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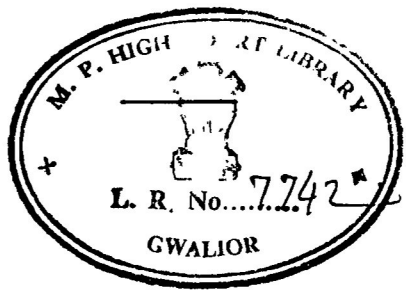

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A complaint must state all the facts which constitute the offence. Mere assertion or a vague allegation that an offence has been committed cannot be regarded as compliance with the letter or spirit of section 82 of the said Act. On such vague complaint the Labour Court has no power to take cognizance of the alleged offences.

Kanhaiyalal v. State. A. I. R. 1952 M. B. High Court Reports 285 ; *Purushottam Devji v. Emperor,* A. I. R. 1944 Bom. 247; *Jyantilal v. Emperor,* A. I. R. 1944 Bom. 139; Dr. N.G. *Chatterji v. Emperor,* A. I. R. 1946 All. 416 and *Rachpal Singh v. Rex,* A. I. R. 1949 Oudh. 66 ; referred to.

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Sitaram Hirachand Birla v. Yograjsingh, A. I. R. 1953 Bom. 293 ; *Sheo. Kumar v. V. G. Oak*, A. I. R. 1953 All. 633 ; distinguished.

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Malobi v. Gous Mohamad, I. L. R. [1948] Nag. 509; explained.
Mt. Krishna Dei v. Governor General in Council, A. I. R. [1950] All. 1.
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Rex. v. Williams Philips Exparte, (1914) 1 K. B. 608; *Gandhinagar Motor Transport Society v. State of Bombay*, A. I. R. 1954 Bom. 202; *Mannarghat Union Motor Services Ltd., v. Regional Transport Authority, Malabar*, A. I. R. 1953 Mad. 59; relied on.

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Parappa v. Nagamma, A. I. R. 1954 Mad. 576 (F.B.) ; not followed.

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William Tracks and Co. Ltd. v. State of Madras, A. I. R. 1955 Mad. 656; discussed and explained.

The word 'include' is a word of enlargement. It is generally used in definitions and interpretation clauses in order to enlarge the meaning of the words and phrases occurring in the body of the statute.

MESSRS BANSILAL *V.* THE COMMISSIONER OF SALES TAX, MADHYA BHARAT, GWALIOR, I. L. R. [1957] M. P. 75

Sales Tax Act, Madhya Bharat [1950] Section 8(1) (b) and (5)—Rebate—Time when it can be Claimed: The proper time for the assessee to claim rebate is when the tax is being actually determined by the assessing authority under section 8(I) (b) of Madhya Bharat Sales Tax Act or in an appeal against the assessment.

MESSRS RAMANLAL POONAMBHAI *V.* COMMISSIONER OF SALES TAX MADHYA BHARAT GOVERNMENT, I. L. R. [1957] M. P. 71

Sales Tax Act, Central Provinces and Berar (XXI of 1947), Section 2 (i) (a)—Quarrying and breaking of boulders into metal (Stones)—Amounts to manufacture—Person carrying on such business—Liable to assessment: The essence of all manufacture is the changing of one object into another for the purposes of making it marketable. Hence the process of quarrying and breaking of boulders into metal amounts to manufacture and a person carrying on such business is liable to be assessed under the Madhya Pradesh Sales Tax Act.

State of Madhya Pradesh v. Wasudeo, 1956 6 *S. T. C.* 30; *North Bengal Stores Ltd.; v. Board of Revenue Bengal, (1960)* 1 *S. T. C.* 157; *and kent v. Astley (1869) L.* R. 5 Q. B. 19; relied on.

G. R. KULKARNI *V.* THE STATE, I. L. R. [1957] M. P. 13

Sales Tax Act, Madhya Bharat, Rule 46—Power to Transfer—Not confined to any particular case pending before Sales Tax Officer—Can be exercised with respect to a class of cases then pending—Jurisdiction—Not conferred by submitting wrong return: The power to transfer conferred on the Commissioner by Rule 46 of the Sales Tax Rules is not confined to any particular case but can be exercised generally with respect to a class of cases which may then be pending before a Sales Tax Officer, but there cannot be a general order for transfer. The assessee cannot by submitting a wrong return confer jurisdiction on an officer who does not possess it or deprive an officer of the jurisdiction which is vested in him under orders of the Commissioner.

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MESSRS KHEMCHAND RAJMAL *V.* THE CHIEF SECRETARY, MADHYA BHARAT GOVERNMENT, I. L. R. (1957) M. P. 92

Suit by licensees against servient owner restraining him from interfering with their right—Maintainability: *Vide* Easement Act, Indian, section 54 1

Suit by Partners of firm in their names—Partner dying—Legal representative not brought on record—Suit abates wholly: *Vide* Civil Procedure Code, Order XXX Rule 4 21

Suit for partition by a widow of deceased coparcener—Property obtained by her after partition—Does not become separate property of her deceased husband—Widow dying—Property reverts to coparcenary—Widow not created a coparcener: *Vide* Hindu Women's Right to Property Act (XVIII of 1937) section 3 114

Tort—Damages—Tort by servant of the Union Government in connection with private undertaking or an undertaking not in exercise of sovereign power—Suit for damages against Union Government—Maintainability—Damages for Tort—Allowed as compensation and not by way of restoration or restitution—Tort to person—Measure of damages: A suit for damages lies against the Union of India for torts committed by its servant in connection with a private undertaking or an undertaking not in exercise of sovereign powers.

P and O. S. N. Company v. Secretary of State for India, 5 *Bom. H. C. R.* Appendix A. P. I.; *Secretary of State for India in Council v. Moment*, (1913) I. L. R. 40 Cal. 391 P. C.; *Secretary of State for India in Council v. Shreegobind Chaudhuri*, (1932) I. L. R. 59 Cal. 1289; and *District Board, Bhagalpur v. Province of Bihar*, A. I. R. 1954 Pat. 529; relied on.

Damages in case of tort are allowed as compensation and not by way of restoration or restitution. Where a person is bodily injured he is entitled to reasonable compensation for the loss of future employment and not an amount on the basis of absolute mathematical calculation without taking into consideration the probable fluctutations in life. For this purpose the compensation allowed under the workmen's compensation Act may serve as an useful guide.

Jones v. Gooday, (1841) 8 M. & W. 146; Principle applied.

UNION OF INDIA *V.* BHAGWATIPRASAD, I. L. R. [1957] M. P. 43

Transfer of Property Act (IV of 1882), Section 58 (c)—Document of sale containing a condition of repurchase—Words in document unambiguous—Surrounding circumstances not to be looked—Document not containing clear and express words excluding mortgage—The Transaction evidenced by such document is mortgaged by conditional sale and not sale with condition of re-purchase—Transaction evidenced by two separate documents one of sale and other an agreement of repurchase—Transaction not a mortgage by conditional sale: Where the transaction is evidenced by a document of sale which contains a condition of repurchase and is worded in unambiguous terms but does not contain clear and express words excluding mortgage, then the transaction is a mortgage by conditional sale and not a sale with a condition of re-purchase. Where however the transaction is evidenced by two documents one of sale and the other an agreement of re-conveyance the transaction cannot be regarded as mortgage by conditional sale.

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Pandit Chunchun Jha v. Sheikh Ebadat Ali and another (1955) 1 S. C. R. 174; explained.

Mohd. Ibrahim v. Sugrabi, (1955) N. L. J. 344; *Atmaram v. Krishna*, Second appeal No. 509 of 1949 dated 25th January 1955; *Vishwanath v. Samarathbai*, Second Appeal No. 222 of 1951 dated 21st November 1955; *Sampat v. Anusaya*, Second Appeal No. 378 of 1948, dated 28th No. 1955; *Deorao v. Ramdas*, Second Appeal No. 113 of 1949, dated 5th July 1955; *referred and approved.*

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'Candidate at the election' in rule 43, Cantonments Act—Includes candidate whose nomination paper has been rejected: *Vide* Cantonments Act (III of 24) Rule 43 80

'Eaves water'—Not discharged through spouts—Height of eaves raised—No additional burden thrown on servient tenement—Right of easement not lost: *Vide* Easement Act Indian (V of 1882) section 17 106

'Fraud' in section 48 (2) of the Civil Procedure Code—To be interpreted in a wider sense—Delay in execution due to untenable objections—Amount to fraud: *Vide* Civil Procedure Code, Section 48 (2) 3

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Workmen's Compensation Act (VIII of 1923)—Section 2 (1) (n) The word "And" in the definition of Workman is conjunctive and not disjunctive—Person employed casually for purposes of employer's trade or business—Falls within the definition: Both the clauses joined by the word "And" in the definition of Workman in Section 2 (1) (n) of the Workmen's Compensation Act are to be read conjunctively. The word "And" is conjunctive not disjunctive.

Manton v. Cantwell (1920) A. C. 781-786; relied on. Even though a person might have been employed casually he would be deemed to be within the definition of "Workman" if he was employed for the purposes of the employer's trade or business.

K. E. S. Corporation v. Bahadur Sardar (1938) 42 C. W. N., 516; relied on.

KISHORCHAND *V.* DAMODAR, I. L. R. [1957] M. P. 10

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Civil Procedure Code (V of 1908), Order XXXIX, Rule 1—Suit for infringement of Trade Mark—Temporary injunction—When can be granted—Order XLI Rule 22—Appeal against appellate order under Order XLIII Rule 1—Cross objection—Maintainability : In a suit for infringement of Trade Mark where it appears that there is a likelihood of injury to the plaintiff by reason of sale of imitation articles, a temporary injunction prohibiting the sale of imitation articles can be granted to prevent the mischief.

In an appeal against an appellate order a cross objection against that order is maintainable.

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Constitution of India, Articles 14 and 19 (1) (g)—Government or legislature—Power of, to lay down limit to create standard of efficiency for securing public comfort and convenience—Court—No power of, to scrutinize except when unreasonable or unrelated to public purpose : *vide* Motor Vehicles Act, Rule 49-A 117

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The conduct of the petitioner who comes to Court praying for issue of writ of *quo-warranto* becomes one of the factors which have to be taken into account in this respect.

Miss Cama v. *Banwarilal*, A. I. R. 1953 Nag. 81; followed.

The provision regarding the existence of office of Vice-Chancellor and the powers he is entitled to exercise under section 45 of Madhya Bharat Vikram University Act will have their immediate operation from the date of passing of the Act.

RAJENDRAKUMAR *v.* THE STATE GOVERNMENT OF MADHYA PRADESH AND OTHERS, I.L.R. [1957] M.P. 188

Constitution of India, Articles 239 and 372 (2)—Government of India Act, 1935, Section 94 (3)—Essential Supplies (Temporary Powers) Act, 1946, Sections 3, 7 and 11 and Notification No. 132/29/170 (50), dated 5-1-51 under section 4 of the Essential Supplies (Temporary Powers) Act 1946—Order delegating authority by Governor General to Chief Commissioner to administer province—Is in the nature of legislative provision—Such order becomes law in force—Falls under Article 372 of Constitution—Notification No. 132/29/170 (50) dated, 5-1-51—Validity—Contravention of such Notification—Punishable—Evidence Act, Indian—Section 57—Notification being law in force—Needs no proof—Court can take judicial notice—Essential Supplies (Temporary Powers) Act 1946—Section 11—Charge-sheet not mentioning all particulars given in First Information Report—Does not amount to defect—Magistrate can take cognizance : Notification issued by the Governor-General under Section 94(3) of the Government of India Act delegating functions to Chief Commissioner to administer the province is legislative in its nature and not executive. It amounts therefore to "law in force" under Article 372(1) of the Constitution. The Notification No. 132/29/170 (50), dated 5-1-51 issued by Government of Madhya Bharat in exercise of its powers delegated to it under Section 4 of the Essential Supplies (Temporary Powers) Act, 1946 falls within the terms "Indian law" as used in Section 3(29) of the General Clauses Act.

Hence such a notification does not require to be proved. Mere production of a copy of the material Gazette Notification is enough. The Court can take judicial notice under Section 57(1) of the Indian Evidence Act. *Edward Mills Co. Ltd.* v. *State of Ajmer*, A. I. R. 1955 S. C. 25, *State of Bombay* v. *F. N. Balsara*, A. I. R. 1951 S. C. 318 and *State* v. *Gopalsingh*, 1955 M. B. L. J. (H. C. Report) 2015; relied on. *Mathuradas* alias *Mathuraprasad* v. *State*, I. L. R. [1954] Nag. 578, dissented from.

Mere failure to repeat all the facts referred to in the First Information Report in the last column of the charge-sheet or failure to mention the particular notification said to have been contravened cannot amount to defect which can prevent the magistrate from taking cognizance under Section 11 of the offence under Section 3/7 of the Essential Supplies (Temporary Powers) Act, 1946.

Shiam Manohar v. *The State*, A. I. R. 1953 All. 443; relied on.

THE STATE *v.* GOKULCHAND, I. L. R. [1957] M.P. 168

Constitution of India, Article 329 (b)—"Election" in, meaning of—High Court—Power to interfere with order of Returning Officer : The word "Election" in Article 329 (b) of the Constitution connotes the entire electoral process.

The High Court has no jurisdiction to interfere with the order of Returning Officer and that any matter which has the effect of vitiating an

election should be brought up only at the appropriate stage in an appropriate manner before a special tribunal and should not be brought up at an intermediate stage before any Court.

Article 329 (b) provides a complete bar to the High Court entertaining a writ petition which would interfere with the electoral process and that the High Court has no power to issue any writ, order or direction which would have the consequences of interfering with the election while it is in progress.

N. P. Ponnuswami v. *Returning Officer, Nammakklal*, A. I. R. 1952 S. C. R. 2/8, *Durga Shankar Hehta* v. *Thakur Raguraj Singh and others*, 1955 S C. R. 267 at 274 and *Kamath's* Case, 1955 S.C.R. 1104; referred to.

LAL CHANDRA BHAN SHAH *v.* THE RETURNING OFFICER, (D.C.), SEONI, I.L.R. [1957] M. P. 15o

Criminal Procedure Code (V of 1898), Section 342—Personal presence of accused normally necessary under—Section 205(2)—Magistrate—Discretion to direct attendance of accused for examination when exemption granted : The Provision of Section 342 Criminal Procedure Code normally is meant to require personal presence of the accused.

Sub-section 2 of Section 205 Criminal Procedure Code confers discretion on the Magistrate to direct the accused to be present whenever he thinks it necessary either for questioning him under Section 342 or for any other purpose. It is for the Magistrate to consider whether it is necessary to direct personal attendance of the accused who was exempted under Section 205 Criminal Procedure Code for questioning him under Section 342 of the Code, and if he does not insist on the appearance of the accused in Court for that pupose, the trial is not rendered illegal.

Emperor v. *Jaffar Cassum Moosa*, A. I. R. 1934 Bom. 212, *Sm. Champa Devi* v. *Babulal Goenka*, A. I. R.1950, Cal. 161 and *in re C.M. Raghavan and another*, A.I.R. 1950 Mad. 814. referred to.

THE STATE *v.* TARACHAND, I.L.R. [1957] M. P. 218

Criminal Procedure Code (V of 1898)—Section 417 (1) and (3), Scope of : Under section 417 (1) of Criminal Procedure Code the State has a right to file an appeal where the prosecution is on the complaint of a Court or of a public servant acting in the discharge of his official duties, while under Section 417 (3) Criminal Procedure Code the private complainant has a right to file an appeal in a case started on the complaint by private person.

STATE *v.* DAULATSINGH, I. L. R. [1957] M.P. 216

Criminal Trial—Evidence—Circumstantial evidence for conviction of an accused—Nature of : Circumstantial evidence in order to furnish a basis for conviction requires a high degree of probability i. e., so sufficiently high that a prudent man considering all the facts and realizing that life and liberty of the accused depends upon the decision feels justified in holding that the accused committed the crime. It must be consistent and consistent only with the guilt of the accused. If any rational explanation is possible then there is an element of doubt of which the accused must be given the benefit.

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Hindu Law—Widow—Grant to—No presumption that she does not get absolute or alienable interest unless power expresely conferred in that respect : There is no warrant for the proposition that when a grant of immoveable property is made to a Hindu female she does not get an absolute or alienable interest in such property, unless such power is expressly conferred upon her.

Ramgopal v. *Nandlal*, A. I. R. 1951 S. C. 139 and *Nathoolal* v. *Durga Prasad*, A. I. R. 1954 S. C. 355 ; followed.

SUKLAL *v.* RAMGOPAL, I. L. R. [1957] M.P. 155

Land Acquisition Act (I of 1894), Section 31 (2)—Dispute regarding party entitled to receive compensation as well as apportionment—Reference by Collector necessary—Payment of compensation money to parties—Jurisdiction of Civil Court to hear reference not ousted—Power of reference court to call money back from party : Under the terms of section 31 of the Land Acquisition Act, a reference is necessary to be made when there is a dispute as to apportionment as well as to the party entitled to receive compensation money.

The jurisdication of the reference court to hear reference is not ousted by reason of the payment of the compensation money by the Collector to a party.

Ramhit v. Mahadeo, A. I. R. 1920 Pat. 222 and *Satish Chandra Sinha v. Ananda Gopal Das*, 20 C. W. N. 816 and *K. M. K. R. M. K. Chettyar Firm* v. *The Secretary of State for India*, I. L. R. 11 Rang. 344 and *Jogesh Chandra Roy* v. *Yakab Ali*, 21 I. C. 111 ; considered.

The High Court as well as the reference court has power to order that the money be forthwith brought into court as an interim measure.

HITKARINI SABHA JABALPUR *v.* THE CORPORATION OF THE CITY OF JABALPUR, I. L. R. [1957] M.P. 130

Land Revenue Act, Central Provinces (II of 1917)—Section 188—"Course of village management", Meaning of—Patta by Lambardar—Not binding if granted during pendency of partition proceedings—Abolition of Proprietary Rights (Estates, Mahals, Alienated lands) Act, Madhya Pradesh, 1950 (I of 1951)—Form prepared under section 13—Not binding on claims officer : The words "Course of village management indicate that it should be for the benefit of the entire proprietary body.

If the Lambardar after an application for an imperfect partition has been made, attempts to benefit his near relatives to the disadvantage of more distant kindered who were also co-sharers, his action can not be described as bonafide and no power to act in that manner can be said to flow to him from the entire proprietary body.

The form which is prepared under section 13 Madhya Pradesh Abolition of Proprietary Rights Act is not conclusive against the claims

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officer who has the power to revise it in accordance with Civil Court's decision.

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Madhya Bharat Maintenance of Public Order Act (No. VI of 1949), Section 7 (1)—Determination of validity of order passed under—Factual existence of power in the authority and not the official designation to be seen—Sections 11 and 38 *ultra vires* : In determining the validity of an order passed under Section 7 (1) of the Madhya Bharat Maintenance of Public Order Act, the essential thing to be seen is the factual existence of power in the authority to act and not the official designation in which he expresses himself to be acting.

Dattatraya v. *The State of Bombay*, A. I. R. 1952 S. C. 161; followed.

Section 38 of the Madhya Bharat Maintenance of Public Order Act is *ultra vires* as being beyond the powers given to the State by clause (5) of Article 19 of the Constitution.

Section 11 of Madhya Bharat Maintenance of Public Order Act as it stood at the material time, was clearly contrary to fundamental rights guaranteed under Article 19 (b) and (d) of the Constitution by imposing unreasonable restrictions upon those rights by reason of the wide amplitude of possible delegation by Government of its power under Section 7 (1) of the Madhya Bharat Maintenance of the Public Order Act.

The State of Madras v. *G. Row*, A. I R 1952 S. C. 196; *Dr. Khare's, case*, A. I. R. 1950 S. C. 211 and *The State* v. *Motilal*, I. L. R. (1952) M. B. 365; relied on.

THE STATE *v.* GANGADHAR, I. L R. [1957] M. P. 179

Madhya Bharat Sales Tax Act, 1950, Sections 2 (k) and 3 (1)(b)—The term "Manufacture" in Section a (k)—Meaning of—Person doing work of dyeing and printing textiles and engaged in the business of selling or supplying printed and dyed material—if a manufacturer—Is liable to pay sales tax : To constitute manufacture all that is necessary is that the material should have been changed or modified by a man's art or industry so as to make it capable of being sold in an acceptable form to satisfy some want or desire or fancy or taste of man.

North Bengal Stores, Ltd. v. Member, Board of Revenue, Bengal, (1938-50) 1 S. T. C. 157; followed.

A person, who is engaged in the work of printing and dyeing textiles purchased by him, and in the business of selling or supplying the printed and dyed material, is a manufacturer within the meaning of the definition given in Section 2 (k) of Madhya Bharat Sales Tax Act and as such he is liable to pay sales tax on sale transactions of cloth printed and dyed by him and sold by him.

MESSRS. HIRALAL JITMAL *v.* THE COMMISSIONER OF SALES TAX, I. L. R. [1957] M.P. 176

Madhya Bharat Sales tax Act, 1950—Section 2 (p) (q) and Section 3 (1)—Turn over of imported goods not exceeding Rs. 5,000/- Total turnover of imported goods and other goods exceeding Rs. 5,000/- Assessee not liable to tax—Constitution of India, Article 226—Infringement of fundamental right—Other remedy under special Act open—No bar to petition under the Article—Composite petition for quashing assessment order regarding several assessment years—Maintainability : The turnover of the imported article not exceeding Rs. 5,000/- though the total turnover of the imported goods and other goods exceeding Rs. 5,000/-, the assessee is not liable to be taxed under the Madhya Bharat Sales Tax Act.

Ayodhaprasad Suklal v. *The Crown*, (1951) 2 Sales Tax C. 44; relied on.

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Composite application challenging the assessment order for different years, involving common questions and simultaneous orders, is maintainable.

Where the complaint in the petition is regarding fundamental right, the objection regarding another remedy under the special Act being available is not tenable and the petition is maintainable.

Himmatlal Hiralal Mehta v. *State of Madhya Pradesh and others*, A.I.R. 1954 S. C. 403 and the *State of Bombay and another* v. *The United Motors (India) Ltd. and others*, A. I. R. [1953] S. C. 252; relied on.

MAHABIRPRASAD *v.* SHRI B. S. GUPTA, SALES TAX OFFICER, I. L. R. [1957] M. P. 206

Magistrate—Discretion to direct attendance of accused for examination when exemption was granted u/s 203 (2) : *vide* Cr. Procedure Code, Section 342 218

Motor Vehicles Act (IV of 1939), Rule 49-A—Constitution of India, Articles 14, 19 (1) (g)—Rule 49-A framed under Motor Vehicles Act—Not ultra vires—Government or legislature—Power of, to lay down limit to create standard of efficiency for securing public comfort and convenience—Court—No power of, to scrutinize except when unreasonable or unrelated to public purpose : The classification provided by Rule 49-A framed under Motor Vehicles Act being based on an intelligible principle having a reasonable nexus does not offend Article 14 of the Constitution.

Under Article 19 (1) (g) of the Constitution the State is free to impose in the interest of general public, reasonable restrictions on the exercise of the right to carry on any trade, occupation or business.

Rule 49-A framed under the Motor Vehicles Act does not contravene the provisions of Articles 14 and 19(1) (g) of the Constitution and hence is not *ultra vires*.

(Case law referred.)

Chiranjit Lal Chowdhury v. *The Union of India and other*, (1950) 1 S.C.R. 869, *The State of Bombay and another* v. *F. N. Balsara*, (1951) 1 S.C.R. 682, *Kathi Raning* v. *State of Saurashtra*, A. I. R. 1952 S. C. 123, *Lachmandas* v. *State of Bombay*, A. I. R. 1952 S. C. 235, *Kedarnath* v. *State of West Bengal*, A.I. R. 1953 S. C. 404, *Shah Transport Co.* v. *The State*, I. L. R. [1953] Nag. 110, *C.S.S. Motor Service* v. *Madras State*, A. I. R. 1953 Mad. 279 ; relied on.

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In re Barnes Ashenden v. *Heath*, (1940) 1 Ch. 267, 272, followed.

(Other cases discussed.)

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Tenancy Act, Central Provinces (I of 1920)—Tenancy—Not created by unilateral Act.—Offer and acceptance necessary—Can be implied from conduct of parties—Mere demand for rent—Not sufficient to create tenancy : A tenancy cannot be created by an unilateral act. Like any other contract there must be offer by one party and its acceptance by the other. The tenancy may be implied from the conduct of the parties e. g. where rent is paid by one party and accepted by the other.

Govindrao v. *Sarjabai*, A. I. R. 1926 Nag. 62; *relied on.*

Ilahibux v. *Munir Khan*, 1953 N. L. J. 147 and *Fateh Shah* v. *Dayalal*, I. L. R. [1949] Nag. 167; referred to.

Merely by claiming the amount as rent, which could well have been described as damages for use and occupation, it can not be said that the landlord could possibly have intended to establish the relationship of landlord and tenant.

MANOHER LAL *v.* BRIJRAJ KISHORE I. L. R. [1957] M. P. 147

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The Provision relating to the inclusion in the plaint of the Statement as to the notice only deals with the form of the plaint which is a matter covered by Order 7, Rules 1 to 8 of the Code and is of a procedural nature and can be got inserted by amendment of plaint.

Kanailal v. *G. G. for India in Council*, A.I.R. 1948 Pat. 164; relied on.

The opening words of Section 80, Civil Procedure Code "No suit shall be instituted" qualify only the first part of the section and not the second part dealing with form of the plaint.

Kanailal v. *G. G. for India in Council* A.I.R. 1948 Pat. 164; relied on.

The provision of Section 80, Civil Procedure Code should be construed liberally.

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Shri Madan Mohan Sansthan v. *Kunnibai*, 1956 N.L.J. 610; referred to.

The expression "any other substantial cause" in Order XLI, Rule 27(b), Civil Procedure Code confers a wide discretion on the appellate Court to admit additional evidence when the ends of Justice require it to be done; but in order that this additional evidence may be admitted and a fresh trial ordered, the evidence sought to be produced must be conclusive in character and free from suspicion.

Ambuja Ammal v. *Appadurai Mudali*, (1912) I.L.R. 38 Mad. 414; followed.

Young v. *Kersha*, (1899) 81 L.T. 531, *Kessowji Issur* v. *Great Irdian Peninsula Railway*, 34 I.A. 115, *Parsottim* v. *Lal Mohar*,—58 I.A. 254 and *Arjan Singh* v. *Kartar Singh*, A.I.R. 1951 S. C. 193; referred to.

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Where departmental proceedings are taken for irregularities committed by a public servant it cannot be said that he is prosecuted for the commission or omission of an act made punishable by any law for the time being in force and although punishment is imposed upon him, it cannot be said that such proceedings are of criminal nature and are before a Court or a Judicial tribunal. If in a departmental enquiry a public servant is punished, but the Government considering it inadequate serves a show cause notice for enhancement of punishment, it is not tantamount to double punishment. All this is one punishment as a result of single departmental proceeding. The petitioner in these circumstances cannot take shelter under Article 20 (2) of the Constitution.

Maqbool Hussain v. *State of Bombay*, A.I.R. 1953 S. C. 325 and *S. A. Venkataraman* v. *Union of India*, A. I. R. 1954 S. C. 375; relied on.

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SHANTI SWAROOP SHARMA *v.* B. R. MANDAL, I.L.R. [1957] M. P. 322

Contract Act, Indian (IX of 1872)—Agreement to reconvey—Time for reconveyance stipulated—Contract to be performed within stipulated period —General Clauses Act—Section 10—Applicability : Normally in the case of contract to sell immovable property, time is not of the essence of the contract and specific performance can be compelled if a tender is made within a reasonable time; but the case of agreement to reconvey, stands on a different footing as it amounts to concession. In such case, the contract must be performed within the stipulated period.

Jamshed Khodaram Irani v. *Burjorji Dhunjibhai*, I.L.R. 40 Bom. 289, *Shriram*, v. *Rambilas*, I.L.R. 1947 Nag. 127 and *Shanmugam Pillai* v. *Annalakshmi*, A.I.R. 1950 F. C. 38; referred to.

The provisions of Sections 10 of the General Clauses Act would apply only to a case where the act itself is directed or allowed to be done or taken by an act of Parliament. Where a party has two courses open before him, one of paying the amount directly to the other party and the other of depositing the amount in Court he is not entitled to take advantage of Section 10 of the General Clauses Act, if the last date of the deposit happens to be a holiday.

Ramkinkar v. *Kamal Basini*, A.I.R. 1938 Pat. 451; referred to.

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Where a portion of the joint family property has been excluded from partition, whatever the reason, it continues to be the joint property of

the family and it must be divided amongst the persons who took under the partition.

Jogendra Nath Roy v. *Baladeo Das Marwari*, 12 C. W. N. 127, *Bhowanni Proshad Shahu* v. *Jaggernath Shahu*, 13 C. W. N. 309, 316, *Lachman Singh* v. *Sanwal Singh*, I.L.R. 1 All. 543 and *Ganeshi Lal* v. *Babu Lal*, I.L.R. 40 All. 374; relied on.

Where there is inequality in partition due to the impact of fraud, the party to the partition should be allowed to re-open the entire partition.

Moro Vishvanath v. *Ganesh Vithal*, 10 Bom. H. C. R. 451 and *Lakshman* v. *Gopal*, I.L.R. 23 Bom. 355; referred to.

A person has no power to bring about a separation among the grandsons, and even if he allots them share they remain joint.

Subbarami Reddi v. *Chenchuraghava Reddi*, I.L.R. [1945] Mad. 714; relied on.

The right of the father to effect partition between himself and his sons is absolute; it cannot be defeated merely because the partition would also result in allotment of property to a grandson.

Aiyayier v. *Subramania Iyer*, A.I.R. 1918 Mad. 395; relied on.

Where the document does not bind a party, it is obviously not necessary for him to sue for its cancellation for that would be a redundant relief.

Chanvirapa v. *Danava*, I. L. R. 19 Bom. 595, *Balkishen Das* v. *Ram Narain Sahu*, I.L.R. 30 Cal. 738 and *Pooran Chand* v. *Radha Raman* A.I.R. 1943 All. 177; distinguished.

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Jurisdiction—Objection to, Can be taken in execution—Nullity is a nullity and can be so declared at any stage : An objection to inherent jurisdiction can be taken in execution.

A nullity remains a nullity and can be so declared at any stage.

GOVINDDAS *v.* LALA PARMESHWARIDAS, I.L.R. [1957] M. P. 223

Limitation Act, Indian (IX of 1908), Section 14 (1)—Conditions to be fulfilled for applicability of—Burden of proving conditions—Civil Procedure Code (V of 1908)—Section 20(b)—Applicability—Objection to Jurisdiction raised—Courses open to party suing—Civil Procedure Code—Section 149—Request for time for payment of Court-fees granted—Propriety of excluding time cannot be questioned : Section 14 (1) of the Indian Limitation Act lays down following conditions..

(i) That the plaintiff was prosecuting the suit with due diligence.
(ii) That he prosecuted it in good faith.
(iii) That the Court was unable to entertain the suit from defect of Jurisdiction or other cause of like nature.

The burden of proving all these conditions is doubtless on the plaintiff.

Gnanacharayya Swamigal v. *Saravanaperumal* I.L.R. [1941] Mad. 347 (F.B.); relied on.

When objection to jurisdiction of Court was raised, the plaintiffs had two courses open. They could have taken back the plaint and filed it in proper Court having jurisdiction. Alternatively they could pray for leave of Court. When the Court grants the prayer for time for payment of Court-fees then the propriety of excluding time up to that date cannot be open to question.

FIRM LALCHAND NATHMAL *v.* FIRM BALARAM, I.L.R. [1957] M. P. 316

Limitation Act, Indian (IX of 1908)—Article 181—Appeal against preliminary decree in mortgage suit—Appeal automatically abating—Starting point for limitation for application for final decree—Civil Procedure Code (V of 1908)—Order XXXIV, Rule 4—Not obligatory on judgment creditor—Only an enabling provision : Even in the case of automatic abatement of an appeal against the preliminary decree in a mortgage suit, the date when an appeal is formally disposed of by the Court is the date from which limitation is to be counted for an application for a final decree.

Murlidhar and others v. *Mahabir Singh*, I.L.R. 1941 All. 658, *Gohar Bepari* v. *Ram Krishna Shaha*, A.I.R. 1927 Cal. 760 and *Lachmeshwar Prasad Shukul* v. *Keshwar Lal Chaudhuri*, A.I.R. 1953 T. C. 545 (F. B.); followed.

Peria Kovil Ramanuja Periya Jeeyangar v. *Lakshmi Doss*, I.L.R. 30 Mad. 520, *Jugisti Mahapatro* v. *Koroda Magata Patro and eighteen others*, I.L.R. 56 Mad. 520 *Ajudhia Prasad* v. *U. P. Government*, I.L.R. 1947 All. 191, *Batuk Nath* v. *Munni Dei and others*, I.L.R. 36 All. 284, *Abdul Majid* v. *Jawahir Lal*, I.L.R. 36 All. 350., *Sachindra Nath Roy and others* v. *Maharaj Bahadur Singh and others*, I.L.R. 49 Cal. 203 and *Abdulla Asghar Ali and others* v. *Ganesh Das Vig*, A.I.R. 1933 P. C. 66; relied on.

The provisions of Order XXXIV, Rule 4, C.P. Code are not obligatory but an enabling provision which may be availed of by the judgment creditor at his pleasure.

GYANIRAM *v.* MST. GANGABAI & ANOTHER, I.L.R. [1957] M. P. 337

Madhya Bharat Identification of Prisoners Act—Section 5—Provisions of—Void being repugnant to Article 20 (3) of the Constitution—A direction by magistrate asking accused to give specimen writing or signature—Amounts to asking accused to furnish evidence against himself : Section 5 of Madhya Bharat Identification of Prisoners Act, to the extent it empowers magistrate to direct an accused person to give his thumb impression, specimen writing or signature for comparison with other documents to be used against the accused at the trial, is repugnant to Article 20 (3) of the Constitution and is void.

M. P. Sharma and others v. *Satish Chandra and others*, A.I.R. 1954 S. C. 300; relied on.

A direction by a Court asking the accused to give his thumb impression or specimen writing or signature amounts to asking the accused to furnish evidence against himself which is prohibited by Article 20 (3) of the Constitution.

M. P. Sharma and others v. *Satish Chandra and others*, A.I.R. 1954 S. C. 300, *Rajamuthukoil Pillai* v. *Perivaswami Nadar*, A.I.R. 1956 Mad. 632, *Sailendra Nath Sinha and another* v. *The State*, A.I.R. 1955 Cal. 247; dissented from.

In re Sheikh Muhammad Hussain, A.I.R. 1957 Mad. 47; distinguished.

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Unless there is a case of intentional evasion or short payment or where a person in charge of articles manages to avoid the route of the outpost or officers of the Committee there is no power in the Municipal Committee to recover double duty.

Sub-section (1) of Section 48 of the C. P. and Berar Municipalties Act contemplates a claim requiring notice, which arises before a suit is instituted but there is nothing to show that the claim arising during the course of proceedings by an act of the Committee itself should be defeated merely because the suit is not formally withdrawn and re-instituted after the expiry of two months next after notice.

Vallabram Purushottam v. *Secretary of State for India,* I.L.R. 59 Bom. 149; referred to.

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Municipalties (Second Amendment) Act, 1956, Madhya Bharat—Sections 2 and 3 —Legislature—Power of, to supply lacuna in the matter of jurisdiction—But no power to direct a decision in a particular way—Sections 2 and 3 are not ultravires : Where the legislature finds that there is a defect in the creation of jurisdiction, it can remove the defect and in doing so it acts within its legislative field.

Where, however, the legislature goes further and compels the determination of a case at the hands of a Court taking it completely out of the reach of the Court to make a contrary decision as the existing law requires the matter is one of the exercise of judicial and not of legislative power.

Piare Dusadh v. *Emperor,* A.I.R. 1944 F.C. 1 and *Basanta Chandra* v. *Emperor,* A.I.R. 1944 F. C. 86; referred to.

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From the mere fact that damage is caused, no inference of negligence can be drawn.

Section 10 of the General Clauses Act, 1897 is applicable to a notice which is required to be given according to clause (c) of Section 140 of the Railways Act.

Section 77 of the Indian Railways Act only means that the claim should be preferred within the period of six months and not that it should also reach the railway administration before its expiry.

Ramgopal Marwari v. *B. & N. W. Railway Company*, I.L.R. 6 Pat. 256; followed.

