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CASES DETERMINED BY THE HIGH COURT
AT PATNA
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FROM HIGH COURT
REPORTED BY

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Advocate—striking work in court on call of Advocates' Association—whether to bear the pecuniary loss suffered by his client due to his non-appearance.

When the advocate who was engaged by a party was on strike, there is no obligation on the part of the court either to wait or to adjourn the case on that account. The advocate would also be answerable for the consequence suffered by the party if the non-appearance was solely on the ground of strike call by Advocates' Association.

Held, that when an advocate opts to strike work or boycott the court he must be prepared to bear atleast the pecuniary loss suffered by the client who entrusts his brief to the advocate with all confidence that his case would be in safe hands of that advocate.

In cases where court is satisfied that the ex-parte order, passed due to the absence of an advocate pursuant to any strike call, could be set aside on terms, the court can permit the party to realise the costs from the advocate concerned, without driving such party to initiate another legal action against the advocate.

Ramon Services Pvt. Ltd. v. *Subhash Kapoor and ors.* (2001) I.L.R. 80 (2), Pat. 255

Appointment in Bank on Compassionate grounds— scheme of employment—Guidelines of Ministry of Finance, Government of India and circular dated 8.8.1993 issued by Bank—whether followed—main consideration—Financial Crunch—if the family has financial resources—whether compassionate appointment is permissible—Articles 14 and 16 of the Constitution—whether offends such appointment— Exception to general rule.

The father of the appellant died just twenty days before his due date of retirement, and the family was aware of the fact that the deceased was to retire soon. The benefits, which would have accrued to the deceased employee after his retirement have been made available to the family. The family has also other resources; such as houses etc. It has also got retiral benefits and pension of more than Rs. 1,800/- per month. Thus it

APPOINTMENT IN BANK ON COMPASSIONATE GROUNDS—Concld. Page

cannot be said that the family is in financial crisis due to untimely death of the deceased employee;

Held, that the compassionate appointment is to be made only in a case of sudden financial crisis and if there is no financial crisis due to untimely death of the deceased employee, the compassionate appointment cannot be given only on the ground that the dependent is the son of the deceased employee.

Held, also, that Article 14 of the Constitution guarantees equality before law and Article 16 thereof is one of the facets of the basic concept of equality contained in Article 14. It guarantees equal opportunities to all the citizens in the matter of employment to the offices in the State. Opportunity of employment has to be given to all the citizens in the public offices on the basis of open invitation and on the basis of merit. The other mode of appointment is violative of Articles 14 and 16 of the Constitution. However, in a case of sudden death of a Government employee, provisions have been made to provide employment to the family to meet the immediate financial crisis. The appointment is not to be made on the ground of descent to give a member of the said family a post much less a post for the post held by the deceased employee.

Held, further, that the appointment on compassionate ground is an exception to the general rule and the main consideration for appointment on such ground is the financial crunch due to untimely death of the bread-earner. If the family has financial resources to survive then compassionate appointment is not to be made as in such a situation it will become an appointment on the ground of descent.

Ajay Kumar v. *Canara Bank through the Chairman/ Managing Director and ors.* (2001) I.L.R. 80 (2), Pat. 302

Appointment—on compassionate ground—married daughter of the government servant who applied for appointment on compassionate ground on the death of her father, whether eligible for appointment—whether

APPOINTMENT—Concld. Page

even after her divorce, she becomes a destitute to be eligible for appointment on compassionate ground.

Where a government employee died in harness and his married daughter, who was subsequently divorced, on a petition filed by her, applied for her appointment on compassionate ground;

Held, that the daughter ceased to be a dependent of the father after her marriage in the eye of law and she became dependent on her husband. Even in case of her divorce the dependency does not come to an end inasmuch as the husband is bound to provide for maintenance of his wife even after divorce. So far as financial destitution, mitigation whereof is the object of compassionate appointment, is, concerned, by reason of the protection available to divorced daughter under law, she cannot be called a destitute and, therefore, she cannot be treated at par with even an adopted son and hence she is ineligible for appointment on compassionate ground.

Malti Kumari v. *The State of Bihar and ors.* (2001) I.L.R. 80 (2), Pat. 311

Arbitration and Conciliation Act, 1996—section 85 (2) (a), the expression "in relation to arbitral proceedings", interpretation of—whether would cover not only the proceedings pending before the Arbitrator but would also cover the proceedings before the Court and any other proceedings which are required to be taken under Arbitration Act, 1940, for the award becoming a decree under section 17 of the Arbitration Act, 1940—provisions of Arbitration and Conciliation Act, 1996, whether will be applicable in respect of arbitral proceedings which commenced on or after Act of 1996 came into force—foreign award given after commencement of Arbitration and Conciliation Act, 1996, whether can be enforced under the Act of 1996—whether there is vested right to have the foreign award enforced under the Foreign Award (Recognition and Enforcement) Act, 1961.

ARBITRATION AND CONCILIATION ACT—Contd. Page

Held, that Arbitration Act, 1940, hereinafter referred to as the old Act, shall apply in relation to arbitral proceedings which have commenced before the coming into force of the Arbitration and Conciliation Act, 1996, hereinafter referred to as the new Act. Hence the award given on September 24, 1997 in the case of *Thyssen Stahlunion G.M.B.H.* V. *Steel Authority of India* (Civil Appeal no. 6036 of 1998) in which the arbitral proceeding commenced before the new Act came into force on January 25, 1996, would be enforced under the provisions of the old Act.

Held, further, that the phrase "in relation to arbitral proceedings" in section 85 (2) (a) of new Act, cannot be given a narrow meaning to mean only pendency of the arbitration proceeding before the Arbitrator. It would cover not only proceedings pending before the Arbitrator but would also cover the proceedings before the Court and any proceedings which are required to be taken under the old Act for award becoming decree under section 17, thereof and also appeal arising therefrom.

Held, further, that in cases where arbitral proceedings have commenced before the coming into force of the new Act and are pending before the Arbitrator, it s open to the parties to agree that the new Act be applicable to such arbitral proceedings and they can so agne even before the coming into force of the new Act.

Held, further, that the new Act would be applicable in rlation to arbitral proceedings which commenced on or aler the new Act came into force.

Held, further, that clause 25 contained in the arbitrtion agreement in the case of *M/s Rani Construction Privati Ltd.* v. *Himachal Pradesh State Electricity Board* (Civil \ppeal no. 61 of 1999) does admit of the interprtation that the case is governed by the provisions of the ew Act.

Held, further, that once the arbitral proceedings have commenced, it cannot be stated that right to be governedby the old Act for enforcement of the award

ARBITRATION AND CONCILIATION ACT—Concld. Page

was an incoh... right. It was certainly a right accrued. It is not imperative that for a right to accrue to have the award enforced under the old Act that some legal proceeding for its enforcement must be pending under that Act at the time the new Act came into force.

Held, also, that if a narrow meaning of the phrase "in relation to arbitral proceedings" in section 85 (2) (a) of the new Act is accepted, it is likely to create great deal of confusion with regard to the matters where award is made under the old Act. Provisions for the conduct of arbitral proceedings are vastly different in both the old Act and the new Act. Challenge of award can be with reference to the conduct of arbitral proceedings. An interpretation which leads to unjust and inconvenient results cannot be accepted.

Held, also, that a foreign award given after the commencement of the new Act can be enforced only under the new Act. There is no vested right to have the foreign award enforced under the Foreign Awards (Recognition and Enforcement) Act, 1961. The foreign award given in the case of *Western Shipbreaking Corporation* v. *Clear Heaven Ltd.* (Civil Appeal no. 4928 of 1997) would be governed by the provisions of the new Act.

Thyseen Stahlunion GMBH v. *Steel Authority of India Ltd.* (2001) I.L.R. 80 (2), Pat. 201

Arbitration—clause 19 of agreement between the owner of the land and the builder being in two parts—second part, whether could be ignored on the plea of redundancy—the clause, whether to be read as a whole—there being no agreement between the parties about arbitration by Justice K.B.N. Singh, nor any order of the Court, Justice K.B.N. Singh, whether had the jurisdiction to arbitrate—want of jurisdiction in the arbitrator, whether rendered his award a nullity.

A plain reading of clause 19 of the agreement entered into between the owner of the land and the developer it is clear that while under the first part the parties agreed to get their differences settled by Justice

ARBITRATION—Concld. Page

CENTRAL EXCISE RULES, 1944—Contd. Page

Held, that a bare perusal of the Notification shows that the Central Government under Rule 8 (1) of the Central Excise Rules exempts goods in respect of first clearance for home consumption by or on behalf of the manufacturer from one or more factories upto a value not exceeding rupees thirty lakhs. The exemption would however be allowable on fulfilment of a condition as contained in the proviso to clause (ii) of the Notification which says that an officer not below the rank of an Assistant Collector of Central Excise to be satisfied that the sum total of the value of the capital investment made on the plant and machinery installed in the industrial unit manufacturing "said goods under clearance" is not more than rupees ten lakhs. On perusal of the proviso under consideration it would be clear that it does not refer to any other goods under clearance except the goods falling under item 68 of the First Schedule to the Central Excise and Salt Act, 1944.

Held, further, that the value of the capital investment has to be in respect of the plant and machinery manufacturing the said goods viz goods covered under Item No. 68 of the Tariff, clearances of which alone is taken into account in exempting from payment of excise duty under the Notification in question. The said goods in the present case is only liquid nitrogen. Thus value of investment in the plants and machinery manufacturing other goods not covered under Item 68 has no relevance nor it is to be taken into account.

Held, further, that such notifications by which exemption or other benefits are provided by the Government in exercise of its statutory power, normally have some purpose and policy decision behind it. Such benefits are meant to be provided to the investors and manufacturers. Therefore, such purpose is not to be defeated nor those who may be entitled for it are to be deprived by interpreting the notification which may give it some meaning other than what is clearly and plainly flowing from it.

FERTILISER (CONTROL) ORDER, 1985—Contd. Page

Controller under the Control Order could issue the order dated 17.12.1998 indicating districtwise allocation of fertiliser (Urea) to be supplied by the petitioner-company under ECA quota for kharif season as well as railway rake points from where supply had to be made—whether the order can be said to have been made under section 3 of the Essential Commodities Act, 1955 section 3—Essential Commodities Act, 1955.

Where the Central Government by notified Order had not delegated the power to the Director of Agriculture cum-Registering Authority-cum-Controller under Fertiliser (Control) Order, 1985, hereinafter referred to as the Control Order, to issue any direction under the Control Order;

Held, that the directions issued by the Director of Agriculture by order dated 17.12.1998 indicating district-wise allocation of fertiliser to be supplied by the petitioner-company under E.C.A. quota for the kharif season as well as Railway rake points from where supply had to be made to the different districts indicated there in can not be said to have been issued under section 3 of the Essential Commodities Act, 1955.

Held, further, that Director of Agriculture-cum-Registering Authority had no authority in law to issue the direction allocating district-wise supply of urea by petitioner (manufacturer) or incorporating other terms and conditions regarding Railway rake point as contained in letter dated 17.12.1998.

The learned Single Judge has rightly held that there was no requirement in Form 'B' that godowns must be located at places where the Railway rakes were received.

The directions contained in letter dated 17.12.1998 even if treated to be regulatory in nature with a view to achieve the object of Control Order, have not been issued by the State Government, but by the Director of Agriculture-cum-Registering Authority, who under the Control Order has no such power.

JURISDICTION—Concld. Page

SERVICE—Concld. Page

from time to time for long period, legality of—persons similarly situate, appointed later than the petitioners were regularised by order of High Court—petitioners, whether deserve to be continued in service in view of Articles 14 and 16 of the Constitution—Constitution—Articles 14 and 16.

The services of the petitioners were continued from time to time in the Bihar Rajya Sahkari Bhoomi Vikas Bank Ltd. and their services were regularised when the Bank failed to fill up the vacancies in a regular manner.

Held, that impugned orders of termination of their services are illegal, arbitrary and against equity and are quashed.

Held, further, that in view of services of employees of the Bank appointed later than the petitioners, having been regularised in service on account of orders passed by High Court in various writ-petitions, the petitioners deserve to be continued in service in view of Articles 14 and 16 of the Constitution.

Jagdish Prasad Yadav & ors. v. *The State of Bihar & ors.* (2001) I.L.R. 80 (2) Pat. 363

SUPREME COURT

*Before D.P. Wadhwa and M.B. Shah, JJ.**

1999

October, 7.

*Thyssen Stahlunion GMBH.***

v.

Steel Authority of India Ltd.

Arbitration and Conciliation Act—1996 (Central Act No. XXVI of 1996), section 85 (2) (a), the expression "in relation to arbitral proceedings", interpretation of—whether would cover not only the proceedings pending before the Arbitrator but would also cover the proceedings before the Court and any other proceedings which are required to be taken under Arbitration Act, 1940 (Central Act no. I of 1940), for the Award becoming a decree under section 17 of the Arbitration Act, 1940—provisions of Arbitration and Conciliation Act, 1996 whether will be applicable in respect of arbitral proceedings which commenced on or after Act of 1996 came into force—foreign award given after commencement of Arbitration and Conciliation Act, 1996, whether can be enforced under the Act of 1996—whether there is vested right to have the foreign award enforced under the Foreign Award (Recognition and Enforcement) Act, 1961.

Held, that Arbitration Act, 1940, hereinafter referred to as the old Act; shall apply in relation to arbitral proceedings which have commenced before the coming into force of the Arbitration and Conciliation Act, 1996, hereinafter referred to as the new Act. Hence the award given on September 24, 1997 in the case of *Thyssen Stahlunion G.M.B.H. V. Steel Authority of India* (Civil Appeal no. 6036 of 1998) in which the arbitral proceeding commenced before the new Act came into force on January 25, 1996, would be enforced under the provisions of the old Act.

Held, further, that the phrase "in relation to arbitral proceedings" in section 85 (2) (a) of new Act, cannot be given a

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* In the Supreme Court of India.

** Civil Appeal No. 6036 of 1998 with 4928 of 1997 and Civil Appeal No. 61 of 1999.

Civil Appeal no. 6036 of 1998 arising from Execution Petition no. 47 of 1998 dated 21.9.1998 of Delhi High Court, Civil Appeal no. 4928 of 1997 arising from Civil Revision No. 99 of 1997 dated 27.4.1997 of Gajrat High Court and Civil Appeal no 61 of 1999 arising from Civil Suit no. 52 of 1996 dated 16.7.1998 of Himachal Pradesh High Court.

narrow meaning to mean only pendency of the arbitration proceeding before the Arbitrator. It would cover not only proceedings pending before the Arbitrator but would also cover the proceedings before the Court and any proceedings which are required to be taken under the old Act for award becoming decree under section 17. thereof and also appeal arising therefrom.

Held, further, that in cases where arbitral proceedings have commenced before the coming into force of the new Act and are pending before the Arbitrator, it is open to the parties to agree that the new Act be applicable to such arbitral proceedings and they can so agree even before the coming into force of the new Act.

Held, further, that the new Act would be applicable in relation to arbitral proceedings which commenced on or after the new Act came into force.

Held, further, that clause 25 contained in the arbitration agreement in the case of *M/s Rani Construction Private Ltd.* v. *Himachal Pradesh State Electricity Board* (Civil Appeal no. 61 of 1999) does admit of the interpretation that the case is governed by the provisions of the new Act.

Held, further, that once the arbitral proceedings have commenced, it cannot be stated that right to be governed by the old Act for enforcement of the award was an incohate right. It was certainly a right accrued. It is not imperative that for a right to accrue to have the award enforced under the old Act that some legal proceeding for its enforcement must be pending under that Act at the time the new Act came into force.

Held, also, that if a narrow meaning of the phrase "in relation to arbitral proceedings" in section 85 (2) (a) of the new Act is accepted, it is likely to create great deal of confusion with regard to the matters where award is made under the old Act. Provisions for the conduct of arbitral proceedings are vastly different in both the old Act and the new Act. Challenge of award can be with reference to the conduct of arbitral proceedings. An interpretation which leads to unjust and inconvenient results cannot be accepted.

Held, also, that a foreign award given after the commencement of the new Act can be enforced only under the new Act. There is no vested right to have the foreign award enforced under the Foreign Awards (Recognition and Enforcement) Act, 1961. The foreign award given in the case of *Western Shipbreaking Corporation* v. *Clear Heaven Ltd.* (Civil Appeal no. 4928 of 1997) would be governed by the provisions of the new Act.

Case laws reviewed.

Appeals against the judgments of Delhi High Court, Gujrat High Court and Himachal Pradesh High Court.

The facts of the cases material to this report are set out in the judgment of D.P. Wadhwa, J.

D.P. Wadhwa, J.

The Facts :

These three appeals raise three different questions relating to the construction and interpretation of Section 85 of the Arbitration and Conciliation Act, 1996 (the 'new Act' for short) which contains repeal and saving provision of the three Acts, namely, the Arbitration (Protocol and Convention) Act 1937, the Arbitration Act, 1940 (the 'old Act' for short) the Foreign Awards (Recognition and Enforcement) Act, 1961 (the 'Foreign Awards Act' for short).

This Section 85 of the new Act we reproduce at the out set :

"85. Repeal and saving—(1) The Arbitration (Protocol and Convention) Act, 1937 (6 of 1937), the Arbitration Act, 1940 (10 of 1940) and the Foreign Awards (Recognition and Enforcement) Act, 1961 (45 of 1961) are hereby repealed.

(2) Notwithstanding such repeal, –

(a) the provisions of the said enactments shall apply in relation to arbitral proceedings which commenced before this Act came into force unless otherwise agreed by the parties but this Act shall apply in relation to arbitral proceedings which commenced on or after this Act comes into force;

(b) all rules made and notifications published, under the said enactments shall, to the extent to which they are not repugnant to this Act, be deemed respectively to have been made or issued under this Act."

In the case of Thyssen Stahlunion GMBH (CA No. 6036 of 1998) the contract for sale and purchase of prime cold rolled mild steel sheets in coils contains arbitration agreement. Relevant clauses are as under :

"Clause 12 : LEGAL INTERPRETATION

12.1 This contract shall be governed and construed in accordance with the Laws of India for the time being in force.

12.2 To interpret all commercial terms and abbreviations used herein which have not been otherwise defined, the rules of "INCOTERMS 1990" shall be applied.

Clause 13 : SETTLEMENT OF DISPUTES

All disputes of differences whatsoever between the parties hereto arising out of or relating to the construction, meaning or operation or effect of this contract or the breach thereof shall unless amicably settled between the parties hereto; be settled by arbitration in accordance with the Rules of Conciliation and Arbitration of the International Chamber of Commerce (ICC), Paris, France by a sole Arbitrator appointed by the Chairman of the Arbitral Tribunal of the Court of Arbitration of ICC and the award made in pursuance thereof shall be binding on both the parties. The venue for the arbitration proceedings shall be New Delhi, India.

Disputes and differences having arisen, the arbitration proceedings commenced on September 14, 1995 under the old Act. On this date request for arbitration was made to the ICC under the arbitration clause in the contract. Mr. Cecil Abraham of the Malaysian Bar was appointed sole arbitrator on November 15, 1995. Terms of reference in the arbitration were finalised on May 13, 1996. Hearing before the sole arbitrator took place from January 7, 1997 till January 28, 1997. Award was given on September 24, 1997. By this time on January 25, 1996 the new Act had come into force. On October 13, 1997 Thyseen filed a petition in the Delhi High Court under Sections 14 and 17 of the old Act for making the award rule of court (Arbitration Suit No. 352-A/97). While these proceedings were pending in the High Court, Thysen, on February 12, 1998, filed an application under Section 151 of the Code of Civil Procedure for stay of the proceedings. On the following day Thyssen filed an application in the High Court for execution of the award under the new Act (Execution Petition No. 47/98). The ground taken was that the arbitration proceedings had been terminated with the making of the award on September 24, 1997 and, therefore, the new Act was applicable for enforcement of the award. The respondent, Steel Authority of India Ltd. (SAIL), opposed the maintainability of the execution petition. SAIL also filed objections to the award on

various grounds under the old Act. The question which arose for consideration is :

> Whether the award would be governed by the new Act for its enforcement or whether provisions of the old Act would apply ?

A learned single Judge of the Delhi High Court by judgment dated September 21, 1998 held that proceedings would be governed by the old Act. Thyssen Stahlunion GMBH feeling aggrieved filed this appeal (CA 6036/98).

In the case of Western Shipbreaking Corporation (CA No. 4928 of 1997) under Memorandum of Agreement dated November 4, 1994 M/s. Clareheaven. Ltd. agreed to sell to Western Shipbreaking Corporation a ship "M.V. Kaldera". Clause (19) of the Memorandum of Agreement contained arbitration clause which is as under :

> "If any dispute should arise in connection with the interpretation in fulfillment of this contract, same shall be decided by arbitration in the city of London. U.K. with English law to apply and shall be referred to a single arbitrator to be appointed by the parties hereto. If the parties cannot agree on the appointment of the single arbitrator, the dispute shall be settled by three arbitrators, each party appointing one arbitrator the third being appointed by London Maritime Arbitration (sic) Association in London.
>
> If one party fails to appoint an arbitrator either or by way of substitution for two weeks after the other party having appointed his arbitrator, has sent the party making default notice by mail, cable or telex to make the appointment, London Maritime Arbitration (sic) Association shall after application from the party having appointed his arbitrator also appoint on behalf of the party making default.
>
> The Award rendered by the arbitrators shall be final binding upon the parties and may if necessary be enforced by any court or any other competent authority in the same manner as a document in the court of justice."

Arbitration proceedings in this case were held in United Kingdom prior to the enforcement of the new Act. The award was made on February 25, 1996 in London. The question which arises for consideration is :

Whether the award is governed by the provisions of the new Act for its enforcement or by the Foreign Awards Act ?

A learned single Judge of the Gujarat High Court by the impugned judgment dated April 21, 1997 held that the new Act would be applicable. *Western Shipbreaking Corporation* is aggrieved and filed appeal against that judgment (CA 4928/97).

In the case of *M/s. Rani Constructions Pvt. Ltd.* (CA No. 61 of 1999) under the contract which was for the construction of certain works of the Himachal Pradesh State Electricity Board, there was an arbitration agreement contained in clause 25 which, in relevant part, is as under :

"Subject to the provisions of the contract to the contrary as aforesaid, the provisions of the Indian Arbitration Act, 1940 or any statutory modification or re-enactment thereof and the rules made thereunder and for the time being in force shall apply to all arbitration proceedings under this clause."

Disputes having arisen, these were referred to the sole arbitrator on December 4, 1993. The arbitrator gave his award on February 23, 1996 after the new Act had come into force. On account of difference of opinion in two judgments of the Himachal Pradesh High Court, both rendered by single Judges, as to whether it is old or new Act will apply, a learned single Judge of the High Court referred the following question to a larger Bench :

"Whether the agreement referred to in Section 85 (2) (a) of the Act of 1996 for the purpose of applicability of the said Act to the pending arbitral proceedings which had already commenced under the Act of 1940 is one necessarily to be entered into after the commencement of the Act of 1996 or any clause to that effect in an agreement already entered into between the parties before the enforcement of the Act of 1996 would be sufficient for that purpose."

Reference question does not appear to have been happily worded. What it means is that when clause (a) of Section 85(2) of the new Act uses the expression "unless otherwise agreed by the parties" can the parties agree for the applicability of the new Act before the new Act comes into force or they have necessarily to agree only after the new Act comes into force.

The Division Bench of the High Court by the impugned judgment dated July 16, 1998 held that clause 25 of the agreement "does not admit of interpretation that this case is governed by Act of 1996".

Arguments have been addressed in considerable detail for and against the application of the new Act or the old Act in the cases of Thyssen and Rani Construction and the Foreign Awards Act in the case of Western Shipbreaking Corporation. We would, however, refer to these arguments in brief in so far we consider these to be relevant to decide the issues before us.

The Submissions :

Mr. F.S. Nariman, who appeared for Thyssen, made the following submissions :

1. Termination of arbitral proceedings by the final arbitration award and the enforcement of the award are two separate proceedings. Under Section 32 of the new Act arbitral proceedings shall terminate by the final award or by an order of the arbitral tribunal under sub-section (2) as provided therein. Thus after the arbitral proceedings are terminated and final award made, reference has to be made to the new Act for enforcement of the award as when award was given old Act stood repealed.
2. In view of the savings provision under clause (a) of sub-section (2) of Section 85 of the new Act it is not necessary to refer to Section 6 of the General Clauses Act, 1897.
3. New act is based on UNCITRAL Model Laws. It is a progressive Act. Objects which led to passing of the new Act should be kept in view. For this, reference may be made to the Preamble of the new Act as well. In the Statement of Objects and Reasons, the objectives behind introduction of the New arbitration law have been explained.

It is clearly intended that the enforcement of the award given after the new Act came into force would be governed by the new Act. Interpretation of the provisions of Section 85 has to be purposeful which advances the object of the new Act. In *Sundaram Finance Ltd.* vs. *NEPC India Ltd.* (1999 (2) SCC 479) the question that arose for consideration was whether under Section 9 of the new Act court has jurisdiction to pass interim orders even before arbitral proceedings commence and before an arbitrator is appointed. Under this Section court is empowered to pass interim orders before or during arbitral proceedings or at any time after the making of the arbitral award but before its enforcement. During the course of discussion this Court referred to the statement

of objects and reasons which led to the promulgation of the new Act and said :

> "The 1996 Act (new Act) is very different from the Arbitration Act, 1940 (old Act). The provisions of this Act have, therefore, to be interpreted and construed independently and in fact reference to the 1940 Act may actually lead to misconstruction. In other words, the provisions of the 1996 Act (new Act) have to be interpreted being uninfluenced by the principles underlying the 1940 Act (old Act). In order to get help in construing these provisions, it is more relevant to refer to the UNCITRAL Model Law rather than the 1940 Act."

4. Law governing arbitration proceedings can be different than that governing the award. In this connection reference may be made to a decision of this Court in *Sumitomo Heavy Industries Ltd.* vs. *ONGC Ltd. and others* (1).

In *Sumitomo Heavy Industries Ltd.'s case* (supra) under the arbitration agreement between the parties proceedings were to be held at London in accordance with the provisions of International Chamber of Commerce and the rules made thereunder as amended from time to time. Award was made on June 27, 1995. ONGC Ltd. filed a petition in the High Court at Bombay praying that the respondent be directed under Section 14 of the old Act to file the award in that court. It was contended by ONGC that the award was invalid, unenforceable and liable to be set aside under the provisions of the Arbitration Act, 1940. This petition of the ONGC was allowed by the High Court. It was noticed that during the course of preliminary hearing in the Queens Bench Division, Commercial Court, in London, Potter, J. had observed that one of the aspects of the case for consideration was :

> "(4) The curial law, i.e., the law governing the arbitration proceedings themselves, the manner in which the reference is to be conducted. It governs the procedural powers and duties of the arbitrators, questions of evidence and the determination of the proper law of the contract."

Decision of the Bombay High Court was challanged in this Court. This Court said that the central issue in the appeal was as to what was the area of operation of the curial law and went on to observe as under :—

(1) (1998) 1 S.C.C. 305.

"The conclusion that we reach is that the curial law operates during the continuance of the proceedings before the arbitrator to govern the procedure and conduct thereof. The courts administering the curial law have the authority to entertain applications by parties to arbitrations being conducted within their jurisdiction for the purpose of ensuring that the procedure that is adopted in the proceedings before the arbitrator conforms to the requirements of the curial law and for reliefs incidental thereto. Such authority of the courts administering the curial law ceases when the proceedings before the arbitrator are concluded.

The proceedings before the arbitrator commence when he enters upon the reference and conclude with the making of the award. As the work by Mustill and Boyd (in Law and Practice of Commercial Arbitration in England, 2nd Edn.) aforementioned puts it, with the making of a valid award the arbitrator's authority, powers and duties in the reference come to an end and he is *"functus officio"* (p. 404). The arbitrator is not obliged by law to file his award in court but he may be asked by the party seeking to enrorce the award to do so. The need to file an award in court arises only if it is required to be enforced, and the need to challenge it arises if it is being enforced. The enforcement process is subsequent to and independent of the proceedings before the arbitrator. It is not governed by the curial or procedural law that governed the procedure that the arbitrator followed in the conduct of the arbitration."

5. Section 85 of the new Act provides for a limited repeal. This Section be contrasted with Section 48 of the old Act, which is as under :–

"48. Saving for pending references–The provisions of this Act shall not apply to any reference pending at the commencement of this Act, to which the law in force immediately before the commencemennt of this Act shall notwithstanding any repeal effected by this Act continue to apply."

This departure from the language used in Section 48 of the old Act is deliberate and has to be given effect to while considering the scope of Section 85 of the new Act.

6. Assuming that Section 6 of the General Clauses Act applies, the question whether a party gets a rights at the time when

the arbitration proceedings commenced under the old Act and that the award given after coming into force of new Act would yet be governed under the old Act, can be answered only if any vested right accrued to the party. Vested rights accrue when proceedings for enforcement of the award are taken and not before that. Right to take advantage of an enactment is not a vested right. One cannot have mere abstract right but only accrued right. Until award is made no party has an accrued right. Till the award is made nobody knows his rights. In this connection reference may be made to a decision of the Privy Council in *Abbott* vs. *The Minister for Lands* (1), which was followed by this Court in *Hungerford Investment Trust Limited* vs. *Haridas Mundhra and others* (2). Reference may also be made to another decision of this Court in *D.C. Bhatia and others* vs. *Union of India and another* (3).

In *Abbott* vs. *The Minister for Lands* (supra) the Court said that "the mere right, existing at the date of a repealing statute, to take advantage of provisions of the statute repealed is not a "right accrued" within the meaning of the usual saving clause." The appellant had contended that under the repealed enactment he had a right to make the additional conditional purchase, and this was a "accrued right" at the time Crown Lands Act of 1884 was passed and that notwithstanding the repeal it remained unaffected by such repeal. The 1884 Act had repealed earlier Crown Lands Act of 1861. The Board observed :-

"It has been very common in the case of repealing statute to save all rights accrued. If it were held that the effect of this was to leave it open to any one who could have taken advantage of any of the repealed enactments still to take advantage of them, the result would be very far-reaching.

It may be, as Windeyer J. observes, that the power to take advantage of an enactment may without impropriety be termed a "right". But the question is whether it is a "right accrued" within the meaning of the enactment which has to be construed.

Their Lordships think not, and they are confirmed in this opinion by the fact that the words relied on are found in

(1) (1895) A.C. 425 (P.C.)
(2) (1972) 3 S.C.R. 690.
(3) (1995) 1 S.C.C. 104.

conjunction with the words "obligations incurred or imposed". They think that the mere right (assuming it to be properly so called) existing in the members of the community or any class of them to take advantage of an enactment, without any act done by an individual towards availing himself of that right, cannot properly be deemed a "right accrued" within the meaning of the enactment.

Even if the appellant could establish that the language of sect. 2(b) was sufficient to reserve to him the right for which he contends, he would have to over come further difficulties. That enactment only renders "rights accrued" unaffected by the repeal "subject to any express provisions of this Act in relation thereto".

This Court in *Hungerford Investment Trust Limited* vs. *Haridas Mundhra and others* (supra) followed decision of Privy Council in *Abbott* vs. *The Minister for Lands* (supra) holding that the mere right to take advantage of provisions of an Act is not an accrued right.

In *D.C. Bhatia and others* vs. *Union of India and another* (supra) the question which arose for consideration before this Court related to the interpretation and constitutional validity of Section 3(c) of the Delhi Rent Control Act. Delhi Rent Control Act was amended with effect from December 1, 1988 when Section 3(c) was introduced which provided that the provisions of that Act will not apply to any property at a monthly rent exceeding Rs. 3,500/-. This Court while upholding the constitutional validity of the provisions as contained in Section 3(c) of Delhi Rent Control Act observed that "we are unable to uphold the contention that the tenants had acquired a vested right in the properties occupied by them under the statute. We are of the view that the provisions of Section 3(c) will also apply to the premises which had already been let out at the monthly rent in excess of Rs. 3500/- when the amendment made in 1988 came into force". One of the contentions raised by the tenants was that they had acquired vested rights which could not be disturbed unless the amending Act contained specific provisions to that effect. They said that under the existing law tenants had acquired valuable property rights and they could neither be evicted nor the rent could be enhanced and that even a suit could not be brought against a tenant on the expiry of the lease. This Court repelled the contention and said :-

"52. We are unable to uphold this contention for a number of reasons. Prior to the enactment of the Rent Control Act by the various State Legislatures, the legal relationship between the landlord and tenant was governed by the provisions of the Transfer of Property Act. Delhi Rent Control Act provided protection to the tenants from drastic enhancement of rent by the landlord as well as eviction, except on certain specific grounds. The legislature by the Amendment Act No. 57 of 1988 has partially repealed the Delhi Rent Control Act. This is a case of express repeal. By Amending Act the legislature has withdrawn the protection hitherto enjoyed by the tenants who were paying Rs. 3500 or above as monthly rent. If the tenants were sought to be evicted prior to the amendment of the Act, they could have taken advantage of the provisions of the Act to resist such eviction by the landlord. But this was nothing more than a right to take advantage of the enactment. The tenant enjoyed statutory protection as long as the statute remained in force and was applicable to him. If the statute ceases to be operative, the tenant cannot claim to continue to have the old statutory protection. It was observed by Tindal, C.J., in the case of *Kay* v. *Goodwin* [(1830) 6 Bing 576 : 130 ER 1403] : (ER p-1405)

"The effect of repealing a statuts is to obliterate it as completely from the records of the parliament as if it had never been passed; and, it must be considered as a law that never existed, except for the pupose of those actions which were commenced, prosecuted, and concluded whilst it was an existing law."

53. The provisions of a repealed statute cannot be relied upon after it has been repealed. But, what has been acquired under the Repealed Act cannot be disturbed. But, if any new or further step is needed to be taken under the Act, that cannot be taken even after the Act is repealed."

7. The expression "in relation to" appearing in Section 85 (2) (a) of the new Act refers to stage of arbitration proceedings under the old Act. Reference is made to various provisions of the new Act employing the words "arbitral proceedings" or "arbitral proceedings and award" to stress that in the new Act there are different stages in the process of arbitration. Section 42 of the new Act uses the expression

"arising out of that agreement and the arbitral proceedings". There is a difference btween the expressions "arising out of" and that "relating to".

8. Section 36 of the new Act is a deeming provision which provides for the enforcement of the award as if it is a decree of a civil court under the Civil Procedure Code. This stage comes after application for setting aside of the arbitral award under Section 34 has been dealt with. This Court in *Oil and Natural Gas Commission* vs. *Western Company of North America* (1) while dealing with the old Act said that till an award is transformed into a judgment and decree under Section 17 of the Arbitration Act, 1940, it is altogether lifeless from the point of view of its enforceability. Life is infused into the award in the sense of its becoming enforceable only after it is made rule of the court upon the judgment and decree and in terms of the award being passed.

9. Claim of the respondents that they had acquired vested right to challenge the award under the old Act in view of Section 6 of the General Clauses Act is also incorrect. In this connection reference be made to Section 100 of the Code of Civil Procedure, which was amended by Section 37 of the Code of Civil Procedure (Amendment) Act, 1976. Now, by Section 100 provisions of second appeal were made more stringent. But then the right which a party had acquired before the amendment came into operation was saved specifically by clause (m) of Section 97 of the Code of Civil Procedure (Amendment) Act, 1976.

Mr. S.G. Desai, learned counsel appearing for Rani Constructions, supported Mr. Nariman in his submissions. He also said that the expression "in relation to" appearing in Section 85 (2) (a) refers to different stages of arbitration proceedings under the old Act and does not cover the proceedings after the award is given. We summarise his submissions as well :

1. Parties can agree to the applicability of the new Act even before the new Act comes into force. There is, however, bar that they cannot agree to the applicability of the old Act after the new Act has come into force when arbitration proceedings though under an agreement under the old Act commence after the coming into force of the new Act.

(1) (1987) 1 S.C.R. 1024.

Reference may be made to *Sir Dinshaw Manekji Patit* vs. *G.B. Badkas & others* (1) for the expression "for the time being in force" and also construction of the similar expression in *Devkumarsingji Kasturchandji* vs. *State of Madhya Pradesh and others* (2). In *Sir Dinshaw Manekji Patit's case* the question before the High Court was the scope of the expression "in any law for the time being in force" as appearing in Clause (g) of Section 19 (1) of the Defence of India Act, 1939. This clause is as under :

"(g) Save as provided in this section and in any rules made thereunder, nothing in any law for the time being in force shall apply to arbitrations under this section."

The learned single Judge of the High Court considered the expression "law for the time being in force" and said that the natural import of the words "for the time being" indicate indefinite future state of thing, and in this connection reference was made to Stroud's Judicial Dictionary, (3rd Edition) Vol. IV page 3030 which is as follows :

"The phrase 'for the time being' may, according to its context, mean the time present, or denote a single period of time, but its general sense is that of time indefinite, and refers to an indefinite state of facts which will arise in the future, and which may (and probably will) vary from time to time (Ellison v. Thomas) (1861) 31 LJ Ch 867 and (1862) 32 LJ Ch 32; Coles v. Pack, (1869) LR 5 CP 65. See also Re Gunter's Settlement Trust, (1949) Ch 502."

High Court said that in their ordinary sense, the words "law for the time being in force" referred not only to the law in force at the time of the passing fo the Defence of India Act but also to any law that may be passed subsequently and which is in force at the time when the question of applicability of such law to arbitrations held under said Section 19 arose.

In *Devkumarsingji Kasturchandji* vs. *State of Madhya Pradesh & Ors.* (supra) Section 132 (1) and Section 135 of the Madhya Pradesh Municipal Corporation Act, 1956 empowered the Municipal Corporation to impose a tax on lands and buildings which the Corporation did under the exercise of that power. The State Legislature enacted a law called the Madhya Pradesh Nagriya Sthavar Sampati Kar Adhiniyam, 1964 which provided for the levy

(1) (1969) A.I.R (Bom.) 151.
(2) (1967) A.I.R (M.P.) 268.

of tax on lands and buildings in the urban areas in the State of Madhya Pradesh. Sub-section (3) of Section 4 of the Madhya Pradesh Corporation Act provided that the tax levied and payable under that Act shall be in addition to any other tax for the time being payable under any other enactment for the time being in force in respect of the land or the building or portion thereof. Act of 1964 was challenged and one of the grounds of challenge was that the State Legislature having delegated its power to impose tax on lands and buildings in favour of the Municipal Corporation and Municipalities under the Municipal Corporation Act, 1956 and the M.P. Municipalities Act, 1961 and the local authorities having imposed a tax on lands and buildings, the State Legislature had no power to levy tax on lands and buildings. The Court said that the expression "any other enactment for the time being in force" did not mean an enactment which was already in force at the time the Corporation imposed a tax under Section 132 of the Municipal Corporation Act but meant any legislation enacted whether before or after the imposition of the tax by the Corporation. The Court said that the general sense of the words "for the time being" is that of time indefinite and refers to indefinite state of facts which will arise in future and which may vary from time to time.

2. Section 28 of the Contract Act does not bar the agreement between the parties if they wish that arbitration proceedings be governed by any enactment relating to arbitration that may be in force at the relevant time.

3. Expression "unless othersise agreed" used in Section 85 (2) (a) of the new Act would clearly apply to the case (Civil) Appeal No. 61 of 1999). Parties were clear in their mind that the old Act or any other statutory modification or reenactment of that Act would govern the arbitration. Parties can anticipate that the new enactment may come into operation at the time the disputes arise. It cannot be said that such an agreement is in restraint of legal proceedings. Agreement can be entered into even before or after the new Act comes into force.

4. There is no right in procedure. Right to challenge the award is still there in the new Act though now in the restricted form. It cannot be said that any prejudice has been caused to a party when it has to challenge the award under the new Act. High Court was wrong that the arbitration clause was hit by Section 28 of the Contract Act and that the

agreement for the application of the new Act has to be entered into only after the coming into force of the new Act.

At this stage itself we may also note the submissions made by Mr. Krishnan Venugopal, counsel appearing for M/s. Clareheaven Ltd. (CA 4928/97) in support of the decision of the High Court holding that for enforcement of the foreign award new Act would apply :-

1. Section 85 (2) (a) of the new Act cannot save the operation of the Foreign Awards Act. On true construction of clause (a) it will have no application to the Foreign Awards Act, 1961. There is no accrued right in favour of the appellant in CA No. 4928/97 to challenge the foreign award under the Foreign Awards Act, 1961. Reference in this connection was made to a decision of this Court in *M.S. Shivananda* vs. *Karnataka State Road Transport Corporation Ors.* [(1980) 1 SCC 149]. In that case this Court said as under :

"In considering the effect of an expiration of a temporary Act, it would be unsafe to lay down any inflexible rule. It certainly requires very clear and unmistakable language in a subsequent Act of the legislature to revive or re-create an expired right. If, however, the right created by the statute is of an enduring character and has vested in the person, that right cannot be taken away because the statute by which it was created has expired. In order to see whether the rights and liabilities under the repealed Ordinance have been put to an end by the Act, 'the line of enquiry would be not whether', in the words of Mukherjee, J. in *State of Punjab* vs. *Mohar Singh* [(1955) 1 SCR 893]. 'the new Act expressly keeps alive old rights and liabilities under the repealed Ordinance but whether it manifests and intention to destroy them". Another line of approach may be to see as to how far the new Act is retrospective in operation.

It is settled both on principle and authority, that the mere right existing under the repealed Ordinance, to take advanctage of the provisions of the repealed Ordinance, is not a right accrued. Sub-section (2) of Section 31 of the Act was not intended to preserve abstract rights conferred by the repealed Ordinance. The legislature had the competence to so restructure the Ordinance as to meet the exigencies of the situation obtaining after the taking over of the contract

carriage services. It could reenact the Ordinance according to its original terms, or amend or alter its provisions."

Provisions of Foreign Awards Act, 1961 cannot be put into operation as that Act has been repealed. In this eventuality, Section 6 of the General Clauses Act would apply. But then Western Shipbreaking Corporation did not acquire any vested right to enforce the foreign award under the Foreign Awards Act and as such Section 6 of General Clauses Act by implication is inapplicable.

2. Western Shipbreaking Corporation did not acquire any vested right as by the time the foreign award was made new Act had come into force for enforcement of the foreign award. Reference was made to two English decisions in *Abbot* vs. *The Minister for Lands* (supra) and *Hamilton Gell* vs. *White* (1).

In *Hamilton Gell* vs. *White* (supra) (Court of Appeal) facts are plainly stated in the headnote, which we quote :

"In September, 1920, the landlord of an agricultural holding, being desirous of selling it, gave his tenant notice to quit. By the Agricultural Holdings Act, 1914, when the tenancy of a holding is determined by a notice to quit given in view of a sale of the holding the notice to quit is treated as an unreasonable disturbance within s. 11 of the Agricultural Holdings Act, 1908, and the tenant is entitled to compensation upon the terms and subject to the conditions of that section. One of the conditions of the tenant's right to compensation under that section was that he should within two months after the receipt of the notice to quit give the landlord notice of his intention to claim compensation, and another condition was that he should make his claim for compensation within three months after quitting the holding. The tenant duly gave notice of his intention to claim compensation within the time so limited; but before the tenancy had expired, and therefore before he could satisfy the second condition, s. 11 of the Act of 1908 was repealed. He subsequently made his claim within the three months limited by the section."

The question was if the tenant had acquired any right for him to maintain the claim. For that purpose the court was considering

(1) (1922) 2 K.B. 422.

the provisions of Section 38 of the English Interpretation Act, passed after the commencement of this Act repeals any other enactment, then, unless the contrary intention appears the repeal shall not.....affect any right, privilege, obligation or liability acquired, accrued or incurred under any enactment so repealed".

Bankes LJ said :-

"In my opinion the tenant had acquired a right under s. 11 of the Act of 1908. This is not like the case which was cited to us (About vs. Minister for Lands [1895] AC 425) in argument where the tenant's right depended upon some act of his own. Here it depends upon some act of his own. Here it depends upon the act of the landlord—namely, the giving of a notice to quit in view of a sale—in which event the section itself confers a right to compensation subject to the tenant complying with the conditions therein specified, and so far as it was possible to comply with them down to the time when the section was repealed he did in fact comply with them. For these reasons I think the question must be answered in the affirmative....."

Scrutton LJ. said :-

"The conditions imposed by S. 11 were conditions, not of the acquisition of the right, but of its enforcement. Sect. 38 says that repeal of an Act shall not (c) "affect any right...acquired...under any enactment so repealed," or (e) "affect any investigation, legal proceeding, or remedy in respct of any such right." As soon as the tenant had given notice of his intention to claim compensation under S. 11 he was enitled to have that claim investigated by an arbitrator."

Atkin LJ said :-

"It is obvious that provision was not intended to preserve the abstract rights conferred by the repealed Act, such for instance as the right of compensation for disturbance conferred upon tenants generally under the Act of 1908, for if it were, the repealing Act would be altogether inoperative. It only applies to the specific rights given to an individual upon the happening of one or other of the events specified in the statute. Here the necessary event has happened, because the landlord has, in view of a sale of the property,

given the tenant notice to quit. Under those circumstances the tenant has "acquired a right," which would "accrue" when he has quitted his holding, to receive compensation. A case was cited in support of the landlord's contention : *Abbott* v. *Minister for Lands* ([1895] A.C. 425], where the question was whether a man who had purchased certain land was entitled to exercise a right to make additional purchases of adjoining land under the powers conferred by a repealed Act, the repealing Act containing the usual saving clause. The Privy Council held that he was not. They said (1) that "the mere right (assuming it to be properly so called) existing in the members of the community or any class of them to take advantage of an enactment, without any act done by an individual towards availing himself of that right, cannot properly be deemed to be a 'right accrued' within the meaning of the enactment." I think that bears out the proposition that I have stated above. The result is that the tenant in this case has acquired a right to claim compensation under the Act of 1908 on his quitting his holding, and therefore the second question asked by the arbitrator should be answered in the affimative."

3. There can be no accrued right to have a decree or an award enforced under a particular procedure that has been repealed by statute. Reference was made to decision of this Court in *Lalji Raja & Sons* vs. *Firm Hansraj Nathuram* (1) and of the House of Lords decision in the case of *Kuwait Minister of Public Works* vs. *Sir Frederick Snow and Partners* (2).

