FULL BENCH

Before Mr. G. P. Singh C. J., Mr. Justice J. S. Verma and Mr. Justice M. L. Malik.

NARBADA PRASAD and another, Petitioners* 1981

v. Feb. 10

STATE OF M. P. and others, Respondents.

Ceiling on Agricultural Holdings Act, M. P. (XX of 1960), as amended by Acts Nos. 13 and 20 of 1974-Section 4—Effect of amendments—Section 4—Part of—Social Welfare legislation Rules of construction as regards expropriatory legislation—Not applicable—Heading of section—Cannot control its plain language—Substitution of date 24th January 1971 by 1st January 1971 by Act No. 13 of 1974-Has reasonable basis—Object of amendments—Sub-section (1)—Expressions "in anticipation of" and "to defeat the provisions of the Act"—Meaning and connotation of—Sub-section (2)—Transfer of land after 1-1-1971 by persons holding lands within ceiling limit under Principal Act but more than ceiling area fixed by Act No. 13 of 1974—Transfer is hit by new sub-section (1)—Transfer of land permitted under section 5(3) of Principal Act—Also hit by new section 4—Sub-section (4)—Expressions "in regard to every transfer to which this section applies" and "in any other manner"—Meaning and connotation of—Includes partitions also covered by sub-section (1)—Burden of proof thereunder—Is on the transferor—Not a negative burden—Offering plausible explanation for making transfer—Not sufficient to discharge burden—Should be proved by evidence and preponderance of probabilities.

In construing a provision relating to social legislation the Courts must be animated by a goal-oriented approach so that the Courts are not converted into rescue shelters for those who seek to defeat agrarian justice by cute transactions of many manifestations.

*Miscellaneous Petition No. 376 of 1978.

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Authorised Officer, Thanjavur v. *S. Naganatha Ayyar* (1); referred to.

Section 4 of M. P. Ceiling on Agricultural Holdings Act, 1960 is a part of the social welfare legislation designed to implement the great objective of securing social justice enshrined in the preamble and the directive principles of State policy. The rule of construction relating to expropriatary legislation which is construed in case of doubt in favour of the subject have no application here.

Heading of a section cannot control its plain language. Omission to change the heading of section 4 while amending the Principal Act by Acts Nos. 13 and 20 of 1974 has no effect on the construction of new section, for, in plain terms it covers the transfers made between 1st January 1971 and the appointed day 7th March 1974.

Section 4 of the M. P. Ceiling on Agricultural Holdings Act, 1960 as substituted by Act No. 13 of 1974 made provision for avoidance of transfers made after 24th January 1971 and before the appointed date, i. e. 7th March 1974. By Act No. 20 of 1974, Ist January was substituted in place of 24th January 1971. The relevance of these dates is that in January 1971, the Govt. announced the policy of lowering the Ceiling limit. It is for this reason that the conference of the Chief Ministers decided to implement the new agrarian policy from 24th January 1971 as is stated in the objects and reasons of Act No. 13 of 1974. But it must have been later noticed that the election manifesto became known to many before it was formally announced and, therefore, by Act No. 20 of 1974, 1st January 1971 was substituted in place of 24th January 1971. There is thus clearly a reasonable basis for fixing the date Ist January 1971 as the beginning of the period, the transfers made within which can be in-validated u/s 4 as amended by Acts Nos. 13 and 20 of 1974.

Ambika Prasad v. *State of U. P.* (2); relied on.

The entire Ceiling Act including section 4 has to be construed to effectuate the object of the legislative in making available surplus land to the Govt. for distribution to the needy.

The words "in regard to every transfer to which this section

(1) A. I. R. 1979 S. C. 1487. (2) A. I. R. 1980 S. C. 1761.

applies" used in sub-section (4) are wide enough to cover transfers and partitions referred to in sub-section (1). A partition may not be in certain context a transfer but in the context in which the words "every transfer" occur in sub-section (4), it is clear that these words embrace all kinds of transfers to which the section applies and include even partitions falling within sub-section (1). The words "in any other manner" are wide and read in the context of the expression "every transfer" the intention is clear to make the sub-section (4) applicable to a partition.

The words "inticipation of" and the words "to defeat the provisions of" the Act in the context of section 4 have the same meaning. A transfer is in anticipation of an Act when it is made with a view to defeat the provisions of an Act which is likely to be passed in future. As section 4 only covers transfers made before the commencement of the Amendment Act No. 13 of 1974, all transfers made in anticipation of will be with a view to defeat the provisions of the Act and *vice versa*. It cannot, therefore, be said that sub-section (4) of section 4 omits from its ambit certain transfers which are covered by sub-section (1).

The words "in any other manner" are wide words and they cannot be restricted to unreal transfers or transfers in the nature of benami. The special burden of proof laid by sub-section (4) will apply to all transfers and partitions covered by sub-section (1) of section 4.

The object of sub-section (2) of the Principal Act is that if the transfer made before the coming into force of the Principal Act was made by a holder who did not hold land in excess of the ceiling area or was made to the persons of categories (i) to (v) mentioned in section 35(1) or to a holder holding less than 5 standard acres, such transfers would not be invalidated by the competent authority. Sub-section (2) of the Principal Act cannot be construed as a permission for transfer for any period after the coming into force of the Act. Sub-section (2) of Section 4 of the Principal Act cannot be used as exception to the power of invalidating transfers conferred on the Competent Authority by section 4 as substituted by Acts Nos. 13 and 20 of 1974. Thus, a transfer made by a person within the 1st January 1971 and before 7th March 1974 who held land within the ceiling area fixed by the Principal Act but more than the ceiling area as fixed by Act No.

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13 of 1974 would also be hit by new sub-section (1) and the Competent Authority will have jurisdiction to invalidate it in case it was made in anticipation of or to defeat the provisions of the Act as amended.

Mahadeo v. *State of M. P.* (1) and *Protap Singh* v. *State of M. P.* (2); not correctly decided.

State of Kerala v. *Thilomina* (3); distinguished.

Simply because the transfers made within the period 1st January 1971 and before 7th March 1974, were within the exception contained in sub-section (3) of section 5 of the Principal Act, they are not saved from the operation of new section 4 if they were made in anticipation of or to defeat the provisions of the Act as amended. The transfers even though permitted by sec. 5(3) of the Principal Act, would be hit by new section 4 unless they are saved by sub-section (2) thereof.

The object of the Act, as shown by its long title is to provide for imposition of ceiling and acquisition and disposal of surplus land. The distribution of surplus land in the scheme of the Act has to be through the agency of the Govt. for otherwise it will lead to many mal-practices. A land holder, having surplus land by selling or transferring land even to a person of the categories mentioned in section 35 cannot be said to be acting in furtherance of the object of the Act.

The occasion and reason for making the transfer are specially within the knowledge of the transferor. It is for him to state the facts relating therto and to prove them by preponderance of probabilities. If the transferor is able to state and establish any good reason for the transfer by preponderance of probabilities, it should be held that the burden of proof on him u/s 4(4) is discharged looked from this angle, it cannot be said that the burden on the transferor is to prove a negative fact.

A transferor must not only give a plausible explanation for the transfer but also support it by evidence and make it acceptable by preponderance of probabilities. It is only then that it can be said that the burden of proof is discharged. To hold that a mere denial or putting forward of same plausible explanation for the transfer would discharge the burden of proof laid down by sub-

(1) 1980 R. N. '82=1980 J. L. J. 797. (2) 1980 R. N. 525.
(3) A. I. R. 1976 S.C. 2363.

section (4) would be entirely defeating its provisions, for it would be easy for every transferor to deny that he made the transfer with a view to defeat the provisions of the Act and to put forward a plausible explanation which may be entirely false.

P. Sambaiva Rao v. *Revenue Divnl. Officer* (1) and *Chandrasekhar* v. *State of M. P.* (2); not followed.

R. K. Pandey and *A. R. Pandey* for the petitioners.

S. L. Saxena and *M. V. Tamaskar* Govt. Advocates for the respondents.

Cur. adv. vult.

ORDER

The Order of the Court was delivered by G. P. SINGH C. J.—This order shall also dispose of Misc. Petition No. 324 of 1977.

These petitions involve the construction of section 4 of the Madhya Pradesh Ceiling on Agricultural Holdings Act, 1960, as it now stands.

The Bill of the principal Act i. e. the Act as originally enacted was published in the Madhya Pradesh Gazette of 15th September 1959. The principal Act received the assent of the President on 20th September 1960 and the assent was first published in the Gazette on 1st October 1960. The Act was enforced by a notification issued under section 1(3) with effect from 15th November 1961. Section 7 of the principal Act fixed 28 standard acres as the ceiling limit of land which could be held by a person. The principal Act also made provision for declaring void transfer under section 4 and for preventing transfers under section 5. The first set of amendments of the principal Act were made by

(1) A. I. R. 1977 A. P. 51. (2) 1980 R. N. 467.

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Acts Nos. 35 of 1961, 38 of 1965 and 25 of 1966. These amendments were given retrospective effect from the date of the commencement of the principal Act. The ceiling limit under section 7 of the Act was reduced from 28 to 25 standard acres. There were some minor amendment in sections 4 and 5. These two sections as amended by the aforesaid Acts read as follows :—

"4. (1) Notwithstanding anything contained in any law for the time being in force, where after the date of publication of the Madhya Pradesh Ceiling on Agricultural Holdings Bill, 1959 (36 of 1959), in the Gazette, but before the commencement of this Act, any holder has transferred any land held by him by way of sale, gift, exchange or otherwise or has effected a partition of his holding or part thereof, the competent authority may, after notice to the holder and other persons affected by such transfer or partition and after such enquiry as it thinks fit to make, declare the transfer or partition to be void if it finds that the transfer or the partition, as the case may be, was made in anticipation of and to defeat the provisions of this Act.

(2) Nothing in this section shall apply to—

(a) a transfer made by a holder who does not hold land in excess of the ceiling area on the date of the transfer;

(b) a transfer by way of sale to any person specified in categories (i) to (v) of sub-section (1) of section 35 or to a holder holding land less than five standard acres on the date of the transfer.

(c) a transfer by way of donation to a Bhoodan Yagna Board constituted under the law relating to Bhoodan Yagna for the time being in force.

(3) Any person aggrieved by an order of the competent authority under this section may prefer an appeal against such order to the Board of Revenue. The decision of the

Board and subject to the decision of the Board in appeal the decision of the competent authority shall be final."

"5. (1) Notwithstanding anything contained in any law for the time being in force, no land shall be--

(a) transferred whether by way of sale (including sale in execution of a decree of a civil court or of an award or order of any other lawful authority) or by way of gift, exchange, lease or otherwise; or

(b) sub-divided (including sub-division by a decree or order of a civil Court or any other lawful authority) whether by partition or otherwise;

Until a final order under Sec. 11 is passed except with the permission in writing of the Collector.

(2) The Collector may refuse to give such permission if in his opinion the transfer or sub-division of land is likely to defeat the object of this Act.

(3) Nothing in this section shall apply to—

(a) a transfer or partition of land by a holder who does not hold land in excess of the ceiling area on the date of the transfer;

(b) a transfer before the appointed date by way of sale to any person specified in categories (i) to (v) of sub-section (1) of Sec. 35 or to a holder holding land less than five standard acres on the date of such transfer.

(c) a transfer by way of donation to a Bhoodan Yagna Board constituted under law relating to Bhoodan Yagna for the time being in force.

(4) The registering officer shall furnish to the Collector or such other officer as may be authorised by him in writing in this behalf, particulars relating to every transfer of land made on or after the commencement of this Act and before the appointed day, in such form and within such period as may be prescribed."

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Section 11 of the Act deals with preparation of a statement of land held in excess of ceiling area by the competent authority. A holder is required to furnish return under section 9. After making such enquiry as it may deem fit, the competent authority prepares and publishes a preliminary statement under section 11(1) which amongst others contains the description of the land which the competent authority proposes to declare surplus and the description of land which the holder is to retain. After receipt of objections to the draft statement and decision thereon, a final statement is prepared under section 11(6) specifying therein the entire land held by the holder; the land to be retained by him and the land declared to be surplus. Section 11(2) is relevant for our purposes which provides as under :—

> "11 (2). The transferor shall, for the purpose of this Act, be deemed to be the holder of the land the transfer of which-
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> (i) has been declared to be void under sub-section (1) of section 4; or
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> (ii) has been found by the competent authority, on such enquiry as may be prescribed to be in contravention of the provisions of sub-section (1) of section 5."

The surplus land declared under section 11 6) is deemed to be needed for public purpose and vests in the State absolutely free from all encumbrances under section 12. Section 16 provides for payment of compensation for the surplus land vesting in the State under section 12. The disposal of surplus land vesting in the State is dealt with in section 35. This section provides that the surplus land shall be allotted in Bhumiswami rights to the persons mentioned in the section in the order of priorities as indicated therein on payment of a premium equivalent to the compensation payable in

respect of such land. The priorities as contained in section 35 of the principal Act were as follows :

"(i) joint farming society, the members of which are agricultural labourers, or landless persons whose main occupation is cultivation or manual labour on land, or a combination of such persons;

(ii) better farming society, the members of which are agricultural labourers, or landless persons whose main occupation is cultivation or manual labour on land, or a combination of such persons;

(iii) agricultural labourers;

(iv) landless persons whose main occupation is cultivation or manual labour on land;

(v) displaced tenants subject to the provisions of Sec. 202 of the Madhya Pradesh Land Revenue Code, 1959 (20 of 1959);

(vi) holders holding contiguous land;

(vii) joint farming society of agriculturists;

(viii) better farming society of agriculturists;

(ix) any other co-operative farming society subject to the condition that land (including the land as owner or tenant individually by members) shall not exceed the area equal to the number of members multiplied by the ceiling area;

(x) an agriculturist holding land less than the ceiling area."

The second set of amendments of principal Act started in 1971. The first amendment in this series was proposed by the Madhya Pradesh Ceiling on Agricultural Holdings (Amendment Bill) 1972 (Bill No. 15 of 1972) which was published on 18th April 1972. The Bill was assented to by the President on 9th December 1972 and the assent was first published on 7th March 1974. This amendment Act, i. e.

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Act No. 12 of 1974, was brought into force on 7th March 1974. The important change brought about by this Act was that "family" was artificially defined in section 2(gg) of the Act to mean husband, wife and their minor children and it was made a separate unit for ceiling purposes. The second amendment in this series was proposed by the Madhya Pradesh Ceiling on Agricultural Holdings Second Amendment Bill, 1972 (Bill No. 57 of 1972) published on 22nd December 1972. The assent of the President to this Bill was given on 5th June 1973. The resulting Act, i. e. Act No. 13 of 1974, was enforced from 7th March 1974, i. e. from the date the assent was published in the gazette. The object behind this amendment Act was to reduce the ceiling limit on the basis of the guideline drawn by the Government of India in accordance with the conclusions of the Chief Ministers' Conference held on 23rd July 1972 and to give effect to the same from a date not later than 24th January 1971. The object further was to give priority in distribution of surplus land to agricultural labourers belonging to Scheduled Castes and Scheduled Tribes. The Statement of Objects and Reasons of this Act reads as follows :

> "The Government of India have forwarded to State Government guide-lines drawn on the basis of the conclusions of the Chief Ministers' conference on ceiling on agricultural holdings held on the 23rd July, 1972 at New Delhi and have desired that the State Ceiling Law should be brought in conformity with the national guide-lines. The guide-lines mainly laid down—
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> (1) That the level of ceiling for a family of five members should be between 10 acres to 18 acres of land receiving assured irrigation or assured private irrigation on two crops;
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> (2) That retrospective effect should be given from a date not later than 24th January 1971 with condition that

onus of proving *bana fide* nature of any transfer of land made after the date should be on the transferor.

(3) That in distribution of surplus land priority should be given to the agricultural labourers particularly those belonging to Scheduled Castes and Scheduled Tribes."

Section 4 of the Act as substituted by Act No. 13 of 1974 made provision for declaring void transfers made between 24th January 1971 and before the appointed day i.e. 7th March 1974. Section 14 of Act No. 13 of 1974, however, made section 4 of the principal Act applicable to transfers made after 1st January 1972 and before 7th March 1974. This section 14 was redundant in view of the fact that section 4 as substituted covered the transfers made after 24th January 1971 and before 7th March 1974. This anamoly was removed and the date as to the restriction of transfers was shifted from 24th January 1971 to 1st January 1971 by Ordinance No. 3 of 1973 which was replaced by Act No. 20 of 1974. Some other amendments were also made in the Act. The Statement of Objects and Reasons for Act No. 20 of 1974 is as under:

"(1) The Madhya Pradesh Ceiling on Agricultural Holdings (Amendment) Act, 1972 (No. 12 of 1974) and the Madhya Pradesh Ceiling on Agricultural Holdings (Second Amendment) Act, 1972 (No. 13 of 1974) were enacted in succession by the State Legislature to bring the ceiling law in force in the State in conformity with national guide-lines. However, the time lag between enactment of the aforesaid two Acts resulted in section 14 of the first named Act, which provided for restrictions on transfers of land made on or after the first January, 1972 becoming nugatory as under the provisions of the second named Act such restriction became operative from the 24th January, 1971.

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(2) The Government of India also desired certain clarificatory amendments to be made in the provisions covered by the aforesaid two amending Acts and proposed that restrictions on transfers should be as from the 1st January 1971."

