## APPELLATE CIVIL

*Before Mr. Justice A.P. Sen and Mr. Justice Tankha.*

DARYAO SINGH and others, Appellants* 1976

v. Jan. 22

SMT. HALKIBAI and others, Respondents.

Benami *Transaction—Burden on person asserting the transaction to be* benami*—Consideration paid by person other than ostensible owner—Not sufficient to establish the transaction to be* benami*—Circumstances to be considered in deciding whether transaction is* benami *or not—Person who is beneficial owner—Is actual owner.*

The onus of establishing that a transaction is *benami* is on the person asserting *benami* nature of the transaction and it must be strictly made out.

*Gangadara Ayyar and others* v. *Subramania Sastrigal and others* (1); referred to.

The fact that the consideration has been paid by a person other than the ostensible owner, is not necessarily in itself sufficient to establish that such a transaction is *benami*. That test is subject to the quailfication "in the absence of all other relevant circumstances."

It is of utmost importance in determining the question to consider (i) the surrounding circumstances, (ii) the position of the parties and their relations to one another (iii) the motives which could govern their actions, (iv) their ex-subsequent conduct, and (v) possession of the title deed.

*Sura Lakshmiah Chetty and others* v. *Kothandarama Pillai* (2); relied on.

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*First Appeal No. 120 of 1971, from the decree of R. L. Sanghai, IIIrd Additional District Judge, Bhopal, dated the 2nd September 1971.

(1) A. I. R. 1949 F. C. 88. (2) A. I. R. 1925 P. C 181.

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*B. K. Pandey* for the appellants.

*R. D. Hundikar* for the respondents.

*Cur. adv. vult.*

JUDGMENT

The Judgment of the Court was delivered by A. P. SEN J.--This judgment will also govern the disposal of First Appeal No. 121 of 1971 (*Daryao Singh & Ors.* v. *Smt. Halkibai & Ors.*).

These appeals brought from a common judgment of Shri R. L. Sanghani, IIIrd Addl. District Judge, Bhopal, dated 2nd September 1971, raise a common question and, therefore, they are disposed of by a common judgment.

The relevant facts, in brief, are as follows: The field *Khasra* no. 77/6/2, area 29.54 acres, situate in village Kondari, belonged to Major Wali Mohammad. By an agreement dated 14.6.1954, Ex.P. 19, he agreed to sell the field to Barelal for Rs.3692.50 p. pursuant to the agreement, he received Rs.1,000/-by way of earnest money. On 2.8.1954 Barelal paid him Rs.700/-, *vide* receipt, Ex.P-20. Barelal paid Rs.1848/- in all but could not arrange for the balance and evidently abandoned the contract in favour of Ganesh Singh, his brother-in-law, i.e., wife's brother. The balance consideration of Rs.1844.50 was accordingly, paid by Ganesh Singh. Wali Mohammad executed a sale-deed on 22-6-1955, Ex.P-21, of the said field in favour of Sunder Singh minor son of Ganesh Singh and Mst. Mathura Bai, his widowed sister and their names were duly mutated as the *Khatedars* of the same. On 28-5-1965, Sunder Singh and Mst. Mathura Bai entered into an agreement, Ex. D-2 to sell the land to Barelal and Ramratan for a consideration of Rs.24,000-/.

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They received Rs,18,000/-under the agreement and placed the purchasers in possession. Incidentally, Barelal is the father-in-law of Sunder Singh, and Ramratan, the brother-in-law of Ganesh Singh. This led to a dispute relating to possession between Daryao Singh on the one hand (party No.I) and Ramratan on the other (Party No.II), and there was an imminent apprehension of breach of peace, and on the report of the Station House Officer, Bari, proceedings u/s 145 of the Code of Criminal Procedure were started. On 6-10-1965, the Sub-Divisional Magistrate, Bareli, passed a preliminary order u/s 145(4) of the Code, requiring the parties to file their statements in respect of their respective claims, and placed the disputed land under attachment on 27-10-1965. The party No.I, Daryao Singh, claimed to be in possession of the disputed land in pursuance of an earlier agreement dated 6-8-1964, Ex.P-5, entered into with Ganesh Singh, acting as guardian of his minor son Sunder Singh, and Mst. Mathura Bai, under the terms of which Ganesh Singh had agreed to sell the land to him for a consideration of Rs. 21,000/-, and alleged that he had paid Rs. 10,750/-towards part-payment of the price. On the other hand, the Party No.II, Ramratan, claimed to be in possession along with Barelal, by virtue of the aforesaid agreement dated 28-5--1965, Ex.D.2, entered into with Sunder Singh and Mst. Mathura Bai, on their paying Rs.18,000/--.

On 15--11--1965, i. e. after passing of the aforesaid preliminary order, Sunder Singh and Mst. Mathura Bai executed the sale-deed, Ex.D-3, in favour of Barelal and Ramratan, on receipt of the balance consideration of Rs.6,000/-. On 17.11.1965, Barelal and Ramratan instituted Civil Suit No. 12-A of 1965 for declaration of their title too, and for grant of

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perpetual injunction in respect of *Khasra* no. 77/6/2, on the strength of their sale-deed, **Ex.D**-3, against Daryao Singh, his brothers Sethji and Dadu Bhaiya, and sons Hanumant Singh and Himmat Singh, who, in their written statement filed on 1.2.1966 alleged that Sunder Singh and Mst. Mathura Bai were not the real purchasers, under the sale-deed dated 22-6-1955, Ex.P-21, executed by Major Wali Mohammad, but were *benamidars* for Daryao Singh. During the pendency of this suit, the Sub-Divisional Magistrate passed a final order dated 19.4.1966, declaring Ramratan (Party No.II) to be in possession of the disputed land on the date of the preliminary order and two months next before the date of such order. The final order of the Sub-Divisional Magistrate, Bareli was eventually upheld by the High Court in Criminal Revision No. 298 of 1965 (*Daryao Singh* v. *Ramratan*) on 18-8-1966. Thereafter, on 10-10-1966, Daryao Singh and his two minor sons Sher Singh and Achhe Bhaiya @ Daulat Singh brought Civil Suit No. 10-A of 1968, for specific performance of the agreement dated 1-10-1964, Ex.P-5, against Ganesh Singh. They subsequently amended the plaint and sought a declaration that the sale-deed dated 22.6.1955, Ex.P-21, executed by Major Wali Mohammad in favour of Sunder Singh and Mst. Mathura Bai was a *benami* one for Ganesh Singh. The points involved in both the suits were common and the evidence was also common, and, therefore, the parties requested that the suits be tried together; and, consequently the evidence was recorded in Civil Suit No. 10-A of 1968; and the documents which were on the file of Civil Suit No. 12-A of 1965, were brought on the record of that suit.

The learned Addl. District Judge, in a carefully written judgment, has found on the evidence that

though Daryao Singh paid the balance of consideration amounting to Rs. 1844.50 p., he was not the real purchaser under the sale-deed dated 22-6-1955, Ex. P-21, executed by Major Wali Mohammad in favour of Sunder Singh and Mst. Mathura Bai; and, that they were, therefore, not *benamidars* for him, but were in possession of the property in their own rights, before they sold the same to Barelal and Ramratan by the sale-deed dated 15-11-1965, Ex. D-3, for a consideration of Rs. 24,000/-. He has also found that when Ganesh Singh paid the balance consideration of Rs. 1844.50 p. to Major Wali Mohammad on 22-6-1955 for execution of the sale-deed dated 22-6-1955, Ex. P-21, in favour of Sunder Singh and Mst. Mathura Bai, he intended that title should pass to them and not that they should be mere *benamidars* for him. He has further found that since Sunder Singh had attained majority, his father Ganesh Singh had no authority in him to act as his guardian and, therefore, the alleged agreement date 1-10-1964, Ex. P. 5, entered into by Ganesh Singh, purporting to act as guardian of his minor son Sunder Singh, in favour of Daryao Singh, was not binding on Sunder Singh and thus did not create any right in Daryao Singh to obtain a sale-deed from Sunder Singh. On these findings, the learned Addl. District Judge has dismissed Civil Suit No. 10-A of 1968 whereby Daryao Singh and his two minor sons claimed specific performance of the alleged agreement dated 1-10-1964, Ex. P-5, entered into by Ganesh Singh, purporting to act as guardian of his minor son Sunder Singh, and Mst. Mathura-bai, and decreed Civil Suit No. 12-A of 1965 brought by Barelal and Ramratan declaring that they were the owners of the suit land, and granting a perpetual injunction restraining Daryao Singh, his brothers Sethji and Dadu Bhaiya, and sons Hanumant

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Singh and Himmat Singh, from interfering with their possession of the land.

The short point involved in these appeals is whether Sunder Singh and Mst. Mathura Bai were *benamidars* for Ganesh Singh and, therefore, the agreement dated 1-10-1964, Ex. P-5, entered into by him was specifically enforceable. It is urged that the learned Addl. District Judge was in error in holding that Ganesh Singh intended that title under the sale-deed should pass to his son Sunder Singh and widowed sister Mst. Mathura Bai for which, it is said, there is no foundation in the pleadings. The submission is that the doctrine of advancement is not applicable in India and, therefore, when property is purchased by a father in the name of his son, or by a brother in the name of his widowed sister dependant on him, it must be resumed that they are *benamidars*, and if they claim it as their own by alleging that the father or the brother, as here, intended to make a gift of the property to them, the onus rests upon them to establish such a gift. In other words, the contention is that the presumption is, therefore, in favour of the transaction being *benami* and reliance is placed on *Sura Lakshmiah Chetty and others* v. *Kothandarama pillai* (1) and on certain other decisions. There can be no dispute with the proposition. The difficulty, however, lies in the application of that principle to the facts of the present case:

Mayne in his treatise on Hindu Law, 11th Ed., makes the following observation at p. 953:

> "A benami transaction is one where one buys property in the name of another or gratuitously transfers his property to another, without indicating an intention to benefit the other. The benamidar, therefore, has no beneficial interest in the property or business that stands

(1) A. I. R. 1925 P. C. 181.

in his name; he represents in fact the real owner and so far as their relative legal position is concerned, he is a mere trustee for him. In other words, a benami purchase or conveyance leads to a resulting trust in India, just as a purchase or transfer under similar circumstances leads to a resulting trust in England. The general rule and principle of the Indian law as to resulting trusts differs but little if at all, from the general rule of English law upon the same subject."

Venkatarama Aiyar J. in delivering the judgment of the Supreme Court in *Sree Meenakshi Mills Ltd.* v. *Income-tax Commissioner* (1), states:

"In this connection, it is necessary to note that the word 'benami' is used to denote two classes of transactions which differ from each other in their legal character and incidents. In one sense, it signifies a transaction which is real, as for example when A sells properties to B but the sale-deed mentions X as the purchaser. Here the sale itself is genuine, but the real purchaser is B, X being his benamidar. This is the class of transactions which is usually termed as benami. But the word 'benami' is also occasionally used, perhaps not quite accurately to refer to a sham transaction, as for example, when A purports to sell his property to B without intending that his title should cease or pass to B. The fundamental difference between these two classes of transactions is that whereas in the former there is an operative transfer resulting in the vesting of title in the transferee, in the latter there is none such, the transferor continuing to retain the title notwithstanding the execution of the transfer deed. It is only in the former class of cases that it would be necessary, when a dispute arises as to whether the person named in the deed is the real transferee or B, to enquire into the question as to who paid the consideration for the transfer, X or B."

The burden was, in the instant case, upon Daryao Singh to prove that the purchase was *benami*. There is no presumption in Hindu Law that

(1) A. I. R. 1957 S. C. 49.

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transactions standing in the name of the wife are the husband's transactions. The decision of the Court must not rest upon suspicion, surmises and mere conjectures but upon legal grounds and on legal testimony, and the onus of establishing that a transaction is *benami* is on the person asserting *benami* nature of the transaction and it must be strictly made out. In the absence of such evidence, the apparent title must prevail. (See, *Gangadara Ayyar and others* v. *Subramania Sastrigal and others* (1).

Even in cases where there is positive evidence that money is contributed by the husband and not the wife, that will not conclude the matter as to its being *benami*, though that is an important criterion. The fact that the consideration has been pain by a person other than the ostensible owner, is not necessarily in itself sufficient to establish that such a transaction is *benami*. That test is subject to the qualification "in the absence of all other relevant circumstances". It is, therefore, of utmost importance in determining the question to consider (i) the surrounding circumstances, (ii) the position of the parties and their relations to one another, (iii) the motives which could govern their actions, (iv) their ex-subsequent conduct, and (v) possession of the title deed.

The pronouncement of their Lordships of the Privy Council in *Sura Lakshmiah Chetty & Ors.* v. *Kothandarama-Pillai (supra)* cannot be interpreted as laying down broadly that a purchase in India by a husband in the name of his wife is always to be regarded as a *benami* transaction, by which the beneficial interest in the property is in the husband, although the ostensible title is in the wefe. It is to

(1) A I.R. 1949 F.C. 88.

be noted that their Lordships never intended to lay down a proposition like this. There, the husband purchased the property in the name of his wife with his own money. The law on the point was thus laid down by Sir John Edge:

> "There can be no doubt that a purchase in India by a native of India of property in the name of his wife unexplained by other proved or admitted facts is to be regarded as a *beanami* transaction by which the beneficial interest in the property is in the husband, although the ostensible title is in the wife."

It is clear from the rule thus enunciated that the fact that the consideration for a purchase has been found by the husband is not conclusive against the wife in whose name the property had been purchased. It is only when the purchase is "unexplained by other proved or admitted facts" that the conclusion should follow that the transaction is *benami* for the husband.

In our view the appeals must fail for various reasons. In the first place, the plaintiffs in this suit, i.e., Daryao Singh and his two minor sons, are not very sure of their stand. Daryao Singh filed two plaints. In the first plaint presented on 1-10-1966 the prayer sought in para 20(a) was that it be declared that the sale-deed dated 22-5-1955, Ex.P-21, executed by Major Wali Mohammad in favour of Sunder Singh and Mst. Mathura Bai was a *benami* one for Ganesh Singh. In the second plaint, i.e., the amended plaint filed on 20.9.1967 that relief was deleted but it was nonetheless alleged in para 8 (1) that the transaction throughout was *benami* and that Ganesh Singh was the real purchaser and sole beneficiary and he alone utilised the usufruct thereof, meaning thereby that Sunder Singh and Mst. Mathura Bai were mere *benamidars*. In the connected suit, Civil Suit

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No. 12-A of 1965 which was prior in point of time, Daryao Singh and others impleaded as the defendants, had in their written statement filed on 1-2-1966, i.e., much earlier, alleged in para 15 thereof that Sunder Singh and Mst. Mathura Bai were *benamidars* for Daryao Singh. In view of these conflicting pleas, it is clear that Daryao Singh and others have not come to Court with a definite case. They have been challenging their stand from time to time as it suits their purpose. We pointedly asked the learned counsel appearing for them, and he unequivocally stated before us that he adopts the stand taken in the amended plaint, i.e., the one filed on 20.9.1967 in this suit. He also advanced his arguments upon the basis that Sunder Singh and Mst. Mathura Bai were *benamidars* for Ganesh Singh. The learned counsel having given up the plea that Sunder Singh and Mst. Mathura Bai were *benamidars* for Daryao Singh, the finding of the learned Addl. District Judge that they were not *benamidars* for Daryao Singh must be upheld.

Upon a consideration of the evidence in the light of all the circumstances appearing, the learned Addl. District Judge has, however, held that purchase by Ganesh Singh of the suit land in the name of his son Sunder Singh, and widowed sister Mst. Mathura Bai, with his own funds, was with the object that it should belong to them and should not be within his reach and, therefore, the transaction was not *benami*. That conclusion of his is, in our view, unassailable on the evidence on record. In a *benami* purchase of land, the person who is proved, as a fact, to be the beneficial owner, is the actual owner.

Bearing these principles in mind, we find that there was no particular motive or reason for Ganesh Singh to have purchased the suit land *benami* in the

names of his son Sunder Singh and widowed sister Mst. Mathurabai. The reason put forward by Daryao Singh in the plaint in Civil Suit No. 10–A of 1968, and in the written statement in Civil Suit No. 12–A of 1965 for going in for the *benami* transaction was that though he had paid to Wali Mohammad Rs. 1844.50 p. under agreement dated 14–6–1954 Ex.P–19, but still balance of Rs.1844.50 p. remained payable and so he requested orally his brother–in–law Ganesh Singh to lend him that amount, and he agreed orally to advance it on condition that a *benami* sale–deed should be executed in the name of his minor son Sunder Singh and his widowed sister Mst. Mathura Bai, who had come to live permanently under his roof, and also that i.e., Ganesh Singh was to remain in possession of, and enjoy the usufruct of that part of the land, which wasnot bid, and had already been brought under cultivation, for 8 years from the date of sale, and after the expiry of that period, he would convey the property back to Daryao Singh by a deed of reconveyance and also restore possession to him, and thus the loan of Rs. 1844.50 p. shall stand fully paid of. It was upon those terms, Daryao Singh alleged that he in good–faith and *bona fide* belief, accepted the proposal and requested Major Wali Mohammed to execute a sale–deed in the name of Sunder Singh and Mst. Mathura Bai. It was further alleged that the transaction was, in fact, a sort of oral usufructuary mortgage in favour of Ganesh Singh by Daryao Singh. The stand taken in the amended plaint is, therefore, that Daryao Singh and not Ganesh Singh was the real purchaser and Sunder Singh and Mst. Mathura Bai were mere *benamidars* for him.

In support of his arguments, learned counsel appearing on behalf of Daryao Singh and others

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drew our attention to the testimony of Zafar Ali Hussain (PW 13), agent of Major Wali Mohammad, Narbada Charan (PW.1), petition writer, Premnarayan (PW. 3), Narbar Singh (PW 6), village patel, Daryao Singh (PW 7), Kishore Singh (PW 8), Kamal Singh (PW 11) and Pritam Singh (PW 12). Their evidence tends to prove the alleged oral agreement between Daryao Singh and Ganesh Singh. The evidence was to substantiate the plea that Daryao Singh, was the real purchaser, and the balance of consideration of Rs. 1844.50 p. was advanced by Ganesh Singh under the arrangement pleaded. That evidence is, therefore, of no avail. Besides, we have no manner of doubt that the evidence is got-up. It appers to us that Daryao Singh and Ganesh Singh have joined hands to defeat the rights of Barelal and Ramratan. It would be sufficient if we refer to the testimony of Zafar Ali Hussain (PW 13), agent of Major Wali Mohammad. This witness would have us believe that when the sale-deed, Ex-P-21, was executed, it was settled orally between Daryao Singh and Ganesh Singh, that in lieu of the loan of Rs.1844.50 p. advanced by Ganesh Singh, he would remain in possession of the lands in suit and enjoy the usufruct thereof, and after expiry of the period, execute a deed of re-conveyance in favour of Daryao Singh. The testimony of this witness does not inspire confidence. He admits during his cross-examination, that the talk took place in the village. He was the agent of Major Wali Mohammad. He would, therefore, be present at the office of the Sub-Registrar at the time of the execution, and not at the time of the alleged talk in the village. The evidence of the other witnesses is no better.

In our judgment, the learned Additional District Judge has rightly held, on a consideration of the

surrounding circumstances and the probable causes likely to have operated on the minds of the parties to bring about the transaction, that the sale was taken by Ganesh Singh in the name of his son Sunder Singh and his widowed sister Mst. Mathura Bai, with the object that the property should belong to them and it should not be within the reach of Daryao Singh or himself. The property was mutated in their names. They were in possession and enjoyment of the same. They were dealing with it as their own. There was apparently no reason for Ganesh Singh to purchase the property *benami* in their names. The two documents on which Daryao Singh relies, Exs-P--6 and P-18, are destructive of his case that Sunder Singh and Mst. Mathura Bai were mere *benamidars* of Ganesh Singh. Ganesh Singh, has put his signature for and on behalf of Sunder Singh, and not on his own behalf. This indicates that at the time of execution of these documents, both Daryao Singh and Ganesh Singh considered that Sunder Singh and Mst. Mathura Bai were the real owners, and that Ganesh Singh could act only on their behalf, and not in his own right. The alleged agreement, Ex-P--5, executed by Ganesh Singh also amounts to an admission by him that, in fact, Sunder Singh and Mst. Mathura Bai were the real owners of the suit lands. We also uphold that finding of the learned Additional District Judge that since Ganesh Singh was not the real owner, and inasmuch as there was no lawful authority in him to act on behalf of Sunder Singh and Mst. Mathura Bai, the agreement dated 1-10-1964, Ex-P-5, executed by Ganesh Singh on behalf of Sunder Singh as his guardian, would not be binding on Sunder Singh, and could not create any right in Daryao Singh to obtain a sale-deed from Sunder Singh, in pursuance of the said agreement.

The appeals must, accordingly, fail and are

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dismissed with costs. Counsel's fee as per schedule, if certified.

*Appeal dismissed.*

## APPELLATE CIVIL

*Before Mr. Justice A. P. Sen.*

NARAYAN, Appellant*

*v.*

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Jan. 15

M/S INDIAN MILL STORES, RAIPUR, Respondent.

*Civil Procedure Code (V of 1908)—Section 100—Question whether need is* bona-fide*—Is a matter of inference of fact to be drawn from other facts—The question whether burden of proof has been discharged—Is a question of fact—The question whether tenant has unlawfully sub-let, assigned or otherwise parted with possession —Is a question of fact—Evidence—Sub-tenancy—Not provable by direct evidence—Inference to be drawn from circumstances and facts on record.*

The question whether the plaintiff's need was *bona fide* or not was a matter of inference of fact to be drawn from other facts. The finding reached by the Courts below is based on appreciation of evidence.

*Mattulal* v. *Radhe Lal* (1) and *T. B. Sarvate* v. *Nemichand* (2); relied on.

The question whether in a given case, the burden of proving that he genuinely requires the premises which lay upon the landlord, has or has not been discharged, is also a question of fact.

The question whether the tenant has sub-let, assigned or

*Second Appeal No. 300 of 1971, from the appellate decree of Shri M. D. Bhatt, District Judge, Raipur, dated the 16th April 1971, modifying the decree of L. J. Singh, IV Civil Judge, Class II, Raipur, dated the 29th June 1970.

(1) A.I.R. 1974 S. C. 1596. (2) 1966 M.P.L.J. 26 (S. C.).

otherwise parted with possession of a part of the accommodation within the meaning of section 12(1)(b) of the Act and was, therefore, liable to be evicted therefrom, that again is a finding of fact based on appreciation of evidence, and the finding is binding in second appeal.

Sub-tenancy can hardly be proved by direct evidence. All that the plaintiff can do is to place on record certain circumstances from which an inference has to be drawn.

*J. V. Jakatdar* for the appellant.

*K. M. Agarwal* for the respondent.

*Cur. adv. vult.*

JUDGMENT

A. P. SEN J.—This appeal by the defendant is directed against a judgment and decree of the District Judge, Raipur, dated 16th April 1971, affirming the judgment and decree of the IVth Civil Judge, Class II, Raipur, dated 29th June 1970, decreeing the plaintiff's suit for eviction under section 12(1)(b) and (f) of the Madhya Pradesh Accommodation Control Act, 1961.

The relevant fact, in brief, is as follows: The parties stand in the relation of landlord and tenant. The plaintiff firm styled as M/s Indian Mill Stores, Raipur is doing business of Oil Engines, Pumps, Electric motors, Machineries, Pipes, Spare-parts etc. at Ganj-para, Raipur in a rented house. The plaintiff-firm purchased a building at Ganjpara, Raipur consisting of 4 identical blocks of one room each of which the demised premises is one, by a registered sale-deed dated 20.3.1965. The defendant who is in occupation of one of the blocks is running a tailoring shop under the name "Chauhan Tailoring

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Shop" attorned to the plaintiff on 1.4.65 *vide kiraya chithi*, Ex. P-2.

The plaintiff's case is that it is in *bona fide* need of the demised premises for continuing its business within the meaning of section 12(1)(f) of the Madhya Pradesh Accommodation Control Act, 1961, i. e., for shifting the business of the partnership, from the rented house to its own building of which the suit accommodation forms a part, alleging that the partnership firm has no other reasonable suitable non-residential accommodation of its own for their requirement in the town. It, therefore, requires the entire building purchased by it for its business purposes, and was filing suits for ejectment against all the tenants including the defendant. The plaintiff's case further is that the defendant had unlawfully sub-let, assigned or parted with the possession of a part of the accommodation in his occupation and was earning profit thereby and was, therefore, liable to be evicted from the demised premises under section 12(1)(b) of the Act. The defendant contested the plaintiff's claim and denied that the plaintiff was in *bona fide* need of the demised premises, alleging that the plaintiff firm was already doing its business at its present site taken on lease, which is in the heart of the business locality since last so many years and has earned reputation and good-will in the market and, therefore, the alleged need was just a pretence to secure his eviction therefrom. He also denied that he had sub-let or assigned a part of the accommodation, and pleaded that he had in fact, started a side business in partnership.

The Courts below have relied on the testimony of Narsi Bhai (P. W. 1) and found, as a fact, that the plaintiff had established its *bona fide* need of the demised premises for continuing its business under

section 12(1)(f) of the Act. The finding is based on appreciation of evidence, and no other conclusion that the one reached by the Courts below is possible. The plaintiff firm has purchased the building for locating its business. The testimony of Narsi Bhai (P. W. 1) clearly shows that the plaintiff has filed separate suits against all the tenants and it is intended to pull down the intervening walls to convert the separate blocks into one accommodation, as otherwise the business of the firm cannot be located in the building. The Courts below rightly relied on the testimony of Nari Bhai (P. W. 1) and granted to the plaintiff a decree under section 12(1)(f) of the Act.

The question whether the plaintiff's need was *bona fide* or not was a matter of inference of fact to be drawn from other facts. The finding reached by the Courts below is based on appreciation of evidence. In *Mattulal* v. *Radhe Lal* (1), their Lordships have reiterated their earlier view in *T. B. Sarvate* v. *Nemichand* (2), that a finding as to whether the landlord does or does not *bona fide* require the premises for the purpose of starting or continuing his business, is a finding of fact, and unless it is shown that in reaching it the District Judge has committed a mistake of law, or it is based on no evidence, the finding is binding in second appeal. Their Lordships have further stated that the question whether in a given case, the burden of proving that he genuinely requires the premises which lay upon the landlord, has or has not been discharged, is also a question of fact.

The Courts below have further found, as a fact, that the defendant has unlawfully sub-let, assigned

(1) A. I. R. 1974 S. C. 1596. (2) 1966 M. P. L. J. 26 (S. C.).

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or otherwise parted with possession of a part of the accommodation within the meaning of section 12(1)(b) of the Act and was, therefore, liable to be evicted therefrom. That again is a finding of fact based on appreciation of evidence, and the finding is binding in second appeal.

Learned counsel for the appellant, however, assails the decree on the ground that there is no evidence of sub-letting and, therefore, no decree for eviction could be founded upon under section 12(1)(b) of the Act. It is urged, placing reliance on *Dulichand Laxminarayan* v. *Commissioner of Income-tax* (1) and *M/s Tulsiram Vishnudutta* v. *Rent Controlling Authority, Jabalpur and another* (2), that a firm is not a legal entity and, therefore, the presumption of sub-letting does not arise. It is also urged that the view taken to the contrary in *Tansukhdas Chhaganlal* v. *Smt. Shyambai and another* (3) is no longer good law.

The question whether there is unlawful sub-letting is, in most cases, a matter of inference to be drawn from the facts of each case. The initial onus of proving unlawful sub-letting, in the first instance, lies upon the plaintiff. Sub-tenancy can hardly be proved by direct evidence. All that the plaintiff can do is to place on record certain circumstances from which an inference has to be drawn. When such circumstances are proved, *prima facie*, the burden placed on the plaintiff is discharged, and the onus shifts on the defendant not to prove any nagative fact but establish a positive aspect about the capacity in which the alleged sub-tenant is occupying the premises, and that he has not parted with the whole or a part of the tenanted accommodation. It follows

(1) A. I. R. 1956 S. C. 354. (2) 1969 M. P. L. J. 475.
(3) A. I. R. 1954 Nag. 160.

that the pleading of the defendant must be clear and explicit as the facts, in which a third person has been inducted into the whole or any part of the premises, are within his knowledge. The defendant must, therefore, specifically plead all the facts necessary to disprove the inference of sub-letting.

In the instant case, the defendant merely alleged that he had formed a partnership. The nature of that partnership was not disclosed. That was a fact especially within his knowledge. He could have established that fact by placing on record the deed of partnership, if any, or the account books of the partnership showing that funds were provided by the partners for starting the business, or that there was sharing of profit and loss between them. That evidence has been withheld by the defendant and an adverse inference must be drawn against him. Besides this, the circumstances can lead to no other inference than of sub-letting. The evidence on record reveals that a part of the premises is in occupation of Daulal (D. W. 2) and he is running a hotel therefrom. My attention is, however, drawn to the statement of Narsi Bhai (P. W. 1) in his cross-examination, where he admits that he has led no evidence to prove that the defendant has parted with a half-portion of the suit accommodation to Daulal (D. W. 2) or that the defendant is recovering Rs. 40/- as rent from him. Nothing really turns on this. This witness could only depose to facts within his knowledge. He had stated that almost daily he passes along the road, and he has seen Daulal (D.W.2) occupying a half-portion of the suit accommodation.

The fact of partnership is sought to be spelled out from the testimony of Narayan Bhai (D.W. 1)

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*Narayan* v. *M/s Indian Mill Stores, Raipur*

and Daulal (D.W.2). Their testimony does not inspire confidence, and the Courts below have disbelieved them for cogent reasons. Although both assert the *factum* of partership but Narayan Bhai (D.W.1) claims to be the exclusive owner of all the material and goods of the partnership business *viz.* hotel, and names Daulal only as a working partner, he does not say as to what is the arrangement between the partners of the firm for the sharing of the profits in the partnership business. Contrary to the defendant's version, Daulal (D.W.2) has claimed himself to be the full and exclusive owner of all the goods and material of the hotel, and claims to be paying to the defendant half-share of profits, but no rents. In view of this, the learned District Judge has righty observed that the story of the alleged partnership was a complete myth. More so, for the reason that Daulal (D.W.2) who is himself running a separate and independent hotel business in the adjoining premises, would not embark upon any partnership for another hotel business, in a portion of the suit premises. I, therefore, affirm the finding of the learned District Judge that the occupation of Daulal (D.W.2) of a portion of the suit accommodation was not in the nature of partnership business but obviously by reason of unlawful sub-letting. The decree of the Courts below for the eviction of the defendant under section 12(1)(b) of the Act is, therefore, upheld.

In my view, the existence of the partnership not having been proved, the question whether the creation of a partnership amounts to unlawful sub-letting, does not arise. The decision in *M/s Tulsiram Vishnudutta* v. *Rent Controlling Authority, Jabalpur & Another* (*supra*) is, therefore, not attracted. That decision is wholly, indeed, inopposite as the point decided

there was clearly different. The decision of the Supreme Court in *Dulichand Laxminarayan* v. *Commissioner of Income-tax (supra)*, is also distinguishable. There, it was held that a firm is a distinctentily from its partners for income-tax purposes. That decision turned on the peculiar provision of the Income-tax Act, 1922 which are radically different from the provisions contained in section 12(1)(b) of the Madhya Pradesh Accommodation Control Act, 1961. That case is, therefore, not helpful in deciding the point involved.

I may refer to *Tansukhdas Chhaganlal* v. *Smt. Shyambai & another (supra)*, where Sinha, C. J. and Bhutt, J. made the following observation:-

> "Where, in the first instances 'A' alone was the tenant of the premises and he allowed other persons to enter into partnership along with himself to carry on business in those premises, the partnership which 'A' entered into along with the third parties was a personality in law distinct from that of 'A' himself."

The decision that a presumption of sub--letting arises, under such circumstances, has throughout been followed. The recent decision of the Supreme Court in *D. N. Sanghavi & Sons* v. *Ambalal Tribhuwan Das* (1), where their Lordships have held, interpreting section 4(h) of the Madhya Pradesh Accommodation Control Act, 1955, that the requirement by the landlord of a non-residential accommodation, for starting or continuing a business in partnership, is not a need, directly or substantially, of his own and, therefore, cannot be a ground for ejectment, lends support to the view taken in *Tansukhas Chhaganlal* v. *Smt. Shyambai & another (supra)*. In the present case, ther is overwhelming evidence to establish that there was sub-letting or at any rate, parting of possession of the premises within the meaning of section 12(1)(b) of the Act.

(1) A.I R. 1974 S.C. 1026.

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*Narayan* v. *M/s Indian Mill Stores, Raipur*

When his attention was drawn to the finding of the Courts below that the plaintiff-firm had also established its *bona fide* need for continuing its business under section 12(1)(f) of the Act, the only comment of learned counsel for the appellant was that: "It is all absurd". I can see no absurdity in this. Presumably, the learned counsel felt that he could not assail the finding because it is a finding on a pure question of fact, in view of the decisions of their Lordships in *Mattulal* v. *Radhe Lal (supra)*, and *T. B. Sarvate* v. *Nemichand (supra)*.

In the result, the appeal must, therefore, fail and is dismissed with costs. Counsel's fee as per schedule, if certified.

*Appeal dismissed.*

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## APPELLATE CIVIL

*Before Mr. Justice C. P. Sen.*

1974

Aug. 14

JAGAN, Appellant*

*v.*

HARAKCHAND & another, Respondents.

*Ceiling on Agricultural Holdings Act, Madhya Pradesh (XX of 1960) —Section 11—Suit for specific performance of contract to sell—Decree for specific performance passed—Execution for possession—Collector holding that decree-holder held land in excess of ceiling limit—Decree for possession not executable so long as order of Collector is not varied or reversed in appeal or revision—Land Revenue Code, Madhya Pradesh, 1959—*

*Miscellaneous (Second) Appeal No. 97 of 1973, from an order of M. S. Qureshi, Additional District Judge, Balaghat, dated the 17th February 1973, arising out of the order of Shri M. G. Chouhan, I Civil Judge, Class II, Balaghat, dated the 14th March 1970.

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*Section 165(4)(a)—Not applicable since no ceiling limit fixed by the rules framed under the Code.*

The plaintiff filed a suit for specific performance of contract to sell agricultural land. A decree for specific performance was passed. Plaintiff decree-holder took out execution of decree for possession. The Collector held that the plaintiff already held surplus land. Question is whether decree for possession could be executed.

Held—The lands sold as per decree to the plaintiff decree-holder will be further in excess of ceiling limit and as such those lands will also vest in the State Government. If that be so, the plaintiff's all rights, title and interest in the suit lands and also right to take possession will be deemed to be extinguished after declaration by the Collector that they are holding lands in surplus. So, the decree for possession could not be executed against the appellant if the order of the Collector has not been varied or reversed in appeal or revision.

The prohibition contained in section 165(4)(a) of the M. P. Land Revenue Code, 1959, can have no application here because there is no ceiling limit fixed so far in the rules framed under the provisions of the Code.

*Gulabchand* v. *Mojiram* (1); referred to.

*R. K. Thakur* for the appellant.

*S. K. Seth* for the resdondents.

*Cur. adv. vult.*

ORDER

C. P. SEN J.—This is an appeal by the appellant-Judgment-debtor against the rejection of his objections regarding tenability of the execution proceedings by the Courts below.

A compromise decree was passed for specific performance of an agreement to sell the lands in

(1) 1966 J. L. J. S. N. 4.

1974

*Jagan*
v.
*Harakchand*

suit and on deposit of the balance amount of consideration, the sale-deed was to be executed by the judgment-debtor. But, as he failed to do so, the respondents filed an application on 18.11.1963 for execution of sale-deed and delivery of possession. On a notice being given, the appellant appeared on 25.3.64 and raised no objection regarding execution but sought a month's time to pay the decretal amount. The application was rejected and no further steps were taken as the appellant absented himself, but on 23.4.66, he filed another application under section 3 of M. P. Postponement of Execution of Decrees Act for staying the proceedings. Ultimately, a sale-deed was executed by the Court on 1.12.1967 and after some time when the decree for possession was sought to be executed, the present objection has been filed by alleging that the respondents own about 309 acres of land as per order of the Collector and, as such, the agreement of sale as well as the sale-deed are void and the decree is incapable of execution in view of the enactments of M. P. Ceilings on Agricultural Holdings Act, 1960 and in view of section 165(4)(a) and (10) of the M.P. Land Revenue Code, 1959. The objections were overruled by the Courts below. It was held by the trial Court that as the agreement for sale was entered into by the parties on 20.1.1958, the same was much before the 1959 Code and the 1960 Ceilings Act came into force, and the decree has been passed by the Court on 29.4.1963 whereas the Ceilings Act has came into force on 15.11.1963. The lower appellate Court, on the other hand, held that the objections were barred by constructive *res judicata* because no objections were raised at the time of the execution of the sale-deed and it cannot now be raised in the subsequent proceedings.

It is contended by the learned counsel for the

appellant that the procedural rule of *res judicata* cannot take away the positive effects of provisions of law so as to make them nugatory and he relied on *State of Punjab* v. *Amar Singh* (1) "that where a compromise goes against a public policy, prescription of a statute or a mandatory direction to the Court to decide on its own fundamental facts a *razi* cannot operate to defeat the requirement so specified or absolve the court from the duty. The resultant order will be ineffective." On the other hand, the learned counsel for the respondents have contended that an executive Court cannot go behind the decree unless there was inherent lack of jurisdiction in the decree of the trial Court by relying on *V. D. Modi* v. *R. A. Rehman* (2).

The contentions raised by the learned counsel of both the parties are besides the point in issue. Here, the pertinent question is as to whether in view of the coming into force of M. P. Ceilings on Agricultural Holdings Act, 1960, after passing of the decree, the decree has become inexecutable. Their Lordships of the Supreme Court in *Haji Sk. Subhan* v. *Mahdorao* (3) have held as under:

> "The principle that the Executing Court could not question the decree and had to execute it as it stood, had no operation in the facts of the present case. The objection of the appellant was not with respect to the invalidity of the decree or with respect to the decree being wrong. His objection was based on the effect of the provisions of the Act which had deprived the respondent of his proprietary rights, including the rights to recover possession over the land in suit and under whose provisions the respondent had obtained the right to remain in possession of it. In these circumstances, the executing Court could refuse to execute the decree holding that

(1) A.I.R. 1974 S. C. 994. (2) A. I. R. 1970 S. C. 1475.
(3) A. I. R. 1962 S. C. 1230.

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*Jagan*
v.
*Harakchand*

it had become inexecutable on account of the change in law and its effect."

This was a case under the M. P. Abolition of Proprietary Rights Act, 1951, and the effect of vesting of all rights of the proprietor in the State was considered here. So, it is evident that the objection raised by the appellant can be entertained by looking into the subsequent changes in the provisions of law as to whether the suit lands have vested in the State and the respondents are deprived of all their rights therein.

It may be noted here that in the M. P. Ceilings on Agricultural Holdings Act, 1960, there is a prohibition over transfer from the date of publication of the Bill i. e. 14.9.59, by any holder of land holding land in excess of the ceiling limit but there is no such prohibition regarding transfer of land to a holder holding more than the ceiling limit but as per section 7, no holder shall hold more than 25 standard acres. Under section 12 of the Ceiling Act, all surplus land shall vest in the State absolutely free from all encumbrances with effect from the commencement of the agricultural year next following the date on which it is declared surplus, under section 13, with effect from the date of vesting all rights, title and interest of the holder in the surplus land shall cease. Under section 46, jurisdiction of Civil Court are barred to settle, decide or deal with any question to be dealt with by the competent authority under the Act. The Collector *vide* his order, dated 30th January 1965, has held that the respondents held 28.01 acres of land in excess of the ceiling limit. So, there can be no doubt that the lands sold as per decree to the respondents will be further in excess of the ceiling limit and, as

such, these lands also will vest in the State Government. If that be so, the respondents' all rights, title and interest in the suit lands and also right to take possession will be deemed to be extinguished after declaration by the Collector that they are holding lands in surplus. So, the decree for possession could not be executed against the appellant if the order of the Collector has not been varied or reversed in appeal or revision. The prohibition contained in section 165(4)(a) of the M. P. Land Revenue Code, 1959, can have no application here because there is no ceiling limit fixed so far, in the rules framed under the provisions of the Code as has been held in *Gulabchand* v. *Mojiram* (1).