In *Lalji Raja & Sons* vs. *Firm Hansraj Nathuram* (supra) this Court relying on the decision of the House of Lords in *Abbot* vs. *Minister for Lands* (supra) said that "the mere right, existing at the date of repealing statute, to take advantage of provisions of the statute repealed is not a "right accrued" within the meaning of the usual saving clause." Further relying on another decision in *Hamilton Gell* vs. White (supra) the Court said that a provision to preserve the right accrued under a repealed Act was not intended to preserve the abstract rights conferred by the repealed Act". "It only applies to specific rights given to an individual upon happening of one or the other of the events specified in statute."

(1) (1971) 1 S.C.C. 721.
(2) (1984) 1 All E.R. 733.

In *Kuwait Minister of Public Works* v. Sir Frederick Snow & Partners (a firm) and others (supra) (House of Lords) there was a contract between the parties entered into some time in 1958 relating to the construction of an international airport in Kuwait. Parties to the contract were the Government of the State of Kuwait and an English firm of civil engineering consultants (English firm). Disputes having arisen award was given by Kuwaiti arbitrator on September 15, 1973. The award required payment by the English firm to the Government of the State of Kuwait an amount well over 3·5 million. Proceedings to enforce the award were initiated in England on March 23, 1979. In 1975 an Act with the title "An Act to give effect to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards" came into force. The award was a foreign award or a convention award. New York Convention came into being on June 10, 1958. United Kingdom became party to the Convention on December 23, 1975 and the 1975 Act was passed to give effect to the New York Convention. Kuwait became party to the Convention on July 27, 1976. On April 12, 1979 an Order in Council was made declaring Kuwait a party to the Convention. Now the award was made before Kuwait had become party to the Convention but when proceedings were initiated to enforce the award Kuwait had done so. It was contended by the English firm that the foreign arbitral award could only qualify as a Convention award for the purpose of 1975 Act if the State in which it was made was already a party to the Convention at the date of the award. Accordingly it was contended that the award was not a convention award and could not be enforced by the State of Kuwait against the English firm. The plea of the English firm was negatived. It was held that the award was maintainable if the State in which the award was made is a party to the convention at the date when proceedings to enforce the award began, even if it was not a party at the date when the award was made. The court considered in all Section 3 of the 1975 Act which provided "An award made in pursuance to an arbitration agreement in the territory of a State, other than the United Kingdom, which is a party to the New York Convention shall, subject to the following provisions of this Act, be enforceable—". The court said that the use of the present tense in the word 'is' in the phrase 'which is a party to the New york Convention' must, as a matter of the ordinary and natural interpretation of the words used, mean that the phrase relates to the time of enforcement and

not to any other time. In particular, if it had been the intention of the Legislature that the phrase should relate to the date of the award, then the draftsman would surely have used the words which made that intention clear such as 'which is and was at the date of the award a party to the New York Convention'. The court repelling the argument of the English firm observed as under :—

> "The first answer is that the presumption against interpreting a statute as having retrospective effect is based on the assumption that, if retrospective effect were to be given to it, the result would be to deprive persons of accrued rights or defences. In the present case I am not persuaded that to give the 1975 Act retrospective effect in the sense which has been discussed would deprive anybody either of an accrued right or of an accrued defence. On the footing that awards made in a foreign state before that state became a party to the convention are not convention awards for the purposes of the 1975 Act, and cannot therefore be enforced under it, the result is simply that a person wishing to enforce such an award in the United Kingdom would be obliged to bring an action on it at common law, the right to do this being expressly preserved by s. 6 of the 1975 Act. It cannot therefore be said that, if the construction of the 1975 Act which I prefer is correct, the result is to make an award, which could not previously have been enforced against a person at all, newly enforceable against him under the 1975 Act. On the contrary, the award could always have been enforced against him by one form of procedure, and the only result is that it subsequently becomes enforceable against him by a second and alternative form of procedure."

4. The expression "in relation to" cannot expand the scope of the saving clause in Section 85 (2) (a) beyond "arbitral proceedings" to the enforcement of an award. Section 85 (2) (a) of the new Act saves only those provisions of the old Act and the Foreign Awards Act that would apply to arbitral proceedings and not the proceedings to enforce the arbitral award. Reference in this connection may be made to a decision of this Court in *Navin Chemicals Mfg. & Trading Co. Ltd.* vs. *Collector of Customs* (1).

In *Navin Chemicals Mfg. & Trading Co. Ltd.'s case* (supra) this Court was considering the expression "the determination of

(1) (1933) 4 S.C.C. 320.

any question having a relation to the rate of duty of customs or to the value of goods for purposes of assessment" appearing in Section 129-C of the Customs Act, 1962. Section 129-C of the Customs Act, 1962, in relevant part, is as under :—

> "129-C. Procedure of Appellate Tribunal—(1) The powers and functions of Appellate Tribunal may be exercised and discharged by Benches constituted by the President from amongst the members thereof.
>
> (2) Subject to the provisions contained in sub-sections (3) and (4) a Bench shall consist of one judicial member and one technical member.
>
> (3) Every appeal against a decision or order relating, among other things, to the determination of any question having a relation to the rate of duty of customs or to the value of goods for purposes of assessment shall be heard by a Special Bench constituted by the President for hearing such appeals and such Bench shall consist of not less than two members and shall include at least one judicial member and one technical member."

This Court held that the appeal could have been heard and decided by a member of the Appellate Tribunal, sitting singly. It said that the phrase "relation to" is, ordinarily, of wide import but, in the context of its use in the said expression in Section 129-C, it must be read as meaning a direct and proximate relationship to the rate of duty and to the value of goods for the purposes of assessment.

Mr. Dipankar Gupta, senior advocate, appearing for the SAIL (in CA No. 6036/98) made his submissions which we record in brief :—

1. There cannot be two segments : (1) uptil the award and (2) after the award. While under Section 17 of the old Act an award has to be made into a decree, under Section 36 of the new Act it is already stamped with the decree. The dispute is, thus, between the enforcement of the award and the corrective process. Question is under which law, the corrective process should take place ? Section 85 of the new Act deals with transitional provisions. When an award is made under the old Act, for its enforcement provisions of the old Act have to be looked into. This is what Section 85(2) (a) of the new Act saves.

2. Procedure for the appointment of arbitrator and holding of arbitration proceedings and the making of award is different

in the old Act and in the new Act. Under the old Act, arbitrator is not required to give reasons unless the agreement between the parties so envisages. Under the new Act, however, arbitrator has to give reasons. This one illustration is advanced to show that when arbitration proceedings have started before coming into force of the new Act, then, under the new Act, the award may not be sustainable.

3. When arbitration proceedings are held under the old Act, arbitrator is conscious of Section 30 of the old Act which gives grounds for setting aside the award. Parties also proceed with that end in view. It is difficult to comprehend a situation where though the award is given under the old Act, its validity has to be decided under the new Act, provisions of which are vastly different than that of the old Act. It is not possible that proceedings be split into two separate segments. This is not warranted by the new Act.

4. The expression 'in relation to" is significant. It is of widest amplitude. If the Legislature intended that the new Act would apply as the award given under the old Act made after the coming into force of the new Act, it would not use the expression "in relation to" but would use the word "to". The expression "in relation to" takes into account stages after the award. There is no difference between the expression "arising out" or "in relation to" or "arising out of" which are expansive expressions and also rather interchangeable. The expression "arising out of" has been used in Section 42 of the new Act. As to what these expressions mean, reference may be made to decisions of the Supreme Court in *M/s. Doypack Systems Pvt. Ltd.* vs. *Union of India & Ors.* (1), *Mansukhlal Dhanraj Jain & Ors.* vs. *Eknath Vithal Ogale* (2) and *M/s. Dhanrajamal Gobindram* vs. *M/s. Shamji Kalidas and Co.* (3).

In M/s. Doypack Systems Pvt. Ltd.'s case (supra) this Court was considering the expression "in relation to". In the context it will be appropriate to quote paras 48, 49 and 50 of the judgment, which are as under :—

(1) (1988) 2 S.C.C. 299.
(2) (1995) 2 S.C.C. 665.
(3) (1961) 3 S.C.R. 1020.

"48. In view of the language used in the relevant provisions, it appears to us that Section 3 has two limbs : (i) textile undertakings; and (ii) right, title and interest of the company in relation to every such textile undertaking. The expression "textileundertakings" has been defined in Section 2(k) to mean the six textileundertakings of the company specified therein. The definition of the said expression in Section 2(k) is, however, subject to the opening words of the section which provide, "In this Act, unless the context otherwise requires". In the context of the expression "textile undertakings" employed in Section 3(1) of the Act, Section 4(1) provides that the textile undertakings referred to in Section 3 shall be deemed to include all assets, rights, leaseholds, powers, authorities and privileges and all property, movable and immovable, including lands, buildings, workshops, stores.....investments and book debts pertaining to the textile undertakings and all rights and interest in or arising out of such property as are, immediately before the appointed day, in the ownership, possession, power or control of the company in relation to all six undertakings. The expression "pertaining to", "in relation to" and "arising out of" used in the deeming provision, are used in the expansive sense, as per decisions of courts, meanings found in standard dictionaries, and the principles of broad and liberal interpretation in consonance with Article 39 (b) and (c) of the Constitution.

49. The words "arising out of" have been used in the sense that it comprises purchase of shares and lands from income arising out of the Kanpur undertaking. We are of the opinion that the words "pertaining to" and "in relation to" have the same wide meaning and have been used interchangeably for among other reasons, which may include avoidance of repetition of the same phrase in the same clause or sentence, a method followed in good drafting. The word "pertain" is synonymous with the word "relate", see *Corpus But is Secundum*, Volume 17, page 693.

50. The expression "in relation to" (so also "pertaining to"), is a very broad expression which presupposes another subject matter. These are words of comprehensiveness which might have both a direct significance as well as an indirect significance depending on the context, see *State*

Wakf Board v. *Abdul Azeez* (AIR 1968 Mad. 79 at 81 paras 8 and 10), following and approving *Nitai Charan Bagchi* vs. *Suresh Chandra Paul* (66 Cal WN 767), *Shyam Lal* v. *M. Shyamlal* (AIR 1933 All 649) and 76 *Corpus Juris Secundum* 621. Assuming that the investments in shares and in lands do not form part of the undertakings but are different subject matters, even then these would be brought within the purview of the vesting by reason of the above expressions. In this connection reference may be made to 76 *Corpus Juris Secundum* at pages 620 and 621 where it is stated that the term "relate" is also defined as meaning to bring into association or connection with. It has been clearly mentioned that "relating to" has been held to be equivalent to or synonymous with as to "concerning with" and "pertaining to". The expression "pertaining to" is an expression of expansion and not of contraction."

In *Mansukhlal Dhanraj Jain and others* vs. *Eknath Vithal Ogale* (supra) this Court was considering Section 41(1) of the Presidency Small Cause Courts Act, 1882 and the scope of the expression "relating to the recovery of possession of any immovable property" appearing in that Section. Section 41(1) is as under :

"41. (1) Notwithstanding anything contained elsewhere in this Act or in any other law for the time being in force but subject to the provisions of sub-section (2). The Court of Small Causes shall have jurisdiction to entertain and try all suits and proceedings between a licensor and licensee, or a landlord and tenant, relating to the recovery of possession of any immovable property situated in Greater Bombay, or relating to the recovery of the license fee or charges or rent thereof, irrespective of the value of the subject-matter of such suits or proceedings."

It also referred to its earlier decision in *M/s. Doypack Systems Pvt. Ltd.* vs. *Union of India and others* (supra). This Court held :

"It is, therefore, obvious that the phrase "relating to recovery of possession" as found in Section 41(1) of the Small Cause Courts Act is comprehensive in nature and takes in its sweep all types of suits and proceedings which are concerned with the recovery of possession of suit property from the licensee and, therefore, suits for permanent injunction restraining the defendant from effecting forcible recovery of

such possessions from the licensee-plaintiff would squarely be covered by the wide sweep of the said phrase."

From *M/s. Dhanrajamal Gobindram's case* (1) we quote the following passage :

"We may dispose of here a supplementary argument that the dispute till now is about the legal existence of the agreement including the arbitration clause, and that this is not a dispute arising out of, or in relation to a cotton transaction. Reference was made to certain observations in *Heyman* vs. *Darwins Ltd.* [(1942) AC 356]. In our opinion, the words of the Bye-law "arising out of or in relation to contracts" are sufficiently wide to comprehend matters, which can legitimately arise under s. 20. The argument is that, when a party questions the very existence of a contract, no dispute can be said to arise out of it. We think that this as not correct, and even if it were, the further words "in relation to" are sufficiently wide to comprehend even such a case. In our opinion, this argument must also fail."

5. Distinction sought of the repealing provisions as contained in Section 48 of the old Act and Section 85 of the new Act is not correct. Under Section 48 of the old Act, concept is of "reference" while under the new Act it is "commencement". Section 2(e) of the old Act defines "reference". Earlier under Section 48, the word used was "to" but now under Section 85 (2) (a), it is the expression "in relation to". There would certainly serious anomalies arise if the expression "in relation to" is given restricted meaning.

6. It is not necessary, that for the right to accrue, legal proceedings must be pending when the new Act comes into force. As to what the accrued right is, reference was made to two decisions of this Court in *Commissioner of Income Tax, U.P.* vs. *M/s. Shah Sadig and sons* (2) and *Bansidhar & Ors.* Vs. *State of Rajasthan & Ors.* (3)

In *Commissioner of Income Tax, U.P.* vs. M/s. Shah sadig and sons (supra) this Court was considering Section 6 of General Clauses Act, 1897 with reference to the Income-Tax Act, 1922 repealed by Section 297 of the Income-Tax Act, 1961. This is how this Court dealt with the question raised before it :—

(1) (1961) 3 S.C.R. 1020.
(2) (1987) 3 S.C.C. 516.
(3) (1989) 2 S.C.C. 557.

"14. Under the Income Tax Act of 1922, the assessee was entitled to carry forward the losses of the speculation business and set off such losses against profits made form that business in future years. The right of carrying forward and set off accrued to the assessee under the Act of 1922. A right which had accrued and had become vested continued to be capable of being enforced notwithstanding the repeal of the statute under which that right accrued unless the repealing statute took away such right expressly or by necessary implication. This is the effect of Section 6 of the General Clauses Act, 1897.

15. In this case the 'savings' provision in the repealing statute is not exhaustive of the rights which are saved or which survive the repeal of the statute under which such rights had accrued. In other words, whatever rights are expressly saved by the 'savings' provision stand saved. But, that does not mean that rights which are not saved by the 'savings' provision are extinguished or stand ipso facto terminated by the mere fact that a new statute repealing the old statute is enacted. Rights which have accrued are saved unless they are taken away expressly. This is the principle behind Section 6 (c) of the General Clauses Act, 1897. The right to carry forward losses which had accrued under the repealed Income Tax Act of 192 is not saved expressly by Section 297 of the Income Tax Act, 1961. But, it is not necessary to save a right expressly in order to keep it alive after the repeal of the old Act of 1922. Section 6(c) saves accrued rights unless they are taken away by the repealing statute. We do not find any such taking away of the rights by Section 297 either expressly or by implication."

In Bansidhar and others vs. State of Rajasthan and others (supra) this Court referred to the observations made in *I.T. Commissioner* vs. *Shah Sadiq and Sons* (supra) and said a saving provision in a repealing statute is not necessarily exhaustive of the rights and obligations so saved or the rights that survive the repeal. The Court said that for the purpose of clauses (c) and (e) of Section 6 of the Rajasthan General Clauses Act, 1955 which provided, respectively, that the repeal of an enatment shall not, unless a different intention appears, "affect any right, privilege, obligation or liability, acquired, accrued or incurred under any enactment so repealed" or "affect any investigation, legal proceeding or remedy

in respect of any such right, privilege, obligation, liability, fine, penalty, forfeiture or punishment as aforesaid", the "right" must be "accrued" and not merely an inchoate one. Distinction between what is and what is not a right preserved by Section 6 of the General Clauses Act is often one of great fineness. What is unaffected by the repeal is a right 'acquired' or 'accrued' under the repealed statute and not "a mere hope or expectation" of acquiring a right or liberty to apply for a right. This Court relied on its earlier decision in *Lalji Raja & Sons* vs. *Firm Hansraj Nathuram* (1). It also referred to observations of Lord Morris in *Director of Public Works* vs. *Ho Po sang* (2), which had been quoted with approval in an earlier decision of this Court in *M.S. Shivananda* vs. *K.S.R.T.C.* (3) as under :—

> "It may be, therefore, that under some repealed enactment, a right has been given but that, in respect of it, some investigation or legal proceeding is necessary. The right is then unaffected and preserved. It will be preserved even if a process of quantification is necessary. But there is a manifest distinction between an investigation in respect of a right and an investigation which is to decide whether some right should be or should not be given. On a repeal, the former is preserved by the Interpretation Act. The latter is not."

Mr. R.P. Bhatt, senior advocate appearing for Western Shipbreaking Corporation (CA 4928/97) submitted that it would be the Foreign Awards Act that would apply and not the new Act. Mr. Bhatt supported Mr. Dipankar Gupta in his submissions. All the three Acts are saved by Section 85(2) (a). Arbitral proceedings include enforcement of award otherwise these Acts would become redundant. He said that the arbitration proceedings were governed by the laws in the U.K. under the (UK) Arbitration Act, 1950. Proceedings began on May 15, 1995. Awards was given in England on February 25, 1996 after the new Act had come into force on January 25, 1996. As to when arbitration proceedings commence have been given in Section 21 of the new Act. Under Section 32 of the new Act, arbitral proceedings terminate by the final award. Since the proceedings had already commenced in England, Section 21 of the new Act has no application. Therefore, one has to look

(1) (1971) 1 S.C.C. 721.
(2) (1961) 2 All. E.R. 721.
(3) (1980) 1 S.C.C. 149.

into the Foreign Awards Act, 1961. Mr. Bhatt said pronouncement of an Arbitration Award after the cut off date is not a condition precedent for applicability of saving clause under Section 85 (2) (a). It does not use the words "Arbitral Award passed before" in place of "Arbitral Proceedings which commenced before". Thus what is saved is applicability of all the provisions of the old Acts where the Arbitral proceedings have commenced before the cut off date and it is further clarified in second portion of the saving clause viz., section 85 (2) (a) of the new Act that the new Act will apply where the Arbitral proceedings have commenced after the cut off date.

Mr. A.K. Ganguli, senior advocate, appeared for Himachal Pradesh State Electricity Board (CA 61/99). He supported the impugned judgment of the High Court. He drew distinction between the various provisions of the old Act and the new Act and said that the enforcement of the award under the new Act would not be compatible with the arbitration proceedings held under the old Act resulting in the award. Any restricted interpretation to the expression "arbitral proceedings" appearing in Section 85(2) (a) would lead to several anomalies. One such instance was that under the old Act arbitrator would not be required to give reasons unless the arbitration agreement so provided. He said when the savings clause makes the provision of the old Act applicable to arbitral proceedings commencing before January 25, 1996 without there being any further condition, the legislative intent was clear that the old Act would apply to the enforcement of the award under that Act. He said such interpretation, apart from being in conformity with the legislative intent, would also be in consonance with justice, equity and fair play. Expression "arbitral proceedings" in Section 85 (2) (a) could not be given restricted meaning of being confined merely to the conduct of the proceedings by the arbitrator and excluding the enforcement of the award from the purview of the old Act. Mr. Ganguli said that it was not disputed that provisions of the new Act were vastly different than that of the old Act. He said use of the expression "provisions" in Section 85 (2) (a) would include all provisions of the old Act, in so far as they have a nexus with the arbitral award. Enforcement of the award is integral part of the process "in relation to arbitral proceedings". Reference was also made to the meaning of expression "in relation to" and to various decisions of this Court in that connection. Provisions of Section 6 of General Clauses Act were also invoked

to contend that provisions of the old Act were saved which included provisions for enforcement of the award under the old Act. Lastly, Mr. Ganguli submitted that the agreement contemplated in the later part of Section 85 (2) (a) would be entered into only after the enforcement of the new Act and that is January 25, 1996. Any agreement if entered into before this date would be void and would be hit by Section 28 of the Contract Act and as rightly held so by the High Court. Accordingly, Mr. Ganguli said that the clause in the arbitration agreement where the parties agreed that provisions of the old Act or any statutory modification or re-enactment thereof "for the time being in force" would have no meaning insofar as applicability of new Act to the enforcement of the award is concerned. Parties could not agree to a provision in advance without knowing what that provision would be.

Reference may yet be made to two more decisions of this Court on the question of effect of repeal of an enactment and as to what is right accrued. In *Gajraj Singh and others* vs. *State Transport Appellate Tribunal and others* (1) this Court was examining the provisions of Section 217 (1) and (2) (a) & (b) and (4) of the Motor Vehicles Act, 1988, which contained repeal and saving provisions of the Motor Vehicle Act, 1939. The Court examined various judgments of this Court and Treatises on the rules of interpretation and said :—

> "22. Whenever an Act is repealed it must be considered, except as to transactions past and closed, as if it had never existed. The effect thereof is to obliterate the Act completely from the record of Parliament as if it had never been passed; it never existed except for the purpose of those actions which were commenced, prosecuted and concluded while it was an existing law. Legal fiction is one which is not an actual reality and which the law recognises and the court accepts as a reality. Therefore, in case of legal fiction the court believes something to exist which in reality does not exist. It is nothing but a presumption of the existence of the State of affairs which in actuality is non-existent. The effect of such a legal fiction is that a position which otherwise would not obtain is deemed to obtain under the circumstances."

On the question on the right acquired or accrued the Court observed :—

(1) (1997) 1 S.C.C. 650.

"42. There is a distinction between right acquired or accrued, and privilege, hope and expectation to get a right, as rightly pointed out by the High Court in the impugned judgment. A right to apply for renewal and to get a favourable order would not be deemed to be a right accrued unless some positive acts are done, before repeal of Act 4 of 1939 or corresponding law to secure that right of renewal. *In Gujarat Electricity Board* v. *Shantilal R. Desai* (AIR 1969 SC 239 : 1969 (1) SCR 580) this Court had pointed out that before Section 71 of the Electricity (Supply) Act, 1948 was amended, the appellant had issued a notice under Section 7 thereof, exercising the option to purchase the under taking. It was held that a right to purchase the electrical undertaking which had accrued to the Electricity Board was saved by Section 6 of the GC Act."

In *G. Ekambarappa & Ors.* vs. *Excess Profits Tax Officer, Bellary* (1) In that case district Bellary, which belonged to Part 'A' State of Madras in British India, was merged in Part 'B' State of Mysore on October 1, 1953. The Excess Profits Act, 1940 applied only to British India. It ceased to apply to the Bellary after it became part of the State of Mysore. Then, after States Reorganisation Act, 1956, Mysore also became Part 'A' State. However, by the Adaptation of Laws (No. 3) Order dated December 31, 1956, the Excess Profits Tax Act was to extend "to the whole of India except the territories which immediately before November 1, 1956 were comprised in Part 'B' States". The result of adaptation was that all the provisions of the Excess Profits Tax Act, 1940 stood repealed so far as the district of Bellary was concerned w.e.f. Deecmber 21, 1956. Excess profits Tax Officer issued a Notice under Section 15 of the Excess Profits Tax Act to the appellants in 1960 in respect of the period from October 30, 1943 to October 30, 1944. It was contended by them that it was not a case of repeal of that Act and so the provisions of Section 6 of the General Clauses Act could not be invoked to sustain the validity of the notices. It was argued that so far as the Excess Profits Tax Act was concerned, the Adaptation Laws Order 1956 did not repeal that Act as such and the effect of the modification was that the provisions of the Act were no longer applicable to the Bellary district which comprised in the territory of Part 'B' State of Mysore immediately before November 1, 1956. This Court said that there

(1) (1967) 3 S.C.R. 864.

was no justification for the argument put forward on behalf of the appellants. The Court proceeded to repel this argument as under :

"The result of the Adaptation of Laws Order 1956 so far as the Act was concerned, was that the provisions of that Act were no longer applicable or in force in Bellary district. To put it differently, the Act was repealed so far as the area of Bellary district was concerned. Repeal of an Act means revocation or abrogation of the Act and, in our opinion, s. 6 of the General Clauses Act applies even in the case of a partial repeal or repeal of part of an Act. Section 6 of the General Clauses Act states :

"Effect of repeal. Where this Act or any Central Act or Regulation made after the commencement of this Act, repeals any enactment hitherto made or hereafter to be made, then, unless a different intention appears, the repeal shall not—

....."

(c) affect any right, privilage, obligation or liability acquired, accrued or incurred under any enactment so repealed; or

....."

Section 3(19) of the General Clauses Act defines an "enactment" as including "a Regulation and also as including any provision contained in any Act or in any such Regulation as aforesaid".

The argument was also stressed on behalf of the appellants that even if s. 6 (c) of the General Clauses Act was applicable there was no "Liability incurred or accrued" as there was no assessment of escaped profits before November 1, 1956 when the adaptation was made. We do not think there is any substance in this argument. The liability of the appellants to tax arose immediately at the end of the chargeable accounting period and not merely at the time when it is quantified by assessment proceedings. It follows therefore that the notice issued under s. 15 of the Act was legally valid and the appellants representing the original partners of the firm continued to be liable to be proceeded against under that section for the profits which had escaped taxation."

The Conclusions :

For the reasons to follow, we hold :

1. The provisions of the old Act (Arbitration Act, 1940) shall apply in relation to arbitral proceedings which have commenced before coming into force of the new Act (The Arbitration and Conciliation Act, 1996).

2. The phrase "in relation to arbitral proceedings" cannot be given a narrow meaning to mean only pendency of the arbitration proceedings before the Arbitrator. It would cover not only proceedings pending before the Arbitrator but would also cover the proceedings before the Court and any proceedings which are required to be taken under the old Act for award becoming decree under Section 17 thereof and also appeal arising thereunder.

3. In cases where arbitral proceedings have commenced before coming into force of the new Act and are pending before the Arbitrator. It is open to the parties to agree that new Act be applicable to such arbitral proceedings and they can so agree even before the coming into force of the new Act.

4. The new Act would be applicable in relation to arbitral proceedings which commenced on or after the new Act comes into force.

5. Once the arbitral proceedings have commenced, it cannot be stated that right to be governed by the old Act for enforcement of the award was an inchoate right. It was certainly a right accrued. It is not imperative that for right to accrue to have the award enforced under the old Act that some legal proceedings for its enforcement must be pending under that Act at the time new Act came into force.

6. If narrow meaning of the phrase "in relation to arbitral proceedings" is to be accepted, it is likely to create great deal of confusion with regard to the matters where award is made under the old Act. Provisions for the conduct of arbitral proceedings are vastly different in both the old and the New Act. Challenge of award can be with reference to the conduct of arbitral proceedings. An interpretation which leads to unjust and inconvenient results cannot be accepted.

7. A foreign award given after the commencement of the new Act can be enforced only under the new Act. There is no vested right to have the foreign award enforced under the Foreign Awards Act (Foreign Awards (Recognition and Enforcement) Act, 1961)

Section 85 (2) (a) of the new Act is in two limbs : (1) Provisions of the old Act shall apply in relation to arbitral proceedings which commenced before the new Act came into force unless otherwise agreed by the parties and (2) new Act shall apply in relation to arbitral proceedings which commenced on or after the new Act came into force. First limb can further be bifurcated into two : (a) Provisions of old Act shall apply in relation to arbitral proceedings commenced before the new Act came into force and (b) old Act will not apply in such cases where the parties agree that it will not apply in relation to arbitral proceedings which commenced before the new Act came into force. The expression "in relation to" is of widest import as held by various decisions of this Court in *M/s Doypack Systems Pvt. Ltd.* (supra) *Mansukhlal Dhanral Jain & Ors.* (supra) *M/s Dhanrajamal Gobindram* (supra) and *Naveen Chemicals Mfg. & Ors.* (supra) This expression "in relation to" has to be given full effect to, particularly when read in conjunction with the word "the provisions" of the old Act. That would mean that the old Act will apply to whole gambit of arbitration culminating in the enforcement of the award. If it was not so, only the word "to" could have sufficed and when the legislature has used the expression "in relation to", a proper meaning has to be given. This expression does not admit of restrictive meaning. First limb of Section 85 (2) (a) is not a limited saving clause. It saves not only the proceedings pending at the time of commencement of the new Act but also the provisions of the old Act for enforcement of the award under that Act.

The contention that if it is accepted that the expression "in relation to" arbitral proceedings would include proceedings for the enforcement of the award as well, the second limb of Section 85 (2) (a) would become superfluous. We do not think that would be so. The second limb also takes into account the arbitration agreement entered into under the old Act when the arbitral proceedings commenced after the coming into force of the new Act. Reference in this connection be made to a decision of this Court in *MMTC Ltd.* vs. *Sterlite Industries (India) Ltd.* (supra) where this Court held that validity of an arbitration agreement did not depend on the number of arbitrators specified in Section 7 of the new Act and that the number of arbitrators is dealt with separately under Section 10 of that Act which is a part of machinery provision for working of the arbitration agreement. In this case the question which came up for decision was the effect of the new Act

on the arbitration agreement made prior to the commencement of the new Act which provided for appointment of one arbitrator by each of the parties who shall appoint an umpire before proceeding with the reference. The agreement was entered into on December 14, 1993 before the coming into force of the new Act. Section 10 of the new Act provides that parties are free to determine the number of arbitrators, provided that such number shall not be an even number. Further failing the determination of odd number of arbitrators, the arbitral tribunal shall consist of a sole arbitrator. This Court upheld the validity of the arbitration agreement dated December 14, 1993 and directed the Chief Justice of the High Court concerned to appoint the third arbitrator under Section 11 (4) (b) of the new Act in view of the failure of the two appointed arbitrators to appoint the third arbitrator. In this case it may be noticed that the respondent had invoked arbitration clause in the agreement by letter dated January 19, 1995 which was received by the appellant on January 31, 1995. The arbitral proceedings would, therefore, commence under Section 21 of the new Act on January 31, 1996 as by that time new Act had come into force.

In this view of the matter, Section 6 of the General Clauses Act would be inapplicable. It is, therefore, not necessary for us to examine if any right to enforce the award under the old Act accrued to a party when arbitral proceedings had commenced before the coming into force of the new Act and the SAIL (CA 6036/98) had acquired a right to challenge the award made under the old Act and there would be corresponding right with the Thyssen to enforce the award under the old Act.

Present day the courts tend to adopt purposive approach while interpreting the statute which repeals the old law and for that purpose to take into account the objects and reasons which led to the enacting of the new Act. We have seen above this approach was adopted by this Court in *MMTC Ltd.'s case* (supra). Provisions of both the Acts, old and new, are very different and it has been so observed in *Sundaram Finance Ltd.'s case* (supra). In that case this Court also said that provisions of the new Act have to be interpreted and construed independently and that in fact reference to old Act may actually lead to the misconstruction of the provisions of the new Act. The Court said that it will be more relevant, while construing the provisions of the new Act, to refer to the UNCITRAL Model Law rather than the old Act. In the case of *Kuwait Minister of Public Works* vs. *Sir Frederick Show and*

Partners (supra) the award was given before Kuwait became party to the New York Convention recognised by Order in Council in England. House of Lords held that though a foreign award could be enforced in England under the (U.K.) Arbitration Act, 1975 as when the proceedings for enforcement of the award were initiated in England Kuwait had become party to the Convention. It negatived the contention that on the date the award was given Kuwait was not party to the New York Convention.

In *Pepper* vs. *Hart* (1) House of Lords for the first time accepted the principle that Judges could refer to the Parliamentary debates in order to ascertain the meaning of an Act of Parliament. Lord Griffiths said (at page 50):

> "The days have long passed when the courts adopted a strict construction 1st view of interpretation which required them to adopt the literal meaning of the language. The courts now adopt a purposive approach which seeks to give effect to the true purpose of legislation and are prepared to look at much extraneous material that bears upon the background against which the legislation was enacted."

But then if the construction of the new Act leads to inconvenient and unjust results, the concept of purposive approach has to be shed. Multiple and complex problems would arise if the award given under the old Act is said to be enforced under the new Act. Both the Acts are vastly different to each other. It has been rightly contended that when arbitration proceedings are held under the old Act, the parties and the arbitrator keep in view the provisions of that Act for the enforcement of the award. As noted above, under the old Act, there is no requirement for the arbitrator to give reasons for the award. That is not mandatory under the new Act. Section 27 of the old Act provides that arbitrator or umpire may, if they think fit, make an interim award, unless of course different intention appears from the arbitration agreement. Interim award is also an award and can be enforced in the same way as the final award. It would certainly be a paradoxical situation if for the interim award, though given after the coming into foce of the new Act, it would still be the old Act which would apply and for the final award, it would be the new Act. Yet another instance would be when under Section 13 of the old Act, the arbitrators or umpire have power to state a special case for the opinion of the Court on any question of law involved in the proceedings. Under sub-

(1) (1993) 1 All. E.R. 42.

section (3) of Section 14 of the old Act when the Court pronounces its opinion thereon such opinion shall be added to and shall form part of the award. From this part of the award no appeal is maintainable under Section 39 of the old Act. There is no such provision under the new Act. In *Sohan Lal & Ors.* vs. *Amin Chand and Sons & Ors.* [(1974) 1 SCR 453]. This Court was considering the powers of arbitrator under Section 13 of the old Act. Clause (b) of Section 13 provided that arbitrators or umpire shall have power to state a special case for the opinion of the court on any question of law involved, or state the award, wholly or in part, in the form of a special case of such question for the opinion of the court. Section 14 of the old Act provides for the award to be signed and filed. Under sub-section (3) of Section 14 where the arbitrators or umpire state a special case under clause (b) of Section 13, the court, after giving notice to the parties and hearing them, shall pronounce its opinion thereon and such opinion shall be added to, and shall form part of, the award. This Court said :

> "We do not think that an opinion given under the first part of s. 13 (b) should be added to and form part of the award. The reason why the opinion given under the latter part of s. 13(b) should be added to and becomes part of the award is because the arbitrators have stated the award wholly or in part in the form of a special case of such question for the opinion of the court. This view is further strengthened by the circumstance that under s. 39 (1) (ii), and appeal" is provided only against an order on an award stated in the form of a special case. The reason why an appeal is provided for in such a case is that the opinion of the court has to be added to and form part of the award and it therefore becomes a decision of the court, notwithstanding the fact it is incorporated in the award. There is no provision for an appeal against an opinion given by the court on a special case stated to the court under the first part of s. 13 (b) or against the decision to state a special case for the opinion of the court for the reason that the opinionis not a decision. Nor is it to be incorporated in the award. If, as a matter of fact, the opinion given by the court on a special case stated under first part of s. 13 (b) is binding on the arbitrators and has to be incorporated in the award, there was no reason why the legislature should not have provided for an appeal against the opinion or against

the reference which led to the opinion. The scheme of the Act shows that the legislature wanted to provide for an appeal only when there is to be a decision by the court binding on the parties, not when it tenders an opinion which is not binding on the arbitrators and which is not to be incorporated in the award. It might be that the arbitrator may choose to act upon the opinion. But that is not for the reason that it is a binding determination or a decision. We have, therefore, no hesitation in holding that the appeals are incompetent."

Section 85 (2) (a) is the saving clause. It exempts the old Act from complete obliteration so far as pending arbitration proceedings are concerned. That would include saving of whole of the old Act uptill the time of the enforcement of the award. This Section 85 (2) (a) prevents the accrued right under the old Act from being affected. Saving provision preserves the existing right accrued under the old Act. There is a presumption that Legislature does not intend to limit or take away vested rights unless the language clearly points to the contrary. It is correct that the new Act is a remedial statute and, therefore, Section 85 (2) (a) calls for strict construction, it being a repealing provision. But then as stated above where one interpretation would produece an unjust or an inconvenient result and another would not have those effects, there is then also a presumption in favour of the latter.

Enforcement of the award, therefore, has to be examined on the touchstone of the proceedings held under the old Act.

Various decisions have been cited before us to show as to what is a mere right and what is right accrued or acquired. We have to examine this question with reference to the provisions of Section 6 of the General Clauses Act if it could be said that when the arbitral proceedings have commenced under the old Act, a party has acquired a right to have the award given thereafter enforced under the old Act. The question that arises for consideration is if a right has accrued to the partyor it is merely an inchoate right. The three cases referred to, namely *Abbott* vs. *The Minister for Lands* (supra) *Hungerfort Investment Ltd.* vs. *Haridas Mundhara & Ors.* (supra) and *D.C. Bhatia & Ors.* vs. *Union of India & Anr.* (supra) show that something more is required for vested right to accrue. Right did exist but then nothing was done to show that any act was done or advantage taken of the enactment under which the right existed till it was

repealed. An Act gave the right and the new Act which repealed the old Act took away that right. Mere right to take advantage of the provision of an Act is not a right accrued.

In *I.T. Commissioner* vs. *Shah Sadiq & Sons* (supra) this Court said that right which had accrued and had become vested continued to be capable of being enforced notwithstanding the repeal of the statute under which that right accrued unless the repealing statute took away such right expressly or by necessary implication. In the case of *Bansidhar & Ors.* vs. *State of Rajasthan & Ors.* (supra) this Court had said that what is unaffected by the repeal is a right "acquired" or "accrued" under the repealed statute and not "a mere hope or expectation" of acquiring a right or liberty to apply for a right. In the case of *Lalji Raja Sona* vs. *Firm Hansraj Nathuram* (supra) this Court had said that "a provision to preserve the right accrued under a repealed Act "was not intended to preserve the abstract rights conferred by the repealed Act. It only applies to specific rights given to an individual upon happening of one of the other of the events specified in statute." We think the observations of Lord Morris in *Director of Public Works* vs. *Ho Po Sang*, (supra) are quite apt which have been quoted elsewhere in the judgment. In *M.S. Shivanda* vs. K.S.R.T.C. (supra) this Court again said that if the right created by the statute is of an enduring character and has vested in the person, the right cannot be taken away because the statute by which it was created has expired. In *Hemilton Gell* vs. *White* (supra) Court of Appeal referred to the decision of the House of Lords in *Abbott* vs. *Minister for Lands* (supra) In the case before it, the Court said that under the old Act (the Agricultural Holdings Act, 1908) which was repealed by the Agricultural Holdings Act, 1914 necessary event had happened under which the tenant "acquired a right" which would accrue when he was quitting his holding to receive compensation from the landiord. The event which occurred was the notice by the landlord to quit to the tenant in view of a sale of the holding. While Section 11 of the 1908 Act treated this as unreasonable disturbance to the tenant entitling him to compensation, the latter Act of 1914 repealed Section 11. The Court held that in spite of the repeal of Section 11 tenant had acquired right to claim compensation inasmuch as notice to quit was given to him when Section 11 of the old Act was in operation. In *Gajraj Singh & Ors.* vs. *State Transport Appellante Tribunal & Ors.* (supra) this Court said that some positive Act is required to be done for the right to accrue

under enactment which is repealed. In this case reference was made to a decision of this Court in *Gujarat Electricity Board* vs. *Shantilal R. Desai* (supra) where the Court had pointed out that before Section 71 of the Electricity (supply) Act, 1948 was amended, the appellant had issued a notice under Section 7 thereof, exercising the option to purchase the undertaking. It was held that a right to purchase the electrical undertaking, which had accrued to the Electricity Board, was saved by Section 6 of the General Clauses Act. In the case of *G. Ekambarappa & Ors.* vs. *Excess Profits Tax Officer, Bellary* (supra), there was repeal of an enactment levying tax. No assessment had been made by the time the Act was repealed and there could, therefore, be no liability. Nevertheless, this Court said that liability to tax arose immediately at the end of the accounting period when the Act was in force though the liability had not been uantified by assessment proceedings. The Court upheld validity of the notice for assessment of proceedings after the repeal of the Act.

Principles enunciated in the judgments show as to when a right accrues to a party under the repealed Act. It is not necessary that for the right to accrue that legal proceedings must be pending when the new Act comes into force. To have the award enforced when arbitral proceedigns commenced under the old Act under that very Act is certainly an accrued right. Consequences for the parties against whom award is given after arbitral proceedings have been held under the old Act though given after the coming into force of the new Act, would be quite grave if it is debarred from challenging the award under the provisions of the old Act. Structure of both the Acts is different. When arbitral proceedings commenced under the old Act it would be in the mind of everybody, i.e., arbitrators and the parties that the award given should not fall foul of sections 30 and 32 of the old Act. Nobody at that time could have thought that Section 30 of the old Act could be substituted by Section 34 of the new Act. As a matter of fact appellant Thyssen in Civil Appeal No. 6036/98 itself understood that the old Act would apply when it approached the High Court under Sections 14 and 17 of the old Act for making the award rule of the Court. It was only later on that it changed the stand and now took the position that new Act would apply and for that purpose filed an application for execution of the award. By that time limitation to set aside the award under the new Act had elapsed. Appellant itself led the respondent SAIL in believing that the old Act would apply. Sail had filed objections to

the award under Section 30 of the old Act after notice for filing of the award was received by it on the application filed by the Thyssen under Sections 14 and 17 of the old Act. We have been informed that numerous such matters are pending all over the country where the award in similar circumstances is sought to be enforced or set aside under the provisions of the old Act. We, therefore, cannot adopt a construction which would lead to such anomalous situations where the party seeking to have the award set aside finds himself without any remedy. We are, therefore, of the opinion that it would be the provisions of the old Act that would apply to the enforcement of the award in the case of Civil Appeal No. 6036 of 1998. Any other construction on the Section 85 (2) (a) would only lead to the confusion and hardship. This construction put by us is consistent with the wording of Section 85 (2) (a) using the terms "provision" and "in relation to arbitral proceedings" which would mean that once the arbitral proceedings commenced under the old Act it would be the old Act which would apply for enforcing the award as well.

Because of the view of Section 85 (2) (a) of the new Act which we have taken, it is not necessary for us to consider difference in the repealing provisions as contained in Section 48 of the old Act and Section 85 of the new Act. We may, however, note that under Section 48 of the old Act concept is of "reference" while under the new Act it is "commencement". Section 2(e) of the old Act defines "reference". Then under Section 48 the word used is "to", and under Section 85 (2) (a) the expression is "in relation to". It, therefore, also appears that it is not quite relevant to consider the provision of Section 48 of the old Act to interpret Section 85 (2) (a).

In *Hoosein Kasam Dada (India) Ltd.* vs. *The State of Madhya Pradesh and others* (1) this Court said that pre-existing right of appeal is not destroyed by the amendment if the amendment is not retrospective by express words or necessary intendment. The fact that the pre-existing right of appeal continues to exist must, in its turn, necessarily imply that the old law which created that right of appeal must also exist to support the continuation of that right. In this case, law had changed and the appellate authority could exercise jurisdiction only if the appeal was accompanied by the deposit of the assessed tax when before the amendment of the provision it only provided for deposit of admitted tax. The Court

(1) (1953) S.C.R. 987.

said that any requirement for deposit of the assessed tax overlooks the fact of existence of the old law for the purpose of supporting the pre-existing right where appeal could be filed only on depositing the admitted amount of tax. The law interpreted by this Court in this judgment, it seems, is to what Civil Procedure Code (Amendment) Act provided by clause (m) of Section 97 of the Code of Civil Procedure (Amendment) Act.

Parties can agree to the applicability of the new Act even before the new Act comes into force and when the old Act is still holding the field. There is nothing in the language of Section 85 (2) (a) which bars the parties from so agreeing. There is, however, a bar that they cannot agree to the applicability of the old Act after the new Act has come into force when arbitral proceedings under the old Act have not commenced though the arbitral agreement was under the old Act. Arbitration clause in the contract in the case of Rani Constructions (Civil Appeal 61 of 1999) uses the expression "for the time being in force" meaning thereby that provision of that Act would apply to the arbitration proceedings which will be in force at the relevant time when arbitration proceedings are held. We have been referred to two decisions–one of Bombay High Court and the other of Madhya Pradesh High Court on the interpretation of the expression "for the time being in force" and we agree with them that the expression aforementioned not only refers to the law in force at the time the arbitration agreement was entered into but also to any law that may be in force for the conduct of arbitration proceedings, which would also include the enforcement of the award as well. Expression "unless otherwise agreed" as appearing in Section 85 (2) (a) of the new Act would clearly apply in the case of Rani Construction in Civil Appeal No. 61 of 1989. Parties were clear in their minds that it would the old Act or any statutory modification or reenactment of that Act which would govern the arbitration. We accept the submission of the appellant Rani Construction that parties could anticipate that the new enactment may come into operation at the time the disputes arise. We have seen Section 28 of the Contract Act. It is difficult for us to comprehend that arbitration agreement could be said to be in restraint of legal proceedings. There is no substance in the submission of respondent that parties could not have agreed to the application of the new Act till they knew the provisions thereof and that would mean that any such agreement as mentioned in the arbitration clause could be entered into only

after the new Act had come into force. When the agreement uses the expressions "unless otherwise agreed" and "law in force" it does give option to the parties to agree that new Act would apply to the pending arbitration proceedings. That agreement can be entered into even before the new Act comes into force and it cannot be said that agreement has to be entered into only after coming into force of the new Act.

Mr. Desai had referred to a decision of the Bombay High Court (Goa Bench), rendered by single Judge in *Reshma Constructions* vs. *State of Goa* (1). In that case arbitration clause in the contract provided as under :—

> "Subject as aforesaid, the provisions of the Arbitration Act, 1940 or any statutory modification or re-enactment thereof and the rules made thereunder and for the time being in force shall apply to the arbitration proceeding under this clause."