Secretary of State v. *Imperial Metal Works*, A. I. R, 1926 All., 214, *Deoro* v. *G. I. P. Railway Co.*, 8 Nag. L. R. 34 and *Manilal* v. *Secretary of State for India*, 24 Nag. L. R. 1; not followed.

General Traffic Manager and now the Chief Traffic Manager is authorised to receive notices of claims under section 77 of the Indian Railways Act.

UNION OF INDIA *v.* SHRIMATI ASHARFI DEVI & OTHERS, I. L. R. [1957] M. P. 253

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(Case law referred.)

The words "or otherwise" in Section 2 (*c*) of the Act are important and very wide.

If the agent or the trustee supplies goods to the members and charges commission or agency brokerage, even then ordinarily, the supply of goods would not amount to a transaction of sale, and the transfer of property from the incorporated club to its members will not amount to a sale within the definition of the Act or even of the Sale of Goods Act.

Sista's Limited v. *The State of Bombay*, (1956) I.L.R. 59 Bom. 149; 7 S. T. C. 343 and *Pannalal Babulal* v. *Commissioner of Sales Tax, U. P., Lucknow*, (1956) 7 S. T. C. 722; relied on.

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Mahadeo Sitaram Thakre v. *State of Madhya Pradesh*, (1955) N. L. J. 66; not approved.

The order passed under Section 4 (2) of Madhya Pradesh Abolition of Proprietary Rights Act is not governed by Section 15 (3) and is not open to review. Hence a suit is not barred.

Balkisan Nathani v. *The State*, I. L. R. [1956] Nag. 674; relied on.

RAGHUBIRPRASAD V. STATE OF MADHYA PRADESH, I. L. R. [1957] M. P. 427

Abolition of Proprietary Rights (Estates, Mahals, Alienated Lands) Act, Madhya Pradesh, 1950 (I of 1951), Sections 4 and 5—Land Revenue Act, Central Provinces, 1917, Section 2 (8)—'Mahal'—Transfer of Property Act (IV of 1882), Section 8—Abadi—Vests in Proprietor—Not appurtenant to village share—Transfer of village share—Abadi does not pass—Suit for Abadi land by proprietor lambardar—Abadi not saved—Suit not maintainable : The area of the Abadi doubtless vests ultimately in the proprietors of the village but it cannot be deemed to be an appurtenance of the village share. It is reserved for special purposes and is liable to be disposed of accordingly.

Unless there is an express transfer of the Abadi site, it would not, under Section 8 of the Transfer of Property Act, go with the village share.

Shiolal v. *Nanhelal*, 8 Nag. L. R. 123, *Narayan* v. *Vithoba*, A. I. R. 1927 Nag. 177 and *Narain Ganesh Ghatate* v. *Baliram and another* 14 Nag. L. R. 165 P. C; explained.

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Umarao Singh v. *Khacheru Singh*, I. L. R. [1939] All. 607, relied on.

The suit for possession of the Abadi site by the mortgagee, who has forclosed the village share, and has thus become proprietor, is not maintainable against the mortgagor.

Chhote Khan v. *Mohammad Obedullakhan*, I.L.R. [1953] Nag. 702; relied on.

MT. RUPKALI V. KEDARNATH, I. L. R. [1957] M. P. .. 451

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Abolition of Proprietary Rights (Estate, Mahals, Alienated Lands) Act came into force; the suit cannot be continued by the proprietor lambardar because under Section 5 (*a*) of the said Act, the plot will be regarded as an appurtenance to the house and will go with the house. The person who holds the house will be entitled to retain the site and to settle with the Government about the terms on which it should be held by him.

RANI ZAMITKUNWAR DEVI *v.* NARSINGH, I. L. R. [1957] M. P. 413

Act, 1860—XLV : *vide* Penal Code, Indian.

Act, 1872—I : *vide* Evidence Act, Indian.

Act, 1882—IV : *vide* Transfer of Property Act.

Act, 1890—IX : *vide* Railways Act, Indian

Act, 1898—V : *vide* Criminal Procedure Code.

Act, 1908—V : *vide* Civil Procedure Code.

Act, 1922—XI : *vide* Income-tax Act, Indian.

Act, 1927—XVI : *vide* Forest Act, Indian.

Act, 1947—C. P. and Berar XXI : *vide* Sales Tax Act, C. P. & Berar.

Act, 1948—XLVII : *vide* Displaced Persons (Institution of Suits) Act.

Act, 1948—C. P. & Berar XXXVIII : *vide* Local Government Act C. P. & Berar.

Act, 1951—M. P. I: *vide* Abolition of Proprietary Rights (Estates, Mahals, Alienated Lands) Act, M. P., 1950.

Act, 1956—M. P. II : *vide* Madhya Pradesh Courts (Amendment) Act.

Central Excise Manual, Vol. I, Para 155/A, Rule I—Provisions Penal—None to be brought under it except by express language : *vide* Constitution of India, Article 311 (2) 415

Civil Procedure Code, Order XXI, Rule 2—Executory agreement—Amounts to adjustment of decree : *vide* Constitution of India, Article 395 396

Civil Procedure Code, Order XXXII, Rule 7—Applicability of, to adjustment in execution proceedings : *vide* Constitution of India, Article 395 396

Constitution of India—Article 311 (2)—Central Excise Manual, Volume I, Para 155-A, Rule 1—Interpretation of Statute—Grammatical construction clear and manifest—It to prevail in the absence of strong and obvious reasons to contrary—Excise Manual Vol. I, Para 155-A, Rule 1—Provisions Penal—None to be brought under it except by express language—Article 311 (2)—Reversion of servant from officiating post to his original substantive post—Amounts to penalty—Article 311 (2) attracted—Article 311 (2) contemplates opportunity at two stages : Where grammatical construction of a rule is clear and, manifest, that construction should prevail, unless there be some strong and obvious reason to the contrary.

he provisions in paragraph 155-A, Rule 1 of the Central Excise Manual Vol. I are analogous to penal provisions and in applying such provisions one has to take care that none is brought within it except by express language. Article 311 (2) of the Constitution will be attracted to a case when a person has been reverted from his officiating post to his original substantive post not on administrative grounds but only as a measure of penalty.

M. V. Vichoray v. The State, I. L. R. [1952] Nag. 105 ; relied on.

Clause (2) of Article 311 of the Constitution requires that the civil servant in question is entitled to have an opportunity to show cause at two stages ; (a) once after he is found guilty and punishment is provisionally proposed, and (b) then, against the punishment so proposed upon above finding.

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RAJARAM RICHHARIA *v.* STATE OF M. P. I. L. R. [1957] M. P. 415

Constitution of India—Article 395—Letters Patent—Clause 10—Letters Patent not an enactment—Does not amend or supplement Government of India Act—Not repealed under express terms of Article 395—Letters Patent, clause 10—O der holding that decree was satisf ed in terms of agreement between parties—Amounts to a decree—Order relates to satisfaction or discharge of decree—Order appealable under clause10 Letters Patent—Hindu Law—Natural guardian—Compromise by, reducing the amount of the debt supportable on ground of legal necessity and conferring benefit on minor—Compromise binding on minor—Civil Procedure Code (V of 1908), Order XXXII, Rule 7—Applicability of, to adjustment in execution proceedings —Civil Procedure Code, Order XXI, Rule 2—Executory agreement—Amounts to adjustment of decree : The Letters Patent is not an enactment which amends or supplements the Government of India Act. Therefore, it does not stand repealed under the express terms of Article 395 of the Constitution.

An order holding that there was satisfaction of decree in terms of the agreement between the parties, falls under Section 47, Civil Procedure Code as it relates to satisfaction or discharge of decree. The order amounts to a decree as defined under Section 2 (2) of the C. P. Code and as such is appealab'e under clause 10 of the Letters Patent.

The Oudh Commercial Bank Ltd. v. *Thakurain Bind Basni Kuer*, I. L. R. 14 Luck 192 P. C. ; relied on.

Prosunno Kumar Sanyal v. Kali Das Sanyal, I. L. R. 19 Cal. 684 P. C. ; *Mahendra Rao* v. *Bishambhar Nath*, A. I. R. 1940 All. 270 F. B. ; *Lal Babu* v. *Rang Bahadur Singh*, A. I. R. 1936 Pat. 506 ; *Meghraj* v. *Kesarimal*, I.L.R. [1947] Nag. 197; *Muhammad Kasim* v. *Rukia Begam*, I. L. R. 41 All. 443 ; *Satyabadi Sahu* v. *Mani Sahu*, I. L. R. 15 Pat. 390 ; *Manorath* v. *Atmaram*, A. I. R. 1943 Nag. 335 ; *Sheodahin* v. *Ramjanam*, A.I.R. 1934 Pat. 202 and *Gajraj Singh* v. *Devi Singh* A.I.R. 1937 Oudh 298 ; referred to.

The natural guardian of the minor has power to compromise suit ; only she cannot impose personal obligation or waste his estate.

Nirvanaya v. *Nirvanaya*, I. L. R. 9 Bom. 365 ; *R. S. Pandit Krishna Chandra Sharma* v. *Seth Rishabh Kumar*, I.L.R. [1940] Nag. 55 and *Shriniwasrao* v. *Baba Ram*, A. I. R. 1933 Nag. 285 ; referred to.

The act of the natural guardian in reducing the amount of the debt supported by legal necessity and conferring benefit on the minor cannot be challenged.

D. B. Seth Jiwandas v. *Mt. Janki*, 18 N. L. R. 145 and *Seth Ghasiram and others* v. *Mt. Binia and others*, 1 N. L. R. 66 ; referred to.

An agreement between the parties adjusts the decree. To such an adjustment Order 32, Rule 7, Civil Procedure Code will apply if a minor is involved on the ground that execution proceeding is continuation of suit.

Tulsiram v. Kevalram, A. I. R. 1943 Nag. 231 ; *Muthalakkammal* v. *Narappa Reddiar*, I. L. R. 56 Mad. 430 F. B. and *Virupakshappa* v. *Shidappa and Basappa*, I. L. R. 26 Bom. 109 ; referred to.

An executory agreement may amount to an adjustment of decree.

Meghraj v. *Kesarimal*, I. L. R. 1947 Nag. 197 ; relied on.

S. S. NIRMALCHAND v. SHRIMATI PARMESHWARI DEVI, I. L. R. [1957] M. P. 396

Contributory negligence—no defence, *vide* Penal Code, Indian, Section 304-A 397

Co-owners—Suit for joint possession—Principles when joint possession should or should not be granted laid down. No hard and fast rule can adequately be laid down in respect of cases of suits for joint possession. In cases where only an amount is paid and surrender of land has been obtained, the equity can easily be adjusted by granting joint possession on payment of the proportionate share of the co-sharer claiming such joint possession. In cases, however, where expenditure of time, money and labour is involved, it cannot be said that joint possession should always be granted. In such cases the Courts have to take equities into account, look to the total area of the land open to others for bringing under cultivation, the proportion of the waste land to the land actually brought under cultivation, with advertence to the share of the defendant and the time and labour involved in such reclamations. The Courts should also consider whether there is evidence of delay on the part of the plaintiff in coming to Court.

(Case law discussed.)

BRIJLAL *v.* DAU MOHANLAL, I. L. R. [1957] M. P. .. 354

Criminal Procedure Code (V of 1898)—Section 488—Term "Resided" in—Covers temporary as well as permanent residence—What constitutes "Residence" depends on facts of each case—Not possible to fix any particular period of time to raise inference of residence to attract provision of Section 488 Criminal Procedure Code. The expression "resided" appearing in Section 488, Criminal Procedure Code is wide enough to cover temporary as well as permanent residence.

Sampoornam v. N. Sunderesan, A. I. R. 1953 Mad. 78 ; *Jolly v. Jolly* A. I. R. 1918 Cal. 785; *Charan Das* v. *Mt. Surasti Bai* A. I. R. 1940 Lah. 449 and *Balksishna Naidu* v. *Sakuntala Bai*, A. I. R. 1942 Mad. 666 ; referred to.

What would constitute "residence" within the meaning of Section 488 of Criminal Procedure Code would depend on the facts of each case. It is neither permissible nor possible to fix any period of time which would raise an inference of a residence sufficient to attract the jurisdiction of the Criminal Court under section 488.

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TULSIRAM *v.* SMT. NARBADABAI, I. L. R. [1957] M.P. . 438

Displaced Persons (Institution of Suits) Act, 1948—Person in the employ of Government opting for India before setting up of the two dominions—Falls under the definition of displaced person—Evidence Act, Indian (I of 1872)—Section 35—Documents received in official correspondence—Admissibility. A person who is in the employ of Government and opted for India before the setting up of the two dominions comes within the definition of a displaced person in Displaced Persons (Institution of Suits) Act which extends to persons voluntarily coming to India on account of the division of the country.

The documents received in official correspondence about the genuineness of which there can be no doubt are admissible under Section 35 of the Indian Evidence Act.

V. P. DESA *v.* THE UNION OF INDIA, I. L. R. [1957] M.P... 434

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So long as the limits permissible under Section 68 of the Forest Act are adhered to, the mode of valuation lies entirely within the discretion of the Forest Officer and he cannot be compelled to adopt any particular mode.

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Choudhry Padum Singh v. *Koer Oodey Singh*, 12 M. I. A. 350 ; distinguished.

BABULAL *v.* SANAT KUMAR, I. L. R. [1957] M. P. .. 375

Hindu Law—Natural guardian—Compromise by—Reducing the amount of debt supportable on ground of legal necessity and conferring benefit on minor—Compromise binding on minor : *Vide* Constitution of India, Article 395 396

Income-tax Act, Indian (XI of 1922)—Section 35—Income-tax Tribunal—Power of to rectify an error on face of order—Action of Tribunal referable to a jurisdiction—Though tribunal not aware of its existence—Term "Rectification—Meaning of: Under Section 35 of the Income-tax Act the appellate tribunal has power to correct an error appearing on the face of the record which is capable of being demonstrated without taking out of any additional evidence and without any detailed arguments *pro* and *con*.

Sidhramappa v. *Commissioner of Income-tax*, 21 I. T. R. 333 ; relied on.

The action of the tribunal may be referred to a jurisdiction possessed by it even though at the time it may not have been aware of it.

Pitamber Vajirshet v. *Dhondu Navlapa*, I. L. R. 12 Bom. 486-489 ; relied on.

The term "Rectification" in Section 35, Income-tax Act means the correction of an error which is apparent on the face of the record.

COMMISSIONER OF INCOME-TAX *v.* SHEOLAL RAMLAL, I. L. R. [1957] M. P. 442

Income-tax Act, Indian (XI of 1922)—Section 59 read with Section 26-A and Rules regarding Registration of Firm—Rules framed under Section 59 read with Section 26-A—Not *ultra vires* : Under the Indian Income-Tax Act the assessee is required to get the firm registered for each assessment year. This naturally flows from the words of Section 26-A and the opening words of Section 59 read with clause (e) of sub-section 2 of Section 59. Hence the rules framed under Section 26-A read with Section 59 of the Income-Tax Act are perfectly valid.

Y. Narayana Chetty v. *Income-tax Officer*, (1954) 26 I. T. R. 310 : relied on.

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Commissioner of Income-tax v. Shantilal Vrajlal, 31 I. T. R. 903 ; distinguished.

THE COMMISSIONER OF INCOME-TAX, M. P. & BHOPAL *v.* THE GOPAL RICE MILLS, KHARSIA, I. L. R. [1957] M. P. 371

Income-Tax-Act, Indian (XI of 1922)—Section 66 (2)—Assessee from Bhopal filing second appeal before Income Tax Tribuna after Indian Income Tax Act was made applicable—Tribunal dismissing appeal as not maintainable—Application to the Tribunal for reference dismissed—Application to High Court for calling upon Tribunal to state the case—High Court, Power of, to call upon Tribunal to state a case and refer questions of law to High Court : After the Indian Income-Tax Act was made applicable to Bhopal, the case against the assessee was re-opened under Section 34. After submission of return the assessee was assessed. The assessee filed an appeal before Appellate Assistant Commissioner, Jabalpur. The appeal failed. The assessee filed a second appeal before the Tribunal. This appeal was dismissed on the ground that the supplemental proceedings were under the Bhopal Income-tax Act and under that Act no second appeal lay. The assessee made an application to the Tribunal to refer the case to the High Court. This was also dismissed. The assessee filed an application under Section 66 (2) of the Indian Income-tax Act, to the High Court to call upon the tribunal to state the case. The question was whether in these proceedings the High Court had jurisdiction to decide the question of the jurisdiction of the tribunal to entertain the second appeal or the tribunal can be called upon to state the case on that point to the High Court.

Held—For us to give a decision on these matters directly will savour of an exercise of appellate jurisdiction and not advisory and consultative, which is the only jurisdiction conferred on the High Court. There can be no doubt that an appeal purporting to be under the Indian Income-tax Act was filed and also an application was made under the same Act under section 66 (1). These were rejected on the ground that the assessment was not under the Indian Income-tax Act. This may be right or it may be wrong, but a question does arise under the Indian Income-tax Act for determination, read with the other Acts pertinent thereto. We can only decide that question under the advisory and consultative jurisdiction by asking for a statement of the case and then pronounce on our jurisdiction as well. But to pronounce on our jurisdiction is to place the cart before the horse. We must therefore call upon the Tribunal to state the case arising out of its order. In doing so we act on the principle that the Tribunal cannot make its decision on jurisdiction final if it is called upon to state a case questioninge that jurisdiction and ought to state a case, assuming that a different view of the law is possible. If we find that the Tribunal was correct, we can endorse its view and reject the application before us also as incompetent, but if we find that the Tribunal had wrongly decided upon its jurisdiction, then we can answer the questions posed and send our opinion for the guidance of the Tribunal. To do otherwise, may leave nothing for reference to this court, for the question will have been answered and the exercise of jurisdiction by us will be appellate and not consultative.

MULLA IRSHAD ALI *v.* THE COMMISSIONER OF INCOME-TAX, I.L.R. [1957] M.P. 447

Land Revenue Act, Central Provinces, 1917, Section 2 (8)—"Mahal"—Meaning of: *vide* M. P. Abolition of Proprietary Rights (Estates, Mahals Alienated Lands) Act, 1950 (I of 1951), Sections 4 and 5. .. 450

Letters Patent—Clause 10—Letters Patent not an enactment—Does not amend or supplement Government of India Act—Not repealed under express terms of Article 395 : *vide* Constitution of India, Article 395. .. 396

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Local Government Act, Central Provinces and Berar (XXXVIII of 1948) Section 12 (1), Proviso—Sections 20 and 33—Nominated Sabha holds office till the period fixed or till any earlier date mentioned in any subsequent notification of the Government—Notification regarding elected Sabha—Electede Sabha functions only after taking office after first meeting: According to the proviso to Sub-section (1) of Section 12, Central Provinces and Berrar Local Government Act, the nominated Sabha continues in office till the date fixed in the notification appointing the Sabha or an earlier date if so notified by the State Government.

Reading Sections 20 and 33 together it is clear that the provision can only come into play after an elected Sabha has taken office after its first meeting.

HARIHARPRASAD SHARMA *v.* THE STATE OF M. P., I.L.R. [1957] M.P. 380

Madhya Pradesh Court (Amendment) Act (II of 1956)—Sections 7 and 9—Section 7 not retrospective—Does not affect appeals arising out of pending cases : Section 7 of the Madhya Pradesh (Amendment) Act has not been made retrospective either expressly or by necessary intendment, nor can the pending cases be said to be necessarily affected. It does not *proprio vigore* affect pending cases and the provisions to save certain cases from the effect of that section enacted in Section 9 of the amending Act was not necessary and superfluous.

LALCHAND AGARWAL *v.* KESHAORAO JAMTHE, I.L.R. [1957] M.P. 382

Penal Code, Indian (XLV of 1860)—Section 304-A—Absence of driving license—Reasonable inference of rash and negligent driving of heavy vehicle not to be reasonably drawn—Contributory negligence—No defence—Mere mistake or Intellectual defect—Does not constitute rashness : From the mere fact that accused does not possess a driving license' it cannot be positively inferred that he is guilty of rashness or negligence in drving a heavy vehicle like a truck.

R v. *Bateman*, (1925) 19 Cr. App. R. 8, *Andrews* v. *Director of Public Prosecutions*, (1937) A.C 576, 583; *R* v. *Bonnyman*, (1942) 28 Cr. App. R. 131; *Reg* v. *Nidamarti Nagabhushanam*, [1872] 7 Mad. H.C.R. 119 and *Empress of India* v. *Idu Beg*, I.L.R. 3 All 776, 779, referred to.

In Criminal Law contributory negligence is no defence.

Regina v. *Swindall*, [1846] 2 Car & K. 230; referred to.

A mere mistake, intellectual defect is not sufficient to constitute criminal rashness or criminal negligence in law. There must be a wilful and forward confidence in his own opinion which is contrary to all reason and experience.

R. v. *Elliot*, [1889] 16 Cox C.C. 710; relied on.

THE STATE GOVERNMENT OF M. P. *v.* BHAWANESH KUMAR, I.L.R. [1957] M. P. 357

Penal Code, Indian (XLV of 1860)—Section 500 and Criminal Procedure Code (V of 1898)—Section 198—Husband—When can make a complaint—When imputation is made to a wife—Imputation—Wife was a witch and practised witchcraft and destroyed crops—Imputation affects husband who can file a complaint : What is required is whether the reputation of the wife *vis-a-vis* the particular imputation made is so bound up with the reputation of the husband that an imputation against the wife affects him also. The nature and the character of the accusation will have an important bearing and consequently it will depend on the facts and cricumstances of each case whether under the particular circumstances established in that case the husband is defamed by any scurrilous attack on the character of his wife.

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The ıtation that the complainant's wife was a witch and practised witchcraft and destroyed the crops of the accused was an imputation affecting the husband and he could validly make a complaint under Section 500, Indian Penal Code.

THE STATE *v.* GAHIRURAM, I.L.R. 1957] M.P. 768

Railways Act, Indian (IX of 1890) -Section 13- -Providing of gates at railway crossing -Not obligatory on Railway Company unless demand to that effect made by Central Government : *vide* Tort. 348

Railways Act Indian (IX of 1890) -Section 72- -Contract of carriage-When comes into existence : The railway acts as a carrier of goods only after the railway receipt is prepared and the relationship of a carrier emerges only after goods are loaded in wagons.

M/S KABRA & CO v. UNION OF INDIA I L.R. [1957 M. P 366

Sales Tax Act Central Provinces and Berar (XXI of 1947)- Section 2 (g) and Explanation II -Despatch of goods by a manufacturer in the State to a person carrying on business outside the State- -Price of goods debited to buyer--Buyer responsible for shortage, etc., in transit--Transaction amount to sale and liable to imposition of sales tax: A manufacture, within the State despatches goods to a person carrying on business outside the State. The price of the goods is debited to that person when the goods are despatched and money received from him is credited in the account. The person to whom the goods are despatched is not liable to give accounts of profits but only to acquaint situation of the business by submitting account of the goods received and sold and the balance in stock at the end of the month, and is also responsible for shortage, etc., in transit. Such a transaction falls within the definition of "Sale" as defined in Section 2 (g) read with Explanation II of the Sales Tax Act and the person despatching the goods is liable to be assessed under the Sales Tax Act.

RAMCHANDRA RATHORE BROS *v.* THE COMMISSIONER OF SALES TAX, I.L.R. [1957 M.P. 391

Sales Tax Act Central Provinces and Berar (XXI of 1947)- -Section 2 (g)-Explanation II- -Sale to Pucca Adatiya- -When takes place—Pucca Adatiya residing outside State- -Goods also leaving State before sale--Explanation not applicable : Sale to Pucca Adatiya comes into existence only if he appropriates the transaction to himself. If the Pucca Adatiya finds a customer, there are no two sales, *viz.* one to pucca Adatiya and another to the buying principal. There is only one sale and that is to an undisclosed principal through the agency of Pucca Adatiya.

The Pucca Adatiya being outside the State and the goods being also at the relevant period at Khadakpur *viz.* outside the State, Explanation II to section 2 (g) of the Sales Tax Act can not apply.

SHRIGOPAL *v.* THE STATE, I.L.R. [1957] M.P. . . 389

Sales Tax Act. Central Provinces and Berar (XXI of 1947)- -Section 22 (1) and Rules 55 and 57- -Payment of tax or penalty- A condition precedent for entertainment of revision but not so in case of appeal : From a comparison of rules 55 & 57 framed under the Sales Tax Act relating to appeals and revisions it is clear that the payment of tax or penalty, if any, or both is a condition precedent to the enterainment of the revision petition. This is not so in the case of appeals. The tax or penalty can also be deposited within the time allowed by the appellate authority

THE SALES TAX COMMISSIONER, M.P. *v.* GHANSHYAMDAS, I.L.R. [1957] M.P. 386

'ort- -Damages- Truck damaged by collision of the train when in possession of hirer—Owner entitled to sue Railway- -Indian Railways Act—

Section 13—Providing gates at railway crossing—Not obligatory on Railway Company unless demand to that effect made by Central Government : Where the property belonging to another but in actual possession of the hirer has been damaged by an alleged tort committed by another, the owner of the property will have a cause of action against that other person subject to the limitation that his right would be the same as the rights which the hirer has in respect of the alleged tort.

Section 13 of the Indian Railways Act does not make it obligatory upon the Railway administration to put up gates upon a railway crossing, unless such a demand is made by the Central Government.

SETH HARAKCHAND PATNI *v.* UNION OF INDIA, I.L.R. [1957] M.P. 348

Transfer of Property, Act, Section 8—Abadi vests in proprietor—Not appurtenant to village share—Transfer of village share—Abadi does not pass : *vide* M. P. Abolition of Proprietary Rights Act, 1950, Sections 4 and 5. 450

Transfer of Property Act (IV of 1882), Section 60—Mortgage dead containing contract to the effect that redemption to be in the month of Baisakh and the period of redemption provided was to be after 80 years—Contract not unconscionble —Condition does not operate as clog on equity of redemption : The condition that money would be payable only in the month of Baisakh cannot be said to be a clog on the equity of redemption. Similarly the condition that money would be payable only after the expiry of 80 years is also not a clog on the equity of redemption.

Durga Charan v. *Poresh Bewa*, A.I.R. 1925 Cal. 105; *Kirpal Singh* v. *Sheoambar Singh*, A.I.R. 1930 All. 283; *Shubratan* v. *Dhanpat Gadariya*, (1932) I.L.R. 54 All. 1041, *Jagannadham* v. *Narasimham*, A.I.R. 1944 Mad.501; *Rama* v. *Waman*, A.I.R.1925 Nag. 11; *Hira* v. *Sitaram*, I.L.R. [1949] Nag. 12; *Hasar Ali* v. *Ajodhya Sah*, A.I.R. 1950 Pat. 173.

Baldeo v. *Losai*, I.L.R. 4 Luck. 203 and *Abdulla* v. *Saadulla Khan*, (1912) 15 I.C. 917; relied on.

Balbhaddar Prasad v. *Dhanpat Dayal*, A.I.R. 1924 Oudh 193, *Bhullan* v. *Bachcha Kunbi*, (1931) I.L.R. 53 All. 58; Har *Dayal Singh* v. *Raja Ram Singh*, A.I.R. 1933 Oudh 460; *V. C. Soni* v. *Gokaldas*, A.I.R. 1953 Bom. 408 and *Khan Bahadur* v. *Mukhana*. A.I.R. 1930 P.C. 142; distinguished.

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The provisions of Sections 45 and 50 of the Land Revenue and Tenancy Act, 1931 are not declaratory or retrospective.

The preamble cannot be made use of to control the enactments themselves where they are expressed in clear unambiguous terms.

Attorney-General v *H. R. H. Princ Ernest Augustus of Hanover*, 1957 All E. R. Vol. 1 p. 49 and *Powell* v *Kemption Park Racecourse Co., Ltd.*, 1699A. C. 143, 185; relied on.

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Abdul Rahman v. *Aminaboi*, A. I. R. 1943 Bom. 409; followed.

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Mahadeo Sahai v. *Secretary of State*, A. I. R. 1932 All. 312 and *Shiam Sunder Lal* v. *Savitri Kunwar*, I. L. R. 58 All. 151 F. B.; observations held to be *obiter*.

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Election Commission, India v. *Saka Venkata Subba Rao* 1953 S. C. R. 1144, *K. S. Rashid and son* v. *The Income-tax Investigation Commission, etc.*, 1954 S. C. R. 738, *Burhanpur National Textile Workers' Union* v. *The Appellate Tribunal, Bombay*, I. L. R. [1955] Nag. 108, *Joginder Singh* v. *Director, Rural Rehabilitation*, A. I. R. 1955 Pepsu 91, *Azmat Ullah* v. *Custodian Evacuee Property, U. P.*, A. I. R. 1955 All. 435 F. B., *A Thangal Kunju Musaliar* v. *M. Venkatachelam Potti and another*, (1955) 2 S. C. R. 1196, and *Hari Vishnu Kanath* v. *Syed Ahmad Ishaque* (1955) 1 S. C. R. 1104; relied on.

Collector of Customs v. *A. H. A. Rahiman*, A. I. R. 1957 Mad. 496; distinguished.

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Macbulnissa v. *Union of India*. I. L. R. 1953 (2) All. 289, and *Barkatali* v. *Custodian General*, A. I. R. 1954 Raj. 214; not followed.

An inferior Court cannot refuse to entertain or take into account a portion of the reasoning which was material for the decision of the case before the Superior tribunal. Further if two reasons are given to reach a conclusion neither is *obiter* and both can be treated as the ratio.

Cornelius v. *Phillips*, (1918) A. C. 199, 211, *Mahendralal Choudhari* v. *Commissioner of Income-tax*, I. L. R [1949] Nag. 330, *Narmadabai* v. *Hidayatalli*, A. I. R. 1949 Bom. 115, *Mata Prasad* v. *Nageshar Sahai*, A. I. R. 1925 P. C. 272, 279, *Ram Subhag Singh* v. *Emperor*, A.I.R. 1916 Cal. 693, 696 and *Atmaram* v. *Pandu*, A. I. R. 1926 Nag. 154, 155; referred to.

SETH SURAJMAL *v.* STATE OF MADHYA PRADESH, I. L. R. [1957] M. P. 507

Contract Act, Indian (IX of 1872), Section 65—Person having no right to transfer entering into contract to sell property—Vendee advancing money in pursuance of Contract—Suit by vendee for refund of money—Maintainability: The contract of sale entered into by a person having no title to the property, is not unlawful, illegal or immoral. It is not void because of section 23 of Contract Act but because it is entered into by a person who had no authority to transfer the property. The Contract falls within the terms of Section 65, Contract Act, and the suit by the proposed vendee for refund of money advanced on it is maintainable. *Thakurain Harnath Kuar* v. *Thakur Indar Bahadur Singh*, A. I. R. 1922 P C. 403, *Ananda Mohan Roy* v. *Gour Mohan Mullick*, A. I. R. 1923 P. C. 189, *Sunderlal* v. *Laxmanprasad*, I. L. R. 1949 Nag. 52 and *Saraswatibai* v. *Madhukar*, I. L. R. 1950 Nag. 467; relied on.

Babu Raja Mohan Mancha v. *Babu Manzur Ahmed Khan*, A. I. R. 1943 P. C. 29; referred to.

Abdula Saheb, v. *Guruvappa and Co.*, A. I. R. 1944 Mad. 387 and *Mohori Bibee* v. *Dharmodas Ghose*, I. L. R. 30 Cal. 539; distinguished.

SHAIKH UMAR *v.* SHIVDANSINGH, I. L. R. [1957] M.P. 590

Court of Wards Act, Central Provinces (XXIV of 1899), Section 12—Applicable only to money claims—Term "Liabilities" in Section 16—Does not include claim for partition or future maintenance : Section 12 of the Court of Wards Act is restricted to money claims only.

The word "liabilities" in Section 16, Court of Wards Act has to be read in *juxtaposition* of the preceding word "debts" and, therefore, means only such claims as create a monetary liability on the ward. The schedule cannot obviously include a claim for partition or future maintenance, though it may extend to a claim for arrears of maintenance, which would be deemed to have ripened into a liability within the meaning of Section 16 of the Act.

ONKAR BAHADUR SINGH *v.* RAGHURAJ SINGH, I. L. R [1957] M. P. 500

Enquiry under Letting of Houses and Rent Control Order, 1949, Clause 23 (1), Proviso—Not necessary to be completed within 15 days of the date of intimation : *vide* Letting of Houses and Rent Control Order, 1949 . 457

Evidence Act, Indian (I of 1872), Section 114, Illustration (e)—Nature of presumption to be drawn under—Regulation of Government Act (I of 1948)—Sections 3 and 4 and Article VI of the convenant—Constitution of India—Article 295 (2) —Order of Sovereign—Force of law—Saved because of Section 3 of the Act—Rights and liabilities created by the said Act—Enforceable under Section 4 in Municipal Courts : The presumption under section 114, illustration (c) of the Evidence Act is not with regard to the doing of an official act or to its validity, but it is only as regards the manner of doing it.

B. Walvekar and others v. *King Emperor*, I. L. R. 53 Cal. 718· A I R 1926 Cal. 966; relied on.

If the ruler of an Indian State is an absolute sovereign regarding all domestic matters, then his will as expressed in his order is the law of the land.

Director of Endowments, Government of Hyderabad v. *Akram Ali*, A. I. R. 1956 S. C. 60 and *Ameer-un-Nissa Begum* v. *Mahboob Begum*, A. I R. 1955 S. C. 352; relied on.

The fact that Section 3 is included in Regulation of Government Act 1948 shows that the object of section 3 was none other than to convert the recognition of the rights, duties, obligations and liabilities dealt with by Article VI (1) from the plane of a covenant, *i. e.* of an agreement, to the plane of statute so as to give any person interested in those rights, obligations and liabilities a legal enforceable right in respect of them against the State of Madhya Bharat. According to Article 299 (2) of the Constitution those rights subsist even after the coming into force of the Constitution and can be enforced in the Municipal Courts of that state.

Wigg and another v. *Attorney-General for the Irish Free State*. 1927 A. C. 674, *Bholanath's Case*, A. I. R. 1954 S. C. 680; relied on.

Maharaj Umeg Singh v. *State of Bombay*, A. I. R. 1955 S.C. 540 and *State of Seraikella* v. *Union of India*, A. I. R. 1951 S. C. 253; distinguished.

THE STATE OF MADHYA BHARAT (M P.) *v.* MESSRS. BEHRAMJI DUNGAJI & CO., I L. R. [1957] M. P. 556

High Court—No power to issue writ to quash the order of the Central Government situated outside the jurisdiction of the High Court *vide* Constitution of India, Article 226 507

Hindu Law—Will—By sole coparcener—Adoption by the widow of another coparcener—Right of adopted son to challenge the disposition made by will—Will executed prior to coming into force of Indian Succession Act—No attestation necessary—No proof of attestation required—Can be proved like any other document—Partition—Mutation entries—Relevant evidence—Possession and overt acts which follow —Admission—Raises only a presumption—Presumption rebuttable—Unless satisfactorily explained it is to be considered like any other evidence : Kodulal and Chhuttulal formed the corparcenary. Chhuttulal died leaving a widow Sardaran Bahu. Thereafter Kodulal died after making a will. He left behind his widow Mst. Noni Bahu. After the death of Kodulal Mst. Sardaran Bahu adopted Phulchand in 1921 and in 1928 Mst Noni Bahu adopted Rupchand. The point for determination was whether Phulchand can challenge the disposition made by will by Kodulal.

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Held—That Phulchand's adoption does not affect the disposition made by Kodulal by will, which has taken effect immediately on his death, that is before the adoption was made.

Ramkishna Krishnarao Kulkarni v. *Ramchandra Shriniwas Kulkarni*, A. I. R. 1950 P. C. 20, *Tatya Shantappa Gadeyannayar* v. *Ratnabai Bharata Dada Gadeyappa*, 1949 F. C R. 258, *Shriniwas Krishnarao Kango* v. *Narayan Devji Kango ana others* 1954 S. C. R. 1, *Bhimaji* v. *Hanmantrao*, A. I. R. 1950 Bom. 271, *Vithalbhai Gokalbhai* v. *Shivabhai Dhoribhai*, A.I.R 1950 Bom. 289, *Ramchandra Hanmant* v *Balaji Dattu Kulkarni*, A. I. R. 1955 Bom. 271, *Puttappa* v. *Basappa*, A. I. R. 1953 Mysore 113, *Udhao. v. Bhaskar*, I. L. R. 1946 Nag. 425, *Pralhad* v. *Seth Gendlal*, I L. R. 1948 Nag. 271, and *Krishnamurthi Ayyar* v. *Krishnamurthi Ayyar* I. L. R. 1950 Mad. 538 P. C.; relied on.

