be instituted in a court beyond that territory. And a further question arises, in the context of the present controversy, as to in what circumstances the present cases, which the C.B.I. insists relate exclusively to the territory of Jharkhand came to be instituted in the court at Patna even while the State was undivided. The solution to the present controversy, to my mind, lies in the answer to these two questions.

27. Let us now examine how and why a proceeding arising from the territories now forming Jharkhand would come to courts beyond those territories even while the State of Bihar was unified before its division by the Reorganisation Act.

28. Here it may be recalled that even before the division of the State of Bihar under the general law of procedure a proceeding relating exclusively to the territory now forming Jharkhand would normally be instituted in courts established in those territories. (Section 16 C.P.C. and Section 177 of the Cr. P.C.) And proceedings relating to those territories could be instituted in courts outside those territories broadly speaking, only under two circumstances. One, that the proceedings did not EXCLUSIVELY relate to those territories in asmuch as at least some part of the cause of action arose outside those territories, with the result that jurisdiction was created also for courts established in areas where part of the cause of action arose outside those territories. (See for example Sections 17, 18 and 20 C.P.C. and Sections 178, 180 and 181 Cr. P.C.). Now, the proceedings falling in this category obviously cannot be described as 'relating exclusively to the territory of Jharkhand State' for the simple reason that the relevant procedural law permitted their institution in courts outside the territories now in Jharkhand even before the division of the State of Bihar. Therefore, all such proceedings, though relating to the territories of Jharkhand the institution of which in courts remaining in the truncated State of Bihar was lawful and valid because of the nature of offences or because of a part of the cause of action had arisen outside those territories will not be covered by Section 89(1) and shall therefore continue to be tried by the respective courts in Bihar.

29. The only other circumstances in which a proceeding, though 'relating exclusively to the territory of Jharkhand State' could be instituted in courts' outside those territories would be that the proceedings arose under special Acts, the court, tribunal, authority or officer under which had its seat outside those territories. The proceedings arising under certain special Act had to be instituted outside the territories now forming Jharkhand for the sole reason that the court, tribunal, authority or officer under those Acts had their seat mostly at the State Capital at Patna having jurisdiction all over the undivided

State. Thus a proceeding, though relating exclusively to the territory of the State of Jharkhand, could only come to Patna which was the seat of those courts, tribunals, authorities and officers. Proceeding before the Central Administrative Tribunal, revisional proceedings under the land ceiling law before the Board of Revenue, revisional proceedings under section 46 of the Bihar Finance Act revisional proceeding under section 8 read with section 89(C) of the Bihar Excise Act an appeal under section 43A of the Wakf Act, 1954 etc. can be cited as illustration of the proceedings falling in the 2nd category. All the proceedings in this category would stand transferred under section 89(1) of the Act, unless in case of a particular proceeding it could be shown that apart from the fact that the seat of the court was at Patna the proceeding could still be maintained here as a part of the cause of action arose on this side of the State. But such a case would naturally be few and far between.

30. On the basis of the discussions made above, it is to be seen that proceedings falling in the 1st category will not be covered by section 89(1) and it is the proceedings under the 2nd category which alone would stand transferred to Jharkhand under that provision.

31. Having, thus, answered the larger and the general question it now remains to be seen how and why the Animal Husbadry cases came to be instituted at Patna and in which of the two aforementioned categories these cases would fall.

32. It is contended on behalf of the C.B.I. that these cases relate exclusively to territories which now form part of the State of Jharkhand. If that be so, these cases should have been normally instituted in courts established in those districts of the undivided Bihar. As all the cases included offences under the Prevention of Corruption Act, 1988, apart from various offences under the Penal Code, normally, those cases should have been instituted before the Special Judge, Dhanbad or the Special Judge, Ranchi. But those cases came to be instituted before the Special Judge, Patna; how and why ?

33. Before proceeding to examine this question, it would be necessary to clear a common misapprehension. It must be clearly borne in mind that the court before whom a case would go for trial has got nothing to do with the agency which might have investigated the case. In other words, whether a case is

investigated by the district police or any other State agency or the C.B.I. would not determine the court before whom the case would go for trial. The Delhi Police Establishment Act does not contain any provision regarding any particular court to try the offences investigated by the C.B.I. In common parlance some special courts are known as C.B.I. courts but that is only a misnomer. Those special courts are constituted under section 3 of the Prevention of Corruption Act and as the cases investigated by the C.B.I. mostly include offences under that Act, those cases go before those special courts which for that reason commonly acquire the name of the C.B.I. courts.

34. It is, therefore, clear that it is not the agency investigating the offence which would determine the court where the case would be instituted and proceed for trial. What, would determine the court where the case would go for trial is the nature of the offence. (See Sections 3 and 4 of the Prevention of Corruption Act, Section 12A of the Essential Commodities Act, Section 14 of the Scheduled Castes and the Scheduled Tribes (Prevention of Attrocities) Act, Sections 9 and 11 of the Terrorist and Disruptive Activities (Prevention) Act, 1987 etc.)

35. Keeping this legal position in mind let us examine certain undisputed facts regarding the institution of these cases. Following the directions issued by the Finance Department, Government of Bihar, a number of cases were instituted in the months of February and March 1996 regarding fraudulant withdrawals over a certain period of time from the Government treasuries in different districts of the State. All these cases were instituted by the district police in the districts of Chaibasa, Godda, Ranchi, Hazaribagh, Dumka, Sahebganj, Lohardagga etc., all of which now form part of the newly created State of Jharkhand. Soon thereafter a bench of this court in a P.I.L. in *Sushil Kumar Modi and others* vs. *State of Bihar and others* (1) directed that the investigation of all these cases, termed as the Animal Husbandry Scam cases be made over to the C.B.I. The operative portion of the judgment as contained in paras 53 and 54 is as follows :

"53. .....It is a fit case, therefore, in which direction should be issued for enquiry and investigation of the

(1) (1996) 1. PLJR 561.

entire episode by the Central Bureau of Investigation for the period in question. According to the State, excess drawals in the Department has been taking place since 1977-78. I am of the view that the proposed enquiry and investigation should cover the entire period from 1977-78 to 1995-96.