Accordingly, the appeal is allowed, the orders of the Courts below are set aside and the case is remitted to the executing Court for determination of the question as to whether there is final determination by the Collector about the surplus lands held by the decree-holders and if so, then to dismiss the execution case, as all rights of the Decree-holders in the suit lands have then vested in the State. The amount deposited by the Decree-holder in the Court to be refunded to them. Parties to bear their own costs.

*Appeal allowed.*

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(1) 1966 J. L. J. S. N. 4.

## CIVIL REVISION

*Before Mr. Justice Raina*

1974

Dec. 11

MAHABIR KIRANA BHANDAR, ASHOK NAGER and others, Applicants*

*v.*

UNION OF INDIA, Through General Manager, Southern Railway, Madras and others, Non-applicants.

*Evidence Act, Indian (I of 1872)—Section 18—Railway receipt prepared on the representation of the consignor regarding number of packages or weight thereof without verification—Railway receipt cannot be treated as admission on the part of railway administration—Liability cannot be fastened on basis of such railway receipt.*

Where a wagon is placed at the disposal of the consignor for loading and the railway receipt is prepared by the railway servants on the basis of the representations made by the consignor or his agent regarding the number of packages and weight thereof without actual verification, the railway receipt cannot be treated as an admission on the part of the administration as to the number of packages and the weight of the consignment specified therein and the liability for shortage cannot be fastened merely on the basis of the railway receipt.

*N. K. Jain* for the applicants.

*H. D. Gupta* for the non-applicants.

*Cur. adv. vult.*

### ORDER

RAINA J.—This is a revision petition under section 25 of the Small Cause Courts Act.

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*Civil Revision No. 186 of 1970. Application for revision of order of V. S. Pyasi, Small Cause Judge, Guna and Civil Judge Class I, Guna, dated the 18 March 1973.

1974

*Mahabir Kirana Bhandar, Ashoknagar*
v.
*Union of India*

The plaintiffs in this case are the partners of registered firm carrying on grocery business at Ashoknagar. The consignment of Jaggery, which according to the plaintiff-applicants consisted of 766 paris (packages) weighing 93 quintals was booked from Anakapali to Ashoknagar *vide* R.R. No. 690320 (Ex. P.3) dated 8.11.67. The R. R. was sent to the plaintiffs-applicants through the bank and was obtained by them on payment of a sum of Rs. 9847.96 as consideration thereof vide Ex.P.2. When the applicants took delivery of the goods 11 packages of Jaggery weighing 1 quintal and 40 Kgs. were found short. The applicants, therefore, filed a suit against the Union of India represented by the General Managers of the Western, Southern and South Eastern Railways for recovery of sum of Rs. 315/- on account of the loss sustained by them due to shortage in goods, which were booked at railway risk after due notice to them.

The suit was resisted by the non-applicants and was dismissed mainly on the ground that the loss was not proved. Being aggrieved thereby, the applicants have filed this revision petition.

The contention of the railway administration is that as the consignment consisted of one full wagon load; the railway authorities did not either count the packages of Jaggery or actually weighed the goods, but accepted the number of packages and the weight as given by the consignor and on that basis prepared the R.R. (Ex.P.3). So the basic point for consideration in this case is whether it has been satisfactorily established that the consignment consisted of 766 packages weighing 93 quintals, it being not disputed that actually 755 packages weighing 91 quintals and 60 kgs. were recieved at the destination. The position would have been simple, if the

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*Mahabir Kirana Bhandar, Ashoknagar* v. *Union of India*

consignor or someone who loaded the goods had been examined to prove this fact. But this has not been done and the contention of the learned counsel for the plaintiffs-applicants is that an inference to effect should be drawn from the R.R. (Ex.P.3) in which it is stated that 766 packages weighing 93 quintals were booked.

Brijnath Sharma (D.W.1) testified that letters 'S.C.' in Ex.P.3 meant 'said to contain' and the letters 'S.W.A.' meant 'sender's weight Accepted'. He further stated that when the railway employees do not themselves count the packages or get the consignment weighed they make an abbreviated note to that effect in the R.R. The learned counsel for the plaintiffs-applicants did not dispute that the aforesaid abbreviated notes have been made in the R.R. (Ex.P.3) in question. But he submitted that inspite of this, the Court should presume that what was stated therein was correct in the absence of any evidence to the contrary.

In *Dominion of India* v. *Firm Museram Kishnuprasad* (1) a Division Bench of the Nagpur High Court held that where it is not proved that the railway servants had loaded the goods after verifying the number of packages, the wagon having been placed at the service of the consignor, and the number stated was accepted as correct for the purpose of charging freight and the receipt qualified the number by stating that the wagon was said to contain 255 bags, it was no admission on the part of the railway that the wagon contained 255 bags. This decision was relied upon by the Madras High Court in *Union of India* v. *S. P. L. Lekhu Reddiar and another* (2). It was held therein that where the goods were loaded

(1) A. I. R. 1950 Nag. 85. (2) A. I. R. 1956 Mad. 176.

in the wagon by the sender and not by the railway servants and the information given by the sender was accepted as correct for the purpose of charging freight, there was no admission on the part of the railway authorities that the wagon contained the number of bags mentioned in the railway receipt and the railway would not be liable merely because the number of bags in the wagons were found less than the number specified in the railway receipt. I entirely agree with this view.

Where a wagon is placed at the disposal of the consignor for loading and the railway receipt is prepared by the railway servants on the basis of the representations made by the consignor or his agent regarding the number of packages and weight thereof without actual verification, the railway receipt cannot be treated as an admission on the part of the administration as to the number of packages and the weight of the consignment specified therein and the liability for shortage cannot be fastened merely on the basis of the railway receipt. In such a case, it is for the consignor or the consignee, as the case may be, to prove what was the actual number of packages loaded in the wagon and their weight by direct evidence. Thus, it was for the plaintiffs to prove that actually 766 packages of Jaggery weighing 93 quintals were loaded in the wagon. Having failed to do so, their claim was rightly dismissed.

It may also be mentioned here that there is no allegation in the plaint that the seals of the wagon were tampered with and there is nothing to suggest that there was any pilferage during transit. All that has been proved is that the number of packages delivered was less than the number of packages specified in the railway receipt (Ex.P.3). As pointed out above, the claim could not be decreed on the basis of

1974

*Mahabir Kirana Bhandar, Ashoknagar v. Union of India*

the railway receipt in the circumstances of the case.

There is, therefore, no justification for interference in this case and the petition is hereby dismissed. I do not, however, make any order as to costs in the circumstances of this case.

*Application dismissed.*

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## MISCELLANEOUS CIVIL CASE

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*Before Mr. B. Dayal C. J. and Mr. Justice Bhargava.*

1971

July 1

THE COMMISSIONER OF SALES TAX, MADHYA PRADESH, Applicant*

*v.*

BHARAT KALA BHANDAR, KHANDWA, Opposite party.

*General Sales-tax Act, Madhya Pradesh, 1958 (II of 1959)—Schedule 1, Item 6, as amended—Hessian not exempted from sales-tax.*

By amendment hessian cloth has been clearly exempted from entry no. 6 of schedule 1 and consequently is not exempt from sales-tax.

Hessian is not covered by the term "cloth" used in item no. 6 of schedule 1 to the State Act and, therefore, is not exempt from sales-tax.

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*Miscellaneous Civil Case No. 297 of 1969. Reference under Section 44 of General Sales-tax Act, M. P., 1958, by the Board of Revenue, M. P., Gwalior, dated the 22nd October 1969.

*M. V. Tamaskar* Deputy Government Advocate for applicant.

*Y. S. Dharmadhikari* for the opposite party.

*Cur. adv. vult.*

JUDGMENT

The Judgment of the Court was delivered by BISHAMBHAR DAYAL C. J.—The judgment in this Miscellaneous Civil Case will also govern the disposal of Miscellaneous Civil Case No. 298 of 1969 (*The Commissioner of Sales Tax, Madhya Pradesh* v. *Punjab Ginning and Pressing Factory, Khandwa*). Both these are references raising the same point. The question referred is "Whether Hessian is covered by the term 'cloth' used in item no.6 of Schedule I to the State Act and, therefore, exempt from tax?"

This Court had in a Division Bench case *Commissioner of Sales Tax, M. P.* v. *M/s New Bhopal Textiles Ltd., Bhopal* (1) held that the word 'cloth' was wide enough to include Hessian cloth and Hessian cloth would therefore be exempt. The State Government have since passed the M. P. General Sales Tax (Amendment and Validation) Act, 1971. Section 9 of this Act is as follows:-

> "In Schedule I to the Principal Act, in entry 6, for the words 'but excluding silk fabrics and articles made thereof', the words 'but excluding silk fabrics, articles made thereof and hessian cloth' shall be substituted".

This section has been given retrospective effect by the provisions of Section 10 of the Amendment Act which is as follows:-

> "(1) The amendments made by..... .....section 9 in so far as it relates to hessian cloth shall be deemed to

(1) 1970 M. P. L. J. 607.

1971

*The Commissioner of Sales-tax, M. P.*
v.
*Bharat Kala Bhandar, Khandwa*

have part of the Principal Act, from the commencement thereof."

In view of these amended provisions the decision of this Court has become obsolete and the present cases must now be decided in view of the amended law.

By the aforesaid amendment hessian cloth has been clearly exempted from entry no.6 of Schedule I and consequently is not exempt from sales tax. Therefore, our answer to the question referred is that "Hessian is not convered by the term 'cloth' used in item no.6 of Schedule I to the State Act and, therefore, is not exempt from sale tax." Parties will bear their own costs in both these references.

*Reference answered accordingly.*

## MISCELLANEOUS PETITION

*Before Mr. Justice A. P. Sen and Mr. Justice Tankha.*

SHIVKANT SHUKLA, Petitioner* 1975

*v.* Sept. 1

ADDITIONAL DISTRICT MAGISTRATE, JABALPUR, Respondent.

*Maintenance of Internal Security Act (XXVI of 1971), as amended by Maintenance of Internal Security (Amendment) Act, 1975—Sections 3 (1), 16-A, 18 and Constitution of India, Articles 226, 352 (1), 359 (1), 22, 32 and 368-Writ of Habeas Corpus—Proclamation of Emergency by the President of India—Suspension of enforcement of rights conferred by Articles 14, 21 and 22 of the Constitution—Jurisdiction of Courts to issue writ of Habeas Corpus against an order of illegal detention is not barred—Scope of enquiry—Power to issue writ of Habeas Corpus is neither a statutory right nor based upon common law or Natural Law—Constitutional remedies cannot be barred by any legislation—Constitution does not empower President to suspend powers to issue writ of Habeas Corpus.*

The terms of Article 359 (1) of the Constitution are sufficiently explicit to make it difficult as a matter of implication to construe the Constitution as empowering the President to suspend the powers of the High Court to issue a writ of *Habeas Corpus* under Article 226 of the Constitution, in case of illegal detention; and, the matter is squarely covered by the decision of their Lordships in *Makhan Singh's case (1)*, in so far as the petitioners seek to challenge their detention on grounds other than those specified in the Presidential Order.

Article 359 (1) of the Constitution in plain terms empowers the President, where a Proclamation of Emergency made under Article 352 (1) is in operation, to suspend by a Presidential Order issued thereunder the Citizen's right to move any Court for the enforcement of such rights in part III of the Constitution as may be mentioned in the Order for the period during which the Proclamation of Emergency is in force or for such shorter period as may be specified. It does not provide for suspension of his right

*Miscellaneous Petition No. 597 of 1975.

(1) A. I. R. 1964 S. C.381.

1975

*Shivkant Shukla* v. *The Additional District Magistrate, Jabalpur*

to move the Court for the enforcement of other rights under the Constitution e. g. the right to move the High Court under Article 226 of the Constitution for a writ of *Habeas Corpus*.

The drastic changes brought about in the Maintenance of Internal Security Act, 1971, as amended by the Maintenance of Internal Security (Amendment) Act, 1975, however, creates a vital difference. During the period specified in sub-section (1) of Section 16 of the Act, the Constitutional safeguards guaranteed to the citizens by clauses (4) to (7) of Article 22 of the Constitution and the procedural requirement of sections 8 to 12 of the Act which essentially represent the fundamental rights guaranteed by Articles 21 and 22 have been removed in certain circumstances. It is debatable whether a law made by the Parliament providing for 'Preventive Detention', e. g., detention without trial, under Entry 9 of List 1 of the Seventh Schedule, without the Constitutional safeguards under Article 22 (4) to (7) is within its legislative competence; but the validity of the Maintenance of Internal Security Act, 1971, as amended by the Maintenance of Internal Security (Amendment) Act, 1975, cannot be challenged in view of the Constitution (Thirty-ninth Amendment) Act, 1975.

Section 18 is only designed to effect a curtailment of the right of a person, to personal liberty when detained under the Act. That is the whole object and purpose of the legislation.

The result of the changes brought about, is that when making the order of detention under section 3, sub-section (1), the Central Government or the State Government, as the case may be, the officer concerned makes a declaration in terms of sub-section (2) or (3) of section 16-A of the Act, there is no longer any necessity to furnish the detenu with the grounds of detention by reason of sub-sections (6) and (7) thereof. Nor does in such a case the provisions of sections 8 to 12 are attracted. Once the two conditions are fulfilled, the new section 18 applies in all its rigour, and the person detained has no right to personal liberty by virtue of natural law or common law, if any.

In case of deprivation of personal liberty, it would still be open to the citizen, despite the Presidential Order, to take the following four grounds of challenge, viz.-

(i) That, the order is *ultra vires*, e. g., that, it appears, on the face of the order, that it has been issued by an authority not empowered to pass it, or in excess of the power delegated to him, or that the power has been exercised inconsistently with the conditions prescribed in that behalf, or, that the order is not in strict compliance with the Act;

(ii) That, the order is *mala fide*, e. g., by showing–

(a) that the authority who passed the order did not apply his mind to the relevant considerations, e. g., whether the order mentions all the grounds specified in the Act and in the affidavit of the authority only some of them are relied on, or mentions "law and order" instead of "public order" as the ground;

(b) that the authority was actuated by improper motives;

(iii) That the grounds mentioned in the order are relevant, or, that there is no proximate connection between the grounds and the object which the legislature had in view;

(iv) That the Act or the Rules suffer from the vice of excessive delegation.

Of these grounds, nos. (iii) and (iv) are no longer available, in view of the changed circumstances.

The scope of enquiry in such a case is, therefore, now limited to two questions, namely:–

(i) Whether there is a valid order of detention made under section 3(1) of the Act; and

(ii) Whether the detaining Authority has made a 'declaration' in terms of section 16-A (2) or (3) of the Act, declaring that 'the detention of such person is necessary for effectively dealing with the emergency.'

*Habeas Corpus*, as an instrument to protect against illegal imprisonment, is written into the Constitution. Its use by the Courts cannot, in our judgment, be Constitutionally abridged by the executive or by the Parliament except in the manner provided by Article 368 of the Constitution.

By Acts of the legislature lawfully passed in 1875 and subsequent years, the legislature has taken away the powers to issue the prerogative writ of *Habeas Corpus* in matters contemplated by section 491 of the Code of Criminal Procedure, 1898. Thereafter, the power to issue a writ of *Habeas Corpus* was not based on the common law but now flows from the Constitution itself.

Under the Constitution, the Constitutional remedies given by Article 32 or 226 cannot be barred by any legislation, short of amendment of the Constitution itself. The new Criminal Procedure Code, 1973, has deleted the old section 491, presumably because it was felt that there was no longer any justification for keeping it on the statute book. That being so, the power to issue a writ of *Habeas Corpus* is not a statutory right. Nor is it based upon

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the common law or any natural law. It is a Constitutional remedy, which cannot be abrogated by the Presidential Order. It is a right enshrined in the Constitution.

*Makhansingh* v. *State of Punjab* (1) and *Subhashchandra* v. *District Magistrate, Jabalpur* (2); followed.

*C. P. Mathen and others* v. *District Magistrate, Trivandrum and another* (3); *Emperor* v. *Sibnath Banerji and others* (4); *Girindra Nath Banerjee* v. *Birendra Nath Pal* (5) and *Vimilabai Deshpande* v. *Crown* (6); referred to.

*Shivkant Shukla*, the detenu-petitioner appeared in person.

*M. V. Tamaskar* Government Advocate for the respondent.

*Rajendra Singh* appeared as *amicus curiae*.

*Cur. adv. vult.*

ORDER

The Order of the Court was delivered by A. P. SEN J.—This order shall also govern the disposal of Miscellaneous Petitions Nos. 626, 669, 671, 672, 693, 694, 700, 702, 703, 704, 735, 736 and 722, all of 1975.

These petitions have been heard on a preliminary point relating to jurisdiction. It would be convenient to deal with it by this common order.

These fifteen petitions are filed by the petitioners under Article 226 of the Constitution for the issue of a writ of *habeas corpus*, by which the petitioners challenge the validity of their detention by the orders of the Addl. District Magistrate, Jabalpur, and of the District Magistrate, Raigarh, Khandwa, Rajnandgaon and Panna, under section 3(1)(a)(ii) of the Maintenance of Internal Security Act, 1971, on their being "satisfied" that the detention of the petitioners was necessary with a view "to preventing the

(1) A. I. R. 1964 S. C. 381.
(2) 1975 M. P. L. J. 132.
(3) A. I. R. 1939 S. C. 213.
(4) A. I. R. 1945 P. C. 156.
(5) I. L. R. 54 Cal. 727.
(6)) I. L. R. 1945 Nag. 6.

petitioners from acting in any manner prejudicial to the maintenance of public order."

In response to the rules which were issued, the learned Government Advocate appeared and raised a preliminary objection as to jurisdiction, namely, that in view of the Proclamation of Emergency by the President of India dated 25th June 1975 under Article 352 (1) of the Constitution, the Presidential Order dated 27th June 1975 issued by him under Article 359 (1) of the Constitution and the provisions of the Maintenance of Internal Security Act, 1971 as amended by the Maintenance of Internal Security (Amendment) Ordinance, 1975 (No. 4 of 1975) and the Maintenance of Internal Security (Second Amendment) Ordinance, 1975 (No. 7 of 1975), this Court has no jurisdiction to entertain these petitions.

The Proclamation of Emergency on 25th June 1975 reads:

"MINISTRY OF HOME AFFAIRS
NOTIFICATION

New Delhi, the 26th June 1975

G. S. R. 353(E).—The following Proclamation of Emergency by the President of India, dated the 25th June, 1975, is published for general information:-

'PROCLAMATION OF EMERGENCY'

In exercise of the powers conferred by clause (1) of Article 352 of the Constitution, I, Fakhruddin Ali Ahmad, President of India, by this Proclamation declare that a grave emergency exists whereby the security of India is threatened by internal disturbance.

NEW DELHI;
The 25th June, 1975.

F. A. AHMAD,
President."

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The Presidential Order issued on 27th June 1975 is as follows:-

> "G. S. R. 361 (E).—In exercise of the powers conferred by clause (1) of article 359 of the Constitution, the President hereby declares that the right of any person (including a foreigner) to move any court for the enforcement of the rights conferred by article 14, article 21 and article 22 of the Constitution and all proceedings pending in any court for the enforcement of the above mentioned rights shall remain suspended for the period during which the Proclamations of Emergency made under clause (1) of article 352 of the Constitution on the 3rd December, 1971 and on the 25th June 1975 are both in force.
>
> This order shall extend to the whole of the territory of India except the State of Jammu and Kashmir.
>
> This Order shall be in addition to and not in derogation of any Order made before the date of this Order under clause (1) of article 359 of the Constitution."

On 29th June 1975, the President promulgated the Maintenance of Internal Security (Amended) Ordinance, 1975 (No. 4 of 1975). The Ordinance provides, *inter alia*, by section 2 that during the period of its operation, the Maintenance of Internal Security Act, 1971 shall have effect subject to the amendments specified in sections 3, 4 and 5. By section 5, a new section 16A was inserted, making special provisions for dealing with emergency. On 15th July, 1975, the President promulgated another Ordinance, namely, the Maintenance of Internal Security (Second Amendment) Ordinance, 1975 (No. 7 of 1975). Amongst other things, the said Ordinance by section 5, substituted new sub-sections for sub-sections (6) and (7) of section 16A.

The two Ordinances Nos. 4 and 7 of 1975 have now been replaced by the Maintenance of Internal

Security (Amendment) Act, 1975. The Act provides, *inter alia*, by sub-section (2) of section 1, that section 7 would be deemed to have come into force on 25th June 1975 and the remaining provisions on 29th June 1975. By section 6, a new section 16-A has been inserted which reads-:

"16-A. (1) Notwithstanding anything contained in this Act or any rules of natural justice, the provision of this section shall have effect during the period of operation of the Proclamation of Emergency issued under clause (1) of article 352 of the Constitution on the 3rd day of December, 1971 or the Proclamation of Emergency issued under that clause on the 25th day of June 1975, or a period of twelve months from the 25th day of June, 1975, whichever period is the shortest.

(2) The case of every person (including a foreigner) against whom an order of detention was made under this Act on or after the 25th day of June, 1975, but before the commencement of this section, shall, unless such person is sooner released from detention, be reviewed within fifteen days from such commencement by the appropriate Government for the purpose of determining whether the detention of such person under this Act is necessary for dealing effectively with the emergency in respect of which the Proclamations referred to in sub-section (1) have been issued (hereafter in this section referred to as the emergency) and if, on such review, the appropriate Government is satisfied that it is necessary to detain such person for effectively dealing with the emergency, that Government may make a declaration to that effect and communicate a copy of the declaration to the person concerned.

(3) When making an order of detention under this Act against any person (including a foreigner) after the commencement of this section, the Central Government or the State Government or, as the case may be the officer making the order of detention sall consider whether the detention of such person under this Act is necessary for dealing effectively with the emergency and

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if, on such consideration, the Central Government or the State Government or, as the case may be, the officer is satisfied that it is necessary to detain such person for effectively dealing with the emergency, that Government or officer may make a declaration to that effect and communicate a copy of the declaration to the person concerned:

Provided that where such declaration is made by an officer, it shall be reviewed by the State Government to which such officer is subordinate within fifteen days from the date of making of the declaration and such declaration shall cease to have effect unless it is confirmed by the State Government, after such review, within the said period of fifteen days.

(4) The question whether detention of any person in respect of whom a declaration has been made under sub-section (2) or sub-section (3) continues to be necessary for effectively dealing with the emergency shall be reconsidered by the appropriate Government within four months from the date of such declaration and thereafter at intervals not exceeding four months and if, on such reconsideration, it appears to the appropriate Government that the detention of the person is no longer necessary for effectively dealing with the emergency, that Government may revoke the declaration.

(5) In making any review, consideration or reconsideration under sub-sections (2), (3) or (4), the appropriate Government or officer may, if such Government or officer considers it to be against public interest to do otherwise, act on the basis of the information and materials in its or his possession without disclosing the facts or giving an opportunity of making a representation to the person concerned.

(6) In the case of every person detained under a detention order to which the provisions of sub-section (2) apply, being a person the review of whose case is pending under that sub-section or in respect of whom a declaration has been made under that sub-section,-

(i) sections 8 to 12 shall not apply; and

(ii) section 13 shall apply subject to the modification that the words and figures "which has been confirmed under section 12" shall be omitted.

(7) In the case of every person detained under a detention order to which the provisions of sub-section (3) apply, being a person in respect of whom a declaration has been made under that sub-section,—

(i) section 3 shall apply subject to the modification that for sub-sections (3) and (4) thereof, the following sub-section shall be substituted namely:-

"(3) When any order of detention is made by a State Government or by an officer subordinate to it, the State Government shall, within twenty days, forward to the Central Government a report in respect of the order."

(ii) sections 8 to 12 shall not apply; and

(iii) section 13 shall apply subject to the modification that the words and figures "which has been confirmed under section 12" shall be omitted,'."

By section 7, a new section 18 has been inserted to the effect:-

" 18. No person (including a foreigner) detained under this Act shall have any right to personal liberty by virtue of natural law or common law, if any."

The question of jurisdiction was argued on demurrer when the petitions came up for hearing. The learned Government Advocate appearing on behalf of the respondents questioned the jurisdiction of the High Court on two main grounds, submitting first, that in view of the Proclamation of Emergency by the President of India dated 25th June 1975 under Article 352(1) of the Constitution and the Presidential Order dated 27th June 1975 under Article 359(1) of the Constitution founded upon it,

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and the fact that the Act has been substantially amended to bring it into accord with the needs of the situation, the Court had no jurisdiction to enter upon an enquiry whether or not the detention of the petitioners under section 3(1)(a)(ii) of the Maintenance of Internal Security Act, 1971 was lawful, i.e., the right of approach to the Court for redress in case of preventive detention under section 3, sub-section (1) during the period specified in the Presidential Order, i.e., for the period during which the Proclamations of Emergency made under clause (1) of Article 352 of the Constitution on the 3rd December, 1971 and on the 25th June, 1975 are both in force is excluded in its entirety; and secondly, that even if there was any such right, the jurisdiction of the Court to issue a writ of *habeas corpus* is completely barred, by reason of the new section 18 of the Act.

The first of the submissions went to the length of saying that in view of the changes brought about the matter is no longer governed by the principles enunciated by the Supreme Court in *Makhan Singh* v. *The State of Punjab* (1). The learned Government Advocate accordingly, urges that the decision of this Court in *Subhashchandra* v. *District Magistrate, Jabalpur* (2) will not apply.

It was said that the President had before him the views expressed by the different High Courts based upon the decision of their Lordships in *Makhan Singh's case* (*supra*), and it was felt that there was need for dealing effectively with the emergency which was not only grave but was such as to threaten the security or economic life of the country by internal disturbance or by its imminent danger to place the subjective satisfaction of the detaining

(1) A.I.R. 1964 S. C. 381. (2) 1975 M.P.L.J. 132.

authority making an order of detention under Section 3, sub-section (1) of the Maintenance of Internal Security Act, 1971 beyond the scope of judicial scrutiny.

Making this assumption, the learned Government Advocate has no doubt that the effect of the Presidential Order dated 27th June 1975, was to suspend the citizens' right to move any Court for enforcing their fundamental rights under Articles 21 and 22 of the Constitution and this, according to him, effectively prevents the detenus from contending that their detention was illegal and void. According to the learned Government Advocate, in determining the question as to whether a particular proceeding falls within the mischief of the Presidential Order or not, what has to be examined is not so much the form which the proceeding has taken, or the words in which the relief is claimed, as the substance of the matter and consider whether before granting the relief claimed by the citizen, it would be necessary for the Court to enquire into the question whether any of his specified fundamental rights have been contravened. It is said that, in case of preventive detention whenever the detenu challenges the validity of the order of detention on whatever grounds, he is, in effect, seeking to enforce nothing but his fundamental right of personal liberty guaranteed under Article 21.

Reliance is placed on the following observations in the majority view of their Lordships in *Makhan Singh's case (supra)*, at p. 402:-

> "This argument seems to assume that if the Parliament had expected the executive to detain citizens under the Preventive Detention Act of 1950 without giving them the benefit of the Constitutional safeguards prescribed by Art. 22, their cases could have been covered if a

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Presidential Order had been issued under Art. 359 (1) in respect of such detentions.

The question is: is this assumption well founded ? Assuming that the Presidential Order had suspended the citizens' right to move any court for enforcing their fundamental rights under Articles 14, 21 and 22 and had made the said Order applicable to persons detained under the Preventive Detention Act of 1950, could that Order have effectively prevented the detenus from contending that their detention was illegal and void.

In such a case, if the detenu was detained under the Preventive Detention Act of 1950 and he challenged the validity of his detention on the ground that the relevant provisions of the said Act had not been complied with, would his challenge be covered by Art. 359 (1) and the Presidential Order issued under it ? In other words, can it be said that in making the said challenge he was enforcing his fundamental rights specified in the Presidentail Order ? If it is held that he was challenging the validity of his detention because the mandatory provisions of the Act had not been complied with, his challenge may be outside Art. 359 (1) and the Presidential Order. If, on the other hand, it is held that, in substance, the challenge is to enforce his aforesaid fundamental rights, though he makes the challenge by reference to the relevant statutory provisions of the Act themselves, that would have brought his challenge within the prohibition of the Presidential Order.

Normally, as we have already held, a challenge against the validity of the detention on the ground that the statutory provisions of the Act under which the detention is ordered have not been complied with, would fall outside Art. 359(1) and the Presidential Order, but the complication in the hypothetical case under discussion arises because unlike other provisions of the Act, the mandatory provisions in question essentially represent the fundamental rights guaranteed by Art. 22 and it is open to argument that the challenge in question substantially seeks to enforce the said fundamental rigths.

> In the context of the alternative argument with which we are dealing at this stage, it is unnecessary for us to decide whether the challenge in question would have attracted the provisions of Art. 359 (1) and the Order or not."

It is accordingly urged that preventive detention under the Maintenance of Internal Security Act, 1971, as amended by the Maintenance of Internal Security (Amendment) Act, 1975, stands on a different footing.

The first submission can easily be met, in two ways: (i) the terms of Article 359 (1) of the Constitution are sufficiently explicit to make it difficult as a matter of implication to construe the Constitution as empowering the President to suspend the powers of the High Court to issue a writ of *habeas corpus* under Article 226 of the Constitution, in case of illegal detention; and (ii) the matter is squarely covered by the decision of their Lordships in *Makhan Singh's case* (*supra*), and, therefore, the decision of this Court in *Subhaschandra Jain* v. *District Magistrate, Jabalpur* (*supra*), applies in so far as the petitioners seek to challenge their detention on grounds other than those specified in the Presidential Order. It will be convenient to consider these points in the order stated.

By Article 359 (1) of the Constitution, it is enacted that:-

> "359 (1).-Where a Proclamation of Emergency is in operation, the President may by order declare that the right to move any Court for the enforcement of such of the rights conferred by Part III as may be mentioned in the order and all proceedings pending in any Court for the enforcement of the rights so mentioned shall remain suspended for the period during which the Proclamation

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is in force or for such shorter period as may be specified in the order."

The provision in plain terms empowers the President, where a Proclamation of Emergency made under Article 352(1) is in operation, to suspend by a Presidential Order issued thereunder the citizens' right to move any Court for the enforcement of such of the rights in Part III of the Constitution as may be mentioned in the order for the period during which the Proclamation of Emergency is in force or for such shorter period as may be specified. It does not provide for suspension of his right to move the Court for the enforcement of other rights under the Constitution, e.g., the right to move the High Court under Article 226 of the Constitution for a writ of *habeas corpus*.

The submissions of the learned Government Advocate were substantially the same as in *Subhashchandra's case* (*supra*), but he contends that in the changed circumstances this Court is deprived of its power to entertain a petition under Article 226 of the Constitution for a writ of *habeas corpus*, even in cases where the challenge by the detenu to the validity of his detention is outside the Presidential Order under Article 359 (1). The contention must, in our view, fail, although the present situation is undoubtedly different.

The only difference is that while the earlier two Proclamations of Emergency under Article 352(1) dated 26th October 1962 and 3rd December 1971, related to a declaration of a state of grave emergency whereby the security of the country was threatened due to "occurrence of war and external aggression," the present Proclamation of Emergency dated 25th June 1975 relates to a declaration of a state of grave

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emergency whereby its security is threatended by "internal disturbance".

The earlier two Presidential orders issued under Article 359(1) i.e., one dated 3rd November 1962, with which their Lordships of the Supreme Court were concerned in *Makhan Singh's case* (*supra*), and the other dated 16th November 1974, which came up for consideration before this Court in *Subhashchandra's case* (*supra*), were more or less similar to the present Presidential Order dated 27th June 1975, except that it also refers to aliens.

The drastic changes brought about in the Maintenance of Internal Security Act, 1971, as amended by the Maintenance of Internal Security (Amendment) Act, 1975, however, create a vital difference. During the period specified in sub-section (1) of section 16 of the Act, the Constitutional safeguards guaranteed to the citizen by clauses (4) to (7) of Article 22 of the Constitution and the procedural requirements of sections 8 to 12 of the Act which essentially represent the fundamental rights guaranteed by Article 22, have been removed in certain circumstances. It is debateable whether a law made by the Parliament providing for "preventive detention", e.g., detention without trial, under Entry 9 of List I of the Seventh Schedule, without the Constitutional safeguards under Article 22(4) to (7) is within its legislative competence, but the validity of the Maintenance of Internal Security Act, 1971, as amended by the Maintenance of Internal Security (Amendment) Act, 1975 cannot be challenged in view of the Constitution (Thirtyninth Amendment) Act, 1975.

The result of the changes brought about is that when making an order of detention under section 3,

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sub-section (1), the Central Government or the State Government, or as the case may be, the officer concerned makes a declaration in terms of sub-sections (2) or (3) of section 16A of the Act, there is no longer any necessity to furnish the detenu with the grounds of detention, by reason of sub-sections (6) and (7) thereof. Nor does in such a case the provisions of sections 8 to 12 of the Act are attracted. Once the two conditions are fulfilled, the new section 18 applies in all its rigour, and the person detained has no right to personal liberty by virtue of natural law or common law, if any.

We find no logic or reason to differ from the view taken by this Court in *Subhashchandra Jain* v. *District Magistrate, Jabalpur (supra)*, explaining the scope and effect of their Lordships' decision in *Makhan Singh's case* (*supra*). This is what was observed:-

> "Their Lordships assumed that despite the issue of the Presidential Order under Article 359(1), the fundamental rights guaranteed under Articles 21 and 22 were not suspended, but held that what was suspended was the enforcement of the said rights during the prescribed period. In dealing with the question, their Lordships observed:
>
> 'In other words, Article 359(1) and the Presidential Order issued under it may constitute a sort of moratorium or a blanket ban against the institution or continuance of any legal action subject to two important conditions. The first condition relates to the character of the legal action and requires that the said action must seek to obtain a relief on the ground that the claimant's fundamental rights specified in the Presidential Order have been contravened and the second condition relates to the period during which this ban is to operate. The ban operates either for the period of

the Proclamation or for such shorter period as may be specified in the Order.'

... ... ...

"Their Lordships then went on to consider what pleas were still open to the citizens to take in challenging the legality or propriety of their detention, and stated:

'(i) If in challenging the validity of his detention order, the detenue is pleading any rights outside the rights specified in the Order, his right to move any Court in that behalf is not suspended, because it is outside Article 359(1) and consequently outside the Presidential Order itself.

(ii) Where the detenu moves the Court for a writ of *habeas corpus* on the ground that his detention has been ordered *mala fide*.

(iii) If a detenu contends that the operative provision of the law under which he is detained suffers from the vice of excessive delegation and is, therefore, invalid'."

This Court then indicated that in case of deprivation of personal liberty by preventive detention of citizens, it would still be open to the citizen, despite the Presidential Order, to take the following four grounds of challenge, namely, :-

"(i) That, the order is *ultra vires*, e. g., that, it appears, on the face of the order, that it has been issued by an authority not empowered to pass it, or in excess of the power delegated to him, or that the power has been exercised inconsistently with the conditions prescribed in that behalf, or, that the order is not in strict compliance with the Act;

(ii) That, the order is *mala fide*, e. g., by showing—

(a) that the authority who issued the order did not

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apply his mind to the relevant considerations, e. g., whether the order mentions all the grounds specified in the Act and in the affidavit of the authority only some of them are relied on, or mentions "law and order" instead of "public order" as the ground,

(b) that the authority was actuated by improper motives;

(iii) That the grounds mentioned in the order are irrelevant, or, that there is no proximate connection between the grounds and the object which the legislature had in view;

(iv) That the Act or the Rules suffer from the vice of excessive delegation."

Of these grounds, nos. (iii) and (iv) are longer available, in view of the changed circumstances.

The scope of enquiry in such a case is, therefore, now limited to two questions, namely:-

(i) Whether there is a valid order of detention made under section 3(1) of the Act; and

(ii) whether the detaining authority has made a declaration in terms of section 16A(2) or (3) of the Act, declaring that the detention of such person is necessary for effectively dealing with the emergency.

To this extent, we think, the matter would still be governed by their Lordships' decision in *Makhan Singh's case (supra)*.

The learned Government Advocate's second submission, being alternative to his first, must now be examined. With the provisions of the Maintenance of Internal Security Act, 1971, as amended by the Maintenance of Internal Security (Amendment) Act,

1975 valid and section 16A effectual, was section 18 meant to create a bar to the jurisdiction of the High Courts under Article 226 of the Constitution to issue a writ of *habeas corpus* ? That section 18 of the Act does not seek to amend the Constitution may be accepted and the question, therefore, turns only on the construction of the section. The section is only designed to effect a curtailment of the right of a person, to personal liberty when detained under the Act. That is the whole object and purpose of the legislation. The words used in section 18 of the Act could scarcely be more comprehensive. In our view, they reflect the fact that a grave emergency can assume many forms and may take demands upon the Government which could only be met if the widest powers were available.

*Habeas corpus*, as an instrument to protect against illegal imprisonment, is written into the Constitution. Its use by the Courts cannot, in our judgment, be constitutionally abridged by the executive or by the Parliament except in the manner provided by Article 368 of the Constitution.

The history of this matter has been set out in many books of reference, (see, Basu on Constitution, 4th Edn., Vol. 3, pp. 405–407 and pp. 437–438), and it is no part of our intent to burden this judgment with any historical disquisition. By Acts of the Legislature lawfully passed in 1875 and subsequent years, the Legislature has taken away the power to issue the prerogative writ of *habeas corpus* in matters contemplated by section 491 of the Code of Criminal Procedure, 1898. Thereafter, the power to issue a writ of *habeas corpus* was not based on the common law.

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In *C. P. Mathen and others* v. *District Magistrate, Trivandrum and another* (1), their Lordships of the Privy Council quoted with approval the views of Rankin, C. J., in *Girindra Nath Banerjee and another* v. *Birendra Nath Pal* (2), and held that, in cases covered by section 491, the power to issue a common law writ of *habeas corpus* in British India had been taken away by Legislation, and the powers conferred by section 491 of the Code of Criminal Procedure, 1898 substituted therefor.

Lord Thankerton, speaking for their Lordships, observed:-

> "It will be convenient to dispose next of the fourth contention of the appellants. On this point their Lordships agree with the conclusions of the Full Bench in the present case which are stated in the judgment delivered by the learned Chief Justice as follows :
>
> The High Courts Act of 1861 authorised the Legislature if it thought fit to take away the powers which this Court obtained as the successor of the Supreme Court, and Acts of the Legislature lawfully passed in 1875 and subsequent years leave no doubt in my mind that the Legislature has taken away the power to issue the prerogative writ of *habeas corpus* in matters contemplated by Sec. 491, Criminal P. C. of 1898.
>
> Indeed counsel for the appellants stated that he found difficulty in pressing this contention, and the reasoning of the learned Chief Justice, on which he based the above conclusion, is so clear and convincing, including his narration of the Legislative Acts referred to in his conclusion, that their Lordships are content to adopt it, as also to state that, like the learned Chief Justice, they are in the entire agreement with the judgment of Rankin C. J. in *Girindra Nath Banerjee* v. *Birendra Nath Pal* (2)."

The view was reiterated by their Lordships of the

(1) A. I. R. 1939 P. C. 213. (2) I. L. R. 54 Cal. 727.

Privy Council in *Emperor* v. *Sibnath Banerji and others* (1) and the history traced by Rankin, C. J. quoted with approval. In this connection, we may also refer to the celebrated judgment of Vivian Bose and J. Sen, JJ., in *Vimlabai Deshpande* v. *Crown* (2).