Sections 4 and 5 as substituted and amended by these Amending Acts i.e. Acts Nos. 13 and 20 read as under:

"4. (1) Nothwithstanding anything contained in any law for the time being in force, where after the 1st January, 1971 but before the appointed day, any holder has transferred any land held by him by way of sale, gift, exchange or otherwise or has effected a partition of his holding or part thereof or the holding held by the holder has been transferred in execution of a decree of any Court, the competent authority may, after notice to the holder and other persons affected by such transfer or partition and after enquiry as it thinks fit to make, declare the transfer or partition to be void if it finds that the transfer or the partition, as the case may be, was made in anticipation or to defeat the provisions of this Act.

(2) Nothing in this section shall apply to a transfer made by a holder—

(a) who does not hold land in excess of the ceiling area; or

(b) who is a member of a family and where all the members of the family together do not hold land in excess of the ceiling area; as specified in sub-section (1) of section 7 as substituted by section 8 of the Madhya Pradesh Ceiling on Agricultural Holdings (Amendment) Act, 1974 on the date of the transfer.

(3) Any person aggrieved by an order of the competent authority under this section may prefer an appeal against such order to the Board of Revenue. The decision of the Board and subject to the decision of the Board in appeal, the decision of the competent authority shall be final.

(4) In regard to every transfer to which this section applies, the burden of proving that the transfer was not benami or was not made in any other manner to defeat the provisions of this Act shall be on the transferor.

(5) Notwithstanding anything contained in any law for the time being in force--

(i) no Court shall entertain any suit for the specific performance of any contract of sale of land on the basis of any agreement or document made on or before the 1st January, 1971, or

(ii) any decree passed by a civil Court for the specific performance of the contract of sale of land on the basis of any agreement or document made on or before the 1st January 1971 shall be null and shall not be enforceable, if such suit or decree is for the purpose of defeating the provisions of this Act.

5. (1) Notwithstanding anything contained in any law for the time being in force, no land shall be—

(a) transferred whether by way of sale (including sale in execution of a decree of a Civil Court or of an award or order of any other lawful authority) or by way of gift, exchange, lease or otherwise; or

(b) sub-divided (including sub-division by a decree or order of a Civil Court or any other lawful authority) whether by partition or otherwise;

until a final order under section 11 is passed except with the permission in writing of the Collector.

(2) The Collector may refuse to give such permission if in his opinion the transfer of sub-division of land is likely to defeat the object of this Act.

(3) Nothing in this sub-section shall apply to a transfer made by holder :—

(a) who does not hold land in excess of the ceiling area; and

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(b) who is a member of a family and where all the members of the family together do not hold land in excess of the ceiling area;

as specified in sub-section (1) of section 7 as substituted by section 8 of the Madhya Pradesh Ceiling on Agricultural Holdings (Amendment) Act, 1974 on the date of the transfer.

(4) The registering officer shall furnish to the Collector or such other officer as may be authorised by him in writing in this behalf, particulars relating to every transfer of land made on or after the 1st January 1971 and before the appointed date, in such form and within such period as may be prescribed.

(5) In regard to every transfer to which this section applies the burden of proving that the transfer was not benami or was not made in any other manner to defeat the provisions of this Act shall be on the transferor."

The priorities for allotment of land as contained in section 35 were also amended by Acts Nos. 13 and 20 of 1974. Items (i) to (x) as amended by these Acts read as follows :

"(i) agricultural labourers –

(a) belonging to Scheduled Castes and Scheduled tribes; and

(b) others;

(ii) joint farming society, the members of which are agricultural labourers, or landless persons whose main occupation is cultivation or manual labour on land, or a combination of such persons;

(iii) better farming society, the members of which are agricultural labourers, or landless persons whose main occupation is cultivation or manual labour on land, or a combination of such persons;

(iv) freedom fighters;

(v) displaced tenants subject to the provisions of section 202 of the Madhya Pradesh Land Revenue Code, 1959 (20 of 1959);

(vi) holders holding contiguous land;

(vii) joint farming society of agriculturists;

(viii) better farming society of agriculturists;

(ix) any other co-operative farming society subject to the condition that land (including the land as owner or tenant individually by members) shall not exceed the area equal to the number of members multiplied by the ceiling area;

(x) an agriculturist holding landless than the ceiling area."

We heard Shri R.K. Pandey and Shri Y.S. Dharmadhikari, learned counsel for the petitioners appearing in these petitions. We also heard Shri P. S. Khirwadkar, Shri A. R. Choubey, Shri R. C. Rai and Shri N. K. Patel, learned counsel appearing in other petitions of similar nature. Shri Tamaskar, learned Government Advocate, addressed us on behalf of the State Government. We now proceed to deal with the various contentions raised by the learned counsel.

It was first contended that there was no basis for making provision in section 4 for invalidating transfers from 1st January 1971 on the ground that the transfers were made in anticipation of or to defeat the provisions made by Act No. 13 of 1974. It was argued that the Bill which became that Act was first published on 22nd December 1972 and no person could conceive that the Government was contemplating to reduce the ceiling limit by amending the principal Act before that date. It was also argued that if a transferor filed an affidavit that he had no knowledge that the ceiling limit was going

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to be reduced by amending the principal Act at the time when he made the transfer, this should be taken to be sufficient to discharge the burden of proof laid on the transferor by sub-section (4) of section 4 at least in those cases where the transfers were made before the publication of the Bill which became Act No. 13 of 1974. Support for this argument was drawn from the ruling of a Division Bench of this Court in *Ramchandra* v. *Board of Revenue* (1).

It may be recalled that section 4 of the principal Act as substituted by Act No. 13 of 1974 made provision for avoidance of transfers made after 24th January 1971 and before the appointed date i. e. 7th March 1974. By Act No. 20 of 1974, 1st January 1971 was substituted in place of 24th January 1971 as the commencement of the period the transfers made within which can be invalidated under section 4. The relevance of these dates as stated in the return is that in January 1971 the Government announced the policy of lowering the ceiling limit. This statement in the return has remained uncontroverted. It is also fully supported by the historical facts mentioned in paragraph 35 of the judgment of the Supreme Court in *Ambika Prasad* v. *State of U. P.* (2). A perusal of that judgment goes to show that the Congress Party which was in power at the centre and in most of the States including Madhya Pradesh announced its election manifesto on 24th January 1971 which contained revised agrarian policy for reducing the ceiling limit. The announcement made by Congress Party which was in power at the centre and in most of the States was in fact the announcement of the Government in power for revision of the agrarian policy. It is for this reason that the conference of Chief Ministers decided to

(1) 1978 R. N. 60. (2) A.I.R. 1980 S. C. 1762.

implement the new agrarian policy from 24th January 1971 as is stated in the Objects and Reasons of Act No. 13 of 1974. Section 4 as substituted by this Act, therefore, made provision for invalidating transfers made after 24th January 1971. But it must have been later noticed that the election manifesto became known to many before it was formally announced and, therefore, by Act No. 20 of 1974, 1st January 1971 was substituted in place of 24th January 1971. There is thus clearly a reasonable basis for fixing the date 1st January 1971 as the beginning of the period, the transfers made within which can be invalidated under section 4 as amended by Acts Nos. 13 and 20 of 1974.

Sub-section (4) of section 4 provides that in regard to every transfer to which the section applies, the burden of proving that the transfer was not benami or was not made in any other manner to defeat the provisions of the Act shall be on the transferor. In *Ramchandra* v. *Board of Revenue* (*supra*), the transferors filed affidavits that they had no knowledge that any amendment in the parent Act reducing the ceiling limit would be introduced by Act No. 13 of 1974. The transfers were made on 11th February 1971. It was held that when the Bill which became Act No. 13 of 1974 was published on 18th April 1972, after the sale-deeds were registered and when the transferors filed affidavits that at the time of making the transfers they had no knowledge that the principal Act would be amended, the Competent Authority should have referred to some other material from which it could be inferred that the statements made by the transferors were improbable. From this ruling it was sought to be argued that the moment the transferors file affidavit denying any knowledge of any move to reduce the ceiling

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area and the transfers relate to a date prior to the date of the publication of the Bill, the burden on the transferors placed by sub-section (4) of section 4 is discharged. In our opinion, *Ramchandra's case* is not an authority for any such proposition. It, however, appears that the learned Judges deciding *Ramchandra's case* were not informed of the reason for fixing 1st January 1971 as the date for the commencement of the period the transfers made within which can be invalidated under section 4. As pointed out by us, the party in power announced in January 1971 its decision to revise the agrarian policy. This fact was not brought to the notice of the learned Judges. An affidavit filed or evidence given by a transferor that he had no knowledge that the principal Act was going to be amended when he made the transfer, cannot in this back-ground be so readily accepted. At any rate, it cannot be laid down as a rule of law that the moment such an affidavit is filed, the burden on the transferor would be discharged unless some other material is put forward to show that the affidavit or evidence is not true for the value of an affidavit or evidence given by a transferor would depend upon the facts and circumstances of each case. As we shall point out later in this order, the burden of proof laid on the transferor can be discharged only by offering a plausible explanation for the transfer and by proving it by preponderance of probabilities.

It was next contended that there was no exact correspondence between sub-sections (1) and (4) of section 4 and to the extent the transfers falling under sub-section (1) were not covered by sub-section (4), the burden of proof laid on the transferor under the latter would not be attracted. In this connection it was pointed out that firstly sub-section (1) covers

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both transfers and partitions whereas sub-section (4) is limited to transfers; and secondly sub-section (1) empowers the competent authority to invalidate a transfer that was made in anticipation of or to defeat the provisions of the Act but sub-section (4) is limited to a transfer which is benami or which is made to defeat the provisions of the Act and it does not cover a transfer which was made in anticipation of the provisions of the Act. This contention is without substance. The entire Ceiling Act including section 4 has to be construed to effectuate the object of the legislature in making available surplus land to the Government for distribution to the needy. In dealing with a similar provision, which was even more stringent, in *Authorised Officer, Thanjavur* v. *S. Nagapatha Ayyar* (1), the Supreme Court laid down that in construing a provision relating to social legislation the Courts must be animated by a goal-oriented approach so that the Courts are not converted into rescue shelters for those who seek to defeat agrarian justice by cute transactions of many manifestations. It is in this spirit that we must proceed to interpret section 4 which is a part of social welfare legislation designed to implement the great objective of securing social justice enshrined in the Preamble and the Directive Principles of State Policy. The rules of construction relating to exproprietary legislation which is construed in case of doubt in favour of the subject have no application here. Sub-section (1) refers to transfers by way of sale, gift, exchange or otherwise and partitions as also to execution sales. Sub-section (4) opens with the words "In regard to every transfer to which this section applies". These words used in sub-section (4) are wide enough to cover transfers and partitions referred to in sub-section (1). A partition may not be in certain context a transfer but in the context

(1) A. I. R. 1979 S. C. 1487.

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in which the words "every transfer" occur in sub-section (4), it is clear that these words embrace all kinds of transfers to which the section applies and include even partitions falling within sub-section (1). The intention to make sub-section (4) very wide in application is further shown from the fact that the burden laid on the transferor is to prove "that the transfer was not benami" or "was not made in any other manner to defeat the provisions of the Act". The words "in any other manner" are wide words and read in the context of the expression "every transfer" which occur in the beginning of sub-section (4), the intention is clear to make the sub-section applicable also to a partition. This wide interpretation would also promote the object of the Act. It is also not possible to accept that sub-section (4) does not embrace a transfer or partition in anticipation of the Act and is restricted to a transfer made to defeat the provisions of the Act. The words "in anticipation of" and the words "to defeat the provisions of" the Act in the context of section 4 have the same meaning. A transfer is in anticipation of an Act when it is made with a view to defeat the provisions of an Act which is likely to be passed in future. As section 4 only covers transfers made before the commencement of the amendment Act No. 13 of 1974, all transfers to defeat its provisions will be in anticipation of the Act. Thus, in the context of section 4, all transfers made in anticipation of will be with a view to defeat the provisions of the Act and *vice versa*. It cannot, therefore, be said that sub-section (4) of section 4 omits from its ambit certain transfers which are covered by sub-section (1). It was also argued that the words "in any other manner" as used in sub-section (4) should be restricted to transfers in the nature of benami i.e. tranfers which are not real and this sub-section

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should not be construed to include genuine transfers. Acceptance of this argument would be defeating entirely the object behind this provision. The argument cannot be accepted on any principle of construction. The words "in any other manner" are very wide words and they cannot be restricted to unreal transfers or transfers in the nature of benami. In our opinion, the special burden of proof laid by sub-section (4) will apply to all transfers and partitions covered by sub-section (1) of section 4.

It was next contended that transfers which were saved by sub-section (2) of the principal Act are not covered by sub-section (1) of section 4 as substituted by Acts Nos. 13 and 20 of 1974. The argument in support of this contention is that although sub-section (1) as substituted by the aforesaid amending Acts operates in respect of transfers made between 1st January 1971 and 7th March 1974, sub-section (2) of the principal Act continued to be effective till 7th March 1974 and, therefore, transfers made before 7th March 1974 which fell within the permissible limits of that sub-section were not affected. The argument proceeds upon a complete misundertanding of the scope of section 4 of the principal Act and section 4 as substituted by Acts nos. 13 and 20 of 1974. Section 4 of the principal Act empowers the competent authority to declare void transfers made after the date of publication of the Madhya Pradesh Ceilling on Agricultural Holdings Bill, 1959, i.e. 15th September 1959, and before the commencement of the principal Act, i.e. 15th November 1961. The competent authority by sub-section (1) of section 4 of the principal Act gets jurisdiction to declare void these transfers if they were made in anticipation of or to defeat the provisions of the principal Act. Sub-section (2) of section 4 of the principal Act which

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opens with the words "nothing in this section shall apply to a transfer, made by a holder", excludes the operation of the section to transfers referred to therein. This only means that a transfer made after 15th September 1959 and before 15th November 1961 would not be invalidated by the competent authority if it falls within the categories of transfers mentioned in sub-section (2). Sub-section (2) of section 4 of the principal Act like sub-section (1) of that section is limited to the transfers made within the said period. Section 4 of the principal Act has no application to any transfer made on or after 15th November 1961. The object of sub-section (2) of the principal Act is that if the transfer made before the coming into force of the principal Act was made by a holder who did not hold land in excess of the ceiling area or was made to the persons of categories (i) to (v) mentioned in section 35(1) or to a holder holding less than 5 standard acres, such transfers would not be invalidated by the competent authority. Sub-section (2) of the principal Act cannot be construed as a permission for transfer for any period after the coming into force of the Act. That subject is dealt with in section 5. Sub-section (2) of section 4 of the principal Act cannot be used as exception to the power of invalidating transfers conferred on the competent authority by section 4 as substituted by Acts Nos. 13 and 20 of 1974. As earlier seen by us, sub-section (1) of section 4 substituted by Acts Nos. 13 and 20 of 1974 enables the competent authority to declare void transfers made after 1st January 1971 and before 7th March 1974. Sub-section (2) of section 4 of the principal Act was also substituted by these amending Acts by a new sub-section. Sub-section (2) of section 4 of the principal Act was an exception to sub-section (1) of section 4 of the principal

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Act and it cannot be read as an exception to sub-section (1) of section 4 as substituted by the amending Act. For finding out, in respect of which transfers, the power under sub-section (1) of section 4 as substituted by the amending Acts is not applicable, we have to see sub-section (2) of section 4 as substituted by these amending Acts and not sub-section (2) of section 4 of the principal Act. Both the amending Acts came into force on 7th March 1974. It is only after that date that the competent authority could exercise the power of invalidating transfers made after 1st January 1971 and before 7th March 1974. Sub-section (2) of section 4 was also substituted from 7th March 1974 specifying transfers to which the power under sub-section (1) of section 4 cannot be exercised. A perusal of new sub-section (2) goes to show that it makes new sub-section (1) inapplicable to a transfer made by a holder who does not hold lands in excess of the ceiling area as fixed by Act No. 13 of 1974. Thus, a transfer made by a person within the aforesaid period who held land within the ceiling area fixed by the principal Act but more than the ceiling area as fixed by Act No. 13 of 1974 would also be hit by new sub-section (1) and the competent authority will have jurisdiction to invalidate it in case it was made in anticipation of or to defeat the provisions of the Act as amended. In support of the argument that the transfers mentioned in sub-section (2) of section 4 of the principal Act were saved from the operation of sub-section (1) of section 4 as substituted by the amending Acts Nos. 13 and 20 of 1974, reliance was placed on *Mahadeo* v. *State of M. P.* (1) and *Pratap Singh* v. *State of M. P.* (2). These cases decided by a Division Bench of this Court do support this construction but, in our opinion, they were not correctly decided. In *Pratap Singh's case*, the learned Judges relied on

(1) 1980 R. N. 482=1980 J. L. J. 797. (2) 1980 R. N. 525.

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State of Kerala v. *Philomina* (1). That case related to the Kerala Land Reforms Act, 1963, the provisions of which were different and not in *pari materia* with section 4 of our Act. Section 84 of the Kerala Act invalidated transfers made between 15th September 1963 and 1st January 1970. But the section was not made applicable to Kayal lands till 1st January 1970 and, therefore, it was held that transfers of Kayal lands between the said period were not affected. The provisions of section 4 of our Act are entirely different as so *Philomina's case* has no application here.

