APPELLATE CRIMINAL

Before Mr. Justice Shiv Dayal and Mr. Justice Surajbhan.

STATE Appellant*

v.

CHAINKARAN Respondent.

1974

Jan. 19

Defence of India Rules—Rule 114, sub- rule (4)—Movement of Food stuffs and fixation of rates or prices are independent—Expression "such food stuffs" refers to regulation of movement of food stuffs—Word "such" in second part—Refers to "Food stuffs" in first part—Does not authorise Government to fix prices or rates of food stuffs including edible oil seeds or edible oils—Commodities Price Display Order, Madhya Pradesh, 1971—Clause 5—Requirements of—Interpretation of Statute—Non-obstante clause—To be strictly construed—Defence of India Rules—Rule 114(4)—Does not cover Commodities Price Display Orders, M. P., 1971.

Movement of Food stuffs and fixation of rates or prices order are independent of each other, it cannot be said that the expression "such food-stuffs" relates to those in respect of which an order has been made for regulating the movement or transport. The word "such" in the second part refers merely to the "food-stuffs" described in the first part.

On a true construction of the *non-obstante* clause contained in sub-rule (4) of Rule 114 of Defence of India Rules, no order for controlling the prices or rates of any food-stuffs, including edible oil seeds and edible oils can be made by the State Government, except with the prior concurrence of the Central Government.

In M. P. Commodities Price Display Order, 1971 from clauses 3 to 5, it is abundantly clear that the requirement of the law is that the dealer must display conspicuously a list of price. The further requirement, which is contained precisely in clause 5, is (1) that the dealer must not sell any commodity at a price higher than the price specified by him in the list of prices; and (2) the dealer cannot refuse

*Criminal Appeal No. 536 of 1972 from the Judgment of V N Shukla, Magistrate I Class, Raipur, dated the 29th January 1972.

to sell a commodity at the price so displayed.

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Non obstante clause has to be strictly construed.

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M P. Commodities Price Display Order, 1971 does not fall within the purview of sub-rule (4) of Rule 114 of the Defence of India Rules, 1971 and did not require prior concurrence of the Central Government. It is valid.

Ku. S. Nagrath for the State.

K. P. Munshi for the respondent.

Cur. adv. vult.

JUDGMENT

The Judgment of the Court was delivered by SHIV DAYAL, J.-This is an appeal against an order of acquittal.

The respondent was tried for contravention of the M.P. Commodities Price Display Order, 1971, issued under Rule 114(2) of the Defence of India Rules, 1971.

The prosecution case against the accused was that on December 13, 1971, he had for sale in his shop baby food, milk powder, Amul Spray, Parag, Lecto-dex, etc.. but he had not displayed the price list.

The accused accepted that he had not displayed the price list and pleaded guilty.

The learned trial Magistrate, however, acquitted the accused on the ground that the said Order had not received prior concurrence of the Central Government as required under Rule 114(4) of the Defence of India Rules, 1971. The material portion of Rule 114 may be reproduced here:-

"General control of industry, etc.—

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(1) x x x x

(2) If the Central Government or the State Government is of opinion that it is necessary or expedient so to do for securing the defence of India and civil defence, the efficient conduct of military operation or the maintenance or increase of supplies and services essential to the life of the community or for securing the equitable distribution and availability of any article or thing at fair prices, it may, by order, provide for regulating or prohibiting the production, manufacture, supply and distribution, use and consumption of articles or things and trade and commerce therein or for preventing any corrupt practice or abuse of authority in respect of any such matter.

(3) Without prejudice to the generality of the powers conferred by sub-rule (2), an order made thereunder may provide for-

(a) regulating by licences, permits or otherwise, the production, manufacture, treatment, keeping, storage, movement, transport, distribution, disposal, acquisition, use or consumption of articles or things of any description whatsoever;

X X X X

(4) Notwithstanding anything contained in sub-rules (2) and (3), an order under these sub-rules for regulating by licences, permits or otherwise by movement or transport of any foodstuffs, including edible oil seeds and edible oils, or for controlling the prices or rates, at which any such food-stuffs may be bought or sold, shall not be made by the State Government except with the prior concurrence of the Central Government."

(Underlined by us)

The contention is that although power is given to the State Government under sub-rules (2) and (3) to issue an order, such as the impugned order, yet, as reqired in sub-rule (4), no order could be issued for controlling the prices except with the prior concurrence of the Central Government. The learned

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trial Magistrate has held that the requirement to display conspicuously a price list was part of price control and was within the mischief of sub-rule (4). It is true that the M. P. Commodities Price Display Order, 1971, (hereinafter referred to as the Order) was published without prior concurrence of the Central Government. The question is whether that Order falls within the purview of Rule 114(4) of the Defence of India Rules, 1971.

Learned counsel for the appellant--State contends that the latter part of sub--rule (4) relates to only those food stuffs, the movement or transport of which is regulated under the first part of the sub--rule. She lays emphasis on the word "such" and urges that it necessarily refers to those foodstuffs for regulating the movement or transport of which an order is made. In our opinion, this argument cannot be accepted. The *non-obstante* clause in sub-rule (4) refers to two kinds of orders, which may be made under sub-rules (2) and (3) of Rule 114 of the Defence of India Rules: (i) An order for regulating (by licences, permits or otherwise) movement or transport of any food--stuffs, including edible oil seeds and edible oils; and (ii) an order for controlling the prices or rates at which any such food--stuffs may be bought or sold. Both these orders are independent of each other. It is not as if the second part is subject to or controlled by the first part. The State Government may make a rule under the first part, without controlling the prices or rates under the second. *Vice versa*, the State Government, may make a rule for controlling prices or rates, but may not regulate the movement or transport of the food--stuffs. Both being independent of each other, it cannot be said that the expression "such food--stuffs" relates to those in respect of which an order has

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been made for regulating the movement or transport. The word "such" in the second part refers merely to the "food--stuffs" described in the first part. It is merely demonstrative of the description of food--stuffs to avoid the necessity of repetition. Under the first part, the order which can be made is for regu--lating the movement or transport of any food-stuffs, including edible oil seeds and edible oils Under the second part, an order may be made for controlling the prices or rates of any food--stuffs, including edible oil seeds and edible oils. For the sake of economy of words, instead of repeating the whole expression "any food-stuffs including edible oil seeds and edible oils", the framers of the law aptly chose to substitute the expre-ssion "such food--stuffs". Therefore, we reject the argument and hold that on a true construction of the *non--obstante* clause contained in sub--rule (4) of Rule 114 of the Defence of India Rules, no order for controlling the prices or rates of any food-stuffs, including edible oil seeds and edible oils, can be made by the State Government, except with the prior con-currence of the Central Government.

However, we have to examine whether the M. P. Commodities Price Display Order, 1971, falls within the purview of the said sub-rule (4). There is no question of regulating the movement or transport of any food--stuffs under that order. We have to see whether that Order is for "controlling the prices or rates". After defining "Commodity", "dealer" and "price" in clause 2, it is provided in clauses 3, 4 and 5 as follows:-

> "3. Every dealer shall, in respect of any commodity display conspicuously a list of prices in Dev Nagri script in the form prescribed in the Second Schedule during the hours of business at a place as near to the entrance of his business as possible.

4. Every dealer shall, in respect of any commodity also display the price of each unit of the items of a commodity, either by getting it printed on the container or by affixing a rubber stamp or by sticking a label on it.

5. No dealer shall—

(a) sell to any person any commodity at a price higher than the price specified in respect of such commodity in the list of prices, or

(b) refuse to sell such commodity to any person at the price so displayed."

From these provisions, it is abundantly clear that the requirement of the law is that the dealer must display conspicuously a list of prices. The further requirement, which is contained precisely in clause 5, is (1) that the dealer must not sell any commodity at a price higher than the price specified by him in the list of prices; and (2) the dealer cannot refuse to sell a commodity at the price so displayed. In other words, if any person offers the price, which is displayed in the price list, the dealer is bound to supply the commodity to him at such price. Thus, the obligations imposed by the said Order are only these two and no other. This can be illustrated thus: Dealer 'X' displays price to Til oil at Rs. 10/- per kg. Another dealer 'Y' at his shop, displays the price at Rs. 90/-per kg. of the same Til oil. Both of them are free to do so. Neither of them has infringed the aforesaid Order. But having so displayed in the price list, dealer 'X' is prohibited to refuse to sell the Til oil to a person, who offers Rs. 10/-per kg., nor can he sell one kg. of Til oil at more than Rs. 10/-. On the other hand, dealer 'Y' can sell a kilogram of Til oil at any price upto Rs. 90/-, but not higher than that; nor can he refuse to supply a kilogram of Til oil to any person, who offers Rs.90/-for it.

From the above illustration, it is abundantly

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clear that what is regulated is the "supply" of the commodity, but the prices or rates are not controlled. Sub-rule (2) of Rule 114 of the Defence of India Rules empowers the Central Government and also the State Government to make an order for securing an equitable distribution and availability of any article or thing at fair price and for that object, it may provide, *inter alia*, for regulating supply and distribution. Supply may be regulated in various ways. Controlling the prices or rates is one of such ways.

In our view (1) the expressions "distribution", "availability" and "supply" within the meaning of Rule 114(2) of the Defence of India Rules, 1971, are of wide connotation, to regulate which prices or rates may or may not be controlled. A law may be enacted to control availability of commodities without controlling their prices or rates. (2) A law which does not fix prices or rates, but merely requires a dealer to display or exhibit a price list so that the dealer is left free to sell his goods at any price he likes, is not one which regulates or controls prices or rates, but merely regulates availability of the commodity and is, therefore, not within the mischief of Rule 114(4) of the Defence of India Rules, 1971.

We have demonstrated above that the M. P. Commodities Price Display Order, 1971, although it regulates "supply", does not control "prices" of any food-stuffs or commodity. It does not control prices or rates but aims at safeguarding availability of commodities and prevention of hoarding.

We may mention that the M. P. Commodities (Exhibition of Prices and Price Control) Order, 1973, not only provides for the price list to be exhibited (see clause 3, which corresponds to clause 3 of the Commodities Price Display Order, 1971), but also

controls the prices (see clause 4). Clauses 3,4 and 5 may be reproduced here:-

"3. Exhibition of Price List.—(1) Every dealer shall exhibit at the entrance or some other prominent place of his business premises the price list of commodities held in stock by him for sale.

(2) The Price list shall,—

(a) indicate separately the prices of different categories or varieties of commodities;

(b) bear the signature of the dealer; and

(c) be legibly written in Hindi language and Devnagri Script.

(3) Every dealer shall prominently exhibit a separate list showing the stock of different categories or varieties of commodities held by him at the end of the day preceding.

4. Charging of prices.—A dealer shall not charge in respect of a sale of any commodity a price in excess of that calculated.—

(a) at the price, if any, fixed by the Central Government or State Government, or

(b) when there is no controlled price as mentioned in sub-clause (a) and when the rate in respect of sale by such dealers is fixed by the manufacturers or producers or their distributors at the rate so fixed;

(c) when there is no controlled price as mentioned in sub-clause (a) and when the rate in respect of sale by such dealers is not fixed by the manufacturers or producers or their distributors as mentioned in sub-clause (b), at a price not exceeding a margin of 2% for the wholesale dealer and 4% for the retail dealer, which will cover all expenses incurred by the wholesale dealer or the retail dealer, but shall exclude taxes payable on the article or transaction.

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5. Dealers not to withhold from sale.-A dealer shall not withhold from sale any commodity ordinarily kept by him for sale."

A *non-obstante* clause has to be strictly construed. The expression "controlling the prices or rates" in sub-rule (4), in the absence of any specific definition, must be given its natural dictionary meaning.

We, therefore, hold that the M. P. Commodities Price Display Order, 1971, does not fall within the purview of sub-rule (4) of Rule 114 of the Defence of India Rules, 1971, and did not require prior concurrence of the Central Government. It is valid.

The accused pleaded guilty. He should be convicted on his plea of guilty.

The appeal is allowed. The order of acquittal is set aside. The respondent is held guilty of the offence punishable under Rule 114(ii) of the Defence of India Rules, 1971, read with clause 3 of the M. P. Commodities Price Display Order, 1971, and is sentenced to pay a fine of Rs. 200/--; in default, to suffer simple imprisonment for one month.

Appeal allowed.

CIVIL REVISION

Before Mr. Justice Shiv Dayal.

LACHHOO and another, Applicants*

v.

KESHAVLAL and another, Non-applicants.

1975

Sept. 18

Suits Valuation Act (VII of 1887)—Rules under Suits Valuation Act, Rule 1(1) to (4) and Court-fees Act, Section 7(v)(b)—Valuation of suit for purposes of jurisdiction under Rule 1(1) to (4)—Same as value for purposes of Court-fees Act, Section 7(v)(b)—Extension of Laws Act, Madhya Pradesh, 1958—Section 3(3)—Suits Valuation Act extended to Madhya Bharat Region—Section 6, Second Proviso—Rules in force in Mahakoshal Region on 31.12.58—Made applicable to Madhya Bharat Region to which Act was extended.

According to Rule 1(1) to (4) of the Rules framed under the Suits Valuation Act of Mahakoshal Region, the valuation of the suit for purposes of jurisdiction under the Suits Valuation Act is also the same as the value for the purposes of court-fee in any suit which falls within Section 7(v) of the Court-fees Act.

The Suits Valuation Act has been extended to the Madhya Bharat Region as well.

According to Second Proviso to Section 6, the rules which were in force in the erstwhile Mahakoshal region on December 31, 1958 continued to be in force and became applicable to those regions as well as to the Madhya Bharat region to which the Act was extended under the Extension of Laws Act.

M. M. Jain for the applicants.

H. G. Mishra for the non-applicants.

Cur. adv. vult.

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*Civil Revision No. 209 of 1972 for revision of the order of R. K. Shukla, District Judge, Vidisha, dated the 6th March, 1972.

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Lachhoo
v.
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ORDER

SHIV DAYAL J.–The defendants are aggrieved by an interlocutory order passed by the District Judge, Vidisha, whereby he has held that the suit has been properly valued and adequate court--fee has been paid.

The suit instituted by respondent Keshavlal in the Court of Civil Judge Class II, Basoda is for declaration of title and possession. The trial Court held that as the market value of the suit land was more than Rs. 10, 000/-- it has no jurisdiction to try the suit; and, consequently, directed the plaint to be returned to the plaintiff for presentation to the proper Court. The plaintiff appealed.

The learned District Judge found that the land in suit is separately assessed to land revenue so that S.7 (v) (b) of the Court Fees Act applies to the suit for possession and the court--fee payable on the plaint would be twenty times of the land revenue. On that basis he held that the plaintiff paid requisite court--fees. He further found that according to the M. P. Rules, the Civil Judge Class I had jurisdiction to try the suit. The land revenue payable on the suit land is Rs. 12/--. The plaintiff, therefore, valued the suit at Rs. 240/-- and paid court-fee thereon. In the result, the appeal was allowed, the suit was directed to be sent back to the trial Court for proceeding further with the trial, according to law.

Learned counsel for the defendants contends before me that even if the value of the suit may be assessed at twenty times the land revenue for the purposes of court--fees, the same cannot be accepted to be the valuation for the purposes of jurisdiction. The argument is that Section 7(v)(b) of the Court Fees Act is in regard to court--fee which is twenty

times of the land revenue separately assessed in respect of the suit land, but there is no provision under which the value for the purpose of court-fee is also the value for the purpose of jurisdiction.

Section 8 of the Suits Valuation Act, 1887 provides that the value as determinable for computation of court-fee is the same as the value for purposes of jurisdiction; but it excludes those suits which fall within the purview of Section 7(v), among others. Since the present suit falls within Section 7(v) of the Court-Fees Act, Section 8 of the Suits Valuation Act does not come into play.

For determining the value of the land for purpose of jurisdiction in a suit which falls within the purview of Section 7(v) of the Court Fees Act, and certain other paragraphs, the State Government has been empowered under Section 3 of the Suits Valuation Act to make rules for determining the value of the land. In the new Madhya Pradesh State as constituted under the States Reorganization Act, 1956, no rules have been framed under Section 3 of the Suits Valuation Act. Shri H. G. Mishra, learned counsel for the plaintiffs has referred to the M. P. Rules as to valuation of suits which were made in the former Mahakoshal Region of the Madhya Pradesh State (See Notification No. 1041 dated September 28, 1911 as amended by Memo No. 19 dated July 14, 1924 *vide* Notification No. 7777/- 303-V dated April 12, 1924). Rule 2 (a) (1) reads thus :-

> "2. In exercise of the powers conferred by Sec. 3 of the Suits Valuation Act, VII of 1887, the State Government has made the following rules for determining the value of land in the Madhya Pradesh and Berar for purposes of jurisdiction in the suits mentioned in paragraphs (v),(vi) and paragraph (X), clause (d) of Sec. 7 of the Court Fees Act, 1870 (VII of 1870):

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(a) "xx xx xx"

1. In suits for the possession of land mentioned in paragraph (v) of Sec. 7 of the Court Fees Act, 1870 (VII of 1870) the value of the land shall be deemed to be as follows:

(1) Where the land forms an entire estate or a definite share of the estate paying annual revenue to Government or where the land forms part of such an estate and is recorded in the Collector's register or separately assessed with such revenue, and such revenue is permanetly settled-twenty times the revenue so payable;

(2) Where the land forms an entire estate, or a definite share of an estate, paying annual revenue to Government or where the land forms part of such estate and is recorded as aforesaid; and such revenue is settled but not permanently-fifteen times the revenue so payable;

(3) where the land pays no such revenue or has partially exempted from such payment, or is charged with any fixed payment in lieu of such payment and net profits have arisen from the land during the year next before the date of presenting the plaint-fifteen times such net profits; but where no such net profits have arisen therefrom the amount at which the Court shall estimate the land with reference to the value of similar land in the neighbourhood;

(4) where the land forms part of an estate paying revenue to Government but is not a definite share of such estate and is not separately assessed as abovementioned the market value of the land."

Clause (1) applies here. It will be found to be the same as Section 7(v)(b) of the Court Fees Act. In other words, according to the above rules of Mahakoshal Region, the valuation of the suit for purposes of jurisdiction under the Suits Valuation Act is also the same as the value for the purposes of court-fee in any suit which falls within Section 7(v) of the Court Fees Act.

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Now, the question is whether the said rules which were in force in the erstwhile Mahakoshal Region are applicable to the present suit which arises from that part of the Madhya Pradesh State which was once a part of the erstwhile Madhya Bharat (Part B) State.

Different enactments which were in force in the different regions comprising the new State of Madhya Pradesh were extended to the whole of Madhya Pradesh by Extension of Laws Act, 1958. Under Section 3 of that Act, the Acts specified in Part A of the Schedule and as in force in the Mahakoshal Region immediately before the appointed day, were extended to all the regions of the State in the new Madhya Pradesh State. Acts specified in Part B of the Schedule which were in force in the Madhya Bharat Region were likewise extended to all the regions of the Madhya Pradesh State. In part A of the schedule at Serial No. 11 is the Suits Valuation Act as in force in the Mahakoshal Region immediately before the "appointed day" (January 1, 1959), per Section 2(a) and Section 1(2) read with Notification No. 41772-X XI-A dated December 31, 1958 published in the Madhya Pradesh Gazette (Extraordinary) dated January 1, 1959).

Sub-section 3 of the Extension of Laws Act provides that the Acts extended by sub-sections (1) and(2) of that Section (S. 3) in their application to the whole of Madhya Pradesh shall be amended in the manner and to the extent specified in the schedule.

While applying the Suits Valuation Act to the whole of Madhya Pradesh State, Section 1 of the Suits Valuation Act is to be read as follows:—

> "This Act may be called the Suits Valuation Act, 1887 and it extends to the whole of India except the States which

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on 1st November 1956 were comprised in Part B State 'Other than the Madhya Bharat and Sironj regions of the State of Madhya Pradesh."

In other words, the Suits Valuation Act has been extended to the Madhya Bharat Region, as well.

The Act having thus been extended, the rules framed under that Act will also be applicable to the Madhya Bharat Region by virtue of second proviso to Section 6 (1) of the Extension of Laws Act. The relevant part of the section would read as follows:--

"6. Repeal and savings.-(1) If immediately before the appointed day, there is in force in any region of the State any law corresponding to any of the Acts now extended to that region, that law shall, save as otherwise expressly provided in the Act, stand repealed:-

Provided that the repeal shall not affect-

(a) the previous operation of any law so repealed or anything duly done or suffered thereunder; or

(b) any right, privilege, obligation or liability acquired, accrued or incurred under any law so repealed; or

(c) any penalty, forfeiture or punishment incurred in respect of any offence committed against any law so repealed; or

(d) any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, forefeiture or punishment as aforesaid;

and any such investigation, legal proceeding or remedy may be instigated, continued or enforced, and any such penalty, forfeiture or punishment may be imposed as if this Act had not been passed:

Provided further that, subject to the preceding proviso, anything done or any action taken (including any appointment or delegation made, notification, order, instruction or direction issued, rule, regulation, form bye-

law or scheme framed, certificate obtained, patent, permit or licence granted or registration effected) under any such law shall be deemed to have been done or taken under the corresponding provision of the Act as now extended to that region, and shall continue to be in force accordingly, unless and until superseded by anything done or any action taken under the said Act."

It is thus clear that according to the second proviso to section 6, the rules which were in force in the erstwhile Mahakoshal region on December 31, 1958 continued to be in force and became applicable to those regions as well as to the Madhya Bharat region to which the Act was extended under the Extension of Laws Act.

The result of the above discussion is that the rules which were framed under Section 3 of the Suits Valuation Act for the Mahakoshal Region in the year 1924 and continued to be in force upto December 31, 1958 continued to be in force not only in that region, but also became applicable to other regions of the new State of Madhya Pradesh from January 1959.

Applying those rules to the present suit, the valuation of the suit for purposes of jurisdiction is the same as its value for the purposes of court-fees.

The revision is dismissed with costs. Counsel's fee Rs. 40/-. Record be returned to the trial Court within five days from today positively and punctually for proceeding with the suit, according to law.

Application dismissed.

CRIMINAL REVISION

Before Mr. Justice Golvalkar.

1974

Aug. 27

ABDUL AZIZ, Applicant*

v.

UNION OF INDIA and another, Non-applicants.

Defence of India Rules—Rule 126-P(2)(ii) and 126—1(10)– Accused in possession of 100 Tolas of Gold—Status of accused not such as to acquire that much gold—Presumption that accused is the owner of gold not available—Evidence Act—Section 27—Confessional statement of accused—To be read as a whole or rejected as a whole unless exculpatory part is shown to be false.

If the evidence on record does reasonably show to a high degree of improbability on the part of the petitioner-accused to acquire 100 Tolas of gold at a cost of about Rs. 15,000.00, the presumption that the accused was the owner of the gold, is not available to the prosecution, and the conclusion is inevitable that the accused was not the owner of the gold recovered from his possession.

State of Assam v. *Krishna Rao and others* (1); referred to

It is now well settled that confessional statement of accused when admissible in evidence, has to be read as a whole or rejected wholesale unless any exculpatory part of the same is demonstrated to be false.

R. N. Rai for the applicant.

R. P. Sinha for the no-applicants

Cur. adv. vult.

ORDER

GOLVALKER J.- This revision petition is by the

*Criminal Revision No. 300 of 1972 for revision of the order of A. G. Gandhe, Additional Session Judges, Khandwa, dated the 5th June 1972

(1) A. I. R. 1973 S C. 28.

accused whose appeal against his conviction under Rule 126-P(2)(II) read with Rule 126-1(10) of the Defence of India Rules for having been found in unauthorised possession of 100 Tolas of gold, contained in 10 biscuits of 10 Tolas each, has been dismissed by the Additional Sessions Judge, Khandwa.

The petitioner, along with one Parshuram Sindhi, had travelled from Bombay by Punjab Mail on way back to Indore. As soon as they got down from the said train at Khandwa in order to take the train from there to Indore, the Central Excise Authorities apprehended them and in course of search of their persons, 100 Tolas of primary gold of foreign make, in the shape of 10 biscuits weighing 10 Tolas each, was discovered found tied round the petitioner's waist. These facts are no longer in dispute.

However, according to the petitioner, he was merely a carrier of the gold which had been acquired by his companion Parshuram at Bombay and tied to his waist for being taken to Indore for delivery to Sajandas who dealt in gold at Indore and that it was he who had sent Parshuram with the requisite amount of money to obtain the same at Bombay. The petitioner asserted that he was sent by Sajandas, his employer-he was serving as driver to him-for purchasing motor car accessories and also to receive and carry back to Indore such other articles as may be entrusted to him by Parshuram at Bombay. He urged that he did not know what was being tied round his waist for carrying back to Indore. He thus claimed to be merely a carrier and hence committed no offence.

Both the Courts below, relied on the presumption that in the absence of any proof to the contrary, possession of gold by the petitioner rendered him its

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owner and as such, guilty. Accordingly he was convicted as stated in the beginning.

I heard Shri R. N. Rai, Advocate for the petitioner and Shri R.P. Sinha, Advocate for the Central Excise Department. In my opinion, the Courts below committed a manifest error in convicting the accused. The relevant provision permitting presumption as aforesaid, reads as under:

> "Any person, who is in possession, custody or control of any article, ornament or primary gold, shall be presumed, until the contrary is proved, to be owner thereof."

The question, therefore, is whether the evidence on record it makes no difference that the accused has himself led no evidence in defence can be held to have reasonably rebutted the aforesaid presumption of ownership of the gold on the part of the accused.

Before I proceed to examine the evidence on record, it will be proper to point out the law with regard to the aforesaid kind of presumption, and what kind and extent or proof the person affected thereby, is required to place on record in order to urge that the said presumption stands rebutted.

What the law is has been laid down by the Supreme Court in the case of *State of Assam* v. *Krishna Rao and others* (1). True it is that the presumption which was being examined by the Supreme Court, was with regard to the presumption under section 4 of the Prevention of Corruption Act. But the relevant words of the aforesaid section of Prevention of Corruption Act are not only indentical, but the nature of the presumption also is the same. After pointing out how the legal position was recognised earlier in the cases of *S. N.*

(1) A.I.R. 1971 S.C. 28.

Bose v. *State of Bihar* (1), *C. I. Emden* v. *State of U. P.* (2), *Dhanwantrai* v. *State of Maharashtra* (3) and *Jhangan* v. *State of U.P.* (4), the Supreme Court has pointed out the legal position as under :

> "....., the words 'unless the contrary is proved' mean that the presumption raised by section 4 has to be rebutted by proof and not by bare explanation which may be merely plausible. The required proof need not be such as is expected for sustaining a Criminal conviction; it need only establish a high degree of probability."

(The underlining is by me.).

It will thus be seen that if the evidence on record, the use of which cannot be denied to the accused, does reasonably show to a high degree of improbability on the part of the petitioner to acquire 100 Tolas of gold at a cost of about Rs. 15, 000.00, the presumption that the accused was the owner of the gold, is not available to the prosecution, and the conclusion is inevitable that the accused was not the owner of the gold recovered from his possession. It would then follow that he held the gold for and on behalf of some one else and he was merely its carrier as stated by him.

It is inherently impossible, especially in the abs-. ence of any evidence to the contrary, that the peti-- tioner who was merely a motor driver, could possibly purchase and own all that gold. In this connection, I may refer to the statement of the petitioner (Ex. P-2) before the Authorities of Central Excise in which he has made no secret of his visit to Bombay along with Parshuram, the Munim of his employer, and purchase of gold made by the said Parshuram there and how it was tied round his waist when they both

(1) A.I R. 1968 S. C. 1292. (2) (1960) 2 S. C. R. 592
(3) A. I. R. 1964 S. C. 575. (4) (1966) 3 S. C. R. 736.

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started on their journey back to Indore. It is now well settled that confessional statement of an accused, when admissible in evidence, has to be read as a whole or rejected wholesale unless any exculpatory part of the same is demonstrated to be false. If that is the law with regard to admissible confessions of an accused, I am unable to see how the aforesaid statement of the petitioner can be treated differently. In fact it has been admitted in its entirety.

That apart, Parshuram, the companion of the accused petitioner in the journey from Indore to Bombay and back, was also examined by the Central Excise Authorities and a true copy of the same was duly supplied to the petitioner at the time of his trial. The learned counsel has filed that statement before me with an application praying for its being taken on record as his defence evidence. In the peculiar circumstances of this case, the Central Excise Authorities ought to have very fairly and properly prosecuted not only Parshuram, but also his and petitioner's employer Sajandas, the real owner of the gold. But having very unfairly and improperly omitted to do so, the petitioner accused was, in all fairness, entitled to tender as his evidence the statement of Parshuram which he did in this Court and accordingly I allowed that statement to be placed on record. In that statement, Parshuram has made no secret of the purpose of his visit to Bombay at the instance of his master Sajandas and not only has stated therein wherefrom he acquired the gold, but also how he proceeded to carry it back to Indore by tying it round the waist of the petitioner. This statement completely destroys the presumption legally permitted to be drawn against the petitioner. It is thus not a mere plausible explanation of the accused

for being in possession of the gold, but is a proof positive that the owner of the gold is Sajandas of Indore.

Thus in the aforesaid state of evidence, it has to be held, disagreeing with both the Courts below, that the petitioner, although was found in possession of all that gold of 100 Tolas, was and is not its owner. Its owner is his employer Sajandas who had acquired it for himself through his Munim Parshuram at Bombay for him. Parshuram, although had played a very intimate and serious part in its acquisition, stands, however, in the same position as the petitioner.

Therefore, in the view that I have taken as aforesaid, I hold that the conviction of the petitioner is unsustainable. Accordingly I set aside the same and acquit the petitioner. His bail-bond shall stand cancelled and fine amount, if recovered from him, be refunded to him.

Then in the circumstances as are on record, I am of opinion that Sajandas, the employer of the petitioner, is the real offender and liable to be prosecuted. It is really amusing that the Central Excise Authorities proceeded departmentally and that too against Sajandas and imposed a fine of Rs. 5, 000.00 on him. However, even now it is not too late for those Authorities to prosecute Sajandas.

Application allowed.

MISCELLANEOUS CIVIL CASE

Before Mr. P. V. Dixit C. J. and Mr. Justice Singh.

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Feb. 18

M/S NOSHIRWAN AND CO. PVT. LTD., INDORE Applicant*

v.

THE COMMISSIONER OF INCOME TAX, M. P. Opposite party.

Income-tax Act, Indian (XIV of 1961)—Sections 30 and 37—Deduction of rent—Allowable if premises used for purposes of business—Amount advanced for financing construction of building—Amount not deductible—Building being made fit for use—Building cannot be said to be in use either actively or passively—Section 37—Not applicable to expenditure of nature described in Section 30.

A deduction under Section 30 in respect of rent for premises is admissible only if the premises are used for the purpose of the business.

Where an amount is advanced to finance the construction of the building by using the device of payment of rent, the same is not deductible under section 30.

When a building is being made fit for use, the building cannot be said to be in use either actively or passively.

Liquidators of Jursa Ltd. v. *I. T. Commissioner* (1); referred to.

Section 37 does not apply to any expenditure of the nature described in sections 30 to 36.

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*Miscellaneous Civil Case No. 20 of 1968. Reference under Section 256 (1) of the Income-tax Act, 1961 against the order of the Income-tax Appellate Tribunal, Bombay, dated the 15th January 1968.

(1) A. I. R. 1954 S. C. 253.

R. S. Dabir for the applicant.

M. Adhikari with *P. S. Khirwadkar* for the opposite party.

Cur. adv. vult.

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JUDGMENT

The Judgment of the Court was delivered by SINGH J.—This is a case stated under section 256(1) of the Income Tax Act, 1961 referring for our answer the following question of law:-

> "Whether on the facts and in the circumstances of the case, was the company entitled to the allowance of the rent paid to the landlord for the new building Bombay-Agra Road, Indore?"

The case relates of the assessment year 1962-63, the account year being the period from 1st April, 1961 to 31st March, 1962. The assessee is a Private Limited Company and is a distributor of Fiat Cars at Indore. It has to maintain a workshop and show-room for the purposes of its business. The principals of the assessee, the Premier Automobiles Limited wanted it to rent a modern show-room and workshop, as the then existing show room and work-shop were not suitable. To meet the demand of the principals, the assessee entered into an agreement on 1st April, 1960 with M/s Goolbanu Godrej and others (an association of persons and hereinafter referred to as the landlords), who owned a suitable plot of land for construction of a building to house the show-room and workshop. It was agreed that the landlords will construct a suitable building and will let it out to the assessee on a monthly rent of Rs.2,500/-per month "with effect from the date of completion and mutual agreement." On 15th March, 1961 a resolution

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was passed by the Board of Directors of the assessee to take over the building constructed by the landlords on rent from 1st April, 1961. This resolution was confirmed in a meeting of share-holders held on 28th August, 1961. The assessee started paying rent from 1st April, 1961 at the rate of Rs.2,500/- per month and at this rate paid in all Rs. 30,000/- towards rent during the account year. In the assessment proceedings, the assessee claimed that this amount of Rs. 30,000/-paid as rent to the landlords should be allowed as a deduction under section 30 as rent for premises used for the purposes of the assessee's business or in the alternative under section 37 as expenditure laid out or expended wholly and exclusively for the purposes of the business. The Income Tax Officer rejected the contention of the assessee and that order was confirmed in appeal by the Appellate Assistant Commissioner. Second Appeal preferred by the assessee was partly allowed by the Tribunal and it was held that part of the rent out of Rs. 2,500/-per month which could be apportioned to the land over which the assessee installed a petrol pump during the account year should be allowed as a deduction under section 30. As regards the rent payable for the building, the orders passed by the Income Tax Officer and the Appellate Assistant Commissioner were confirmed. On an application made by the assessee, the Tribunal referred to us the question of law that we have already set out.

The facts found are that the association of persons constituting the landlords in the relevant year consisted of members who were all share-holders in the assessee company; they were all persons from the same family, the details of which are given in the order of the Appellate Assistant Commissioner, which forms part of the statement of the case. There was

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therefore, virtual identity of interest between the landlords and share-holders of the assessee. The assessee's workshop was actually shifted to the new building in October, 1962 and the show-room was shifted in January, 1963. The workshop and the show-room were both thus shifted after the close of the material account year. Up to 31st March, 1961 the landlords spent two lacs of rupees in construction of the building. They further spent a sum of Rs. 67,000/- during the period from 1st April, 1961 to 31st March, 1962. By 5th March, 1963, on which the date the certificate for the completion of the building was obtained, the expenses incurred on construction had gone up to Rs. 3,28,000/-. On 1st April, 1961 when the building was taken on rent it was not complete and except for intsallation of a telephone, during the account year, nothing substantial was done by the assessee in the building.

Having regard to the identity of the share-holders in the assessee company and the members in the association of persons constituting the landlords, and on the finding that nothing substantial was done in the building by the assessee during the account year, the Income Tax Authorities including the Tribunal came to the conclusion that it could not be said that the building was used for the assessee's business during the account year, and that in reality the assessee in paying Rs. 30,000/- towards rent financed the construction of the building.

Section 30 of the Act reads as follows:

"30. In respect of rent, rates, taxes, repairs and insurance for premises, used for the purposes of the bussiness or profession, the following deductions shall be allowed–

(a) Where the premises are occupied by the assessee–

(i) as a tenant, the rent paid for such premises; and

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further if he has undertaken to bear the cost of repairs to the premises, the amount paid on account of such repairs;

(ii) otherwise than as a tenant, the amount paid by him on account of current repairs to the premises;

(b) any sum paid on account of land revenue, local rates or municipal taxes;

(c) the amount of any premium paid in respect of insurance against risk of damage or destruction of the premises."

It would be seen that a deduction under section 30 in respect of rent for premises is admissible only if the premises are "used for the purposes of the business." The only question before us is whether the rent paid in respect of the building should be allowed as a deduction. We have already stated that the finding is that the show-room and the workshop, which the assessee maintains for the purposes of its business, were shifted to the new building long after the close of the account year. Mere installation of a telephone in the building cannot be taken to be such a factor which may show that the building was used during the account year for the purposes of the assessee's business. The identity of the landlords with the share-holders of the assessee company cannot be lost sight of. Although the initial agreement was to take the building on completion, it was actually taken on rent when it was not complete. Having regard to all these circumstances, it must be held that the Tribunal's conclusion was correct that the building was not used for the purposes of the business during the account year, and that the assessee in effect financed the construction of the building by using the device of payment of rent. It was argued by the learned counsel for the assessee that the user of premises within the meaning of section 30 may be either

an active user or a passive user. He has referred in this connection to the decision in *Commissioner of Income-tax, Bombay* v. *V. B. Sathe* (1). According to the learned counsel, the building was kept ready for use during the account year, although it may not have been actually used, and this was enough to entitle the assessee to claim deduction under section 30. There is no substance in this contention. Even according to the facts alleged by the assessee (which have not been accepted), the building was not kept ready for use but was being made fit for use of business by installing machinery and furnishing it. It was never ready for use during the account year. When a building is being made fit for use, the building cannot be said to be in use either actively or passively. In *Liquidators of Pursa Ltd.* v. *I.T. Commissioner* (2) their Lordships while referring to clauses (v),(vi) and (vii) of section 10(2) of the 1922 Act said that the words "used for the purposes of the business" mean used for the purpose of enabling the owner to "carry on the business and earn profits in the business", and further observed as follows:

> "The word "used" has been read in some of the pool cases in a wide sense so as to include a passive as well as active user. It is not necessary, for the purposes of the present appeal, to express any opinion on that point on which the High Courts have expressed different views. It is, however, clear that in order to attract the operation of cls. (v),(vi) and (vii) the machinery and plant must be such as were used, in whatever sense that word is taken, at least for a part of the accounting year. If the machinery and plant have not at all been used at any time during the accounting year no allowance can be claimed under Cl. (vii) in respect of them and the second proviso also does not come into operation."

Similar considerations will apply in construing the words "used for the purposes of the business"

(1) A. I. R. 1937 Bom. 493. (2) A.I.R. 1954 S.C. 253.

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as they occur in section 30 of 1961 Act. On the facts found it cannot be said that the building was used during the account year for the purposes of the business, and therefore, the rent paid in respect of it was not allowable as a deduction under section 30.

It was urged in the alternative that the expenditure incurred in payment of rent was allowable under section 37, as expenditure laid out wholly and exclusively for the purposes of the business. This argument must be rejected on the ground that section 37 does not apply to any expenditure of the nature discribed in sections 30 to 36. The sections expressly says so. The nature of the expenditure is rent for premises, although it does not fulfil all the conditions on which it can be permitted as a deduction under section 30; its nature is the same as described in that section and therefore, it cannot be allowed under section 37. A different construction would nullify the conditions and limitations under which deductions are allowable under sections 30 to 36.

As a result of the aforesaid discussion, we answer the question referred to us in the negative. The costs of this reference shall be paid by the assessee. Counsel's fee Rs. 150/-, if certified.

Reference answered accordingly.

MISCELLANEOUS CRIMINAL CASE

Before Mr. Justice Tankha

SHRI KRISHNA SANGHI and others, Applicants* 1975

v July 22

STATE OF M. P., Non-applicant.