In India, prior to the Constitution, the right to *habeas corpus*, so far as it rested upon the statutory provision in section 491 of the Code of Criminal Procedure, 1898 could be barred or controlled by Legislation. Thus, sub-section (3) of section 491 of the Code itself specified certain enactments with respect to which no relief under section 491 was available, e. g., Reg. III 1818; State Prisoners Acts. The remedy was also barred by separate enactments, e. g., the Bengal Criminal Law (Amendment) Act, 1925.

To sum up : Under the Constitution, the constitutional remedies given by Article 32 or 226 cannot be barred by any legislation, short of amendment of the Constitution itself. The new Criminal Procedure Code, 1973, has deleted the old section 491, presumably because it was felt that there was no longer any justification for keeping it on the statute book. That being so, the power to issue a writ of *habeas corpus* is not a statutory right. Nor is it based upon the common law or any natural law.

The decisions in *Ramchandra* v. *The State of M. P. and others* (3) and *Dayaram* v. *The State of M. P. and others* (4) of the Indore Bench, relied upon by the respondents, are of no avail. The decision in *Ramchandra* v. *The State of M. P. and others (supra)*, was *per incuriam*, while that in *Dayaram* v.

(1) A. I. R. 1954 P. C. 156. (2) I. L. R. (1945) Nag. 6.
(3) M. P. No. 106 of 1975, decided of the 30th July 1975.
(4) M. P. No. 148 of 1975, decided on the 21st July 1975.

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*The State of M. P. and others (supra)*, does not touch the point of jurisdiction.

The preliminary objection, therefore, partly fails and is rejected.

The respondents are however, granted a certificate of fitness under Article 132 of the Constitution, as the case involves a substantial question of law as to the interpretation of the Constitution.

*Preliminary objection partly rejected.*

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## MISCELLANEOUS PETITION

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*Before Mr. Justice A. P. Sen and Mr. Justice Tankha.*

1975

Aug. 18

SHRI NIRMAL CHAND JAIN, Petitioner*

*v.*

STATE OF M. P., Respondent.

*Detention Order, Madhya Pradesh, 1971—Rule 4(3)—Detenus of Class I not equated with Class 'B'—So also Detenus of Class II with those in class 'C' or ordinary class—Detention Order, Madhya Pradesh, 1971—Is self contained Code regulating place and conditions of detention of persons not governed by Prisons Act, 1894—Detention Order, Madhya Pradesh, 1961—Rule 4(3)—Word "ordinarily" in—Means without execption generally—Detenus in Class I—Entitled to same facilities and amenities of prisoners in Class B or superior class—"Superior class"—Means Class A—Confers discretion on authority—Discretion to be used in favour of detenu—Rule 27—Confers wide discretion on Government to relax conditions or issue special orders regarding condition of detention—Jail Manual Rules—Rule 431(2)—Permits detenu to have his own mosquitoe-net and his own bed-Stead and mattress—*

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*Miscellaneous Petition No. 681 of 1975

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*Shri Nirmal Ghand Jain*
v.
*State*

*Facility reggrding mosquitoe-net—Is subject to condition of sanction by Medical Officer.*

Sub-rule (3) of Rule 4 of M. P. Detention Order, 1971 does not equate Class II with Class B and Class II with Class C or ordinary class.

M. P. Detention Order, 1971 constitutes self-contained code regulating place conditions of detention of detenu who are not governed by Prisons Act, 1894.

The word "ordinarily" in sub-rule (3) of Rule 4 of the M. P. Detention Order, 1971 means without exception generally.

*Kailash Chandra* v. *The Union of India* (1); referred to.

Superior class cannot mean anything than Class A.

Sub-rule (3) of Rule 4 of the Order confers discretion, but discretion must be used in favour of detenu.

Under Rule 27 of the Order, the State Government has the power to relax any of the conditions or issue special orders in that behalf.

Under Rule 431(2) Class A prisoner is entitled to have his bed-stead or mattress and mosquitoe-net subject to the condition that it is considered necessary by Medical Officer.

The detenu in person.

*M. V. Tamaskar* Government Advocate for the State.

*Cur. adv. vult.*

## ORDER

The Order of the Court was delivered by A. P. SEN, J.—By this petition under Article 226 of the Constitution, the petitioner Shri Nirmal Chand Jain, who has been detained by an order of the District Magistrate, Jabalpur, dated 26.6.1975 under section 3 (1)(a)(ii) of the Maintenance of

(1) A.I.R. 1961 S.C. 1346.

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Internal Security Act, 1971, makes a grievance that though he was classified as a Class I detenu, he was being deprived of the facilities to which he was entitled, i.e., the facilities and amenities provided to prisoner placed in Class 'A' under the Jail Manual and, accordingly, seeks appropriate writ or direction against the District Magistrate and the Superintendent, Central Jail, Jabalpur.

The allegations made by the petitioner, briefly, are that he along with several doctors, advocates and other prominent citizens of Jabalpur were being detained at the Central Jail, Jabalpur. His allegation is that these detenus though classified as Class 'A' prisoners, were being denied reasonable living comforts, and were being kept in a barrack in deplorable condition inasmuch as (i) the place was unhygenic, insanitary and unsafe, being infested with mosquitoes and snakes, and (ii) the authorities do not provide them with beds or mosquitoe-nets. He states that it is extremely hot inside and it is impossible to sleep or have relaxation, and even if the authorities permitted it, sleeping outside would involve risk to life. Though the detenus, the petitioner alleges, made several representations in the matter, their grievances have not been redressed.

These allegations of his have been refuted by the respondents on a counter-affidavit of the Superintendent, Central Jail, Jabalpur. In their return, the respondents state that the barrack in which the detenus are kept is absolutely sanitary and hygenic, spacious, well-ventilated and airy, and is cleaned every day. It is also said that gamaxine is spread twice a week, and the authorities have purchased liquid Novan for spraying, in the barrack in order that mosquitoes and flies are considerable eliminated. They go on to say that:-

"It is denied that there is any threat of snakes entering the barracks. It may be that due to rainy season, a snake might have been spotted in open i.e. the compound. The life in barracks is quite safe and the same barracks are two feet above the ground. The barracks are well-lighted throughout the night."

The respondents further assert that detenus who are classified as Class I by the District Magistrate are awarded Class 'B'. Nevertheless, 16 out of 240 detenus have been classified as Class 'A' prisoners by the District Magistrate and given all the facilities provided under the Rules.

Before the petition came up for hearing, the detenu under the orders of the State Government under section 5(b) of the Act was transferred to the District Jail, Tikamgarh. It appears that the facilities available there are no better and, therefore, the grievances of the detenu still remain the same. Ordinarily, we would have directed him to implead the District Magistrate, Tikamgarh and the Superintendent, District Jail, Tikamgarh. This being a petition by a person under detention, they are impleaded as respondents nos. 3 and 4 so that the petition does not become infructuous.

We have heard the detenu, Shri Nirmal Chand Jain, in person. It is accepted before us that he is being treated as a Class 'A' prisoner. The detenu contends that under sub-rule (3) of rule 4 of the Madhya Pradesh Detention Order, 1971, the authorities were in duty bound to afford him certain reasonable facilities and amenities to which Class 'A' prisoners were entitled under Jail Manual which are being denied to him. He raised before us his grievance on four counts (i) the diet was inadequate, (ii) he is not provided with an electric fan which is making

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his life miserable in this hot and sultry weather, (iii) he is not given a mosquitoe-net and the place is infested with mosquitoes, endangering his life, and (iv) there is no provision for games. He lays emphasis on the word "ordinarily" in sub-rule (3) of rule 4 of the said Order, and contends that the word, in the context, must mean "as far as may be". In other words, his contention is that the authorities are bound to keep the detenus in reasonable comfort.

In reply, the learned Government Advocate contends that sub-rule (3) of rule 4 of the said Order equates all detenus of Class I with prisoners placed in Class 'B' and detenus of Class II with prisoners placed in Class 'C' or ordinary class. That, we are afraid, is not a proper construction of sub-rule (3), as it overlooks "the superior class" envisaged therein.

Section 5(a) of the Act confers power on the State Government to regulate the place and conditions of detention, and it reads:--

> "5. Power to regulate place and conditions of detention:—Every person in respect of whom a detention order has been made shall be liable—
>
> (a) to be detained in such place and under such conditions, including conditions as to maintenance, discipline, and punishment for breaches of discipline, as the appropriate Government may, by general or special orders, specify."

The Madhya Pradesh Detention Order, 1971, was framed by the State Government in exercise of the powers conferred by section 5(a) of the Act, and constitutes a self-contained code regulating the place and conditions of detention of the detenus, who are not governed by the Prisons Act, 1894.

Rule 3 of the Madhya Pradesh Detention Order, 1971, reads:

> "3. Application of general rules: The rules for the time being in force applicable to other prisoners confined in a place shall apply to detenus also, except to the extent to which they are modified by this Order".

The classification of the detenus has to be made into two categories, Class I and Class II, according to the State of their health and their education, status and mode of living before detention. Sub-rule (3) of rule 4 of the Order runs thus:

> "Subject to the provisions of this Order, detenus of Class I and Class II shall ordinarily be treated in the same manner as laid down in the Jail Manual, for the time being in force, for prisoners placed in Class B or superior class and class C or ordinary class, respectively."

The word "ordinarily" may have different shades of meaning. Thus in *Kailash Chandra* v. *The Union of India* (1), their Lordships while interpreting the words "should ordinarily be retained" in rule 2046 (2)(a) of the Railway Establishment Code, held that the word "ordinarily" means "in the majority of cases but not invariably". That particular construction left a discretion to the appropriate authority, and it was not bound to retain the servant after he attains the age of 55 even if he continues to be efficient.

It all depends upon the context as to what the meaning of a word should be. The word "ordinarily" in sub-rule (3) of rule 4 of the Order must in the context in which it appears mean "without exception, generally". That being so, the authorities are bound to provide the same facilities and amenities to detenus of Class I in the same manner as

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laid down in the Jail Manual, for the time being in force, for prisoners placed in Class **'B'** or superior class. The words "superior class" cannot mean anything than class 'A'.

If the meaning given by their Lordships of the Supreme Court to the word "ordinarily" in *Kailash Chandra* v. *The Union of India (supra)*, is adopted, in the construction of sub-rule (3) of rule 4 of the Order, the result would be the same. The authorities in that event, would have a discretion in the matter. That discretion must, however, be exercised in favour of the detenus. In the large majority of cases, the detenus classified as Class I will have to be given the facilities available to prisoners placed in Class 'B' in the Jail Manual, but not invariably. There may still be some detenus who by reason of their social status or their education, will have to be provided the facilities, in the same manner, as afforded to prisoners of Class 'A'. It is, however, admitted before us that on his classification as a Class I detenu, the petitioner was being treated as a Class 'A' prisoner. He is, therefore, entitled to be given the same facilities and amenities, and treated in the same manner, as prisoners placed in Class 'A'.

That brings us to the grievances of the petitioner. The provisions of Rules 430 and 431 of the Jail Manual are applicable to him. Rule 430 reads:-

> "430. Classes 'A' and 'B' are reserved for prisoners of superior social status, i. e., for those whose habit or position make confinement in jail under ordinary conditions a very much severer form of punishment than it is for those less educated or of coarser habit. The social status required for admission to class 'A' will be considerably higher than that required for class 'B'."

Definition

The opening words of Rule 431 are:-

Rule relating to 'A' and 'B' class prisoners.

"431. The following rules relate to 'B' class prisoners and are also applicable to 'A' class prisoners unless otherwise stated."

Sub-rules (1) to (16) relate to different facilities and amenities available to these prisoners.

Sub-rule 3(a) relates to the diet of labouring male convicts. Under clause (c) thereof, non-labouring male and female prisoners of 'A' and 'B' classes have to be given the diet mentioned in clause (a) except that the quantities of wheat flour, loaf bread, rice, meat, ghee, butter, gur and sugar shall be two thirds of the quantities authorised. The diet provided in clause (a) is for convicts engaged in manual labour. Perhaps the anxiety is to provide them with food that has a value of 3,000 calories. The same equation cannot, it is urged, equally apply to detenus classified as Class I and placed in class 'A'. It is further urged that the quantity provided for i. e., 2/3rds of the normal ration, is wholly inadequate to meet their requirements.

Our attention was drawn to the quantities of various articles of food specified in clause (a), and it is said that two-thirds of the quantities so provided are inadequate. It is pointed out that there is provision for a cup of tea once a day in the morning; but there is no provision for one in the after-noon. It is also pointed out that persons of a mixed diet i. e., those who eat *chapatis* with rice, get only two-thirds 290 grams of flour wheat and 235 grams of rice. This works out to about 200 grams of flour wheat and 150 grams of rice. Further, it is said that *Dal* is no substitute for meat or eggs in

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case of vegetarians, and their diet should be supplemented with milk. The last grievance is with respect to the quantity of fuel supplied to each detenu for purposes of cooking his meals. The quantity works out to 466 grams of firewood or coal for the day.

We refrain from entering into the controversy as to whether or not the quantities of food provided for specified in clause (a) of sub-rule 3 is inadequate. This is not a matter within our province. The diet provided for in clause (a) must have been devised by experts. The question whether or not the detenu should have two-thirds of the normal quantities of wheat flour, loaf bread, rice, meat, ghee butter, gur and sugar according to clause . (c), is a matter for the State Government to consider.

In this connection, it would suffice to recall the observations of their Lordships of the Supreme Court in *Ranbir Singh* v. *State of Punjab* (1), on the question of treatment of convicted prisoners, to the following effect:-

> "The modern development of criminology has revolutionized the system of treatment of convicted prisoners. The old brutal treatment has given place to more humane one. The concept of vengeance by society and of deterrence is fast disappearing and is being replaced by the concept of correction an rehabilitation."

The Supreme Court emphasised the need for a humanitarian approach. Under .Rule 27 of the order, the State Government has the power to relax any of the conditions or issue special orders in that behalf. The State Government, therefore, may consider afresh the grievances with regard to inadequacy

(1) A. I. R. 1962 S. C. 510.

of milk, tea etc. So also, the grievance that *Dal* is no substitute for meat or eggs, in case of vegetarian as well as the grievance as to the quantity of fuel supplied to each detenu for preparing his meals.

Ordinarily, a detenu placed in Class I and treated as a Class A prisoner, a detenu should have no grievance regarding clothing and bedding, diet and feeding utensils. Under Rule 8 of the Order, the detenu may wear his own clothes and use his own bedding, and his friends and relations may, if permitted to do so, by the Superintendent, send him extra clothes and bedding. It is only when he is unable to do so, that he would be governed by rule 431(2) and (3) of the Jail Manual. Under Rule 9, the detenu is allowed to bring his own feeding utensils. As regards diet, rule 10 provides that the Superintendent may permit a detenu, if he so desires, to make arrangements for his own food.

It is, however, urged by the petitioner that this is not possible on his transfer to Tikamgarh, as he has no friends or relations there. He further contends that if he were to make his own arrangements, this is impracticable. That is because under rule 11 of the Order, a detenu may not receive funds exceeding Rs. 30/- per month in the case of a Class I detenu, and Rs. 15/- per month in the case of a Class II detenu. There can be no doubt that the amount provided for in rule 11 is wholly inadequate to meet the requirements. The State Government may well consider whether the amount of fund permitted to a detenu under rule 11 should be increased or not.

The detenu, Shri Nirmal Chand Jain, then complains that he is made to sleep on a berth of masonry at night. We are afraid we can do nothing

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in the matter. That is the provision made under Rule 431(2). The detenu should, however, have no grievance on that account. Under the terms of that rule, he being a detenu of Class I and treated as a Class 'A' prisoner, is entitled to bring his own bed-stead and mattress of the approved size.

His next complaint is that he is not supplied with a mosquito-net or an electric fan, and this is making his life miserable. Under Rule 431(2) he being a Class 'A' prisoner, he is entitled to have a mosquito-net at his own cost. The grant of this facility is, however, made subject to the condition that it shall be allowed, if considered necessary by the Medical Officer. The learned Government Advocate assured before us that this condition shall be relaxed. The Jail Authorities may also consider whether the detenu can be allowed to bring an electric fan at his own cost.

As regards games the detenu should have no grievance. Under Rule 22 of the Order the detenus are permitted to play Ring Tennis. The respondents in their return have stated that they are also provided with facility to play Volley Ball etc.

Subject to these observations, the petition fails and is dismissed.

*Petition dismissed.*

## MISCELLANEOUS PETITION

*Before Mr. P. K. Tare C. J. and Mr. Justice Sharma.*

ASBESTOS CEMENT LIMITED, KYMORE, M. P., Petitioner*

*v.*

THE COMMISSIONER OF SALES TAX, M. P., INDORE, Respondent.

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*General Sales-tax Act, Madhya Pradesh, 1958 (II of 1959)—Section 3—Deputy Commissioner of Sales-tax—Is an authority appointed to assist the Commissioner—Section 39(2)—Appellate order of Deputy Commissioner of Sales-tax—Revisable by the Commissioner—Section 39(2)—Proviso—Point from which limitation of 3 years to be counted.*

Any Deputy Commissioner of Sales-tax, who would exercise first appellate power would be an authority appointed to assist the Commissioner.

The Commissioner has the power to revise the first appellate order of the Deputy Commissioner of Sales-tax in exercise of powers conferred by Section 39(2) of the M. P. General Sales-tax Act, 1958.

*H. B. Munshi, Commissioner of Sales-tax, Bombay* v. *The Oriental Rubber Industries Pvt. Ltd.* (1) referred to.

*Commissioner of Sales-tax, M. P., Indore* v. *Amerjeet Singh* (2); distinguished.

The period of 3 years provided by proviso to sub-section (2) of section 39 of the M. P. General Sales-tax Act has to be computed from the date of issue of notice and not from the date of service of notice.

*M/s R. M. E. Works, Raipur* v. *The Commissioner of Sales-tax, M. P.* (3); referred to.

*Miscellaneous Petition No. 332 of 1972.

(1) (1974) 34 S. T. C. 113. (2) (1963) 14 S. T. C. 501.

(3) Misc. Civil Case No. 345 of 1973, decided on the 26th August 1975.

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*M. M. Sapre* for the petitioner.

*K. K. Adhikari* for the resdondents.

*Cur. adv. vult.*

ORDER

The Order of the Court was delivered by P. K. TARE, C. J.—In this petition under Articles 226 and 227 of the Constitution of India the petitioner, a Limited Company incorporated under the Indian Companies Act. 1913, seeks to have the notice, dated 23.8.1969 (Petitioner's Annexure-B), issued by the Additional Commissioner of Sales Tax and the order, dated 18.4.1972 (Petitioner's Annexure-C), passed by the Commissioner of Sales Tax, quashed on the ground that the Commissioner had no power of revision under Section 39(2) of the Madhya Pradesh General Sales Tax Act, 1958, so as to revise an appellate order of the Deputy Commissioner of Sales Tax for the reason that the appellate order was prejudicial to the interests of revenue. At this stage we are not concerned with the merits of the case regarding the point whether the sales effected by the petitioner were inter-State sales or intra-State sales.

The petitioner had submitted quarterly returns of sales for the years 1960-61, and 1961-62. For the year 1960-61, the petitioner claimed exemption to the extent of Rs. 30,39,717.35 paise on the ground that the sales were inter-State sales not liable to be taxed under the State Act. In respect of the year, 1961-62, exemption was claimed on the same ground to the extent of Rs. 47,37,327.98 paise. The consignments were booked F. O. R. Ex-Works, Kymore.

The Additional Commissioner of Sales Tax, Jabalpur, rejected the petitioner's contentions, while

the Deputy Commissioner of Sales Tax, by order, dated 25th August, 1966 (Petitioner's Annexure-A) allowed the petitioner's appeal and exempted the sales from taxation under the State Act. Consequently the notice, dated 23.8.1969 (Petitioner's Annexure-B) was issued to the petitioner by the Additional Commissioner of Sales Tax under Section 39(2) of the M. P. General Sales Tax Act, 1958, intending to revise the order of the Deputy Commissioner of Sales Tax on the ground that it was prejudicial to the interests of revenue. That notice was served on the petitioner on 6 9.1969. Subsequently, by order, dated 18.4.1972 (Petitioner's Annexure-C), the Commissioner of Sales Tax rejected the petitioner's objection to the proposed revision and fixed the case for final hearting on 13.6.1972. It is against the said orders that the petitioner has filed the present writ petition, wherein the question of scope of Section 39(2) of the Act has been raised.

The learned counsel for the petitioner relied on the observations of a Division Bench of this Court in *Commissiouer of Sales Tax, M. P. Indore* v. *Amarject Singh* (1). In that case the Division Bench had to consider the implication of Section 22-B of the C. P. & Berar Sales Tax Act. 1947, with particular reference to Section 3 of that Act. The questions referred to the Court by the Tribunal were as follows:

> (i).-Whether the revisional jurisdiction vested in the Commissioner of Sales Tax under Section 22-B of the Central Provinces and Berar Sales Tax Act, 1947, extends to orders passed in appeal under Section 22 of that Act?
>
> (ii).-Whether an authority prescribed under Section 22(1) of the Central Provinces and Berar Sales Tax Act, 1947,

(1) (1963) 14 S. T. C. 501.

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read with rule 53 of the rules thereunder, is a person appointed under section 3 of that Act to assist the Commissioner of Sales Tax?

The Division Bench held that the Commissioner could not revise an appellate order of the Deputy Commissioner under Section 22-B of of the C.P. & Berar Sales Tax Act, 1947. The reasoning of the Division Bench was that in view of Section 3 of that Act an appellate authority which exercise appellate powers on account of the rules presciribed, could not be considered to be an authority appointed to assist the Commissioner. For the sake of convenience we may reproduce S.3 of that Act, which is as follows:

"S. 3.-(1) The State Government may appoint any person to be a Commisioner of Sales Tax, and such other persons under any prescribed designations to assist him as it thinks fit.

(2) Persons appointed under sub-section (1) shall, within such areas as the State Government may specify, exercise such powers as may be conferred and perform such duties as may be imposed, by or under this Act.

(3) All persons appointed under sub-section (1) shall be deemed to be public servants within the meaning of section 21 of the Indian Penal Code."

Section 22 of that Act provided as follows:

"S. 22. (1) Any dealer aggrieved by an original order under this Act, may, in the prescibed manner, appeal to the prescribed authority against such order and any dealer aggrieved by an order passed in appeal under this Act may appeal to such authority as may be prescribed against the order passed by the first appellate authority:

Provided that no first or second appeal against an order of

assessment with or without penalty shall be admitted by the appellate authority unless such appeal is accompanied by a satisfactory proof of the payment of the tax, with penalty, if any, in respect of which the appeal has been preferred.

(2) Notwithstanding anything contained in the proviso to sub-section (1), the appellate authority may in its discretion allow time to the dealer to pay the whole or part of the amount of tax or penalty or both and if the amount is paid within such time, the appeal shall be admitted.

(3) Every first or second appeal shall be filed within thirty days from the date of the communication of the order against which the appeal is to be filed.

(4) Subject to such procedure as may be prescribed and after such further enquiry as it may think fit, the appellate authority, in dispoing of any appeal under sub-section (1), may—

(a) confirm, reduce, enhance or annul the assessment, or

(b) set aside the assessment or penalty, or both, and direct the Commissioner or the person appointed under section 3 to assist the Commissioner to make a fresh assessment after such further inquiry as may be directed. or

(c) in other cases, pass such orders as it may think fit.

(5) Every order passed in first appeal or second appeal under this section shall, subject to the provisions of this section section 22-A or section 23, as the case may be, be final.

(6) Subject to rules made under this Act, any person appointed under section 3 may review any order passed by him and likewise the second appellate authority may review any order passed by it.

(7)-Thc Tribunal may, on application by a dealer for revision

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of an order passed under this Act by the second appellate authority made within sixty days from the date of communication of the order, revise the order, if it appears to the Tribunal that the order passed by the second appellate authority is contrary to law."

Section 22-A of that Act provided as follows:

S. 22-A. (1) The Commissioner may on his own motion call for the record of any proceeding under this Act in which an order has been passed by any authority subordinate to him and may make such inquiry or cause such inquiry to be made, and subject to the provisions of this Act, may pass such order thereon, not being an order prejudicial to the dealer, as he thinks fit:

Provided that the Commisioner shall not revise any order under this sub-section if-

(a) where an appeal against the order lies to an authority prescribed under sub-section (1) of section 22, the time within such appeal may be made has not expired; or

(b) the order is pending on an appeal before the authority prescibed under sub--section (1) of section 22 or has been made the subject of a revision to the Tribunal;

(c) the order has been made more than one year previously.

(2)-The Commissioner may, on application by a dealer for revision of an order under this Act passed by any authority subordinate to the Commissioner made within one year from that date of the order, call for the record of the proceeding in which such order was passed, and on receipt of the record may make such inquiry or cause such inquiry to be made, and subject to the provisions of this Act, may pass such order thereon, not being an order prejudicial to the dealer, as he thinks fit:

Provided that the Commissioner shall not revise any order under this sub-section, if,-

(a) Where an appeal against the order lies to the authority prescribed under sub-section (1) of section 22 but has not been made, the time within which such appeal may be made has not expired, or in the case of a revision to the Tribunal the dealer has not waived his right of revision; or

(b) Where an appeal against the order has been made to the authority prescribed under sub-section (1) of section 22, the appeal is pending before such authority; or

(c) the order has been made the subject of a revision to the Tribunal:

Provided further that an order by the Commisioner declining to interfere shall be deemed not to be an order prejudicial to the dealer."

Section 22-B of the said Act provided as follows:

"S. 22-B.(1) The Commissionermay call for and examine the record of any proceeding under this Act and if he considers that any order passed therein by any person appointed under section 3 to assist him is erroneous in so far as it is prejudicial to the interests of the revenue, he may, after giving the dealer an opportunity of being heard and after making or causing to be made such inquiry as he deems necessary, pass such order thereon as the circumstances of the case justify including an order enhancing or modifying the assessment, or cancelling the assessment and directing a fresh assessment.

(2)-No order shall be made under sub section (1) after the expiry of two years from the date of the order sought to be revised.

(3)-Any dealer objecting to an order passed by the Commissioner under sub-section (1) may appeal to the Tribunal within sixty days of the date on which the order is communicated to him."

The Division Bench was of the view that Section 22 of the Act conferred appellate powers on

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the Deputy Commissioner of Sales Tax independently and for the purposes of S. 22-B of the Act, the first appellate authority could not be considered to be an authority appointed to assist the Commissioner of Sales Tax. On a perusal of the said provisions reproduced above, it is clear that the Commissioner of Sales Tax has no judicial appellate powers. But the only judicial power exercisable by him is by way of revision at the instance of a party or of his own motion if he considers the order to be prejudicial to the interest of the revenue. Under the Act a party aggrieved has the right of appeal, but the State has no right of appeal. It was for that reason that the revisional powers were conferred on the Commissioner, if he thought that an order was prejudicial to the interests of the revenue. We may observe that the said case is clearly distinguishable inasmuch as a different provision has been made in the M. P. General Sales Tax Act, 1958.

We may reproduce Section 39 of the M. P. Geneal Sales Tax Act, 1958, which is as follows:

> "S. 39. Power of revision by Commissioner.-(1) The Commissioner may, either of his own motion or on application by a dealer or person made within the prescribed period from the date of the Order, call for the record of the proceeding in which any order was passed, and on receipt of the record may such inquiry or cause such inquiry to be made, as he considers necessary and subject to the provisions of this Act, may pass, such order thereon, not being an order prejudicial to the dealer or person as he thinks fit:
>
> Provided that the Commissioner shall not revise any order under this sub-section---
>
> (a) where an appeal against the order is pending before any authority specified in sub-section (1) of section 38, or where if such appeal lies, time within wihch it may be filed has not expired; or

(b) where a second appeal against the order has been filed.

Provided further that the Commissioner shall not entertain any application by a dealer against an order determining his liability to pay tax or a notice issued under this Act for assessment, except after an assessment order is passed.

Explanation.—An order by the Commissioner declining interference shall not be deemed to be an order prejudicial to the dealer or person.

(2) The Commissioner may of his own motion or on information received call for and examine the record of any proceeding under this Act if he considers that any order passed therein by any person appointed under section 3 to assist him is erroneous in so for as it is prejudicial to the interests of the revenue, he may after giving the dealer or person an opportunity of being heard and after making or causing to be made such inquiry as he deems necessary, pass such order thereon as the circumstance of the case justify including an order enhancing or modifying the assessment, or cancelling the assessment and directing a fresh assessment:

Provided that no proceedings shall be initiated under this sub-section after the expiry of three years from the date of the order sought to be revised:

Provided further that the Commissioner shall not revise any order under this sub-section where a second appeal against such order is pending or such appeal has been decided on the merits.

(3) Any dealer or person objecting to an order passed by the Commissioner under sub-section (2) may appeal to the Tribunal within sixty days of the date on which the order is communicated to him.

(4) The provisions of sub-sections (3) and (5) of section 38, shall, *mutatis mutandis*, apply to appeals filed under sub-section (3)."

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Thus, the Commissioner has been given the power to revise an order which he considers prejudicial to the interests of the revenue. It is not urged by the learned counsel for the petitioner that such power cannot be exercised by the Commissioner in respect of original orders passed by the Sales Tax Officer or the Assistant Commissioner of Sales Tax. What is urged before this Court is that the Commissioner has no jurisdiction to exercise revisional powers in respect of an appellate order passed by a Deputy Commissioner of Sales Tax, because the Deputy Commissioner cannot be considered to be an authority appointed to assist the Commissioner. Of course, that was the reasoning of the earlier Division Bench in *Commissioner of Sales Tax, M.P., Indore* v. *Amarjeet Singh (supra)*. However, Section 3 of the M. P. General Sales Tax Act, 1958, is differently worded as followed:

Section 3 of the M. P. General Sales Tax Act, 1958, is as under:

"S. 3.–Taxing authorities and other officers—

(1) There may be appointed a person to be the Commissioner of Sales Tax and the following category of officers to assist him, namely:–

(a) Additional Commissioner of Sales Tax;

(b) Deputy Commissioner or Additional Deputy Commissioner of Sales Tax;

(c) Appellate Assistant Commissioner or Additional Appellate Assistant Commissioner of Sales Tax;

(d) Assistant Commissioner or Additional Assistant Commissioner of Sales Tax;

(e) Sales-Tax Officer or Additional Sales-Tax Officer;

(f) Assistant Sales-Tax Officer; and

(g) Inspector of Sales-Tax.

(2) The Commissioner of Sales-Tax and the Additional Commissioner of Sales-Tax shall be appointed by the State Government and the other officers referred to in sub-section (1) shall be appointed by the State Government or such other authority as it may direct.

(3) The person appointed under sub-section (2) shall within such areas as the appointing authority may specify, exercise such powers as may be conferred and perform such duties as may be imposed by or under this Act.

(5) An Additional Commissioner of Sales Tax shall exercise such of the powers and perform such of the duties of the Commissioner, as the State Government may by notification, direct and references to the Commissioner in this Act shall be deemed to include references to the Additional Commissioner of Sales Tax when exercising such powers or performing such duties."

It is to be noted that all other authorities mentioned in the said Section would be authorities appointed to assist the Commissioner. Thus, there is a clear distinction between S. 3 of the present Act and S. 3 of the repealed Act. Under the present Act, the appellate powers are conferred on authorities, which are constituted by designation under S. 3 of the Act. Thus, any Deputy Commissioner of Sales Tax, who would exercise first appellate power would be an authority appointed to assist the Commissioner and we do not see as to why the Commissioner cannot exercise powers under S. 39(2) of the Act in respect of an appellate decision of the Deputy Commissioner of Sales Tax, if the Commissioner considers such an order prejudicial to the interests of the revenue. In this connection we would rely on

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the observations of a decision of a Division Bench of the Bombay High Court in *H. B. Munshi, Commissioner of Sales-Tax. Bombay*, v. *The Oriental Rubber Industries Pvt. Ltd.* (1). In that Bombay Act the Deputy Commissioner, who exercised second appellate powers, came to the conclusion that the orders of forfeiture were bad in view of the decision of the Supreme Court in *Abdul Quader and Co.* v. *Sales-Tax Officer, Hyderabad* (2) and directed the amounts to be refunded to the petitioner. The Commissioner of Sales Tax took the view that the decision of the *Supreme Court in Abdul Quader and Co.* v. *Sales-Tax Officer, Hyderabad (supra)* was not applicable in view of another decision of the Gujarat High Court in *Ramgopal & Sons.* v. *Sales Tax Officer, Surat* (3) and, therefore, the Commissioner purported to revise the orders of the Deputy Commissioner and passed an order of forfeiture. Thereupon, the aggrieved assessee filed a writ petition in the High Court. A learned Single Judge of the Bombay High Court, accepting the assessee's contention, held that when the Deputy Commissioner passed the orders in appeals from the order of the Assistant Commissioner, he was exercising powers of the Commissioner under S. 55(1)(b) as statutory delegate of the Commissioner and, therefore, the orders made by the Deputy Commissioner would be deemed to be orders made by the Commissioner himself and as such, the Commissioner had no power to revise the order of the Deputy Commissioner in exercise of powers conferred by S. 57 of the Bombay Sales Tax Act, 1959. The Division Bench, reversing the decision of the learned Single Judge, held that the Deputy Commissioner exercised powers and performed functions conferred upon him

(1) (1974) 34 S.T C. 113. (2) (1964) 15 S.T.C. 403 (S.C.).
(3) (1965) 16 S.T.C. 1005.

under the Act in his own right and not as a delegate or an agent of the Commissioner and, for that reason, the orders passed by the Deyuty Commissioner in second appeal were revisable by the Commissioner under S. 57 (1) (a) of the said Act.

We may observe that the same analogy would be applicable to the instant case. The Deputy Commissioner under our State Act has been conferred powers of first appellate authority independently. But, all the same, by virtue of S. 3 of the State Act he is an authority appointed to assist the Commissioner. In this view, we are clearly of the opinion that because of alteration of the provisions in the M. P. General Sales Tax Act, 1958, the position is altogether changed and this case is distinguishable from the earlier Division Bench case of *Commissioner of Sales Tax, M. P. Indore* v. *Amarjeet Singh (supra)*. Therefore, we are of opinion that the Commissioner had the power to revise the first appellate order of the Deputy Commissioner of Sales Tax in exercise of powers conferred by S. 39(2) of the M. P. General Sales Tax Act, 1958. In this view of the matter, the impugned notice and the order (Petitioner's Annexures B and C) do not call for any interference.

As regards limitation of three years provided by the proviso to sub-section (2) of S. 39 of the Act, the period will have to be computed from the date of issue of the notice and not from date of service. In the present case the notice, dated 23.8.1969 (Petitioner's Annexure-B) was issued on 23.8.1969. while it was served on the petitioner of 6.9.1969. In *M/S R. M. E. Works, Raipur* v. *The Commissioner of Sales Tax, M. P.* (1), we have held that compu-

(1) M. C. C. No. 346 of 1973, decided on the 25th August 1975.

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*Asbestos Cement Limited, Kymore, M.P.* v. *The Commissioner of Sales Tax, M. P., Indore*

tation of period of three years anterior to the notice will be from the date of issuance of notice and not from the date of service of the notice. In this view of the matter, the notice, dated 23.8.1969 (Petitioner's Annexure-B) was well within three years of the order of the Deputy Commissioner of Sales Tax dated 25.8.1966 (Petitioner's Annexure-A) and as such, the question of limitation would not at all arise.

As a result of the discussion aforesaid, this petition fails and is accordingly dismissed. However, under the circumstances, we direct that there shall be no order as to costs of this petition. The outstanding amount of the security deposit shall be refunded to the petitioner.

*Petition dismissed.*

## MISCELLANEOUS PETITION

*Before Mr. Justice A.P. Sen and Mr. Justice Sohani*

1973

July, 27

LAXMINARAYN, Petitioner*

*v.*

STATE OF M. P. and others, Respondents.

*Municipalities Act, Madhya Pradesh (XXXVII of 1961)—Section 41(2)—Contemplates two distinct categories of legal proeedings —Words "relating to any matter in which council is or has been concerned"—Refers to proceedings against State—Counsel who is a councillor appearing against Municipal Council—Comes under the mischief of this provision—State Government not required to state reasons when removing a councillor—Section 35(k), 38 and 41—Provisions operate at the time of election—*

*Miscellaneous Petition No. 90 of 1970.

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Laxmi-narayan v. State

*Power of State Government under Section 41—Not controlled by adjudication under Section 38—Section 38(1) and (2)—Provisions of sub-section (1) of Section 38—Is subject to sub—section (2)—Section 38, Sub-section (2) contemplates adjudication by prescribed authority*—Mala-fide *exerise of Power—Power conferred by statute—Exercise of power cannot be inferred readily to be* mala fide *unless supported by strong circumstances—Section 41(4)—Power of removal is coupled with duty to specify period of disqualification.*

Section 41(2) of the Act clearly contemplates two distinct categories of legal proceedings; one against the Council. and the other against the State Government.

The words "relating to any matter in which the Council is or has been concerned" qualify the second category of suits, i.e. instituted against the State Government.

A practitioner who appeared against the Council after he was elected as a Councillor. came within the mischief of Section 41(2) of the Act.

The State Government while ordering the removal of the Councillor is not required to state its reason.

*Suresh Seth* v. *State of Madhya Pradesh and another* (1); distinguished.

Section 35, clauses (a) to (m) operates at the time of election,

The power of the State Goverement under Section 41 is an independent power not controlled by an adjudication under Section 38.

The provisions contained in Section 38 (1) are subject to the provisions of sub--section (2) thereof. Sub--section (2) contemplates an adjudication by the prescribed authority i. e. Collector.

When statutory powers are entrusted, the exercise of such powers is not to be readily inferred as *mala fide* unless there are strong cirumstances to support such an inference.

The power of removal of a Councillor is coupled with a duty

(1) 1969 M. P. L. J. 327.

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to specify the period of his disqualification. Unless this is done, the Councillor removed may stand disqualified for all times.

*G. M. Chaphekar* for the petitioner

*S. S. Sharma* for the State.

*R. C. Mukati* for respodent. no 3.

*Cur. adv. vult.*

ORDER

The Order of the Court was delivered by A. P. SEN J.—This is a petition by Shri L. N. Trivedi, under Article 226 of the Constitution, directed against an order of the State Government dated the 25th June, 1970, for his removal as a Councillor of the Municipal Council, Mahidpur, under the provisions of Section 41(2) of the Madhya Pradesh Municipalities Act, 1961.

Shortly stated, the facts are these: The petitioner is an Advocate of this Court, practising at Mahidpur. He was appearing as a counsel against the Municipal Council in a suit wherein the plaintiff had claimed the relief of perpetual injunction against the Council. That suit was eventually decreed and the petitioner, as counsel, had put the decree into execution. He was elected as a Councillor in December, 1968. Despite his election as Councillor, he continued to appear as a counsel for the decree-holder in the execution proceedings. These proceedings were taken by the decree-holder under the provisions Order 21, rule 32 of the Code of Civil Procedure. Meanwhile, the decree-holder died and the petitioner applied for substitution of the names of his legal representatives under Order 21, Rule 16 of the Code. He also filed a *Vakalatama* on their behalf on 5th April 1969. While these proceedings were pending, the Collector,

Ujjain, served the petitioner with a show cause notice dated 22-12-1969, as to why he should not be removed from his office as a Councillor under the provisions of Section 41(2) of the Act. Upon service of the notice, the petitioner withdrew from the execution proceedigs on 5-1-1970. He then submitted his answer to the show-cause notice on 9-1-1970. In due course, the State Government gave him a personal hearing on 22-6-1970, and eventually by the impugned order directed his removal.

The order of removal has been assiled before us on several grounds. In the first place, learned counsel for the petitioner contends that the provisions of Section 41(2) of the Act were not attracted at all because the petitioner did not act or appear "in a proceeding relating to a matter in which the Council was concerned", within the meaning of the section; and therefore, the State Government had no power to pass the impugned order. He urges that the proceedings under Order 21, Rule 32 of the Code were taken against the Administrator and not against the Municipal Council. It is pointed out that there was a breach of the decree for perpetual injunction on the part of the Administrator and his subordinates and therefore. proceeding had to be taken for violation of the injuntion. Such proceedings, learned counsel contends, cannot be construed to be proceedings againts the Municipal Council, nor according to him, was the Municipal Council in any way concerned with the proceedings.