Anant Bhikappa Patil v. *Shankar Ramchandra*, 70 I A 232; discussed and distinguished.

Will made prior to the coming into force of the Indian Succession Act, 1927 did not require attestation compulsorily and therefore it was not necessary to prove valid attestation, nor was its execution provable by an attesting witness alone. All that is necessary to show is that that will has been executed by the executor

The question of the nature of possession depends upon the intention of the parties and the overt acts which follow.

Admission raises only a presumption which is rebuttable but unless the peculiar circumstances under which the admissions were made are satisfactorily explained, they would have to be considered just as any other piece of evidence.

MST. JHUNKARI BAHU *v.* PHOOLCHAND, I. L. R. [1957] M. P .. 531

Income-Tax Act, Indian (XI of 1922), Section 27—Scope and applicability of—Appeal against order under this section—Question whether Income-tax Officer can make best judgment assessment—If can be raised: Section 27 of the Indian Income-tax Act deals with the following matters :—

(*a*) Where the assessee was prevented from making a return for sufficient cause.

(*b*) When he did not receive notice under sub-section (4) of Section 22 or sub-section (2) of Section 23.

(*c*) Where he had no reasonable opportunity to comply with those notices.

(*d*) Where he was prevented by sufficient cause from complying with the terms of the last mentioned notices.

This section does not contemplate a situation in which the assessee says that no books of account were maintained separately at a Branch Office and the Income-Tax Officer holds on evidence before him or otherwise, that such books of account must have been maintained.

Section 27 allows a *denovo* inquiry into the assessment on proof of one of the four circumstances mentioned above.

In an appeal against the quantum of assessment the question whether the Income-tax Officer who disregarded the books of account and proceeded to make a best judgment assessment under section 23 (4) was justified in doing so is always implicit and can be raised. An application under section 27 is not a condition precedent to the raising of the contention.

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SUGANCHAND RATHI v. THE COMMISSIONER OF INCOME-TAX, M. P. I.L.R. [1957] M.P. 549

Income-Tax Act, Indian (XI of 1922), Section 34—Production of Account Books before the Officer at the time of assessment —Irrelevant fact in determining whether any income had escaped assessment—Burden on assessee to prove items of cash credits—Explanation furnished not supported by evidence—Income-tax Department can reject explanation— If explanation supported by evidence —Burden on department to show some other material showing why explanation should not be accepted—Income from undisclosed source—Not liable to be deducted from the assessable income arrived at by applying mode of enhanced flat rate— Absence of satisfactory proof regarding source of credit— Inference of Tribunal that credits are assessee's income from undisclosed source is a question of fact : Mere production of account books does not fasten knowledge upon department as to existence of cash credits. The fact that account books were produced and contained these entries is an irrelevant fact for determining whether any income had escaped assessment or not

D. R. Dhanwatey v. Income-tax Commissioner, A. I. R. 1956 Nag. 120, *Lajwanti Sial v. Commissioner of Income-tax* 30 I. T. R. 228 and *M. Parikh and Co. v. Income-tax Commissioner*. A. I. R. 1956 S. C. 554; distinguished.

In proceedings under section 34, Indian Income-tax Act the assessee has not only to furnish an explanation but support it by means of evidence such as vouchers, etc. If the explanation is reasonable then the department has to show from some other material on record that that evidence should not be believed. But where assessee gives no evidence, does not enter the witness-box and declines to produce the vouchers and fails to explain satisfactorily how the cash credits came to be in his book, the department is entitled to reject the explanation and hold the income to be from an undisclosed source.

Where the existence of a hidden source is deductible from the proceedings and the account books, the assessee is not entitled to claim deduction for those credits from the taxable income arrived at by taking flat rate basis.

R. B. N. J. Naidu v. *Commissioner of Income-tax*, 29 I. T. R. 194; distinguished.

In the absence of satisfactory proof as to the source of the credits, the inference of the Tribunal, that the credits are assessee's income from some undisclosed sources is an inference of fact.

SETH KALEKHAN MAHOMED HANIF *v.* THE COMMISSIONER OF INCOME-TAX, M. P. AND BHOPAL I.L.R. [1957] M.P. 466

Interpretation of Statute—Principle—Preamble not to control the Act : *vide* Circular No. 13 of 1908 of former Holl State and Land Revenue and Tenancy Act, 1931 573

Letting of Houses and Rent Control Order, 1949, Clause 23 (1) Proviso— Enquiry under—Not necessary to be completed within 15 days of the date of intimation : The proviso to sub-clause (1) of Clause 23 of the Letting of Houses and Rent Control Order, 1949 does not lay down that the enquiry as to the need of the landlord has to be completed within 15 days of the receipt of the intimation under sub-clause (1) of Clause 22.

SK. MOHAMMAD UMAR v. THE HOUSE RENT CONTROLLER, BILASPUR, I. L. R. [1957] M.P. 457

Limitation Act, Indian (IX of 1908) Section 14,—Not applicable to suit which is misconceived or not recognised by law as

legal in its initiation —Article 89—Applies to suit for recovery of movable property from agent : When a suit is dismissed because it was misconceived or because the proceedings or the suit was not one recognised by law as legal in its initiation, then clearly Section 14 of the *Limitation* Act is not attracted to such a suit.

V. C. Thani Chettiar v. *Dakshinamurthy Mudaliar*, A. I. R. 1955 Mad. 288, *Nakul Chandra Ghose* v. *Shyamapada Ghosh*, A. I. R. 1945 Cal. 381, and *Ramanand Prasad* v. *Gaya Prasad Ram*, A. I. R. 1949 Pat. 362; relied on.

Article 89 of the Limitation Act applies to a suit for recovery of any movable property which has been received by the agent and which has not been accounted for.

Deorao Kolba Kunbi v. *Laxman Singh Bania*, A. I. R. 1943 Nag. 227; referred to.

KASHIRAM *v.* SANTOKHBAI, I. L. R. [1957] M. P... .. 552

Mahomedan Law—Co-owner—Right of, to alienate any specific item of property—Alienee from a co-owner of specific item of property—Has equity to claim that the specific item be allotted to the share of his vendor in a suit for general partition: Under the Mahomedan Law every joint owner of the several items of property left by a deceased Mohammedan has in every item of the property a specific share which vests in him on the death of the original owner. The result is that no co-owner can alienate any specific item of property before the same has been allotted to his share in general partition effected either through Court or privately and if a co-owner alienates any specific property without the consent of the other co-owners, the other co-owners may sue for a partial partition of the property so alienated.

A co-owner under Mahomedan Law has a right of claiming a general partition of all the properties; the right cannot be denied to an alienee of a specific item of property. In a suit for general partition by him he can ask that that particular item should be put in the share of his alienor.

ABDUL RAHMAN *v.* SYED HAMID, I.L.R. [1957] M.P. .. 463

Muafi and Inam Tenants and Sub-tenants Protection Act, 1954 (Madhya Bharat), Sections 3 and 4—Tenancy coming to an end by efflux of time prior to coming into force of the Act—Tenant dying before the Act—His heirs in possession not entitled to protection : The heirs of a tenant of Inam lands, whose tenancy came to an end by efflux of time and who died before the enactment of the Madhya Bharat Muafi and Inam Tenants and Sub-tenants Protection Act, 1954 came into force are not tenants, ordinary tenants or ex-tenants for the purposes of Sections 3 and 4 of the Act and as such they are not entitled to protection.

Hasanali v. *Dara Shah*, A. I. R. 1949 Nag. 282, *Adimulam* v. *Pir Ravuthan*, I.L.R. 8 Mad. 424, *Vadapalli Narasimham* v. *Dronaraju*, I.L.R. 31 Mad. 163, and *Kantheppa Raddi* v. *Sheshappa*, I.L.R. 22 Mad. 893; referred to.

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Municipalities Act, Central Provinces and Berar (II of 1922), Section 48 (1)—Omission to pay money due under Contract—Is not act done or purporting to be done under the Act—Section not applicable to suit for recovery of such money : The omission to pay a sum due under a contract is not an act done or purporting to be done under the Act but under the contract itself.

Municipal Borough of Ahemdabad Jayantilal Chhotalal, I.L.R. [1947] Bom. 841 F.B., *Muyandi* v. *Meaunaa*, I.L.R. 2 Mad. 124 and *K.L. Nivagi and Co* v *The District Council, Buldana*, 26 N.L.R. 81, followed. ages

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Railways Act, Indian (IX of 1890),—Section 72—Non-delivery of goods—Suit by consignee for damages—Measure of damages—Civil Procedure Code (V of 1908) Section 80—Notice by the firm—Suit by firm and the partners—Notice not invalid : In a suit by consignee against railway for non-delivery the plaintiff is entitled to damages at the rate prevailing at the destination on the date on which the goods should have ordinarily arrived.

Dominion of India v. *Rupchand*, I.L.R. 953 Nag. 314 and *Dominion of India*, v. *Chhaganlal Premji*, 1951 N.L.J. 490; referred to.

Notice was given by the firm, but the suit instituted by the firm and the partners against railway for non-delivery cannot be defeated as the notice was not defective.

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Regulation of Government Act (I of 1948), Sections 3 and 4 and Article VI of the covenant—Constitution of India, Article 295 (2)—Order of Sovereign—Force of law—Saved bacause of Section 3 of the Act—Rights and liabilities created by the said Act—Enforceable under Section 4 in Municipal Courts : *vide* Evidence Act, Indian, Section 114 556

Regulation of Letting of Accommodation Act, Central Provinces and Berar, 1946, Section 2—Rent Control Order—Clause 13 (8)—Sub-clause (8) does not go beyond provision of Section 2 of Parent Act—Rent Controller—Power of, to make order regarding portion of house : Sub-clause (8) of clause 13 of the Rent Control Order does not in any way go beyond the provisions of section 2 of the C.P. & Berar Regulation of Letting of Accommodation Act.

Under sub-clause (8) of Clause 13 of the Rent Control Order the Rent Controller has power to make an order in respect of portion of house found sufficient to meet the needs of the landlord.

Pandit Sakharam Pant v. *K. L. Lodhi*, E.A.C., 1953 N.L.J. 235; held wrongly decided.

NATHULAL *v.* RATANSI, I.L.R. [1957] M.P. 494

Representation of the People Act as amended in 1956 Sections 83, 85 and 90 (4)—Rule of interpretation—Where legislature amends the Act—Amendments have to be taken together—Amendments made in all the three sections—To be read as part and parcel of the same intention—Term

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"Trial" in Section 90 (1)—Meaning of—Power of Tribunal to order better particulars—Particulars not given—Tribunal not compelled to try an indefinite issue—Article 226—Order in interlocutory stage—High Court—Power to decide upon correctness of order made with jurisdiction : The rule of interpretation is that when the legislature amends an Act by deleting something which was already there, then in the absence of an intention to the contrary the deletion nus be taken to be deliberate.

D. R Fraser and Co. Ltd., v. *Minister of National Revenue*, (1949) A.C. 24; referred to.

To take a consistent view, the amendments to Sections 83, 85 and 90 must be read together and as part and parcel of the same intention.

The term "Trial" in section 90 (1 of the Representation of the People Act covers an entire process of litigation from the acceptance of the election petition for trial to its disposal.

Harish Chandra v. *Triloki Singh*, A.I.R. 1957 S.C. 445; relied on

According to the amended provision the tribunal has no power to order particulars. If the particulars are not stated and no issue arises the tribunal need not try an indefinite issue. It can strike out pleadings on which an issue cannot be raised.

Under Article 226 of the Constitution, the High Court shall not at an interlocutory stage decide upon the correctness of orders made with jurisdiction.

H. V. KAMATH v. ELECTION TRIBUNAL, JABALPUR, I.L.R [1957] M.P. 479

Rule of interpretation—Where legislature amends the Act—Amendments have to be taken together—Amendments made in all the three sections—To be read as part and parcel of the same intention : *vide* Representation of the People Ac as amended in 1956 .. 479

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In the matter of *the Distribution of Compensation to the dependents of Kartarsingh*, A.I.R. 1931 Lah. 752; followed.

In re *Maung Kyan*, A.I.R. 1931 Rang. 173; not followed.

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Devidotta v. *Shriram*, A.I.R. 1933 Bom. 291; relied on.

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Held that the Court has the necessary power under Order 41, Rule 19-A read with Sections 153 and 107 of the C.P. Code. It is not only the law but the duty of every Court to see that its procedure if it is found defective does not harm a litigant.

Held further that in the circumstances of the present case there was sufficient cause for restoration of appeal to file.

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State of Orissa v. *Madan Gopal Rungta*, A.I.R. 1957 S.C. 12; relied on

In regard to the question whether in an application under Article 226 of the Constitution the High Court can embark on the investigation into disputed facts and meterials, no hard and fast rule can be laid down. The matter is one in the discretion of the Court. The High Court is not precluded under Article 226 of the Constitution from determining questions of fact. There is no limit to the power of the High Cour under Article 226 to issue directions, writs or order in the exercise of its jurisdiction under Article 226, except such limits as the Court may in its discretion impose on itself.

Shri Sohan Lal v. *Union of India*, A.I.R. 1957 S.C. 529; relied on.

The power of the High Court under Article 226 ought not to be exercised if the right which the petitioner is seeking to enforce depends on facts, complex and disputed and which have to be established

The rule that the High Court should not in an application under Article 226 embark on an investigation into the disputed facts and materials for determining whether the petitioner has the right which he is seeking to enforce, cannot apply where the doubt or dispute is as to the construction of a document or a judicial order or as to the effect and meaning of a record.

Himmatlal v. *State of Madhya Pradesh*, A.I.R. 1954 S.C. 403 and *Mahabir Prasad* v. *B. S. Gupta, Sales Tax Officer, Indore* 1957 M.P. Cases 214; referred to.

A person whose fundamental right is infringed by a private individual must seek his remedy under ordinary law and not under Article 32 or Article 226 of the Constitution.

P. D. Shamdasani v. *The Central Bank of India Ltd.*, A.I.R. 1952 S.C. 59; relied on.

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Mere presence of a Shivalinga in the temple proved to be a Jain temple and the use of the temple by the Hindu community cannot be regarded as significant and supporting the claim of the opponent that the temple was a Hindu temple.

Babu Bhagwan Din v. *Gir Har Saroop*, A.I.R. 1940 P.C. 7; referred to.

The right of the members of a particular community to worship in a temple according to the principles and forms of their religion is a fundamental and guaranteed right under Article 25(1) of the Constitution.

The power of the High Court under Article 226 is not confined to the issue of writs and is wide enough to give redress to the petitioners against wholly illegal action of the opponents infringing their fundamental rights under Articles 25(1) and 26(*b*) of the Constitution.

TEJRAJ, PRESIDENT JAIN SANGH, RATLAM v. STATE (M.B.) and COLLECTOR and TAHSILDAR OF RATLAM, I.L.R. [1957] M.P. 658

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Constitution of India—Article 226—Technicalities of law—Resulting in unjust enrichment of one party—Tribunal under the Special Act not giving effect to such technicalities—High Court—Power of, to exercise discretion under this Article : where the tribunal appointed under the Special Act—in this case the Municipal Act—did not allow technicalities to stand in the way of doing justice and where giving effect to such technicalities is likely to result in unjust enrichment of one party at the cost of the other, the Court will not exercise its extraordinary powers under Article 226 of the Constitution to defeat by technicalities of procedure what is prima facie a just claim and interfere with the orders of the said tribunal.

MUNICIPAL COMMITTEE, SAGAR v. BOARD OF REVENUE AND OTHERS, I.L.R. (1957) M.P. 622

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Bilaskunwar v. *Desraj Ranjit Singh*, I.L.R. 37 All. 557 P.C. *Motilal and others* v. *Kundanlal and another* A.I.R. 1917 P.C. 1; relied on.

Premraj v. *Nathmal*, I.L.R 1936 Nag. 142-145 and *Kalloo* v. *Rishabh Kumar*, 1951 N.L.J.—544 545-546; approved .

Murugesam Pillai v. *Manickavasaka Desika Gnana Sambandha Pandara Sannadhi and others*, I.L.R 40 Mad. 402 P.C., *Hiralal and others* v. *Badkulal and others*, 1953 S.C.R. 758 and *Rameshwar Singh and another* v *Bajit Lal Pathak and others*, A.I.R 1929 P.C. 95; referred to and explained

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Charanjit Lal v. *Union of India*, A.I.R. 1957 S.C. 41, *Baburao* v. *Bombay Housing Borard*, A.I.R. 1954 S.C. 153 and *Brigade Commander, Meerut* v. *Ganga Prasad*, A.I.R. 1956 All. 507; referred to.

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Gwalior State Cooperative Societies Act Section 65 and Rule 46(3) —Award by Registrar under Section 60- Circumstances under which Civil Court can execute it as a decree : The award made under Section 60 of the Gwalior State Co-operative Societies Act by the Registrar is not a decree of a civil court, and not being a decree of a Civil Court, it cannot be maintained that the award is *proprio vigore* executable by a civil court in accordance with the judicial procedure prescribed in the code for the execution of decrees by a civil court. Under Rule 46(3) a Civil or Revenue Court can execute the award only when it is transferred to it for execution through the agency of the Government Inspector Co-operative Societies and not without him.

INDORE PARASPAR SAHAKARI PEDHI LTD., KRISHNAPURA, INDORE *v.* B.M. THORAT, I.L.R. [1957] M.P. 684

Madhya Bharat High Court Rules -Rule 23- -Copyist not notifing the person about the copy being ready- The period between the date when copy was ready and the date when delivery was actually taken- -Whether can be excluded—Madhya Bharat Police Act -Beating a person in the course of investigation- -Does not fall within the scope of Police Act : Where the copyist does not notify to the person when the copy would be ready (according to Rule 23 of Madhya Bharat High Court Rules), then the period between the date when the copy was ready and the date when the copy was actully delivered can be excluded.

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Municipalities Act, Central Provinces and Berar (II of 1922)—Section 66—House divided into six blocks—Right of Municipality to demand tax regarding each block from its respective tenant or of all blocks from the owner of the house: The Municipal Committee is entitled to make assessment on the footing that the building stood divided into six houses and the rate applicable is different in respect of each tenemei t. This demand of tax levied on separate tenements can be made both from the tenants by way of six notices of demand to them or from the landlady by six different notices of demand to her.

SMT. SONABAI *v* THE MUNICIPAL COMMITTEE ,SAGAR AND2 OTHERS, I. L. R. [1957] M. P 61

Penal Code, Indian (XLV of 1860). Section 500—Proceedings for defa(ation-The proof of exact words used-When necessary-When proof of purport of defamatory remarks sufficient for conviction : There is no universal tule that in a defamation case the accused can not be convicted unless the actual words used by the accused are proved. The question, whtther certain words used are defamatory, depends solely on the shade of their meaning in the context in which they are used. Then it is very essential to prove the exact words used by the accusetas also the context in which they were spoken. When the exact words used and theirm contex are not aterial, a sufficiently clear account of the purport of the defamatory remarks would be enough to find the accused guilty.

Emperor v. Col. Bholanath, I. L. R. 51 All. 313; relied on.

MOHANLAL MURLIDHAR *v.* RAMCHARAN DEVIPRASAD, I.L.R [1957] M. P. 63

Public Trusts Act, Madhya Pradesh (XXX of 1951)— Provisions of the Act—Effect on Section 92, Civil Procedure Code—Constitution—Articles 25 and 26—Distinction between matters of religion and holding and management of property by religious instituuon Matters of religion outside pale of Municipal law, but not true of property—Madhya Pradesh Public Trusts Act, Section 2 (4)—Religious and Charitable institutions—

Absence of existence of public trust- -Institutions do not come under the definition—The term "Trust" in- Has same meaning as given in Indian Trusts Act -Constitution- Article 226—State Government, Right of, to impugn order passed by Registrar under Madhya Pradesh Public Trusts Act : The general superintendence of trusts which emerged from section 92 Civil Procedure Code is nullified by the provisions of Madhya Pradesh Trusts Act.

Articles 25 and 26 of the Constitution make a distinction between matters of religion and the holding and management of property by religious institutions which has to be held in accordance with law. While matters of religion are entirely outside the pale of municipal law and dependent upon the beliefs and the tenets of a particular religion, the same is not true of property which has to be held and enjoyed in accordance with such law as the legislature may choose to make.

Ratilal Panachand Gandhi v. *The State of Bombay (and connected appeal)* 1954 S. C. R. 1055 ; followed.

In matters of property there is always a secular angle which is supplied by the law of the country, and that no religious denomination can make a law about its own property and thus nullify the law of the land.

The religious and charitable institutions, which do not administer any trust property, cannot fall under the definition of Public Trust given in Section 2(4) of Madhya Pradesh Public Trusts Act, because the basic condition, *viz.* the existence of a public trust, is missing.

The word "Trust" in veiw of the provisions of Section 2 (1) of the above Act has to be given the same meaning as in the Indian Trusts Act.

The extra-ordinary powers of the High Court under Article 226 of the Constitution cannot be invoked by the State Government to impugn the order made by the Registrar.

Per Bhutt F.- The term "includes" in Section 2 (4) of the said Act is a phrase of extension and not of restriction.

Unless a religious or charitable institution has vested in it or administers, property to the ownership of which an obligation is annexed, it would not be amenable to the provisions of sections 4 and 5 of the Madhya Pradesh Public Trusts Act.

STATE OF MADHYA PRADESH *v.* MOTHER SUPERIOR CONVENT SCHOOL AND ANOTHER, I. L. R. [1957] M. P. 599

Representation of the People Act (XLIII of 1951) -Election Tribunal- -Inherent power to restore the petition dismissed for default : An election petitioner's counsel was unavoidably delayed by ten minutes by a break-down of his car. The petition was dismissed in his absence but was restored to file when he arrived and explained the delay.

Held- The election tribunal possesses the inherent power to dismiss an election petition when the petitioner does not appear and also to restore it to file *exdebito justitiae* on sufficient cause being shown, though there is no specific provision in the Act for the purpose.

SUNDERLAL *v.* NANDRAM DAS AND OTHERS, I. L. R. [1957] M. P. 627

Sales Tax Act, Central Provinces and Berar (XXI of 1947), Section 2 (G), Explanation (ii) -Constitution of India -Article 286 -Tax on sale of goods outside the State prior and subsequent to 26.1.50- Validity : Some goods were despatched from Madhya Pradesh to agents in Uttar Pradesh for being sold to consumers there, and some were sent after 26-1-50. The question was whether tax could be levied on sales of goods during both these periods.

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Held—That Sales Tax can be collected in respect of transactions of sales between 22-10-49 and 25-1-50

Messrs Shriram Gulabdas v. *Board of Revenue, Madhya Pradesh, Nagpur and another* A.I.R. 1952 Nag. 378 *and Himmatlal* v. *Sta e of Madhya Pradesh*, A.I.R. 1954 S.C. 403; followed.

Bengal Immunity Co. v. *State of Bihar* A.I.R. 1955 S.C. 661; relied on.

Held further that Sales Tax can only be collected by the State in which goods are actually delivered for the purpose of consumption in that State and not by the State from which the goods were sent for such delivery because of Article 286 of the Constitution.

MESSRS MULLAJI JAMALUDDIN AND CO. *v.* THE STATE OF M.P. AND OTHERS, I.L.R. [1957] M.P. 631

Sales Tax Act, Central Provinces and Berar, (XXI of 1947), Section 11-A—Scope of Term "Escaped assessment"—Explained-When it can be taxed : Section 11-A of C. P. and Berar Sales Tax Act does not govern the cases where the assessment is being made for the first time, either on a return being made or where no return is made and action is taken under 4th sub-section of section 11 of the said Act. The question of escaped assessment arises only if there is a final assessment under the Act and some information is received subsequently by the Commissioner on the basis of which he feels that some turnover which ought to have been assessed was not so assessed. That is a case of escaped assessment; but not when the turnover of a person is being found out or verified and he is being assessed in the first instance.

Rajendra Nath v. *Commissioner of Income-tax* A.I.R. 1934 P.C. 30 and *Lachiram Basantlal* v. *Commissioner of Income-tax, Bengal*, 5 I.T.C. 114, 118; referred to.

The limitation provided in Section 11-A cannot be read back into Section 11, sub-sections (1) to (4).

REGIONAL ASSISTANT COMMISSIONER OF SALES TAX v. GHANSHYAMDAS, I.L.R. [1957] M.P. 634

Succession Act, Indian(XXXIX of 1925)—Section 222(1)—Executor appointed by an executor or the heirs of executor appointed by will—Not entitled to grant of Probate : An executor appointed by the executor under a will is not the derivative executor of the original testator and accordingly a probate of the will of the original testator cannot be granted to him.

Nathu Ram v. *Alliance Bank*, A.I.R. 1929 Lah. 546, *Parshottam Ram* v. *Kesho Das*, A.I.R. 1945 Lah. 3 and *Musammat Phenki v. Musammat Manki*, I.L.R. 9 Pat. 698; relied on.

Even an heir of the executor under a will has not the right to the grant of probate.

Sarat Chandra Banerjee v. *Nani Mohan Banerjee* I.L.R. 36 Cal. 799 and *Mithibai* v. *Canji Kheraj*, I.L.R. 26 Bom, 571; relied on.

SMT. SUSHILABAI v. GOVIND GANESH KHARE, I.L.R. [1957] M.P. 643

Tort—Damages—Person dissuading a servant from performing a contract contrary to public policy—Suit for damages against such person—Maintainability : No action for damages lies against a person for dissuading one from performing a contract which must be regarded as contrary to public policy.

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Lumley v. *Gye* (1853) 2 E and B 216 and *South Wales Miners' Federation* v. *Glamorgan Coal Company* 1905 A. C. 239 ; principles held to be not applicable to case in question.

SITARAM S/O DEOKARAN *v*. BALDEO AND OTHERS, I. L. R. [1957] M. P. 645

APPELLATE CIVIL

Before Mr. M. Hidayatullah, Chief Justice

SHRI S. C. MUKERJI and another *Appellants.** 1957

Vs.

Jan. 9.

SMT. GANGABAI *Respondent.*

Easements Act, Indian (V of 1882), Section 54—Suit by licensees for injunction against servient owner restraining him from interfering with their right—Maintainability.

A suit by a licensee of a servient heritage who enjoys certain licensee rights for a few days in a year, for an injunction restraining the dominant owner from exercising the alleged easement right is not maintainable.

Pannalal v. Anant Singh (1), referred to.

Shri *A. N. Mukerji* for the appellants.

JUDGMENT

HIDAYATULLAH, C. J.—This second appeal is by the plaintiffs whose suit for a permanent injunction was dismissed in the Court of appeal below. In the trial Court the plaintiffs had succeeded.

The appeal in the Court below was decided only on one point, viz., that the plaintiffs had no right of suit. The plaintiffs belong to the Bengali community, though they have not sued in a representative capacity. One Babu Sharda Kumar Mukerji made a will (Exhibit P-4) in 1939, by which he left his house and other property absolutely to his daughter. In the house it was customary to instal at Dasehra the image of Devi, and this right was continued to the Bengalis of Sagar, unless it was abandoned for five years.

*Second Appeal No. 760 of 1950 from the decree of H. C. Daga, Additional District Judge, Sagar, dated the 9th August 1950 reversing the decree of J. N. Khare, Additional Civil Judge, Class II, Sagar, dated the 23rd July 1949.

(1) A. I. R. 1946 All. 284.

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Hidayatullah C. J.

The defendant constructed two doors towards the western side of her house, and it was alleged she started using the land appurtenant to the house where the Devi is installed as a passage. She also constructed drains and *nabdans* and used the passage for the sweeper. The suit was filed for a permanent injunction prohibiting her from such user.

The trial Court decreed the suit. But the lower appellate Court reversed the decision and dismissed the suit holding on the authority of *Manbahal Rai V. Ram Ghulam* (1) that the plaintiffs had no right of suit being mere licensees themselves.

It is contended that the correct law is laid down in *Pannalal v. Anant Singh* (2) and that the licensees had a right of suit. In the latter ruling it is stated that each case by the licensee must be examined with reference to the relief claimed to see whether the right of suit exists or not.

An easement right is carved out in favour of a dominant heritage and is imposed on a servient heritage. In every case the right is exercised *qua* owner or occupier of a dominant heritage and falls as a burden on the owner or occupier of a servient heritage. If the suit had been brought by Mrs. Tarulata Devi, to whom the property belonged absolutely, no question could be raised. But the suit was brought by two members of the Bengali community of Sagar who are only allowed use of the premises for a few days in a year for the purpose of installing the Devi. If the easement right was acquired in the land the burden will fall on them, as on the owner. It was for the owner and not for the licensees enjoying licensee rights for a few days in a year to resist by suit the right claimed by the defendant. Such a suit is not open to licensees.

I see no reason to interfere. The appeal fails and is dismissed with no order for costs since the defendant respondent did not put in an appearance in this Court.

Appeal dismissed.

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(1) A. I. R. 1927 All. 633. (2) A. I. R. 1946 All. 284.

APPELLATE CIVIL

Before Mr. Justice B. K. Chaturvedi

FIRM RADHAKISAN *Applicant**. 1956

Vs. *Dec. 13.*

KALICHARAN *Non-Applicant.*

Civil Procedure Code (V of 1908)—Section 48 (2)—"Fraud" in, to be interpreted in a wider sense—Delay in execution due to untenable objections—Amounts to fraud.

The word "Fraud" in sub-section 2 of section 48 Civil Procedure Code is to be interpreted in a wider sense.

Delay in execution by manifestly frivolous, futile, dishonest objections, amounts to fraud.

Lalta Prasad v. Suraj Kumar (1), relied on.

Shri *N. P. Dwivedi* for the appellant.

Shri *J. V. Jakatdar* for the respondents.

ORDER

CHATURVEDI J.—The only point pressed in this miscellaneous appeal by Shri N. P. Dwivedi is, that the present execution application is barred by time, and the learned Civil Judge, Class I, Khandwa, was in error when he held that it was within time.

To understand the implications on this point, some facts may be stated briefly. Mst. Pannibai, the mother of respondents 1 and 2, and respondent No. 2, Surajprasad, filed a suit against the present appellants and obtained a consent decree on 7th October 1936. The defendants were allowed to pay the decretal amount in certain instalments which are stated in paragraph 2 of the order of the learned lower Court. In default of 3 yearly instalments, the whole was to be paid at once.

There was a default in the payment and the decree-holders took out execution for the recovery of Rs. 528-4-0 on 23rd July 1941. On the 10th January

*Miscellaneous First Appeal No. 35 of 1956 from an order of D. B. Pawday, 1st Civil Judge, Class I, Khandwa, dated the 3rd February, 1956.

(1) A. I. R. 1922 All. 145=44 All. 319.

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Chaturvedi J.

1942, the judgment-debtors paid Rs. 600/- to the decree-holders and the execution was dismissed as the decree was partly satisfied. At this date, there was a balance of Rs. 2,928-4-0 in the decretal amount. Meanwhile, Pannibai, decree-holder, died. She had two sons, Surajprasad and Kalicharan. The name of the former was already on record, and so the name of the minor son, Kalicharan, was brought on record on 8th April 1942.

Then an application was made by Surajprasad on behalf of himself and on behalf of his minor brother, and also by the judgment-debtors, to have an adjustment recorded as certified. It was mentioned that the decree-holders had agreed to accept Rs. 1,800/- in full satisfaction of the decree and to forego the remaining amount. The judgment-debtors had paid Rs. 150/- before the application and Rs. 1,000/- in cash on 3rd April 1942, and therefore, it was stated that the balance of Rs. 650/- would be paid on 1st March 1943. On 15th April 1942, the adjustment was ordered to be recorded as certified.

Kalicharan, at that time, was a minor, and Surajprasad, his next friend, did not seek permission from the Court to enter into a compromise on his behalf. So Kalicharan, through his next friend, his father, made an application for setting aside the order recording the adjustment as certified, alleging that the adjustment could not have been for his benefit. This application was rejected on 15th September 1942.

The minor Kalicharan then went in appeal to the High Court of Judicature at Nagpur, and the High Court set aside the order of the executing Court and sent the case back for a finding whether the adjustment was for the benefit of the minor, and whether it was a fit case for according sanction. This order was passed on 18th November, 1946 in miscellaneous appeal No. 331 of 1942.

The Civil Judge, Class I, Khandwa, held an enquiry and held that the adjustment which had been certified and which had been set aside by the High Court, could not be for the benefit of the minor decree-holder, Kalicharan, and therefore, the adjustment was set aside. The order was passed on 16th August 1949.

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Against this order, the judgment-debtors went in appeal to the High Court. The appeal failed and it was dismissed with costs on 10th April 1953.

Then Kalicharan, minor, through his next friend, his father Mangal Singh, took out execution of the decree, for the first time, on 22nd January 1954. Kalicharan attained majority on 23rd November 1953, and on his application being granted, he was permitted to prosecute the application for execution himself. The application was opposed by the judgment-debtors and the main point taken in the execution Court which is material in this appeal is, that the application, either under section 48 of the Code of Civil Procedure or under Article 182 of the Indian Limitation Act was barred by time.

This is the main point pressed before me by Shri N. P. Dwivedi, but Shri J. V. Jakatdar invites my attention first to sub-section 2 of section 48 of the Code of Civil Procedure, and urges that the judgment-debtors in this case have, by fraud, prevented the execution of the decree at sometime within 12 years, immediately before the date of the application, and therefore, that period must be excluded.

The word 'fraud' in sub-section 2 of section 48 of the Code of Civil Procedure is to be interpreted in wider sense, and it has been held that any improper means to prevent execution would be 'fraud' within the meaning of this sub-section. Thus, delaying execution by manifestly frivolous, futile and dishonest objections. has been held to be fraud. See *Lalta Prasad v Suraj Kumar* (1).

From 8th April 1942 to 16th August 1949, the minor Kalicharan, decree-holder, could not execute the decree in view of the false and frivolous plea of adjustment, taken by the judgment-debtors. This period of 7 years 4 months and 8 days, is to be excluded from computation and the execution will be within time.

The next point taken by Shri Jakatdar, learned counsel for the respondents, is that the mere fact that there is a guardian for the person under disability, does

(1) A. I. R. 1922 All. 145.

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not deprive such person of the indulgence granted by section 6 of the Indian Limitation Act. The learned counsel for the respondents drew my attention to Note No. 35 at page 281 of Volume I of Chitaley's Commentaries on the Indian Limitation Act, and the cases cited therein are definitely in favour of the respondents.

In *Satyendra Narayan Sinha v. Pitambar Singh* (1), it has been held in clear words, that where a guardian for minor applies for execution of a decree obtained on behalf of the minor, and the application is held to be barred by limitation, the minor is not precluded from applying for execution of the decree within the statutory period of 3 years from the date of attaining majority, and the order in the previous execution proceedings, is not binding on him.

I need not multiply authorities cited in Note 35 of Chitaley's Commentaries. It will be sufficient to observe that Kalicharan, minor, decree-holder, had attained majority only on 22nd March 1953, and the application for execution filed on 22nd January 1954, will be within limitation.

The appeal, therefore, is devoid of substance and must fail. It is dismissed with costs.

Appeal dismissed.

APPELLATE CIVIL

Before Mr. M. Hidayatullah, Chief Justice and Mr. Justice Choudhuri.

1956

Nov. 22.

SHOP BABULAL MANGILAL *Appellant.**

Vs.

FIRM MANGILAL BALKISHAN *Respondent.*

Oil Seeds (Forward Contracts Prohibition) Order, 1943—*Clauses* 3 *and* 4—*Notification of Government of India,*

*Second Appeal No. 550 of 1951 from the decree of B. K. Puranik, District Judge, Hoshangabad, dated 18th June 1951, confirming the decree of N. C. Dwivedi, Civil Judge Class II, Harda dated the 18th July, 1950.

(1) A. I. R. 1938 Pat. 92.

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Babulal vs. *Mangilal*

C. D., No. P & S. C. 75 (2) 143 *dated* 31-5-1943—*The word "And" is conjunctive and not disjunctive—Types of forward delivery contracts regarding oilseeds exempted by the said Notification—Interpretation of Statute—Interpretation advancing the spirit of order to be accepted in preference to doubtful interpretation.*

Reading the scheme of the Notification issued by the Government of India, C. D., No. P. & S. C. 75 (2)/43 dated 31-5-1943 the word 'And' in the said notification is conjunctive and not disjunctive.