It was then contended that section 4(1) as substituted by the amending Acts cannot be applicable to transfers which were permitted by section 5 (3) of the principal Act. Section 5(1) prohibits transfers after coming into force of the principal Act except with the permission in writing of the Collector. Sub-section (3) of the principal Act made exceptions and the permission was not needed in respect of certain transfers, for example, transfer or partition by a holder who did not hold land in excess of the ceiling area as fixed by the principal Act and transfer or sale to persons specified in categories (1) to (v) of section 35 (1) or to the holder holding lands less than 5 acres. These transfers could be made without the permission of the Collector as provided in sub-section (3) of section 5 of the principal Act. The obvious reason was that these transfers did not defeat the provisions of the principal Act. As already seen, the Act was radically amended by Acts Nos. 12 of 1972, 13 and 20 of 1974 and ceiling limit was further reduced. Power was conferred on competent authority to invalidate transfers made after 1st January 1971 and before 7th

(1) A. I. R. 1976 S.C. 2363.

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March 1974, if they were in anticipation of or to defeat the provisions of the Act which means the Act as amended. Simply because the transfers made within this period were within the exception contained in sub-section (3) of section 5 of the principal Act, they are not saved from the operation of new section 4 if they were made in anticipation of, or to defeat the provisions of the Act as amended. The new agrarian policy having been announced in 1971, even land-holders having lands within the ceiling limit as prescribed by the principal Act were tempted to transfer their lands to escape from the oncoming legislation. These transfers, even though permitted by section 5 (3) of the principal Act, would be hit by new section 4 unless they are saved by sub-section (2) thereof. It was also argued that transfers to persons mentioned in clauses (i) to (v) of section 35 cannot defeat the Act as the object is to distribute surplus land to them. This argument is also not sound. The object of the Act, as shown by its long title, is to provide for imposition of ceiling and acquisition and disposal of surplus land. The distribution of surplus land in the scheme of the Act has to be through the agency of the Government for otherwise it will lead to many malpractices. A land-holder, having surplus land, by selling or transferring land even to a person of any of the categories mentioned in section 35 cannot be said to be acting in furtherance of the object of the Act. The policy of the Act is equitable distribution of the land through the agency of the Government which cannot be implemented by individual land-holders.

It was further contended that although Acts Nos. 13 and 20 of 1974 substituted new section 4, the original heading of the section was not changed and hence the new section cannot be given effect to.

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The heading of section 4 is: "Transfers or partitions made after the publication of the Bill but before the commencement of the Act". This heading was in line with section 4 as it originally stood. It ought to have been changed when the original section was substituted by the new section. The omission in that matter, however, has no effect on the construction of the new section for in plain terms it covers the transfers made between 1st January 1971 and the appointed day i. e. 7th March 1974. It is well settled that the heading of a section cannot control its plain language.

Arguments were also addressed as to the ambit of the burden of proof laid on the transferor by sub-section (4) of section 4. In this connection, it was submitted that a mere denial by the transferor that he intended to defeat the provisions of the Act by the transfer or at any rate the giving of a plausible explanation by him should be sufficient to discharge the burden of proof. It was also submitted that the transferor cannot prove anything else in discharging the burden to prove a negative. We are unable to agree. The occasion and reason for making the transfer are specially within the knowledge of the transferor. It is for him to state the facts relating thereto and to prove them by preponderance of probabilities. If the transferor is able to state and establish any good reason for the transfer by preponderance of probabilities, it should be held that the burden of proof laid on him under section 4(4) is discharged. Looked from this angle, it cannot be said that the burden on the transferor is to prove a negative fact. To hold that a mere denial or putting forward of some plausible explanation for the transfer would discharge the burden of proof laid by sub-section (4) would be entirely defeating

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its provisions for it would be easy for every transferor to deny that he made the transfer with a view to defeat the provisions of the Act and to put forward a plausible explanation which may be entirely false. In this connection, our attention was drawn to *P. Sambasiva Rao* v. *Revenue Divnl. Officer* (1) which was followed by a Division Bench in *Chandrasekhar* v. *State of M.P.* (2). The *Andhra Pradesh case* does lay down that if the transferor gives some plausible explanation, the burden of proof laid on him under section 7 of the Andhra Pradesh Ceiling on Agricultural Holdings Act is discharged and the explanation given by the transferor must be accepted. To the same effect is the ruling of the Division Bench in *Chandrasekhar's case*. We are unable to agree with the view taken in these cases. Such a view will reduce sub-section (4) of section 4 to a dead letter. A transferor must not only give a plausible explanation for the transfer but also support it by evidence and make it acceptable by preponderance of probabilities It is only then that it can be said that the burden of proof is discharged

We now turn to the facts of the cases in hand. We first take up Misc. Petition No. 376 of 1978. Petitioner no. 1, Narbadaprasad, is son of petitioner no. 2, Raghunandanlal. Narbadaprasad was holder of 202.46 acres of land on 1st January 1971. He executed six sales between 22nd November 1971 and 13th April 1972 covering 140.27 acres of land. Raghunandanlal petitioner no. 2, was holder of 99.57 acres of land on 1st January 1971. He executed three sales on 22nd March 1972 covering 48.52 acres of land. All these sales were made to relatives. It was stated that one of the petitioners was kidnapped by dacoit Muratsingh in 1969 and the petitioners

(1) A. I. R. 1977 A P 51 (2) 1980 R. N. 467

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had to borrow loans of Rs. 1 lac in all from the relations in 1967 to pay ransom to Murat Singh and the sales were executed for repayment of these loans. There is no writing evidencing the loans. The loans were time barred on the date when the sales were executed. Having regard to all these factors, the competent authority and Board of Revenue, in appeal disbelieved the story of repayment of loans by sales and came to the conclusion that the petitioners had failed to discharge the burden that the transfers were made to defeat the provisions of the Act. This finding does not suffer from any error of law or error of jurisdiction.

We now come to Misc. Petition No. 324 of 1974. The sale in favour of the petitioner of 30.96 acres of land for Rs. 7,500/- was made on 18th April 1972 by Pancham Singh who was the holder. The transferor stated that the transfer was made for the marriage of his daughter. He produced no evidence that there was really any marriage for which expenses were incurred. The transferor also stated that in 1972 he purchased bullocks for Rs. 2000/- and spent Rs. 1000/- on construction of an embankment but led no evidence to prove it. The transferor admitted that he gave loan to his brother for purchase of a tractor from which it was inferred that the transferor was a well-to-do person who could himself advance loans. The transferor was in possession of 101 acres of land. The competent authority and the Board of Revenue after appreciating the evidence came to the conclusion that the explanation given for making the sale was not established and the burden was not discharged. In our opinion, the finding so reached does not suffer from any error of law or error of jurisdiction.

The petitions fail and are dismissed but without

any order as to costs. The security amount be refunded to the petitioners.

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Petition dismissed.

MISCELLANEOUS PETITION

Before Mr. Justice G. P. Singh and Mr. Justice Raina.

DR. (KU.) SNEH RANI JAIN, Petitioner*

v.

STATE OF M. P. and others, respondents.

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Commissions of Inquiry Act (LX of 1952), Sections 4, 5 and 8, Vishwavidyalaya Adhiniyam, M. P. (XXII of 1973), Sections 2(v), 15(4) and 15(5) and Constitution of India, Article 226—Bias on the part of the Commission on the ground of relationship with a person involved—Exact relationship not stated—Commission only distantly related—Bias not made out—Question not referred to Commission—It has no jurisdiction to give a finding on such matter—Such finding liable to be quashed—Remarks by the Commission—Should not be unnecessarily intemperate and unjustified—Vishwavidyalaya Adhiniyam, 1973—Sections 2(v) and 15(4)—Resignation of an employee accepted by Vice-Chancellor under section 14(4) of the University of Saugar Act, 1946—Deemed to be under section 15(4) of the Adhiniyam—Resignation—When may be withdrawn—Emergency decision by Kulpati—Executive Council has a statutory duty to consider the action of Kulpati and decide whether it is approved or disapproved—While considering the action of Kulpati Executive Council not to be influenced by the report of Commission which is without jurisdiction—Constitution of India—Article 226—Report of Commission—When may be quashed—Full opportunity to produce evidence made difficult—Finding not binding.

When allegations of personal bias are made against a person functioning as an authority or Tribunal, it is desirable that affidavit

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should be filed by the person concerned. However, when exact relationship is not stated and the Commission is only distantly related with a person involved, ground of bias is not made out.

When the Commission had no jurisdiction to give its opinion on the question of resignation of the Petitioner and the Commission in its report observed that "the Petitioner wrote out her resignation in a spirit of defiance and disrespect for everybody and left the Vice-Chancellor's room in a huff", these observations contain a finding by necessary implication that the Petitioner submitted her resignation voluntarily and not under duress. The finding of the Commission in this respect is liable to be quashed.

The Petitioner's resignation was accepted by the Vice-Chancellor acting under section 14(4) of the University of Saugar Act, 1946. The University of Saugar Act was repealed and replaced by Vishwavidyalaya Adhiniyam, Madhya Pradesh, 1973. Under Section 2(v) of the Adhiniyam all "things done" under the repealed Act and "in force" immediately before the date of repeal are deemed to have been done under the Adhiniyam. The Vice-Chancellor's act of acceptance of petitioner's resignation and the report made by him were things done under the repealed Act and were in force or effective before the date of repeal. Therefore, as a result of the fiction enacted in section 2(v) these acts of the Vice-Chancellor must be deemed to have been done under the corresponding provisions of the Adhiniyam i. e. under section 15(4).

D. M. Dharmadhikari for the petitioner.

M. V. Tamaskar and *S. K. Seth* for the respondents.

Cur. adv. vult.

ORDER

PER SINGH J.—The petitioner, Dr. (Ku.) Sneh Rani Jain, was Assistant Professor in the Department of Pharmaceutical Science in the University of Saugar. In October 1972 the petitioner was also appointed as Warden of Girls' Hostel known as 'Nivedita Hostel'. 19th March 1973 was the day of Holi. On that date some boy students entered the compound

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of Nivedita Hostel. According to the petitioner, the students misbehaved and used filthy and abusive language for the girls and the petitioner. The petitioner pasted a notice on the gate of the hostel which is as follows :

"VISITORS AND FRIENDS"

Holi brings Fun but not Goondaism? Only student leader Mr. Uttam Khatik and his group boys came to hostel twice, damaged the Hostel and behaved absurdly dangerous ?

Please join me in condemning their behaviour publicly :

Abusers : Reflected the Black deeds of their mothers and dirty origin of their seeds ?

Lady Warden"

This notice offended the students. On 22nd March 1973 the petitioner was called by the Vice-Chancellor and she submitted her resignation which was accepted on the same date. The Vice-Chancellor further directed that a report be sent to the Executive Council about the resignation. The petitioner contends that the said resignation is not in true sense a resignation and that it was obtained under duress.

There were reports in the newspapers about the incident that happened on 19th March 1973. As public interest was aroused, the State Government by a notification issued on 9th April 1973 appointed a one man Commission consisting of Shri K. N. Shukla, the then District Judge, Sagar, under section 3 of the Commissions of Inquiry Act, 1952, to enquire into and reports on the following matters :

" (i) Did some of the students of the University of Sagar misbehave with the inmates of Nivedita Hostel on the 19th March 1973 and, if so, in what manner ?

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(ii) Who was responsible for the mis-behaviour, if any ?

(iii) Was adequate and prompt action taken in connection with this incident and, if not, who was responsible for any short-comings ?

(iv) Was the behaviour of any person connected with the alleged incident blameworthy in any manner and, if so, how ?"

The Commission submitted its report to the Government on 31st December 1973. On the first question, the Commission's report was that there was no misbehaviour by the boy students of the University with the inmates of Nivedita Hostel on 19th March 1973. The Holi was celebrated by the boys as they had been celebrating for the past several years by singing and dancing in the Girls' Hostel compound outside the hostel building and leaving the place quietly. The boys entered the hostel compound against the orders of the petitioner and sang Holi Songs in which they referred to her name. On the second question, the Commission held that no one misconducted or misbehaved with the inmates of the Nivedita Hostel. On the third question, the Commission found that no incident happened which required any adequate and prompt action, and that the Vice-Chancellor through the Proctor started proceedings on the complaint of the Warden which on facts was not true. As regards the fourth question, the Commission held that the petitioner's conduct was blameworthy.

The Executive Council of the University considered the report of the Vice-Chancellor and the representation of the petitioner in the matter of her resignation and the following resolution was passed on 16th October 1974 :

"Resolved that the matter has already been decided, reported

and noted. Resolved that her representation is rejected."

The petitioner thereafter filed the present petition under Article 226 of the Constitution praying that the report of the Commission, the order of the Vice-Chancellor dated 22nd March 1973 accepting her resignation and the resolution of the Executive Council dated 16th October 1974 be quashed.

The first point raised by the learned counsel for the petitioner for challenging the report of the Commission is that one of the students involved in the incident, namely, Subodh Pandey, was closely related to Shri K. N. Shukla and, therefore, Shri Shukla was not competent to function as the Commission. All that has been stated in paragraph 31 of the petition on this point is that Subodh Pandey was closely related to Shri Shukla. The exact relationship is not stated in the petition. Shri Shukla who is respondent no. 2 in the petition has not filed any return or affidavit. The State Government has, however, filed an affidavit sworn in by Subodh Pandey. In this affidavit, it is stated that Subodh Pandey's mother who died long back was distantly related to Shri Shukla. It is further stated that there was no contact between the family of Subodh Pandey and the family of Shri Shukla after the death of Pandey's mother which took place about 23 years back It is no doubt true that when allegations of personal bias are made against a person functioning as an authority or tribunal, it is desirable that affidavit should be filed by the person concerned. However, in the circumstances of the case, I do not think that the allegation of bias resting on the ground of relationship with Subodh Pandey can be said to have been substantiated although no affidavit has been filed by Shri Shukla. As earlier stated, the exact

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relationship has not been stated in the petition and the affidavit of Subodh Pandey shows that though Shri Shukla was distantly related to him there was no contact between his family and the family of Shri Shukla for the last so many years. I am, therefore, not prepared to hold that Shri Shukla was not competent to function as the Commission because of his relationship with Subodh Pandey. There are also other allegations in the petition that the Commission did not act fairly towards the petitioner and did not permit her to properly cross-examine the witnesses and did not give her sufficient opportunity to examine her witnesses. Even though at the request of the petitioner record of the inquiry was made available at the hearing, the learned counsel was unable to substantiate these allegations from the record. I have, therefore, no hesitation in rejecting the ground of bias raised by the petitioner.

It was next contended by the learned counsel for the petitioner that the Commission exceeded its jurisdiction in giving its finding on the question whether the resignation submitted by the petitioner to the Vice-Chancellor was voluntary or under duress. It was conceded by the learned Government Advocate and also by the learned counsel appearing for the University that the question whether the petitioner's resignation was voluntary or whether it was obtained under duress was not submitted for inquiry to the Commission. The Commission was also alive to this aspect of the matter. In paragraph 49 of its report the Commission stated that it would not bother about the question whether the petitioner's resignation was given voluntarily or under duress, and that it will merely consider the incident for properly appreciating the conduct and the motives of the parties involved. I have earlier set out the

questions that were referred to the Commission. "The alleged incident" referred to in the fourth question was in the context clearly the incident of 19th March 1973 which was the subject matter of question no. 1 and not any incident which took place later. The Commission was, therefore, to report on question no. 4 whether the behaviour of any person connected with the incident of 19th March 1973 was blameworthy in any manner. The Commission could, no doubt, take into account the facts preceding and succeeding the incident of 19th March 1973 in giving its opinion on question no. 4; but it could not directly or indirectly pronounce upon the validity or otherwise of the resignation submitted by the petitioner. Indeed, this position, as earlier stated, is not disputed by the learned counsel appearing for the parties. The Commission, although conscious of the fact that it had no jurisdiction to give its opinion on the question of resignation of the petitioner, in paragraph 55 observed that "the petitioner wrote out her resignation in a spirit of defiance and disrespect for everybody and left the Vice-Chancellor's room in a huff." These observations, in my opinion, contain a finding by necessary implication that the petitioner submitted her resignation voluntarily and not under duress. As the Commission had no jurisdiction to pronounce upon the voluntariness or otherwise of the petitioner's resignation, this finding of the Commission must, in my opinion, be quashed.

The petitioner's learned counsel also complained that the Commission has used unnecessarily intemperate language for the petitioner at certain places. In our opinion, this grievance also is to some extent justified. In paragraph 54 the Commission observed that "the petitioner was a hypersensitive, high-strung and vain person and that she

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greatly magnified the innocuous holy revelry into an act of rampage by Uttam Khatik and his friends, and that this was done with an ulterior and *mala fide* motive." I fail to understand the necessity or propriety of using these strong words in the report by the Commission. The Commission has failed to state as to what was the ulterior and *mala fide* motive which the petitioner had against the students. The fact remains that certain students led by Uttam Khatik entered the girls' hostel compound on the Holi day and they were singing Holi Songs in which the name of the petitioner, if not that of the girls, was referred to. The petitioner apprehended that the Holi revelry may not cross the limits of propriety and take an ugly turn resulting in molestation of the girls. This apprehension, as found by the Commission, and I must assume that the finding of the Commission is correct on this point, was not justified. The petitioner with a view to deter the students in their conduct got pasted the notice which I have earlier extracted. The language used by the petitioner in that notice was un-becoming and her conduct in that respect cannot be supported. But there cannot be any doubt that the petitioner acted in her capacity as Warden honestly for the safety of the girls in the hostel and not from any ulterior and *mala fide* motive. I am, therefore, constrained to observe that the aforesaid remarks made by the Commission in paragraph 54 of its report were unjustified.