The contention cannot be accepted. No doubt, learned counsel is right in contending that there is a distinction between the Administrator and the Municipal Council. But that distinction has no significance. The suit for perpetual injunction was filed against the Municipal Council. That suit was decreed against

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the Council and the decree was put into execution against it. The Council having been superseded, all powers and duties of the Council under the Act, untill the Council was reconstituted, had to be exercised and performed by the Administrator. Although the Administrator was not the Municipal Council, the supersession did not mean that the Municipal Council as a corporate body ceased to exist. Under Section 18 of the Act, the Municipal Council is a body corporate with perpetual succession. The documents on record clearly show that the proceeding under Order 21, Rule 32 of the Code of Civil Procedure were commenced against the Municipal Council and not against the Administrator personally. The contention that Section 41 (2) of the Act was not attracted, therefore fails.

The construction placed by learned counsel for the petitioner upon the provisions of Section 41(2) of the Act cannot also be accepted. The Section reads as follows:-

> "41 (2) The State Government may, at any time, remove a Councillor if he, being a legal practitioner, acts or appears on behalf of any other person against the Council in any legal proceeding or against the State Government in any such proceeding relating to any matter in which the Council is or has been concerned, or acts or appears on behalf any person in any criminal proceeding instituted by or on behalf of the Council against such person."

The Section clearly contemplates two distinct categories of legal proceedings; one against the Council, and the other against the State Government. The words "relating to any matter in which the Council is or has been concerned" qualify the second category of suits, i.e. instituted against the State Government. The petitioner here being a legal practitioner, not

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only acted but also appeared on behalf of the decree-holder and then for the legal representatives in the execution proceedings againts the Council, after he was elected as a Councillor; and therefore, he came within the mischief of Section 41(2) of the Act.

The second contention of learned counsel for the petitioner is that the State Government was in duty bound under Section 41 (2) to apply its mind before making an order of removal of Councillor. In support of the contention reliance is placed on the decision in *Suresh Seth* v. *State of Madhya Pradesh and another* (1). The contention cannot be accepted. The decision in *Suresh Seth* v. *State of Madhya Pradesh* (*supra*) is distinguishable. There the Court was dealing with Section 422 of the Madhya Pradesh Municipal Corporation Act, 1956, under which the State Government was required to state reasons for the supersession of the municipal corporation. The entire decision turned on the language of Section 422. Under Section 41 (2) of the Madhya Pradesh Municipalities Act, 1961, the State Government while ordering the removal of a Councillor, is not required to state its reasons.

That brings us to the most crucial question urged by learned counsel for the petitioner. The contention proceeds on a construction of Section 38 (1) read with 35(k) and 41(2) of the Act. It is urged that when a Councillor becomes subject to any of the disqualifications specified in Section 35 and that includes a disqualication under Section 41, and such disqualification being removable is not removed, the Councillor does not cease to be a Councillor uniess the the State Government issues a notification under Section 38(1) specifying a date with effect from which his seat shall become vacant. There is a falacy in

(1) 1969 M. P. L. J. 327.

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the argument. To appreciate this, it is necessary to set out the relevant provisions:

> 35. Disqualification of candidates-No, person shall be eligible for election or selection as a Councillor if he.
>
> ... .. ...
>
> (k)-is disqualified to be a Councillor under section 41:-
>
> Provided that a disqualification under clause .. (k) may be removed by an order by the State Government in this behalf:"
>
> "38. Effect of subsequent disabilities.-
>
> (1) If any Councillor,-
>
> (a) becomes subject to any of the disqualifications specified in section 35 and such disqualification is not removable or being removable is not removed;
>
> ... ... ...
>
> he shall be subject to the provisions of sub-section (2) cease to be a Councillor and his seat shall become vacant with effect from a date to be notified by the State-Government."

The provisions contained in Sections 35, 38, and 41, operate in their respective fields. Section 35 deals with disqualification of candidates. No person shall be eligible for election or selection as a Councillor if he is a person specified in any of the clauses (a) to (m). That provision, therefore, operates at the time of election. When the petitioner was elected a Councillor, he was not subject to any disqualification under Section 41(2). That disqualification was subsequently incurred when there was the order of removal passed by the State Government under Section 41 (2). The power of the State Government under Section 41 is an independent power not controlled

by an adjudication under Section 38. The power under section 38(1) has been delegated by the State Government to the Collector vide Notification No. 29(U)-XVIII, published in the Madhya Pradesh Rajpatra dated 16th February 1962. In the very nature of things, when the State Government has passed an order of removal of a Councillor under Section 41, then the matter cannot be brought up before the Collector. The provisions contained in Section 38(1) are subject to the provisions of sub-section (2) thereof. Sub-section (2) contemplates an adjudication by the prescribed authority, i.e. the Collector. From and order of the Collector an appeal lies to the Commissioner under Section 38(3). Under the scheme of the Act no subsequent adjudication is contemplated by the Collector under Section 38(1), once the order of removal has been passed by the State Government under Section 41.

Lastly, learned counsel for the petitioner tried to challenge the impugned order on the ground that the action of the State Government was *mala fide*. He tried to draw the inference from a sequence of events. It appears that a meeting of the Municipal Council was scheduled to be held on the 26th June, 1970, for the election of the President. It is urged that the Councillors belonging to the party in power and those opposed to it were evenly balanced. The object of the order, it is said, was to tilt the balance in favour of the party in power. Learned counsel also pointed out that the order was communicated not in the usual manner but by a telephonic message by the Sub-Divisional Officer, which learned counsel characterizes as rather unusual. When statutory powers are entrusted the exercise of such powers is not to be readily inferred as *mala fide* unless there are strong circumstance to support such

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an inference. There is nothing on record for us to find that the State Government did not act *bona-fide*. The show cause notice had been served upon the petitioner as far back as 22-12-1969. The petitioner had submitted his reply to the show-cause notice on 9-1-1970. The matter was then referred to the State Government which gave to the petitioner a personal hearing on 22-6-1970. Merely because the meeting of the Municipal Council was scheduled to be held on the 26th June, it cannot be said that the action of the State Government in passing the order of removal on the 25th was mala fide. The State Government having passed the order on the 25th June itself, its communication through a telephonic message by the Sub-Division Officer on the 26th morning became necessary in view of the meeting which was scheduled to be held on that day.

Before parting with the case, we think it desirable to draw the attention of the State Government to a lacuna in its order passed under Section 41(2). When the State Government passes an order of this nature, whether be it under sub-section (1) or sub-section (2), the removal disqualifies such Councillor from election, selection or appointment to the office from which he is removed, for such period as may be specified by the State Government not exceeding four years. That is by reason of Section 41(4) which reads as follows:-

> "41. (4) Removal from office under sub-section (1) or sub-section (2) shall disqualify the person so removed for further election, selection or appointment to the office from which he is removed for such period not exceeding four years as may be specified by the State Government."

The power of removal of a Councillor is coupled

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with a duty to specify the period of his disqualification. Unless this is done, the Councillor removed may stand disqualified for all times. That would be against the letter of the section itself. The period of disqualification may vary; but such disqualification cannot, in any case, exceed four years. The discretion reposed in the State Government has to be exercised with due circumspection depending upon the facts and circumstance of each case. In the present case, the breach by the petitioner being of a technical nature, we trust the Government would keep that in view in prescribing the period of his disqualification.

Subject to these observations, the petition fails and is dismissed. There shall, however, be no order as to costs. The security deposit be refunded to the petitioner after verification.

*Petition dismissed.*

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## MISCELLANEOUS PETITION

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*Before Mr. Justice Raina and Mr. Justice Dwivedi.*

HARISH CHANDRA GUPTA, Petitioner*

*v.*

THE STATE OF M. P. and another, Respondents.

1972

Feb. 10

*Master and Servant—Resignation when takes effect—Principles of contract are applicable in matters not governed by any statutory rules or terms of employment—Neither party can bring about termination of service by unilateral act except in accordance with rules of employment—Public Works Department Manual, Madhya Pradesh, (Vol. I)—Rule 98—Member of temporary establishment—Member desiring to resign employment—One*

*Miscellaneous Petition No. 215 of 1970.

1972

*Harish Chandra Gupta*
v.
*State*

*month's notice sufficient or forfeiture of one month's pay in lieu of such notice—Resignation by temporary employee—Takes effect after period of one month and brings about termination—Acceptance of resignation by competent authority not necessaay—Competent authority cannot refuse such resignation—Service one validly terminated—Relationship cannot be restored by withdrawing resignation.*

The general rule is that a resignation can take effect only when it is accepted by the employer (Government). It merely amounts to an offer to quit the service and unless the offer is accepted by the employer or someone duly authorized in this behalf, it cannot bring about the termination of service of the employee concerned.

In matters which are not governed by any statutory rules or the terms of employment, the principles relating to contracts are also applicable to withdrawal of a resignation and it has been held in a number of cases that a resignation can be withdrawn before it is accepted by the competent authority.

*Shankar Dutta* v. *Oraiya Municipality* (1) and *Raj Kumar* v. *State of Punjab* (2); relied on.

The termination of the service of a government servant can be brought about either in accordance with the rules governing the conditions of the service or by the terms of employment or by aceeptance of resignation. Neither party is competent to bring about the termination of service by an unilateral act, except in accordance with the rules or the terms of employment.

Rule 98 of the Public Works Department Manual, Madhya Pradesh, (Vol. I) provides that if the members of the temporary establishment desire to resign their appointment they will be required to give a month's notice or forfeit a month's pay in lieu of such notice. Such resignation takes effect on the expiry of the period of notice and brings about the termination of service automatically. In such a case, acceptance of resignation by the competent authority is not necessary to bring about the termination of the service.

A resignation tendered under this Rule does not require acceptance and, in fact, it is not open to the Government or to

(1) A.I.R. 1956 All. 70. (2) A. I. R. 1956 Punj. 221.

the competent authority not to accept a resignation which is submitted under this rule.

Once service is duly terminated, the relationship cannot be restored by withdrawal of the resignation.

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*Harish Chandra Gupta* v. *State*

*R. K. Sharma* for the petitioner.

*J. P. Shrivastava* Deputy Government Advocate for the respondent.

*Cur. adv. vult.*

ORDER

The Order of the Court was delivered by RAINA J.—This is a petition under Article 226 of the Constitution.

The petitioner was appointed as Overseer in the Irrigation Department by the Chief Engineer of the said department (non-petitioner No. 2) on 14th September 1959 and he continued to work on the said post till 21-2-1966, on which date he was relieved from the said post at his own request in pursuance of a resignation tendered by him on 16-1-1966. The case of the petitioner is that there was no lawful termination of his service as the resignation was not accepted by the competent authority. In fact, a departmental inquiry was held against him on certain charges and inquiry continued till July, 1970. The inquiry ultimately terminated in his favour. On 30-12-69, the petitioner submitted an application for withdrawal of his resignation and for being permitted to resume his duties as an overseer. In reply he was informed that he could not be permitted to resume his service as he had tendered his resignation and had remained absent from duty for more than 80 days vide Annexure 5. The petitioner has, therefore, filed this petition

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*Harish Chandra Gupta*
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praying for a writ of mandamus directing the State Government and the Chief Engineer to repost the petitioner as overseer and award him all his dues.

The non-petitioners, in their return, submitted that treating the letter of resignation of the petitioner vide Annexure R2, as one month's notice he was relieved from the department on 21.2.1966, and, therefore, he is not entitled to withdraw his resignation and to resume his duties as an overseer.

We would like to observe at the outset that the manner in which the case of the petitioner has been handled by the Irrigation Department is not at all satisfactory and it appears that they have no clear idea of the implications of the letter of resignation (Annexure R-2) and the action taken by them in the matter. It seems that the matter was not brought to the notice of the Chief Engineer and his orders were not obtained. Whatever action was taken, appears to have been taken in the office of Executive Engineer without reference to higher authorities.

The general rule is that a resignation can take effect only when it is accepted by the employer (Government). It merely amounts to an offer to quit the service and unless the offer is accepted by the employer or someone duly authorized in this behalf, it cannot bring about the termination of service of the employee concerned. Although the relationship between the Government and its employees is not entirely based on contract, in matters which are not governed by any statutary rules or the terms of employment, the principles relating to contracts are applicable. It is for this reason that the principles

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*Harish Chandra Gupta* v. *State*

applicable to withdrawal of offers under the law of contract are also applicable to the withdrawal of a resignation and it has been held in a number of cases that a resignation can be withdrawn before it is accepted by the competent authority *vide Shankar Dutta* v. *Oraiva Municipality* (1) and *Raj Kumar* v. *State of Punjab* (2).

The termination of the service of a government servant can be brought about either in accordance with the rules governing the conditions of service or by the terms of employment or by acceptance of resignation. Neither party is comptent to bring about the termination of service by an unilateral act, except in accordance with the rules or the terms of employment. It is therefore, clear that the service of an employee does not stand terminated merely by tendering resignation. It can be terminated only by acceptance of the resignation by a competent authority.

In the instant case, the petitioner was appointed by the Chief Engineer and as such his service could be terminated by acceptance of his resignation by the Chief Engineer, who was the appointing authority. There is nothing to show that the Chief Engineer ever accepted the resignation or had even occassion to consider it. On the contrary the order of the government dated 9th May 1968 (Annexure 2) which was sent through the Chief Engineer regarding holding a department inquiry against the petitioner and another officer, suggests that the petitioner was still being treated in service. Thus if the acceptance of the resignation is considered necessary in this case it would follow that there was no lawful termination of the service of the petitioner even though he was relieved of his post on 21.2.66 vide Annexure-2.

(1) A. I.R. 1956 All. 70. (2) A. I. R. 1956 Punj. 221.

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We however find that in this case the question of acceptance of the resignation is not at all material. The petitioner was admittedly a temporary employee and as such it was open to him to bring about termination of his service by giving notice for the required period in accordance with rule 12 of the M. P. Government servants (Temporary and Quasi permanent servants) Rules, 1960. The said Rule is reproduced below for facility of reference:—

> "12 (a) subject to any provision contained in the order of appointment or in any agreement between the government and the temporary government servant, the service of a temporary government servant who is not in quasi permanent service shall be liable to termination at any time by notice in writing given either by the government servant to the appointing authority or by the appointing authority to the Government servant:
>
> ... ... ... ...
>
> (b) The period of such notice shall be one month unless otherwise agreed between the Government and the Government servant."

Under the aforesaid Rule, it is open to a temporary Government servant to bring about the termination of his service at any time by giving one month's notice in writing to the appointing authority unless a longer period of notice is repuired by the terms of appointment. Similarly, it is open to the appointing authority to terminate the service of a temporary employee by a similar notice. There is a similar provision in Rule 98 of the M. P. Public Works Department Manual (Vol. 1). The Rule provides that if the members of the temporary establishment desire to resign their appointment they will be required to give a month's notice or forfeit a month's

pay in lieu of such notice. A regisnation tendered under this Rule stands on a different footing from a resignation tendered by a permanent employee. Such a resignation takes. effect on the expiry of the period of notice and brings about the termination of service automatically. In such a case, acceptance of the resignation by the competent authority is not necessary to bring about the termination of the service. In fact, this Rule gives either party an option to bring about the termination of service by its unilateral act by giving notice for the required period. A resignation tendered under this Rule does not require acceptance and, in fact, it is not open to the Government or to the competent authority not to accept a resignation which is submitted under this Rule. It would, therefore, appear that since the petitioner was relived of his post in pursuance of a notice given under this Rule, his service stood terminated with effect from the date he was relieved and there was no question of acceptance of his resignation.

Learned counsel for the petitioner produced at the hearing the order of appointment of the petitioner, which provides as under:-

> "If he desires to resign his appointment he will be required to give 3 months notice or forfeit 3 months pay in lieu thereof."

Even according to the aforesaid provision it was open to the petitioner to bring about the termination of his service by giving three month's notice, He could even quit without giving any such notice, but in that case he was liable to forfeit 3 month's pay. Thus, even under this provisions, the petitioner could bring about the termination of service by unilateral act and that is what he did in this case. He submitted a letter of resignation giving one month's notice

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and he was relieved on the expiry of the said period. It is, therefore, clear that the petitioner's service stood terminated with effect from the date he was relieved and thereafter it was not open to him to withdraw his resignation. Once the service is duly terminated and the relationship of master and servant comes to an end, the relationship cannot be restored by withdrawal of the resgination. On this view of the matter the petition is liable to fail. It seems that under some erroneous impression, the Government held an inquiry against him treating him in service, but that is of no consequence, looking to the legal position as indicated above.

The petition therefore, fails and is hereby dismissed. We do not, however, make any order as to costs in the circumstances of this case. The Security amount shall be refunded to the petitioner.

*Petition dismissed.*

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## APPELLATE CIVIL

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*Before Mr. Justice A. P. Sen and Mr. Justice Singh.*

1975

Dec. 20

H. H. MAHARAJA DEVENDRA SINGH JU DEO and another, Appellants*

*v.*

THE STATE OF M. P., Respondent.

*Custom–Family custom–Burden of proof—Thing which should be considered for finding out whether custom is proved—Solitary instance of recent date—Not sufficient—Deed—Interpretation of—Words clear, certain and unambiguous—They should be*

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*First Appeal No. 10 of 1971, from the decree of Shri D. P. Pande, Additional District Judge, Tikamgarh, dated the 29th March 1970.

1975

H. H. Maharaja Devendra Singh Ju Deo v. State

*interpreted in their plain ordinary grammatical meaning—Extrinsic evidence when admissible—Maintenance grant—Ceases with life of grantee—Presumption rebuttable—Hindu Succession Act, 1956—Section 14(2)—Property held under grant—Property is acquired under an instrument—Nature of estate to be determined in terms of grant—Grant giving restricted estate—The estate cannot be enlarged.*

In respect of family custom, the same principles are applicable, though, of course, in the case of a family—custom instances in support of the custom may not be as many or as frequent as in case of customs pertaining to the community. In dealing with family customs consensus of opinion among members of the family, the traditional belief entertained by them and acted upon by them, their statements and their conduct would all be relevant.

A solitary instance of recent date as to such succession, is not sufficient to prove a special family custom, as it is neither ancient nor certain.

Where the words of a grant are clear, certain and unambiguous, they should be interpreted in their plain ordinary grammatical meaning, and consideration of any extraneous matter or evidence would be completely irrelevant, but where they are far from being clear, certain and unambiguous, extrinsic evidence is relevant and should be had recourse to, for the purpose of construing the grant.

A grant for maintenance *prima facie* ceases with the life of the grantor and is resumable on the death of the grantee, but the presumption is rebuttable.

The property held by the grantee under the grant was 'property acquired under an instrument' within the meaning of sub-section (2) of section 14 of the Act and, therefore, the nature of the estate must be determined on the terms of the grant, which prescribed a restricted estate. That is to say, there could, in law, be no enlargement of such estate by reason of section 14(1) of the Act.

*B. C. Verma* for appellant.

*M. V. Tamaskar* Govt. Advocate for the State.

*Cur. adv. vult.*

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JUDGMENT

The Judgment of the Court was delivered by A. P. SEN J.—This appeal, by the plaintiff, is directed against a judgment of the Addl. District Judge, Tikamgarh, dated 29th August 1970, dismissing her claim for possession of five items of immovable property known as *Janki Bag*, as detailed in para 27 of the plaint, and for recovery of Rs. 10,800/- as *mesne* profits thereof at the rate of Rs. 300/- per month, on the strength of the *rubkar*, Ex. P-104, dated 26-6-1924.

The material facts of the case are not in dispute. The plaintiff, Maharani Appla Kondayamba Devi Baru *alias* Urmila Devi, sues in the status of Maharani of Orchha, claiming the right to enforce the terms of the *rubkar*, Ex. P-104, dated 26-6-1924 executed by the late Maharaja Sir Pratap singh Ju Deo of Orchha in favour of his third wife, Maharani Narendra Kunwar Baronhiwali, the material portion of which reads:-

> माबदौलत की पहिली महारानी श्री श्री श्री ब्रसभान कुवंर जू देव्य साहबा सिरिया वारिया दूसरी महारानी श्री श्री श्री गनेश कुअरि जू देव्य साहबा सैंगुवा वारि थी जिनके बेकुन्ठ वास होने के बाद हमने तीसरी शादी श्री महारानी श्री महेन्द्र महारानी श्री सवाई महेन्द्र महारानी नरेन्द्र कुवरि जू देव्य साहबा बरौही वारि साथ की ओरछा (टीकमगढ़) भी महारानीयों के लिये हस्व रिवाज साविका शुरु से यह कायदा रियासत हाजा में जारीं है कि उनके हुक्म की तामील रियासत हाजा के कुल कारखाने जाम वगैरा में उनकी जरुरियात के मुताबिक हुआ करती है पस बर वक्त शारि जुमला मरासिव व अखतियारात महारानी साहबा मौसुफा के हस्व रिवाज साविका कायम रखकर जुमला जर व जेवाहरात व जेवरात वजुरुफ तिलाई व नुकरई व बिरंजी वगैरह व पाईलाजात व पौशाक वगैरा वगैरा जुमला महारानी हायसाविका का और जो अभी हाल मे बना है वह कुल मय जानकी बाग व उसके हद के अंदर की जुमला इमारत व हवेली वा कि जानकी बाग व शाहरे के दीगर मकानात जो मुतालिक ड़ेवढ़ी है वह कुल

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स्त्रीधन में महारानी साहबा मौसूफा हाल को अस्पष्ट अर्ता फरमा चुके है ।

गंदिर जानकी बाग की निगरानी जैसी साविक से महारानी साहबा की चली आती है वैसा ही महारानी साहबा हाल की माफक है ऊसी तरह हमेशा रहेगी ।

Maharaja Sir Pratap Singh Ju Deo was first married to Maharani Brijbhan Kunwar Khiriyawali, and upon her death was next married to Maharani Ganesh Kunwar Sengwali. On the death of his second wife, he married Maharani Narendra Kunwar Baronhiwali. All the three wives, in their turn, apparently held *Janki Bag* towards their maintenance. On the death of Maharaja Sir Pratap Singh Ju Deo in the year 1930, he was succeeded to the *Gaddi* and the *Raj* by his grandson Maharaja Sir Vir Singh Ju Deo, and he made an endorsement on 15-4-1930 at the foot of the *rubkar*, Ex. P.-104, in favour of his wife Maharani Kamla Devi, i. e., renewed the grant in her favour by reason of her status of being the reigning Maharani. The endorsement made by him was to the effect:-

"मुहर छोटी आज्ञा है कि परंपरा गत पूर्व प्रथानुसार ऊक्त लेख स्वीकार किया जाय । ऊल्लिखित समस्त स्थानों के सवाई पूर्व बत श्रीमती महारानी श्री सवाई महेंद्र महारानी श्रीमती कमला देवी को प्रदान किये जाते है ।

दस्तखत श्री जू देव
श्री सवाई महेन्द्र महाराजा के

Maharaja Sir Vir Singh Ju Deo died on 7-10-1956, and was succeeded by his son Maharaja Devendra Singh Ju Deo. Meanwhile, the rulers of the erstwhile states of Bundelkhand and Baghelkhand, including the late Maharaja Sir Pratap Singh Ju Deo had entered into an Instrument of Accession,

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whereby they agreed to integrate the territories of their States into the one State by the name of the United State of Vindhya Pradssh w. e. f. 1-1-1950. On 26--12-1949, the former ruler of Orchha executed the merger agreement. Consequently on 21-11-1956 the President of India granted recognition to Maharaja Devendra Singh Ju Deo as the ruler of Orchha w. e. f. 7-10-1956. In consequence whereof, his wife Smt. Maharani Appla Kondayamba Devi Baru @ Urmila Ju Deo, the plaintiff, became the Maharani.

To continue the sequence of events, the Rajmata, i. e., Maharani Kamla Devi in her capacity as Maharani of Orchha, had instituted a suit against the State Government of Madhya Pradesh, being Civil Suit No. 4 of 1955 in the Court of the Addl. District Judge, Tikamgarh, for rendition of accounts of the income of the 12 *jagir* villages which she held in terms of the *sanad*, Ex. P-103, dated 22--7-1921 in lieu of her maintenance, and she tentatively claimed that Rs. 1,63,711.70 p. were due to her. That suit having been dismissed, she had preferred First Appeal No. 7 of 1957 (*Smt. Kamla Devi* v. *The State of Madhya Pradesh*). During the pendency of the appeal, the parties entered into a compromise and in lieu of the State Government paying to her a sum of Rs. 2,52,000/-- towards the income from the *jagir* villages for a period of 12 years, commencing from the year 1947-48 at the rate of Rs. 21,000/- per year, she gave up all claims to immovable properties covered by the *sanad*, Ex. P-103, dated 22-7--1921, and the *rubkar*, Ex. P--104, dated 26-6-1924, endorsed in her favour by Maharaja Sir Vir Singh Ju Deo. Thereupon, this Court by its judgment dated 4-12--1961, Ex. P-25, directed that a decree be drawn in terms of the

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compromise. Accordingly, the compromise decree dated 4-12-1961, Ex. P-25, was drawn.

The plaintiff who was insane and had brought the suit through her guardian Maharaja Devendra Singh Ju Deo, i. e., her husband, asserted that she was not bound by the compromise decree passed in First Appeal No. 7 of 1957 (*Smt. Kamla Devi* v. *The State of Madhya Pradesh*), dated 4-12-1961, Ex.P-25; that according to the *kulachar*, i. e., the family custom, the property known as *Janki Bag* covered by the *rubkar*, Ex.P-104, dated 26-6-1924, was held by the reigning Maharani. She pleaded that the custom in the family of the ruler was that the property descended from Maharani to Maharani and, therefore, she being the Maharani became entiled to the properties in suit, which were owned by and in possession of the former Maharani Kamla Devi, and were placed in possession of the State Government under the terms of the compromise decree. Upon that basis, she prayed for a decree for possession of these properties and for *mesne* profits thereof.

That claim of hers has been negatived by the learned trial Judge holding that the plaintiff has failed to prove the alleged custom; and, that under the terms of the *rubkar*, Ex.P-104, dated 26-6-1924, the intention of the grantor Maharaja Sir Pratap Singh Ju Deo was that the grantee Maharani Narendra Kunwar Baronhiwali should hold the property for her life time, without any interference by any one evening by succeeding rulers. In construing the grant, the learned trial Judge observes:-

> "The grant cited above was a fresh grant as "Stridhan" to Barohiwali Maharani. Towards the close of the "Robkar" it was ordered that this "Robkar" be published in the manner specified therein so that the succeeding rulers might not interefere with the rights granted under

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it. The use of the word "Stridhan" and a desire to stop the succeeding rulers from taking away the property granted by him make the intention of the grantor quite clear. The intention plainly was that the property should be held by the grantee for her whole life without any interference even by the succeeding rulers."

Accordingly, the learned trial Judge holds that Maharani Kamla Devi in whose favour the *rubkar* had been endorsed by Maharja Sir Vir Sing Ju Deo on 15-4-1930, could not be divested of the suit properties during her life-time, irrespective of the fact whether she was or was not the Maharani. The learned trial Judge was of the view, on a construction of the *rubkar* that the grant of *Janki Bag*, was not subject to the condition that the Maharani should possess and enjoy the property granted, so long as she was, in fact, the Maharani and that in the event of her surviving the ruler, the property was to be taken away from her. On that view, the learned trial Judge held that Maharaja Sir Vir Sing Ju Deo having died on 7-10-1956, i.e., four months after the Hindu succession Act, 1956 was brought into force, Maharani Kamla Devi being possessed of the property as a Hindu female, became by virtue of section 14(1) of the Act, the absolute owner thereof. The learned trial Judge further held that the effect of sec. 4 of the Act was to abrogate the alleged family custom, if any. In that view, the learned Judge held that the compromise decree in First Appeal No. 7 of 1957, Ex,P-25, dated 4-12-1961 was binding on the plaintff, and that the State Government under the terms thereof, acquired an indefeasible title to the suit property.

The plaintiff's suit is founded upon the alleged family custom. The burden of proving that custom was upon the plaintiff. In respect of family custom, the same principles are applicable, though, of course, in the case of a family custom instances in support

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of the custom may not be as many or as frequent as in case of customs pertaining to the community. In dealing with family customs consensus of opinion among members of the family, the traditional belief entertained by them and acted upon by them, their statements and their conduct would all be relevant. (See, Mulla's Hindu Law, 14th Edn.. P. 84). The evidence must, however, be clear and unambiguous and should further prove that it was certain in character.

To establish the alleged custom, the plaintiff has examined her husband Maharaja Devendra Singh Ju Deo (PW 1), Parmanand (PW 3), Pandit Har Prasad (PW 5), Major Bhan Singh (PW 6), Govinddas (PW 7) and Har Prasad (PW 8), who are old servants of the Orchha State. Her allegation in the plaint is that *Janki Bag*, was got constructed by Maharaja Sir Pratap Singh Ju Deo about a hundred years back, for the Maharanis of the State. The learned trial Judge rightly observes 'that this means that the custom that grew in relation to this property is not older than the times of Maharaja Sir Pratap Singh Ju Deo.' The suit property, therefore, came to be possessed by his three Maharanis. He married them one after another, and each remained in possession and enjoyment of the property during her life-time. In other words, all of them died during the tenure of being the Maharani. As Maharaja Sir Pratap Singh Ju Deo used to re-marry after the demise of the earlier Maharani, the property was always available for being given to the newly wed Maharani. During his reign, there never arose an occasion when there were two claimants to the suit properties at one and the same time. The situation first arose after his death, when his son Maharaja Sir Vir Singh Ju Deo endorsed the suit properties to his Maharani

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Kamla Devi. There was, therefore, no previous instance where the grantee on ceasing to be A Maharani was divested of her rights, and the property granted to the succeeding Maharani. A solitary instance of recent date as to such succession is not sufficient to prove a special family custom, as it is neither ancient nor certain. The plaintiff's claim based upon the alleged family custom must, therefore, fail.

The construction placed by the learned trial Judge upon the *rubkar* does not seem to be correct. He has laid undue emphasis on the word "*stridhana*", The recitals in the deed particularly the word '*stridhanā*', were used out of deference for the Maharani for the time being, and they did not signify an intention to make a grant in perpetuity. The use of the word 'stridhana' is, therefore, not decisive of the nature of the grant. Where the words of a grant are clear, certain and unambiguous, they should be interpreted in their plain ordinary grammatical meaning and consideration of any extraneous matter or evidence would be completely irrelevant, but where they are far from being clear, certain and unambiguous, extrinsic evidence is relevant and should be had recourse to, for the purpose of construing the grant. The learned trial Judge was, in our view, wrong in relying on the word '*stridhana*', forgetting that there is also reference to *riwaz*. i. e., family usage, in the opening recitals.

Looking to the object of the grant and the surrounding circumstances, it was not the intention to grant an estate to the grantee for her life-time, i.e., to enure beyond her status as the Maharani. The grantor intended that the grantee, i.e., the Maharani for the time being, should possess and enjoy the usufruct of the grant, so long as she

remained his consort. The grant was, therefore, a pure maintenance grant. A grant for maintenance *prima facie* ceases with the life of the grantor and is resumable on the death of the grantee, but the presumption is rebuttable. Here, *Janki Bag*, under the *rubkar* formed part of the *Raj* from which it was never separated and, therefore, it would revert to the Maharaja for the time being, on the death of the grantee, or on her ceasing to be the Maharani.

Without entering into the question whether the property covered by the *rabkar*, Ex.P-104, dated 26-6-1924 was a limited estate of the kind contemplated by sub-section (1) of section 14 of the Hindu Succession Act, 1956. We are satisfied that the plaintiff's claim must fail on other grounds. We are, however, inclined to think that the property held by Maharani Kamla Devi under the grant was 'Property acquired under an instrument' within the meaning of sub-section (2) of section 14 of the Act and, therefore, the nature of the estate must be determined on the terms of the grant, which prescribed a restricted estate. That is to say, there could, in law, be no enlargement of such estate by reason of section 14(1) of the Act. Maharaja Sir Vir Singh Ju Deo having died on 7-10-1956, the property reverted to the *Raj* i.e., escheated to the State Government.

In the present case, the plaintiff's suit must fail for several reasons. In the first place, there is no endorsement of the *rubkar*, Ex.P-104, dated 26-6-1924 in favour of the plaintiff. She, therefore, had no vestige of right or title to the property in suit, and could not claim to be placed in possession thereof. The property had, in fact, escheated to the State Government and could not be endorsed in her favour. In the second place, after 1948, i.e., after execution of the Instrument of Accession, the plaintiff's husband

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Maharaja Devendra Singh Ju Deo had no power to make a grant. Thirdly, the alleged family custom on which the suit is based is not proved. Fourthly, Maharaja Devendra Singh Ju Deo having been de-recognised by sub-clause (22) of Art. 363-A of the Constitution inserted by the Constitution (Twenty-sixth Amendment) Act, 1971, his status as the ruler ceased, and consequently the plaintiff ceased to be the Maharani and, therefore, could lay no claim to the suit property. Fifthly, the compromise in First Appeal No. 7 of 1957 (*Smt. Kamla Devi* v. *The State of Madhya Pradesh*) was entered into by Maharani Kamla Devi, in her capacity as Maharani of Orchha, and she, having relinquished all her claims under the *rubkar*, Ex.P-104, dated 26-6-1924 in lieu of payment of Rs. 2,52,000/-, the plaintiff's claim, if any, was not maintainable. Lastly, the plaintiff having died during the pendency of the appeal, the right to sue does not survive, as the nature of relief sought in the suit was personal to her.

The result, therefore, is that the appeal must fail and is dismissed with costs. Hearing fee as per schedule.

*Appeal dismissed.*

## APPELLATE CIVIL

*Before Mr. Justice A. P. Sen.*

DAULAL, Appellant*

*v.*

M/S INDIAN MILL STORES, GANJPARA, RAIPUR, Respondent.

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*Civil Procedure Code (V of 1908)—Section 100—Finding regarding* bona-fide *need for non-residential purpose—Is a finding of fact and cannot be interfered in second appeal—Burden to prove that land-lord has no other accommodation of his own—Burden is on land-lord—Question whether burden of proof is discharged—Is also a question of fact—Accommodation Control Act, Madhya Pradesh, 1961—Act not meant to deprive the owner of beneficial enjoyment of his property—Practice—New plea—Plea whether partnership is registered or not—Is a mixed question of fact and law—Plea cannot be raised for first time in appeal—Accommodation Control Act, Madhya Pradesh, 1961—Section 12(1)(f)—Certain business could not be accommodated in part of suit accommodation—Does not mean that need is not* bona fide.

The finding that land-lord *bona fide* requires the suit accommodation for purposes of continuing the business is a finding of fact. A finding of this nature which is a finding on a pure question of fact cannot be interfered with in second appeal.

*Sarvate T. B.* v. *Nemichand* (1) and *Mattulal* v. *Radhe Lal* (2); relied on.

The burden of proving *bona fide* requirement for its business, as also that the plaintiff has no reasonably suitable accommodation of its own, lay on the plaintiff. Whether in a given case that

*Second Appeal No. 731 of 1970, from the appellate deeree of P. C. Gupta, Vth Additional District Judge, Raipur, dated the 9th Septemher 1970, confirming the decree of Lal Jagaditya Singh, IV Civil Judge, Class II, Raipur, dated the 17th September 1968.

(1) 1966 M. P. L. J. 26 (S. C.). (2) A. I. R. 1974 S. C. 1596.

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burden is discharged by the evidence on record is a question of fact.

Accommodation Control Act, Madhya Pradesh, 1961 was not meant to deprive the owner of the beneficial enjoyment of his property.

The question whether a partnership is registered or not is a mixed question of fact and law and therefore, cannot be raised for the first time in second appeal.

Merely because the suit accommodation forms a part of the building, wherein the entire business could not be located, would not imply that the need is not a *bona fide* need within the meaning of section 12(1)(f) of the Act.

*K. P. Munshi* for the appellants.

*K. M. Agarwal* for the respondent.

*Cur. adv. vult.*

JUDGMENT

A. P. SEN, J.—This appeal filed by the defendant is directed against a judgment and decree of the First Addl. District Judge, Raipur, dated 9th September, 1970, affirming the judgment and decree of the IVth Civil Judge Class II, Raipur, dated 17th September, 1968, decreeing the plaintiff's suit for his eviction under section 12(1) of the Madhya Pradesh Accommodation Control Act, 1961.

The relevant fact, in brief, is as follows:- The parties stand in the relation of landlord and tenant. The plaintiff is a Partnership firm styled as M/s Indian Mill Stores Raipur, which is doing business of Oil-engines, Pumps, Electric-motors, Machineries, Pipes, Spare-parts etc., at Ganjpara, Raipur, in a rented house. The plaintiff-firm purchased a building at Ganjpara, Raipur, consisting of 4

identical blocks of one room each of which the demised premises is one, by a registered sale-deed dated 23.3.1965. The defendant who is in occupation of one of the blocks is running a hotel under the name Dau hotel, attorned to the plaintiff on 1.4.1965 *vide Kirayanama*, Ex. P-2.

The plaintiff states that it is a registered partnership firm under the Partnership Act, and that Narsi Bhai who signed the plaint, is one of the partners of the firm. The plaintiff's case is that the partnership firm purchased the building for location of its business and that it does not have any house of its own in Raipur city. Therefore, the plaintiff *bona fide* requires the demised premises for the purpose of continuing its business under section 12(1)(f) of the Madhya Pradesh Accommodation Control Act, 1961. The plaintiff states that the tenancy of the defendant was according to the English Calendar month and commenced from first and ended on the last day of the month, and that his tenancy had been determined after the close of last day of May, 1967, by service of a notice dated 22.4.1967, Ex. P-3.

The defendant contested the plaintiff's claim while admitting that the plaintiff-firm had purchased the building in which the demised premises is located. The defendant pleaded that the alleged need of the plaintiff was just a pretence to secure his eviction. It was denied that the plaintiff requires *bona fide* the suit accommodation for its business purposes, or that it has no other reasonably suitable non-residential accommodation of its own for that purpose in Raipur city. The defendant alleges that the plaintiff-firm is already doing its business in its present site taken on lease since last so many years which is in the heart of the business locality and

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has earned reputation and good-will and, therefore, the alleged requirement was not *bona fide* but was made only with a view to secure an increase of the rent. He further pleaded that the tenancy has not been validly determined according to law, denying that the tenancy commences from the first and ends on the last day of the month. On these pleadings, the parties went to trial.

Both the Courts below have concurrently found, as a fact, that the plaintiff-firm has established that it *bona fide* requires the suit accommodation for purposes of continuing the business of the partnership within the terms of section 12(1)(f) of the Madhya Pradesh Accommodation Control Act, 1961, relying on the testimony of Narsi Bhai (P. W. 1) one of the partners of the firm. That is a finding of fact based on appreciation of evidence. A finding of this nature which is a finding on a pure question of fact cannot be interfered with in second appeal. See, *Sarvate T. B.* v. *Nemichand* (1) and *Mattulal* v. *Radhe Lal* (2).

No doubt, the burden of proving *bona fide* requirement for its business, as also that the plaintiff has no reasonably suitable accommodation of its own, lay on the plaintiff. Whether in a given case that burden is discharged by the evidence on record is the question of fact: *Sarvate T. B.* v. *Nemichand (supra)*.