The forward delivery contracts regarding oilseeds which are saved by the notification of Government of India C. D., No. P. & S. C. 75 (2)/43 dated 31-5-1943 are of specified qualities and types, for specified deliveries at a specified price with no possibilities of third parties intervening.

The interpretation advancing the spirit of the Order must be accepted in preference to a doubtful interpretation enlarging the exemption granted by the Government of India notification.

Shri M. Adhikari for the appellant.

Shri N. P. Dwivedi for respondent No. 1.

JUDGMENT

The Judgment of the Court was delivered by HIDAYATULLAH C. J.—This is a defendant's second appeal against a decree for Rs. 4,117-15-0 with costs in the two Courts below.

The facts of the case are simple, and the arguments were limited to only one point. There were forward contracts between the parties in Alsi, and the present matter relates to a transaction of 1945 involving a sum of Rs. 3,643-7-0 and costs. Though there were earlier transactions between the parties, the accounts were admittedly adjusted before the last transaction was made, and no balance was due on either side. The present transaction was admittedly a forward contract. There were pleas that it was a wagering contract, but those pleas have been negatived in the Courts below and the plaintiff-firm has been awarded a decree for the amount claimed by it less some deduction in the matter of interest.

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In this appeal only one argument has been raised, that the transaction was hit by the Oilseeds (Forward Contracts Prohibition) Order, 1943. The plaintiff-firm claimed an exemption by virtue of the Notification issued by the Government of India, C. D., No. P & S. C. 75 (2)/43 dated the 31st May 1943. But for this exemption granted by the Government of India the matter would have stood concluded under clause 3 and 4 of the Order, particularly clause 3, under which no person could enter into any forward contract in any oil seed after the promulgation of the Order. The defendant-firm pleaded illegality, and in answer the plaintiff averred as follows :

> 'That the forward contracts for the purchase and sale of Alsi were not at all in the nature of wagering contracts. The forward contracts of Alsi transactions made by the defendants through the plaintiffs were of specific quality or type 'namely bold linseed and for specific delivery at fixed time at a specified price and for specific quantities.'

The contention of the appellant (defendant-firm) is that the contract was not shown to be not transferable and the exemption granted by the Government of India does not thus apply to this case. Reliance was placed by the learned counsel for the appellant on *Hussain Kasam Dada v. V. C. Association* (1) *Seetharamaswami v. Bhagavathi Oil Co.* (2) and *Firm Hansraj v. Vasanji* (3). During the course of the arguments we discovered two other cases, viz., *Venkata-Swami v. Noor Muhammad* (4). No case was cited on the other side, though reliance was placed upon certain observations made in *Seetharamaswami v. Bhagavathi Oil Co.,* (2) and it was contended that the decisions given need reconsideration.

The exemption granted by the Government of India was in the following terms :

> 'Forward contracts for.....linseed.....of specific qualities or types and for specific delivery at a specified price, delivery orders, railway receipts or bills of ladings against which contracts are not transferable to third parties'.

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(1) A. I. R. 1954 Mad. 528; 1950 (1) M. L. J. 557.
(2) I. L. R. (1951) Mad. 723, (3) (1949) 4 D. L. R. (Bom.) 7.
(4) A. I. R. 1956 Andhra 9 and 85 C. L. J. 136.

The wording of this exemption is not happy and is not even grammatical. It has given a great amount of trouble to those whose task has been to interpret it. The first point to settle is whether the conjunction 'and' is disjunctive or conjunctive. In our opinion, reading the sentence as a whole it is conjunctive; and this is also the view taken in one of the cases relied upon.

The next question is whether the condition of non-transferability applies only to the last portion where delivery orders, railway receipts, and bills of lading are mentioned or whether it applies to all transactions which are saved. In the Calcutta case the learned Judge pointed out that 'specific delivery' indicated that at least it should be for specific and ascertained goods. This contention was not raised to start with by the learned counsel for the appellant, but when his attention was drawn to the ruling he said that it would be an additional argument in his favour. No doubt, the language in the latter part of the notification is cryptic and some words are missing. The intention, however, is clear viz., that the transactions which are saved should be for specified qualities and types, for specified deliveries at a specified price, with no possibility of third parties intervening. In the present case there is nothing to show that the Alsi which was to be delivered by the defendant-firm could not be ordered to be delivered to a third party. We think that any other interpretation would undo the scheme of the Order completely, and an interpretation advancing the spirit of the Order must be accepted in preference to a doubtful interpretation enlarging the exemption granted by the Government of India notification. We accept the view expressed in the Madras and Bombay cases, and we hold that in this case there was nothing to show that the delivery was only to the vendee and not to any other persons. If third parties could have been assigned the benefits of the contract then the exemption cannot apply. The respondent was required to show that the benefits of the contract were not assignable to others. This, the plaintiff-firm neither pleaded nor proved. In view of this, we think that the decision of the Court below must be reversed and the claim of the plaintiff should be dismissed with costs throughout. We hesitated whether or not to allow the defendant-firm its costs because it was as much in breach of the Order as the plaintiff-firm; but in view of the decision in *Haji Habib v. Bhikamchand Jankilal Shop* (1), we think that costs must

(1) I. L. R. [1954] Nag. 514.

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follow the event in this case. We accordingly allow the appeal and dismiss the plaintiff's suit with costs throughout.

Appeal allowed.

LETTERS PATENT APPEAL

Before Mr. M. Hidayatullah, Chief Justice & Mr. Justice Chaturvedi.

1956

Dec. 7.

KISHORCHAND & others *Appellants.**

Vs.

DAMODAR *Respondent.*

Workmen's Compensation Act (VIII of 1923)—Section 2(1)(n)—The word "And" in the definition of Workman is conjunctive and not disjunctive—Person employed casually for purposes of employer's trade or business—Falls within the definition.

Both the clauses joined by the word "And" in the definition of Workman in Section 2 (1) (n) of the Workmen's Compensation Act are to be read conjunctively. The word "And" is conjunctive and not disjunctive.

Manton v. Cantwell (1), relied on.

Even though a person might have been employed casually he would be deemed to be within the definition of "Workman" if he was employed for the purposes of the employer's trade or business.

K. E. S. Corporation v. Bahadur Sardar (2), relied on.

Shri K. K. Dube for the appellants.

Shri A. R. Choube for the respondent.

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*Letters Patent appeal No. 23 of 1953 from the appellate order of the Honourable Mr. Justice P. P. Deo dated the 9th March 1953.

(1) (1920) A. C. 781-786. (2) (1938) 42 C. W. N. 516.

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Kishorchand vs. *Damodar*

ORDER

The order of the court was delivered by HIDAYATULLAH, C. J.—This appeal is against an order passed by Deo J. in Miscellaneous (First) Appeal No. 160 of 1951 on 9th March 1953. The matter arises out of proceedings under the Workmen's Compensation Act, and the present appellant (now deceased and represented by his heirs) was the employer against whom the orders of the learned Commissioner and that of the learned Single Judge have been made.

The facts of the case are as follows : The respondent Damodar was working as the head mason in the construction of a godown which the employer was getting constructed to store grain in which he was doing business. Damodar was working as a mason and used to dress stones for use in the godown. While so working a chip of stone flew up and got embeded in his eye, which though treated resulted in the loss of the sight of that eye. Compensation was claimed on two accounts, viz for permanent loss of the limb and for the expenses of treatment. A lump sum has been awarded by the learned Commissioner, and that amount is not in dispute any longer.

The appeal of the employer is directed only against the finding that Damodar falls within the definition of 'workman' given in the Workmen's Compensation Act. According to the employer, both the learned Commissioner as well as the learned Single Judge have erred in holding that Damodar can be described as a 'workman' within the Workmen's Compensation Act. The definition is contained in section 2 (1) (n) of the Act. It reads as follows :

> "Workman" means any person (other than a person whose employment is of a casual nature and who is employed otherwise than for the purposes of the employer's trade or business) who is:—'.....
>
> (ii) employed on monthly wages not exceeding four hundred rupees, in any such capacity as is specified in Schedule II,.....'

According to the learned counsel for the appellants Damodar's employment was of a casual nature and he was not employed for the purposes of the employer's trade or business.

The first question to settle is whether the word 'and' is disjunctive or conjunctive; or in other words whether both

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the limbs of the conditions of exclusion have to be satisfied. There is a large number of rulings showing that both these clauses are to be read conjunctively. The leading case on the subject is of the House of Lords where Lord Birkenhead, L. C., laid down that both the conditions have to be satisfied : See *Manton v. Cantwell* (1). In dealing with a cognate clause the Lord Chancellor said that the meaning of the second part of the sentence was that if a man be employed for the purposes of the trade or business, the employer is liable, even though the employment was of a casual nature. It thus appears that even though this mason might have been employed casually he would be deemed to be within the definition of 'workman' if he was employed for the purposes of the employer's trade or business. Now, the construction of a godown for the purposes of storing grain is so vitally connected with the business of dealing in grain that there can be no doubt that a mason constructing it was employed for the purposes of the employer's trade or business. In the same case to which we have referred the House of Lords laid down that the thatching of a roof through workmen by farmers was so connected with the employers' business as to be contemplated by the definition. In that case the farmer who was living in a thatched house for the purposes of his business employed a workman for thatching the roof. The employee fell off the roof and was killed and was held entitled to compensation and was taken to be within the definition. There are other cases in India on the same point, which need not be cited here. One of them is *K. E. S. Corporation v. Bahadur Sardar* (2). Other cases will be found collected in any leading text book on this Act.

The second part of the definition has now to be considered. The question is whether this mason could be said to have been employed on monthly wages not exceeding Rs. 400 in a capacity as described in Schedule II. It has been found as a fact by the learned Commissioner that the building which was being constructed was more than 20 feet in height from the ground to the apex of the building. This is a finding of fact and is not open to challenge in view of the provisions of section 30 of the Act. Once this is held, it is quite obvious enough that Damodar came within the II Schedule of the Act.

(1) [1929] A. C. 781, 786. (2) (1938) 42 C. W. N. 516.

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The next question is whether he was employed on monthly wages not exceeding Rs. 400. No doubt, Damodar was being paid daily wages; but the employment had continued for more than two months. His total emoluments, though they were not paid on a monthly basis, did not exceed Rs. 400 per month. This is an admitted fact. In view of the rulings which have been cited by the learned Single Judge one has not to see that the employment should be on a monthly basis. What has to be seen is that the emoluments which are mentioned do not exceed more than Rs. 400 per month. In the present case this condition is also satisfied.

In the result Damodar must be treated as a workman even though his employment was of a casual nature, because he was employed for the purposes of the employer's trade or business, his emoluments did not exceed Rs. 400 per month, and he was working in a capacity such as is described in one of the clauses of the second schedule of the Act. The decision of the learned Single Judge, therefore, with all due respect is entirely correct. We see no reason to interfere. Indeed, we did not trouble the learned counsel for the respondent for a reply.

The appeal fails and is dismissed with costs.

Appeal dismissed.

MISCELLANEOUS CIVIL CASE

Before Mr. M. Hidayatullah, Chief Justice & Mr. Justice B. K. Chaturvedi.

1957

Jan. 16.

G. R. KULKARNI *Applicant**.

Vs.

THE STATE

Madhya Pradesh Sales Tax Act (XXI of 1947), Section 2 (i) (a)—Quarrying and breaking of boulders into metal (stones)—Amounts to manufacture—Person carrying on such business—Liable to assessment.

The essence of all manufacture is the changing of one object into another for the purposes of making it marketable. Hence the process of quarrying and breaking of

*Miscellaneous Civil Case No. 105 of 1956. Reference under section 23 (1) of the Madhya Pradesh Sales Tax Act by the Board of Revenue dated the 26th March 1955.

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boulders into stones amounts to manufacture and a person carrying on such business is liable to be assessed under the Madhya Pradesh Sales Tax Act.

State of *Madhya Pradesh v. Wasudeo* (1), *North Bengal Stores Ltd., v. Board of Revenue, Bengal* (2) and *Kent v. Astley* (3) relied on.

Shri K. K. Dube for the applicant.

Shri S. B. Sen, Addl. Govt. Advocate, for the State.

The Reference came on for hearing before the Bench consisting of Hidayatullah C. J. and Chaturvedi J. who delivered the following :—

OPINION

This is a reference under section 23 (1) of the Madhya Pradesh Sales Tax Act by the Board of Revenue. The following questions have been referred for the opinion of this Court :

(1) Whether the quarrying and breaking boulders into stone is manufacture within the meaning of section 2 (1) (a) of the Act?

(2) Whether on the facts of the case the transactions are taxable sales within the meaning of section 2 (g) of the Act?'

For the purposes of answering these questions a few facts have to be narrated. The assessee is one G. R. Kulkarni. He is a railway contractor, who takes on contracts the digging and preparing of *gitti* (metal) and collecting it at the railway sidings according to his contracts and who sells this metal for constructions of roads and as ballast etc. The short question, therefore, is whether the breaking of boulders into metal (*gitti*) is process of manufacture.

We may mention that the case arose before the passing of Act 20 of 1953, which introduced a section defining 'manufacture'. That definition says that manufacture includes any process or manner of producing, preparing or making any goods. In our opinion, even without this definition the word 'manufacture' in relation to other parts of this Act would bear the identical meaning. The definition does nothing more than clear the ground, so that no dispute may hereafter exist. Now, the gist of the matter

(1) (1955) 6 S. T. C. 30 (2) (1950) 1 S. T. C. 157
(3) (1869) L. R. 5 Q. B. 19.

in this case is that according to the definition of 'taxable quantum' the present assessee would be liable to pay a tax on a turnover of Rs. 5,000/-if he was himself manufacturing or producing any goods for the purposes of sale; [see the definition of 'taxable quantum' in section 2 (i) (a) of the Sales Tax Act.] The contention of the assessee is that he was neither manufacturing nor producing any goods for the purposes of sale. He contends that breaking boulders into *gitti* is not a manufacturing process and that *gittis* are not 'produced' within the meaning given to it by the definition. He relies upon *North Bengal Stores, Ltd., v. Board of Revenue Bengal* (1) *and State of Bihar v. Chrestien Mica Industries Ltd.,* (2). On the other side reference is made to *State of Madhya Pradesh v. Wasudeo* (3).

It is obvious enough that the process of manufacture changes from one article to another and there are so many different processes in existence that to take the analogy of any single manufacturing process is likely to cause confusion. It is better therefore to apply one's mind to the exact process employed by which one article is shaped into another and to see whether the purposes of the Act are satisfied. Now, in the present case the act of quarrying results in the accumulation or extraction of a large heap of big stones. Those stones may well be marketable, and if they are sold the process would be not one of manufacture but one of quarrying. After that stage is reached and the person who has won the stones attempts to break them, may be by manual labour, into sizeable stones for sale as *gitti*, he is shaping the stone into an object of a different size. Now, the word 'manufacture' has got various shades of meaning. There may be manufacture of a complicated object like the super-constellation, or there might be manufacture of a simple object like a toy kite. In the Calcutta case which is reported in 1 S. T. C. 157 a mixture compounded by an apothecary from medicines was said to be 'manufactured' by him. The essence of manufacture is the changing of one object into another for the purposes of making it marketable. The stones which are won in the process of quarrying may be sold without fashioning them into something else. If they are so sold they would not be manufactured but merely delivered from the quarry-head. When they are broken into metal or *gitti* there is some process, manual though it

(1) (1950) I. S. T. C. 157. (2) (1956) 7. S. T. C. 626.
(3) (1955) 6 S. T. C. 30.

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may be, for the purpose of shaping the stones into another marketable commodity.

Now it cannot be denied that the metal which the assessee produces is 'goods' within the meaning of the Indian Sale of Goods Act or the Constitution. Once we reach the conclusion that what he produces is 'goods' and that some process of manufacture enters into it, in our opinion, the definition (i) in section 2 is fully met. In *State of Madhya Pradesh v. Wasudeo* (1) there is a reference to the fashioning of timber into logs for the purposes of sale, and Bhutt J., who decided the case, held that it is a manufacturing process. It is contended that on a parity of reasoning the chopping of wood into fuel would be a manufacturing process. Perhaps, that is an extreme example, and we are not called upon to pronounce upon it; but the making of metal for the purposes of ballast and road is a well-known trade and occupation and is a very fruitful source of income to one who shapes larger stones into smaller ones of a pre-determined size. It is well-known that metal has to be within a particular size. Each piece cannot be smaller than a designated size nor above another designated size. The size therefore determines the skill necessary to fashion the stone. In *Kent v. Astley* (2) Cockburn C. J. dealing with the case of preparing slates after quarrying said that it was a manufacturing process. There also the slate blocks which were won were merely split into sheets with the use of a hammer and chisel or wedges. The entire process was manual. We do not see any distinction between the fashioning of slate from a block and the fashioning of a graded size metal from a big block or boulder of stone. The essential condition is the same, *viz.* that there is an expenditure of some skill in fashioning an object of a different size and shape, ready for a commercial deal. In the present case, the man who manufactures metal is manufacturing a new article which has got a different price and that price includes the labour which goes into its manufacture.

We are satisfied, therefore, that the process indulged in to shape stones into metal is a manufacturing process and therefore the assessee was within definition (i) of section 2 of the Act. We only pause to say that the position has now been cleared by the introduction of the definition of the word 'manufacture'. But, as we have already stated above,

(1) (1955) 6 S. T. C. 30. (2) (1869) L. R. 5 Q. B. 19.

the definition does no more than bring out the essential meaning of the word 'manufacture' as used in the Act. 1957 *Kulkarni vs. State*

That there are 'sales' is quite clear from the discussion in paragraph 2 of the order of the President dated 26-3-1955. We see no reason to differ nor anything to add to what the learned President has observed.

Our answers to both the questions are thus in the affirmative. A copy of this opinion shall be sent to the tribunal concerned as provided in the Act. In the circumstances of the case there shall be no order about costs.

Reference answered accordingly.

APPELLATE CIVIL

Before Mr. Justice V. R. Sen and Mr. Justice G. P. Bhutt

DHIRAJKUAR and another *Appellants.** 1956 *Dec. 31.*

Vs.

LAKHANSINGH and others *Respondents.*

Hindu Succession Act, 1956 (*XXX of* 1956), *Section* 14 *—Provisions in Retrospective—Reversioners, Suit by —For setting aside alienation by widow Maintainability—Provisions of the Act—Applicable at the stage of appeal.*

Section 11 of the Hindu Succession Act 1956 is retrospective.

A suit by a reversioner to set aside an alienation made by a widow or other limited owner is not maintainable after the coming into force of the Hindu Succession Act 1956.

R. A. Missir v. R. Missir (1), followed.

The Provisions of the Hindu Succession Act 1956 are applicable to a case even at the stage of appeal.

Lachmeshwar Prasad Shukul v. Keshwar Lal Choudhuri (2), relied on.

Shri R. K. Pandey for appellants.

Shri *M. I. Shrivastava* for respondents.

*First Appeal No. 63 of 1951 from the decree of R. N. Rongirwar, 1st Additional Civil Judge Class I, Bilaspur, dated the 7th March 1951.

(1) (1956) B. L. J. R. 730. (2) (1940) F. C. R. 84.

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Dhirajkuar vs. *Lakhansingh*

JUDGMENT

The Judgment of the Court was delivered by SEN J.— This is defendants' appeal from the decree of the First Additional Civil Judge, Class I, Bilaspur, in civil Suit No. 2-A of 1950, by which a deed of gift Ex. P-9 dated 16-4-1949, executed by Mst. Dhirajkuar, appellant No. 1, in favour of Dwarkaprasad, appellant No. 2, has been held to be not binding on the plaintiff-respondent, Mannoolalsingh, now represented by his sons and widow, respondents 1(a), (b), (c) and (d).

Prithisingh, the propositus of the family, left behind four sons, Chaitsingh, Bhawarsingh, Kanwalsingh & Nawalsingh. Bhawarsingh was married to Mst. Akalo from whom he had a son, Tikaitsingh, who died on 24-4-1934. Tikaitsingh held -/8/- share of village Karwa, which, on his death, devolved upon his widows, Dhirajkaur and Champakuar, -/5/- village share being mutated in the name of Dhirajkuar and -/3/- in that of Champakuar. Champakuar, however, remarried and left the family sometime in the year 1938 and consequently her -/3/- village share reverted to Dhirajkuar.

Kanwalsingh left behind two sons, Mannoolalsingh, the plaintiff, and Tiloksingh, father of appellant No. 2 Dwarkaprasad. Mannoolalsingh was the son of his legally married wife. Tiloksingh was born of Kanwalsingh from Mst. Akalo and his legitimacy is in question. According to the plaintiff, Mst. Akalo was the mistress of Kanwalsingh and not his legally married wife. On the other hand, the case of the defendants was that Mst. Akalo had married Kanwalsingh after the death of Bhawarsingh in accordance with the custom of the caste.

Dhirajkuar executed a deed of gift dated 16-9-1949 in favour of Dwarkaprasad. The plaintiff instituted the suit, from which this appeal arises, for a declaration that the transfer was not binding on the reversioners after the demise of Dhirajkuar. According to him, although the parties are Raj-Gonds, they had long ago adopted Hinduism and were classed as Kshatriyas. His case, therefore, was that Dhirajkuar held only a widow's interest in the property and accordingly had no absolute power of disposition.

The defendants denied that the parties had adopted Hinduism or were governed by the Hindu Law. In this view, they contended that Dhirajkuar was the absolute owner of

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the village share in question. They further contended that Tikaitsingh had left a will a day before his death by which he had given absolute right to his widows in the village share after his death. In this view also they challenged the right of the plaintiff to question the alienation of Dhirajkuar. Their further plea was that Tiloksingh was all along joint with his uterine brother Tikaitsingh and, therefore, his son Dwarkaprasad as a joint member of the family has a preferential claim to inheritance.

The trial Court held that the parties had adopted *lex loci* of the province, namely, Benaras School of Hindu Law and, therefore, the widows got only a limited interest in the property of Bhawarsingh. It also held that no valid marriage between Kanwalsingh and Mst. Akalo was established and accordingly Dwarkaprasad being the son of the illegitimate issue of Kanwalsingh could not compete with plaintiff in the matter of inheritance. As regards the will of Tikaitsingh set up by the defendants, the Court held that its execution by Tikaitsingh in a proper disposing mind was not established. In this view, it granted a decree to the plaintiff declaring his right to the property after the demise of Dhirajkuar.

An objection has been raised that since the passing of the Hindu Succession Act 1956, the plaintiff's character as reversioner has ceased to exist and accordingly his suit is liable to be dismissed. This question was considered recently by the Patna High Court in *R. A. Missir v. R. Missir* (1), in which, in similar circumstances, the suit of the plaintiff was held to be untenable and was dismissed. The learned Counsel for the respondents has only formally demurred to this view, but was not able to give any particular points against it. On a reading of the Hindu Succession Act, it appears to us that the case of R. A. Missir was correctly decided.

Section 6 of the Hindu Succession Act deals with devolution of interest in coparcenary property. While the main part of the section purports to keep intact devolution by survivorship, the proviso attached to it makes an exception where the deceased has left surviving a female relative specified in class (1) of the schedule or a male relative specified in that class, who claims through such female relative. A widow is one of the female relatives specified in that class.

(1) 1956 B. L. J. R. 730.

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Therefore, under the proviso to section 6, the village share in question devolved upon the widows of Bhawarsingh by succession under the Act and not by survivorship. Under the explanation to section 14 of the Act, the village share was the property possessed by Dhirajkuar within the meaning of sub-section (1) of section 14. This sub-section is expressly retrospective in character and, therefore, the village share in the hands of Dhirajkuar must be deemed to have been held by her as a full owner and not as a limited owner. The exception provided in sub-section (2) of section 14 is not attracted in this case because it is nobody's contention that a restricted estate was created in her favour by the alleged will of Tikaitsingh. It is no doubt true that under clause (b), sub-section (2) of section 15, of the Act, the property would devolve, on Dhirajkuar's death, upon the heirs of her husband. This does not, however, mean that the law recognises any reversionary rights in them. This provision only specifies the persons who would be her heirs on her demise, and therefore she would become the stock of descent and the estate would go to the persons specified therein as her own personal heirs. Under the scheme of the Act, therefore, the reversionary rights which were so long recognised by the Hindu Law stand abrogated.

Before the enactment of the Hindu Succession Act, a Hindu widow did not take the estate merely for life, for in certain cases, she could dispose of the whole estate inherited by her which she could not do if she were a mere life-tenant. Therefore, what vested in her was not a mere life estate but the whole estate. She also represented the estate completely and it was for this reason that in certain cases a decree passed against her with reference to property inherited by her was binding not only upon herself but also upon the reversioners, though they were not parties to the suit. Her estate was, therefore, an absolute one subject to the restrictions on her power of alienation. These limitations were not imposed upon her for the benefit of the reversioners, for she could not alienate the property except for legal necessity. Even if there were no reversioners, these limitations were inseparable from her estate and it is on this account that the next reversioner was given the right to question her alienations even during her own lifetime so as to be binding upon all the body of the reversioners. Since now the widow's estate has been abolished by the Hindu Succession Act, it necessarily follows that the right of a reversioner, which is otherwise a *spes successionis*, cannot now

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be enforced. Since section 14 of the Act is expressly retrospective in character and there was no vested interest in a reversioner in the property inherited by a Hindu Widow, the provisions of the Act must be applied to a case even at the stage of appeal : See *Lachmeshwar Prasad Shukul v. Keshwar Lal Choudhuri* (1). The suit cannot, therefore, be maintained after the enactment of the Hindu Succession Act.

The result is that the appeal is allowed, the decree of the lower Court is set aside and the suit is dismissed. Parties shall, however, suffer their own costs of both the Courts.

Appeal allowed.

APPELLATE CIVIL

Before Mr. Justice V. R. Sen and Mr. Justice G. P. Bhutt

PYARELAL & others *Appellants**.

Versus

MODI SIKHARCHAND *Respondent.*

1956

Dec. 31.

Civil Procedure Code (V of 1908), Order XXX, rule 4—Deals with forms of suit and not with whether legal representative of deceased party is or is not necessary party—Order XLI, Rule 4 and Rule 33—Applicable only where legal representative is not necessary party—Order XXII, Rule 3 and 9—Suit by partners of firm in their names—Partner dying—Legal representative not brought on record—Suit abates wholly.

Order XXX, Rule 4, Civil Procedure Code, deals with the form of suit and does not affect the question whether the representative of deceased party was or was not a necessary party to the suit..

The provisions of Order XXII, Rule 3, and Order XLI, Rules 4 and 33, can be reconciled if Order XLI, Rule 4, or for the matter of that Rule 33 is held to apply only to cases

(1) 1940 F. C. R. 84.

*First Appeal No. 75 of 1950 from the decree of H. C. Daga, 2nd Civil Judge, Class I, Sagar dated the 31st October 1949,

1956

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where the legal representatives of deceased party are not necessary parties to the *lis*.

Where a suit or appeal is brought by the partners of the firm in their individual names and after the death of one of the partners his legal representatives are not brought on record, the suit or the appeal abates in *toto* despite the provisions of Order XLI, Rule 4 or Rule 33, Civil Procedure Code.

Malobi v. Gous Mohamad (1) explained.

Mt. Krishna Dei v. Governor General in Council (2) *Halima Khatun v. Sashi Kumar* (3) *(Moulvi) Mohammad Faruq v. Azizul Hasan* (4) and *Dhondo Khando v. Waman Balwant* (5), referred to.

Shri *A. Razak* for the appellants.

Shri *R. S. Dabir* for the respondent.

JUDGMENT

The Judgment of the Court was delivered by BHUTT J.—This is plaintiffs' appeal against the dismissal of a part of their claim for damages by the 2nd Civil Judge, 1st Class, Sagar, in civil suit No. 11-B of 1947.

The suit was instituted by Pyarelal and Pannalal, sons of Jankiprasad, Babulal, and Narayandass and Bhagwandass sons of Babu Surajdin. They were carrying on business of purchase and sale of grain as partners of a registered firm styled Durga Prashad Ganesh Dass, shortly called Durga Ganesh. They entered into a contract with the defendant on 6-7-1947 for purchase of his stock of linseed at Satna. Out of this stock, a lot of 2,500 bags was lying in the godown of the defendant's commission agent, Ramchand Rampratap, which was sold to the plaintiffs F. O. R. Satna at Rs. 44-13-9 per bag of 90 seers net, after packing them in new gunny bags. The lower Court has found that the defendant broke the contract and was liable in damages to the plaintiffs. It has, however, determined the damages at the rate prevailing at Satna, and not at Lilloah (Calcutta), on 28-7-1947 when the contract was broken. In this view, it awarded to the plaintiffs, Rs. 1,914-1-0 for damages instead of Rs. 9,524-9-0

(1) I. L. R. [1948] Nag. 509. (2) A. I. R. 1950 All. 1.
(3) A. I. R. 1947 Cal. 453. (4) A. I. R. 1935 Oudh 329.
(5) A. I. R. 1945 Bom. 126.

as claimed. This appeal was accordingly filed by the plaintiffs for claiming the balance of Rs. 7,610-8-0.

During the pendency of the appeal, Pannalal died on 27-2-1954 and his legal representatives were duly brought on record. Pyarelal meanwhile also died on 17-10-1954. An application for substitution of his legal representatives was filed on 20-1-1955 after the period of limitation. Another application for setting aside the abatement was filed on 25-2-1955. These applications were dismissed by an order of this Court on 28-3-1955, and a Letters Patent appeal from the order was also dismissed on 18-7-1955 in motion hearing. The appeal has thus abated so far as Pyarelal is concerned. The question is if it has abated as a whole.

There appears no doubt that the suit is governed by section 45 of the Indian Contract Act, (Act No. IX of 1872), which is reproduced below :—

> "45. *Devolution of joint rights.*—When a person has made a promise to two or more persons jointly, then, unless a contrary intention appears from the contract, the right to claim performance rests, as between him and them, with them during their joint lives, and after the death of any of them, with the representative of such deceased person jointly with the survivor or survivors, and, after the death of the last survivor, with the representatives of all jointly."

The plaintiffs were joint promisees, and therefore, had a joint right of suit, and consequently of appeal. Accordingly, on the death of one of them, the right to continue the appeal vested jointly in the survivors and the legal representatives of the deceased. In this connection, *Ganeshmull v. Sohanlal* (1) which was relied upon by the learned counsel for the appellants, has no application as it deals with the case of joint promisors and not of joint promisees. Therefore, the legal representatives of Pyarelal were necessary parties to the appeal.

It was, however, contended that the matter is governed by Order 30 Rule 4 of the Code of Civil Procedure as the plaintiffs were partners, and although they had instituted the suit in their own names, the firm as such was really the plaintiff. This contention was also raised in *Hari Singh V. Karam Chand Kanshi Ram* (2), in which it was negatived on

(1) I. L. R. [1955] Nag. 33. (2). 1927 I. L. R. 8 Lahore.

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Pyarelal vs. *Sikharchand*

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(1) I. L. R. [1955] Nag. 33. (2). 1927 I. L. R. 8 Lahore.

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the ground that Order 30 Rule 4 of the Code of Civil Procedure did not apply as the suit was not instituted in the name of the firm. Whether or not, this view may be correct, it appears that Order 30 Rule 4 only deals with the form of suits and does not affect the question as to whether the representative of the deceased (party) was or was not a necessary party to the suit.

An attempt was also made to bring the case within the four-corners of Order 41 Rules 4 and 33 of the Code of Civil Procedure. In *Malobi vs. Gous Mohamad* (1), it was observed, following *Ramphal Sahu vs. Babu Satdeo Jha* (2) and *Ghulam Muhammad vs. Sherdilkhan* (3) that Order 41 Rule 4 suggests that the rule was intended to apply to cases where all the plaintiffs or defendants were alive and only one or more of such plaintiffs or defendants had appealed from the decree. In this case *Abdul Rahman vs. Girjesh Bahadur Pal* (4) was not considered, in which it was observed that in applying Order 41 Rule 4 of the Code of Civil Procedure, there is no essential difference between-

(i) the case where some only of the plaintiffs or defendants, as the case may be, have appealed without impleading the others,

(ii) the case where all the plaintiffs or defendants have appealed and one of them dies and his heirs are not substituted, and

(iii) the case where some only of the plaintiffs have appealed and have impleaded the non-appealing plaintiffs and the *pro forma* defendants having the same interests as the plaintiffs and one of the non-appealing plaintiffs or *pro forma* defendants dies and his heirs are not brought on the record.

Similar view was held in *Mt. Krishna Dei V. Governor General in Council* (5) and *Halima Khatun V. Sashi Kumar Banik* (6) although in the latter case, it was doubted whether the rule would apply to cases where the persons who were not joined were necessary parties to the appeal. It appears to us that where it is impossible to proceed with the appeal in

(1) I. L. R. 1948 Nag. 509. (2) I. L. R. 1940 Pat. 870 (F. B.)
(3) I. L. R. 1942 Kar. 435. (4) (1938) I. L. R. 60 All. 350.
(5) A. I. R. 1950 All. 1. (6) A. I. R. (34) 1947 Cal. 453.

the absence of the legal representatives of the deceased, the appeal abates in toto despite the provisions in Order 41 Rule 4 or Rule 33 of the Code of Civil Procedure : See *(Moulvi) Mohammad Faruq v. Azizul Hasan* (1) and *Dhondo Khando v. Waman Balwant and another* (2).

If another view is held, it would exclude from the Code of Civil Procedure, Order 22 Rule 3. Therefore, while, as held in *Sheo Govind and others v. Zahur Mohammad and others* (3) it would not be proper to read Order 41 Rule 4 out of the Code and nullify its effect, it would also not be proper to read it in a manner so as to exclude the operation of Order 22 Rule 3. The two provisions can be reconciled if Order 41 Rule 4, or for the matter of that, Rule 33, is held to apply only to cases where the legal representatives of the deceased are not necessary parties to the *lis*. As in the instant case, the legal representatives of the deceased appellant, Pyarelal, were necessary parties to the appeal and were not brought on record in his place, the abatement of the appeal as a whole cannot be saved on the basis of Order 41 Rule 4 or Rule 33 of the Code of Civil Procedure.

The appeal accordingly is dismissed. There shall, however, be no order as to costs.

Appeal dismissed

MISCELLANEOUS PETITION

Before the Honourable Mr. M. Hidayatullah, Chief Justice and Mr. Justice B. K. Chaturvedi.

SMT. GULAB BAI *Applicant**

1957
Feb. 5.

Versus

BOARD OF REVENUE OF M. P. and 2 others Non-Applicants.

Madhya Pradesh Abolition of Proprietary Rights (Estates, Mahals, Alienated Lands) Act, 1950, Section 91 (1)—Rules framed thereunder--Rules are not executive instructions—Framed for carrying out purposes under the Act.

(1) A. I. R. 1935 Oudh 329. (2) A. I. R. (32) 1945 Bom. 126.
(3) (1941) I. L. R. 16, Luck. 382.

*Miscellaneous Petition No. 518 of 1956.

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Gulabbai vs. *Board of Revenue*

The rules framed under Section 91 (1) of the M. P. Abolition of Proprietary Rights (Estates, Mahals, Alienated Lands) Act, 1950 and published under notification No. 777-XXVIII dated 27-10-1951 are promulgated for carrying out the purposes of the Act and as such they cannot be treated as executive instructions.

Shri *D. B. S. C. Dube* for the petitioner.
None for the respondents.

The Reference came on for hearing before the Bench consisting of HIDAYATULLAH, C. J. and CHATURVEDI J. who delivered the following

OPINION.

This opinion will also govern Miscellaneous Petition No. 162 of 1956.

These cases came before us on a reference by Choudhari J. The learned Single Judge has not framed the question, but in the course of his order he has clearly indicated what that question is. To quote the learned Single Judge :

> "The important question for consideration is whether the rules framed under section 91 (1) of the M. P. Abolition of Proprietary Rights (Estates, Mahals, Alienated Lands) Act, 1950, and published under notification No. 777—XXVIII dated 27-10-1951, by the State Government, have the force of law or do they amount to executive instructions and the orders passed thereunder are not justiciable."

This question has a history of its own. The rules were framed by the State Government, presumably under section 91 (1) of the Madhya Pradesh Abolition of Proprietary Rights (Estates, Mahals, Alienated Lands) Act, 1950. It is conceded by the learned counsel for the petitioner that he has not found any power apart from the first sub-section of section 91. The rules do not indicate the power under which they have been framed; but it is settled law that when rules are framed they may be referred to any power in the Act which validates them.

We are therefore required to see only whether the rules could be framed under the Act at all. The first sub-section

of section 91 reads as follows :

> "The State Government may make rules to carry out all or any of the purposes of this Act."