The Court held that these terms in the clause disclosed that the parties had agreed to be governed by the law which was in force at the time of execution of the arbitration agreement as well as by any further statutroy changes that may be brought about in such law. This is how the High Court considered the issue before it :—

> "Considering the scheme of the Act, harmonious reading of the said provision contained in sub-section (2) of Sec. 85 thereof would disclose that the reference "otherwise agreed" necessarily refers to the intention of the parties as regards the procedure to be followed in the matter of arbitration proceedings and not to the time factor as regards execution of the agreements. It provides that though the law provides that the provisions of the old Act would continue to apply to the pending proceedings by virtue of the said saving clause in Sec. 85, it simultaneously provides that the parties can agree to the contrary. Such a provision leaving it to the discretion of the parties to the proceedings to decide about the procedure to be followed–other in terms of the new Act or the old Act–is certainly in consonance with the scheme of the Act, whereunder most of the provisions of the new Act, the procedure reagarding various stages of the arbitration proceedings is made subject to the agreement to the contrary between the parties, thereby giving ample

(1) (1999) 1 M.L.J. 482.

freedom to the parties to decide about the procedure to be followed in such proceedings; being so, it is but natural that the legislature in its wisdom has left it to the option of the parties in the pending proceedings to choose the procedure for such pending proceedings. The reference "otherwise agreed by the parties" in Sec. 85 (2) (c) of the new Act, therefore, would include an agreement already entered into between the parties even prior to enforcement of the new Act as also the agreement entered into after enforcement of the new Act. Such a conclusion is but natural since the expression "otherwise agreed" do not refer to the time factor but refers to the intention of the parties regarding applicability of the provisions of the new or old Act."

We agree with the High Court on interpretation put to the arbitration clause in the contract.

Section 28 of the Contract Act contains provision regarding agreements in the restraint of legal proceedings. Exception 1 to Section 28 of the Contract Act does not render illegal a contract by which the parties agree that any future dispute shall be referred to arbitration. That being so parties can also agree that the provisions of the arbitration law existing at that time would apply to the arbitral proceedings. It is not necessary for the parties to know what law will be in force at the time of the conduct of arbitration proceedings. They can always agree that provisions that are in force at the relevant time would apply. In this view of the matter, if the parties have agreed that at the relevant time provisions of law as existing at that time would apply, there cannot be any objection to that. Thus construing the clause 25, in Rani Constructions (CA 61/99) new Act will apply.

Foreign Awards Act gives the party right to enforce the foreign award under that Act. But before that right is exercised Foreign Awards Act has been repealed. It cannot, therefore, be said that any right had accrued to the party for him to claim to enforce the foreign award under the Foreign Awards Act. After the repeal of the Foreign Awards Act a foreign award can now be enforced under the new Act on the basis of the provisions contained in Part II of the new Act depending whether it is a New York Convention Award or Geneva Convention Award. It is irrespective of the fact when the arbitral proceedings commenced

in a foreign jurisdiction. Since no right has accrued Section 6 of the General Clauses Act would not apply.

In the very nature of the provisions of Foreign Awards Act it is not possible to agree to the submissions that Section 85 (2) (a) of the new Act would keep Act alive for the purpose of enforcement of a foreign award given after the date of commencement of the new Act though arbitral proceedings in foreign land had commenced prior to that. It is correct that Section 85 (2) (a) uses the words "the said enactments" which would include all the three Acts, i.e., the old Act, Foreign Awards Act and the Arbitration (Protocol and Convention) Act, 1937. Foreign Awards Act and even she 1937 Act contain provisions only for the enforcement of the foreign award and not for the arbitral proceedings. Arbitral proceedings and enforcement of the award are two separate stages in the whole process of arbitration. When the Foreign Awards Act does not contain any provision for arbitral proceedings it is difficult to agree to the argument that in spite of that the applicability of the Foreign Awards Act is saved by virtue of Section 85 (2) (a). As a matter of fact if we examine the provisions of Foreign Awards Act and the new Act there is not much difference for the enforcement of the foreign award. Under the Foreign Awards Act when the court is satisfied that the foreign award is enforceable under that Act the court shall order the award to be filed and shall proceed to pronounce judgment accordingly and upon the judgment so pronounced a decree shall follow. Sections 7 and 8 of the Foreign Awards Act respectively prescribe the conditions for enforcement of a foreign award and the evidence to be produced by the party applying for its enforcement. Definition of foreign award is same in both the enactments. Section 48 and 47 of the new Act correspond to Sections 7 and 8 respectively of the Foreign Awards Act. While Section 49 of the new Act states that where the court is satisfied that the foreign award is enforceable under this Chapter (Chapter I, Part II, relating to New York Convention Awards) the award is deemed to be decree of that court. The only difference, therefore, appears to be that while under the Foreign Awards Act a decree follows, under the new Act foreign award is already stamped as the decree. Thus if provisions of the Foreign Awards Act and the new Act relating to enforcement of the foreign award ar juxtaposed there would appear to be hardly any difference.

Again a bare reading of the Foreign Awards Act and the Arbitration (Protocol and Convention) Act, 1937 would show that

these two enactments are concerned only with recognition and enforcement of the foreign awards and do not contain provisions for the conduct of arbitral proceedings which would, of necessity, have taken place in a foreign country. The provisions of Section 85 (2) (a) in so far these apply to the Foreign Awards Act and 1937 Act, would appear to be quite superfluous. Literal interpretation would render Section 85 (2) (a) unworkable. Section 85 (2) (a) provides for a dividing line dependent on "commencement of arbitral proceedings" which expression would necessarily refer to Section 21 of the new Act. This Court has relied on this Section as to when arbitral proceedings commence in the case of *Shetty's Construction Co. P. Ltd. vs. Konkan Railway Construction* (1) Section 2(2) read with Section 2(7)[1] and Section 21 falling in Part-I of the new Act make it clear that these provisions would apply when the place of arbitration is in India, i.e., only in domestic proceedings. There is no corresponding provision anywhere in the new Act with reference to foreign arbitral proceedings to hold as to what is to be treated as "date of commencement" in those foreign proceedings. We would, therefore, hold that on proper construction of Section 85 (2) (a) the provision of this sub-section must be confined to the old Act only. Once having held so it could be said that Section 6 of the General Clauses Act would come into play and foreign award would be enforced under the Foreign Awards Act. But then it is quite apparent that a different intention does appear that there is no right that could be said to have been acquired by a party when arbitral proceedings are held in a place resulting in a foreign award to have that award enforced under the Foreign Awards Act.

We, therefore, hold that the award given on September 24, 1997 in the case of *Thyssen Stahlunion CMBH* vs. *Steel Authority of India Ltd.* (Civil Appeal No. 6036 of 1998) when the arbitral proceedings commenced before the Arbitration and Conciliation Act, 1998 came into force on January 25, 1996, would be enforced under the porvisions of Arbitration Act, 1940. We also hold that clause 25 containing the arbitration agreement in the case of *M/s. Rani Constructions Pvt. Ltd.* vs. *Himachal Pradesh State Electricity Board* (Civil Appeal No. 61 of 1999) does admit of interpretation that the case is governed by the provisions of the Arbitration and Conciliation Act, 1996. We further hold that the foreign award given in the case of *Western Shipbreaking Corporation* vs.*M/s.*

(1) (1998) 5 S.C.C. 599.

Clareheaven Ltd. (Civil Appeal No. 4928 of 1997) would be governed by the provisions of the Arbitration and Conciliation Act, 1996. Thus we affirm the decisions of the Delhi High Court in Execution Petition No. 47 of 1996 and of the Gujarat High Court in Civil Revision Application No. 99 of 1997, and set aside that of Himachal Pradesh High Court in Civil Suit No. 52 of 1996.

Accordingly Civil Appeal Nos. 6036 of 1998 and 4928 of 1997 are dismissed, while Civil Appeal No. 61 of 1999 is allowed. Parties shall bear their own costs.

R.D.

Civil Appeal no. 61 of 1999 allowed
Civil Appeal no. 6036 of 1998 and
Civil Appeal no. 4928 of 1997 dismissed.

SUPREME COURT

Before U.C. Banerjee and Brijesh Kumar, JJ.

2000

November, 7.

*Collector of Central Excise, Calcutta, etc.***

v.

The Himalayan Co-operative Milk Products Union Ltd., etc.

Central Exise Rules, 1944—sub-rule (1) of Rule 8—Notification No. 105/80-C.E. dated 19.6.1980 issued by Central Government exempting the payment of excise duty on the goods falling under item 68 of the First Schedule to the Central Excise and Salt Act 1944—Interpretation of.

Held, that a bare perusal of the Notification shows that the Central Government under Rule 8 (1) of the Central Excise Central Rules exempts goods in respect of first clearance for home consumption by or on behalf of the manufacturer from one or more factories upto a value not exceeding rupees thirty lakhs. The exemption would however be allowable on fulfilment of a condition as contained in the proviso to clause (ii) of the Notification which says that an officer not below the rank of an Assistant Collector of Central Excise is to be satisfied that the sum total of the value of the capital investment made on the plant and machinery installed in the industrial unit manufacturing "said goods under clearance" is not more than rupees ten lakhs. On perusal of the proviso under consideration it would be clear that it does not refer to any other goods under clearance except the goods falling under item 68 of the First Schedule to the Central Excise and Salt Act, 1944.

Held, further, that the value of the capital investment has to be in respect of the plant and machinery manufacturing the said goods viz goods covered under Item No 68 of the Tariff, clearances of which alone is taken into account in exempting from payment of excise duty under the Notification in question. The said goods in the present case is only liquid nitrogen. Thus the value of investment in the plants and machinery manufacturing other goods not covered under Item 68 has no relevance nor it is to be taken into account.

Held, further, that such notifications by which exemption or other benefits are provided by the Government in exercise of its

** In the Supreme Court of India.

Civil Appeal Nos. 77-78 of 1989 with 637 of 1991 (Tribunal's Appeal Nos. E/2019 & 2021/84-C and E/2773/86-C).

statutory power, normally have some purpose and policy decision behind it. Such benefits are meant to be provided to the investors and manufacturers. Therefore, such purpose is not to be defeated nor those who may be entitled for it are to be deprived by interpreting the notification which may give it some meaning other than what is clearly and plainly flowing from it.

Case laws discussed.

Appeal against the judgment of Customs, Central Excise and Gold (Control) Appellate Tribunal.

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

BRIJESH KUMAR, J.

Since the above noted two appeals involve a common question for determination, as to the interpretation of a Notification issued by the Central Government under sub-rule (1) of Rule 8 of the Central Excise Rules, 1944, exempting goods falling under Item No. 68 of the First Schedule to the Central Excise and Salt Act 1944, on fulfilment of certain conditions, the appeals are being disposed of by this common judgment. As usual in such cases, the Revenue is trying to bring manufacturers within its net to charge it with the excise duty whereas the manufacturer-respondents trying to get out of it claiming benefit under the aforesaid Notification.

2. The brief facts of the case are that the manufacturer-respondent, Himalayan Cooperative Milk Product Union Limited manufactures butter and skimmed milk powder etc. in its industrial complex. For purposes of chilling plant of Dairy Unit, the respondent seems to have installed a plant manufacturing liquid nitrogen which item, un-disputedly falls under Item 68 of the Excise Tariff. By means of Notification No. 105/80-C. E. dated 19.6.1980 the excise duty payable on goods falling under Item No. 68, is exempted in respect of the first clearances of the said goods for home consumption by or on behalf of a manufacturer from one or more factories upto a value not exceeding rupees thirty lakhs inter alia, on the condition that the total of the value of the capital investment made from time to time, on the machinery installed for manufacturing said goods is not more than rupees ten lakhs. According to the manufacturer-respondents the total capital investment in the plant and machinery manufacturing liquid nitrogen is less than rupees ten lakhs, therefore the benefit of

exemption from excise duty is admissible under the Notification in question dated 19.6.1980.

3. The Assistant Collector, Central Excise, Siliguri Division by order dated 5.9.1983 rejected the claim of the respondents and confirmed the demand as raised by the Superintendent of Central Excise under Central Excise Rules, observing that the respondents are using all the plants and machinery for purposes of manufacturing all kinds varieties of excisable goods falling under different Tariff items, the total value of capital investment of all plants and machineries, installed in the said factory are to be taken into acount and no exemption on investment which was more than ten lakhs was admissible. Thus according to the excise authorities the total value of investments in all the plants manufacturing butter and skimmed milk powder and other dairy products as well as for manufacturing of liquid nitrogen was to be taken into account. According to the respondents Himalayan Cooperative Milk Product Union Limited the value of investment on liquid nitrogen plant which alone is relevant is much less than rupees ten lakhs. The appeal preferred against the order of Assistant Collector was also dismissed by the Collector (Appeals), Central Excise, Calcutta by order dated 9.1.1984. Both the authorities have, however, held that liquid nitrogen itself is a finished product and falls under Tariff Item 68.

4. The respondents preferred an appeal before the Customs, Excise and Gold (Control) Appellate Tribunal, New Delhi. The Appellate Tribunal by its order dated 21.1.1988 allowed the appeal holding that the respondents would be entitled for the benefit under the Notification of exemption. On facts though the Tribunal remanded the matter to the original adjudicating authority for computing the capital investment on plant and machinery referable to liquid nitrogen and the common plant and machinery in the same industrial complex so as to ascertain the capital investment on generator used for the chilling water.

5. We feel it would be better to peruse the Notification dated 19.6.1980 exempting the payment of excise duty on goods falling under Item 68 of the Tariff. It reads as follows :

> "In exercise of the powers conferred by sub-rule (1) of rule 8 of the Central Excise Rules, 1944, and in supersession of the notification of the Govt. of India in the Ministry of Finance (Department of Revenue) No. 89/79-Central Excises, dated the 1st March 1979, the Central Government

hereby exempts goods, falling under Item No. 68 of the First Schedule to the Central Excise and Salt Act 1944 (1 of 1944), (hereinafter referred to as the said goods), in respect of the first clearances of the said goods for home consumption by or on behalf of a manufacturer from one or more factories, upto a value not exceeding rupees thirty lakhs, cleared on or after the 1st day of April in any financial year, from the whole of the duty of excise leviable thereon :

Provided that during the period commencing on the 19th day of June 1980 and ending on the 31st day of March, 1981, the value of the clearances of the said goods eligible for exemption under this notification shall be subject to the following conditions, namely :—

(i) The aggregate of the value of clearances eligible for exemption contained in this notification during the aforesaid period, and the clearances, if any, already effected by or on behalf of a manufacturer in terms of the exemption contained in the notification No. 89/79-Central Excises, dated the 1st March 1979 aforesaid, during the period commencing on the 1st day of April, 1980, shall not exceed rupees thirty lakhs; and

(ii) The value of clearances eligible for exemption contained in this notification during the aforesaid period commencing on the 19th day of June, 1980 and ending on the 31st day of March, 1981 shall, in no case, exceed rupees twentyfour lakhs.

Provided further that an officer not below the rank of an Assistant Collector of Central Excise is satisfied that the sum total of the value of the capital investment made from time to time *on plant and machinery installed in the industrial unit in which the said goods, under clearance, are manufactured,* is not more than rupees ten lakhs. (Underlined by us for emphasis)

2. Where a factory producing the said goods is run at different times during a financial year by different manfacturers, the total value of the clearances of the said goods from such factory eligible for exemption under this notification in such year shall not exceed rupees thirty lakhs.

3. Nothing contained in this notification shall apply to a manufacturer, if the total value of the said goods cleared, if any, for home consumption by him or on his behalf from one or more factories in the preceding financial year exceeded rupees thirty lakhs.

Explanation 1—While determining the sum total of the value of the capital investment, only the face value of the investment at the time when such investment was made shall be taken into account, but the value of the investment made on plant and machinery which have been removed permanently from the industrial unit or rendered unfit for any use shall be excluded from such determination.

Explanation II. –In this notification, the expression 'factory' has the meaning assigned to it in clause (m) of section 2 of the Factories Act, 1948 (63 of 1948).

Explanation III. –For the purpose of computing the value of clearances under this notification, the clearances of the said goods which are exempted from the whole of the duty of excise leviable thereon by any other notification issued under sub-rule (1) of rule 8 of the Central Excise Rules, 1944, and for the time being in force, shall not be taken into account."

A bare perusal of the Notification quoted above shows that the Central Government under Rule 8 (1) of the Excise Rules exempts goods in respect of first clearance for home consumption by or on behalf of the manufacturer from one or more factories upto a value not exceeding rupees thirty lakhs. The exemption would however be allowable on fulfilment of a condition as contained in the proviso to clause (ii) of the Notification which says that an officer not below the rank of an Assistant Collector of Central Excise is to be satisfied that the sum total of the value of the capital investment made on the plant and machinery installed in the industrial unit manufacturing *"said goods* under clearance" is not more than rupees ten lakhs. On perusal of the proviso under consideration, it would be clear that it does not refer to any other goods under clearance except the goods falling under Item 68 of the First Schedule to the Central Excise and Salt Act, 1944. In the beginning itself the Notification says that the goods falling under Item 68 are to be referred to, in the Notification, as 'said goods'. According to own findings of the Assistant Collector, liquid nitrogen is itself a finished product and falls under Tariff Item No. 68. In that view of the matter the question of taking into account the value of the capital investment made on plants and machinery manufacturing goods other than covered unde Item No. 68 does not arise. We find no force in the submissions made on behalf of the appellants that value of all plants and machinery manufacturing butter and skimmed milk powder etc. has also to be added up so as to find out as to whether total value of the capital investment in the plant and machinery is rupees ten lakhs or more. In our view the value of the capital investment has to be in respect of the plant and machinery manufacturing the "said goods" viz. goods covered under Item No. 68 of the Tariff, clearances of which alone is taken into account in exempting from payment of excise duty under the Notification in question. The said goods in the present

case is only liquid nitrogen. Thus the value of investment in the plants and machinery manufacturing other goods not covered under Item 68 has no relevance nor it is to be taken into account.

6. The Tribunal while allowing the appeal followed a decision of Bombay High Court reported in *Devidayal Electronics & Wires Ltd. and another* versus *Union of India and another* (1) The similar notification in respect of an earlier year was under consideration before the Court. It had been noticed that two words have been used in the Notification namely, the 'factory' and 'industrial unit'. The two expressions would be presumed to have been used for different meaning. It was held that industrial unit would mean something other than the factory, which would be a separate isolate part of the plant which is exclusively used for manufacture of goods for which exemption is claimed. Learned counsel for the appellants tried to distinguish the case on facts. We, however, find that in principle what has been held in Devidayal (supra) as followed by the Tribunal, cannot be said to be an incorrect view. The factual deviation would be a matter on facts of each case. The other case which the Tribunal has referred to is reported in *Golden Press* versus *Deputy Collector of Central Excise, Hyderabad and Another* (2) In this case a notice was issued on the manufacturer of cartons as to why penalty be not imposed since the goods manufactured were removed without payment of duty. It was pleaded that cartons were exempted under a notification exempting all products of printing industry. The Court, however, held that cartons though may be printed, cannot be held to be product of printing industry. They will be relatable to packaging industry. Hence, the benefit, as pleaded, was not admissible. In so far as the other arguments raised about the value of the investment made for manufacture of printed cartons, it was held that cost of cutting machines etc. could not be excluded which according to the manfacturer was not used for printed cartons. The argument that the value of the investment in the plant and machinery manufacturing a particular item under a separate tariff would alone be taken into consideration was not accepted. The language of the exemption notification as involved in that case was quoted which was to the effect :

> "The sum total of the value of the capital investment made from time to time on plant and machinery installed in the industrial unit in which the goods under clearance are

(1) 1984 (16) E.L.T. 30 (Bom)

(2) (1987) (27) E.L.T. 273 (A.P.)

manufactured is not more than rupees ten lakhs". (As quoted in Para 22 (b) of the judgment).

rupees ten laksh or more. In our view the value of the it is then observed that according to the said notification total value of the entire machinery in the industrial unit should be taken into account as there was no occasion for allocating the machinery between various goods manufactured therein and by way of an example, it was observed that it may create complications where a factory manufacturing goods falling under more than one tariff item but has only one generator of power plant, so in such cases in what manner generator or power plant was to be allocated between two items. The plea raised was negatived and it was held that total value of the entire machinery in the industrial unit should be taken into account. At this stage, it would be appropriate to point out the difference in the language used in two notifications. We find that in the Notification dated 19.6.1980, with which we are presently concerned, the proviso to clause (ii) of the Notification says ".....the capital investment made from time to time on plant and machinery installed in the industrial unit in which the said goods under clearance are manufactured.....". The expression "said goods" is not used in the Notification interpreted in the case of *Golden Press* (supra). The "said goods" signifies or identifies the goods which are covered under Item 68 in respect of which exemption has been granted. But the word "said" is not used in the Notification under consideration in the case of *Golden Press* (supra) as indicated above says ".....industrial unit in which the goods under clearance are manufactured.....". The goods have not been specified by using the expression "said goods. In the Notification dated 19.6.1980, as already indicated earlier, the goods falling under Item 68 are to be referred as "said goods". Therefore, in our view it will not be possible to take into consideration the value of investment of all the plants and machinery manufacturing different items viz. goods other than the "said goods".

7. In our view the Tribunal rightly preferred the view taken in the case of *Devidayal* (supra). The factual hurdles like a common generator may be in use by different units in the factory complex as indicated in the case of *Golden Press* (supra) can well be worked out by devising proper method while apportioning the value of different plants proportionately. In no way such hurdle, as posed, would change the meaning of a Notification which on the

face of it and by the plain language used therein has unambiguous and clear meaning.

8. Such Notifications by which exemption or other benefits are provided by the Government in exercise of its statutory power, normally have some purpose and policy decision behind it. Such benefits are meant to be provided to the investors and manufacturers. Therefore, such purpose is not to be defeated nor those who may be entitled for it are to be deprived by interpreting the notification which may give it some meaning other than what is clearly and plainly flowing from it.

9. In view of the discussion held above, we find no merit in the appeals and they are hereby dismissed. No order as to costs.

S.D. *Appeals dismissed.*

SUPREME COURT

Before K.T. Thomas and R.P. Sethi, JJ.

2000
November. 14.

Ramon Services Pvt. Ltd."

v.

Subhash Kapoor and others.

Advocate—striking work in court on call of Advocates' Association—whether to bear the pecuniary loss suffered by his client due to his non-appearance.

When the advocate who was engaged by a party was on strike, there is no obligation on the part of the court either to wait or to adjourn the case on that account. The advocate would also be answerable for the consequence suffered by the party if the non-appearance was solely on the ground of strike call by Advocates' Association.

Held, that when an advocate opts to strike work or boycott the court he must be prepared to bear atleast the pecuniary loss suffered by the client who entrusts his brief to the advocate with all confidence that his case would be in safe hands of that advocate.

In cases where court is satisfied that the ex-parte order, passed due to the absence of an advocate pursuant to any strike call, could be set aside on terms, the court can permit the party to realise the costs from the advocate concerned, without driving such party to initiate another legal action against the advocate.

Case laws discussed.

Appeal against the judgement of Delhi High Court.

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

THOMAS, J.

Leave granted.

Another ticklish issue concerning legal profession has winched to the fore which, perforce, has to be decided by us in this case. Should a litigant suffer penalty for his advocate boycotting the court pursuant to a strike call made by the association of

" In the Supreme Court of India.
Civil Appeal No. 6385 of 2000 (Arising out of SLP © No. 19489 of 1999)

which the advocate was a member ? The question arose in this case after the suit was decreed exparte by the trial court in consequence of the non-appearance of the counsel on a day fixed for hearing, on the premise of the strike call.

Appellant-company was in occupation of a building as tenant at Barakhamba Road, New Delhi. A suit was filed against the appellant for eviction from the building and other consequential reliefs which was resisted by the appellant by raising various contentions. Issues in the suit were framed by the court and the case was posted to 26.8.1998 for trial. None of the advocates belonging to the firm of lawyers which was engaged by the appeallant did not appear in the court on the day-because the advocates were on a strike called by the advocates association concerned. As nobody for the appellant was present the court set the defendant ex-parte and evidence of the plaintiff was recorded. Appellant whose place of business was in Mumbai, on coming to know of the developments, applied under Order 9 Rule 7 of the Code of Civil Procedure (for short the "Code"). But the application was dismissed and eventually the suit was decreed on 13.11.1998. Thereafter, appellant filed an application to set aside the exparte decree. The said application was dismissed by the trial court, for which the following reasoning, inter alia, has been stated :

> "It is settled law that strike or boycott by the advocates is no ground for adjournment. Hon'ble Supreme Court in Mahabir Prasad Singh vs. Jacks Aviation (1998-RLR-SC-644) has held that all the courts have to do judicial business during court hours. It is the solemn duty of every lawyer to attend the court. The defendant and the counsel very well know that the case was fixed on 26.8.98 for plaintiff's evidence. Counsel for the defendant (at least 8 counsel had been engaged by the defendant) and the defendant deliberately did not appear on 26.8.98. There is no bona fide or reasonable ground put forward by the defendant or their counsel for non-appearance. They were knowing the consequences of non-appearance. I therefore, find no ground in allowing the application under Order IX R 16 CPC. The application is hereby dismissed with costs."

Appellant thereafter approached the High Court with an appeal against the aforesaid order. The High Court concurred with the reasoning of the trial court and dismissed the appeal. Learned Single Judge while dismissing the appeal stated thus :

"In my considered opinion, the proposition of law as laid down in the decision of the Supreme Court in Mahabir Prasad Singh's case (1999 (1) SCC 37) squarely applied to the facts of the present case. There was negligence and total lack of bona fide on the part of the defendants and therefore, they are not entitled to any relief in the present appeal. The appeal stands dismissed as without any merit leaving the parties to bear their own costs."

We have no doubt that the legal position adumbrated by the Additional District Judge as well as the High Court cannot be taken exception to. When the advocate who was engaged by a party was on strike there is no obligation on the part of the court either to wait or to adjourn the case on that account. Time and again this Court has said that an advocate has no right to stall the court proceedings on the ground that advocates have decided to strike or to boycott the courts or even boycott any particular court. Vide *U.P. Sales Tax Service Association* vs. *Taxationin Bar Association, Agra & ors.* (1995 (5) SCC 716), *K.John Koshy & ors.* vs. *Dr. Tarakeshwar Prasad Shaw* (1998 (8) S.C.C. 624); *Mahabir Prasad Singh* vs. *Jacks Aviation* (1999 (1) SCC 37); and *Koluttumottil Razak* vs. *State of Kerala* (2000 (4) SCC 465).

Now the party says that his absence may be viewed from a broader angle particularly on account of the following background. Appellant company is situated at Mumbai and the court in which the suit was filed is situated in Delhi. On 24.8.1998 the counsel for the appellant transmitted a message to the appellant that none of the advocates would attend the court due to the strike call on 26.8.1998. Appellant says that it was not possible to make arrangements for appearing in court on the succeeding day at such a short note and from such a long distance. He would have thought that the courts could not function when the advocates were on strike though he later realised that it was a wrong assumption. He made out a case for setting aside the ex-parte order, at least on some terms because his non-appearance was attributable entirely to the firm of advocates whom he engaged (M/s. B.C. Das Gupta & Co.).

In view of the aforesaid stand of the appellant we passed the folowing order on 8.5.2000 :

"We tentatively propose to set aside the exparte judgment on some terms, like payment of costs to the other side,

because petitioner's counsel was absent in the trial court when the case was called as he was participating in the lawyers' strike. But it is difficult for us to mulct the petitioner with the cost portion as he is innocent. Hence we issue notice to M/s. Das Gupta & Co. lawyers of Delhi, to show cause why the petitioner shall not be permitted to realise the said cost amount from the said advocats."

A reply affidavit has been filed on behalf of the said firm of advocates. It is admitted in the affidavit that the firm was engaged by the appellant in the said suit. The deponent tried to explain their non-appearance on two factual premises. First is that when the firm came to know that Delhi Bar Association resolved to boycott the court of Additional District Judge, Delhi, appellant was informed of it and expressed the inability of the advocates to appear before the said court on 26.8.1998. Second is that in spite of such communication a member of the lawyers' firm made an attempt to reach the court concerned, but he did not succeed as he was prevented by the other striking lawyers. The following is the statement made by the firm of advocates regarding their absence in the court :

"That on 26.8.1998, a member of our firm visited the court of the aforsaid learned ADJ. However the office bearers and members of Delhi Bar Association did not allow any counsel to appear before the court of aforesaid learned ADJ. Therefore we could not appear in the aforesaid matter on 26.8.1998 and the aforesaid learned ADJ was pleased to pass the following order.

About the second facet of the explanation offered by the lawyers' firm there is no direct information from the particular person who is said to have tried to enter the court or as to who were the persons who prevented him from entering the court. Even the name of the advocate member of the firm who tried to enter the court hall has not been mentioned. Be that as it may, if the firm of advocates thinks that they really wanted to attend the court but were physically prevented by somebody else from doing so it is open to the counsel concerned to resort to such steps as against those persons.

But the fact remains that appeal was set ex-parte due to the absence of the appellant and his counsel in the court when the case was taken up for hearing. In the special circumstances of this

case we are inclined to set aside the ex-parte order dated 26.8.1998, on some terms.

Appellant shall pay a sum of Rs. 5000/- as costs to the respondent/plaintiff within one month from today and on such payment (or deposit with the trial court) the ex-parte order dated 26.8.1999 would stand set aside.

Now comes the question of syphoning the said burden on to the advocate. Should the advocate be mulcted with that amount as he is primarily instrumental for setting his client ex-parte. Shri M.N. Krishnamani, learned senior counsel, after disowning the liability of the counsel, adopted the alternative plea on that score like this: Till 10.9.1998, when the apex Court pronounced in unmistakable terms while deciding *Mahabir Prasad Singh's* case (supra) that boycott of the court by the advocate is unquestionably illegal, the legal fraternity took it for granted that the courts would not proceed with the cases during strike periods. The following can be extracted from the written submission made by the senior counsel :

> "The courts were sympathesing with the Bar and would agree for not dismissing cases for default and to take up the matter of disposal only if both the parties in person agree for an adjudication. This practice of the court unofficially co-operating with the strike and agreeing or adjourning the cases lulled the lawyers into a bona fide belief that even if he did not appear, the court would not do any harm to the case. It was in this belief and in this legitimate expectation which emanated on the basis of the convention and the practice for over 3 to 4 decades, the lawyers either participated in the strike and several of them were really physically prevented from entering the courts. Most of the lawyers participated passively rather than actively in strikes."

Shri Krishnamani, however, made the present position as unambiguosly clear in the following words :

> "Today, if a lawyer participates in a Bar Association's boycott of a particular court that is ex facie bad in view of the clear declaration of law by this Hon'ble Court. Now, even if there is a boycott call, a lawyer can boldly ignore the same in view of the ruling of this Hon'ble Court in 1999 (1) SCC 37."

Though we appreciate the stand of the senior counsel that an advocate would hereinafter venture to ignore the boycott call, I am unable to agree with the learned senior counsel that the courts had earlier sympathized with the Bar and agreed to adjourn cases during the strikes or boycotts. If any court had adjourned cases during such periods it was not due to any sympathy for the strikes or boycotts, but due to helplessness in certain cases to do otherwise without the aid of a counsel. Nor do we concede to the contention that this Court declared the legal position only when *Mahabir Prasad Singh* (supra) was decided that strikes or boycotts are illegal. We have cited supra the earlier decisions rendered by this Court in tune with the same stand.

Therefore, we permit the appellant to realise half of the said amount of Rs. 5000/- from the firm of advocates M/s. B.C. Das Gupta & Co. or from any one of its partners. Initially we thought that the appellant could be permitted to realise the whole amount from the said firm of advocates, However, we are inclined to save the firm from bearing the costs partially since the Supreme Court is adopting such a measure for the first time and the counsel would not have been conscious of such a consequence befalling them. Nonetheless we put the profession to notice that in future the advocate would also be answerable for the consequence suffered by the party if the non-appearance was solely on the ground of a strike call. It is unjust and inequitable to cause the party alone to suffer for the self imposed dereliction of his advocate. We may further add that the litigant who suffers entirely on account of his advocate's non-appearance in court, he has also the remedy to sue the advocate for damages but that remedy would remain unaffected by the course adopted in this case. Even so, in situations like this, when the court mulcts the party with costs for the failure of his advocate to appear, we make it clear that the same court has power to permit the party to realise the costs from the advocate concerned. However, such direction can be passed only after affording an opportunity to the advocate. If he has any justifiable cause the court can certainly absolve him from such a liability. But the advocate can not get absolved merely on the ground that he did not attend the court as he or his association was on a strike. If any advocate claims that his right to strike must be without any loss to him but the loss must only be for his innocent client such a claim is repugnant to any principle of fair-play and canons of ethics. So when he opts to

strike work or boycott the court he must as well be prepared to bear at least the pecuniary loss suffered by the litigant client who entrusted his brief to that advocate with all confidence that his cause would be safe in the hands of that advocate.

In all cases where court is satisfied that the ex-parte order (passed due to the absence of the advocate pursuant to any strike call) could be set aside on terms the court can as well permit the party to realise the costs from the advocate concerned without driving such party to initiate another legal action against the advocate.

We my also observe that it is open to the court as an alternative course to permit the party (while setting aside the ex parte order or decree earlier passed in his favour) to realise the cost fixed by the court for that purpose, from the counsel of the other party whose absence caused the passing of such ex parte order, if the court is satisfied that such absence was due to that counsel boycotting the court or participating in a strike.

We, therefore, dispose of this appeal with the above direction.

SETHI, J.

I agree both with the reasonings and the conclusions arrived at by Thomas, J. in his lucid judgment. However, the matter being important having far reaching effects on the institution of the judiciary, and for my views with respect to the role of the Courts during strikes by Advocats, I have opted to pen down my own observations in addition.

Persons belonging to the legal profession are concededly the elite of the society. They have always been in the vanguard of progress and development of not only law but the Polity as a whole. Citizenary looks at them with hope and expectations for traversing on the new paths and virgin fields to be marched on by the society. The profession by and large, till date has undoubtedly performed its duties and obligations and has never hesitated to shoulder its responsibilities in larger interests of the mankind. The lawyers, who have been acknowledged being sober, task oriented, professionally responsible stratum of the population, are further obliged to utilise their skills for socio-political modernization of the country. The lawyers are a force for the preservance and strengthening of constitutional government as they are guardians of the modern legal system.

After independence the concept of social justice has bcome a part of our legal system. This concept gives meaning and significance to the democratic ways of life and of making the life dynamic. The concept of welfare state would remain in oblivion unless social justice is dispensed with. Dispensation of social justice and achieving the goals set forth in the constitution are not possible without the Active, concerted and dynamic efforts made by the person concerned with the justice dispensation system. The prevailing ailing socio-economic-political system in the country needs treatment which can immediately be provided by judicial incision. Such a surgery is impossible to be performed unless the Bench and the Bar make concerted effort. The role of the members of the Bar has thus assumed great importance in the post independent era in the country.

Generally strikes are antithesis of the progress, prosperity and development. Strikes by the professionals including the Advocates cannot be equated with strikes under taken by the industrial workers in accordance with the statutory provisions. The services rendered by the advocates to their clients are regulated by a contract between the two besides statutory limitations, restrictions and guidelines incorporated in the Advocates Act, the Rules made thereunder and Rules of procedure adopted by the Supreme Court and the High Courts. Abstaining from the courts by the Advocates, by and large, does not only affect the persons belonging to the legal profession but also hampers the process of justice sometimes urgently needed by the consumers of justice, the litigants. Legal profession is essentially a service oriented profession. The relationship between the lawyer and his client is one of trust and confidence.

With the strike by the lawyers, the process of court intended to secure justice is obstructed which is unwarranted under the provisions of the Advocates Act. Law is no trade and briefs of the litigants not merchandise. This Court in *The Bar Council of Maharashtra* v. *M.V. Dabholkar & Ors.* (1) placed on record its expectations from the Bar and observed :

> "We wish to put beyond cavil the new call to the lawyer in the economic order. In the days ahead, legal aid to the poor and the weak, public interest litigation and other rule-of-law responsibilities will demand a whole new range of responses from the Bar or organised social groups with

(1) (1976) 2 S.C.C. 291.

lawyer members. Indeed, the hope of democracy is the dynamism of the new frontiersmen of the law in this developing area and what we have observed against solicitation and alleged profit-making vices are distant from such free service to the the community in the jural sector as part of the profession's tryst with the People of India."

In *Pandurang Dattatraya Khandekar* v. *Bar Council of Maharashtra Bombay & Others* (1) it was observed that, "An advocate stands in a loco parent is towards the litigants. Therefore, he is expected to follow norms of professional ethics and try to protect the interests of his client in relation to whom he occupies a position of trust. Counsel's paramount duty is to the client. The client is entitled to receive disinterested, sincere and honest treatment". It would be against professional etiquette of a lawyer to deprive his client of his services in the court on account of strike. No advocate can take it for granted that he will appear in the court according to his whim or convenience. It would be against professional ethics for a lawyer to abstain from the court when the cause of his client is called for hearing or further proceedings.

This Court in Tahil Ram Issardas Sadarangani & Ors. v. Ramchand Issardas Sadarangani & Anr. [1993 Supp. (3) SCC 256] while deprecating the decreasing trend of service element and increasing trend of commercialisation of legal profession, pointed out that it was for the members of the Bar to act and take positive steps to remove such an impression before it is too late. By striking work, the lawyerws fail in their contractual and professional duty to conduct the cases for which they are engaged and paid. In *Common Cause, A Regd. Society* v. *Union of India & Ors* (2) it was observed, "Since litigants have a fundamental right to speedy justice as observed in *Hussainara Khatoon* v. *Home Secy., State of Bihar* (3) it is essential that cases must proceed when they appear on board and should not ordinarily be adjourned on account of the absence of the lawyers unless there are cogent reasons to do so. If cases get adjourned time and again due to cessation of work by lawyers it will in the end result in erosion of faith in the justice delivery system which will harm the image and dignity of the Court as well".

(1) (1984) 2 S.C.C. 556.
(2) (1994) 5 S.C.C. 557.
(3) (1980) 1 S.C.C. 81.

Noting casual and indifferent attitude of some of the lawyers and expecting improvement in quality of service this Court in In Re : *Banjiv Datta, Deputy Secretary, Ministry of Information & Broad Casting, New Delhi, etc.* (1) held :

> "Of late, we have been coming across several instances which can only be described as unfortunate both for the legal profession and the administration of justice. It becomes, therefore, our duty to bring it to the notice of the members of the profession that it is in their hands to improve the quality of the service they render both to the litigant-public and to the courts, and to brighten their image in the society. Some members of the profession have been adopting perceptibly casual approach to the practice of the profession as is evident from their absence when the matters are called out, the filing of incomplete and inaccurate pleadings—many time even illegible, and without personal check and verification, the non-payment of court fees and process fees, the failure to remove office objections, the failure to take steps to serve the parties, et al. They do not realise the seriousness of these acts and omissions. They not only amount to the contempt of the court but do positive disservice to the litigants and create embarrassing situation in the court leading to avoidable unpleasantness and delay in the disposal of matters. This augurs ill for the health of our judicial system.
>
> The legal profession is a solem and serious occupation. It is noble calling and all those who belong to it are its honourable members. Although the entry to the profession can be had by acquiring merely the qualification of technical competence, the honour as a professional has to be maintained by its members by their exemplary conduct both in and outside the court. The legal profession is different from other professions in that what the lawyers do, affects not only an individual but the administration of justice which is the foundation of the civilised society. Both as a leading member of the intelligentsia of the society and as a responsible citizen, the lawyer has to conduct himself as a model for others both in his professional and in his private and public life. The society has a right to expect of him such ideal behaviour. It must not be forgotten that the legal profession has always been held in high esteem and the members have

(1) (1995) (3) S.C.C 619.

played an enviable role in public life. The regard for the legal and judicial system in this country is in no small measure due to the tireless role played by the stalwarts in the profession to strengthen them. They took their profession seriously and practised it with dignity, deference and devotion. If the profession is to survive, the judicial system has to be vitalised. No service will be too small in making the system efficient, effective and credible. The casualness and indifference with which some members practise the profession are certainly not calculated to achieve that purpose or to enhance the prestige either of the profession or of the institution they are serving. If people lose confidence in the profession on account of the deviant ways of some of its members, it is not only the profession which will suffer but also the administration of justice as a whole. The present trend unless checked is likely to lead to a stage when the system will be found wrecked from within before its wrecked from outside. It is for the members of the profession to introspect and take the corrective steps in time and also spare the courts the unpleasant duty. We say no more."

In *Brahma Prakash Sharma* v. *State of U.P.* (1), a Constitution Bench of this Court held that a resolution passed by the Bar Association expressing want of confidence in the judicial officers amounted to scandalising the court to undermine its authority which amounted to contempt of court. In Tarini Mohan Barari, Re : [AIR 1923 Cal. 212] the Full Bench of the High Court held that pleaders deliberately abstaining from attending the court and taking part in a concerted movement to boycott the court, was a course of conduct held not justified. The pleaders had duties and obligations to their clients in respect of matters entrusted to them which were pending in the courts. They had duty and obligation to cooperate with the court in the orderly administration of justice. Boycotting the court was held to be high handed and unjustified. In Pleader, Re : [AIR 1924 Rang 320] a Division Bench of the High Court held that a pleader abstaining from appearing in the court without obtaining his client's consent and leaving him undefended, amounted to unprofessional conduct. In *U.P. Sales Tax Service Association* v. *Taxation Bar Association, Agra & others* (2) this Court observed :

(1) (1953) S.C.R. 1169

(2) (1995) (5) SCC. 716

"It has been a frequent spectacle in the recent past to witness that advocates strike work and boycott the courts at the slightest provocation over looking the harm caused to the judicial system in general and the litigant public in particular and to themselves in the estimate of the general public. An advocate is an officer of the court and enjoys a special status in the society. The workers in furtherance of collective bargaining organise strike as per the provisions of the Industrial Disputes Act as a last resort to compel the management to concede their legitimate demands.

It is not necessary to go into the question whether the advocates, like workmen, have any right at all to go on strike or boycott court. In *Federal Trade Commission v. Superior Court Trial Lawyers' Assn. 493 US 411* the attorneys who regularly accepted court appointments to represent indigent defendants in minor felony and misdemenaour cases before the District of Columbia Superior Court sought an increase in the statutorily fixed fees they were paid for the work they had done. When their lobbying efforts to get increase in the fees failed, all the attorneys, as a group, agreed among themselves that they would not accept any new cases after a certain date, if the District of Columbia had not passed legislation providing for an increase in their fees. The Trial Lawyers Association to which the attorneys belonged supported and publicised their agreement. When they are not accepting the briefs which affected the District's criminal justice system, the Federal Trade Commission (FTC) filed complaint against the Trial Lawyers' Association complaining that they had entered into a conspiracy to fix prices and go in for a boycott which was an unfair method of competition violating Section 5 of the Federal Trade Commision Act (15 USCS 45). The administrative law judge rejected various defences of the Association and recommended that the complaint to browbeat the boycott be dismissed. The Court of Appeals for the District of Columbia reserved the FTC order holding that the attorneys are protected by Federal Constitution's First Amendment etc. On certiorari, majority of USA Supreme Court speaking through Stevens, J, held that the lawyers had no protection of the First Amendment (free speech) and the action of the group of attorneys to boycott the courts constituted restraint

of trade within the meaning of Section 1 of Shreman Act against unfair method of competition. Though the object was enactment of a favourable legislation, the boycott was the means by which the attorneys sought to obtain favourable legislation. The Federal Constitution's First Amendment does not protect them.

In *Mahabir Prasad Singh* v. *Jacks Aviatioin Pvt. Ltd.* (1) to which one of us (Thomas, J.) was a party observed :

"Judicial function cannot and should not be permitted to be stonewalled by browbeating or bullying methodology, whether it is by litigants or by counsel. Judicial process must run its even course unbridled by any boycott call of the Bar, or tactics of filibuster adopted by any member thereof. High Courts are duty bound to insulate judicial functionaries within their territory from being demoralised due to such onslaughts by giving full protection to them to discharge their duties without fear. But unfortunately this case reflects apathy on the part of the High Court in affording such protection to a judicial functionary who resisted, through legal means, a pressure strategy slammed on him in open court."

It was further held :

"If any counsel does not want to appear in a particular court, that too for justifiable reasons, professional decorum and etiquett require him to give up his engagement in that court so that the party can engage another counsel. But retaining the brief of his client and at the same time abstaining from appearing in that court, that too not on any particular day on account of some personal inconvenience of the counsel but as a parmanent feature, is unprofessional as also unbecoming of the status of an advocate. No court is obliged to adjourn a cause because of the strike call given by any association of advocates or a decision to boycott the courts either in general or any particular court. It is the solemn duty of every court co proceed with the judicial business during court hours. No court should yield to pressure tactics or boycott calls or any kind of browbeating. A three-Judge Bench of this Court has reminded members of the legal profession in Lt. Col. S.J. Chaudhary v. State

(1) (1999) (1) SCC 37

(Delhi Admn.) (1984) 1 SCC 722 that it is the duty of every advocate who accepts a brief to attend the trial and such duty cannot be overstressed. It was further reminded that 'having accepted the brief, he will be committing a breach of his professional duty, if he so fails to attend'.

"A lawyer is under obligation to do nothing that shall detract from the dignity of the court, of which he is himself a sworn officer and assistant. He should at all times pay differential respect to the Judge, and scrupulously observe the decorum of the courtroom."

(Warvelle's Legal Ethics, at p. 182)

Of course, it is not a unilateral affair. There is a reciprocal duty for the court also to be courteous to the members of the Bar and to make every endeavour for maintaining and protecting the respect which members of the Bar are entitled to have from their clients as well as from the litigant public. Both the Bench and the Bar are the two inextricable wings of the judicial forum and therefore the aforesaid mutual rospect is the sine qua non for the efficient functioning of the solemn work carried on in courts of law. But that does not mean that any advocate or a group of them can boycott the courts or any particular court and ask the court to desist from discharging judicial functions. At any rate, no advocate can ask the court to avoid a case on the ground that he does not want to appear in that court."

In the Light of the consistent views of the judiciary regarding the strike by the advocates, no leniency can be shown to the defaulting party and if the circumstances warrant to put such party back in the position as it existed before the strike. In that event, the adversary is entitled to be paid exemplary costs. The litigant suffering costs has a right to be compensated by his defaulting counsel for the costs paid. In appropriate cases the court itself can pass effective orders, for dispensation of justice with the object of inspiring confidence of the common man in the effectiveness of judicial system. In the instant case respondent has to be held entitled to the payment of costs, consequent upon the setting aside of the ex-parte order passed in his favour.