Criminal Procedure Code (V of 1898)—Section 468—Magistrate barred from taking cognizance of offences of the categories mentioned in section 468(2), Criminal Procedure Code after period of limitation—Provisions mandatory—Section 473—Satisfaction for purposes of extending the period of limitation to be done before taking cognizance of offence—Provisions to be construed liberally but not too liberally—Before condonation of delay accused must be heard.

Section 468, Criminal Procedure Code clearly creates a bar for taking cognizance of the offence after a lapse of period of limitation in relation to the offences of the categories specified in sub-section (2) of section 468 of the Code.

The wordings of section 468 of Criminal Procedure Code are mandatory and not directory.

The satisfaction for purposes of extending the period of limitation under section 473, Criminal Procedure Code must be done before the cognizance of an offence is taken and not subsequently.

The provisions of section 473 of the Code should also be liberally construed like section 5 of the Limitation Act so as to advance substantial justice when no negligence or inaction or want of *bona fides* is imputable to the prosecutor but cannot be construed too liberally because the Government is the prosecutor or prosecution is upon police report.

Before condoning the delay, although there is no provision of giving any notice to the person accused in Chapter XXXVI of the Code, still natural justice demands that the accused persons

*Miscellaneous Criminal Case No. 683 of 1974, for quashing the proceedings in Criminal Case No. 6228 to 6234 of 1974, pending in the Court of Chief Judicial Magistrate, Durg.

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must be heard before passing an order in that regard as such an order is bound to affect a valuable right which accrues to the accused and which cannot be allowed to be taken away lightly.

S. C. *Datt* for the applicants.

K. K. Adhikari for the State.

Cur. adv. vult.

ORDER

TANKHA J.--This order shall also govern the disposal of Misc. Criminal Cases Nos. 685, 686, 687 and 688 of 1974 (*Krishna Sanghi and others* v. *The State of M. P.*).

These five petitions have been filed by the five accused persons in five separate cases pending against them in the Court of Chief Judicial Magistrate, Durg, for quashing the proceedings.

Five criminal cases which were registered against the accused persons before the Chief Judicial Magistrate, Durg, are Criminal Cases Nos. 6228, 6229, 6230, 6231 and 6232 of 1974. Proceedings in all these five cases have been initiated against the accused persons on a complaint filed by the State Scooter Controller, Madhya Pradesh under section 24 and 24A of the Industries (Development and Regulation, Act, 1951 (Act LXV of 1951) read with Clauses 5(1) and 10 of the Scooter (Distribution and Sale) Control Order, 1960. The trial Court took cognizance of the five complaints on 20.6.1974 on which date they were filed and ordered that the accused persons be summoned. Thereafter, on 1.8.1974 an application was moved on behalf of the accused persons under section 468(2) of the Code of Criminal Procedure, 1973 raising an objection that the trial Court could not

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take cognizance of the alleged offence after the lapse of the period of limitation, which in the present case was one year. The date of the alleged offence is 17.9.1971 while the complaints were filed on 20-6-1974, much beyond the period of limitation. On that application the Court fixed 22.8.1974 as the date for arguments. In the meanwhile the accused persons filed the present petitions in this Court which were admitted and further proceedings before the trial Court were stayed.

Learned Counsel for the petitioners in all the petitions raised one common point for consideration. He contended that in view of the provisions of section 468 of the Code of Criminal Procedure, 1973 the trial Court acted illegally and without jurisdiction in taking cognizance of the alleged offence against the accused persons after a lapse of the period of limitation prescribed under that section, which in the present case was one year since the offence alleged under sections 24 and 24A of the Industries (Development and Regulation) Act, 1951 is punisable with imprisonment which may extend to three months, or with fine which may extend to two thousand rupees, or with both. Learned counsel, therefore, contended that the entire proceedings before the trial Court have to be quashed. On the other hand, learned counsel for the State contended that the proceedings need not be quashed at this stage as the trial Court has fixed a date for hearing on the question involved and as such no interference is required by this Court.

Having heard learned counsel of the parties, I am of opinion that these petitions must be allowed. The only point for consideration, as stated earlier, is whether as to what course should be adopted by a Magistrate in taking cognizance of a case which

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prima facie falls under the purview of section 468 of the Code of Criminal Procedure, 1973. In my opinion, section 468 of the Code clearly creates a bar for taking cognizance of the offence after a lapse of period of limitation in relation to the offences of the categories specified in sub-section (2) of section 468 of the Code. Section 469 deals with the commencement of the period of limitation, or to say how the period of limitation shall be computed while section 473 gives a very wide power to the Court for taking cognizance even after the expiry of the period of limitation provided the Court is satisfied on the facts and in the circumstances of the case that the delay has been properly explained or that it is necessary so to do in the interests of justice. This power has been conferred on the Courts notwithstanding anything contained in the foregoing provisions of Chapter XXXVI in which sections 467, 468, and 469 also appear. A reading of the aforementioned sections thus make it very clear that the Court cannot take cognizance of an offence of the categories of cases specified in sub-section (2) of section 468 after the lapse of the period of limitation mentioned therein. If it does so, I am of opinion, it would be acting without jurisdiction as section 468 creates a bar for taking cognizance of such cases. In this connection I may refer to the heading of section 468:

> "Bar to taking cognizance after lapse of the period of limitation."

The wordings as they appear are mandatory and not directory. But in view of the provisions of section 473 of the Code, the Court has power to take cognizance of the offence after satisfying itself on the facts and in the circumstances of the case that the delay has been properly explained or that it is

necessary so to do in the interest of justice. But the satisfication for purposes of extending the period of limitation must be done before the cognizance of an offence is taken and not subsequently. If the Court acts otherwise it would be clearly acting without jurisdiction.

In the present case, it was not disputed before me by both the learned counsel that the alleged date of offence is 17.9.1971 and the trial Court took cognizance of the offence without satisfying itself about the delay. On an objection raised by the accused persons, a reply was submitted by the prosecution explaining the delay. This was the novel procedure adopted by the trial Court for rectifying the mistake committed earlier. I only wish that the trial Court should have looked into the provisions of law in that regard and after having understood them should have proceeded with the case in accordance with the same. The procedure adopted by the trial Court is wholly contrary to the provisions of law.

Learned counsel appearing for both the parties requested me to lay down the procedure to be followed by the trial Courts in such cases since this is a new provision incorporated in the Code of Criminal Procedure, 1973. Whenever a complaint or a chalan is filed at the instance of any person or any police officer, the Court must first see that section 468 of the Code of 1973 is attracted or not. If it does, it should not register the case but give an opportunity to the person or the police officer filing the complaint or chalan to satisfy it on the point of limitation for purposes of condonation of delay. As regards the condonation of delay it should not be done as a matter of course. The delay has to be condoned with exercise of judicial discretion. Section 473 of the Code empowers the Court to condone

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such delay if sufficient cause has been shown or if the interests of justice make it necessary to do so. But the application of the section would always depend upon the facts and circumstances of each case of which the Court would be required to exercise its judicial discretion in the matter, like an application under section 5 of the Limitation Act, 1963. At this stage I would also like to point out that the provisions of section 473 of the Code should also be liberally construed like section 5 of the Limitation Act so as to advance substantial justice when no negligence or inaction or want of *bona fides* is imputable to the prosecutor but cannot be construed too liberally because the Government is the prosecutor or prosecution is upon police report. After the delay is condoned by the Court on its being satisfied by the process referred to above, then alone it would register the case and proceed with the same in accordance with law. Before condoning the delay, although I do not find any provision of giving of notice to the accused person in Chapter XXXVI of the Code, but natural justice demands that the accused persons must be heard before passing an order in that regard as such an order is bound to affect a valuable right which accrues to the accused and which cannot be allowed to be taken away lightly. As such, they have to be heard when an application under section 473 of the Code is moved by the prosecution before cognizance is taken.

For the reasons stated above, the petitions succeed and are allowed. The proceedings in all the aforementioned cases are hearby quashed and the matter is remitted back to the trial Court with the directions as indicated above.

Application allowed.

FULL BENCH

Before Mr. Tare C. J., Mr. Justice Malik and Mr. Justice C. P. Sen.

RASHTRIYA KHADAN MAZDOOR SAHAKARI SAMITI LTD, P. O. DALLI-RAJHARA, DISTRICT DURG, Petitioner*

1975 May 5

v.

THE PRESIDING OFFICER, CENTRAL GOVT., INDUSTRIAL TRIBUNAL-CUM-LABOUR COURT, JABALPUR, and others, Respondents.

Industrial Disputes Act, (Central) (XIV of 1947)—Section 10—Mining is industry—Workman engaged in mining operation—Is workman in mining industry—Dispute between such employee and his employer—Is industrial dispute—Central Government appropriate authority to make reference—Reference to industrial court is valid and proper—For making reference dispute to be raised by employee with employer—Constitution of India—Article 284—Conflict between special Act and General Act—Circumstances in which special Act or general Act will prevail—Industrial Disputes Act is special Act—Not repealed by Co-operative Societies Act, 1960—Both can co-exist without repugnancy—Co-operative Societies Act, Madhya Pradesh, 1960 and Industrial Disputes Act, (Central), 1947—Difference between the two—Industrial Disputes Act, 1947—Industrial Dispute to be decided under this Act—Industrial Disputes Act (after amendments by Acts 45/65 and 45/71)—Prevails over Madhya Pradesh Co-operative Societies Act.

Per Malik and C. P. Sen JJ. and Tare, Chief Justice contra.—

There can be no dispute that mining is an industry and any employee engaged in the mining operations is a workman in the mining industry. Any dispute between such employer and its employees would be Industrial Dispute within the meaning of Industrial Disputes Act. Such minerals as declared by special enactment are in the Central list in the Constitution and as

* Miscellaneous Petition No. 813 of 1972.

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such the Central Government is the appropriate Government for reference of such dispute under Section 10 of the Act.

G. V. Ramanaiah v. *Superintendent, Central Jail* (*1*) referred to.

Samyukta Khadan Majdoor Singh, Rajnadgaon v. *M/s Hindusthan Steel Ltd., Ranchi* (*2*) and *Sagar Motor Transport Karmachari Union, Sagar* v. *The Amar Kamgar Passenger Transport Company Co-operative Society, Sagar and another* (*3*); overruled.

Therefore, reference to Industrial Court is proper and validly made by the proper authority under the Industrial Disputes Act.

Section 55(2) of the M. P. Co-operative Societies Act can in no case take away such vested right of the Central Government in its own exclusive sphere.

Per C P. Sen J.-Before the Government can make a reference the Dispute is to be raised by the employee with his employer and then only reference can be made.

S. R. Corpon. v *Industrial Tribunal, Gujrat* (4); referred to.

It is well settled that if the legislature makes a special Act dealing with a particular subject and latter makes a general Act which by its terms would include the subject of the special Act, and is in conflict with the special Act, nevertheless unless it is clear that in making the general Act, the legislature has had the special Act in its mind and has inclined to abrogate it, the provisions of the general Act do not override the special Act. If possible general Act is not to be extended to special subject specially dealt by earlier Act.

Pratap Singh v. *Manmohan Dey* (5); referred to.

General Act cannot be treated as impliedly repealed by a later local or special Act because ordinarily the general law of the country is not altered by special legislation without particular reference to it. The special Act is to be treated as exception to the general Act.

In case both the enactments are absolutely repugnant and inconsistent to one another, this Court has no other alternative but to declare the prior Act as repealed by the subsequent Act.

(1) A. I. R. 1974 S. C. 31. (2) 1973 M. P. L. J. 269.
(3) 1968 M. P. L. J. 837. (4) A. I. R. 1968 S. C. 529.
(5) A.I.R. 1966 S.C. 1931.

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The Co-operative Societies Act is a general enactment concerning all Co-operative Societies making provisions on different subjects concerning Co-operative Societies.

Industrial Disputes Act is a special enactment concerning only industrial disputes and not other types of disputes between employee and employer. Hence the Act cannot be held to be repealed by the Co-operative Societies Act, looking also to the relations between a Society and its employees in the absence of any specific provision for its repeal.

Industrial Disputes Act and M. P. Co-operative Societies Act can stay together without there being any repugnancy or inconsistency, both can be enforced without any conflict.

As per Article 254(1) of the Constitution, if there is repugnancy between a law made by the State and that of the Parliament with respect to one of the matters enumerated in the concurrent list, the law made by Parliament shall prevail to the extent of the repugnancy, and the law made by the State to the extent of such repugnancy be void.

Clause (2) of Article 254 is an exception to this rule and the proviso qualifies the exception. Under this clause if the legislature of a State makes a provision repugnant to the provisions of the law made by the Parliament, it would prevail over the legislation of the State if it has received the assent of the Parliament.

Deepchand v. *State of U P. (1)*, *Zaverbhai* v. *State of Bombay* (2) and *Krishna* v. *State of Madras* (3); referred to.

There is no direct conflict between the two statutes and both occupy different fields and the Co-operative Societies Act is not an exhaustive Code on Industrial Disputes.

Ahmedabad M. O. Asson v. *I G. Thakora* (4); referred to.

Industrial Disputes are to be decided under the Industrial Disputes Act.

Jullundur T. C. Society v. *Punjab State* (5), *Kerala State Handloom Weavers Co-op. Society Ltd.* v. *State of Kerala* (6), *Malabar*

(1) A. I. R. 1959 S. C, 648.
(2) A. I. R. 1959 S. C. 752.
(3) A I. R. 1957 S C. 297.
(4) A. I. R. 1967 S. C. 1091.
(5) A. I. R. 1959 Punj. 34.
(6) 1964 (1)L. L. J. 559.

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Co-op. Central Bank Ltd. v. *State of Kerala* (1), *Kendriya Sarvodya Sahokari Ltd.* v. *Industrial Tribunal* (2), *Gujrat State Co-operative Land Mortgoge Bank Ltd.* v. *Labour Court* (3), *K Subba Rao* v. *National Consumers Federation* (4) and *Rambhai* v. *Vinkar Co-op. Society* (5); referred to.

Individual Disputes are now industrial disputes after the amendment by Acts 45/65 and 45/71. Therefore under the proviso to Article 254(2) the Central Act will now prevail in view of the amendments subsequent to Madhya Pradesh Co-operative Societies Act 1960 in respect of the same subject matter.

Per Tare C. J.-M. P. Co-operative Societies Act has received the assent of the President and consequently, the provisions of this Act will prevail in M. P. even though there might be conflict with the Central enactment as per Article 254(2) of the Constitution of India.

Madhya Pradesh Industrial Relations Act 1960 will not apply so far as mines are concerned as Mines is a Central subject and it is only the Central Industrial Disputes Act which will be applicable to mines

Samyukta Khadan Majdoor Sangh Rajrandgaon v. *M/s Hindusthon Steel Ltd.* (6); referred to.

Any dispute between the Co-operative Society and its employees must be decided in accordance with the provisions of Section 55(2) of the Co-operative Societies Act and such jurisdiction is vested in the Registrar.

P. S. Nair with *O. P. Namdeo* for the petitioner.

Y. S. Dharmadhikari with *S. D. Mukherjee* for respondents on 3.

Cur. adv. vult.

ORDER

Per TARE, C.J. —In this petition under Articles 226

(1) 1964 (1) L. L. J. 557.
(2) 1967 (1) L. L. J. 270.
(3) 1968 (1) L. L. J. 670.
(4) A. I. R. 1974 Raj. 132.
(5) A. I. R. 1966 Bom. 187 (F. B.)
(6) 1973 M. P. L. J. 269.

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and 227 of the Constitution of India, the petitioner, a registered Co-operative Society, challenges the order of the Central Government, dated 6.4.1972 (Petitioner's Annexure-D) as also the award of the Central Industrial Tribunal, dated 8.9.1972 (Petitioner's Annexure-E) on the ground that the reference to the Industrial Tribunal was not maintainable in law in respect of the dismissal of the employee, by name Ramprasad and his wife, Smt. Jankibai, as they were employees of the petitioner Co-operative Society and as such, the question of their dismissal or termination of service will be governed by the provisions of the Madhya Pradesh Co-operative Societies Act, 1960, and not by the provisions of the Central Industrial Disputes Act, 1947.

The facts leading to the filing of the present writ petition lie in a narrow compass: Ramprasad and his wife, Smt. Jankibai were servants of the petitioner, Co-operative Society. They were charged with an act of misconduct. The Society appointed an Enquiry Officer, who found them guilty. Therefore, their services were terminated by the Society. The question of their dismissal was taken up by the third respondent, namely, the Samyukta Khadan Mazdoor Sangh and the Central Government, by order, dated 6.4. 972 (Petitioner's Annexure-D) referred the following question for adjudication by the Industrial Tribunal:

> "Whether the Rastriya Khandan Mazdoor Sahakari Samiti, Post Office, Dalli--Rajhara, Durg (Madhya Pradesh) is justified in terminating the services of Shri Ramprasad and Shrimati Jankibai, with effect from the 5th May,1971? If not, to what relief are these workmen entitled ?"

The said reference under S. 10 (1) (d) of the Industrial Disputes Act, 1947, was heard by the first

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respondent, the Presiding Officer of the Central Government Industrial Tribunal-cum-Labour Court. No reply was filed on behalf of the petitioner, Co-operative Society. The Industrial Tribunal, therefore, recorded the evidence of Ramprasad, who stated that the charges levelled against him and his wife Smt. Jankibai were false and they had replied to the said charges. There was no inquiry at all and neither he nor his wife was given an opportunity to defend. Therefore, the Industrial Tribunal, relying on the assertion of Ramprasad, held that there was no proper inquiry with regard to the charges made by the employer against the employees and that there was no opportunity to defend. Under the circumstances the order of termination of service was unwarranted and unjustified. The Industrial Tribunal, therefore, answered the reference to the effect that the Rastriya Khadan Mazdoor Sabakari Samiti, Durg, was not justified in terminating the service of Ramprasad and his wife, Smt. Jankibai with effect from 5.5.1971. Accordingly, they were ordered to be reinstated in service and were directed to be paid their wages and other dues with effect from 5.5.1971.

It does not appear that the question as to whether the matter is governed by the Madhya Pradesh Co-operative Societies Act, 1960 or the Central Industrial Disputes Act, 1947, was at all raised before the Industrial Tribunal nor does it appear to have been raised before the Central Government, which made a reference to the Industrial Tribunal under S.10(d) of the Industrial Disputes Act, 1947. However, it appears that the petitioner had raised such an objection before the Assistant Labour Commissioner, *vide* Annexure-C. For this reason we have permitted the petitioner to raise this question before us besides the other question on merits.

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Before dealing with the main question involved in the present writ petition, we may dispose of the two other points, namely (i) that the matter being governed by the terms of the contract, the petitioner could dispense with the services of employees at pleasure and that as inquiry of any sort was necessary, and (ii) that the dispute not having been raised by the employees with the employer, the reference by the Central Government was not tenable and as such, the award of the Industrial Tribunal was without jurisdiction.

As regards the first point, the learned counsel for the petitioner invited attention to a Division Bench decision of this Court in *Krishna Chandra Gupta* v. *Registrar, Co-operative Societies* (1). In that case the facts were that the petitioner, Krishna Chandra Gupta was appointed to the post of Assistant Manager-cum-Accountant by an order passed by the Chairman of the Board of Directors. Some months after his appointment when certain mistakes and irregularities committed by him were brought to the notice of the Board of Directors, the petitioner was cautioned to be careful. Later on, Bhagwatprasad, a peon of the Bank, made a complaint to the Chairman that the petitioner had abused him and had slapped him. Another complaint was made by M/S.N.G. Brothers, Bilaspur, with regard to the settlement of a loan of Rs. 500/-. The working Committee of the Bank, therefore, passed a resolution suspending the petitioner. The resolution of the Working Committee was communicated to the petitioner and he was asked to express his regret for his misbehaviour towards Bhagwatprasad. In that letter a reference was also made to the complaint made by M/s N.G. Brothers, Bilaspur, The petitioner was called upon to furnish his explanation. He did not reply. He, however, sent a letter tendering his

(1) A.I.R. 1963 M.P. 298.

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apology for having slapped Bhagwatprasad and also expressed his regret for the acts against which M/S. N.G. Brothers, Bilaspur had complained. Thereafter the Working Committee passed a resolution dismissing the petitioner. It was contended on behalf of the petitioner that the Working Committee could not have dismissed the petitioner without giving him an opportunity and without holding an inquiry. That contention was negatived. The Division Bench laid down that conditions of service of employees of the Bank must be ascertained from the byelaws themselves. If the byelaws do not provide for the procedure to be followed, then the ordinary law of master and servant will apply. It was not the petitioner's contention that the dismissal was in violation of any byelaws or any statutory rules framed under the Co-operative Societies Act, 1912. There can be no doubt that if the provisions of the Madhya Pradesh Co-operative Societies Act, 1960, be held applicable, in that event, the matter will be governed by the statutory rules framed by the State Government or the byelaws framed by the Co-operative Society or any specific terms of contract. If we hold the M.P. Co-operative Societies Act, 1960, applicable to the instant case, in that event, we may have to examine this aspect. However, if we find that the Central Industrial Disputes Act, 1947, applies, in that event, different considerations will prevail. In our opinion, this case relied on by the learned counsel for the petitioner does not at all advance the petitioner's case any further.

The second point urged on behalf of the petitioner was that the petitioner never raised a dispute with the employer and consequently, the Central Government had no power to refer the dispute for adjudication by the Industrial Tribunal. For this

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proposition reliance was placed on the pronouncement of their Lordships of the Supreme Court in *Sindhu Resettlement Corporation Ltd.* v. *Industrial Tribunal of Gujrat & Ors.* (1). In that case their Lordships in paragraph 4 of the Judgment observed as follows:...

> "No doubt, the order of the State Government making the reference mentions that the Government had considered the report submitted by the Conciliation Officer under sub-section (4) of Section 12 of the Industrial Disputes Act, in respect of the dispute between the appellant and workmen employed under it, over the demand mentioned in the Schedule appended to that order; and, in the Schedule, the Government mentioned that the dispute was that of reinstatement of respondent No. 3 in the service of the appellant and payment of his wages from 21st February, 1958. It was urged by Mr. Gopalkrishnan on behalf of the respondents that this Court cannot examine whether the Government, in forming its opinion that an industrial dispute exists, came to its view correctly or incorrectly on the material before it. This proposition is, no doubt, correct; but the aspect that is being examined is entirely different. It may be that the Conciliation Officer reported to the Government that an industrial dispute did exist relating to the reinstatement of respondent No. 3 and payment of wages to him from 21st February, 1958, but when the dispute came up for adjudication before the Tribunal, the evidence produced clearly showed that no such dispute had ever been raised by either respondent with the management of the appellant. If no dispute at all was raised by the respondents with the management, any request sent by them to the Government would only be a demand by them and not an industrial dispute between them and their employer. An industrial dispute, as defined, must be a dispute between employers and employers, employers and workmen, and workmen and workmen. A mere demand to a Government, without a dispute being raised by the workmen with their employer, cannot become an

(1) A. I. R. 1968 S.C. 529.

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industrial dispute. Consequently, the material before the tribunal clearly showed that no such industrial dispute, as was purported to be referred by the State Government to the tribunal, had ever existed between the appellant Corporation and the respondents and the State Government, in making a reference, obviously committed an error in basing its opinion on material which was not relevant to the formation of opinion. The Government had to come to an opinion that an industrial dispute did exist and that opinion could only be formed on the basis that there was a dispute between the appellant and the respondents relating to reinstatement."

There can be no doubt that before a Central or a State Government refers a dispute to the Tribunal for adjudication, the dispute must be raised by the concerned parties with the employer or the employee, as the case may be. In the absence of such dispute being raised between the concerned parties, a reference to the Industrial Tribunal will not be tenable. There can be no doubt about that proposition in view of the authoritative pronouncement of their Lordships of the Supreme Court. It is, therefore, necessary to examine whether such a dispute was raised by the employees with the employer. It was necessary to raise such a dispute if we ultimately hold that the provisions of the Central Industrial Disputes Act, 1947, apply. However, if we hold the provisions of the M.P. Co-operative Societies Act, 1960, applicable; in that event, raising of such a dispute with the employer would not be necessary. It is to be noted that the employee's case had been taken up by the third respondent, the Samyakta Khadan Mazdoor Sangh. From the recital in the order of reference, dated 6.4.1972 (Petitioner's Annexure--D), it is clear that the management of the Rastriya Khadan Mazdoor Sahakari Samiti contractors and their workmen represented by the Samyukta Khadan Mazdoor Sangh had jointly applied to the

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Central Government under sub-section (2) of S. 10 of the Industrial Disputes Act, 1947, for a reference to the Industrial Tribunal of an industrial dispute that existed between them. Hence, the Central Government made the reference. The very fact that the petitioner applied for a reference of the dispute with the employees to the Industrial Tribunal would show that the employees had approached the employer. In view of these facts the mere failure of the third respondent to produce the correspondence showing a demand for justice to be made on the employer, would not, in our opinion, attract the principle laid down by their Lordships of the Supreme Court in *Sindhu Resettlement Corporation Ltd.* v. *Industrial Tribunal of Gujrat (supra)*. It was not that the employees or the Union, namely, the third respondent, who represented them directly approached the Assistant Labour Officer or the Central Government. The recital in the said notice is a clear indication of the fact that a demand was made by the employees through their Union on the employer and as no settlement could be arrived at, the Union and the employer made a joint request to the Central Government to refer the dispute to the Industrial Tribunal for adjudication. This point raised on behalf of the petitioner, in our opinion, is without substance and consequently, we reject this contention.

Coming to the question as to which of the two Acts applies to the instant case, we were handicapped on account of the fact that the petitioner has failed to produce its byelaws. The purpose for which the petitioner Society was formed is to raise contract labour. This work previously used to be done by private contractors. But in pursuance of a settled policy of the Government, the said work has been entrusted to Co-operative Societies. It was for this purpose that the petitioner Co-operative Society was

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formed. Its object as such was to introduced the principle of co-operation in industrial matters. But the essential feature is that the activity of the Co-operative Society is in respect of an industrial matter and not exclusively for the purpose of introducing co-operation. This aspect, in our opinion, will have a bearing on the question for consideration before us. We may next examine the provisions of the two Acts.

Section 4 of the M. P. Co-operative Societies Act, 1960, states as to what Societies may be registered. The said provision is as follows:

> "Subject to the provisions of this Act, a society which has as its objects the promotion of the economic interest of its members or their general welfare in accordance with co-operative principles or a society established with the object of facilitating the operations of such a society, may be registered under this Act."

The requirements of the Section are that a Society must have as its objects the promotion of the economic interest of its principals or their general welfare in accordance with the co-operative principles, or in the alternative the society must have been established with the object of facilitating the operations of such a society. In either of the events such a society can be registered. In the absence of the necessary material, we are unable to hold as to for what objects the petitioner society was formed. But for the purposes of this petition we assume that its object was one of the three mentioned in S. 4 of the Act. Section 10 of the Act classifies the Societies into ten different categories. In the absence of the necessary material, we are unable to hold as to which is the category of the petitioner Society. However, we may assume that it belongs to category No. 10, that is, a General Society. It cannot be

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classified in any one of the remaining nine categories. Section 55 of the Act empowers the Registrar to determine terms of employment in Societies. It is as follows:

"S 55.-(1) The Registrar may from time to time frame rules governing the terms of employment and working conditions in a society or a class of societies and the society or the class of societies to which such terms of employment and of working conditions are applicable shall comply with the order that may be issued by the Registrar in this behalf.

(2) Where a dispute including a dispute regarding terms of employment, working conditions and disciplinary action taken by a Society, arises between a society and its employees, the Registrar or any officer appointed by him, not below the rank of Assistant Registrar, shall decide the dispute and his decision shall be binding on the society and its employees"

The said section provides for settlement of disputes between a Society and its employees. Section 64 of the Act provides for settlement of such disputes. It is as follows:

"S.64-Disputes.-(1) Notwithstading anything contained in any other law for the time being in force, any dispute touching the constitution, management or business of a society or the liquidation of a society shall be referred to the Registrar by any of the parties to the dispute if the parties thereto are among the following:-

(a) a society, its committee, any past committee, any past or present officer any past or present agent, any past or present servant or a nominee, heirs or legal representatives of any deceased officer, deceased agent or deceased servant of the society; or the liquidator of the society;

(b) a member, past member or a person claiming through

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a member, past member or deceased member of a society or of a society which is a member of the society:

(c) a person other than a member of the society who has been granted a loan by the society or with whom the society has or had business transactions and any person claiming through such a person;

(d) a surety of a member, past member or deceased member or a person other than a member who has been granted a loan by the society whether such a surety is or is not a member of the society;

(e) any other society or the liquidator of such a society; and

(f) a creditor of a society.

(2) For the purposes of sub-section (1), a dispute shall include-

(i) a claim by a society for any debt or demand due to it from a member, past member or the nominee, heir or legal representative of a deceased member, whether such debt or demand be admitted or not;

(ii) a claim by a surety against the principal debtor where the society has recovered from the surety any amount in respect of any debt or demand due to it from the principal debtor as a result of the default of the principal debtor whether such debt or demand be admitted or not;

(iii) a claim by a society for any loss caused to it by a member, past member or deceased member, any officer, past officer or deceased officer, any agent, past agent or deceased agent, or any servant; past servant or deceased servant, or its committee, past or present, whether such loss be admitted or not;

(iv) a question regarding rights, etc., including tenancy

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rights between a housing society and its tenants or members; and

(v) any dispute arising in connection with the election of any officer of the society.

Provided that any matter arising out of election proceeding between the period commencing from the announcement of election programme and ending with the declaration of results shall not be deemed to be dispute for the purpose of this clause.

(3) If any question arises whether a dispute referred to the Registrar is a dispute, the decision thereon of the Registrar shall be final and shall not be called in question in any Court."

By this Section the decision of the Registrar is made final under the Act, which cannot be called in question in any Court. Further on S. 77 of the Act provides for appeal, which is as follows:

"S. 77. Appeals.- (1) Save where it has been otherwise provided, an appeal shall lie from every original order under this Act or the rules thereunder--

(a) if such order is passed by an officer subordinate to the Registrar, other than Additional Registrar or Joint Registrar, whether or not the officer passing the order is invested with the powers of the Registrar-to the Registrar;

(b) if such order is passed by the Registrar, Additional Registrar or Joint Registrar--to the State Government.

(2) A second appeal shall lie against any order passed in first appeal by the Registrar, Additional Registrar or Joint Registrar to the State Government on any of the following grounds and no other, namely;—

(i) that the order is contrary to law; or

(ii) that the order has failed to determine some material

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issue of law; or

(iii) that there has been a substantial error or defect in the procedure as prescribed by this Act which may have produced error or defect in the decision of the case upon merits.

(3) Every appeal shall be presented in the prescribed manner to the appellate authority concerned within 30 days of the date on which the order appealed against was communicated to the party affected by the order:

Provided that in computing the period of limitation under this sub-section the time requisite for obtaining a copy of the order appealed against shall be excluded.

(4) Where an application for membership has been rejected under sub-section (4) of section 19 an appeal shall lie in such manner, and to such authority, as may be prescribed and the society to which the application for membership relates shall abide by such order as may be passe on such appeal.

Section 77-A- Bar of appeal, Revision or Review in respect of certain orders regarding Co-operative Bank.- Notwithstanding anything to the contrary contained in this Act, where with previous sanction in writing or on the requisition of the Reserve Bank of India—

(i) an order for the winding up of a Co-operative Bank is made, or

(ii) a scheme of compromise or arragement or of re-construction or reorganisation or amalgamation is made or is given effect to, or

(iii) an order for the supersession of the committee or managing body by whatever name called of a Co-operative Bank and the appointment of an Administrator therefor has been made,

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No appeal, revision or review there against shall lie or be permissible, and such order or the sanction or requisition of the Reserve Bank shall not be liable to be called in question. Section 80 of the Act provides for revisions.

It is as follows:—

"S. 80.—Power of State Government and the Registrar to call for proceedings of subordinate officers and to pass orders thereon. Subject to the provision of section 77-A, the State Government or the Registrar may call for and examine the record of any enquiry or the proceedings of any subordinate officer for the purpose of satisfying itself or himself as to the legality or propriety of any decision or order passed and as to the regularity of the proceedings of such officer. If in any case, it appears to the State Government or the Registrar that any decision or order or proceedings so called for should be modified annulled or reversed the State Government or the Registrar, as the case may be, may pass such order thereon as to it or he may deem fit;

Provided that-

(i) no application for revision shall be entertained against an order appealable under this Act;

(ii) no such application shall be entertained unless presented within 45 days from the date of order under challenge;

(iii) no order under this section shall be made to the prejudice of any party unless such party has had an opportunity of being heard."

Section 82 of the Act bars the jurisdiction of Courts. The same is as follows:-

"S. 82.-(1) Save as provided in this Act no civil or revenue Court shall have any jurisdiction in respect of—

(a) the registration of a society or of byelaws or of an amendment of a bye-law;

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(b) the removal of a committee and the management of the society after such removal;

(c) any dispute required to be referred to the Registrar or his nominee or Board of nominees;

(d) any matter concerning the winding up and the dissolution of a society.

(2) While a society is being wound up no suit or other legal proceedings relating to the business of such society shall be proceeded with, or instituted against the liquidator as such or against the society or any member thereof except by leave of the Registrar and subject to such terms as he may impose.

(3) Save as provided in this Act no order, decision or award made under this Act shall be questioned in any Court on any ground whatsoever."

There can be no doubt that if the matter be governed by this Act, the procedure as laid down by the said Sections will have to be followed and the third respondent in that event could not have approached the Central Government for a reference under the Industrial Disputes Act, 1947.

Further on S. 93 of the Act provides that certain other Acts will not apply to Co-operative Societies. The said Section is as follows :

"S. 93.--Certain other Acts not to apply to Co--operative Societies.-Nothing contained in the Madhya Pradesh Shops and Establishments Act, 1958, (25 of 1958), the Madhya Pradesh Industrial Workmen (Standing Orders) Act. 1959 (19 of 1959) and the Madhya Pradesh Industrial Relations Act, 1960 (27 of 1960) shall apply to a society registered under this Act."

It is to be noted that the said section provides for exclusion of the Madhya Pradesh Industrial Relations Act, 1960, and it does not mention the Central Industrial Disputes Act, 1947. This Act had received

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the assent of the President and consequently, the provisions of this Act will prevail in Madhya Pradesh even though there might be a conflict with a Central enactment as per Article 254(2) of the Constitution of India. Similarly, the Madhya Pradesh Industrial Relations Act, 1960, had also received the assent of the President and it will prevail in the State of Madhya Pradesh inspite of any conflict with any Central Enactment, in respect of the Concurrent List. But, so far as mines are concerned, the said Act will not at all apply as mining is a Central subject and it is only the Central Industrial Disputes Act, 1947, which will be applicable to mines, as laid down by a Special Bench of this Court in *Samyukta Khadan Mazdoor Sangh, Rajnadgaon* v. *M/s. Hindusthan Steel Limited, Ranchi* (1).

The question of applicability of the two Acts had come up for consideration before a Division Bench of this Court in *Sagar Motor Transport Karmachari Union Sagar* v. *The Amar Kamgar Passenger Transport Company, Co-operative Society, Sagar* (2). It is necessary for us to examine the reasoning adopted by the members of the Division Bench. For the sake of convenience, we may reproduce the observations of the Division Bench as follows;

> "Having heard learned counsel for the parties, we have formed the opinion that this application must be dismissed. The M. P. Co-operative Societies Act, 1960, was enacted in 1960. It received the assent of the President on 28th Aprial 1961. The assent was first published in the Madhya Pradesh Gazette on 12th May, 1961. That Act came into force on 15th May, 1962. The M. P. Co-operative Societies Act, 1960, is "an Act to consolidate and amend the laws relating to Co-operative Societies in Madhya Pradesh," section 55(2) of the Act runs as follows:-

(1) 1973 M. P. L. J. 269. (2) 1968 M. P. L. J. 837.

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'55. (2) Where a dispute including a dispute regarding terms of employment, working conditions and disciplinary action taken by a society, arises between a society and its employees, the Registrar or any officer appointed by him, not below the rank of Assistant Registrar, shall decide the dispute and his decision shall be binding on the society and its employees.' The language of this provision is clear enough to show that under the Act, which is a special enactment dealing with the special subject of co-operative societies, a dispute with regard to termination of services of an employee of a co-operative society can be decided only by the Registrar or any officer appointed by him, not below the rank of Assistant Registrar. Section 55(2) contains a special provision for adjudication of disputes between a co-operative society and its employees regarding terms of employment, working conditions and disciplinary action. It is no doubt true that the definition of "industrial dispute" given in section 2(k) of the Industrial Disputes Act, 1947, is wide enough to include disputes between a co-operative society and its employees regarding the terms of employment, working conditions and disciplinary action. The Industrial Disputes Act, 1947, is also a special enactment dealing with the special subject of industrial disputes and their adjudication. But whereas the Industrial Disputes Act, 1947, deals generally with Industrial disputes arising between "employers" and "employees" as defined in that Act, section 55(2) of the M. P. Co-operative Societies Act is concerned only with the adjudication of disputes between a co-operative society and its employees. There is no provision in the Industrial Disputes Act, 1947, that disputes arising between a body or a society governed by a special enactment and its employees, also governed by that special enactment, with regard to terms of employment, working conditions and disciplinary action shall be adjudicated upon in accordance with the Industrial Disputes Act, 1947, notwithstanding the fact that a special provision has been made for adjudication of those disputes in the special enactment regulating the society or body and its employees.

There is thus a conflict between the Industrial Disputes

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Act, 1947, a Central Law, and the M. P. Co-operative Societies Act, 1960, a law by the State in regard to the adjudication of disputes between a co-operative society and its employees regarding terms of employment, working conditions and disciplinary action. But as "industrial and labour disputes" is one of the matters enumerated in the Concurrent List and the M. P. Co-operative Societies Act, 1960, received the assent of the President, section 55(2) of the Act must prevail in the State over the provisions of the Industrial Disputes Act, 1947, in regard to disputes between a co-operative society and its employees ragarding terms of employment, working conditions and disciplinary action. This is clear from Article 254(2) of the Constitution."

"Learned counsel referred us to the decisions in *Co-operative Milk Societies Union* v. *W. B. State* (1) and *Jullundur T. C. Society* v. *Punjab Society* (2) where it has been held that the provisions of the Bengal Co-operative Societies Act, 1940, and the Punjab Co-operative Societies Act, 1955, have to yield to the provisions of the Industrial Disputes Act, 1947. This conclusion of the Calcutta and Punjab High Courts proceeded on the reasoning that the Industrial Disputes Act, 1947, was a special enactment dealing with the special subject of industrial disputes and the relevant Co-operative Societies Act was, on the other hand, a general enactment which must yield to the special provisions of the Industrial Disptues Act, 1947. It is not nececssary to examine this reasoning. It is sufficient to point out that section 55(2) of the M. P. Co-operative Societies Act, 1960, and the material sections of the Bengal Co-operative Societies Act, 1940, and the Punjab Co-operative Societies Act, 1955, differ *to to coelo* and thus render the two decisions cited on behalf of the petitioner altogether inapplicable in the present case. In those Acts there is no provision analogous to section 55(2) of the Local Act. It may, however, be pointed out that both under the Bengal Co-operative Societies Act and the Punjab Co-operative Societies Act a dispute regarding disciplinary action taken by a co-operative society against its employees is expressly excluded from the purview of the Registrar's jurisdiction.