The short question, therefore, is whether the rules carry out any purpose under the Act.

Under section 3, sub-section (1), all the proprietors stood divested from the date of vesting of all the rights mentioned in section 4 of the Act. Sub-section (2) of section 3, however, provides as follows :

> "After the issue of a notification under sub-section (1), no right shall be acquired in or over the land to which the said notification relates, except by succession or under a grant or contract in writing made or entered into by or on behalf of the State..."

There is no doubt that in the property which vests in the State under section 3 (1) and section 4 of the Act, a right can only be acquired either by succession or under a grant or contract in writing made or entered into by or on behalf of the State. The question is whether the creation of occupancy rights in the Central Provinces in ex-malguzari land in favour of the proprietors under the impugned rules can be said to be a grant by the State or not. If it is a grant, then apparently rules can be made to regulate the conditions under which the grant is to come into operation.

Now, the rules in question, if they are read to the end, clearly show that after the inquiry which is to be made, a *patta* is to be granted in favour of the ex-proprietor. The rules show how the proprietors have to go before the Deputy Commissioner and other revenue officers seeking reservation of a portion not exceeding 10% of the grass lands for the exclusive use of their own cattle. They also show that inquiries have to be made and then the reservation of the right in favour of the ex-proprietors has to be certified by a *patta* in Form-C appended to the rules. Now, we take it that after the inquiry is made and the right in the grass lands is reserved with a *patta* granted to that effect, there is a grant by the Government or, at any rate, on behalf of the Government by the Deputy Commissioner to the ex-proprietors. This obviously is a purpose within sub-section (2) of section 3 of the Act, and making of rules is justified under section 91 (1) in view of the generality of the provision there.

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Our attention was called to the decision of the Board reported in *Gulab Bai V. State* (1). In our opinion and we say it with all due respect the learned members of the Board proceeded to examine the policy underlying the definitions rather than the clear provisions of section 3 (2) of the Act. This pertinent argument was regarded by them as far-fetched. In our opinion, if the rules had been read in their entirety, the members of the Board would have easily seen that at the end of all the inquiry a *patta* is to be granted, and that would amount to a grant by the State within sub-section (2) of section 3. Rules for carrying out the purposes of the Act dealing with the grant of *pattas* which include rights can conceivably come within the first sub-section of section 91. We do not, therefore, think it right to treat these rules as executive instructions. They are statutory rules under the authority of sub-section (2) of section 3 of the Act.

It follows that the revenue officers in implementing the rules have to act on judicial principles and their action is capable of being examined by way of appeal under section 84 of the Act.

We answer the first limb of the question in the affirmative and the second in the negative. Let the papers be returned to the learned Single Judge.

Reference answered accordingly.

LETTERS PATENT APPEAL

Before Mr. M. Hidayatullah, Chief Justice and Mr. Justice B. K. Chaturvedi.

1957

Jan. 17.

M. A. BASHIR & another *Appellants**

Versus

MRS. ETHEL & another *Respondents.*

Transfer of Property Act (IV of 1882), Section 58(c) -Document of sale containing a condition of repurchase—Words in document unambiguous—Surrounding circumstances

(1) (1955) N. L. J. 624.

*Letters Patent Appeal No. 50 of 1953 from the appellate decree of the Hon. Mr. Justice C. R. Hemeon, dated the 18th September 1953.

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not to be looked—Document not containing clear and express words excluding mortgage—The Transaction evidenced by such document is mortgage by conditional sale and not sale with condition of re-purchase—Transaction evidenced by two separate documents, one of sale and other an agreement of repurchase—Transaction not a mortgage by conditional sale.

Where the transaction is evidenced by a document of sale which contains a condition of repurchase and is worded in unambiguous terms but does not contain clear and express words excluding the mortgage, then the transaction is a mortgage by conditional sale and not a sale with a condition of re-purchase.

Where however the transaction is evidenced by two ducuments one of sale and the other an agreement of re-conveyance the transaction cannot be regarded as mortgage by conditional sale.

Pandit Chunchun Jha v. Sheikh Ebadat Ali and another (1), explained.

Mohd. Ibrahim v. Sugrabi (2), *Atmaram v. Krishna* (3), *Vishwanath v. Samarathbai* (4), *Sampat v. Anusaya* (5), *Deorao v. Ramdas* (6), *referred and approved.*

Shri *Adhikari* for the appellant.

Shri *D. T. Mangalmurti* with Shri *P. S. Pultamkar* for the respondents 2 (a) to (c).

JUDGMENT

PER HIDAYATULLAH, C. J.—This Letters Patent appeal is by the defendants against the judgment of Hemeon J. in Second Appeal No. 290 of 1948, dated 18th September 1953.

The plaintiff (since deceased and represented by his legal representatives) brought the suit for the ejectment of the defendants from a house situated at Ganpatrao's Chhaoni, Civil Station, Nagpur and for arrears of rent and mesne profits valued at Rs. 672/12/-. The plaintiff had

(1) (1955) 1 S. C. R. 174. (2) (1955) N. L. J. 344.
(3) Second Appeal No. 509 of 1949 dated 25th January 1955.
(4) Second Appeal No. 222 of 1951 dated 21st November 1955.
(5) Second Appeal No. 378 of 1948, dated 28th Nov. 1955.
(6) Second Appeal No. 113 of 1949, dated 5th July 1955.

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previously obtained the permission of the Rent Controller. According to the plaintiff, the defendants, who had sold the house to him on 15th March 1943, had taken it from that date on a monthly rent of Rs. 19/8/-. They paid rent till 15th October 1944 but not thereafter. The suit was thus for ejectment, rent and mesne profits.

The defendant's plea was that the transaction was a mortgage by conditional sale and that the rent note was in lieu of interest calculated at Rs. 1/8/- per cent per month on the purchase price of Rs. 1,300/-. They accordingly contended that it was a mortgage without possession by conditional sale and the suit ought to have been for foreclosure and not for ejectment. They denied the relationship of landlord and tenant and stated that the transaction was an ostensible one and represented the relationship of creditor and debtor.

The trial Court concluded that the transaction was a mortgage by conditional sale and ordered the dismissal of the suit. On appeal the first appellate Court held that it was an outright sale with condition of repurchase and that the plaintiff was entitled to succeed and to get a decree for rent and mesne profits. The second appeal was dismissed by Hemeon J. and hence this Letters Patent appeal with the leave of the learned Single Judge.

The document in question was preceded by a promissory note for Rs. 1,050/- which were paid to the first appellant on 14th March 1943. Exhibit P-1, the promissory note, mentions the sale of the house and the price settled. On 15th March 1943 Exhibit P-2 was executed. It is described as a sale deed and the parties are also described as vendors and purchaser. The transaction is shown to be an absolute sale and the reason given is as follows :

> "Whereas the vendors were urgently in need of this money for payment to the decree-holders Messrs C. F. Nazareth and R. F. Nazareth who had obtained a final mortgage decree against the house conveyed by the sale deed in C. S. No. 36-A of 1935, dated 7-1-35 and at present the execution of the same is pending in the Court of the 2nd Sub-Judge, 2nd Class, Nagpur, for 17-3-43, the vendors in order to save that property are compelled to execute the sale deed and obtain money therefor."

After describing the property and the absolute conveyance of title, the deed goes on to incorporate the following condition :

> "It is hereby agreed that in case the vendors wish to take back this house, they shall at any time within three years of the execution of this document get reconveyance of this property executed at the cost of vendors, and in which case the purchaser shall execute the re-sale of the property to the vendors by paying the full amount of Rs. 1300/-"

The learned Single Judge relied mainly upon a statement of the law by Rao J. in *Bhaiyalal v. Kishorilal* (1) that there was no presumption that the transaction was a mortgage and that the burden was upon the defendants who desired that the document should be construed contrary to its tenor. The learned Single Judge also referred to the dictum of Lord Cranworth, L. C., in *Alderson v. White* (2) which was quoted with approval in *Bhagwan Sahai v. Bhagwan Din* (3). He also referred to *Balkishen Das v. W. F. Legge* (4) and *Jhanda Singh v. Wahid-uddin* (5). According to the learned Judge, there was nothing to show that the relationship of creditor and debtor remained after the transaction had taken place, and he was of opinion that the two terms should be interpreted as showing an outright sale coupled with an independent term for the repurchase of the house.

The appellants contend that the result reached by the learned Single Judge is erroneous and they rely upon a decision of the Supreme Court reported in *Pandit Chunchun Jha v. Sheikh Ebadat Ali and another* (6). According to the learned counsel for the appellants, the Court must start with a presumption in favour of a mortgage and that presumption can only be rebutted if the mortgage is excluded by clear words to be found in the document or, in case of ambiguity, by reference to the surrounding circumstances. The learned counsel for the respondents says that the decision of their Lordships of the Supreme Court does not lay down any such rule of presumption, and he refers to the preface to the

(1) I. L. R. (1950) Nag. 719. (2) 44 ER 924, 928.
(3) (1890) I. L. R. All. 387.
(4) (1900) I. L. R. 22 All. 149 P. C.
(5) (1916) I. L. R. 38 All. 570 (6) (1955) 1 S. C. R. 174.

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fourth edition of Mulla's Transfer of Property Act in which Das, C. J., extracted a passage from the judgment and stated that it had settled the law which was in a state of confusion previously. The learned counsel for the respondents says that we should not give more meaning to the decision than that is contained in the passage quoted in the said preface.

Their Lordships' decision was interpreted by me sitting with Mangalmurti J. in *Mohd. Ibrahim v. Sugrabi* (1). There I had referred to the difference of opinion existing in the Nagpur High Court between Grille J. (as he then was) and J. Sen J. I had then referred to the opinion of Rao J. in *Bhaiyalal's Case (cit sup.)* and had stated that the view of Rao J., approved by myself and Sinha C. J., (as he then was) in *Shrinarayan v. Bhaskar* (2), must be taken to be modified by the Supreme Court. The same view of the Supreme Court case was taken by V. R. Sen J. in *Atmaram v. Krishna* (3), *Vishwanath v. Samarathbai* (4) and *Sampat v. Anusaya* (5) and by me sitting singly in *Deorao v. Ramdas* (6). The learned counsel for the respondents contends that all these subsequent decisions of this Court do not faithfully represent the decision of the Supreme Court. It is therefore necessary to examine once again the decision of their Lordships.

The decision of their Lordships was given in a suit for redemption of what the plaintiff described as a mortgage dated 15th April, 1930. Their Lordships stated that the only question for determination was whether it was a mortgage by conditional sale or a sale out and out with a condition of repurchase. Their Lordships further observed that the success or failure of the plaintiff depended upon whether the document was interpreted as a mortgage or as a sale with a condition of repurchase. It may be pointed out that the plaintiff was the appellant before their Lordships and that he succeeded in getting it established that the document was a mortgage by conditional sale. Their Lordships described the terms of the document at page 178 after paragraphing them for convenience and omitting unnecessary words. They showed that there was a previous simple

(1) (1955) N. L. J. 344. (2) (1954) N. L. J. 64.
(3) Second Appeal No. 509 of 1949, dated 25th Jan. 1955.
(4) Second Appeal No. 222 of 1951, dated 21st Nov. 1955.
(5) Second Appeal No. 378 of 1948, dated 28th Nov. 1955.
(6) Second Appeal No. 113 of 1949, dated 5th July, 1955.

mortgage on the property to pay off and that more money was required to meet the cost of a suit. They then observed that the vendors stated that at that time there was no other way of arranging for the money without selling the property mortgaged under the previous bond. Their Lordships then quoted the operative portion of the document as follows :

> "(3) Therefore, we, the executants.....declare.....that we....sold and vended the properties detailed below on condition (given below) for a fair and just price of Rs. 700/-...."

Thereafter there is acknowledgement of the consideration received and an averment that the vendee was put in possession and occupation and that he was made an absolute proprietor 'in our place'. Then followed the condition of repurchase which was stated in the judgment of their Lordships to be as follows :

> "(6) If we, the executants, shall repay the consideration money to the said vendee within two years...the property vended under this deed of conditional sale attached shall come in exclusive possession and occupation of us, the executants.
>
> (7) If we do not pay the same, the said vendee shall remain in possession and occupation thereof, generation after generation, and he shall appropriate the produce thereof.
>
> (8) We, the executants, neither have nor shall have any objection whatsoever in respect of the vended property and the consideration money. Perchance if we do so it shall be deemed null and void in Court."

Then followed certain conditions in case a flaw in the title was discovered, which do not affect the proposition, and the last condition was as follows :

> "(10) Therefore we, the executants,.....have executed this deed of conditional sale so that it may be of use in future".

It would, therefore, appear that there was an outright sale, because the property could not otherwise be saved, and that there was a condition for repurchase which gave the vendors a chance of getting back the property. In dealing with this transaction their Lordships observed that it was not necessary to examine the numerous cases on the subject because each case must be decided on its own facts and because the attendant circumstances always contain from

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case to case "imponderable variables". Their Lordships, however, observed that certain broad principles remained.

In laying down these principles their Lordships observe that the intention of the parties is the determining factor and rely upon *Balkishen Das v. Legge* (1) which according to their Lordships, must be gathered in the first place from the document itself. Their Lordships lay down that if the words are express and clear, effect must be given to them and extraneous inquiry into what was thought or intended is ruled out. In other words, the interpretation of the document depends upon the legal effect of the words used by the parties. Their Lordships also observe that if there is ambiguity in the language employed then it is permissible to look to the surrounding circumstances to determine what is intended. Their Lordships then quote Lord Cranworth's dictum in *Alderson v. White* (2) which is to the following effect :

> "The rule of law on this subject is one dictated by common sense; that *prima facie* an absolute conveyance, containing nothing to show that the relation of debtor and creditor is to exist between the parties, does not cease to be an absolute conveyance and become a mortgage merely because the vendor stipulates that he shall have a right to repurchase.....In every such case the question is, what, upon a fair construction, is the meaning of the instruments?"

and refer also to *Bhagwan Sahai v. Bhagwan Din* (3) and *Jhanda Singh v. Wahid-ud-din* (4) where the Privy Council had applied that dictum.

Their Lordships then say that the converse of Lord Cranworth's dictum is also true and if, on the face of it, the instrument clearly purports to be a mortgage, it cannot be turned into a sale by reference to extraneous and irrelevant considerations. Their Lordships note that difficulty only arises in the borderline cases where there is ambiguity. Their Lordships therefore lay down the rules for guidance for the Courts.

Their Lordships take into consideration the fact that section 58 (c) of the Transfer of Property Act was amended by the Legislature to remove the difficulty, and they

(1) (1899) 27 I. A. 58.
(2) 44 E. R. 924, 928.
(3) (1890) 17 I. A. 98.
(4) (1916) 43 I. A. 284.

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therefore lay down what the Legislature intended and in which way the Legislature thought the difficulty would be obviated. Their Lordships state that after the amendment, two separate documents incorporating respectively the sale and the agreement to repurchase cannot be construed as one transaction of mortgage by conditional sale. They then observe that, with this exclusion, it is reasonable to suppose that persons who, after the amendment choose not to use two documents, do not intend the transaction to be a sale. Pausing here, the rule of interpretation is that if the condition of repurchase is in the document, the intention of the parties, as deduced from the document itself, is that *prima facie* it is not meant to be an outright sale. Their Lordships then add that the only escape for persons who have used a single document with two conditions is to "displace that presumption by clear and express words". Pausing here, it is clear that the words must be in the document. Their Lordships then observe :

> "If the conditions of section 58 (c) are fulfilled, then we are of opinion that the deed should be construed as a mortgage."

Pausing here, it is quite clear that if there is an outright sale, coupled with a condition of repurchase in the document, and there are no clear and express words to exclude a mortgage, then it must be taken that the parties intended executing a mortgage by conditional sale rather than an outright sale with a condition of repurchase. Their Lordships in another passage state that the apparent words of the document describing it as a sale should not weigh too much if the condition of repurchase is put in the same document. The reason given is that section 58 (c) postulates that there must be "an ostensible sale"; and if a sale is ostensible, it must necessarily contain all the outward indicia of a real sale. The question, according to their Lordships, is not whether the words purport to make the transferee an absolute proprietor, for of course they must under section 58 (c), but whether that is done "ostensibly" and whether conditions of a certain kind are attached.

As I read their Lordships' decision, I think that the result, stated in commonplace language, is this : If the purchasers do not desire that their transaction should be interpreted as a mortgage by conditional sale, they must insist on two separate documents which can never be construed as a mortgage under the law. If, however, they

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choose to incorporate the condition of repurchase in the same document, they must insist that clear and express words excluding the mortgage are incorporated in the same document. If they do not insist on these two things, and the condition of repurchase is in the same document, then, however ostensible the first part conveying absolute title to the purchaser may be, Courts will hold that a mortgage was intended and they will go to the surrounding circumstances only if there be ambiguity, but not otherwise.

Applying the above tests, it is quite clear that here there is no ambiguity. There is an outright sale coupled with a condition of repurchase in the same document. If anything, there is an indication that the property could not be saved except by selling it temporarily with a condition for its repurchase, because if the present transaction had not been gone through the property would have been sold anyhow under the simple mortgage decree. If there was any ambiguity, this circumstance, together with other circumstances pointed out by the trial Court, would have denoted an intention to raise a loan; and the fact that the rent was fixed at Rs. 19/8/- per month, which works out as interest on Rs. 1,300/- at Rs. 1/8/- per cent per month, would have been material. In my opinion, all this inquiry is not necessary. The condition of repurchase is incorporated in the same document. There is no ambiguity and there are no clear words excluding a mortgage. The conditions of section 58 (c), particularly the third clause, are fulfilled and therefore the transaction must be regarded as a mortgage by conditional sale and not as an absolute sale coupled with a condition of repurchase. It was on a consideration of these things that I had observed in *Mohd. Ibrahim v. Sugrabi* (1) as follows :

> "10. It would appear from this that the approach to the problem has to be restated. Whereas under the law as understood before, a document, though ostensibly a sale with a bare condition merely for repurchase, could be interpreted as incorporating two independent conditions creating an absolute conveyance and an option of repurchase, placing the burden upon the one who sought to interpret it against the clear tenor of the document as a mortgage, that approach is not now permissible. The inclusion of the condition of repurchase in the same

(1) (1955) N. L. J. 344.

document must now be taken as a token of mortgage in the first instance, and it must be left to one who contends that the conveyance was absolute with only an option of repurchase to establish it by express words to be found in the document and, in case of ambiguity, by reference to the surrounding circumstances. The need for interpretation would really arise if there be ambiguity."

After considering the matter once again, I am of opinion that the law laid down in *Mohd. Ibrahim v. Sugrabi* (*cit. sup.*) by me and Mangalmurti J. does not need any reconsideration. I am fortified in this view by the subsequent decisions given by V. R. Sen J. to which I have already referred. In my opinion, the decision of Hemeon J. must be reversed in view of the decision of the Supreme Court. I accordingly set aside the decree passed by Hemeon J. as well as that passed by the first appellate Court and restore that of the trial Court. The costs throughout shall be borne by the plaintiff.

Chaturvedi J.—I agree.

Appeal allowed.

LETTERS PATENT APPEAL

Before Mr. M. Hidayatullah, Chief Justice and Mr. Justice Chaturvedi

BALWANT RAO & others *Appellants.** 1956

Nov. 30.

Versus

SHAMRAO *Respondent.*

Relief of Agriculturist Debtors (Temporary Measures) Act, Central Provinces and Berar, 1949 (*XXI of* 1949), *Section 4—Words "All proceedings" in—Scope of Relief of Indebtedness Act,* 1939, *Section* 13 (3)—*Issuance of certificate under—Sine qua non for execution of notional decree—Proceedings under this provision—Do not terminate with the order of the issue of certificate.*

The words "All proceedings" in Section 4 of Central Provinces and Berar Relief of Agriculturist Debtors

*Letters Patent Appeal No. 5 of 1953, from an order of the Hon. Mr. Justice J. R. Mudholkar, dated the 29th Dec, 1952.

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(Temporary Measures) Act, 1949 contemplate proceedings of every description. There are no words of limitation in the section.

The issuance of a certificate under section 13 (3) of the Relief of Indebtedness Act 1939 is the *sine qua non* for execution of notional decree and until the certificate is issued no action to execute notional decree can be taken.

The proceedings under section 13 (3) of the Relief of Indebtedness Act do come to an end until the certificate under Section 13 (3) of the said Act is signed by the Deputy Commissioner.

Shri *P. R. Padhye*, for the appellants.

Shri *P. S. Pultamkar*, for the respondent.

ORDER

The order of the Court was delivered by HIDAYATULLAH, C. J.—This appeal is against a judgment of Mudholkar J. in Miscellaneous (First) Appeal No. 161 of 1949 decided on 29th December 1952.

The appellants, who are executing a decree which, according to them, has come into existence as a result of a certificate by the Deputy Commissioner under section 13 (3) of the Central Provinces and Berar Relief of Indebtedness Act, contend that the decision of the Single Judge in holding that the certificate was invalid is incorrect. The facts of the case are as follows :

The Debt Relief Court was moved to frame a scheme in connexion with a debt which it scaled down to Rs. 12,581 and made it payable by 25 instalments of Rs. 500 each commencing from 15th May 1943. The contention of the present appellants is that the first two instalments which fell due on 15th May 1943 and 15th May 1944 were defaulted by the judgment-debtors under that scheme. They contend that as a result of this failure they were entitled to get a certificate under section 13 (3) of the Relief of Indebtedness Act. They moved the Deputy Commissioner for the grant of a certificate. We need not go into the history of the case before the revenue court; suffice it to say that the Commissioner ordered that the certificate be issued and the Board of Revenue upheld his order. This certificate was granted by the Deputy Commissioner on 17th May 1949. It is this certificate and the notional decree

which under the Act comes into existence that the present appellants seek to execute.

It was held by the executing Court and also by the learned Single Judge whose judgment is impugned here that the Deputy Commissioner was incompetent to issue the certificate on that day in view of the provisions of the Central Provinces and Berar Relief of Agriculturist Debtors (Temporary Measures) Act, 1949. That Act was passed to grant temporary relief to agriculturist debtors and by its 4th section provided as follows :

> 'All proceedings under section 13 of the Central Provinces and Berar Debt Conciliation Act, 1933, or section 13 of the Central Provinces and Berar Relief of Indebtedness Act, 1939, against an agriculturist debtor pending before a revenue officer having jurisdiction in the area to which this Act applied shall be stayed till the first day of January 1950 and all the attachment of growing crops, agricultural produce, live-stock, and other moveable property of a perishable nature made in such proceedings shall be withdrawn.'

It appears that the attention of the Deputy Commissioner was not drawn to the provisions of this Act when he signed the certificate after the Commissioner's order. The learned counsel for the appellants contends that section 4 is connected with section 3 of the Act, and that relief by stoppage of proceedings is contemplated only in those cases where instalments are postponed under section 3. We do not agree with this submission. It is quite obvious that the words 'all proceedings' contemplate proceedings of every description. There are no words of limitation in the section, nor words which can be said to connect section 4 with section 3. The generality of section 4, therefore, must stand. Taking the normal meaning of the words 'all proceedings' we are satisfied that the present was a proceeding in which the Deputy Commissioner became incompetent to deal with the matter pending before him till the 1st day of January 1950.

It is contended by the learned counsel for the appellants that the Commissioner's order as well as the order of the Board of Revenue were both prior to the date of the Act and all that remained to be done was the ministerial act of drawing up the certificate. Reliance was placed upon *Mungniram Marwari v. Gursahai Nand* (1). That case is

(1) I. L. R. 17 Cal. 347.

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an authority only for the facts decided there. It was explained in *Subba Naick v. Rama Ayyar* (2). In the present context the issuance of a certificate is the *sine que non* for the execution of the notional decree. The certificate can only be issued by the Deputy Commissioner, and till the certificate is issued no action to execute the notional decree can be taken. It has been ruled in the Nagpur High Court in several cases that even if an order sheet is produced showing that a certificate was ordered to be issued it is not enough. The Court can only act upon a valid certificate and nothing else. Applying that consideration to the present case it is clear enough that the Deputy Commissioner who issued the certificate had not terminated the revenue proceedings under section 13 of the Relief of Indebtedness Act till the certificate was signed. That clearly postulates that the proceedings were pending. Once this is accepted section 4 applies with great force. Under that Section, all proceedings, of whatever character they may be, were stayed till the 1st day of January 1950. The Deputy Commissioner, therefore, was incompetent to draw up the certificate before that date was reached. This is in effect the decision of the two Courts below. We see no reason to differ.

The appeal fails and is dismissed; but in the circumstances of the case and considering the fact that the respondent was not called upon to reply, we see no reason to award costs. The costs in the lower Courts shall be as ordered by the learned single Judge.

Appeal dismissed.

LETTERS PATENT APPEAL

Before Mr. M. Hidayatullah, C. J. and Mr. Justice B. K. Chaturvedi.

TRIMBAK — Appellant*

Vs.

1957

Feb. 20.

THE AKOLA EDUCATION SOCIETY, AKOLA — Respondent.

Contract Act, Indian (IX of 1872), *Section* 73—*Contract of service for a certain period—Termination of service by*

(2) I. L. R. 40 Mad. 775 at p. 778.

*Latters Patent Appeal No. 25 of 1953 from the appellate decree of the Hon. Mr. Justice P. P. Deo. dated the 31st March 1953.

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one month's notice—Employee can claim salary for unexpired period of service by way of damages.

The contract of service is for a period certain. The employee was ever ready and willing to perform his part of contract. His services cannot be terminated before the expiry of the period by giving one month's notice. If it is so terminated, the employee is entitled to claim the balance of his pay for unexpired period of contract by way of damages, provided that inspite of due diligence he is not able to get another employment.

Turner v. Goldsmith (1) *and Sundaram Chettiar v. Chockalingam Chettiar* (2); relied on.

T. O. T. Co., v. Uganda Sugar Factory, (3) and *Pragdas v. Jeewanlal* (4); distinguished.

Shri R. S. Dabir with *Shri N. M. Golwalkar* and *Shri S. C. Upadhya* for the appellant.

Shri K. L. Gupta for the respondent.

Cur. adv. vult.

JUDGMENT

The judgment of the court was delivered by Hidayatullah C. J.—This appeal is by the plaintiff whose suit for damages for wrongful dismissal, which he placed at Rs. 700 was decreed in the trial court. On appeal it was held he was entitled to one month's salary in lieu of notice and the rest of the claim was dismissed. The learned Single Judge has confirmed the decision of the first appellate Court.

The facts are as follows : The plaintiff was employed by the Akola Education Society, Akola, as a teacher, and his employment was to be from 15th June 1950 to 31st March 1951. The society issued an order, which is Ex. P. 1, in which it was stated that he was employed on Rs. 70/- with the usual C. C. L. A., with effect from 19th June 1950 till 31st March 1951. On 29th August 1950 the President of the Education Society sent a letter to the plaintiff in which it was stated that in view of the financial situation of the school it was not possible for the management to continue his services as a teacher from 1st September 1950. In other words, two days before his services were to be terminated he was told that he would not be required from 1st September 1950.

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(1) (1891) 1 Q. B. 544 C. A. (2) (1938) 1 M. L. J. 857
(3) A.I. R. 1945 P. C. 144. (4) A. I. R. 1948 P. C 217,

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Trimbak vs. *The Akola Education Society Akola*

It is an admitted fact that the plaintiff tried to obtain other employment but failed, and it has been accepted by the learned Single Judge that he did everything to mitigate the damages. Indeed, the learned Single Judge has stated that if the dismissal was wrongful the plaintiff would be entitled to the salary claimed by him.

The trial Court held that the dismissal was wrongful and that plaintiff was entitled to serve for the whole term up to 31st March 1950 and that he was thus entitled to get damages which he claimed, viz. Rs. 700/- being equivalent to seven months' salary at Rs. 70 per month and C. C. L. A. for those seven months at Rs. 30 per month. The first appellate Court observed that under the rules of the Society, particularly rule 7, he was entitled to one month's notice, and therefore it awarded him damages in the sum of Rs. 100. The learned Single Judge held that the case of a temporary employee was no better than that of a permanent employee, and that if the services of permanent employees could be dispensed with after one month's notice the plaintiff could not claim any better terms. The rules do not apply to such a case, and there was nothing to show that in the contract of employment the rules were included by reference or that the plaintiff had accepted them. This was a contract for a period certain, viz till 31st March 1951. The plaintiff was ever ready and willing to perform his part of the contract, and his services could not, therefore, be terminated before the expiry of that period unless the employee was at fault. This has been laid down in *Turner v. Goldsmith* (1). The same rule of law has been laid down by a Division Bench of the Madras High Court reported in *Sundaram Chhettiar v. Chockalingam Chettiar* (2). In dealing with the law on the subject Leach C. J. observed as follows :

> 'The learned trial Judge disallowed the appellant's salary for 10½ months on the ground that the respondent was entitled to dismiss the appellant when he found that his business was not proving profitable. This is an erroneous view of the law. The respondent had entered into a contract with the appellant under which the appellant was to serve him in Madras for a period of three years certain, and the appellant was always 'ready and willing to carry out his duties. The real reason why the respondent dispensed with the appellant's services

(1) (1891) 1. Q. B. 544 C. A. (2) (1938) 1 M. L. J. 857.

after a little over two years was that he found he could get another agent at a lower salary. Where a person has agreed to employ another he is not entitled to put an end to the employment simply because he finds his business is not proving as profitable as he anticipated or because he finds that he can get somebody to perform the duties at a smaller salary. If the contract provides for termination of employment by notice the employer can lawfully terminate the employment on giving the required notice. In a case like the present where the employment was for a definite period the employer is bound to pay the stipulated salary, unless he shows that the discharged servant had an opportunity of other employment, but refused to avail himself of it. In other words, the principle that a person must do what he can to mitigate damages, applies to a contract of service just as it applies to an ordinary commercial contract'.

We respectfully follow the dictum laid down. In the present case we have been unable to see how rule 7 could be applied to the present plaintiff. The rules were not made applicable to him by the contract; nor can they be made applicable to him in terms. The learned counsel for the appellant cited two cases of the Privy Council, *T. O. T. Co., v. Uganda Sugar Factory* (1) and *Pragdas v. Jeewanlal* (2). They are cases of frustration and do not apply here.

We accordingly set aside the judgment and decree of the two appellate Courts below and restore that of the trial Court. The respondent shall bear the costs of this appeal.

Appeal allowed.

APPELLATE CIVIL

Before Mr. Justice V. R. Sen and Mr. Justice G. P. Bhutt

1957

Jan. 28.

UNION OF INDIA Appellant*.

Versus

BHAGWATIPRASAD Respondent.

Tort—Damages—Tort by servant of the Union Government in connection with private undertaking or an undertaking not in exercise of sovereign power—Suit for

*First Appeal No. 48 of 1952 from the decree of S. M. Pagare, Additional 1st Civil Judge, Class I, dated the 26th Dec. 1951.

(1) A. I. R. 1955 P. C. 144. (2) A. I. R. 1948 P. C. 217.

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Union of India vs. Bhagwati-Prasad

damages against Union Government—Maintainability —Damages for Tort—Allowed as compensation and not by way of restoration or restitution—Tort to person—Measure of damages.

A suit for damages lies against the Union of India for torts committed by its servant in connection with a private undertaking or an undertaking not in exercise of sovereign powers.

P. and O. S. N. Company v. Secretary of State for India (1), *Secretary of State for India in Council v. Moment* (2), *Secretary of State for India in Council v. Shreegobinda Chaudhuri*(3), *and District Board, Bhagalpur v. Province of Bihar* (4); relied on.

Damages in case of tort are allowed as compensation and not by way of restoration or restitution.

Where a person is bodily injured he is entitled to reasonable compensation for the loss of future employment and not an amount on the basis of absolute mathematical calculation without taking into consideration the probable fluctuations in life. For this purpose this compensation allowed under the Workmen's Compensation Act may serve as an useful guide.

Jones v. Gooday, (5); principle applied.

Shri T. L. Shevde for appellant.

Shri M. Adhikari and *J. N. Sinha* for respondent.

Cur. adv. vult.

JUDGMENT

The Judgment of the Court was delivered by BHUTT J :—This is an appeal by the defendant, Union of India against the decree of the Additional First Civil Judge, First Class, Jabalpur, in civil suit No. 85-B of 1950. This judgment shall also dispose of the plaintiff's cross-objection.

The plaintiff-respondent, Bhagwatiprasad, was employed as a delivery-man by the Government Military Farm, Jabalpur. His duty was to supply milk to the customers. The milk used to be carried in a military truck. On 22nd November 1947, the plaintiff met with an accident

(1) 5 Bombay H. C. R. Appendix A., P. 1.
(2) (1913) I. L. R. 40 Cal. 391 P. C.
(3) (1932) I. L. R. 59 Cal 1289.
(4) A. I. R. 1954 Pat. 529. (5) (1841) 8M & W. 146.

when he was out on his duties. The driver of the truck was Kartarsingh (D. W. 3). It is not disputed that the plaintiff had fallen down from the truck and came under its hind wheel. He was in the hospital under treatment from 22-11-1947 till 26-1-1948. The injuries resulted in (1) fracture both pubic rami left, (2) fracture medical malleolus left tibia and (3) dislocation of right sacro-illic joint. The injury, according to Dr. Bishensingh (P.W. 2), has resulted in permanent disablement of the plaintiff to perform the duties as a delivery-man. The disability was found to be 40 per cent : See Ex. D-3.

The case of the plaintiff was that on the date of the incident, he was sitting in the front part of the truck by the side of the driver. When the truck was in motion, one of the milk cans, which were kept behind, got tilted. Accordingly the truck was stopped and he got down to arrange the milk can. After doing the needful, as he came back and was boarding the truck, the driver negligently put it in motion on account of which he fell down and came under the hind wheel. He claimed damages to the extent of Rs. 8000/- for loss of earnings and Rs. 2000/- for bodily and mental suffering, total Rs. 10,000/-. The suit was allowed by the lower Court to the extent of Rs. 8200/-, made up of Rs. 8000/- for loss of earnings and Rs. 200/- on account of bodily and mental suffering. The plaintiff has filed cross-objection claiming Rs. 1800/- more as damages on the latter count *viz.*, bodily and mental suffering.

The liability of the Union of India was resisted on the doctrine of State immunity. It was urged that the military farm was run by the Government in its sovereign rights and accordingly the Union of India could not be made liable for the negligence of its servants. The liability of Government for the negligence of its servants was first considered in *P and O. S. N. Company v. Secretary of State for India* (1). That was a case of tort committed in the conduct of business in which it was held that the Secretary of State in Council could be sued. Sir Barnes Peacock, however, also dealt with the question of the liability of the Government where an act is done by its servants in the course of the exercise of powers which could not lawfully be exercised save by the sovereign. The views which he expressed on this question were ultimately approved of by the Judicial Committee in *Secretary of State for*

(1) 5 Bom. H. C. R. Appendix A., P. 1.

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India in Council v. Moment (1). Summing up the law on the subject, Rankin C. J., in *Secretary of State for India in Council v. Shreegobind Chaudhuri* (2), observed :

> "This doubt as to whether the Secretary of State for India in Council can ever be sued in respect of tort was laid at rest finally in the following year 1912—by the judgment of the Judicial Committee delivered by Lord Haldane in the case of *Secretary of State for India in council v. Moment* (1). There the Government of Burma had an ordinary dispute with an individual about the ownership of certain landed property. It was finally decided that the property belonged to the individual, and the suit was an ordinary common law suit in tort for damages for wrongfully interfering with the plaintiff's property. The local Act had purported to say that all claims to any right over lands as against Government should be brought in the revenue court and not civil court. The Privy Council held that that was *ultra vires* of the legislative authority of the local legislature and they held that a suit for damages for wrongful interference with the plaintiff's property would have lain against the East India Company for the reasons explained by Sir Barnes Peacock in the *P and O* case. Therefore, the *P and O* case was finally affirmed in so far as it held that it was possible to sue the Government for tort if it was in connection with a private undertaking or undertaking not in exercise of sovereign powers."

It will thus appear that a suit lies against the Union of India for torts committed by its servants in connection with a private undertaking or an undertaking not in exercise of soverign powers : See *District Board, Bhagalpur v. Province of Bihar* (3), in which the entire case law has been summarised.