On the question of resignation, the learned counsel for the petitioner first contended that the petitioner was entitled to withdraw her resignation before the report of the Vice-Chancellor accepting the resignation was approved by the Executive Council. According to him, the acceptance of

resignation was complete after the report was approved by the Council and till then it was open to the petitioner to withdraw the resignation. In our opinion, there is no substance in this contention. The acceptance of the resignation was complete when the Vice-Chancellor accepted the resignation and there was no room for withdrawal of the resignation thereafter. It is true that the Executive Council can disapprove the action of the Vice-Chancellor, but that is altogether a different matter. The petitioner cannot set at naught the act of acceptance of the resignation by the Vice-Chancellor by withdrawing her resignation without the intervention of the Executive Council.

Learned counsel for the petitioner then contended that the petitioner submitted her resignation on 22nd March 1973 under duress. It was also submitted that the resignation was not a resignation at all because it was addressed to none. It was further argued that there was no emergency and the Vice-Chancellor had no jurisdiction to accept the resignation acting under his emergency powers. It was also contended that the Executive Council did not apply its mind to the report of the Vice-Chancellor in the matter of resignation, and that the resolution of the Executive Council dated 16th October 1974 deserves to be quashed. As for the reasons given below I am accepting the challenge to the resolution of the Executive Council dated 16th October 1974, I do not think it proper at this stage to consider other points relating to the resignation raised here by the petitioner, because those points can be reconsidered by the Executive Council.

The petitioner's resignation was accepted by the Vice-Chancellor acting under section 14(4) of the

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University of Saugar Act, 1946. This provision reads as follows :

"14(4). The Vice-Chancellor may, in any emergency which in his opinion requires that immediate action should be taken, take such action as he deems necessary, and shall at the earliest opportunity report his action to the authority which in the ordinary course would have dealt with the matter."

On 5th May 1973 the University of Saugar Act was repealed and replaced by the Madhya Pradesh Vishwavidyalaya Adhiniyam, 1973. The emergency powers of Vice-Chancellor, now called 'Kulpati', are contained in section 15 of the Adhiniyam, the relevant provisions of which read as follows :

"15(4). If in the opinion of the Kulpati any emergency has arisen which requires immediate action to be taken, the Kulpati shall take such action as he deems necessary and shall at the earliest opportunity thereafter report his action to such officer, authority, committee or other body as would have in the ordinary course dealt with the matter;

Provided that the action taken by the Kulpati shall not commit the University to any recurring expenditure for a period of more than three months:

Provided further that where any such action taken by the Kulpati affects any person in the service of the University such person shall be entitled to prefer, within thirty days from the date on which such action is communicated to him, an appeal to the Executive Council.

(5) On receipt of a report under sub-section (4) if the authority, committee or body concerned does not approve of the action taken by the Kulpati, it shall refer the matter to the Kuladhipati whose decision thereon shall be final.

(6) The action taken by the Kulpati under sub-section (4) shall be deemed to be the action taken by the appropriate

authority until it is set aside by the kuladhipati on a reference made under sub-section (5) or is set aside by the Executive Council on an appeal under the second proviso to sub-section (4)."

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Both under the University of Saugar Act as also under the Adhiniyam, the power to appoint officers and teachers of the University and to exercise all powers of the University not otherwise provided for is vested in the Executive Council. The power to accept resignation of an employee of the University is not specifically conferred on any authority and, therefore, it is a power which in the normal course has to be exercised by the Executive Council. Under the University of Saugar Act, in case of an emergency, the Vice-Chancellor could take action on behalf of any authority of the University, but he was bound to report under section 14(4) the action taken by him to the authority competent to take that action in the ordinary course. It was implicit in that provision that on a report made by the Vice-Chancellor of the action taken by him in an emergency, it would be open to the authority concerned either to approve that action or to set it aside. Therefore, on the report of the Vice-Chancellor regarding his acceptance of the resignation of the petitioner it would have been open to the Executive Council to approve or to set aside that action had the University of Saugar Act continued at the time when the report was considered by the Executive Council. The University of Saugar Act was, however, repealed by the Adhiniyam before the report could be considered. Under section 2(v) of the Adhiniyam all "things done" under the repealed Act and "in force" immediately before the date of repeal are deemed to have been done under the Adhiniyam. The Vice-Chancellor's act of acceptance of petitioner's resignation and the

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report made by him were things done under the repealed Act and were in force or effective before the date of repeal. Therefore, as a result of the fiction enacted in section 2(v) these acts of the Vice-Chancellor must be deemed to have been done under corresponding provisions of the Adhiniyam i e. under section 15(4). Further action on the report of the Vice-Chancellor had, therefore, to be taken under the Adhiniyam and not under the repealed Act. Under the Adhiniyam if action taken by the Vice-Chancellor in an emergency affects any person in the service of the University, such person has a right of appeal to the Executive Council under the second proviso to section 15(4). The Executive Council under section 15(6) can accept the appeal and set aside the action of the Vice-Chancellor. I, however, do not find that any appeal, as is contemplated under the second proviso to section 15(4), was filed or could be filed because the period of limitation is thirty days which expired long before the Adhiniyam came into force. The Executive Council, however, was also the authority to which the report was to be submitted. The Executive Council, therefore, could consider the report of the Vice Chancellor under section 15(5), but under that provision it had no authority to set aside the action of the Vice-Chancellor and in case of its disapproval it could only refer the matter to the Chancellor for setting it aside.

The report of the Vice-Chancellor accepting the resignation of the petitioner first came up before the Executive Council in its meeting held on 10th June 1973. As by that time the Adhiniyam had come into force, the Council decided to obtain the opinion of the Chancellor whether further action should be taken under the Adhiniyam or under the repealed Act. The Chancellor presumably decided that further

proceedings be taken under the Adhiniyam. The petitioner's case then again came up before the Executive Council in its meeting held on 23rd March 1974 and it was resolved that "the consideration of the matter be deferred till the report of the Commission appointed regarding the matter was out and a decision has been taken on it by the State Government". Thereafter, in the meeting held on 16th October 1974 the Executive Council considered the petitioner's case as also the report of the Commission vide items nos. 36 and 37 of the Agenda. The Executive Council in that meeting passed the resolution, which we have earlier extracted, rejecting the petitioner's representation.

From the facts stated above, it is clear that the Executive Council had not taken any decision before 16th October 1974 on the question of the petitioner's resignation and the action of the Vice-Chancellor accepting her resignation, and the matter had only been postponed awaiting the report of the Commission. It is, therefore, difficult to understand the resolution of the Executive Council of 16th October 1974 which states that "the matter has already been decided, reported and noted". There being no prior decision of the Executive Council, the resolution proceeds upon a complete misapprehension. The Executive Council thus failed to apply its mind to the report of the Vice Chancellor accepting the resignation and the representation of the petitioner was rejected under a complete misunderstanding that the matter had already been decided. Under section 1(5) of the Adhiniyam the authority, which in this case was the Executive Council, to which report is made by the Vice-Chancellor of an action taken in an emergency has either to approve the same or, in case of disapproval, has to refer the matter to the

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Chancellor. There was thus a statutory duty cast upon the Executive Council to apply its mind to see whether the action of the Vice-Chancellor taken under the emergency merited approval or disapproval. The Executive Council in the instant case failed to do this statutory duty of applying its mind under section 15(5) of the Adhiniyam.

From the resolution passed by the Executive Council on 23rd March 1974 it appears that the Council thought it proper to await the report of the Commission. In the meeting of 16th October 1974 the Commission's report was before the Council. It appears, though it is not clearly stated, that the Commission's report was taken into account in rejecting the petitioner's representation. I have earlier stated that the report of the Commission in so far as it found that the petitioner's resignation was voluntary was in excess of jurisdiction. The Executive Council, therefore, should not have been influenced by this finding. It was for the Executive Council to consider the facts and circumstances of the case, the report of the Vice-Chancellor and the representation of the petitioner and then to reach its conclusion whether the action of the Vice-Chancellor should be approved or whether a report be made to the Chancellor. Consideration by the Executive Council of a report which was in excess of authority on the question in issue before the Council also makes the resolution dated 16th October 1974 invalid.

The learned Government Advocate contended that as the Commission's report is not binding on anyone by its own force, the Court should not quash any part of it under Article 226. It is true that the Commission's report by itself has no effect. But when it is found that the Commission has exceeded its jurisdiction in reporting upon an issue which was

not referred to it and when it is further found that the Commission's finding is causing prejudice to the petitioner, I find no principle or authority that the report to that extent cannot be quashed. In the instant case, the Commission's report on the issue of the petitioner's resignation was taken into account by the Executive Council to her prejudice. The petitioner has also stated in the petition that although subsequently she was selected by the Publice Service Commission for the post of Principal of Women Polytechnic, she was not appointed by the State Government, presumably having regard to the adverse report of the Commission against her. The petitioner has further stated that she appeared in an interview for appointment as Principal in a private college of Pharmacy of Bombay and she was assured at the time of interview that she would be given the post, but later on she was not given that appointment. The petitioner's suggestion is that the report of the Commision has been coming in her way in getting another job. In these circumstances, it cannot be said that it would not be proper to quash the report of the Commission even to the extent it is in excess of jurisdiction. I may add that I have read the note of Raina J, and I agree with his observations.

The petition is partly allowed. The report of the Commission to the extent it gives an implied finding in para 55 that the petitioner's resignation was voluntary is quashed. The resolution of the Executive Council dated 16th October 1974 is also quashed. The Executive Council is directed to consider the report of the Vice-Chancellor relating to the resignation of the petitioner as also the representation of the petitioner in that behalf under section 15(5) of the Adhiniyam. There shall be no

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order as to costs of this petition. The amount of the security deposit shall be refunded to the petitioner.

PER RAINA J.--I agree but would like to add a few words.

The observations made by the Commission in paragraph 54 of its report, to which reference has been made by my learned brother in paragraph 8, are not only lacking in propriety but have done immense harm to the petitioner as would appear from the facts stated in paragraph 16. The petitioner, no doubt, committed an act of gross indiscretion in pasting the notice "VISITORS AND FRIENDS" on the gate of the hostel which must have outraged the feelings of the students and enraged them; but her conduct must be judged in the context of her responsibility as the warden of the girls hostel, keeping in view the fact that it was the day of 'Holi and students had entered the compound of the hostel in a hilarious mood to celebrate the festival. Even sober people sometimes behave queerly in a mood of revelry while celebrating 'Holi'; and, therefore, we cannot blame the petitioner if she entertained an apprehension that the situation may be out of control if some of the girls happened to join the boys in a festive mood without realizing the consequences. The petitioner may have overreacted to the situation; but there can be no doubt that whatever she did was done by her in the interests of the girl students in her charge as the warden of the hostel. There is, therefore, no justification for imputing an ulterior or *mala fide* motive to her.

One of the grievances made by the petitioner in

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this petition regarding the enquiry before the Commission is that since the principal witnesses were the girl students of the hostel and the proceedings were not held in camera, they dared not to speak against the students who flocked to attend the proceedings of the Commission. This grievance cannot be considered to be without substance, particularly because the enquiry was held during pre-emergency days. In any case, whatever may be said about the petitioner regarding her conduct as a warden, there is absolutely nothing against her conduct as a teacher; and we fail to see why the observations or the findings of the Commission should come in the way of the petitioner for securing a good job in the Education Department for which she may be considered fit by the Public Service Commission or by any Selection Committee with due regard to her academic qualifications. She may have exhibited lack of tact in handling the delicate situation on the day of the occurrence; but there is absolutely no justification for drawing an adverse inference from her conduct about her capacity and ability as a teacher.

Petition partly allowed.

APPELLATE CIVIL

Before Mr. Justice C.P. Sen and Mr. Justice B.C. Varma.

RAMNARAYAN and others, Appellants*

v.

FIRM MANGARAM RADHESHYAM and another, Respondents.

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Nov. 13

Specific Relief Act (XLVII of 1963), Section 34 and Civil Procedure

*First Appeal No. 222 of 1976, from the decree of K. K. Verma, II Additional District Judge, Hoshangabad, dated 10th November 1976.

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Code (V of 1908), Section 9 and Order 7, rule 7—Scope of—Section 34 is not exhaustive—Declaratory decree can also be granted under section 9 and Order 7, Rule 7, Civil Procedure Code—Suit for mere declaration, that no pecuniary liability arising out of commercial transactions attaches to Plaintiff—Maintainability of.

The Court's power to grant declaratory decrees is not limited to the terms of Section 34 (present) or Section 42 (old) of the Specific Relief Act. Declaratory decrees can well be made by the Courts under the general provisions of the Code of Civil Procedure as Section 9 or Order 7, Rule 7 of the Code. The exercise of jurisdiction to grant such declaratory reliefs beyond the term of that section shall depend upon the facts of each case. Such a declarations may be granted when it is essential as a step to a relief in some other case or when a declaration in itself is a substantial relief and has immediate coercive effect.

It is not an obsolute right to obtain a declaratory decree. The courts have a discretion in the matter of grant of such declaratory reliefs. The Court must exercise sound judgment while granting or refusing such reliefs. Danger to involve the opponent in vexatious litigation should be carefully avoided.

Where the Plaintiff filed a suit at Hoshangabad in M. P. against the Defendant, a merchant, at *Hardoi in* U. P. claiming a declaration that Plaintiffs nos. 1 to 3 had no dealings with the Defendants and they have to pay nothing to the Defendants in respect of any dealings are breach of contract and so also accounts of Defendants with the Plaintiff No. 4 have been settled and have been fully cleared and nothing is due by Plaintiff No. 4 to the Defendants and the Defendants while challenging the suit on merits also contended that the suit for mere declaration without claiming further relief of injunction preventing them from recovering the amount due under the contract was not maintainable, such a suit does not fall within the purview of Section 34 of the Specific Relief Act. It is also not one to enable the Plaintiffs to seek further relief in some other forum. It cannot as well be termed to be a substantial relief in itself and does not have any immediate coercive effect. No infringement of legal right is demonstrated for the vindication of which the declaration sought for can be said to be necessary. Issuance of a demand notice by the defendants to the Plaintiffs can by no stretch be said to be infringing any legal right or character which the Plaintiffs may have. The Plaintiffs are thus not

entitled to the declaration sought for either under Section 7 or Order 7, Rule 7, Civil Procedure Code.

Madanlal v. *State of Madhya Bharat* (1) and *Mahavir Jute Mills* v, *Firm Kedar Nath* (2); referred to.

Ramaraghava Reddy v. *Seshu Reddy* (3), *S. G. Films Exchange* v *Brijnath Singhji* (4) and *Sheo Singh Raj* v. *Mussumat Dakho* (5); relied on.

Halsbury's Laws of England (Hallsham Edition), Vol. 19, para 511 at pp. 212-215; referred to.

Fairclough Dodd. Ltd. v. *Vantol. Ltd.* (6) and *Household Machines Ltd* v. *Cosmos Exporters Ltd.* (7); distinguished.

Y. S. Dharmadhikari for the appellants.

A. R. Choubey for the respondents.

Cur. adv. vult.

JUDGMENT

The Judgment of the Court was delivered by B. C. VARMA J.—The lower Court has accepted the preliminary objection raised by the defendants-respondents to the maintainability of the suit for the relief of bare declaration without claiming any further relief. The suit has accordingly been dismissed. The plaintiffs challenge this dismissal of their suit by this appeal.

The case of the plaintiffs is that plaintiff no. 4 is a partnership firm. It had entered into certain commercial transactions with defendant no. 1 which is a partnership firm trading at Hardoi in U. P. Defendant no. 2 is one of the partners of the said

(1) A. I. R. 1955 M.B. 111. (2) A. I. R. 1960 All. 254
(3) A. I. R. 1967 S. C. 436. (4) A. I. R. 1975 S. C. 1810.
(5) 5 I. A 87 at p. 111. (6) 1956 (2) All E. R. 921.
(7) 1946 (2) All E.R. 622.

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firm. According to the plaintiffs appellants, defendant no. 1 was the commission agent and used to supply *Singdana* to plaintiff no. 4 on approval. The transactions ranged between February 1975 to April 1975. Thereafter some dispute appears to have arisen between the parties. There was exchange of letters, telegrams and notices between the parties.

On 16.4.1975, plaintiff no. 4 required 5 wagons of *Singdana* to be sent to it. However, on 17.4.1975, defendant no. 1 was asked not to make purchases at higher rate. Defendant no. 1 nevertheless purchased two trucks of *Singdana* at Rs. 350/- per quintal for plaintiff no. 4. It appears that defendant no. 1 purchased *Singdana* at Rs. 360/- per quintal and also at Rs. 362.50 per quintal. It appears that defendant no. 1 wanted to sell certain quantity of *Singdana* to plaintiff no. 4. Sometime in May 1975, some quantity of *Singdana* was sent to plaintiff no. 4 at Itarsi and the railway receipt and demand draft were sent through the Bank. They were not honoured by plaintiff no. 4. The plaintiffs alleged that on 26.5.1975 accounts between the parties of all their dealings were settled at Itarsi and a sum of Rs. 1,02,521/- was found due to defendant no. 1 from plaintiff no. 4. According to the plaintiffs, this was in final settlement of all the dues. However, defendant no. 1 alleged that it had certain more dues outstanding against the plaintiffs and made a demand for the same alleging that plaintiff no. 4 had committed breach of contract to purchase 5 wagon-load of *Singdana* and was liable for damages. The total amount then claimed by defendant no. 1 was Rs. 41,509.60. It is the plaintiffs, allegation that no such amount was due to defendant no. 1 from either of them and the claim was false. According

to them, accounts were settled finally on 26.5.1975 at Itarsi and nothing was due from them to defendant no. 1. The precise allegation in this behalf is contained in paragraph 11 of the plaint which is as follows :

> "11. That the plaintiffs are, therefore, entitled to a declaration that they have to pay nothing to defendants on account of any transaction. They are, therefore, filing this suit for declaration that no amount of Rs. 41,509,60 N. P. claimed in the notice, dated 22/24-7-75 is due by any of the plaintiffs to defendants."