(1) A. I. R. 1958 Cal. 373. (2) A. I. R. 1959 Punj. 34.

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Learned counsel also urged that section 93 of the Act, which said that certain Acts including the M. P. Industrial Relations Act, 1960, shall not apply to a society registered under the Act, made no mention whatsoever, of the Industrial Disputes Act, 1947, and that therefore, it must be taken that the Act of 1947, would apply to a Co-operative Society. We are unable to accept this contention. The omission of any reference in Section 93 to the Industrial Disputes Act 1947, cannot be read as a positive direction that the Industrial Disputes Act, 1947, would apply to a society registered under the Act, even though that Act, as pointed out earlier, does not regulate adjudication of disputes between a co-operative society and its employees regarding terms of employment, working conditions and disciplinary action. On the other hand, the provision in section 93 of the Act, that the M. P. Industrial Relations Act, 1960, shall not apply to a society registered under the Act only emphasizes the fact that a dispute falling under section 55(2) of the Act can be decided only by the authorities pointed out therein even though the dispute may be capable of adjudication under the M P. Industrial Relations Act, 1960, as an industrial dispute."

It is this reasoning, which we are required to examine in the present case. The Division Bench, which heard the present petition on an earlier occasion has referred the entire case to the Full Bench and not merely any stated question of law. We may next examine the provisions of the Industrial Disputes Act, 1947. Section 2(a) of the Act defines the 'appropriate Government' to mean (i) in relation to any industrial dispute concerning.....

> (a) any industry carried on by or under the authority of the Central Government .. (b) or by a railway company or concerning any such controlled industry as may be specified in this behalf by the Central Government, (c) .. (d) or in relation to an industrial dispute concerning the Industrial Finance Corporation of India established under section 3 of the Industrial Finance Corporation Act, 1948, or the employees' State Insurance Corporation

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established under S. 3 of the Employees' State Insurance Act, 1948, (34 of 1948) or the "Indian Airlines" and "Air India" Corporations established under S. 3 of the Air Corporations Act, 1953, or the Life Insurance Corporation of India established under S. 3 of the Life Insurance Corporations Act, 1956 or (e) "the Agricultural Refinance Corporation established under S. 3 of the Agricultural Refinance Corporation Act, 1963, (10 of 1963), or the Deposit Insurance Corporation established under S. 3 of the Deposit Insurance Corporation Act, 1961 (47 of 1961) or, the Unit Trust of India established under S. 3 of the Unit Trust of India Act, 1963 (52 of 1963) or "(f) the Food Corporation of India established under S. 3, or a Board of management established for two or more contiguous States under S. 16 of the Food Corporation Act, 1964, or (g) a banking or an Insurance company, a mine, an oil-field, (h) a catonment Board, (i) or a major port, the Central Government, and

(ii) in relation to any other industrial dispute, the State Government."

Section 2 (j) of the Act defines an "industry" as under:

"Industry" means any business, trade undertaking manufacture or calling of employers and includes any calling, service, employment. handicraft, or industrial occupation or avocation of workmen;"

Evidently, an industry will not include the activities of a Co-operative Society, which may be in the nature of a business. Section 2(k) of the Act defines an "industrial dispute" in the following words:

"industrial dispute' means any dispute or difference between employers and employers or between employers and workmen, or between workmen and workmen which is connected with the employment or non-emplyment or the terms of employment or with the conditions of labour, of any person."

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As was observed by the Division Bench in *Sagar Motor Transport Karmachari Union, Sagar*, v. *The Amar Kamgar Passenger Transport Company, Co-operative Society, Sagar (supra)*, the deifintion of 'industrial dispute' may be wide enough to include any dispute between the employer and the employee, yet Section 55(2) of the M. P. Co-operative Societies Act, 1960, being in a special provision in respect of employer and employee in a Co-operative Society, the same will prevail if it be held that the M. P. Co-operative Societies Act, 1960, applies to such a dispute.

At this stage we might advert to the pronouncement of their Lordships of the Supreme Court in *Co-operative Central Bank Ltd.* v. *Additional Industrial Tribunal, Andhra Pradesh* (1), wherein their Lordships made the following observations:

> "The Tribunal and the High Court, in rejecting the plea taken on behalf of the Banks, expressed the view that the disputes actually referred to the Tribunal were not capable of being decided by the Registrar of the Co-operative Societies under section 61 of the Act, and, consequently, the reference to the Industrial Tribunal under the Industrial Disputes Act was competent. Learned counsel appearing on behalf of the Banks took us through the provisions of the Act to indicate that, besides being a local and special Act, it is a self-contained Act enacted for the purposes of successful working of Co-operative Societies, including Co-operative Banks, and there are provisions in the Act, which clearly exclude the applicablity of other laws if they happen to be in conflict with the provisions of the Act. It is no doubt true that the Act is an enactment passed by State Legislature which received the assent of the President, so that if any provision of a Central Act, including the Industrial Disputes Act, is repugnant to any provision of the Act, the provision of the Act will prevail and not the provision of the Central Industrial Disputes Act,

(1) A. I. R. 1970 S C. 245.

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1947. The general proposition urged that the jurisdiction of the Industrial Tribunal under the Industrial Disputes Act will be barred if the disputes in question can be competently decided by the Registrar under section 61 of the Act is, therefore, correct and has to be accepted. The question, however, that has to be examined is whether the Industrial dispute referred to the Tribunal in the present cases was such as was required to be referred to the Registrar and to be decided by him under section 61 of the Act."

Their Lordships laid down that if a dispute be capable of a decision by the Registrar under the provisons of the Co-operative Societies Act, the same cannot be tried by an Industrial Tribunal under the Industrial Disputes Act. The two jurisdictions would be exclusive of each other.

Further on S. 10 of the Act provides for reference of disputes to Boards, Courts or Tribunals and the subsequent Sections make provision for the procedure to be followed, including duties of conciliation officers, Boards, Courts and Tribunals, the manner of arbitration and manner of adjudication. It is not necessary for us to refer to those provisions in great details. Previously, the Industrial Disputes Act, 1947 contemplated only a collective dispute between the employer and employees. But, by introducing section 2-A, as per the Industrial Disputes (Amendment) Act, 1955, which came into force with effect from 1. 4. 1955. dismissal of an individual workman is now considered to be an industrial dispute The said section is as follows:

"S.2-A. Dismissal, etc., of an individual workman to be deemed to be an industrial dispute —Where any employer discharges, dismisses, retrenches or otherwise terminates the services of an individual workman, any dispute or difference between that workman and his employer connected with, or arising out of, such discharge, dismissal,

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retrenchment or termination shall be deemed to be an industrial dispute notwithstanding that no other workman nor any union of workman is a party to the dispute."

Thus there can be no doubt that the dismissal of an individual workman could become an industrial dispute as per the amended provision.

The learned Advocate General for the respondents invited our attention to the Supreme Court case of *The Secretary Madras Gymkhana Club Employees, Union* v. *The Management of the Gymkhana Club* (1) and urged that the said case will be distinguishable inasmuch as a Club may not be an industry or an undertaking, it was urged that the kind of activity carried on by the petioner Society, namely, running of contract labour, would clearly be a trade or a business activity, which would necessarily involve organisation of labour for raising coal from the mines. Therefore, it was suggested that the activity of the petitioner Society should be considered to be an industrial activity. In this connection we may observe that every activity would not be an industrial activity. In *The Management of Safdar Jung Hospital, New Delhi* v. *Kuldip Singh Sethi* (2), it was contended on behalf of the respondent that the hospital was an industry. That contention was negatived by their Lordships of the Supreme Court and the appeal of the hospital was allowed.

We may consider this matter from another point of view. The Industrial Disputes Act, 1947, and the M. P. Industrial Relations Act, 1960, have been enacted by the Parliament and the State Legislature respectively under Item 22 of the Concurrent List contained in Schedule VII, List III. The M. P. Cooperative Societies Act, 1960, has been enacted by the State Legislature under Item No. 32 of List II

(1) A. I. R. 1968 S. C. 554. (2) A. I. R. 1970 S. C. 1407.

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of Schedule VII, that is, the State List, which is within the ordinary power of the State Legislature and regarding which the Parliament would not ordinarily legislate except under the conditions mentioned under Article 246 of the Constitution of India. Article 254 (1) of the Constitution of India provides that if there be repugnancy between a law made by the Legislature of a State and a law made by Parliament, which the Parliament is competent to enact or to any provision of any existing law with respect to one of the matters enumerated in the Concurrent List, then, subject to the provisions of clause (2), the law made by Parliament, shall prevail. However, subclause (2) of Article 254 of the Constitution provides that where a law made by the Legislature of a State with respect to one of the matters enumerated in the Concurrent List contains any provision repugnant to the provisions of an earlier law made by Parliament or an existing law with respect to that matter, then, the law so made by the Legislature of such State shall, if it has been reserved for the consideration of the President and has received his assent, shall prevail in that State. The industrial dispute is in the Concurrent List; while the law relating to Cooperative Societies would be a State subject. As such, the conflict would be between a law made by the Legislature of a State in its exclusive power to legislate on the State subject on the on hand and the law made by the Parliament on a matter enumerated in the Concurrent List. As such, by virtue of Article 254 (2) of the Constitution, the law made by the Legislature of the State will prevail in the State of Madhya Pradesh even though there may be a conflict between the State law and the Central Industrial Disputes Act, 1947.

There can be no doubt that an activity may be connected with an industry. But the nature of the

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activity must be industrial in nature. Judged in this light, there can be no doubt that the activity of the petitioner Society is to raise contract labour. But, for that purpose it has organised itself into a Co-operative Society and so far as its internal organisation is concerned, it is governed by the provisions of the Madhya Pradesh Co operative Societies Act, 1960. We may note that Section 55(2) of the M. P. Co-operative Society Act, 1960, is a special provision, which is not to be found in any of the other States' Co-operative Societies Acts or the Central Co-operative Societies Act, 1912. As a special provision has been made in this State enactment, which must prevail in the State by virtue of Article 254(2) of the Constitution of India, we are of the opinion that any dispute between the Co-operative Society and its employees, must be decided in accordance with the provisions of S. 55(2) of the Act and such jurisdiction is vested in the Registrar. Therefore, we would approve of the reasoning of the Division Bench of this Court in *Sagar Motor Transport Karmachari Union, Sagar* v *The Amar Kamgar Passenger Transport Company, Co-operative Society, Sagar* (1) and following the dictum of their Lordships of the Supreme Court in *Co-operative Central Bank Ltd.* v. *Additional Industrial Tribunal, Andhra Pradesh* (2) we would hold that where dispute is triable by the Registrar of Co-operative Societies, its decision by an Industrial Tribunal would altogether be excluded. In this view of the matter, we would affirm the view of the Division Bench of this Court in *Sagar Motor Transport Karamachari Union, Sagar,* v. *The Amar Kamgar Passenger Transport Company, Co-operative Society, Sagar (supra).*

As a result of the discussion aforesaid we hold that the dispute between the petitioner society and

(1) 1968 M.P.L.J. 837. (2) A. I. R. 1970 S. C. 245.

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the petitioner's empolyees, namely, Ramprasad and Shrimati Jankibai was not an industrial dispute, which could have been referred to the Industrial Tribunal under S. 19(1)(d) of the Industrial Dispute Act, 1947. In this view of the matter, the reference and the award of the Industrial Tribunal are rendered as being without jurisdiction. We further hold that the said dispute was trible by the Registrar or his nominee under S. 55(2) of the M. P. Co-operative Societies Act, 1960. We therefore, quash the reference (Petitioner's Annexure-D) dated 4-6-1972, as also the award of the Industrial Tribunal dated 8-9-1972 (Petitioner's Annexure-E). In all properiety the question of termination of services of Ramprasad and his wife Smt. Jankibai is to be decided by the Registrar or his nominee under S. 55(2) of the M. P. Co-operative Societies Act, 1960. Steps in that behalf might be taken by any person aggrieved.

Consequently, this petition succeeds and is accordingly allowed and the order of reference and the award of the Industrial Tribunal are accordingly quashed. However, under the circumstances, we direct that there shall be no order as to costs of this Court. The outstanding amount of the security deposit shall be refunded to the petitioner.

PER C. P. SEN J.:- I had the advantage of going through the opinion recorded by Hon'ble the Chief Justice but with great respect, I regret I am unable to agree with the views expressed by him. I, therefore, proceed to record my reasons in detail separately.

This case has come up before this Full Bench on a reference by a Division Bench to reconsider mainly, the decision of a Division Bench of this

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Court in *Sagar Motor Transport Karmachari Union, Sagar* v. *The Amar Kamgar Passenger Transport Company and another* (1), that is whether Section 55(2) of the M. P. Co-operative Societies Act, 1960 (hereinafter referred to as the Co-operative Act), completely ousts the jurisdiction of the industrial Courts under the Industrial Disputes Act, 1947, in respect of all industrial disputes in the State of M. P., concerning employees of a Co-operative Society.

The petitioner is a Society registered under the M. P. Co-operative Act and it carried on business of raising iron ores. One Ramprasad and his wife Smt. Jankibai were employed as raising majdoors in its Kokan Mines at Dalli-Rajhara, of Durg District. They were not members of the petitioner Society. Their services were terminated with effect from 5.5.1971. They therefore raised industrial dispute through the respondent No. 3 Union before the Assistant Labour Commissioner, Raipur challenging their terminations for certain misconducts under Rule 14 (3)(a) and (h) of the Industrial Employment (Standing Orders) Central Rules, 1946, on the ground that no enquiry was held and no opportunities were given. The application was opposed by the petitioner Society. However, the petitioner and the respondent No. 3 jointly applied to the Central Government under sub-section (2) of section 10 of the Industrial Disputes Act, 1947, for reference of the industrial dispute to an Industrial Tribunal Accordingly, the Central Government referred the dispute to the Central Government Industrial Tribunal, Jabalpur on 6.4.1972 under section 10(1)(d) of the Act. The respondent No. 1 after holding an enquiry, gave his award on 8.9.72, setting aside the termination orders of the said workmen Ramprasad and his wife Smt. Jankibai and the ground that there was no proper

(1) 1968 M P.L.J. 837 = A. I. R. 1969 M. P. 46.

enquiry and no opportunities were given to the workmen. The petitioner Society was proceeded *ex-parte* as it remained absent inspite of service of notice.

Againt this award, the petitioner has filed this petition under Articles 226 and 227 of the Constitution. Apart from the objections that the respondent No. 2, Union of India, had no jurisdiction to refer the dispute under section 10 nor the respondent No. 1, Central Government Industrial Tribunal, could have adjudicated the dispute under the Industrial Disputes Act between the petitioner Society and its employees, the dispute could only be decided by the Registrar under section 55(2) of the Co-operative Act, by relying on 1968 M. P. L. J. 837 (supra); the petitioner has further raised various other objections. It has been contended that (i) since the petitioner Society has not framed any rules or bye-laws about the service conditions of its employees, employment is purely at pleasure, governed by law of master and servant and hence dispute about termination could not be an industrial dispute; (ii) the employees having not raised their disputes with their employer petitioner Society first, the Central Government could not have referred the disputes to the Central Government Industrial Tribunal by relying on *S. R. Corpn.* v. *Industrial Tribunal, Gujrat* (1); (iii) in any case, the reference could have been made by the State Government, as the state Government is the appropriate authority for the petitioner Society registered under the Co-operative Act; and (iv) the petitioner Society was not given proper apportunity to defend its case by the Industrial Tribunal.

Before going into the main question it would be better to dispose of the various other contentions. Admittedly, the petitioner Society is carrying on

(1) A. I. R. 1968 S. C. 529

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business of raising iron ores from the mines i.e. mining. There can be no dispute that mining is an industry and any employee engaged in the mining operations is a workman in the mining industry. Any dispute between such employer and its employees would be industrial dispute within the meaning of the Industrial Disputes Act. Such minerals as declared by special enactment are in the central list of the Constitution and as such the Central Government is the appropriate Government for reference of such dispute under section 10 of the Act. The Supreme Court in *G. V. Ramanaiah* v. *Superintendent, Central Jail* (1) has defined 'appropriate Government' to be one within whose legislative competence the subject matter lies. Besides, under the Mines and Minerals (Regulation and Development) Act, 1957, the control and development of all mines and minerals specified therein, including iron ores, are with the Central Government and so the Central Government is the 'appropriate Government' for referring such dispute. Further, a Division Bench of this Court in *Sanmyukta Khadan Majdoor Sangh* v. *M/s Hindusthan Steel Ltd.* (2) has held that 'workmen' in mines are governed by the Industrial Disputes Act, 1947 and not by the M. P. Industrial Relations Act, 1960. Therefore the reference to the Industrial Court was proper and validly made by the proper authority under the Industrial Disputes Act.

The petitioner Society having itself taken the action under the Industrial Employment (Standing Orders) Central Rules, it is not now open to it to say that Industrial Disputes Act has no application. The employees of the petitioner Society having raised the dispute before the Assistant Labour Commissioner and both the parties having jointly moved the Central Government for referring the dispute to the Industrial

(1) A. I. R. 1974 S. C. 31. (2) 1973 M. P. L. J. 269

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Tribunal, it is too late in the day to contend that the employees did not raise the dispute with the employer before the reference was made by the Central Government. In *S. R. Corpn.* v. *Industrial Tribunal Gujrat (supra)*, it has been held by the Supreme Court that before the Government can make a reference, the dispute is to be raised by the employee with his employer and then only reference can be made. In that case the only dispute raised by the retrenched employee was about the retrenchment compensation but the Government made a reference for reinstatement. That case has no application here. The reference in this case is in respect of the same dispute pending between the parties before the Assistant Labour Commissioner and both the parties jointly moved the Central Government for reference. The Industrial Tribunal had duly served notice of hearing on the petitioner under registered post and the acknowledgement is on record. The petitioner cannot be permitted to say here that notice served on its Manager was not proper service, when in fact the Manager had been representing the petitioner Society before the Assistant Labour Commissioner. He never raised any objection that service of notice on him was not proper and he was not authorised to represent the Society. The Manager on behalf of the petitioner had also moved the Central Government for reference of the dispute to the Industrial Tribunal. The petitioner having chosen to remain *ex parte* before the Tribunal, cannot now complain that it was not given sufficient opportunity to defend its case.

Before going into the main question, it would be necessary to quote the relevant provisions of the Co-operative Act, material for determination of this question. Section 55 is as under:-

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"S. 55(1)--The Registrar may from time to time frame rules governing the terms of employment and working conditions in a society or a class of socities and the society or the class of societies to which such terms of employment and of working conditions are applicable shall comply with the order that may be issued by the Registrar in this behalf.

(2).--Where a dispute including a dispute regarding terms of employment, working conditions and disciplinary action taken by a society, arises between a society and its employees, the Registrar or any officer appointed by him, not below the rank of Assistant Registrar, shall be binding on the society and its employee."

Clause (a) of sub-section (1) of section 64 is quoted hereunder:

"S. 64 (1)-Notwithstanding anything contained in any other law for the time being in force, any dispute touching the constitution, management, or business of a society or the liquidation of a society shall be referred to the Registrar by any of the parties to the dispute if the parties thereto are among the follwing:--

(a)--a society, its committee, any past committee, any past or present officer, any past or present agent, any past or present servant or a nominee, heirs or legal representatives of any deceased officer, deceased agent or deceased servant of the society or the liquidator of the society."

Clause (c) of sub-section (1) of section 82 and sub-section (3) are to this effect:-

"S. 82(1)-Save as provided in this Act no civil or revenue Court shall have any jurisdiction in respect of-

* * * *

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"82(c)--any dispute required to be referred to the Registrar or his nominee or Board of nominees;

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"S. 82(3)--Save as provided in this Act no order, decision or award made under this Act shall be questioned in any court on any ground whatsoever.

Section 93 is as under:-

"Nothing contained in the Madhya Pradesh Shops and Establishments Act, 1958 (25 of 1958), the Madhya Pradesh Industrial Workmen (Standing Orders) Act, 1959 (19 of 1959) and the Madhya Pradesh Industrial Relations Act, 1960 (27 of 1960) shall apply to a society registered under this Act."

In Sagar Motor Transport Karamchari Union. Sagar v. *The Amar Kamgar Passenger Transport Company* (*supra*) the Division Bench held that the Co-operative Act is a special enactment in respect of co-operative societies and Industrial Disputes Act, 1947, is a special enactment regarding industrial disputes, but section 55(2) of the Act provides for adjudication of disputes regarding terms of employment, working conditions and disciplinary action in respect of an employee of a co-operative society by the Registrar or his nominee; whereas Industrial Disputes Act, 1947, deals generally with industrial disputes arising between employees and employees, on the other hand the Co-operative Act deals only with employees of co-operative societies and therefore the special enactment contained in section 55(2) would override the general provisions of the Industrial Disputes Act. It has further been held that M. P. Co-operative Societies Act, 1960, being a subsequent enactment and it having received the assent of the President on 28.4. 1961, and as there is conflict, section 55(2) would prevail over the Industrial Disputes Act, 1947, in this State under Article 254(2) of the Constitution, as 'Industrial and labour dispute' is entry no. 22 of the concurrent list in the seventh schedule of the Constitution. Therefore, the reference of the dispute regarding termination of two employees of that Society to

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the Industrial Tribunal under section 10(1) was upheld to be invalid.

It is well settled that if the legislature makes a special Act dealing with a particular subject and later makes a general Act, which by its terms would include the subject of the special Act and is in conflict with the special Act, nevertheless unless it is clear that in making the general Act the legislature has had the special Act in its mind and has included to abrogate it, the provisions of the general Act do not override the special Act. If possible, general Act is not to be extended to special subject specially dealt by earlier Act [*Pratap Singh* v. *Manmohan Dei*] (1). Similarly, a general Act cannot be treated as impliedly repealed by a later local or special Act because ordinarily the general law of the country is not altered by special legislation without particular reference to it. The special Act is to be treated as exception to the general Act. In both the above cases, if both the statutes can be read together without contradiction or repugnancy or absurdity or unreasonableness, they should be harmoneously construed, as repeal by implication is seldom favoured and conflict if possible is to be avoided. But in case both the enactments are absolutely repugnant and inconsistent with one another, then the courts have no other alternative but to declare the prior Act as repealed by the subsequent Act. What is a general statute and what is a special statute is often a question of difficulty, but classification has to be made with reference to the context in each case and the subject matter dealt with by each statute. Most Acts can be classified as General Acts from one point of view and special Acts from another.

The M. P. Co-operative Societies Act, 1960, is 'an

(1) A. I. R. 1966 S. C. 1931.

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Act to consolidate and amend the laws relating to Co-operative Societies in Madhya Pradesh'. It has been enacted with a view to strengthening and developing co-operative movement in the State. Co-operative Societies come under entry no. 32 of the State List of the Constitution. The Co-operative Act is therefore a general enactment concerning co-operative societies, making provisions on different subjects concerning co-operative societies. Section 55 of the Co-operative Act quoted above is a peculiar feature in the Madhya Pradesh Act, there are no such analogous provisions in other State Acts. Industrial and Labour Disputes come within entry no 22 of the concurrent list. The Industrial Disputes Act, 1947, has been legislated for investigation and settlement of industrial disputes. The Act is based on necessity of achieving collective amity between labour and capital by means of conciliation, mediation and adjudication. The principal object of the Act is to encourage collective bargaining and to maintain industrial peace by resorting to the machinery set up under the Act, to prevent illegal strikes and lock-outs and to provide lay-off and retrenchment compensation. The Act is calculated to ensure social justice to both employers and employees and advance the progress of industry. It can certainly be said to be a special enactment concerning only industrial disputes and not other types of disputes between employer and employee. Therefore, this special enactment about industrial disputes cannot be held to have been repealed by the Co-operative Act, touching also on the relations between a society and its employees, in the absence of any specific provisions for its repeal. Similarly, if section 55 of the Co-operative Act is treated as special enactment concerning a society as an employer and its employees, while Industrial Disputes Act as a general enactment concerning all employers, as held by the Division Bench, still the Co-operative Act

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has not repealed the Industrial Disputes Act either directly or by necessary implication. Both can stay together without there being any repugnancy or inconsistency, both can be enforced without any conflict, as will be shown hereinafter.

Sub-section (1) of section 55 of the Co-operative Act provides that the Registrar may from time to time frame rules governing the terms of employment and working conditions in a society or class of societies and the same has to be complied by the Society or societies concerned. Under sub-section (2), in case of a dispute regarding terms of employment, working conditions and disciplinary action by a society, the Registrar or his nominee shall decide the dispute. The State has also similar powers to frame rules under section 95 (2) (jj) of the Act. The Registrar or his nominee has been empowered to decide dispute concerning an individual employee about his terms of employment, working conditions and disciplinary action taken against him by his employer-Society in contravention of the rules framed under the Act either by the Registrar or by the State. Clearly, the Registrar or his nominee can resolve the dispute by confining himself to the provisions of the Act, rules or bye-laws and the dispute to be settled is an individual dispute. Whereas, the Industrial Disputes Act, 1947 (before its amendment by Act, no. 35 of 1965) did not provide for adjudication of individual disputes but provided for reference of collective disputes i. e. industrial disputes, for adjudication. Industrial Disputes Act further provides for strikes and lock-outs, lay-off and retrenchment compensation and the Act is a comprehensive legislation providing for all types of industrial disputes. The Co-operative Act, on the other hand, has no such provision for reference, strikes and lock-outs,

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lay-off and retrenchment etc. etc.. It only provides for a particular type of dispute for adjudication by the Registrar or his nominee i. e. only of employer employee disputes within the four corners of the Act, rules or bye-laws, and that the decision so given shall be binding on the parties. Therefore there is no repugnancy or conflict between the two Acts and both the provisions could stand together.

Clause (c) of sub-section (1) of section 82 of the Co-operative Act only bars jurisdiction of Civil or Revenue Courts in respect of any dispute required to be referred to the Registrar or his nominee. There is no such restriction on the jurisdiction of the labour or industrial Courts. But sub-section (3) enjoins that once an award is given, the same cannot be questioned in any Court. So, unless an award is given, the jurisdiction of the labour or industrial Court is not barred in respect of any particular dispute in question. Moreover, section 92 of the Co-operative Act provides that the Companies Act, 1956, shall not apply to a society registered under the Act. Similarly, section 93 lays down that provisions of M. P. Shops & Establishments Act, 1958 M. P. Industrial Workmen (Standing Orders) Act, 1959 and M. P. Industrial Relations Act, 1960, shall not apply to a society registered under the Act. It is therefore clear Industrial Disputes Act, 1947, has not been made inapplicable to a society nor it is so by necessary implication. If the State Legislature wanted that provisions of the Industrial Disputes Act are not to be made applicable to a society, such provision would have been made to this effect, as has been done in respect of other enactments If a co-operative society carries on industrial activity on a organised scale there is no reason why the provisions of the social, and beneficial legislation like the Industrial Disputes Act should not apply to its employees. Otherwise,

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an anomalous situation may arise, there can be two mining industries side by side in the same area but one of the employers may defeat the provisions of the Industrial Disputes Act by simply getting his concern registered as a Co-operative Society. In this case, the petitioner society had taken disciplinary actions against its employees for misconduct under the industrial Employment (Standing Orders) Central Rules and therefore the remedy of the employees lay under the provisions of the Industrial Disputes Act, 1947.

Further, regulation of mines of all major minerals including iron ores and their developments have been taken under the control of the Central Government under the Mines & Minerals (Regulation and Development) Act, 1957. Therefore, regulation of such mines and mineral development including regulation of labour and safety in such mines are central subjects as per entry in list I of the Constitution. Therefore, the Central Government is the appropriate government of referring of an industrial dispute concerning such mining industry under section 10 of the Industrial Disputes Act. How can the State legislature possibly deprive such rights of the Central Government in respect of its central subjects by enactment of the M. P. Co-operative Act, Therefore section 55(2) of the Act can in no case take away such vested rights of the Central Government in its own exclusive sphere. It is true that the State has got competence to legislate on subjects in lists II & III of the Constitution and for that purpose it can incidentally affect an entry in list no. I of central subjects and thereby the legislation will not cease to be a legislation with respect to an entry in list II or III *K. D. H. P. Co.* v. *State of Kerala* (1). Legislative power normally includes all incidental and subsidiary

(1) A. I. R. 1972 S. C. 2301.

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powers but there are limits to such incidental or ancilliary powers and they have to be exercised in aid of the main topic of the legislation. In *D. N. Banerji* v. *P. R. Mukherji* (1), it has been held that Industrial Disputes Act, 1947, encroaches upon powers of Municipal Commissioner to dismiss or appoint municipal servants working in a department which is an industry, but Act is not *ultra-vires* because there is encroachment on provincial subject viz. local Government.

As per Article 254 (1) of the Constitution, if there is repugnancy between a law made by a State and that of the Perliament with respect to one of the matters enumerated in the concurrent list, the law made by Parliament shall prevail to the extent of the repugnancy, and the law made by the State to the extent of such repugnancy be void. Clause (2) of this Article is exception to this rule and the proviso qualifies the exception. Under this clause, if the legislature of a State makes a provision repugnant to the provisions of the law made by the Parliament, it would prevail if the legislation of the State has received the assent of the President. Even in such a case, in view of the priviso, Parliament may subsequently either amend, vary or repeal such law made by the legislature of a State. In *Deepchand* v. *State of U. P.* (2), the Supreme Court has laid down the following three tests to ascertain the repugnancy between the two statutes:

(i) Whether there is direct conflict between the two statutes;

(ii) Whether the Parliament intended to lay down exhaustive Code in respect of the subject-matter replacing the Act of the State Legislature and

(iii) Whether the law made by the Parliament and the law

(1) A. I. R 1953 S. C. 58. (2) A.I R. 1959 S. C. 648.

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made by the State occupied the same field.

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The Supreme Court in *Zaverbhai* v. *State of Bombay* (1) held that if the later legislation deals not with matters which form the subject matter of an earlier legislation, but with other and distinct matters, though of a cognate and allied character, then Article 254(2) will have no application. Similarly, in *Krishna* v. *State of Madras* (2), it has been observed that if a State law is found to relate to a State subject in the list II, no question of any repugnancy to any Union law can possibly arise, because the State legislature has exclusive jurisdiction to enact the law, and it will prevail even if there is any conflict between any of its provisions and those of a Union law relating to list I or list III.

As has been observed earlier, there is no repugnancy between the M.P. Co-operative Act and the Industrial Disputes Act and both can exist side by side. Co-operative Act has provided for settlement of different types of disputes than those disputes provided under the Industrial Disputes Act. There are no provisions in the Co-operative Act for settlement of collective disputes by reference by appropriate Government, no provisions about strike and lock-out, lay off and compensation, whereas the Industrial Disputes Act did not provide for settlement of individual disputes of an employee. Under section 55(2) of the Co-operative Act, the Registrar has to decide dispute about terms of employment, working conditions and disciplinary action taken against an employee in terms of the provisions of the Co-operative Act, its rules and bye-laws. Moreover, the Co-operative Act is an enactment under entry no. 32 of the State list regarding co-operative society and incidentally it has dealt with its

(1) A. I. R 1954 S C. 752. (2) A. I R. 1957 S.C. 297.

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employees about terms of employment, services conditions and disciplinary action. Broadly speaking, it is a State Act within the State list and so Article 254(2) is not at all attracted, In any case, there is no direct conflict between the two statutes and both occupy different fields and the Co--operative Act is not an exhaustive code on industrial disputes. In *Ahmedabad M.O. Asson* v. *L.G. Thakore* (1), the Supreme Court held that provisions in chapter V of the Bombay Industrial Disputes Act, 1938, are not repugnant to the Industrial Disputes Act, 1947, as there are no provisions for Standing Orders and their changes in the Later Central Act. Therefore, both can stand together.

After the decision of the Division Bench of this Court in *Sagar Motor Transport Karmachari Union* v. *The Amar Kamgar Transport Co. (supra)*, there are two decisions of the Supreme Court on State Co--operative Acts of Bombay and Andhra Pradesh. In *D.M. Co-op. Bank* v. *Dalichand* (2), the Supreme Court interpreted section 91 of the Maharashtra Co-operative Societies Act, 1961, which is analogous to section 64 of the M.P. Co- operative Act and the Supreme Court held that sub--section (1) of the section, the word 'business' has to be used in a narrower sense and it means actual trading or commercial or similar business activity of the society and further the word 'dispute' covers only five types of disputes i.e. disputes touching (i) the constitution of the society, (ii) election of office bearers, (iii) conduct of general meetings, (iv) management and (v) the business of a society In that case, the dispute was between a society, which was co--operative Bank and its tenants and the dispute was referred to Registrar's nominee for arbitration The tenants sought protection under the Rent Act and contended that the

(1) A. I R. 1967 S.C. 1091 (2) A. I. R. 1969 S C. 1320.

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dispute was not one that touches the business of the bank and that their dispute could only be decided under the Rent Act. The Supreme Court upheld the contentions and held that the dispute was not touching the business of the society and it not being one of the disputes enumerated in section 91(1), it cannot be decided under section 91 of the Act. It has also been observed that the Maharashtra Co-operative Societies Act was passed, in the main to shorten litigation, lessen its costs and to provide a summary procedure for the determination of the matters relating to the internal management of the societies. But under the Rent Act a different social objective is intended to be achieved and for obtaining that social objective, it is necessary that a dispute between the landlord and the tenant should be dealt with by the courts set up under the Rent Act and in accordance with special provisions of the Rent Act. This social objective does not infringe on the objective underlying the Act. The two acts can be harmonised best by holding that in matters covered by the Rent Act, its provisions, rather than the provisions of the Maharashtra Co-operative Societies Act should apply.

In the other case of *Co-operative Credit Bank* v. *Industrial Tribunal Hyderabad*(1), the Supreme Court interpreted section 61 of the Andhra Pradesh Co-operative Societies, Act, 1964, similar to section 91 of the Maharashtra Act and section 64 of the M.P. Act, with only difference that it mentions disputes other than disputes regarding disciplinary action. Relying on the earlier case, the Supreme Court held that dispute touching the business of a society cannot possibly include disputes in respect of alterations in the service conditions of the employees of a society. It has further been held that the Registrar or other person dealing under the Act is not competent to grant relief in respect to

(1) A. I. R. 1970 S. C. 245.

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disputes relating to alteration of various conditions of service of employees they have to act within the four corners of the Act, its rules and bye-laws. It has therefore been held that such disputes are to be decided under the Industrial Disputes Act, 1947. It has also been observed that in case of disputes capable of being resolved by the Registrar, jurisdiction of the Industrial Tribunal under the Industrial Disputes Act is barred in view of Article 254(2) of the Constitution. As has been pointed out earlier, the nature of dispute to be adjudicated under section 55(2) of the M. P. Co-operative Act is limited in scope and is not comprehensive enough to include all industrial disputes and they do not at all cover all the disputes and the remedies provided under the Industrial Disputes Act, 1947, In view of the two decisions of the Supreme Court mentioned above, all industrial disputes cannot possibly be adjudicated by the Registrar or his nominee and the same has to be done by the Industrial Tribunal under the Industrial Disputes Act. The sweeping observation of the Division Bench of this Court that the M.P. Co-operative Act prevails over the Industrial Disputes Act and the later Act can have no application in Madhya Pradesh in respect of employees of co-operative societies is contrary to the two Supreme Court decisions and is therefore no longer good law. At the most, the State Act could have prevailed with respect to disputes covered under section 55(2) of the Act.

A large number of High Courts have held with respect to their respective State co-operative societies Acts that industrial disputes are to be decided under the Industrial Disputes Act. Some of these case sare;*Jullundur T.C. Society* v. *Punjab State* (1),(ii) *Kerala State Handloom Weavers Co-op. Society Ltd.* v. *State of Kerala* (2)

(1) A. I. R. 1959 Punj. 34. (2) (1974)(1)L. L. J. 559 (D. B)

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(iii),*Malabar Co-op. Central Bank Ltd.* v. *State of Kerala*(1),(iv) *Kendriya Sarvodya Sahakari Ltd.* v. *Industrial Tribunal* (2) (v) *Gujrat State Co-operative Land Mortgage Bank Ltd.* v. *Labour Court* (3), (vi) *K. Subba Rao* v. *National Consumers Fedaration* (4) and (vii) *Rambhai* v. *Vinkar Co-operative Society* (5) etc. etc. In these cases it has been held that jurisdiction of the Industrial courts are not ousted by the respective Co-operative Societies Act, containing provisions similar to section 64 of the M. P. Co-operative Act and inspite of *non-obstante* clause of the section 'Notwithstanding anything contained in any other law for the time being in force'. But now the Supreme Court has said that this provision does not envisage adjudication of industrial disputes. It is to be mentioned here that there are no analogous provisions to that of section 55(2) of the M. P. Co-operative Act, However, the limited scope of this section has already been pointed out and the section does not override the comprehensive provisions contained in the Industrial Disputes Act, 1947, about industrial disputes Now proceeding with the assumption of the Division Bench that section 55(2) of the M. P. Co-operative Act prevails over the Industrial Disputes Act in view of Article 254(2) of the Constitution, but that position has now changed in view of the amendments of the Industrial Disputes Act by amending Act no. 45/1965 and Act no. 45/1971 which came into force on 19.11.1965 and 8.12.1971 respectively. Individual disputes are now Industrial disputes. Therefore under the provision to Article 254(2), the Central Act will now prevail in view of the amendments subsequent to M. P. Co-operative Act of 1960 in respect of the same subject matter. Under the circumstances, employees of these co-operative societies

(1) 1964 (1) L.L. J. 557. (D. B.) (2) 1967 (1) L. L. J. 270. (D. B.)
(3) 1968 (1) L. L. J. 670 (D. B.) (4) A. I. R. 1974 Delhi 132 (D. B.)
(5) A.I.R. 1966 Bom 187 (F. B.).

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engaged in industrial activities are to be governed by the Industrial Disputes Act and not by section 55 of the M. P. Co-operative Act, in view of the amendment of the Industrial Disputes Act in 1965 and in 1971.

I am, therefore, of the opinion that the petition must fail and it has to be dismissed with costs. Counsel's fee Rs. 200/-, if certified. The outstanding amount of the security deposit, after deduction of the costs, be refunded to the petitioner.