There appears to us no doubt that the farm run by the Government was not an undertaking which can be referred only to its sovereign powers. It was an undertaking which any private person could take to and is indeed in the nature of a business or commercial concern. It appears from the evidence of plaintiff as P. W. 1 that milk was

(1) I. L. R. 40 Cal. 391. (2) I. L. R. 59 Cal. 1289.
(3) I. L. R. 1954 Pat. 529.

being supplied on payment of price at two rates, one with and the other without concession. Similarly, it appears from his evidence that butter was also sold through him. It is, therefore, immaterial whether or not the customers belonged exclusively to military organisation, but it appears that the rate without concession was intended for persons who were not members of the military service. We are not, therefore, inclined to accept the contention that the injury resulted from the undertaking of the Government in exercise of its sovereign powers.

We are not concerned in this case with an act of a Government servant which was performed in exercise of any statutory powers. Therefore, we need not consider the law on the subject. The case is governed by the ordinary law of the liability of a master for the tort committed by his servant. We would, therefore, consider the case on that basis.

It was contended that the plaintiff had failed to prove that the injury sustained by him was caused by the negligence of the driver. The incident had occurred in the early hours of the morning, at about 4 O'clock, when it was cold and none could be present to witness the occurrence. In the circumstances of the case, therefore, there could be no person to testify to the incident except the plaintiff and the driver. These persons have given their respective versions. The question is which of them is reliable.

The version of the plaintiff is that on the date of the incident he had taken his normal seat by the side of the driver. On the way, he heard the noise of tilting of one of the milk cans. Accordingly he got the truck stopped and when, after going behind and setting the can in order, he returned and was attempting to board the vehicle, the driver suddenly moved it on account of which he fell down and came under the hind wheel of the truck. The version of the driver, Kartarsingh (D. W. 3), is that the plaintiff was sitting in the rear of the truck where the milk cans were kept; that he stopped the truck on the plaintiff's direction and then drove the vehicle ahead; and that when he did not hear the plaintiff's response to his call at the next stop, he returned and saw him lying on the ground. The plaintiff could come under the hind wheel if he had a fall in the manner stated by him. If he had fallen while sitting in the

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rear of the truck, as stated by the driver, it was not possible that he could come under the hind wheel.

In this connection, the suggestion of Kartarsingh (D. W. 3) that one sitting in the back side of the truck could come to the front seat without alighting from the vehicle does not appear to be correct. A military truck of the usual pattern was produced before the lower Court. It would appear from its photographs that the front part of the vehicle is entirely separate and is closed from behind. It appears from the plaintiff's testimony that there is another type of vehicle, which was used on the date of the incident, in which the back part is attached with the front portion, but in that model also, as he has said, the back side of the front portion is closed except for a slit through which the driver is given directions. In either case, therefore, the plaintiff could not have attempted to go to the front seat from inside the vehicle and this was also not the version of Kartarsingh (D.W. 3).

An attempt was made to prove that the plaintiff had not taken the front seat in the vehicle as deposed to by him. In this connection, Kamal Kumar Bose (D.W. 1), a cleark of the Dairy Farm, said that the delivery-man was not ordered to sit with the driver. He, however, admitted that there was no written order to that effect. Dr. Bishensingh (P.W. 2) said, on the other hand, that he always saw the delivery-man sitting with the driver in front. This appears to have been his usual seat as, with the milk cans packed on the floor behind, he could not easily be accommodated in the rear of the vehicle. The delivery-man was also likely to be in the charge of the papers showing the stations where the milk was to be delivered on any particular day. We therefore, see no reason to doubt the plaintiff's statement that he used to sit in front as he was the person to give directions to the driver where to stop the truck.

For the above reasons, we see no reason to doubt the plaintiff's version of the incident. The driver was apparently not careful in the discharge of his duties when he started the truck before the plaintiff could take his seat. The accident, therefore, was caused through his negligence. It was pleaded in this connection that the plaintiff was guilty of contributory negligence in as much as, firstly he took his seat in front contrary to rules and

secondly he did not properly place the milk cans on account of which one of them got tilted. We have already disposed of the first point above. As regards the second point, there is no proof that the milk can had tilted through the plaintiff's negligence in arranging it and not on account of a jerk of the truck. Even if this was so, the matter was too remotely connected with the incident. In these circumstances, the Union of India would be liable as the injury sustained by the plaintiff was caused by its servant's negligence in the course of his employment.

This brings us to the *quantum* of damages. The lower Court has awarded damages on account of (i) loss of prospective employment and (ii) bodily and mental pain. The plaintiff was earning per mensem Rs. 28/- on account of pay, Rs. 16/- on account of dearness allowance and Rs. 6/12/- on account of grain compensation allowance, total Rs. 50/12/-. He was then 30 years old and was, according to the lower Court, expected to serve till the age of 60. On this basis, the Court below thought that the amount of Rs. 8000/- on account of loss of employment for 30 years is moderate. On the second count, the lower Court allowed only Rs. 200/- on account of the fact that he was treated at the defendant's expense.

Damages, in cases of tort, are allowed as compensation and not by way of restoration or restitution. Thus, for instance, the measure of damages in a case of cutting of trench on land is the diminished value of the land and not the cost of restoring it to its original position. *Jones v. Gooday* (1). Applying this principle to the case of bodily injury, the plaintiff would be entitled only to reasonable compensation for the loss of future employment and not an amount on the basis of an absolute mathematical calculation without taking into consideration the probable fluctuations in life. For this purpose, the compensation that is allowed in accident cases under the Workmen's Compensation Act, 1923, may serve as a useful guide.

In the instant case, the plaintiff's basic pay was only Rs. 28/- p. m. His service was also temporary as has been deposed to by Asanand (D.W. 2), Head Clerk of the Dairy Farm. He had also lost only 40 per cent physical capacity on account of the injury. Even on the basis of Rs. 50/12/-

(1) (1841) 8 M. & W. 146.

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as the plaintiff's monthly wages, the amount of compensation, under the Workmen's Compensation Act, for permanent disablement of 100 per cent would be Rs. 2520/; it would be Rs. 1008/- for 40 per cent total disablement. We think that an award of Rs. 2000/- for loss of future emoluments would be a fair compensation on the basis that the disablement is permanent for any gainsome undertaking.

As regards physical pain and mental suffering, the lower Court has erred in allowing only a nominal compensation on account of the fact that the plaintiff had not to spend for treatment. He was in acute suffering from 22-11 1947 to 26-1-1948 during treatment. Even after discharge from the hospital, he is unable to walk without pain and support which is likely to be his permanent condition. The amount of Rs. 2,000/- claimed by him, therefore, appears to be reasonable. The cross-objection accordingly succeeds and is allowed. The total amount of damages is thus assessed at Rs. 4000/-.

The appeal is partly allowed. The decree of the lower Court is modified by substituting Rs. 4000/- in place of Rs. 8200/- and it is directed that the plaintiff would be liable to pay the court-fee on Rs. 6000/- and the defendant on Rs. 4000/-. Defendant shall be liable to pay plaintiff's costs in the lower Court corresponding to success, and the rest of the costs shall be borne as incurred. In view of partial success and failure in this Court parties shall bear their own costs of the appeal and of the cross-objection.

Appeal partly allowed.

FULL BENCH

Before Mr. M. Hidayatullah, C. J., the Hon. Mr. Justice B. K. Choudhuri and Mr. Justice B. K. Chaturvedi.

1957

Feb. 11.

THAKUR KISANSINGH & four others *Petitioners**.

Versus

THE STATE OF MADHYA PRADESH and two others *Respondents*

Municipalities Act, C. P. and Berar (II of 1922)—Section 15 (j)—"Any local authority" in, Meaning of.

*Miscellaneous Petition No. 407 of 1956,

The phrase "any local authority" in clause (j) of Section 15 of C. P. and Berar Municipalities Act means each and every local authority and not any local authority with special rules of its own. This provision hence refers to ineligibility created by a general statute in respect of all local authorities.

Shri Baburao Pandurangji v. The State of Madhya Pradesh and others (1), approved.

Shri *R. S. Dabir* for petitioners.

Shri *M. Adhikari,* Advocate-General, for the State, respondent No. 1.

Shri *M. L. Singhai* for respondent No. 2.

ORDER

The Order of the Bench was delivered by HIDAYATULLAH C. J.—This case comes before us on a reference by one of us (Choudhuri J.). Though the learned Judge referred two questions of law which, according to him, arose in this petition, those two questions are precisely the only questions open for decision in the case. Fortunately, Choudhuri J. is a member of this Full Bench and he agrees that on a fair interpretation of those questions the entire case is before this Full Bench.

The facts of the case are as follows. One Rai Saheb Kisanchand Sharma was the president of the Municipal Committee, Khurai. While he was the president, he was convicted of an offence under section 399 of the Indian Penal Code read with section 120-B *ibid* and sentenced to three years' rigorous imprisonment and a fine of Rs. 1,000/-. Against his conviction he has filed an appeal, and the appeal is pending in this Court. Meanwhile the petitioners, who number five, moved the State Government for a declaration that the office of the president had become vacant under section 22 of the C. P. and Berar Municipalities Act, 1922. The State Government not having acceded to their representations and ordered a fresh election, the present petition was filed for *writs* in the nature of *mandamus* and *quo-warranto* against Rai Saheb Kisanchand Sharma, the State Government of Madhya Pradesh and the Municipal Committee, Khurai.

(1) Miscellaneous Petition No. 15 of 1954 dated 19-4-54.

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Thakur Kishan Singh vs. *State*

The questions which were framed by Choudhuri J. read as follows :

"(i) Whether on the conviction of Respondent No. II under section 120-B and 399 I.P.C. by the Additional Sessions Judge, Sagar, he ceases to be president of the Khurai Municipal Committee forthwith under the provisions of section 22 (2) of the C.P. and Berar Municipalities Act.

(ii) Whether the disqualifications enumerated in section 15 (j) include the disqualification mentioned in section 10 (m), Local Government Act, 1948."

These are the questions which, as we have already indicated, are the sole questions arising in this case.

There are a number of statutes which create local authorities in the State. A list of them need not be given because they are all well known. In each of these Acts there is a section which lays down qualifications for membership and also discloses the disqualifications. In that section there is always one sub-section which is common and which says that a person shall be ineligible if under any law for the time being in force he is disqualified to be a member of any local authority. It is this section which is the bone of contention between the parties. Shri R. S. Dabir on behalf of the petitioners contends that this provision indicates that the disqualifications contained in any Act connected with any other local authority must be read into the Municipalities Act. The contention of the learned Advocate-General and Shri M. L. Singhai, who appears for Rai Saheb Kishanchand Sharma, is that this provision refers only to a disqualification which is created in statutes for all local authorities taken together. The gist of the matter is, therefore, what meaning must be assigned to this provision of law, particularly the words "any law for the time being in force" and "any local authority".

In the original C. P. and Berar Municipalities Act, 1922, section 15 contained several clauses which created disabilities for membership. Some of these clauses were later deleted by the Legislature, including clause (g) which read as follows :

"No person shall be eligible for election, selection or nomination as a member of a committee, if such person—

* * * *

(g) has subsisting against him a conviction by a criminal court, whether within or without British India, involving a sentence of transportation or imprisonment for a term exceeding six months, unless the offence of which he was convicted has been pardoned;"

This clause was deleted by Act IV of 1927. It is clear enough that if the matter had rested there, the disqualification resulting from a criminal conviction would have ceased to exist. Shri Dabir refers, however, to clause (j) of the same Act which lays down :

or "is, under the provisions of any law for the time being in force, ineligible to be a member of any local authority";

He says that by virtue of this clause one can look into the statutes creating local authorities to see whether there is in them any disqualification which can be read as Part of the present statute.

There is no doubt whatever that by clause (j) of section 15 of the C. P. and Berar Municipalities Act, 1922, there is an incorporation of ineligibility created by any law for the time being in force. The only condition precedent is that the ineligibility should be of being a member of "any local authority." The crux of the controversy, therefore, is not in the phrase "any law for the time being in force" but is in the phrase "any local authority". The question which arises, therefore, is whether in interpreting this phrase we have to look for an Act which creates a disability in respect of *all* local authorities or take each individual Act setting up a local authority and find out what the disqualifications for membership are and apply them to the Municipalities Act. In other words, when we interpret the word "any" whether we must have in view a general law creating a disability in respect of local authorities in general, or must we look for a law in which the ineligibility is created in respect of any one local authority by a special statute.

Now, the Local Government Act, 1948, is referred to by Shri Dabir as creating ineligibility, on which he relies. Section 10 of that Act provides the conditions and the disqualifications for being a councillor. Clause (m) thereof says :

"No person shall be eligible for election or selection or appointment as a councillor of a Sabha, if such person—

* * * *

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(m) has been sentenced by any court to imprisonment or whipping for an offence punishable with imprisonment for a term exceeding six months, or to transportation;"

Shri Dabir says that here we have a provision in a law for the time being in force which creates ineligibility for membership of a local authority, namely, the Janapada Sabha. He says this disability must be read by virtue of clause (j) of section 15 of the C. P. and Berar Municipalities Act into that Act. The trouble however, is that there are other Acts in which a similar disability has been created, but in entirely different terms. In the C. P. and Berar Panchayats Act, 1946, the disability is created against a person who has been convicted by a Court in India of any offence and sentenced to transportation or to imprisonment for not less than two years, unless a period of five years or such less period as the State Government may allow in any particular case, has elapsed since his release.

In the Nagpur Improvement Trust Act, 1936, the disability is that the person has been sentenced by a Criminal Court to imprisonment for a term exceeding six months or to transportation, or has been ordered to find security for good behaviour under the Code of Criminal Procedure, such sentence or order not having subsequently been reversed or remitted or the offender pardoned. If one goes to other statutes, like the Nyaya Panchayat Act and the Corporation Act, one finds conflicting provisions on the subject.

Shri Dabir says that the cardinal rule of interpretation is that one must go by the letter of the law and must not try to avoid the inconvenient consequences that the interpretation might lead to. He says that if the letter of the law is quite clear, we must give effect to the meaning underlying those words and should not concern ourselves with the question whether any inconsistency or absurdity is created. On the other hand, the learned Advocate-General and Shri Singhai contend that in interpreting the words "any local authority" we must bear in mind the entire scheme of legislation under the various Acts and also Acts like the Provincial Insolvency Act in which disabilities are also created, and then decide what is the meaning which should be given to this phrase.

The rule of interpretation was stated by *Lord Blackburn in Mayor and C. of Portsmouth v. Smith* (1). In that case it

(1) (1885) 10 A.C. 364 at page 371.

was laid down that where a single section of an Act of Parliament is introduced into another Act by reference, the entire scheme of the Act must be seen to know in what sense that section must be understood. It is obvious that the introduction of clause (j) of section 15 in the C. P. and Berar Municipalities Act may bring in its pale not only statutes like those creating local authorities but also general statutes like the Provincial Insolvency Act. It is also clear on a reading of section 73 of the Provincial Insolvency Act that the phrase "any local authority" there cannot but mean all local authorities. The question is whether a similar meaning should not be assigned to the phrase in clause (j) of section 15 of the C. P. and Berar Municipalities Act.

Now, of these two different meanings, viz., that the word "any" means all local authorities viewed together, or all local authorities viewed separately, we think that the better view would be to give the phrase a meaning uniform with the phrase in the Provincial Insolvency Act. Our attention was also drawn during the course of arguments to a decision of a Division Bench of the Nagpur High Court in *Shri Baburao Pandurangji v. The State of Madhya Pradesh and others* (1). There the learned Judges laid down that in clause (g) the intention is only to allow ineligibility created by a general statute in respect of all local authorities to be brought in by reference. Their Lordships on that occasion were not prepared to hold that disabilities created by other statutes setting up local authorities were meant.

A glance at the sections creating disqualifications in the various local authorities is very illuminating. In one of the Acts the disqualification is against lepers. In another statute the disqualification is against lepers suffering from leprosy of an infectious type. Both the statutes, however, have the same phrase that the disqualification for the time being existing in any statute in relation to any local authority is to be read as part of that statute. It is obvious that that clause cannot be read as incorporating conflicting terms. Similarly, one notices that though there is the clause incorporating disqualification from other statutes, the disqualification arising from insolvency is also expressly mentioned. From this it appears that these clauses were not drawn up with meticulous care to be mutually exclusive but were

(1) M.P. No. 15 of 1954, dated 19th April 1954.

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designed to create disqualifications for different local authorities in different circumstances.

In the present case we have the C. P. and Berar Municipalities Act, and it includes within itself several clauses creating disqualifications for memberhip. Among them one clause which was previously existing has been deleted. If there had been nothing, as we have already said, the intention would clearly be to remove that disqualification from the list. If the disqualification was to be subsisting, there was no need for removing it. The fact that a general clause bringing in disqualifications from the other statutes was already there does not show that the removal was merely to avoid an overlap. In our opinion, the intention was to remove this disqualification completely from the C. P. and Berar Municipalities Act and that no reliance can be placed upon the general clause (j) for bringing in that disqualification from other statutes, particularly as those statutes among themselves are conflicting and make radically different provisions on the subject. No doubt, it is possible to find out the highest common measure from all these statutes and to apply it to the C. P. and Berar Municipalities Act. But we do not think that the intention of the Legislature in incorporating that general clause was to make people embark upon an analysis of all the statutes existing on the subject of local authorities to find out what is the highest common measure or the lowest common multiple on any particular subject. We do not think that that clause was meant for this purpose.

We agree with the Division Bench that that clause was meant to bring in the disqualification from general statutes like the insolvency Act creating disability for *all* local authorities viewed as a whole. In our opinion, therefore, the phrase "any local authority" must be given the meaning 'each and every local authority' and not any individual local authority with special rules of its own. In other words, we approve of the decision of the Division Bench and respectfully affirm it.

We cannot leave this case without saying that the Legislature would be well advised in using some phrase other than the one which is used in clause (j) of section 15 of the C. P. and Berar Municipalities Act. No doubt, this decision will set at rest this controversy; but the phrase itself is of dubious import, and one has to go very deep before the meaning can be gathered. We cannot do better

than reiterate the caution which Lord Blackburn has voiced in the first cited case :

> "It is a dangerous mode of draftsmanship to incorporate a section from a former Act; for unless the draftsman has a much clearer recollection of the whole of the former Act than can always be expected, there is great risk that something may be expressed which was not intended."

It is better, when there is a reference to other statutes, to state the limits within which that incorporation by reference is to apply. If this were done, all such controversy would be avoided in future.

The result of our decision, therefore, is that the petition must fail. It fails and is dismissed; but in the circumstances of the case we make no order about costs.

Petition dismissed.

CRIMINAL MISCELLANEOUS APPLICATION (INDORE BENCH)

Before Mr. Justice P. V. Dixit and Mr. Justice S. M. Samvatsar.

AMBARAM *Petitioner**

Versus

GUMANSINGH & another *Opponents.*

1957
Jan. 7.

Constitution of India, Article 227—Petitioner invoking jurisdiction of a particular Tribunal—Cannot be allowed to repudiate that jurisdiction—Question of jurisdiction not raised before the tribunal—Question not to be allowed to be raised in a petition—Madhya Bharat Panchayat Vidhan 1949, *Section* 89—*The expression "Sessions Judge" in—Includes Additional Sessions Judge.*

The petitioner who had invoked a particular jurisdiction cannot be allowed to repudiate it.

In the matter of issue of a writ of certiorari, the High Court exercises a special jurisdiction and that a question of jurisdiction cannot be allowed to be raised on a petition

*Criminal Miscellaneous Application No. 10 of 1955 against a decision of Additional Sessions Judge, Ujjain, in Criminal Revision No. 123 of 1954, dated the 15th Nov. 1954.

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when no objection to the jurisdiction had been taken before the tribunal whose order or proceedings are being challenged.

Rex v.. Williams Phillips Exparte (1), *Gandhinagar Motor Transport Society v. State of Bombay* (2), *Mannarghat Union Motor Services Ltd., v. Regional Transport Authority, Malabar* (3), relied on.

The expression "Sessions Judge" occurring in section 89 of Madhya Bharat Panchayat Vidhan must be taken as including an Additional Sessions Judge.

Shri W. Y. Pande for the petitioner.

Shri S. L. Dubey for the opponents.

Shri K. A.. Chitale for the State.

ORDER

The Order of the Court was delivered by DIXIT J.— This petition under Article 227 of the Constitution of India is directed against a decision of the Additional Sessions Judge, Ujjain, setting aside the convictions and sentences under Ss. 504 and 506 I. P. C. of the opponents Gumansingh and Kaluram and acquitting them of the offences. The opponents were convicted by the Nyaya Panchayat of Makdon on a complaint filed by the petitioner Ambaram under S. 75 of the Madhya Bharat Panchayat Vidhan, 1949. That section and S. 76 confer jurisdiction on Nyaya Panchayats to try certain offences under the Penal Code and under other Acts limiting the power of the Nyaya Panchayat in the matter of punishment to a fine not exceeding Rs. 100/-. A Nyaya Panchayat under the Act is not competent to sentence any person convicted for any of the offences specified in S. 75 to imprisonment. A Nyaya Panchayat cannot also try persons mentioned in S. 80 and under S. 83 it cannot entertain any complaint with regard to the commission of an offence after the expiry of a period of one year from the date of the commission thereof. Under S. 89 a decision of the Nyaya Panchayat in a criminal case is revisable by a Sessions Judge and the decision of the Sessions Judge is final.

(1) (1914) 1 K. B. 608; (2) A. I. R. 1954 Bom. 202;
(3) A. I. R. 1953 Mad. 59.

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Mr. Pande, learned counsel appearing for the petitioner assailed the decision of the Additional Sessions Judge, Ujjain, on three grounds. First it was said that Ss. 75, 76 and 77 of the Panchayat Vidhan, which was not reserved for the consideration of the President and which had not received his assent, being repugnant to the Code of Criminal Procedure were void under Article 254 of the Constitution and that, therefore, the Nyaya Panchayat had no jurisdiction to entertain the petitioner's complaint. Secondly it was urged that for the same reason S. 89 of the Act was also repugnant and the learned Additional Sessions Judge had no jurisdiction to entertain the revision petition filed by the opponents. Thirdly it was contended that under S. 89 it was the Sessions Judge and not an Additional Sessions Judge who was competent to hear and determine a revision petition against a decision of the Nyaya Panchayat.

In my opinion, this petition must be dismissed without considering the validity of the petitioner's contention as regards the jurisdiction of the Nyaya Panchayat to entertain the complaint and of the Additional Sessions Judge to hear the revision petition because of the alleged repugnancy between Ss. 75, 76, 77 and 89 of the Panchayat Vidhan and of the provisions of the Code of Criminal Procedure. The petitioner himself filed a complaint against the opponents before the Nyaya Panchayat. When he did that he must be assumed to have accepted the position that the Nyaya Panchayat was legally clothed with the authority to try his complaint. The petitioner who presented the complaint before the Nyaya Panchayat under S. 75 could not clearly at the same time say that the provision which conferred jurisdiction on the Nyaya Panchayat being repugnant to the Code of Criminal Procedure is void. On the maxim *'allegans contraria non est audiendus'* (a person making contradictory statements is not to be heard), the petitioner cannot now be heard to repudiate the very jurisdiction which he invoked. Again before the Additional Sessions Judge the petitioner did not raise the point that as S. 89 of the Panchayat Vidhan was repugnant to S. 438 Cr. P. C., the Sessions Judge had no jurisdiction to entertain the revision petition preferred by the accused persons. At that time it never occurred to the petitioner that the Additional Sessions Judge had no jurisdiction. He took the chance of success before the Sessions Court and it was not until he had failed that he

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elected to move this Court under Article 227 of the Constitution. If the revision petition had been dismissed we would not have heard anything further about the jurisdiction of the Nyaya Panchayat to entertain the complaint and of the Sessions Judge to hear and decide the revision petition. Learned counsel for the applicant admitted that the petitioner never raised the point as to the jurisdiction of the Additional Sessions Judge when he heard the revision petition. He, however, argued that if the Nyaya Panchayat and the Sessions Judge had in fact no jurisdiction under the Act, the petitioner's conduct in invoking the jurisdiction of the Nyaya Panchayat and in omitting to raise before the Sessions Judge the point as to the jurisdiction, could not confer any jurisdiction on these authorities and that he could, therefore, raise the point for the first time in this Court. It is true that if the Nyaya Panchayat and the Sessions Judge had no jurisdiction under the Act, the petitioner's conduct cannot validate the proceedings held by them. But the question is not whether the proceedings are validated by the petitioner's consent or conduct, but it is whether a party invoking this Court's special jurisdiction under Arts. 226 and 227 can be allowed to raise a question of jurisdiction when no objection on that score had been taken before the tribunal whose order is being challenged. Several English authorities have laid down the proposition that in the matter of issue of a writ of Certiorari, the High Court exercises a special jurisdiction and not ordinary jurisdiction and that a question of jurisdiction cannot be allowed to be raised on a petition when no objection to the jurisdiction had been taken before the tribunal whose order or proceedings are being challenged. In the case of *Rex Vs. Williams* (1) where a man applied for a writ of certiorari to quash an order made by Justices on the ground that one of the Justices was an interested party, it was held that the applicant was not entitled to the writ *'ex debito justitiae'* because knowing the disqualification he had chosen to stand by during the hearing before the Justices without taking any objection. Channell J. pointed out :—

> "No objection was taken to the jurisdiction of the Court below at the hearing before that Court; that being so, it is the rule of this Court not to grant a writ of certiorari except upon an affidavit which negatives knowledge on

(1) (1914) 1 K.B. 608.

the part of the applicant when he was before the Court below of the facts on which he bases his objection. That rule is established on good grounds. It applies equally whether the objection is on grounds which make the act of the justices voidable or void."

He then observed at Page 614 :—

"A party may by his conduct preclude himself from claiming the writ *ex-debito-justitiae*, no matter whether the proceedings which he seeks to quash are void or voidable. If they are void, it is true that no conduct of his will validate them; but such considerations do not affect the principles on which the Court acts in granting or refusing the writ of certiorari. This special remedy will not be granted *ex-debito-justitiae* to a person who fails to state in his evidence on moving for the rule nisi that at the time of the proceedings impugned he was unaware of the facts on which he relies to impugn them. By failing so to do a party grieved precludes himself from the right to have the writ *ex-debito-justitiae* and reduces his position to that of one of the public having no particular interest in the matter. To such a one the granting of the writ is discretionary."

This case and other English cases in the same line have been followed by many High Courts in India while exercising the jurisdiction under Arts. 226 and 227 of the Constitution of India. In *Gandhinagar Motor Transport Society Vs. State of Bombay* (1) an order passed by the Bombay Government in an appeal from a decision of the State Transport Authority was challenged on the ground that the Government had no jurisdiction to sit in appeal over the decision of the State Transport Authority. The petitioner in that case did not raise the point as to the jurisdiction of the Government when the Government heard the matter. A Division Bench of the Bombay High Court presided by the learned Chief Justice following the rule laid down in *Rex Vs. Williams* (2) held that before a question of jurisdiction of a tribunal could be allowed to be raised on a petition under Articles 226 and 227 of the Constitution, objection to the jurisdiction must be taken before the tribunal whose order is being challenged. A similar view has been taken in *Mannarghat Union Motor*

(1) A.I.R. 1954 Bom. 202; (2) (1914) 1 K.B. 608;

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Services Ltd., Vs. Regional Transport Authority, Malabar (1). That was a case where the jurisdiction of the Regional Transport Authority was challenged before the High Court in a petition under Articles 226 and 227 of the Constitution and the petitioner had failed to object to the jurisdiction before the Regional Transport Authority. It was held that when the petitioner submitted to the jurisdiction of the Regional Transport Authority and took the chance of getting a decision in his favour, he could not when the decision went against him question the jurisdiction of the tribunal before the High Court and that he had by his conduct precluded himself from objecting to the jurisdiction whether the objection was based on a pure point of law or based on facts which were or should have been within his knowledge during the proceedings before the tribunal. The rule laid down in *Rex Vs. Williams-Phillips exparte* (*supra*) was also followed in some pre-Constitution cases (see *Adiraju Vs. Somavaram Co-operative Society* (2) and *O. A. O. K. Latchmanan Chettiar Vs. Commissioner, Corporation of Madras* (3). I see no reason why in this particular case the salutary rule laid down in *Rex Vs. Williams* (*Supra*) should not be given effect to while exercising this Court's jurisdiction under Arts. 226 and 227 of the Constituiton which is not an ordinary jurisdiction but a special jurisdiction. In my opinion, the petitioner has precluded himself by his conduct from objecting to the jurisdiction of the Nyaya Panchayat to try the complaint preferred by him and of the Sessions Judge to hear the revision petition.

It was then urged that under S. 89 a Sessions Judge alone was competent to entertain and determine a revision petition against a decision of the Nyaya Panchayat and that, therefore, Shri Manzar Ali, who was an Additional Sessions Judge at Ujjain, had no jurisdiction to hear the revision petition. This objection must also be rejected. The whole scheme of the Madhya Bharat Panchayat Vidhan and of the provisions of Chapter VII in particular is that in matters of civil, revenue and criminal disputes, the Nyaya Panchayat exercises its powers as a Court of law and that it is to the Court concerned and not to the individual Judge who may preside in or constitute the Court that revisional jurisdiction is given under S. 89. That being

(1) A. I. R. 1953 Mad. 59. (2) A. I. R. 1938 Mad. 69.
(3) A.I. R. 1927 Mad. 130

so, the expression Sessions Judge occurring in S. 89 must be taken as including an Additional Sessions Judge. In my opinion, an Additional Sessions Judge is competent to entertain and decide the revision petition under S. 89 of the Act.

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In the result, this petition fails and is rejected.

SAMVATSAR J.—I agree. *Petition rejected.*

CRIMINAL MISCELLANEOUS APPLICATION (INDORE BENCH)

Before Mr. Justice P. V. Dixit and Mr. Justice S. M. Samvatsar.

PYARELAL and others Petitioners* 1956

Dec. 27.

Versus

THE SECRETARY,
INDORE MILL MAZDOOR SANGH,
INDORE Opponent.

Bombay Industrial Relations Act, 1947, *Section* 82—*Number of employees reduced in particular department—Complaint filed by representative Union—Representative Union not a person aggrieved—Complaint not maintainable—Complaint under—To state all facts constituting offence.*

When, the number of permanent or semi-permanent employees in any department of any industry to which the Bombay Industrial Relations Act applies is reduced, the persons affected by the reduction are the employees actually retrenched or the persons retained whose workload has increased consequent to the retrenchment and not the representative Union. Hence a complaint filed by the representative union in such circumstances is not maintainable.

A complaint must state all the facts which constitute the offence. Mere assertion or a vague allegation that an offence has been committed cannot be regarded as compliance with the letter or spirit of section 82 of the said Act.

*Criminal Miscellaneous Application No. 13 of 1956 against a decision of Industrial Court (M. B.), Indore, in Criminal Revisions Nos. 1, 2 and 3 of 1956, dated the 9th March, 1956.

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On such vague complaint the Labour Court has no power to take cognizance of the alleged offences.

Kanhaiyalal v. State (1), *Purshottam Devji v. Emperor* (2), *Jayantilal v. Emperor* (3), *Dr. N. G. Chatterji v. Emperor* (4), *Rachpal Singh v. Rex* (5), referred to.

Shri G. M. Chaphekar for the petitioners.

Shri Jal D. Patel for the opponent.

ORDER

The order of the Court was delivered by DIXIT J.— By this petition under Art. 227 of the Constitution of India directed against a common decision of the Industrial Court, Madhya Bharat, disposing of three revision petitions, the petitioners challenged the jurisdiction of the Labour Court to entertain three separate complaints filed by the opponent against the petitioners in respect of offences under S. 106 (1) of the Bombay Industrial Relations Act as adapted in Madhya Bharat.

The matter arises thus. In that part of Madhya Pradesh which was formerly Madhya Bharat, the relations of employers and employees in certain industries and the settlement of industrial disputes is regulated by the Bombay Industrial Relations Act, 1947, as adapted by Madhya Bharat Act No. 31 of 1949. Almost all industrial disputes are the outcome of a desire of change in the existing state of things as regards wages, hours of work, amenities, etc. The object of the Bombay Industrial Relations Act is peaceful settlement of industrial disputes and avoidance of strikes and lock-outs as means to enforce changes in industrial matters as far as possible. With this purpose in view, the Act provides that an employer wishing to make a change in specified industrial matters or an employee desiring to affect a change in such matters should give notice to the other party of the proposed change and make an effort to arrive at a settlement. If no settlement is reached, then conciliation proceedings will be instituted and the Government Conciliator will attempt to bring about a settlement as regards the proposed change. In the event of the conciliation proceedings failing, the employer would be entitled to make the change or to declare

(1) A. I. R. 1952 M. B. High Court Reports 285.
(2) A. I. R. 1944 Bom. 247. (3) A. I. R. 1944 Bom. 139.
(4) A. I. R. 1946 All. 416. (5) A. I. R. 1949 Oudh.66.

a lock-out to enforce it and the employees will also be at liberty to resort to strike to enforce or resist the change as the case may be. The Act also gives recognition to the principle that as now labour is organised in many industries, the redress of grievances should not be individual but should be collective through its Union. A 'change' under the Act means an alteration in an industrial matter as defined in S. 3 (18) of the Act. S. 3 (32) defines a "representative of employees" as meaning a representative of employees entitled to appear or act as such under S. 30. S. 3(33) defines "representative Union" as meaning a Union for the time being registered as a Representative Union under the Act. S. 30 of the Act prescribes the order of preference in which representatives of employees are entitled to appear or to act, and the first preference is given to a Representative Union. S. 42 (1) lays down that an employer intending to effect any change in respect of an industrial matter specified in Schedule—II shall give notice of such intention in the prescribed form to the representative of employees, who shall then send a copy of the notice to the Chief Conciliator, the Conciliator for the industry concerned for the local area, the Registrar, the Labour Officer and such other person as may be prescribed. Any change made by an employer without any such notice is under S. 46 an illegal change. S. 106 (1) provides the penalty for an illegal change and says that any employer who makes an illegal change shall, on conviction, be punishable with fine which may extend to Rs. 5,000/-. The jurisdiction of the Labour Court to take cognizance of any offence arises under S. 82. It provides that no Labour Court shall take cognizance of any offence except on a complaint of facts constituting such offence made by the person affected thereby or on a report in writing by the Labour Officer. On 8th and 9th December 1955, the Secretary, Indore Mill Mazdoor Sangh, a representative Union filed in the Labour Court three separate complaints against the petitioners who are the Directors and Managers of the Indore Malwa United Mills Ltd., Indore, complaining that the petitioners had without giving a notice as required by S. 42 reduced the number of permanent employees in certain departments of the Mills and had thus committed offences under Section 106 of the Bombay Industrial Relations Act. Each of these complaints related to separate departments, to wit, Cotton Godown Department, Cloth Godown Department and Carding Department. Before the Labour Court the petitioners raised the preli-

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minary objection in each case that as the opponent was not a person affected by any of the alleged offences he had no *locus standi* to file the complaints and that the Labour Court could not take cognizance of the alleged offences on complaints filed by the opponent. The Judge of the Labour Court following a decision of the Industrial Court overruled this objection. The petitioners then preferred three separate revision petitions before the Industrial Court raising the contention that the Labour Court had no jurisdiction to entertain the three complaints. These revision petitions were dismissed. The learned Industrial Judge took the view that as the Representative Union was entitled to receive a notice under S. 42 (1) of the Act as regards the intended change, and as no notice of the changes effected was given to the representative of the employees, the opponent, who is the Secretary of the Representative Union, was a person affected within the meaning of S. 82. The petitioners have now filed this application under Art. 227 of the Constitution of India challenging the correctness of the decision of the Industrial Court.

The question raised in this petition turns on the meaning of the expression "on a complaint of facts constituting such offence made by the person affected thereby" occuring in S. 82. Mr. Chaphekar, learned counsel for the petitioners, urged that the Representative Union was not a person and that in any case it was not a person affected by any change made by the petitioners which is said to constitute an offence under the Act and that the person affected by the alleged offence was in each case the person retrenched or reduced and not the Representative Union. Learned counsel compared S. 79 and S. 82 and submitted that whereas S. 79 by using expressly the words "Representative Union" gave to a Representative Union the right to commence proceedings under that section, no such words were to be found in S. 82; and that formerly S. 79 also did not contain the words "Representative Union" which were added subsequently by an amending Act and that no such amendment was made in S. 82. It was said that the absence of the words "Representative Union" in S. 82 and their addition in S. 79 only support the construction that under S. 82 the Representative Union was not competent to make a report or complaint of any offence under the Act. Learned counsel also referred to S. 106 (3) as confirming the construction. In reply, Mr. Patel contended that a Representative Union was a person affected by the

alleged offences as the Union was entitled to a notice under S. 42 (1) of the proposed changes.