"54. I would, accordingly, direct the Central Bureau of Investigation (C.B.I.) through the Director to enquire and scrutinize all cases of excess drawals and expenditure in the Department of Animal Husbandry in the State of Bihar during the period 1977-78 to 1995-96 and lodge cases where the drawals are found to be fraudulant in character, and take the investigation in those cases to its logical end, as early as possible, preferably, within four months. The investigations by the State police in cases already instituted shall remain suspended in the mean time."

36. The order passed by this court was affirmed by the Supreme Court with slight modification by its judgment and order in *State of Bihar* vs. *Ranchi Zila Samta Party* (1) The Supreme court directed that the entire investigation would stand entrusted to the CBI which was directed to take over the investigation already made by the State police inclusive of the F.I.R., arrests and attachments and to that extend the order of this court directing the investigation by the State police to remain suspended was modified. Further, the Supreme Court, in order to alleviate the apprehension of the State about the control of the investigation by the C.B.I., put the investigation under the over all supervision and control of the Chief Justice of this court or of a bench constituted for this purpose by the Chief Justice.

37. Here it must be noted that neither in the order passed by this court nor in the order of the Supreme Court there was any mention of the court where those cases were to be instituted.

38. Following the orders passed by this court and the Supreme Court, the C.B.I. re-registered the F.I.Rs., initially instituted by the local police in the different districts of the State, at its Patna office mainly during the period 16.4.96 to

(1) (1996) (1) PLJR 97.

20.12.96. The re-registered F.I. Rs were then produced before the Special Judge at Patna.

39. As an illustration, let us examine Special Case No. 22 of 1996 in its initial stages of institution. This case was instituted as Chaibasa PS Case no. 12 of 1996 and the F.I.R. instituted by the local police was produced before the C.J.M., Chaibasa on 22.2.1996. As the case included offences under the Prevention of Corruption Act, the C.J.M., Chaibasa on 11.3.1996 sent the record of the case to Special (Vigilance) Judge, being the Ist Addl. Sessions Judge, Ranchi. Following the orders passed by this court and the Supreme Court, the C.B.I. re-registered the case at its Patna office, as R.C. 20 (A)/ 96-PAT and on 29.3.96 submitted the re-registered F.I.R. in the court of Special Judge (South), Patna where it was registered as Special Case No. 22 of 1996. On 27.4.1996 the C.B.I. filed a petition before the Special Judge, Patna making a prayer for calling the records of Chaibasa PS Case No. 12 of 1996 from the court of C.J.M. Chaibasa and to tag it with the record of RC 20(A) : Special Case No. 22 of 1996. The prayer was apparently allowed and a requisition was sent by the Special Judge, Patna, to the C.J.M., Chaibasa asking for the records of Chaibasa PS Case No. 12/1996. On 1.5.1996 the C.J.M., Chaibasa informed the Special Judge, Ranchi that the records were called for by the Special Judge, Patna. whereupon on 24.5.96 the records of Chaibasa PS Case No. 12/1996 were sent by, the Special Judge, Ranchi to the Special Judge, Patna. More or less the same pattern is discernible in all other cases.

40. At this stage, it will be essential to clearly understand the nature of the Special courts and the system of special courts as were in existence in Bihar at the material time. It has been noted that cases involving offences under the Prevention of Corruption Act can only be tried by Special Judges appointed in terms of Section 3 of the Act. It will be useful here to take a look at Sections 3 and 4 of the Prevention of Corruption Act which are re-produced below :

> "3. Power to appoint Special Judges.–(1) The Central Government or the State Government may, by notification in the Official Gazette, appoint as many Special Judges as may be necessary *for such area* or areas *or for such case or group of cases* as may be specified in the notification to try the following offences, namely :

(a) Any offence punishable under this Act: and

(b) Any conspiracy to commit or any attempt to commit or any abetment or any of the offences specified in clause (a).

(2) A person shall not be qualified for appointment as a Special Judge under this Act unless he is or has been a Sessions Judge or an Additional Sessions Judge or an Assistant Sessions Judge under the Code of Criminal Procedudre, 1973 (2 of 1974).

"4. Cases triable by Special Judges–Notwithstanding any thing contained in the Code of Criminal Proceudure, 1973 (2 of 1974), or in any other law for the time being in force, the offences specified in sub-section (1) of Section 3 shall be tried by Special Judge only.

(2) Every offence specified in sub-section (1) of Section 3 *shall be tried by the Special Judge for the area within which it was committed, or, as the case may be, by the Special Judge appointed for the case, or, where there are more Special Judges than one for such area, by such one of them as may be specified in this behalf by the Central Government.*

(3) When trying any case, a Special Judge may also try any offence other than an offence specified in Section 3, with which the accused may, under the Code of Criminal Procedure, 1973 (2 of 1974), be charged at the same trial.

(4) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974) a Special Judge shall, as far as practicable, hold the trial of an offence on day to day basis."

(emphasis added)

41. Coming now to the system of Special Judges as were in existence in Bihar at that time, it may be noted that prior to 1990 the practice was to appoint Special Judges by name. This practice caused some dislocation because there used to be some delay in nominating the successor in place of the transferred officer. Hence, the Standing Committee of this court in its meeting of 3.8.1990 accepted the stand of the Central Government that Special judges for the trial of cases investigated by the C.B.I. and the State Anti-Corruption Bureau, be notified by designation instead of by name and further resolved that the court of Ist Addl. Sessions Judge, Patna, Ranchi and Dhanbad be designated as Special Courts for the trial of cases investigated by the C.B.I. and the State Anti-Corruption Bureau.

42. At the material time when the Animal Husbandry Cases surfaced the notification under which Special Judges

were appointed under the Prevention of Corruption Act was the one, dated 19.4.1994. This notification was issued in supercession of all previous notifications and it appointed three special courts for the entire State of Bihar assigning them Jurisdictions in the following manner :

(1) Addl. Dist & Sessions Judge I, Dhanbad

Jurisdiction – entire region of North Chotanagpur Division.

(2) Addl. Dist. & Sessions Judge I, Ranchi :

Jurisdiction – entire region of South Chotanagpur Division.

(3) Addl. Dist. & Sessions Judge I, Patna :

Jurisdiction – entire region except North and South Chotanagarpur.

43. This was the position of Special Courts in April, 1996 when the CBI started getting the cases re-registered and having then instituted before the Special Judge, Patna.