PER MALIK, J.- I had the advantage of reading the draft judgments prepared by Hon'ble the Chief Justice and brother C.P. Sen, J. I am in agreement with Sen, J. To avoid verbosity, I am not restating the facts nor the relevant provisions of law. The simple question to answer is whether an industrial dispute raised by a workman engaged by a Co-operative Society is referable to an Industrial Tribunal under the Industrial Disputes Act, 1947, or whether he has an exclusive remedy under section 55(2) of the Madhya Pradesh Co-operative Societies Act, 1960. In the present case, the activity of the society is to extract iron ore and the dismissed employee is one of the raising Mazdoors. The workman is employee in the iron-ore mining industry which is a Central subject, is not disputed. The Co-operative Societies Act is the State Act on a subject in the State list. It would not be within the legislative competence of the State Lagislature to trench upon the field allocated exclusively to the Union Legislature. That is the first aspect which arises for consideration. Any beneficial legislation touching upon the subject of iron-ore mining, any advantage given to a workman employed in the industry of the mining, and any procedural remedies provided for adjudication of disputes by any

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Central Act relating thereto, cannot be taken away by the State Act. If the Employer happens to be a Co-operative Society the activity of which is iron-ore mining, it shall be governed as much by the Central Act in matters touching upon the subject of mining as any other individual private industrialist. If the Central Act provides for industrial disputes to be raised before the Industrial Tribunals, that right cannot be taken away by any State Legislation. See: *G.V. Ramanaiah* v. *The Superintendent of Central Jail* (1), where the question arose as to which Government should exercise the powers to remit the sentence, whether the Central or the State, when the offence involved was covered by the subject in List I.

The second aspect is more important. The dispute contemplated under section 55(2) of the M.P. Co-operative Societies Act is a dispute relating to rights and obligations arising out of the ordinary law of master and servant, or the law of contract, including breach of bye-laws or terms and conditions of service. The industrial dispute as such, which has acquired a special meaning or significance in the industrial Law, is not referable to the Registrar. The Industrial Law seeks to provide extra-ordinary process of adjudication even outside the scope of contract and terms and conditions of employment, and the controversies in an industrial dispute, by their very nature, are out-side the scope and purview of an ordinary litigation. The industrial dispute connotes an entirely different concept from a disputes arising under a Co-operative Societies Act. The two Acts, therefore, can exist side by side and when a dispute is one touching the terms and conditions as embodied in the terms of contract, which is sought to be enforced, the Registrar will have an authority to deal with it but when the dispute is beyond his

(1) A. I. R. 1974 S.C. 31.

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authority and falls for consideration under the Industrial Law, the Industrial Tribunal will have jurisdiction to deal with it. See: *Gujrat State Co-operative Land Mortage Bank Ltd. Labour Court, Rajkot.* (1).

The view seems to find favour with the Supreme Court in *Co-operative Central Bank Ltd.* v. *Additional Industrial Tribunal, Andhra Pradesh, Hyderabad* (2), and to quote the relevant portion this is what their Lordships observed:

> "Dealing with the contention, that the byelaws of a co-operative society framed in pursuance of the provisions of the Act, would be law or have the force of law and hence an industrial tribunal altering a condition of service contained in a bye-law would be acting contrary to law, it was held that the bye-laws contemplated by the Act can be merely those which govern the internal management, business or administration of a society. The bye-laws may be binding between the persons affected by them but they do not have the force of a statute. The bye-laws framed by a society under the Act are similar in nature to the articles of association of a company incorporated under the Companies Act and such articles have never been held to have the force of law. The bye-laws are just like the standing orders, certified under the Industrial employment (standing orders) Act which govern the service conditions of workmen employed in industries and which are binding between the employers and the employees of the industry, and they do not have the force of law.
>
> The industrial tribunal while adjudicating an industrial disputes is not bound by the service conditions laid down by the standing orders certified under the Industrial Employment (Standing Orders) Act. The jurisdiction of industrial tribunal is not merely to administer the existing laws or to enforce the existing contracts but the industrial tribunal has the right to vary

(1) (1968) I. L. L. J. 670. (2) 1969 II-L. L. J. 691.

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contracts of service between the employer and employees which jurisdiction can never be exercised by a civil Court or a Registrar acting under the Co-operative Societies Act."

Their Lordships of the Supreme Court did refer to the dicision of this Court in *Sagar Motor Transport Karmachari Union, Sagar* v. *Amar Kamgar Passenger Transport Company Co-operative Society, Sagar* (1) and, it appears, did not agree, with the broad proposition that all disputes, whether contractual or industrial would be referable to the Registrar alone. Their Lordships said that industrial disputes by their very nature were not referable to the Registrar.

I need not dwell on other points covered by brother Sen, J. with whom I fully agree. In the result the petition must fail.

ORDER

BY THE COURT

As per the majority opinion, this petition fails and is dismissed with costs. Counsel's fee Rs. 200/-, if certified. The outstanding amount of the security deposit, after deduction of the costs, be refunded to the petitioners.

Petition dismissed.

(1) 1969-I L. L. J.—708.

MISCELLANEOUS PETITION

Before Mr. Bishambhar Dayal Chief Justice and Mr. Justice A. P. Sen

GHANSHYAMLAL SONI, Petitioner* 1971

v. Mar. 1

STATE OF MADHYA PRADESH and others, Respondents.

Constitution of India—Articles 14 and 16—After reorganization Government making classification of lecturers; post-graduates and graduates—Classification both reasonable and based on intelligible differentia.

Lecturers were classified in two classes on basis of higher classification. The criterion for making this classification is both reasonable and bassed on an intelligible differentia and also has a reasonable relation to the object sought to be achieved. After reorganization the State Government decided to create two classes of lecturers, it is not possible to say that the principle of equality is violated.

Kishori v. *Union of India* (1) and *State of Mysore* v. *P. Narasinga Rao* (2) relien on.

Y. S. Dharmadhikari for the petitioner.

K. P. Munshi Government Advocate for the State.

Cur. adv. vult.

ORDER

The Order of the Court was delivered by BISHAMBHAR DAYAL C. J.-This is a writ petition by Ghanshyam Lal Soni who was appointed a Lecturer in a Government Junior Technical School in 1961. He has claimed several reliefs with which we will

*Miscellaneous Petition No. 422 of 1969

(1) A. I. R. 1962 S.C. 1139. (2) A. I. R. 1968 S. C. 349.

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deal separately. It is necessary to give a short resume of facts which have given rise to this petition.

In 1961 the Government of Madhya Pradesh published an advertisement for the post of Junior Lecturer in Government Junior Technical Schools, Madhya Pradesh. The qualification prescribed for the post was a degree in Science. The petitioner applied and on the 1st September 1961 he was appointed a Junior Lecturer (Non-technical) in Science on a pay-scale of Rs. 150-10-250. It was expressly mentioned in the order of his appointment that the designation as well as the pay-scale were liable to be revised. Subsequently in 1962 the Government declared the unified scale as well as the revised scale for these lecturers who were then called Lecturers (non-technical) in Government Junior Technical Schools. The unified scale was from Rs. 100 to Rs. 250/-, while the revised scale was from Rs. 250/-, to Rs. 400/-. Further details are not relevant. These scales were, however, actually not made applicable to the petitioner as the Principal of his Institution was doubtful whether these unified and revised scales were applicable to new entrants also who had been appointed after the reorganization of the State or whether they were applicable only to those who had been absorbed from different units. While this state of uncertainty existed, the State Government issued a notification (Annexure-A-20) dated 21st November 1966 by which unified scales as well as the revised scales were refixed and all the previous notifications in that respect were superseded. Under this notification the unified scales were to be effective from 1st April 1958 and the revised scales from 1st July 1960. By this notification, Lecturers (Non-Technical) were divided into two classes. Those holding post graduate

degrees were to get a unified scale of Rs. 200--19--250--15-325--EB--15--400 and a revised scale of Rs. 250-10-290-15 350-EB-20-450. The Second category of lecturers, who were only graduates, wete to get a unified scale of Rs. 110-/ running up to Rs. 250/- and a revised scale of Rs 150-/ going up to Rs. 290/-. These scales were applied to the petitioner also and by order dated 30th April 1969 (Annexure-A-XXII) the Government directed that a sum of Rs. 3975 63, which had been overpaid to the petitioner according to the scale mentioned in his appointment letter and which was in excess of the new scales applied to him, should be deducted from his future pay. He was thus, being only a graduate, not given the higher scals. Against these orders the present writ peitiont has been filed.

The first contention of learned counsel for the petitioner is that the State Government violated principles of equality under articles 14 and 16 of the Constitution by creating two categories of Junior Lecturers (Non-Technical) by the notification dated 21st November 1966 (Annexure A-xx) and that that being illegal, the petitioner was entitled to the higher scale on the ground that lacturers, who were post graduates, and those who were graduates performed the same kind of work, and were entitled to the same pay. We are not impressed by this argument. The Government was entitled to create two classes among the Lecturers based upon higher qualifications. There can be no doubt that, particularly in the Education Department, a better qualified lecturer can perform his duties more efficiently than a less qualified one. The criterion, therefore, for making this classification is both reasonable and based on an intelligible defferentia and also has a reasonable relation to the object sought to be achieved. After reorganization of this State the Government was

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entitled to determine the classes of its employees for different purposes and if in 1966 the State Government decided to create two classes of lecturers for these subjects, it is not possible to say that the principle of equality was violated. In *Kishori* v. *Union of India* (1) their Lordships of the Supreme Court recognized this right of the State and observed:-

> "It is fantastic to suppose that Art 16 of the Contitution forbids the creation of different grades in the government service;....."

In that case among the Income-tax Officers two grades had been created called Class I and Class II and this was upheld by the Supreme Court. Again, in *State of Mysore* v. *P. Narasinga Rao* (2) the State of Mysore created two classes of tracers: those who had passed the S.S.L.C. examination and those who had not passed the same and fixed different pay scales for the two classes of tracers. The High Court stuck it down as violative of articles 14 and 16 of the Constitution. But the Supreme Court reversed the judgment of the High Court and at page 352 of the report observed as follows;-

> "In our opinion, therefore, higher educational qualifications such as success in the S.S.L.C. examination are relevant considerations for fixing a higher pay scale for tracers who have passed the S. S. L. C. examination and the classification of two grades of tracers in the new Mysore State, one for matriculate tracers with a higher pay scale and the other for non-matriculate tracers with a lower pay scale is not violative of Arts. 14 or 16 of the Constiution."

We are, therefore, unable to agree with this contention of the petitioner.

It was next contended that the petitioner also acquired M Sc. degree in Mathematics in the year

(1) A. I. R. 1962 S.C. 1139. (2) A. I. R. 1968 S. C. 349.

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1968 and at least from that date the petitioner is entitled to the higher scale of pay which has been denied to the petitioner. In reply on behalf of the State it has been contended that the petitioner was a Lecturer in Physics and, therefore, on acquisition of a post-graduate degree in Mathematics he was not automatically entitled to the higher scale of pay. As soon as a post in Mathematics would fall vacant, he would be appointed to that post and would be entitled to the higher scale but not so long as he was a teacher in Physics. To this the reply of learned counsel for the petitioner was that the appointments were not made subjectwise but that the appointments made to the post of Junior Lecturer in Science (Non-Technical) and those lecturers taught all the three subjects Physics, Chemistry and Mathematics and hence it did not matter whether the petitioner was actually teaching physics. We have heard learned counsel and looked into a large number of documents filed from time to time by the parties. We are satisfied that actual appointments were made to particular subjects. The documents relied upon by the petitioner are only dacuments which have determined the pay scales of these lecturers. Naturally, lecturers (Non-Technical) to these technical schools have classed together and one scale of pay has been provided, whether they taught Physics, Chemistry or Mathematics. But that does not indicate that teachers were appointed to take charge of particular subjects. On behalf of the State a large number of documents showing appointments of different teachers have been filed as Annexure R-16. In those documents more then two dozen teachers are expressly mentioned as having been appointed for particular subjects, either Physics or Chemistry or Mathematics. It is also natural and general experience that a teacher must be appointed to take

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charge of a particular subject so that he may be responsible for that subject in a particular institution. It is fantastic to think that three teachers would be appointed in all the three subjects, and any of them may take any subject haphazardly. Two applications of the petitioner himself have also been filed on behalf of the State (Annexures R-17 and R-18) in which the petitioner himself has signed as Lecturer in Physics. If he had not been appointed as Lecturer in Physics, he would not have so described himself. We are therefore, satisfied that the petitioner was appointed a Lecturer in Physics.

The next contention of learned counsel for the petitioner in this connection was that the notification of 1966 fixing two scales of pay does not state that the lecturer who acquires a post-graduate qualification can get the higher scale only if he acquires a qualification in his own subject which he is teaching, and, therefore, according to learned counsel, acquisition of a post-graduate qualification in any subject would entitle the petitioner to the higher scale of pay. We are unable to agree with this contention. The result of accepting such a proposition would be that in these technical schools where only Science subjects are being taught, a teacher may acquire a post-graduate qualification in economics or music and may claim the higher scale of pay which would be ridiculous. The only reasonable interpretation of this notification would be that post-graduate degree refers to the post-graduate degree in the subject which the teacher is taking. In the supplementary return filed on behalf of the State it has been shown that in 1968 when the petitioner acquired a post-graduate degree in Mathematics, all the posts of Mathematics-teachers in the 14 junior technical schools were already occupied by teachers holding a

post-graduate degree in Mathematics and hence it was not possible even to transfer him to any such post-immediately. It has been stated that as soon as a post is available, the petitioner would be transferred to a post in Mathematics subject and he would then be entitled to the higher scale. We are, therefore, satisfied that the petitioner, merely by acquiring a post-graduate qualification in Mathematics, was not entitled to get the higher scale of pay.

Another complaint of the petitioner is that he has not been made permanent although he is in Government service since 1961. That is a matter in the discretion of the Government and we are unable to see how this Court can direct that the petitioner should be made permanent. We are, however, informed that during the pendency of this petition, the Government has issued an order making the petitioner *quasi*-permanent.

The last contention of learned counsel is that in any case the direction in Annexure A-22 regarding refund of excess payment to the petitioner is unwarranted. We are satisfied that this contention of the petitioner is well founded. When the petitioner was appointed, he was given a pay scale of Rs. 150-10-250. It was noted at the bottom of the appointment order that the scale of pay was liable to revision. This note only meant that as long as the pay was not revised, the petitioner would be entitled to receive the pay mentioned in the order. Thus, the petitioner was entitled to the pay on the scale of Rs 150-10-250 till his scale was revised which was done by Annexure A-20 in 1966 To apply this new scale of pay retrospectively would be to go back upon the promise given to the petitioner that he would be entitled to get that pay as long as that was not revised. The appointment order cannot be read

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to mean that at any future time even the scale of pay which had already been given to him can be reduced from a back date so that he may have to refund the amount which he had taken and consumed. Even the Government cannot have the right to go back upon its assurances and clear undertakings. We are, therefore, of opinion that the order dated 30th April 1969 (Annexure A-XXII) directing refund of pay is without jurisdiction and it is quashed so far as it applies to the petitioner. The petitioner is not entitled to any other relief.

In all the circumstances of the case, we direct the parties to bear their own costs. The outstanding amount of the security deposit shall be refunded to the petitioner.

Petition partly allowed.

APPELLATE CRIMINAL

Before Mr. Justice K.K. Dube and Mr. Justice Bhachawat.

1975

Jan. 2

STATE OF MADHYA PRADESH, Appellant*

v.

MOORATSINGH and others, Respondents.

Criminal Procedure Code, 1973 (II of 1974)—Section 482—Tests to be applied for applicability—Does not override express provision of law—Criminal Procedure Code (new)—Contains no specific provision for withdrawal or refusal to withdrawal appeal—Section 333—Not applicable to such contingency—Criminal Procedure Code (old)—Sections 421 to 423 and 494—Provisions are exhaustive and are peremptory—Appellate Court

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* Criminal Appeal No 661 of 1973, from the judgment of Additional Sessions Judge, Camp Sagar, dated the 30th April 1973.

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cannot act outside the provisions of these sections—Appeal not dismissed summarily—Cannot be dismissed for default of appearance—Has to be decided on merits—Appellate Court has no power to permit withdrawal—Interpretation of Statutes—To be read so as to harmonise different provisions.

The following tests are applicable to determine the applicability of Section 482 of New Code. They are:-

(i) that an order is essential to give effect to the order made under the Code; or

(ii) that an order is essential to prevent the abuse of the process of any Court; or

(iii) that an order is otherwise necessary to secure the ends of justice.

Section 482 of New Code does not override the express provision of Law.

The Criminal Procedure Code does not contain any specific provision providing specifically for withdrawal or refusal of withdrawal of appeal.

Section 333 of the Code cannot be pressed into service for determining the question regarding withdrawal of appeal.

The provisions contained in Sections 421 to 423 are exhaustive and are peremptory and the appellate Court cannot act outside those provisions.

King Emperor v. *Dahu* (1) and *Emperor* v. *Ghulam Mohammad* (2); referred to.

An appeal which has not been dismissed summarily cannot be dismissed at the stage of hearing for default of appearance. It is the duty of the appellate Court to go through the record and dispose of the appeal on its merit.

Queen Empress v. *Pohpi* (3), *Trimbak Balwant Vaidya* v. *Emperor* (4) and *Dashrath* v. *State* (5); referred to.

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(1) A. I. R. 1935 P. C. 89.
(2) A. I. R. 1942 Lah. 296.
(3) I. L. R. 13 All. 171.
(4) A. I. R. 1926 Bom. 548.
(5) 1957 M. P. C. 530.

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Appellate Court cannot act beyond the provisions contained in Sections 421 to 423 and as such there being no provision for the withdrawal of appeal in section 423, the appellate Court cannot permit its withdrawal; doing so would be acting in violation of the requirements of section 423.

Appeal against acquittal is a pending prosecution.

Kalawati v. *The State of Himachal Pradesh* (1); relied on.

It is a fundamental rule of interpretation of statute that the provisions of a statute should be so read as to harmonise with one another and the provisions of one section cannot be used to defeat those of another.

J. P. Bajpai Deputy Advocate General, *P. C. Naik* and *A. P. Tare* for the State.

R. K. Pandey for the respondents.

Cur. adv. vult.

ORDER

The Order of the Court was delivered by BHACHAWAT J.—The present appeal was filed by the State under section 417 of the Code of Criminal Procedure against Mooratsingh, Nathoo and Ramprasad against acquittal of the aforesaid persons of the charges, under sections 364, 302 and 149 of the Indian Penal Code, recorded by the Additional Sessions Judge, Sagar, in Sessions Trial No. 107 of 1973, dated 30. 4. 73. The appeal was admitted by this Court *vide* its order dated 13. 9. 73 against Mooratsingh only.

After the admission of this appeal, an Interlocutory Application No. 1386 of 1973 was filed on behalf of the respondent Mooratsingh praying for a

(1) A. I. R. 1953 S. C. 131.

direction to the State Government for the withdrawal of the appeal for the reasons stated in the said application. This application was subsequently withdrawn as would be evident from this Court's order dated 1. 2. 1974. Subsequent to this, an Interlocutory Application No. 986 of 1974 has been filed on behalf of the State-appellant purporting to be under section 482 (561 of the old Criminal Procedure Code) of Criminal Procedure Code, 1973, praying that the State be allowed to withdraw the appeal.

The instant appeal was filed and admitted when the Criminal Procedure Code, 1898 (hereinafter referred to as Code) was in force; hence it is this Code which would be applicable to the instant appeal.

The application has been filed to invoke the inherent powers of the Court. The section in the Code providing for the inherent powers of the Court is 561-A (the corresponding section in the Criminal Procedure Code of 1973 is 482 which is a verbatim reproduction of this section), which is set out below:

> "Nothing in this Code shall be deemed to limit or affect the inherent power of the High Court to make such orders as may be necessary to give effect to any order under this Code, or to prevent abuse of the process of any Court or otherwise to secure the ends of justice."

On analysing the section, we find that it lays down the following test to attract its applicability:

(i) that an order is essential to give effect to the order made under the Code; or

(ii) that an order is essential to prevent the abuse of the process of any Court; or

(iii) that an order is otherwise necessary to secure the ends of justice.

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This section saves the inherent powers of the High Court to mould the procedure subject to the statutory provision. It does not override the express provision of law. There is a long catena of case law supporting our this view of the section, but as this is a well settled position in law, we do not propose to refer those cases.

It is true that there is no specific provision in the Code providing specifically either for withdrawal or refusal of withdrawal of appeal, but as we shall presently discuss, there are provisions relating to withdrawal of prosecution and the powers of the appellate Court, on construction whereof alone, the question under consideration has to be determined and bearing the aforesaid test for the applicability of section 561-A, the question of exercising the inherent powers of this Court does not arise.

In the Code we have Chapter XXXI concerning appeals, which deals with the powers of the appellate Court, then we have sections 333 and 494, which specifically deal with the withdrawal of prosecution. At this stage, we may safely say that section 333 of the Code, by no stretching, can be pressed into service for the question under consideration. The very reading of the section makes it clear that it relates to the jury trial before a High Court where before the verdict of the Advocate General can enter *nolle prosequi*.

The actual question with which we are posed is "Whether the appellate Court is competent to permit the withdrawal of an appeal against acquittal once when it is not summarily dismissed under section 421 of the Code and is admitted for hearing." In view of the question posed, our first attention would be attracted towards the aforesaid Chapter XXXI of

the Code concerning the appeals. The relevant sections of this Chapter, for the purpose of the problem in hand, are sections 421 to 423 and in particular section 423 in the back ground of the facts of this case (facts as stated in paragraphs 1 and 2 of this judgment).

Section 421 empowers the appellate Court to dismiss an appeal summarily to quote "if it considers that there is no sufficient ground for interfering." If an appeal is not dismissed under this section and, as, by established practice of the Courts, is called "admitted" *albeit*, the observation of the Privy Council in *King Emperor* v. *Dahu* (1) the words 'admitted' and 'admission' in reference to an appeal which is not summarily dismissed, do not appeal to be happily chosen. However, once the appeal is thus admitted, section 422 comes into play and it is a peremptory requirement that the appellate Court should then issue notices in the manner and to the persons in conformity with that section for the hearing of the appeal. The key words, in this section relevant for the problem in hand, are ".....at which such appeal will be heard." Then comes section 423, which is set out below including its caption:

> "423. Powers of Appellate Court in disposing of appeal.--
> (1) The Appellate Court shall then send for the record of the case, if such record is not already in Court. After perusing such record, and hearing the appellant or his pleader, if he appears, and the Public Prosecutor, if he appears, and, in case of an appeal under section 411-A, sub-section (2), or section 417, the accused, if he appears, the Court may, if it considers that there is no sufficient ground for interfering, dismiss the appeal, or may—
>
> (a) in an appeal from an order of acquittal, reverse such order and direct that further inquiry be made,

(1) A. I. R. 1935 P. C. 89.

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or that the accused be retried or committed for trial, as the case may be, or find him guilty and pass sentence on him according to law;

(b) in an appeal from a conviction, (1) reverse the finding and sentence, and acquit or discharge the accused, or order him to be retried by a Court of competent jurisdiction subordinate to such Appellate Court or committed for trial, or (2) alter the finding, maintaining the sentence, or, with or without altering the finding, reduce the sentence, or, (3) with or without such reduction and with or without altering the finding, alter the nature of the sentence but, subject to the provisions of section 106, sub-section (3), not so as to enhance the same;

(c) in an appeal from any other order, alter or reverse such order;

(b) make any amendment or any consequential or incidental order that may be just or proper.

(1A) Where an appeal from a conviction lies to the High Court, it may enhance the sentence, notwithstanding anything inconsistent therewith contained in clause (b) of sub-section (1) :

Provided that the sentence shall not be so enhanced, unless the accused, has had an opportunity of showing cause against such enhancement.

(2) Nothing herein contained shall authorise the Court to alter or reverse the verdict of a jury, unless it is of opinion that such verdict is erroneous owing to a misdirection by the Judge, or to a misunderstanding on the part of the jury of the law as laid down by him."

As the very caption of the fore quoted section indicates, it prescribes the powers of the appellate Court regarding the disposal of an appeal which has not been dismissed summarily and notices for its hearing as required by section 422 have been issued. In

other words, it is a stage which comes when the petition of appeal has travelled the path of sections 421 and 422. The powers of the appellate Court at this stage are circumscribed by the fore quoted section 423. In this section there is no provision for the withdrawal of an appeal. The expressions "shall then send for the record" and "after perusing such record" in this section unveil the intention of the Legislature that the appellate Court must peruse the record and decide the appeal on merit. This is further clear from the words "at which such appeal will be heard" in the foregoing section 422. The notice that is issued under that section is for the hearing of the appeal.

At this stage we would advert to the Privy Council decision in *King Emperor* v. *Dahu (supra)*, the relevant observations whereof are set out below:

> "The jurisdiction of the Court in these matters is statutory, and the Court, however admirable its intentions, is not entitled to go outside these provisions and—in effect—to legislate for itself."
>
> * * *
>
> "Failing summary dismissal, the provisions of sections 422 and 423 apply and, in their Lordships' opinion, the provisions as to notices in S. 422 and the provision as to sending for the record in S. 423 are clearly peremptory, and there can be no room for revision at that stage. The words 'admitted' and 'admission' in reference to appeals which are not summarily dismissed, though not infrequently used in the Courts in India, do not appear to their Lordships to be happily chosen. From their ordinary meaning they would imply that the appeal requires to be admitted at this stage, whereas the appellate Courts are bound to deal with the appeal, and they can only do so when they have complied with the preliminary steps of giving the statutory notices under S. 422, and sending for the record, which will enable the Court to deal with the appeal

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in accordance with the provisions of S. 423."

* * *

"Accordingly, their Lordships will humbly advise His Majesty that the appeals shou'd be allowed, and that it should be declared that, upon the true construction of the Criminal Procedure Code, the appellate Court is not entitled to dismiss an appeal summarily in terms of S. 421 unless the Court is satisfied that there is no sufficient ground for interfering in accordance with the relief sought in the appeal, and that where the appeal is not dismissed summarily, the Court is bound, in order to the disposal of the appeal, to comply with the provisions of S. 422 as to the notice, and with the provisions of S. 423 as to sending for the record, if such record is not already in Court."

We will also refer to the decision of their Lordships of the Supreme Court in *Rabari Ghela Jadav* v. *State of Bombay* (1). In this case, the appellate Court had, in purported exercise of the powers given under section 421, summarily dismissed the appeal as regards conviction and directed the appeal should be heard only on the question of sentence. Hence, the question arose, had the appellate Court the jurisdiction to so order. It was in this context that sections 421, 422 and 423 came up for construction. Their Lordships of the Supreme Court, quoting the aforesaid Privy Council decision *King Emperor* v. *Dehu (supra)* with approval, seems to be of the view that the provisions contained in the aforesaid sections are exhaustive and are peremptory and the appellate Court cannot act outside those provisions. After quoting the aforesaid sections, their Lordships observed as under:

"It is clear from these provisions that on receiving the petition and a copy under S. 419, the Appellate Court shall peruse the same and if it considers, that there

(1) A. I. R. 1960 S.C. 748.

is no sufficient ground for interfering it will dismiss the appeal summarily, and that if the Appellate Court does not dismiss the appeal summarily, it shall cause notice to be given to the appellant or his pleader, and to such officer as the State Government may appoint in this behalf, of the time and place at which such appeal will be heard. The recording of an order that the appeal is admitted, when it is not summarily dismissed is not a happily chosen expression as was pointed out by the Privy Council in the case of *King-Emperor* v. *Dahu* (1). Section 421 gives ample power to the Appellate Court to dismiss an appeal summarily if it considers that there is no sufficient ground for interfering. On the other hand, if it does not dismiss the appeal summarily then it is obligatory upon it to cause notice of the appeal to be given to the appellant and to such officer as the State Government may appoint in this behalf of the time and place at which such appeal will be heard."

* * *

"It seems to us, however, having regard to the provisions of the Code, that while an Appellate Court has power to dismiss an appeal summarily, if it considers that there is no sufficient ground for interfering, it has no power to direct, as in the case before us, that the appeal shall be heard only on the point of sentence. Such an order is not an order of summary dismissal under S. 421 and neither is it an order in terms of S. 422 of the Code. When an appeal is filed it is an appeal against conviction and sentence and it is not permissible for an Appellate Court to direct that it shall be heard only on the question of sentence."

Practically all the High Courts are unanimous on the point that an appeal which has not been dismissed summarily cannot be dismissed at the stage of hearing for default of appearance. It is the duty of the appellate Court to go through the record and dispose of the appeal on its merit. This is the conclusion arrived at on the interpretation of the

(1) 62 I. A. 129=A. I. R. 1935 P. C. 89

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expression "After perusing the record". (See: *Queen Empress* v. *Pohpi* (1), *Trimbak Balwant Vaidya* v. *Emperor* (2) and *Dashrath* v. *State* (3).

From the fore quoted decisions the law that discerns is that the appellate Court cannot act beyond the provisions contained in sections 421 to 423 and as such there being no provision for the withdrawal of appeal in section 423, the appellate Court cannot permit its withdrawal; doing so would be acting in violation of the requirements of section 423.

Having construed the powers of the appellate Court with reference to section 423, we would like to consider whether appeals are also included in the ambit of section 494 which specifically deals with withdrawals of prosecution. This section is set out below:

> "494. Any Public Prosecutor may, with the consent of the Court, in cases tried by jury before the return of the verdict, and in other cases before the judgment is pronounced, withdraw from the prosecution of any person either generally or in respect of any one or more of the offences for which he is tried; and upon such withdrawal,—
>
> (a) if it is made before a charge has been framed, the accused shall be discharged in respect of such offence or offences;
>
> (b) if it is made after a charge has been framed, or when under this Code no charge is required, he shall be acquitted in respect of such offence or offences."

According to the fore quoted section 494, the last stage upto which the prosecution can be withdrawn is in respect of cases tried by jury upto the return of the verdict by the jury, and in other cases

(1) (1891) 13 All E. R. 171. (2) A. I. R. 1926 Bom. 548.
(3) 1957 M. P. C. 530.

before the judgment is pronounced. In the instant case, admittedly, there was no jury trial. Hence, the last stage would be upto the pronouncement of judgment.

Now, reverting to the consideration of its applicability to appeal, the essential requirement implied in the words 'withdrawal of prosecution' is that the prosecution must be pending. So the first thing to attract the applicability of this section is to see whether the prosecution is pending. Neither the word 'prosecution' is defined in the Code nor it is anywhere specifically provided in the Code upto what stage it would be said to be pending for the purposes of section 494. Their Lordships of the Supreme Court had of course in a decision *Kalawati* v. *The State of Himachal Pradesh* (1) observed that an appeal against acquittal is a pending prosecution. The observations of their Lordships are set out below:

> "If there is no punishment for the offence as a result of the prosecution, the sub-clause (2) of Art. 20 has no application; and secondly, an appeal against an acquittal wherever such is provided by the procedure is in substance a continuation of the prosecution."
>
> (Para 9)

The aforesaid observations of their Lordships were in context of construing the scope of Article 20(2) of the Constitution. In our opinion, therefore, those observations cannot be pressed into service construing the scope of section 494.

The analogy of the Code of Civil Procedure that appeal is nothing but a continuation of the suit cannot be applied in the case of criminal appeals. The reason is apparent. In the Code of

(1) A I.R. 1953 S. C. 131.

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Civil Procedure there is section 107 which reads as below:

"107. (1) Subject to such conditions and limitations as may be prescribed, an Appellate Court shall have power—

(a) to determine a case finally;

(b) to remand a case;

(c) to frame issues and refer them for trial;

(d) to take additional evidence or to require such evidence to be taken.

(2) Subject as aforesaid, the Appellate Court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by this Code on Courts of original jurisdiction in respect of suits instituted therein."

The sub-section (2) of the aforesaid section is very pertinent. It is because of the existence of this sub-section, it is said that appeal is nothing but a continuation of the suit. And it is because of this sub-section that the provision of Order XXIII, Rule 1, Code of Civil Procedure, regarding the withdrawal of suit can be pressed into service for the withdrawal of appeal as well. There is no such provision contained in section 423 of the Code which is reproduced herein-above in paragraph 7 of this judgment.

Further, on construing the expression "before the judgment is pronounced" in section 494 of the Code to include the judgment of the appellate Court and as such if it is held that section 494 of the Code includes in its ambit the withdrawal of an appeal also, it would tantamount to creating a conflict in sections 494 and 423 of the Code.

In section 494 of the Code the consent of the Court is a must. And if that section is held to apply to appeals, it would mean that the appellate Court is competent to give consent for the withdrawal of an appeal, whereas as we have construed section 423, the powers of the appellate Court are exhaustively dealt with in section 423 to deal with the appeal after it is admitted for hearing according to which it must decide it on merits. It is a fundamental rule of interpretation of statutes that the provisions of a statutes should be so read as to harmonise with one another and the provisions of one section cannot be used to defeat those of another. Therefore, on the harmonious reading of the two sections, we are of the firm opinion that section 494 cannot be pressed into service for the withdrawal of an appeal.

Before a Full Bench of the erstwhile High Court of Lahore a similar question, i. e., whether the appellate Court can permit the withdrawal of an appeal against a judgment of acquittal once when the appeal was not dismissed summarily under section 421 and the statutory notices under section 422 were issued, had arisen. The Full Bench in its decision in *Emperor* v. *Gulam Mohammad* (1), while construing section 423 of the Code, held that such a course was not permissible under that section. The relevant observations of the decision are reproduced below:

> "From all these considerations, it appears clear to me that the Legislature have never contemplated any withdrawal of an appeal once lodged whether by the accused or by the Crown and that once the appeal has been lodged and admitted, it is not in the power of any Court nor in the power of the appellant to allow the appeal to be withdrawn. The Court is bound once the appeal is admitted to proceed under S. 421 or

(1) A. I. R. 1942 Lah. 296.

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under Ss. 422 and 423 to decide the appeal on the merits."

As a result of the foregoing discussion, we hold that the withdrawal of the instant appeal cannot be permitted. I. A. No. 986 of 1974, therefore, stands rejected and we order that the appeal be now listed for hearing on merit.

Application rejected.

CIVIL REVISION

Before Mr. Justice Singh.

1975

Jan. 1

RAMJILAL, Applicant*
v.
MUNICIPAL COMMITTEE, SARANGARH, Non-applicant.

Municipalities Act, Madhya Pradesh (XXXVII of 1961)—Section 97—Fiction under—Makes money or property misappropriated etc. as property of State Government—Suit by State Government against Municipal employee—Maintainable—Suit by Municipal Committee against employee for loss—Not a suit under this provision, but under general law—Section 176—Applicable to suits for recovery of money due under the Act—Limitation starts from the date when sum became due—Limitation Act, Indian, 1963—Article 4—Applicable to suits against agents for neglect or misconduct—Employee of Municipal Committee entrusted with money—Is in a position of agent—Article applicable to a suit against Agent—Starting point of limitation.

The fiction created by Section 97 of the Act makes the money or property which has been lost or wasted, misapplied or misappropriated as the money or property belonging to the

* Civil Revision No. 148 of 1974 for revision of the order of K. K Shrivastava, Civil Judge, Class II, Sarangarh, dated the 14th December 1973.

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State Government. The result of the fiction is that the State Government can bring a suit for compensation against the employee concerned because the money or property lost, wasted etc., is deemed to be belonging to the State Government. The fiction cannot be read as providing that although the money or the property should be deemed to be belonging to the State Government, the Municipal Council can sue for it or that a suit instituted by the Municipal Council for recovery of compensation will be deemed to be a suit by or on behalf of the State Government.

A suit brought by a municipal council against its employee for loss caused to it by the neglect or misconduct of the employee is not a suit under section 97 but is a suit under general law.

Section 176 provides that no distraint shall be made and no suit shall be instituted for the recovery of any sums due to a Council under this Act after the expiration of six years from the date on which such sum became due. This section is limited to sums due under the Act.

Article 4 of the Limitation Act will apply to a suit against agent by principal for neglect or misconduct. The employees, who are entrusted with the funds of the Council to be utilized they misappropriate the amount, suit filed for recovery of compensation would be a suit by a principal against his agent for compensation for misconduct. The limitation under this article begins from the date when the neglect or misconduct becomes known to the plaintiff.

The limitation would begin from the date when the Council came to know of the misappropriation of particular item.

S. C. Pandey for the applicant.

D. M. Dharmadhikari for the non-applicant.

Cur. adv. vult.

ORDER

SINGH J.—This order shall also dispose of Civil Revision No. 149 of 1974 *Hulas Singh* v. *Municipal*

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Committee, Sarangarh.)

Civil Revision No. 148 of 1974 arises out of a suit which was filed by the Municipal Council, Sarangarh against the applicant Ramjilal for recovery of Rs. 1683 70. All that it is necessary to state here is that the plaintiff alleged that Ramjilal was employed as a cashier during the period from 3rd May, 1968 to 1st July, 1968 and was entrusted with certain items of cash out of which he misappropriated the amount for which the suit was brought. Ranjilal, defendant-applicant, raised a preliminary issue of limitation which was decided against him by the trial Court on 14th December, 1973. It is against this order that Ramjilal, has filed Civil Revision No. 148 of 1974.

Civil Revision No. 149 of 1974 arises out of a suit which has been filed by the Municipal Council, Sarangarh against Hulas Singh (applicant in this revision). The suit is for recovery of Rs. 5000/-alleged to have been misappropriated by the defendant who was working as cashier in 1967-68. In this suit also the defendant Hulas Singh raised a plea of limitation which was decided against him by the trial Court on 14th December, 1973. Hulas Singh thereafter filed Civil Revision No. 149 of 1974.

The trial Court has held that the period of limitation in such a suit filed by the Municipal Council shall be governed by Article 112 of the Limitation Act which provides for 30 years limitation. This article relates to a suit which is filed by or on behalf of the Central Government or the State Government. The suits with which I am concerned are certainly not suits filed by or on behalf of any Government. The benefit of this article has been allowed to the Municipal Council by the trial Court by relying upon

section 97 of the M. P. Municipalities Act, 1961. The section reads as follows:

> "Liability of Municipal employees for misappropriation of funds.-Employee of the Council shall be personally liable for the loss, waste, mis-application or misappropriation of any money or other property (held for the administration of the Council) if such loss or waste or mis-application is a direct consequence of his neglect or mis-conduct in his capacity as servant of the Council, and a suit for compensation for the same may be instituted against him, as if the money or the property had belonged to the State Government."

The argument in support of the view taken by the trial Court is that the words of the section "a suit for compensation for the same may be instituted against him, as if the money or the property had belonged to the State Government" go to show that a suit instituted by the Municipal Council for compensation against its employee would be treated to be a suit by or on behalf of the State Government. In my opinion, there is no merit in this argument. Section 97 makes an employee of the Council personally liable for the loss, waste, mis-application or mis-appropriation of any money or property if such loss etc., is a direct consequence of the employee's neglect or misconduct. The section further provides that a suit for compensation for the loss, waste etc., may be instituted against the employee "as if the money or the property had belonged to the State Government" The fiction created by this section makes the money or property which had been lost or wasted, misapplied or mis-appropriated as the money or property belonging to the State Government. The result of the fiction is that the State Government can bring a suit for compensation against the employee concerned because the money or property lost, wasted etc., is deemed to be belonging to the State Government.

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The fiction cannot be read as providing that although the money or the property should be deemed to be belonging to the State Government, the Municipal Counicl can sue for it or that a suit instituted by the Municipal Council for recovery of compensation will be deemed to be a suit by or on behalf of the State Government. A municipal employee is liable to the municipal council under the general Law for all loss caused to the council which is a direct consequence of his neglect or misconduct. It was, therefore, not necessary to make a statutory provision to make the municipal empolyees liable in such a case to the municipal council. Section 97, in my opinion, was intended to create a liability which could be enforced by the State Government as if the money or property which was lost or wasted etc., by the employee concerned was the property belonging to the State Government. A suit brought by a municipal council against its employee for loss caused to it by the neglect or misconduct of the employee is not a suit under section 97 but is a suit under general Law.