To my mind, the plain meaning of the expression "on a complaint of facts constituting such offence made by the person affected thereby" is, on a complaint of facts constituting such offence made by a person whose position in respect of any of the rights, benefits or privileges conferred by the Act has been altered or injuriously varied by the alleged offence. The question whether a person is or is not affected must be determined by the nature of the offence, the rights and privileges of the person and the special circumstances of each case. Now, for the purposes of the Bombay Industrial Relations Act, the Representative Union can have no powers or rights except those expressly or impliedly granted to it under the Act. The scheme of the Act makes it perfectly clear that the main and the only purpose of the incorporation of Unions and their recognition is the representation of large bodies of employees before the tribunals under the Act. For this purpose the Union is entitled to appear or act as the representative of employees and to safeguard their interests before the tribunal. The Union itself has no rights with regard to employment, hours of work, wages etc., or in regard to any of the matters specified in Schedule-II except the withdrawal of recognition to Union of employees. When, therefore, the number of permanent or semi-permanent employees in any department of any industry to which the Act applies is reduced, the persons affected by the reduction are the employees actually retrenched or the persons retained whose workload has increased consequent to the retrenchment and not the Representative Union. No doubt under S. 42 (1) a Representative Union is entitled to receive a notice with regard to an intended reduction by an employer in the strength of permanent or semipermanent employees in any department of the concern and if a reduction is made by the employer without such notice the Union's right to receive a notice is violated. But the change made in the form of the reduction of the number of employees does not in any way alter the position of the Union which after the reduction remains the same as before it. The Union's right to appear and act on behalf of the employees before the tribunals is in no way varied or destroyed by the change even though it may be illegal. The word "thereby" which follows the word "affected" in S. 82 is very significant. It shows that the person competent to make a complaint

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under S. 82 must be a person affected by the result of the alleged offence and not by the manner in which it has been committed. The omission to give a notice as required by S. 42 (1) which renders a change an illegal change is merely the mode in which an illegal change has been made. It is not the result of the illegal change, that is of the offence alleged. The argument that the Representative Union is a person affected within the meaning of S. 82 when the alleged offence consists in the reduction of the number of employees in a department without notice cannot, therefore, be accepted.

I do not think S. 79 (1) or S. 106 (3) throw any light on the construction of S. 82. It is important to observe the distinction between the language of S. 79 (1) and S. 82. Whereas S. 79 (1) *inter alia* says that proceedings in respect of a matter falling under clause (c) of paragaph A of sub-section (1) of S. 78 can be commenced on an application made by any employer or employee directly affected or the Labour Officer or a Representative Union, Section 82 requires that the complaint of facts constituting an offence must be by the person affected thereby. Now, no doubt, when S. 79 (1) uses the expressions "employee directly affected" and "Representative Union", it emphasizes the fact that a Representative Union is not an employee directly affected. But from this it does not follow that a Representative Union is an employee indirectly affected by the matters referred to in S. 79 (1) or that a Representative Union can never be said to be a person affected by an offence or that it is always so affected. As has been said before, the question whether a Representative Union is a person affected by an offence depends solely on the nature of the offence alleged and the rights and privileges conferred on the Union under the Act. To illustrate, when an illegal change is in respect of withdrawal of recognition to a Union of employees, the Union would clearly be a person affected by the offence constituted by the illegal change. If on the other hand the illegal change is in regard to wages, hours of work, and reduction the employees, where the only right the Union has is of appearing or acting before the Labour Court or Industrial Court as the representative of employees and of safeguarding their interest, a registered Union is not affected as a result of the offence constituted by the illegal change, any the more a counsel appearing in an action on behalf of a party is affected by the decision

therein. S. 106 (3) provides for the payment of compensation to any employee directly and adversely affected by the change in issue when a Court convicts an employer under S. 106 (1). The fact that compensation is payable only to an employee directly and adversely affected cannot on any reasoning justify reading the expression "the person affected thereby" as "employee directly and adversely affected". I am clearly of opinion that in the instant case the opponent registered Union cannot be said to be a person affected in any way by the offences alleged to have been committed by the petitioners by reducing the number of employees in certain departments of their Mills.

The opponent himself realised that the Union was not a person affected by the offences alleged in the complaint filed by him, when in the complaint he did not say that by the offences any right of the Union itself had been affected. He made the consequential increase in the workload of the retained employees as the basis of his competency to file the complaints. There was some discussion at the bar as to whether the complaints filed fulfilled the requirements of S. 82 as to the facts of the alleged offences. In each of these complaints it was simply alleged that the petitioners had in a certain month reduced the number of permanent employees without giving notice as required by S. 42 and that as a result of this reduction the workload of the retained employees had increased. No details as to how and when precisely the reduction was made and whether the reduction was intended to be of permanent or semipermanent character in the number of persons employed have been given in any complaint. These details were necessary as Schedule-II, Item-1, of the Bombay Industrial Relations Act speaks not of mere reduction but of reduction intended to be of permanent or semi-permanent character in the number of persons employed. The learned Industrial Judge held that the complaints disclosed all the facts constituting the offence without considering the effect and significance of the words "complaint of facts constituting such offence" occuring in S. 82. The object of S. 82 is to protect the employers from being needlessly harassed by rash, baseless or vaxatious prosecution at the instance of private persons. For taking cognizance of any offence punishable under the Act on a complaint by a person, the *sine qua non* is a complaint in substantial compliance with the requirements of S. 82. It would be observed that S. 82 uses the expression "a complaint of facts constituting such

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offence" and not the expression "a complaint of such offence". A complaint must state all the facts which constitute the offence. This is a requisite of fundamental importance. Mere assertion or a vague allegation that an offence has been committed cannot be regarded as compliance with the letter or spirit of S. 82. The concrete facts which constitute the alleged offence must be before the Court so as to enable the Court to apply its mind to the suspected commission of the offence and to take the decision whether cognizance of the offence should or should not be taken. Here, the complaints are lacking altogether in the facts indicating that the reduction complained against is intended to be of permanent or semi-permanent character and do not fulfil the requirements of S. 82. On such complaints the Labour Court had no power to take cognizance of the alleged offences. In this connection, I need only refer to the decisions in *Kanhaiyalal v. State* (1); *Purushottam Devji v. Emperor* (2); *Javantilal v. Emperor* (3); *Dr. N. G. Chatterjji v. Emperor* (4) and *Rachpal Singh v. Rex* (5), where the meaning of the expression "on a report in writing of the facts constituting such offence" in S. 11 of the Essential Supplies Act and the expression" a report in writing of the facts constituting such contravention as used in Rule-130 of the Defence of India Rules was explained and it was pointed out that the jurisdiction of a Court taking cognizance of an offence under those provisions depended upon a report by the competent authority stating all the concrete facts constituting the alleged offence.

For these reasons, I am of the view that the opponent Representative Union is not a person affected by the offences alleged here and that, therefore, the Labour Court could not take cognizance of those offences on the complaints filed by the Union. The decisions of the Industrial Court and the Labour Court are, therefore, set aside and the complaints filed by the opponent are rejected.

SAMVATSAR J.—I agree.

Application allowed.

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(1) (1952) M. B. H. C. R. 285 (2) A. I. R. 1944 Bom. 247
(3) A. I. R. 1944 Bom. 139 (4) A. I. R. 1946 All. 416
(5) A. I. R. 1949 Oudh. 66.

CIVIL REFERENCE
(INDORE BENCH)

Before Mr. Justice P. V. Dixit and Mr. Justice S. M. Samvatsar.

MESSRS RAMANLAL POONAMBHAI *Petitioner.** 1956

Versus *Dec. 18.*

COMMISSIONER OF SALES TAX, M. B. GOVERNMENT *Opponent.*

Madhya Bharat Sales Tax Act, No. 30 of 1950, Section 8 (1) (b) and (5)—Rebate—Time when it can be claimed.

The proper time for the assessee to claim rebate is when the tax is being actually determined by the assessing authority under section 8 (1) (b) of Madhya Bharat Sales Tax Act or in an appeal against the assessment.

Shri S. L. Dubey for the assessee Ramanlal Poonambhai.

Shri K. A. Chitale for the Commissioner, Sales Tax.

ORDER

The Order of the Court was delivered by DIXIT J.— In this reference under S. 13 of the Madhya Bharat Sales Tax Act, 1950, made by the Commissioner, Sales Tax, of the former Madhya Bharat Government, the questions referred to for decision are :—

1. "Whether rebate under S. 8 (5) of the Act can be allowed for full one year, comprising of all the four quarters keeping in view assessment made under S. 8 (1) (b) of the Act for any of the said quarters?"
2. "Whether demand created under S. 8 (1) (b) of the Act for any quarter can be modified under S. 8(5) of the Act?"

Messrs. Ramanlal Poonambhai who are dealers in tobacco and licensed under the Sales Tax Act were required to file their returns of turnover quarterly. In the year 1950-51 they failed to submit their return for the first quarter

*Civil Reference No. 68 of 1953. Reference under section 13 of Madhya Bharat Sales Tax Act, No. 30 of 1950, made by the Commissioner of Sales Tax.

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ending on 30th June, 1950. Thereupon under S. 8(1) (b) of the Act, the assessing authority determined the turnover of the firm for the said period to the best of his judgment and assessed the tax accordingly. Messrs. Ramanlal Poonambhai, however, submitted in time their returns for the succeeding three quarters. At the time of determining the tax for the three quarters for which returns had been submitted, the assessee claimed that under S. 8(5) he was entitled to a rebate on the tax payable for the first quarter in respect of tobacco imported in that quarter as also a rebate on the tax payable for the remaining three quarters on the goods imported during that period. The assessing authority did not allow any rebate on the tax payable for the first quarter which tax had been determined under S. 8 (1) (b). The assessee then appealed to the Judge, Sales Tax Appeals. The appellate Judge took the view that the assessee was entitled to a rebate on the total tax payable by him for the whole year including the amount of tax assessed for the first quarter under S. 8 (1) (b). The Sales Tax Officer then preferred a revision petition against the decision of the appellate Judge to the Commissioner, Sales Tax. The learned Commissioner took the view that the assessment under S. 8 (1) (b) for the first quarter having become final, could not be modified by any order of assessment of tax for the remaining quarters of the year. He has now made this reference at the instance of the assessee for the determination of questions referred to above.

The material provisions are clauses (a) and (b) of S. 8 (1) and sub-section (5) of Section 8 of the Act. Clauses (a) and (b) of S. 8(1) are as follows :—

"(a) —Assessment of taxable turnover and determination of tax due for any year, shall be made after the returns for all the periods of that year have become due:

Provided that in the case of Melas the assessment shall be made as soon as the return of turnover has been received.

(b)—Notwithstanding anything contained in clause (a) if any dealer fails to submit a return under section 7 (1) for the prescribed period within the prescribed time, the assessing Authority shall, after making such enquiry as he considers necessary and after giving the dealer a reasonable opportunity of being heard determine the turnover of the dealer for the said period to the best of

his judgment and assess the tax on the basis thereof. This assessment, subject to the provision of S. 10 and to such orders as may be passed in appeal or revision, shall be final for the period."

Rule 4(a) of the Madhya Bharat Sales Tax Rules, 1950, prescribes the period for which returns have to be filed and the time within which they are to be filled. It says a dealer shall file returns of turnover for the periods ending June, September, December, and March of an assessment year in Form—I within four weeks of the end of each period. Sub-section 5 of S. 8 reads as follows :—

"(5) —In determining the tax for the year 1950-51 the Assessing Officer shall allow a rebate, varying from 20 per cent to 40 per cent, as may be found necessary, of the tax payable on imported goods by a dealer who had in his stock on 1st May, 1950, goods imported before that date."

Mr. Dubey, learned counsel appearing for the assessee, argued that under S. 8 (1) (a), the assessment of sales-tax for any year had to be made after the returns for all the quarters of that year had become due and that, therefore, the assessing authority was not justified in assessing the tax separately for the first quarter when the assessee failed to submit any return for that period. It was further said that even if such an assessment for any quarter could be made under S. 8 (1) (b), the question of allowing any rebate on the tax for the year 1950-51 could only be decided at the time of determining the tax for the entire year 1950-51, that is at the end of the year when the returns for all the periods had become due; and that, therefore, the assessee could claim a rebate under sub-section (5) on the tax payable by him for the first quarter of 1950-51 even though the assessment of the tax for that quarter had become final. In reply, Mr. Chitale contended that the assessing authority was within his rights in making a separate assessment for the first quarter ending 30th June, 1950, under S. 8 (1) (b) when the assessee failed to submit his return for that quarter; that the tax for the first quarter having been determined and assessed, the determination of the tax for the remaining quarters could not be said to be a determination of the tax for the entire year 1950-51, and that, therefore, sub-section 5 which permitted rebate in determining the tax for the year 1950-51 could not be availed of by the assessee for claiming any rebate and that

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in any case he could not claim any rebate on the tax assessed for the first quarter as the assessment had become final at the time of determining the tax for the remaining quarters.

In my judgment, the provisions of clauses (a) and (b) of S. 8(1) leave no doubt that while assessment of taxable turnover and determination of tax due for any year can be made after the returns for all the periods of that year have become due, in the event of any dealer failing to submit a return for any quarter, the assessing authority can, and is required to determine the turnover of the dealer for this quarter to the best of his judgment and assess the tax on its basis. The opening words of clause (b) "notwithstanding anything contained in clause (a)" and the following direction in clause (b) "determine the turnover of the dealer for the said period.....and assess the tax on the basis thereof" unmistakably show that a separate assessment of the tax for a quarter for which no return has been filed is legal. Such an assessment is open to appeal or revision but if there is no appeal or revision against it, it is final. In the instant case, the assessee did not appeal against the assessment for the quarter ending on 30th June, 1950. Now, sub-section 5 speaks of allowing a rebate to an assessee "in determining the tax for the year 1950-51". On the arguments advanced by the learned counsel for the parties the real question raised is whether the expression "in determining the tax for the year 1950-51" should be construed as meaning determining the tax compositely for all the four quarters in the year or whether it should be taken as including a separate determination of the tax for any quarter or quarters. I think it is unnecessary to express any opinion on this question. For, whichever construction is put, in the present case the assessee cannot claim any rebate on the tax assessed for the first quarter ending on 30th June 1950. If it is held that under sub-section (5) rebate can be allowed only when there is a composite determination of the tax for all the four quarters in the year 1950-51, then, here, clearly the tax for the first quarter having been determined and assessed it cannot be said that the determination of the tax for the remaining three quarters was a determination of the tax for the whole year 1950-51. If the alternative construction is adopted as the right one, then also no rebate can be allowed to the assessee for the first quarter ending on 30th June, 1950. For, the tax for that quarter had

already been determined and assessed under S. 8(1) (b) and has become final and did not remain to be determined when the assessee claimed rebate for that quarter at the time of the determination of the tax for the remaining three quarters of the year. The proper time for the assessee to raise the question of rebate for the quarter in question was when the tax was being actually determined by the assessing authority under S. 8(1) (b) or in an appeal against that assesssment. The assessee having failed to do so, it is not now open to him to claim that he is entitled to any rebate under sub-section (5) of S. 8 on the tax assessed on him for the quarter ending on 30th June, 1950. I would, therefore, answer the second question referred to for our decision by saying that in this case as the assessment for the quarter ending on 30th June, 1950, had become final, it could not be modified subsequently under sub-section (5). As to the first question, I express no opinion as the assessment for the first quarter having become final it does not arise for determination. There will be no order as to costs of this reference.

SAMVATSAR J.—I agree *Reference answered accordingly.*

CIVIL REFERENCE
(INDORE BENCH)

Before Mr. Justice P. V. Dixit and Mr. Justice S. M. Samvatsar.

MESSRS BANSILAL *Petitioner.**

Versus

THE COMMISSIONER OF SALES TAX, MADHYA BHARAT, GWALIOR *Non-applicant.*

Madhya Bharat Sales Tax Act, No. 30 of 1950 Section 5, item 30 of Notification dated 22-5-50—Item 30 refers to Electric goods of every description—Expression "Electric goods of every description"—Wide enough to include Torch Batteries—Word "Include"—Is a word of enlargement—Used to enlarge the meaning of words and phrases occurring in body of statute.

Item No. 30 of the schedule of rate of tax issued in 1950 refers to electric goods of every description. This

*Civil Reference No. 79 of 1954 Reference under section 13 (1) of Madhya Bharat Sales Tax Act, No. 30 of 1950, by the Commissioner of Sales Tax.

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means all kinds of electric goods whether meant for producing electricity or which can be used only with the application of electric energy.

The natural import of the expression "Electric goods of every description" is wide enough and includes a torch battery.

William Tacks and Co., Ltd,. v State of Madras (1) discussed and explained.

The word "include" is a word of enlargement. It is generally used in definitions and interpretation clauses in order to enlarge the meaning of the words and phrases occurring in the body of the statute.

Shri Machalpurkar & *Shri Rege* for the assessee.

Shri K. A.. Chitale for the Commissioner of Sales Tax.

ORDER

The Order of the Court was delivered by DIXIT J.— This is a reference by the Commissioner of Sales Tax under S. 13 (1) of the Madhya Bharat Sales Tax Act, 1950 The assessee M/S Bansilal Agarwal and Brothers are dealers in hosiery, fancy goods, electric torch batteries etc. In connection with sale transactions of torch batteries during the period from 7th May, 1950, to 31st March, 1951, the Sales Tax Officer held the assessee liable to pay sales tax under item No. 30 of the notification issued on 22-5-1950 under S. 5 of the Act. This item levied sales-tax at the rate of Rs. 6-4-0 per cent on the taxable turnover of electrical goods of every description including bulbs (बिजली का हर किस्मी सामान जिसमें बल्ब सम्मिलित है). The Sales Tax Officer rejected the contention of the assessee that he was entitled to deduct the amount of sales tax recovered from the purchaser from the taxable turnover on the ground that the dealer included the amount of sales tax in the sale price and did not recover it separately as required by Rule-51 of the Sales Tax Rules. The assessee repeated these contentions before the Commissioner in a revision petition filed by him against the assessment order made by the Sales Tax Officer. The said revision petition was rejected by the Commissioner. In this reference the Commissioner has

(1) A. I. R. 1955 Mad. 656.

referred to this Court following questions of law for decision :—

1. "Whether sales tax realised from the purchaser under Rule 51 of the Madhya Bharat Sales Tax Rules by including it in the sale-price can be included in the taxable turnover?
2. Whether the privileges enjoyed by the dealer who collects sales tax separately cannot be enjoyed by the dealer who collects sales tax by including it in the sale price?
3. Whether battery cells can be regarded as electric goods for the purpose of item No. 30 of the Schedule to the Act published on 22nd May, 1950."

The first two questions are fully covered by the answers given in the case of *Dhannalal vs. The Commissioner of Sales Tax* (1) wherein similar questions were referred to by the Commissioner of Sales Tax for the decision of the Madhya Bharat High Court In Dhannalal's case, the questions were answered thus :—

1. The dealer cannot deduct from the aggregate amount for which the goods are sold, the amount representing the sales tax, unless he has collected it separately as such in addition to the sale price after fulfilling the three conditions laid down in rule-51.
2. The term "taxable turnover" as defined in section 2 (p) of the Act would include the amount of sales tax if the amount is collected by including it in the sale price. But the amount of sales tax collected separately as such in addition to the sale price in conformity with Rule-51 is not included in the term.
3. The amount of sales tax collected by a dealer by including it in the sale price is liable to be taxed again.

These answers were based on a consideration of the material provisions of the Act and the rules thereunder and the decision of this Court in *Jethalal Vs. The State of Madhya Pradesh* (2). Learned counsel for the assessee admitted that the answers formulated in Dhannalal's case completely dispose of the first two questions referred to in this case. It is, therefore, unnecessary for me to repeat here all that has been said in Dhannalal's case while answering the questions referred to therein.

(1) M. L. R. 1956 Civil 718. (2) A. I. R. 1953 Nag. 194.

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On the third question the argument of Mr. Rege, learned counsel for the assessee, was that item No. 30 in the schedule of tax issued on 22nd May, 1950, under S. 5 of the Act as it was worded, did not include torch batteries and that a torch battery could not be said to be "electrical goods" and that, therefore, no sales tax could be levied on sales of torch batteries. Learned counsel sought to reinforce his argument by referring to item No. 16 of schedule of rate of tax issued on 24th October, 1953, under S. 5 which superseded the earlier schedule. Item No. 16 is as follows :—

> "Electrical goods of every description including bulbs, loudspeakers, microphones, torch-cells".

It was said that this item No. 16 expressly included torch-cells in electrical goods and that this specific addition only indicated that under item No. 30 of the earlier schedule torch-cells were not included in "electrical goods". Learned counsel relying on *William Tacks and Co. Ltd., Vs. State of Madras* (1), also argued that electrical goods meant only such articles the use of which could not be had except with the application of electrical energy. I am unable to accept this contention. Item No. 30 of the schedule of rate of tax issued in 1950 refers to electrical goods of every description. This, in my judgment, means all possible kinds of electric goods whether meant for producing electricity or which can be used only with the application of electric energy. A torch battery is clearly an article which generates electricity. The fact that in item No. 30 bulbs have been specifically included in electrical goods does not, however, mean that batteries are not electrical goods. It is now settled that the word "include" is a word of enlargement. It is generally used in definitions and interpretation clauses in order to enlarge the meaning of the words and phrases occurring in the body of the statute, and when it is so used, the words or phrases must be construed as apprehending not only such things as they signify according to the natural import, but also those things which the interpretation clause declares that they shall include The natural import of the expression "electrical goods of every description" being wide enough to include a torch battery, the specific mention of torch battery in item No. 16 of the schedule of rate of tax issued in 1953 can only be regarded

(1) A. I. R. 1955 Mad. 656.

as one by way of clarification only and not as in any way infering the natural and ordinary meaning of the expression "electrical goods of every description". The decision of the Madras High Court cited by the learned counsel is not in point. In that case, it was with reference to a certain type of machinery that it was observed that if the machinery was such which could not be used except with the application of electrical energy, then it would be electrical goods within the relevant provision of Madras General Sales Tax Act, 1939. The Madras decision nowhere laid down that electrical goods according to its ordinary connotation meant only those articles which could be used only with the application of electric energy and did not include articles which generate electricity. In the Madras case it was, on the other hand, sought to be argued on behalf of the assessee that only whatever was needed for generating, storing and distributing electricity, that could fall within the scope of electrical goods. The learned Judges of the Madras High Court rejected this contention and held that electrical goods covered not only these things but also such articles which could not be used except with the application of electric energy. Learned counsel then said that batteries were not electrical goods inasmuch as they only stored electric energy and did not generate it like a dynamo. Such a distinction is altogether untenable. There is no difference between the electric energy produced by Voltaic or galvanic action as in a battery or that generated by a dynamo rotated by mechanical or any other kind of power. A battery is 'electrical goods' equally as is a dynamo. In our view, there can be no doubt that torch battery cells are electrical goods for the purposes of item No. 30 of the schedule of the rate of tax published on 22nd May, 1950. The third question is answered accordingly.

There will be no order as to costs of this reference.

SAMVATSAR J.—I agree.

Reference answered accordingly.

MISCELLANEOUS CIVIL CASE
(INDORE BENCH)

Before Mr. Justice P. V. Dixit and Mr. Justice S. M. Samvatsar.

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Jan. 4.

RAMNARAYAN & another — *Petitioners**

Versus

VISHNU & others — *Opponents.*

Cantonments Act (III of 1924), Rule 43—Expressions "A candidate at the Election" and "A candidate for the Election"—Used in the Act without any distinction but synonymously—Used in the rules framed under the Act to denote the candidate at the election—"Candidate at the election" in rule 43—Includes candidate whose nomination paper has been rejected—Difference in address of a candidate in nomination paper and Electoral Roll—Identity of candidate sufficiently established—No valid reason for rejecting nomination paper—Nomination improperly rejected—Presumption that election is materially affected.

The expressions "a candidate at the election" and "a candidate for the election" have been used synonymously in the rules under the Cantonments Act without drawing any distinction between a candidate who is actually a contestant at the Poll and one who is not. These expressions have been used in the said rules to denote a candidate at any stage of the election starting with the filing of nomination papers and ending with the declaration of the result.

Kumar v. V. G. Oak (2), distinguished.

Sitaram Hirachand Birla v. Yograjsingh (1), *Shiv Bhikaji Keshao Joshi v. Brijlal* (3), referred to.

Vishwamittra v. District Judge, Jhansi, (4) relied on.

The expression 'a candidate at the election' as used in rule 43 framed under the Cantonments Act includes a candidate whose nomination paper has been rejected.

*Miscellaneous Civil Case No. 61 and 62 of 1955.

(1) A. I. R. 1953 Bom. 293 (2) A. I. R. 1953 All. 633.
(3) A. I. R. 1955 S. C. 610 (4) A. I. R. 1956 All. 89.

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Where the identity of the candidate is established the variation, if any, in the address given in the nomination paper and the electoral roll is inconsequential and nomination paper cannot be rejected on that ground.

Where the nomination paper is improperly rejected, it must be taken that the result of the election is materially affected.

Shankar Rao Vs. State of Madhya Bharat (1), followed.

Shri S. L. Dubey for the petitioners Ramnarayan and Babulal.

Shri S. L. Garg for Ramchandra s/o Narayan and Vishnu s/o Krishnarao Kelkar.

ORDER

The Order of the Court was delivered by DIXIT J.— In these two petitions under Articles 226 and 227 of the Constitution of India, the applicants apply for an order of *certiorari* to bring up and quash a decision of the District Judge, Indore, setting aside the election of the opponents Ramnarayan Maluram and Babulal Keshoram to the Cantonment Board from Ward No. 4, Mhow, and directing a fresh election.

The election to the Cantonment Board was held in 1954. The petitioners Ramnarayan and Babulal and the opponents Vishnu Krishnarao Kelkar and Ramchandra Narayan were candidates for election to the Board from Ward No. 4. Two persons were to be elected from this ward, one for filling the general seat and the other for a seat reserved for the scheduled caste. The nomination papers of Vishnu Krishnarao Kelkar and Ramchandra Narayan were rejected by the Returning Officer at the time of scrutiny. The opponent Triyoginarayan also filed a nomination paper which was rejected. Ramnarayan Maluram and Babulal Keshoram being the only candidates left in the field for filling the two seats were declared as elected to the Board from Ward No. 4. Thereafter Vishnu Krishnarao Kelkar and Ramchandra Narayan presented two election petitions before the District Judge of Indore under Rule 43 of the Cantonments Electoral Rules 1945, made under the Cantonments Act, 1924, contending that their nomination papers had been improperly rejected by

(1). A. I. R. 1952 M. B. 97.

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the Returning Officer. The successful candidates opposed the petitions saying that the nomination papers of Vishnu Kelkar and Ramchandra Narayan were rightly rejected; that as their nomination papers had been rejected, they were not "candidates at the election;" and that, therefore, under Rule-43 they were not entitled to present election petitions calling in question the validity of the election. The objection as to the competency of Vishnu Kelkar and Ramchandra Narayan to file election petitions was overruled by the learned District Judge. He found that their nomination papers had been improperly rejected by the Returning Officer and accordingly set aside the election of the present petitioners.

Mr. Dubey, learned counsel for the petitioners, first submitted that under Rule-43 an election petition could be presented either by a person who was a candidate at the election or by not less than five persons entitled to vote at the said election; that the election petitions before the District Judge were not presented either by a candidate at the election or by five voters; that "a candidate at the election" was one whose nomination paper had been accepted after scrutiny and who had not withdrawn thereafter and who was a contestant at the election; that the nomination papers of Vishnu Kelkar and Ramchandra Narayan having been rejected at the time of scrutiny they could not be called 'candidates at the election'; that, therefore, they were not entitled to present election petitions challenging the election. Learned counsel referred to some of the rules of the Cantonments Electoral Rules to emphasize the distinction between "a candidate at the election" and "a candidate for the election" and said that in the rules a candidate seeking election has been, upto the stage of withdrawal following the scrutiny of nomination papers and the publication of a list of valid nominations, referred to as a 'candidate for the election' and that it is only after this stage that he has been described in the Rules as a 'candidate at the election'. Reliance was placed on the decisions in *Sitaram Hirachand Birla Vs. Yograjsingh* (1) and *Shiv Kumar Vs. V. G. Oak* (2) in support of the contention that the words 'at the election' have reference to the actual time when the voting takes place and that a candidate who has withdrawn or whose nomination papers has been rejected cannot be

(1) A. I. R. 1953 Bom. 293. (2) A. I. R. 1953 All. 633.

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regarded as 'a candidate at the election'. It was further contended that the Cantonments Electoral Rules were amended in 1954 when the view taken by the Bombay and the Allahabad High Courts as to the proper meaning and significance of the expression 'at the election' was before the framers of the Rules and that if they had thought that the words 'at the election' included persons whose nomination papers had been wrongly rejected, an express provision to that effect would have been made in the Rules. Learned counsel sought to illustrate the point by referring to the provisions of U. P. Panchayat Act where there is an express provision enabling a person whose nomination paper has been rejected to file an election petition.

In my view, this contention advanced on behalf of the petitioners cannot be accepted. The matter is not one of the meaning of the expressions 'at the election' and 'for the election' in abstract without reference to the context in which they have been used. The words—'a candidate at the election' and 'a candidate for the election' have not acquired a settled and fixed meaning so as to hold that wherever and whenever the said expressions are used they have that meaning and no other meaning. The meaning of the expressions "a candidate at the election" and "a candidate for the election" as used in the Cantonments Electoral Rules has to be ascertained on a comprehensive consideration of the relevant rules, their scheme and of the purpose and requirements of Rule-43 as to the filing of an election petition challenging an election. When the matter is investigated with reference to the Rules, it becomes clear that the expressions 'a candidate at the election' and 'a candidate for the election' have been used synonymously without drawing any distinction between a candidate who is actually a contestant at the poll and one who is not so. Rule-16 provides that a candidate for election shall be nominated by a nomination paper in Form-VI. The nomination paper has to be strictly in Form-VI and not substantially according to Form-VI. This is plain from the use of 'in' and not "according to" in relation to Form-VI. Now, the prescribed Form-VI is thus :

> **"We, the undersigned, being duly qualified electors..... nominate the undermentioned person as a candidate for the Ward No..... at the election."**

It will thus be seen that even at the stage of the filing of the nomination paper a person seeking election has been

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referred to as a 'candidate for election' and also in the alternative as a 'candidate at the election'. In connection with the Rules 19, 20 and 21, which deal with the drawing up of a list of candidates in Form-VII after the receipt of nomination papers, objections to the eligibility of candidates to stand for election and with the prohibition as regards re-nomination of a candidate who has withdrawn following the scrutiny of nomination papers, the expression used is 'candidate for the election' and not 'candidate at the election'. But that by itself does not indicate that the Rules recognised that up to the stage of withdrawal a candidate filing a nomination paper is only a 'candidate for the election' and not a 'candidate at the election'. For one finds in Rule-22 candidates validly nominated and who have not withdrawn described as 'candidates standing for election' for the preparation of a list under Rule-22(2). The first sub-rule of Rule-22 lays down that if, after the time allowed for withdrawal has expired, the number of candidates standing for election in a ward is equal to, or less than, the number of members to be elected, the Returning Officer shall declare such candidates to be duly elected, and further that if the number of candidates is more than the number of candidates to be elected, a poll shall be taken. It will be noticed that sub-rule (1) of Rule-22 is concerned with the stage after the time for withdrawal of candidates has expired following the scrutiny of nomination papers and acceptance of nomination papers as valid, and before the voting. Sub-rule (1) refers to candidates whose nomination papers have been accepted as valid and who have not withdrawn within the time fixed for it as 'candidates standing for election' and not as 'candidates standing at election'. Sub-rule (1) of Rule-22 thus does not lend support to the argument of the learned counsel for the petitioners. Sub-rule (2) of Rule-22 enjoins that the Returning Officer shall draw up a list, ward by ward, of candidates who are standing for election and also a list of candidates, if any, who have been declared duly elected under sub-rule (1) and shall publish the list not later than twenty days before the date of poll. The list referred to in sub-rule (2) is the list which has to be drawn up after the stage of withdrawal of candidates and is of persons declared elected without contest and of persons contesting the election. That sub-rule describes the contesting candidates as 'candidates standing for election'. Rule-22 alone thus negatives the contention that a person who has filed a nomination paper

becomes a 'candidate at the election' after his nomination paper has been accepted as valid and his right to withdraw has disappeared. According to the distinction sought to be drawn by the learned counsel for the petitioners between a 'candidate standing for election' and one standing 'at the election', the appropriate expression that one would have found in Rule-22 is 'candidates standing at the election' and not 'candidates standing for election'. Rule-28 also refers to candidates at the time of actual voting as 'candidates for election'. Sub-rule (4) of Rule-28 says that the Returning Officer shall in the case of every elector who has been permitted to give his vote at the election by postal ballot send by registered post to each such elector a ballot paper in Form-VIII-A together with a letter in Form VIII-C. Now in Form VIII-C the voter is addressed thus :—

> "The persons whose names are printed on the ballot paper sent herewith have been nominated as candidate for the election to the Cantonment Board.....".

It is thus amply clear that Rule-28 itself describes candidates at the time of actual poll sometimes as candidates at the election and sometimes as candidates for the election. It cannot, therefore, be maintained with any degree of force that in the Cantonments Electoral Rules the expression 'a candidate at the election' has been used to distinguish a candidate who continues in the contest after the stage of withdrawal from one before it. Both the expressions 'a candidate at the election' and 'a candidate for the election' have been used in the said Rules to denote a candidate at any stage of election starting with the filing of nomination papers and ending with the declaration of the result. If the words 'a candidate at the election' have not the limited meaning of a candidate at the time of the poll, then it seems to me that it would be against the ordinary canons of construction to read the words in that limited sense for the purposes of Rule-43. That the limited connotation of the words would be repugnant to the context of Rule-43 and its object becomes clear when one considers the provisions of Rule-47. Under Rule-47 one of the grounds on which an election can be declared void is that the result of the election has been materially affected by improper refusal of a nomination paper. This ground for declaring an election void necessarily imports that a person whose nomination paper has been improperly rejected has himself the remedy to have the election declared void on that ground.

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If the construction sought to be put on the expression 'a candidate at the election' by the learned counsel for the petitioners is accepted as correct, then a person whose nomination paper has been rejected would himself have no right to file an election petition on the ground of the improper refusal of his nomination paper but would have to depend on a defeated candidate or five voters filing an election petition for taking up his cause. I do not think that the framers of the Rules while making the improper refusal of a nomination paper a ground for declaring the election void intended that the real person aggrieved by the refusal of his nomination paper could not avail himself of this ground but that it could be availed of by other persons if they chose to. Again in an election petition filed by five voters, or even by a defeated candidate (assuming the possibility of a defeated candidate filing an election petition on the ground of someone else's nomination paper having been improperly rejected), it would be difficult to establish the essential condition that the result of the election has been materially affected by the improper rejection of a nomination paper unless the person whose nomination paper has been rejected is, as one interested in having the election declared void, given notice of the election petition. Now under Rule—45 a notice of the election petition is issued only to the candidates concerned at the election. On the construction suggested by the learned counsel a person whose nomination paper has been rejected not being a candidate at the election will not be entitled to a notice of the petition It is difficult to see how the petitioner or petitioners in such a case can establish the fact that the result of the election has been materially affected by the improper rejection of nomination paper of a person, without giving that person a notice of the petition. I am clear in my mind that the expression 'a candidate at the election' as used in Rule-43 includes a candidate whose nomination paper has been rejected.