Though a matter of regret, yet it is a fact, that the courts in the country have been contributory to the continuance of the

strikes on account of their action of sympathising with the Bar and failing to discharge their legal obligations obviously under the threat of public frenzy and harassment by the striking advocates. I find myself in agreement with the submission of Sh. M.N. Krishnamani, Senior Advocate that the courts were sympathising with the Bar by not agreeing to dismiss the cases for default of appearance of the striking advocates. I have my reservations with the observations of Thomas, J. that the courts had not been sympathising with the Bar during the strikes or boycotts. Some courts might have conducted the cases even during the strike or boycott periods or adjourned due to helplessness for not being in a position to decide the lis in the absence of the counsel but majority of the courts in the country have been impliedly sympathieers by not rising to the occasion by taking positive stand for the preservation of the high traditions of law and for continued restoration of the confidence of the common man in the institution of judiciary. It is not too late even now for the courts in the country to rise from the slumber and perform their duties without fear or favour particularly after the judgment of this Court in *Mahabir Singh's* case (supra). Inaction will surely contribute to the erosion of ethics and values in the legal profession. The defaulting courts may also be contributory to the contempt of this Court.

R.D. *Order accordingly*

MISCELLANEOUS CRIMINAL

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

1999
August, 6.

*Md. Khursid Anwar and anr.***

v.

State of Bihar.

Code of Criminal Procedure, 1973 (Central Act No. II of 1974), section 482—Petitioners application for quashing entire criminal proceeding initiated against them for an offence under sections 323/379/594/386/34 of the Indian Penal Code—magistrate after considering the statements recorded on solemn affirmation took cognizance of the offence—allegations made in the complaint prima facie constitutes an offence—whether proceedings a fit case for quashing under section 482 Cr. P.C..

Admittedly there is allegation and counter allegation in between the complainant and the petitioners, and it cannot be inferred at this stage that the allegations made by the complainant are false and fabricated.

Held, therefore, it is not a fit case where this court should exercise its inherent power under section 482 Cr. P.C.

Held, further, that there is no reason to quash the complaint and the order taking cognizance.

Application by the accused.

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

M/s M.M. Banerjee & D.K. Chakravorty for the petitioners.

A.P.P. and *Mr. R.S. Mezumdar* for the opp. parties.

M.Y. Eqbal, J. In this application filed under section 482 Cr. P.C. the petitioners have prayed for quashing the entire criminal proceeding initiated against them in connection with City P.S. case No. 454/97 for an offence under sections 323/379/504/386/34 of the Indian Penal Code pending before the Judicial Magistrate, Ist class, Dhanbad.

2. The petitioners' case is that on 18.6.97 the complainant, opposite party no. 2 along with some of his associates entered in

* Sitting at Ranchi Bench.

** Criminal Misc. No. 7534/97 (R). In the matter of an application under section 482 Cr. P.C.

the office of the petitioners at Katras and started abusing them and quarreling with them. The petitioners who are the sales tax officers, made a representation to the superior officers bringing to their notice the conduct of the complainant who was in the habit of creating such nuisance in the office. It is stated that on the basis of the representation made by the petitioners the Commissioner, Commercial Taxes, Bihar, accorded sanction for launching prosecution as against opposite party no. 2 in relation to the incident which had taken place on 13.6.97 Accordingly, F.I.R. was lodged on 1.8.97 against the complainent for an offence under sections 448, 353, 383, 341 and 504/34 of the Penal Code which was registered as Katras PS case No. 185/97. It is stated that in the meantime, the opposite Party no. 2 came to know about the aforesaid fact and lodged the instant complaint case in defence before the Chief Judicial Magistrate, Dhanbad making false and frivolous allegations against the petitioners. On the basis of the said complaint and the evidences of the witnesses the Judicial Magistrate, Dhanbad took cognizance of the offence on 25.11.97 against the petitioners.

3. Mr. M.M. Banerjee, learned counsel appearing on behalf of the petitioners firstly submitted that the allegations made in the complaint petition are forged and fabricated and mala fide inasmuch as the petitioners are innocent and have committed no offence as alleged in the complaint petition. Learned counsel has drawn my attention to the statement of one Gopal Prasad as contained in annexure 5 to the petition and submitted that said Gopal Prasad gave statement that he had never authorised the complainant/ opposite party no. 2 to make any grievance to the petitioners in respect of this matter which may suggest commission of any offence by the petitioners.

4. It is well settled that in a proceeding initiated on a complaint, inherent power to quash the said proceeding can be exercised by this court only in cases where the complaint does not disclose any offence or is frivolous or vexatious. It is not necessary that there should be meticulous analysis of the case before trial to find out whether the case would end in conviction or not. If the allegation made in the complaint petition, prima facie, constitutes an offence and the Magistrate is satisfied with the allegations and the statements of the complainant and takes cognizance, then this court is not supposed to quash the cognizance on additional materials produced by the accused.

5. In the light of the said settled proposition of law, this court has to peruse the complaint, a copy of which has been annexed as annexure 4 to this petition. In the complaint petition it is alleged that on 28.6.97 one of the peons of Katras Circle of Seles Tax Office, came to the complainant and told that the Deputy Commissioner, Sales Tax is desirious to meet him. The complainant alleged that he went to the office of the Sales Tax Commissioner along with the registered sale deed and other documents which the complainant had to furnish before the authority of BCCL Area. Whe the complainant entered in the premises of the Sales Tax office with a hand bag containing all papers and was seraching for the D.C., Sales tax, all on a sudden the accused persons called him and started abusing and tried to insult the complainant. It is alleged that on protest, the accused persons became furious and they called two unknown persons who were looking like criminals and the accused persons ordered them to snatch all the belongings of the complainant. It is further alleged that when the complainant raised hulla or alarm many people including the witnesses arrived there and saw the occurrence. Immediately thereafter, one of the unknown persons pointed a knife towards the neck of the complainant and the accused no. 2 said him to kill the complainant. Many more allegations have been made in the complaint petition by the complainant.

6. On the basis of the allegations made in the complaint and after considering the statements recorded on solemn affirmation the learned Magistrate took cognizance of the offence under the aforementioned sections of the penal Code.

7. On reading of the allegations made in the complaint prima facie, it constitutes an offence and, therefore, there is no illegality committed by the Magistrate in taking cognizance on the basis of those allegations coupled with the statements of the witnesses recorded on oath. The only question, therefore, to be considered is whether those allegations are false and fabricated as submitted by Mr. Banerjee, learned counsel for the petitioners. Admittedly, some incident took place in the sales tax office either on 18.6.97 or on 28.6.97 for which, according to the petitioners, they filed representation before the superior authority requesting for sanction for lodging FIR against the complainant. Admittedly, there is allegation and counter allegation in between the complainant and the petitioners.

8. In view of the admittad position it cannot be inferred at this stage that the allegations made by the complainant are false and fabricated. It is, therefore, not a fit case where this court should exercise its inherent power unde section 482 Cr. P.C. and quash the entire prosecution launched against the petitioners by the complainant by filing a complaint patition. It is also not justified to consider the materials brought by the petitioners in defence to show that the complaint lodged by the complainant is mala fide.

9. Having regard to the facts and circumstances of the case I do not find any reason to quash the complaint and the order of cognizance. There is no merit in this application which is, accordingly, dismissed.

G.N. *Application dismissed*

CIVIL WRIT JURISDICTION

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

1999

August, 20

*Tata Iron and Steel Company Ltd.***

v.

The Presiding Officer & Ors.

Industrial Dispute—with regard to the date from which wages and other benefits raised by employees of Indian Tube Company, the Transferor Company, which they would get at par with the employees of Tata Iron and Steel Company, the Transferee Company—as per clause 15 of the scheme of amalgamation and order of Bombay High Court passed in Company Petition no. 89 of 1994, whether the effective date for giving benefits wages and other benefits to them is 1.10.1985.

Held, that the finding of the Industrial Tribunal, Ranchi that the effective date is 1.4.1983 from which employees of the Indian Tube Company, the Transferor Company are entitled to get benefits of pay scale and dearness allowance at par with that drawn by the Tata Iron and Steel Company, the transferee Company is perverse in law and contrary to clause 15 of the amalgamation scheme and the order passed by the Bombay High Court in Company Petition no. 89 of 1994.

Held, further, that the effective date as per the amalgamation scheme is 1.10.1985 for the purpose of giving benefits of the wages and other benefits to the employees of the Transferor Company.

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.

M/s G.M. Mishra, N.C. Ganguli, advocates for the petitioner.

Mrs. M.M. Pal and Miss. Mahua Palit, advocates for the respondents.

Mr. T.K. Mishra for rspondent no. 3

M.Y. Eqbal, J. In this writ application petitioner M/s Tata Iron and Steel Company has prayed for issuance of appropriate

* Sitting at Ranchi Bench.

** Civil Writ Jurisdiction Case No. 2968 of 1992 (R). In the matter of an application under Articles 226 and 227 of the Constitution of India.

writ in the nature of certeriori for quashing the award passed by the Presiding Officer, Industrial Tribunal Ranchi in reference case no. 3/86 deciding the reference in favour of the respondents, the Workmen represented by Tube Company Workers' Union holding that 1.4.83 is effective date of amalgamation of Indian Tube Company Ltd. with the petitioner.

2. It appears that vide notification dated 30.4.86 by the Labour Employment and Training Department, Govt. of Bihar the following dispute was referred to the tribunal for adjudication in exercise or jurisdiction U/s 10 (1) (d) of Industrial Disputes Act.

3. "Consequent upon amalgamation of M/s Indian Tube Company with Tisco to what pay scale, Dearness Allowance and other benefits the employees are entitled and from which date the same shall be payable to them."

4. The case of Tube Company Workers' Union is that Management of M/s Indian Tube Company Limited, hereinafter referred to as Tube Company amalgamated with the management of Tisco on 1.4.83 and that the workmen of Tube Company are entitled to get payscale and dearness allowance which are being drawn by the employees of Tisco as well as the workmen of Indian Tube Company are entitled to other benefits which were being enjoyed by the employees of the Tisco with the personal protection of other monetary benefits which are available to and other facilities which were being enjoyed by the employees of the Union prior to the date of amalgamation i.e. prior to 1.4.83 The further case of the respondent Union is that several monetary benefits which were available to the workmen of Tube Company and certain other facilities which were enjoyed by the workmen of the Tube Company have either been withdrawn or reduced.

5. On the other hand case of the management is that the management of the Tube Company amalgamated with the management of the Tisco on 1.10.85 and that the workmen of Tube Company are getting pay scale, dearness allowance and other benefits at par with the workmen of Tisco. The further case of the management is that the management made an agreement with the Tata Worker's Union which Union was joined by majority of the members of the Tube Company Workers' Union on 3.2.86 by which the demand raised by the Tube Company workers' Union on 2.11.85 was settled, wherein it was agreed that the service conditions of the employees of the Tube Division shall be at par

with the employees of other Division of the Company at Jamshedpur. According to the management since the agreement has been implemented before 20.4.86 on which the present reference was made, the present reference has become infructuous.

6. The Tribunal formulated the following points for consideration in this reference :–

I) What is the effective date of amalgamation of the Indian Tube Company with Tisco ?

II) Whether the majority of the members of the Tube Company Workers' Union joined the Tata Workers' Union on amalgamation of the Indian Tube Co. with Tisco and if the answer is in affirmative whether the agreement, if any, entered in between the Tata Workers' Union with the management of Tisco, shall be binding on the minority of the members of the Tube Company Workers' Union ?

III) Whether there was any industrial dispute in between the management of Indian Company Ltd. and its workmen on the date on which the present reference was made.

IV) Whether the industrial dispute which was in between the management of Indian Tube Company Ltd. and its workmen was resolved prior to the date on which the present reference was made ?

V) To what scale, dearness allowance and other benefit the workmen of Indian Tube Company are entitled and from which date the same will be payable to them ?

7. The Tribunal considered all the three points namely point nos. II, III and IV together and decided these points in favour of the respondent/union. The Tribunal further considered point nos. I and V together and finally held that 1.4.83 is the effective date of amalgamation of Indian Tube Company with the Tisco. The Tribunal further held that the payscale, dearness allowance and other benefits should be made available to the Workmen of the Indian Tube Company Ltd. at par with the workmen of Tisco from 1.4.83.

8. This writ petition was admitted on 5.11.92 for deciding the limited questions as to what is the effective date of amalgamation of the Tube Company with the petitioner/Tisco and what payscale,

dearness allowance and other benefits the Workmen of Tube Company are entitled and from which date the same will be payable to them.

9. Mr. G.M. Mishra learned counsel appearing for the petitioner assailed the award on the ground inter-alia that the Tribunal has comitted serious error of law, which is apparent on the face of the award and that the relevant materials on record have not at all considered or overlooked by the Tribunal. The learned counsel further submitted that amalgamation of one company with another company requires sanction of the Court under the provisions of the Companies Act. Order of sanction made by the Court comes into effect only when certified copy of order is filed with the Registrar. Learned counsel submitted that the Companies as such does not give any protection to the employees of transferor company with regard to their absorption/ employment in the transferee company. Learned counsel referred paragraphs 7. 15 of the amalgamation scheme, a copy of which is annexure-11 here and submitted that scheme itself envisaged that the amalgamation shall take effect from the date when the copy of order of Calcutta and Bombay High Courts sanctioning the scheme shall be filed with the appropriate Registrar of the companies and such date would be considered as effective date for the purpose of the scheme, viz. implementation of the transfer of employees. Learned counsel further referred relevant portion of the order dated 1.8.85 passed by Bombay High Court and relevant portion of the order dated 15.5.85 passed by the Calcutta High Court. Learned counsel therefore submitted that certified copies of the orders of Bombay and Calcutta High Courts were filed with Registrar of the companies on 1.10.85. Laarned counsel further submitted that in terms of the scheme and in terms of the orders passed by the High Courts, one day before the filing of the orders before the Registrar i.e. on 1.9.85 a general offer was given by the Chairman-cum-Managing Director of the Company to the employees of the Tube company inviting them to exercise their option and unless they decline the offer in writing their services in the Tube Company Ltd. will be transferred in the petitioner's Company without any interruption. Learned counsel therefore submitted that on the basis of relevant clause of the scheme and the orders passed by the High Courts the effective date shall be 1.10.85 and not from 1.4.83. Learned counsel then submitted that "appointed date" reletable to the transfer of assets and liabilities of Tube

Company to Tisco. It is specifically laid down for accounting purposes and also for the termination of the relationship of buyers and sellers of Tubes manufactured by Tube Company. It is contended that charter of demand was submitted by the Tube Company workers's Union on 7.5.85 to the General Manager of the Tube Company and not to the petitioner Tisco and the employees of Tube Company continued to draw their wages from Tube Company prior to 1.10.85. It is there-fore contended that in any view of the matter effective date can be only 1.10.85 and can not be 1.4.83.

10. On the other hand Mrs. M.M. Pal learned counsel appearing for the worker's Union submitted that the effective date and the appointed date of the scheme of amalgamation of the Tube Company with the petitioner Co. are inconsonance with the judgement of Bombay and Calcutta High Courts on that point. Learned counsel drawn my attention to the relevant paragraphs of the scheme particularly paragraphs 5 and 7 and submitted that on the reading of the scheme and the order together it is abundantly clear that the effective date of the amalgamation is 1.4.83. Learned counsel then submitted that tribunal has given positive and satisfactory reason in the award and there is no perversity or other error of law or error of fact. Learned counsel then submitted that factually merger of two companies took place w.e.f. 1.4.83 from which date workmen have become entitled to extra monetary benefits by rason of amalgamation.

11. From perusal of the impugned award it transpires that on the main issue i.e. Issue nos 1 and 5 the Tribunal has come to the finding that as per Ext. M-12 and M-15 scheme of amalgamation was to be effective from 1.4.83 and the scheme of amalgamation was to take effect finally from 1.10.85. The Tribunal therefore held that 1.4.83 is the effective date of amalgamation of Indian Tube Company with Tisco and therefore the workmen of Tube Company are entitled to get all benefits at par with the workmen of Tisco from 1.4.83.

12. Before appreciating the rival contention made by the learned counsels appearing for the parties and finding arrived at by the Tribunal it would be useful to first look into the order passed by the Bombay High Court and the relevant clauses of the scheme of amalgamation.

13. From perusal of the order passed by the Bombay High Court it transpires that an application U/s 391 and 394 of the Indian Companies Act was filed by the petitioner-Tisco being Company petition No. 89/84 praying for sanction of an arrangement embodied in the scheme of amalgamation of the Tube Company with the petitioner Tisco. The Bombay High Court passed order on 1.8.85 granting sanction for amalgamation. The relevant portion of the orders reads as under :

> "THIS COURT DOTH HEREBY sanction the Arrangement embodied in the Scheme of Amalgamation annexed as Exhibit 'C' to the petition and annexed hereto as Schedule II. AND DOTH DECLAARD the same to be binding on the Transferee-Company and its members and also on the Transferor Company and its members AND THIS COURT DOTH FURTHER ORDER that the Scheme of Amalgamation be and it is hereby effective from the Ist day of April, 1983, which date is hereinafter referred to as "the Appointed Day."
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> .....
>
> AND THIS COURT DOTH FURTHER ORDER that the Transteree-Company shall prior to the day immediately preceding the Effective Date referred to in Clause 15 of the Scheme of Amalgamation by a general notice offer employment to all the employees of the Transferor-Company on their existing remuneration and conditions or service and all such employees of the Transferor-Company as are in its employment at the close of business of the aforesaid day and as shall not expressly in writing declined such offer shall continue in employment in the said undertaking as employees of the Transferee-Company without interruption in service and on the same remuneration and conditions as or on remuneration and conditions not in any way less favourable to such employees then these applicable to them at the aforesaid day and the Transferee Company shall be legally liable to pay to any such employee in the event of this retrenchment such compensation as he may be entitled to receive under the Industrial Disputes Act, 1947 or any substituted enactment on the basis that his service has been continuous and has not been interrupted by the transfer of the undertaking of the Transferor-Company to the Transferee-Company."

14. From perusal of the relevant portion of the order quoted above it is manifest that 1.4.83 is the appointed date i.e. the date from which scheme of amalgamation became effective. It is also not disputed by the respondent that 1.4.83 is the appointed date when entire business and undertakings of the transferor Company stood transferred and vested in the transferee company. The later part of the order further declares that the transferee company prior to the date immediately preceding the effective date referred to in clause 15 of the scheme of amalgamation by a general notice to offer employment to all the employees of the transferor company on their existing remuneration and conditions of service and such employees of the transferor company in absence of any express declination shall continue in the employment of the transferee company and the transferee company shall be legally liable to pay to any such employee in the event of his retrenchment or on such declination on such compensation as may be entitled to under the law.

15. It is therefore clear that the effective date used in the order of the High Court refers to the effective date mentioned in clause 15 of the scheme from which date transferee company shall be liable to pay remuneration compensation etc. It, is therefore necessary to look into clause 15 of the amalgamation scheme alongwith other clauses which reads as under :

1. "This Scheme of Arrangement and Amalgamation (hereinafter referred to as "the Scheme") is effective from Ist April, 1983 or such other date as the appropriate High Court may direct, which date is hereinafter referred to as 'the Appointed day."

2. "On and from the Appointed Day, the entire business and undertaking of the Indian Tube Company Limited, a public Company having its Registered Office at 43, chowringhee Road, Calcutta 700071 (hereinafter referred to as "the Transferor Company") shall without any further act or deed be and the same shall stand transferred to and vested in and be deemed to have been transferred to and vested in. The Tata Iron and Steel Company Limited, a public Company having its Registered Office at Bombay House', 24, Homi Mody Street, Fort, Bombay 400 023 (hereinafter referred to as "the Transferee Company") pursuant to the provisions of Section 394 of the Companies Act, 1956 (hereinafter referred to as "the said Act.") for all the estate and interest of the

Transferor Company subject nevertheless to all changes if any then affecting the same and on the Appointed Day the Transferor Company shall be amalgamated with the Transferee Company."

5. "The Transferor Company shall with effect from the Appointed Day be deemed to have carried on its business and activities of its undertaking on behalf of and for the benefit and on account of the Transferee Company and accordingly all profits accruing or losses arising or incurred by or in the business of the Transferor Company as and from the Appointed Day shall for all purposes be and shall be treated as profits or losses as the case may be of the Transferee Company and shall be available to the Transferee Company for disposition in any manner including the declaration of any dividend by the Transferee Company. As such the Transferor Company shall carry on its business and activities on and from the Appointed Day as economically and efficiently as possible and with utmost prudence and without creating any charge or making any alienation of or otherwise dealing with its undertaking or any part thereof except in the ordinary course of business.

7. "The Transferee Company shall prior to the day immediately preceding the Effective day referred to in clause 15 below of the Scheme by a general notice offer employment to all the employees of the Transferor Company on their existing remuneration and conditions of service and all such employees of the Transferor Company as are in its employment at the close of business on the aforesaid day and as shall not have expressly in writing declined such offer shall continue in employment in the said under-taking as employees of the Transferee Company without interruption in service and on the same remuneration and conditions as or on remuneration and conditions not in any way less favourable to such employees than those applicable to them at the aforesaid day and the Transferee Company shall be legally liable to pay to any such employee in the event of his retrenchment such compensation as he may be entitled to receive under the industrial Disputes Act, 1947 or any substituted enactment on the basis that his service has been continuous and has not been interrupted by the

transfer of the undertaking of the Transferor Company to the Transferee Company.

15. "The Scheme although operative from the Appointed Day shall take effect finally from the last of the dates upon which certified copy/copies of the order/orders of the High Courts at Calcutta and Bombay sanctioning the Scheme shall have been filed with the appropriate Registrars of Companies pursuant to Section 394 of the said Act. (such last date being referred to in the Scheme as "The Effective Date" for the purpose of the Scheme."

16. From perusal of clause 15 it is abundantly clear that although the scheme of amalgamation would be operative from the appointed date i.e. 1.4.83 but it shall take effect finally from the last of the date upon which certified copy of the orders of the High Court's sanctioning the scheme shall be filed with the appropriate Registrar of the companies pursuant to section 394 of the Companies Act. Such last date will be taken as an effective date for the purpose of the scheme. Clause 7 of the scheme also provides that the transferee Company shall give a general notice of offer just prior to the date preceding the effective date offering employment to all the employees of the transferor Company on their existing remuneration. It appears that in terms of the scheme and the order passed by the High Court to that effect a general notice of offer was issued by the petitioner Company on 1.9.85, a copy of that letter was proved and marked Exhibit and also annexed and filed as Annexure-2 to the writ petition. It is therefore clear that in terms of the High Court order a general notice offering employment to all the employees of the transferor Company was given immediately preceding the effective date as referred to in clause 15 of the scheme. The tribunal has not understood the implications of the order reading it together with clause 7 and 15 of the amalgamation scheme. There is no reference in the award regarding the general notice dated 1.9.85 which is clearly suggestive of the fact that after 1.9.85 i.e. 1.10.85 is the effective date from which transfer of the employees came into effect.

17. Besides the above it is not disputed by the respondent that the concerned workmen of Tube Company continued to draw their wages from the Transferor Company (Tube Company) prior to 1.10.85 and the employees of the Transferor Company have

already given benefits of wages at par with the employees of the Transferee Company w.e.f. 1.10.85–The finding of the tribunal therefore that the effective date is 1.4.83 from which employees of the Transferor Company are entitled to get benefits is perverse in law and contrary to the amalgamation scheme and the order passed by the High Courts. From the facts and the materials discussed herein above, it can safely be concluded that effective date is 1.10.85 for the purpose of giving benefits of wages and other benefits to the employees of the Transferor Company.

18. This writ application is therefore allowed and the impugned order passed by the Tribunal is set aside. However in the facts of the case there shall be no order as to cost.

R.D. *Application allowed.*

MISCELLANEOUS CRIMINAL

Before Narayan Roy, J.

1999
November, 3.

*Chandan Kumar.**

v.

The State of Bihar and Anr.

Code of Criminal Procedure, 1993 (Central Act No. II of 1974), section 482—Petition for quashing order of magistrate taking cognizance of offence under section 420 of the Indian Penal Code and under sections 138 and 142 (b) of the Negotiable Instruments Act—whether barred under law.

Where a cheque issued in the name of the Bank bounced, and admittedly the cause of action had arissn on 11.11.1994 but the complaint was filed on 21.2.1995, i.e. more than one month after the cause of action had arisen.

Held, that the order taking cognizance of the offence under section 138 of the Act is barred under law.

Held, further, that in this case the cause of action had arisen for prosecution under section 138 of the Negotiable Instruments Act on 11.11.1994. Hence the complaint filed on 21.2.1995 must be held beyond time.

Saket India Ltd. and others. v. *India Securities Ltd.* (1) — relied on.

An application under section 482 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 Narayan Roy, J.

Mr. N.K. Agrawal for the petitioner.

Mr. Ram Krishna Pd. APP for the State.

Narayan Roy, J. Heard counsel for the parties.

2. This application has been filed by the petitioner for quashing order dated 21.2.1995 passed by the Chief Judicial Magistrate, Dumka, in Case no. 38 of 1995 whereby and whereunder the learned Magistrate has taken cognizance of the offence under section 420 of the Indian Penal Code and under

* Criminal Miscellaenous No. 5852 of 1995. In the matter of an application under section 482 of the Code of Criminal Procedure.

(1) (1999) Vol. 3 S.C.C. 1.

section 138 of the Negotiable Instrument Act (hereinafter referred to as the Act).

3. The short facts giving rise to this application are as follows :

A petition of complaint was filed by the opposite party no. 2 before the Chief Judicial Magistrate, Dumka, on 21.2.1995 stating therein that the accused petitioner had purchased two tyres on credit from M/s Dilip Motors on 5.11.1993 amounting to Rs. 13,398/-. Thereafter, the accused petitioner fraudulently issued a cheque on 5.5.1994 amounting to Rs. 13,398/- in the name of State Bank of India, Dumka Bazar Branch, in favour of M/s Dilip Motors. The said cheque was presented in the bank and the same was returned with an objection note "insufficient fund in the account of the accused". The complainant, accordingly, issued notice to the accused on 20.10.1994 in terms of sub-section (b) of section 138 of the Act.

4. On the basis of the complaint the learned Magistrate, after examining the complainant on solemn affirmation took cognizance of the offence on 21.2.1995 and issued process against the petitioner.

5. Learned counsel for the petitioner submitted that even at the face of the complaint petition no offence whatsoever is made out against the petitioner under section 420 of the Indian Penal Code and at best the complaint discloses facts constituting an offence under section 138 of the Act as the complainant only alleges about bouncing of the cheque. Learned counsel further submitted that the order taking cognizance against the petitioner under section 138 of the Act is also barred by limitation as envisaged under section 142 (b) of the Act. It is submitted that the notice issued by the complainant was received by the petitioner on 26.10.1994 whereas the complaint petition was filed on 21.2.1995. Learned counsel further submitted that in view of the provisions of Sub-section (b) of section 142 of the Act the complaint was maintainable if it could have been filed within one month from the date of cause of action. According to the counsel for the petitioner the cause of action in this case had arisen on 11.11.1994 and the complaint, therefore, could have been filed by 11.12.1994 and since admittedly it was filed on 21.2.1995 the order taking cognizance of the offence under section 138 of the Act is barred under law. This question has already been set at rest in the case

of *Saket India Ltd. and Others* Vrs. *India Securities Ltd.* (1) In the case of Saket India Ltd. (Supra) the Apex Court has held that in view of section 142 (b) of the Act the complaint has to be filed within one month from the date of the cause of action. Admittedly, in this case the cause of action had arisen for prosecution under section 138 of the Act on 11.11.1994. Hence, the complaint filed on 21.2.1995 must be held beyond time.

6. Besides this question a categorical statement has been made by the petitioner in paragraph no. 15 of this application that after receipt of the information regarding dishonouring of the cheque, the petitioner paid the amouont to the complainant. This aspect of the matter is not being disputed by the learned counsel appearing on behalf of the complainant.

7. Considering the facts and circumstances of the case and for the reasons discussed above, this application is allowed and the prosecution launched against the petitioner is hereby quashed.

G.N. *Application allowed*

LETTERS PATENT

Before Nagendra Rai and D.P.S. Choudhary, JJ.

2001
April, 12.

*State of Bihar & Ors.**

v.

M/s Oswal Chemicals & Fertilisers Ltd. & Ors.

Fertiliser (Control) Order, 1985—whether the Director of Agriculture-cum-Registering Authority-cum-Controller under the Control Order could issue the order dated 17.12.1998 indicating districtwise allocation of fertiliser (Urea) to be supplied by the petitioner-company under ECA quota for kharif season as well as railway rake points from where supply had to be made—whether the order can be said to have been made under section 3 of the Essential Commodities Act, 1955 (Central Act no. X of 1955)—Essential Commodities Act, 1955—section 3.

Where the Central Government by notified Order had not delegated the power to the Director of Agriculture-cum-Registering Authority-cum-Controller under Fertiliser (Control) Order, 1985, hereinafter referred to as the Control Order, to issue any direction under the Control Order;

Held, that the directions issued by the Director of Agriculture by order dated 17.12.1998 indicating district-wise allocation of fertiliser to be supplied by the petitioner-company under E.C.A. quota for the kharif season as well as Railway rake points from where supply had to be made to the different districts indicated therein cannot be said to have been issued under section 3 of the Essential Commodities Act, 1955.

Held, further, that Director of Agriculture-cum-Registering Authority had no authority in law to issue the direction allocating district-wise supply of urea by petitioner (manufacturer) or incorporating other terms and conditions regarding Railway rake point as contained in letter dated 17.12.1998.

The learned Single Judge has rightly held that there was no requirement in Form 'B' that godowns must be located at places where the Railway rakes were received.

* Letters Patent Appeal No. 864 of 1999. From the judgment and order dated 22.6.1999, passed in C.W.J.C. No. 3623 of 1999 by the learned Single Judge of this Court.

The directions contained in letter dated 17.12.1998 even if treated to be regulatory in nature with a view to achieve the object of Control Order, have not been issued by the State Government, but by the Director of Agriculture-cum-Registering Authority, who under the Control Order has no such power.

Case laws discussed.

Appeal under Clause 10 of the Letters Patent of the Patna High Court.

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

Mr. Ganga Pd. Roy, A.A.G. III and *Mr. S.K. SINHA* (JC TO AAG III) for the Appellants.

Mr. Navaniti Prasad Singh for the Respondent.

Nagendra Rai, J., The State of Bihar and its officers, namely, the Agriculture Production Commissioner and Director of Agriculture are the appellants and they have filed the present appeal under Clause 10 of the Letters Patent of the Patna High Court against the order dated 22.6.1999, passed by a learned Single Judge, by which, he has set aside the orders passed by the Registering Authority and the appellate-authority under the provisions of the Fertiliser (Control) Order, 1985, (hereinafter referred to as the 'Control Order'), cancelling the certificate of registration granted to the respondents to carry on the business of selling fertiliser under E.C.A. quota as a wholesale dealer in the State of Bihar.

2. Respondent no. 1 is a Company registered under the Companies Act and respondents no. 2 and 3 are the Director and employee of the said Company. They filed the writ application for quashing the order dated 29.3.1999 passed by appellant no. 2-the Agriculture Production Commissioner dismissing the appeal against the orders dated 18.1.1999 and 24.2.1999, passed by appellant no. 3-Director of Agriculture, appointed as Registering Authority as well as Controller under the Control Order cancelling the Certificate of Registration granted to respondent no. 1 to sell the fertilisers as a wholesale dealer in the State of Bihar and the same has been quashed by the learned Single Judge as stated above.

3. Respondent-Company has its registered office at Shahajahanpur and it has set up a modern plant at Shahajahanpur in the State of Uttar Pradesh. One of the objects of the Company is to manufacture and sell urea fertilizer, for which it has set up

a plant at Shahajahanpur itself. The respondent-Company applied for grant of Certificate of Registration for carrying on business in sale of fertilisers in statutory Form 'A' as provided under the Control Order. The Certificate of Registration in Form 'B' was granted on 10.5.1996 by the Registering Authority to deal in fertilizer under the E.C.A. quota as a wholesale dealer in the State of Bihar. The said Certificate of Registation was valied up to 31.3.1999.

4. The Central Government under the provisions of the Control Order fixes the prices of urea and also makes allocation of urea to different States in different seasons. The Central Government is also empowered to issue direction to the manufacturer to sell the fertilisers produced by it in such quantity and in such States and within such period as may be specified thereunder. The Respondent-Company was directed to supply 90,000 M.T. of urea to the State of Bihar for the Rabi season 1998-99 i.e. October 1998 to March, 1999. The Central Government, thereafter, issued different monthly movement orders under the provisions of the Fertiliser (Movement Control) Order, 1973 (hereinafter referred to as 'the Movement Control Order') for supply of urea by respondent-Company to the State of Bihar. Under Clause 3 of the Movement Control Order, direction was issued directing supply of quantity of urea mentioned therein to the State of Bihar. The movement order for the month October was issued on 30.9.1998. After receipt of such movement order/ allocation order, the respondent-Company on 21.10.1998 submitted a districtwise allocation of urea to the Direotor of Agriculture-cum-Controller of Fertiliser, who is also the registering authority against the 90,000 M.T. of urea fertiliser allocated by the Central Government for the Rabbi season. According to the allocation issued to the respondent-Company, it was intended to make through its dealership network. A copy of the said letter was appended as Annexure 4 to the writ application.

5. The fertilisers were to be moved in bulk from the manufacturing unit and the same were to be brought by Railway at different places and different districts and for that the Railway was requested to provide rakes, consisting of large number of wagons. Shahajahanpur is connected with broad gauge and meter gauge. The Railway showed its inability to provide Railway rakes on broad gauge for carrying urea fertilisers for supply to the district of East Champaran and agreed to provide meter guage

Railway rake for the same to be delivered at rake points at Adapur and Raxaul. As there was demand of fertiliser in the pick season of December and as the movement order was already issued, the respondent Company accepted the offer of the Railway for movement of urea from Shahajahanpur to Raxaul and Adapur on meter gauge Railway rake points. The respondent-Company informed the District Agriculture Officer on 8.12.1998 that rakes were to arrive at Raxaul and Adapur (Meter gauge) Railway rake points. In the meantime, on 17.12.1998, the Registering Authority (the Director of Agriculture-appellant no. 3) issued an order (Annexure 6) indicating districtwise allocation of the fertilizers to be supplied by the respondent-Company under E.C.A. quota and other manufacturers for the aforesaid Kharif season as well as the Railway rake points from where the supply has to be made to the different districts indicated therein. It also provided for buffer godowns at Railway rake points and prior approval of the authorities mentioned therein before receipt and sale of urea to the wholesalers. The respondent-Company was ordered to supply 1025 M.T. of urea to the East Champaran and Motihari was fixed as a rake point for suppy of urea to the East Champaran and West Champaran. It is to be mentioned so far as West Champaran is concerned, no allocation of supply of urea was provided in the allocation order. A copy of the said order was appended as Annexure 6 to the writ petition.

5. According to the respondent-Company, as the aforesaid direction was issued in the month of December by the Fertiliser Controller under the Control Order, by that time, urea was already despatched for the districts of East Champaran and West Champaran by the meter gauge and was to arrive at the relevant rake points at Adapur and Raxaul and as such on 22.12.1998, the respondent-Company requested the Director of Agriculture to include these Railway rake points at Raxaul and Adapur as additional rake points. The respondent-Company is alleged to have supplied 3285. 35 metric tons of urea in East Champaran, 1147.55 metrictons in West Champaran. Rakes arrived at Adapur and Raxaul near Napal border on 16th and 24th December, 1998, which had left Sahjahanpur on 6th and 16th December, respectively. On 4.1.1999, the Director of Agriculture-cum-Controller of Fertiliser-cum-Registering authority issued a show-cause notice to the respondent-Company and other two manufacturers for cancellation of their Certificates of Registration on the grounds

mentioned therein and also suspended the Certificate of Registration. A copy of the said show-cause notice was annexed as Annexure 8 to the writ petition. In the show-cause notice, following grounds were given :–

(i) You have not informed the arrival of Rail Rakes of Urea in Rabi 1998-99 to the concerned authority.

(ii) You have failed to comply with the orders of Director of Agriculture, Bihar, Patna, regarding Rail points.

(iii) Without approval of the list of distribution of Urea by DM/DAU, East Champaran, you have distributed the same.

(iv) You have sold the Urea directly to the farmers making fake list of farmers.

(v) You have not maintained proper records.

(vi) You have violated the Rules of Fertiliser Movement Control Order.

(vii) You have furnished false information in return, declaration & records.

(viii) You have been found guilty for non-furnishing of returns statements and other information as required to the concerned authority.

(ix) You have been found guilty for non-functioning required information to the fertlizer Inspector.

(x) You have been found guilty for abetment to contravention of FCO-1985 etc.

6. Respondent-Company filed its show-cause and denied the allegations made therein. It was stated that the Railway offered to provide a meter gauge for transportation of urea from manufacturing unit and rake points at Adapur and Raxaul, for which an information has already been to the authorities and the supplies were made to the dealers after information was given to the District Agriculture Officer and other authorities. It was also said that no sale was made directly to the agriculturists and it has maintained the proper records and furnished al informations as and when required by the authorities under the relevant provisions.

7. The Director of Agriculture-cum-Fertiliser Controller-cum-Registering Authority cancelled the certificate of registration and the said decision was taken on 18.1.1999, which was annxed as Annexure 12 and which was communicated to the respondent-

Company by letter dated 4.2.1999, a copy of which was annexed as Annexure 10 to the writ petition.

8. The Respondent-Company preferred an appeal against the order dated 4.2.1999 and during the pendency of the appeal, a complaint was made by the respondent-Company that no reasons have been assigned in the impugned order. Thereafter, the appellate authority directed the Registering Authority to give a detailed order and then the Registering Authority informed that the matter has already been disposed of by a reasoned order dated 18.1.1999, which has also been challenged in the said appeal. The appeal was dismissed on 29.2.1999 by the Appellate Authority, a copy of which was appended as Annexure 14 to the writ petition.

9. According to the Respondent-Company, the Director of Agriculture-cum-Fertiliser Controller-cum-Registering authority under the Control Order has no power to issue directions as contained in letter dated 17.12.1998 regarding districtwise allocation of fertilisers, approval of the list of wholesalers and fixation of Railway rake points under the provisions of the Control Order and as such the cancellation of certificate of registration for violation of the said directioins is not valid in law. Further stand of the respondent-Company is that after allocation of Urea to be supplied by it to the State of Bihar and issuance of movement order by the Central Government, it took prompt steps and requested to provide rake for supply of urea to different districts of Bihar and the Railway offered only meter gauge rake points at Adapur and Raxaul for bringing the urea from the manufacturing unit for supply of urea to the districts of East Champaran and West Champaran and the respondent-Company taking into consideration the need of the farmers brought the fertlisers through meter gauge which were despatched before issuance of direction dated 17.12.1998 by the concerned authorities and as such there was no question of violating any such directions. It has acted in bona fide manner and the authorities should not have cancelled the Certificate of Registration for violation of the order/direction contained in letter dated 17.12.1998.

10. The stand of the appellant-State is that the urea is a controlled item under the Essential Commodities Act (hereinafter referred to as 'the Act') and the Director of Agriculture being the Registering authority as well as the Controller under the Control Order has power to issue directions as contained in letter dated 17.12.1998 regarding districtwise allocation of urea, which the

manufacturer has to supply in terms of the order passed by the Central Government under E.C.A. quota. He has also power to fix and specify the railway rake points for particular districts for receipt, unloading and storage of urea by such manufacturers, insist on buffer godowns at such authorised Railway rake points. In other words, directions with regard to districtwise allocation of urea as contained in the aforesaid letter dated 17.12.1998 were validly issued and non-compliance or violation of the same would result in cancellation of Certificate of Registration granted under the Control Order. Accordingly, the certificate was cancelled by the concerned authority. Further stand of the appellant-State is that the Rabbi crops are usually transplanted in Bihar after 15th November and the requirement of urea peaks up in the first fortnight of December and as such the directions were issued by the authorities on 17.12.1998. In fact, there was no delay in issuing such directions. Other manufacturers have obeyed the aforesaid directions but the respondent-Company did not obey the same. The assertion made by the respondent-Company that it has already despatched the urea through the meter gauge prior to issuance of the aforesaid letter is only an excuse to justify the violations made by it of the aforesaid directions.

11. The learned Single Judge quashed the order of cancellation of Certificate of Registration on the ground that the Director of Agriculture-cum-Fertiliser Controller-cum-Registering Authority has no power to issue directions as contained in letter dated 17.12.1998 and as such for violation of the same the Certificate of Registration cannot be cancelled under Clause 31 of the Control Order. In other words, it has held that the grounds of cancellation of Certificate of Registration were not covered by Clause 31 of the Control Order.

12. Before adverting to the respective submissions advanced at the Bar, it will be relevant to state in brief the provisions having relevancy to decide the question in controversy. The Parliament enacted the Essential Commodities Act (hereinafter referred to as the Act) in exercise of power vested under Entry no. 33, List-III of the Seventh Schedule of the Constitution for the control of the production, supply and distribution of, and trade, and commerce in certain commodities in the interest of general public. Section 3 of the Act authorises the Central Government to issue an order, which provides for regulating or prohibiting the production, supply and distribution of essential commodities and trade and commerce,

with the object for maintaining or increasing supplies of any essential commodity or for securing their equitable distribution and availability at fair prices mentioned therein. Sub-section (2) (1) (d)-thereof authorises the Central Government to issue order for regulating by licences, permits or otherwise the storage, transport, distribution, disposal, acquisition, use of consumption of any essential commodities. In exercise of the power under the said Act, the Central Government has issued Control Order as well as the Fertiliser Movement Order. Sub-section (5) of section 3 of the Act requires that the order of the general nature or effecting class of persons, be notified in the Official Gazette and sub-section (6) thereof provides that every order made under the said section by the Central Government or by any officer or authority of the Central Government shall be laid before both the Houses of Parliament after it is made. Section 5 deals with the delegation of powers, under which the Central Government may delegate the power to any officer or authority subordinate to the Central Government or the State Government or an officer or authority subordinate to the State Government to make orders or issue notifications under section 3 by a notified order with regard to the matter enumerated in the order on such conditions as may be specified in the notified order/direction. Admittedly, in this case no power has been delegated by the Central Government to issue any order or notification or direction to the State Government in exercise of delegated power.

13. Clause 3 of the Control Order authorises the Central Government to fix the prices of fertilisers. Clause 6 provides that the Central Government may, with a view to securing equitable distribution and availability of fertilisers to the farmers in time direct any manufacturer/importer to sell the fertilisers produced by him in such quantities and in such State and within such period as may be specified in the notification published in the Official Gazette. The Central Government has power to appoint the Controller of Fertiliser and the Registering Authority is appointed under Clause 26 by the State Government by notification published in the Official Gazette. Clause 8 provides for application for registration. Every person desiring to obtain a Certificate of Registation under the Control Order for selling fertilisers, whether in wholesale or retail or both, has to make an application before the Registering authority and the Certificate of Registration is granted under Clause 9. Under Clause 27, there is a provision for

appointment of Inspectors by the State or Central Government. The Inspectors have power to make search, seizure and to require the manufacturers, dealers etc. to give any information in his possession with respect to the manufacture, storage and disposal of any fertiliser manufactured or, in any manner handled by him and other duties. Clause 31 contains a provision with regard to suspension/cancellation of certificate of registration and sub-clause (1) thereof is relevant, which provides that after giving an opportunity of hearing, the certificate of registration may be suspended or cancelled on the two grounds : (a) that such certificate has been obtained by mis-representation as to material particulars; and (b) that any of the provisions of this Order or any of the terms and conditions of such certificate has been contravened or not fulfilled. The certificate of registration is granted in Form 'B', in which a description of the place and type of business had to be mentioned. Location of sale depot and the location of godowns attached to the sale depot have to be made in the Certificate of Registration. Terms and conditions of certificate of registration are as follows :—

"(1) This certificate of registration shall be displayed in a prominent and conspicuous place in a part of the business premises open to the public.

(2) The holder of the certificate shall comply with the provisions of the Fertiliser (Control) Order 1985 and the notification issued thereunder for the time being in force.

(3) The certificate of registration shall come into force immediately and be valid up to .....

UNLESS PREVIOUSLY CANCELLED OR SUSPENSED

(4) The holder of the certificate shall from time to time report to the Registering Authority any change in the premises of sale depot and godowns attached to the sale depot.

(5) The wholesale dealer/retail dealer shall submit a report to the Registering Authority, with a copy to the Block Development Officer or such other officer as the State Government may notify, in whose jurisdiction the place of business is situated, by the 5th of every month, showing the opening stock, receipts, sales and closing stocks of fertilisers in the preceding month. He

shall also submit in time such other returns as may be prescribed by the Registering Authority.

(6) The industrial dealer shall submit a report to the Central Government by the 15th of April for the preceding year, showing the opening stocks as on 1st of April of the reporting year, sourcewise receipts during the year, sale and closing stock of fertilisers along with the sourcewise purchase/sale price.

(7) The wholesale or retail dealer, except where such a dealer is a State Government, a manufacturer, importer or a pool handling agency, shall not sell fertiliser for industrial use and, as the case may be, an industrial dealer for agriculture use."

14. Movement Control Order under section 3 of the Act has been issued by the Central Government to secure equitable distribution of fertilisers in the States of India. According to the said provision, the movement of fertilisers from one State to other State has to be made in terms of the aforesaid provisions.

15. Learned counsel for the appellants raised two points. Firstly he submitted that the direction as contained in the letter dated 17.12.1998 (Annexure 6 to the writ application), making districtwise allocation and providing other conditions have been issued under section 3 of the Act and as such the violation of the same will be a ground to cancel the licence under Clause 31 of the Control Order. The learned Single Judge has wrongly held that the Registering Authority has no power to issue such directions. Secondly, he submitted that even assuming that the said directions have not been issued under section 3 of the Act, the directions issued by the Registering Authority are not in the nature of restrictions to carry trade and business by the respondent Company which is a fundamental right as guaranteed under Article 19(1) (g) of the Constitution of India, but the said directions are regulatory in nature and issued in public interest and as such they cannot be held to be ultra vires or unauthorised in law.