My attention was drawn to section 83 which deals with the responsibility of councillors for misapplication of municipal funds. The section provides that a suit against a councillor can be instituted either by the council or the State Government. This section specifically provides for a suit by the council probably to clear the doubt that the council is entitled to make a councillor liable for mis-application of municipal funds. Similar language could have been used in section 97 to clarify the position. However, that section, as it stands, cannot be construed to confer a right of suit on the municipal council. As already stated, the municipal council has a right of suit under the general Law which is not taken away. Section 97 confers a right of suit on the State Government by creating a fiction.

As a result of the above discussion it is clear that the trial Court was wrong in holding that the suit instituted by the Municipal Council is a suit by or on behalf of the State Government and is governed by Article 112 of the Limitation Act.

The question then is as to which article applies to the suits with which we are concerned. Learned counsel appearing for the Municipal Council referred to me section 176 of the M. P. Municipalities Act. This section provides that no distraint shall be made and no suit shall be instituted for the recovery of any sums due to a Council under this Act after the expiration of six years from the date on which such sum became due. This section is limited to sums due under the Act. I have already stated that the liability of the employees for the neglect or misconduct which the Municipal Council is enforcing under these suits is a liability under the general Law. For this reason the compensation that is claimed under these suits cannot be called "sums due under this Act". Section 176 is, therefore, not applicable

Coming to the provisions of the Limitation Act, in my opinion, Article 4 will apply to these suits. This Article applies to suits by principals against agents for neglect or misconduct. The employees, who are entrusted with the funds of the Council to be utilized in a particular manner, stand in the position of agents and if they misappropriate the amount, the suit filed for recovery of compensation would be a suit by a principal against his agent for compensation for misconduct. The limitation under this Article begins from the date when the neglect or misconduct becomes known to the plaintiff. The limitation in the present suits would, therefore, begin from the date when the Council came to know of the

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misappropriation of the particular items. The trial Court did not enquire into this question of fact because it held that the suits were governed by Article 112. A fresh enquiry will, therefore, have to be made to find out as to when the plaintiff came to know of the different acts of misappropriation.

The revisions are allowed. The orders passed by the trial Court holding the suits to be within limitation are set aside and the Court shall re-determine the question of limitation in the light of the observations made above. There shall be no order as to costs.

Application allowed.

CRIMINAL REVISION

Before Mr. Justice A. P. Sen and Mr. Justice Malik.

SITARAM HEDA, Applicant*

v.

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Apr. 17

STATE OF MADHYA PRADESH, Non-applicant.

Criminal Procedure Code (V of 1898)– Sections 435 and 439—Both provisions to be read together—Section 435—"Proceeding" in—Mean proceeding before inferior criminal court—Essential Commodities Act, 1955—Section 6-C(1)—Appeal against order of confiscation—Entertainable by District and Sessions Judge as judicial authority and not as session Judge of the Court of Sessions—Essential Commodities (Amendment) Act, 1966—Section 6-A—Collector passing order of confiscation—Collector does not act as Magistrate as defined by Section 6 Criminal Procedure Code– Not subordinate to Court of Sessions– Essential Commodities Act, 1955—Section 6-C(1)—Judicial authority

* Criminal Revision No. 309 of 1974 for revision of the order of Ram Murti, Sessions Judge, Betul, dated the 11th April 1974.

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Sitaram Heda v. *State*

appointed by State under—Not an Inferior criminal Court—No revision against the order entertainable by High Court.

Sections 435 and 439, Criminal Procedure Code be read together.

Emperor v. *Har Prasad Das* (1); referred to.

The word "proceeding" under Section 439, Criminal Procedure Code must, therefore, mean a proceeding before an inferior criminal Court within the meaning of section 435 of the Code.

An appeal against an order of confiscation made by Collector under Section 6-A is not provided to the Court of Sessions. The District and Sessions Judge entertains and disposes of an appeal under Section 6-C(1) not as a Sessions Judge of Court of Session but as judicial authority appointed by the State Government under the notification dated 27.4.67.

The Rule that when a statute directs that an appeal shall lie in a Court already established, then such appeal must be regulated by the practice and procedure of that court has, therefore, no application to a case where appeal is provided to judicial authority.

Kailashchandra and others v. *District Judge, Bhopal and others* (2) and *Municipal Council, Khandwa* v. *Santoshkumar and others* (3); held not applicable.

The Collector while passing an order of confiscation under section 6-A does not function as a Magistrate nor does he thereby become "a Court" within the classification of criminal Courts under section 6 of the Code of Criminal Procedure. The Collector is the administrative head of his district, and he as such is not subordinate to the Court of Sessions

Mumar Singh Chhajor v. *Emperor* (4), *Dargah Committee* v. *State of Rajasthan* (5) and *The Cantonment Board, Ambala* v. *Pyare Lal* (6); referred to.

The State of Uttar Pradesh v. *Kaushalliya* (7); distinguished.

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(1) I. L.R. 40 Cal. 477 (S. B.).
(2) 1963 M. P. L. J. 270.
(3) 1975 M. P. L. J. 33 (F. B.).
(4) A. I. R. 1946 P. C. 169.
(5) A. I. R. 1962 S. C. 574.
(6) A. I. R. 1966 S. C. 108.
(7) A. I R. 1964 S.C. 416.

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M/s Satya Narayan Dal Mill, Multai v *The State of Madhya Pradesh* (1), followed.

Judicial authority appointed by State Government under Section 6-C (1) of the Act is not "an inferior crimial Court", and was, therefore, not subject to the revisional jurisdiction of the High Court under sections 435 and 439 of th Code of Criminal Procedure.

The State of Mysore v. *Panowang Purusappa Naik and others* (2), *State* v. *Sriramulu Chettiar* (3) and *The State of Gujarat* v. *Chimanlal Maganlal Shah* (4); referred to.

Legisetty Ramaiah and another v *State of Andhra Pradesh* (5); not followed.

R. S. Dabir for the applicant.

M. V. Tamaskar Government Advocate for the State.

Cur. adv vult.

ORDER

The Order of the Court was delivered by A. P. SEN J.— This case has been placed before this Bench for a decision on the question whether an order of the Judicial authority under Section 6-C(1) of the Essential Commodities Act, 1955 (hereinafter referred to as 'the Act') is subject to the revisional jurisdiction of the High Court under Section 439 of the Code of Criminal Procedure, 1898

The answer to the question must depend on whether the Judicial authority appointed by the State Government to hear appeals under Section 6-C(1) of the Act, against orders of confiscation of an essential commodity made by the Collector acting under section 6-A, seized in pursuance of an order under section 3

(1) Cr. R. No. 832 of 1970, decided on the 30th April 1971.
(2) (1971) 2 Cr. L. J. 1355. (3) (1973) 1 Cr. L. J. 732.
(4) (1974) 1 Cr. L. J. 716. (5) (1972) 2 Cr. L. J. 1071.

of the Act, is an "inferior criminal Court."

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It is well settled that sections 435 and 439 of the Code must be read together. [See, *Emperor* v. *Har Prasad Das* (1)]. Section 439 must, therefore, be read along with and subject to the provisions of Section 435. Sub-section (1) of section 435 authorises the High Court to call for and examine the record of any proceeding before "any inferior criminal Court" situate within the local limits of its jurisdiction. The word 'proceeding' under section 439 must, therefore, mean a proceeding before an inferior criminal Court within the meaning of section 435 of the Code.

Section 6C-(1) of the Act reads as follows:

> "6-C. Appeal.—(1) Any person aggrieved by an order of confiscation under section 6-A may within one month from the date of the communication to him or such order, appeal to any judicial authority appointed by the State Government concerned and the judicial authority shall, after giving an apportunity to the appellant to be heard, pass such order as it may think fit, confirming modifying or annulling the order appealed against."

Pursuant thereto, the State Government issued a notification to the following effect:

> "Notification No. 14393-1792-XXI-B, dated 27-4-1967—In exercise of the powers conferred by sub-section (1) of section 6-C of the Essential Commodities (Amendment) Act, 1966, the State Government are pleased to appoint all District and Sessions Judges as Judicial authority within their respective jurisdiction."

It is worthy of note that the appeal against an order of confiscation made by the Collector under Section 6-A is not provided to the Court of Sessions. The appeal lies to "the District and Sessions Judge" who is the holder of an office, and exercises both

(1) I L. R. 40 Cal. 477 (S B.)

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civil and criminal jurisdictions. The District and Sessions Judge entertains and disposes of an appeal under section 6C(1) not as a Sessions Judge of the Court of Sessions, but as a Judicial authority appointed by the State Government, under the notification referred to above.

The line of authorities starting from '*National Telephone Co. Ltd.* v. *Post-master-General*' (1) and ending with *N. S. Thread Co.* v. *James Chadwick and Brothers* (2), enunciating the well known rule that when a statute directs that an appeal shall lie in a court already established, then such appeal must be regulated by the practice and procedure of that court has, therefore, no application. The decisions in *Kailashchandra and others* v. *District Judge, Bhopal and others* (3) and *Municipal Council, Khandwa* v. *Santoshkumar and others* (4) on which reliance is placed, and which proceed upon that well recognized principle are, therefore, not attracted.

The act itself makes a distinction between the Judicial authority and the Court. The group of sections 6A to 6D were inserted by the Essential Commodities (Amendment) Act, 1966. These provisions were designed to authorise the confiscation of essential commodities like foodgrains, edible oilseeds or edible oils etc., which are seized in pursuance or orders under section 3 in relation thereto, and for the speedy and effective control and disposal of the seized commodities, which are perishable in nature, i.e., for equitable distribution thereof to the community. Section 6A authorises the Collector to direct the confiscation of an essential commodity seized in pursuance of an order under section 3 of the Act. This is purely a Governmental function. This section has

(1) L. R. (1913) A. C. 546. (2) A. I. R. 1953 S. C. 357
(3) 1963 M. P. L. J. 270. (4) 1975 M. P. L. J. 33 (F. B.)

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not been enacted with a view to provide an alternative to section 7 which deals with penalties. The Parliament in its wisdom thought it necessary that an order of confiscation or forfeiture may be passed initially, and may not wait till the final disposal of the prosecution.

Under section 7 of the Act, a person, who contravenes an order made under section 3, is punishable with the penalties mentioned in its various clauses. Under clause (b), the Court has been empowered to forfeit the seized commodity like foodgrains etc., in respect of which an order under section 3 has been contravened. The proviso confers a discretion on the Court, for the reasons to be recorded, to refrain from passing an order for forfeiture. It is thus clear that a person, who has contravened any order under section 3, is liable to punishment under section 7. He is also liable under section 6A to the confiscation of the involved goods, where the Collector is satisfied that there has been a contravention of an order under section 3.

The power of confiscation of an essential commodity seized in pursuance of an order under section 3 of the Act, vested on the Collector under section 6A is, therefore, distinct from the power of forfeiture given to the criminal Court under section 7(1)(b) of the Act In regard to prosecutions for violation of different Foodgrains Control Orders passed by virtue of the powers conferred on the State Government by Section 3 of the Act, a different procedure is provided in the Act. Some of the provisions of the Code of Criminal Procedure are applicable so far as they relate to trial of cases, and appeals and revisions against convictions in the said trials. In regard to provisions for confiscation, a different procedure is provided and a distinct right of appeal is conferred.

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That part of the scheme of the Act has been kept separate and it is not provided that it has anything to do with ordinary criminal Courts. Prosecutions of the breach of provisions of the various Food-grains Control Orders are made to lie in ordinary criminal Courts. Section 7 of the Act, dealing with penalties has laid down that such penalties have to be awarded by Courts. It is, therefore, apparent that a distinction has been made in the Act itself between a Judicial authority and a Court.

The power of confiscation conferred on the Collector under section 6-A of the Act being of a drastic nature, the Parliament has provided an adequate safeguard that he shall not exercise such powers without compliance with the requirements of section 6B. This section lays down that before the orders for confiscation of the seized commodity is passed, the Collector shall conform to the rules of natural justice. He is required to give a notice to the owner of the seized commodity to show cause why the commodity is proposed to be confiscated, and he must be given a reasonable opportunity of being heard, before the commodity is confiscated. The Parliament has provided a further safeguard, by enacting section 6C. This section expressly provides for a right of appeal against the order of confiscation to a Judicial authority to be appointed by the State Government.

That the confiscation order passed by the Collector under section 6A is provisional, and is made subject to the result of the appeal to the Judicial authority appointed under section 6C(1) as also to the result of the prosecution eventually launched is made clear by enacting section 6C(2) which reads:

> "6C.(2) Where an order under section 6A is modified or annulled by such judicial authority, or where in prosecution instituted for the contravention of the order

in respect of which an order of confiscation has been made under section 6A, the person concerned is acquitted and in either case it is not possible for any reason to return the essential commodity seized such person shall be paid the price therefor as if the essential commodity has been sold to the Government, with reasonable interest calculated from the day of the seizure of the essential commodity and such price shall be determined—

(i) in the case of foodgrains, edible oilseeds or edible oils, in accordance with the provisions of sub-section (3B) of section;

(ii) in case of sugar, in accordance with the provisions of sub-section (3C) of section; and

(iii) in the case of any other essential commodity in accordance with provisions of sub-section (3) of section 3."

The Collector while passing an order of confiscation under section 6A does not function as a Magistrate nor does he thereby become "a Court" within the classification of criminal Courts under section 6 of the Code of Criminal Procedure. The Collector is the administrative head of his district, and he as such is not subordinate to the Court of Sessions. Their Lordships of the Privy Council in *Mumar Singh Chhajor* v. *Emperor* (1), held that a Special Magistrate acting under Clause 26 of the Special Criminal Courts Ordinance, 1942, is not a Court inferior to the High Court and, indeed, not a Court at all and, therefore, the High Court has no power of revision under sections 435 and 439 of the Code of Criminal Procedure. So also, in *Dargah Committee* v. *State of Rajasthan* (2), their Lordships of the Supreme Court while interpreting section 234 of Ajmer Merwara Municipalities Regulation, 1925, held that the enquiry contemplated by the Magistrate under that section, partakes of the

(1) A. I. R. 1946 P. C. 169. (2) A. I. R. 1962 S. C. 574.

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character of a ministerial enquiry rather than judicial enquiry. They held that an order made by him under section 234 was not subject to the revisional jurisdiction of the High Court under section 439 of the Code of Criminal Procedure, as such he could not be regarded as an inferior criminal Court within the meaning of section 435 of the Code.

In *the Cantonment Board, Ambala*, v. *Pyare Lal* (1), their Lordships while dealing with the powers of the Magistrate acting under section 259 of the Contonments Act, 1924, held that he acts as a *persona designata* and, therefore, his order is not revisable under sections 435 and 439 of the Code of Criminal Procedure. Their Lordships held that though the High Court may not have jurisdiction to interfere under sections 435 and 439 of the Code of Criminal Procedure, it can certainly interfere with the order of the Magistrate under Article 227 of the Constitution. That precisely is the case here. The decision of their Lordships in *The State of Uttar Pradesh* v. *Kaushaliya* (2) is distinguishable on facts. There the Magistrate acting under section 20 of the Suppression of Immoral Traffic in Women and Girls Act (1956), is a Court and, therefore, subject to the revisional jurisdiction conferred under sections 435 and 439 of the Code of Criminal Procedure.

The controversy in question had arisen before one of us (Sen J) in *M/s Satya Narayan Dal Mill, Multai* v. *The State of Madhya Pradesh* (3). In repelling the contention that a revision lay under section 439 of the Code of Criminal Procedure, it was observed:

> "On a plain construction of the section, it must follow that the Sessions Judge, who entertains an appeal under Section 6C, acts as a *persona designata* and not

(1) A. I. R. 1966 S. C. 108. (2) A. I. R. 1964 S. C 416.
(3) Criminal Revision No. 832 of 1970, decided on the 30th April 1971.

as a Court functioning and exercising his authority under the Code of Criminal Procedure. He cannot, therefore, be regarded as an inferior criminal Court within the meaning of Section 439 of the Code of Criminal Procedure."

"That precisely is the position obtaining under Section 6C of the Essential Commodities Act, under which the District Judge acts as a *persona designata* of the State Government. Likewise, in *State of M.P.* v. *Gulabkhan* (1), a learned Single Judge of this Court, while dealing with an order of the Rent Controlling Authority under Section 8 of the Madhya Pradesh Accommodation Control Act, 1955, held that he does not function as a Criminal Court and, therefore, the provisions, of Section 435 of the Code were not attracted. Following these decisions, it must be held that the revision is incompetent."

We think, that lays down the correct law.

The majority of the High Courts have taken the view is that the judicial authority appointed by the State Government under section 6C(1) of the Act, is not "an inferior criminal Court", and was, therefore, not subject to the revisional jurisdiction of the High Court under sections 435 and 439 of the Code of Criminal Procedure, 1898. [See, *The State of Mysore.* v. *Pandurang Purusappa Naik and others* (2); *State* v. *Sriramulu Chettiar* (3) and *The State of Gujarat* v. *Chimanlal Maganlal Shah* (4)]. The view to the contrary in *Legisetty Ramaiah and another* v. *State of Andhra Pradesh* (5), does not seem to be correct.

We, accordingly, hold that no revision lies under section 439 of the Code of Criminal Procedure. The application shall, therefore, be treated as a petition under Article 227 of the Constitution.

Reference answered accordingly.

(1) 1964 M P. L. J 355
(2) (1971) 2 Cr. L J, 1355. (3) (1973) 1 Cr. L J, 732.
(4) (1974) 1 Cr. L. J. 716. (5) (1972) 2 Cr. L. J. 1071.

MISCELLANEOUS CIVIL CASE

Before Mr. P V. Dixit C. J. and Mr. Justice Singh.

1969
Feb. 19

THE COMMISSIONER OF SALES TAX, M. P.
Applicant*
v.
INDIAN COFFEE WORKER'S CO-OPERATIVE SOCIETY, LTD, JABALPUR, Opposite party

General Sales-Tax Act, Madhya Pradesh, 1958 (II of 1959)—Section 10(1) and Item 9 of Schedule I—"Cooked Food"—Circumstances when it is exempt from tax—Word "meal"—Meaning of—Sale of different articles in restaurant—Does not constitute sale of any "meal".

From section 10(1) read with entry no. 9 it will be seen that sales of "cooked food" are exempt from tax. But if the "cooked food" is "a meal" the charge of which exceeds rupees two, then its sale is not exempt from tax.

The expression "a meal" must, therefore, be understood in the sense it has in common parlance and in its popular meaning as understood by people who sell and serve meals.

Ramavtar v. Assistant Sales Tax Officer (1); relied on.

When one talks of a meal, what one means is "food one takes at regular times of the day at a breakfast, dinner, supper ect."

The sales of any of the articles in the restaurant such as "hot coffee, tray coffee" etc. sold by the assessee does not constitute sale by any "meal".

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*Miscelloneous Civil Case No. 161 of 1967. Reference under Section 44 of the Madhya Pradesh General Sales Tax, Act. 1958, against the order of the Board of Revenue, Madhya Pradesh, dated the 6th October 1965.

(1) A, I. R. 1961 S. C. 1325.

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The Commissioner of Sales Tax, M. P. v. *Indian Coffee Worker's Co-operative Society, Ltd., Jabalpur*

K. K. Dubey Government Advocate for the applicant.

M. Adhikari for the opposite party.

Cur. adv. vult.

JUDGMENT

The Judgment of the Court was delivered by DIXIT C. J.- In this reference under section 44(1) of the Madhya Pradesh General Sales Tax Act, 1958 (hereinafter referred to as the Act) at the instance of the Commissioner of Sales Tax the two questions which the Board of Revenue (Sales Tax Tribunal) has referred are:-

"1. What is the correct interpretation of the word 'meal' occurring in sub-item (b) of item 9 of Schedule I of the Madhya Pradesh General Sales Tax Act, 1958, and will the sale of one or more articles of Annexure II constitute a sale of a meal ?

2. Under the facts and circumstances of the case is the cooked food supplied by the assessee and mentioned in Annexure II exempted from the payment of sales tax under item 9 of Schedule I of the Madhya Pradesh General Sales Tax Act, 1958 ?"

The material facts are that the assessee, the Indian Coffee Workers' Co-operative Society Ltd., Jabalpur, runs a restaurant. It servce or sells to its customers as many as 32 food articles. They are:-

1. Hot coffee, 2. Tray coffee, 3. Hot cream coffee, 4. Cold cream coffee, 5. Cold coffee, 6. Ice--cream, 7. Fruit Ice cream, 8. Pine-apple Ice-cream, 9. Dosa, 10. Mutton cutlet, 11. Vegetable cutlet, 12. Mutton chops, 13. Omlette, 14. Eggs fried, 15. Eggs boiled. 16. Bread and Butter, 17. Toast, 18. Bread with Jam, 19. Toast with Jam, 20. Eggs Sandwiches, 21. Vegetable Sandwiches, 22. Pakoda, 23. Nuts, 24. Waffer, 25. Oothappam,

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26. Chips, 27. Tomato sauce (Extra), 28. Milk, 29. Mutton omlette, 30. Tamato omlette. 31. Screambuled eggs, 32. Dahibada.

On the basis of counterfoils, each of them showing sales of these article for an amount exceeding Rs. 2/-, the Sales Tax Officer, Jabalpur, came to the conclusion that in the period from 1st July 1961 to 30th June 1962 the assessee's turnover of Sales of "meals" was Rs. 39,000/--and subjected it to salex tax accordingly. This turnover was reduced to Rs. 20,000/-- by the Appellate Assistant Commissioner of Sales Tax Jabalpur, in the first appeal that the assessee preferred against the assessment order of the Sales Tax Officer. In the second appeal which the assessee then preferred before the Board of Revenue it was held that the sale by the assessee of any of the afore-enumerated articles singly or collectively to its cutomer or customers did not constitute any sale of a "meal"; that by selling those articles what the assessee sold was cooked food which was exempt from tax under section 10(1) read with item no. 9 of Schedule I to the Act. On this view the Sales Tax Tribunal excluded from the taxable turnover, the turnover of the articles which the Appellate Assistant Commissioner had treated as turnover of sale of "meals", each exceeding in value Rs. 2/--.

Section 10(1) of the Act says that:

> "No tax shall be payable on the sales or purchases of goods, specified in the second column of Schedule 1, subject to the conditions and exceptions, if any, set out in corresponding entry in the the third column thereof."

Item No. 9 of the Schedule reads as follows:

"SCHEDULE I

(See Section 10(1)

Goods exempted from tax

S. No.	Description of goods	Conditions and exceptions subject to which exemption has been allowed
9.	Cooked food other than—	
	(a) pastries.	
	(b) a meal the charge of which exceeds rupees two.	
	(c) sweatmeats.	

It will be seen from section 10(1) read with entry no 9 that sales of "cooked food" are exempt from tax. But if the "cooked food" is "a meal" the charge of which exceeds rupees two, then its sale is not exempt from tax. In this reference there is no controversy that the articles enumerated earlier sold by the assessee are cooked food. The sole question raised in this reference is whether the sale of any of those articles singly or collectively exceeding in value rupees two constitutes "a meal" the charge of which exceeds rupees two. This question turns on the construction of the expression "a meal". The Act does not give any definition of "meal" The expression "a meal" must, therefore, be understood in the sense it has in common parlance and in its popular meaning as understood by people who sell and serve meals. (See *Ramavtar* v. *Assistant Sales Tax Officer* (1). Now, when one talks of a meal,

(1) A. I. R. 1961 S. C. 1325.

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what one means is "food one takes at regular times of the day at a breakfast, dinner, supper etc.,". No doubt, one can satisfy the requirements of hunger and exist by eating at any time everything that is eatable, but that is not taking "a meal"; it is making "a meal" of the eatable or eatables. No-one who goes to the restaurant run by the assessee and asks for being served "a meal" will accept singly or collectively any of the snacks or preparations enumerated earlier sold by the assessee. In our judgment, the sale of any of the articles sold by the assessee did not constitute sale of any "meal". The sales were of "cooked food" which is exempt from tax under item no. 9 of Schedule I.

For these reasons, our answer to the first question is that the word "meal" as used in Schedule I, item no. 9(b) means the food which one takes at regular times of the day at a breakfast, dinner, supper etc.; that the articles sold by the assessee taken singly or collectively do not constitute a meal and their sale is not a sale of a meal. The second question is answered in the affirmative. The assessee shall have costs of this reference. Counsel's fee is fixed at Rs. 100/-

Reference answered accordingly.

FULL BENCH

Before Mr. P. K. Tare C. J., Mr. Justice Singh and Mr. Justice Sharma.

CHHOGALAL, Appellant*
v
IDOL OF BHAGWAN SHRI SATYANARAYAN, NEEMUCH Respondent.

1975
Aug. 13

Accommodation Control Act, Madhya Pradesh (XLI of 1961)— Section 13(1), (2) and (3)— Dispute raised as to amount of rent payable by tenant or person to whom payable— Sub-section (1) of Section 13 is controlled by these provisions— Obligation to pay rent arises when provisional rent is fixed— Court has also power to fix time when fixing provisional rent so that party may not be prejudiced by time taken by Court in passing order— Section 13— Court omitting to fix provisional rent during entire trial— Tenant is not at fault in not complying with section 13— Section 13(2)— Does not provide the manner of raising the dispute— Dispute raised in written statement— It is sufficient for purpose of sub-section (2) of Section 13.

When a dispute is raised as to the amount of rent payable by the tenant or as to the person to whom it is payable, sub section (1) gets controlled by sub-sections (2) and (3).

The obligation to deposit or pay the rent arises only when the Court fixes the reasonable provisional rent and till then the obligation to deposit rent in accordance with sub-section (1) remains suspended.

Jivrambhai and another v *Amarsingh* (1); referred to.

It is implicit that the Court at the time of fixing the reasonable provisional rent will have the necessary power to fix the time for making deposit or payment under sub-section (1) for any period prior to the fixation of provisional rent so that the time taken by the Court in passing its order may not prejudice any party.

*Second Appeal No. 410 of 1965.

(1) 1972 M. P. L. J. 785.

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If the Court omits to fix the provisional rent during the entire trial, it cannot be said that there has been any failure on the part of the tenant to deposit or pay rent in accordance with section 13.

Firm Ganeshram Harvilas and another v. *Ramchandra* (1); not followed.

Section 13(2) is silent regarding the manner in which the dispute should be raised. The only requirement of this provision is that there should be a dispute as to the amount of rent payable by the tenant. The moment this requirement is fulfilled, it becomes the duty of the Court to fix a reasonable provisional rent.

If the tenant has raised the dispute regarding rent in the written statement, that would be sufficient for purposes of the sub-section.

It is not necessary for the tenant to specifically ask for fixation of provisional rent. Raising of a dispute in the written statement by itself amounts to an implied request, if any request is at all needed, for fixation of provisional rent.

M. P. Avadhoot for the appellant.

None for the respondent.

Cur. adv. vult.

OPINION

The Opinion of the Court was delivered by SINGH J.—This appeal was first heard by Bhachawat, J. sitting singly. He found difficulty in reconciling two Division Bench decisions of this Court on the construction of section 13 of the Madhya Pradesh Accommodation Control Act, 1961. These Division Bench cases are: *Firm Ganeshram & Harvilas and another* v. *Ramchandra* (2) and *Jivrambhai and another* v. *Amarsingh* (3). The learned Judge, therefore,

(1) 1970 M. P. L. J. 902.
(2) 1970 M. P. L. J. 902.
(3) 1972 M. P. L. J. 785

referred to a Division Bench the following question of Law:

> "Whether the operation of section 13(1) of the Madhya Pradesh Accommodation Control Act, 1961 is arrested so far as the deposit of rent, according to it, is concerned and it remains in suspense until the Court fixes a provisional rent since when the dispute is raised by the defendant-tenant in his written statement, or it would be so since when the defendant-tenant makes an application inviting the attention of the Court to the specific dispute and asks the Court to fix the provisional rent?"

When the reference came up before a Division Bench (Oza and Sohani, JJ.), the learned Judges considered that as the question required reconsideration of two Division Bench decisions, the reference should be heard by a Full Bench. On their recommendation this Full Bench was constituted to hear the reference.

The material facts pertaining to the question referred to us are that the defendant-appellant is a tenant of the plaintiff-respondent and is in occupation in that capacity of a part of house No. 716 situated at Neemuch. The suit giving rise to this appeal was instituted on 8th July 1963 by the respondent for eviction of the appellant and for arrears of rent. The appellant's ejectment was sought on various grounds one of them being under section 12 (1)(a) of the Act. The respondent's case was that the appellant was a tenant on a monthly rent of Rs. 5/-, and that there was failure on his part to pay the arrears of rent within two months from the service of the notice of demand. The suit was decreed *ex parte* on 13th December 1963. On the appellant's application that he was not served with the summons of the suit, the *ex parte* decree was set aside. The appellant, soon thereafter, filed his written statement on 2nd April 1964. In his written statement the appellant pleaded that the rent of the house to begin

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with was Rs. 2/- per month and it was first enhanced to Rs. 2/8/- per month and then to Rs. 3/- per month and that there was never any agreement to pay the rent of Rs. 5/- per month. It was also pleaded that the appellant on receiving notice sent all the arrears at the rate of Rs. 3/-per month, and that some amount of rent was deposited in the Court of the Rent Controller. The appellant deposited a sum of Rs. 132/- as arrears of rent, calculated at the rate of Rs. 3/-- per month, on the very date he filed his written statement and in that context pleaded that as all the arrears were deposited within one month as required by section 13(1) of the Act, the suit was liable to be dismissed. The trial Court did not fix any reasonable provisional rent as required by section 13(2) of the Act. The appellant continued to deposit rent at the rate of Rs. 3/-- per month during the pendency of the suit.

The trial Court in its final judgment came to the conclusion that the rent of the house was Rs. 5/-- per month and not Rs. 3/-- per month as alleged by the appellant, and that the appellant was liable to eviction under section 12(1)(a) of the Act. In appeal the appellate Court agreed with the finding that the rent was Rs. 5/-- per month and that as the appellant tendered arrears of rent after notice of demand at the rate of Rs. 3/-- per month and not at the rate of Rs. 5/-- per month, the ground under section 12(1)(a) was made out. The appellate Court, however, held that the appellant by depositing the arrears of tent at the rate of Rs. 3/-- per month and by continuing to deposit rent at that rate during the pendency of the suit in the trial Court complied with section 13 of the Act in so far as that Court was concerned. In this context it was observed that when an *ex parte* decree is set aside on the ground of non-service of summons, "the service of the writ of

summons" within the meaning of section 13 (1) cannot be held to have taken place earlier to the date when the *ex parte* decree is set aside. But the appellate Court further held that the appellant by failing to deposit rent in that Court during the pendency of appeal was liable to eviction and was not entitled to protection under section 12(3) or section 13(5) of the Act. In this view of the matter, the decree of eviction passed by the trial Court was confirmed. It is against the decree of the appellate Court that the appellant filed this second appeal.

Bhachawat, J. in his order of reference, has rightly pointed out that the view taken by the appellate Court that the appellant was bound to deposit rent in appeal was erroneous being in direct conflict with the view of the Full Bench in *Ratanchand Firm* v. *Rajendra Kumar* (1). Thus, the particular non-compliance of section 13 on which the decree of the trial Court was upheld by the first appellate Court could not be supported. It was, however, agrued before Bhachawat, J. by the respondent that as the appellant did not deposit arrears and monthly rent at the rate of Rs. 5/-- per month in the trial Court and as he did not specifically and separately apply for fixation of provisional rent, he was not entitled to protection under section 13 of the Act and on this ground the decree for eviction should be maintained. In reply it appears to have been contended that the operation of section 13(1) was suspended immediately the appellant raised a dispute as to the rate and quantum of rent in his written statement; that it was obligatory for the Court to fix a provisional rent under section 13(2); and that it was not incumbent upon the appellant to make a separate application or to pray specifically for fixation of provisional rent. It appears that it was in connection with this

(1) 1969 M. P. L. J. 672.

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argument that Bhachawat, J. found difficulty in reconciling the two Division Bench decisions and referred the question which we have earlier set out.

A suit for eviction against a tenant can be filed only on one or more of the grounds mentioned in section 12(1). Clause (a) of this section permits a suit on the ground "that the tenant has neither paid nor tendered the whole of the arrears of rent legally recoverable from him within two months of the date on which a notice of demand for the arrears of the rent has been served on him by the landlord in the prescribed manner." Section 12(3), however, directs that no decree for eviction on this ground shall be made "if the tenant makes payment or deposit as required by section 13" Section 13 reads as follows:

> "13. When tenant can get benefit of protection against eviction.—(1) On a suit or proceeding being instituted by the landlord on any of the grounds referred to in section 12, the tenant shall, within one month of the service of the writ of summons on him or within such further time as the Court may, on an application made to it, allow in this behalf, deposit in the Court or pay to the landlord an amount calculated at the rate of rent at which it was paid, for the period for which the tenant may have made default including the period subsequent there to upto the end of the month previous to that in which the deposit or payment is made and shall thereafter continue to deposit or pay, month by month, by the 15th of each succeeding month a sum equivalent to the rent at that rate.
>
> (2) If in any suit or proceeding referred to in sub-section (1), there is any dispute as to the amount of rent payable by the tenant, the Court shall fix a reasonable provisional rent in relation to the accommodation to be deposited or paid in accordance with the provisions of sub-section (1) till the decision of the suit or appeal.

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(3) If, in any proceeding referred to in sub-section (1), there is any dispute as to the person or persons to whom the rent is payable, the Court may direct the tenant to deposit with the Court the amount payable by him under sub-section (1) or sub-section (2) and in such a case, no person shall be entitled to withdraw the amount in deposit until the Court decides the dispute and makes an order for payment of the same.

(4) If, the Court is satisfied that any dispute referred to in sub-section (3) has been raised by a tenant for reasons which are false or frivolous the Court may order the defence against eviction to be struck out and proceed with the hearing of the suit.

(5) If, a tenant makes deposit or payment as required by sub-section (1) or sub-section (2), no decree or order shall be made by the Court for the recovery of possession of the accommodation on the ground of default in the payment of rent by the tenant, but the Court may allow such cost as it may deem fit to the landlord.

(6) If a tenant fails to deposit or pay any amount as required by this section, the Court may order the defence against eviction to be struck out and shall proceed with the hearing of the suit."

If there is no dispute between the parties as to the amount or rate of rent or as to the person to whom it is payable, the deposit or payment of arrears and monthly renth as to be made by the tenant in accordance with sub-section (1) of section 13. But when a dispute is raised as to the amount of rent payable by the tenant or as to the person to whom it is payable, sub-section (1) gets controlled by sub-sections (2) and (3). If the dispute is as to the amount of rent, the Court under sub-section (2) fixes a reasonable provisional rent and it is this rent which is to be deposited or paid under sub-section (1). As the obligation on the tenant in case of

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dispute is to deposit or pay the reasonable provisional rent fixed by the Court, it is implicit that the obligation to deposit or pay the rent arises only when the Court fixes the reasonable provisional rent and till then the obligation to deposit rent in accordance with sub-section (1) remains suspended. This is also the view expressed in *Jivrambhai v. Amar Singh (supra)*. Similarly, when a dispute is raised as to the person to whom the rent is payable, there is no obligation to deposit or pay the rent but "the Court may (under sub-section 3) direct the tenant to deposit with the Court the amount payable by him", and it is then that the tenant has to make the deposit. Further, although the Court must fix the reasonable provisional rent under sub-section (2) expeditiously, it is conceivable that there may be delay in some cases making it impossible for the tenant to adhere to the time schedule under sub-section (1) for depositing or paying rent for the period before the fixation of provisional rent. It is implicit, therefore, that the Court at the time of fixing the reasonable provisional rent will have the necessary power to fix the time for making deposit or payment under sub-section (1) for any period prior to the fixation of provisional rent so that the time taken by the Court in passing its order may not prejudice any party. Again, there may be cases, where although a dispute is raised as to the amount of rent within the meaning of sub-section (2), yet the Court omits to fix reasonable provisional rent during the entire trial of the suit. Indeed, this is actually what happened in the instant case In such a situation, the tenant cannot be allowed to suffer for the failure of the Court to do its duty. The maxim *actus curiae naminem gravabit*, which is founded upon justice and good sense, would apply to such a case. As a result of the dispute raised by the tenant,

the obligation to deposit or pay rent, as already seen, gets suspended until the fixation of provisional rent by the Court. So if the Court omits to fix the provisional rent during the entire trial, it cannot be said that there has been any failure on the part of the tenant to deposit or pay rent in accordance with section 13. In such a case as there is nothing to be paid or deposited, it would be said that "the tenant has made payment or deposit as required by section 13" within the meaning of section 12(3). and section 13(5). This question was formulated as question No. 4 in *Firm Ganeshram Harvilas* v. *Ram-Chandra (supra)* in paragraph 6 (pages 903, and 904), but in our opinion, was wrongly answered against the tenant in the conclusion No. 6 formulated in paragraph 22 at p. 908 of the report.

The question referred to us thus rightly assumes the that operation of sub-section(1) of section 13 is arrested and this provision remains in suspense when a dispute is raised by the tenant under sub-section (2), and that the obligation to deposit rent remains so suspended until the Court fixes the provisional rent and the tenant is not in default if no provisional rent is fixed by the Court. The point that we are required to decide is whether it is sufficient for the tenant to raise the dispute in his written statement or whether he must make an application inviting the attention of the Court to the specific dispute and ask the Court to fix the provisional rent.

Sub-section (2) of section 13, in so far as material, provides that "if there is any dispute as to the amount of rent payable by the tenant, the Court shall fix a reasonable provisional rent in relation to the accommodation." The sub-section is silent regarding the manner in which the dispute should be

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raised. The only requirement of this provision is that there should be a dispute as to the amount of rent payable by the tenant. The moment this requirement is fulfilled, it becomes the duty of the Court to fix a reasonable provisional rent. Having regard to the language of the provision, if the tenant has raised the dispute as to the amount of rent payable by him in the written statement, that would be sufficient for purposes of the sub-section. A dispute so raised will make it obligatory on the Court to fix the reasonable provisional rent. No further action on the part of the tenant, such as making of an application or inviting the attention of the Court to the specific dispute or specifically asking the Court to fix the provisional rent, is needed to cast an obligation on the Court to fix the reasonable provisional rent, for the simple reason that the sub-section does not say that the tenant should file a separate application or specifically pray for fixation of provisional rent. In *Jivrambhai* v. *Amar Singh (supra* p. 789) it has been rightly observed that "if the dispute has been raised in the written statement, the Court cannot refuse to determine provisional rent on the ground that a separate application has not been made." There are certain observations in *Firm Ganeshram Harvilas* v. *Ramchandra* (*supra;* proposition No. 1 at p. 907) that it is not enough for the tenant to raise the dispute and in addition he must invite the attention of the Court to the dispute and the Court must be asked to fix a reasonable provisional rent. In our opinion, these observations do not lay down the law correctly as they add certain requirements in sub-section (2) which are not there. If the tenant disputes the rate and amount of rent in his written statement, as was done in the instant case, there arises a dispute within the meaning of sub-section (2)

casting a duty on the Court to fix a reasonable provisional rent. The Court is expected to go through the pleadings of the parties for eliciting the matters in dispute and it is not necessary for the tenant to specially draw the attention of the Court that he has disputed the amount or rate of rent. Similarly, it is not necessary for him to specifically ask for fixation of provisional rent. Raising of a dispute in the written statement by itself amounts to an implied request, if any request is at all needed, for fixation of provisional rent.