The conclusion that the Courts below have reached is the only conclusion possible on the evidence on record, in the light of the circumstances appearing. The plaintiff, which is a partnership firm trading in Oil-engines, Pumps, Electric-motors, Machineries, Pipes, Spare-parts etc., at Ganjpara, Raipur, from a

(1) 1966 M. P. L. J. 26 (S.C). (2) A. I. R. 1974 S. C. 1596.

rented premises purchased the building of which the demised premises forms a part, by a registered sale-deed dated 23.3.1965. The testimony of Narsi Bhai (PW. 1), one of the partners of the firm shows that the plaintiff-firm, which is carrying on business from a rented premises at Ganjpara, purchased the building situate at Ganjpara for location of the business of the partnership. The buliding consists of 4 identical blocks of one room each of which the demised premises is one. According to him, the entire business of the firm cannot be located in one of the blocks and therefore, the plaintiff has filed separate suits against all the tenants. He states that it is intended to pull down the intervening walls, to convert the four separate blocks, into one business premises. There is no reason to disbelieve this witness. In the circumstances, it cannot be asserted that the plaintiff's need is a mere pretence. The Act was not meant to deprive the owner of the beneficial enjoyment of his property.

Faced with this situation, learned counsel for the appellant has tried to assail the decree on other grounds. He has put forward a four-fold submission. His first contention is that the plaintiff's suit was based under section 69(3) of the Partnership Act. It is urged that the moment a fresh deed of partnership dated 26.4.1964 Ex.P-6 was executed, a new firm came into existence. The old firm: styled as M/s Indian Mill Stores Raipur, therefore, ceased to exist. It is said that it was, therefore, incumbent on the partners of the new firm to get the firm registered. The contention is that the old registration, Ex.P-1, would not enure to the benefit of the new firm. The submission is that in law, it must be held, that the plaintiff firm is not registered under the Partnership Act. It is further urged that Narsi Bhai could not

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sign the plaint as he was not shown as a partner of the new firm. The contentions are wholly unfounded, and can hardly be accepted.

The question whether a partnership is registered or not, is a mixed question of fact and law and, therefore, cannot be raised for the first time in second appeal. The defendant nowhere pleaded that the plaintiff's suit was bad on the ground that the firm was not registered, by reason of section 69(3) of the Partnership Act. There was no issue on the question of registration. The point was not taken in the Courts below. It is not pure question of law, but a question which depends on facts. When the point was not raised in the pleadings, the question is not before the Court at all. To permit the point to be raised for the first time at this stage, would not only take the plaintiff by surpirse and cause prejudice, but would work manifest injustice. I, therefore, do not think it proper to allow the defendant to raise this issue, because this point with regard to the non-registration of the firm was not taken in the written statement.

I was, however, referred to *Mohanlal Jagannath* v. *Kashiram Gokul* (1), *Abdul Karim* v. *Ramdas Narayandas* (2), *Govindmal Gianchand* v. *Kunj Biharilal and others* (3) and *Balasore Textile Distributors Association* v. *Indian Union and another* (4). These cases are all distinguishable on facts. They rest on the principle as stated by their Lordships of the Privy Council in *Surajmul Nagoremull* v. *Triton Insurance Co.*, (5) that if the evidence adduced by the plaintiff proves the illegality, the Court ought not to assist him. It is necessary to refer to only two of

(1) A. I. R. 1950 Nag. 71. (2) A. I. R. 1951 Nag. 159.
(3) A. I. R. 1954 Bom 364. (4) A.I.R. 1960 Orissa 119.
(5) A. I. R. 1925 P. C. 83.

them. In *Adbul Karim* v. *Ramdas Narayandas.* (*supra*), there was an admission made by the plaintiff in his evidence, that the firm was not registered and consequently, the suit was dismissed under section 69(2) of the Partnership Act, even though no such plea was taken in the written statement. That was because the defendant was entitled to rely upon the admission made by the plaintiff. In *Govindmal Gianchand* v. *Kunj Biharilal and others* (*supra*), it transpired during the cross-examination of the witnesses, that the plaintiffs were not a registered firm and there upon, an issue was raised and tried as to whether the plaintiffs were a duly registered firm at the date of the suit, and it was found on the evidence that they were not so, and, therefore, the suit was dismissed. Each case depends on its own facts.

Narsi Bhai (P.W. 1) one of the partners of the plaintiff-firm, was subjected to a searching cross-examination, but he has nowhere admitted that a new partnership firm was brought into existence. On the contrary, his evidence shows that there was merely a reconstitution of the firm. All that he states is that Rudha retired from the partnership w.e.f. 28.10.1962, and in his place, his minor son Kantilal who had been admitted to the benefits of the partnership, became a partner w.e.f. 29.10.62. The change was duly notified to the Registrar as required under section 63(2) of the Partnership Act, *vide*, Certificate of Registration, Ex.P-1. His evidence does not show that there was a discontinuance of the business of the firm styled as: M/s Indian Mill Stores, Raipur, or there was dissolution of the firm, followed by some of the erstwhile partners taking-over the assets and liabilites of the dissolved partnership and forming themselves into a new partnership. In his cross-examination, Narsi Bhai (PW. 1), has no doubt, used

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*Daulal* v. *M/s Indian Mill Stores, Ganjpara, Raipur*

the terms, 'old firm' and 'new firm' but the use of these terms by a person not well-versed in law, is of little significance.

That the same partnership styled as: M/s Indian Mill Stores, Raipur continued to exist is further borne out by the recitals of the instruments of partnership dated 26.6.1964, Ex.P-6. The only change was that a new partner was brought in, and he was Kantilal, son of Rudha, as stated above. The preamble to the deed reads:

> "WHEREAS party No. 1,2,3,4,5,6,7,8,9, and 10 were carrying on partnership business under the name and style of Indian Mill Stores, Raipur *vide* partnership-deed dated 29th October, 1962..."
>
> "AND WHEREAS in consequence of the aforesaid change, the aforesaid parties No. 1,2,3,4,5,6,7,8,9 and 10 and 11 decided orally to continue the partnership business and also decided the terms and conditions thereof orally any whereas there was no authentic evidence of partnership the aforesaid parties agreed to reduce the terms of the oral agreement into a formal deed and the parties agree that the terms and conditions of the said partnership (which came into existence on 22.5.64), under which they were working so far and propose to work in future be reduced in writing.
>
> NOW this deed witnesses as under:-"

In *Commissioner of Income-tax* v. *M/s Ratanchand Darbarilal, Satna*, (1), I had occasion to bring out the distinction between dissolution and reconstitution of a partnership. I had then observed:

> "The dissolution and reconstitution of a partnership are two different legal concepts. The dissolution puts an end to the partnership, but reconstitution keeps it subsisting, though in another form. A dissolution followed by some of the erstwhile partners taking over the assets and

(1) 1973 M.P.L.J. 996.

liabilities of the dissolved partnership and forming themselves into a partnership is not reconstitution of the original partnership. A partnership formed after dissolution is new partnership and not a continuation of the old partnership, for it would be a contradiction in terms to say that what ceased to exist was continued. A reconstitution of a partnership necessarily implies that the firm never became extinct. What it denotes is the structural alteration of the membership of the firm by addition or reduction of members, and the incidental redistribution of the shares of the partners. That distinction must be borne in mind...".

A certificate of registration of the firm Ex.P-1 clearly shows that the firm had been reconstituted and not dissolved. Rudha ceased to be a partner w.e.f. 28.10.1962 and his son Kantilal, Party No. 10 to the deed of partnership dated 26.6.1964, Ex P-6, became a partner from the 29th i.e. the next day.

The conclusion, therefore, is irresistible that the same firm continued its business as before, and therefore, it is a duly registered partnership firm under the Partnership Act, *vide* the Registration Certificate, Ex.P-1. The objection to the maintainability of the plaintiffs suit based on the ground that it was not a duly registered firm and the suit should, therefore, be dismissed under section 69 (2) of the Partnership Act, must be overruled.

The second contention that since the entire business of the Partnership could not be located in the suit accommodation, on the admission of Narsi Bhai (PW 1) and, therefore, the plaintiff's alleged need could not be treated to be a *bona fide* need within the meaning of section 12(1)(f) of the Act, can hardly be accepted. Narsi Bhai (PW 1) has stated that the plaintiff needs the entire building and that separate suits have been filed against all the tenants. The building consists of four blocks. At the hearing, I

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was informed by the learned counsel for the respondent that the plaintiff has secured possession of two of the blocks in execution of the decrees. The 3rd block was the subject matter of *Narayan* v. *M/s Indian Mill Stores* (1), and the suit accommodation is the fourth. This means that the plaintiff has established its need in three other suits, but it cannot get the suit accommodation and re-construct the building. The genuineness of the requirement of the building by the plaintiff-firm is not in dispute. Merely because the suit accommodation forms a part of the building, wherein the entire business could not be located, would not imply that its need is not a *bona fide* need within the meaning of section 12(1)(f) of the Act. The second point must, therefore, fail.

The next contention that the notice Ex. P-3 served by the plaintiff did not validly terminate the tenancy, as it did not expire with the end of the month of tenancy, is wholly devoid of substance. The defendant attorned to the plaintiff by the writing Ex. P-2 w. e. f. 1.4.1965, and thereafter, he had paid the rent to the plaintiff, *vide*, Exs. D-1 to D-3. The rent receipts show the month of tenancy to be according to the English Caldendar month and commenced from the first and ended on the last day of each month. The plaintiff had averred this fact in para 3 of the plaint. The defendant merely denied this in the written statement, but did not take a specific plea as to the date of commencement of the month of tenancy. Under Order 8, Rule 5 of the Code, the denial was, therefore, not a specific denial. My attention was, however, drawn to the cross-examination of Narsi Bhai (P. W. 1) where he disavows all knowledge about the actual date of

(1) Second Appeal No. 300 of 1971, decided on the 15th January 1976.

commencement of the tenancy, but nothing turns on this. It is but natural that he would not know the terms agreed upon between the defendant and his previous landlord. The defendant Daulal (D W 1) admits in his cross-examination, that the tenancy commences from the first day of each month. In view of this position, it must be held that the tenancy of the defendant was according to the English Calendar month, and that his tenancy commenced from the first and ended on the last day of the month. That being so, the notice dated 22.4.67 Ex. P-3 validly determined the tenancy after the close of last day of May, 1967. This point must also fail.

It is, however, urged that in any event, the notice, Ex. P-3, must be held to be invalid, because Narsi Bhai (P W 1) during his cross-examination admits that the notice was served by the 'old firm'. As already held, there was no 'new firm' brought into existence by execution of the deed of partnership dated 26.6.1964, Ex. P-6. All that happend was that there was only a re-constitution of the firm by the retirement of Rudha w. e. f. 28 10.1962, and his son Kantilal who had come of age, being brought in as a new partner. The building was purchased by the firm styled as: M/s Indian Mill Stores, Raipur i. e. the plaintiff-firm, and the notice, Ex. P-3, was given by the firm to terminate the tenancy i. e. by the same firm.

The last contention based on sub-section (6) of section 12 of the Act, as regards the *quantum* of compensation payable i. e., it must be double the amount of rent, was not pressed by learned counsel for the appellant when his attention was drawn to the fact that the learned Addl. District Judge had awarded compensation upon that basis.

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The result, therefore, is that the appeal fails and is dismissed with costs. Counsel's fee as per schedule, if certified.

*Appeal dismissed.*

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## APPELLATE CIVIL

---

*Before Mr. Justice A. P. Sen.*

1974

Sept. 6

GHANSHYAM, and another, Appellants*
*v.*
NATHMAL, Respondent.

*Accommodation Control Act, Madhya Pradesh (XLI of 1961)—Sections 12(1)(h) and 18(1)—Section 18(1)—Casts duty on Court to record election of tenant and to incorporate the same in the order—Duty is cast also to specify the date for vacating possession by tenant—Section 18(2) and (3)—Gives concession to tenant to re-enter on fulfilment of condition—Condition not fulfilled—Right of re-entry is lost—Section 18(3)—To be construed strictly—Section 18(1)—Word "Court" in—Includes even appellate Court—Tenant not abiding by conditions in order—Tenant filing appeal—Act does not provide for fixing fresh date by appellate Court.*

Under the scheme of the Act, the Court is enjoined with a duty under Section 18(1) while passing a decree under section 12 (1)(h) to ascertain from the tenant whether he elects to be placed in occupation of the accommodation, from which he is to be evicted, and if he so elects, shall record a fact of the election in the order, and specify therein the date on or before which he shall deliver possession, so as to enable the landlord to commence the work of repairs or re-building, as the case may be.

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*Miscellaneous Appeal No. 128 of 1974, from an order of R. K. Seth, Additional District Judge, Bhopal, dated the 16th March 1974, confirming the order of the IV Civil Judge, Class II, Bhopal, dated the 4th August, 1973.

*Chandrashekhar* v. *Niyamatram* (1); not followed.

It is plain from the provisions of sub-sections (2) and (3) of Section 18 that the right of re-entry is given to the tenant as a concession on the fulfilment of the conditions precedent, namely, that the tenant must deliver possession of the accommodation to the landlord on or before the dates specified in the decree. If the tenant fails to do so, he forfeits the right of re-entry.

*Hargovind* v. *Smt. Sunder Bai* (2) and *Babulal and another* v. *Mahabir Pershad* (3); referred to.

The word "Court" appearing in section 18(1) means not only the Court trying the suit, but also the appellate Court.

The Act, however, nowhere provides that when the tenant does not abide by his election and files, instead, an appeal against the decree, the appellate Court should specify another date.

*Vijay Kumar and others* v. *Shrimati Mahadevi and others* (4); referred to.

*R. D.Hundikar* for the appellants.

*K. L. Issrani* for the respondent.

*Cur. adv. vult.*

ORDER

A. P. SEN, J.—This order will also dispose of Miscellaneous Civil Case No. 223 of 1974 (*Ghanshyam & another* v. *Nathmal*).

This further appeal in execution, filed by the judgment-debtors, defendants, is directed against an order of the Additional Judge to the District Judge, Bhopal. affirming that of the 4th Civil Judge, Class II, Bhopal, rejecting their application under section

(1) 1972 J.L.J. 464.
(2) 1970 J L.J. (N) 123. (3) 1973 J. L. J. (N) 77.
(4) Second Appeal No. 151 of 1967, decided on the 21st August, 1971.

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*Ghanshyam v. Nathmal*

47 of the Code of Civil Procedure to the executability of the decree. The connected application under section 152 of the Code of Civil Procedure has been filed by them for amending the decree in second appeal No. 119 of 1972 (*Hazarimal and another* v. *Nathmal*), decided on 4.9.1972.

The facts, in brief, are these: The plaintiff's suit for ejectment under section 12(1)(h) of the Madhya Pradesh Accommodation Control Act, 1961 was decreed by the 3rd Civil Judge, Class II, Bhopal, but the learned trial Judge, while decreeing the suit, failed to ascertain under section 18(1) of the Act from the defendants whether they wanted to exercise their option of re-entry upon re-construction of the demised premises. That was, however, set right in appeal by the 3rd Additional District Judge, Bhopal, who directed the defendants to deliver possession of the accommodation to the plaintiff on or before 15-2-1972. The defendants, however, instead of delivering possession of the premises to the plaintiff, preferred a second appeal to this Court. In Second Appeal Singh J. affirmed the decree for ejectment under section 12(1)(h), but did not, in my opinion rightly, appoint another date under section 18(1) of the Act.

When the plaintiff put the decree in execution, the defendants raised an objection under section 47 of the Code, stating that they had, by their notice to the plaintiff, stated that they were ready to hand over possession of the premises, as required by section 18(1) of the Act and, therefore, the Executing Court should give them time to vacate. That objection of their was rejected by the Executing Court as also by the learned Additional District Judge.

The decision of the case turns upon the construction of section 18 of the Madhya Pradesh Accommodation Control Act, 1961, which reads–

"18. Recovery of possession for repairs and rebuiding and re-entry.–(1) In making any order on the grounds specified in clause (g) or clause (h) of sub-section (1) of section 12, the Court shall ascertain from the tenant whether he elects to be placed in occupation of the accommodation or part thereof from which he is to be evicted and, if the tenant so elects, shall record the fact of the election in the order and specify therein the date on or before which he shall deliver possession so as to enable the landlord to commence the work of repairs or building or re-building, as the case may be.

(2) If the tenant delivers possession on or before the date specified in the order, the landlord shall, on the completion of the work of repairs, building or re-building place the tenant in occupation of the accommodation or part thereof, as the case may be, within one month of the completion of such work.

(3) If, after the tenant has delivered possession on or before the date specified in the order, the landlord fails to commence the work of repairs or building or rebuilding within one month of the specified date or fails to complete the work in a reasonable time or having completed the work, fails to place the tenant in occupation of the accommodation in accordance with sub-section (2), the Court may, on an application made to it in this behalf by the tenant within such time as may be prescribed order the landlord to place the tenant in occupation of the accommodation or part thereof or to pay to the tenant such compensation as the Court thinks fit."

In support of the appeal, reliance is placed on the followtng observation of Raina J. in *Chandrashekhar* v. *Niyamatram* (1):-

"Section 18 confers a very valuable right on the tenant and

(1) 1972 J. L. L. 464.

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casts a duty on the Court to do the needful in order to enable him to exercise that right. A Court of appeal is invested with all the powers of the trial Court and where the trial Court fails to perform an important duty cast upon it by the legislature, the appellate Court can itself perform that duty while dealiag with an appeal. The appellate Court can step in to perform this duty where the trial Court has failed to do so."

"Where the date specified by the Courts below under sub-section (1) of section 18 has become meaningless as a result of the appeal it is the duty of the appellate Court to specify a fresh date for the purpose of sub-section (1) of section 18. It is obvious that this Court failed to perform this duty through inadvertence while disposing of the appeal and this omission can now be rectified by this Court in exercise of its powers under section 151 read with section 152 of the Code of Civil Procedure. It is a cardinal principle of justice that no one shall be injured by an act or omission on the part of the Court. The Court can, therefore, very well do the needful in exercise of its inherent powers under section 151 as well as under section 152, Civil Procedure Code. The Court has inherent powers to act *ex debito justititiae* to do real and substantial justice which is its chief function. The applicant cannot, therefore, be denied the benefit of sub-section (2) of section 18 of the Act."

In that view, Raina J. who had heard the second appeal in that case, specified the date on which possession was delivered in execution of the decree as the date for delivery of possession for purposes of section 18(1) of the Act.

In view of the settled law, the view of Raina J. in *Chandrashekhar* v. *Niyamatram* (*supra*) does not appear to be correct. His attention was apparently not drawn to the decision of the Supreme Court in

*Ram Nath* v. *M/s Ram Nath Chhittar Mal* (1), and that of this Court in *Hargovind* v. *Smt. Sunder Bai* (2) and *Babulal and another* v. *Mahabir Pershad* (3).

Under the scheme of the Act, the Court is enjoined with a duty under section 18(1) while passing a decree under section 12(1)(h) to ascertain from the tenant whether he elects to be placed in occupation of the accommodation, from which he is to be evicted, and if he so elects, shall record a fact of the election in the order, and specify therein the date on or before which he shall deliver possession, so as to enable the landlord to commence the work of repairs or re-building, as the case may be.

It is plain from the provisions of sub-sections (2) and (3) of section 18 that the right of re-entry is given to the tenant as a concession on the fulfilment of the conditions precedent, namely, that the tenant must deliver possession of the accommodation to the landlord on or before the dates specified in the decree. [*Hargovind* v. *Smt. Sunder bai* (*supra*)]. If the tenant fails to do so, he forfeits the right of re-entry. [*Babulal and another* v. *Mahabir Pershad* (*supra*)]. The provision of section 18(3) has to be construed strictly and the tenant planning that privilege must fulfil it exactly. After all, the right of re-entry is given to him as a concession on the fulfilment of the condition precedent.

In *Ram Nath* v. *Ram Nath Chittar Mal* (*supra*), their Lordships, while interpreting the analogous provision contained in section 15(3) of the Delhi and Ajmer Rent Control Act, 1952, observed as follows:-

(1) A. I. R. 1961 S. C. 104. (2) 1970 J. L. J. (N) 123.
(3) 1973 J. L J. (N) 77.

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"Under that section they had the right to elect and did elect to get possession after rebuilding; this possession was to be given by the landlords to the tenants within a reasonable time and six months' period was fixed by consent between the parties and the rent, if the respondents were not put into possession on the same terms as before, was to be settled by Court and that is what was done under the terms of the consent decree. The applications for being put into possession which were filed by the respondents were really under S.15 (3) of the Act. As the respondents did not deliver possession to the appellants on or before the dates specified in the decree the provisions of S. 15 contained in sub-sec. (3) of that Act were not available to them and they were not entitled to be put into possession as prayed by them."

No doubt, the word "Court" appearing in section 18(1) means not only the Court trying the suit, but also the appellate Court. It may well be that the landlord's suit under section 12(1)(h) may fail in the Court of first instance, but, succeed in appeal. All that the section provides is that the "Court" while making an order for eviction under section 12(1)(g) or (h) shall ascertain whether the tenant elects to be placed in possession. When the suit is decreed by the trial Court, that Court has the duty to ascertain the fact, and if the tenant so elects, to specify a date by which he should deliver possession. But, if the suit is decreed on appeal the appellate Court has to perform that duty.

The Act, however, nowhere provides that when the tenant does not abide by his election and files, instead, an appeal against the decree, the appellate Court should specify another date. The tenant has to make a choice. If the tenant does not stand by his election, he forfeits the right of re-entry. In *Vijay Kumar and others* v. *Shrimati Mahadevi and others*

(*supra*) in similar circumstances, I had occasion to observe–

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> "I refrain from making any direction under Section 18(1) of the Act. The Act nowhere contemplates that an appellate Court in hearing an appeal against a decree under section 12(1)(h) should make a fresh direction in terms of section 18(1). Such a direction was made by the learned Additional District Judge and the matter must rest at that."

I find no reason to take a different view now.

The result, therefore, is that both, the appeal as well as application, must fail and are accordingly dismissed with costs. Counsel's fee, in appeal, Rs.50/–, if certified.

*Appeal dismissed.*

## CIVIL REVISION

*Before Mr. Justice Shiv Dayal.*

SINGHAI KARELAL KUNDANLAL TRUST, SAGAR, Applicant*

*v.*

M/S KESRI DAL MILL, SAGAR and others, Non-applicants.

1975

Jan. 3

*Civil Procedure Code (V of 1908)—Order 6, rule 16—Enables a party to ask for striking out defence of the opponent which is unnecessary or scandalous—Which tends to prejudice or embarrass trial.*

*Civil Revision No. 1005 of 1973, for revision of order of V. S. Pyasi, IInd Additional District Judge, Sagar, dated the 15 November 1973.

1975

Singhai Karelal Kundanlal Trust, Sagar v. M/s Kesri Dal Mill, Sagar

Order 6 rule 16, Civil Procedure Code, enables a party to apply to strike out any part of opponents pleadings which may be unnecessary or scandalous or which may tend to prejudice, embarrass or delay the fair trial of the suit.

*Davy* v. *Garrett* (1), referred to.

Where an allegation cannot offer any defence to the action and which, if not struck out, would unnecessarily delay the suit, must be struck out.

*K. N. Agarwal* for the applicant.

*B. C. Verma* with *N. D. Tiwari* for the non-applicants.

*Cur. adv. vult.*

ORDER

SHIV DAYAL J.—This revision is from an interlocutory order passed by Shri V. S. Pyasi, 2nd Additional District Judge, on a preliminary objection raised by the plaintiff.

The learned trial judge rejected the plaintiff's objection that (1) paragraphs 11,12,13,14,15,16,17,18, 19,20,23,24, and 28 be struck out as being unnecessary, irrelevant and frivolous, (2) likewise, paragraphs 2 and 27 of the written statement be also directed to be struck out.

The plaintiff has been described as "Singhai Karelal Kundanlal Trust, through managing trustee Balchand Malaiya". It is averred in the plaint that the trust has been carrying on business of Kachchi Adhat (Commission agency) from October 24,1950. By resolution dated December 26,1972, the trust committee has appointed Bal Chand Malaiya, managing trustee to institute the present suit.

(1) 1877 (C. D) 473.

The defendants in their written statement disputed the plaintiff's competence to sue. They have given different reasons. It is said *inter alia* in paragraphs 27 that the trust was cancelled by a registered deed dated March 31,1959.

In the plaintiff's application to strike out these pleadings certain facts to support the plaintiff's competence to sue have been alleged.

It is abundantly clear that the dispute about the plaintiff's competence to sue has to be tried. It cannot be said that the defendants cannot challenge the plaintiff's competence to sue. It must, therefore, be said that the learned trial judge was right in rejecting that part of the plaintiff's application. To that extent this revision must be dismissed.

As regards the second part of the plaintiff's application dated October 12,1973, it is contended by the learned counsel for the petitioner that the question as to the refund of sales tax and the defendants' right of retention is a frivolous pleading, which is not available to the defendants. It is aimed at mere harassment of the defendant by unnecessarily protracting litigation. These paragraphs of the written statement must, therefore, be ordered to be struck out. Shri Verma learned counsel for the defendants tells me that the substance of those paragraphs is as follows: The plaintiff recovered from the defendants certain sums on account of sales tax which the plaintiff paid to the Sales Tax Department. But now the plaintiff has claimed refund of the sales tax from the Sales Tax Department. If that sales tax is refunded by the Sales Tax Department to the plaintiff, the defendants will be entitled to that amount. Moreover, the defendants may be

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*Singhai Kanelal Kundanlal Trust, Sagar*
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made liable to pay sales tax. Therefore, the defendants are entitled to retain the amount claimed in the suit.

It is clear from the plaint that the suit claim is in respect of two items. It is averred in the plaint that the defendants' firm purchased from cultivators in the plaintiff's *Kacchi adhat* (i) 31 bags of Masoor for Rs. 4748.74 on November 23,1972 and (ii) 47 bags of Masoor for Rs. 6939.63 on November 25,1972. The plaintiff trust paid the amount on behalf of the defendants to the cultivators (vendors). The defendants were liable to re-pay the amount within seven days. But they did not so re-pay inspite of repeated demands. Total of these two items is Rs. 11,688.37 Ps., on which the plaintiff has claimed interest Rs. 536.94 and in the result a decree for Rs. 12,225.31 Ps. Thus the suit is for re-imbursement of the amount paid by the plaintiff on behalf of the defendants in respect of two specified transactions.

In the impugned paragraphs of the written statements, see for instance paragraph 15, the defendants have alleged that from the year 1963-64 to 1972-73, the plaintiff recovered from the defendants' firm Rs. 18617.88 Ps. on account of sales tax. This follows other allegations, the substance of which has been stated above.

Even according to the defendants' allegation, the plaintiff has merely claimed refund of sales tax. One does not know whether that claim will be allowed or not; or when will it be allowed. The defence is merely about a contingent expectancy. No cause of action has arisen to the defendants, as yet for making any claim against the plaintiff. No demand has been made against the defendants to pay any

sales tax. That they may become liable to pay any sales tax is merely an apprehension today. The defendants have not made any counter claim, nor have they claimed any set-off. Furthermore, the possible claim does not arise from the suit transactions. It is not the defendants' case that in respect of the said transaction, they have paid any sales tax to the plaintiff.

It is thus quite clear that the paragraphs in the written statement to which the plaintiff has taken exception, do not make out any defence to the suit. The plaintiff's contention is right that this part of the pleading is unnecessary, irrelevant, frivolous and embarrassing. The only obvious purpose is to confuse and protract the trial.

Order 6, Rule 16 of the Code of Civil Procedure provides that the Court may at any stage of the proceedings order to be struck out or amended any matter to any pleading which may be unnecssary or scandalous or which may tend to prejudice, embarrass or delay the fair trial of the suit. This rule enables a party to apply to strike out any party of opponent's pleadings which may be unnecessary or scandalous or which may tend to prejudice, embarrass or delay the fair trial of the suit. In *Davy* v. *Garrett* (1). It was held that although the Court of Appeal will not readily interfere with the discretion of the Court of first instance in a matter of procedure, it is its duty to exercise its own discretion as to whether a pleading is so framed as to embarrass the opposite party. In a case, therefore, where a statement of claim was in the opinion of the Court of appeal calculated to embarrass the defendants by reason of its stating immaterial facts, and setting out at great length documents which could not be material except as evidence by way of

(1) 1877 C. D. 473.

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admission, it was ordered to be struck out, though a motion for that purpose had been dismissed with costs by the Court below.

It is clear law that where any allegation cannot offer a defence to the action and which if not struck out would unnecessarily delay the suit, must be struck out.

The learned counsel for the petitioner asks my attention to paragraphs 3 and 4 of the plaint and the corresponding paragraphs 3 and 4 of the written statement and contends that the transactions and amounts due being admitted a decree should forthwith be passed on the admission under Order 12, Rule 6 of the Code of Civil Procedure. Among others, reliance has been placed on *Shikharchand* v. *Bari Bai* (1). The argument is that decree must be passed in favour of the plaintiff on the defendants' admission and the liability must not be deferred even for a day. I have no doubt that the trial Court will duly consider this objection.

The revision is partly allowed. Paragraphs 11,12, 13,14,15,17,18,19,20.23,24, and 28 of the written statement shall be struck out. The other part of the revision is dismissed. Parties shall bear their own costs in this revision.

*Application partly allowed.*

(1) A. I. R. 1974 M. P. 75=1974 M.P. L.J. 126.

## MISCELLANEOUS CIVIL CASE

*Before Mr. B. Dayal C.J. and Mr. Justice Bhargava.*

MESSRS PUROHIT LODGE, JAWAHAR CHOWK, DURG, Applicant*

*v.*

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

1971

July, 12

*General Sales-tax Act, Madhya Pradesh, 1958 (II of 1959)—Kinds of dealers to whom exemption is granted regarding sale of cooked food—Terms "Dhabawalas, Tandurwalas"—Refer to small businessmen who themselves cook food and serve it—Answer to reference.*

The exemption granted by the provision is in favour of these kinds of dealers in respect of cooked food alone excluding sweets and other prepared foods which are not served fresh.

The terms "Tandurwalas, Dhabawalas" etc. refer only to small businessmen who themselves cook fresh food and serve it.

Answer to the questions referred to are as follows:-

(1) On the facts and circumstances of the case the turnover of the Bhojnalaya of the assessee is not exempt from sales-tax under Notification No.965-V-ST, dated 31.3.1964.

(2) The conclusion drawn by the Sales-tax Officer is based upon material on record.

(3) It is correct to hold that the categories described in the said Notification No. 965-V-ST, dated 31.3.1964 are small operators who themselves or with the help of a few personal servant prepare food and also serve the

*Miscellaneous Civil Case No. 115 of 1970. Reference under Section 44 of General Sales-tax Act, 1958, by the Board of Revenue, M. P. Gwalior, dated the 17th March 1970.

1971

*Messrs Purohit Lodge, Jawahar Chowk, Durg*
v.
*The Commissioner of Sales Tax, M. P.,*

same and that, therefore, the Bhojnalaya of a size as that of the assessee is not covered by the terms of the said notification and is not exempt from sales-tax.

(4) The interpretation put upon the said notification No. 965-V-ST, dated 31.3.1964 by the Sales-tax Tribunal (Board of Revenue) is correct.

*Y. S. Dharmadhikari* for the applicant.

*M. V. Tamaskar* Deputy Government Advocate for opposite party.

*Cur. adv. vult.*

JUDGMENT

The Judgment of the Court was delivered by BISHAMBHAR DAYAL C. J.—This is a reference under section 44 of M. P. General Sales Tax Act. The assessee Purohit Lodge is a registered dealer in vegetrian meals and sweets. Before the assessing officer his contention was that the sales of cooked food amounting to Rs. 1,50,537.54 were not liable to tax since the assessee was in the position of a Dhabawala and was entitled to exemption. The exemption created by the Government is for coked food excluding sweetmeats, cakes, pastries, chocolates, toffees, lozenges and peppermint drops when prepared and sold by Tandurwalas, Dhabawalas, Lohawalas, Khomchawalas and Halwais. In substance, therefore, the exemption is in favour of these kinds of dealers in respect of cooked food alone excluding sweets and other prepared foods which are not served fresh. The terms "Tandurwalas", "Dhabawalas" etc. have not been defined and have, therefore, to be understood in the ordinary sense in which they are understood by common men. The sales tax department has found that the assessee is the biggest hotel-keeper and

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*Messrs Purohit Lodge, Jawahar Chowk, Durg*
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a prominent member of the hotel-owners' association. The assessee not only serves food to those who come to his shop to take the same but he also keeps a counter for selling sweets and *namkeen* which are freely sold in sufficient quantity. The sales tax department also held that the terms "Tandurwalas", "Dhabawalas" etc., refer only to small businessmen who themselves cook fresh food and serve it. We agree that these terms are applicable to small units and those terms cannot be applied to the assessee which has large sales of sweets and *namkeen* and maintains a big establishment with waiters etc.

These are all matters of fact on which no interference is possible by this Court. Consequently, our answers to the questions referred to are as follows:-

(1) On the facts and circumstances of the case, the turnover of the Bhojnalaya of the assessee is not exempt from sales tax under Notification No. 965-V-ST dated 31.3.1964.

(2) The conclusion drawn by the Sales Tax Officer is based upon material on record.

(3) It is correct to hold that the categories described in the said Notification No. 965-V-ST dated 31.3.1964 are small operators who themselves or with the help of a few personal servants prepare food and also serve the same and that, therefore, the Bhojanalaya of a size as that of the assessee is not covered by the terms of the said notification and is not exempt from sales tax.

(4) The interpretation put upon the said Notification No. 965-V-ST dated 31 3.1964 by the Sales Tax Tribunal (Board of Revenue) is correct.

Parties will bear their own costs of the reference.

*Reference answered accordingly.*

## FULL BENCH

*Before Mr. Justice Malik, Mr. Justice Sharma and Mr. Justice Bajpai.*

1977

July 27

SMT. NALINI, Applicant*

*v.*

C. H. ISSAC, Non-applicant.

*Divorce Act, Indian (IV of 1869)—Section 14, Proviso—Does not bar jurisdiction of court to grant decree for dissolution of marriage at the instance of a spouse who is also guilty of adultery—Discretion—When to be exercised—Social consideration—Relevancy of.*

The only point which needs consideration before confirming the decree passed by the lower Court is whether the petitioner, who is also guilty of adultery, is entitled to the relief claimed. The proviso to section 14 of the (Indian) Divorce Act, though does not create a bar to the grant of a decree for dissolution of the marriage in favour of the petitioner, who is also guilty of adultery, but provides that the Court shall not be bound to grant such a decree in favour of the petitioner, who is also found to be guilty of adultery.

Thus, it is clear that the mere fact of bigamy having been committed by the spouse, who is asking for the exercise of discretion, does not in itself operate as a bar to such exercise but the default on the part of the petitioner has to be primarily weighed in the balance with other matters when the Court is considering the question of the exercise of its discretion. The circumstances in which the petitioner committed the default must be carefully taken into consideration.

It is true that the binding sanctity of marriage is to be given due importance and has to be maintained, but it would be half true to say that the same has to be maintained at all costs by ignoring the other social consideration. Thus, a true balance has to be maintained in between respect for the binding sanctity of the

* Misc. Civil Case No. 40 of 1977, Proceedings under Section 17 of Indian Divorce Act, 1869 by Shri K. K. Verma, District Judge, Jabalpur.

marriage and the social considerations which make it contrary to public policy to insist on the maintenance of a union which has utterly broken down. It is noteworthy that according to the present trend of decisions, the social considerations have operated to induce the Courts, both in England and India, to exercise discretion even in favour of the spouse guilty of adultery in the facts and circumstances of a particular case, wherein, in earlier time, a decree would certainly have been refused.

*Nigent* v. *Nigent* (1), *Wilson* v. *Wilson* (2) and *Bourke* v. *Bourke* (3); referred to.

*Anup Choudhry* for the applicant.

*None* for the opposite party.

*Cur. adv. vult.*

ORDER

The Order of the Court was delivered by BAJPAI J.:- These proceedings under section 17 of the (Indian) Divorce Act have been placed before us for confirmation of a decree passed by the District Judge, Jabalpur, granting divorce as applied for by the petitioner (wife) on the grounds of desertion and adultery.

The facts relevant are that the petitioner Nalini was lawfully married to the respondent C. H. Issac on 8-2-1970 at Hangton Prayer Room Church, Jabalpur, the wife being then about 19 to 20 years of age and the husband about 22 to 23 years of age. Undisputedly, the petitioner and the respondent profess the Christian religion and are domicile in India. For about 10 months from the date of the marriage, parties lived at Bilhari and cohabited. According to the petitioner, earlier at one occasion, the respondent had turned her out of his residence

(1) A.I.R. 1934 All. 782. (2) A. I. R. 1930 Cal. 729.
(3) A.I.R. 1932 Sindh 18.

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and, therefore, she had to live in her own quarter at Vaidyanath Nagar. Later on, after about a month, the respondent, however, again took her back along with her two younger sisters, Chandrakanta aged about 20 years and Anita aged about 18 years, who also lived with her in the same house.

The allegation was that the respondent developed illegitimate intimacy with Chandrakanta and they started living in adultery. A letter written by the respondent, indicating his affair with Chandrakanta, was also discovered by the petitioner. This development disturbed the relation of the petitioner with her husband and they used to quarrel with each other. When the petitioner was pregnant and carrying for about six months, the respondent, again forcibly turned her out of his residence. The petitioner wanted to take her sisters Chandrakanta and Anita along with her while going to her own quarter at Vaidyanath Nagar, but the respondent did not allow her to do so and permitted Anita (the second sister) alone to go with the petitioner. Thus, Chandrakanta remained in the house of the respondent. Since then, the petitioner and the respondent are living separately and conjugal cohabitation has not been resumed. While living at Vaidyanath Nagar, after about 3 or 4 months, the petitioner, who was already pregnant, gave birth to a female child in June 1971. The respondent, however, took the child from her when it was about $1\frac{1}{2}$ years in age. During the period of association with the respondent, Chandrakanta gave birth to two children.

The petitioner also formed an association with one Edward George, a friend of the respondent. She also gave birth to a child during the said association with Edward George. The petitioner, however, filed an application against the respondent before the

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District Judge claiming divorce on the grounds of desertion and adultery. Parties led evidence, both oral and documentary.

The learned District Judge, after due appreciation of the evidence brought on record, has found that the respondent developed illegitimate intimacy with Chandrakanta. Naturally, due to that, the relation between the parties became strained. The District Judge has further found that the respondent forcibly turned the petitioner out of his house and started living in adultery with Chandrakanta. During the period of the said adulterous association with Chandrakanta, he had two issues, one of which, however, died immediately after the birth, and the other child is still alive. The respondent stated that he had written the aforesaid letter in an attempt to divert the response of his wife towards himself which, according to him, she was not giving. The respondent expected that on seeing such a letter indicating the affair of her husband with Chandrakanta, she might become much more attached to him. This explanation, however, under the facts and circumstances of the case, did not find favour with the learned Judge of the District Court. After holding the respondent guilty of deserting his wife and also of living in adultery with Chandrakanta, the learned District Judge has passed the decree for dissolution of the marriage. While doing so, the District Judge has observed that despite the fact that the petitioner was also living in adultery with Edward George, it was a fit case for grant of divorce looklng to the interest of the parties and the children.

After going through the entire material on record and keeping in view the undisputed facts and circumstances, we are satisfied that the findings

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recorded by the learned District Judge are quite reasonable and proper and there is no scope for taking a different view by us. We are also satisfied that the petition has not been presented or prosecuted in collusion with the respondent. In the circumstances of the case, the marriage has utterly broken down. The grounds of desertion and adultery have been fully established.

The only point which needs consideration before confirming the decree passed by the lower Court is whether the petitioner, who is also guilty of adultery, is entitled to the relief claimed. The proviso to section 14 of the (Indian) Divorce Act, though does not create a bar to the grant of a decree for dissolution of the marriage in favour of the petitioner, who is also guilty of adultery, but provides that the Court shall not be bound to grant such a decree in favour of the petitioner, who is also found to be guilty of adultery.

Thus, it is clear that the mere fact of bigamy having been committed by the spouse, who is asking for the exercise of discretion, does not in itself operate as a bar to such exercise but the default on the part of the petitioner has to be primarily weighed in the balance with other matters when the Court is considering the question of the exercise of its discretion. The circumstances in which the petitioner committed the default must be carefully taken into consideration. In the present case, it was the respondent who created the situation resulting in the break down of the marriage by developing illicit intimacy with Chandrakanta and by deserting the petitioner, he created such circumstances which compelled the petitioner to do so.