16. Learned counsel for the respondent-Company reiterated the same very submission, which was urged before the learned Single Judge. He submitted that the directions issued by the Registering Authority under the Control Order cannot be treated as a direction under section 3 of the Act for Act for the reason that no notification of the Central Government has been brought on

the record under section 5 of the Act authorising the State Government or the Registering Authority being the Director of Agriculture to issue directions with regard to the Control Order. He further submitted that the Registering Authority under the Control Order has no power to issue such directions and the respondent-Company has not violated any terms and conditions of the registration and as such cancellation of licence on the ground of violation of directions contrained in letter dated 17.12.1998, which were issued by an authority having no competence to issue the same, was rightly quashed by the learned Single Judge.

17. Article 19 of the Constitution of India guarantees rights of freedom regarding the matters enumerated therein, including the right to practice any profession or to carry on any occupation, trade or business. However, Clauses (2) to (6) of the said Article permit the legislature to make law imposing restrictions in exercise of the fundamental rights of freedom guaranteed under the aforesaid Article. With regard to trade, profession or business, Clause (6), inter-alia, provides that a reasonable restriction may be put on the exercise of the aforesaid rights of carrying trade and business in the interest of general public.

18. In the case of *Narendra Kumar & Ors.* v. *Union of India*, reported in A.I.R. 1960 Supreme Court, Page-430, a Constitution Bench held that the law can be made putting a restriction which in some cases may amount to prohibition with regard to the fundamental rights guaranteed under the aforesaid Article provided the same is reasonable and is in interest of the general public. In applying the test of reasonableness, the Court has to consider several relevant factors including the evil that was sought to be remedied by such law, ratio of the harm caused to individual citizens by the proposed remedy to the beneficial effect reasonably expected to result to the general public. It is relevant to quote paragraphs 18 and 19 of the said judgment as follows :-

> "18. As it was to remedy the harm that would otherwise be caused by the provisions of Art. 13, that these saving provisions were made, it is proper to remember the words of Art. 13 in interpreting the words" reasonable restrictions, on the exercise of right used in Cl. (2). It is reasonable to think that the makers of the Constitution considered the word "restrictions" to be sufficiently wide to save laws "inconsistent" with Art.

(19) (1) or "taking away the rights" conferred by the Article, provided this consistency or taking away was reasonable in the interest of the different matters mentioned in the clause. There can be no doubt, therefore, that they intended the word "restriction" to include cases of "prohibition" also. The contention that a law prohibiting the exercise of a fundamental right is in no case saved cannot, therefore, be accepted. It is undoubtedly correct, however, that when, as in the present case, the restriction reasches the stage of prohibition special care has to be taken by the Court to see that the test of reasonableness is satisfied. The greater the restriction, the more the need for strict scrutiny by the Court.

19. In applying the test of reasonableness, the Court has to consider the question in the background of the facts and circumstances under which the order was made, taking into account the nature of evil that was sought to be remedied by such law. The ratio of the harm caused to individual citizen by the proposed remedy to the beneficial effect reasonably expected to result to the general public. It will also be necessary to consider in that connection whether the restraint caused by the law is more than was necessary in the interests of the general public."

19. The same view has been reiterated in the case of *M/S Bishamber Dayal Chandra Mohan* v. *State of U.P.*, reported in A.I.R. 1982 S.C. 33, wherein it has been held that the fundamental right to carry on trade and business guaranteed under Article 19(1) (g) must yield to the common good. The court must balance the individual's rights of freedom of trade and the freedom of inter-State trade and commerce as against the national interest and a reasonable restriction can be imposed on a person in enjoyment of the right. The test of reasonable restriction should be applied to each individual Statute and no abstract standard, or a general pattern of reasonableness can be laid down as applicable in all cases. The restriction which arbitrarily or excessively invades the right cannot be said to contain the quality of reasonableness and unless it strikes a proper balance between the freedom guaranteed under Article 19(1) (g) and the social control permitted under clause (6) of Article 19, it must be held to be wanting in that

quality. However, such restrictions or social control must be made by a law or order having a statutory force and not by a mere executive or departmental instructions (See *Bijoe Emmanuel v. State of Kerala*, reported in A.I.R. 1987 S.C. 748).

20. Thus, the fundamental right of trade and business is not absolute and the law permits a social control under Clause (6) of Article 19 of the Constitution. However, such restrictions should be reasonable and in public interest and to decide the question as to whether the particular Statute is reasonable or not relevant factors; such as evil sought to be remedied, the benefit available to the public and other relevant factors have to be considered.

21. The law is well settled by catena of judgements of the Apex Court that restrictions to the freedom quaranteed under Article 19 of the Constitution must be law or order having statutory force and not by executive instructions.

22. The first question for consideration is as to whether directions contained in the letter dated 17.12.1998 are the directions issued under section 3 of the Act or not ? Nothing has been brought on behalf of the appellant-State to show that the Central Government by a notified order has delegated the power to the Director of Agriculture or the Registering Authority to issue any direction under the Control Order. In that view of the matter, the said directions cannot be said to have been issued under the Act. In absence of any delegation, the Registering Authority has no power to issue any such directions under section 3 of the Act.

23. Next question for consideration is as to whether the Registering Authority has power under the Control Order to issue such order or not ? Under the Control Order, the Registering Authority has power to grant to refuse Certificate of Registration in Form 'B' and the terms and conditions of From 'B' have already been enumerated above. The Registering Authority has power to suspend and cancel the Certificate of Ragistration on two gorunds as mentioned above. The relevant ground for the purpose of this case is Clause 31 (1) (b) of the Control Order, which provides that the registration may be cancelled on the ground of contravention or non-fulfilment of any of the provisions of the Control Order or under the terms and conditions of the certificate. Thus, the Control Order does not authorise the Controller to issue any direction.

24. Now, it has to be seen as to whether the terms and conditions of registration as provided in Form 'B' authorise the

Registering Authority to issue directions as contained in the aforesaid letter. From a perusal of the terms and conditions as enumerated above, the Registering Authority has no power to issue directions allocating districtwise supply of urea by manufacturer or incorporating other terms and conditions regarding rake points without the prior approval of the authority before sale etc.

25. Learned counsel for the appellants however submitted that condition no. 5 authorises the Registering Authority to issue such direction. Condition no. 5 only provides that the dealer has to submit a return showing opening of stock, receipt, sales and closing stock of fertiliser in the preceding month and to submit other returns as may be specified by the Registering Authority. Submission of the return with regard to stock etc. cannot authorise the Registering Authority to issue directions controlling the movement of the fertiliser. As such, the Registering Authority has no authority in law to issue the directions as contained in the letter dated 17.12.1998.

26. Learned counsel for the appellants further submitted that in the registration Form 'B', location of godowns attached to the sale depot has to be given, and as at Adapur and Raxaul, where the Railway rakes were received, the respondent-Company has no godown there was violation of the terms and conditions of the licence justifying the cancellation.

27. The said point would have some merit if it would have been found that the fertilisers received at Adapur and Raxaul were disposed of by the respondent-Company at that places. There is no such material on the record nor is evident from the order passed by the authority. The learned Single Judge has rightly held that there is no requirement in Form 'B' that the godowns must be located at places where the Railway rakes are received.

28. Learned counsel for the appellant-State also submitted that the directions are not restrictions on trade and business of the respondent-Company but they were regulalatory in nature and such regulatory directions can be issued by the authority for the purpose of carrying out the object and purposes of the Act. Such directions cannot be struck down on the ground of lack of authority and in support of the same he relied upon the decision of the Supreme Court in the case of *Bishamber Dayal Chandra Mohan* (supra).

29. I am unable to agree with the aforesaid submission. In the said case, the State Government issued certain directions to secure compliance of the provisions of the orders issued under the Essential Commodities Act and the Apex Court held that the State in exercise of executive power can issue such directions. In this case, the directions contained in letter dated 17.12.1998 even if treated to be regulatory in nature with a view to achieve the object of the Control Order have not been issued by the State Government, but by the Registering Authority, who under the Control Order has no such power.

30. Thus, there is no merit in this appeal and the same is dismissed.

D.P.S. Choudhary, J. I agree.

S.D. *Appeal dismissed.*

LETTERS PATENT

Before Nagendra Rai and S.K. Katriar, JJ.

2001
April, 16.

*Ajay Kumar.**

v.

Canara Bank through the Chairman/Managing Director and ors.

Appointment in Bank on Compassionate ground—scheme of employment—Guidelines of Ministry of Finance, Government of India and circular dated 8.8.1993 issued by Bank—whether followed—main consideration—Financial Crunch—if the family has financial resources—whether compassionate appointment is permissible—Articles 14 and 16 of the Constitution—whether offends such appointment.

The father of the appellant died just twenty days before his due date of retirement, and the family was aware of the fact that the deceased was to retire soon. The benefits which would have accrued to the deceased employee after his retirement have been made available to the family. The family has also other resources; such as houses etc and has also got retiral benefits and pension of more than Rs. 1,800/- per month. Thus it cannot be said that the family is in financial crisis due to untimely death of the deceased employee;

Held, that the compassionate appointment is to be made only in a case of sudden financial crisis and if there is no financial crisis due to untimely death of the deceased employee, the compassionate appointment cannot be given only on the ground that the dependent is the son of the deceased employee.

Held, also, that Article 14 of the Constitution guarantees equality before law and Article 16 thereof is one of the facets of the basic concept of equality contained in Article 14. It guarantees equal opportunities to all the citizens in the matter of employment to the offices in the State. Opportunity of employment has to be given to all the citizens in the public offices on the basis of open invitation and on the basis of merit. The other mode of appointment is violative of Articles 14 and 16 of the Constitution. However, in a case of sudden death of a Government employee, provisions

* Letters Patent Appeal No. 312 of 2001 against the order dated 8.3.2001 passed by a learned Single Judge of this Court in C.W.J.C. No. 918 of 2001.

have been made to provide employment to the family to meet the immediate financial crisis. The appointment is not to be made on the ground of descent to give a member of the said family a post much less a post for the post held by the deceased employee.

Held, further, that the appointment on compassionate grounds is an exception to the general rule and the main consideration for appointment on such ground is the financial crunch due to untimely death of the bread-earner. If the family has financial resources to survive then compassionate appointment is not to be made as in such a situation it will become an appointment on the ground of descent.

Umesh Kumar Nagpal and ors. v. *State of Haryana & ors.* (1). *Director of Education* v. *Pushpendra Kumar* (2). *Sanjay Kumar* v. *State of Bihar* (3) and *Ashok Choudhary* v. *State of Bihar* (4)—followed.

Balbir Kaur v. *Steel Authority of India* (5)—distinguished.

Appeal under Clause 10 of the Letters Patent of Patna High Court.

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

M/s Ambuj Nayan Choubey and *Nilesh Kumar* for the appellant.

Mr. K.B. Verma for the respondents.

ORDER

Nagendra Rai and S.K. Katriar—This appeal is directed against the order dated 8.3.2001, passed by a learned Single Judge in C.W.J.C. No. 918 of 2001, rejecting the claim of the appellant for appointment on compassionate ground.

2. Two writ applications being C.W.J.C. No. 13522 of 2000 and C.W.J.C. No. 918 of 2001 were filed for appointment on compassionate ground. The former was filed by one Sanjeev Kumar Sinha against the State Bank of India, where-as the latter was filed by appellant-Ajay Kumar against the Canara Bank. Both the writ applications were heard together and disposed of by a common order dated 8.3.2001 by the learned Single Judge,

(1) (1994) 4. S.C.C. 138.
(2) (1998) 5 S.C.C. 192
(3) (2000) 7 S.C.C. 192.
(4) (2000) (4) P.L.J.R. 651 paras 8 and 9:
(5) (2000) A.I.R. (S.C.) 1596.

whereby he allowed the claim of Sanjeev Kumar Sinha (C.W.J.C. No. 13522/2000), but rejected the claim of the appellant in C.W.J.C. No. 918/2001 for his appointment on compassionate ground. The appellant is aggrieved by the order rejecting his claim for appointment on compassionate ground.

3. The admitted fact is that the father of the appellant, namely, late Shiboo Sharma, was working as a Clerk in the respondent-Canara Bank and died on 11.12.1999 while working in the Gandhi Maidan Branch of the said Bank just before twenty days of his due date of retirement on 31.12.1999. The appellant applied for appointment on compassionate ground on 18.1.2000 so that the family might meet the sudden economic crisis created due to the death of his father. When no steps were taken by the Bank, the appellant came to this court in C.W.J.C. No. 7263 of 2000 for a direction to the respondent-Bank to appoint him on compasionate ground. This court disposed of the said writ application by order dated 25.9.2000 and directed the respondent-Bank to consider the claim of the appellant for his appointment on compassionate ground within two weeks of the receipt/production of a copy of the order. Thereafter, the Divisional Manager communicated by letter dated 16.12.2000 that the appellant cannot be appointed on compassionate ground as no circumstances exist for appointment on the said ground. A copy of the said order was appended as Annexure 4 to the writ petition. The competent authority of the Head Office of the Canara Bank at Bangalore declined by order dated 14.12.2000 to consider the employment to the appellant on compassionate ground and rejected his prayer on the ground that the financial position of the dependent family is satisfactory as family has got 3.70 lacs as terminal benefits. The spouse of the deceased employee is eligible for pensionary benefits either from the Bank or from military authorities as the deceased was an ex-service man. The spouse has to opt for either of the pensions. The family has two residential houses, one at Patna and the another at its native place Begusarai. The dependent family consists of two family members and the deceased had 20 days service left at the time of his death. The terminal benefits of the deceased employee settled to the dependents is more or less the same, the ex-employee would have received had he survived till the date of his retirement. A copy of the said order was appended as Annexure 5 to the writ petition. The appellant challenged the decisions taken in the aforesaid two letters (Annexures 4 and 5).

4. The case of the respondent-Bank is that it has formulated a scheme of employment on compassionate grounds with a view to help the dependent of the deceased employee, who dies in harness and to overcome the immediate financial difficulties on account of sudden stoppage of main source of income. The Ministry of Finance is the nodal agency for the respondent-Bank and the guidelines issued by the Ministry of Finance from time to time are being followed. In the light of the guidelines issued by the Ministry of Finance, respondent-Bank has issud a circular dated 8.8.1993 governing employment on compassionate ground. Thereafter, again the Ministry of Finance has directed the respondent-Bank to consider the question of compassionate appointment keeping in view of the observation of the Supreme Court in *Umesh Kumar Nagpal & Ors.* v. *State of Haryana & others* (1) The father of the appellant died just 20 days before his due date of retirement. His death before the retirement has not changed the financial position of the family since his family has been given all the eligible terminal benefits and the spouse is also entitled to pension and his other properties were detailed in the order. The competent authority considered the case of the appellant for compassionate appointment on the basis of the said circular and in the light of the observation made by the Supreme Court in the aforesaid case and found that there was no indigent circumstances necessitating employment to the appellant for the reasons mentioned in the order.

5. The learned Single Judge after having accepted the stand taken by the respondent-Bank has dismissed the writ application of the appellant for compassionate appointment.

6. Article 14 of the Constitution guarantees equality before law and Article 16 thereof is one of the facets of the basic concept of equality contained in Article 14. It guarantees equal opportunities to all the citizens in the matter of employment to the offices in the State. However, Article 16 contains an enabling provision to make provision of reservation for Backward classes by the Government. Opportunity of employment has to be given to all the citizens in the public offices on the basis of open invitation and on the basis of merit. The other mode of appointment is violative of Articles 14 and 16 of the Constitution. However, in a case of sudden death of a Government employee, provisions have been made to provide employment to the family to meet the immediate financial crisis.

(1) (1994) 4 S.C.C 138

The appointment is not to be made on the ground of descent to give a member of the said family a post much less a post for the post held by the deceased employee. The appointment on compassionate ground is an exception to the general rule and the main consideration for appointment on such ground is the financial crunch due to untimely death of the bread-earner. If the family has financial resources to survive then compassionate appointment is not to be made as in such a situation, it will become an appointment on the ground of descent. The Apex Court in the case of *Umesh Kumar Nagpal* (supra) at paragraph no. 2 considered the question of compassionate appointment, which is reproduced below :—

> "2. The question relates to the considerations which should guide while giving appointment in public services on compassionate ground. It appears that there has been a good deal of obfuscation on the issue. As a rule, appointments in the public services should be made strictly on the basis of open invitation of applications and merit. No other mode of appointment nor any other consideration is permissible. Neither the Governments nor the public authorities are at liberty to follow any other procedure or relax the qualifications laid down by the rules for the post. However, to this general rule which is to be followed strictly in every case, there are some exceptions carved out in the interests of justice and to meet certain contingencies. One such exception is in favour of the dependents of an employee dying in harness and leaving his family in penury and without any means of livelihood. In such cases, out of pure humanitarian consideration taking into consideration the fact that unless some source of livelihood is provided, the family would not be able to make both ends meet, a provision is made in the rules to provide gainful employment to one of the dependents of the deceased who may be eligible for such employment. The whole object of granting compassionate employment is thus to enable the family to tide over the sudden crisis. The object is not to give a member of such family a post much less a post for post held by the deceased. What is further, mere of an employee in harness does not entitle his family to such source of liveli-hood. The

Government or the public authority concerned has to examine the financial condition of the family of the deceased, and it is only if it is satisfied, that but for the provision of employment, the family will not be able to meet the crisis that a job is to be offered to the eligible member of the family. The postsin Class III and IV are the lowest posts in non-manual and manual categories and hence they alone can be offered on compassionate grounds, the object being to relieve the family, of the financial destitution and to help it get over the emergency. The provision of employment in such lowest posts by making an exception to the rule is justifiable and valid since it is not discriminatory. The favourable treatments given to such dependent of the deceased employee in such posts has a rational nexus with the object sought to be achieved, viz., relief against destitution. No other posts are expected or required to be given by the public authorities for the purpose. It must be remembered in this connection that as against the destitute family of the deceased there are millions of other families which are equally, if nor more destitute. The exception to the rule make in favour of the family of the deceased employee is in consideration of the services rendered by him and the legitimate expectations, and the change in the status and affairs, of the family engendered by the erst-while employment, which are suddenly upturned."

7. The same view has been reiterated by the Apex Court in the case of *Director of Education* v. *Pushpendra Kumar* (1), wherein it was held as follows :-

"The object underlying a provision for grant of compassionate employment is to enable the family of deceased employee to tide over the sudden crisis resulting due to death of the bread-earner which has left the family in penury and without any means of livelihood. Out of pure humanitarian consideration and having regard to the fact that unless some source of livelihood is provided, the family would not be able to make both ends meet, a provision is made for giving gainful appointment to one of the dependents of the deceased who may be eligible for such appointment. Such

(1) (1998) 5 SCC 192

a provision makes a departure from the general provisions of making appointment by following prescribed procedure. It is the nature of an exception to the general provisions. An exception cannot subsume the main provision and thereby nullify the main provision by taking away completely the right conferred by the main provisioin. Care has, therefore. to be taken that a provision for grant of compassionate employment, which is in the nature of an exception to the general provisions, does not unduly interfere with the right of other persons who ar eligible for appointment to seek employment against the post which would have been available to them, but for the provision enabling appointment being made on compassionate grounds of the dependent of a deceased employee."

8. Recently in the case of *Sanjay Kumar* v. *State of Bihar* (1) the Apex Court has held that the compassionate appointment is intended to enable the family of the deceased employee to tide over the sudden crisis resulting due to the death of the breadearner, who had left the family in penury and without any means of livelihood.

9. The question of compassionate appointment was also considered by a Division Bench of this court, to which one of us (Nagendra Rai, J.) is a party, in the case of *Ashok Kumar Choudhary* v. *State of Bihar* (2) it was held as follows :—

"8. Employment is a national property and is to be shared by all on the basis of their merit and qualification. No one should be discriminated on irrational ground. Public office should be filled up by open invitation and on the basis of merit. In law there is no other mode of appointment in Government service. The constitutional mandate does not permit entry through backdoor or preference on the ground of csate, creedor being a dependent of the Government employee. The Constitution prohibits giving preference in the matter of employment on the ground of descent, and that would violate the equality clause.

9. The experience showed that in many cases on the death of a Government employee the family is in a financial distress and needs immediate financial help. Taking

(1) (2000) 7 S.C.C. 192

(2) (2000) (4) P.L.J.R. 651 Paras 8 and 9

into consideration this aspect of the matter purely on humanitarian ground to tide over the financial crisis due to the death of the bread-earner, provisions have been made by the Central Government, State Government and other Corporations to provide employment on compassionate ground to the dependants on the death of a Government employee in Class III and IV posts (non-manual and manual). The Apex Court has upheld the said provisions on the ground that the object of compassionate appointment is to enable the family to tide over the sudden crisis and the object is not to give a member of the family a post on the ground of descent."

10. Learned counsel for the appellant relied upon a judgment of the Supreme Court in the case of *Balbir Kaur* v. *Steel Authority of India* (1) and on the basis of the same submitted that even it the family of a deceased employee has other sources of income, the compassionate appointment cannot be denied. It appears that the Steel Authority of India Ltd. introduced a Family Benefit Scheme is terms of NJSC Tripartite Agreement of 1989 providing regular monthly income to the dependent of the deceased employee. The stand of the Steel Authority of India Ltd. was that in view of the introduction of the aforesaid Scheme, the scheme for compassionate appointment has come to an end. The Apex Court, taking into consideration the facts of that particular case, held that the compassionate appointment cannot be refused since the Tripartite Agreement expressly preserves the earlier circular to the effect that any benefit conferred by the earlier circular shall continue to be effective and the earlier rules as a matter of fact were not prohibitive of such compassionate appointments but lend affirmation to such appointments.

11. As the said decision in the case of *Balbir Kaur* (supra) is not an authority on the point that even if the family of the deceased employee is financially sound and has other sources of income, the compassionate appointment is to be given to the dependent of the deceased employee on his death, the same, in our view, is no applicable to the case of the appellant.

12. Thus, it is well-settled that the compassionate appointment is to be made only in a case of sudden financial crisis and if there is no financial crisis due to untimely death of the

(1) (2000) AIR. S.C. 1596

deceased employee. The compassionate appointment cannot be given only on the ground that the dependent is the son of the deceased employee.

13. In the present case, the admitted fact is that the father of the appellant died just twenty days before his due date of retirement, so the family was aware of the fact that the deceased was to retire soon. The benefits, which would have accrued to the deceased employee after his retirement have been made available to the family. The family has also other resources; such as houses etc. It has also got retiral benefits and pension of more than Rs. 1,800/- per month. Thus, it cannot be said that the family is in financial crisis due to untimely death of the deceased employee.

14. For the aforementioned reasons, we do not find any merit in this apeal and it is, accordingly, dismissed.

S.D. *Appeal dismissed.*

LETTERS PATENT

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

2001
April, 16.

*Malti Kumari.**

v.

The State of Bihar & ors.

Appointment—on compassionate ground—married daughter of the government servant who applied for appointment on compassionate ground on the death of her father, whether eligible for appoinment—whether even after her divorce, she becomes a destitute to be eligible for appointment on compassionate ground.

Where a government employee died in harness and his married daughter, who was subsequently divorced on a petition filed by her, applied for her appointment on compassionate ground;

Held, that the daughter ceased to be a dependent of the father after her marriage in the eye of law and she became dependent on her husband. Even in case of her divorce the dependency does not come to an end inasmuch as the husband is bound to provide for maintenance of his wife even after divorce. So far as financial destitution, mitigation whereof is the object of compassionate appointment is concerned, by reason of the protection available to divorced daughter under law, she cannot be called a destitute and, therefore, she cannot be treated at par with even an adopted son and hence she is ineligible for appointment on compassionate ground.

Case laws discussed.

Appeal under clause 10 of the Letters Patent of the Patna High Court.

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

Mr. Mihir Kr. Jha & Mrs. Namrata Mishra for the appellant.

Mr. Rajeshwar Prasad, GP6 for the State.

S.N. Jha & I.P. Singh, JJ. Whether a divorced daughter of a government servant dying in harness is entitled to appointment on compassionate ground is the significant question which arises

* Letters Patent Appeal No. 147 of 2001. In the matter of an appeal under Clause 10 of the Letters Patent vide Appendix E to the Patna High Court Rules.

for consideration in this letters patent appeal. A learned Single Judge of this Court has dismissed the writ petition of the appellant whereby she had sought direction for her appointment on compassionate ground. Observing that a married daughter is not one of the dependents of the deceased government servant in terms of the circular and the claim of the appellant that she is not on good terms with her husband is a pretext to get appointment. The appellant filed review petition being Civil Review No. 203 of 2000 pointing out, inter alia, that a competent court has already granted decree of divorce. The learned Single Judge dismissed the review petition observing that the divorced daughter cannot be equated as unmarried daughter. He noted that no averment regarding any decree of divorce by the competent court had been made in the writ petition.

2. It may be mentioned that a Division Bench of this Court in *Usha Gautam* v. *State of Bihar*, 2001 (2) PLJR 201, approving the judgment of one of us has held that married daughter is not eligible for compassionate appointment. The question is whether divorced daughter is to be treated at par with unmarried daughter for the purpose of compassionate appointment ?

3. The case of the appellant is as follows. Her father, late Rambalak Singh, died in harness on 17.9.93 leaving behind a widow and two daughters including the appellant, she being the younger one. The elder daughter was already married. The appellant was also married but there was estranged relationship with the husband. He abducted the appellant's mother giving rise to Ghoshi P.S. Case No. 197/93. In the circumstances, she filed application for her compassionate appointment as a dependent of her deceased father. Her claim was supported by the District Magistrate, Jehanabad and, later, by the Law Department/Advocate General, Bihar. Though the opinion of the Law Department/ Advocate General was generally accepted by the State Government, the government took the view that it required amendment in the circular and the matter thus remained pending. Meanwhile, the appellant filed Divorce Case No. 9/94 which ended in decree of divorce on 31.7.96. Finally as no concrete action was being on the application the appellant approached this Court seeking appropriate direction in the connected case i.e. CWJC. No. 079/2000 which was dismissed on 11.7.2000. The case of the appellant is that her marriage with Ramashish Yadav which was solemnised in the lifetime of her father had run into rough weather from the very

beginning. On account of estranged relationship she not living with the husband and, in the circumstances, she should be treated as dependent of the father In any view, the marriage having eventually culminated in divorce, she cannot be treated as married daughter and, therefore, ineligible for appointment on compassionate ground.

4. It is relevant to state at this stage that in terms of circular no. 13293 dated 5.10.91 of the Personnel and Administrative Reforms Department, Government of Bihar, which holds the field on the subject of compassionate appointment, one of the dependents of the government servant dying in harness can be appointed on compassionate ground. Wife, son, unmarried daughter and widow of deceased son have been specified as dependents. In terms of the circular it is they alone, in that order of preference, who are eligible for appointment. The circular clarifies that adopted son, son-in-law, nephew etc. shall not be treated as dependents.

5. Counsel for the appellant submitted that the learned Single Judge committed error of record in observing that the case of the appellant that she was not on good terms with her husband was a pretext to get appointment on compassionate ground; the fact is that by the time the writ petition was filed the decree of divorce had already been granted by the competent court. Secondly, a married daughter after divorce becomes dependent of the father. In any case she cannot be said to be married daughter dependent on her husband after cessation of the marriage. Thirdly, having regard to the beneficial nature of compassionate appointment a liberal view of the matter should be taken. It was pointed out that though in terms of the circular an adopted son cannot be treated as dependent a Division Bench of this Court in *Kamal Ranjan* v. *The State of Bihar & ors.* (1) has held that adopted son stands on par with natural son and, therefore, eligible for appointment on compassionate ground. It was submitted, lastly, that the claim of the appellant has not been rejected by the State Government. As a matter of fact, the government was favourable disposed to appoint the appellant as per the legal advice tendered by the Law Department/Advocate General but for the contemplated amendment in the circular datetd 5.10.91. The claim of the appellant in the circumstances, should not have been rejected.

(1) (1994) 2 P.L.J.R. 536.

6. Before expressing opinion on the contentions the scope and nature of compassionate appointment may briefly be stated. Starting with *Smt. Sushma Gosain & ors.* v. *Union of India & ors.* (1) which is probably the first decision of the Supreme Court on the subject, till date the consistent view of the Supreme Court is that compassionate appointment is made to mitigate the hardship of the bereaved family so that the family is able to tide over the sudden crisis caused on account of the premature death of the bread-earner in harness. But whereas in *Sushma Gosain's* case the Supreme Court went to the extent of observing that to achieve the object a supernumerary post may even be created, in the latter decisions it was held that appointment could be made only against sanctioned post and in accordance with the rules. Further, there is no vested right in any dependent of the deceased government servant to seek appintment on compassionate ground. Such appointment should be made as early as possible. After a reasonable period, it would not be permissible. compassionate appointment has no nexus with the qualification of the person, after offer is made for appointment on any post the right gets exhausted and there cannot be second appointment on compassionate ground. Most importantly, that the compassionate appointment is not to be made as a matter of course it would depend on financial condition of the family or the dependetns. Reference may be made to decisions in *Life Insurance Corporation of India* v. *Asha Ramchandra Ambekar &. anr.* (2) *State of Rajasthan* v. *Chandra Narain Verma* (3) *Umesh Kumar Nagpal* v. *State of Haryana & ors.* (4) *State of Rajasthan* v. *Umrao Singh* (5) *State of U.P. & ors.* v. *Ramesh Kumar Sharma* (6) *State of Bihar & ors.* v. *Samsuz Zoha* (7) *State of U.P. & ors.* v. *Paras Nath* (8) *Dhalla Ram* v. *Union of India & ors* (9)

7. Now adverting to the contention it may be kept in mind that the argument of the counsel so far as it falls within the realm of inheritance is well founded. No distinction as an heir can be

(1) (1989) A.I.R. (S.C.) 1976.
(2) (1994) 2 S.C.C. 718.
(3) (1994) 2 S.C.C. 752.
(4) (1994) 4 S.C.C. 138.
(5) (1994) 6 S.C.C. 560.
(6) (1994) Supp. 3 S.C.C. 661.
(7) (1996) A.I.R. (S.C.) 1961.
(8) (1998) A.I.R. (S.C.) 2612.
(9) (1999) A.I.R. (S.C.) 564.

made between a married daughter and unmarried daughter. But so far as it relates to compassionate appointment they do not stand at par. We have stated above that object of the compassionate appointment is to mitigate the financial hardships of the family. The question is does the divorce result in financial destitution of the daughter ? In the eye of law it does not. Becuse the law gives certain protection to a divorced wife or ex-wife. Section 24 of the Hindu Marriage Act, 1955 provides for maintenance pendente lite to spouse during the pendency of any proceeding under the Act. while section 25 provides for permannent alimony and maintenance. It lays down that any Court exercising jurisdiction under the Act may, at the time of passing any decree or at any time subsequent thereto, on application made to it for the purposes by either the wife or the husband, as the case may be, order that the respondent shal pay to the applicant for her or his maintenance and support such gross sum or such monthly or periodical sum for a term not exceeding the life of the applicant as, having regard to the respondent's own income and other property of the applicant the conduct of the parties and other circumstance of the case, it may seem to the Court to be just, and any such payment may be secured, if necessary, by a charge on the immoveable property of the respondent. Apart from the Hindu Marriage Act which is applicable only to persons governed by that Act, Section 125 of the Criminal Procedure Code provisions whereof are applicable to persons of all religions and faith, also provides for maintenance of the divorced wife. Explanation (b) appended thereto the section clarifies that for the purpose of section 125 and the related section the term 'wife' includes "a woman who has been divorced by, or has obtained a divorce from, her husband and has not remarried".

7. No explanation has been furnished as to why any such relief/order regarding maintenance was not sought from the Family Court which granted the appellant the decree of divorce, or as to why no such application was filed under section 125 Criminal Procedure Code. In our opinion, where the person is possessed of means or avenues of livelihood he or she cannot be called financially destitute and, therefore, eligible for appointmnet on compassionate ground.

8. The Hindu Adoptions and Maintenance Act, 1956 also gives some indication as to why a married daughter-whether divorced or not-cannot be treated as dependent of the father. In the definition of 'dependents' in section 21 of that Act, amongst

others, unmarried daughter and widowed daughter have been included, but not married daughter or divorced daughter. Even in the case of widowed daughter it is hedged in by the clause "provided and to the extent that she is unable to obtain maintenance". The distinction between married and unmarried daughter in circular no. 13293 dated 5.10.91, therefore, appears to be based on sound principles of law.

9. Amongst the decisions of the Supreme Court, referred to above, we would like to particularly mention the case of *Auditor General of India & ors. v. G. Ananta Rajeshwara Rao.* (1) In that case the office memorandum envisaged appointment of "son/daughter or near relative" of the deceased government servant. Commenting on the memorandum the Supreme Court observed that where the circular/memorandum creates a mechanism to avoid regular appointment it would be violative of Article 16(2) of the Constitution which prohibits public employment under the State on ground, inter alia, only of descent. However, apointment of son, daughter or widow on compassionate ground was held to be valid as not being based on descent but as a means to provide assistance to the bereaved employee dying in harness. But the Court clarified that the facility could not be extended to others. To quote, "But in other cases it cannot be a rule to take advantage of the Memorandum to appoint the persons to these posts on the ground of compassion". It may be useful to quote the entire passage in order to bring home the point as under :—

> "A reading of these various clauses in the Memorandum discloses that the appointment oncompassionate grounds would not only be to a son, daughter or widow but also to a near relative which was vague or underfined. A person dies in harness and whose members of the family need immediate relief of providing appointment to relieve economic distress from the loss of the bread-winner of the family need compassionate treatment. But all possible eventualities have been enumerated to become a rule to avoid regular recruitment. It would appear that these emumerated eventualities would be breeding ground for misuse of appointments on compassionate grounds. Articles 16(3) to 16(5) provided exceptions. Further exception must be on constitutionally valid and permissible grounds. Therefore, the High Court is right in holding that the appointment on

(1) (1994) 1 S.C.C. 192.

grounds of descent clearly violates Article 16(2) of the Constitution. But, however, it is made clear that if the appointments are confined to the son/daughter or widow of the deceased government employee who died in harness and who needs immediate appointment on grouonds of immediate need of assistance in the event of there being no other earning member in the family to supplement the loss of income from the bread-winner to relieve the economic distress of the members of the family, it is unexceptionable. But in other cases it cannot be a rule to take advantage of the Memorandum to appoint the persons to these posts on the ground of compassion. Accordingly, we allow the appeal in part and hold that the appointment in para 1 of the Memorandum is upheld and that appointment on compassionate ground to a son, daughter or widow to assist the family to relieve economic distress by sudden demise in harness of government employee is valid. It is not on the ground of descent simpliciter, but exceptional circumstance for the ground mentioned. It should be circumscribed with suitable modification by an appropriate amendment to the Memorandum limiting to relieve the members of the deceased employee who died in harness from economic distress. In other respects Article 16(2) is clearly attracted."

It would, thus, apear that only son, daughter or widow were held eligible for compassionate appointment. It is to be kept in mind that thought the widow was not mentioned in the Memorandum the Court upheld her eligibility as being "near relative" of the deceased employee but such extended meaning was not given to other relatives.

10. The submission that the Law Department/Advocate General gave a favourable opinion in respect of the claim of the appellant has no relevance. In an apropriate case the opinion of the high dignitaries may be entitled to respect but it is not binding on Courts. The Courts are bound by the authorities and the precedents set by the superior Courts and not by holders of offices however high they may be.

11. As regards the submission that the claim of adopted son has been upheld by this Court and he has been treated at par with the natural son, it may be observed that by virtue of extended meaning which flows from the relevant provisions of the Hindu Adoptions and Maintenance Act, an adopted son is as good a

dependent as a natural son so far as the financial destitution resulting from the death of the father-whether natural or adoptive-is concerned. The daughter ceases to be a dependent of the father after marriage in the eye of law and she becomes dependent on her husband. In the case of divorce the dependency does not come to an end inasmuch as the husband is bound to provide for maintenance of the wife even after divorce. Thus, so far as financial destitution, mitigation whereof is the object of compassionate appointment, is concerned, by reason of the protection available to divorced daughter she cannot be called a destitute and, therefore, she cannot be treated at par with adopted son and hence eligible for appointment on compassionate ground. In the present case, it may be noted the decree of divorce was passed at the instance of the appellant herself.

12. Before we conclude, we may mention that when ineligibility of the appellant was pointed out to the counsel, it was submitted that the only other dependent who is widow of the deceased being eledrly woman of 55 years age could not have sought appointment on compassionate ground. It is not clear as to whether she was 55 years old at the time of her husband's death or that is her present age. Without going into question as to whether the mother could apply for compassionate appointment and she could be appointed after relaxing the age-bar, it may be observed that in every case of death of the government servant in harness it may not be possible to appoint one of the dependents. After all, there is no vested right to compassionate appointment.

13. In the above premises, we do not find any merit in the claim of the appellant for her compassionate appointment. This letters patent appeal is accordingly dismissed.

R.D. *Appeal dismissed.*

MISCELLANEOUS APPEAL

Before Sachchidanand Jha, J.

2001

April, 18.

M/s Sangita Housing Development Pvt. Ltd.

v.

Shri Birendra Prasad Singh & anr.

Arbitration—clause 19 of agreement between the owner of the land and the builder being in two parts—second part, whether could be ignored on the plea of redundancy—the clause, whether to be read as a whole—there being no agreement between the parties about arbitration by Justice K.B.N. Singh, nor any order of the Court, Justice K.B.N. Singh, whether had the jurisdiction to arbitrate—want of jurisdiction in the arbitrator, whether rendered his award a nullity.

A plain reading of clause 19 of the agreement entered into between the owner of the land and the developer it is clear that while under the first part the parties agreed to get their differences settled by Justice K.B.N. Singh, under the second part thereof they further agreed that they would appoint one arbitrator each who could appoint an Umpire if needed to arbitrate under the provisions of the Arbitration Act.

Held, that the plea of redundancy to ignore the second part of clause 19 cannot be accepted. The ordinary rule is to read the document as a whole. Thus clause 19 of the agreement ought to be read as a whole.

Held, further, there being no agreement by the parties about arbitration by Justice K.B.N. Singh, or an order of the Court in that regard, he did not possess the necessary jurisdiction to arbitrate the dispute between the parties.

The jurisdiction of the arbitrator and the validity of the reference has to be determined with reference to the state of affairs as existing on the date of reference and not on the basis of any subsequent development. There can not be a post facto satisfaction about the existence of a dispute. The facts as existing on the date of the reference and disclosed in the application and thus, brought

Misc. Appeal Nos. 186 and 187 of 1993. Appeal from original order dated 31st March, 1993 passed by Sri Narendra Mishra, Subordinate Judge, Ist Court, Patna in Title Suit No. 406 of 1992 (Arising out of Misc. Case Nos. 1/92 & 12/92.

to the notice of the arbitrator would determine whether there was any pre-existing dispute.

Held, that the arbitrator committed error in treating the letter/reply dated 24.9.1991 by the builder as repudiation of the appellants claim and assumed on that basis that there existed a dispute between the parties.

Held, further, that there being inherent lack of jurisdiction and the reference being invalid, the ultimate award must be treated as nullity and is accordingly set aside.

Case laws reviewed.

Appeals by the defendent.

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

M/S Ram Balak Mahto, Mihir Kumar Jha & Arvind Kumar Jha for the appellant.

M/S Abhay Kumar Singh, Binod Shanker Tiwary & Abha Singh for the respondents.

S.N. Jha, J. These two miscellaneous appeals are directed against the judgement and order dated 31.3.93 passed by the Subordinate Judge 1st Court, Patna in Title Suit No. 406 of 1992 arising out of Misc. Case Nos. 1 of 1992 and 12 of 1992. The dispute relates to an arbitration award. The appellant filed Misc. Case No. 1/92 challenging inter alia, the jurisdiction of the Arbitrator. Meanwhile the Arbitrator pronounced the award. Misc. Case No. 12/92 was registered on the application of the respondent to make the award rule of the Court. After the appellant filed objection the case was converted into Title Suit. By the impugned judgement and order, the objection of the appellant was rejected. Misc. Case No. 1/92 was dismissed and the suit i.e. Title Suit No. 406/92 was decreed in favour of respondent no. 1 i.e. the plaintiff. The facts giving rise to the dispute are as follows :—

2. Plaintiff Shri Birendra Prasad Singh (hereinafter referred to as 'the respondent') owned and possessed a piece of land bearing M.S. Plot No. 1164 appertaining to Khata No. 64 of Tauzi No. 5225/14848 at Boring Canal Road in Patna town, measuring about 8840 sq. ft. having a double storied house over it bearing holding no. 277 within Circle No. 245 of the Patna Municipal Corporation. He entered into an agreement called 'Development Agreement' with defendant M/S Sangeeta Housing Development Pvt. Ltd., a Private Limited Company, (hereinafter referred to as

'the appellant') on 26.8.87 for development of the property on certain terms and conditions. The appellant undertook to construct 24 flats of approximately 950 sq. ft. each, leaving out stairs, common space etc., and deliver possession of 25 per cent of the saleable built up area to the respondent as consideration for the transfer of right, title and interest in the property in favour of the appellant. The choice of the 25 per cent built up area was to be mutually decided by the parties. As per the agreement if the appellant failed to construct 24 flats within the stipulated period he would be bound to deliver six flats or 6000 sq. ft. (approx.) built up area to the respondent out of the total number of flats constructed within the stipulated period. There was also a condition that the appellant shall be liable to compensate the respondent in case of failure to construct and deliver the flats, to the extent of Rs. 18 lakhs and the appellant would have no claim over the property or the construction made thereon. The respondent was also entitled to 25 per cent of the garage, shops and open space besides the flats. The construction was to be made in accordance with the building plan sanctioned by the PRDA. The time was the essence of the Development Agreement and the appellant was bound to construct the building as per the sanctioned plan by 25.8.90 or within the extended period as mutually agreed upon.

3. The case of the respondent is that the appellant constructed only 14 flats-8 out of which measuring built up area of 1300 sq. ft. and 6 measuring built up area of 1150 sq. ft. besides the stairs and common space. In course of construction also it did not stick to the sanctioned plan which gave rise to various litigations. It also attempted to construct a flat on the 4th floor without the consent of the respondent. All these gave rise to differences between the respondent and the appellant. On 7.1.89 the appellant informed the respondent that two flats having built up area of 1500 sq. ft. each and two flats having built up area of 1150 sq. ft. each were allotted to him. This according to the respondent was a clear violation of the Agreement. Further, without delivering six flats or 6000 sq. ft. built up area as agreed upon, the appellant started inducting persons in the remaining flats without the knowledge and consent of the respondent. When the respondent failed in his efforts to settle the differences with the appellant by mutual negotiation, he filed an application before the Arbitrator named in the Agreement, Justice K.B.N. Singh, former Chief Justice of the Patna and the Madras High Courts, in

terms of Clause 19 of the Agreement. According to the respondent, by violating the terms of Agreement the appellant and lost its rights over the property and construction made thereon and became liable to pay compensation of Rs. 18 lakhs. The respondent gave further details of the violation of the Agreement, which it is not necessary to notice for the disposal of these appeals.

4. The case of the appellant is that pursuant to the Development Agreement dated 26.8.87 the respondent executed power of attorney in favour of the Managing Director of the appellant-Company on 3.11.87 but with respect to only 5 kathas 17 dhurs of land which comes to 7961 sq. ft which was less than the area mentioned in the Agreement i.e. 8840 sq. ft. Thus, the area actually handed over to the appellant being less the respondent was not entitled to 600 sq. ft. saleable built up area being 25 per cent of 8840 sq. ft. of land. The proportionate share of the saleable built up area on the basis of area handed over to the appellant on the basis of deed of power of attorney came to 5403. 39 sq. ft. only out of which 5300 sq. ft. saleable built up area had already been delivered to the respondent comrising of flat no. 2 on the ground floor, flat nos. 102 and 103 on the first floor and flat no. 304 on the third floor. The respondent was thus entitled to the money value of the remaining 103.03. sq. ft. of built up area @ Rs. 270 per sq. ft. totaling Rs. 27,195.30 paise. As against this the respondent had already received sum of Rs. 1,50,000/- through cheques and pay orders on 11.3.88, 8.9.88, 18.10.88 and 1.12.88. After deducting the said amount of Rs. 27,195.30 paise from the amount paid to him, the respondent in fact was liable to pay sum of Rs. 1,22,804.70 paise.

5. A notice to the above effect was sent to the respondent by Advocate Birendra Kumar on behalf of the appellant on 7.9.91 to pay the amount with interest within 15 days of the service of notice. On 23.9.91 the respondent approached Justice K.B.N. Singh with an application to settle the disputes mentioned thereunder by arbitration in terms of the Agreement between the parties or to pass such other order or orders as may be deemed fit and proper. To complete the sequence of events it may be mentioned at this very stage that the respondent sent reply to the above said notice dated 7.9.91 by the appellant through Sri Janardan Prasad Singh, Advocate on 24.9.91 denying the claim of the appellant. Curiously no mention was made of the fact that

respondent had already filed the above said application before Justice K.B.N. Singh a day earlier.