For the reasons stated above, we answer the question referred to us as follows:

> "The operation of sub-section (1) of section 13 of the Madhya Pradesh Accommodation Control Act, 1961, is arrested when a dispute as is referred to in sub-section (2) is raised by the defendant-tenant in his written statement and it is not necessary that he should make an application inviting the attention of the Court to the specific dispute and asking the Court to fix provisional rent."

The second appeal shall now be placed before a Single Judge for final disposal. There shall be no order as to costs of this reference.

Reference answered accordingly.

FULL BENCH

1975

Oct. 8

Before Mr. P. K. Tare C. J., Mr. Justice Dwivedi and Mr. Justice C. P. Sen.

SMT. MUSTAQ BI, Petitioner*

v.

STATE TRANSPORT APPELLATE TRIBUNAL, MADHYA PRADESH, GWALIOR, and others., Respondents.

Motor Vehicles Rules, 1949—Before coming into force of M. P. Transport appellate Tribunal (Appeal and Revision) Rules, 1972—No power in Transport Appellate Tribunal to dismiss appeal in default.

Regional Transport Authority has no jurisdiction to dismiss an application in default and that in the absence of a party, the Regional Transport Authority is bound to consider the case on merits. That principle would be applicable to the State Transport Appellate Tribunal as well before New Rules were brought into force from 11.8.72.

Surendra v. *State Transport Appellate Authority* (1); relied on

V.S. Dabir with *A.S. Kutumbale, A.G. Dhande* and *O.P. Namdeo* for the petitioner.

S.S. *Agarwal* with *A. S. Jha* for respondent no. 3.

Cur. adv. vult.

ORDER

The Order of the Court was delivered by TARE C. J. - In this petition under Articles 226 and 227 of the Constitution of India, the petitioner challenges the order of the State Transport

* Miscellaneous Petition No. 315 of 1973.

(1) 1970 M. P L. J. 253 (F. B.).

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Appellate Tribunal, dated 27-2-1973 (Petitioner's Annexure C). By the said order, the petitioner's application for restoration of the appeal to file was rejected by the State Transport Appellate Tribunal on the ground that it was barred by limitation. At this stage, we might note that the petitioner has not made any prayer for quashing the order of the State Transport Appellate Tribunal, dated 4-4-1972, dismissing the petitioner's appeal in default.

The petitioner's husband, Nazir Ahmed, a bus operator, and other bus operators, namely, respondents 3 to 7, had applied for a stage carriage permit for the Sanjeet-Mandsaur route. The Regional Transport Authority, by order dated 12-12-1970, granted a permit in favour of the third respondent, namely, Motilal Phulchand. Against that order of the Regional Transport Authority, the petitioner filed an appeal before the State Transport Appellate Tribunal. A notice of the hearing on 4-4-1972 was issued to the petitioner, but in spite of that notice, she remained absent. Therefore, the Appellate Tribunal dismissed the appeal in default by an order of that date. Thereafter, the petitioner on 19-12-1972 filed an application for restoration of the appeal to file. No doubt, that restoration application was unduly delayed and there is no explanation offered for the delay caused. The State Transport Appellate Tribunal, by order dated 27-2-1973 (Petitioner's Annexure C), dismissed the restoration application on the ground that it was barred by limitation. Hence this writ petition.

Before considering the instant question arising in the present writ petition, it may be relevant to note that the Madhya Pradesh State Transport Appellate Tribunal (Appeal and Revision) Rules, 1972, came into force with effect from 11-8-1972.

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Sub-Rule (5) of Rule 4 of the said Rules provides as follows:

> "Unless otherwise expressly provided in the Act or in these Rules, the procedure laid down in the Code of Civil Procedure, 1908 (V of 1908) shall, so far as may be, followed in all proceedings under these Rules."

Therefore, by virtue of the said Rules, now after 11-8-1972, the State Transport Appellate Tribunal can resort to the provisions of the Code of Civil Procedure so far as they may be made applicable to a particular situation. But prior to the coming into force of these Rules on 11-8-1972, no procedure was prescribed for the Appellate Tribunal to follow any course of action. So far as the Regional Transport Authorities are concerned, the procedure has been prescribed by the Rules and there is no provision for application of the provisions of the Code of Civil Procedure.

As regards the procedure to be followed by the Regional Transport Authority, a Full Bench of this Court in *Surendra* v. *State Transport Appellate Authority* (1), laid down that a Regional Transport Authority has no jurisdiction to dismiss an application in default and that in the absence of a party, the Regional Transport Authority is bound to consider the case on merits. That principle, in our opinion, would be applicable to the State Transport Appellate Tribunal as well before the new Rules were brought into force from 11-8-1972. We do not find, any reason to depart from the reasoning of the said Full Bench which, in our opinion, would be applicable to the proceedings before the Appellate Tribunal as well before 11-8-1972. However, after the new Rules have been brought into force, the position so far as the Appellate Tribunal is

(1) 1970 M.P.L.J. 253 F.B.

concerned would altogether change and it is now open to the Appellate Tribunal to resort to the provisions of the Code of Civil Procedure so far as they can be found applicable. In this view of the matter, we are of the opinion that the State Transport Appellate Tribunal had no jurisdiction to dismiss the appeal in default on 4-4-1972. It is true that the Rules in force then, namely, the Madhya Bharat Motor Vehicles Rules, 1949. permit the Regional Transport Authority or the Appellate Authority to refuse to grant relief to a person who would remain absent. It would be for the simple reason that the Regional Transport Authority or the Appellate Authority would not be in a position to decide the case on merits if some information was required from the applicant or the appellant. In that event, the decision would certainly be on merits analogous to the provisions of Order 17, Rule 3 of the Code of Civil Procedure. But on the basis of the said Rules, we are unable to conclude that the Regional Transport Authority or the Appellate Authority had any jurisdiction to dismiss an application in default on the lines analogous to Order 9, Rule 8 or Order 17, Rule 2, Civil Procedure Code.

In the view we take, we are clearly of the opinion that the order, dated 4-4-1972 passed by the State Transport Appellate Tribunal dismissing the petitioner's appeal in default was without jurisdiction. Consequently, the other proceedings that followed in the matter of restoration of the appeal to file would not be very material. Of course, if the provisions of the Code of Civil Procedure had been made applicable at that stage, the petitioner's restoration application would have been barred by time.

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However, the learned counsel for the third respondent urged that there is no prayer for quashing the order of the State Transport Appellate Tribunal, dated 4-4-1972, and if an amendment were to be sought now for quashing that order, the present petition would be unduly delayed. We are of opinion that this contention raised on behalf of the third respondent is of no significance in view of our finding that the order, dated 4-4-1972, passed by the State Transport Appellate Tribunal was without jurisdiction and that the Appellate Tribunal was bound to decide the question on merits. In this view of the matter, neither the question of limitation nor the question of delay arises and we cannot allow an order without jurisdiction to remain on record for a mere technicality. Therefore, we feel that it is necessary to quash the order of the State Transport Appellate Tribunal, dated 4-4-1972 and consequently all subsequent proceedings thereafter would automatically stand quashed.

As a result of the discussion aforesaid, this petition succeeds and is accordingly allowed. We hereby quash the order of the State Transport Appellate Tribunal, dated 4-4-1972, as also the subsequent proceedings in the matter of restoration of the appeal to file including the order of the Appellate Tribunal, dated 27.2.1973 and, by a writ of *mandamus*, we direct the State Transport Appellate Tribunal to decide the appeal on merits in accordance with law. Under the circumstances, we further direct that there shall be no order as to the costs of the present writ petition which shall be borne as incurred. The security amount deposited by the petitioner be refunded to her. The third respondent will be free to raise all questions in the appeal to be heard by the Appellate Tribunal which would be

available to him and we do not wish to pronounce anything in that behalf.

Petition allowed.

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Smt. Mustoq Bi v. State Transport Appellate Tribunal, Gwalior

MISCELLANEOUS PETITION

Before Mr. Justice Shiv Dayal and Mr. Justice Dube.

S. M. A. RIZVI, Petitioner*

v.

STATE OF MADHYA PRADESH and others, Respondents.

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Feb. 21/Mar. 4

Constitution of India—Article 14—Memorandum No. 25065—3048/XXI--B, dated 13--7--64—Vires *of.*

The memorandum No. 25065—3048/XXI-B, dated 13-7-64 issued by the State of Madhya Pradesh in the Law Department in so far as it excludes the District and Sessions Judges who were promoted as such before April 1, 1958 from being allowed w.e.f. April 1, 1958, the benefit of pay fixation in the I. A. S. (Senior) Scale was *ultra-vires* Article 14 of the Constitution. The reason being that there is no intelligible differentia which distinguishes a District and Sessions Judge promoted before April 1, 1958, and another promoted on or after that date. Once a date is fixed, there is no real and substantial distinction bearing a just and reasonable relation to the object sought to be achieved in fixing a higher salary to those who were either junior or less efficient even though drawn from the same integrating unit.

State of U. P. v. *K. C. Dhiun* (1) and *Anandji Haridas and Co. (P) Ltd.* v. *S. P. Kasture and others (2)*; relied on.

Ramchandra Rao Kotasthane v. *State of M. P.(3)*; overruled by Supreme Court.

*Misc. Petition No. 62 of 1969.

(1) Civil Appeal No. 1832 of 1968, decided on the 12th Decmeber 1968.

(2) A. I. R. 1968 S.C. 565.

(3) A. I. R. 1968 M. P. 77.

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G. P. Patanker for the petitioner.

R. S. Bajpai Additional Government Advocate for the respondents.

Cur. adv. vult.

ORDER

The Order of the Court was delivered by SHIV DAYAL J.-By this petition under Art. 226 of the Constitution the petitioner has challenged *ultra vires* Article 14 of the Constitution the exclusion of the District & Sessions Judges, who were promoted as such before April 1, 1958, from the benefit of the pay fixation of the District & Sessions Judges in the I. A. S. (Senior) Scale.

The petitioner was in the judicial service of the erstwhile State of Madhya Bharat which merged in the New State of Madhya Pradesh on its formation on November 1, 1956. On that date the petitioner was officiating as District & Sessions Judge, Ujjain, by virtue of an order dated October 23, 1956 (Annexure 'A'). Under that order the petitioner who was on that date an Additional District & Sessions Judge was temporarily appointed as the District & Sessions Judge and was asked to assume the charge of that office immediately at Ujjain and to continue to officiate until Shri Surajbhan (who was then Registrar, High Court, and was under orders of posting of Ujjain) assumed the charge of his office as District & Sessions Judge, Ujjain.

On the formation of the New State of Madhya Pradesh the petitioner was absorbed in the judicial service of the New State. In February 1957 Shri Surajbhan was posted as District & Sessions Judge,

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Indore, instead of Ujjain and the petitioner continued to work as officiating District & Session Judge at Ujjain. Later on he was transferred from Ujjain to Guna in the same capacity.

On February 21, 1959, a provisional gradation list of the M. P. Judicial Services was published in the M. P. Extraordinary Gazette. The petitioner was ranked among the Civil Judges (Category III) though he was also shown a permanent Additional District & Sessions Judge and offg. District & Sessions Judge.

The petitioner was then transferred from Guna to Bhind as offg. temporary District & Sessions Judge. By order dated June 6, 1961 (Annexure 3) he was provisionally confirmed as District & Sessions Judge w. e. f November 1, 1956. By an order of the State Government dated June 30, 1961 the petitioner was absorbed provisionally against the post of District & Sessions Judge and included in the cadre of District & Sessions Judge w. e. f November 1, 1956, and this post was directed to be for the purposes of Unification of Pay Scales and Fixation of Pay on Absorption Rules, 1959, the "post of absorption" in respect of the petitioner within the meaning of clause (g) of Rule 2 of the said Rules.

On September 21, 1961 the final gradation list of the judiciary was published in the M. P. Gazette. The petitioner was shown in Category III of the "permanent Civil Judges". He was also shown in Category II as "offg. Temporary Additional District & Sessions Judge" and was also shown in Category No. I as "Offg. Temporary District and Sessions Judge" (Annexure 5).

By an order dated April 6, 1962 the petitioner

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was confirmed on the post of District & Sessions Judge w. e. f. November 1, 1956 (Annexure 6). Eventually the petitioner retired in 1966.

The officers constituting the judicial services of the new Madhya Pradesh State have been drawn from the old Madhya Pradesh (Mahakaushal) and from other units which constituted the new State of Madhya Pradesh. The District & Sessions Judges drawn from the old Madhya Pradesh were already getting their pay in the I. A. S. (Senior) Scale in accordance with Illustration II below Schedule II to the I. A. S. (Pay) Rules, 1954. By memorandum No. 25065-3048/xxi-B dated July 13, 1964, the Government of Madhya Pradesh ordered that the judicial officers drawn from the units other than old Madhya Pradesh who were promoted as District and Sessions Judges on or after April 1, 1958, were also allowed the benefit of pay fixation in the I. A. S. (Senior) Scale. It will be useful to reproduce here the memorandum:-

"Government of Madhya Pradesh,
Law Department,

MEMORANDUM

No. 25065-3048/XXI-B, Bhopal, dated the 13th July, 1964

To,

The Registrar,
High Court of Madhya Pradesh,
Jabalpur.

Sub: Unification of system of pay fixation of the judicial Officers promoted as District and Sessions Judges.

Reference correspondence resting with your D. O. Letter No. 110/IV-12-63/69-II, dated 2.6.64 on the above subject. The State Government are pleased to order

that the judicial Officers drawn from units other than old Madhya Pradesh who were promoted as District and Sessions Judges on or after 1-4-58 and are hereinafter promoted as District and Sessions Judges, be allowed the benefit of pay fixation in the IAS (Senior) Scale in accordance with the illustration-II below Schedule II to the IAS (Pay) Rules, 1954, which benefit is permissible to Officers of the old Madhya Pradesh by virtue of rule 7(1) of the Madhya Pradesh Judicial Services (Classification, Recruitment and Condition of Service) Rules, 1965.

By order and in the name of the
Governor of Madhya Pradesh,
Sd/- N. C. Dwivedi,
Dy. Secretary to the Government."

The effect of this order was that all the District and Sessions Judges were allowed the benefit of pay fixation in I. A. S. (Senior) Scale except those District & Sessions Judges who had been drawn from units other than the Old Madhya Pradesh and who had been promoted as such before April 1, 1958. Besides the petitioner, only seven more Officers were excluded. They all belonged to the Madhya Bharat region:

1. Shri V. K. Dongre,
2. Shri Surajbhan,
3. Shri K. B. Patil,
4. Shri S. M. Pagnis,
5. Shri M. K. Kaul,
6. R. B. Kotasthane,
7. Shri S. R. Vyas.

The petitioner challenges the validity of this exclusion and claims for himself the benefit of the

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order dated July, 13, 1964, w. e. f. April 1, 1958, the same pay fixation in the I. A. S. (Senior) Scale as all other District & Sessions Judges not so excluded.

The petitioner's contention is twofold:-

(i) It was on April 6, 1962 that he was confirmed as a District & Sessions Judge and that must be taken to be the date of his promotion as District & Sessions Judge in the "real sense" of the word although he had been allowed earlier to work as a temporary and officiating District and Sessions Judge;

(ii) The order dated July 13, 1964, in so far as it excludes him from the benefit of that order is discriminatory and *ultra vires* Art. 14 of the Constitution.

The first contention must be rejected. Prior to November 1, 1956, when the new State of Madhya Pradesh came into being the petitioner had been working as District and Sessions Judge, Ujjain in the former State of Madhya Bharat. Later on he was first provisionally confirmed as District & Sessions Judge (on July 16, 1961) and finally on April 6, 1962, he was confirmed as District & Sessions Judge w. e. f. November 1, 1956. Thus the petitioner must be deemed to have been promoted and confirmed as District and Sessions Judge, as on November 1, 1956. He cannot, therefore, claim to have been promoted as District and Sessions Judge on or after April 1, 1958.

We shall now advert to the second contention. The case of the State Government is that the Rules governing the pay of the District & Sessions Judges drawn from the various cadres of the integrating States was governed by I. A. S. (Pay) Rules, 1954. The pay was fixed in accordance with the M. P. Unification of Pay Scales and Fixation of Pay on

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Absorption Rules, 1959. In the old Mahakaushal region the pay Scale of the District & Sessions Judges was senior scale in I. A. S. cadre i. e. Rs. 800–1800 as governed by the M.P. Judicial Services (Classification, Recruitment and Condition of Service) Rules, 1955. In the Madhya Bharat region the Pay Scale was Rs. 800-1200 (ordinary), Rs. 1250–1500 (Select). The Senior I. A. S. scale of pay was applicable only to the District and Sessions Judges drawn from Mahakaushal region. After the formation of the new State of Madhya Pradesh it was considered essential to have one cadre of the Judicial officers with identical scales of Pay. Accordingly, Unified Scale of pay was evolved and published *vide* Notification dated October 5, 1960 (Gazette October 7, 1960). Unification scale of the cadre of the District & Sessions Judges therefore, came to be fixed as "I. A. S. (Senior) Scale". However, the benefit I. A. S. (Senior) Scale was extended to all the District & Sessions Judges drawn from other units who were promoted as District & Sessions Judges on or after April 1, 1958. As the petitioner had been confirmed on his promoted post of the District & Sessions Judge w. e. f. November 1, 1956, he could not get the benefit.

It is contended for the respondents that where the State Government frames or applies any rules it has discretion to fix a date for such rules to come into force or to apply. In the present case the Government decided that I. A S. Pay Rules should be applied to the persons who were promoted to the posts of District & Sessions Judges on or after April 1, 1958. The petitioner cannot grudge the application of the said rules to the promotees after April 1, 1958, only. Reliance is placed on *Ramchandra Rao Kotasthane* v. *State of M. P.* (1).

(1) A. I. R. 1968 M. P. 77—1968 J. L. J. 17.

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It seems to us patent enough that the resultant position which emerged from the Government Order dated July 13, 1964, was that the petitioner's juniors who were promoted as District & Sessions Judges on or after April 1, 1958, got a higher pay than the petitioner. This discrimination was sought to be justified on the ground that the District & Sessions Judges drawn from the old Mahakaushal region had already been admitted to the benefit of the I. A. S. (Senior) Scale even before the formation of the new State of Madhya Pradesh, so that the District & Sessions Judges who were drawn from other units could have no grievance. In our opinion, this argument which was advanced before us on behalf of the respondent State cannot be accepted. Apart from other things, the argument ignores the discrimination between two District & Sessions Judges who were both drawn from the same unit (say, Madhya Bharat), one of whom was promoted as such before and the other after April 1, 1958. It is not understandable that one who was promoted as District & Sessions Judge before April 1, 1958, should even after April 1, 1958, draw less Pay than another District & Sessions Judge who was promoted on or after April 1, 1958, even if both were drawn from the same intergrating unit (e. g. Madhya Bharat). It is incontestable that the former had been promoted before April 1, 1958, either because they were senior to the latter or because they were found more efficient than the latter. In either case their Pay scale could not have been more disadvantageous than that of the latter who were subsequently promoted. It is not necessary to enter into the question of discrimination between a District and Sessions Judge drawn from the old Madhya Pradesh (Mahakaushal) and another District & Sessions Judge drawn from any other intergrating unit. The impugned order is unjustifiably discriminatory when the cases of two District & Sessions

Judges (drawn from the same intergrating unit other than the old Mahakaushal) are compared, one of whom was promoted as such before April 1, 1958, while the other who was promoted as District & Sessions Judge on or after that date. No reason for this unequal treatment could be shown to us. Therefore, the classification is in entirety arbitrary and must be struck down.

The view we take is fully fortified by the decision of the Supreme Court in the *State of U. P.* v. *K. C Dhaun* (1). In that case, the respondent joined the U. P. Civil (Judicial) Service as Munsiff in 1925. He was promoted to the post of a Civil & Sessions Judge on October 15, 1947, and confirmed in that post with effect from September 16, 1949. He was appointed as an officiating District and Sessions Judge on may 16, 1949 and confirmed in that post with effect from July 1, 1951. He retired from service on February 15, 1954. Perior to July 4, 1931, the Pay Scale of Civil and Sessions Judge was Rs. 800/-100/-1300/-50/-1350 and that of the District and Sessions Judges was Rs. 1275/75-1500/100-2000/50-2250. The Officers who were promoted as Civil and Sessions Judges after July 4, 1931, were given a lower scale namely Rs. 600-1200. The pay scale of Officers who joined service prior to July 4, 1931 and confirmed in the post of Civil and Sessions Judges prior to December 31, 1950, are regulated by Rule 30(a) whereas the officers who joined service prior to July 4, 1931 but confirmed in the post of Civil and Sessions Judges after December 31, 1950, are governed by rule 24 read with rule 30(b). In the case of the former class their old pay scales were retained but in the case of the latter class a new pay scale was fixed.

(1) Civil Appeal No. 1532 of 1968, decided on the 17th December 1968.

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Rule 24 as it stood at the relevant time reads:-

"Monthly rates of pay:—The scales of pay admissible to members of the service shall be as follows:

(1) For Civil and Sessions Judges, the scale of pay shall be Rs. 500-50-800-50-1,200, per mensem, with an efficiency bar at the stage of Rs. 800.

(2) For District and Sessions Judges. the scale of pay shall be Rs. 800-50-1,000-75-1,750-50-1800, per mensem.

(3) Fixation of initial pay on appointment to the service in posts of Civil and Sessions Judge shall be regulated as follows:—

(a) Direct recruits will commence on the minimum of the time scale, namely, Rs. 600 per mensem. Such a recruit will, on satisfactory completing of the first year of his probation, draw Rs. 650 per mensem, and on confirmation, Rs. 700 per mensem.

Note :-If the probation is extended in the case of a candidate appointed by direct recruitment, such extension shall not count for increment unless the appointing authority directs, otherwise.

(b) The initial pay of an officer of the Uttar Pradesh Civil Service (Judicial Branch) promoted to the post of Civil and Sessions Judge, should be fixed at the stage in the scale for Civil and Sessions Judges next above the amount equal to the Officer's pay, or presumptive pay in the ordinary time-scale (as distinguished from pay in the selection grade) of the Uttar Pradesh Civil Service (Judicial Branch) plus an increase at the rate of one increment in the time-scale for Civil and Sessions Judges for every three years of service in the Uttar Pradesh Civil Service (Judicial Branch) subject to a minimum increase of Rs. 200 and a maximum increase of Rs. 300/-."

Rule 30(a) says:

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"Notwithstanding anything contained in these rules the pay of an officer appointed or approved for appointment to the U. P. Civil Service (Judicial Branch) on or before July 4, 1931, and confirmed as a Civil and Sessions Judge on or before December 31, 1950, shall, as a Civil and Sessions Judge, be governed by rule 12 of the U. P. Civil Service (Judicial Branch) (Condition of Service) Rules, 1942. Such officer shall on appointment as a District and Sessions Judge draw pay in the time-scale for District and Sessions Judges mentioned under rule 24, and his initial pay in that time scale shall be fixed at the stage next above the amount equal to the officer's pay, or presumptive pay in the ordinary time-scale of the U. P. Civil Service (Judicial Branch), plus an increase at the rate of one increment in the time-scale for the District & Sessions Judges for every three years of his total service in the U.P. Civil Service (Judicial Branch) and as Civil and Sessions Judge, subject to a minimum increase of Rs. 20/ and a maximum increase of Rs. 300, as if this rule was in force on his first appointment as a District & Sessions Judge in a substantive, temporary or officiating capacity on or after March 6, 1948; provided that when with the increase calculated as aforesaid, the figure arrived at corresponds to a stage in the time-scale for District and Sessions Judges, the pay shall be fixed at that stage and not at the next higher stage; provided further that if the pay of an officer in the post of District and Sessions Judge as calculated under this Clause, is at any stage, less than the pay already allowed to him under the orders issued in this behalf by Government, the different shall be treated as his personal pay and absorbed in his future increments."

Rule 20(b) reads:-

"The pay of every other officer as a member of the U.P. Civil (Judicial Branch) on the 16th day of August, 1947, appointed to the post of District and Sessions Judge, or a post of Civil and Sessions Judge, whether in a substantive, temporary or officiating capacity, shall be refixed in accordance with rule 24 as if that rule was in force on the date of his first appointment

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as aforesaid; provided that if the pay of an officer in the post of District and Sessions Judge as calculated under this clause is, at any stage, less than the pay already allowed to him under the orders issued in this behalf by Government, the difference shall be treated as his personal pay and absorbed in his future increments."

In view of these rules officers though recruited prior to July 4, 1931, but confirmed after December 31, 1950 got the benefit of a lift ranging from about Rs. 200 to Rs. 300 per month under rule 24 over their substantive pay on their appointment as Civil and Sessions Judges but those officers who were appointed prior to July 4, 1931 but confirmed before December 31, 1950 were not given the above benefit. Their pay scale was fixed as Civil and Sessions Judges at the next stage of their substantive pay. The resulting position was that the respondent's juniors confirmed as Civil and Sessions Judges after December 31, 1950 got an initial pay of about Rs. 1150 per month on their first appointment at Civil and Sessions Judges whereas the respondent got an initial pay of Rs. 900/- on his appointment as Civil and Sessions Judge.

In that case Mr. Justice Hegde speaking for the Court said:-

"The object of rule 30, admittedly was to preserve to the officers who entered into service prior to July 4, 1931 their previous pay scale. We have to examine the validity of the classification made under the said rule having in mind the object intended to be achieved. One can appreciate any difference made in service conditions between those officers who entered service prior to July 4, 1931 and those who entered service thereafter. But what is not understandable is why there should be any difference between those who were confirmed as Civil and Sessions Judges before December 31, 1950 and those confirmed

therefter. Among the officers appointed prior to July 4, 1931, some might have been confirmed prior to December 31, 1950 either because they were seniors to those confirmed latter for because they were found to be more efficient. In either case their pay scale should not have been more disadvantageous than that of the officers confirmed subsequent to December 31. 1950. Under rule 30 generally speaking, officers who entered service prior to July 4, 1931 but confirmed as Civil and Sessions Judges after December 31, 1950 started with an initial salary of about Rs. 1150/- whereas those confirmed before December 31, 1950, started with an initial salary of Rs. 900/-. In other words the former class had the advantage of getting about Rs. 250/- per month more than the latter. We have not been shown ony reason for this unequal treatment. *Prima facie* rule 30 is discriminatory. The classification made under that rule appears to be an arbitrary one. The rule in question has adversely affected the respondent and officer similarly placed."

Their Lordships further laid down thus:

"A valid classification must be based on facts and not merely on theory. Further, a general classification cannot be justified on the basis of exceptional cases."

In *Anandji Haridas and Co. (P) Ltd.*, v. *S. P. Kasture and others* (1) their lordships held:-

"To be a valid, classification, the same must not only be founded on an intelligible differentia which distinguishes persons and things that are grouped together from others left out of the group but that differentia must have a reasonable relation to the objects sought to be achieved.

... ...

It is true the State can by classification determine who should be regarded as a class for the purpose of legislation and in relation to a law enacted on a particular subject, but the classification must be based on

(1) A. I. R. 1968 S C. 265.

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S.M.A. Rizvi v. *State*

some real and substactial distinction bearing a just and reasonable elation to the object sought to be attained and cannot be made arbitrarily and without any substantial basis."

Applying these dicta to the present case we are unable to see an intelligible differentia which distinguishes a District & Sessions Judge promoted before April 1, 1958, and another promoted on or after that date. The classification is intelligible between officers drawn from the different units to continue upto the stage of unification. Undoubtedly it was entirely in the discreation of the State Government to allow the benefit of the I. A. S. (Senior) scale to the District and Sessions Judges and it had also unfettered power to fix any particular date from which they would be allowed that benefit. But once a date is fixed, there is no real and substantial distinction bearing a just and reasonable relation to the object sought to be achieved in fixing a higher salary to those who were either junior or less efficient, even though drawn from the same integrating unit.

In *Ramchandra Rao Kotasthane* v. *State of M. P.* (1) a Division Bench of this Court held that the order dated July 13, 1964, which is under challenge in the present case was not violative of Art. 14 of the Constitution. It was observed that a differentiation arising from historical reasons and geographical classification based on historical reasons could not be held to offend Art. 14. It was observed:—

"Equal protection under Art. 14 means a right to equal treatment in similar circumstances. That article does not require things or persons of different type and nature in fact to be treated in law as though they were the same".

(1) A. I. R. 1968 M. P. 77=1968 J. L. J. 17.

It was further observed:— 1971

"The abstract doctrine of equal pay for equal work has nothing to do with article 14." *S.M.A. Rizvi v. State*

The Division Bench justified the discrimination as follows:

"The difference that arose after 1st April 1958 in the pay of allocated permanent District and Sessions Judge was not because of the 1959 Rules or the Notification dated 5th October 1960 but because of the fact that in the old Madhya Pradesh the pay scale of permanent District and Sessions Judges was already the I. A. S. Senior scale, and therefore, the fixation of their initial pay was governed by rule 7 of the M. P. Judicial Service (Classification, Recruitment and Conditions of Service) Rules, 1955. In the Madhya Bharat region from where the petitioner hailed, the scale of pay was Rs. 800–1200 (ordinary) and Rs. 1250–1500 (Select Grade)"

....

"If therefore, a person who was a permanent District and Sessions Judge in the old State of Madhya Pradesh before 1st November 1956 and who continued to serve in that capacity in the new State drew a higher salary than the petitioner even after the application of the unified scale of pay to the application on 1st April 1958, the petitioner cannot complain that there has been any discrimination as between him and the District and Sessions Judges from the old State of Madhya Pradesh. An allocated District and Sessions Judge from the old State of Madhya Pradesh drew a higher salary because of the fact that in the old State of Madhya Pradesh the pay scale of District and Sessions Judges was already the I. A. S. Senior Scale and the fixation of their pay was governed by the M. P. Judicial Service (Classification, Recruitment and Conditions of Service) Rules, 1955, and not because of any different application of the unified scale of pay. In regard to the difference in the petitioner's salary after 1st April 1958 and the salary of a person under the unified scale

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promoted as District and Sessions Judge after 1st April 1958, the differentiation is not between persons similarly placed. The petitioner belonged to a class of persons who had already been promoted as District and Sessions Judge before the unified scale came into force. Equal protection under Art. 14 means a right to equal treatment in similar circumstances. That article does not require things or persons of different type and nature in fact to be treated in law as though they were the same. As an allocated permanent District and Sessions Judge he could not claim that he should have been treated in the same way as a person who was promoted after 1st April 1958 as a District and Sessions Judge. It is no doubt true that the petitioner did the same kind of work as allocated permanent District and Sessions Judges from the old State of Madhya Pradesh and the persons promoted as District and Sessions Judges after 1st April 1958 did."

With great respect it must be said that in *Ramchandrarao Kotasthane* v. *State of M.P. (supra)* a case of discrimination between two District and Sessions Judges drawn from the same integrating unit (one promoted as such before; and the other promoted as such after April 1, 1958) does not seem to have been considered. It appears that that Division Bench concentrated its attention on the case of discrimination between a District and Sessions Judge drawn from old Madhya Pradesh region and another drawn from the Madhya Bharat region. Moreover, that decision regards the District and Sessions Judge who had been promoted as District & Session Judge before the unified scale of pay came into force as one class while those promoted after that date as another class and holds that they are persons "of different type and nature in fact" and holds that they cannot be "treated in law as though they were the same." These observations and the conclusion run counter to what their Lordships have expressed and held in the *State of U.P.* v. *K. C. Dhaun (supra)* The decision

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of this Court in *Ramchandra's case* (*supra*) must, therefore, be taken as overruled and is no more good law. *Ramchandra Kotasthane's case* (*supra*) was decided by this Court on July 4, 1967, while the *State of U. P.* v. *K. C. Dhaun* (1) was decided on December 12, 1968.

It remains to be said that the petitioner in the present case has not only prayed for declaring the impugned memorandum as void and repugnant to Art. 14 of the Constitution in so far as it withholds the benefit of initial pay fixation from the District and Sessions Judges promoted prior to April 1, 1958, but also claims a direction to get the pay and pension of the petitioner fixed in conformity with the principles and rules as are applicable to promotees on the post of District and Sessions Judges on or after April 1, 1958. As to the latter prayer we cannot do better than to reproduce what their Lordships said in the *State of U. P.* v. *K. C. Dhaun* (*supra*) as follows:-

> "As seen earlier, the High Court has given a direction to the Government to pay to the respondent the arrears of salary due on the basis of the refixation ordered. We do not think that on the facts of this case any such direction is either necessary or proper. Evidently the Government had withheld the benefit of those rules to the respondent and other officers similarly placed as it thought it was bound by rule 30(a). Now that we have declared rule 30(a) *ultra vires* the Constitution, we are sure the Government will immediately take necessary steps in accordance with law and justice. In this view it is not necessary to consider the contention advanced on behalf of the appellants that no mandamus should have been issued to the appellants as regards the arrears of salary in view of the delay in bringing the writ petition. Hence we set aside the direction

(1) (1969) II S. C. N. 17.

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given by the High Court as regards the arrears of pay."

The present writ petition was filed on July, 9, 1969.

In the result, this petition is partly allowed. It is declared that the memorandum No. 25065-3048/XXI-B, dated July 13, 1964, issued by the State of Madhya Pradesh in the Law Department, in so far as it excluded the District and Session Judges who were promoted as such before April 1, 1958 from being allowed w.e.f. April 1, 1958, the benefit of pay fixation in the I. A. S. (Senior) Scale was *ultra vires* Art. 14 of the Constitution. A mandamus shall issue to the State Government directing them to treat the petitioners pay as fixed with effect from April, 1, 1958, in accordance with the said memorandum dated July 13, 1964, after deleting the words "promoted as" (first occuring) i. e. after the words "who were" and before the words "District and Sessions Judges on or after 1-4-58"in the memorandum. In the circumstances of the case, we direct that the parties shall bear their own costs. Security amount deposited by the petitioner shall be refunded to him.

Petition partly allowed.

APPELLATE CIVIL

Before Mr. Justice Bhave and Mr. Justice Tankha.

DHANPALSINGH and others, Appellants* 1973

v. Aug. 18

HARIRAM, Respondent.

Public Trusts Act, Madhya Pradesh (XXX of 1951)—Section 7(2)—Entries made in registrar operate as decision in rem—Section 27—Interpretation of Section 92, Civil Procedure Code—Cannot be invoked in interpreting this provision—Scope of the provision is of a different nature—When trustee is removed—That trustee has to hand over possession to newly appointed trustee—Power to give direction under clause (f) of Section 27—Includes the power regarding direction to deliver possession.

The entries made in the Registrar under Section 7(2) of the Act operate as decision *in rem* and they are not confined to the parties to the proceedings only.

The interpretation put on section 92, Civil Procedure Code, cannot be invoked while interpreting Section 27 of Public Trusts Act, Madhya Pradesh.

The scope of Section 27 of the Act is of a different nature. Under section 27, the District Judge is given authority to decide whether the trust is being properly managed or not, the trust about which a declaration has already been given; and if the trust is not being managed properly, to remove the trustees, appoint new trustees and to give directions regarding the management of the trust.

When a trustee is removed, it follows that he is to hand over possession of the property to the new trustee appointed; and unless that is done, the direction as to how the property is to be managed by the new trustee becomes otiose. The authority to give direction to the trustee who is removed to deliver possession of the property is implicit in the provisions of section 27 itself

* Miscellaneous (First) Appeal No. 155 of 1972, from an order of C. L. Masurkar, District Judge, Hoshangabad, dated the 5th July 1972.

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and that power is covered under clause (f) of section 27 of the M. P. Public Trusts Act.

R. K. Pandey for the appellants.

A. R. Choube for the respondent.

Cur. adv. vult.

ORDER

The Order of the Court was delivered by BHAVE J.—Shri Ramchandraji Mandir, Banada, Tahsil Seoni-Malwa, District Hoshangabad, is a registered public trust under section 4 of the Madhya Pradesh Public Trusts Act, 1951. The entries recorded by the Registrar of Public Trusts indicate that Motidas Bairagi, the third appellant, and Hariram, the respondent, were the trustees and that succession to the trusteeship was confined to the members of Amraji Patel, the creator of the trust. The only immovable property attached to the trust was Khasra No. 182, area 4.09 acres, of mouza Banada The Trust was registered under the M. P. Public Trusts Act on 14 5.1968 (See Annexure A-2).

It appears that Motidas was working as a manager-trustee and, as such, was in possession of the trust property. He sold Khasra No. 182 to appellants Dhanpalsingh and Ramadharsingh under a registered sale-deed dated 21.6.1968. The sale-deed appears to have been executed by Motidas Bairagi in his capacity as Sarbarakar of Shri Ramchandraji Mandir. It also appears that the appellants purchased the property soon after the registration of the trust and with full knowledge that the property belonged to the trust.

Hariram, the respondent, on the allegation that Motidas had disposed of all the trust property and

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had neglected the worship of the idol filed an application before the Registrar of Public Trusts under section 26 of the M. P. Public Trusts Act. On the direction of the Registrar, Hariram filed an application under section 27 of the Act before the District Judge on the same allegations for the relief that Motidas be removed from the trusteeship of the public trust, that Hariram be declared to be the sole trustee of the trust, and that Motidas and the transferees from him be directed to place Hariram in possession of the said property, namely, Khasra No. 182, belonging to the trust. In the proceedings under section 27 of the Act, apart from Motidas, the transferees, namely, appellants Dhanpalsingh and Ramadharsingh were also added as parties.

The appellants had denied that there was any trust and also feigned ignorance about the registration of the trust on 14.5.1968. Even the existence of the temple was denied. On these assertions it was further stated that there was no question of removing Motidas from the trustee-ship and that the non-applicants (Motidas and two appellants here) could not be directed to give possession of the land to Hariram or anyone else. It was claimed that the ancestors of Motidas had installed the deity for private worship and the income from Khasra No. 182 was utilized towards the expenses of the worship. About 15 years ago Motidas had left the village Banada and had shifted to Kartana where he kept his family deity. The Khasra No. 182 being private property of Motidas, it could be validly transferred to Dhanpalsingh and Ramadharsingh.