It is true that the binding sanctity of marriage

is to be given due importance and has to be maintained, but it would be half true to say that the same has to be maintained at all costs by ignoring the other social considerations. Thus, in our opinion, a true balance has to be maintained in between respect for the binding sanctity of the marriage and the social considerations which make it contrary to public policy to insist on the maintenance of a union which has utterly broken down. It is note-worthy that according to the present trend of decisions, the social considerations have operated to induce the Courts, both in England and India, to exercise discretion even in favour of the spouse guilty of adultery in the facts and circumstances of a particular case, wherein, in earlier time, a decree would certainly have been refused.

In the cases reported in *Nigent* v. *Nigent* (1) and *Wilson* v. *Wilson* (2) followed in *Bourke* v. *Bourke* (3), the Courts exercised discretion even in favour of the guilty wife under the facts and circumstances of each case.

When the marriage has utterly broken down and there are no prospects of reconciliation between the husband and the wife, no purpose will be served by refusing the exercise of discretion on the ground that the petitioner was also guilty of adultery. In the present case, the wife's adultery has been conduced by the conduct of the husband. There is one more circumstance in her favour that she has frankly admitted that she was living with Edward George and has given birth to a child. In our opinion, it would not be proper to compel four persons to continue to live in adultery by refusing the decree of divorce. We are also inclined to

(1) A. I. R. 1934 All. 782. (2) A. I. R. 1930 Cal. 729.
(1) A I. R. 1932 Sindh 18.

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exercise discretion in favour of the petitioner under the facts and circumstances of the case by considering the interest of the possible children which might otherwise be born out of the wedlock and the probability of one party to the proceedings marrying the third party involved, if enabled to do so, by being accorded freedom from the marriage tie. We would, however, like to make it clear that the Court is not expected to just put a rubber stamp by exercising discretion in favour of a guilty party in each and every case. The exercise of discretion will always be dependent upon the facts and circumstances of each case and, in our opinion, the present case is such where we should exercise discretion in favour of the petitioner-wife.

We, therefore, confirm the decree made by the District Court. Under the facts and circumstances of the case, there will be no order as to costs. Parties will bear their own costs throughout.

*Decree confirmed.*

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## MISCELLANEOUS PETITION

*Before Mr. Justice G.P. Singh and Mr. Justice S.M.N. Raina*

1976

Sept. 14

UNIVERSAL CABLES LTD., SATNA; Petitioner*

*v.*

UNION OF INDIA and others, Respondents.

*Natural Justice—Requirements of—Central Excise and Salt Act, Section 4 (a)—Assessable value how to be determined —Sales of Defective rods—Could not be basis for finding whole sale cash price of good quality rods—Things to be considered in determining assessable value of* properzi *rods—Central*

*M. P. 1571 of 1975.

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*Excise Rules, 1944, Rule 173-Q and 173-C—Rule 173-Q(1)(a) and (d)—Conditions necessary for applicability—Rule 173—C —Does not make a person liable to penalty when information supplied is false—Omission to enter correct price—Is not contravention of rule 173-C within meaning of Rule 173 Q—Central Lxcise and Salt Act—Section 40(2)—Expression "other legal proceedings" in—Ambit and scope of—Conditions under which rule applies—Provision not applicable to proceedings taken under Rule 173-Q read with Section 33 of the Act —Section 35(2)—Word "Final" in—Meaning of—Does not prohibit taking of original proceedings—Excise Authoritie – In assessing excise Duty—Authorities perform quasi-judicial power—Can fix valuation only according to Section 4 of the Act and directions of Board regarding valuation not binding on them—Constitution—Article 226 —Existence of alternative remedy—Can be a circumstance to be considered in exercistng discretion—Does not take away jurisdiction of High Court to interference in suitable cases.*

Natural Justice requires that a *quasi*-judicial authority must inform the person proceeded against the material which it proposes to use against him so that he may meet the inferences that are likely to be raised from that material. Even when the material used is within the knowledge of the person proceeded against, he must be told that it would be used against him, for, unless he so informed he would have no opportunity of offering his explanation for meeting the inference that the authority seeks to draw from it.

*Collector of Central Excise and Land Customs, Shilong* v. *Sansawarmal Purohit* (1); and *Prakash Cotton Mills* v. *B. N. Rangwani* (2); referred.

Under Section 4(a) of the Act, as in force at the relevant time, the assessable value of the article is deemed to be "the wholesale cash price for which an article of the like kind and quality is sold or is capable of being sold at the time of the removal of the article chargeable with duty from the factory or any other premises of manufacture or production for delivery at the place of manufacture or production, or if a wholesale market

(1) 1969 Assam L. R. (S.C.) 11. (2) A.I R. 1971 Bom. 386 at p. 392.

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does not exist for such article at such place, at the nearest place where such market exists".

*A. K. Roy* v. *Voltas Ltd.* (1); referred. to.

The sales of defective rods could not form any basis for finding out wholesale cash price of good quality rods because these sales were not of the goods of the same quality.

In determining the assessable value of the goods removed, what has to be seen is the wholesale cash price of the article of "like kind and quality."

For applicability of either of these clauses, it was necessary to be proved that the petitioner contravened the provisions of Rule 173-C.

Rule 173-Q does not say that a person shall be liable to penalty when the information supplied by him is false. The omission in this respect in Rule 173-Q is pertinent and it shows that the rule does not intend to penalise a person for giving false information.

Omission to enter correct price is not a contravention of Rule 173-C within the meaning of Rule 173-Q.

*N. B. Sanjana* v. *E. S. and Mills* (2); referred to.

"Other legal proceeding" in Section 40 (2) of Central Excise and Salt Act are limited to the same category of legal proceedings of which "suit" and "prosecution" are examples. In other words, the expression "other legal proceeding" in the context of section 40(2) bears a restrictive meaning conveying the idea of judicial proceedings or proceedings taken in a Court of Law.

"Other legal proceeding" is ordinarily wide enough to include any proceeding taken in accordance with law. Whether so taken in a court of law or before any authority or tribunal.

*Public Prosecutor, Madras* v. *R. Raju* (3); referred.

The rule of "*ejusden generis*" applies when the following conditions exist:

(1) A. I. R. 1973 S. C. 225. (2) A. I. R. 1971 S. C. 2039.
(3) A. I.R. 1972 S.C. 2504.

(i) the statute contains an enumeration of specific words;

(ii) the subjects of enumeration constitute a class or category;

(iii) that class or category is not exhausted by the enumeration;

(iv) the general term follows the enumeration; and

(v) there is no indication of a different legislative intent.

*Amar Chandra* v. *Excise Collector, Tripura* (1); referred to.

Proceeding cannot be instituted by the authority before itself by issuing notice.

The penalty proceedings taken by the Collector against the petitioner under Rule 173-Q read with section 33 of the Act were not governed by the period of limitation prescribed by section 40(2) of the Act.

The word "final" as it occurs in Section 35(2) only means that the order passed in appeal under section 35(1) would not be open to any further appeal or revision except as mentioned in the section. Section 35(2), in my opinion, does not prohibit taking of original proceedings such as proceedings for re-assessment under Rule 10 or proceedings for imposition of penalty under Rule 173-Q, on the ground that the assessee by contravening certain provisions or by making false statements evaded payment of duty.

*Re: Halder & Sons* (2) and *I. T. Officer, Calcutta* v. *Lakhmani* (3); referred. to.

*Amalgamated Coalfields* v. *Janapada Sabha* (4), *Collector of Central Excise* v. *Fallappa* (5), *The Marsdeh Spg. & Co.* v. *Shri L.V. Pol and others* (6) and *Commr. of Sales Tax M. P.* v. *Amarjeet Singh* (7); distinguished.

The excise authorities in assessing excise duty perform a *quasi*-judicial function and have to follow the principles of valuation laid down in section 4 and the directions issued under the

(1) A. I. R. 1972 S.C. 1863 at p. 1868
(2) 1942 I.T.R. 79
(3) A. I.R. 1976 S.C. 1753 at p. 1760
(4) A. I. R. 1964 S.C. 1013.
(5) A.I.R. 1964 Mad. 111.
(6) I. L. R. 1965 Guj. 240.
(7) XIV S. T. C. 501.

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authority of the Board in that matter were not binding on them.

Existence of alternative remedy is no doubt taken into account in deciding whether interference should be made under Article 226; but it does not take away the jurisdiction of the High Court to interfere in appropriate cases.

*N. B. Sanjana* v. *E. S. & W. Mills* (1); referred to.

*S. J. Sarabjee* for the petitioner.

*R. P. Sinha* for the respondents.

*Cur. adv. vult.*

ORDER

PER SINGH, J.—By this petition under Article 226 of the Constitution the petitioner, Universal Cables Ltd., calls into question 13 orders passed by the Collector, Central Excise, Nagpur on 10th/11th September 1975 under Rule 173-Q of the Central Excise Rules, 1944, imposing penalty to the tune of nearly Rs. 2½ crores in respect of the properzi rods removed by the petitioner from its properzi mill from 1st May 1970 to 23rd May 1971. The petitioner also prays for quashing of 15 show cause notices which were issued by the Assistant Collector before the said 13 orders were passed by the Collector.

The petitioner is an existing Company within meaning of the Companies Act, 1956. The petitioner carries on business of manufacturing and dealing in cables and conductors required for transmission of electricity. The petitioner has its cable factory at Satna. For the purpose of manufacturing cables and conductors, the petitioner requires aluminium wire rods commonly known as properzi rods as an essential raw material. The petitioner has a properzi mill

(1) A.I.R. 1971 S.C. 2039.

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at Satna for converting aluminium ingots into properzi rods. The petitioner acquires aluminium ingots primarily from two leading manufacturers in India, namely, Hindustan Aluminium Corporation Ltd., Renukoot (Hindalco) and Indian Aluminium Co. Ltd., Belgaum (Indal). The petitioner converts the aluminium ingots into rods and uses them in its cable factory. In order to fully utilise the capacity of the properzi mill, the petitioner also converts aluminium ingots belonging to other cable or conductor manufacturers. These other manufacturers send aluminium ingots of Hindalco or Indal Brand to the petitioner who converts the ingots into rods and realises conversion charges.

Before 1st March 1970, excise duty on aluminium, including ingots, wire rods etc. was linked with weight. As the duty was the same on ingots and wire rods, no duty was payable on the manufacture of properzi rods from duty-paid aluminium ingots. From 1st March 1970, excise duty on aluminium ingots, wire bars and wire rods became leviable on the basis of rate *ad valorem*. However, by a notification dated 1st March 1970, exemption from duty was granted in respect of aluminium ingots, wire bars wire rods etc. By this exemption, no excise duty was payable on the manufacture of aluminium wire bars and rods including properzi rods. But by another notification issued on 26th March 1970, exemption granted in respect of aluminium wire bars and wire rods including properzi rods was withdrawn. The result, therefore, was that from 26th March 1970 excise duty became leviable on properzi rods on *ad valorem* basis. There was some confusion for certain period about the effect of the withdrawal of this exemption and the procedure laid down for removal of preperzi rods under the Central Excise Rules was not strictly followed till 26th April 1970.

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We are, however, not concerned with this period in this petition.

The procedure for removal of properzi rods by the producers and manufacturers is contained in Chapter VII-A of the Central Excise Rules. This chapter applies to such excisable goods as the Central Government may by notification issued under Rule 173-A specify. By a notification issued on 11th May 1968, this Chapter has been applied to a number of excisable goods including aluminium. This Chapter consists of Rules 173-A to 173-Q. Before removing any excisable goods, every assessee has to file before the proper officer for approval a list in such form as the Collector may direct under Rule 173-B showing full description of the goods produced or manufactured by him, the item number of the First Schedule to the Act under which each such goods fall, the rate of duty leviable on each such goods and such other particulars as the Collector may require. The proper officer after such inquiry as he deems fit approves the list with such modification as are considered necessary and returns a copy of the approved list to the assessee who determines the duty payable on the goods in accordance with the list. Rule 173-C requires the assessee to file a price list of goods which are assessable *ad valorem* in such form and in such manner as the Collector may require. The proper Officer approves the price list after making such modifications as he considers necessary. The assessee determines the duty on the goods in accordance with the list approved by the proper Officer. Rule 173-C has an important bearing in this case. This rule omitting the amendments, which were made later and with which we are not concerned in this petition, reads as follows:-

"173-C. (1) Every assessee, who produces, manufacturers or ware houses goods which are chargeable with duty at a rate dependent on the value of the goods, shall file with the proper Officer for his approval a price list, in such form and in such manner and at such intervals as the Collector may require, showing the price of each of such goods and the trade discount, if any, allowed in respect thereof to the buyers.

(2) The proper Officer shall approve the price list after making such modifications as he may consider necessary so as to bring the value shown in the said list to the correct value, for the purpose of assessment as provided in section 4 of the Act. He shall thereafter return one copy of the list approved as aforesaid to the assessee who shall, unless otherwise directed by the proper Officer, determine the duty payable on the goods intended to be removed in accordance with such list.

** ** ***

(3) If in the list approved by the proper Officer under sub-rule (2) any alteration becomes necessary for any reason, the assessee shall likewise file a fresh list or an amendment of the list already filed for the approval of such Officer.

Note: After the initial submission of the price list by an assessee, it will not normally be necessary for him to submit any further list unless there is a change in the prices of excisable goods produced by him. The responsibility, however, is clearly fixed on the assessee to intimate in advance the changes made in the price lists already submitted by him for approval by the proper Officer.

(4) Notwithstanding the provisions of sub-rules (1) and (3), the Collector may, having regard to the nature of goods manufactured and the frequency of market price fluctuations of such goods, allow an assessee or a class of assessees to declare the price transacted by the said assessee or assessees for the particular wholesale consignment on the gate pass or accompanying challan or advice note and to determine the duty payable on such goods

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intended to be removed on the basis of the said declared price.

Provided that where the price thus declared on the gate pass or accompanying challan or advice note does not represent the value as determined under section 4 of the Act, the proper Officer may, after such further inquiry, as he may consider necessary reassess the duty due and thereupon the assessee shall pay the deficiency, if any, by a debit in his account current or in case of excess payment take credit of the amount paid in excess in the manner prescribed in sub-rule (2) of rule 173-I."

Rule 173-D requires the assessee to furnish information regarding principal raw material if so required by the Collector. After the assessee complies with the provisions of Rules 173-B, 173-C and 173-D, he himself determines his liability for the duty on the excisable goods intended to be removed and can remove the goods after payment of duty so determined. The procedure for payment of duty is contained in Rule 173-G which lays down that every assessee has to keep an account current with the Collector separately for each excisable goods and he has to pay the duty determined by him for each consignment by debit to such account current before removal of the goods. This rule further requires every assessee to submit monthly returns in the proper form showing *inter alia* the quantity of excisable goods removed on payment of duty and the duty paid on such quantity. Rule 173-I provides for aseessment of duty by the proper Officer on the basis of information contained in the return filed by the assessee under Rule 173-G and after such further inquiry as he considers necessary. Rules 10 and 11 of the Rules which provide for recovery of duty short levied and for refund of duty paid in excess respectively are made applicable for Chapter VII-A by rule 173-J with the modification of the

period of limitation. The period of limitation as mentioned in Rules 10 and 11 is three months, but for purposes of Chapter VII-A Rule 173-J makes the period of limitation in these rules read one year. Rule 173-Q provides for confiscation and penalty. It is under this rule that the impugned orders were made by the Collector. This rule as in force at the relevant time is as under:

"173-Q. Confiscation and penalty.---If any manufacturer, producer or licensee of a warehouse,

(a) remove any excisable goods in contravention of the provisions of any rules; or

(b) does not account for all such goods manufactured, produced or stored by him, or

(c) engages in the manufacture, production or storage of such goods without having applied for the licence required under Section 6 of the Act, or

(d) contravenes the provisions of any rule with intent to evade payment of duty,

then--

(i) any land, building, plant, machinery, materials, conveyance, animal or any other thing used in connection with the manufacture, production, storage, removal or disposal of such goods, and

(ii) all excisable goods on such land or in such building or produced or manufactured with such plant, machinery, materials or thing,

belonging to such manufacturer, producer or licensee shall be liable to confiscation and the manufacturer, producer or licensee shall be liable to a penalty not exceeding three times the value of the excisable goods in respect of which any contravention of the nature referred to in clauses (a), (b), (c) or (d) has been commiteed or five thousand rupees, whichever is greater and in every case where there has been such a contravention the proper

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Officer may assess the duty due to the best of his judgment and the assessee shall thereupon pay the duty so assessed."

On 27th April 1970, the petitioner filed before the Superintendent, Central Excise, Satna, a list of goods under Rule 173-B and a list of prices under Rule 173-C. In the price list filed under Rule 173-C, the ex-factory price was shown as Rs. 5,005/- per m. t. and Rs. 4,600/- per m. t. for properzi rods manufactured from Hindalco and Indal ingots respectively. The basis for showing these prices was explained by the petitioner in its letter dated 30th April 1970, addressed to the Superintendent, Central Excise. The petitioner clarified that it had valued the properzi rods manufactured out of the respective aluminium ingots of the two manufactures at the respective control prices of the said manufactures. The petitioner further explained that it was only charging Rs. 400/- per m. t. for conversion of aluminium ingots into properzi rods from its clients who send ingots for conversion purposes. The list of goods and the price list submitted by the petitioner were approved on 6th May 1970 by the Superintendent, Central Excise, who was the proper Officer for the purposes of Chapter VII-A of the Rules. The approval was made by making endorsements in the respective lists under Rules 173-B and 173-C. On 22nd July 1970, the petitioner filed a revised list of classification of goods and a revised list of prices under Rules 173-B and 173-C. In the revised price list, the price of properzi rods manufactured from Indalco ingots was shown at Rs. 4,500/- per m. t. instead of Rs. 4,600/-. It was explained that in the earlier price list Rs. 4,600/- per m. t. was shown as the price under a mistake. Copies of correspondance which showed that the mistake was *bona fide* were also submitted. The revised lists of classification of

goods and prices were also approved by the proper Officer on 6th August 1970. From time to time between May 1970 and May 1971, the petitioner cleared and removed from its factory at Satna various quantities of properzi rods after payment of duty which was calculated on the basis of the list of prices approved by the proper Officer. Monthly returns in the prescribed form under Rule 173-G (3) were filed before the proper Officer from time to time. The proper Officer after making such inquiry as he considered necessary assessed the duty on the goods and completed the assessment memorandum as required under Rule 173-I. By a letter dated 3rd April 1971, the proper Officer informed the petitioner that all properzi rods manufactured by the petitioner would be assessed on the value of Rs. 5,005/- per m. t. On the petitioner's protest, the Deputy Collector, by an order made on 28th April 1971, permitted the petitioner to pay the duty by valuing properzi rods from Hindalco ingots at Rs.5,005/- and from Indal ingots at Rs. 4,500/- per m. t. under Rule 9-B. Some proceedings were taken by the Superintendent, Central Excise, and the Assistant Collector, Central Excise, for recovery of short levy for the earlier period on the basis that the duty was payable on the value determined at the rate of Rs. 5,005/- per m. t. in respect of all properzi rods. It is not necessary to go into these proceedings because they became abortive by an order passed in appeal by the Appellate Collector, New Delhi, on 18th May 1974. In the meantime, representations were made by the petitioner and other manufactures to the Government of India for laying down the basis for valuing the properzi rods manufactured by job-workers for cable manufactures. By an order passed on 15th May 1972, the Government of India communicated the recommendation of the Central

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Board of Excise that the properzi rods manufactured by job-workers for cable manufactures should be valued by adding a sum of Rs. 510/- per m. t. to the prices of the ingots used in the manufacture of properzi rods. The said recommendation related to the period from 1st March 1970 to 23rd May 1971. On 12th July 1970, the Superintendent, Central Excise, informed the petitioner that all cases would be finalised in the light of the said order of the Government of India. The petitioner was directed to furnish particulars of all past clearances. On 28th August 1972, the petitioner claimed a refund of Rs. 2,82,599/- in view of the order of the Government of India. By an order passed on 9th April 1973, the Assistant Collector allowed a refund of Rs. 2,09,254/- to the petitioner. This refund was presumably ordered under Rule 11 read with Rule 173-J. The petitioner preferred an appeal for claiming the refund to the extent it was disallowed by the Assistant Collector. This appeal was partly allowed by the Appellate Collector and by an order passed on 30th July 1974 some further relief was granted to the petitioner.

In exercise of its powers conferrred by section 3 of the Essential Commodities Act, 1955, the Central Government on 20th March 1970 promulgated the Aluminium (Control) Order, 1970. On the same date, the Central Government issued a Notification under Clause 4 of the Control Order fixing sale prices of aluminium of the different producers, manufacturers or dealers at the ex-factory prices of the different items of the said producers, manufacturers or dealers prevailing on 28th February 1970. This notification had the effect of fixing the maximum selling price of aluminium goods including properzi rods at the price prevailing on 28th February

1970. The price so fixed was not uniform because different manufacturers sold their products at different rates on 28th February 1970. By another notification issued on 24th May 1971, uniform selling price for properzi rods was fixed at Rs. 5,815 per m. t. inclusive of excise duty.

On 17th October 1974, the Assistant Collector, Central Excise, issued the 13 impugned notices to the petitioner in respect of clearances of properzi rods made from May 1970 to May 1971. It was alleged in the notices that the petitioner contravened the provisions of Rules 173-C, 173-F and 173-G in that the petitioner did not file correct price list, did not determine correct assessable value and did not pay proper duty as required by the Rules. It was also alleged in the notices that the scrutiny of the records of the petitioner showed that the petitioner had been selling the properzi rods manufactured by it in wholesale to other cable manufacturers under open market conditions prior to 28th February 1970. In support of this allegation, it was stated in the notices that the petitioner sold two lots of 9. 260 m. t. and 9. 951 m.t. at the ex-factory price of Rs. 7,400/- per m.t. on 2nd January 1970 and 10th January 1970 respectively to Messrs Deora P. V. Cabcon Manufacturing Co. Pvt. Limited, pologround, Indore and that one further consignment of 10.008 m. t. was sold to the same party on 16th February 1970 at Rs.7,325/- per m.t. It was further alleged that the price at which the last consignment was sold represented the price prevailing on 28th February 1970 and the ex-factory price of properzi rods manufactured by the petitioner was, therefore, Rs.7,325/- in terms of the Aluminium (Control) Order and this price should have formed the basis for valuation of the petitioner's goods under section 4(a) of the Central Excise Act,

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1944, and that the petitioner evaded payment of duty by not declaring this price as correct price in the price list filed under Rule 173-C. The petitioner was required to show cause to the Collector, Central Excise, Nagpur, as to why penalty should not be imposed under Rule 173-Q. The petitioner was also required to show cause why the land, buildings, plants etc. and the excisable goods on such land or in such buildings with plant, machinery be not confiscated and differential duty be not charged and recovered under Rule 173-Q. In reply to the notices to show cause, the petitioner submitted that it was not a seller of properzi rods. It was explained that the petitioner manufactured properzi rods either for the use in its factory or for supplying to other manufacturers of cables and conductors who supplied aluminium ingots to the petitioner. The Petitioner only charged from these other manufacturers conversion charges and not the price. It was further explained that as aluminium ingots that were used in the manufacture of properzi rods were either Hindalco or Indal Brand, the petitioner adopted the contral prices of properzi rods of these two manufacturers for purposes of payment of excise duty. As regards the sales to the Indore party, the petitioner submitted that the sales to that party were of an insignificant quantity of non-dutiable defective properzi rods and that the stray sales of such rods could not form the basis for determination of the wholesale price of properzi rods manufactured by the petitioner. It was also submitted that the sale price of defective stuff could not be accepted as wholesale price of the quality goods. The petitioner further submitted that isolated sale of defective and unusable properzi rods did not mean or prove the existence of a potential wholesale market for the articles for being sold on wholesale basis at the place of manufacture because the petitioner never sold any quality properzi rods to any customer at

any time. On 10th/11th September 1975 the Collector, Central Excise, passed the thirteen impugned orders. The Collector did not decide whether the three sales of properzi rods to the Indore party referred to in the show cause notices related to the defective rods or whether the sales were of quality rods. The Collector also took into account certain despatches of properzi rods to Bombay and Ahmedabad between 12th March 1970 and 29th May 1970 under consignment to self. It may here be mentioned that these despatches were not referred to in the show cause notices and the petitioner was not given any opportunity to give its explanation in respect of these despatches. The Collector held that it was imperative for the petitioner to have mentioned that price in the price list under Rule 173-C at which its properzi rods sent to Bombay and Ahmedabed under consignment to self were eventually sold. It was observed that the price list did not contain this material information and, therefore, there was contravention of Rule 173-C. It was further held by the Collector that the properzi rods sent to Bombay, Ahmedabad etc. were capable of being sold at a rate not below the control price, i. e. at the rate of Rs. 7,325/- per m. t. The control price of Rs.7,325/- was derived by the Collector on the basis of sales made to the Indore party prior to 28th February 1970 which were referred to in the show cause notices. On these findings, the Collector held that there was contravention of Rules 173-B, 173-C, 173-F, 173-G and 173-I and the petitioner was liable to penalty under Rules 173-Q. As earlier stated, the Collector imposed in all the thirteen cases penaly totalling nearly to Rs. 2½ crores.

The impugned orders of the Collector proceed on the basis that the petitioner contravened Rules 173-B, 173-C, 173-F, 173-G and 173-I. The show cause

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notices issued preceding these orders also alleged breaches of rules 173-C, 173-F and 173-G. It is, however, clear that the contravention, on the findings of the Collector, was in essence of Rule 173-C and not of other rules. The petitioner did file a list of goods for approval in proper form as required by Rule 173-B. It is not disclosed in what manner this rule was contravened by the petitioner. The contravention found in respect of Rule 173-C is that the prices mentioned in the price list filed by the petitioner were not correct and did not disclose the true prices at which the petitioner's goods were sold or were capable of being sold. The list of prices submitted by the petitioner was approved by the proper Officer and the petitioner valued the goods in accordance with prices so approved as required by Rule 173-F. There was, therefore, no contravention of Rule 173-F. The petitioner opened a current account as required by Rule 173-G and the duty was paid by debit to this account before removal. The petitioner also submitted returns as required by clause (3) of Rule 173-G in the proper form. Thus there was also no contravention of Rule 173-G. As regards Rule 173-I, it is for the proper Officer to make an assessment on the basis of the returns and after such further inquiry as he may consider necessary. The assessments were duly made by the proper Officer from time to time. It is difficult to understand as to how could the petitioner be made liable for any breach of Rule 173-I. Indeed, learned counsel appearing for the respondents has accepted before us that the contravention in the real sense was of Rule 173-C alone and it is for the contravention of this rule which resulted in evasion of duty that the petitioner has been punished by imposition of penalty under Rule 173-Q by the impugned orders passed by the Collector.

The arguments addressed at the bar in this petition can be divided under the following heads: (1) Denial of natural justice; (2) Wrong valuation of properzi rods; (3) No contravention of Rule 173-C; (4) Bar of limitation under section 40(2); (5) Bar of finality under section 35(2); (6) Unreasonable exercise of statutory powers; and (7) Alternative remedy.

(1) DENIAL OF NATURAL JUSTICE:

The first contention that has been raised before us is that the Collector in holding the petitioner liable for contravention of Rule 173-C took into account certain despatches to Ahmedabad and Bombay which were not referred to in the show cause notices nor was the petitioner's attention drawn to them at any stage during the proceedings before the Collector and, therefore, principles of natural justice were not followed and the finding is vitiated for that reason.

In paragraph 5 of the orders the Collector formulated six issues as requiring this decision. Issue no. 4 formulated by him reads as follows:

> "Whether the information mentioned in the price list submitted on 30.4.70 was correct and complete for determination of value in terms of section 4 of the Act in respect of the properzi rods manufactured and cleared from their factory during the relevant period? If not, whether the party furnished misleading information and/or suppressed material particulars in their said price list by not determining such value on the basis of their sales under open market condition and thereby wilfully undervaluing their excisable goods."

In giving his finding on the above issue, the Collector observed that a scrutiny of the petitioner's despatch account showed that in several cases properzi

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rods consigned to self were sent to different places like Bombay and Ahmedabad which indicated that these self consigned goods on reaching the destination were sold from those places to other customers. The Collector referred in this connection to nineteen despatches which were made between 12th March 1970 and 29th May 1970. The Collector observed that under Rule 173-C it was imperative for the petitioner to have mentioned that price in the price list at which the properzi rods sent to Bombay and Ahmedabad under consignment to self were eventually sold to other customers as that would be the nearest place from Satna at the relevant time. The Collector also observed that as it was undisputed fact that the price list in question did not contain the material information, he came to the irresistible conclusion that the information furnished by the petitioner was incorrect and incomplete and the petitioner had wilfully suppressed material information and gave misleading information so as to undervalue the excisable goods.

It is quite clear by reading the impugned orders that the conclusion as to the contravention of Rule 173-C was solely based on the despatches of goods made by the petitioner to Bombay and Ahmedabad which were referred to by the Collector in his finding on issue no. 4. These despatches were not referred to in the show cause notices and the attention of the petitioner was not drawn to them at any stage during the pendency of proceedings before the Collector. The petitioner, therefore, had no opportunity to meet the inference drawn from the aforesaid despatches by the Collector. Learned counsel for the respondents submitted that as these despatches were recorded in the petitioner's despatch register, this was a fact within the knowedge of the petitioner

and no grievence can be made if facts within the knowledge of the petitioner were not brought to its notice during the inquiry. In my opinion, there is no substance in this argument. Natural justice requires that a *quasi*-judicial authority must inform the person proceeded against the material which it proposes to use against him so that he may meet the inferences that are likely to be raised from that material. Even when the material used is within the knowledge of the person proceeded against, he must be told that it would be used against him, for, unless he is so informed he would have no opportunity of offering his explanation for meeting the inference that the authority seeks to draw from it. In *Collector of Central Excise and Land Customs, Shilong* v. *Sansawarmal Purohit* (1) the Supreme Court observed that "a *quasi*-judicial authority would be acting contrary to the rule of natural justice if it acts upon information collected by it which has not been disclosed to the party concerned and in respect of which full opportunity of meeting the inferences which arise out of it has not been given." [See further–*Prakash Cotton Mills* v. *B. N. Rangwani* (2)]. It is true that the fact that certain despatches were made to Bombay and Ahmedabad between 12th March 1970 and 29th May 1970, on dates referred to in the orders of the Collector, was known to the petitioner. But the petitioner was never told that these despatches will be taken into account in holding it liable for contravention of Rule 173–C. The petitioner, therefore, had no opportunity of meeting the inference which the Collector drew from these despatches. The petitioner's case is that these stray despatches were not of good quality properzi rods but of defectives and the prices at which these rods were sold at Bombay and Ahmedabad were irrelevant for finding out the

(1) 1969 Assam LR (SC) 11. (2) A.I R. 1971 Bom. 386 at p. 392.

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wholesale price of good quality rods at Satna and, therefore, the petitioner was not obliged to enter these prices in the price list filed under Rule 173-C. The petitioner had no opportunity of offering this explanation before the Collector as the petitioner was not told that the said despatches to Bombay and Ahmedabad would be taken into account against it. The non--disclosure to the petitioner that the despatches to Bombay and Ahmedabad would be used against it lends a serious infirmity to the finding that the petitioner did not enter correct prices in the price list and thereby contravened Rule 173-C.

(2) WRONG VALUATION OF PROPERZI RODS

It was next contended that the Collector acted against the principles of valuation contained in section 4 (a) of the Central Excise and Salt Act, 1944, in finding that the assessable value of the properzi rods clearld by the petitioner during the relevant period was Rs. 7,325/- per m. t.

The Collector's reasoning in adopting Rs. 7,325/- per m. t. as the assessable value is something like this. The assessable value ought to be determined on the basis of the wholesale cash price charged by the petitioner from its customers in the course of transactions at arms length at the places of production, i. e. Satna, or at any place nearest to it. The petitioner sold the properzi rods consigned to self at Ahemdabad and Bombay between March and May 1970 and the price at which these sales were made should form the basis for finding out the assessable value under section 4 (a). The petitioner did not produce any evidence that these sales were at a rate below the maximum control price and, therefore, it must be assumed that the sales were made at the

control price. The control price was Rs. 7,325/- per m.t. because it was at this price that the petitioner sold a consignment of properzi rods on 16th February 1970 to M/s P. V. Cabcon Manufacturing Co. Pvt. Ltd., Indore, and this sale was nearest to the date 28th February 1970 with reference to which the Central Government fixed the control price under clause 4 of the Aluminium (Control) Order.

The reasoning of the Collector suffers from many infirmities. The Collector fixed the wholesale price on the basis of the despatches made to Ahemdabad and Bombay. As earlier stated, the attention of the petitioner was never drawn to these despatches either in the show cause notices or at any other stage during the proceedings and the Collector was, therefore, not entitled to take into account these despatches. The Collector wrongly blamed the petitioner that no evidence was produced to show the rate at which the goods despatched to Ahemdabad and Bombay were sold there. When the petitioner's attention was not drawn to these despatches, how could it know that it was required to lead evidence of the price at which these goods were sold. As regards the consignments sold to the Indore party, including the consignment that was sold on 16th February 1970, the petitioner's reply was that these consignments were of defective rods and not of good quality rods and, therefore, these sales could not furnish any basis for determining the value of good quality rods. The Collector did not decide the pertinent question raised by the petitioner that the consignments sold to the Indore party were of defective rods and not of good quality rods, and without deciding it the Collector adopted the rate at which the consignment dated 16th February 1970 was sold as the control rate applicable for all the

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properzi rods removed by the petitioner during the relevant period.

The petitioner's contention before the Collector was that there was no wholesale market of properzi rods at Satna, that the petitioner's business was not of selling properzi rods, and that the stray sales made to the Indore party were of defective rods, i.e. rods which were not in conformity with the prescribed standard. Under section 4 (a) of the Act, as in force at the relevant time, the assessable value of an article is deemed to be "the wholesale cash price for which an article of the like kind and quality is sold or is capable of being sold at the time of the removal of the article chargeable with duty from the factory or any other premises of manufacture or production for delivery at the place of manufacture or production, or if a wholesale market does not exist for such article at such place, at the nearest place where such market exists". This section was construed by the Supreme Court in *A. K. Roy* v. *Voltas Ltd.* (1) in which it was held that a wholesale market does not mean that there should be an actual place where articles are sold and bought on a wholesale basis and that these words can also mean the potentiality of the articles being sold on a wholesale basis. The first question to be examined by the Collector, therefore, was whether there was any wholesale market in the sense as explained by the Supreme Court for the properzi rods manufactured by the petitioner at Satna. In other words, it ought to have been found whether there was potentiality of the articles being sold on a wholesale basis at Satna. As earlier stated, the petitioner's case throughout was that there was no such wholesale market at Satna because the properzi rods manufactured by it were either used in the factory or returned

(1) A.I.R. 1973 S. C. 225.

to its customers. This case of the petitioner was not found to be untrue. The stray sales of properzi rods made on 16th February 1970 and in January 1970 to the Indore party could not furnish any basis for wholesale market at Satna during the period from May 1970 to May 1971, with which we are concerned in this case. Moreover, these sales, according to the petitioner, were of defective rods and not of the goods of "like kind and quality" within the meaning of section 4 (a). The Collector first ought to have decided whether the contention of the petitioner that these sales related to defective rods was true. In the absence of any finding by the Collector overruling the petitioner's stand that the sales to Indore party were of defective rods, the learned counsel for the respondents had no option but to invite us to proceed on the assumption that the petitioner's stand was true and that the sales were of defective rods. Now, if the sales to Indore party were of defective rods, they could not form any basis for finding out wholesale cash price of good quality rods because these sales were not of the goods of the same quality. Learned counsel for the respondents submitted that good quality rods and defective rods were both properzi rods taxable under Item 27 of the First Schedule to the Act which made no distinction between good quality rods and defectives. There is no merit in this argument. It is true that good quality properzi rods and defectives are both taxable under Entry 27 of the First Schedule, but their assessable value has to be determined under section 4. In determining the assessable value of the goods removed, what has to be seen is the wholesale cash price of the article of "like kind and quality". Good quality rods and defective rods may be goods of the same kind, but certainly they are not of the same quality. Therefore, the price obtained for defective

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rods cannot in law form the basis for finding out the wholesale cash price for good quality rods. There was no evidence whatsoever before the Collector of sales of good quality properzi rods at Satna. It could not, therefore, be held that there was any wholesale market or any potentiality of the good quality rods being sold on a wholesale basis at Satna. The Collector then ought to have considered, in accordance with section 4 (a), the wholesale price prevailing in a wholesale market at a place nearest to Satna. The nearest wholesale market, according to the petitioner, is Renukoot where Hindalco has its factory and sells goods of like kind and quality. The Collector could not have taken into account the sales made at Ahmedabad and Bombay firstly, because, these sales were not brought to the notice of the petitioner in the show cause notices or at any stage during the inquiry; and secondly because Renukoot being nearer to Satna as compared to Ahmedabad and Bombay, the wholesale price prevailing at Renukoot had to be adopted under section 4(a) as against the wholesale price, if any, prevailing at Ahmedabad or Bombay. In my opinion, therefore, the entire basis on which the Collector proceeded in fixing Rs.7,325/- per m. t. as the assessable value of the properzi rods cleared by the petitioner during the relevant period is apparently erroneous being in contravention of section 4(a) of the Act as also being against the principles of natural justice.

It was argued by the learned counsel for the respondents that when the petitioner sold rods of defective quality at Rs.7,325/- per m.t., it must be held that the petitioner must have sold good quality rods at a higher price. The argument assumes that there were sales of good quality rods by the petitioner for which there is no finding or foundation. The

sale of properzi rods was controlled by the Aluminium (Control) Order. Under clause 5 of that Order, aluminium rods could be sold to only such person or persons as may be specified by the authorities under the Order. It is quite possible that because of scarcity of good quality properzi rods available in the market, the Indore party paid a somewhat high price for the defective rods which the petitioner sold. But from these stray sales it could not be assumed that the good quality rods were capable of being sold at Satna at the same or higher price. As earlier stated, there was no finding that there was any wholesale market of good quality rods at Satna in the sense explained by the Supreme Court in *Voltas'* case. Admittedly, there was a wholesale market at Renukoot where Hindalco was selling goods of like kind and quality. Therefore, in the absence of a finding of any wholesale market at Satna or any place nearer to it than Renukoot, the price prevailing at Renukoot could alone furnish the basis for valuation of the petitioner's goods.

(3) NO CONTRAVENTION OF RULE 173-C:

It was then contended by the learned counsel for the petitioner that even on the assumption that the price list submitted by the petitioner did not disclose correct prices, it cannot be held that the petitioner contravened Rule 173-C and thereby made itself liable to penalty under Rule 173-Q.