With these allegations, the plaintiffs claimed the following relief:

> "That it be declared that the plaintiffs 1 to 3 had no dealing with the defendants and they have to pay nothing to the defendants in respect of any dealings or breach of contract and so also accounts of defendants with plaintiff no. 4 have been fully cleared and nothing is due by plaintiff no. 4 to the defendants."

The defendant-respondents while challenging the suit on merits also contended that the suit for mere declaration without claiming further relief of injunction preventing them from recovering the amount due under the contract was not maintainable.

The lower Court on the pleadings of the parties, among others, framed issue no. 5 as under:

> "Whether the suit for bare declaration without claiming the relief of injunction is not maintainable?"

This preliminary objection as to the maintainability of the suit has found favour with the lower Court which dismissed the suit as not maintainable in view of section 34 of the Specific Relief Act, 1963.

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Shri Y. S. Dharmadhikari, learned counsel for the plaintiffs-appellants, contends that section 34 of the Specific Relief Act is not exhaustive of the declaratory reliefs. Such reliefs, according to the learned counsel, can also be granted under the general law. The present relief claimed by the plaintiffs, according to the learned counsel, may not fall strictly within the ambit of section 34 of the Act and yet such a suit and particularly one arising out of commercial transactions is maintainable. Shri A. R. Choubey, learned counsel for the defendants-respondents, on the other hand contends that even if a declaratory relief could be granted apart from section 34 of the Act, the scope is very limited.

Havind heard the learned counsel, we are of opinion that the appellants' contention cannot be accepted and the appeal must fail. Decrees merely declaratory are an innovation and they first obtained an authoritative sanction in England by section 50 of the Chancery Procedure Act, 1852. In India, this type of relief got a statutory recognition with the enactment of section 15 of the Code of Civil Procedure, 1859, and was practically in the same terms as section 50 of the Chancery Procedure Act. This Code of 1859 was repealed by the Code of 1877. In the same year was enacted the Specific Relief Act. The provision as to declaratory decrees was omitted from the Code of Civil Procedure and incorporated in the Specific Relief Act as section 42. This section of the Specific Relief Act, 1877 (old Act), has been replaced by section 34 of the Specific Relief Act, 1963 (present Act), and is in the following terms :

"34. Any person entitled to any legal character, or to any right as to any property, may institute a suit against

any person denying or interested to deny his title to such character or right, and the Court may in its discretion make therein a declaration that he is so entitled, and the plaintiff need not in such suit ask for any further relief:

Provided that no Court shall make any such declaration where the plaintiff, being able to seek further relief than a mere declaration of title, omits to do so.

Explanation.--A trustee of property is a 'person interested to deny' a title adverse to the title of someone who is not in existence, and for whom, if in existence, he would be a trustee."

It will thus be seen that section 34 of the Specific Relief Act, 1963 (old Section 42) merely gives a statutory recognition to certain well-recognised types of declaratory reliefs and further enacts a limitation on the grant of such relief in the shape of the proviso. Analysing the scope of this section, Dixit J. (as he then was) in *Madanlal* v. *State of Madhya Bharat* (1), pointed out that in order to be able to seek a relief of declaration in terms of section 42 (of old Act), the plaintiff must show that he has some legal character or some right to property and that his opponent is denying or interested to deny such legal character or right. Legal character is the same thing as Legal status, i. e., a position recognised by law. Like view has been expressed by the Allahabad High Court in *Mahavir Jute Mills* v. *Firm Kedar Nath* (2).

The aforesaid two decisions, however, do not say that grant of declaratory decree independent of section 42 (old Act) or section 34 (present Act) is prohibited. All that these decisions say is that the section permits grant of declaration as to legal

(1) A. I. R. 1955 M.B 111. (2) A. I. R. 1960 All. 254.

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character or right to property only when the same is being denied by the opponent or when the opponent is interested to deny it. In *Ramaraghava Reddy* v. *Seshu Reddy* (1), their Lordships of the Supreme Court in paragraph 11 at page 440 of their judgment have laid down the law as under :

> "In our opinion, S. 42 of the Specific Relief Act is not exhaustive of the cases in which a declaratory decree may be made and the Courts have power to grant such a decree independently of the requirements of the section. It follows, therefore, in the present case that the suit of the plaintiff for a declaration that the compromise decree is not binding on the deity is maintainable as falling outside the purview of S. 42 of the Specific Relief Act."

Similar view has again been reiterated by the Supreme Court in *S. G. Films Exchange* v. *Brijnath Singhji* (2). It has been observed in that case that section 42 cannot be deemed to be exhaustive of every kind of declaratory relief or to circumscribe the jurisdiction of Courts to give declarations of right in appropriate cases falling outside section 42. These authorities now well settle the law that section 34 does not exhaust the field of declaratory decrees and the Courts do have jurisdiction to grant declarations apart from the terms of that section.

Question then is whether the Court's jurisdiction to grant declaratory decrees is unfettered. The law has been stated succinctly in para 511, pp. 212-215 of Halsbury's Laws of England (Hailsham Edition), Vol.19 in these terms :

> "Judgments and orders are usually determination of rights in the actual circumstances of which the Court has cognizance, and give some particular relief capable of being

(1) A. I. R. 1967 S.C. 436. (2) A. I.R. 1975 S. C. 1810.

enforced. It is, however, sometimes convenient to obtain a judicial decision upon a state of facts which has not yet arisen, or a declaration of the rights of a party without any reference to their enforcement. Such merely declaratory judgments may now be given, and the Court is authorised to make binding declarations of right whether any consequential relief is or could be claimed or not. There is a general power to make a declaration whether there be a cause of action or not, and at the instance of any party who is interested in the subject-matter of the declaration, and although a claim to consequential relief has not been made, or has been abandoned or refused, but it is essential that some relief should be sought or that a right to some substantitive relief should be established." (The underlining is ours).

It can at once be seen that a declaration falling outside section 34 of the Specific Relief Act will be governed by the general provisions of the Code of Civil Procedure like section 9 or Order 7, Rule 7. In the decision in *S. G. Films Exchange* v. *Brijnath Singhji* (1) it is ruled that the circumstances in which a declaratory decree under section 42 should be awarded is a matter of discretion depending upon the facts of each case. Thus, where the act complained of deprives the plaintiff of certain present rights to property and the declaratory decree has the effect of giving present relief as well, the Courts shall have power to make such a declaration. In *Sheo Singh Rai* v. *Mussumut Dakho* (2), the law is very precisely stated in the following terms:

"..... ... a declaratory decree ought not to be made unless there is a right to some consequential relief which, if asked for, might have been given by the Court or unless in certain cases a declaration of right is required as a step to relief in some other Court."

The conclusion we have thus reached may be

(1) A.I.R. 1975 S. C. 1810. (2) 5 I. A. 87 at page 111.

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summarised thus: Thus Court's power to grant declaratory decrees is not limited to the terms of section 34(Present) or section 42 (old) of the Specific Relief Act. Declaratory decree can well be made by the Courts under the general provisions of the Code of Civil Procedure as section 9 or Order 7, Rule 7 of the Code. The exercise of jurisdiction to grant such declaratory reliefs beyond the terms of that section shall depend upon the facts of each case. Such a declaration may be granted when it is essential as a step to a relief in some other case or when a declaration in itself is a substantial relief and has immediate coercive effect.

It is well-settled that it is not an absolute right to obtain a declaratory decree. The Courts have a discretion in the matter of grant of such declaratory reliefs. The Courts must exercise sound judgment while granting or refusing such reliefs. Danger to involve the opponent in vexatious litigation should be carefully avoided. The instant case presents a glaring instance of a vexatious litigation ingeniously designed to coerce a merchant at Hardoi in U. P. to run down to Hoshangabad in M. P. to defend an action. Obviously the declaration sought for does not fall within the purview of section 34 of the Act. It is also not one to enable the appellants to seek further relief in some other form. It cannot as well be termed to be a substantial relief in itself and does not have any immediate coercive effect. No infringement of legal right is demonstrated for the vindication of which the declaration sought for can be said to be necessary. All that is alleged is that the defendants-respondents have made a demand on the plaintiff-appellants for a sum of Rs. 14,509. 60 *vide* notice, dated 22/24-7-1975. The issuance of such a notice can by no stretch be said to be infringing any

legal right or character which the appellants may have. The appllants are thus not entitled to the declaration sought for either under section 9 or Order 7, Rule 7 of the Code of Civil Procedure. It appears that the appellants have forestalled this action on receipt of a notice of demand from the defendants-respondents. Such devices by litigants are not unknown. The conduct of the appellants in rushing to Court, disguising the suit as one for declaration on payment of Rs.30/-as Court-fee completely disentitles them to grant of any declaratory decree even if they were otherwise held entitled to it.

Learned counsel for the appellants strongly relied upon a passage from Benjamin's Sale of Goods, 1st Edition, para 1352 at page 680 and decisions reported in *Fairclough Dodd, Ltd.* (1) and *Household Machines Ltd.* v. *Cosmos Exporters Ltd.* (2). The passage, which is based on these two English decisions, runs thus:

> "In appropriate circumstances, the buyer may obtain a declaration setting out his legal rights against the seller. A declaration may be made before any breach of contract has occurred, and may thus guide the parties in the implementation of a contract whose performance is spread over a long period. For instance, the buyer may ask the court to determine whether he is still bound by the contract, or whether he is entitled to repudiate his remaining obligations. Even where the defendant is liable to pay damages, the plaintiff may claim only a declaration that the defendant was in breach of contract and that the damages for the loss caused by the breach amounted to a stated sum."

The passage cited really does not render any help to the appellants. True it is that it permits a purchaser to obtain declaration of 'legal rights' against a seller even before a breach has occurred. Even such a

(1) 1956 (2) All E. R. 921. (2) 1946 (2) All E. R. 622.

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relief is permissible only in 'appropriate case' and not as a general rule or as a matter of course. The passage itself says that the declaration may be made only to guide the parties in the implementation of a contract whose performance may be spread over a long period. This passage, therefore, does not serve as an authority to say that it is permissible to grant a declaratory decree that no pecuniary liability arising out of a commercial transaction attaches to a plaintiff. The decision in *Fairclough Dodd. Ltd.* v. *Vantol, Ltd.* (*supra*), only indicates that a declaratory judgment may be obtained as to the effect of a contract. In *Household Machines Ltd.* v. *Cosmos Exporters Ltd.* (*supra*), the declaration sought was of substantial right, viz., that the seller was bound to indemnify the buyer for anything which can be adjudged by a Court of law to be due from him to a third party and can be handed on to the seller. This relief was granted with a view to shorten litigation.These two cases are thus clearly distinguishable.

The suit has thus been rightly held to be not maintainable. The appeal is dismissed with costs. Counsel's fee as per schedule.

Appeal dismissed.

CIVIL REVISION

Before Mr. Justice B. C. Varma.

1979

Sept. 20

MODI BAI, Applicant*

v.

NAGRAJ, Non-applicant.

Civil Procedure Code (V of 1908), as amended byamendment Act (CI

*Civil Revision No. 971 of 1979, for revision of the Order of C. P. Sharma, I Additional District Judge, Durg, dated the 8th February 1979.

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of 1976)—Order 21, Rule 100—Object and effect of amendment made therein—Imperative on the part of the Executing Court to investigate about right, title or interest of an objector thereto—Interpretation of Statutes—Retrospective operation of a Statute—Rules of—Mere rights under law relating to procedure—Are not "rights accrued"—Rights relating to procedure—Are not vested rights—Alterations in law relating to procedure—Are generally retrospective—Civil Procedure Code, as amended—Section 97(2)(q) and (3)—Pending suits are saved—Objection relating to wrongful dispossession in execution of a decree pending investigation on the day amended provisions came into force—Has to be decided according to amended provision.

It is firmly established rule of law that no statute shall be construed to have retrospective operation unless such a construction appears very clearly in terms of the Act or arises by necessary and distinct implication. Similarly, a statute is not to be construed to have a greater retrospective operation than its language renders necessary. Whenever the intention of the Lagislature is clear that the Act should be retrospective in operation, it must unquestionably be so construed even though the consequences may appear unjust or hard.

The general principle is that the alterations in procedure are retrospective, unless there be some good reason against it.

Maxwell on the "Interpretation of Statutes", 11th Edn., at pp. 204, 206, 212 and 216; referred to.

Craxfords (Ramsgate) Ltd. v. *William and Steer Manufacturring Co. Ltd.* (1) and *Chuluram* v. *Bhagatram* (2); referred to.

A mere right, existing at the date of repealing Statute to take advantage of the provisions of the Statute repealed is not a "right accrued" within the meaning of usual saving clause.

Lalji Raja and Sons v. *Firm Hansraj Nathuram* (3) and *G. Ogden Industries Pvt. Ltd.* v. *Lucas* (4); referred to.

Comparison of old and the amended provisions regarding investigation of claims to attachment in execution or complaint

(1) (195) 3 All E. R 17.
(2) Misc (Second) Appeal No. 55 of 1978, decided on the 2nd Aug. 1979.
(3) A. I. R, 1971 S.C. 974. (4) (1969) 1 All E. R. 121.

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regarding wrongful dispossession in the course of execution shows that on such applications being filed, the executing Court is required to decide all questions including questions relating to right, title or interest in the property. The apparent object for this change appears to be to avoid delay in execution of the decrees and multiplicity of proceedings. This change brought about by the Amending Act No. 104 of 1976, is only as regards the procedure of investigation. This right of investigation cannot be said to be a vested right in a suit or like the right of appeal. The amendment in this behalf can well be held to be retrospective and, therefore, applicable to the case pending investigation on the date when the amendment was brought into force. Therefore, to an application filed under Rule 100 of Order 21 of the unamended Code pending on February 1, 1977, when the amendment came into force, the provisions as amended by that Act shall apply.

Syndicate Bank, New Delhi v. *M/s Rallies India Ltd., New Delhi and others* (1); not followed.

Clause (q) of sub-section (2) of Section 97 of the Civil Procedure (Amendment) Act, 1976, makes it clear that instead of taking away the right of suit, the Legislature has specifically saved the pending suits and by Rule 58(2) and Rule 101 of Order 21, as they stand after the amendment of C. P. C., the right, title and interest in the property affected are required to be investigated by the Executing Court. It cannot, therefore, be said that the right earlier provided by a suit after the decision of a claim or objection to attachment or on an application complaining of dispossession has been taken away by the amendment. Such applications are expressly saved from operation of Section 97(2) by sub-section (3) thereof.

D. M. Dharmadhikari for the applicant.

Ravish Agrawal for the non-applicant.

Cur. adv. vult.

ORDER

B. C. VARMA J.-One Modi Bai obtained a decree for possession in respect of Khasra No. 200/2 of

(1) A. I. R. 1979 Delhi 40.

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village Gahiranawagaon, tahsil Balod, district Durg, against certain persons in Civil Suit No. 16-A of 1970 of the Court of Civil Judge, class II, Balod. She put this decree into execution. One Janki Bai also figured as a defendant in that suit. The decree was also passed against her. Non-applicant, Nagraj obtained a sale-deed, dated 28-5-1968, from this Janki Bai prior to the institution of that suit. Non-applicant, Nagraj claimed that in the process of execution of that decree he was wrongfully dispossessed of Khasra No. 200/2. He, therefore, filed an objection on 9-11-1973 before the executing Court, complaining of this wrongful dispossession. This objection was filed under Order 21, Rule 100, Code of Civil Procedure, as it stood prior to the amendment of the Code by Amending Act No. 104 of 1976, which came into force on 1st of February, 1977. After due investigation, the executing Court decided this objection by its order, dated 7-9-1978 and held that the non-applicant, Nagraj was in possession of the property on his own account and allowing the objection, directed that the non-applicant be put in possession of the property. The decree-holder, Modi Bai appealed. The lower appellate Court held that the decree-holder obtained possession of the property from the non-applicant, Nagraj in execution of the decree. It was held that the non-applicant was then in possession of the land in his own right on the basis of the sale-deed from Janki Bai and, therefore, was wrongly dispossessed in execution of the decree in that suit. The lower appellate Court, thus, upheld the finding of the executing Court in this behalf. It appears that before the lower appeal Court, it was urged that while the objection by non-applicant was pending adjudication before the executing Court, the Civil Procedure Code was amended by the Amendment

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Act No. 104 of 1976 and drastic changes were made in Order 21 of the Code. It was urged that the right of suit consequent upon an order passed on an objection complaining of wrongful dispossession in execution of a decree was taken away by the amending Act and that the executing Court should have investigated into the title of the parties relating to the land in question. As that was not done, it appears to have been urged before the lower appellate Court, the matter be remanded for due investigation. It appears that the lower appellate Court instead of remanding the matter has attempted to decide the title of the respective parties on the basis of the available records, and has held that the non-applicant has acquired good title to the land which remained unaffected despite the decree in Civil Suit No. 16-A of 1970. The contention that no appeal lay before him and that the remedy was only a suit under the provisions of the Code as they stood prior to the amending Act No. 104 of 1976, was repelled by the lower appellate Court. The appeal was held tenable. For all these reasons, the lower appellate Court dismissed the appeal.