44. On 22.5.1996 another notification came by which Shri S.K. Lal, Additional District & Sessions Judge was appointed Special Judge under the Prevention of Corruption Act, 1988 and was given the following territorial jurisdiction:

(i) One Shri Sudhanshu Kumar Lal, Additional District & Sessions Judge, Patna :–

Jurisdiction – Patna region (all regions excluding North & Sourth Chotanagpur)

45. Shortly thereafter another notification was issued on 5.6.96 by which the territorial jurisdiction given to Shri S.K. Lal was extended for the entire area of Bihar in the following manner :

(1) Shri Sudhanshu Kumar Lal, Addl. Dist. & Sessions Judge, Patna : Entire area of Bihar.

46. The two notifications, dated 22.5.96 and 5.6.96 did not supersede or rescind the earlier notification, dated 6.5.94.

47. Thus, what follows from the three notifications can be summarised as follows :

(i) Till the issuance of the notification, dated 5.6.96 the territorial jurisdictions of the three Addl. Judges at Patna, Dhanbad and Ranchi (and of Shri Sudhanshu Kumar Lal with

effect from 22.5.1996) were well defined and well demarcated and there was no way those cases could be lawfully instituted before the Special Court at Patna unless it was said that some part of the offences were committed at Patna and, therefore, the Patna Court equally had jurisdiction over those cases.

(ii) When the animal husbandry cases cropped up in large numbers, the need was perhaps felt for appointing additional special court to handle those cases. Though Section 3 of the Prevention of Corruption Act made it possible to appoint a Special Judge for a case or a group of cases and though appointing a Special Judge for animal husbandry cases might have better served the purpose, that course was not adopted. What was done instead, whether intentionally or unintentionally was to appoint an Addl. Special Judge in Shri Sudhanshu Kumar Lal and to define his jurlisdiction with reference to territory *and not with reference to a group of cases.* By notification, dated 22.5.96 he was given exactly the same territorial jurisdiction as available from before to the Ist Addl. Dist. & Sessions Judge, Patna, by virtue of the notification, dated 19.4.1994. This achieved nothing and only created confusion in the respective jurisdictions of the Special Courts.

(iii) Then by notification, dated 5.6.1996 the territorial jurisdiction of Shri Lal was extended all over Bihar. The result was that at no stage the jurisdiction of the Special Judges at Ranchi and Dhanbad was cancelled in respect of the Animal Husbandry cases. But Shri Sudhanshu Kumar Lal came to have additional, parallel jurisdiction over those cases. A situation was, thus, created where there are more then one Special Judges for the area within which the offences were committed and in terms of secion 4(2) of the Prevention of Corruption Act it was now left to the Central Government to specify the court which would try those cases.

48. No decision or order, issued by the Central Government, specifying the court (between Shri Sudhanshu Kumar Lal and the two Special Judges, one at Dhanbad and the other at Ranchi) which would try the Animal Husbandry cases waa brought to the notice of the court. What, however, came to the notice of the court was something quite odd. It appears that in response to a letter from the Dist. Judge, Patna seeking instructions in the matter, a letter, dated

13.6.1996 was issued to him by the Registrar General of this court. This letter is reproduced below in its entirity :

"From,

Nirmalesh Chandra Lala,
Registrar General,
High Court of Judicature at Patna.

To,

The District and Sessions Judge,
Patna.
Dated, Patna the 13th June, 1996.

Sir,

With reference to your letter no. 2612 dated the 7th June, 1996, I am directed to inform you that *Shri Sudhanshu Kumar Lal, Additional District & Sessions Judge, Patna* who has been appointed as a Special Judge for disposal of the cases investigated by the Delhi Police Establishment, as per the State Government's Notification No. 5693 dated the 6th June, 1996 (copy enclosed), *may be asked to deal with all cases pertaining to the Animal Husbandry scam without any restriction of Area.*

So far the question of designating the A.D.J. Ist, Patna is concerned, I am directed to invite your attention to Court;s letter Nos. 1712 dated 27.1.96 and No. 5539-79 dated 28.4.95 and to request you to act accordingly.

Yours faithfully,
Sd/-N.C. Lala,
Registrar General,
13.6.96

49. On the basis of this letter, the Dist. & Sessions Judge, Patna issued order, dated 14.6.1996 whereby all the cases investigated by the Delhi Police Establishment pertaining to the animal husbandry scam (without any restriction on area) pending in the court of Addl. Dist. & Sessions Judge I, Patna were recalled and transferred to the court of Shri Sudhanshu Kumar Lal, Addl. Dist. & Sessions Judge XII, Patna for disposal. It was further directed in that order that from that date all papers connected with those cases will be received from the C.B.I. in the court of the XIIth Addl. Dist. & Sessions Judge, Patna.

50. From the materials on record it is evident that even before the appointment of Shri S. K. Lal as an Special Judge, the C.B.I. had got some cases instituted before the 1st Additional Sessions Judge, Patna who was appointed as Special Judge by notification dated 19.4.1994. Later all the Animal Husbandry cases were transferred/instituted before Shri S. K. Lal as directed in the letter issued by the High Court.

51. Here I am constrained to observe that I am unable to find any sanction in law for the letter, dated 13.6.1996 issued by the High court on its administrative side directing that Shri Sudhanshu Kumar Lal be asked to deal with all cases pertaining to the animal husbandry scam without any restriction of area. It seems that in the absence of any direction issued by the Central Government in that regard the High Court stepped in and assumed the authority vested in the Central Government alone by virtue of Section 4(2) of the Prevention of Corruption Act. It may be difficult to justify the direction given by the High Court even with reference to the Supreme Court decision in *J. Jayalalitha* Vs *Union of India & Ors* (1) as that decision was rendered in a totally different set of facts. It may, however, be stated here that there was no inherent lack of jurisdiction in the Special Court of Shri S. K. Lal and the direction issued by the High Court may be considered as an irregularity which was not incurable.

52. The legal position that plainly emerges from the aforesaid facts and circumstances is that at no stage the Special Courts at Dhanbad and Ranchi appointed under notification, dated 19.4.1994 were lawfully divested of their jurisdiction and authority to try those cases which related to fraudulant withdrawals made within the territorial jurisdiction of those courts and yet those cases got to be instituted at Patna where they proceeded for more than four years. It was before the Special Court at Patna that the C.B.I. got those cases instituted, it was from the Special Court at Patna that the C.B.I. got on remand the accused in those cases, it was before the Special Court at Patna that the C.B.I. opposed the prayer for bail made on behalf of the accused, it was here that the C.B.I. submitted its final report of investigation and it was before the Special Court at Patna that the C.B.I. proceeded with

(1) (1999) (5) SCC 138

the trial of R.C. 20A/96; Special Case No. 22/96 and examined 39 prosecution withesses. And all this was fully within the knowledge of not only the monitoring bench but also the administrative side of this court. The inference clearly is that the C.B.I. believed and this court found and held that the Patna court equally had jurisdiction in this matter because part of the offences were committed at Patna.