As earlier stated, the penalty has been imposed on the petitioner under Rule 173-Q essentially on the ground of contravention of Rule 173-C. The clauses of Rule 173-Q(1) that are relevant in this connection are clauses (a) and (d). For applicability of either of these clauses, it was necessasy to be proved that the petitioner contravened the provisions

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of Rule 173-C. The obligation laid on a manufacturer by Rule 173-C is that he shall file with the proper Officer for his approval a price list, in such form and in such manner and at such intervals as the Collector may require, showing the price of goods chargeable with duty and the trade discount, if any, allowed in respect thereof to the buyer. The rule further requires that if in the list approved by the proper Officer any alteration becomes necessary for any reason, the assessee shall likewise file a fresh list or an amendment of the list already filed for the approval of such officer. It is not disputed that the petitioner did file a price list as also an amended list in the form and in the manner prescribed by the Collector, showing the prices of the properzi rods manufactured by it. The prices mentioned in both these lists were approved by the proper Officer. The gravamen of the charge against the petitioner is that the prices in these lists were not correctly shown. The question, therefore, to be determined is whether if a manufacturer files a list in the form and in the manner prescribed by Rule 173-C showing the price of excisable goods but the price shown is not correct, can it be said that he cantravenes the provisions of Rule 173-C within the meaning of clauses (a) and (d) of Rule 173-Q (1). In this connection it is relevant to note that section 9 of the Central Excise and Salt Act, which provides for offence and penalty, makes a person liable to a criminal offence not only when he removes an excisable goods in contravention of the any of provisions of the Act or any rule made thereunder, or when he fails to supply any information which he is required by Rules made under this Act to supply but also when he supplies false information. Rule 173-Q on the other hand does not say that a person shall be liable to penalty when the information supplied by him is false. The omission

in this respect in Rule 173-Q is pertinent and it shows that the rule does not intend to penalise a person for giving false information. Further, under sub-rule (2) of Rule 173-C, the proper Officer while approving the price list can modify the value shown in the list so as to bring it to the correct value. Now if the rule requires the manufactures to enter the correct price, he would became liable to penalty under Rule 173-Q on every occasion the proper officer modifies the list. Such a consequence could not have been intended, which supports the view that omission to enter correct price is not a contravention of Rule 173-C within the meaning of Rule 173-Q. So when the petitioner filed a list in the form and in the manner prescribed under Rule 173-C, showing the prices of the goods, it cannot be said that the petitioner contravened the provisions of that rule even on the assumption that the information supplied by it under that rule was false in relation to the prices.

In *Union of India* v. *Shree Ram Durgaprasad* (1) the Supreme Court considered section 12(1) of the Foreign Exchange Regulation Act, 1947, which, as it then stood, prohibited the exportation of any notified goods from India until a declaration supported by such evidence, as may be prescribed or specified, was furnished by the exporter to the prescibed authority that the amount representing the full export value of the goods has been or will, within the prescribed period, be paid in the prescribed manner. The exportation of goods contrary to the prohibition or restriction contained in section 12(1) was made punishable under section 167(8) of the Sea Customs Act, 1878, by recourse to section 23-A of the Fereign Exchange Regulation Act. M/s Shree Ram Durgaprasad, who were respondents before the Supreme

(1) A.I R. 1970 S.C. 1597.

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Court, had furnished declarations in the prescribed form before exporting the goods mentioning therein the full export value of the goods. They had also furnished to the proper authorities the prescribed evidence. The case against them was that they had under-invoiced the goods and had given incorrect information in the declarations. Even accepting that the goods were under-invoiced and the information supplied in the declarations was incorrect, the Supreme Court held that there was no contravention of section 12 (1) as the declarations given satisfied the requirement of that section. It was also held that the declaration could not be considered as nonest, although they did not correctly furnish all the information asked for. It was further held that supplying of wrong information was punishable under section 23 read with section 22 of the Foreign Exchange Regulation Act, which provides that no person, when making an application or declaration to any authority or person for any purpose under the Act, shall given any information or make any statement which he knows has reasonable cause to believe to be false or not true, in any material particular. The reasoning of the Supreme Court in *Shree Ram Durgaprasad's* case supports our view that if a manufacturer files a price list in the form and in manner prescsibed by Rule 173-C stating the price of excisable goods, he cannot be said to have contravened the provisions of that rule within the meaning of Rule 173-Q, even if the price stated by him is not correct, although he can be made liable for an offence under section 9. This conclusion is further supported by the case of *N. B. Sanjana* v. *E. S. & W. Mills* (1). In *Sanjana's case*, the goods were removed after filing the required applications and forms under Rules 9 and 52 of the Central Excise Rules and showing that the goods were

(1) A. I. R. 1971 S. C. 2039.

exempted and after there was a nil assessment made by the proper Officer. Later on, the excise authorities entertained doubt about the fact that the goods were exempted. A notice was issued demanding duty, but it was beyond time under Rule 10. The notice was sought to be supported under Rule 9 (2). But this was negatived by the Supreme Court on the ground that there was no contravention of Rule 9 (1) as necessary applications were made and goods were removed after nil assessment. It will be seen that if the goods were really not exempted, the information supplied in the application or form under Rule 9(1) that the goods were exempted was not true, still it was held that there was no contravention of Rule 9 (1) as the goods were removed after making applications as required by that rule.

Learned counsel for the respondents argued that the petitioner did not disclose its own prices but disclosed the prices of Hindalco and Indal and, therefore, it cannot be said that any prices were disclosed as required by Rule 173-C. In my opinion, there is no merit in this argument. The petitioner adopted the prices at which Hindalco and Indal were selling their properzi rods, because the petitioner's case was that it was not selling any properzi rods and it was only manufacturing for use its own factory or for use of its customers properzi rods from ingots manufactured by Hindalco or Indal. The petitioner explained this position in the letter which it sent along with the price list. The petitioner adopted the prices of Hindalco and Indal as the price of its own properzi rods. Even if the petitioner's goods were sold or were capable of being sold at higher prices, all that can be said is that the petitioner did not disclose correct prices in the price list. But this error did not invalidate the price list to render it non-est.

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I am, therefore, of opinion that even on the assumption that the petitioner did not show the prices correctly in the price lists submitted by it, it did not contravene Rule 173-C and, therefore, there was no basis whatsoever for levy of penalty under Rule 173-Q. The proceedings against the petitioner for levy of penalty were, therefore, entirely misconceived.

(4) BAR OF LIMITATION UNDER SECTION 40 (2):

It was then contended by the learned counsel for the petitioner that the penalty proceedings were barred by limitation under section 40 (2) of the Central Excise and Salt Act. This section, as in force at the relevant time, reads as follows:

> "No suit, prosecution, or other legal proceeding shall be instituted for anything done or ordered to be done under this Act after the expiration of six months from the accrual of the cause of action or from the date of the act or order complained of."

The argument of the learned counsel is that the expression "other legal proceeding" in this section should be interpreted in its natural sense to mean any proceeding taken in a manner prescribed by law or in pursuance of law irrespective of whether it is taken in a Court of law or before any authority or tribunal. Reference in this connection was made to *G. G. in Council* v. *Shiromani Sugar Mills* (1), where it was held that a proceeding under section 46(2) of the Income-tax Act, 1922, before the revenue authorities for recovery of income-tax dues was a legal proceeding within the meaning of section 171 of Companies Act, 1913. Reference was also made to *Abdul Aziz* v. *State of Bombay* (2) and *Jagmohandas*

(1) A. I. R. 1946 F. C. 16. (2) A.I.R. 1958 Bom. 279.

v. *Jamnadas* (1). In the Bombay case, it was held that assessment proceedings were "any legal proceeding" within the meaning of section 48 of the Bombay Sales Tax Act, 1953, and in the Gujarat case it was held that a proceeding before the District Court for appointment of a member of the Managing Committee of a trust was "any legal proceeding" within section 56-B of the Bombay Public Trusts Act.

Section 40(2) of the Act came up for construction before the Supreme Court in *Public Prosecutor, Madras* v. *R. Raju* (2). In that case it was held that section 40(2) was not confined in operation to Government servants and that the section was applicable to any person including an assessee. It was further held that non-compliance with the provisions of the Act or Rules by omitting to do what they enjoin will be anything done or ordered to be done under the Act within the meaning of section 40 (2). The limitation for taking penalty proceedings under Rule 173-Q for contravention of Rule 173-C with a view to evade duty, therefore, will be governed by section 40(2) in case it is held that such proceedings are "other legal proceeding" within the meaning of that section. So the question that falls for our consideration is the ambit and scope of the expression "other legal proceeding" as it occurs in section 40(2). It may be at once conceded that the expression "other legal proceeding" is ordinarily wide enough to include any proceeding taken in accordanc with law, whether so taken in a Court of law or before any authority or tribunal. The question, however, is whether in the context of section 40(2) this wide meaning should be given to the said expression. Now the language of section 40 (2) is: "no suit, prosecution or other legal proceeding shall be instituted". "Suit" and "prosecution" which precede the expression "other legal proceeding"

(1) A. I. R. 1965 Guj. 181. (2) A I. R. 1972 S. C. 2504.

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can be taken only in a Court of law. "Suit" and "prosecution" belong to a class or category of lagal proceeding which can be described as judicial proceedings or proceedings taken in a Court of law. This class or category is not exhausted by "suit" and "prosecution" for "suit" is not comprehensive enough to include civil preceedings which are instituted by filing petitions or applications. In this situation, the rule of *ejusdem generis* persuades us to hold that the general words "other legal proceeding" are limited to the same category of legal proceeding of which "suit" and "prosecution" are examples. In other words, the expression "other legal proceeding" in the context of section 40(2) bears a restrictive meaning conveying the idea of judicial proceedings or proceedings taken in a Court of law. The rule of *ejusdem generis* is founded on the reasoning that had the Legislature intended the general words to be used in their unrestricted sense, it would have made no mention of the specific words as they, in such a case, would be superfluous. The rule applies when the following conditions exist: (1) the statute contains an enumeration of specific words; (ii) the subjects of enumeration constitute a class or category; (iii) that class or category is not exhausted by the enumeration; (iv) the general term follows the enumeration; and (v) (v) there is on indication of a different legislative intent. (See *Amar Chandra* v. *Excise Collector, Tripura* (1). All these conditions for applicability of the rule are here satisfied. There is no indication in section 40(2) or elsewhere in the Act that the general words "other legal proceeding" should be given their wide meaning and should not be construed in a limited sense by applying the rule of *ejusdem generis*. Indeed, the word "Instituted" in section 40(2) is a pointer in the direction that the expression "other legal

(1) A. I. R. 1972 S. C. 1863, at p. 1868; Sutherland, Vol. 2, pp. 399 and 400.

proceeding" is limited to preceeding taken in a Court of law and does not cover proceedings before departmental authorities. A departmental proceeding like a penalty proceeding is commenced by issue of a notice to the assessee by the adjudicating authority. It would be inappropriate to say that by issuing a notice the authority concerned institutes a proceeding before itself. The word "institute" is commonly used in the context of proceedings instituted in a Court of law like suits or prosecutions. There are also other indications that the wide meaning of the expression "other legal proceeding" was not intended by the Legislature. Now, if the words "other legal proceeding" are construed in a wide sense, recovery proceedings for realising duty and penalty under section 11 of the Act before the authorised officer and the Collector, on the assessee failing to pay same, will be governed by the rule of six months' limitation provided in section 40(2). Similarly, the proceeding for re-assessment under Rule 173-J read with Rule 10 will be governed by section 40(2) and the period of limitation of one year prescribed by Rule 173-J would become invalid. These consequences are somewhat startling and could not have been intended by the Legislature.

It was suggested that no judicial proceeding other than a suit or prosecution can be thought of "for anything done or ordered to be done under the Act" and therefore, if the expression "legal proceeding" in section 40(2) is construed in a limited sense as restricted to judicial proceedings' it will have no practical application and will become redundant. In my opinion, it is not correct to say that no judicial proceeding other than a suit or prosecution can be contemplated in the context of "anything done or ordered to be done under the Act." An application

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to sue as a pauper, which is not a suit until permission to sue is granted, will be a judicial proceeding which a person may institute against the Central Government or a Government servant for anything done or ordered to be done under the Act. Further, the Government may institute a petition for winding up against a company which has omitted to pay excise duty or penalty which it is ordered to pay under the provisions of the Act. There is authority in support of the view that the Government can make use of the machinery of winding up of a company in the High Court for enforcing a debt in the nature of revenue from the company: (See *Md. Amin Bros.* v. *Dominion of India* (1)). So a winding up petition may furnish another example of a judicial proceeding which, though not a suit or prosecution, may be taken for anything done or ordered to be done under the Act. An example of the same nature may be an insolvency petition under the Insolvency Acts. These examples are not exhaustive but they go to show that it is not a valid argument that the expsession "other legal proceeding" in section 40(2) will become redundant in case it is construed in a limited sense to mean judicial proceedings.

The cases relied upon on behalf of the petitioner are distinguishable as they relate to construction of enactments where the language used was construed was different. In S. 171 of the Companies Act, 1931, which was construed by the Federal Court in *Shiromani Sugar Mills'* case, the words used were "no suit or other legal proceeding shall be proceeded with or commenced". The mention of only one specific word "suit" could not obviously give rise to the application of *ejusdem generis* rule for construing the general words "other legal proceeding" in section

(1) A. I. R. 1952 Cal. 323.

171. We may here mention that in construing section 446 of the Companies Act, 1956, which corresponds to section 171 of the Companies Act, 1913, the Supreme Court held that the expression "other legal proceeding" will not include re-assessment proceedings under section 147 of the Income-tax Act, 1961: (see *S. V. Kondaskar* v. *V. M. Deshpande* (1)). In the Gujarat case of *Jagmohandas* v. *Jamnadas* (*supra*) the material words were "any suit or legal proceeding" and Bhagwati, J., as he then was, specifically held that there being only one species. namely, suit, it was not possible to find the genus and the rule of *ejusdem generis* could not be applied. In the Bombay case of *Abdul Aziz* v. *State of Bombay* (*supra*), the words used were only "any legal proceeding" and thus the general words were not used in association with any word of specific import. Reference was also made to case of *Secretary to the Government of India and others* v. *A. Loganathan* (2), where a Division Bench of the Madras High Court held that assessment proceedings are not taken for anything done or ordered to be done under the Central Excise Act, therefore, the priod of limitation prescribed by section 40 (2) is not applicable to such proceedings. The case is not very helpful in determining the meaning of the expression "other legal proceeding" as used in the section.

It was also argued by the learned counsel for the petitioner that a narrow construction of section 40(2) will open it to challenge on the ground of discrimination that when the limitation of six months is prescribed for a criminal offence under section 9, there is no reasonable basis why there should be no limitation for penalty proceedings under Rule 173-Q. In my opinion, there is no merit in this argument.

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(1) A.I.R. 1972 S. C. 878.

(2) Writ Appeal No. 134 of 1974, decided on the 16th July 1975.

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All persons liable to prosecution under section 9 would be governed by the same rule of limitation of six months without any discrimination. Similarly, all persons against whom penalty preceedings can be taken under Rule 173-Q would not be governed by any period of limitation without any discrimination. Moreover, there is a basic distinction between a prosecution under section 9 and a penalty proceeding under rule 173-Q. A prosecution may deprive a person of his personal liberty in that he may be sentenced to a term of imprisonment. On the other hand, a penalty proceeding under Rule 173-Q can only deprive a person of his property. In our opinion, no reasonable doubt can be raised as to the validity of section 40 (2) or Rule 173-Q on the ground that no period of limitation is prescribed for proceedings under that Rule, although a period of six months is prescribed for a prosecution under section 9 of the Act. The plea for a wide construction of section 40 (2) of the Act on this ground must, therefore, fail.

In my opinion, the penalty proceedings taken by the Collector against the petitioner under Rule 173-Q read with section 33 of the Act were not governed by the period of limitation prescribed by section 40 (2) of the Act.

(5) BAR OF FINALITY UNDER SECTION 35 (2):

It was next contended by the learned counsel for the petitioner that by the order dated 30th July 1974 the Appellate Collector in appeal confirmed the order of the Assistant Collector dated 9th April 1973 granting refund and allowed further refund to the petitioner, and, as this order became final under section 35 (2), it was not open to the Collector, in penalty proceedings under Rule 173-Q, to hold that

the assessable value on the basis of which refund was ordered was wrong. In other words, it was contended that penalty proceedings, if at all, could be taken only on the basis that the assessable value accepted in proceeding for refund was the correct value. It was argued that as the order of the Appellate Collector became final under section 35 (2), subject to the power of revision under seetion 36, it was binding in all proceedings taken under other provisions between the parties.

In my opinion, there is no merit in this argument. The question before the Collector in the penalty proceedings under Rule 173-Q was whether the petitioner mis-stated the price of properzi rods in the price list submitted by it with a view to evade payment of duty. The inquiry into this question which arose on the basis that the petitioner sold certain of its goods to the Indore party or at Ahmedabad or Bombay at a much higher price than what was disclosed in the price list was not under gone in the proceedings for assessment or refund. Probably, then the fact that the petitioner made sales of certain properzi rods to the Indore party or at Ahmedabad or Bombay was not even known to the authorities concerned. When the question whether the petitioner submitted wrong price list with a view to evade payment of duty was not enquired into in the refund proceedings, it is difficult to accept the argument that by implication the assessable value on the basis of which the refund order proceeded became binding in penalty proceedings. The word "final" as it occurs in section 35(2) only means that the order passed in appeal under section 35 (1) would not be open to any further appeal or revision except as mentioned in the section. Section 35(2), in my opinion, does not prohibit taking of original preceedings, such as proceedings for

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re-assessment under Rule 10 or proceedings for imposition of penalty under Rule 173-Q, on the ground that the assessee by contravening certain provisions or by making false statements evaded payment of duty. Under Section 254 (4) of the Income-tax Act, 1961, orders passed in appeal by the Appellate Tribunal are final, save as provided in section 256, which deals with reference to High Court. In spite of this finality in section 254(4), which in terms is not subject to section 147, it has never been doubted that re-assessment proceedings can be taken under section 147 for reopening an assessment which has been confirmed in appeal and attained finality under section 254 (4) : (See In *Re. Halder & Sons* (1), decision on the corresponding provisions of the Income tax Act, 1922). The Supreme Court in *I. T. Officer, Calcutta* v. *Lakhmani* (2), in the context of reopening of assessment under section 147 of the Income-tax Act, 1961, recently observed that "the provisions of the Act in this respect depart from the normal rule that there should be, subject to right of appeal and revision, finality about orders made in judicial and *quasi*-judicial proceedings". In my opinion, similar observations can be made in relation to the Central Excise and Salt Act and the Rules made thereunder. The scheme of the Rules is to provide for proceeding at three stages. First is the stage of assessment under Rule 173-I. The second stage is of re-assessment under Rule 10 read with Rule 173-J. The third is the stage of the proceeding under Rule 173-Q, which proceedings are combination of penalty proceedings and proceedings for best judgment assessment. The original proceedings for re-assessment under Rule 10 and penalty proceedings and proceedings for best judgment assessment under Rule 173-Q can be taken even after the assessment under

(1) 1947 I. T. R. 79. (2) A. I. R. 1976 S. C. 1753 at. p. 1760.

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Rule 173-I has become final in appeal. Similarly, the finality of the refund order in appeal cannot affect the jurisdiction to initiate these original proceedings under Rule 10 and Rule 173-Q.

In *Amalgamated Coalfields* v. *Janapada Sabha* (1) a case on which the learned counsel for the petitioner placed reliance, it was held that the assessment of coal cess which became final under the rules became binding on the parties and could not be reopened because in the rules there was no provision for re-assessment. This case has, therefore, no application here. The learned counsel also relied upon the cases of *Collector of Central Excise* v. *Pallappa* (2) and *The Marsden Spg. & Co. Ltd.* v. *Shri L. V. Pol and others* (3). In the Madras case, penalty was imposed on the assessee by the Collector under Rule 223-A of the Central Excise Rules. The Central Board of Revenue in appeal vacated the order of the Collector. The Collector then started *de novo* inquiry in the same matter and it was held by the High Court that as there was no order of remand passed by the Central Board of Revenue while vacating the order of the Collector, the Collector had no jurisdiction to hold further inquiry in the same matter and the order of the Board being final was binding on the parties. In the Gujarat case, the Superintendent, Central Excise, imposed penalty under Rule 226 and demanded duty under Rule 9 (2) of the Central Excise Rules. The assessee went up in appeal and the Deputy Collector set aside the order of the Superintendent. Another notice was again issued for penalty under Rule 226 and for duty under Rule 9 (2). It was held by the High Court that as there was no remand order made by the appellate authority, the same matter could not be reopened by the

(1) A I. R. 1964 S.C. 1013.
(2) A. I. R. 1964 Mad. 111. (3) I. L. R. 1965 Guj. 240.

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Superintendent, The ratio of these two cases, which are similar, is that when a proceeding is terminated by an appellate order, the same proceeding cannot be restarted by the original authority in the absence of remand. These cases have no application before us, because, in the instant case the Collector did not reopen the refund proceedings which attained finality in appeal, but started entirely different proceedings under Rule 173-Q.

The learned counsel for the petitioner also referred to the case of *Commr. of Sales Tax. M. P. V. Amarjeet Singh* (1). It was held in this case that an order in appeal which became final under section 22 (5) of the Central Provinces and Berar Sales Tax Act, 1947, could not be revised by the Commissioner under section 22-B Section 22 (5) of the Act provided that "every order passed in appeal shall, subject to the provisions of sections 22-A and 23, be final". On a construction of this section, it was held that power of revision under section 22-B could not be exercised against an appellate order. The position in the instant case, as already noticed, is entirely different. Here the appellate order relating to refund was not challenged in further appeal or revision contrary to the finality clause. What was done was that independent original proceedings under Rule 173-Q were taken against the petitioner for levying penalty on the ground that it had contravened Rule 173-C by mis-stating the prices of the properzi rods and by not showing the correct prices with a view to evade duty. This charge against the petitioner was levelled on the allegations that the petitioner had sold properzi rods at a much higher price than shown by it in the price lists. These matters were not enquired into either in the proceedings for a assessment or in

(1) 14 S T. C. 501 (M. P.)

the proceedings for refund. The order of the Appellate Collector in the refund proceedings, therefore, had no bearing upon the penalty proceedings. The Collector was not bound in the penalty proceedings to accept the assessable value of the goods on the basis of which the refund was ordered. If the Collector rightly found that the price of the goods was mis-stated with a view to evade duty and if this legally constituted contravention of Rule 173-C., the petitioner could be mad liable to pay penalty. It is another matter that on merits I have come to the conclusion that there was no contravention of Rule 173-C and, therefore, the Collector was not entitled to commence penalty proceedings against the petitioner for the period in question.

(6) UNREASONABLE EXERCISE OF STATUTORY POWER:

It was then contended by the learned counsel for the petitioner that even if there were technical breaches of Rule 173-C, the Collector should not have, in the circumstances of the case, imposed penalty on the petitioner. In this connection, it was pointed out that there were no clear out principles for valuing properzi rods manufactured by job-workers for cable manufacturers and the Central Government on 16th May 1972 recommended that such properzi rods should be valued by adding a sum of Rs.500/- per m.t. to the prices of the ingots used in the manufacture of rods. It was further pointed out that on this principle there was no evasion of duty by the petitioner; rather it had paid duty in excess which was refunded to it later. It was also submitted that as the petitioner throughout acted with the concurrence and approval of the excise authorities and in conformity with the decision of the Board and the Central Government, it was not reasonable for

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the Collector to exercise his statutory powers of imposing penalty. Reliance in this connection was placed on the case of *Hindustan Steel Ltd.* v. *State of Orissa* (1) in which it was laid down in the context of Orissa Sales Tax Act that an order imposing penalty for failure to carry out a statutory obligation is the result of a *quasi*-criminal proceeding, and penalty will not ordinarily be imposed unless the party obliged either acted deliberately in defiance of law or was guilty of conduct contumacious or dishonest, or acted in conscious disregard of its obligation. It was further observed that penalty will not also be imposed merely because it is lawful to do so, and that whether penalty should be imposed for failure to perform a statutory obligation is a matter of discretion of the authority to be exercised judicially and on a consideration of all the relevant circumstances.

In the instant case, the Collector started penalty proceedings and imposed penalty on the ground that the petitioner concealed the sales made to the Indore party and the sales made by it at Ahmedabad and Bombay. In the opinion of the Collector, the properzi rods removed by the petitioner during the relevant period ought to have been valued at the price obtained by it from the Indore party. Now, if this finding of the Collector be correct, there can be no doubt that there was not merely technical breach of law but the true price of the properzi rods was suppressed with a view to evade duty. So on the findings reached by the Collector it cannot be said that he imposed penalty merely for technical breaches or acted unreasonably in the exercise of his discertion in imposing penalty.

The letter of the Central Government dated 16th

(1) A. I. R. 1970 S.C. 253.

May 1972 communicated to the excise authorities the decision taken by the Central Board of Excise that for assessments during the period from 1st March 1970 to 23rd May 1971 the assessable value of properzi rods should be determined by adding a sum of Rs. 510/- per m.t. to the price at which the particular lot of ingots used in the manufacture of rods was purchased. The argument of the learned counsel for the respondents is that this is not a letter under the authority of the Board; but this argument cannot be accepted. The Board is a respondent in this petition and it has not been denied that the letter was issued with its concurrence or authority. The learned counsel for the respondents has further argued that the directions in the said letter, even if they emanated from the Board, could not fetter the *quasi*-judicial powers of the excise authorities exercisable under the Central Excise Act and the Rules. In my opinion, this argument has to be accepted. The Board has a statutory power under Rule 233 to issue supplementary instructions; but these instructions cannot go against statutory provisions and fetter the *quasi*-judicial powers of the excise authorities: [See *Orient Paper Mills* v. *Union of India* (1)]. The method of valuation of excisable goods is laid down in section 4 of the Act. The Board cannot prescribe different method of valuation by issuing supplementary instructions. The excise authorities in assessing excise duty perform a *quasi*-judicial function and have to follow the principles of valuation laid down in section 4 and the directions issued under the authority of the Board in that matter were not binding on them. Therefore, if the Collector was right in holding that there was contravention of Rule 173-C, because the price at which sales were made to the Indore party represented to correct wholesale price

(1) A.I.R. 1969 S. C. 48.

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at Satna of the properzi rods removed by the petitioner which ought to have been entered in the price list, his order could not be challenged on the ground that he departed from the instructions contained in the Central Government's letter, or on the ground that he exercised his statutory power of imposing penaly unreasonably. It is a different matter that the findings on which the Collector proceeded cannot be sustained.

(7) ALTERNATIVE REMEDY:

Learned counsel for the respondents raised a preliminary objection that in view of the remedy of appeal which was open to the petitioner under the Central Excise and Salt Act, it will not be a sound exercise of discretion on our part to interfere under Article 226. The petitioner has filed appeals against the impugned orders and those appeals are pending. The petitioner's stand is that it has done so as a matter of abundant caution. Existence of alternative remedy is no doubt taken into account in deciding whether interference should be made under Article 226; but it does not take away the jurisdiction of the High Court to interfere in appropriate cases. Indeed, interference has been made under Article 226 in proper cases even at the stage of notice when it was found that the notice for re-assessment or for imposition of penalty was clearly in excess of authority: [See for example- *N. B. Sanjana* v. *E. S. & W. Mills* (1)]. In the instant case, on the facts admitted and found, there was no contravention of any rule within the meaning of Rule 173-Q and the penalty proceedings were misconceived. There was denial of natural justice in taking into account the material which was not put to the petitioner. Further, the Collector in finding out the assessable value of

(1) A. I. R. 1971 S. C. 2039.

properzi rods removed by the petitioner during the relevant period, proceeded on wrong principles contrary to those laid down in section 4. In the circumstances, it would not be a sound exercise of discretion on our part to dismiss the writ petition on the ground that the petitioner can get redress in the appeals filed by it.

I allow the petition and quash the impugned show cause notices issued by the Assistant Collector and the orders passed by the Collector, Central Excise, Nagpur, in all the thirteen cases. The petitioner will recover costs of this petition from the Union of India. Counsel's fee Rs. 1, 000/-, if certified. The security deposit shall be refunded to the petitioner.

## OPINION

PER RAINA J.— I agree that this petition should be allowed for the reasons given by my learned brother, Singh, J.; but I would like to reserve my opinion on the question whether the imposition of such a heavy penalty was in any case justified in view of the decision of the Supreme Court in *Hindustan Steel Ltd.* v. *State of Orissa* (1). I am sure the Collector would keep in view the observations of their Lordships in that case whenever a question of mposition of penalty may arise.

## ORDER

(By Court)

We allow the petition and quash the impugned show cause notices issued by the Assistant Collector and the orders passed by the Collector, Central

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(1) A. I. R. 1970 S. C. 253.

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Excise, Nagpur, in all the thirteen cases. The petitioner will recover costs of this petition from the Union of India. Counsel's fee Rs. 1, 000/, if certified. The security deposit shall be refunded to the petitioner.

*Petition allowed.*

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## MISCELLANEOUS PETITION

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

1974

May 12

TEJPAL JAIN, Petitioner*

*v.*

THE COLLECTOR, JABALPUR and others, Respondents.

*Accommodation Control Act, Madhya Pradesh (XLI of 1961)—Section 39(1) and (2)—Limitation of 15 days for passing order—Applicable only when landlord gives information under Section 39(1)—Section 39(2)—Conditions necessary for passing order under this provision—Monthly rent of accommodation Rs. 25/—Not necessary for landlord to give intimation regarding accommodation having fallen vacant—Section 39(2) and (5)—Case falling within exception in Section 39(5)—Section 39(2) is out of the way—Section 39(5)—First exception—Does not contemplate fixing of "rental value"—Period between accommodation falling vacant and order of allotment immaterial—Section 39(2)—Not limited in its operation to let-out accommodation—Covers cases of accommodation which "has fallen vacant or is likely to fall vacant"—Not restricted to accommodation let out to a tenant—Implications and extent of words "any accommodation which has fallen vacant or is likely to fall vacant" in.*

Limitation on the exercise of the power that the order of allotment must be made within 15 days under section 39(2) of the

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*Miscellaneous Petition No. 42 of 1974.

Act, comes into play only when information is given by the landlord under Section 39 (1).

When a case falls within any of the exceptions contained in sub-section (5) of Section 39, sub-section (2) of section 39 remains completely out of the way, and then there is complete lack of power to make any allotment.

*Tulsiram* v. *Rent Controlling Authority, Jabalpur* (1); referred to.

The first exception in Section 39 (5) of the Act applies only in respect of the accommodation which was let out to a tenant for residential purposes and the monthly rent did not exceed Rs. 25/-. There is no provision in this exception to determine monthly "rental value". The period which may have elapsed between the accommodation falling vacant (owing to the last tenant vacating it) and the order of allotment, is immaterial, provided the accommodation remains vacant all the while so that the order of allotment relates back to its having fallen vacant on the last tenant vacating it.

Section 39(2) is not limited in its operation to accommodations which are let out to tenants.

Sub-section (2) of Section 39 is wide enough to cover every case where an accommodation 'has fallen vacant' or 'is likely to fall vacant'. There are no words in this Section or in any other Section which confine the ambit of sub-section (2) to an accommodation which was let out to a tenant. There is nothing in this Section which excludes an accommodation which was not let out to a tenant.

The expression "any accommodation which has fallen vacant or is likely to fall vacant" in Section 39(2) of the Act does not limit its operation to those accommodations which were let out to tenants. It is wide and general in its application.

The words "has fallen vacant" or "is likely to fall vacant" are eloquent enough of a change from occupation to vacation. Power under sub-section (2) can be exercised only when the accommodation was in occupation and then it falls vacant because the person in occupation vacates it. This is the *sine-qua-non*.

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(1) 1969 M. P. L. J. 475.

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*Tejpal Jain* v. *The Collector, Jabalpur*

The order of allotment is *ultra vires* Section 39(2) if it was made merely because the accommodation was found "lying" vacant. The order of allotment is *intra vires* the section because the accommodation has "fallen vacant" and it is immaterial when it fell vacant.

*J. P. Dubey* for the petitioner.

*J. P. Bajpai* Deputy Advocate General for respondents nos. 1 to 3.

*Fakruddin* and *S. K. Shukla* for respondent no. 4.

*Cur adv. vult.*

ORDER

The Order of the Court was delivered by SHIV DAYAL J.—By this petition under Articles 226/227 of the Constitution, an order of allotment passed by the Authorised Officer, Jabalpur, under section 39(2) of the M. P. Accommodation Control Act, 1961, (hereinafter referred to as the Act), is challenged. The first contention is that the impugned order relates to "house No. 271, Madhatal, Jabalpur", while in fact the petitioner was dispossessed from his house No. 275/1, possession of which was given to Manoharlal Gupta (respondent No. 4, the allottee). On a perusal of the record of the Authorised Officer, we found that house No. 271, Madhatal, Jabalpur, was mentioned throughout. The petitioner filed objections before the Authorised Officer in which he stated that "house No. 271, Madhatal, Jabalpur" was in a dilapidated condition and that as soon as he would get the sale proceeds of house No. 273 (another house belonging to him, which he has sold to U. S. Tiwari), he would rebuild the house and then reside in it himself.

On January 19, 1974, the petitioner told us that

he is the owner of the following houses :—

No. 272 in which U. S. Tiwari is the tenant;

No. 272/1 in which Devaji Tailor is the tenant;

No. 273 in respect of which the petitioner has entered into an agreement of sale with U. S. Tiwari and in the first floor of which he himself resides;

No. 274;

No. 275;

No. 275/1;

No. 276 in which one Soni is the tenant; and

No. 277.

He stated before us that house No. 271 does not belong to him and he is not concerned with it, and that it was a mistake of the typist when in his objection filed before the Authorised Officer, he said that house No. 271 was in a dilapidated condition and he would rebuild it after selling his house No. 273. He stated before us that in fact he meant to say all that about house No. 275/1. He further admitted that in fact the house which has been allotted to M. L. Gupta (respondent No. 4) is house No. 275/1 and its possession has been given by the Collector to the allottee.

It is abundantly clear that the accommodation in respect of which proceedings were taken and allotment made and possession delivered to the allottee really bears No. 275/1, while the Authorised Officer was under the impression that its number was 271 and the petitioner also in his objection described the house as No. 271. However, inspite of the confusion or the mistake as regards the number

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of the house, the Authorised Officer as well as the petitioner, as also the allottee, were certain about the indentity of the accommodation. We are, therefore, of the view that on that ground the proceedings are not vitiated and the first contention must be rejected.

The second contention is that house No. 275/1 (which is the correct number of the accommodation in question) is exempt from the operation of section 39(2) of the Act, inasmuch as the last tenant who occupied it was Baijnath, paying monthly rent of Rs. 25/-. The petitioner's contention is that once an accommodation is let out to a tenant, it is the rent paid by him which determines the application of section 39(5). Learned Deputy Advocate General contends that occupation by a tenant 7 years ago is of no consequence and cannot be taken into consideration for the purposes of section 39(5). His argument is that the section contemplates recent possession of a tenant, that is, soon before the order of allotment is made. He further argued that in such a case it is the rental value of the accommodation at the time of allotment which should be seen. Apart from all this, his last contention is that the house fell vacant when the petitioner himself having been in occupation, vacated it. We shall postpone consideration of this last contention for a while and first deal with the petitioner's contentions.

To appreciate these contentions, we must state the facts which, at this stage, are not in controversy. (1) The petitioner and another purchased the house (comprising of Municipal Corporation Nos. 272, 272/1,273,274,275,275/1,276 and 277 ) situate at Madhatal, Jabalpur, from one Hariram, Smt. Tarabai and Mulkraj, under a deed of sale dated July

18,1966. (2) Prior to this, the accommodation in question (that is the portion bearing Municipal Corporation No. 275/1) was in the occupation of one Baijnath as tenant. He was paying Rs. 25/- per month as rent (and this has been ascertained on investigation by the Authorised Officer himself during the pendency of this writ petition). (3) Baijnath had vacated the accommodation before the execution of the above sale deed. In the sale deed, the recitals in clause (h) are as follows:-

> "The portion which was in occupation of Baijnath tenant is vacant and its possession has been delivered to the purchasers (Indrapal Singhai and Tejpal Singhai) today and they have locked the same. Its Corporation No. is 275/1."

From the date of sale to December 29,1973, the accommodation remained in possession of the petitioner. We shall refer to this again while dealing with the last contention of the learned Deputy Advocate General. (5) On the last mentioned date, vacant possession was given to M. L. Gupta (respondent No. 4) in pursuance of the impugned order of allotment dated December 11,1973.

From the above facts, it is clear that Baijnath was the last tenant. The accommodation fell vacant within the meaning of section 39(2) of the Act when Baijnath vacated it. That was in the year 1966 or earlier. An order of allotment could be passed at that time under section 39(2) of the Act. At this stage, we may mention a point which was faintly raised by the petitioner before us. It was contended that after the expiry of the statutory period of 15 days, no order of allotment could be made. In our opinion, that contention is misconceived. Limitation on the exercise of the power that the order of allotment must be made within 15 days under section

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39(2) of the Act, comes into play only when information is given by the landlord under section 39(1). But where such information is not given, limitation of 15 days is out of the way. Here, it is not the petitioner's case that he or his predecessor-in-title had given information to the Collector or the Authorised Officer as required by section 39(1).

We now come back to the petitioner's contention that the accommodation was, by virtue of section 39(5)(a) exempt from the operation of section 39(2). That exception reads as follows:-

> "(5) Nothing in this section shall apply to-
>
> (a) any accommodation used for residential purposes the monthly rent of which does not exceed twenty-five rupees."

There can be no doubt that the *sine qua non* for an order under section 39(2) is that the "accommodation has fallen vacant or is likely to fall vacant". If, in the present case, the accommodation fell vacant for the purposes of section 39(2), when Baijnath vacated it in or about the year 1966, then undoubtedly the impugned order of allotment is *ultra vires* the section, as the accommodation is exempt from its operation by virtue of section 39(5)(a). When Baijnath vacated it in or about the year 1966, no duty was cast on the then landlords to give information to the Collector or the Authorised Officer under section 39(1) because "nothing in this section" applies to this accommodation, the monthly rent being Rs. 25/-, that is, not exeeeding Rs. 25/-. Likewise, it was no duty of the petitioner, as purchaser, to give such information under section 39(1). If that state of affairs continued upto the date of the order of allotment and if the expression "has fallen vacant" related back to that point of time,

when Baijnath vacated, the order of allotment would be bad even though passed after 7 years. When a case falls within any of the exceptions contained in sub-section (5) of section 39, sub-section (2) of section 39 remains completely out of the way, and then there is complete lack of power to make any allotment. This view was also taken in *Tulsiram* v. *Rent Controlling Authority, Jabalpur* (1). Thus, if that is all, the petitioner's contention would prevail and the order of allotment would be struck down.

We are not persuaded to accept the contention of the learned Advocate General that where an accommodation has been lying vacant for a large number of years, the monthly rent which was paid by the last tenant should be forgotten and ignored, and there should be fresh assessment of the monthly rental value in order to see whether it is exceeding Rs. 25/- for the purposes of applying the first exception. In our opinion, the first exception applies only in respect of the accommodation which was let out to a tenant for residential purposes and the monthly rent did not exceed Rs. 25/-. There is no provision in this exception to determine monthly "rental value". The period which may have elapsed between the accommodation falling vacant (owing to the last tenant vacating it) and the order of allotment, is immaterial, provided the accommodation remains vacant all the while so that the order of allotment relates back to its having fallen vacant on the last tenant vacating it. As we are going to say after a little while, sub-section (2) of section 39 is not restricted in its scope to an accommodation falling vacant on being vacated by a "tenant". The section is not limited in its operation to accommodations which are let out to tenants. An accommodation

(1) 1969 M.P.L.J. 475=1969 J. L. J. 681.

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which was never let out to any tenant can also be subject to the control of letting as enacted in the section. Take, for instance, the case of a licensee. In that case, when the accommodation has fallen vacant or is likely to fall vacant, an order of allotment can be made under section 39(2). We shall presently deal with this point further.

This brings us to a rather new contention raised by the learned Deputy Advocate General. He urges that if an accommodation is found vacant for several years and it is not in actual occupation of the landlord, it is 'vacant' within the meaning of sub-section (2) of section 39, and it must be completely dissociated with the fact of its having been occupied and vacated by a tenant long ago. In such a case, the accommodation must be made available for allotment; the landlord will get his rent.

Shri Dube's argument on the other hand is that sub-section (2) of section 39 is limited in its operation to those accommodations which are let out to tenants, so that an accommodation which was never let out to a tenant cannot be subjected to the control of letting under section 39 (2).