Shri D. M. Dharmadhikari, learned counsel for the applicant (decree-holder), urged that the matter would be governed by Order 21 as it stands amended by the Amending Act No. 104 of 1976 and, therefore, in terms of Rule 101 of Order 21, it was imperative for the executing Court to enquire and decide as to the title of the decree-holder *vis-a-vis* the non-applicant before it passed any order upon the objection filed by the non-applicant. He, therefore, prayed for remand of the matter. As against this, Shri Ravish Agarwal, learned counsel for the non-applicant, urged that the matter shall be governed by the Code of Civil Procedure as it stood

prior to the amendment for the reason that the objection was filed before the amendment came into force on 1-2-1977. He, therefore, submitted that even the appeal before the lower appellate Court was not competent.

The scheme relating to adjudication of claims or objections to attachment of property and resistance or obstruction to possession of immoveable property during the course of execution has been drastically amended by the Civil Procedure Code (Amendment) Act 104 of 1976. Before this amendment, the enquiry relating to claim or objection to attachment was within a very narrow compass and the party aggrieved by an order of the executing Court upon any such claim or objection had a right to file a Civil Suit under Rule 63 of Order 21, C. P. C., to get his title adjudicated. The Order was subject to such a result of that suit. Similarly, a party who complained of dispossession from any immoveable property in the course of execution of any decree, could institute a suit to establish the right which he claimed to the present possession of property and order of dispossession was subject to the result of such suit, if any. Section 72 of the Amending Act 104 of 1976 incorporates the changes made by the Act in Order 21 of the Code of Civil Procedure. By Clause XXXIV of Section 72 of the Amending Act, new Rules 99, 100 and 101 have been inserted in place of Rules 100, 101, 102 and 103 of the Code, as it stood prior to this amendment. The new Rule 101 of Order 21 is as under :-

> "All questions (including questions relating to right, title or interest in the property) arising between the parties to a proceeding on an application under rule 97 or rule 99 or their representatives, and relevant to the adjudication of the application, shall be determined by the

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Court dealing with the application and not by a separate suit and for this purpose, the Court shall, notwithstanding anything to the contrary contained in any other law for the time being in force, be deemed to have jurisdiction to decide such questions."

The Rule 103, as amended, provides for an appeal against the order passed upon and adjudication made under Rule 98 or Rule 100 and enacts that the order shall have the same force and shall be subject to an appeal or otherwise as if it were a decree. The other important section to be noticed is section 97 of the amending Act, which deals with repeal and savings. For the purpose of this case, clause (q) of sub-section (2) of Section 97 is relevant and is, therefore, reproduced below:-

"97. XX XX XX

(q) the provisions of rules 31, 32, 48-A, 57 to 59, 90 and 97 to 103 of Order XXI of the First Schedule as amended or, as the case may be, substituted or inserted by section 72 of this Act shall not apply to or affect—

(i) any attachment subsisting immediately before the commencement of the said section 72, or

(ii) any suit instituted before such commencement under rule 68 aforesaid to establish right to attached property or under rule 103 aforesaid to establish posssesion, or

(iii) any proceedings to set aside the sale of any immoveable property,

and every such attachment suit or proceeding shall be continued as if the said section 72 had not come into force;"

Another important provision is sub-section (3) of Section 97, which runs as under :-

"Save as otherwise provided in sub-section (2), the provisions

of the principal Act, as amended by this Act, shall apply to every suit, proceedings, appeal or application, pending at the commencement of this Act or instituted or filed after such commencement, notwithstanding the fact that the right, or cause of action, in pursuance of which such suit, proceeding, appeal or application, is instituted or filed, had been acquired or had accrued before such commencement."

Comparison of the old and the amended provisions regarding investigation of claim to attachment or to complaint regarding dispossession in course of execution shows that on such application being filed, the executing Court is required to decide all questions, including questions relating to right, title or interest in the property. The Court dealing with that application shall decide those questions. The amended rule 101 specifically provides that the question relating to right, title or interest in the property shall be decided by the Court dealing with that application and not by a separate suit. Precisely for this reason the order passed under rule 98 or rule 100, as amended, has been made appealable as if it were a decree. The apparent object for this change appears to be to avoid delay in execution of the decrees and multiplicity of proceedings. On a person objecting to attachment or complaining of dispossession, all the rights of the parties, including title thereto, relating to the property in question, are to be inquired into and determined once for all in the same manner as is done in a suit.

Learned counsel for the applicant is right when he says that his application was pending before the executing Court complaining of wrongful dispossession in execution of a decree, and as rule 101, as amended, had then come into force, the executing Court should have disposed of that application in accordance with this amended rule 101. It is

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common ground that the application was pending before the executing Court when the relevant rules in Order 21 were amended and the Amending Act came into force on 1-2-1977. It is also not disputed that the objection was filed on 19.11.1973, i. e., prior to this amendment. Question is whether this amended provision shall also apply to the applications made before the amendment came into force. The rule of law that no statute shall be construed to have retrospective operations unless such a construction appears very clearly in terms of the Act or arises by necessary and distinct implication, is now firmly established. Similarly, a statute is not to be construed to have a greater retrospective operation than its language renders necessary. Maxwell on the "Interpretation of Statutes" (11th Edn.), at page 204, says that it is a fundamental rule of English law that no statute shall be construed to have a retrospective operation unless such a construction appears very clearly in terms of the Act, or arises by necessary and distinct implication. At page 206 of the same Volume, the law relating to retrospective operations as regards vested rights is stated as under:-

> "It is cheifly where the enactment would prejudicially affect vested rights, or the legality of past transactions, or impair contracts, that the rule in question prevails. Every statute, it has been said, which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, or impose a new duty, or attaches a new disability in respect of transactions or considerations already past, must be presumed, out of respect to the legislature, to be defended not to have a retrospective operation."

Relating to pending actions, the learned author, at page 212, stated the law as follows :-

> "In general, when the law is altered during the pendency of an action, the rights of the parties are decided according to the law as it existed when the action was begun, unless the new statute shows a clear intention to vary such rights."

From this, it can safely be inferred that whenever the intention of legislature is clear that the Act should be retrospective in operation, it must unquestionably be so construed even though the consequences may appear unjust or hard. Then, at page 216 of the same Volume, dealing with the retrospective operation of statute as regards procedure, it is observed that a law which merely alters the procedure may, with perfect propriety, be made applicable to past as well as future transactions. It is said that no person has a vested right in any course of procedure. He has only the right of prosecution or defence in the manner prescribed for the time being. If an Act of Parliament alters that mode of procedure, he has no other right than to proceed according to the altered mode. The remedy in such cases does not take away any vested right. In *Craxfords (Ramsgate) Ltd.* v. *William and Steer Manufacturing Co. Ltd.* (1), it has been held that the repeal of the Sale of Goods Act, 1893, Section 4, as to the need for a note or memorandum in writing, deprived a defendant of the defence of the absence of such a note, notwithstanding that the writ was issued and the defence delivered before the repeal. When the legislature gives a new remedy for enforcing the rights, it shall extend to rights which have accrued before the new remedy was provided. The general principle deduced from decided cases has been stated by the learned author to be that the alterations in procedure are retrospective, unless there be some good reason against it. Of course,

(1) (1954) 3 All E. R. 17.

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an appeal to a superior tribunal, a right which belongs to every suitor, is different from merely regulating procedure. It is a vested right. In *Chuluram* v. *Bhagatram* (1), a Division Bench of this Court observed that an appeal is a right of entering a Superior Court and invoking its aid and interposition to redress an error of the Court below and, though procedure does surround an appeal, the central idea is a right. It has been held therein that although the right of appeal is exercised after the decree or order against which appeal is preferred is passed, it accrues and vests in the suitor at the time of institution of the proceeding in which the Decree or Order is passed. Such a right, said the Division Bench, is not impaired by a change in law relating to appeals.

When a claim is preferred or any objection is made to the attachment of any property attached in execution of a decree under Order 21, Rule 58, C.P.C., or when a complaint is made of wrongful dispossession from immoveable property under a decree, the persons so claiming or objecting are entitled to the adjudication to the claim so laid. Before the amendment, the procedure was to decide them at two stages-first before the executing Court and other by a suit. The order passed by the executing Court was made subject to decision of a suit by the party adversely affected. After the amendment, it is the executing Court which has been given jurisdiction to inquire into the right, title and interest of the person so laying the claim or objection to the property attached in execution of a decree or dispossessed during the course of execution of a decree. Thus, the change is only as regards the procedure of investigation into the rights of the person objecting to the attachment or complaining of dispossession. This right

(1) Misc. (Second) Appeal No. 55 of 1978, decided on the 2th August 1979.

of investigation of a claim or objection to attachment or into the complaint of dispossession, cannot be said to be a vested right in a suitor like the right of appeal. The amendment in this behalf bringing a change in procedure only thus does not affect any vested right and, therefore, can well be held to be retrospective and, therefore, applicable, to the case pending investigation on the date when the amendment was brought into force. In the present case, therefore, the executing Court should have inquired into the right title and interest of the respondent Nagraj into the property in question when he made a grievance that he was wrongfully dispossessed of it during the execution of a decree held by the appiicant against others. The lower appellate Court should have, therefore, remanded the case to the trial Court for that purpose.

Shri Ravish Agarwal, learned counsel for the respondent, strongly relied upon a decision of Delhi High Court in *Syndicate Bank, New Delhi* v. *M/s Rallies India Ltd., New Delhi and others* (1) and urged that the right to file a suit is a vested right. It cannot be taken away by subsequent legislation unless by express provisions or necessary intendment that right is taken away. That was a case relating to objection to attachment of some property under Order 21, Rule 58, C. P. C. The objection petition was filed in the Court before the amending Act came into force on 1st February, 1977. Against the decision on the objection, an appeal was preferred in terms of Rules as amended. This was objected to on the ground that since the objection was preferred before the amending Act came into force, although decided later, the objector had a vested right of a suit under Rule 63 (as it stood prior to its

(1) A. I. R. 1979 Delhi 40

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amendment). It has, therefore, been held that a suit and not an appeal was the proper remedy and the amendment Act did not take away either expressly or by necessary intendment the right to file the suit. In paragraph 18 of the report, as a matter of law, it has been held that unless the provisions of the new enactment clearly say so or it can be found out as a matter of necessary intendment, the new provisions cannot affect accrued rights and the right to file a suit or an appeal is just as much a vested right as any other. I have also indicated above that this proposition of law is quite firmly established. In *Lalji Raja and Sons* v. *Firm Hansraj Nathuram* (1), it has been observed that a mere right, existing at the date of repealing statute to take advantage of the provisions of the statute repealed is not a "right accrued" within the meaning of usual saving clause. For this proposition of law, the Supreme Court relied upon the decision in *G. Ogden Industries Pvt. Ltd.* v. *Lucas* (2). It may be seen here that by virtue of clause (q) of sub-section (2) of Section 97, Code of Civil Procedure, the provisions of Rules 57 to 59, 90 and 97 to 103 of Order 21 of the first Schedule as amended or as the case may be, substituted or inserted by Section 72 of that Act, do not apply or affect any suit instituted before such amendment under Rule 63 to establish right to attached property or under Rule 103 to establish possession. This should only mean that the amended provisions shall not apply to a suit which has been instituted under Rule 63 or Rule 103 (as it stood prior to the amendment) before the amending Act came into force. This sub-section makes it clear that instead of taking away the right of suit, the Legislature has specifically saved the pending suits. And by Rule 58(2) of Section 101, as

(1) A. I. R. 1971 S. C. 974. (2) (1969) 1 All E. R. 121.

they stand after the amendment of the Code of Civil Procedure, the right, title and interest in the property affected are required to be investigated by the executing Court. It is the executing Court which is now required to decide all questions, including questions relating to right, title or interest in the property involved. It cannot, therefore, be said that the right earlier provided by a suit after the decision of a claim or objection to attachment or on an application complaining of dispossession has been taken away by the amendment. It cannot, therefore, be said that the amending Act has taken away any right which the objector or the person complaining of dispossession had prior to the amendment. A right to avail of the remedy in future on the happening of an event is not a vested right. This is because in a pending proceeding the amended provision can be given effect to by a further inquiry. Although it may not be so in a concluded proceeding.

Again, in my opinion, such applications are expressly saved from operation of sub-section (2) of Section 97 by enactment of sub-section (3) thereof. This sub-section (3) of Section 97 is in the following terms:-

> "Save as otherwise provided in sub-section (2), the provisions of the principal Act, as amended by this Act, shall apply to every suit, proceeding, appeal or application, pending at the commencement of this Act or instituted or filed after such commencement, notwithstanding the fact that the right, or cause of action, in pursuance of which such suit, proceeding, appeal or application is instituted or filed, had been acquired or had accrued before such commencement."

A plain reading of the sub-section shows that the provisions of the amending Act shall apply to

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applications pending at the commencement of this Act except as otherwise provided in sub-section (2). Relevant clause (q) of sub-section (2) of Section 97 of the Amending Act does not exclude the operation of the amending Act to a claim or an objection under Rule 58 on an application for possession under Rule 100 (as unamended). All that it says is that the provision unamended shall not apply to any attachment subsisting immediately before the commencement of the said Section 72 or a suit instituted before such commencement under Rule 63 to establish right to the attached property or under Rule 103 to establish possession or any proceeding to set aside the sale of any immoveable property and it further says that any such attachment, suit or proceeding shall be continued as it the said Section 72 has not come into force. From what I have stated above, I am of the opinion that to an application filed under Rule 100 of Order 21 of the unamended Code pending on February 1, 1977, when the amendment in the Code came into force, the provisions as amended by that Act shall apply. With great reluctance and with utmost regard to the Hon'ble Judges of the Delhi High Court, I am unable to subscribe to the view taken by them in *Syndicate Bank's case* (*supra*). I hold that to an objection or claim made under Rule 58 or an application made under Rule 100 of Order 21 of the Code of Civil Procedure, as is stood prior to its amendment by Act No. 104 of 1976, the provisions of the Rules as they stand amended by the amending Act shall apply.

Contention that in any case, the lower appellate Court has returned findings on the merits of the title of the respective parties and, therefore, no remand is necessary should not detain us long. It was the primary function of the executing Court to

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make full investigation as to right, title or interest of the parties relating to the property in question. That apparently was not done. The parties had an unquestionable right to establish title to the property by adducing oral as well as documentary evidence and any decision could only be taken after this opportunity was afforded to them. As that has not been done, the matter must go back to the executing Court, which shall give the parties adequate opportunity of making proper pleadings and adducing evidence to support their rival claims to the property in question and thereupon to reach a conclusion one way or the other.

The revision application is allowed. The impugned order passed by the Courts below are set aside and the case is sent back to the executing Court for disposal according to law in the light of observations made above. The costs shall abide the ultimate result. Hearing fee Rs.100/-, if certified.

Application allowed.

MISCELLANEOUS CIVIL CASE

Before Mr. A. P. Sen C.J. and Mr. Justice J.S. Verma.

COMMISSIONER OF INCOME TAX, BHOPAL,
Applicant*

v.

THE NATIONAL NEWSPRINT AND PAPER MILLS LTD., NEPANAGAR, Opposite Party.

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Mar. 23

Incometax Act, Indian (XI of 1922), Sections 10 and 9 and Income

*Misc. Civil Case No. 49 of 1972. Reference under Section 66(1) of the Income Tax Act, 1922, by the Income Tax Appellate Tribunal, Indore, dated the 1st February 1972.

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Tax Act, Indian (XLIII of 1961), Sections 28 and 21—Expression—Business Income—Connotation of.

The assessee a Government undertaking in the public sector, incorporated under the Companies Act, 1956 and engaged in the business of manufacture of sale of newsprint, built quarters and let out to Government for location of Bank, Post Office, Police Station, Central Excise Office, Railway staff Quarters for carrying on its business efficiently and smoothly. The assessee collected rents from them. Whether such rental income received by the assessee is taxable as receipts from the business or as income from property.

Held—The letting out of the accommodation by the assessee to the Government for locating a branch of the State Bank of India, Post Office, Police Station, Central Excise Office, Railway Staff Quarters etc. was incidental to the assessee's business and therefore liable to be taxed under Section 10 of the Income Tax Act, 1922, and Section 28 of the Income Tax Act, 1961, as business income and not as income from property.

Where the letting is only incidental and subservient to the main business of the assessee, the income derived from the letting will not be the income from property falling under Section 9 and the exception to Section 9 may also come into operation in such cases.

In cases where the income received is not from the bare letting of the tenement or from the letting accompanied by incidental services or facilities but the subject hired out is a complex one and the income obtained is not so much because of the bare letting of the tenement but because of the facilities and services rendered; the operations involved in such letting of the property may be of the nature of business or trading operations and the income derived may be income not from exercise of property-rights properly so called so as to fall under section 9, but income from operations of a trading nature falling under section 10 of the Act.

Jamshedpur Engineering and Machine Manufacturing Co. Ltd. v, *Commissioner of Income Tax, Bihar and Orissa* (1), *Rohtas Industries Ltd.* v. *Commissioner of Income Tax, Bihar and Orissa* (2),

(1) (1957) 32 I. T. R. 41. (2) (1961) 41 I T.R. 524

Commissioner of Income Tax, Delhi and Rajasthan v. *Delhi Cloth and General Mills Co. Ltd.* (1), *Commissioner of Income Tax, Bombay City I* v. *National Storage Pvt. Ltd.* (2), *Nalinikant Ambalal Mody* v. *A. A. L. Narayan Row* (3) and *Governors of the Rotunda Hospital, Dublin* v. *Coman* (4); referred to.