6. On 25.9.91 Justice K.B.N. Singh (hereinafter called 'the Arbitrator') informed the appellant that a reference had been made to him under clause 19 of the Development Agreement by the respondent for arbitration in the matter of 'differences and disputes arising out of or relating to the construction and terms and conditions of the said Agreement.' The appellant was called upon to appear and file comments and objections. The appellant was informed that if it does not appear or fails to file any objection on the said date the arbitration would proceed ex parte. An order to that effect was also drawn by the Arbitrator on 23.9.91. On 11.10.91 an application was filed by the Managing Director of the Company on behalf of the appellant-Company before the Arbitrator with a request not to proceed with arbitration and drop the proceeding pointing out, inter alia, that in terms of Clause 19 of the Agreement if there was difference between the parties each as party was supposed to appoint his arbitrator who may appoint umpire but the respondent without giving notice of intention to refer the alleged points for difference, had directly approached him i.e. Arbitrator. In these circumstances, he i.e. the appellant, did not consent to the illegal arbitration by him. The appellant also reserved its right to give reply on merit on the allegations which were described as wrong and misleading, as and when occasion arises. On 12.10.91 to which the proceeding was adjourned, documents were filed on behalf of the respondents who appeared through counsel; on behalf of the appellant application for adjournment till 27.10.91 was filed on the ground of non-availability of the lawyer on account of the Durga Puja. The proceeding was adjourned to 14.10.91. On 14.10.91 again application for adjournment was filed on behalf of the appellant. The Arbitrator heard the submissions of the Advocate on behalf of the respondent and fixed 21.10.91 for reply. It may be mentioned here that both on 12.10.91 and 14.10.91 the appellant was represented by one Sri Nand Kishore Prasad, Office Superintendent. On 21.10.91 and 22.10.91 the Arbitrator heard the counsel for the parties on the interpretation of Clause 19 of the Agreement under which reference had been made to him. On 24.10.91 he delivered a reasoned order overruling the objections of the appellant. He held that Clause 19 of the Development Agreement dated 26.8.87 constitutes arbitration clause within the meaning of Section 2(a) of the Arbitration Act

and reference made under first part of Clause 19 of the Agreement was a valid reference, and there was no question of obtaining a fresh consent by the respondent from the other side i.e. the appellant in this regard. After the order was delivered prayer for adjournment was made on behalf of the appellant to file rejoinder to the main application dated 23.9.91. The Arbitrator granted time till 28.10.91 making it clear that no further time will be allowed for this purpose and both parties must file their respective documents, if any, by the date fixed, the documents would thereafter be admitted in evidence and marked exhibits and the proceeding will then proceed on merit. The application of the respondent for appointment of an Engineer Commission for measurement of the land as well as the constructed area was postponed to the next date for consideration. The Arbitrator also fixed his remuneration as well as the remuneration of P.A., Peshkar and Peon on the same day. In fact, on the same day sums of Rs. 10,000/- towards remuneration of the Arbitrator and Rs. 990/- towards remueration of the staff were also paid on behalf of the respondent by Bank Draft dated 23.10.91. The Arbitrator noted that no such payment had been made by the appellant. On the next date i.e. 28.10.91 application was filed on behalf of the appellant for supplying copy of the above said order dated 24.10.91 on payment of cost. In the application it was stated that both the Managing Director as well as Senior Advocate were out of Patna. After hearing the submissions on behalf of the parties, the Arbitrator adjourned the proceeding to 2.11.91 reiterating his previous order regarding filing of the rejoinder, documents, if any, by the appellant. On 2.11.91 the documents produced by the respondent were admitted in evidence as exhibits. One Shri Bharat Prasad Singh was appointed as Engineer Commissioner. The application for copy of the order, however, was turned down on the ground that as the remuneration had not been paid either to the Arbitrator or the Office staff, there was no point in issuing copies of the orders. On 7.11.91 the Engineer Commissioner was directed to submit his report by 9.11.91. On behalf of the appellant an application was filed stating that its counsel never agreed to bear the Arbitration cost because the arbitration proceeding was not valid and when the appellant had not accepted the Arbitrator, 'the question of paying arbitration cost did not arise.' On 10.11.91 the Engineer Commissioner Shri Bharat Prasad Singh submitted his report. On 14.11.91 two applications were

filed on behalf of the appellant. Accusing the Arbitrator of 'biased and indifferent attitude towards it' the appellant informed him that hereafter it would not attend the proceedings. The appellant was informed that its acts amounted to misconduct under Section 11 of the Arbitration Act. While postponing the order on the said application, the Arbitrator examined the Engineer Commissioner as A.W. 1 and the respondent himself as A.W. 2. On account of paucity of time the hearing was adjourned to the following day. On the next date i.e. 15.11.91 the respondent filed rejoinder to the above said application of the appellant. The Arbitrator noted the absence of the appellant but as an indulgence adjourned the proceeding for the next day. On 16.11.91 the Arbitrator noticed the absence of the appellant and after recounting the events observed that the appellant had appeared but ceased to contest the matter. Neither rejoinder to the main application nor any objection to the Engineer's report had been filed nor the remuneration etc. had been paid to the Arbitrator or the staff and the Engineer Commissioner. In the circumstances, the Arbitrator heard the arguments on behalf of the respondent. On 21.12.91 he delivered his award.

7. In the meantime on 20.12.91 the appellant had field Misc. Case No. 1/92 labelling the application under Sections 5, 8, 11 and 33 of the Arbitration Act, 1940 seeking a number of reliefs including determination of the scope of Clause 19 of the Agreement, a declaration that there was no arbitration agreement and in any case, Justice K.B.N. Singh not being the duly appointed Arbitrator, had no jurisdiction to proceed with the arbitration and/or decide the issue regarding his jurisdiction. Alternatively, it was prayed that even if the reference is held to be valid, in the facts and circumstances the appellant may be granted relief to revoke the authority of the Arbitrator or he may be removed by the Court.

8. It so happened that on account of the employees' strike in the Civil Courts at the relevant time the aforesaid Misc. case was not taken up until 5.2.92. On 7.2.92 the case was admitted and notice was issued on 4.3.92. Meanwhile, it appears, the Arbitrator had sent his award to the concerned court, namely, the Court of First Subordinate Judge, Patna. On 9.3.92 the respondent filed application to make the award rule of the Court. The said applicatioin was registered as Misc. case No. 12/92. On notice the appellant appeared on 22.6.92 and filed objection to the award under section 30 read with Section 33 of the Arbitration Act. The

Misc. case was thereafter converted into Title Suit (T.S. No. 406/92) on 24.7.92. The two cases i.e. Misc. Case No. 1/92 and Title Suit No. 406/92 were amalgamated on 21.1.93. It is not necessary at this stage to refer to the course of events thereafter during the pendency of the suit in the court below excep to mention that the cases were heard on a number of days on the point of (validity of) arbitration and condonation (of delay in filing objection to the award). After the hearing concluded, the parties filed their written arguments and the order was reserved on 26.2.93. After 2-3 adjournments finally the suit was decreed in favour of the respondent on 31.3.93. The award was made rule of the Court and Misc. case no.1/92 was dismissed with cost giving rise to these appeals.

9. The points formulated by the Court below for consideration were :

(i) Whether in terms of Clause 19 of the agreement Hon'ble Justice K.B.N. Singh can be said to be arbitrator or he was merely a conciliator ?

(ii) Whether there was any pre-existing dispute between the parties for referring the matter to the arbitrator ?

(iii) Whether there was any misconduct on the part of the arbitrator in giving the award ? and

(iv) Whether the objections taken by or on behalf of the defendants is barred by limitation ?

The court below decided all the points except the point of limitation in favour of the respondent. It held that Justice K.B.N. Singh was duly appointed Arbitrator and the reference was a valid reference; that dispute had arisen between the parties because the appellant had failed to deliver 6000 sq. ft. built up area to the respondent and he always avoided the measurement of the flats despite request by the respondent; that the allegation of bias was without any substance, there was no ground to hold that any substantial miscarriage of justice had occurred at the hands of the arbitrator.

10. The submissions advanced on behalf of the appellant in support of the appeals may be summarized as follows. Clause 19 of the agreement merely empowered Justice K.B.N. Singh to settle the differences. His role was that of a conciliator rather than arbitrator. In the event of his failure to bring about any settlement, the parties were to appoint one arbitrator each and such arbitrators

could jointly appoint an umpire, if need be, to arbitrate the dispute. There is distinction between 'difference' and 'dispute'. Unless the claim put forward by one party is specifically denied, for the purpose of arbitration dispute cannot be said to have arisen. In the present case, the respondent did not make any endeavour to settle the differences across the table. There was no specific denial of claim. Nor any attempt was made to reach a settlement. After the appellant served advocate's notice on him putting forward certain claims, the respondent rushed for arbitration. There being no existing dispute, the arbitrator had no jurisdiction to enter upon reference and the entire proceeding before him was therefore without jurisdiction. No opportunity was given to challenge the authority of the arbitrator. After the objection was overruled, the appellant was even denied copy of the orde so that it could effectively carry forward the challenge to the competent court, and after the appellant filed misc. case, inter alia, for revoking the authority of the Arbitrator, in haste he proceeded to deliver the award. The facts and circumstances show that the Arbitrator was biased against the appellant and conducted the proceeding with a closed mind.

11. On behalf of the respondent it was submitted that Clause 19 of the agreement clearly provided for arbitration by Justice K.B.N. Singh only in case of non-availability of Justice K.B.N. Singh occasion could arise to appoint arbitrator or umpire as provided in the latter part of the clause. The correspondence entered into between the parties vide Exts. 3 and 6 shows a pre-existing dispute and therefore, upon reference by either party, the arbitrator was competent to entertain the reference and arbitrate the dispute. In any case, the appellant initially participated in the proceedings, it was only after the report of the Engineer Commisioner came that he stayed away from the proceeding. The appellant cannot thus challenge the authority of the arbitrator. The allegations of bias and misconduct are without any substance. The appellant having agreed to get the dispute resolved by Justice K.B.N. Singh, implying that he had faith in him–whether as mediator or conciliator or arbitrator–the appellant was required to say as to when and what made it loose faith in him.

12. On the arguments made by the counsel for the parties three questions arise for consideration :–

(i) Whether the role of Justice K.B.N. Singh as per clause 19 of the agreement was that of counciliator or arbitrator. In other

words whether Clause 19 of the agreement authorised Justice K.B.N Singh to act as Arbitrator ?

(ii) Whether there was any pre-existing dispute which could be referred to for arbitration. In other words, whether there was valid reference of the dispute ?

(iii) Whether the Arbitrator committed any misconduct in conducting the proceeding ?

13. At this stage Clause 19 of the agreement on which the answer to the first question rests may be quoted as under :—

> "That in case of any difference arising out of or relating to the lands and constructions thereon covered by this agreement or arising out of this agreement will be settled by reference of dispute to the arbitration of Justice K.B.N. Singh (retired), S.K. Puri, Patna–800 001. In case of any difference, the owners and the developer shall appoint one arbitrator each who shall jointly appoint one umpire, if needed, and arbitrate under the provisions of Arbitration Act 1940."

14. A plain reading of the clause would suggest that it consists of two distinct parts. While under the first part the parties agreed to get their differences settled by Justice K.B.N. Singh, under the second part they further agreed that they would appoint one arbitrator each who could appoint an umpire, if needed, to arbitrate under the provisions of the Arbitration Act. Upon literal interpretation of the clause, it would appear, there is an apparent conflict between the two parts because there cannot be two-tier arbitration in respect of the same dispute. The ascertainment of the intention of the parties in the circumstances, becomes essential. The normal rule of interpretation of deeds etc. is to give plain, literal meaning to the words used, but sometimes there is dichotomy in the words used or the words are not sufficient to convey clearly what the two parties meant. In that case their intention has to be gathered. In Odgers' Construction of Deeds and Statutes (5th Edition at page 31) it is stated–

> "Ordinarily, parties use apt words to express their intention: but often they do not. The cardinal rule again is that clear and unambiguous words prevail over any intention, but if the words used are not clear and unambiguous, the intentiion will prevail. We have seen that the most essential thing is to collect the intention of the parties from the expressions

have used in the deed itself. What if the intention so collected will not square with the words used ? The answer is that the intention prevails."

15. Counsel for the parties not only differed in their interpretation of the clause but also suggested different ways of reading. On behalf of the appellant it was submitted that the Court should not read the clause in manner as to make one or the other part redundant. If the interpretation suggested by the respondent is accepted it would render the second part redundant or superfluous. In view of the clear volition of the parties to appoint one arbitrator each and, if needed, an umpire to arbitrate the dispute under the Arbitration Act, the rule assigned to Justice K.B.N. Singh could not be that of arbitrator. Justice K.B.N. Singh was merely authorised to settle the differences between the parties and thus his role was that of a mediator or conciliator. On behalf of the respondent, on the other hand, it was submitted that the second part of the clause should be treated as redundant. The second part could come into play only in the case of non-availability of Justice K.B.N. Singh under the first part. As he was not only available, but had also entertained the reference, there was no question of the parties appointing any arbitrator, or the arbitrators so appointed, appointing any umpire under the second part.

16. In my opinion, it is not possible to accept the plea of redundancy and ignore the second part. The ordinary rule is to read the document as a whole. In present context, thus, the clause ought to be read as a whole. It is true that where the words of the deed are not clear and specific, the court in order to give effect to the intention of the parties may sometimes supply words, sometimes discard words and sometimes transpose words. But this should be done only where it is not possible to cull out or ascertain the intention of the parties. The parties, in the present case are well educated persons. The respondent, in fact, is a retired High Court Judge. It is difficult to believe that he was not aware of the implications and being aware allowed the conflict to creep in. The words "in case of any differences the owners and the developers shall appoint one arbitrator each.....if needed" in the second part cannot be said to have been inadvertently used. By agreeing to arbitration by the arbitrators appointed by both parties and an umpire appointed by them, he cannot at the same time have intended that Justice K.B.N. Singh would act as arbitrator.

17. I am inclined, in the facts and circumstances, to think that both parties having faith in justice K.B.N. Singh, a retired Chief Justice of the Patna High Court and the Madras High Court, at one stage, what they intended was that differences between them relating to lands or construction etc. be settled by him. In case failed to amicably settle the differences, the parties would appoint arbitrators–one each–and the arbitrator so appointed would appoint an umpire, for arbitration under the Arbitration Act. So read, there would be no conflict between the two parts of the clause and both of them could be given effect to. If on the other hand Justice K.B.N. Singh is regarded as the arbitrator, the second part would be rendered meaningless and otiose. It is true that the word 'arbitration' has been used also in the first part but, in context, the expression seems to have been loosely used. In *K.K. Modi* Vrs. *K.N. Modi & ors.* (1) the Supreme Court observed that mere use of the word arbitrator does not mean that the person concerned was to act as arbitrator. While laying down the attributes of arbitration the court held an the facts and circumstances that the Memorandum of Understanding did not envisage reference of the dispute to the Chairman, IFCI for arbitration, it only provided for reference of issues to an expert for decision.

18. If the clause is interpreted in the manner suggested above, it would follow that the role of Justice K.B.N. Singh was that of a mediator or conciliator, he could not assume the role of arbitrator. The arbitrator derives his authority under the agreement, if the agreement does not confer such authority he cannot assume it himself. The legal position has been lucidly stated in Russell on Arbitration in these words.

> "It might seem therefore that if the agreement between the parties is in effect and agreement to prevent disputes from arising and not an agreement as to how they are to be settled, then it is neither the agreement to refer to arbitration nor a submission to arbitration, and it is not within the Act."

19. The usual mechanism of resolution of dispute is through the process of Court. It is only when the parties agree to get the dispute resolved through arbitration that the person appointed by them (or by the Court) as arbitrator gets the authority to do so.

(1) (1998) 3 S.C.C. 573.

In *Khardah Company Ltd.* V. *Raymon & Co. (India) Pvt. Ltd.* (1) the Supreme Court observed :-

> "But what confers jurisdiction on the arbitrators to hear and decide a dispute is an arbitration agreement as defined in S. 2(a) of the Arbitration Act, and where there is no such agreement, there is an initial want of jurisdiction which cannot be cured by acquiescence. :

Though in a somewhat different context, earlier in *Thawardas Pherumal* V. *Union of India* (2) it had said,

> "A reference requires the assent of 'both' sides. If one side is not prepared to submit a given matter to arbitration when there is an agreement between them that it should be referred, then recourse must be had to the Court, under Section 20 of the Act and the recalcitrant party can then be compelled to submit the matter under sub-section (4).
>
> In the absence of either agreement by 'both' sides about the terms of reference or an order of the Court under Section 20(4), compelling a reference, the arbitrator is not vested with the necessary exclusive jurisdiction."

20. The decision of the Kerala High Court in *P. Narayanan Nair* Vrs. *E. Achuthan Nair* (3) was relied upon by the counsel for both sides in this connection. The dispute in that case related to specification and demarcation of certain properties. There has been an agreement between the paties earlier authorising inter alia, three persons to inspect and decide the dispute with stipulation that both parties would accept their decision. The plaintiff later filed suit for specification and demarcation of the suit property. The defendant objected to the maintainability of the suit on the ground that in terms of the agreement the only course open to the plaintiff was to seek decision through arbitration and that Section 32 of the Arbitration Act barred the suit. That section lays down, "notwithstanding any law for the time being in force..... nor shall any arbitration agreement or award be enforced.....otherwise than as provided in this Act." The objection of the defendant found favour with the trial court which dismissed the suit. On appeal by the plaintiff the High Court held that as the parties had merely agreed for mediation by the persons concerned, they cannot be called arbitrators within the meaning of

(1) (1962) A.I.R. (S.C.) 1810.
(2) (1955) A.I.R. (S.C.) 468.
(3) (1974) A.I.R. (Ker.) 551.

the Arbitration Act and therefore, the bar of Section 32 of the Act was not applicable. Repelling the defendant's objection as to the maintainability the Court observed–

> "we do not think that the suit is one to enforce an award. The process of arbitration is the determination of a pre existing dispute. Every agreement entered into for the purpose of avoiding a dispute cannot be said to be an arbitration agreement. If parties are at variance on any issue, the issue has necessarily to be settled as between them. The process of reference to an arbitration could be agreed upon by the parties and in such cases the arbitrators' award will be binding upon the parties to such agreement. But if it be that both parties agree that certain services will be rendered by mediators to settle matters which are not yet in dispute between them, but such settlement is desirable to avoid disputes in future, even though the persons who are appointed as mediators are styled as arbitrators they will not become arbitrators within the meaning of the Act."

Amongst others the Court noticed the decision in In *Re. Carus-Wilson And Greene* (1). The following passage from the said decision may usefully be quoted :—

> "There is an intermediate class of cases in which a person is appointed to determine disputes after they have arisen, but is not bound to hear evidence or argument. In those cases it may be more difficult to say whether the person is a valuer or an arbitrator. They must be determined according to the circumstances in each particular instance by the intention of the parties."

21. There being no agreement by the parties about arbitration by Justice K.B.N. Singh, or an order of the Court in that regard, he did not possess the necessary jurisdiction to arbitrate the dispute between the parties. Question no. 1 formulated above is accordingly answered in favour of the appellant and against the respondent.

22. Another sine qua non of a valid reference to the arbitrator is the pre-existence of dispute between the parties. The case of the appellant is that after it served notice putting forward certain claim on 7.9.91 the respondent rushed to Justice K.B.N. Singh with an application to arbitrate the dispute without making

(1) (1886) 56 L.J.Q.B. 530.

any endeavour for amicable settlement across the table or to even identify the dispute. The law on the point is settled that the jurisdiction of an arbitrator depends not upon the existence of a claim or accrual of a cause of action but upon the existence of a dispute. The dispute implies an assertion of a right by one party and repudiation thereof by the other party. On behalf of the respondent it was submitted that the letter of the appellant dated 7.6.89 and the endorsement thereon by the respondent (marked Exts. 3 and 3/a by the arbitrator) coupled with the notice dated 7.9.91 (Ext. 6) suggest a pre-existing dispute. As a matter of fact, it appears that the arbitrator also relied on these three documents in coming to the conclusion that there was a pre-existing dispute between the appellant and the respondent. The court below too has relied on them hold that there was valid reference to the arbitrator. I am unable to accept the submission of the counsel for the respondent. The letter dated 7.6.89 (Ext. 3) and notice dated 7.9.91 (Ext. 6) were in the nature of claim by the appellant. Dealing with this aspect of the case the arbitrator stated in his impugned award as under :—

> "It may be relevant to mention here that the developer, through his letter 7th June, 1989 (Exhibit 3) had intimated to the owner that four flats covering 5300 sq. ft. of built up area have been allotted to him and on this letter itself the owner put an endorsement (Exhibit 3/a) indicating that he could not agree for less than 6000 sq. ft. built up area in terms of the agreement (Exhibit 5) and that too after actual measurement, since the area indicated was not the built up area.
>
> In reply to the aforesaid notice (Exhibit 6) the owner, through his lawyer, stated by a communication dated 24th September, 1991 (Exhibit 7) that the total area of land in possession of the owner was 8840 sq. ft. over which there was already a double storeyed house existing consisting of eight living rooms, six varandas, four bath rooms, an out-house and a court-yard."

From paragraphs 14, 15, 16 and 17 of the award it is evident that in coming to the conclusion that there existed a dispute between the parties, the arbitrator took into consideration, nay, relied on the reply of the respondent dated 24.9.91 in response to the appellant's notice dated 7.9.91. But it is to be kept in mind that before sending the said reply, on 23.9.91 the respondent had

already made an application to the arbitrator to "settle the dispute mentioned hereunder by arbitration". In my opinion the jurisdiction of the arbitrator and the validity of the reference has to be determined with reference to the State of affairs as existing on the date of the reference and not on the basis of any subsequent development. There cannot be post-facto satisfaction about the existence of a dispute. The facts as existing on the date of the reference and disclosed in the application and, thus, brought to the notice of the arbitrator would determine whether there was any 'pre-existing' dispute.

23. Counsel for the appellant rightly pointed out that the "details of dispute and differences" mentioned in paragraph 14 of the reference application dated 23.9.91 were never put up before the appellant. According to the counsel, the respondent seems to have presumed on receipt of the notice dated 7.9.91 that there existed dispute but the dispute could be regarded as 'dispute' for the purpose of arbitration only after the claim of the appellant vide notice dated 7.9.91 was repudiated. Without formal repudiation of the claim it cannot be said that there was a pre-existing dispute on 23.9.91 when the application for arbitration was filed, and the arbitrator committed error of law in relying on the subsequent reply of the respondent dated 24.9.91 for the purpose of holding that there existed dispute between the parties. I find substance in the submission of the counsel for the appellant. The endorsement (Ext. 3/a) on the letter dated 7.6.89 (Ext. 3) also cannot be construed as repudiation of claim. In any view such claim and counter claim were made in 1989 itself. Claims having been put forward by the appellant vide notice dated 7.9.91, in my opinion, it was incumbent upon the respondent to first repudiate the claim. Only if such repudiation failed to elicit any positive response that it could be said that a dispute existed between the parties. In business transactions it is usual to make claim and counter claim against each other. Unless one party knows what the claim or the counter claim of the other party is, there is no occasion for him to either accept or deny the same, or reduce his claim so that area and extent of dispute, is identified and referred to for arbitration.

24. In *London & North Western & Great Western Joint Railway Companies* V. *J.H. Billington. Ltd.* (1), Lord Halsbury observed that before the arbitrator could enter upon the reference, it must be shown that a difference had arisen between the parties *before the*

(1) (1899) A.C. 79 (H.L.)

submission and, that the arbitrator would have jurisdiction only to adjudicate upon the particular difference which had arisen *before the submission*. If fresh differences arise after the arbitrator had entered upon the reference, the arbitrator cannot adjudicate upon them without a fresh submission. It would be useful to quote the following from the said decision :—

> "A condition precedent to the invocation of the arbitrator on whatever grounds is that a difference between the parties should have arisen; and I think that must mean a difference of opinion before the action is launched, either by formal plaint in the country Court or by writ in the superior Courts. Any contention that the parties could, when they are sued for the price of the services, raise then for the first time, the question whether or not the charges were reasonable and that therefore they have a right to go to an arbitrator, seems to me to be absolutely untenable."

In the same case, Lord Ludlow observed :—

> "One matter about which I do desire to say a word.....is this .....that this difference before action brought, and that it is too late.....afterwords to raise a difference which can be brought within the meaning of this section."

In the above premises, I am of the view that the arbitrator committed error in treating the letter/reply dated 24.9.91 as repudiation of the appellant's claim and assume on that basis that there existed a dispute between the parties.

25. In fairness to the respondent I must mention that apart from the decision in *P. Narayanan Nair* Vrs. *E. Achuthan Nair* (Supra), his counsel also relied on *Uttamchand Saligram* Vs. *Mahmood Jewa Mamoojt* (1) and *Union of India* Vrs. *Birla Cotton Spinning and Weaving Mills Ltd.* (2). He submitted that there need not be an express affirmation of assertion and denial and the same can be inferred from the conduct of the parties. There cannot be any dispute about the principle. But there is nothing on the record, at least brought to my notice, that there was any specific repudiation of claim–by the respondent of the appellant's claim or by the appellant of the respondent's claim–if the letter dated 24.9.91 is excluded from consideration between 7.6.89 and 23.9.91 when the application was made to the arbitrator.

(1) (1920) A.I.R. (Cal.) 143.

(2) (1967) A.I.R. (S.C.) 688.

26. The second question in the facts and circumstances also thus is answered in favour of the appellant and against the respondent.

27. It was submitted on behalf of the respondent that as the appellant had participated in the proceeding it is estopped from challenging the jurisdiction of the arbitrator and/or validity of the reference of the arbitration proceeding. The submission is totally misconceived. In view of the decision in *Khardah Company Ltd.* Vs. *Raymon & Co. (India) Pvt. Ltd.* (supra) there cannot be any dispute that where there is initial lack of jurisdiction in the arbitrator the defect is not cured by acquiescence. Dealing with this aspect it has been stated in Russell On Arbitration.

> "In cases where an arbitrator enters into the consideration of matters which are not referred to him, or which he has no jurisdiction to try, 'the question is not one of waiver or estoppel, but of authority' and a party continuing to attend the reference after objection taken and protest made does not give the arbitrator authority to make an award.
>
> If a party to a reference objects that the arbitrators are entering upon the consideration of a matter not referred to them and protests against it, and the arbitrators nevertheless go into the question and receive evidence on it, and the party, still under protest, continues to attend before the arbitrators and cross-examines the witnesses on the point objected to, he does not thereby waive his objection, nor is he estopped from saying that the arbitrators have exceeded their authority by awarding on the matter.
>
> Continuing to take part in the proceedings after protest made does not amount to be a consent."

It may also be useful to notice the remarks of Lord Selborne L.C. In *Hamlyn* Vs. *Betterlay* (1) as under :

> "In arbitrations, where a protest is made against jurisdiction, the party protesting is not bound to retire; he may go through the whole case, subject to the protest he has made."

The above principle has been followed by courts in India in the cases fo *Chetandas Daga* Vrs. Radhakisson Ramchandra & ors. (2) and *Rambaksh Lachmandas* Vrs. *Bombay Cotton Company* (3).

(1) (1880) 6 Q.B.D. 63.

(2) (1927) A.I.R. (Bom.) 553.

(3) (1931) A.I.R. (Bom.) 81.

28. As a matter of fact, in the present case, as noticed above, the jurisdiction of the arbitrator was challenged by the appellant at the very first instance, but its objection was overruled and unfortunately copy of the order was not supplied on grounds and in circumstances about which I feel diffident, depriving the appellant of the opportunity to carry forward the challenge to the Civil Court in good time. Much has been argued on behalf of the appellant about the 'conduct' of the arbitrator, but in view of my conclusions on the first two questions, I do not think it is necessary to go into the question of misconduct or any other question. There being inherent lack of jurisdiction and the reference being invalid, the ultimate award must be treated as nullity and accordingly set aside.

29. Coming to the question of consequences of setting aside of the award, in view of my findings, there is no question of remitting the case to the court below for fresh decision. The only option to the parties is to go in for fresh arbitration, if so advised, through the arbitrators/umpire appointed in accordance with clause 19 of the agreement.

30. In the result, these appeals are allowed, the award of the arbitrator dated 21.12.91 is set aside. Consequently, the order/decree of the court below making the award rule of the Court also is set aside leaving the parties free to appoint arbitrators for arbitration. There will be no order as to costs.

R.D. *Appeals allowed.*

REVISIONAL CRIMINAL

Before Anil Kumar Sinha, J.

2001
April, 19.

*Smt. Bharti Tewari.**

v.

The State of Bihar and ors.

Code of Criminal Procedure, 1973 (Central Act No. II of 1974), section 340(1)—Provisions whether attracted where no document produced in court or given in evidence in 107 Cr. P.C. proceeding—section 195 (1) (b), whether applicable—whether appeal lies from the order refusing to lodge complaint against the petitioner under sections 182/211 of the Indian Penal Code—Appellate Court's direction to hold an inquiry under section 340 of the Code of Criminal Procedure—legality of.

Held, that in the instant case the admitted position is that no document had been produced or tendered in evidence in the proceeding under section 107 Cr. P.C. pending before the Subdivisional Magistrate. Since no document was produced or given in evidence by the petitioner in 107 Cr. P.C. proceeding the question of dircting an inquiry under the provision of section 340 (1) of the Code of Criminal Procedure does not arise at all.

Held, further, that the impugned order passed by the learned Sessions judge directing sub-divisional Magistrate to make an inquiry in terms of section 340 (1) of the Code of Criminal Procedure is manifestly illegal and without jurisdiction.

Held, also, that the appeal was not maintainable because the Opposite party nos. 2 to 4 had filed a petition before the Subdivisional Magistrate, Patna for filing a complaint against the petitioner under sections 182/211 I.P.C. which was rejected and against that order there is no provision for appeal in view of provision of section 195 (1) (a) of the Code of Criminal Procedure.

Sachida Nand Singh v. *State of Bihar* (1)—followed.

Application by the accused.

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

* Criminal Revision No.104 of 1999. Against the judgment dated 3.12.1998. passed by the Additional District & Sessions Judge, VIII, Patna in Cri. Appeal No. 108/97.

(1) (1998) (2) S.C.C. 493.

M/s. Satyendra Narayan Singh Dinkar Raj Bhandari for the petitioner.

M/s. Subodh Chandra Jha Manoranjan Pd. Sinha for the O.P. Nos. 2 to 4.

Mr. Rudra Deo Kumar Sinha, A.P.P for the State.

A.K. Sinha, J. This revision application has been directed against the order dated 3.12.1998, passed by the Additional District & Sessions Judge, VIII, Patna in Criminal Appeal No. 108 of 1997 by which the learned court below set aside the order dated 30.5.1997 passed by the Subdivisional Magistrate, Sadar, Patna in case no. 667 (M) 94 directed him to make an inquiry into the matter under section 340 of the Code of Criminal Procedure.

2. Some of the essential facts relating to the present revision application may be briefly stated as hereunder :

3. There was a proceeding under section 107 of the Code of Criminal Procedure, in which the petitioner was first party and opposite party nos. 2 to 4 were the second party, bearing case no. 19 (M) 94 of the court of Subdivisional Magistrate, Patna. The proceeding was initiated at the instance of the petitioner who submitted a written report to the Officer Incharge of Kankarbagh Police Station on 12.12.1993 against opposite party nos. 2 to 4 in which it was alleged that the O. ps went to the residence of the petitioner and threatened him with dire consequences for vacating the house in which she was living. The police made an inquiry and submitted a report to the Subdivisional Magistrate, Patna praying therein to initiate a proceeding under section 107 Cr. P.C. against both the parties and accordingly the proceeding was initiated. The learned Subdivisional Magistrate, Patna vide his order dated 7.4.1994, however dropped the proceeding holding that it is a false case which was filed only to malign the second party. The petitioner preferred a revision against the order passed by the Subdivisional Magistrate which was also dismissed by the Sessions Judge vide his order dated 24.4.1995 passed in criminal revision no. 259 of 1994. Thereafter, opposite party nos. 2 to 4 filed a petition before the Subdivisional Magistrate, Patna for initiating a proceeding against the petitioner under section 182/211 of the Indian Penal Code. The learned Subdivisional Magistrate vide his order dated 30.5.1997 rejected the petition against which an appeal was preferred before the Sessions Judge and the appeal was transferred to the file of Additional Sessions Judge who passed the impugned order as stated above.

4. Learned counsel appearing for the petitioner submitted at the very out set that the order passed by the learned Additional District Judge is without jurisdiction because in the facts and circumstances of the case the provision of section 340 Cr. P.C. is not applicable at all, in as much, as the petitioner had not produced any document nor any document was given in evidence in the proceeding under section 107 Cr. P.C. It was urged that the petitioner had only given an information to the police regarding the high handedness committed at the hands of O.P. nos. 2 to 4 and the police had made an inquiry into the matter and had recommended for initiating a proceeding under section 107 Cr. P.C. against both the parties. Save and except that, the petitioner had not produced or used any document whatsoever, as evidence in the proceeding pending between the parties. As such, the direction given by the appellate court for making an inquiry under section 340 (1) Cr. P.C. is without jurisdiction.

5. The provision of section 340 (1) Cr. P.C. may usefully be quoted as hereunder :

> 340. Procedure in case mentioned in Section 195:-(1) When, upon an application made to it in this behalf or otherwise, any Court is of opinion that it is expedient in the interest of justice that an inquiry should be made into any offence referred to in clause (b) of sub-section (1) of section 195, which appears to have been committed in or in relation to a proceeding in that Court or, as the case may be, in respect of a document produced or given in evidence in a proceeding in that Court, such Court may, after such preliminary inquiry, if any, as it thinks necessary:-
>
> (a) record a finding to that effect;
>
> (b) make a complaint thereof in writing;
>
> (c) send it to Magistrate of the first class having jurisdiction;
>
> (d) take sufficient security for the appearance of the accused before such Magistrate, or if the alleged offence is non-bailable and the Court thinks it necessary so to do, send the accused in custody to such Magistrate; and
>
> (e) bind over any person to appear and give evidence before such Magistrate."

6. The provisions as quoted above manifestly to go to show that it applies to a case where any offence as referred to in clause (b) of sub section (1) of section 195 appears to have been committed in relation to proceeding in a Court in respect of a document produced or given in evidence in the proceeding of the Court. But here in the instant case the admitted position is that

no document had been produced or tendered in evidence in the proceeding under section 107 Cr. P.C. pending before the Subdivisional Magistrate.

7. In the case of *Sachida Nand Singh and Anr.* Vs. *The State of Bihar and Anr.* (1) the Apex Court held as follows :-

> "The scope of the preliminary enquiry envisaged in Section 340 (1) is to ascertain whether any offence affecting administration of justice has been committed in respect of a document produced in Court or given in evidence in a proceeding in that Court. In other words the offence should have been committed during the time when the document was in custodia legis."

8. The decision referred to above is fully applicable in the facts and circumstances of the present case and following the ratio of the aforesaid decision, it can be said without any doubt that the provision of section 340 (1) Cr. P.C. is attracted where any offence falling within the ambit of 195 (1) (b) of the Indian Penal Code appears to have been committed in respect of a document produced in court or given in evidence in a proceeding in that court. Since no document was produced or given in evidence by the petitioner in 107 Cr. P.C. proceeding the question of directing an inquiry under the provision of section 340 (1) Cr. P.C. does not arise at all. In that view of the matter, the impugned order passed by the learned sessions judge directing the Subdivisional Magistrate to make an inquiry in terms of section 340 (1) Cr. P.C. appears to be manifestily illegal and without jurisdiction.

9. The learned counsel for the petitioner has contended that the appeal was not maintainable because the opposite party nos. 2 to 4 had filed a petition before the Subdivisional Magistrate, Patna for filing a complaint against the petitioner under section 182/211 of the Indian Penal Code, which was rejected by him and against that order there is no provision for appeal in view of provision of section 195 (1) (a) of the Cr. P.C. This submission has also got force in it.

10. For the reasons stated above this revision application is allowed and the impugned order passed by the Additional District Judge in criminal appeal no. 108/97 is set aside.

Application allowed.

S.D.

(1) (1998) 2 S.C.C. 493.

LETTERS PATENT

Before Nagendra Rai and S.K. Katriar, JJ.

2001
April, 23

*Sita Ram Paswan.**

v.

The State of Bihar & others.

Service—Dismissal of Enforcement Sub Inspector, Gopalganj—Constitution of India—Article 311 (2) Proviso (b)—indicating the reasons for not holding an inquiry—legality of—Transport Commissioner himself is accuser, whether can pass order of dismissal being the disciplinary authority—Doctrine of necessity.

Held, that once the order has been passed in exercise of power, under the second proviso to Article 311 (2) of the Constitution of India indicating the reasons for not holding an inquiry the order attains finality in view of the provision contained under clause (3) to Article 311 of the Constitution of India resulting into dismissal of the appellant from service.

Held, further, that this is really a case where doctrine of necessity will have to be applied as neither any superior officer in the State could have courage to take any action in the matter nor the Government is interested in taking action in the matter and in such a situation if the disciplinary authority will sleep over the matter the result would be that the law breakers will have supremacy and it will encourage the law breakers to harass the officers in discharging their official duties.

Held, also, that from the perusal of the impugned order it is clear from the circumstances mentioned in the order including the episode of 18.1.2001, the conduct of the appellant, protection given by the high-ups of the State to the appellant and the conduct of the persons who have taken the office of the Transport Commissioner to ransom to show that the holding of the inquiry is not reasonably practicable in this case.

Case laws considered.

An appeal under Clause 10 of the Letters Patent of the Patna High Court.

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* Letters Patent No. 375 of 2001. Against the order dated 27.3.2001 passed in C.W.J.C. No. 3912 of 2001 by a learned Single Judge of this Court.

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

Mr. Tarakant Jha, Sr. Advocate, *Mr. Vijay Shankar Shrivastava*, Adv., *Mr. Ashwani Kumar Singh*, Advocate for the appellant.

Mr. S. Alamdar Hussain, SC 6, *Mr. Shashi Bhushan Kumar*, JC to SC 6 for the State.

Nagendra Rai, J. The appellant has filed the present appeal under Clause 10 of the Letter Patent of the Patna High Court against the order dated 27.3.2001 passed by a learned Single Judge of this Court is CWJC No. 3912 of 2001 dismissing the writ application filed by the appellant challenging the order dated 6.2.2001 (Annexure -5 to the writ application) passed by the Transport Commissioner, respondent no. 3 herein, dismissing him from service by taking recourse to the provision of Second proviso to Article 311 (2) of the Constitution of India.

2. The appellant was posted as Enforcement Sub Inspector in the district of Gopalganj since 1996. On 12.1.2001, respondent No. 3–Transport Commissioner, issued an order directing the appellant to join at headquarters at Patna within three days from the date of issuance of the order. The said order was served upon the appellant. On 15.1.2001, the appellant joined in the department at Patna and on the following day, he proceeded on leave without the same being approved by the competent authority till 31.1.2001. On 18.1.2001 at 6.30 P.M. while the respondent no. 3 –Transport Commissioner Sri N.K. Sinha was in the midst of holding a departmental meeting in his chamber along with Joint Transport Commissioner, Under Secretary, Registrar and other staff, an M.L.A. having been elected from Gopalganj Constituency, namely, Sri Anirudh Prasad @ Sadhu Yadav along with two body guards armed with AK–47 rifles and 10 to 15 persons armed with fire arms entered into his chamber and they took the office in ransom in the sense that they asked the other officers present in the meeting to leave the place by show of arms. The door of the chamber was closed and then at the gun point, the Transport Commissioner was forced to put his signature on the order purporting to be an order transferring back the appellant to Gopalganj after expiry of his leave on 31.1.2001. The mob led by the said MLA also got an office order issued and said order was also served upon the person present there.

3. It is admitted position that the said MLA is the brother the present Chief Minister of Bihar and brother-in-law of the President of the ruling party. The respondent-Transport Commissioner informed about the said incident to the Chief Secretary, State of Bihar and the Chief Minister, Bihar. He also reported the matter to the Police, but no action was taken from any of the agency. Latter on when hue and cry was raised, the police registered a case on the basis of clarification given by the respondent-Transport Commissioner with regard to certain news. In the FIR, the offences were shown bailable. The police with a view to please the persons in power went to the residence of the said MLA and granted him bail. It further appears from the records that in pursuance of the said order of transfer, the appellant joined at Gopalganj and the District Transport Officer informed on 1.2.2001 to the Transport Commissioner about his joining. It is to be mentioned here that the appellant joined at Gopalganj without any relieving order having been issued by the competent authority. When no action was taken by the aforesaid authority, i.e., head of the executive, head of the State Services as well as the police, respondent-Transport Commissioner, came to the conclusion that it was not reasonably practible to hold inquiry with regard to misconduct of the appellant and passed the order by taking recourse to the provision of second Proviso to Article 311 (2) of the Consitution of India.

4. From perusal of Annexure-5 to the memo of appeal, it is evident that the respondent-Transport Commissioner has narrated the entire facts and also indicated the circumstances under which he was passing the order in exercise of power under Article 311 (2) (b) of the Constitution of India.

5. Mr. Tarakant Jha, the learned Counsel for the appellant, submitted two points Firstly, he submitted that the appellant was not present when the aforesaid incident took place in the chamber of the Transport Commissioner and as such it cannot be presumed that what was done by the said MLA and his hench men, was done at the instance of the appellant. Secondly, he submitted that the order is vitiated by malafide as the Transport Commissioner is himself the accuser as well as the disciplinary authority passing the impugned order. Elaborating his submission, he submitted that allegation has been made by the Transport Commissioner and FIR has been lodged and as such passing an order by him is

malafide in the sense that he has become the judge as well as the witness in the same case.

6. The learned Counsel appearing for the State on the other hand supported the order passed by the learned Single Judge.

7. The relevant provisions of Article 311 of the Constitution of India are as follows.

"311. (1) No person who is a member of a civil service of the Union or an all India service or a civil service of a State or holds a civil post under the Union or a State shall be dismissed or removed by an authority subordinate to that by which he was appointed.

(2) No such person as aforesaid shall be dismissed or removed or reduced in rank except after an inquiry in which he has been informed of the charges against him and given a reasonable opportunity of being heard in respect of these charges.

Provided that where it is proposed after such inquiry, to impose upon him any such penalty, such penalty may be imposed on the basis of the evidence adduced during such inquiry and it shall not be necessary to give such person any opportunity of making representation on the penalty proposed :

Provided further that this clause shall not apply—

(a) xx xx xx

(b) where an authority empowered to dismiss or remove a person or to reduce him in rank is satisfied that for some reason, to be recorded by that authority in writing, it is not reasonably practicable to hold such inquiry, or

(c) xx xx xx

(3) If, in respect of any such person as aforesaid, a question arises whether it is reasonably practicable to hold such inquiry as is referred to in clause (2), the decision thereon of the authority empowered to dismiss or remove such person or to reduce him in rank shall be final."

'8. Doctrine of Pleasure is embodied in Article 310 of the Constitution of India. Clause (1) and (2) to Article 311 of the Constitution of India gives protection to the members of Civil services. The said protection has been withdrawn by the Second Proviso to Clause (2) to Article 311 of the Constitution of India and said withdrawal of protection is in public interest and based on public policy. If the conditions mentioned in the proviso are fulfilled then the inquiry as provided in Clause (1) and (2) to Article 311 of the Constitution of India can be dispensed with and the major punishments as provided therein can be awarded. Proviso (b) to Clause (2) of Article 311 dispenses with the inquiry

when the disciplinary authority arrived at the satisfaction that it is not reasonably practicable to hold the inquiry. The said word was interpreted by the Constitution Bench of the Apex Court in the case of *Union of India* V. *Tulsiram Patel* (1) and it was held that the said words cannot be interpreted to mean total or absolute impracticability. *What is requisite is that the holding of the inquiry is not practicable in the opinion of a reasonable man taking a reasonable view of the prevailing situation.* The disciplinary authority who is at the spot is the best judge of the matter and it is for him to assess as to whether the inquiry is to be dispensed with or not. It was also held in that case that though the finality has been given to the decision of the disciplinary authority under Article 311 of the Constitution of India, but the same is not binding upon the Court and in exercise of judicial review, it can interfere with the order and their Lordships referred to the case of *Arjun Chaubey* Vs. *Union of India* (2) where the order was interfered with on the ground that the disciplinary authority was accuser with regard to some of the charges for which inquiry was dispensed with. The relevant paragraph dealing with the said question is 130 of the said judgement which runs as follows.

> "The condition precedent for the disciplinary authority that it is not reasonably practicable to hold the inquiry contemplated by clause (2) of Article 311. What is pertinent to note is that the words used are" not reasonably practicable "and not impracticable". According to the Oxford English Dictionary "practicable" means "Capable of being put into practice, carried out in action, effected, accomplished, or done, feasible". Webster's Third New International Dictionary defines the word "practicable" inter alia as meaning "possible to practice or perform : capable of being put into practice, done or accomplished : feasible". Further, the words used are not "not practicable" but "not reasonably practicable". Webster's Third New International Dictionary defines the word "reasonable" as "in a reasonable manner : to a fairly sufficient extent". Thus, whether it was practicable to hold the inquiry or not must be judged in the context of whether it was reasonably practicable to do so. It is not a total or absolute impracticability which is required by clause (b). What is requisite is that the holding of the inquiry is not

(1) (1985) AIR. (SC) 1416.

(2) (1984) AIR. (S.C.) 1356.

practicable in the opinion of a reasonable man taking a reasonable view of the prevailing situation. It is not possible to enumerate the cases in which it would not be reasonably practicable to hold the inquiry, but some instances by way of illustration may, however, be given. It would not be reasonably practicable to hold an inquiry where the government servant, particularly through or together with his associates, so terrorizes, threatens or intimidate witnesses who are going to give evidence against him with fear of reprisal as to prevent them from doing so or where the government servant by himself or together with or through others threatens intimidates and terrorizes the officer who is the disciplinary authority or afraid to hold the inquiry or direct it to be held. It would also not be reasonably practicable to hold the inquiry where an atmosphere of violence or of general indiscipline and insubordination prevails, and it is immaterial whether the concerned government servant is or is not a party to bringing about such an atmosphere. In this connection, we must bear in mind that numbers coerce and terrify while an individual may not. The reasonable practicability of holding an inquiry is a matter of assessment to be made by the disciplinary authority. Such authority is generally on the spot and knows what is happening. It is because the disciplinary authority is the best judge of this that clause (3) of Article 311 makes the decision of the disciplinary authority on this question final. A disciplinary authority on this question final. A disciplinary authority is not expected to dispense with a disciplinary inquiry lightly or arbitrarily or out of ulterior motives or merely in order to avoid the holding of an inquiry or because the Department's case against the government servant is weak and must fail. The finality given to the decision of the disciplinary authority by Article 311 (3) is not binding upon the court so far as its power of judicial review is concerned and in such a case the court will strike down the order dispensing with the inquiry as also the order imposing penalty."