53. Let us here examine a hypothetical question. Supposing, long before the division of the State, any of the accused had raised an objection regarding the institution of the cases at Patna contending that the courts where the cases could be lawfully instituted were the Special Court at Dhanbad and Ranchi because the fraudulant withdrawals were made in those districts, the cases were originally instituted in those districts and the proceedings related exclusively to the territory of those districts. I have not the slightest doubt in my mind that such an objection raised by the accused was liable to be rejected in no time and the accused raising the objection would have been told that in referring to the fraudulant withdrawals from the district treasuries, he was only alluding to the branches of the massive tree of the scam, the roots of which lay in Patna and that a substantial part of the offences, specially of criminal-conspiracy having been committed at Patna, the Special Court at Patna equally had the jurisdiction to try those cases. All those same arguments and all those same materials which would have been used to reject the hypothetical objection raised by the accused would now confront the C.B.I. against its plea that the proceedings in these cases relate exclusively to the territory of Jharkhand and these cases must, therefore, be held to have been transferred to that State by virtue of Section 89(1) of the Act.

54. On the basis of the discussions made above, I come to the definite conclusion that these cases were instituted by the C.B.I. at Patna not due to any compulsion in law in the sense that the Special Court at Patna was the only available court but on the basis that the Special Court at Patna equally had jurisdiction to try those cases along with the jurisdiction vested in the Special Courts at Dhanbad and Ranchi.

55. The animal husbandry cases, thus, clearly fall in the Ist category in respect of which it is shown that those cases are

not covered by section 89(1) of the Act and would remain unaffected by the division of the State.

56. The conclusion is re-inforced as one refers to the relevant materials relating to those cases such as the charge-sheets, statements of witnesses recorded under Section 164 of the Code of Criminal Procedure and other similar materials on record.

57. However, before proceeding to refer to those materials, it must be stated that no attempt was made by the C.B.I. to present the relevant materials before the court in order to support its claim that the cases related exclusively to the territories forming part of Jharkhand. The C.B.I. seems to have taken it for granted that all the cases of which it had given a list had stood transferred to Jharkhand and all that was argued on its behalf was that the offences were committed 'substantially' and in 'larger portion' in Jharkhand as the fraudulant withdrawals were made from the treasuries situate there. The proceedings were, therefore, covered by the expression "exclusively" occurring in Section 89(1) of the Act and the proceedings, therefore, stood transferred to Jharkhand by operation of law.

58. Whatever materials from the records of the case were brought to the notice of the court were by counsel appearing for the different sets of the accused and those materials go a long way to show that, according to the prosecution, offences were committed in equal if not in greater measure, on this side of the State.

59. In RC 38(A)96–PAT (Special Case No. 39/1996) the C.B.I. submitted charge sheet against a large number of known and unknown accused. In column no. 5 of the charge-sheet, under the marginal heading 'result of investigation' it is stated as follows :

> "Investigation has revealed that during 1988-96 the accused, shown in Annexure 1 and other unknown, *had entered into a criminal conspiracy* and agreed to do or caused to be done illegal act or acts which are not legal by illegal means, at Dumka, Patna and other places of Bihar and in pursuance of the said criminal conspiracy during December 1995 and January 1996 an amount of Rs. 3,42,37,601/- was illegally withdrawn by the Regional

Director.....from Dumka Treasury....."

60. In the same charge sheet a number of acts of Commission and commission are attributed against Lalu Prasad Yadav, who is accused no. 12 and who was the Chief Minister of the State at the material time. Almost all those acts could only be committed at Patna.

61. In the same charge sheet it is further stated :

"Investigation has unearthed a deep rooted conspiracy, pursuant to which crores of rupees over and above the budgetary provisions of Animal Husbandry Department were withdrawn fraudulantly year after year by A.H.D. officials in collusion with the suppliers/transporters, Government officials, politicians of different political parties, *Minister concerned* and the *Chief Minister of the State* of Bihar."

It is further stated :

"Investigation has further disclosed that on 17.6.97 a mobile phone No. 9834001749 was recovered by the local administration from the possession of the co-accused Dr. R. K. Rana (A/47) who was then in judicial custody *in Beur Jail in Patna* in connection with the A.H.D. scam cases. The print outs/ call details of the said mobile phone shown that repeated calls were made from the said mobile phone on the P & T telephone numbers installed at the *official residence* of the Ex-Chief Minister Shri Lalu Prasad and further on mobile phone mumber with the P.A. to the Ex-Chief Minister Shri Lalu Prasad .....

Thus, co-accused Dr. Rana (A/47) while in jail *remained in constant touch with the co-conspirator Shri Lalu Prasad.*"

62. In RC 64(A) 96-Patna (Special Case No.65/96) a charge sheet was submitted which has a similar passage under the heading 'result of investigation'. This is as follows :

"Investigation has revealed that during 1988-96 the accused persons from serial no.1 to 34 and unknown others *entered into a criminal conspiracy* and agreed to do or caused to be done illegal act or acts which were not legal by illegal means at Deoghar, Dumka, Patna, Ranchi

and other places of Bihar and outside Bihar in other State....."

63. Under the heading 'Modus Operandi adopted in this case' reference is made to persons and bodies which were operating from the seat of the State Government. The following passage is to be found under the head of 'Modus Operandi' :

"Investigation has further revealed that sub-allotment, vide letter no. 1343, dated 18.7.1991 for Rs. 6 lakh was also made to DAHO, Deoghar, prior to 16.11.91 and was utilised in making fraudulant withdrawals from the Deoghar treasury. Thus, 11 fake allotment letters in all figure in this case. These were not issued form the Directorate from the allotment files of the budget section. Investigation has revealed that the letter numbers put on the 11 fake allotment letters do not pertain at all to the budget section or the allotment files. However, the *desptach register AHD Dirctorate shows* taht the different letters bearing the same letter numbers (as written the forged allotment letters) were issued form the Directorate as under."