The Bombay and Allahabad cases cited by the learned counsel for the petitioners are not of much help in the construction of the words 'a candidate at the election' as used in the Cantonments Electoral Rules. Those are decisions in which the meaning of the said words was considered with reference to the provisions of the Representation of People Act. 1951, and in particular with reference to S. 82 of the Act, and it was held that the words 'a candidate at the election' as used in S. 82 meant one who

was a candidate at the actual poll and did not include a person who had withdrawn from the contest before the polling This conclusion was based on an examination of various provisions of the Representation of People Act and of the object of S. 82 of the Act. The decision in *Sitaram Hirachand Birla Vs. Yograjsing* (1) and *Sheo Kumar Vs. V. G. Oak* (2), are not authorities for the proposition that the expression 'a candidate at the election' has a rigid and inflexible meaning in any law using that expression. The meaning of the expression being dependant on the context, the provisions of the statute in which it has been used and on the object of the particular provision where the expression has been used, no assistance can be derived from the Bombay and Allahabad cases or from the decision in *Shah Mohammad Umair Vs. Ram Charan Singh* (3), taking a view contrary to that taken by the Bombay and Allahabad High Courts, or from the assumption that these decisions were before the framers of the 'Cantonments Electoral Rules when they were amended in 1954, or from the provisions of U. P. Panchayat Act or U. P. Municipalities Act. In this connection, the observations of the Supreme Court in *Bhikaji Keshao Joshi Vs. Brijlal* (4), are very pertinent. In that case the question of the construction of S 82 of the Representation of People Act came up for consideration and it was argued before the Supreme Court that persons who filed their nominations but who withdrew from the contest within the prescribed time inspite of their nominations having been found to be in order on scrutiny by the Returning Officer could not be said to come within the category of 'candidates duly nominated at the election'. The decisions in *Sitaram Hirachand Birla Vs. Yograjsingh* (*Supra*), *Sheo Kumar Vs. V. G. Oak* (*Supra*) and *Shah Mohammad Umair Vs. Ram Charan Singh* (*Supra*) were cited before the Supreme Court. The Supreme Court observed :—

> "It appears to us to be unnecessary and academic to go into this judicial controversy having regard to the decision of this Court in—*'Jagan Nath Vs. Jaswant Singh'* (5). If we were called upon to settle this controversy, we would prefer to base the decision not on any meticulous construction of the phrase 'at the election'

(1) A. I. R. 1953 Bom. 293. (2) A. I. R. 1953 All. 633.
(3) A. I. R. 1954 Pat. 225. (4) A. I. R. 1955 S. C. 610.
(5) A. I. R. 1954 S. C. 210 (E)

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but on a comprehensive consideration of the relevant provisions of the Act and of the Rules framed thereunder and of the purpose, if any, of the requirement under S. 82 as to the joinder of parties other than the returned candidate."

The Supreme Court no doubt did not decide as to what the expression 'a candidate at the election' as used in S. 82 of the Representation of People Act meant, but the learned Judges of the Supreme Court indicated that the phrase 'at the election' should be construed on a comprehensive consideration of the relevant provisions of the Act and of the rules framed thereunder and of the purpose of the particular provision in question. It is on this approach to the question of the construction of the words 'a candidate at the election' that I have endeavoured to show that the phrase as used in Rule-43 of the Cantonments Electoral Rules has not the narrow and limited meaning of a candidate who continues to be a contestant at the poll but includes a candidate whose nomination paper has been rejected. The view I have taken finds support in the decision of the Allahabad High Court in *Vishwamitra Vs. District Judge, Jhansi* (1), where it has been held that under Rule-43 of the Cantonments Electoral Rules a candidate whose nomination paper has been improperly rejected is competent to file an election petition. Learned counsel submitted that the decision in *Vishwa Mittra Vs. District Judge, Jhansi* (*supra*), proceeded on the basis that the Supreme Court had decided in *Bhikaji Kesheo Joshi Vs. Brijlal* (2), that the phrase 'a candidate at the election' should not be construed in a narrow and limited sense and that the Supreme Court had not given any such decision. The suggestion is altogether untenable. A perusal of the judgment in Vishwa Mittra's case is sufficient to show that in that case the learned Judge based his view as to the construction of the expression 'a candidate at the election' as used in Rule-43 on a consideration of the context, the provisions of the various rules of the Cantonments Electoral Rules and the object of Rule-43 and the decision of the Supreme Court has been referred to by the learned Judge only to emphasize the point that the phrase has to be construed "in the light of the context, in view of the other provisions of the statute and in view of the object underlying".

(1) A. I. R. 1956 All. 89. (2) A. I. R. 1955 S. C. 610.

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The other contentions of the learned counsel for the petitioners related to the rejection of the nomination papers of Vishnu Kelkar and Ramchandra Narayan. It was said that the nomination papers of these candidates were rightly rejected by the Returning Officer. Before the Returning Officer three objections were taken to Kelkar's nomination paper: (i) first that in the electoral roll his name was entered as Shri Vishnu Krishnarao Kelkar, while in the nomination paper he was described as Vishnu Krishnarao Kelkar; (ii) secondly, that he had not mentioned in the nomination paper whether he was a candidate for filling the general seat or the seat reserved for the scheduled castes; and (iii) thirdly his address as given in the electoral roll was Hiralal Baoli whereas in the nomination paper it was stated to be Gokulganj. The first two objections were rejected by the Returning Officer who was satisfied as to the identity of Vishnu Kelkar and held that Vishnu Krishnarao Kelkar was no other than Shri Vishnu Krishnarao Kelkar. The Returning Officer, however, accepted the objection as to the variation in the address. In his opinion though it was a "trifling discrepancy" it should have been got rectified earlier. The learned District Judge held that the Returning Officer having satisfied himself as to the identity of Kelkar was not justified in rejecting his nomination paper on the ground of the slight variation in the address and that in fact there was no variation in the address as given in the electoral roll and as entered in the nomination paper. I think the learned District Judge took the right view. The prescribed nomination form does not require that in the case of a double member constituency where a seat is reserved for a scheduled caste a candidate should enter in the nomination paper the seat which he is contesting. The opponent Kelkar's name is no doubt entered in the electoral roll as Shri Vishnu Krishnarao Kelkar. But it is obvious from the electoral roll and it is common knowledge also, that the word 'Shri' is only a title prefixed to a man's name and is not a part of the name itself. As to the variation in the address, the electoral roll no doubt says that house No. 2513-14 of Vishnu Kelkar is on Hiralal Baoli Road. But it is apparent from the roll and the evidence on record that in the Cantonment area all houses have been numbered separately; that they are not numbered separately with reference to roads or Mohallas; that Gokulganj includes houses bearing numbers 2425 to 2544; and that of these houses bearing Nos. 2507 to 2516 are situated on Hiralal Baoli Road which is a part of Gokulganj. If in these

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circumstances the opponent Kelkar gave his address in the nomination paper as Gokalganj it cannot be said that the address given by him differed so materially from that entered in the electoral roll as to indicate that he was not the person whose name was entered in the electoral roll at serial No. 1548 as Shri Vishnu Krishnarao Kelkar residing in house No. 2513-14, Hiralal Baoli Road. On the name as entered in the nomination paper and house number given therein and the serial number given in the electoral roll, the Returning Officer having satisfied himself as to the identity of Kelkar, the variation, if any, in the address given by him was clearly inconsequential. The Returning Officer was thus clearly in error in rejecting Vishnu Kelkar's nomination paper on the ground that he did.

Ramchandra Narayan's nomination paper was rejected by the Returning Officer on the ground that the name of his seconder did not appear in the electoral roll at the serial number given in the nomination paper by the seconder. The seconder was one Rajaram Moroti. His name has been entered at serial No. 372 in the English text of the electoral roll. But in the Hindi version of the electoral roll the serial number, on account of some printing error, has been shown as '४७५' instead of '३७२'. In the Hindi text Rajaram's name is preceded by the name of one Rajju Bai at serial No. 371 and followed by the name of one Laxmi Bai at serial No. 373. There can, therefore, be no doubt that the serial number of Rajaram entered in the Hindi list of voters was a printing mistake. In the nomination paper Rajaram entered the incorrect number shown in the Hindi list. Rajaram, therefore, did all that was required to be done by him properly and according to the electoral roll, albeit the Hindi one The defect in the nomination paper as regards the correct serial number of the seconder arose not on account of any fault of the seconder or of the candidate but on account of an official mistake in the printing of the electoral roll. For this official error Rajaram Moroti could not clearly be disenfrenchised much less a nomination paper seconded by him after filling in the number given in the electoral roll could be invalidated. The learned District Judge was, therefore, right in holding that the Returning Officer, was not justified in rejecting Ramchandra Narayan's nomination paper on the ground of a printing error. With regard to Ramchandra Narayan's nomination paper, learned counsel for the applicants also said that Rajaram Moroti signed the nomination paper not as a seconder but only as a witness.

There is no substance in this contention. In his evidence Rajaram has clearly said that he signed the nomination form as a seconder. He no doubt said in his cross-examination that some seven or eight days before the filing of the nomination form Ramchandra Narayan had told him that he would have to sign the nominaition paper as a witness. From this statement it does not at all follow that when the nomination form was actually signed by Rajaram seven days after this talk, it was merely as a witness and not as a seconder. Learned counsel also raised the objection that while declaring the election void the learned District Judge did not give any finding on the question whether the result of the election had been materially affected by the improper rejection of the nomination papers of Vishnu Kelkar and Ramchandra Narayan. The objection may be disposed of by saying that in the case of a petition presented by a person whose nomination paper has been improperly rejected, if the election tribunal finds that the nomination paper was improperly rejected, it must be taken that the result had been materially affected. It was pointed out by a Full Bench of the Madhya Bharat High Court in *Shankar Rao Vs. State of Madhya Bharat* (1) that in such a case the election tribunal would have no option but to hold that the result of the election has been materially affected and to declare the election to be wholly void. In fact, the learned District Judge has given a distinct finding that where a nomination paper has been improperly rejected it must be presumed that the result of the election has been materially affected.

For these reasons, I am of the view that the learned District Judge rightly set aside the election of the petitioners. Accordingly, I dismiss these petitions leaving the parties to bear their own costs.

SAMVATSAR J.—I agree.

Petition dismissed.

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(1) A. I. R. 1952 M. B. 97

CIVIL MISCELLANEOUS CASE
(INDORE BENCH)

Before Mr. Justice V. R. Nevaskar and Mr. Justice S. M. Samvatsar.

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Dec. 14. MESSRS KHEMCHAND RAJMAL *Petitioner.**

Vs.

THE CHIEF SECRETARY, M. B. GOVT. and others *Opponents.*

Madhya Bharat Sales Tax Rules, Rule 46—Power to Transfer—Not confined to any particular case pending before Sales Tax Officer—Can be exercised with respect to a class of cases then pending—Jurisdiction—Not conferred by submitting wrong return.

The power to transfer conferred on the Commissioner by rule 46 of the Sales Tax Rules is not confined to any particular case but can be exercised generally with respect to a class of cases which may then be pending before a Sales Tax Officer, but there cannot be a general order for transfer.

The assessee cannot by submitting a wrong return confer jurisdiction on an Officer who does not possess it or deprive an officer of the jurisdiction which is vested in him under orders of the Commissioner.

Shri *Jindal* for the petitioner.

Shri *Patel*, Dy. Govt. Advocate, for opponents.

JUDGMENT

The Judgment of the Court was delivered by SAMVATSAR J.—These are two petitions under Article 226 of the Constitution of India filed by the same petitioner, Messrs. Khemchand Rajmal of Indore. Civil Misc. Case No. 4 of 1955 is filed for a *writ of certiorari* to quash the order of the Sales Tax Officer Shri V. K. Kolhe, assessing the petitioner to sales tax for the assessment year 1952-1953. Civil Misc. Case No. 5 of 1955 is directed against the order of the same officer assessing the petitioner to sales tax for the year 1953-1954. As both these petitions involve same points for determination and are based on almost identical facts, they are being dealt with together.

The petitioner Messrs. Khemchand Raimal are dealers in cloth and have their establishment in Sitalamata Bazar at Indore Proceedings were initiated against him for assessment of sales tax for the years 1951-52, 1952-53 and 1953-54

*Civil Miscellaneous Cases Nos. 4 and 5 of 1955.

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before the Sales Tax Officer Shri Pancholia. Shri Pancholia had fixed these cases for hearing on 21-6-1954. On that day before the proceedings commenced, some unpleasant incident occurred as a result of which the hearing was not commenced and was adjourned to 28-6-1954. On that date the petitioner did not appear but submitted an application to the Sales Tax Officer intimating to him that he did not want his cases to be heard by Shri Pancholia and was approaching the Commissioner, Sales Tax for transferring them to some other Sales Tax Officer.

On 22-7-1954 the petitioner applied to the Commissioner, Sales Tax for transferring his cases to some other Sales Tax Officer for all purposes and under all circumstances and for staying all further proceedings before Shri Pancholia. The Commissioner, Sales Tax allowed the application by his order dated 11-10-1954 and transferred the case of the petitioner pertaining to sales tax proceedings to Shri Kolhe, another Sales Tax Officer at Indore.

During the interval, Shri Pancholia had completed the assessment for the year 1951-52 and had passed a final order in the matter on 5-8-1954. It is stated that the petitioner has filed an appeal against that order and that appeal is pending before the appellate authority.

On the transfer of the file to him, Shri Kolhe issued notice to the petitioner to appear with his account books for the final assessment for the years 1952-53 and 1953-54. The petitioner by his application dated 1-11-1954 requested Shri Kolhe to re-open the order of assessment for the year 1951-52 and to deal with that case first before taking up the work of final assessment for the years 1952-53 and 1953-54. Shri Kolhe expressed his inability to accede to the request of the petitioner and the petitioner thereupon again approached the Commissioner, Sales Tax to give retrospective effect to his order for transfer and to allow Shri Kolhe to re-open the assessment for the year 1951-52 The request of the petitioner was not granted.

Shri Kolhe again asked the petitioner to appear before him with his account-books in order to enable him to complete the final assessment for the years 1952-53 and 1953-54, but the petitioner did not comply with his orders. Shri Kolhe thereupon proceeded to make a best-judgment assessment and by his orders dated 10-1-1955 and 11-1-1955 determined the petitioner's taxable turn over for the year 1952-53 at Rs. 44,000/- and for the year 1953-54 at Rs. 52,000/-

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respectively. He consequently fixed the tax liability of the petitioner for these respective years at Rs. 2406-4-6 and Rs. 2875/-. Shri Kolhe also issued a notice of demand and called upon the petitioner to deposit the amount of tax due from him pursuant to his aforesaid orders.

The petitioner did not comply with the notice of demand but at this stage took a somersault and contended that the assessment by Shri Kolhe was without jurisdiction. As Shri Kolhe refused to listen and to drop the demand for arrears of tax, he filed the present petitions under Article 226 of the Constitution of India for a *writ of certiorari* to quash the assessment made by Shri Kolhe for the years 1952-53 and 1953-54 respectively.

The main contentions raised by the petitioner in the petitions are as follows :

(1) that the Commissioner, Sales Tax, has in exercise of his powers under Rule 3 (2) of the Sales Tax Rules, 1950, determined the jurisdiction of the Sals Tax Officers at Indore, according to which Shri Pancholia alone was empowered to make assessment in petitioner's case and that Shri Kolhe had neither any jurisdiction nor authority authority to do it;

(2) that the petitioner has applied to the Commissioner, Sales Tax, for transferring his pending case relating to the assessment for the year 1951-52 only; that the Commissioner transferred all the pending cases as also cases relating to future assessment of the petitioner to Shri Kolhe which was illegal and contrary to law; Shri Kolhe did not, and could not, therefore acquire jurisdiction to assess the petitioner for the years 1952-53 and 1953-54; that therefore the assessment orders passed by Shri Kolhe were without jurisdiction and not binding on the petitioner;

(3) that the pecuniary jurisdiction fixed on the basis of the taxable turn over is to be determined with reference to and on the basis of the return filed by the assessee; that Shri Kolhe could not be held to have acquired jurisdiction to assess the petitioner even on the basis of his pecuniary jurisdiction and the assessment made is devoid of any force even for this reason.

The petitioner has impleaded the Chief Secretary to the Government of Madhya Bharat, the Commissioner, Sales Tax, and the Sales Tax Officer, Shri Kolhe, as opponents in this case. All the opponents opposed the

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petitions. The opponent No. 2, the Commissioner, Sales Tax and the Sales Tax Officer Shri Kolhe, raised their contentions by filing separate returns.

In the return filed by the Commissioner, it is contended :

(1) that on 22-7-1954 the petitioner applied under Rule 46 of the Madhya Bharat Sales Tax Rules, 1950, for transfer of his assessment case from the jurisdiction of Shri Pancholia, the Assessing Authority, Indore, on the ground that he was personally prejudiced against the petitioner; that on considering the allegations and the merits of the case and for the ends of justice the petitioner's assessment case was transferred to the jurisdiction of Shri Kolhe, Sales Tax Officer, Indore;

(2) that under Rule 46 of the Madhya Bharat Sales Tax Rules, 1950, the Commissioner had power to transfer any case or class of cases pending before any Sales Tax Officer to another Sales Tax Officer and in exercise of that power, he had issued the order dated 11-10-1954;

(3) that on 15-11-1954 the petitioner applied through his Sales Tax Practitioner, accepting transfer of his case from the jurisdiction of Shri Pancholia to the jurisdiction of Shri Kolhe and requested the Commissioner to give retrospective effect to his order by directing Shri Kolhe to re-open the assessment order for the year 1951-52; that the application dated 15-11-1954 clearly showed that the petitioner accepted and had knowledge of his assessment cases having been transferred to the jurisdiction of Shri Kolhe.

Shri Kolhe, in his return submitted—

(1) that when Shri Pancholia was dealing with the assessment of the petitioner for the year 1951-52, the petitioner abstained from appearing before him and by his application dated 28-6-1954, expressed his inability to appear before him on personal grounds and asked Shri Pancholia not to proceed with the assessment of any of the years 1951-52, 1952-53 or 1953-54 as he had applied to the Commissioner, Sales Tax for transfer of his file from the jurisdiction of Shri Pancholia to the jurisdiction of some other Sales Tax Officer;

(2) that the petitioner also applied to the Commissioner, Sales Tax for transfer of his case from the jurisdiction

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of Shri Pancholia for all purposes and under all circumstances and repeatedly pressed the Commissioner with reminders to expedite action in his case; that the Commissioner, on consideration of that application and in exercise of the powers under Rule 46, transferred the petitioner's case from the jurisdiction of Shri Pancholia and ordered the entire assessment proceedings in respect of the petitioner to be dealt with by him (opponent No. 3);

(3) that when the file of the petitioner's assessment was transferred to him, he issued a notice under Section 8 (2) of the Madhya Bharat Sales Tax Act to the petitioner for his assessment for the years 1952-53 and 1953-54; that the petitioner did not appear on the dates fixed therein and without challenging his jurisdiction, requested him for adjournment of the proceedings; that the petitioner submitted to his jurisdiction and by the applications dated 1-11-1954 and 28-12-1954 asked him to re-open the assessment for the year 1951-52 before taking in hand the assessment case for the year 1952-53 and 1953-54;

(4) that inspite of repeated opportunities the petitioner failed to appear in compliance with the notice and he (Opponent No. 3) had to proceed to assess the petitioner under Section 8 (4) (a) under the Sales Tax Act and to issue a demand notice for payment of the tax; that he also served a notice on the petitioner under Section 14 (1) (d) and 14 (1) (e) and it was at this stage and in reply to the notice that the petitioner objected to the jurisdiction of opponent No. 3 to deal with the petitioner's assessment case.

The opponent No. 3 contended that the petition was not maintainable on the following among other grounds :

(i) that the Commissioner had on motion of the petitioner himself and in exercise of the powers vested under Rule 46 of the Madhya Bharat Sales Tax Rules, transferred the petitioner's assessment case from the jurisdiction of Shri Pancholia to his own jurisdiction and he was therefore empowered to assess the petitioner;

(ii) that the petitioner never challenged the jurisdiction of opponent No. 3 while he applied for postponement of his case and the subsequent objection is an afterthought and mala fide;

(iii) that the opponent No. 3 had jurisdiction and authority in law to assess the petitioner and his contention to the contrary is unfounded;

(iv) that the petitioner by his application dated 28-6-1954 himself asked Shri Pancholia not to proceed with his case for any year as he had made an application for transfer of his file from Shri Pancholia's jurisdiction; that the petitioner is now estopped from challenging the jurisdiction of the opponent No. 3;

(v) that the petitioner had filed a writ petition to circumvent the general provisions of the Sales Tax Act and has not followed the procedure laid down under that Act; that he had an alternative and equally effective remedy of appeal and revision under the Sales Tax Act where these objections could have been agitated;

(vi) that even on merits the transfer of the case from the jurisdiction of Shri Pancholia was justified as the petitioner was personally aggrieved against him;

(vii) that the opponent No. 3 had the jurisdiction in law in respect of the petitioner's case without reference to the year of assessment; that during the course of the proceedings for assessment it was found that the petitioner had suppressed the real taxable turn over for the years 1952-53 and 1953-54; that as per the best judgment the taxable turn over for the year 1952-53 was determined at Rs. 44,000/- and for the year 1953-54 at Rs. 52,000/- which was under the jurisdiction of the opponent No. 3 under the Commissioner's order No. 30436 dated 7-9-1954 issued under Rule 3 (2) of the Sales Tax Rules.

The opponents therefore submitted that the petition was not maintainable and should be dismissed.

Before proceeding further, it is necessary to state that the petitioner in this case has not challenged the *vires* of any of the provisions of the Madhya Bharat Sales Tax Act or the Madhya Bharat Sales Tax Rules framed in exercise of the powers conferred on the Government under that Act. The validity of the order of assessment alone is challenged and that two on the ground that the Commissioner, Sales Tax, had in passing the order transferring the petitioner's case, exercised powers not vested in him in law It was contended that by such a transfer order, the Commissioner could not invest the opponent No. 3 with jurisdiction to make the assessment in petitioner's case.

Under the Indian Income-tax Act a right is conferred of Sales tax is to be made by the assessing authority,

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which means a person authorized by the Government to make assessment.

Section 24 of the Madhya Bharat Sales Tax Act empowers the Government to make rules to carry out the purposes of the Act and in particular and without prejudice to the generality of the powers, the Government is authorized by the rules to provide for the appointments, duties and the powers of the officers appointed for the purpose of enforcement of the provisions of the Act. In exercise of the powers conferred by Section 24, the Government of Madhya Bharat has framed rules known as the Madhya Bharat Sales Tax Rules, 1950.

By Rule 3 (1) power is conferred on the Government to create a range of the Deputy Commissioners or Judge Appeals, and fix the limits of a Circle and appoint officers to the Range and Circle as the case may be. By Rule 3 (2) it is further provided that where there are more Sales Tax Officers than one in the Circle the Commissioner, Sales Tax, shall determine their respective jurisdiction within that Circle.

Rule 5 (a) then provides that the Sales Tax Officer shall be the assessing authority in respect of dealers carrying on business within the limits of a Circle.

Rule 46 which empowers the Commissioner to transfer a case pending before one Sales Tax Officer to another, is then as follows :

> "46. The Commissioner may transfer any case or class of cases pending before any Sales Tax Officer to another Sales Tax Officer".

The Government has exercised the power vested by Rule 3 (1) and has by notification published in the Government Gazette, fixed the limits of Circles. This notification shows that one of these Circles is the District of Indore.

In Indore District there are several Sales Tax Officers and therefore the Commissioner, Sales Tax, has exercised the authority vested in him under Rule 3 (2) and specified the jurisdiction of these various Sales Tax Officers. According to this, Shri Pancholia has been invested with power to make assessment in respect of all assessees in Sitlamata Bazar and certain other localities of Indore, in cases where the taxable turnover does not exceed Rs. 25,000/-. Shri Kolhe is specifically empowered to

deal with cases in which the taxable turnover exceeds Rs. 25,000/- and for assessing which Shri Pancholia has no jurisdiction.

It is in the light of these provisions that I shall now deal with the petitioner's contention that the assessment made by Shri Kolhe is without jurisdiction and that the order of the Commissioner, Sales Tax, transferring the case of the petitioner is illegal and of no effect.

The impugned order of transfer passed by the Commissioner on 11-10-1954 is as follows :—

> "In exercise of my powers under Rule 46 of the Madhya Bharat Sales Tax Rules, I remove the case relating to the Sales Tax Assessment of Messrs. Khemchand Rajmal, from the jurisdiction of Shri Pancholia and transfer it to the jurisdiction of Shri Kolhe. All the proceedings relating to Sales Tax Assessment of the said assessee will in future be dealt with by Shri Kolhe".

Shri Jindal, Counsel for the petitioner, has put forward a twofold argument in support of his contention that the order of the Commissioner transferring the case of the petitioner from the jurisdiction of Shri Pancholia to that of Shri Kolhe is invalid. He contended :

(i) that the petitioner had applied to the Commissioner for transferring his pending case viz., the case of the assessment for the year 1951-52 and that the order passed on this application really transferred that case alone from the jurisdiction of Shri Pancholia; that the transfer order was not intended to be operative with respect to cases which were not pending before Shri Pancholia; &

(ii) that the Commissioner has passed a general and omnibus order transferring all future cases of the assessee to Shri Kolhe; that this was not permitted by Rule 46 under which the Commissioner had purported to act; that such a general and omnibus order could not be passed under Rule 46; that Rule 46 only empowered the Commissioner to transfer a specific or particular pending case from one Sales Tax Officer to another but did not invest him with power to make a general and omnibus order transferring the case of the assessee from the jurisdiction of one Sales Tax Officer to that of another.

I shall examine these contentions in their serial order.

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It is admitted by the petitioner that Shri Pancholia had fixed the assessment case for the year 1951-52 for hearing on 21-6-1954 and that on that date there was an unpleasant incident which created apprehensions in the mind of the petitioner that Shri Pancholia was biased against him. On 28-6-1954 the petitioner himself wrote a letter to Shri Pancholia and thereby requested him not to take up his cases as he was applying to the Commissioner to transfer his file to some other Sales Tax Officer. On 22-7-1954 he submitted an application to the Commissioner in which after narrating the incident that took place on 21-6-1954, he requested him to transfer his case to another Sales Tax Officer under Rule 46 of the Madhya Bharat Sales Tax Rules, 1950 for all purposes and under all circumstances and to order stay of all further proceedings before Shri Pancholia until final orders were passed regarding the transfer.

The circumstances under which the transfer application was made by the petitioner clearly indicate that the petitioner felt that Shri Pancholia was prejudiced against him and that he did not expect that Shri Pancholia would be just in the matter of his assessment. His request for transfer of his case for all purposes and under all circumstances and for staying further proceedings before Shri Pancholia further shows that he did not want to have his present or future cases to be dealt with by Shri Pancholia.

After the transfer order was passed by the Commissioner, the petitioner was asked by Shri Kolhe to appear before him for the purpose of assessment for the years 1952-53 and 1953-54. In reply the petitioner by his letter dated 1-11-1954 requested Shri Kolhe to re-open the assessment order for the year 1951-52 and to take up the assessment for 1952-53 and 1953-54 later on. On 28th December, 1954, the petitioner again wrote a letter to Shri Kolhe stating therein that he had approached the Commissioner, Sales Tax, with a request to give retrospective effect to his order for transfer of the cases and that the proceedings for assessment for the year 1952-53 and 1953-54 be stayed until the pending issue regarding 1951-52 assessment is finally decided by him. During the interval the petitioner had applied to the Commissioner, Sales Tax to give retrospective effect to his order dated 11-10-1954 so as to enable Shri Kolhe to set aside the assessment order for the year 1951-52 which had been passed by

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Shri Pancholia in a manner prejudicial to the assessee; but his prayer in that behalf was not accepted.

All this correspondence and applications disclose that the petitioner himself believed, even after the transfer order dated 11-10-1954 was passed by the Commissioner, that the latter had transferred the whole of his cases to Shri Kolhe. The petitioner not only raised no objection to the jurisdiction of Shri Kolhe to assess him for the year 1952-53 but wanted Shri Pancholia's order for assessment for the year 1951-52 to be reopened and the case for that year also to be dealt with by Shri Kolhe on its own merits. The petitioner was aware of the fact that his case relating to the assessment of sales tax was transferred to the jurisdiction of Shri Kolhe and was permanently removed from the jurisdiction of Shri Pancholia and that he had no objection to this course being adopted.

It cannot be disputed, and was not in fact disputed, that the transfer of the case was effected by the Commissioner on the application of the petitioner and to avoid prejudice being caused to him by leaving his cases to be dealt with by an officer who was considered to be prejudiced against him.

In view of the circumstances discussed above, it cannot be held that the order passed by the Commissioner on 11-10-1954 related only to the assessment for the year 1951-52 and was not intended to be a transfer of the assessee's case generally from the jurisdiction of Shri Pancholia to that of Shri Kolhe.

The next point taken up by Shri Jindal relates to the construction of Rule 46 of the Madhya Bharat Sales Tax Rules, 1950. The learned Counsel urged that the provisions of this rule could be invoked to transfer cases pending before a Sales Tax Officer. He submitted that the case or cases to be transferred must be those having specific numbers and a general and omnibus order transferring all the present and future cases of the assessee is not an order covered by this rule. In support of his contention the learned Counsel referred to the decision of the Supreme Court in Bidi Supply Company, v. Union of India (1).

The Supreme Court case was a case decided under the Indian Income-tax Act. The assessee in that case was manufacturer and seller of Bidis and had its principal place

(1) A. I. R. 1956 S. C. 479.

Shri Pancholia in a manner prejudicial to the assessee; but his prayer in that behalf was not accepted.

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of business at Calcutta where books of accounts were kept and where it had its banking account also. From the very inception of the business of the assessee it was assesed by the Income-tax Officer, District III, Calcutta. All of a sudden and without notice to the assessee, the Central Board of Revenue purporting to exercise powers under Section 5 (7-A) of the Income-tax Act, transferred its cases to the Income-tax Officer, Special Circle, Ranchi. Thereafter the Income-tax Officer, Special Circle, Ranchi called upon the assessee to submit returns for the assessment year 1955-56. The assessee challenged the validity of this order of the Central Board of Revenue by a petition to the Supreme Court under Article 32 of the Constitution of India. It was contended on its behalf that sub-section (7-A) of Section 5 of the Indian Income-tax Act and the order passed by the Central Board of Revenue under that provision of law were unconstitutional in that they infringed the fundamental right guaranteed to the petitioner under Article 14, Article 19 (1) (g) and Article 31 of the Constitution. Both these contentions prevailed. S. R. Das, C. J., with whom the other learned Judges agreed, examined the provisions of Section 64 and the provisions of Section 5 (7-A) of the Indian Income-tax Act and held that Section 64 conferred a right on the assessee to be assessed by the Income-tax Officer of the area within which his principal place of business was situate or wherein he resided. It gave the assessee a valuable right and entitled him to tell the taxing authority that he shall not be called to attend at different places and upset his business. The learned Chief Justice further held that in order to deprive a particular assessee of the benefit of Section 64, there must be a valid order under Section 5 (7-A).

The learned Judge then examined the language of Sub-section 7-A of Section 5 and held that the transfer of a case under this Sub-section was intended to refer to transfer of a particular case actually pending before the Income-tax Officer of one place to the Income-tax Officer of another place and that a general and omnibus order of transfer is not contemplated by this Sub-section.

It was found in the aforesaid Supreme Court case that the order of transfer was passed without notice to the assessee and had considerably prejudiced it by requiring it to appear at a distant place and suffer all the inconvenience and expense on that account. In the present case the order

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of transfer has been made on a request made by the assessee and is intended for his benefit. The petitioner is also not likely to be subjected to any particular hardship or inconvenience on account of the transfer of his case as by this transfer he is not required to appear at any distant place, the transfer being from the jurisdiction of one Sales Tax Officer at Indore to that of another at the same place.

Under the Indian Income--tax Act a right is conferred on an assessee by Section 64 of that Act to be assessed by the Income-tax Officer of the area within which his principal place of business is situated or wherein he resides. There is no provision corresponding to Section 64 of the Indian Income-tax Act in the Madhya Bharat Sales Tax Act and a mere transfer of the case from one Sales Tax Officer to another would not by itself constitute a violation of any of the rights conferred on the assessee under the provisions of the Sales Tax Act.

Rule 46 of the Sales Tax Rules empowers the Commissioner to transfer any case or class of cases pending before one Sales Tax Officer to another Sales Tax Officer. The power to transfer is not confined to any particular case but can be exercised generally with respect to a class of cases which may then be pending before a Sales Tax Officer. The proceedings relating to the assessment of the petitioner for the years 1951-52, 1952-53 and 1953-54 were pending before Shri Pancholia when the application for transfer was made by the petitioner on 22-7-1954. The assessment for the year 1951-52 was closed and a final order of assessment was passed by Shri Pancholia in regard to it but the proceedings for the subsequent years were then pending and could without any valid objection be transferred from the jurisdiction of Shri Pancholia to that of Shri Kolhe.

But the order of the Commissioner is not confined to pending proceedings only and is undoubtedly a general order transferring the file of the assessment of the petitioner from the jurisdiction of Shri Pancholia to that of Shri Kolhe without any reference to the cases then pending.

The contention of the opponents is that the Commissioner had authority under Rule 46 of the Sales Tax Rules to effect a general transfer as he has done in the present case. I do not think that this contention is well founded. Powers under Rule 46 could be exercised by the Commissioner only to transfer cases pending before one Sales Tax Officer to another and the order must therefore refer to

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either specific cases or class of cases and the cases must in any event be pending. The validity of the general order passed by the Commissioner cannot therefore be supported by reference to Rule 46.

The opponents however have contended that even apart from the transfer order, it was Shri Kolhe alone who was possessed of the jurisdiction to assess the petitioner for the particular years, i. e. 1952-53 and 1953-54. The contention is based on the ground that the Commissioner, Sales Tax, while exercising powers under Rule 3 (2) had determined the pecuniary limits of the jurisdiction of Shri Pancholia in his order dated 15th June, 1954. The order states that all cases within the jurisdiction of Shri Pancholia in which the taxable turn over of the assessee exceeds Rs. 25,000/- shall, for the purposes of assessment, be dealt with by Shri Kolhe. It is contended on behalf of the opponents that the taxable turn over of the petitioner was Rs. 44,000/- for the year 1952-53 and Rs. 52,000/- for the year 1953-54 and as in each of these years, the taxable turn over was found to be more than Rs. 25,000/-, Shri Kolhe had jurisdiction to complete the final assessment.

The petitioner has, in a very vague form, contended in the petition that the pecuniary limits of the jurisdiction must be deemed to have reference to the taxable turn over disclosed in the return. It is difficult to accept this contention as the language of the order of the Commissioner determining the jurisdiction of the various Sales Tax Officers is clear. The Commissioner has by his order under Rule 3 (2), invested Shri Kolhe with jurisdiction to make the assessment in cases where the assessee's taxable turn over for the assessment year exceeds Rs. 25,000/-. It is also not possible to uphold the contention raised by the petitioner for the reason that to do so would render the jurisdiction of the Sales Tax Officer dependent on the sweet-will of the assessee. The assessee cannot by submitting a wrong return, confer jurisdiction on an officer who does not possess it or deprive an officer of jurisdiction which is vested in him under orders of the Commissioner. I am therefore of opinion that Shri Kolhe had jurisdiction even apart from the transfer order dated 11-10-1954, to proceed with the assessment of the petitioner for the years 1952-53 and 1953-54 and the assessment made by him cannot be held to be without jurisdiction by reason of any defect that may be there in the order transferring the cases to Shri Kolhe.

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The petitioner's conduct also disentitles him to any relief in these proceedings. The petitioner picked up a quarrel with Shri Pancholia on 21-6-1954 and thereafter refused to appear before him. He himself moved the Commissioner, Sales Tax, for transfer of his case for all purposes and under all circumstances and to stay further proceedings before Shri Pancholia until orders were passed on the transfer application. The transfer was thus effected on his own representation and to suit his own convenience. The petitioner took the benefit of this order. He approached Shri Kolhe, the Sales Tax Officer, to whom the assessment case of the petitioner was transferred and requested him to reopen the assessment for the year 1951-52 and then finalize the assessment for the years 1952-53 and 1953-54. He also approached the Commissioner, Sales Tax, with a request that the order of transfer should be given retrospective effect so as to enable Shri Kolhe to reopen Shri Pancholia's order of assessment for the year 1951-52. It was only when he did not succeed in his efforts and when Shri Kolhe passed his orders relating to the assessment for the years 1952-53 and 1953-54 and called upon him to pay the amount of tax, that the petitioner turned round and raised the contention that Shri Kolhe had no jurisdiction to pass the assessment orders and that it was really Shri Pancholia who had jurisdiction to do so. To start with, the petitioner took advantage of the order of transfer to the fullest extent but later on turned round to say that Shri Kolhe had no jurisdiction to make the assessment. The petitioner's application challenging the validity of the order of assessment passed by Shri Kolhe does not appear to have been made in good faith and indicates his mala fides. In this view of the matter, I am of opinion that the petitioner is not entitled to any relief in exercise of the discretionary power vested in this Court by Article 226 of the Constitution.

As the petition fails on merits, it is not necessary for me to consider the further contentions raised by the opponents, namely, that the petitioner had an equally efficacious alternative remedy and that there should be no interference by this Court for that reason.

The result is that the petitions fail and are hereby dismissed with costs. Advocate's fees shall be taxed at Rs. 100/-

NEVASKAR J.—I agree.

Petition dismissed.