9. Once the order has been passed in exercise of power under the second proviso to Article 311 (2) of the Constitution of India indicating the reasons for not holding an inquiry the order attains finality in view of the provision contained under Clause (3)

to Article 311 of the Constitution of India but as held by the Constitution Bench in the case of *Tulsiram Patel* (supra), the order is subject to judicial review and it can be challenged on the ground that the order was passed on extraneous consideration or on irrelevant ground or as a result of malafide. However, the truth or correctness of the materials cannot be questioned nor can it be gone into the adequacy of the material. Even in the case of malafide, the Court will not interfere unless it is found to be abuse of power or fraud on power. See *Union of India* and *another* vs. *Balbir Singh and another* (1)

10. So far as the first submission raised by the learned Counsel for the appellant is concerned, it is apparent from the record that the appellant was posted at Gopalganj and he had completed his tenure there. Thereafter he was transferred from there and asked to join at the headquarter at Patna. On 18.1.2001, the member of legislative Assembly along with his two body guards armed with sophisticated modern fire arms and other henchmen all armed with fire arms entered into the office of the Transport Commissioner, took the office to ransom, intimidated and by use of force obtained an order retransferring the appellant to the same place. An office order was also issued by use of force and thereafter the appellant joined on the basis of the said order and the District Transport Officer sent a communication to the Transport Commissioner informing about the same. Though the Transport Commissioner has not stated in the impugned order that the appellant was present at the time when the aforesaid episode happened, but the fact is that the appellant enjoyed the fruits of the order obtained by coercion and force. It is only indicative of the fact that the entire thing was done at the instance of the appellant and to help the appellant. A matter can be proved either by direct evidence or by circumstancial evidence. The circumstances indicated above lead to only one inference that at the instance of the appellant, the said MLA along with two body guards armed with AK-47 rifles as well as his hence men, all armed with fire arms went to the Chambers of the Transport Commissioner and after driving out the persons present there manhandled the Commissioner and obtained the transfer order and as such the learned Single Judge, in our view, rightly held the appellant has hand in the episode which had taken place on the aforesaid date and the appellant has full protection of the men in power.

(1) (1998) AIR. (SC) 2043.

11. So far as the second submission raised on behalf of the appellant is concerned, it is be seen as to whether the order is vitiated on the ground that the Transport Commissioner being accuser, cannot pass the impugned order as a disciplinary authority. The facts narrated above clearly show that the appellant has a protection of a powerful MLA who is brother of the present Chief Minister and brother-in-law of the President of the Ruling Party who is in power. Inspite of the matter being brought to the notice of the Chief Secretary and the Chief Minister, no action was taken. In such a situation, it is not possible to expect that any action would be taken against the appellant either by an officer superior to the appellant or by the Government. In such a situation whether the competent authority to pass the order under the aforesaid provision will tie his hands and leave the appellant. The Apex Court in the case of *Arjun Chaubey* Vs. *Union of India* (supra) held that a disciplinary authority cannot be a witness as well as a judge as in that case the scale of the justice will not be even. The said case was considered by the Apex Court in the case of *Tulsiram Patel* (supra) where in paragraph 131 of the judgement it was held as follows.

> "It would be illogical to hold that the administrative work carried out by senior officers should be paralysed because a delinquent government servant either by himself or along with or through others makes the holding of an inquiry not reasonably practicable.

12. Even in the case of *Arjun Chaubey* (Supra) the Apex Court made the aforesaid observation taking into consideration the facts of the case and held in paragraph 7 of the judgement that misbehaviour on the part of the employee on that part was not serious as to cure or condone the infirmity in the order of dismissal passed in that case by the authority who had made some of the allegation.

13. In the present case, the situation as is evident from the record are such that the respondent-Transport Commissioner moved all the authorities of the State including the Chief Secretary and the Chief Minister of the State and informed about such incident. The Government has also not proceeded in the matter in view of the facts stated above. When the Superior Officers of the State have preferred career to character and escapism to discharge of the duty, then it cannot be reasonably expected for them to take any action in the matter. This is really a case where, in my view,

doctrine of necessity will have to be applied as neither any superior officer in the State would have courage to take any action in the matter nor the Government is interested in taking action in the matter and in such a situation, if the disciplinary authority will sleep over the matter, the result would be that the law breakers will have supremacy and it will encourage the law breakers to harass the officers discharging their official duties. This is one of such cases where the aforesaid provision has to be applied in true sense. Thus the second submission raised on behalf of the appellant is also rejected.

14. From perusal of the impugned order, it is clear from the circumstances mentioned in the order including the episode of 18.1.2001, the conduct of the appellant, protection given by the high-ups of the State to the appellant, and the conduct of the persons who have taken the office of the Transport Commissioner to ransom show that the holding of the inquiry is not reasonably practicable in this case.

15. Accordingly, we fully agree with the view taken by the learned Single Judge. The appeal is dismissed.

S.K. Katriar, J. I have the privilege and the advantage of hearing the judgement dictated by Brother Nagendra Rai, J. in Court. I agree with the conclusion arrived at by him. However, I wish to add my own views.

17. Nemo Judex In Causa Sua. No person can be a judge in his own case. This general rule, however, has a few exceptions. A Judge who would otherwise be disqualified may act in a case of necessity where no other judge has jurisdiction. It was observed as follows in the case of *Serjeant* Vs. *Dale*, (1877) 2 Q. B.D. 558 :

"By the common law, a judge who has an interest in the result of a suit is disqualified from acting except in cases of necessity, where no other judge has jurisdiction.

The following passage from Administrative Law by Craig (Third edition, 1994, Page 333) is relevant in the present context :

> " The normal rules against bias will be displaced in circumstances where the individual whose impartiality is called in question is the only person empowered to act. Thus in the *Dimes case* (1852) 3 H.L.C. 759, 787, it was held that the Lord Chancellor's signature on an enrolment

order which was necessary in order for the case to proceed to the House of Lords, was unaffected by his shareholding in the Company because no other person was given the power to so sign. Similarly, in *Philips* Vs. *Eyre* [(1870 L.R. 6 Q.B.)]; See also Re Manchester (Ringway Airport) Compulsory Purchase Order (1935) 153 L.T. 219; *Jeffs* Vs. *New Zealand Dairy Production & Marketing Board* (1967) 1 A.C. 551; if. *Wilkinson* Vs. *Barking Corporation* (1948) 1 K.B. 721] it was held that the Governor of a Colony could validly assent to an Act of Indemnity which protected, inter alia, his own actions because the relevant Act had to receive the signature."

Parliament has at different times made statutory exceptions to the rule against bias, allowing justices to sit who have some kind of interest in the subject matter of the action. Also see AIR 1962 All. 117 (*Laxmi Chand Agarwal* Vs. *State of U.P.*), and Natural justice by H.H. Marshall.

The following statement of the law appearing in Administrative Law by Wade and Forsyth (7th edition, 1994, Page 476) is to the same effect:

".....there are many cases where no substitution is possible, since no one else is empowered to act. Natural justice then has to give way to necessity (1982 PL 628 (R.R.S. Tracey); *for otherwise there is no means of deciding and the machinery of justice or administration will break down.*

This point made an appearance in *Dimes* Vs. *Grand Junction Canal* (1852) 3 HLC 759)."

(Emphasis mine)

18. The second exception is brought about by the statute. If the statute itself confers a power on an authority and imposes a duty on it which may have the effect of making him a judge in his own cause or to decide a dispute in which he has an official bias, the doctrine of bias stands qualified to the extent of the statutory authorisation. The following passage from Judicial Review of Administrative Action by S.A. de smith (Third edition, 1980, Page 277) illumines the position :

".....what would be the position in English administrative law if a Minister were to be called upon to decide whether or not to confirm an order made by a local authority

affecting his own property ? He could not lawfully transfer to another Minister his duty to decide. He might depute one of his own officials to make the decision; the decision would nevertheless be made in the Minister's name. It is submitted that the validity of the decision could not be challenged merely on the ground that the Minister was in a sense judge in his own cause: for the legal duty to decide the class of matter to which he belonged had been cast upon him, and upon him alone. If it were possible to show that the Minister had in fact failed to consider the merits of the order for reasons of personal interest, his decision could be successfully challenged....."

The statement of the law in *Wade and Forsyth* (Supra) at Page 477 is to the same effect, and concludes by stating that ".....The Court will naturally not allow Statutory machinery to be frustrated in this way. [Re Manchester (Ringway Airport) Compulsory Purchase Order (1935) 153 LT 219]. For similar reasons, a Governor of a colony may validly assent to an act of indemnity for his own actions, since otherwise the Act could not be passed at all. (*Phillips* Vs. *Eyre* 1870) LR 6 Q.B. 1). It is generally supposed, likewise, that a minister must act as best he can even in a case where he, for instance, himself owns property which will be benefited if he approves a development plan....."

19. The third exception relates to the category of departmental proceedings where the disciplinary authority is the judge in his own cause. He takes the decision to initiate disciplinary proceedings, to frame charges, to appoint enquiry officer or enquire himself, takes the decision on the enquiry report, and passes the final order. Reference may be made to the judgements reported in AIR 1956 Cal. 662 (*Choudhary* Vs. *Union of India*), and AIR 1967 M.P. 81 (*Ramesh Chandra* Vs. *Union*).

20. Another recognised exception is arbitration proceedings. The arbitration clause quite often stipulates that the Government or governmental agency, or the Company, assigning the contract will nominate the arbitrator, generally giving the designation of one of its officers in the event of a dispute between the parties. Reference in this connection may be made to the judgement of a learned Single Judge of this Court in *Bharat Refractories Ltd.* Vs. *R.K. Das* [1997 (1) PLJR 737].

21. The present case is thus covered by the third exception stated above.

22. For the facts stated in the impugned order and discussed in the judgement of Brother Rai, J. with which I fully agree, proviso (b) to Article 311 (2) of the Constitution is manifestly available to the disciplinary authority. I am convinced that the disciplinary authority is fully justified in reaching the conclusion that it is not reasonably practicable to hold an enquiry. A person of the rank of Secretary-cum-Commissioner has been terrorised into subservience, and was forced to sign the transfer order by putting him under fear of being beaten up and that of life in his office chamber in the Secretariat by threatening to use sophisticated weapons. The State Government at all levels upto the Chief Secretary has remained absolutely unmoved obviously because of the fear of being beaten up and that of their lives. Full sister of the MLA who lead the team of goons is the Chief Minister of the State, and her husband is the President of the ruling party in power. The employee joined the new place of posting without being relieved at the place of previous posting, and no objection is raised at either of the two places. A person of the rank of Enforcement Sub-Inspector has been able to organise such a massive show of terrorism of extra-ordinary dimensions in the main Secretariat without a word of protest. Who will risk his life or would like to be beaten up for conducting the enquiry or coming as a witness. I am reminded of the observations of the Supreme Court in the case of *Rudal Sah* vs. *State of Bihar*, AIR 1983 S.C. 1986, though made in a slightly different context, that "there is darkness all around in the present administration of the State of Bihar". If there has to be one case, it is the present one which would be covered by proviso (b) to Article 311 (2) of the Constitution.

Appeal dismissed.

S.D.

LETTERS PATENT.

Before Nagendra Rai and S.K. Katriar, JJ.

2001
April. 25.

*Sushil Kumar Pandey.**

v.

Union of India & ors.

Jurisdiction—the appellant having had the knowledge of his dismisal at Battalik which is outside the territorial jurisdiction of the Patna High Court—writ-application against the order of his dismissal, whether could lie in the Patna High Court.

Held, that it is settled law that in case of order of dismissal, the order becomes effective when it is communicated, published or known to the person concerned.

Held, further, that as the appellant had already the knowledge of the order of his dismissal at Battalik itself, the order of dismissal had already taken effect and subsequent notice sent to his mother does not form integral part of the cause of action and as such no part of the cause of action had arisen within the territorial jurisdiction of this court.

Case laws discussed.

Appeal under Clause 10 of the Letters Patent of the Patna High Court.

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

Mr. Ganesh Pd. Singh, Sr. Advocate, *Mr. Choudhary Shyam Nandan, Mr. Sharad Kr. Sinha*, Advocates for the appellant.

Mr. Ajay Kr. Tripathi, Addl. SCCG., *Mr. Gyan Prakash Ojha*, Adv for Union of India.

Nagendra Rai and S.K. Katriar, JJ. The question which arises for consideration in this appeal is as to whether the cause of action or part of cause of action has arisen within the territorial jurisdiction of this Court so as to entitle it to entertain and decide the writ application. The learned Single Judge by the impugned order dated 1.3.2001 in CWJC No. 9616 of 1999 held that no part

* L.P.A. No. 336 of 2001. Against the Order dated 1.3.2001 in C.W.J.C. No. 9616 of 1999 passed by the learned Single Judge of this Court.

of cause of action has arisen within the territorial jurisdiction of this Court and accordingly dismissed the writ application for want of territorial jurisdiction.

2. The facts giving rise to the present appeal are that the appellant was enrolled in the Bihar Regiment on 26th November, 1997 and taken on strength as a Sepoy in this unit on 9th November, 1998 at Cooch Bihar (West Bengal). During Kargil War (Vijay Operation), the appellant was despatched to participate in the said operation on 20.5.1999 and was moved to Battalik Sector. One of his fellow Sepoy Arvind Kumar Pandey belonging to the district of West Champaran died on 29th May, 1999 during the combat. The appellant was asked to hand over the dead body of said Martyr Arvind Kumar Pandey to his parent at his native village and was given a movement order with a direction to return back within the period mentioned in the movement order. The appellant escorted the dead body and finally the dead body was cremated. The appellant though asked to return back to the unit after expiry of temporary duty, did not appear. His whereabouts were not known and thereafter a telegram was sent to him to report on duty and he joined the duty on 22nd July, 1999. A decision was taken to initiate summary court martial proceeding for his absence under Section 39 (a) of the Army Act, 1950 and the appellant participated in the said proceeding and put his signature on the relevant documents. Thereafter punishment of dismissal was awarded. On 26th July, 1999 in presence of all the Jawans of the Unit he was informed that he has been dismissed from service and the relevant documents including warrant dated 26th July, 1999 from Jammu Tawi to village home was also given to him. Subsequently, a letter dated 26th July, 1999 was also sent to the mother of the appellant informing her about the dismissal from service of her son. A copy of which has been annexed as Annexure-5 to the writ application.

3. The appellant filed the said writ application challenging the order of dismissal on several grounds. It is not necessary to state the same for the reasons that the only question involved in this appeal is as to whether this Court has territorial jurisdiction to entertain the writ application or not.

4. A counter affidavit had been filed on behalf of the respondents in the writ application in which it was stated that the order of dismissal was passed in presence of the appellant at Battalik where the Unit was in operation. A letter sent to the

mother of the appellant was only for the purpose of information to the next of his kin which is being done in a routine manner to keep the family members duly informed of such development, so that the appellant would not indulge in any mischief after returning back to home. Thus, no cause of action has arisen within the territorial jurisdiction of this Court.

5. The learned Single Judge after hearing the parties, as stated above, held that this Court has no territorial jurisdiction to entertain the writ application.

6. Under Article 226 of the Constitution of India as it stood prior to insertion of Clause 1-A by 15th Amendment Act, 1963, there were two limitations in exercise of power by the High Court. One was that the power to be exercised throughout the territory in which the High Court exercises its jurisdiction and the other was that the person or the authority to whom writ can be issued must reside within the territory subject to jurisdiction of the High Court. In other words, the High Court was not empowered to issue writ beyond the territory subject to jurisdiction and to the persons who have neither their residence or location within the said territory. Clause 1-A was inserted by 15th Amendment, 1963, conferring power on the High Court to entertain any petition under Article 226 of the Constitution of India if the cause of action arisen wholly or in part in its jurisdiction. The said clause was re-numbered as Clause (2) of Article 226. Thus, the High Court can issue writ against a person or authority who resides within the territorial jurisdiction of the High Court or the cause of action or part of cause of action has arisen within the territorial jurisdiction of the High Court.

7. Cause of action means the bundle of facts which the petitioner must prove, if traversed, to entitle him to a judgement in his favour by the Court. The law is well settled that to decide the question as to whether the cause of action has risen within the territorial jurisdiction of a Court or not, the Court must take into consideration the facts asserted/pleaded in the plaint/petition. There could be no inquiry about the correctness or truth of the assertions made. The question has to be decided on the basis of the assertion without taking into consideration the other version pleaded by the opposite party. The question as to whether the cause of action or part cause of action has arisen with a view to decide the question of territorial jurisdiction of the Court, no fixed

or abstract formula can be laid down. It depends upon the facts and circumstances of each case and the nature of grievance made.

8. The Apex Court in the case of *Oil and Natural Gas Commission* Vs. *Utpal Kumar Basu and others*, reported in (1994) 4 Supreme Court Cases 711, held as follows in paragraph 6 of the judgement.

> "Therefore, in determining the objection of lack of territorial jurisdiction the court must take all the facts pleaded in support of the cause of action into consideration albeit without embarking upon an enquiry as to the correctness or otherwise of the said facts. In other words the question whether a High Court has territorial jurisdiction to entertain a writ petition must be answered on the basis of the averments made in the petition, the truth or otherwise whereof being immaterial. *To put it differently, the question of territorial jurisdiction must be decided on the facts pleaded in the petition.*"

9. In the present case, we are concerned with regard to dismissal matter and as such it has to be considered as to when the order of dismissal became effective. The order of dismissal becomes effective only when it is either communicated or published or made known to the person concerned. This question was considered by the Apex Court in the case of *State of Punjab* Vs. *Amar Singh*, reported in AIR 1966 Supreme Court 1313, and it was held that unless the order is communicated or published to the officer concerned, the order of dismissal does not become effective. Mere passing of the order is not sufficient to make the order effective. Taking the same view, it gives rise to several complications, such as, what would be the orders or decision taken by the authorities after passing the order of dismissal but before communication of the same, whether the officer is entitled to payment of salary after the order is passed or before it was communicated to him. It is apt to refer paragraph 11 of the said judgement.

> "The first question which has been raised before us by Mr. Bishan Narain is that though the respondent came to know about the order of his dismissal for the first time on the 28th May, 1951, the said order must be deemed to have taken effect as from the 3rd June, 1949 when it was actually passed. The High Court has rejected this contention,

but Mr. Bishan Narain contends that the view taken by the High Court is erroneous in law. We are not impressed by Mr. Bishan Narain's argument. It is plain that the mere passing of an order on dismissal would not be effective unless it is published or communicated to the officer concerned. If the appointing authority passed an order of dismissal, but does not communicate it to the officer concerned, theoretically it is possible that unlike in Court, the authority may change its mind and decide to modify its order. It may be that in some cases, the authority may feel that the ends of justice would be met by demoting the officer concerned rather than dismissing him. An order of dismissal passed by the appropriate authority and kept with itself, cannot be said to take effect unless the officer concerned knows about the said order and it is otherwise communicated to all the parties concerned. If it is held that the mere passing of the order of dismissal has the effect of terminating the services of the officer concerned, various complications may arise. If before receiving the order of dismisal, the officer has exercised his power and jurisdiction to take decisions or do acts within his authority and power, would those acts and decisions be rendered invalid after it is known that an order of dismissal had already been passed against him ? Would the officer concerned be entitled to his salary for the period between the date when the order was passed and the date when it was communicated to him ? These and other complications would inevitably arise if it is held that the order of dismissal takes effect as soon as it is passed, though it may be communicated to the officer concerned several days thereafter. It is true that in the present case, the respondent had been suspended during the material period; but that does not change the position that if the officer concerned is not suspended during the period of enquiry, complications of the kind already indicated would definitely arise. We are therefore, reluctant to hold that an order of dismissal passed by an appropriate authority and kept on its file without communicating it to the officer concerned or otherwise publishing it will take effect as from the date on which the order is actually written out by the said authority; such an order can only be effective after it is communicated

to the officer concerned or is otherwise published. When a public officer is removed from service, his successor would have to take charge of the said office; and except in cases where the officer concerned has already been suspended, difficulties would arise if it is held that an officer who is actually working and holding charge of his office, can be said to be effectively removed from his office by the mere passing of an order by the appropriate authority. In our opinion, therefore, the High Court was plainly right in holding that the order of dismissal passed against the respondent on the 3rd June 1949 could not be said to have taken effect until the respondent came to know about it on the 28th May, 1951."

10. So far the order of suspension is concerned, it takes effect from the date of communication and not from the date of actual receipt. This question was considered by the Apex Court in the case of *State of Punjab* V. *Khemi Ram*, reported in AIR 1970 Supreme Court 214, and it was held that in case of suspension, once an order is issued and it is sent out to the concerned Government servant, it must be held to have been communicated to him, no matter when he actually received it. In paragraph 16 of the said judgement it was, however, held that in case of dismissal actually knowledge by employee may perhaps become necessary because of the consequences but that will not be the situation in case of suspension as after the order of suspension was passed, there was no question of his doing any act or passing any order which is likely to be challenged. Thus, the settled law is that in case of order of dismissal, the order becomes effective when it is communicated, published or known to the person concerned.

11. In the present case in paragraph 21 of the writ application, the appellant has stated that after the conclusion of the summary Court martial proceeding at Battalik, he was orally informed on 26.7.1999 that he has been dismissed from service and he should proceed to his home, but no order of dismissal was served on him and all the articles as handed over to him by the Army were requested to be returned and it had been so returned. In paragraph 22 of the writ application, he has stated that thereafter he returned to his native village and thereafter letter dated 26.7.1999 was sent addressing to his mother, a copy of which has been annexed as Annexure-5 to the writ application

and on that assertion, the writ application has been filed in this Court.

12. The learned counsel for the appellant submitted that as the order of dismissal addressed to his mother was sent to his village home in Bihar and the order of dismissal becomes effective only when it is communicated to the person concerned and the communication was made at his village home, the part cause of action has arisen within the territorial jurisdiction of this Court. In other words, he submitted that the notice informing about the order of dismissal is integral part of cause of action and as the same was received within the jurisdiction of this Court, then the writ is maintainable.

13. The learned counsel appearing for the respondents/ Union of India on the other hand submitted that summary Court Martial proceeding, according to averments in the writ application which is only material to be looked into, was conducted in presence of the appellant and his own assertion is that after conclusion of the said proceeding he was informed about his dismissal from service and was asked to go to his village home and as such the order of dismissal became effective when it was known to him while he was posted at Battalik. Thus, the order of dismissal has become effective, the moment the appellant knew about the same. Thereafter sending a notice informing the mother of the appellant about the dismissal of the appellant from service is only a formal matter as the same does not form integral part of cause of action and and as such no cause of action has arisen within the territorial jurisdiction of this Court.

14. As stated above, in the case of *State of Punjab* (Supra), the Apex Court has held that the order of dismissal cannot be effective unless the officer concerned knows about the said order. In the present case own averment of the appellant shows that he has knowledge of the order of dismissal (Para 21 of the writ application), at Battalik itself. Further assertioin made by the appellant in the writ application shows that he was asked to go to village home after depositing the artices supplied by the Army. In such a situation, even if the averments made in the counter affidavit filed by the respondent in the writ application to the effect that the order of dismissal was passed in presence of the appellant and he had also signed on the proceeding is not taken into consideration, the material on record is sufficient to show that the order of dismissal became effective at the Battalik itself as the

order of dismissal was communicated and known to the appellant at that place which does not fall within the jurisdiction of this Court. Subsequent issuance of notice to the mother of the appellant informing about the order of dismissal from service of the appellant is not an integral part of the cause of action giving jurisdiction to this Court to entertain and decide the matter.

15. The learned counsel for the appellant relied upon two decisions in support of his submission, one of the Apex Court in the case of *Oil and Natural Gas Commission*, reported in (1994) 4 Supreme Court 711 and other of a division Bench of this Court in the case of *Brig Ashok Malhotra* Vs. *The Union of India and others*, reported in 1997 (2) PLJR 595. None of the aforesaid two cases supports the submissions advanced on behalf of the appellant.

16. In the case of *Oil and Natural Gas Commission* (Supra), the Apex Court held that the cause of action has to be decided with reference to the averments made in the petition as stated above. In that case, Engineers India Ltd. (EIL), acting as consultants for Oil and Natural Gas Commission (ONGC), issued an advertisement in leading newspapers of the country inviting tenders for setting up of a Kerosene Recovery Processing Unit at ONGC's Hazira Complex in Gujarat. The head office of the Commission was at New Delhi. The NICCO, having its registered office in Calcutta, read and became aware of the tender notice and submitted tenders and made correspondences with the EIL from Calcutta and sent a fax message and received reply thereto from the EIL. The Apex Court held that the reading of advertisement at Calcutta, submitting offer from Calcutta and making representation from that place would neither constitute an integral part of cause of action nor sending a fax message from Calcutta and receiving reply from New Delhi would constitute an integral part of the cause of action.

17. So far as the case of *Brig. Ashok Malhotra* (Supra) is concerned, in that case, it was found that the order of supersession was passed when the writ petitioner was posted as Commander of Bihar and Orissa Sub-area, Danapur Cantonments and the same was also received while he was posted at Danapur and it was held by this Court that the supersession of the appellant cannot be said to have become complete the moment when the decision was taken and the order in that behalf was issued. It became effective when it was served upon the petitioner at Danapur. It was held

that the cause of action arose at Danapur which falls within the jurisdiction of this Court.

18. In the present case, as stated above, the appellant has already knowledge of the order of dismissal at Battalik itself and as such the order of dismissal has already taken effect and subsequent notice sent to his mother does not form integral part of cause of action and as such no part of cause of action has arisen within the territorial jurisdiction of this Court.

19. Accordingly, we fully agree with the view taken by the learned Single Judge. The appeal is dismissed for want of territorial jurisdiction.

R.D. *Appeal dismissed.*

CIVIL WRIT JURISDICTION

Before Shiva Kirti Singh, J.

2001
May. 7.

*Jagdish Prasad Yadav & ors.**

v.

The State of Bihar & ors.

Service—termination of services of petitioners appointed on ad hoc/daily wage and were continued in service from time to time for long period, legality of—persons similarly situate, appointed later than the petitioners were regularised by order of High Court—petitioners, whether deserve to be continued in service in view of Articles 14 and 16 of the Constitution—Constitution—Articles 14 and 16.

The services of the petitioners were continued from time to time in the Bihar Rajya Sahkari Bhoomi Vikas Bank Ltd., and their services were regularised when the Bank failed to fill up the vacancies in a regular manner;

Held, that impugned orders of termination of their services are illegal, arbitrary and against equity and are quashed;

Held, further, that in view of services of employees of the Bank appointed later than the petitioners, having been regularised in service on account of orders passed by High Court in various writ-petitions, the petitioners deserve to be continued in service in view of Articles 14 and 16 of the Constitution.

Case laws considered.

Applications under Article 226 of the Constitution of India.

The facts of the cases material to this report are set out in the judgement of Shiva Kirti Singh, J.

Mr. Shyama Prasad Mukherjee, Sr. Adv., *Mr. Ganesh Prasad Singh*, Sr. Adv., *Dr. Sharang Dhar Upadhyay*, Adv., *Mr. Shanti Pratap*, Adv., *Mr. Gyanand Roy*, Adv., *Mr. Uma Kant Singh*, Adv., *Mr. Mithilesh Kumar Rai*, Adv. for the petitioners.

* Civil writ Jurisdiction Case Nos. 1118, 1120, 1371, 1634, 2059 and 3573 of 2001.
In C.W.J.C. No. 1120 of 2001.....Beer Bahadur Singh....petitioner.
In C.W.J.C. No. 1371 of 2001.....Vyas Narayan Singh....petitioner.
In C.W.J.C. No. 1634 of 2001.....Uma Shankar Rai and ors....petitioners.
In C.W.J.C. No. 2059 of 2001.....Kapildeo Prasad.....petitioner.
In C.W.J.C. No. 3573 of 2001.....Yogendra Singh..... .....petitioner.

Mr. J. P. Shukla, Sr. Adv., *Mr. Upendra Kumar*, Adv. for the respondent.

Mr. B. N. Singh, A.A.G–1 for the State.

Shiva Kirti Singh, J. All these writ applications involve common issues of law and facts and hence they have been heard together and are being disposed of by a common order. The challenge by the petitioners to orders of termination of their services passed by a common set of respondents raises a vexatious question as to validity of regularisation of adhoc/daily wage employees and issues of equity due to long lapse of time since initial appointment and regularisation.

Before noticing the common features and admitted facts in these cases it will be useful to notice the details of appointment of individual petitioners in the service of Bihar Rajya Sahkari Bhoomi Vikas Bank Ltd. Patna (hereinafter referred to as the Bank). The sole petitioner in CWJC no. 1118/2001 was appointed on 4.9.1981 on the post of Field Officer, on adhoc basis for six months. The tenure of such adhoc service was extended from time to time and his service was regularised on 6.10.1987 w.e.f. 1.2.1987. The sole petitioner in CWJC no. 1120/2001 was appointed as an Assistant on daily wages on 4.9.1981. He continued as such till his service was regularised vide order dated 18.4.1987 w.e.f. 1.2.1987. His termination is on additional ground that he was overage by about one year and four months. Petitioner in CWJC no. 1371/2001 was initially appointed as a Typist on 3.5.1976 for a period of six months on purely temporary basis. He was re-appointed on daily wages on 17.9.1980 and thereafter appointed in regular pay scale of Assistant, on temporary basis on 31.12.1982. In their counter-affidavit the respondents have treated the date of appointment of this petitioner as 3.12.1982. His termination is also for an additional ground that he was overage by about seven years in December, 1982. In CWJC no. 1634/2001 there are three petitioners who were appointed as Field Officers on adhoc basis on 1.9.1981, 2.5.1981 and 7.5.1981 respectively. They continued in service as such adhoc employees till their services were regularised by order dated 6.10.1987 w.e.f. 1.2.1987. In their cases also the termination is on additional ground that they were overage by one month eleven days, three months six days and three days respectively. In CWJC no. 2059 of 2001 the petitioner was appointed as Field Officer on adhoc basis on 4.9.1981. The initial period of six months was extended till his

service was regularised on 6.10.87 w.e.f. 1.2.1987. In CWJC no. 3573/2001 the sole petitioner was similarly appointed on the post of Field Officer on adhoc basis for an initial period of six months on 24.2.1981. His service was also extended from time to time till he was regularised vide order dated 6.10.1987 w.e.f. 1.2.1987. His termination order also mentions, as an additional ground for termination that he was overage by 7 years, 5 months and 21 days.

Besides the ground of overage with regard to some of the petitioners as noticed earlier, the termination orders proceed on common facts and contain two common grounds for termination of petitioners' service, namely, (1) at the time of appointment there was a ban on appointment imposed by the State Government and (2) while making the appointment the prescribed procedures of appointment, viz. advertisement/reservation etc were not followed. Mainly on these two common grounds the appointments were treated to be irregular leading to termination of petitioners' services.

The common facts which for the sake of convenience have been taken mainly from the records of CWJC no. 1118/2001 disclose that the Bank was established in the year, 1957 as a Society registered under the provisions of Bihar and Orissa Co-operative Societies Act, 1935 (hereinafter referred to as the Act). Initially the name of the society was Bihar State Co-operative Land Mortgage Bank Ltd. Patna which was subsequently changed to its present nomenclature. The Bank is governed by its Bye Laws and the relevant provisions of the Act. Under the Bye Laws the Registrar, Co-operative Societies or a person especially appointed by the State Government shall be the trustee for certain purposes specified in the Bye Laws mainly relating to the fiscal business of the Bank. The Board of Directors or the Board has been vested with powers under the Bye Laws and such powers include the power to regulate, from time to time the strength of Bank staff and their salaries, allowances and service conditions. The Board also has the power to appoint, suspend, remove and exercise disciplinary control over officers and staff of the Bank in accordance with rules of business framed by the Bank with the approval of the Registrar Co-operative Societies. The Bank framed rules for direct recruitment to the cadre of peon/LDC/Supervisor etc and those rules were approved by the Registrar, Co-operative Societies, Bihar in June, 1970 as appears from Annexure-2 to the writ application.

Vide letter dated 10.8.1976 the Registrar, Co-operative Societies directed all the Co-operative Societies of the State of Bihar not to make new appointments or give promotions to their employees until procedure in this regard could be finalised by the State Government.

According to the petitioners the ban on appointment/ promotion imposed by the Registrar was not applicable to the Bank because its recruitment rules had already been approved by the Registrar. However, the Bank felt necessity of further recruitment of employees on the ground of opening of new branches in different parts of the state during the years 1976-1982 and hence on 8.1.1981 the Board of the Bank resolved to request the government to lift the ban and further resolved to engage persons on adhoc/daily wage basis to meet the exigency of work. For the said purpose the service-cum-appointment committee was also constituted by the Board and in that meeting of the Board the Secretary of Co-operative Department, Government of Bihar took part as representative of the government. The committee held its meeting on 15.3.1981 and decided to engage Field Officers and Accountants on adhoc basis. Most of the petitioners were appointed pursuant to said decision on temporary/adhoc basis. The State Government vide letter dated 29.9.81 (Annexure-4) lifted the ban with regard to Bank on certain conditions.

It is admitted that on 4.10.1985 the Registrar, Co-operative Societies, Bihar approved a draft of staffing pattern and a number of new posts were sanctioned as per demand of the Bank. A meeting of the service-cum-appointment committee was held on 30.11.1986 followed by a meeting of the Board of Directors on 4.12.1986. The Board decided to regularise the service of employees who were appointed on daily wage/adhoc basis. Board's resolution dated 4.12.1986 (Annexure-6) discloses that an explicit decision was taken that in the matter of regularisation the rules relating to reservation shall not be followed. The Board decided that the rules of reservation and prescribed procedure of appointments shall be strictly followed in future appointments. By different office orders petitioners services were regularised in the light of aforesaid resolution of the Board of Directors dated 4.12.1986. This meeting was attended by Shri Mahendra Singh, Secretary, Co-operative Dept., Govt. of Bihar.

It is also not in dispute that after the ban on appointment was lifted with regard to Bank vide letter dated 29.9.1981, an

advertisement for regular appointments was published in the month of August. 1982 but this exercise was subsequently abandoned. The Bank resorted to further appointments on adhoc/ daily wage basis. On receiving complaints about irregular appointments made in the Bank the State Government constituted a two member enquiry committee consisting of Shri Mahendra Singh, Commissioner-cum-secretary Co-operative Department, Govt. of Bihar and Smt. S. Jalja, Additional Secretary, Personnel and Administrative Reforms Dept., Govt. of Bihar. This committee enquired into appointments made between 29.9.1981 and 1984 and found appointments made on adhoc daily wage basis to be irregular and recommended for their cancellation vide its report dated 14.3.1984. It also recommended for cancellation of the advertisement for regular appointment issued in the year. 1982 because of irregularity in receiving the applications and in maintaining the record thereof.

Petitioners have pleaded and respondents have not disputed that the Chairman of the Bank vide order dated 3.4.1984 and 6.8.1986 retrenched such employees appointed after August. 1982 but due to intervention of this court in various writ applications, their retrenchment was quashed and their services were regularised.

Acting on one of the recommendations of the aforesaid two members committee the State Government constituted vide order dated 2.7.1992 another high level enquiry committee consisting of three members to enquire in respect of appointments made in the Bank between August. 1976 to 1980 and between 1985 and December. 1990. The intervening period between 1981 to 1984 was left out because the said period had been treated to be covered by the earlier enquiry committee consisting of two members. This committee of three members submitted its report on 22.7.1993 and as per that report also the appointments made on adhoc/daily wage basis were found to be illegal for the reasons that the appointment procedure was not followed and rules of reservation were ignored. This committee however noted that against the sanctioned strength of 3033 posts only 2268 employees were working in the Bank. The committee admittedly enquired into the general procedure of appointments and not into individual cases of every employee.

But petitioners have alleged and the respondents have not controverted the fact that the Bank had communicated to the government on 7.3.1996 the difficulties being faced in

implementation of the enquiry reports because services of some of the employees appointed in similar manner had been regularised after directions of this court issued in one or another case. In the meantime, one Jai Prakash Rai and 7 others had filed a writ application bearing CWJC no. 10673/95 with a prayer to direct the Bank to make regular appintments against such sanctioned posts which were either lying vacant or were occuped by persons engaged on daily wage/adhoc basis. According to the petitioners the regularisation of their services and other similar employees had not been questioned in the aforesaid writ application and they were not made party in that case. The aforesaid writ application was disposed of by order dated 13.1.1997 with a direction to the Bank to take a final decision with regard to persons continuing as class-III and IV employees in the Bank in irregular manner within two months. Thereafter the Bank issued identical show-cause notices to about 700 employees of the Bank including the petitioners in the month of August and September 1997 calling upon them to show-cause as to why their appointments should not be cancelled in view of reports of the enquiry committees as well as order of this court dated 13.1.97 passed in CWJC no. 10673 of 1995. Such show-cause notices were challenged through various writ applications such as CWJC no. 8553/1997 and analogous cases. The writ applications were dismissed vide order dated 2.11.1998 as premature and with an observation that concerned employees should file their show cause within time granted by the court and they would have liberty, to challenge the ultimate order if passed against them. No interference was made with the aforesaid order dated 2.11.1998 in LPA no. 1231/1998 and other analogous appeals disposed of on 15.3.2000. The petitioners filed their show-cause and pointed out to the authorities, inter alia, that the show-cause notices disclose that the authorities had already made up their mind to terminate petitioners services and hence it was an empty formality: that the initial appointments of the petitioners were on adhoc/daily wage basis by the authority competant to make such appointments; subsequently their services were regularised on sanctioned and vacant posts in the year, 1987, as per policy decision of the respondent-Bank and since then the petitioners had been treated as regular permanent and confirmed employees. Thereafter services of the petitioners have been terminated by the impugned orders issued in August, 2000

which are under challenge in the present writ applications as noticed earlier.

The main contentions advanced on behalf of the petitioners are that at the time the petitioners were initially appointed on adhoc/daily wage basis the Bank as a Registered Co-operative Society was not bound by Rules of appointment and reservation relating to State Government employees; the initial appointments for limited periods were in accordance with Rule 14 of the rules of recruitment approved by the Registrar, Co-operative Societies on 8th June, 1970; the Rules of reservation applicable to services under the State were not applicable to the Bank as per the approved rules of 1970; The Rules of reservation applicable to services under the State were not applicable to the Bank as per the approved rules of 1970; petitioners services were regularised long ago in the interest of the Bank as per its policy decision and it was not permissible for the Bank to reopen the matter of petitioners initial appointments and to terminate their services after 19 years or more. It was also submitted on behalf of the petitioners that actually there was no ban over appointments in the Bank specially on adhoc/daily wage basis and the ground of overage cannot be available to the respondent-Bank because age can be relaxed by the employer and once regularisation of service was allowed on the basis of all the relevant facts, such a ground cannot be raised for termination of services of permanent regular employees.

On the other hand, learned counsel for the respondent-Bank relying upon facts and grounds disclosed in the orders of termination, specially upon the reports of two enquiry committees dated 14.3.1984 and 22.7.1993 submitted that the initial appointments suffered from serious infirmity as there was a ban on appointments and promotions imposed by the government and the appointments were void because applications were not invited through advertisement and provisions for reservation were not followed. According to respondents such an infirmity rendered the appointments void because they were in violation of Articles 14 and 16 of the Constitution of India. In such eventuality, according to the respondents the subsequent regularisation was meaningless and petitioners cannot derive any advantage even if they continued in service for more than 19 years.

From the materials on record it is clear that petitioners were initially appointed in the year, 1981 or earlier on adhoc/daily

wage basis for limited periods, such appointment was permissible under Rule-14 of the recruitment rules approved for the Bank by the Registrar, Co-operative Societies in June, 1970. Even if there was a ban on such appointment applicable to the Bank, it was lifted on 29.9.1981 pursuant to request of the Bank. Since the petitioners services were extended for further periods after 29.9.1981 hence, the first ground mentioned in the impugned orders that the appointment was in teeth of ban imposed by the State government has no substance.

It is the second common ground for termination that appointments were made without advertisement and without following the rules of reservation which is of substantive nature and requires detailed consideration. A perusal of approved rules of recruitment (Annexure-2) shows that regular permanent appointments for other than class-IV catagories of posts had to be made after written examination followed by oral interview and for class-IV staff only personal interview was required. Besides regular permanent appointments, Rule 14 permitted filling up vacancies in ministerial cadre and lower posts on purely temporary basis in the interest of work. For such appointments on adhoc/daily wage basis no advertisement or reservation was prescribed. Even for regular appointments the rules required written examination but did not specifically require any advertisement for inviting applications nor they mentioned anything regarding age or reservation. According to undisputed claim of the petitioners, statutory rules were prescribed for the first time vide notification no. 926 dated 9.2.1989 in exercise of power prescribed u/s 66 B of the Act and these rules which prescribe in detail the procedure of appointments such as advertisement in newspapers and also provision for reservation as prescribed by the State, were prospective and hence not applicable to the case of the petitioners. A copy of rules produced by learned counsel for the respondent-Bank at the stage of hearing shows that detailed rules containing provisions for advertisement and reservation etc were framed for the Bank in exercise of powers conferred by different clauses of the Bye Laws of the Bank. Rule 4 of these rules provides that these rules shall be deemed to have come into force from the date of approval of the Registrar, Co-operative Societies, Govt. of Bihar. There is nothing on record or in the copy of these rules to disclose the date or even the year of coming into force of these rules. In absence of any material either in the copy of rules or in the counter-affidavit

filed on behalf of the Bank it is not possible to presume that such detailed rules framed under the Bye Laws of the Bank were in force at the relevant time when the petitioners were initially appointed on adhoc/daily wage basis. The statutory rules u/s 66B of the Act undisputedly came into force only on 9.2.1989.

In such circumstances as noticed above, it is clear that for temporary recruitment for limited period the requirement of advertisement or of following the rules of reservation were not prescribed by the then prevailing Rules framed under the Bye Laws of the Bank and the statutory rules containing such provisions came into effect much later on 9.2.1989. Since the rules in force at the relevant time provided for and permitted filling up vacancies in ministerial cadre and lower posts on purely temporary basis in the manner done hence such appointments made in the interest of work as per provision in the rules cannot be treated as appointment in violation of Articles 14 and 16 of the Constitution of India. In such a situation, the initial entry of the appointees like the petitioners would not be unauthorised and their initial appointments cannot be treated as void-ab-initio. The facts noticed with regard to the petitioners disclose that their entry into service was in accordance with the provision in the rules. Thereafter, their services were extended from time to time on account of exigency of work and on account of failure of the Bank to fill up the vacancies in regular manner. It was in such circumstances that their services were regularised under a conscious policy decision taken by Board of the Bank and as a consequence the petitioners have continued as permanent and confirmed employees of the Bank for 13 years or more. In such circummstances, learned counsel for the petitioners have rightly submitted that equity now lies in favour of the petitioners and they should not be permitted to be thrown out of job at this late stage of their life when they are to shoulder heavy responsibilities as parents/bread earners. This court, in the facts of the case, feels that if the respondent-Bank wanted to act on the basis of allegations now being hurled against the petitioners, it should have been done so in the year, 1984 itself when the report of the first enquiry committee became available. At that period of time these petitioners could have competed with others in any regular process of recruitments and in case of failure also most of them could have looked for other jobs on the basis of their young age. In such circumstances, and specially in view of the fact noticed above the initial entry of

petitioners in the service at the relevant time was in accordance with the rules then applicable, equity must be found in favour of the petitioners.

Before concluding the discussion it is relevant to mention that both the sides have relied upon a number of case laws.

Judgements cited on behalf of the petitioners such as–

(i) (1998) 8 SCC. 59 *(Roshni Devi* Vs. *The State of Hariyana).*

(ii) AIR. 1999. SC. 517 *(Union of India* vs. *Kishorilal Bablani),*

(iii) (AIR. 1999. SC. 1624 *(V.M. handra* vs. *Union of India).*

(iv) AIR. 1992. SC. 2130 *(State of Hariyana* vs. *Piara Singh).*

(v) 1994 (2) PLJR 499 (*Ashok Kumar* vs. *The State of Bihar)* and

(vi) 2000 (1) PLJR. 642 *(Tarkeshwar Singh* vs. *The State of Bihar)*

in support the contention that in given circumstances regularisation of temporary employees under a policy decision is permissible and long years of service can give rise to equity in favour of an employee. In the case of *Ashok Kumar* (Supra) a Division Bench of this court in paragraph 10 of the judgement clearly held thus : Thus, even if the appointment of the petitioners were initially wrong, after regularlisation the question of validity of the appointment cannot be reopened after a lapse of about 12 years."

On the other hand learned counsel for the respondent Bank has in support of the submission that if the initial appointment is against law and against Articles 14 and 16 of the Constitution of India then no regularisation is permissible, relied upon the following judgements :–

(i) AIR. 1996. SC. 2775 *(Surinder Singh Jamwal* vs. *State of J & K)*

(ii) AIR. 1997. SC. 1628 *(Ashwani Kumar* vs. *State of Bihar).*

(iii) AIR. 2001. SC. 201 *(Subedar Singh* vs. *District Judge, Mirjapur),*

(iv) (1998) 3. SCC. 88 *(Dr. Meera Massey* v. *Dr. S. R. Mehrotra).*

(v) (1998)6. SCC. 165 *(State of M.P.* vs. *Dharambir).* Some other judgements were also cited but they are not being noticed because they related to the question of requirement of natural justice for removal of patently illegal appointees or such employees whose services were temporary or on daily wage basis and the removal order was found to be termination simpliciter. Such issues have not been raised in this case and hence those judgements are not relevant. In the case of *Dr. Surinder Singh* (Supra) the prayer before the court was to order for regularisation and the same was

refused because adhoc appointments had been made against the service rules. But still the Supreme Court permitted them to continue till regular appointments and age requirement was condoned to enable the adhoc employees to apply and seek selection according to rules. In the present case petitioners were regularised in the year. 1987. In the case of *Ashwani Kumar* (Supra) the Spreme Court was dealing with notorious fraudulent appointments of thousands of employees by one Dr. Mallic in total disregard of all norms and known methods of appointments and without caring for existence of post or vacancies. In paragraph 12 of that judgement the Apex court considered the effect of confirmation of such employees whose entry itself was illegal and void and the ratio laid down was –"question of confirmation or regularisation of an irregularly appointed candidate would arise if the concerned candidate is appointed in an irregular manner or on adhoc basis against an available vacancy which is already sanctioned. But if the initial entry itself is unauthorised and is not against any sanctioned vacancy, question of regularising the incumbent on such a non existing vacancy would never survive for consideration and even if such purported regularisation or confirmation is given it would be an exercise in futility. It would amount to decorating a still born baby" it follows from this judgement that if the initial entry was authorised then appointees on adhoc basis against an available vacancy may be validly considered for regularisation. In the case of *Subedar Singh (Supra)* the claim for regularisation was turned down because the appointments made were not in consonance with the statutory rules. In the case of *Dr. Meera Massey* (Supra) the Supreme Court was dealing with adhoc appointment of teacher in an University and in the context of need for maintaining standard of teaching in Universities the need to adhere to the laws of the Universities viz. Act, statutes and ordinances was highlighted in paragraph 27 of the judgement and it was further observed that for regularisation to the post of teachers in Universities a law must be prescribed certainly not on parity with the general principle of law of industrial workmen or class-IV employees or the casual worker or daily worker. In the case of *State of M.P.* vs. *Dharambir* (Supra) the concerned employee wanted his adhoc promotion to be treated as regular promotion for obstructing regular promotion process initiated on the basis of recruitment rules. In that context the court held that the nature of appointment will not change with

passage of time. A discussion of above case laws makes the legal position clear that claim for regularisation will not be allowed by courts by ignoring statutory provisions or rules and even if regularisation has been allowed, as in the case of *Ashwani Kumar*, it will be of no consequence if the initial entry in the service was unauthorised and not against existing vacancies. From paragraph 13 of the judgement in the case of *Ashwani Kumar* it is further clear the regularisation is possible in two contingencies. Firstly, if against clear vacancies appointments are made on adhoc basis or daily wage basis by a competent authority and are continued from time to time for a long period of time and their services are otherwise required by the institution, but for regularisation in such a case the initial entry of such employee against available vacancy should have been in accordance with rules and regulations governing such entry. The second type of situation for regularisation would be when the initial entry against an available vacancy may have suffered from some flaw in the procedural exercise though the person appointing is competent to appoint and has otherwise followed due procedure for such recruitment. In such a situation the procedural flaw may be waived.