64. In that charge-sheet a reference is made to File no. BS23/94 of Vigilance Department from which it transpires that the alleged criminal actions were taking place at the level of the Chief Minister at Patna. In the same charge sheet under the marginal heading "Knowledge of excess withdrawals in AHD", it is stated as follows :

"Investigation has revealed that the different *accused persons of the AHD Directorate, Secretariat, Finance Department, Vigilance Department* PAC, A.G.Office, Treasury Office, Income Tax Department, other Bureaucrats and politicians *including the then Chief Minister (A-25) himself were knowing about the excess fraudulant withdrawals for a very long time* but no action was taken by them, rather *the higher ups sheltered the accused persons directly responsible for the drawals before the scam broke out. By their wilful inaction, they allowed the loot to continue with increasing intensity.*"

65. Again under the heading no action taken on the letter of the DAG regarding irregularities at AHD, Ranchi, the illegal actions of the accused at Patna is discussed.

66. In RC 20(A)96-PAT (Special Case No. 22/96) a charge sheet was submitted where in under the marginal heading result of investigation' it is stated as follows :

> "Investigation has revealed that during 1988-96 the accused, shown in column 1 and others unknown had *entered into a criminal conspiracy* and agreed to do or caused to be done illegal act or acts which are not legal by illegal means at Chaibasa, Patna and other places of Bihar....."

67. In this case a number of accused occupied very high offices in the State Government, such as Chief Minister, Finance Minister, Minister for Animal Husbandry Department, Govt. of Bihar, Minister of State for Animal Husbandry Department, Chairman of the Public Accounts Committee, Finance Commissioner, Secretary of Animal Husbandry Department, Govt. of Bihar etc. and according to the prosecution case being part of the conspiracy the accused abused and misused their official positions. The allegations against all these accused are mostly referable to Patna.

68. In the charge framed by the court against a number of accused in Special Case No. 22/96, it is stated as follows :

> "That you all amongst yourselves .....during the period 1988-96 at Chaibasa, *Patna-1* Ranchi, Bhagalpur and other places of Bihar, Calcutta and Delhi etc. were party to criminal conspiracy and agreed to do or caused to be done illegal acts or acts which are not legal by illegal means, namely, creation of allotment letters, creation of false supply orders, creation and submission of false supply....."

69. In the same case the charge framed against the accused Lalu Prasad Yadav reads as follows :-

> "That you being a public servant while functioning as M.L.A., M.P. and thereafter as Chief Minister / Finance Minister of the State of Bihar during the period from 1988-96-97 by corrupt and illegal means or by otherwise abusing your position as such to be public servant dishonestly and fraudulantly recommended for the promotion / elevation of Dr. Ram Raj Ram, co accused....."

70. A perusal of the charge framed against Lalu Prasad leaves no room for doubt that the alleged acts attributed to him are referable at Patna.

71. In the supplementary petition filed by one of the accused Krishna Mohan Prasad (petition at Flag A/1 in the court's brief) a reference is made to the statements of a number of witnesses recorded by the C.B.I. under Section 164 of the Code of Criminal Procedure. According to those statements. Dr. Shyam Bihari Sinha (since deceased) one of the main accused in the cases used to come to Patna where he stayed at hotel Patliputra and it was here that he got fake allotment letters manufactured and made arrangements for transfer of convenient officers to North Chotanagpur and South Chotanagpur Directorates. It was at hotel Patliputra at Patna that meetings were held amongst the different accused persons being party to the conspiracy and it was here that part of the defalcated amount was distributed among his minions.

72. The above cited materials have been taken purely at random and numerous such illustrations can be found in the thousands of pages comprising the records of these cases. It is also to be noted that the proseccution case in all these cases is over-lapping and to a certain degree repetetive.

73. On going through the materials of all these cases one is left in no doubt that according to the prosecution case the fountain head of the conspiracy and of the criminal acts flowing from the conspiracy, was at Patna. I have, therefore, no hesitation in holding that part of the alleged offences, rather a substantial part of the alleged offences, were committed at Patna and the Special Court at Patna equally had jurisdiction to try these cases. Consequently it must be held that these cases do not relate exclusively to the territory now forming part of the State of Jharkhand and therefore, these cases cannot be said to have been transferred to the court in Jharkhand as provided under Section 89(1) of the Bihar Reorganisation Act, 2000. These cases will, therefore, continue to proceed before the Special Judge at Patna.

74. The reference is answered accordingly.

Nagendra Rai, J. 75. I have had the advantage of going through the judgment rendered by my learned Brother (Hon'ble Aftab Alam. J.) I agree with him with regard to the maintainability

of Criminal Reference No. 1 of 1996 and also on the point that now the controversy between the parties is as to whether 36 cases as mentioned in the petition of the Central Bureau of Investigation (for short C.B.I.) are to be transferred to the new created State of Jharkhand or not. I do not find myself in agreement with his other conclusions, for which I am indicating the reasons hereinafter.

76. A hue and cry was raised by the public as well as by the Press with regard to loot and plunder of huge amount of public money by the public servants and suppliers in connivance and conspiracy with high-ups/men in power in the Animal Husbandry Department. The State Government, by way of eye-wash, instituted 41 cases in the beginning of the year 1996. In the meantime, a number of writ applications in the nature of Public Interest Litigation were filed in the High Court at Patna as well as at its Ranchi Bench (now Jharkhand High Court) and all the cases were disposed of by a Division Bench of this court on 11.3.1996 vide *Sushil Kumar Modi* v. *State of Bihar*, reported in 1995 (1) P.L.J.R., 561. This court directed the Central Bureau of Investigation (for short the C.B.I.) to enquire and scrutinise all cases of excess drawals and expenditure in the department of Animal Husbandry in the State of Bihar during the period 1977-78 to 1995-96 and lodge cases where prima-facie case was made out to investigate. The investigations by the State Police in cases already instituted were ordered to remain suspended in the meantime.