On giving a considered thought we are of the opinion that sub-section (2) is wide enough to cover every case where an accommodation 'has fallen vacant' or 'is likely to fall vacant'. There are no words in this section or in any other section which confine the ambit of sub-section (2) to an accommodation which was let out to a tenant. There is nothing in this section which excludes an accommodation which was not let out to a tenant. We are clearly of the view that sub-section (2) comes into play as soon as an accommodation 'falls vacant' or is 'likely to fall vacant' irrespective

of the fact whether the falling vacant is due to a tenant vacating it or otherwise. The accommodation may 'fall vacant' in a variety of circumstances, vacating by a tenant is only one of them. For instance, where a lessee vacates an accommodation, or a usufructuary mortgagee vacates an accommodation, or even where the owner, being in actual occupation of the accommodation, vacates it and shifts to another one; in all these illustrations it must be said that the accommodation 'has fallen vacant'. There is nothing in the section for which it can be said that it does not apply although the accommodation has 'fallen vacant'. If the intention of the legislature was to limit the operation of the sub-section to the case of tenants only, nothing was easier than to employ such words in the section.

It was an argument that sub-section (c) of section 5 throws light on the intention of the legislature to limit sub-section (2) to the case of a tenant vacating an accommodation. We are not persuaded to accept this argument. There are 4 exceptions which are enumerated in sub-section (5). They are independent of one another. There is no nexus *inter se* between them. Clause (a) of sub-section (5) applies to a case where an accommodation, used for residential purposes, is vacated by a tenant as is indicated by the words "monthly rent". Clause (b) applies when an accommodation used for non-residential purposes is vacated by a tenant. Clause (c) steps in and prevents an accommodation to be allotted under the section, if it has fallen vacant in pursuance of an order passed under the Act, for the purpose of occupation by the landlord, e.g. when a decree of eviction is passed by virtue of section 12 (1)(e) or (f). Thus clause (c) means that where a decree for eviction is passed and in pursuance of it the tenant is

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evicted and the accommodation falls vacant, but for clause (c) of sub-section (5), the object and intent of clauses (e) and (f) of section 12 would have been defeated by section 39(2). Therefore, clause (c) of section 39(5) is only harmonious with clauses (e) and (f) of section 12(1).

The view we take finds support in clause (b) of section 41. The section reads as follows:-

> "41. Liability of person allotted accommodation to pay rent.-Where an accommodation is allotted to a person under sub-section (2) of section 39 or section 40-A, he shall be deemed to be a tenant of the landlord of such accommodation and shall be liable to pay therefor from the date of the vacation of the accommodation-
>
> x x x x
>
> (b) where the accommodation was not previously in occupation of a tenant, such rent may be determined by the Rent Controlling Authority in accordance with the principles specified in section 7. Provided that .. .... ".

This section creates a statutory tenency by legal fiction between the landlord and the allottee and then provides for payment of rent by the allottee-tenant to the landlord. The mode of determination of rent is also provided in this section. Clause (a) applies to an accommodation which was in occupation of a tenant and is vacated by him. Clause (b) applies to a case where the accommodation was 'not' in occupation of a tenant and in that case rent has to be determined by the Rent Controlling Authority in accordance with the principles specified in section 7 (standard rent).

The result of this discussion is that the expression "any accommodation which has fallen vacant

or is likely to fall vacant" in section 39(2) of the Act does not limit its operation to those accommodations which were let out to tenants. It is wide and general in its application. The section comes into play in every case where an accommodation 'falls vacant' or is likely 'to fall vacant'. However, it must be remembered that "falling vacant" is not the same thing as "lying vacant". The words "has fallen vacant" or "is likely to fall vacant" are eloquent enough of a change from occupation to vacation. Power under sub-section (2) can be exercised only when the accommodation was in occupation and then it falls vacant because the person in occupation vacates it. This is the *sine-quo-non*. This can be illustrated thus.-'A' builds a house but after its construction, does not occupy it, nor allows anyone else to occupy it either as a tenant or otherwise. It cannot be said that the accommodation has "fallen vacant", although it will be said that it is 'lying vacant'. The expression "has fallen vacant" presupposes that it was in the occupation of someone. The importance of this distinction has to be realized in this context at the point of time when order of allotment is to be made under section 39(2), which can be made only in the case of an accommodation "which has fallen vacant or is likely to fall vacant". It is a different matter that an accommodation which has not fallen vacant but is lying vacant may be made available in any other mode e. g. acquisition or requisition.

To judge the present case by these tests it must be recalled that the accommodation was in the occupation of a tenant (Baijnath) who vacated it as back as in the year 1966 or earlier. Since then it has been lying vacant. The impugned order of allotment is *ultra vires* section 39(2) if it was made

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merely because the accommodation was found "lying" vacant. The order of allotment is *intra vires* the section because the accommodation has "fallen vacant" and it is immaterial when it fell vacant. In either case the order of allotment will have to be struck down; in the former case the order is without jurisdiction; in the latter, the case falls within the exception contained in sub-section (5)(a).

When examined from yet another angle we reach the same conclusion. When Baijnath vacated the accommodation, the landlord could have stated that he needed it for his own occupation. But this was unnecessary because its monthly rent did not exceed Rs.25/- and the case was within sub-section (5)(a). Therefore, the landlord could occupy it in his own right. He cannot be deprived of that right now, merely on the ground that the "rental value" has subsequently increased to Rs.30/-or Rs. 35/- as now reported by the Authorised Officer.

The impugned order of allotment would have been valid and good if the accommodation had been occupied by the petitioner and then he vacated it. If the petitioner had "occupied" the accommodation after he purchased it and then shifted to another house (say, to No. 273 or to his house at Panagar) and vacated this house No. 275/1, it could be said that the accommodation has in consequence, 'fallen vacant' within the meaning of section 39 (2). But this is nobody's case, neither in the writ petition nor in the returns filed before us. We have carefully gone through the entire record of the Authorised Officer as well. The petitioner, no doubt, ventured to say that he had been occupying the accommodation and his household effects were there, but this was denied by the respondents. Moreover, when actual possession was taken by breaking open the petitioner's lock and

possession was delivered to the allottee (respondent No. 4), nothing was found in the house, as is recorded in the Police Roznamcha which has been placed before us for our inspection. The Authorised Officer had directed the police to make an inventory of such articles as might be found in the house; but no inventory was made because nothing was found there. In his writ petition also the petitioner does not say that the police had removed any article from the house when possession was given to respondent No. 4. We were not told at any stage that the petitioner made any complaint or report or gave any notice or took any other proceeding, which he would have done in the natural course if any of his articles had been removed. In any event, since it is not the respondent's case that the petitioner was in occupation and then vacated the accommodation, the order of allotment cannot be sustained on that ground.

The Authorised Officer very correctly said in this order to the Police under section 39(4) that the house was "lying vacant", when the allotment order was made. Now it can be seen that the house was "lying vacant" because it had "fallen vacant", and that was from July 1966 or earlier; after that the house did not "fall vacant" although it remained "lying vacant". Therefore, in order to see whether by virtue of section 39(5)(a) the accommodation is or is not exempt from the operation of section 39(2), it is that monthly rent of the accommodation which was being paid by the last tenant, Baijnath. That rent being Rs.25/- (not exceeding Rs.25/-) the case is within the exception.

Learned Deputy Advocate General asked us whether an accommodation which has been lying vacant for several years should not be made available to a Government servant when there is pancity of

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residential accommodation. This question ought to have been asked elsewhere. The Court merely interprets the law as made by the Legislature, and enforces it, but does not, in the garb of interpretation, rewrite it or make a new law.

The petition is allowed and the rule is made absolute. The order of allotment being *ultra vires* the law, a writ of mandamus shall issue to the respondents to deliver vacant possession of the accommodation (house No. 275/1) to the petitioner.

In the circumstances of the case, the parties are left to bear their own costs.

*Petition allowed.*

## MISCELLANEOUS PETITION

*Before Mr. P. K. Tare Chief Justice and Mr. Justice Raina.*

PT. GIRJASHANKER SHARMA, Petitioner*

*v.*

COLLECTOR, HOSHANGABAD, Respondent.

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Aug. 1

*Administrative Function—Government officer to exercise administrative functions* bona-fide *with fair mind—If powers exercised arbitrarily—Action can be challenged by party adversely affected—Discretion vested in public body—Discretion to be exercised fairly and honestly and not arbitrarily with an ulterior motive—Plea of* mala fide *is relevant plea—Action or order of authority in exercise of judicial,* quasi-*judicial or administrative power—Can be struck down as null and void at the instance of aggrieved party—Arbitrary refusal of solvency certificate—Infringes upon fundamental right guaranteed by Constitution of India, Article 19*—Mala fides—*Not possible to be*

*Miscellaneous Petition No. 839 of 1972.

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*proved by direct evidence—Can be inferred from conduct of authorities in the light of facts and circumstances.*

Grant of solvency certificate is not regulated by any statutory provision but a Government officer is expected to exercise his administrative functions *bona fide* with a fair mind. If he acts arbitrarily and abuses his administrative powers to the prejudice of a party, his action is open to challenge by the party adversely affected on the ground that it is discriminatory.

Whenever a discretion is vested in a public body or other authority, the discretion must be exercised fairly and honestly with due regard to the purpose for which it is vested and not arbitrarily with an ulterior purpose.

*Susannah Sharp* v. *Wakefield and others* (1) and *S. Pratap Singh* v. *State of Punjab* (2); referred to.

The plea of *mala fides* has always been considered as a relevant plea for determining the validity of the action of the Government or any other public authority.

*C. S. Rowjee* v. *State of Andhra Pradesh* (3), *Mohammad Ibrahim* v. *The State of Andhra Pradesh and others* (4) and *Union of India and others* v. *M/s Anglo Afghan Agencies* (5); referred to.

Any action or order passed by an authority whether in exercise of its judicial, *quasi*-judicial or administrative powers is vitiated and is liable to be struck down as null and void at the Instance of the party adversely affected thereby if it amounts to an abuse of the power and is *mala fide* or for some improper purpose.

An arbitrary refusal of the solvency certificate therefore infringes upon the fundamental right of the party to carry on trade or business guaranteed by Article 19 of the Constitution of India.

It is always difficult to prove bias or *mala fides* by direct evidence. It has to be inferred from the conduct of the authorities in the light of facts and circumstances of each case.

(1) (1891) A. C. 173.
(2) A. I. R. 1964 S.C. 72.
(3) A. I. R. 1964 S.C. 962.
(4) A.I.R 1970 S. C. 1399.
(5) A.I.R. 1968 S. C. 718.

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*R. L. Sharma* for the petitioner.

*P. C. Khare* Govt. Advocate for the respondent.

*Cur. adv. vult.*

ORDER

The Order of the Court was delivered by RAINA J.-This is a petition under article 226 of the Constitution of India.

The petitioner wanted to give a tender for construction of tube-wells, the last date for which was 6.12.1972 For giving tender, solvency certificate of Rs.1,00,000/- (One lac) was required by the petitioner. He, therefore, filed an application on 9.11.1972 accompanied by certain documents *vide* Annexures A,B,C to the Collector, Hoshangabad who was the competent authority to grant the certificate. The said application was rejected by the Collector on 7.12.1972 *vide* Annexure 'D'. The contention of the petitioner is that the rejection of his application was *mala fide* due to personal grudge against Shri Ramlal Sharma, the natural father of the petitioner and that it was wholly unjustified. He has, therefore, filed this petition praying that the order of the Collector, Hoshangabad be quashed and an appropriate writ be issued directing the respondent to issue a solvency certificate for Rs. 1,00,000/-(One Lac) to the petitioner.

In the return filed by the respondent it is denied that the action of the Collector was *mala fide* or due to personal grudge. The case of the respondent is that solvency certificate was refused because it was found from the record that the petitioner did not own any immovable property and grant of solvency certificate on the basis of movable property is prohibited.

Learned counsel for the respondent raised a preliminary objection that this petition is not maintainable because the grant of solvency certificate is regulated by Government instructions which are non-statutory. In support of his contention he relied on two decisions of the Supreme Court, namely: *The State of Assam and another* v. *Ajit Kumar Sharma and others* (1) and *G.J. Fernandez* v. *The State of Mysore and others* (2). It was held in these cases that mere administrative instructions confer no right on any member of the public to ask for a writ against the Government to enforce them.

It is no doubt true that grant of a solvency certificate is not regulated by any statutory provision but a Government officer is expected to exercise his administrative functions *bona fide* with a fair mind. If he acts arbitrarily and abuses his administrative powers to the prejudice of a party, his action is open to challenge by the party adversely affected on the ground that it is discriminatory. The discrimination in such cases arises out of malice or personal bias and as such it offends article 14 of the Constitution of India.

Whenever a discretion is vested in a public body or other authority, the discretion must be exercised fairly and honestly with due regard to the purpose for which it is vested and not arbitrarily with an ulterior purpose. In *Susannah Sharp* v. *Wakefield and others* (3), Lord Halsbury L.C. observed as under while dealing with the exercise of discretion by Magistrates in the matter of grant of licences under the Licensing Act:

> "An extensive power is confided to the justices in their capacity as justices to be exercised judicially; and

(1) A.I.R. 1965 S. C. 1196. (2) A. I. R. 1967 S. C. 1753.
(3) 1891 A. C. 173.

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"discretion" means when it is said that something is to be done within the discretion of the authorities that something is to be done according to the rules of reason and justice, not according to private opinion: *Rooke's Case* (1); according to law, and not humour. It is to be, not arbitrary, vague and fanciful, but legal and regular. And it must be exercised within the limit, to which an honest man competent to the discharge of his office ought to confine himself: *Wilson* v. *Rastall* (2)".

In *S. Pratap Singh* v. *State of Punjab* (3) their Lordships in paragraph 6 emphasised the rule that every power vested in a public body or authority has to be used honestly, *bona fide* and reasonably. Their Lordships also quoted with approval the following observations of Pollock M. R. in *Short* v. *Poole Corporation* (4):

> "Where an authority is constituted under statute to carry out statutory powers with which it is entrusted.. if an attempt is made to exercise those powers corruptly—as under the influence of bribery, or *mala fides*–for some improper purpose, such an attempt must fail and it is null and void."

Their Lordships further quoted with approval the following observations of Warrington L. J., in the aforesaid case:

> "No public body can be regarded as having statutory authority to act in bad faith or from corrupt motives, and any action purporting to be that of the body, but proved to be committed in bad faith or from corrupt motives, would certainly be held to be inoperative."

The plea of *mala fides* has, therefore, always been considered as a relevant plea for determining the validity of the action of the Government

(1) 5 Rep. 100.
(2) 4 T. R. at p. 757.
(3) A. I. R. 1964 S. C. 72.
(4) 1926 Ch. 66 at p. 85.

or any other public authority. In this connection reference may also be made to the decisions of the Supreme Court in *C. S Rowjee* v. *State of Andhra Pradesh* (1) and *Mohammad Ibrahim* v *The State of Andhra Pradesh and others* (2) where such a plea was considered. In *Union of India and others* v. *M/s Anglo Afghan Agencies* (3) their Lordships, while dealing with the right of the petitioner to import licence, held that the Court was competent to grant relief where the departmental authority acted arbitrarily.

Thus it is clear that any action or order passed by an authority whether in exercise of its judicial, *quasi*-judicial or administrative powers is vitiated and is liable to be struck down as null and void at the instance of the party adversely affected thereby if it amounts to an abuse of the power and is *mala fide* or for some improper purpose.

The Government usually insist upon a solvency certificate before accepting a tender of a party. Thus a solvency certificate is essential for a party who wants to engage in a contract or other business activity with the Government. An arbitrary refusal of the solvency certificate therefore, infringes upon the fundamental right of the party to carry on trade or business guaranteed by article 19 of the Constitution of India.

The simple point for consideration, therefore, is whether the action of the Collector, Hoshangabad, in rejecting the application of the petitioner for a solvency certificate was arbitrary and *mala fide*. The instructions contained in paragraph 6 of the

(1) A. I. R. 1 64 S. C. 962. (2) A. I R. 1970 S C. 1399.
(3) A. I. R. 1968 S. C. 718.

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Revenue Book Circular-Section VI-Serial No. 3 under head 'Miscellaneous Instructions'; no doubt, provide that a solvency certificate should not be granted on basis of movable property; but the petitioner had filed an affidavit *vide* Annexure "B" in which he had stated that he owns a house in Hoshangabad town, the market value of which was over Rs. 1,00,000 (Rupees One Lac). In support of his title to the house he filed a notice of demand of property tax for the year 1971-72 and he also filed a copy of the order of Income Tax Officer *vide* Annexure 'E' in which it was stated that a partition was effected between Bhawanishanker and the petitioner and that he was satisfied that partition was genuine. The petitioner also filed a copy of the challan for payment of wealth-tax *vide* Annexure 'F'.

From the order of the Collector, Annexure 'D' it would appear that the application was rejected solely on the consideration that no document had been produced showing that the house in question was recorded in the name of Girjashanker, that is the petitioner. It would appear from the report of the Naib-Tehsildar *vide* Annexure 'G' that the Chief Municipal Officer had certified that the house of the petitioner was valued at about Rs. 3,00,000 (Rupees Three Lacs). But it was recorded in the name of Bhawanishanker and not Girjashanker. If so, the Collector, at the most, could demand from the petitioner an affidavit of Bhawanishanker that the house belonged to the petitioner.

The learned counsel for the petitioner urged that he was not in a position to produce any title deeds because it is an ancestral house and had fallen to the share of the petitioner in a partition which took

place recently and mutation in favour of the petitioner had yet to be effected.

The Collector has not given any reasons for not placing any reliance on the affidavit filed by the petitioner and other documents in support of his solvency. It is stated in paragraph 6 of the petition that the relations of the then Collector Shri Anand Mohan with Ramlal Sharma, natural father of the petitioner were bad, since about 8 months because of a no-confidence motion having been passed against him in governing body of Narmada Education Society, Hoshangabad of which Shri Sharma is the Manager and the Collector is the President. In paragraph 6 of the return the facts are not disputed but it is stated that no-confidence motion was void and illegal because the Collector was *ex-officio* President of the Society. In support of the contention that Shri Anand Mohan was biased against the petitioner, it is alleged in paragraphs 7 and 8 of the petition that when no orders on his application for a solvency certificates were passed till 6.12.1972, the last date for submitting the tender, inspite of the fact that the petitioner's counsel was persistently making requests from 30.11.1972 to 5.12.1972, the petitioner approached the Chief Secretary who asked the Collector on phone to pass orders on the application immediately and thereafter the orders were passed on 7.12.1972. In reply it is stated that it was not known whether the Chief Secretary was approached it was denied that the Chief Secretary had issued any direction to pass orders immediately. But such an inordinate delay in disposing of the application for solvency certificate does lend support to the contention of the petitioner that the attitude of authorities concerned was not normal. Apart from this, the fact that the order was passed after the last date for

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submission of the tender had expired, also supports the allegation of bias particularly in view of the facts and circumstances of this case. It is always difficult to prove bias of *mala fides* by direct evidence. It has to be inferred from the conduct of the authorities in the light of the facts and circumstances of each case. After taking into account all the facts and circumstances of this case it appears to us that the action of the Collector was not fair but was arbitrary and *mala fide* and as such is liable to be quashed.

We, therefore, allow the petition and quash the order of the Collector, Hoshangabad, Annexure 'D' rejecting the application of the petitioner for solvency certificate. The application of the petitioner shall be considered afresh by the Collector, Hoshangabad on the basis of the material on record and such other material as may be placed by the petitioner before him in support of his title to the house. We do not, however, make any order as to costs, in the circumstances of this case. The outstanding security amount shall be refunded to the petitioner.

*Petition allowed.*

## APPELLATE CIVIL

*Before Mr. Justice Shiv Dayal and Mr. Justice A.P. Sen.*

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Mar. 23

GOPALDAS, Appellant*

*v.*

THE STATE OF MADHYA PRADEH, Through Collector, Betul, Respondent.

*Forest Contract Rules—29(1)—Divisional Forest Officer—Power of,*

*First Appeal No. 68 of 1968 from the decree of Shri S. M. Afzal, Additional District Judge, Betul, dated the 12th October 1966.

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*to terminate contract—Rule 29(2)—Relinquish material after termination of contract becomes property of Government —Rule 29(2)—Gives discretion either to recover defaulted instalment as arrears of land revenue or to re-sell the contract— Sale of Goods Act, 1930—Section 54—Provision in, is subject to contract to contrary—Forest Act, 1927—Section 82—Confers power to recover defaulted instalment as arrears of land revenue-Sale of Goods Act—Section 54(4)—Gives right to unpaid seller to claim damages for rescission of contract— Rescission does not result in total annulment of contract.*

Under the terms of Rule 29(1) of the Forest Rules the Divisional Forest Officer, who was empowered to execute the contract on behalf of the Government, had the right to terminate the contract.

Under Rule 29 (2) of the Rules the relinquished material becomes the absolute property of Government on the termination of contract.

Under Rule 29 (2) of the Rules the Government had clearly an option either to proceed under cl. (b) and to recover as arrears of land revenue, the part of consideration which had fallen due but was still un-paid on the date of the termination of the contract, or, to fall back on the 2nd part of cl. (e) and to resell the contract.

The provisions of Section 54 of the Sale of Goods Act are subject to a contract to the contrary.

Sub-section (4) of Section 54 of the Sale of Goods Act reservest the ounpaid seller the right to claim damages inspite of rescission of the contract.

Rescission of the contract does not result in total annulment of the contract so as to deprive it of the right to recover the price due thereunder.

*J. A. Dalmet* v. *State of Mysore* (1); distinguished.

*R. K. Pandey* for the appellant.

*M. V. Tamaskar* Deputy Govt. Advocate for the State.

*Cur. adv. vult.*

(1) A. I R. 1965 Mys. 109.

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JUDGMENT

The Judgment of the Court was delivered by A. P. SEN J.- This appeal, by the unsuccessful plaintiff, is directed against a judgment of the Additional District Judge, Betul, dated 12th October 1966, dismissing his suit for declaration, injunction and refund of consideration.

The relevant facts may be shortly stated. At a public auction held on 10th July 1962, the plaintiff purchased felled trees of teak and other species lying in coupe No. IX (A & B) Felling Series, Sarni, for a consideration of Rs.8,000/-. The amount of consideration was payable in 4 equal instalments of Rs. 2,000/- each. The plaintiff paid the 1st instalment and after execution of a coupe boundary certificate and the usual contract deed, he was placed in possession of the coupe. For a period of 4 months, he made no complaint whatever about any shortage of material. The complaint was not made until he had defaulted in payment of the 2nd instalment. No enquiry on his complaint was called for as the plaintiff had satisfied himself about the material before executing the coupe boundary certificate. Thereafter, he also made a default in payment of the 3rd instalment. The Divisional Forest Officer served him with a notice calling upon him to pay the defaulted instalments within 15 days, failing which he threatened that action for cancellation of the contract would be taken. That notice had no effect on the plaintiff who, instead, applied for an extension of time alleging that he was misled in bidding at the auction. In rejecting his prayer for extension, the Divisional Forest Officer observed that the quantity of forest produce had not been guaranteed and there was thus no case for extension. In the meanwhile, the plaintiff did not

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also pay the 4th instalment which had fallen due. He was, therefore, served with another notice to pay the over-due instalments. The notice stated that if he did not remit the 2nd, 3rd and the 4th instalments within 15 days, the Divisional Forest Officer would be compelled to take action for the cancellation of the contract. The plaintiff preferred an appeal to the Conservator of Forests against the refusal of the Divisional Forest Officer to grant an extension but that appeal was rejected.

Eventually, when the plaintiff did not comply with the notices of demand for payment of the 3 defaulted instalments, the Divisional Forest Officer, by his order, Ex.D-7, terminated the contract under Rule 29 of the Forest Contract Rules, and in his forwarding endorsement directed that the relinquished material would be re-auctioned.

The decision of the appeal turns on a construction of Rule 29(2)(e) of the Forest Contract Rules. To understand the proper scope of that Rule, it is necessary to set out the provisions of Rule 29 which read as follows:-

> "29. (1) A forest contract may be terminated by the officer empowered to execute it on behalf of the Government if the Forest Contractor makes default in the payment of the consideration for his contract or of any instalment thereof, or commits a breach of any of the other conditions of his contract.
>
> (2) Such termination shall be notified to the forest contractor by a written notice delivered to him personally or sent to him by registered post, and thereupon all the contractor's rights under the contract including all accessory licences, shall cease and all the forest produce remaining within the contract area or at the depots specified under rule 13 shall become the absolute property of Government.

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On such termination Government shall be entitled–

(a) .. ..... ..... ..... ..... ..... .....

(b) to recover as arrears of land revenue any part of consideration which has fallen due but is still unpaid on the date of the termination of the contract;

... .. .. ..... .. .....

(e) to recover as arrears of land revenue any part of the consideration which would have subsequently fallen due but for such termination or to resell the contract and to recover in like manner the amount by which the price secured on such resale falls short of that part of the consideration which would have so fallen due."

There was admittedly default on the part of the plaintiff to pay the 2nd, 3rd and 4th instalments. Under the terms of Rule 29(1), the Divisional Forest Officer, who was empowered to execute the contract on behalf of the Government, had the right to terminate the contract. Admittedly, the contract was so terminated and such termination was duly notified to the plaintiff under Rule 29(2). On such termination, the Government was entitled, under cl. (b), either to recover the defaulted instalments due on the date of the termination of the contract as arrears of land revenue or to resell the contract, under 2nd part of cl. (e), and recover in like manner the amount by which the price secured on such resale fell short of that part of the consideration which had so fallen due.

The contention that in a case like this, where the Divisional Forest Officer had, while terminating the contract, directed that the relinquished material would be re-auctioned falls only within the 2nd part

of cl. (e), cannot be accepted. The order of cancellation, Ex. D-7, does not direct resale of the contract, but of the relinquished material only. Under Rule 29(2), the relinquished material became the absolute property of the Government on the termination of the contract.

There is no warrant for the submission that the provisions of S. 82 of the Forest Act could not be invoked by the Government That section clearly invests the Government with authority to recover any sum recoverable under a contract relating to timber or forest produce, if not paid when due, as if it were the arrears of land revenue.

Undsr Rule 29(2), the Government had clearly an option either to proceed under cl. (b) and to recover as arrears of land revenue, the part of consideration which had fallen due but was still un-paid on the date of the termination of the contract, or, to fall back on the 2nd part of cl. (e) and to resell the contract. The course of action to be adopted was left to the discretion of the Government and it cannot be said that having regard to the fact that the period of contract was about to expire, the Government was not within its rights in deciding to proceed under cl. (b).

Learned counsel for the appellant, however, contends that the law is otherwise and he relies upon *Badriprasad* v. *The State of Madhya Pradesh* (1); and *K. P. Chowdhry* v. *State of Madhya Pardesh* (2) for the contention that the right of the Government is to realise the deficiency on resale, and not to realise the arrears of money due as arrears of land revenue.

(1) A. I. R. 1966 S. C. 58.

(2) 1966 M. P. L. J. 1057=1970 J.L.J. (N.) 42.

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The contention is wholly unfounded and cannot be accepted. In *Badriprasad* v. *State of Madhya Pradesh* (*supra*), their Lordships of the Supreme Court were dealing with a case where the cut timber auctioned was destroyed by fire before the contract deed was executed. Their Lordships held that as the sale was of goods in a deliverable state, the property in them passed to the contractor, and further that it was within the realm of possibility that the forest produce might be lost on account of fire or any other risk mentioned in Rule 32 of the Forest Contract Rules before the deed of contract was formally signed. According to them, the contract entered into, therefore, involved the possibility of loss of goods by fire, and the contractor was not absolved of his liability thereby. Their Lordships also interpreted Rule 8 of the Forest Contract Rules, which gave a right to the Government to stop the removal of forest produce under certain circumstances. In that context, they also interpreted the provisions of Rule 83 of the Forest Act which created a lien on forest produce for the money payable to the Government. We fail to see what relevance that dicision has to the present controversy.

The two decisions in *K. P. Chowdhry* v. *State of Madhya Pradesh* (*supra*) are clearly distinguishable on facts. There, there was no contract in writing as provided for under Art. 299(1) of the Constitution. Their Lordships accordingly held that there being no completed contract, the deficiency on resale could not be recovered as arrears of land revenue under Rule 29(2)(e). Nor could the liability be enforced upon the basis of an implied contract. Their Lordships, however, remitted the case to the High Court for an enquiry whether the claim of the State for recovery of the deficiency on resale could

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be supported under any other provision of law. On remand, the High Court held that there was no Rule existing on the date of resale, under which the amount became payable to the Government and, therefore, S. 82 of the Forest Act had no application. That is not the case here where admittedly there was a completed contract, Ex. D-4, executed between the parties as envisaged by Art. 299(1) of the Constitution. The provisions of S. 82 of the Forest Act as also those of Rule 29 of the Forest Contract Rules, were, therefore, applicable with full force.

Reliance is also placed on S. 54(2) of the Sale of Goods Act, for the contention that on the plaintiff making default, the Government was entitled to rescind the contract and thereby the original contract of sale stood rescinded, but without prejudice to any claim which the Government may have for damages. In support of that contention, reliance is also placed on *Firm Karam Narain* v *Volkart Bros.* (1) and *J. A. Dalmet* v. *State of Mysore* (2). We are unable to accept the contention. The provisions of S. 54 of the Sale of Goods Act are subject to a contract to the contrary. Here, the contract deed executed between the parties provides, *inter alia*, by cl. 6, that the contract shall be subject to the Forest Contract Rules, which shall be deemed to be part of the contract, in so far as they are applicable thereto. That being so, the mutual rights and obligations of the parties have to be worked out with reference to the Forest Contract Rules. Under Rule 29, the Government was entitled upon termination of the contract to recover the arrears of instalments as arrears of land revenue. Apart from the Rule,

(1) A. I. R. 1946 Lah. 116 F.B. (2) A. I. R. 1965 Mys. 109.

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that was also its statutory right under S. 82 of the Forest Act.

Besides, the authorities relied upon do not support the appellant. In *Firm Karam Narain* v. *Volkart Bros.* (*supra*), Harries C. J., speaking on behalf of the Full Bench of the Lahore High Court, stated that the rescission contemplated in S. 54(4) is something less than a complete annulment or destruction of the contract. Their Lordships were concerned with a claim for damages and in regard to that claim they held that the contract must be regarded as existing at least for that purpose. Indeed, sub-section (4) of S. 54 reserves to the unpaid seller the right to claim damages inspite of recission of the contract. We are, however, here not concerned with any claim for damages. The contract has been, no doubt, rescinded by the Government on account of a breach by the plaintiff, but such rescission does not result in total annulment of the contract so as to deprive it of the right to recover the price due thereunder. In *J. A. Dalmet* v. *State of Mysore* (*supra*), the cancellation of the auction was due to the failure of the contractor to deposit 25% of the price. Therefore, his tender was cancelled and the coupe was resold. As a result of resale, the Government suffered a loss. The question was, whether the claim fell within the ambit of S. 82 of the Forest Act. The Mysore High Court held that a case of that nature fell under S. 54(4) of the Sale of Goods Act and after the cancellation of the sale, the relationship between the parties was not that of a seller and buyer and consequently, no price was due from the contractor. That case is equally inapplicable to the facts of the present case.

It is then urged that the plaintiff was entitled

to avoid the contract, having been misled into bidding at the auction by the false representation made by the Divisional Forest Officer at the time of the auction as to the quantity of material offered for sale. We are in complete agreement with the finding of the learned Additional District Judge that there was no such fraudulent misrepresentation on the part of the Divisional Forest Officer, and indeed, the quantity of forest produce offered for sale had not been guaranteed to any extent. We may advert to cl. 1 of the contract deed which recites that the sale was in respect of the forest produce described in the First Schedule. Cl. 2 provides that the quantity of the said forest produce sold under the contract "shall be the quantity which may exist" at the time of executing the deed, or "may come into existence thereafter". The First Schedule gives a description of the forest produce sold. There is a foot-note added to the following effect–"But quantity and quality of material and details of area are not guaranteed."

The plaintiff cannot be heard to say that he was misled into bidding by any false description of the thing sold. Under condition No. 3 of the Auction Conditions, it was specifically stated that the details of the quantities of forest produce announced at the time of auction was correct to the best of knowledge of the Divisional Forest Officer but were not guaranteed to any extent. By that clause, the plaintiff was, therefore, advised to inspect on the spot, the contract area and the produce he intended to bid for, with a view to satisfy himself about its correctness. That he did so is amply clear from the evidence on record. He, indeed, not only signed the auction conditions in token of acceptance of the terms on which the bid was held, but after acceptance

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of the bid in his favour, inspected the contract area and executed the necessary coupe boundary certificate.

In the result, the appeal fails and is dismissed with costs.

*Appeal dismissed.*

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## APPELLATE CIVIL

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*Before Mr. Justice A. P. Sen.*

1974

Dec. 23

MST. BHAGWANIA, Appellant*

*v.*

GILLI, Respondent.

*Hindu Succession Act (XXX of 1956)—Section 15(2)(g)—Scope of—Expression "Son" in—Includes son from former husband—Same principle applies to daughter-Son or daughter entitled to inherit the property of his or her mother dying intestate.*

Clause (b) of sub-section (2) of section 15 of Hindu Succession Act comes into play when a Hindu female dies intestate, without leaving any son or daughter. The learned Judge overlooked the words: "in the absence of any son or daughter of the deceased".

The expression "Son" used in Entry (a) has not been defined in the Act. It includes both a natural son and a son adopted in accordance with the law relating to adoption among Hindus in force at the time of the adoption. In case of a female intestate, who had remarried after the death of the husband or after

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*Second Appeal No. 331 of 1968, from the appellate decree of S. D. Kale, Additional District Judge, Umaria, dated the 23rd Nov. 67, confirming the decree of P. D. Khandelwal Addl. Civil Judge, Class II, Sahdol, dated the 2nd November 1964.

divorce, her sons by different husbands would all be her natural sons and entitled to inherit the property left by the female Hindu, regardless of the source of the property. The rules relating to a 'son', as stated above, apply *mutatis mutandis* to the case of a daughter.

*Keshri* v. *Harprasad* (1); referred to.

*J. P. Sanghi* for the appellant.

*G. C. Jain* for the respondent.

*Cur. adv. vult.*

JUDGMENT

A. P. SEN J.– The short question for determination in this appeal is, whether the property of a Hindu female dying intestate would, under clause (a) of sub-section (1) of section 15 of the Hindu Succession Act, devolve on her son or daughter from a previous husband, or upon the heirs of the husband under clause (b).

The facts, in brief are as follows:

The plaintiff, Gilli, brought a suit of declaration of title to, and possession of, the suit lands and house, alleging that the property constituted joint family property and, therefore, devolved on him by survivorship. That claim of the plaintiff was contested by the defendant, Mst. Bhagwania. She alleged that the property was the separate property of Kandhai. She further alleged that, upon the death of Kandhai in the year 1952, the property was inherited by his widow, Mst. Chaturia. The defendant is the daughter of Mst. Chaturia from her previous husband.

(1) 1970 M. P. L. J. 669.

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The Courts below have decreed the plaintiff's claim, holding that the suit property was the separate property of Kandhai and, on his death in 1952, it was inherited by his widow Mst. Chaturia; that Mst. Chaturia, being possessed of the property, became the absolute owner thereof under section 14 of the Hindu Succession Act; and that, upon her death in 1958, the property devolved on the plaintiff. The findings of fact arrived at by the Courts below, being based on appreciation of evidence, are binding in second appeal.

The only question that arises in this appeal is as to who is the preferential heir under section 15 of the Hindu Sussession Act. Sub-sections (1) and (2) of the section, so far as relevant, read–

> "15. (1) The property of a female Hindu dying intestate shall devolve according to the rules set out in section 16,–
>
> (a) firstly, upon the sons and daughters (including the children of any pre-deceased son or daughter) and the husband;
>
> (b) secondly, upon the heirs of the husband;
>
> *** *** ***
>
> (2) Notwithstanding anything contained in sub-section (1),–
>
> (a) *** *** ***
>
> (b) any property inherited by a female Hindu from her husband or from her father-in-law shall devolve, in the absence of any son or daughter, of the deceased (including the children of any pre-deceased son or daughter) not upon the other heirs referred to in sub-section (1) in the order specified therein, but upon the heirs of the husband."

In dealing with the question, the learned

Addition District Judge observes:

> "According to section 14 of the Hindu Succession Act, Mst. Chaturia undoubtedly became absolute owner of the suit property; but it has been found that the defendant was not the daughter of Kandhai. According to section 15(2) of the Hindu Succession Act, the property of a Hindu female dying intestate shall devolve upon the heirs of her husband, if she had inherited the property from her husband."

The view taken by the learned Additional District Judge can hardly be supported. Clause (b) of sub-section (2) of section 15 of the Act comes into place when a Hindu female dies intestate, without leaving any son or daughter. The learned Judge overlooked the words: "in the absence of any son or daughter of the deceased". The expression "the deceased" in the context means the female Hindu dying intestate. The law is succinctly stated in Mulla's Hindu Law, Fourteenth Edition, page 914. The expression 'son' used in Entry (a) has not been defined in the Act. It includes both a natural son and a son adopted in accordance with the law relating to adoption among Hindus in force at the time of the adoption. In case of a female intestate, who had remarried after the death of the husband or after divorce, her sons by different husbands would all be her natural sons and entitled to inherit the property left by the female Hindu, regardless of the source of the property. The rules relating to a 'son', as stated above, apply *mutatis mutandis* to the case of a daughter; (see Illustrations under Entry (a), p. 917).

I am fortified in my view by the decision of T. C. Shrivastava, J. in *Keshri* v. *Harprasad* (1) where he states-

(1) 1970 M. P. L. J. 669.

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"This clause (clause (b) of sub-section (2) of section 15) provides for the mode of succession to the property of the female Hindu which she had inherited from her husband and states that the property goes to her husband's heirs. However, it has to be borne in mind that clause (b) operates only 'in the absence of any son or daughter of the deceased'. The deceased here obviously refers to the female Hindu. It is true that the words 'notwithstanding anything contained in sub-section (1)' exclude the provision in sub-section (1) in so far as the succession of the property inherited by a Hindu female from her husband is concerned. However, the special mode of succession provided in sub-section (2) itself restricts the application of clause (b) to cases where there is no son or daughter. Where a son or daughter exists, the heirs of the husband cannot succeed according to this sub-section and the property must go to the son or daughter."

The learned Judge further states-

"The only question is whether the word 'son' should be restricted to the 'son' of the husband from whom the Hindu female inherited the property or it should include sons of the Hindu female irrespective of whether they are born of the husband whose property is in dispute or by any other husband. It was argued that the Legislature intended to preserve the property to the branch of the person from whom, it devolved on the widow and therefore the word 'son' should be restricted to mean a son of the husband whose property is in dispute. I do not see any reason to restrict the interpretation of the word 'son' in this manner. From the language used in sub-sections (1) and (2) it is clear that the intention of the Legislature was to allow succession of the property to the sons and daughters of the Hindu female and only, in the absence of any such heirs, the property would go to the husband's heirs."

Then, he concludes:

"It is true that the idea of the property of her deceased

husband passing to the previous husband's son is not in consonance with the orthodox Hindu law. But that alone cannot be a ground for interpreting the unambiguous language of section 15 differently. In the scheme of Hindu Succession Act, there are many provisions which are contrary to the orthodox Hindu law. In spite of this, the effect has to be given to them. For instance, it appears to me that section 15 (b) read with the definition of the word 'related' in clause (j) of section 3 will enable an illegitimate son of the Hindu female to succeed to the estate of her husband in preference to the husband's heirs. This would be against the spirit of strict Hindu law, but the intention to bring about this effect seems to be deliberate."

I am in respectful agreement with these observations.

In this view, the Courts below were manifestly wrong in holding that the plaintiff, who is the husband's heir falling under clause (a) of sub-section (1) of section 15 of the Act, would take the property of Mst. Chaturia, the female Hindu dying intestate, to the exclusion of the defendant who is her daughter and, therefore, comes within the ambit of clause (b).

In the result, the appeal succeeds and is allowed. The judgment and decree of the Courts below are reversed and the plaintiff's suit is dismissed with costs throughout. Counsel's fee as per schedule or certificate, whichever is less.

*Appeal allowed.*