In view of such settled law and the facts of this case it is found that petitioners entry into service on adhoc/daily wage basis was as per provisions in the rule governing such temporary entry and by a competent authority. It is not the case of respondents that there were no vacancies. It is also not disputed that their services were continued from time to time. Their services were regularised when the Bank failed to fill up the vacancies in a regular manner. Hence, in such facts the contention of learned counsel for the respondents cannot be accepted that the regularisation of petitioners services is of no consequence and should be ignored even after a lapse of long years.

On the basis of undisputed pleadings noticed earlier the petitioners have also succeeded in showing that some later appointed similarly situated employees of the Bank have been regularised in service on account of orders passed by this court in various writ petitions. For that reason also the petitioners deserve to be continued in service in view of Articles 14 and 16 of the Constitution of India. The respondents have not pleaded that action is being contemplated against such other employees and although the orders of this court have not been produced but since regularisation has been made on account of orders of this

court hence it may not be open for the respondents to reopen the cases of those employees who were regularised in view of different orders of this court.

There is yet another aspect in favour of the petitioners which may be noticed in brief. The secretary of the concerned department who was one of the members of the first enquiry committee was also present as a member of the Board of Directors in the meeting in which decision was taken for regularisation of petitioners services. On that basis it was submitted on behalf of the petitioners that the representative of the government had taken no action against such decision either himself or through the Registrar, Co-operative Societies and hence, any defect on account of earlier ban must be deemed to have been waived and such facts demonstrate acquiescence to the decision for regularisation of old temporary employees like the petitioners. For this purpose reliance has been placed upon AIR, 1977, SC, 112 *(Nayagarh Co-operative Central Bank* vs. *Narain)*. The said judgement of the Supreme Court clearly helps the case of the petitioners more so because it has been noticed that no statutory provisions or rules were violated either at the time of initial entry of the petitioners or at the time of their regularisation on the basis of such entry.

So far as some individual shortcoming like overage in case of some of the petitioners is concerned, these calculations appear to have been made on the basis of rules introduced subsequently as there are no such requirements in the rules approved by the Registrar, Co-operative Societies, Bihar in the year, 1970. Further, such shortcomings can be waived by the employer in appropriate cases and it will not be proper to permit the respondents to raise such issues with regard to appointments made more than 19 years ago. Any such probe after so many years would be unfair and unreasonable. Further, equity as held earlier would also be available in aid of the petitioners.

For all the aforesaid reasons the impugned orders of termination of petitioners services are found to be illegal, arbitrary and against equity. Hence, they are quashed. The writ applications are allowed and respondents are directed to treat the petitioners in continuous service with all consequential benefits.

In the facts of the case, there shall be no order as to costs.

R.D. *Applications allowed*

CIVIL WRIT JURISDICTION

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

2001
June, 20.

*Kumud Ranjan & anr.**

v.

Munger Kshetriya Gramin Bank & ors.

Promotion—on the basis of seniority-cum-merit, whether persons having minimum merit, being senior could be entitled to be promoted—respondents directed to consider as to whether the petitioners are entitled to restoration of their seniority, if on the basis of 'seniority-cum-merit' the petitioners were fit to be promoted in the same transaction.

Held, that after National Bank for Agricultural and Rural Development, hereinafter referred to as the NABARD, issued revised guidelines for promotions in Regional Rural Bank on 31.12.1984 which was adopted by the Board of Directors of the Respondents Bank on 30-1-1987 circulated on 10.2.1987, the cases for promotion of petitioners had to be considered in accordance with those guidelines.

Held, further, that denial of promotion to the petitioners based as it was on comparative assessment of the merit of the persons concerned, cannot be said to be in accordance with law. The posts of Field Supervisors and Officer/Branch Manager being 'non-selection posts', selection was meant for a limited purpose to find out if the person possessed minimum merit, the purpose was not to make a comparative evaluation of merit and in that process passover the senior on the ground that his junior possessed more merit even though the senior possessed the minimum merit. The non-promotion of the petitioners being on the basis of merit, seniority taking the back seat, the decision in making promotions were not in accordance with law.

Held, also, that the respondents are directed to consider as to whether the petitioners are entitled to restoration of their seniority. If on the correct application of the principle of 'seniority-cum-merit' the petitioners were fit for promotion in the same

* C.W.J.C. No. 5886 of 1987, 26 of 1988 and 5927 of 1990. In the matter of applications under Articles 226 and 227 of the Constitution of India.
In C.W.J.C. No. 26/1988....Ashwani Prakash Narayan....Petitioner.
In C.W.J.C. No. 5927/90....Birendra Prasad Keshri.....Petitioner.

transaction, there can be no justification not to restore their seniority from the due dates.

Case laws reviewed.

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

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

M/s Ramchandra Jha, Shivendra Kishore, R. N. Mukhopadhyay, Arun Kumar Gupta, Binod Kumar & Sanjeev Shanker for the petitioners.

Dr. Sada Nand Jha, Dr. Anil Upadhyaya & Mr. Kripanand Jha for the Bank.

S. N. Jha, J. The dispute in these three writ petitions relates to promotion in the Munger Kshetriya Gramin Bank and involves the interpretation of the 'seniority cum merit' rule in the context of the circulars and rules governing such promotion.

2. There are two petitioners in CWJC No 5886/87 and one each in CWJC No 26/88 and CWJC No 5927/90. The petitioners in CWJC Nos. 5886/87 and 5927/90 are Field Supervisors in the Munger Kshetriya Gramin Bank (hereinafter referred to as 'the Bank'). They are aggrieved by their supersession by respondents 4 to 11 in the matter of promotion in the Officer's cadre i.e. the post of Branch Manager. The petitioner in CWJC No 26/88 is Clerk-cum-Cashier. He was denied promotion to the post of Field Supervisor while as many as 30 persons were promoted to the post. Those 30 persons were initially impleaded as respondents 4 to 33 but their names were deleted at the time of admission on 20.1.88 because the petitioner did not seek cancellation of their promotion. The petitioners in all these cases in effect and substance seek direction to promote them to the posts of Officer/Field Supervisor, respectively, from the dates their juniors were promoted. It is relevant to mention here that petitioners of CWJC No 5886/87 and CWJC No 26/88 have since been promoted to the respective posts during pendency of the case. Their claim thus now is confined to seniority with those who were promoted earlier. It is not known if petitioner of CWJC No 5927/90 has also been promoted in the meantime.

3. The case of the petitioners of CWJC No 5886/87 is somewhat different from that of the other petitioners. It is therefore appropriate to separately state their case. According to them, in

terms of Clause 13 of the Staff Service Regulations 1980 seniority in a particular grade or scale is reckoned with reference to the date of appointment in that grade or scale. Thus having been appointed and also confirmed earlier than the respondents they were to be treated as senior to them. They in fact were shown above the respondents in the seniority list of Field Supervisors. By virtue of their seniority they were entitled to promotion to the post of Officer in terms of the Ad Hoc Promotion Policy of the Bank contained in its circular dated 30.11.84 which envisaged promotion to eligible employees on the basis of seniority; however on 10.2.87 the Bank issued fresh guidelines as per which promotion was to be made on the basis of seniority cum merit. The case of the petitioners is that this was done without previous sanction of the Government of India and without consulting the Sponsor Bank viz United Commercial Bank and the Reserve Bank of India. The petitioners contend that there were as many as 24 vacancies - in the post of Officer and had the criterion not been changed, they would have been promoted by virtue of their seniority and eligibility but in view of the guidelines, which was given retrospective effect from 31.12.84, promotion was denied to them while respondents 4 to 11, admittedly junior to them, were promoted. It is contended that the promotion rules cannot be amended with a retrospective effect. The grievance of these petitioners as made out in the writ petition is devoid of any substance.

4. Before considering the case of the petitioners it seems appropriate to make few introductory remarks about Regional Rural (Kshetriya Gramin) Banks. These banks have been established under the provisions of the Regional Rural Banks Act, 1976 (hereinafter referred to as 'the Act'), enacted with a view to develop the rural economy by providing credit and other facilities for the development of agriculture, trade, commerce, industry and other productive activities. Section 3 of the Act empowers the Central Government to establish by notification one or more regional rural banks in a State or Union Territory having area of operation within the specified local limits. Section 8 of the Act provides that superintendence, direction and management of the affairs and business of the Regional Rural Banks shall vest in the Board of Directors. Section 17 provides that the Bank may appoint such number of officers and other employees as may be necessary or desirable in such manner as may be prescribed for the efficient performance of its functions and determine the terms and conditions

of their appointment and service. Section 24 lays down that in the discharge of its functions the Regional Rural Bank shall be guided by such directions in regard to matters of policy involving public interest as the Central Government may after consultation with the National Bank for Agricultural and Rural Development (NABARD) give. Under Section 29 of the Act the Central Government has been empowered to make rules after consultation with the NABARD and Sponsor Bank, for carrying out the provisions of the Act. Clause (ba) of Sub-section (2) of Section 29, which was inserted by the Regional Rural Banks (Amendment) Act 1987, relates to the manner in which officers and other employees of the Regional Rural Banks shall be appointed. Under Section 30 the Board of Directors of the Regional Rural Bank also has been empowered to make regulation not consistent with the Act or the rules made thereunder, after consultation with the sponsor Bank and NABARD and with previous sanction of the Central Government, for giving effect to the provisions of the Act.

5. Now adverting to the case of the petitioners (in CWJC No 5886/87) it is apt to mention that the Staff Service Regulations 1980 framed under Section 30 of the Act, did not contain any guideline for promotion. Clause 14 merely stated that "all appointments and promotions shall be made at the discretion of the Bank and no officer or employee shall have a right to be appointed or promoted to any particular post or grade". Pending issuance of the Guidelines regarding promotion policy in the Regional Rural Banks by the Government of India, an ad hoc promotion policy was framed for promotion of Field Assistant/ Supervisor and Clerk cum Cashier/Typist of the Bank vide circular dated 30.11.84 stating as under :-

> "It may please be noted that the policy so framed by the Board is purely temporary and shall continue to be in operation till any further alteration/addition is made in the same or withdrawn by the Bank or a regular policy is formulated by the Government of India and adopted by the Bank in this regard."

The said circular laid down qualifications/eligibility for promotion of Field Assistant/Field Supervisor to the Officer's grade and stipulated :

> "(a) Taking into account the assessed vacancy and eligibility of staff for promotion to the Officer and Field Supervisor cadre three times the number of vacancies

persons from the seniority list will be considered and the panel prepared by the committee constituted by the Board for the purpose be placed before the Board of Directors for approval.

(b) The minimum qualifying marks for being considered and inclusion in the panel for promotion would be 50% of the full marks for assesment/appraisal by the Chairman."

It appears that soon after issuance of the said circular by the Bank, which apparently was pursuant to the directives of the NABARD, a circular was issued by the NABARD on 31.12.84 stating as under :-

"With a view to streamlining the procedures for filling up the vacancies in the Regional Rural Banks and to bring about uniformity in the same, the Government of India in consultation with the National Bank for Agriculture and Rural Development has approved a set of guidelines to be followed in the recruitment of staff on the posts of Junior Clerk cum Cashier, Senior Clerk cum Cashier, Field Supervisor and Officer. A copy of the detailed guidelines is herewith enclosed for information.

As you are aware these guidelines will have to be given the shape of service regulation. Draft regulations based on these are being framed and will be circulated for adoption by the Board of Directors of the individual Banks. In the meantime, to facilitate the work relating to filling up of these vacancies which exist in large number in most of the banks, these guidelines are being issued to enable the banks to make them the basis for necessary advance action."

By letter dated 22.2.85 the NABARD informed the Chairmen of all Regional Rural Banks that with the issuance of circular dated 31.12.84 (Supra) all ad hoc promotion policies prevailing in different Regional Rural Banks stand superseded with effect from the date of issuance of the guidelines contained in that circular and, therefore, they were required to strictly adhere to these guidelines for effecting any promotion in the concerned banks. Consequential circular was issued by the respondent Bank on 20.5.85, giving reference to the above circular of the NABARD dated 31.12.84, to the effect "Our Circular no. HO/Cir/31/84

dated 30.11.84 will no longer be operative and stands superseded". By another letter dated 8.5.85 issued in the meantime the NABARD advised the Chairmen of all Regional Rural Banks to follow the guidelines as contained in circular dated 31.12.84 for the purpose of recruitment and promotion of staffs. Similar directive was issued again on 7.4.86. On 20.11.86 the NABARD advised the Chairmen of different Regional Rural Banks, after consulting the Government of India, that the guidelines contained in circular dated 31.12.84 should be formally adopted by the Board of Directors of the Regional Rural Banks in a legally convened meeting immediately. The Board of Directors of the respondent Bank accordingly in the 60th meeting of the Board held on 30.1.87 adopted the guidelines stating that "the same will be considered to be in operation since that date". The said guidelines were thereafter formally circulated by the respondent Bank on 10.2.87 as Circular No. HO/Cir/03/87 dated 10.2.87 impugned in this case.

6. It is thus not correct to say that circular dated 10.2.87 has been given retrospective effect. As noticed above, the Ad Hoc Promotion Policy was framed as a temporary measure "to continue to be in operation till any further alteration/addition is made in the same by the Bank or a regular policy is formulated by the Government of India". Within a month of the issuance of the said ad hoc promotion policy the NABARD issued revised guidelines on 31.12.84 with a direction to the Regional Rural Banks to strictly adhere to those guidelines clarifying that all ad hoc promotion policies prevailing in different Regional Rural Banks stand superseded with effect from the date of issuance of the guidelines. what the Board of Directors of the respondent Bank did on 30.1.87 was to formally adopt the said guidelines pursuant to the advice/directive of the NABARD contained in letter dated 20.11.86. The circular dated 10.2.87 was mere communication of the said decision of the Board of Directors. Those guidelines had come into existence on 31.12.84 itself, the Board of Directors of the respondent Bank simply observed the formality of adopting them. The grievance that the guidelines have been given retrospective effect from an earlier date viz. 31.12.84 therefore does not have any substance.

7. The question as to the nature and effect of the circular/ guidelines issued by the NABARD came up for consideration by a Division Bench of this court in the case of *Radhey Shyam Lal* Vrs. *Vaishali Kshetriya Gramin Bank* (CWJC No 933/88 and

analogous). The Court held that the Central Government, the Sponsor Bank and the NABARD have definite role to play in the affairs of the Regional Rural Banks and they are empowered to issue direction to the banks from time to time which are binding to them. The decision was upheld by the Supreme Court in SLP (Civil) No 15040-41 of 1994. Reference may also be made to the case of *Jagathi Gowda* Vrs *Chairman, Cauveri Gramin Bank (1).*

8. Even if the plea of retrospectivity urged by the petitioners had any substance, on the date the Selection Committee considered their cases for promotion along with the respondents viz. on 3.12.87, the Board of Directors of the respondent Bank had already adopted the guidelines dated 31.12.84 pursuant to the advice/directive of the NABARD dated 20.11.86. Since the guidelines thus held the field on the day of consideration, clearly, the cases had to be considered as per the provisions contained therein.

9. It is not in dispute that no rule laying down the norms of promotion had been framed by the Central Government under Section 29 of the Act until 28.9.88 when the rules called the Regional Rural Banks (Appointment and Promotion of Officers and other Employees) Rules 1988 were notified. As a matter of fact the said rules were adopted by the Board of Directors of the respondent Bank only on 30.12.89. It is well settled that where there are no statutory rules on the particular subject it is open to the authority to issue instructions or circulars which are equally binding as the rules. In *B. N. Nagrajan* v. *State of Mysore (2)* it was observed that it was not obligatory under proviso to Article 309 of the constitution to make rules of recruitment etc., before a service can be constituted or a post created or filled. In the well known case of *Sant Ram Sharma* vrs *State of Rajasthan & ors* (3), the Supreme Court observed.

> "It is true that there is no specific provision in the Rules laying down the principle of promotion of junior or senior grade officers to selection grade posts. But that does not mean that till statutory rule are framed in this behalf the Government cannot issue administrative instructions regarding the principle to be followed in promotions of the officers concerned to selection grade posts. It is true that Government cannot amend or supersede statutory Rules by

(1) (1996) 9 S.C.C. 677.

(2) (1996) A.I.R. (S.C.) 1942.

(3) (1967) A.I.R. (S.C.) 1910.

administrative instructions, but if the rules are silent on any particular point Government can fill up the gaps and supplement the rules and issue instructions not inconsistent with the rules already framed."

10. Thus it was open to the NABARD in consultation with the Government of India to lay down the norms of promotion by way of circulars. The Staff Service Regulation, 1980 framed by the Board of Directors of the respondent Bank under Section 30 of the Act did not lay down any norms or criteria for promotion. The relevant Clause that "all appointments and promotions shall be at the discretion of the Bank" meant nothing in real terms. Apparently, the provision was too wide to be acted upon as the basis of promotion. The Ad Hoc Promotion Policy, as noticed above, was a temporary measure, framed to meet the growing need of a promotion policy, which was to continue till another policy is framed by the Government of India and adopted by the Bank. But within a month of the framing of the ad hoc promotion policy came the impugned guidelines dated 31.12.84. It is true that the Board of Directors of the respondent Bank formally adopted the guidelines only on 30.1.87; nonetheless in view of the injunction contained in the directives of the NABARD, even during the interregnum the said Ad Hoc Promotion Policy could not have been acted upon. Therefore even it be assumed that vacancies existed on the post of Officer/Branch Manager during that period; no promotion could have been given on the basis of such ad hoc promotion policy.

11. There is another aspect of the case of these petitioners. The relevant clause of the Ad Hoc Promotion Policy has been quoted above. From bare perusal thereof it would appear that though it did not specifically refer to consideration of merit of the persons concerned and all those who fulfilled the eligibility were to be considered on the basis of seniority, the fact that for promotion to the Officer's (Branch Officer) cadre three times the number of vacancies persons from the seniority list were to be considered and panel prepared from amongst them implies that such consideration or empanelment was not bereft of consideration of the merit. It is not that all eligible Field Supervisors were to be empanelled/promoted by virtue of their seniority, otherwise there was no question of considering persons three times the number of vacancy. Consideration of merit thus was implicit in consideration for promotion even as per that Policy.

12. Be that as it may, after the NABARD issued revised guidelines on 31.12.84 which was adopted by the Board of Directors of the respondent Bank on 30.1.87 circulated on 10.2.87, the cases for promotion had to be considered in accordance with those guidelines. The question which would thus arise for consideration is whether the impugned promotion of the respondents was in accordance with those guidelines. Though it is not the thrust of the petitioners' case, I consider it proper to consider the grievance from that angle. This question is the common question which is involved in other writ petitions too.

13. There is however one salient distinction between the other two writ petitions which I must point out. While the promotions impugned in CWJC No 26/88 were made at the time when the said guidelines dated 31.12.84/10.2.87 were in force, by the time the promotions impugned in CWJC No 5927/90 were granted the statutory rules viz Regional Rural Banks (Appointment and Promotion of Officers and other Employees) Rules 1988 had come into existence. However, notwithstanding that the two sets of promotions were to be governed by different provisions, the common feature of the guidelines and rules is that both of them envisaged promotion on the basis of seniority cum merit. The common question in all these cases thus is whether the impugned promotions, made purportedly in the light of provisions of the guidelines/rules, was really on the basis of seniority-cum-merit as provided therein. This is the core issue involved in these cases.

14. At this stage the relevant provisions of the guidelines/ circular dated 31.12.84 may be noticed. Relating to the post of Field Supervisors, to which CWJC No. 26/88, the circular laid down :—

"Recruitment to 50% posts of Field Supervisors will be by direct recruitment in the open market, and 50% posts will be filled by promotion from amongst the Senior Clerk-cum-Cashier on the basis of seniority-cum-merit. Other terms and conditions will be as follows :

(a) Source of Recruitment : (i) 50% by direct recruitment from the open market.

(ii) 50% by promotion from amongst Senior Clerk-cum-Cashier.

(b) Qualifications/ Eligibility :	(i)	*For Direct Recruitment*
		... ...
	(ii)	*For Promotion :*
		(a) Minimum four years service as Senior Clerk-cum-Cashier.
		OR
	(b)	Six years service as Junior Clerk-cum-Cashier in RRBs which do not have posts of Senior Clerk-cum-Cashier.

The provisions as regards the post of Officer/Branch Manager were as follows.

"50% of the vacancies of the Officers are to be filled by direct recruitment in the open market and the balance 50% by promotion from amongst Field Supervisors. Promotions will be on the principle of seniority-cum-merit. The other terms and conditions are as given below :

(a) Source of Recruitment :	(i)	By promotion– 50%
	(ii)	By direct recruitment from open market–50%
(b) Qualifications/ 'Eligibility :	(i)	*For Direct Recruitment :*
		... ...
	(ii)	*For Promotion :*
		Five years service as Field Supervisor.
		The above condition of minimum service is relaxable as stated below :
		... ...

15. The provisions of the Regional Rural Banks (Appointment and Promotioin of the Officers and other Employees) Rules 1988 may also be noticed as follows. Whereas the promotion impugned in CWJC Nos. 5886/87 and 26/88 were made when the guidelines/ circular dated 31.12.89 was in vogue, by the times the promotions in CWJC No. 5927/90 were made the aforesaid Rules had come into being with effect from 28.9.88. The Board of the direction of the respondent Bank formally adopted those Rules on 6.12.89/ 30.12.89. The relevant provisions as regards the post of Officer/

Branch Manager (which post alone is subject matter of CWJC No. 5927/90) in the said Rules are as follows.

"6. *Officers*

(a) Source of recruitment :	(i)	Fifty per cent by direct recruitment from open market.
	(ii)	Fifty per cent by promotion from amongst confirmed Field Supervisors on the principle of seniority-cum-merit.
(b) Qualification and eligibility :	(i)	*For direct recruitment* ... ...
	(ii)	*For promotions* Confirmed Field Supervisor with a minimum of five years service as Field Supervisor. The above condition of minimum service is relaxable as stated below : ... ...
(c) Mode of selection :	(i)	Written test and interview for direct recruitment.
	(ii)	Interview and assessment of the performance reports for preceding three years period, for promotion."

16. Before adverting to the interpretation of the clause 'seniority-cum-merit' occurring in both circular and Rules it would be appropriate to briefly notice the relevant facts of CWJC 26/88 and 5927/90. In CWJC No. 26/88 the sole petitioner was appointed on the post of Clerk-cum-Cashier on 6.6.80. On 12.6.80 he joined the post. On completion of one year's period of probation he was confirmed on 12.6.81. In the seniority list of Clerks-cum-Cashiers he was shown at serial no. 18. On 25.6.86 he along with those placed at serial nos. 17 and 19 to 39 were called to appear before three-member Selection Committee on 18.9.86. On 1.10.86 persons at serial nos. 17 and 19 to 30 were promoted. The petitioner was

denied promotion. He claims to have filed representations on 5.10.86 and 23.10.86. On 19.11.97 he was again called for interview to be held on 1.12.87. Along with him those who were called earlier at serial nos. 31 to 39 and others upto serial no. 60 were also called. On 1.12.87 a five-member Selection Committee took the interview. While the juniors were promoted, the petitioner was again denied promotion. At this stage he came to this Court in the present writ petition.

17. In CWJC No. 5927/90 the sole petitioner was appointed on the post of Field Supervisor along with respondent nos. 4 and 5 on 1.3.82. They were confirmed in due course on completion of two years' probation. Respondent nos. 6 to 11 who were earlier appointed on the post of Clerk-cum-Cashier during 1979-80 were promoted as Field Supervisor later during 1983-84. After the rules i.e. Regional Rural Banks (Appointment and Promotion of Officers and other employees) Rules, 1988 came into effect by reason of adoption thereof by the Board of Directors of the respondent-Bank on 6.12.89, circulated on 30.12.89, the Board in its meeting on 31.1.90 constituted Selection Committee for promotion to the post of Officer/Branch Manager from amongst the Field Supervisors. The petitioner and others were called for interview vide letter dated 11.4.90, on 1.5.90. At the end of the process on 31.8.90 while respondent nos. 4 to 11 were promoted, the petitioner was denied promotion.

18. Counsel for the petitioners in CWJC Nos. 26/88 and 5927/90, inter alia, submitted that the impugned promotions were given on the basis of assessment of merit which is contrary to the rule of 'seniority-cum-merit' and, therefore, they are not in accordance with the guidelines/circulars dated 31.12.84 and/or the 1988 Rules. They relied on a decision of the Supreme Court in *B.V. Sivaiah & ors.* v. *K. Addanki Babu & ors.* (1) and three decisions of this Court in *D.P.Singh* v. *Ranchi Kshetriya Gramin Bank* (2) *Shyam Bihari Pandey* v. *Bhojpur Rohtas Gramin Bank* (3) *Ranchi Kshetriya Gramin Bank* v. *D.P. Singh.* (4), the last one being by a Full Bench. On behalf of the respondent-Bank it was submitted that promotions were made in accordance with the circulars issued from time to time by the NABARD, which are binding on the bank. Where there are no statutory rules or the

(1) (1998) 6 S.C.C. 720.
(2) (1992) 1 P.L.J.R. 409.
(3) (1997) 1 P.L.J.R. 93.
(4) (2000) 1 P.L.J.R. 251. (F.B.)

rules are silent, it was submitted, it is open to the Government or other authorities, as the case may be to issue circulars or instructions which are equally binding, as held in the case of *Sant Ram Sharma* v. *State of Rajasthan* (supra). It was contended that no employee can claim a right to be promoted, he has merely right to be considered for promotion and where promotion is given on consideration of 'seniority-cum-merit' he cannot claim such promotion as a matter of right by virtue of seniority alone. Reliance in support of the contention was placed on *State of Mysore* v. *Syed Mahmood* (1) and *State of Mysore* v. *C.R. Seshadri* (2). Reliance was also placed on *State Bank of India* v. Mohd. Mynuddin (3) *Chandra Gupta* v. *Secretary, Government of India* (4) and finally *Jagathigowda* v. *Chairman, Cauvery Gramin Bank* (5).

19. The concept of 'seniority-cum-merit' as criterion of promotion has fallen for consideration a number of times by the Supreme Court and other courts. In *Sant Ram Sharma* v. *State of Rajasthan* (supra) the Supreme Court observed that principle of seniority ensures absolute objectivity by requiring all promotions to be made entirely on the ground of seniority and that if a post falls vacant it is filled by the person who has served the longest in the post immediately below. But the trouble with the seniority system is that it is so objective that it fails to take any account of personal merit. It is fair to every official except the best ones; an official has nothing to win or lose provided he does not actually become so inefficient that disciplinary action has to be taken against him. The Court expressed the view that there should be correct balance between seniority and merit in a proper promotion-policy. The criterion of 'seniority-cum-merit' and 'merit-cum-seniority' which takes into account seniority as well as merit seems to achieve such a balance. While the principle of 'merit-cum-seniority' lays greater emphasis on merit or ability-seniority playing less significant role–to be given weight only when merit or ability are approximately equal, the criterion of seniority-cum-merit has greater emphasis on seniority.

20. It is true that no person can claim promotion as a matter of right, and even where the promotion is guided by the

(1) (1968) AIR. (S.C.) 1113.
(2) (1974) AIR (S.C.) 460.
(3) (1987) AIR (S.C.) 1889.
(4) (1995) 1 S.C.C. 23.
(5) (1996) 9 S.C.C. 677.

principle of seniority-cum-merit he cannot claim promotion as of right by virtue of seniority alone. As clarified in *State of Mysore* v. *Syed Mahmood* (supra) "if he is found unfit to discharge the duties of the higher post, he may be passed over and an officer junior to him may be promoted". The moot question is as to what weight is to be given to the two factors, namely, seniority and merit where promotion is made on the principle of seniority cum merit. The Supreme Court explained the principle in the aforesaid case to mean "seniority subject to the fitness of the candidate to discharge the duties of the post from amongst persons eligible for promotion". In *State of Kerala* v. *N.M. Thomas* (1), the Supreme Court observed,

> "The principle of equality is applicable to employment at all stages and in all respects, namely, initial recruitment promotion, retirement, payment of pension and gratuity. With regard to promotion the normal principles are either merit cum seniority or seniority cum merit. Seniority-cum-merit means that given the minimum necessary merit requisite for efficiency of administration, the senior though the less meritorious shall have priority. This will not violate Articles 14, 16(1) and 16(2)."

21. Thus, where a person possesses the merit requisite for the higher post he cannot be denied promotion on the ground that other persons junior to him possessed better merit. In other words, the principle of seniority-cum-merit does not envisage comparative assessment of merit. This really is the core point of distinction between 'seniority-cum-merit' and 'merit-cum-seniority'. Whereas comparative assessment of merit is required to be made in applying the criterion of merit-cum-seniority, for seniority-cum-merit no such comparative assessment is required.

22. Before proceeding further on this topic it would be proper to refer to the criteria actually followed in giving impugned promotions in CWJC No. 26/88 and 5927/90. In CWJC No. 5886/87 there are no pleadings on the point by either party. The grievance of the petitioners rests on different premise altogether which I have already dealt with above. In the absence of foundational facts regarding the fixation of criterion i.e. allocation of marks inter se between seniority and other factors the respondents have also not stated facts in this regard. So far as CWJC No. 26/88 is concerned, on 10.9.87 the Board of Directors

(1) (1976) A.I.R. (S.C.) 490.

laid down norms by allocating marks under different heads as the criteria for promotion as under :—

(1)	Seniority	—	40 marks @ 4 marks for each year of completed service.
(2)	Educational Qualifications—		
	2 marks for Graduation		
	2 marks for B.A. (Hons.) in Economics, B. Com., B.Sc. and B.Sc. (Agri)		
	2 marks for CAIIB—		
	(i) 2 marks for CAIIB		
	(ii) 2 marks for Post Graduation		
	Sub-total	—	10
(3)	Assessment report Aggregate of at least 3 years	—	20
(4)	Interview	—	30
	Grand total	—	100

In CWJC No. 5927/90 the allocation of marks fixed by the Board of Directors in its 79th meeting on 7.1.90 was as follows.

(1)	Experience/seniority	—	50 marks @ 4 marks for each completed year of service or one mark for completed quarter of year.
(2)	Higher qualification	—	Maximum 5
	Intermediate	—	2
	Graduation	—	2
	Post Graduation/LLB	—	1
	Sub total	—	5
(3)	Performance Appraisal (Max - 15)		
	Excellent	—	5 marks per year
	Very good	—	3 marks per year
	Good	—	1 mark per year
(4)	Interview	—	30
	Grand total	—	100

It is on the basis of evaluation in the abovesaid manner that the petitioners were awarded less marks than the respondents and denied promotion. It is to be considered whether the inter se allocation of marks i.e. criteria/norms for consideration of the cases of the petitioners and others was in accordance with the principle of seniority-cum-merit.

23. In the cases of *D.P. Singh* v. *Ranchi Kshetriya Gramin Bank*. (supra) *Shyam Bihari Pandey* v. *Bhojpur Rohtas Gramin Bank* (supra) and *Ranchi Kshetriya Gramin Bank* v. *D.P. Singh* (supra) promotions had been made on the basis of more or less similar criteria and inter se allocation of marks which were not approved by this Court. In the case of *D.P. Singh* the allocation of marks was as follows.

(1)	Seniority	— 40 marks
(2)	Educational Qualifications	— 6 marks
(3)	Assessment of performance (of least 3 years)	— 24 marks
(4)	Interview	— 30 marks
	Total	— 100 marks

In the case of Shyam Bihari Pandey the allocation was as follows.

(1)	Service records	— 30 marks
(2)	Performance	— 30 marks
(3)	Interview	— 40 marks

The Full Bench decision, 2000 (1) PLJR 251 arose from the decision of the learned Single Judge in *D.P. Singh's* case. That was a case of promotion to the post of Area Manager/Senior Manager, the provisions in respect of which are contained in para 7 of the Second Schedule to the 1988 Rules and similar to those with respect to the post of Officer/Branch Manager contained in para 6 quoted above. The impugned decision of the Selection Committee was held to be based on the comparative assessment of merit and not in accordance with the principle of seniority-cum-merit i.e. in accordance with the guidelines/circulars dated 31.12.84. The Full Bench observed,

> "It is, therefore, evident that para 7(c) of the second schedule to the rules does not, in my opinion, lend support to the contention that criterion of seniority-cum-merit envisaged by the rule making authority involves assessment to comparative merit for the purpose of promotion. The word 'selection' has been used in the sense of selecting an officer for promotion on the basis of criterion of seniority-cum-merit. The requirement that such selection shall be made on the basis of interview and assessment of performance reports for the preceding three years is consistent with the criterion of seniority-cum-merit. The

said mode enables an assessment to be made for the minimum necessary merit requisite for efficiency of administration and it cannot be construed as importing assessment of comparative merit of the officers eligible for promotion. It is well settled that service rule should provide reasonable promotional opportunity in every wing of public service to generate efficiency in service. I am, therefore, of the view that in the case of promotion on the basis of seniority-cum-merit, obtaining minimum percentage of marks in viva voce test cannot be a decisive factor for selection and such provision is arbitrary."

24. The decision of the Supreme Court in *B.V. Sivaiah & ors.* v. *K. Addanki Babu & ors.* (supra) in fact, in my opinion, settles the issue. The said decision was rendered on a group of appeals relating to different Regional Rural Banks, namely, Rayalaseema Grameen Bank, Pinakini Gramin Bank, Bastar Kshetriya Gramin Bank, Rewa Sidhi Gramin Bank and Chhindwara-Seoni Kshetriya Gramin Bank. The allocation of marks in the case of Rayalaseema Grameen Bank was as under :

"(a)	Seniority	—	34 marks (0.75 mark for each completed month of service over and above the minimum qualifying service)
(b)	Qualifications	—	10 marks (minimum qualification applicable to the cadre shall not be reckoned)
	Postgraduation	—	3 marks
	Double graduation (like BL, LL. B., B. Ed.)	—	1 mark
	Any Diploma/s	—	2 marks
	CAIIB Part I	—	2 marks
	CAIIB Part II	—	2 marks
(c)	Interview	—	20 marks
(d)	Performance	—	56 marks
	Total	—	120 marks

The allocation of marks in the case of Pinakini Grameen Bank was as follows :

"(a)	Seniority	—	55 marks
	Officers (Managers) who		

have completed 8 years of service as per SSR of the Bank

(b) For passing CAIIB Part I — 2 marks
CAIIB Part II — 3 marks

(c) Performance — 25 marks

(d) Interview — 15 marks

Total — 100 marks

The allocation of marks in the case of Rewa Sidhi Bank was as under :—

"(a) Seniority — 15 marks

(b) Job responsibility — 12 marks

(c) Placement/Posting mobility — 8 marks

(d) Performance — 40 marks

(e) Interview — 25 marks

25. The Supreme Court held that the criterion of selection in all the cases was not in accordance with the principles of seniority-cum-merit. Dealing with different cases separately the Court observed.

> "It is not a case where minimum qualifying marks are prescribed for assessment of performance and merit and those who secure the prescribed minimum qualifying marks are selected for promotion on the basis of seniority. In the circumstances, it must be held that the High Court has rightly come to the conclusion that the mode of selection that was in fact employed was contrary to the principle of "seniority-cum-merit" laid down in the Rules.
>
> ... ...
>
> The said circular did not prescribe minimum qualifying marks for assessment of performance and merit on the basis of which an officer would be considered for being selected and, as pointed out by the High Court, the selection was made of only those officers who secured the highest number of marks amongst the eligible officers. In the circumstances, the High Court, in our view, has rightly held that this method of selection was contrary to the principle

of "seniority-cum-merit" and it virtually amounts to the application of the principle of "merit-cum-seniority".

... ...

The criterion of the promotion policy cannot be regarded as being in consonance with the principle of "seniority-cum-merit" as prescribed under the Rules."

However, the promotion in the case of Chhindwara-Seoni Kshetriya Gramin Bank was upheld on the ground that those who secured the minimum qualifying marks were selected on the basis of merit-cum-seniority, the Court observed,

"On a perusal of the said documents, we find that 50 marks out of the total of 100 marks were prescribed as the minimum qualifying marks for interview and only those who had obtained the qualifying marks in interview were selected for promotion on the basis of seniority. It was, therefore, a case where a minimum standard was prescribed for assessing the merit of the candidates and those who fulfilled the said minimum standard were selected for promotion on the basis of seniority. In the circumstances, it cannot be said that the selection has not been made in accordance with the principle of "seniority-cum-merit".

26. As a matter of fact, the scope of seniority-cum-merit rule was explained by the NABARD vide letter no. IDD/RRB No. C-78/316 (Gen)/86-88 dated 1.12.87 and the impugned promotions do not seem to be in accordance with the NABARD'S understanding of the rule. It would be useful to quote the relevant part of the letter as under :

"Please refer to our circular letter IDD.RRB. No. C-62/316 (Gen)/84-85 dated 31 December 1984 regarding appointments to the posts of Area Managers and Senior Managers. The matter has been examined by us in consultation with Government of India and have to advise that the posts of Area Managers/Senior Managers are promotional posts to be filled up by 100% promotion from only one source and non-selection rule of seniority-cum-merit has to be applied. This rule envisages promotion by seniority with the due considerations to minimum merit/ fitness prescribed. Fitness implies that there is nothing against an officer; no disciplinary action is pending against him and none is contemplated. The officer has neither been

reprimanded nor any adverse remarks have been conveyed to him in the reasonable recent past. The promotions are meant to be made on the abovementioned considerations only. In other words, if a Manager satisfies the qualifications and eligibility criteria and there is nothing adverse against him, due promotion should not be denied to him. Similar procedure may be followed in the case of promotions to Supervisor's and Manager's posts."

27. The decision in the case of *Jagathigowda* v. *Chairman, Cauvery Gramin Bank*, (supra) relied upon by the counsel for the respondent-Bank at the first instance seems to support the case of the bank. However, from the facts stated in the judgment it appears that the respondents had been promoted on appraisal of their performance on the basis of marks awarded in the interview. The performance of appraisal comprised of dimension of work, general intelligence, job knowledge, initiative and resourcefulness etc. The service record of the officers who assailed the promotion before the High Court was admittedly adverse. The High Court had set aside the promotion holding that the service records of the recent past should have been taken into consideration and in case there was nothing against the officer he should not be denied promotion on the ground that some other person junior to him was more meritorious. Reversing the judgment of the High Court the Supreme Court referred to the circular of the NABARD dated 7.4.86 which provided that "selection of the eligible candidates should be based on performance of the respective candidates in the bank". The decision in the above case was noticed by the Supreme Court in the case of *B.V. Sivaiah* v. *K. Addanki Babu* (supra) the Court observed.

"This judgment, in our opinion, does not make a departure from the law laid down by this Court in the earlier judgments explaining the criterion of "seniority-cum-merit" because in this case, the selection had been made by taking into account the seniority as well as performance and performance was appraised by assigning marks on the basis of performance appraisal and interview. Those who secured 85 marks out of 150 marks were shortlisted for promotion, which shows that securing 85 marks out of 150 marks was treated as the minimum standard of merit for purposes of promotion and those who satisfied the said

minimum standard were selected for promotion on the basis of seniority."

28. The other decision relied on by counsel for the respondents viz. *State of Mysore* v. *C.R. Seshadri* (1) was also noticed in *B.V. Sivaiah* v. *K. Addanki Babu*.(supra) In that case a two-Judge Bench of the Supreme Court had observed.

> "However, if the criterion for promotion is one of seniority-cum-merit, comparative merit may have to be assessed, if length of service is equal, or an outstanding junior is available for promotion".

A larger Bench of three-Judges in the case of *B.V. Sivaiah* v. *K. Addanki Babu* (supra) did not approve these observations. It stated.

> "In the observations on which reliance has been placed by the learned counsel for the rural banks and the promoted officers, the distinction between "seniority cum merit" and "merit cum seniority" has been obliterated and both the criteria have been equated. Since comparative assessment of merit is required to be made while applying the criterion of "merit-cum-seniority : and for "seniority-cum-merit" no such comparative assessment is required, the aforementioned observations in the case of *C.R. Sheshadri* on which reliance has been placed cannot be regarded as correctly reflecting as to what is meant by the criterion of "seniority-cum-merit".

The decision in *State of Mysore* v. *C.R. Seshadri* (supra) also therefore is of no help to the respondents.

29. The facts of *State Bank of India* v. *Mohd. Mynuddin* (2) another case relied upon by the counsel for the respondents, were different. That was a case of promotion to Middle Management Grade III in the State Bank of India. The promotion depended not merely upon the eligibility but on merit and the impugned promotion was accorded only after a proper evaluation of the service records, performance appraisal and the potentiality of the officer concerned to assume higher responsibilities.

30. In the above premises, the denial of promotion to the petitioners based as it was on comparative assessment of the merit of the persons concerned, cannot be said to be in accordance with law. The posts of Field Supervisor and Officer/Branch Manager

(1) (1974) A.I.R. (S.C.) 460

(2) (1987) A.I.R. (S.C.) 1889.

being 'non-selection posts'. selection was meant for a limited purpose-to find out if the person possessed minimum merit. the purpose was not to make a comparative evaluation of merit and in that process pass over the senior on the ground that his junior possessed more merit even though the senior possessed the minimum merit. It is clear from the pleadings of the respondents in CWJC Nos. 26/88 and 5927/90 that the selection/non-selection was on the basis of the total marks secured by the candidates. that is to say, on the basis of comparative assessment of the merit. In CWJC No. 5886/87, though there are no specific pleadings, this much is clear that in that case too, selection or non-selection was on the basis of total marks. What the respondent-bank was supposed to do was to identify the eligible candidates by prescribing the minimum qualifying marks and to consider only those who got the qualifying marks, on the basis of seniority as was done, for example, in the case of *Chhindwara-Seoni Kshetriya Gramin Bank* vide pages 737-738 of (1998) 6 SCC 720. The non-promotion being on the basis of merit, seniority taking the back seat, I have no hesitation in holding that the decisions were not in accordance with law.

31. It was submitted on behalf of the Bank that the petitioners having subjected themselves to the process cannot challenge the validity of the criteria. Reliance was placed on an unreported judgment of the Supreme Court in the case of *Dr. Abdul Samad* v. *Shri Kant Prasad Shrivastava* (Civil Appeal nos. 2529-2530 of 1998). The principle is well known but has no application in the present case. Where the person participates in the selection process with knowledge of the ground of invalidity he cannot subsequently turn around and challenge it. In the cited case, as found by the Supreme Court, the writ petitioners had knowledge about the illegal constitution of the Selection Committee but took chance of selection. The Court accordingly held that the writ petition should not have been entertained by the High Court. In the present case, there is nothing to suggest that criterion was notified or the petitioners had otherwise come to know about it. The principle therefore has no application in these cases. The plea is thus rejected.

32. However, the impugned promotions were given more than a decade ago and meanwhile at least in two cases, viz., C.W.J.C. Nos. 5886/87 and 26/88 the petitioners have been promoted in the meantime. In the circumstances, it would not be

proper to interfere with the promotions already granted. In fact, as noted at the outset, in CWJC No. 26/88 the names of the persons concerned have been deleted as the petitioners had not sought its cancellation. Though it cannot be said with definiteness that petitioners would have been selected for promotion along with the respondents and others in the same transaction but considering that at least in two cases they have been promoted (it is not known whether the petitioner in the third case too has been promoted in the meantime) it seems appropriate to direct the respondents to consider as to whether the petitioners are entitled to restoration of seniority. If on correct application of the principle of 'seniority-cum-merit' in the light of what has been stated above, the petitioners were fit for promotion in the same transaction, there can be no justification not to restore their seniority from the due dates.

33. The case of *Chandra Gupta* v. *Secretary, Govt. of India* (1) relied upon by the counsel for the respondent-Bank, on the point of restoration of seniority, was completely different. The point for consideration in that case, inter alia, was where the basis of promotion is 'merit-cum-seniority' and the adverse remark on account of which the person was refused promotion earlier is subsequently expunged and he is granted promotion, whether he is entitled to restoration of seniority. The point was answered in the negative. The Supreme Court observed that the promotion could date back only if there are materials to show that after expunction of the remarks the service of the officer concerned was more meritorious than that of the officers superseding him.

34. In the result, these writ petitions are allowed. The respondent-bank is directed to consider the cases of the petitioners for promotion to the post of Field Officer and Officer/Branch Manager, as the case may be, from the due dates in accordance with law and in the light of this judgment. There will be no order as to costs.

I.P. Singh, J. I agree.

R.D. *Applications allowed.*

(1) (1995) 1 S.C.C. 23.

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