77. The State of Bihar challenged the aforesaid order before the Apex Court and the order of this High Court was upheld by order dated 19.3.1996 with only one modification that the entire investigation stood entrusted to the C.B.I. and it was further directed to take over the investigations already made by the State Police, inclusive of the F.I. Rs., arrests and attachments mentioned in the order and deal appropriately therewith and the order of this court to suspend the investigation by the State Police, thus, was modified to that extent. The Apex Court also directed that the investigation by the C.B.I. should be under the overall control and supervision of the Chief Justice of the Patna High Court and the C.B.I. Officers entrusted with the investigation shall, apart from the concerned criminal court, inform the Chief Justice of the Patna High Court from

time to time of the progress made in the investigation and may, if need any directions in the matter of conducting the investigation, obtain them from him. The learned Chief Justice may either post the matter for directions before a Bench presided over by him or constitute any other appropriate Bench. *The Apex Court also directed that the High Court and the State Government shall co-operate in assignig adequate number of Special Judges to deal with the cases expeditiously so that no evidence may be lost.* Thereafter, the C. B. I. registered cases by lodging F. I. Rs. with regard to the 41 cases, which have been instituted earlier by the State Police and also registered few new cases at Patna. The total number of cases registered by the C.B.I., as informed at the Bar, is 61, out of which according to the C.B.I. 52 cases come from a territory, which has now fallen in the State of Jharkhand. Later on, the C.B.I. requested that only 36 cases are to be transferred to the Jharkhand State. Thirtythree cases out of them were registered by it on the basis of cases registered by the State Police at different Police Stations which, admittedly, fall within the territorial jurisdiction of the Jharkhand State. Three cases, namely, RC-64(A)/96-PAT (Special Case No. 65/96), RC-77(A)/96-PAT (Special Case No. 69/96) and RC-2(A)/98-AHD/PAT (Special Case No. 2/98) were registered by the C.B.I. itself on 15.5.1996, 28.11.1996 and 22.5.1998, respectively. R.C. Case No. 64-(A)/96-PAT relates to an offence alleged to have been committed at Deoghar, R. C. Cae No. 77-(A)/96-PAT relates to an offence alleged to have been committed at Dumka and Godda and R. C. Case No. 2(A)/98-AHD/PAT has been registered against accused Krishna Mohan Prasad under the provisions of the Act on the allegation of having acquired property disproportionate to his income while he was posted as the Regional Director, Animal Husbandry Department, South Chotanagpur, Ranchi, Bihar.

78. The offences punishable under the Prevention of Corruption Act, 1988, (for short 'the Act') are tried by the special courts constituted under the provisions of the Act. Section 3 of the Act contains a provision with regard to power to appoint special Judges and section 4 of the Act provides for cases triable by special Judges notwithstanding any contrary provisions contained in the Code of Criminal Procedure, 1973

(2 of 1974), or in any other law. These provisions have been quoted in the judgment of my learned Brother and as such I am not reproducing the same. Sub-section (1) of Section 3 of the Act empowers the Central Government or the State Government, by notification in the Official Gazette, to appoint as many special Judges as may be necessary for such area or areas or for such case or group of cases as may be specified in the notification to try the offences as mentioned therein. Sub-section (2) of section 4 of the Act provides that every offence as enumerated in section 3(1) shall be tried by the special Judge for the area within whose jurisdiction it was committed, or by the special Judge appointed for the case, or, where there are more special Judges than one for such area, by such one of them as may be specified in this behalf by the Central Government.

79. The aforesaid provisions were considered by the Apex Court in the case of *J. Jayalalitha* v. *Union of India & Ors.*, reported in (1999) 5 S.C.C. 138. While interpreting section 3(1) of the Act, the Apex Court said that the competent authority can appoint special Judge for an area or areas or for such case or group of cases and within that area or areas, it can also appoint Judges for a particular case. The word 'or' used in the said section cannot be interpreted to mean that the power conferred upon the Government is in the alternative, that is to say that the State Government may appoint special Judges either for an area or areas or for such case or group of cases. Regarding section 4(2) of the Act, it was held that it visualises three situations; firstly every offence specified in section 3(1) shall be tried by the special Judge, for the area within whose jurisdiction the offence is committed; secondly every case or group of cases shall be tried by the special Judge appointed for such case or group of cases and thirdly if there are more special Judges than one appointed for a particular area then the Central Government has to specify as to which one of them will try the case. It was further held that once a special Judge has been appointed to do a case or group of cases then he is alone competent to proceed with the case or group of cases. The power under section 4(2) given to the Central Government to decide as to which one of the special Judges will try the case when there are more special Judges than one for an area, has

to be exercised only when it is necessary and while exercising the power under section 4(2), the guideline as provided under section 3(1) will be applied by the Central Government.

80. Thus, it is clear that the Central Government or the State Government has power to issue notification appointing special Judge for a case or group of cases or even a special Judge will be appointed for a particular area and a special Judge can also be appointed for cases falling within that area. Once a Special Judge is appointed for a case or group of cases then he alone is competent, to proceed with the trial. The exercise of power by the Central Government under section 4(2) arises only when there are more Special Judges than one for an area or areas or even that power is to be exercised not in a routine manner but only when it becomes necessary.

81. The State Government in exercise of power under section 3 of the Act issued a notification on 19.4.1994 appointing three Special Judges to try cases under the Prevention of Corruption Act, one for the North Chhotanagpur, second for the South Chhotanagpur and the third one for the area excepting the aforesaid two areas. The Ist Additional District and Sessions Judges by designation were appointed as special Judges. By notification, issued on 22.5.1996, the State Government appointed Shri S.K. Lal, Additional District and Sessions Judge, Patna, as a special Judge to deal with the C.B.I. cases of Patna region, excluding the areas of South and North Chhotanagpur. Thereafter, another notification was issued by the State Government on 5.6.1996, whereby the jurisdiction of Shri S.K. Lal to try cases under the Act was extended to the entire State of Bihar.

82. Thus, it is clear that by earlier notification dated 22.5.1996. the Ist Additional District and Sessions Judge was *notified to try cases* under the Act with regard to entire area excluding North and South Chhotanagpur. Later on, by notification dated 5.6.1996, his jurisdiction was extended to the entire State. The District and Sessions Judge, Patna, having received the notice dated 22.5.1996 notifying Shri S.K. Lal to try cases of the area excepting North and South Chhotanagpur, sought clarification from this court as to whether in view of the afroresaid notification both the courts, namely, court of the Ist Additional Sessions Judge, Patna and the Court

of Shri S.K. Lal will work as Special Judge and if so then what nature of the cases to be tried by the said courts. The Registrar General of this court informed teh District and Sessions Judge, Patna, that this court has taken a decision that Shri S.K. Lal, who has been notified by notification dated 5.6.19996 to exercise jurisdiction over the entire State of Bihar, shall deal with all cases pertaining to the Animal Husbandry Scam without any restriction of area.