Learned District Judge, on the basis of the entries in the Register of Trusts (Ex. A-2), came to the conclusion that Shri Ramchandraji Temple was

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a registered trust and that Khasra No. 182 was attached to the trust. Apart from the entries in Ex.A-1, the District Judge relied on the evidence of Hariram and his witnesses Laxmi Narayan and Moojeeram who appeared to be respectable persons of the village. It was also held that Motidas failed to show clearly as to how the property in question belonged to his ancestors and how he had any authority to see the property to Dhanpalsingh and Ramadharsingh. Having held that the trust was a registered trust and that the property in question belonged to the trust, the District Judge further came to the conclusion that Motidas was liable to be removed from the trusteeship, as he had transferred the trust property and had thus committed a breach of trust. The District Judge further held that Dhanpalsingh and Ramadharsingh were purchasers of the trust property with notice that it was a trust property. In this view of the matter, the District Judge directed the appellants Dhanpalsingh and Ramadharsingh to hand over possession of the field in question (Khasra No. 182) to Hariram, the other trustee, to whom the management of the trust was entrusted. The appellants, that is, the trustee, who was removed, as well as the transferees from him have, therefore, preferred this appeal.

The removal of Motidas from the trusteeship cannot be questioned, as even after the declaration under the Madhya Pradesh Public Trusts Act that Shri Ramchandraji Mandir was a public trust and that the property in question, that is, Khasra No. 182, was trust property, Motidas transferred the property and thus acted in breach of trust. Similarly, the finding of the District Judge that Dhanpalsingh and Ramadharsingh are purchasers of the

trust property with notice cannot also be questioned because even from the sale-deed in their favour it is clear that Motidas had transferred the property in his capacity as Sarbarakar of the Mandir and also from the fact that the transfer was after the declaration and registration of the trust and also because of the fact that Dhanpalsingh and Ramadharsingh live in the same village and are bound to know that the property belonged to the trust. Realising this position, Shri R. K. Pandey, learned counsel for the appellants, confined his arguments to only one ground, namely, that in exercise of powers under section 27 of the M. P. Public Trusts Act the District Judge had no jurisdiction to direct delivery of possession from the transferees of the property and that the remedy of respondent No. 1 was to file a separate suit for possession of the property. In support of this ground Shri Pandey relied on certain decisions of the Supreme Court and other Courts on the interpretation of section 92 of the Code of Civil Procedure as, according to learned counsel, the scope of section 92 C. P. C. and section 27 of the M. P. Public Trusts Act is the same and that the provisions of that section should also be interpreted in the same manner. We, however, find it difficult to accept this contention of Shri Pandey.

Under section 4 of the M. P. Public Trusts Act a working trustee is required to apply to the Registrar for registration of the public trust. In this application certain details are required to be given, including the names of the managing and other trustees; the property attached to the trust; the mode of succession of the trustee etc. Section 5 then provides that on receipt of an application under section 4 or upon an application made by any person having interest in the public trust or even on his own motion, the Registrar shall make an inquiry in the prescribed

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manner for the purpose of ascertaining the facts as to whether the trust is a public trust; whether any property is attached to the trust; the names of the persons who are the trustees etc. etc. Sub-section (2) of section 5, however requires that before any inquiry is started under section 5, the Registrar is required to give a public notice of the inquiry proposed to be made and to invite all persons interested in the public trust under inquiry to perfer objections, if any, in respect of such trust. After completion of the inquiry the Registrar is required to record his findings on all the matters referred to in section 5 and to make the necessary entries in the register maintained for this purpose in consonance with the findings recorded by him. He is further required to publish on the notice Board of his office the entries made in the register (sub section (1) of section 7). Sub-section (2) of section 7 then provides that the entries so made shall, subject to the provisions of the Act and subject to any change recorded under any provision of the Act, be final and conclusive. Section 8 then provides that any working trustee or person having interest in the public trust or any property found to be trust property, aggrieved by any of the finding Registrar under section 6, may, within six months from the date of the publication of the notice under sub section (1) of section 7, institute a suit in a civil court to have such finding set aside or modified. That section further provides that on the final decision of the suit, the Registrar shall, if necessary, correct the entries made in the register in accordance with such decision. From these provisions it is clear that subject to the decision of the Civil Court contemplated under section 8, the entries made by Registrar become final and conclusive. In other words, they operate as decisions *in rem* and they are not confined to the parties to the proceedings only.

This is so because under sub-section (2) of section 5 the Registrar is required to give a public notice inviting all persons interested in the public trust to prefer objections, if any, in respect of such trust. It was, however, held in *A. Karim* v. *Raipur Municipality* (1) that the M. P. Public Trusts Act is concerned with the registration of public, religious and charitable trusts and the enquiry which is contemplated is an enquiry into the question as to whether the trust in question is public or private. The enquiry into the question as to whether the property belongs to a private individual and is not the subject matter of any trust at all is not contemplated. The only persons who are required to file their objections in response to a notice issued by the Registrar are persons interested in the public trust; not persons who dispute the existence of the trust or who challenge the allegation that any property belongs to the said trust. It was further held in that case that no doubt section 8(1) permitted a person having interest in the public trust or any property found to be trust property to file a suit, but the interest to which this section refers is the interest of a beneficiary or the interest of a person who claims the right to maintain the trust or any other interest of a similar character and is not the interest which is adverse to the trust set up by a party who does not claim any relation with the trust at all. It was further held that, in any case, persons not party to the proceedings before the Registrar could not be held bound by the declaration under section 7 of the Act. This decision, however, will have no bearing in this case because Motidas was a party to the proceedings before the Registrar, he being a managing trustee. Dhanpalsingh and Ramadharsing being purchasers of the trust property with notice that it

(1) A. I. R. 1965 S.C. 1744.

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Dhanpalsingh v. *Hariram*

was trust property and, that too, after the trust was registered as a public trust, are bound by the declaration, as they claim through a person who himself is bound by the said declaration. Therefore, there is no question of making any fresh enquiry and deciding the title of the trust. The argument of Shri Pandey that the purchasers from the trustee could not be deprived of their possession because under section 27 of the M. P. Public Trusts Act the District Judge had no authority to enquire into the title of the parties and on that ground directing the delivery of possession cannot be sustained.

This brings us to the consideration of the scope of the powers of the District Judge under section 27 of the M. P. Public Trusts Act. Section 26 of the Act provides that if the Registrar on the application of any person interested in the public trust or otherwise is satisfied that the original object of the public trust has failed, or that the trust property is not being properly managed or administered, or that the direction of the Court is necessary for the administration of the public trust, he may, after giving the working trustee an opportunity to be heard, direct such trustee to apply to the Court for directions within the time specified; and if the trustee fails to do so, the Registrar shall himself make an application to the Court. Section 27 then provides that on receipt of such an application the Court shall make or cause to be made such inquiry into the case as it deems fit and pass such order thereon as it may consider appropriate. Sub-section (2) then provides as under:-

> "While exercising the power under sub-section (1) the Court shall, among other powers, have power to make an order for-
>
> (a) removing any trustee;

(b) appointing a new trustee;

(c) declaring what portion of the trust property or of the interest therein shall be allocated to any particular object of the trust;

(d) providing a scheme of management of the trust property;

(e) directing how the funds of a public trust whose original object has failed, shall be spent, having due regard to the original intention of the author of the trust or the object for which the trust was created;

(f) issuing any directions as the nature of the case may require."

Sub-section (3) then provides that any order passed by the Court under sub-section (2) shall be deemed to be a decree of such Court and an appeal shall lie therefrom to the High Court. Sub-section (4) then provides that no suit relating to a public trust under section 92 of the Code of Civil Procedure shall be entertained by any Court on any matter in respect of which an application can be made under section 26. Now, clauses (a) to (e) of section 27 of the M.P. Public Trusts Act are similar to clauses (a), (b), (e) and (g) of section 92 of the Code of Civil Procedure. Clause (f) of section 27 is similar to clause (h) of section 92. While interpreting clause (h) of section 92 of the Code of Civil Procedure, it has been held by the Privy Council in *Abdul Rahim* v. *Abu Md. Barkat Ali* (1) that the words "further or other relief as the nature of the case may require" must on general principles of construction be taken to mean relief *ejusdem generis* with those described in clauses (a) to (g) of the section and not as wholly outside thereof. Similar view was taken by the Supreme Court in *Bishwanath* v. *Radha Ballabhji* (2). Those were the cases where the trustees or persons

(1) A. I. R. 1928 P. C. 16. (2) A. I. R. 1969 S. C. 1044.

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interested in the trust on the basis of title had filed suits for possession of the property from trespassers or alienees from trustees. The objection raised was that such a suit could not be filed, as it was covered by clause (h) of section 92 of the Code of Civil Procedure; and inasmuch as the permission of the Advocate-General was not obtained, the suit was not tenable. The interpretation put by their Lordships of the Privy Council on section 92 of the Code cannot be invoked while intepreting section 27 of the M. P. Public Trusts Act. Under section 92 of the Code a suit regarding the matters enumerated under that section is barred unless the sanction of the Advocate-General is obtained. Under the circumstances, it was necessary to interpret section 92 strictly, and a suit not covered by the provision of section 92 could not be thrown out. The scope of section 27 is, on the other hand, of a different nature. Under section 27 the District Judge is given authority to decide whether the trust is being properly managed or not, the trust about which a declaration has already been given; and if the trust is not being managed properly, to remove the trustees, appoint new trustees and to give dirctions regarding the management of the trust. Now, when a trustee is removed, it follows that he is to hand over possession of the property to the new trustee appointed; and unless that is done, the direction as to how the property is to be managed by the new trustee becomes otiose. The authority to give direction to the trustee who is removed to deliver possession of the property is implicit in the provisions of section 27 itself and, in our opinion, that power is covered under clause (f) of section 27 of the M. P. Public Trusts Act. The transferees from the managing trustee are in the position of trustees *de son tort* and hence they can also be directed to deliver possession of the property

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and it is not necessary that the new trustee should be forced to file a suit for possession of the property. In the present case, there is no question of any title being investigated afresh as has been pointed out by us in the beginning. We are, therefore, not inclined to accept the contention of Shri Pandey that the District Judge was in error in directing delivery of possession of the property.

The appeal, therefore, fails and is dismissed with costs. Hearing fee Rs. 75/-.

Appeal dismissed.

APPELLATE CRIMINAL

Before Mr. Justice Singh and Mr. Justice Malik.

1973

Oct. 9

RAMBHAROSE, Appellant*

v.

STATE OF MADHYA PRADESH, Respondent.

Penal Code, Indian (XLV of 1860)—Section 84—To determine whether accused was insane at the time of commission of crime—The state of mind before and after commission of offence is relevant—Law presumes a man of age of discretion to be sound—Word "wrong" in—Means morally wrong—Gives wider protection to accused as compared to English Law—Things accused has to prove to claim benefit of insanity—The test to be applied—Section 84—Plea of insanity—Burden of proof—Burden how discharged—Burden shifts on prosecution to prove mens rea *of accused.*

In order to see whether the accused was insane at the time of the commission of offence, the state of his mind before and after the commission of the offence is relevant. The law

* Criminal Appeal No. 647 of 1968, from the Judgment of B. B. L. Shrivastava, Additional Sessions Judge, Jagdalpur, dated the 8th July 1968.

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Rambharose v. *State*

presumes every person of age of discretion to be sane unless the contrary is prove.

Per Singh J.—The word "wrong" in section 84 must mean morally wrong, otherwise it will be redundant and serve no useful purpose.

Jailal v. *Delhi Administration* (1) and *S. W. Mohammad* v. *State of Maharashtra* (2); referred to.

Section 84, Indian Penal Code, gives in this respect a wider protection to the accused as compared to English Law.

A defence of insanity under Section 84 will succeed if the accused establishes that by reason of unsoundness of mind he was incapable of knowing: (1) the nature of the act, or (2) that he was doing what was morally wrong, or (3) that he was doing what was contrary to law.

Ashiruddin Ahmed v. *The King* (3); referred to.

The test in such cases is whether the accused through a disease or defect or disorder of the mind cannot think rationally of the reasons which to ordinary people make the particular act right or wrong.

R. v. *Porter* (4); referred to.

The defence of insanity can be raised by the guardian of the accused. There is a presumption that every man is sane. This presumption can be rebutted by preponderance of probability and cirumstances. After the presumption of sanity is rebutted, the burden shifts on the prosecution to prove the *mens rea* of the accused.

Dahyabhai v. *State of Gujart* (5); referred to.

"Law of crimes in India" by R. C. Nigam and "Russel on crime" Vol. I; referred to.

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(1) A.I. R. 1969 S. C. 15 at p. 16. (2) A. I R. 1972 S. C. 2443 at p 2445.
(3) A. I. R. 1949 Cal. 182. (4) (1933) 55 C. L. R. 182 at pp. 189 and 190.
(5) A. I. R. 1964 S. C. 1563.

Rajendra Singh for the appellant.

M. L. Chansoria Government Advocate for the State.

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Cur. adv. vult.

JUDGMENT

PER MALIK J.-Rambharose and his wife Mst. Kiron were tried before the Additional Sessions Judge, Jagdalpur, for the murder of their son Pappu aged 5 years, Rambharose has been convicted under section 302 of the Indian Penal Code and sentenced to suffer imprisonment for life. Mst. Kiron has been acquitted. Rambharose has come up in appeal against his conviction and it is registered as Criminal Appeal No. 647 of 1968. The State has appealed against the acquittal of Mst. Kiron and it is registered as Criminal Appeal No. 703 of 1968. This judgment shall govern the disposal of both the appeals.

Appellant Rambharose was, at the time of the commission of the alleged offence i.e. on 10-9-1967, Sub-Divisional Officer, P. W. D. (Tribal) at Dantewada. He was a Gazetted Officer in the State service. He was posted at Dantewada in September, 1967. He occupied a Government bungalow and his family consisted of his wife Kiron and three minor children, the eldest being a son aged 11 years, the second, a daughter aged 8 years and Pappu aged 5 years. Sukaluram (P. W.1) was his orderly-peon and lived in the servant's quarter closeby. He generally cooked for the family.

The evidence discloses the following story. On 7-9-1967, Mst. Kiron asked Sukaluram (P. W. 1) to bring from the market 10 metres of cloth. He was told that the cloth was required in connection with

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Pooja on the *Teeja* day. He brought the cloth from the market and gave it to Kiron. He also brought 7 kgs. of milk from Chandrashekhar's house for the *Parsad*. The *Pooja* room was got cleaned. The old *Tatta* which covered the roof as an inner ceiling, was removed and the room was got white washed. The windows of the Pooja room had wooden panels. They could be closed from inside to secure privacy. Yet wooden rafters were nailed from outside and curtains were nailed from within.

On the night of the 7th September, 1967, Sukaluram heard the shouts of Rambharose. The shouts were somewhat unusual. He heard him shouting "Ohe-Ohe". He was then at his quarter.

On the 8th September, 1967, Rambharose went to his Office. He was looking normal

On the 9th evening, Rambharose slapped his son Naresh who ran out of the bungalow. His sister also was frightened and she ran after him Rambharose struck his wife Kiron with a lock on the head. What enraged him thus is not known. That evening Sukaluram had not gone to the bungalow and no food was cooked. At about 1 A. M. in the night, Rambharose called Sukaluram and asked him to cook for them. He was feeling hungry. Sukaluram began cooking at that odd hour of the night. After the food was ready, while he was leaving the bungalow, he saw Rambharose outside the room, absolutely naked, beating his head against the wall and beating his chest with his fist. Rambharose accosted him saying that he was panicky and he should, therefore, sleep at the bungalow. Sukaluram declined to sleep there. He said that he had his small son left in the servant's quarter who could not be left alone. Rambharose then asked him to bring his son along and both of

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them should sleep at the bungalow. Sukaluram replied that the boy would be afraid to sleep there since he was raving and shouting. Rambharose then said that he was a Ghost and would eat him away. Sukaluram left the bungalow saying that he would come after half an hour along with Mannuram Choukidar. Sukaluram never returned. He took his son away and they both slept at Mohansingh's (P.W. 10) house. While leaving the servant's quarter, he had warned Mannuram Choukidar also not to go to Rambharose's bungalow. While he was leaving the bungalow at that hour of the night, he saw Rambharose breaking the glasses of the door and eating human excreta. Rambharose had offered excreta to Sukaluram to eat which he refused.

In the same strain is the story given by Kashi Prasad (P.W. 11) who was then a senior clerk in the office of Rambharose. On 8-9-1967, Rambharose told him that he was earlier working in some project. He belonged to Rajasthan where his forefathers were ordinary labourers. He came across a Sidha-Baba and his blessings proved fruitful. He had once failed in the examination but then Sidha-Baba helped him out. He passed in the Supplementary examination. Sidha-Baba, he said, beats him and he held out his hands to show marks of injury. Then Rambharose recited some verses of Ramayan. Soon after he began shouting "Aun-Aun". He took off his shirt. A few minutes after, the lantern which was lying on his table was thrown down. The glass broke and it was dark in the Office. Kalishankar and Nayar Overseer stood up to go and Rambharose shouted at them saying that whosoever walked out would become a leper. The witness says that Rambharose's conduct was abnormal. They were both alarmed and anxious. They went to the Police Station but could

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not find a responsible officer. The constable who was present, was told by them to keep a watch on the activities of Rambharose. The same evening, Kunjilal Postman was called to chant the evil spirit away which had possessed Rambharose.

Chandrashekhar (P.W.13) who had earlier served Rambharose as a Time Keeper, was his good friend. On 6-9-1967, Rambharose called him. When he went inside the room, he saw Rambharose naked. Rambharose picked up a blanket and wrapped himself up. He came out weeping. He said, he was not well. He was seen shouting and weeping, and restlessly walking about. Rambharose shouted "Alakh Niranjan" and accosted Chandrashekhar that he was not S.D.O. but Sidh-Baba and if he did not believe him, he might look at him once again. So saying, he removed the blanket and stood stark-naked.

Mundhar (P.W.9) is a carpenter, who lived close to Ramdharose's house. He says that he was occasionally hearing the shouts of Rambharose of "Alakh Niranjan" on the 8th and 9th September. He also heard breaking of glasses. The noice came from inside Rambharose's house. On the 9th evening at about 8.30 p.m. he had seen Rambharose stark naked running towards the Block-office. Kunjilal Postman was called to drive away the evil spirits Rambharose was possessed of.

Another very responsible witness who deserves mention is Shri S. R. Gupta, S.D.O. (Executive (P.W.12). He was approached by the local officers on the evening of the 9th September, 1967 with anxiety. They said that Rambharose was behaving like a mad man and that something should be done about him. Shri Gupta directed Shri Jain to go to Rambharose's house and find out if all was well. Shri Jain went to

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Rambharose's house and found the door closed. He shouted for Rambharose, who answered from inside the house that he was talking with Sidh-Baba and would not come. On a day previous, Rambharose had thrown the cup of tea offered to him by Shri Varma S.D O. (Forest) He soon-after, caught Varma's feet and cursed him that his daughter would die very soon. He cursed the Tahsildar also that he should expect to die within six months.

Dr. Dhansingh (P. W. 3) was reported on the 9th September, 1967 by Kashi Prasad that Rambharose was behaving abnormally He, therefore, went to Rambharose's bungalow. He met Shri Varma, S.D.O. (Forest) and Shri Garg, Ranger, at his door. Shri Garg shouted for Rambharose to come out. He was then in the lavatory. Rambharose peeped out of the window of the lavatory and said that they should all go away, everything was alright. He was then told that Shri Varma was with them and he replied that he would shortly come out. He did come out but the doctor could not examine him since he had prohibited everyone to touch him. Rambharose, however, did not look normal He was occasionally shouting at them, and cursed Shri Sharma Overseer that he would be a leper in 15 days. He accompanied them o Varma's bungalow. He met Tahsildar there and cursed him that he would die within six months if he did not decide cases honestly. Then he cried "Alakh Niranjan" and dropped the cup of tea from his hand and wept. He became normal for a while but soon after spoke to the Ranger that he would not be blessed with a son unless he worshipped him (i. e. Rambharose).

AND this is what happened on the 10th September: Mundhar (P W. 5) was busy making a cot. It was between 2 and 3 P. M. that he heard Pappu's voice

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"Baba-Baba" thrice. His voice was no longer heard thereafter. Rambharose's house was closed from all sides except a door and a window at the back. The voice of Pappu had come from within the house. Soon he heard Rambharose and Kiron weeping loudly. He also heard Rambharose saying to Kiron that Pappu did not belong to them; he was not theirs and had gone away; they were both sinners. He was heard asking Kiron to repeat three words and she was repeating them every word, after he uttered them. Soon thereafter the two children of Rambharose came running out of the back door. Mundhar made anxious enquiries about Pappu who was a playmate of his son. He was told that Pappu was dead and Rambharose was bringing him back to life.

Mundhar called Chandrashekhar (P. W. 13) and narrated what he had heard. While they were talking, Ghosh Babu came there. He rushed to inform Shri Gupta, S. D. O. (Executive) who in turn requisitioned the Sub-Inspector Madhavi (P. W. 14). They all collected in front of Rambharose's bungalow. Rambharose could be seen from the kitchen window. Shri Gupta beckoned at him and Rambharose said to him "आप लोगों का काम नहीं है। सरकारी काम नहीं है। आप लोग अपना सरकारी काम अलग कीजिये।" Madhavi says that the two children of Rambharose who had sneaked out of the bungalow, were standing near Mundhar and Chandrashekhar. Enquiries from them revealed that Pappu was killed any they were driven out. The S. D. O. Shri Gupta then commanded them to force their entry in and they all entered through the kitchen. Rambharose was sitting on the floor with legs stretched and Kiron was massaging them. Pooja-room was locked from without. The lock was broken open. The room was dark. The windows had the curtain nailed from inside and the raf ers nailed from outside. They were removed. In the

Pooja-room lay the dead body of Pappu on a deer-skin which was placed on a wooden platform. The Parsad was lying near him, so was an iron safe kept open. In a plate there were *Parathas* with currency notes of Rs. 101/- placed on them. It appeared that *Havan* was performed. An elaborate worship seemed to have been done. The dead body of Pappu had charcoal powder or some black powder rubbed on the chest.

Rambharose and Kiron were taken in the police custody. They had to be dragged out of the room. Rambharose was not talking sense and when asked where Pappu was, so that some feed may be given to him, replied that he would meet them after Wednesday. This was the talk Madhavi had with Rambharose before the lock of the Pooja-room was broken open.

Kashi Prasad (P. W. 11), Shri Gupta S. D. O. (P. W. 12) and Madhavi (P. W. 14) corroborate each other on material particulars as to how they had forced their entry into the bungalow, how the lock of the Pooja-room was broken open to find the dead body of Pappu lying on a deer-skin and the articles of elaborate worship, which seemed to have been recently performed. Before the entry was made, Rambharose was seen sitting at ease on the floor with legs stretched and Kiron massaging them and when questioned about Pappu, his answer was that it was not a Government job he was doing, it was his private business and Pappu would be available to them after Wednesday.

The dead body of Pappu was sent for postmortem examination and the doctor's opinion was that the boy had died of asphyxia due to throttling. The doctor found injuries of abrasions and scratches

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round the neck, as many as thirteen, and he says that they could possibly be due to the boy resisting and shifting positions.

We have no doubt whatsoever that Pappu died a homicidal death and none else but Rambharose had throttled him. Elaborate preparations for pooja were being made. 10 meters of cloth and seven kilograms of milk were purchased. Kiron was seen busy preparing *Parsad*. The *Pooja* room was got cleaned. Rambharose's shouts of "Alakh Niranjan" were being repeatedly heard. And Mundhar (P. W. 9) also heard Pappu's voice "Baba-Baba" thrice before he was done to death. Soon followed the mother's wailings and Rambharose was heard consoling her by saying that they were sinners and the boy did not belong to them but belonged to him. Kiron was repeating the words after her husband, that they were sinners and the boy did not belong to them.

With this evidence on record, the conclusion is irrestible that Rambharose had killed the boy by throttling him. The suggestion that the boy might have died a natural death or might have been killed by someone who sneaked away, is a hopelessly incredible proposition. The boy in that case would not be found locked in a Pooja-room, nor would the parents behave in the fashion they did. Possibility of a stranger coming into murder the boy when *Pooja* was going on is completely ruled out.

The question that might be considered at this stage is whether Mst. Kiron was a willing party to the killing of the child; whether she was induced by the husband to believe that human sacrifice at the bidding of or to propitiate the Sidha-Baba, would bring them wealth and prosperity or supernatural powers and that the child would come back to life

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after three days; whether on account of this belief, she gave her consent to the killing of the boy and that she assisted Rambharose in the offer of the human sacrifice ? The learned Additional Sessions Judge holds in para 18 of his judgment, and for cogent reasons, that Mst. Kiron was not an active participant in the crime, she was probably helpless when the boy was being throttled, and she might have come to know of her husband's designs at the eleventh hour when, who knows, despite her resistence, the cruel act was completed.

We agree with this finding of the learned Additional Sessions Judge. It appears that Mst Kiron could not help the situation. It could possibly be a case of helpless resignation or passive giving in the face of *fait accompli*. Or was it that she was out of the Pooja-room when the act was committed and when she entered in, found the boy already dead lying on the deer-skin ? Mundhar (P. W. 9) heard Pappu's voice "Baba-Baba." Had Kiron been present, would the child not have cried for the mother? Another pertinent circumstance is the wailing of Kiron and Rambharose uttering the words of consolation and asking her to repeat the words after him. Had Kiron participated in the crime, she would have quietly sobbed She would not have lamented loudly. The circumstances, therefore, induce us to hold that Kiron had neither consented to the killing of the child nor was she an active participant. At any rate, benefit of doubt should be given to her.

What needs serious consideration in this appeal is the defence of insanity raised on behalf of the appellant; whether at the time he throttled the boy, he was, by reason of unsoundness of mind, incapable of knowing the nature of the act, or that he was doing what was either wrong or contrary to law. "In

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order to see whether the accused was insane at the commission of the offence, the state of his mind before and after the commission of the offence is relevant. The law presumes every person of age of discretion to be sane unless the contrary is proved".

Their Lordships of the Supreme Court have laid down in *Dahyabhai* v. *State of Gujarat* (1) the following three propositions on the doctrine of burden of proof in the context of the plea of insanity: (1) The prosecution must prove beyond reasonable doubt that the accused had committed the offence with the requisite *mens rea;* and the burden of proving that always rests on the prosecution from the beginning to the end of the trial. (ii) There is a rebuttable presumption that the accused was not insane, when he committed the crime in the sense laid down by Section 84 of the Indian Penal Code; the accused may rebut it by placing before the Court all the relevant evidence-oral, documentary or circumstantial, but the burden of proof upon him is no higher than that rests upon a party to civil proceedings. (iii) Even if the accused was not able to establish conclusively that he was insane at the time he committed the offence, the evidence placed before the Court by the accused or by the prosecution may raise a reasonable doubt in the mind of the Court as regards one or more of the ingredients of the offence, including *mens rea* of the accused and in that case the Court would be entitled to acquit the accused on the ground that the general burden of proof resting on the prosecution was not discharged.

About the antecedent conduct of the accused, we have stated the evidence above. He was behaving abnormally sometimes as if possessed by some *Sidh-Baba*, was under a delusion that he was being beaten

(1) A. I. R. 1964 S. C. 1563.

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by him or he was talking to him, or that he himself was a *Sidh-Baba* who had acquired some supernatural powers. He would in his frenzy curse people and believe that his prophecies would come out true. He was sometimes irritable and destructive. He was at times moody and would weep without reason. He was once seen running about naked. He was also seen eating human excreta.

He was for all and sundry afflicted by some mental disorder though only at certain periods and vicissitudes, having intervals of reason. His friends were anxious to see that something is done for him; either his relatives come up to look after him or the doctor cures him of his ailment.

As regards the state of his mind after the commission of the crime, we have the statement of two doctors, Dr. Sen and Dr. Mandal besides the jailor's report. Rambharose was sent to judicial lock-up on 13-9-1967. The jailor writes, "Rambharose had to be physically lifted by four constables and was placed between the gates. He was very violent and being a strong young man, required help of several persons to take him to the cells His mental condition was abnormal and ways violent." This was the condition at 10. 45 A. M. At 7. 25 P. M., he was quiet, did not reply questions and sat naked. On September 14th, he was seen murmuring at random, did not answer questions and wrapped his naked body with a blanket. In the evening, he was again abnormal, threw away his underwear and stood naked. On the 15th September, he was talking at random and whosoever went near him to talk or persuade, he would spit on him. He tore off his underwear and stood naked.

We need not refer to day-to-day history of

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his mental condition. It grew worse sometimes and the report of the doctor may be seen of 3rd and the 6th October. On the 1st October he passed urine and stool on the floor, painted the wall with his stool, tore away the blanket, threw his *Chaddi* and became naked. On the 3rd October, he was violently excited, tried to assault others, pressed his neck with his hands, passed stool on the blanket and shouted. On the 6th October, 1967, he painted his stool over his body and also ate it.

Dr. Sen says that his observations indicated that Rambharose was suffering from mental derangement with lucid intervals. It was not a case of feigned insanity. He was not pretending to be insane.

Having read the evidence, we are left in no manner of doubt that at the time the offence was committed, Rambharose was labouring under some insane delusion and possibly the delusion was that he was a Sidh-Baba, possessed of super-natural powers and that no harm would be done to the child even if sacrificed at the Alter since the child would come back to life after 3 days; that this sacrifice was going to bring immense wealth and prosperity in addition.

The question to ask is whether such a morbid delusion as this which had carried him away beyond the power of his own control, should exempt him from the criminal liabilities. 'M' Naghten Rules which form the basis of our Law of insanity under section 84 of the Indian Penal Code, give the answer thus:

> "Question No. IV: If a person under an insane delusion as to existing facts commits an offence in consequence thereof, is he thereby excused?
>
> "Answer;—The answer must, of course, depend on the

nature of the delusion; but making the same assumption as we did before, namely, that he labours under such partial delusions only, and is not in other respects insane we think he must be considered in the same situation as to responsibility as if the facts with respect to which the delusion exists were real. For example, if under the influence of this delusion, he supposes another man to be in the act of attempting to take away his life, and he kills that man, as he supposes, in self-defence, he would be exempt from punishment. If his delusion was that the deceased had inflicted a serious injury to his character and fortune and he killed him in revenge of such supposed injury, he would be liable to punishment"

The oft quoted illustrations to explain the law are these: A person strikes another and in consequence of an insane delusion thinks he is breaking a jar. Here he does not know the nature of the act. Or he may kill a child under an insane delusion that he is saving him from sin and sending him to heaven. Here he is incapable of knowing by reason of insanity that he is doing what is morally wrong; or he may under insane delusion believe as innocent man whom he kills to be a man that was going to take his life; in which case, by reason of his insane delusion, he is incapable of knowing that he is doing what is contrary to law of the land.

To add to these illustrations, one is found mentioned by Sir James Stephen of an idiot who cut off the head of a man whom he found sleeping because as he explained it would be much fun to watch him looking about his head when he awoke. It was probable that the idiot was quite aware that the man was entitled to possession of his head, and expected that if he was detected he would be well cuffed by the man and very probably taken up by the police. It is quite certain that he had no idea that his fun would be lost, because the man would never awake.

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In the present case as well, under the insane delusion Rambharose was incapable of appreciating the nature of his act that the child once throttled would not come back to life. The delusion had affected his cognitive faculties to an extent that he believed in the existence of some state of things, which if it existed, would justify or excuse his act. And that state of things was the resurrection after three days. He would not have throttled the boy if he was not deluded into believing that the child would come back to life. The argument, therefore, is that punish *Sidh-Baba* who had possessed Rambharose; it was not Rambharose who had committed the crime. His odd behaviour, seeming detachment from the world of reality, the presence of delusions (false beliefs) and hallucination (perception of non-existent external stimuli) indicated a disease of mind and under the influence of paroxyems of that disease, he could be assaultive, destructive and commit crimes with reckless abandon. The indecent exposure was also one of symptoms of the same disease (which is commonly known as schizophrenia).

The present case, as we see, is covered by the 'M' Naghten Rules themselves. Rambharose was having an obsession and he gave way to it without knowing the guilt of his act and without knowing whether it was right or wrong. To put it differently, insanity had manifested in the lack of knowledge or incapacity to have knowledge of the nature and quality of the act or its character as a wrong act.

The learned Additional Sessions Judge felt that despite the symptoms of disorder Rambharose exhibited, he yet had the capacity to know that he was doing something wrong or forbidden by law. He had secured complete privacy by nailing the curtains and rafters on the windows. He had kept the room

locked after the boy was sacrificed, he had preformed elaborate worship and the arrangements that were made spoke for his predetermined design; he expected that he would thereby acquire supernatural powers or worldly fortune.

In a case of this type, the criticism of the medical men to 'M' Naghten Rules seriously troubles the mind. The discussion of the Royal Commission on Capital Punishment 1949-53 puts the criticism as under:

> "Briefly, they have contended that the 'M' Naghten test is based on an entirely obsolete and misleading conception of the nature of insanity, since insanity does not only, or primarily, affect the cognitive or intellectual faculties, but affects the whole personality of the patient, including both the will and the emotions. An insane person may therefore often know the nature and quality of his act and that it is wrong and forbidden by law, but yet commit it as a result of the mental disease. He may, for example, be overwhelmed by a sudden irresistible impulse; or he may regard his motives as standing higher than the sanction of the law; or it may be that in the distorted world in which he lives, normal considerations have little meaning or little value. Most medical men would take the view that in the violent acts of an insane man his insanity has been, as a general rule, an essential and predominant cause, and that therefore he should not be judged by the same standards as normal men."

The criticism of the medical men seems valid in its own place but it cannot be incorporated in the law contained in section 84 of the Indian Penal Code. Nonetheless, if it could be reasonably said that the mental disorders had affected the whole personality of Rambharose and though outwardly he seemed to exhibit conduct which indicated that he knew that he was doing something wrong, yet in a true sense,

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he neither knew the nature of the act nor its quality. His case falls under the exonerating scope of section 84 of the Indian Penal Code.

Something may be said about the burden of proof which the law places on the accused to substantiate his plea of insanity. It is too much to expect from a person who acted under a declusion to tell us what he felt and how he behaved at the time he committed the crime. If he were only to recollect that, he would cease to be insane. It is not as much the accused who takes the plea of insanity but his friends or his counsel who take such a defence. The question, therefore, is always for the jury or for the Court to say whether the accused was labouring under some form of mental delusion or insanity when he committed the crime. To refuse the right to a guardian or friend of the accused to raise a defence for him, would be to assume his sanity, which in fact, is the question in issue.

The Supreme Court, therefore, lays down in *Dahyabhai* v. *State of Gujrat* (1) that the matter has to be decided on preponderance of probabilities from the evidence and circumstances placed on record, and as soon as the presumption of sanity is rebutted, the Court has to look to the prosecution evidence whether it could satisfactorily discharge the evidence of proving, beyond reasonable doubt, the requisite *mens rea* for the offence.

R. C. Nigam in his book "Law of Crimes in India" writes that the accused in his plea of insanity suffers from two fold disadvantages, namely (1) that though insane, he is an accused person; (2) that being insane he cannot make use of his faculties and resources to discharge this burden to his

(1) A. I. R. 1964 S. C. 1563.

advantage. The author says that G. Williams has rightly observed:

> "The present rule (regarding burden of proof) as stated in the books originated in a confusion between the introduction of evidence and burden of proof proper. In the United States the tendency is distinctly to place the burden of proof in the true sense upon the prosecution; and this is the rule adopted in the Model Penal Code. This, too, is the rule on the Continent."

We may quote Wharton towards progressive thinking on the subject:

> "Under the old practice if the accused was convicted he was punished as if he were a perfect moral agent; and if he was acquitted, he was suffered to run at large, though the acquittal was on the ground of a monomania, which would impel him to commit the same act the very next day. Under the present practice, both these alternatives may be avoided by insuring the sequestration of the accused from the society untill a proper finding of sanity is made... Dangers are much diminished, as such acquittal no longer involves the setting at large a dangerous lunatic with the growing force of humane interest in the insane, the Court has gradually to assume lenient attitude. A change may likely come in the burden of proof. Where idiocy or semi-idiocy is proved, prosecution might be required to establish affirmatively a capacity on the part of the accused to distinguish right from wrong; or where the evidence be equally balanced as to sanity and insanity, the Court might be asked to presume that sanity did not prevail and the accused was entitled to a reasonable benefit of doubt."

Russell on Crime (Vol. I) refers to *R.* v. *Kemp* and draws attention to a further peculiarity so far as it appears from the reports; it was the prosecution and not the defence which raised the issue of prisoner's insanity, arguing that the case fell within

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the 'M' Naghten Rules and, therefore, the special verdict was applicable; whereas the defence argued that this was not a case of insanity within the Rules and the Special Verdict did not apply...The Court returned the verdict "Guilty but insane." It is submitted that the dictum let fall by Lord Denning "The old notion that only the defence can raise a defence of insanity is now gone."

In the present case, the prosecution had been very fair. The evidence on the antecedent and subsequent conduct of the accused was fully given and it was left to the Court to decide whether the case was covered by the exception provided in section 84 of the Indian Penal Code. As discussed above, we are clearly of the opinion that the appellant Rambharose was of unsound mind, acting under some type of delusion, and was incapable of knowing the nature of the act or that he was doing something wrong or contrary to law. We accept the appeal, set aside Rambharose's conviction and sentence under section 302 of the Indian Penal Code and acquit him of the offence. He shall be dealt with under section 471 of the Code of Criminal Procedure. He shall be detained in safe custody by the jail authorities.

A report be submitted to the State Government for action under the provisions of sections 474 and 475 of the Code of Criminal Procedure.

The State appeal against the acquittal of Mst. Kiron is hereby dismissed.

Per SINGH J.-My learned brother Malik, J. has admirably discussed the evidence and I need not repeat the same. I agree with his finding that Rambharose killed his son Pappu aged five by throttling

labouring under some delusion possibly that he was *Sidha Baba* possessed of super-natural powers, and that the child would come to life after three days bringing in addition wealth and prosperity. The conduct of Rambharose before and after the incident which is proved by the prosecution itself, leaves no manner of doubt that because of some disease of the mind his cognitive faculties were greatly impaired. Strange it may seem but sane people thought that Rambharose was possessed by a ghost and the only treatment that he received was a sitting with a post-man who was believed to have developed occult powers sufficiently strong to over-power the ghost. It is unfortunate that though other officers and subordinates in Rambharose's office had come to know of his condition, no serious effort was made to arrange medical treatment, otherwise the tragedy may have been averted.

The main point to be decided in the case is whether Rambharose can get the benefit of the Exception enacted in section 84 of the Penal Code which reads: "nothing is an offence which is done by a person who, at the time of doing it, by reason of unsoundness of mind, is incapable of knowing the nature of the act, or that he is doing what is either wrong or contrary to law." This section, as pointed out by my learned brother, is based on the answers given by the Judges in *M. Naghten's case* (1) to the questions put to them by the House of Lords. Therein the learned Judges said that "to establish a defence on the ground of insanity it must be clearly proved that, at the time of the committing of the act the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or, if he did know it, that

(1) (1843-60) All E. R Rep. 229.