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Commissioner of Income Tax, Bhopal v. *The National Newsprint and Paper Mills Ltd., Nepanagar*

P. S. Khirwadkar for the applicant.

K. A. Chitale with *V. S. Dabir* and *A. G. Dhande* for the opposite party.

Cur. adv. vult.

JUDGMENT

The Judgment of the Court was delivered by A. P. SEN C. J.- These three references under section 66(1) of the Income Tax Act, 1922, and under section 256(1) of the Income Tax Act, 1961, raise a common question of law and, therefore, they are disposed of by this common judgment.

In Miscellaneous Civil Case No. 49 of 1972, the Income Tax Appellate Tribunal, Indore Bench, Indore, has referred a question of law, at the instance of the Commissioner of Income Tax, arising from its consolidated order dated 25-6-1971, in Income Tax Appeals Nos. 3047 (Bom) and 3048 (Bom) of 1968-69, pertaining to the assessment years 1960-61 and 1961-62, to the High Court for its opinion, namely :-

> "Whether on the facts and the circumstances of the case, the Tribunal was justified in law in holding that the rent received by the assessee from the various departments of the Government occupying the assessee's buildings, are

(1) (1966) 59 I. T. R. 152. (2) (1967) 66 I T R. 596.
(3) (1966) 61 I.T.R. 428 at p. 432. (4) (1920) 7 Tax Cases 517.

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taxable as receipts from the business and not as income from property, for each of the two assessment years 1960-61 and 1961-62."

In Miscellaneous Civil Case No. 242 of 1972, the same question has been referred by the Income Tax Appellate Tribunal, Indore Bench, Indore, from its consolidated order in Income Tax Appeals No. 3590 and 3591 of 1968-69, dated 10-9-1971, pertaining to the assessment years 1964-65 and 1965-66, with the difference that they relate to the relevant assessment years.

In Miscellaneous Civil Case No. 332 of 1975, a similar question has been referred by the Income Tax Appellate Tribunal, arising out of its order in Income Tax Appeal No. 992 (Ind) of 1973-74, dated 26-11-1974, pertaining to the assessment year 1966-67.

The assessee, National Newsprint and Paper Mills Ltd., Nepanagar, is a Government undertaking in the public sector, incorporated under the companies Act, 1956, engaged in the business of manufacture and sale of newsprint. Nepanagar is a huge industrial complex. The assessee not only built residential quarters for its employees but also made available to the Government accommodation for locating a branch of the State Bank of India, Post Office, Police Station, Central Excise Office and railway staff quarters, as it required these facilities for carrying on its business efficiently and smoothly. The assessee made available to these authorities its buildings and collected rent for them. The accommodation in question was let out to the Government and not to any private person unconnected with the assessee's business.

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The Income Tax Appellate Tribunal has held that the rent received by the assessee from the various departments of the Government on account of the location of Bank, Post Office, Police Station, Central Excise Office and railway staff quarters, was incidental and subservient to the assessee's business income, under section 10 of the Income Tax Act, 1922, or under section 28 of the Income Tax Act, 1961, and not under section 9 of the Income Tax Act, 1922, or section 22 of the Income Tax Act, 1961, as income from property.

Feeling aggrieved, the Commissioner of Income Tax, applied for reference under section 66(1) of the Income Tax Act, 1922, for the assessment years 1960-61, 1961-62 and under section 256(1) of the Income Tax Act, 1961, for the assessment years 1964-65, 1965-66 and 1966-67. Since a question of law does arise, from its order for the various years in question, the Income Tax Appellate Tribunal has made these references.

Incidentally, we may mention that the department has throughout accepted that the residential quarters constructed by the assessee for, and let out to its employees, would be outside the scope of section 9 of the Income Tax Act, 1922, and section 22 of the Income Tax Act, 1961, as being incidental to the assessee's business. A distinction is, however, tried to be drawn by the department with respect to the income derived from the accommodation let out to the Government for location of the State Bank of India, Post Office, Police Station, Central Excise Office, etc. on the ground that it was income derived by exercise of property rights properly so-called, and, therefore, such income was liable to be taxed under section 9 of the Income Tax

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Act, 1922, and section 22 of the Income Tax Act, 1961.

Shri Khirwadkar, learned counsel appearing for the Commissioner of Income Tax, contends that income, which is specifically made chargeable under a distinct head, cannot be brought to charge under a different head in lieu of, or in addition to, being charged under its specific head, inasmuch as the various heads of income enumerated in section 6 of the Income Tax Act, 1961, are mutually exclusive. He drew our attention to the different heads of income enumerated therein, and contends that the rent derived by the assessee by letting out the accommodation to the Government for providing facilities, like Bank, Post Office, Police Station, Central Excise Office, etc. is nothing but "income from house property" and, therefore, falls within head (iii) of section 6 of the 1922 Act and head 'C' of section 14 of the 1961 Act, namely:-

"Income from house property".

According to the learned counsel, since a specific head of charge is provided for income from the ownership of house property, rent or other income from ownership of house propery cannot be brought to tax under any other head. Assessment under head (iii) of Section 6 of the 1922 Act or head 'C' of section 14 of the 1961 Act, is not only proper but obligatory. He further contends that it is not the assessee's business to let out house properties and, therefore, the rental income cannot be taxed under section 10 of the 1922 Act or section 28 of the 1961 Act, as business income. Placing reliance on the words "as he may occupy" in the otherwise provision in section 9(1) of the 1922 Act and section 22 of the 1961 Act, he further contends that since

the accommodation was let out to the Government, the assessee was not in occupation thereof, and, therefore, the rent was an income taxable as property income under section 9 of the 1922 Act and section 22 of the 1961 Act. We are afraid, none of these contentions can prevail.

It is true that income which is specifically made chargeable under a distinct head cannot be brought to charge under a different head in lieu of, or in addition to, being charged under its specific head. There is no overlapping between one head of income and another, inasmuch as they are mutually exclusive. This follows from the language of section 14 of the 1961 Act, which is as follows:-

> "14. Heads of income.—Save as otherwise provided by this Act, all income shall, for the purposes of charge of income-tax and computation of total income, be classified under the following heads of income :—
>
> A—Salaries.
>
> B—Interest on securities.
>
> C—Income from house property.
>
> D—Profits and gains of business or profession.
>
> E—Capital gains.
>
> F—Income from other sources."

It must be noticed that the opening words of the section "Save as otherwise provided by this Act" no doubt make the section subject to section 22. It is, however, significant to observe that both section 9 of the 1922 Act and section 22 of the 1961 Act are themselves subject to the otherwise provision contained therein.

The different heads of income enumerated in

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section 6 of the 1922 Act and in section 14 of the 1961 Act are mutually exclusive. That being so, if there is nexus with business, then section 9 of the 1922 Act or section 22 of the 1961 Act, does not come into play. The dominant purpose of letting of the accommodation in question, on the facts found by the Appellate Tribunal, was to enable the assessee to carry on its business more efficiently and smoothly. If that be so, then the activity of letting has a definite nexus with the business that the assessee is carrying on. It will be noticed that both section 9 of the 1922 Act and section 22 of the 1961 Act, as well as both section 12 of the 1922 Act and section 56 of the 1961 Act. steer clear of section 10 of the 1922 Act and section 28 of the 1961 Act. If section 10 of the 1922 Act or section 28 of the 1961 Act applies, then section 9 of the 1922 Act or section 22 of the 1961 Act, as well as section 12 of the 1922 Act or section 56 of the 1961 Act are necessarily excluded.

When the residential quarters were built at Nepanagar, they were essential and indispensible parts of the Industrial complex. Similarly, when accommodation was let out to the Government for providing certain facilities in aid of the business carried on by the assessee, i. e. for locating a branch of the State Bank of India, Post Office, Police Station, Central Excise Office, etc., the motivation was facility of business. This is also the finding reached by the Appellate Tribunal.

We fail to appreciate the distinction that eth department is trying to draw between income derived from the letting of residential quarters by the assessee to its employees and the accommodation let out to the Government for providing certain facilities in connection with the assessee's business. We find

no distinction in principle between the letting of the two classes of accommodation, in the facts and circumstances of the present case.

In *Jamshedpur Engineering and Machine Manufacturing Co. Ltd.* v. *Commissioner of Income Tax, Bihar and Orissa* (1), the assessee company, which carried on business of manufacturing and selling agricultural implements had constructed residential quarters for its employees and let out the quarters to its employees, as incidental to its main business. The assessee incurred expenditure for the repair and maintenance of the residential quarters. The question before the Patna High Court was whether such expenditure incurred by the assessee was allowable as deduction from the profits of the business of the assessee under section 10(2)(xv). The Patna High Court held that as letting out of residential quarters was subservient and incidental to the main business, section 9 of the Income Tax Act did not apply to the case and so assessment should be made under section 10 of the Act.

In *Rohtas Industries Ltd.* v. *Commissioner of Income Tax, Bihar and Orissa* (2), the Patna High Court reiterated its earlier view and held that the rent derived by the assessee by letting out of its residential quarters to its employees was assessable not under section 9 of the Act, but under section 10 (1) of the Act.

In *Commissioner of Income Tax, Delhi and Rajasthan* v. *Delhi Cloth and General Mills Co. Ltd.* (3), the Punjab High Court followed the view of the Patna High Court that such income was outside the scope of section 9 of the 1922 Act. It rejected the

(1) (1957) 32 I. T. R. 41. (2) (1961) 41 I. T. R. 524.
(3) (1966) 59 I. T. R. 152.

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contention of the Revenue, based upon the use of the word "occupy" in section 9 of the Act, as meaning "actual physical occupation" only and not legal occupation. In rejecting the contention, it adverted to the opinion of the Judicial Member, who had affirmed the order of the Appellate Assistant Commissioner, to the effect that the rental income in question was "income from property" and thus had to be assessed under section 9 of the Act, and observed :-

> "It will be appropriate at this stage to mention that Mr. Rajagopal Sastri decided against the assessee's contention on the basis that the word 'occupy' in section 9 means 'physical occupation' or in other words 'actual occupation' and not 'legal occupation'."
>
> "In law, whenever premises are let out to a tenant, it is the tenant who is in physical occupation of the premises; but against the entire world, the landlord is in occupation of the premises, for the tenant's occupation is treated as landlord's occupation. The landlord's occupation through his tenant would only come to an end, when the tenant sets up a hostile title to the landlord; otherwise the occupation of the tenant is occupation of the landlord. If both sections 9 and 10 of the Act are read together, it will be apparent that where the property is held and used for the purposes of business, income therefrom would be 'income from business' and not 'income from property'."
>
> "In the present case, there can be no manner of doubt that the company holds the property in the occupation of its employees for the purposes of its business. If it be held, as was held by the Judicial Member, that income from that part of the property only can be assessed under section 10 which is in the actual occupation of the assessee for the purposes of its business, this would create an anomaly because property which is admittedly the business asset of the assessee but not in physical occupation of the assessee would not entitle him to claim depreciation thereon, while on the other hand, its income

would not be treated as 'income from property'. But if the narrow interpretation placed by the Judicial Member is not accepted, full effect can be given to sections 9 and 10, and this anomaly would disappear."

"The property held by the assessee for his business, though not in his actual occupation, will entitle him to depreciation. In other words, property held and used by the assessee for his business, though not in his physical possession, would entitle the assessee to depreciation under section 10. Therefore, the income from such property would fall to be assessed under section 10 and not 9. We are not prepared to put a narrow and pedantic construction on the word 'occupy' as has been done by Mr. Rajagopal Sastri, the Judicial Member of the Tribunal."

The view taken by the Punjab High Court that the word "occupy" in section 9 of the 1922 Act, did not mean actual physical occupation alone, stands fortified by the decision of their Lordships of the Supreme Court in *Commissioner of Income Tax, Bombay City I* v. *National Storage Pvt. Ltd.* (1) where they observe :-

"But the learned counsel for the Commissioner says that section 9 applies because the assessee cannot be said to be in occupation of the premises for the purpose of any concern of its own. He says that the licensees were in possession of the vaults as lessees and not merely as licensees. But in our opinion, the agreements are licences and not leases. The assessee kept the key of the entrance which permitted access to the vaults in its own exclusive possession. The assessee was thus in occupation of all the premises for the purpose of its own concern, the concern being the hiring out of specially built vaults and providing special services to the licensees."

It is stated at the Bar by both the learned counsel appearing for the assessee as well as the

(1) (1967) 66 I. T. R. 596.

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Commissioner of Income Tax, that there is no authority directly in point. The only authority, which is nearest to the point, is the decision of their Lordships in *Commissioner of Income Tax* v. *National Storage Pvt. Ltd.* (*supra*). There, the assessee purchased a plot of land at an approved place and constructed thereon godowns for the storage of films, in conformity with the requirements and specifications laid down in the Cinematograph Film Rules, 1948. Under the licence, the vaults could not be used for any purpose other than storing cinema films. A key to each vault was retained by the vault-holder but the key to the entrance which permitted access to the vaults was in the exclusive possession of the assessee. The assessee not only constructed vaults of special design and special doors and electric fittings, but it also rendered other services to the vault-holders. It installed a fire alarm and was incurring expenditure for the maintenance of fire alarm, by paying charges to the municipality. Two railway booking offices were opened in the premises for the despatch and receipt of film parcels. A canteen was also run in the premises for the benefit of the vault-holders and a telephone had been provided for them. It also maintained a regular staff, consisting of a Secretary, a peon, a watchman, etc.

It would, therefore, appear that the subject, which was let out or given on licence, was not a bare tenement but was a complex one, where safe deposit vaults for storing and preserving films, including special device facilities and services were provided. The contention of the department before their Lordships was that the income derived by the assessee was by exercise of property-right properly so-called and was, therefore, assessable under section 9 of the

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1922 Act, while the contention of the assessee was that it was business income chargeable to tax under section 10(1) of the Act. Learned counsel for the assessee formulated his proposition as follows: Distinction has to be drawn between income derived by exercise of property-rights properly so-called, on the one hand, and on the other hand, income derived from licensees who are allowed the use of any property, specially constructed safe deposit vaults for securely storing hazardous or inflammable films, or similar goods or safe deposit lockers for securely keeping valuables and for which purpose special amenities are given; in the latter class of cases, the object is a complex one and not merely letting of property and the activities amount to carrying on trade or business of property being the subject-matter of business.

The question before their Lordships was whether the assessee was carrying on any business, i. e. was it carrying on any adventure or concern in the nature of trade or commerce? Their Lordships, at first, quoted with approval the following observations of Sarkar, C. J., in *Nalinikant Ambalal Mody* v. *S. A. L. Narayan Row* (1):

> "Whether an income falls under one head or another has to be decided according to the common notions of practical men for the Act does not provide any guidance in the matter."

Then they relied upon the following observations of Viscount Finlay in *Governors of the Rotunda Hospital, Dublin* v. *Coman* (2), to the effect :-

> "Profits are undoubtedly received in the present case which are applied to charitable purposes, but they are profits derived not merely from the letting of the tenement but from its being let properly equipped for entertainments,

(1) (1966) 61 I. T. R. 428 at p. 432. (2) (1920) 7 Tax Cases 517.

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with seats, lighting, heating and attendance. The subject which is hired out is a complex one. The mere tenement as it stands, without furniture etc. would be almost useless for the entertainments. The business of the Governors in respect of those entertainments is to have the hall properly fitted and prepared for being hired out for such uses. The profits fall under Schedule D, and to such profits the allowance in question has no application, as they cannot be properly described as rents or profits of lands, tenements, hereditaments or heritages. They are the proceeds of a concern in the nature of a trade which is carried on by the Governors, and consists in finding tenants and having the rooms so equipped as to be suitable for letting."

Their Lordships held that the High Court was, therefore, right in holding that the assessee was carrying on an adventure or a concern in the nature of trade.

In that case, the sixth and seventh propositions, as enumerated by the High Court, were these :-

"6. In cases where the income received is not from the bare letting of the tenement or from the letting accompanied by incidental services or facilities but the subject hired out is a complex one and the income obtained is not so much because of the bare letting of the tenement but because of the facilities and services rendered, the operations involved in such letting of the property may be of the nature of business or trading operations and the income derived may be income not from exercise of property rights properly so-called so as to fall under section 9, but income from operations of a trading nature, falling under section 10 of the Act.

7. In cases where the letting is only incidental and subservient to the main business of the assessee, the income derived from the letting will not be the income from property falling under section 9 and the exception to section 9 may also come into operation in such cases."

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In their Lordships' view, as observed by Viscount Finlay in *Governors of the Rotunda Hospital, Dublin* v. *Coman* (*supra*) "the subject which is hired out is a complex one", and the rent received by the assessee was not an income derived from the exercise of property-rights, but was derived from carrying on an adventure or concern in the nature of trade. The judgment indicates that their Lordships approved the sixth and seventh propositions formulated by the High Court, as quoted above.

We are, therefore, of the opinion that in the facts and circumstances of the present case, the Income Tax Appellate Tribunal was right in holding that the letting out of the accommodation to the Government for locating a branch of the State Bank of India, Post Office, Police Station, Central Excise Office, railway staff quarters, etc. was incidental to the assessee's business and, therefore, rightly taxed under section 10 of the Income Tax Act, 1922, and section 28 of the Income Tax Act, 1961, as business income.

The result, therefore, is that the references are answered against the Revenue and in favour of the assessee. In our view, the Income Tax Appellate Tribunal was right in holding that rent received from letting out of the accommodation to the Government departments being incidental to the assessee's business, is taxable as income from business and not as income from property. The assessee shall have the costs of these references. Hearing fee Rs.150/-in each case.