83. The C.B.I. has been constituted under the Delhi Police Special Establishment Act, 1946, by resolution dated 1.4.1963 to investigate cases including economic offences and corruption in public services, particularly where the interests of the Central Government are involved. Different Divisions have been created in C.B.I. to deal with different types of cases. Relevant extract of the C.B.I. Manual have been produced during the course of hearing, which show that the territorial jurisdictions of the various Branches of the C.B.I. to deal with all types of cases have been provided therein. The C.B.I. Branch Patna is located at Patna and it deals with the cases of the entire State of Bihar. The C.B.I. Branch, Ranchi deals with the cases of State of Bihar, West Bengal, Orissa and Madhya Pradesh in respect of specified Public Sector Undertakings and the C.B.I., Dhanbad Branch, deals with the cases of State of Bihar, West Bengal in respect of specified Public Sector Undertakings.

84. Thus, Branch of C.B.I. at Patna deals with all cases registered in the State of Bihar, which do not pertain to Public Undertakings and the C.B.I. Branches at Dhanbad and Ranchi deal with the cases in respect of only Public Undertakings. In case of alleged offences under the Act having been committed in any part of the State of Bihar, except in cases of Public. Under takings, as specified therein, the investigation has to be carried out by the Patna Branch of the C.B.I. Only because a case has been registered at Patna by the C.B.I. neither it can be presumed nor can it be inferred that the C.B.I. believe that the part of action has been committed within the jurisdiction at Patna.

85. As stated above, the C.B.I. was entrusted with the investigation and the investigation was put under the overall control and supervision of the Chief Justice of this High Court,

who was directed by the Apex Court to monitor the investigation of cases either by himself or by constituting any other appropriate court. The Chief Justice constituted a Division Bench having its sitting at Patna. The State Government notified Shri S.K. Lal to deal with the cases under the Act for the entire State of Bihar and this court, as is evident from the letter of the Registrar General dated 13.6.1996, directed that Shri S.K. Lal would deal with all cases arising out of Animal Husbandry Scam. The direction given by the said letter to Shri S.K. Lal to deal with the Animal Husbandry scam cases does not mean that this court has come to a conclusion that the Patna Court has equal jurisdiction to deal with the matter as part of the offences having been committed at Patna. On the other hand, it appears that the said direction was issued by the court taking into consideration the fact that as monitoring of the cases was being done at Patna, it would be better to confer power to try cases on the special Judge stationed at Patna.

86. At this stage I would like to clarify that I am not in agreement with the view of my learned Brother that the letter issued by this High Court under the signature of the Registrar General dated 13.6.1996, on its administrative side, directing Mr. S.K. Lal to deal with the Animal Husbandry scam cases, has no sanction in law. Though power to issue notification is vested in the State or Central Government but that is done with the effective consultation with the concerned High Court and the appointment of the Special Judge and allocation of area or cases is done by the High Court and only a formal notification is issued in this behalf by the State Government (See Jailatita's case (supra).

87. In that view of the matter, non-issuance of formal notification in accordance with the decision taken by this court on administrative side regarding allocation of cases can only be an irregularity and that will not render the aforesaid direction of this court to be ineffective.

88. In view of the magnitude of the crime and the observation made by this court while allowing the P.I.L. that there should be centralised investigation, the C.B.I. registered all the cases at Patna and proceeded with the investigation. In terms of its Manual also, the institution and investigation with regard to the offences committed in the State of Bihar, except

the offences pertaining to the specified Public Undertakings, were to be done by the Patna Branch of the C.B.I. Thus, the lodging of the cases by the C.B.I. proceeding with the investigation and submitting report to the special court do not mean that the C.B.I. believed that the part of action has taken place at Patna.

89. The court of Shri S.K. Lal was constituted to deal with all Animal Husbandry scam cases instituted in any part of the State. Submission of the F.I.R. and relevant papers before him by the C.B.I, issuance of warrant and disposal of bail matters by him in no way lead to a conclusion that he was dealing with the matter only because the offences have been committed at Patna. This court also also never issued any direction at any point of time indicating that it has found that the offence has been committed at Patna for the simple reason that there was no occasion for this court to come to the aforesaid conclusion, on the other hand, in the light of the observation made by the Apex Court to expedite the matter, this court constituted a special court of Shri S.K. Lal to deal with all the Animal Husbandry scam cases.

90. Thus, I find myself unable to agree with the view taken by my learned Brother that the only inference that emerges from the facts of the case is that the C.B.I. believed and this court found that the Patna court has equal jurisdiction because of part of the offences having been committed at Patna.

91. Under section 154 of the Code of Criminal Procedure (for short 'the Code'), once an information relating to commission of a cognizable offence is given to the Officer-in-charge of a Police Station, he shall reduce the same into writing even if he has no territorial jurisdiction over the place of crime. In such a case, he can forward the same to the Police Station having jurisdiction over the same in which the crime is alleged to have been committed. However, so far as the investigation is concerned, the matter is different. The investigation can be conducted by the concerned Police Officer only when he has territorial jurisdiction over the place of crime. Section 156 of the Code provides that any Officer-in-charge of a Police Station may, without the order of a Magistrate, investigate any cognizable case which a Court having jurisdiction over the local area within the limits of such station would have power to inquire

into or try under the provisions of Chapter XIII of the Code. Thus, the jurisdiction of the Police Officer depends upon the fact as to whether the Court, within whose jurisdiction the area of the Police Station falls, has power to enquire or try the case under the provisions of the Code or not. Therefore, it cannot be said that the question of investigation has no relevancy to the question of enquiry and trial by a court.

92. All the 33 cases, as stated above, were registered at the local Police Stations, which fall within the territory of State of Jharkhand. Investigations were taken over by the C.B.I. by the order of the Court and the C.B.I. Branch at Patna, as stated above, has jurisdiction to investigate all the cases registered by it having taken place anywhere in the State of Bihar and the court of the Special Judge Shri S.K. Lal was vested with the jurisdiction to try all the Animal Husbandry scam cases even if they relate to the areas, which fall within the territory of State of Jharkhand.