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he did not know he was doing what was wrong;" (p. 233). The word "wrong" occurring here has given rise to sharp difference of opinion. In England the earlier cases proceeded on the basis that "wrong" meant moral wrong, but in *R.* v. *Windle* (1) the Court of Criminal Appeal ruled that "wrong" meant contrary to law and that if the defence is that the accused did not know that he was doing what was wrong, it is not sufficient to prove that he believed that what he was doing was morally right. The High Court of Australia in *Stapleton* v. *The Qneen* (2) dissented from *Windle's case* and it was held that in applying the second branch of the legal test of insanity in criminal cases as formulated in *M'Naghten's case* the question is whether the accused knew that his act was morally wrong i.e. wrong according to the ordinary principles of reasonable men and not whether he knew it was wrong as being contrary to law. So the position now is that if a case like *Hadfield* (3) were to arise again, the accused would be convicted in England but he would be acquitted in Australia. Hadfield was tried in 1800 for shooting at George III and acquitted on the ground of insanity. The delusion with which he was afflcited was that the world was coming to an end and that he was commissioned by God to save mankind by the sacrifice of himself. Labouring under this delusion he shot at the King in order to be hanged. So Hadfield had the knowledge that what he was doing was contrary to law but he believed that what he was doing was morally right. The framers of the Penal Code appear to have appreciated the dual meaning of the word "wrong" and, therefore, section 84 uses the words "either wrong or contrary to law". The word "wrong" in the section must mean morally wrong, otherwise it will be redundant and serve no useful purpose. Indeed, this is

(1) (1952) 1 All E. R. 1. (2) (1952) 86 C. L. R. 358.
(3) 27 State Trials 1281.

how the section has been read in two decisions of the Supreme Court *viz. Jailal* v. *Delhi Administration* (1) and *S. W. Mohammad* v. *State of Maharashtra* (2). Section 84, therefore, gives in this respect a wider protection to the accused as compared to English law. A defence of insanity under this section will succeed if the accused establishes that by reason of unsoundness of mind he was incapable of knowing: (1) the nature of the act, or (2) that he was doing what was morally wrong, or (3) that he was doing what was contrary to law. The section was similarly construed by a Division Bench of the Calcutta High Court in *Ashiruddin Ahmed* v. *The King* (3).

The first question that arises is whether Rambharose was incapable of knowing the nature of his act when he throttled the child. By "nature of the act" in this context is meant the physical nature of the act or the normal effects of the act. "A man is properly said to be ignorant of the nature of his act, when he is ignorant of the properties and operation of the external agencies which he brings into play;" Mayne, quoted in *Baswantrao Bajirao* v. *Emperor* (4). The evidence of Mundhar (P. W. 9) discloses that immediately after the child died the accused was heard telling his wife Kiron that Pappu (the child) did not belong to them. The witness also heard the accused weeping. When Kashi Prasad (P. W. 11) and others entered the house, the accused told them that Pappu will come back after Wednesday. The conduct of the accused, therefore, discloses that he did know that his act of throttling the child will cause his death. This is not a case of the type where a person while killing a human being feels that he is squeesing an orange or breaking a twig. In my opinion, Rambharose was not incapable of

(1) A. I. R. 1969 S. C. 15 at p. 16. (2) A. I R. 1972 S. C. 2443 at p. 2445.
(3) A. I. R. 1949 Cal 182. (4) A. I. R. 1949 Nag. 66 at p. 71

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knowing the nature of his act and the benefit of the first limb of section 84 cannot be given to him.

The next question is whether Rambharose was incapable of knowing that he was doing what was either morally wrong or contrary to law. In this connection it is relevant to notice that the accused believed to have acquired supernatural powers and he also believed that the dead child will come to life after three days. I have already mentioned that the accused told to those who entered his house soon after the incident that the child would be available by Wednesday. Further, he was seen by these witnesses sitting at ease without worry of any kind and his wife was engaged in massaging his legs This conduct of the accused coupled with his actions before the incident makes it highly probable that because of the disordered condition of the mind he was incapable of knowing that his act was either morally wrong or contrary to law. The test in such cases in whether the accused through a disease or defect or disorder of the mind could not think rationally of the reasons which to ordinary people make the particular act right or wrong. This was the test which was applied by Dixon, J. in *R.* v. *Porter* (1) and approved in *Stapleton's case* (*supra*). Applying this test, I am satisfied that Rambharose has made good both the defences under the second limb of section 84 and he must be acquitted.

For these reasons, I agree that appeal of Rambharose be allowed as proposed by my learned brother. I also agree with him that the appeal of the State against Kiron be dismissed.

Appeal allowed.

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(1) (1933) 55 C. L. R. 182 pp. 189, 190.

CIVIL REVISION

Before Mr. Justice Shiv Dayal.

BABULAL and others, Applicants* 1975

v. Sept '18

CHHOTEKHAN, Non-applicant.

Civil Procedure Code (V of 1908)—Order 9, rule 8 and Order 17, rule 2—Date for framing issues—Is a date of hearing within the meaning of these provisions—Order which Court can pass in the absence of either of the parties—Party not appearing on date of hearing—Party not entitled to fresh notice or intimation from Court—Court not framing issues on the date when parties appear or on next date fixed therefor—Court dismissing suit or proceeding ex parte—Court acts arbitrarily or capriciously—Such course not judicious—Order 9, rule 9 or rule 13—Application made for setting aside dismissal—Duty of Court to give each party reasonable opportunity to support or oppose application—Court can take recourse to Order 19, rule 1—Affidavit takes place of evidence in that contingency.

It is true that a date which is fixed for framing of issues is a date of hearing within the meaning of Order 9, rule 8 or Order 17, rule 2 of the Code of Civil Procedure. Therefore, when the plaintiff does not appear, the suit can be dismissed for default, and if the defendant does not appear, the court can proceed *ex parte*.

A party who does not appear on the date of hearing is not entitled to any fresh notice or intimation from the Court and if on the next date so fixed any party does not appear, it has to suffer adverse consequences.

If the court does not frame issues when the parties appeared, and, on the next date fixed for framing of issues if it dismisses the suit for non-appearance of the plaintiff or proceeds, *ex parte* for non-appearance of the defendant, it must be said

* Civil Revision No 17 of 1972 for revision of the order of V Civil Judge, Class II, Gwalior, dated the 1st November 1971.

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that the court acts arbitrarily and capriciously and such a course is anything but not judicious.

It is the duty of the Court to give each of the parties reasonable opportunity to support or oppose the application. Recourse can also be had to Order 19, rule 1, C. P. C. within its limitations.

It is a different matter if an affidavit is filed when the court has taken recourse to the provisions of Order 19, rule 1 of the Code of Civil Procedure, or, if the parties agree that affidavits should be substituted for the evidence to be so recorded.

Khandesh Spinning and Weaving Mills Co. Ltd. v. *R. G. K. Singh* (1); referred to.

Summary of the discussion:—

(1) (a) On the date fixed for framing of issues, the Court MUST frame issues, and not fix another date for it. This is mandatory and the Court MUST comply with it. The Court is bound to frame issues on that very date, and it *MUST*. To postpone framing of issues to another date is unwarranted and unjustified except in the circumstances beyond the control of the Court, such as illness of the Judge, or his absence otherwise. It is to be considered as an act of shirking one's duty. It further entails undue harassment to the parties, whose time, money and energy are unnecessarily wasted because of the leziness of the Court.

(b) It is duty of the parties to assist the Court in framing of issues. The Court can call upon them to assist it. If either party does not respond the court should make a note of it in the proceedings, so that if subsequently it complains that any issue has not b en properly framed, or that issue has been left out which should have been framed, it can be saddled with costs not only while rejecting the complaint as incorrect, but also while amending the issues if necessary. However, assistance

(1) A. I. R. 1960 S. C. 571, paragraph 9.

or not assistance, the Court MUST frame issues on the date fixed for that purpose.

(c) It is inexcusable if the court, having not framed issues on the preceding date which was fixed for that purpose inspite of the parties' appearance, dismisses the suit or proceeds with it *ex parte*, on the next date fixed for framing of issues, because of non--appearance of the plaintiff or defendant respectively.

(2) When the Court CAN do one of two things; and it has to choose which of them it SHOULD do, it must remind itself of the celebrated doctrine which has become axiomatic, that discretion must be exercised judicially. This is based on the principle that every thing which is permitted by law is not necessarily right and that it is the demand of discretion that due regard must be had to all the existing circumstances. The matter is different when the law peremptorily requires the court to act in one particular way only.

(3) (a) The date for framing of issues is a date of HEARING so that the suit CAN be dismissed for default, or, CAN be proceeded with *ex parte*, as the case may be. The Court CAN, but whether it SHOULD ? The power is there; but the question is one of propriety.

(b) Notwithstanding non--appearance of a party or parties on the date fixed for framing of issues, the Court has also the power under Order 17, rule 2, C. P. C. (where that Rule applies).—

(i) to frame issues on that date and fix another date for evidence etc; or,

(ii) to adjourn the hearing and fix another date for framing of issues.

In either case it will be no duty of the Court to intimate the absent party or parties of the next date of hearing. No party will be heard to say that it had no intimation from the court. It will be the duty of the parties

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to inform themselves of the next date of hearing and to take necessary steps in compliance with the directions of the court contained in that order, otherwise suffer the consequences. And, if the Court has framed the issues, it will also be the duty of the parties to inform themselves of the issues as framed.

(4) (a) Where an application for restoration of the suit or for setting aside an *ex parte* decree is contested, the Court can be satisfied of the "sufficient cause" within the meaning of rule 9 or rule 13 of Order 9, C P. C. only on the basis of evidence but not on whim or fancy.

(b) It is the duty of the Court to give the parties reasonable opportunity to produce evidence instead of straightaway hearing arguments. unless recourse is had to Order 19 of the Code of Civil Procedure, or, unless both the parties agree that the question may be determined on affidavits.

(5) An affidavit which accompanies an application is intended merely for *prima facie* satisfaction of the court that the averments in the application are true so that the court may issue notice to the opponent and the court may act upon it if the opposite party contests the application. Otherwise an affidavit can be acted upon only if recourse has been had to the provisions of Order 19, rule 1, C P. C., or when both the parties agree that affidavit should be substituted for the evidence to be recorded.

M. M. Jain for the applicants.

A. B. Mishra for the non-applicant.

Cur. adv. vult.

ORDER

SHIV DAYAL J.-The defendants are aggrieved by an order passed by the trial Court whereby the suit instituted by the non-petitioner has been restored.

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On November 3, 1969 the suit was dismissed for non-appearance of the plaintiff. That date had been fixed for framing of issues. On November 18, 1969, the plaintiff made an application under Order 9, rule 9, C.P.C. for restoration of the suit stating that on the 3rd November 1969 he was suddenly down with fever and his counsel was busy in another Court when the case was called on for hearing In support of his application, the plaintiff filed his affidavit. The defendants opposed the application for restoration.

The trial Court did not record any evidence but on the above material ordered restoration of the suit. It has observed that there was sufficient cause for non-appearance of the plaintiff. It has made a specific mention of the fact that the date on which the suit was dismissed was for framing of issues. He did not award costs to the defendants.

In this revision, Shri M. M. Jain, learned counsel for the defendants contends that the order of the trial Court is invalid, and not in accordance with law. No reasons are given in the impugned order. The date for framing of issues was a "date of hearing" and it was obligatory for the plaintiff to appear on that date. There was no legal evidence to support the plaintiff's case for non-appearance. The affidavit filed by the plaintiff was no legal evidence. It was merely for the *prima facie* satisfaction of the trial Court. The learned counsel has relied on several decisions of this Court. Suffice to mention three of them:-

Mitkalal Gupta v. *Inland Auto Finance* (1),

Anand Swaroop v. *Kishanchand* (2) *and*

E. S. I. Corporation v. *Harcharansingh* (3).

(1) A. I. R. 1968 M. P. 33. (2) 1961 J. L. J. 1239.
(3) 1969 J. L. J. 725.

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As legal propositions, all the three contentions are right. It is true that a date which is fixed for framing of issues is a date of hearing within the meaning of Order 9, rule 8 or Order 17, rule 2 of the Code of Civil Procedure. Therefore, when the plaintiff does not appear the suit can be dismissed for default, and if the defendant does not appear, the court can proceed *ex parte*. The remedy open to the plaintiff or the defendant, as the case may be, is provided in Order 9, C.P.C. It is, however, worthy of note that if a date so fixed is a date to which the hearing of the suit was adjourned within the meaning of Order 17, rule 2, C.P.C., the Court has also discretion to make such other order as it thinks fit. The Court is not bound to dismiss the suit. For instance, the court can frame issues and inspite of non-appearance of a party or both the parties, fix another date for evidence, or other steps which may be necessary. The Court may even adjourn the hearing simpliciter, fixing another date for framing of issues. In such a case, it will be the duty of the parties to find out what order was passed by the Court and whether issues were framed by it and what steps they have to take in compliance with the directions of the Court. A party who does not appear on the date of hearing is not entitled to any fresh notice or intimation from the court and if on the next date so fixed any party does not appear, it has to suffer adverse consequences.

When the court has before it two alternative courses open, on the one hand, to dismiss the suit or to proceed *ex parte* because of non-appearance of the plaintiff or defendant, as the case may be, or, on the other hand, to frame issues and fix another date for evidence or to adjourn the hearing for framing of issues; the court has certainly to exercise its

discretion judicially having regard to the existence of the facts and circumstances of the case.

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The duty of framing issues is primarily of the court. It is an important responsibility because the trial rests on the issues. When a date is fixed for framing of issues, it is duty of the court to frame issues on that very date and not postpone this function to another date. When it is the court which has to discharge that function there can be no justifiaction for postponing it except in extraordinary and unforeseen circumstances beyond the control of the presiding officer of the court, otherwise, the court is considered to have shirked its duty. By not framing issues on the date fixed for it the court unnecessarily causes waste of time, money and energy of the parties. It amounts to harassment to them which they do not deserve. This court certainly looks upon as a serious lapse on the part of a subordinate judge when he postpones framing of issues to another date. Whenever such a lapse comes to the notice of this Court it forms a poor opinion of the presiding officer, and where more than two dates are fixed for framing of issues it should be inexcusable. Above all, if the court does not frame issues when the parties appeared, and, on the next date fixed for framing of issues if it dismisses the suit for non-appearance of the plaintiff or proceeds *ex parte* for non-appearance of the defendant, it must be said that the court acts arbitrarily and capriciously and such a course is anything but judicial. It is the duty of this court in exercise of its powers of superintendence to see that no subordinate court acts in that manner.

Both under rule 9 and rule 13 of Order 9, C.P.C., the applicant must show that he was prevented by any "sufficient cause" from appearing when the suit was called on for hearing. And, sufficient cause can

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be made out to the satisfaction of the court only on the basis of evidence. It cannot depend on any whim or fancy of the presiding officer. It is the duty of the Court to give each of the parties reasonable opportunity to support or oppose the application. Recourse can also he had to Order 19, rule 1, C.P.C. within its limitations.

As held in *Mithailal Gupta* v. *Inland Auto Finance* (1) on which Shri Jain has relied, an affidavit in support of an application is merely intended to satisfy the court *prima facie* that the averments in the application are true, so that the court may issue notice to the opponent. Such an affidavit can also be acted upon if the opposite party does not contest the application. It is a different matter if an affidavit is filed when the court has taken recourse to the provisions of Order 19, rule 1 of the Code of Civil Procedure, or, if the parties agree that affidavits should be substituted for the evidence to be so recorded. [See, *Khandesh Spinning & Weaving Mills Co. Ltd.* v. *R.G.K. Singh* (2).

The above discussion may be summed up thus:

(1) (a) On the date fixed for framing of issues, the Court MUST frame issues, and not fix another date for it. This is mandatory, and the Court MUST comply with it. The Court is bound to frame issues on that very date, and it MUST. To postpone framing of issues to another date is unwarranted and unjustified except in the circumstances beyond the control of the Court, such as illness of the Judge, or his absence otherwise. It is to be considered as an act of shirking one's duty. It further entails undue harassment to the parties, whose time, money and energy are unnecessarily wasted because of the laziness of the court.

(b) It is the duty of the parties to assist the court in framing of issues. The Court can call upon

(1) A. I. R. 1968 M. P. 33. (2) A. I. R. 1960 S.C. 571, paragraph 9.

them to assist it. If either party does not respond the court should make a note of it in the proceedings, so that if subsequently it complains that any issue has not been properly framed, or that issue has been left out which should have been framed, it can be saddled with costs not only while rejecting the complaint as incorrect, but also while amending the issues if necessary. However, assistance or no assistance, the Court MUST frame issues on the date fixed for that purpose.

(c) It is inexcusable if the court having not framed issues on the preceding date which was fixed for that purpose inspite of the parties, appearance, it dismisses the suit or proceed with it *ex parte*, on the next date fixed for framing of issues, because of non-appearance of the plaintiff or defendant respectively.

(2) When the Court CAN do one of two things; and it has to choose which of them it SHOULD do, it must remind itself of the celebrated doctrine which has become axiomatic, that discretion must be exercised judicially. This is based on the principle that every thing which is permitted by law is not necessarily right, and that it is the demand of discretion that due regard must be had to all the existing circumstances. The matter is different when the law peremptorily requires the court to act in one particular way only.

(3) (a) The date for framing of issues is a date of HEARING so that the suit CAN be dismissed for default, or, CAN be proceeded with *ex parte*, as the case may be. The Court CAN, but whether it SHOULD? The power is there; but the question is one of propriety.

(b) Notwithstanding non-appearance of a party or parties on the date fixed for framing of issues, the Court has also the power under Order 17, rule 2, C.P.C. (where that rule applies):—

(i) to frame issues on that date and fix another date for evidence etc; or,

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(ii) to adjourn the hearing and fix another date for framing of issues.

In either case it will be no duty of the court to intimate the absent party or parties of the next date of hearing. No party will be heard to say that it had no intimation from the court. It will be the duty of the parties to inform themselves of the next date of hearing and to take necessary steps in compliance with the directions of the Court contained in that order, otherwise, suffer the consequences And, if the Court has framed the issues, it will also be the duty of the parties to inform themselves of the issues so framed.

(4) (a) Where an application for restoration of the suit or for setting aside an *ex parte* decree is contested, the Court can be satisfied of the "sufficient cause" within the meaning of rule 9 or rule 13 of Order 9, C.P.C. only on the basis of evidence but not on whim or fancy.

(b) It is the duty of the Court to give the parties reasonable opportunity to produce evidence instead of straightaway hearing arguments, unless recourse is had to Order 19 of the Code of Civil Procedure, or, unless both the parties agree that the question may be determined on affidavits.

(5) An affidavit which accompanies an application is intended merely for *prima facie* satisfaction of the Court that the averments in the application are true so that the court may issue notice to the opponent and the court may act upon it if the opposite party contests the application. Otherwise, an affidavit can be acted upon only if recourse has been had to the provisions of Order 19, rule 1, C.P.C. or when both the parties agree that affidavit should be substituted for the evidence to be recorded.

I shall now proceed to consider the particular facts of the present case in the light of the above propositions.

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(i) The trial Court had fixed July 2, 1969, for framing of issues. On that date it had made a note that no documentary evidence was filed. The date (July 2, 1969) had been fixed only for the purpose of framing of issues and for nothing else. On July 2, 1969, the Court did not frame issues, but fixed August 4, 1969. Again it did not frame issues on August 4, 1969, but fixed September 3, 1969, for framing of issues and also for hearing the application of defendant no. 1 under Order 13, rule 2, C.P.C. which had been filed on April 4, 1969. On September 3, 1969, again the Court did not frame issues, but merely observed that it was busy with other matters, and fixed November 3, 1969. On the last mentioned date, the Court recorded non-appearance of the plaintiff and dismissed the suit for default. Thus, it is obvious enough that three successive dates were fixed for framing of issues and the plaintiff appeared on each of these dates (2.7.69, 4.8.69 and 3.9.69), but the Court did not frame issues, for no fault of the plaintiff and rather entailing undue waste of his time, money and energy. On the very first occasion of the plaintiff's non-appearance (i.e. on 3.11.69), the Court dismissed the suit for default even when it was merely for framing of issues. Undoubtedly, the Court acted arbitrarily and capriciously. It shirked its duty and utilised the opportunity as a convenient mode of "disposal" of the suit. In my view, it amounted to dereliction of duty. This by itself would have persuaded me to redress the wrong and set aside the order of dismissal of the suit by exercising the powers under Sec. 115, C.P.C. *suo motu*.

(ii) However, it appears that the learned presiding officer realised his mistake and rightly restored the suit on the plaintiff's application. The fact that he did not impose costs fortifies this inference.

(iii) In his application for restoration of the suit, the plaintiff, apart from pleading his illness, stated that his counsel was busy in another court. It is a matter of common experience that a counsel sometimes while busy with other important matters tells himself that he would note down the issues later on when he is comparatively free. In the present case, it was not as if the court had sent for the counsel particularly and still he did not turn up. The

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minutes show that the case was repeatedly called on for hearing and dismissed for non-appearance.

(iv) After the restoration of the suit by the impugned order, and even after this revision was admitted for hearing as back as on February 19, 1972, the defendants did not apply for stay of the proceedings of the trial Court, with the result that the trial has gone long ahead. The plaintiff's evidence has been closed, and now September 22, 1975, is fixed for the defendants' evidence.

On the above facts and in the above particular circumstances I shall not interfere in revision.

The revision is dismissed. There shall be no order for costs. The record shall be returned to the trial Court within 5 days from today.

Application dismissed.

CRIMINAL REVISION

Before Mr. Justice Raina.

1974

Oct. 17

ADMINISTRATOR, MUNICIPAL CORPORATION, BHOPAL, Applicant*

v.

RAFIQUE AHMAD and another, Non-applicants.

Criminal Procedure Code, Old and New (V of 1898 and II of 1974) —Contain no provision for issue of injunction—Section 561-A-Merely saves inherent powers of High Court—Does not speak of powers regarding subordinate Courts—Subordinate Court can exercise inherent power in interest of justice—Power not to be exercised arbitrarily or capriciously—Power has to be exercised for doing real and substantial justice—No statutory bar to institute departmental enquiry for misconduct which is subject-matter of criminal charge.

* Criminal Revision No. 554 of 1973, for revision of the order of S. K. Malviya, I Additional Sessions Judge, Bhopal, dated the 7th August 1973.

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Rafique Ahmad

Admittedly there was no provision in the old Criminal Procedure Code empowering the magistrate to issue an injunction. There is also no provision in the New Code.

Criminal Courts are not invested with wide powers of issuing injunction like Civil Court; and, therefore, they must function within the scope of powers conferred by the Code.

It is no doubt true that section 561-A, Criminal Procedure Code, merely saves the inherent powers of the High Court and is silent with regard to any such powers possessed by subordinate Courts. But this does not mean that subordinate Courts cannot when necessary exercise inherent powers.

Criminal Courts have an inherent power to make such orders as may be necessary for the ends of justice. But this inherent power is not to be capriciously or arbitrarily exercised. It is to be exercised *ex debito justitiae* to do real and substantial justice for the administration of which alone Courts exist.

The inherent powers can, however, be invoked only in exceptional cases where it is necessary to do so in the interest of justice there being no other remedy open to the party aggrieved.

There is no statutory bar to institute departmental enquiry against an employee for misconduct which is also the subject matter of a criminal charge.

Delhi Cloth and General Mills Ltd. v *Kushal Bhan* (1) and *Tata Oil Mills Co. Ltd* v. *The Workmen* (2); referred to.

N. S. Kale for the applicant.

R. S. Dabir for the non-applicants.

Cur. adv. vult.

ORDER

RAINA J.--This is a revision petition under section 439 of the Code of Criminal Procedure against the order dated 28.1.1973 passed by Magistrate First Class, Bhopal in a Misc. Criminal Case.

(1) A. I. R. 1960 S. C. 806. (2) A.I.R. 1965 S. C. 155.

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The non-applicant Rafique Ahmad is an employee of the Municipal Corporation, Bhopal (hereinafter referred to as 'the Corporation'). On a report made by the Corporation against the non-applicant Rafique Ahmad, the police has registered an offence under section 409 of the Indian Penal Code for committing criminal breach of trust in respect of the funds of the Corporation. The non-applicant was arrested on 18.11.1972 and the investigation is still proceeding. No challan has, however, been filed so far by the police against the non-applicant.

On 23.10.1972, the non-applicant was suspended by the Corporation and departmental enquiry was commenced against him. He has been served with a charge sheet and has been called upon to explain the charges against him. On 11.1.1973 the non-applicant filed an application before the Magistrate for restraining the applicant from continuing the departmental enquiry against him on the following grounds:-

(i) The departmental enquiry and the criminal prosecution would be on the same facts.

(ii) Continuance of the enquiry would obstruct and interfere with the cause of justice and would also prejudice his defence.

The application was opposed by the Corporation but it was allowed by the learned Magistrate and he issued an injunction directing the Corporation not to insist on the explanation of the non-applicant on the points covered by the police report during the pendency of the investigation and the subsequent trial of the case, if any. Being aggrieved by this order the Corporation filed a revision petition in the Court of Sessions; but it was dismissed by the Additional Sessions Judge, Bhopal. The Corporation has, therefore, come up in revision before this Court.

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Administrator Municipal Corporation, Bhopal
v.
Rafique Ahmad

The main point for consideration in this case is whether the Magistrate was competent to issue an injunction of this nature.

As the order in question was passed on 28.2.1973 the matter would be governed by the old Code of Criminal Procedure. Admittedly there was no provision in the old Code empowering the Magistrate to issue an injunction of this nature. There is also no such provision in the new Code. The power of the criminal Courts or the Magistrates to grant injunctions or prohibitory orders is extremely limited. Under section 142 of the old Code a Magistrate can issue an injunction if he considers that immediate measures are necessary to prevent imminent danger or injury of a serious kind to the public. Under section 144 the District Magistrate or Sub-Divisional Magistrate or a Magistrate specially empowered can issue prohibitory orders to prevent continuance of public nuisance or in urgent cases of nuisance or apprehended danger. Criminal Courts are not invested with wide powers of issuing injunctions like Civil Courts and, therefore, they must function within the scope of powers conferred by the Code.

In the absence of any specific provision conferring power on a Magistrate to issue injunction in a matter like this, we have to consider whether such an injunction could be issued by the Court in exercise of its inherent jurisdiction. It is no doubt true that section 561-A of the Code of Criminal Procedure merely saves the inherent powers of the High Court and is silent with regard to any such powers possessed by subordinate Courts. But this does not mean that subordinate Courts cannot when necessary exercise inherent powers. It is an established proposition of law that Courts of Justice must possess inherent powers apart from the powers expressly

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conferred on them by the provisions of law which are necessary to their existence and the proper discharge of duties imposed upon them by law. Criminal Courts have an inherent power to make such orders as may be necessary for the ends of Justice. But this inherent power is not to be capriciously or arbitrarily exercised. It is to be exercised *ex debito justitiae* to do real and substantial justice for the administration of which alone Courts exist. While exercising this power the Court must be careful to see that its decision is based on sound general principles and is not in conflict with any statutory provision because a Court has no inherent power to do that which is prohibited by the Code. *vide Akhil Bandhu Ray and others* v. *Emperor* (1) and *Hariram* v. *The State* (2).

The inherent powers can, however, be invoked only in exceptional cases where it is necessary to do so in the interest of justice there being no other remedy open to the party aggrieved. The power cannot be invoked so as to interfere with the statutory rights of the parties.

Under section 60 of the Madhya Pradesh Municipal Corporation Act, the Corporation is competent to impose penalties including removal or dismissal of servants for good and sufficient reasons. This is a statutory power and it is obvious that the Corporation has instituted departmental enquiry, against the non-applicant in exercise of this power.

There is no statutory bar to institute departmental enquiry against an employee for misconduct which is also the subject matter of a Criminal charge. No doubt, in *Delhi Cloth and General Mills Ltd.* v. *Kushal Bhan* (3) their Lordships made the

(1) A. I. R. 1938 Cal. 258. (2) A. I. R. 1956 M. B. 17.
(3) A. I. R. 1960 S. C. 806.

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following pertinent observations in connection with a departmental action against an employee facing criminal charge for misconduct:—

> "It is true that very often employers stay enquiries pending the decision of the Criminal trial Courts and that is fair; but we cannot say that principles of natural justice require that an employer must wait for the decision at least of the Criminal trial Court before taking action against an employee. In *Shri Bimal Kanta Mukherjee* v. *Messrs Newsmans's Printing Works* (1), this was the view taken by the Labour Appellate Tribunal. We may however, add that if the case is of a grave nature or involves questions of fact or law, which are not simple, it would be advisable for the employer to await the decision of the trial Court, so that the defence of the employee in the criminal case may not be prejudiced."

Similar observations were made by their Lordships in *Tata Oil Mills Co. Ltd.* v. *The Workmen* (2). These are weighty observations entitled to consideration by the employers; but they do not suggest hat it is open to a criminal Court to issue an injunction restraining an employer from taking departmental action against the employee merely because he is facing or is likely to face a criminal charge on the basis of some misconduct.

We must further bear in mind that in this case even a police challan has not been presented and, therefore, the Megistrate has not yet taken cognizance of the case. Shri N. S. Kale, learned counsel for the petitioner-Corporation submitted that the Corporation waited for a sufficiently long time for the challan to be presented; but when there was undue delay; it decided to proceed with the departmental action against the non-applicant. The action taken by the Corporation thus appears to be *bona fide* and is within the exercise of its statutory power. It

(1) 1956 Lab. A. C. 185. (2) A. I. R. 1965 S. C. 155.

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was, therefore, highly improper for the Magistrate to issue an injunction of this nature. The impugned order is not only improper but also without jurisdiction and is, therefore, liable to be quashed.

The petition is, therefore, allowed and the impugned order is hereby quashed and set aside.

Application allowed.

MISCELLANEOUS CIVIL CASE

Before Mr. B. Dayal C. J. and Mr. Justice Pandey.

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Nov. 17

MESSRS GOPALDAS KHIMJI TRADING CO., UJJAIN, Applicant*

v.

THE COMMISSIONER OF SALES TAX, M. P., INDORE, Opposite party.

General Sales-tax Act, Madhya Pradesh, 1958 (II of 1959)—Section 52 (1) Proviso—Preserves right or liability to be assessed according to the provisions of the repealed Act, in respect of turnovers effected during the time of repealed Act—Repealed Act not providing for second appeal—Second appeal not maintainable—Sections 52 (1-A) and 18-A, amending Act—Give retrospective effect.

Section 52 (1). proviso preserved unaffected by that Act the right or liability to be assessed in accordance with the provisions of the repealed Act in respect of turnovers of sales effected during the time when the latter were in force.

Sales Tax Officer v. *Hanuman Prasad* (1); referred to.

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*Miscellaneous Civil Case No 302 of 1966. Reference under Section 44(1) of the Madhya Pradesh General Sales Tax Act, 1958, by the Board of Revenue, Madhya Pradesh, Gwalior, dated the 7th November 1966.

(1) (1967) 19 S.T.C. 87.

It is plain from Section 18-A of the Act of 1964, that five years further time from the commencement of Act 20 of 1964 was allowed for all assessment of turnovers covered by the repealed Acts, which had not already been subjected to tax when the new Act came into force. In that context, section 52(1) of the new Act, as originally enacted, which merely preserved the rights and liabilities under the repealed Acts, including the limitation prescribed therein, was rendered inappropriate and had to be conformably amended. Therefore, by Act 23 of 1967, a new sub-section (1-a) was inserted in section 52 and given retrospectivity to the same extent as section 18-A *ibid.*

V. S. Pandit for the applicant.

K. P. Munshi Government Advocate for the State.

Cur. adv. vult.

JUDGMENT

The Judgment of the Court was delivered by PANDEY J.--At the instance of the assessee, the Sales Tax Tribunal has, acting under section 44(1) of the Madhya Pradesh General Sales Tax Act, 1958 (hereinafter called the new Act) referred to this Court for its opinion the following question of law:

> Whether, in the facts and the circumstances of this case, the applicant had the right to file a second appeal before the Tribunal under the provisions of the M. P. General Sales Tax Act, 1958?

The material facts giving rise to this reference lie within a narrow compass and may be shortly stated. The applicant is a registered dealer which carries on business at Ujjain. The relevant turnover of sales made by the applicant related to the period April 1, 1957 to March 31, 1958. During that period, the Madhya Bharat Sales Tax Act, *Samvat* 2007, was in force. It was, however, repealed by the new Act which

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came into force on April 1, 959. That turnover was actually assessed to tax on December 18, 1962 though, as found by the Tribunal, the *lis* had arisen on April 11, 1958 when a notice was issued to the applicant to show cause why, for its failure to submit returns for the period, a best judgment assessment should not be made and a penalty be not levied. Against the order of assessment dated December 18, 1962, there was a first appeal which was dismissed by the Deputy Commissioner on June 30, 1964. Thereafter, the applicant preferred a second appeal to the Tribunal which, on December 31, 1965, rejected it as incompetent on the view that the *lis* had arisen before the new Act (which provided for two appeals) came into force, that the case was governed by the Madhya Bharat Sales Tax Act and that that Act provided for only one appeal. Subsequently, at the instance of the applicant, this reference was made.

Having heard the counsel, we have formed the opinion that the question referred to us must be answered in the negative. It was argued that, before the order of assessment had become final, the new Act came into force and, since it enlarged the right to go up in appeal before the superior sales tax authorities by providing for a second appeal, the assessee was entitled to avail of it. In support of this contention, reliance was placed upon *Indira Sohanlal* v. *Custodian of Evacuee Property* (1) and *Moti Ram* v. *Suraj Bhan* (2). These two authorities do not relate to tax matters and proceed on the general principle that, unless otherwise provided, the law amended during the pendency of the proceedings in so far as it did not affect vested rights applied to them even though they had been initiated prior to the amendment. The present case was, however, governed

(1) A. I. R. 1956 S. C. 77. (2) A. I. R. 1960 S. C. 655.

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by a contrary provision in the new Act itself, namely, the proviso to section 52(1), which preserved unaffected by that Act the right or liability to be assessed in accordance with the provisions of the repealed Acts in respect of turnovers of sales effected during the time when the latter were in force. So, in *Sales Tax Officer* v. *Hanuman Prasad* (1), the Supreme Court stated:

> "The mere enforcement of that Act by the time the order of assessment was passed by the Sales Tax Officer cannot lead to the conclusion that the assessment of the respondent was made under the new Act and not under the repealed Act. It was under section 52 of the new Act that the repealed Act was repealed, and that section itself, under the proviso laid down that such repeal shall not affect the previous operation of the said Act or any right, title, obligation or liability already acquired, accrued or incurred thereunder. There was also the further addition that subject thereto, anything done or any action taken (including any appointment, notification, notice, order, rule, form regulation, certificate or licence) in the exercise of any power conferred by or under the said Act shall, in so far as it is not inconsistent with the provisions of this Act, be deemed to have been done or taken in exercise of the powers conferred by or under this Act, as if this Act were in force on the date on which such thing was done or action was taken. In view of this proviso, it has to be held that when this new Act came into force on 1st April, 1959, all rights, title, obligation or liability already acquired, accrued or incurred under the repealed Act by the respondent remained unaffected and intact. The rights and liabilities, which had been acquired or incurred under the repealed Act, included the right or liability to be assessed in accordance with the provisions of the repealed Act in respect of turnover of sales effected during the time when that Act was in force. The repealed Act laid down what turnover was taxable, how it was to be computed, and at what rate the tax was to be

(1) (1967) 19 S. T. C. 87.

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charged. These provisions clearly created rights as well as liabilities of dealers. Those rights and liabilities were thus preserved by section 52 of the new Act."

(Page 90)

It follows that, when the Madhya Bharat Sales Tax Act did not provide for a second appeal, the Tribunal rightly regarded the second appeal as incompetent.

Since this position has been somewhat altered by legislation, but not so as to confer on the assessee a right of second appeal, it is necessary to notice it if only to make a correct statement of the law bearing on the point. In *Firm Jagmohandas Vijaykumar* v. *The Additional Assistant Commissioner of Sales Tax* (1) and other Division Bench cases decided on March 31, 1964, this Court held that the limitation of 3 years prescribed for re-assessment under section 10 of the Madhya Bharat Sales Tax Act, 1950, applied to assessments under section 8 of that Act. The result of this view taken in these cases was that a large number of assessments already made, and numerous proceedings initiated, beyond 3 years were invalidated. The State Legislature intervened, amended the law with retrospective effect and in conformity therewith validated those assessments and the initiation of proceedings. A new section 18-A, was inserted by Act 20 of 1964. It reads:

"18-A. (1) Where a dealer was registered or licensed under any of the Acts repealed by section 52 and has not been assessed to tax for any period prior to the commencement of this Act, then notwithstanding-

(i) any judgment, decree, or order of any Court, Tribunal or any other competent authority to the effect that the turnover for that period cannot be assessed to tax on the ground that the assessment has not

(1) Miscellaneous Petition No. 37 of 1963, decided on the 31st March 1964.

been made within the period prescribed therefor, under the relevant provisions of the relevant repealed Act; or

(ii) anything contained in section 19 of this Act or in the relevant repealed Act; he shall within five years from the date of the commencement of the Madhya Pradesh General Sales Tax (Second Amendment) Act, 1964, be assessed to tax for that period.

(2) Where, before the commencement of this Act, a proceeding for assessment had been initiated or an assessment had been made, for any period prior to such commencement, in respect of a dealer registered or licensed under any of the Acts repealed by section 52, then notwithstanding any judgment, decree or order of any Court, Tribunal or any other competent authority such proceeding or assessment shall be and shall always be deemed to have been validly initiated or made, notwithstanding that the period laid down for initiation or assessment had already expired and such proceeding or assessment shall not be called in question in any Court or Tribunal, or before any other authority merely on that ground."

It is plain from section 18-A *ibid* that five years further time from the commencement of Act 20 of 1964 was allowed for all assessment of turnovers covered by the repealed Acts, which had not already been subjected to tax when the new Act came into force. In that context, section 52(1) of the new Act, as originally enacted, which merely preserved the rights and liabilities under the repealed Acts, including the limitation prescribed therein, was rendered inappropriate and had to be conformably amended. Therefore, by Act 23 of 1967, a new sub-section (1-a) was inserted in section 52 and given retrospectivity to the same extent as section 18-A *ibid*. The new sub-section (1-a) reads:

"Notwithstanding anything contained in sub-section (1), a

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dealer registerd or licensed under any of the repealed Acts who has not been assessed to tax for any period prior to the commencement of this Act shall be assessed to tax in accordance with the provisions of the repealed Acts as if this Act has not been passed, subject however to the condition that the period prescribed therefor under the relevant provisions of the relevant repealed Acts shall extend till the expiry of five years from the date of commencement of the Madhya Pradesh General Sales Tax (Second Amendment) Act, 1964 (20 of 1964)."

It will be readily seen that the assessment made in this case on December 18, 1962, which had been rendered invalid according to the view taken in the case of *Firm Jagmohandas Vijaykumar (supra)*, was validated by section 18-A of the new Act and, in view of sub-section (1-a) of section 52 of that Act, it is governed, subject only to one exception which is here not relevant, by the repealed Madhya Bharat Act as if the new Act had not been passed. It is also now conceded by the learned counsel for the assessee and the Government Advocate that this is so. It follows that there was in this case no right of second appeal.

We have answered this reference on the assumption that it was validly made. As we have already indicated, a second appeal itself was incompetent and any order passed in such appeal could not be the basis of a valid reference.

We direct the assessee to pay all costs of this reference. Hearing fee Rs. 100/-.

Reference answered accordingly.