93. In that view of the matter, after bifurcation of the erstwhile State of Bihar and creation of State of Jharkhand, Shri S.K. Lal ceased to have any jurisdiction with regard to the area falling within the territory of Jharkhand State and, thus, all the aforesaid 36 cases, with which Mr. Lal was dealing by virtue of his being the special Judge of entire State of Bihar form the appointed day, shall stand transferred to the corresponding court in the Jharkhand State. I would have taken the aforesaid view but there are difficulties in coming to the aforesaid conclusion for two reasons; firstly that with regard to the pending cases, specific provision has been made under section 89 of the Bihar Reorganisation Act (for short the Reorganisation Act) and secondly that the observation has been made by the Apex Court in the order dated 13.12.2000 that the controversy as to whether these cases should be transferred or not is to be disposed of in terms of the provisions contained in section 89(2) of the Reorganisation Act. Section 89 of the said Act runs as follows :—

"89. Trasfer of pending proceedings.–(1) Every proceeding pending immediately before the appointed day before a court (other than the High Court), tribunal, authority or officer in any area which on that day falls within the State of Bihar shall, if it is a proceeding relating exclusively to the territory, which as from that day is the territory of

Jharkhand State, stand transferred to the corresponding court, tribunal, authority or officer of that State.

(2) if any question arises as to whether any proceeding should stand transferred under sub-section (1), it shall be referred to the High Court at Patna and the decision of that High Court shall be final.

(3) In this sectin–

(a) "proceeding" includes any suit, case or appeal; and

(b) "corresponding court, tribunal, authority or officer" in the State of Jharkhand

(i) the court, tribunal, authority or officer in which, or before whom, the proceeding would have laid if it had been instituted after the appointed day; or

(ii) in case of doubt, such court, tribunal, authority, or officer in that State, as may be determined after the appointed day by the Government of that State or the Central Government, as the case may be, or before the appointed day by the Government of the existing State of Bihar to be the corresponding court, tribunal, authority or officer."

94. Sub-section (1) of section 89 of the Reorganisation Act provides, inter-alia, provides that every proceeding pending immediately before the appointed day before a court other than the High Court in any area, which was part of the undivided State of Bihar shall stand transferred to the corresponding court of the Jharkhand State from the appointed day if the proceeding exclusively relates to the territory, which forms part of the Jharkhand State. Sub-section (2) of section 89 provides that in case of there being any dispute as to whether the proceeding is to be transferred in terms of sub-section (1), the same shall be referred to the High Court for deciding the controversy. The case shall stand transferred only to the newly created Jharkhand State if the proceeding exclusively relates to a territory, which from the appointed day falls within the jurisdiction of Jharkhand State.

95. The general principle is that the court dealing with a case has no extra territorial jurisiction. Ordinary place of enquiry and trial is the place where an offence has been committed. This principle is embodied in section 177 of the Code of Criminal Procedure (for short 'the Code'). However,

there are exceptions to the said principle for the reason that the offences may be committed at different places, offences may be committed at one place, the consequences may follow at other places, difficulty may arise as to whether offences having been committed at one place or the other place. Sections 178 to 189 of the Code contain provisions dealing with exceptions or special provisions with regard to enquiry and trial in the circumstances where the offence has taken place at more than one place or trial of the specific offence or where an offence has been committed outside India. In case of criminal breach of trust, sub-section (4) of section 181 of the Code provides that with regard to offence of criminal breach of trust, misappropriation etc. enquiry or trial may be held by the court within whose local jurisdiction either the offence was committed or any part of the property, which is subject matter of dispute, was received or retained, or was required to be retained or accounted for, by the accused persons. In a case where an offence of conspiracy took place, the court has jurisdiction to try not only that case of conspiracy but also the offences committed in pursuance of that conspiracy even beyond its jurisdiction. Thus, under the scheme of the Code, elaborate provisions have been made to decide the forum of enquiry and trial with regard to the offences committed at different places or with regard to the different types of offences.

96. Section 89 of the Reorganisation Act postulates that only those cases, which exclusively pertain to the territorial jurisdiction of Jharkhand, shall stand transferred after the appointed day to the corresponding court of Jharkhand State. The Legislature has purposely mentioned the word 'exclusively' in the said section, which, according to the Law Lexicon, Rama Natha Aiyar Reprinted Edition 1987, means 'to the exclusion of all others; without admission to any others to participation."

97. Any word used in the Statute has to be given a meaning in the context in which it is used. The words of the Statute in case of doubt, are to be understood in the sense in which they best harmonise with the subject of the enactment and the object which the legislature has in view. It may be given a wider meaning or restricted meaning depending upon the relevant factors including the Legislature's object for which the provisions have been made.

98. Learned counsel for the C.B.I. vehemently submitted that the word 'exclusively' used in section 89 of the Reorganisation Act means substantial or greater part and, thus, where the substantial or greater part of the offence has taken place in the territory, which forms part of the Jharkhand State after the appointed day then the corresponding courts at that place have jurisdiction to try the offences and not the State of Bihar.

99. The word 'exclusively' used in section 89 of the Reorganisation Act has to be given a wider meaning. There is a reason to take the aforesaid view. If the offences have been committed in different territories, part of which now falls in the State of Jharkhand and part of which also falls in the State of Bihar then under the law, as discussed above, the cases may be tried by the courts located at the places falling within the territories of both the States. If the cases can be tried by the courts situate in both the States then there will be no use of transferring the cases from the courts falling within the territory of one State to the court falling within the territory of other State. Thus, the word 'exclusively' used in section 89 of the Reorganisation Act means exclusion of all others. In other words, only those cases, which exclusively belong to the territory of State of Jharkhand shall alone be transferred. If place of crime of a particular case or proceeding falls in the territory of State of Bihar as well as the territory of Jharkhand State after the appointed day then if the case/proceeding is pending in the Court falling in the territory of State of Bihar, the said case cannot be transferred to the court in the State of Jharkhand for the simple reason that it cannot be said that the proceeding relates exclusively to the territory of Jharkhand State.

100. Thus, the qeustion as to whether all the said 36 cases or some of them would be transferred to the State of Jharkhand or not, has to be decided in the light of the aforesaid principle. Brief facts leading to the filing of the cases have to be stated to arrive at a right conclusion at this stage. The Animal Husbandry Department, Government of Bihar, had three wings, namely, Husbandry Section Section, Fishery Section and Dairy Section. The main function of the said department is to improve the livestocks milk, meat and egg products and also to develop the genetic quality of the cattle of