Reference answered accordingly.

MISCELLANEOUS CRIMINAL CASE

Before Mr. Justice Mulye.

1979

Mar. 7

BANSHILAL, Applicant*

v.

THE NAGAR PALIKA, BHIKANGAON and others, Non-applicants.

Prevention of Food Adulteration Act (XXXVII of 1954)—Sections 13(2), 7 and 16—Report of the Public Analyst must be filed with the complaint—Prosecution filing application under section 13(2) for permission to send a part of sample to the Director of Central Food Laboratory—Magistrate taking cognizance of offence—Magistrate acts illegally—Criminal Procedure Code, 1973—Section 482—Complaint or charge-sheet not making out any offence—High Court may exercise inherent jurisdiction to quash proceedings.

Before launching a prosecution under the Prevention of Food Adulteration Act, 1954, the report of the Public Analyst is a must, which is a *sine qua non*. After the prosecution is launched a rigtt given to the accused under section 13(2) of the Act, to get one part of the sample analysed by the Director of Central Food Laboratory. This right is given to the prosecution under section 13(2E) of the Act and not otherwise, through the Court.

Where one part of the sample, which was sent to the Public Analyst was lost and the other part of the sample was refused to be examined by the Public Analyst on the ground that the sample was not sent in conformity with Rule 70 of the Prevention of Food Adulteration Act, 1954 and the prosecution filed an application in court praying that a part of the sample obtained for purposes of analysis be sent to the Director of Central Food Laboratory, Calcutta, for analysis under section 13(2) of the Act, and, thereupon, the Magistrate took cognizance of the offence, registered the case, issued bailable warrants against accused persons and ordered that the part of the 3rd sample be called from the District family planning and welfare officer, the Magistrate was not justified in law in straightway taking cognizance of the offence and ordering issue

*Miscellaneous Criminal Case No. 70 of 1978.

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of bailable warrant. Obviously, on that they there was no material available with the prosecution to indicate that the sample taken was found to be adulterated. In view of the clear cut provisions made under section 13(2E) of the Act, as also in Rules 3 and 4 of the Rules framed under the Act, the application of the prosecution was misconceived.

It is now well settled that once the allegations set out in the complaint, or the charge-sheet, did not constitute any offence, it is competent for the High Oourt in exercise of its inherent jurisdiction under section 482 of the Criminal Procedure Code, 1973 to quash the order passed by the Magistrate taking cognizance of the offence.

P. K. Saxena for the applicant.

B S. Johar for the non-applicant.

Cur. adv. vult.

ORDER

P. D. MULYE J.-The applicant has filed this petition under Sec. 482, Cr. P. Code for quashing the proceedings of criminal case No. 64 1978, pending in the court of Judicial Magistrate First Class, Bhikangaon, arising out of proceedings under Section 7 read with S. 16 of the Prevention of Food Adulteration Act and also under Section 201, I.P.C.

The short facts giving rise to this application are that Municipality Bhikangaon, through its Health Officer filed an application in the court of Judicial Magistrate First Class, Bhikangaon, on 16.1.1978. This application was presented by the Food Inspector. In the said application the only prayer made was, that a part of the sample of oil obtained for purposes of analysis from the applicant, be sent to the Director of Central Food Laboratory, Calcutta, for analysis under Section 13(2) of the Prevention

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of Food Adulteration Act, as one part of the sample, which was sent to the Public Analyst Indore, was lost, though it was sent by registered post from the post office Bhikangaon on 4.6.1977. The other part of the sample was refused to be examined by the Public Analyst Indore, on the ground that the sample was not sent in conformity with Rule 17 of the Prevention of Food Adulteration Act, 1955.

The learned Magistrate on the very same day took cognizance of the offence, registered the case, issued bailable warrant of Rs.500/-each against all the accused persons, and ordered that the part of the 3rd sample be called from the District Family Planning and Welfare Officer, Badwani.

Being aggrieved by the said order the applicant has filed this petition, to quash the proceedings, as the application did not disclose any offence, and, consequently, the learned Magistrate had no jurisdiction to proceed with the complaint, as he was also not empowered to try the case, under Section 16-A of the said Act.

After hearing the arguments, of both the sides and after going through the material on record, I have reached the conclusion that this is a fit case, which requires interference by this court, in exercise of its inherent powers, in the interest of justice, as the impugned order passed by the learned Magistrate is a clear abuse of the process of law.

The amended Food Adulteration Act came into force on 1.4.1976, and the sample of the oil in this case was taken on 3.6.1977. According to Section 11(1)(c)(i) the Food Inspector who takes the sample of food for analysis has to send one of the parts for analysis to the public analyst under intimation

to the Local (Health) Authority; and (ii) send the remaining two parts to the Local (Health) Authority for the purposes of sub-section (2) of this Section and sub-sections (2A) and (2E) of Section 13. Sub-section (2) of this section further provides that where the part of the sample sent to the public analyst under sub-clause (i) of clause (c) of sub-section (i) is lost or damaged, the Local (Health) Authority shall, on a requisition made to it by the public analyst or the food inspector despatch one of the parts of the sample sent to it under sub-clause (ii) of the said clause (c) to the public analyst for analysis.

Section 13 of the said Act, which deals with the report of the Public Analyst, states that the Public Analyst shall deliver, in such form as may be prescribed, a report to the Local (Health) Authority of the result of the analysis of any article of food submitted to him for analysis. Sub-section (2) of this section provides that on receipt of the report of the result of the analysis under sub-section (1) to the effect that the article of food is adulterated, the Local (Health) Authority, shall after the institution of prosecution against the person from whom the sample of the article of food was taken and the person, if any, whose name, address and particulars have been disclosed under Section 14-A, forward, in such manner as may be prescribed, a copy of the report of the result of the analysis to such person or persons, as the case may be, informing such person or persons, that if it is so desired, either or both of them may make an application to the court within a period of ten days from the date of receipt of the copy of the report to get the sample of the article of food kept by the Local (Health) Authority analysed by the Central Food Laboratory. Sub-section (2-A) further

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provides that when an application is made to the court under sub-section (2) the court shall require the Local (Health) Authority to forward the part or parts of the sample kept by the said Authority and upon such requisition being made, by said Authority shall forward the part or parts of the sample to the court within a period of five days from the date of receipt of such requisition. Sub-section (2-B) further provides that on receipt of the part or parts of the sample from the Local (Health) Authority under sub-section (2-A), the court shall first ascertain that the mark and seal or fastening as provided in clause (b) of sub-section (1) of Section 11 are intact and the signature or thumb impression, as the case may be, is not tempered with, and despatch the part or, as the case may be, one of the parts of the sample under its own seal to the Director of the Central Food Laboratory who shall thereupon send a certificate to the court in the prescribed form within one month from the date of receipt of the part of the sample specifying the result of the analysis. Sub-section (2-D) also provides that until the receipt of the certificate of the result of the analysis from the Director Central Food Laboratory, the court shall not continue with the proceedings pending before it in relation to the prosecution.

Sub-section (2-E) of Section 13, provides that if, after considering the report, if any, of the food inspector or otherwise, the Local (Health) Authority is of the opinion that the report delivered by the public analyst under sub-section (1) is erroneous, the said Authority shall forward one of the parts of the sample kept by it to any other public analyst for analysis and if the report of the result of the analysis of that part of the sample by that other public analyst is to the effect that the

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article of food is adulterated, the provisions of sub-Sections (2) to (2D) shall, so far as may be, apply. Sub-section (3) of Section 13 also state that the certificate issued by the Director of the Central Food Laboratory under sub-section (2B) shall supersede the report given by the public analyst under sub-section (1).

Public Analyst is very important figure for the implementation of the Act, he is the officer who analyses the food articles and can detect whether it is adulterated or not. It is the report of the Public Analyst on which report the prosecution is launched, and the complaint is filed duly attached with the report of the Public Analyst. Section 13 of the Act is one of the most important sections of the Act. The whole prosecution depends upon the proof of the article being adulterated, and, therefore, in order to bring home the guilt of the accused, the report of the Public Analyst serves an important factor and it is the report of the Public Analyst which declares an article to be adulterated or not. Similarly, the certificate of the Director of Central Food Laboratory serves an important purpose. This can supersede the report of the Public Analyst. The party aggrieved from the report of the Public Analyst, can challenge it by obtaining the certificate of the Director Central Food Laboratory, Calcutta, by sending the sample to the Central Food Laboratory, through the court. Thus, to prove whether an article is adulterated or not, the report of the Public Analyst is an evidence which can be superseded by the certificate of Director Central Food Laboratory, and, therefore, the provisions of Section 13 of this Act, are very important, both from prosecution as well as defence points of view.

The difference between the report of the Public

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Analyst and the certificate of the Director, Central Food Laboratory is thus-(i) the former is the report of test or analysis and its result communicated by the public analyst, whereas, later is the certificate of test or analysis communicated by the Director of Central Food Laboratory;(ii) the report of the Public Analyst is in response of the sample sent for analysis either by the Food Inspector or by a private individual, whereas the certificate of the Director of Central Food Laboratory is in response of the sample sent for analysis or test by the Court on application of the aggrieved party; (iii) the report of the Public Analyst is sufficient to start with the prosecution, whereas, certificate of the Director of Central Food Laboratory gives the final opinion whether the article is adulterated or not; (iv) the report of the Public Analyst is very essential to prove the guilt of the accused, whereas it is at the option of the aggrieved party to have the certificate of the Director, Central Food Laboratory; (v) the report of the Public Analyst shall be liable to be superseded by the certificate of the Director Central Food Laboratory and is the conclusive and final proof of the facts stated therein.

Thus, it would be clear that before launching a prosecution under this Act, the report of the Public Analyst is a must, which is a *sine qua non*. After, the prosecution is launched, a right is given to the accused under Section 13(2) of the said Act, to get one part of the sample analysed by the Director Central Food Laboratory. This right is given to the prosecution under Section 13(2E) of the Act, and not otherwise, through the Court.

The functions of the Central Food Laboratory

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under Rule 3 of the Prevention of Food Adulteration Rules, 1955, are as under:-

"3. Functions—In addition to the functions entrusted to the Laboratory by the Act, the Laboratory shall carry out the following functions namely :—

(a) analysis of samples of food sent by any officer or authority authorised by the Central Government for the purpose and submission of the certificate of analysis to the authorities concerned;

(b) investigations for the purpose of fixation of standard of any article of food;

(c) investigation, in collaboration with the laboratories of Public Analyst in the various States and such other laboratories and institutions which the Central Government may approve in this behalf for the purpose of standardising methods of analysis."

Rule 4 also provides that (1) Samples of food for analysis whether under sub-section (2) of Section 13 of the Act or under clause (a) of Rule 3 shall be sent either through a messenger or by registered post in a sealed packet, enclosed together with a memorandum in Form I in an outer cover addressed to the Director; (2) The container as well as the outer covering of the packet shall be marked with a distinguishing number; (3) A copy of the memorandum and a specimen impression of the seal used to seal the container and the cover shall be sent separately by registered post to the Director; (4) On receipt of the packet, it shall be opened either by the Director or by an officer authorized in writing in that behalf by the Director, who shall record the condition of the seal on the container; (5) After test or analysis the certificate thereof shall be supplied forthwith to the sender in Form II;(6) The fee payable in respect of such a certificate shall be Rs.40/-per

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sample of food analysed; and (7) Certificates issued under these rules by the Laboratory shall be signed by the Director.

Therefore, if, as in the present case, the prosecution felt that the Public Analyst had refused to analyse the sample, other parts of the sample could be sent for analysis to other Public Analyst, as contemplated by Section 13(2E) of the said Act. The prosecution could not straightway rush to the court with an application under Section 13(2) of the Act, in which as in the present case, the only prayer is, that part of the sample may be sent to the Central Food Laboratory Calcutta, for purposes of analysis. Obviously, on that day there was no material available with the prosecution to indicate that the sample of oil taken from the applicant was found to be adulterated, and consequently, in absence of any such material, the learned Magistrate was not justified in law, in straightway taking cognizance to the offence and ordering issue of bailable warrant. It appears that the learned Magistrate did not care to look into the prayer made in the application, and in a careless and negligent manner straightway issued bailable warrants, which definitely is an abuse of the process of law. It is the duty of the court, to look into the contents of the application, find out, whether *prima-facie* any case is made out and what is the relief sought for. In the present case, admittedly, the only relief sought for, was that the sample be sent to the Central Food Laboratory, Calcutta for purposes of analysis and nothing more.

However, the learned counsel appearing for the respondent Municipality submitted that when the Public Analyst, without any valid reason had bluntly refused to analyse even the second part of the sample,

he has no other alternative, but to approach the court itself directly with a prayer under Section 13(2) of the said Act. But, I am not persuaded to agree with this submission, in view of the clear-cut provisions made in Section (2E) of Section 13 of the said Act, as also in Rule 3 and Rule 4 of the Rules framed under the Prevention of Food Adulteration Act. The application filed before the learned Magistrate, in these circumstances, was misconceived and admittedly does not disclose any offence. It is now settled law that once the allegations set out in the complaint, or the charge-sheet, did not constitute any offence, it is competent for this Court exercising its inherent jurisdiction under Section 482 of the Cr. P. Code to quash the order passed by the Magistrate taking cognizance of the offence. The question, which therefore, remains for consideration is, whether the allegations set out in the complaint, constitute any offence, against the applicant. Where the allegations contained in the complaint do not constitute any offence, the learned Magistrate was in error in taking cognizance of it. I am, therefore, of opinion, that this application deserves to be allowed.

In the result, this application is allowed, the proceedings pending against the accused persons in this case, are quashed. However, on the basis of the certificate of the Central Food Laboratory, Calcutta, the respondent Municipality shall be at liberty to launch a fresh prosecution in accordance with law.

Application allowed.

FULL BENCH

Before Mr. G. P. Singh C. J., Mr. Justice J. S. Verma and Mr. Justice C. P. Sen.

THE CONTROLLER OF ESTATE DUTY, MADHYA PRADESH, BHOPAL, Applicant*

v.

SMT. RANI BAHU, Opposite party.

1981
Aug. 18

Estate Duty Act (XXXIV of 1953), Sections 5, 7 and 39 and Hindu Succession Act (XXX of 1956), Section 14—Female Hindu possessed of right amounting to property in generic sense—Vests in her as full owner—Her share not liable for Estate Duty—Hindu Succession Act, 1956—Section 14—Is retrospective—Immaterial whether right of a female accrues before or after commencement of the Act—Partition—A female entitled to a share on partition—Not deprived of her right simply because parties thereto not assigning any share—Her act of standing by or failure to raise objection to partition—Does not take away her right to get a share—Such conduct does not amount to acquiescence or relinquishment—Hindu Law—Family consisting of deceased and his wife—Entire property and not half of it passes on the death of deceased in case the deceased being the only coparcener and owner of entire coparcenary interest—Estate Duty Act, 1953—Section 10—Gifts in favour of grandsons of cash amounts—Donees depositing amounts with a firm of which donor not partner—Donor becoming partner subsequently on reconstitution of firm—After some time donees withdrawing amounts from that firm and reinvested in another firm—Section 10 not attracted.

The strict rule of Hindu Law that the wife did not get any right of ownership in the joint family property until the property was devided by metes and bounds and a share was allotted to her and even a declaration of her share in a preliminary decree did not confer on her any right of ownership, has no application after the enactment of the Hindu Succession Act, 1956. The effect of

*Misc. Civil Case No. 35 of 1972. Reference under Section 64(1) of the Estate Duty Act, 1953, by the Income Tax Appellate Tribunal, Indore, dated the 7th May 1971.

Section 14 of the Hindu Succession Act, 1956, is that of a female is possessed of any right which can be described as a property in the generic sense, the same becomes vested in her as a full owner in spite of the fact that the right was not recognized as property under the strict Hindu law.

Where there was a partition by surrender deed executed between the deceased and his three sons and the grandson of a predeceased son in which no share whatsoever was allotted to the deceased's wife and the wife did not sue for partition, still in view of the change of law brought about by the Hindu Succession Act, 1956, wife has a right to share 1/6th in the property which the deceased had obtained in partition of the Estate Duty cannot be charged on the whole of the estate but only on 5/6th which passed on the death of the deceased, under section 5 of the Estate Duty Act, 1953. Even applying section 7 and section 39 of the Estate Duty Act, 1953, the same result follows.

Section 14 is retrospective and it is immaterial for application of this principle whether such a right is acquired before or after the commencement of the Act.

Pratapmull Agarwalla v, *Dhanbatt Bai* (1) and *Radhabai* v. *Pandharinath* (2); referred to.

Munnalal v. *Rajkumar* (3); followed.

Bhanwarsingh v. *Pilubai* (4); relied on.

Simply because parties to a partition do not assign any share to a woman who is entitled to a share on partition, she cannot be deprived of her rightful share and she can sue for it.

Radhabai v. *Pandharinath* (2); relied on.

Merely by standing by or by not raising any objection, a woman does not lose her right to get a share and such a conduct does not amount to acquiescence or relinquishment.

Ganesh Dutt Thakoor v. *Jewach Thakourain* (5) and *Radhabai* v. *Pandharinath* (2); referred to.

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(1) A. I.R. 1936 P. C. 20 (2) A. I. R. 1944 Nag. 135.
(3) A. I. R. 1962 S.C. 1493 (4) 1972 M. P. L. J. 639
(5) I. L. R. 31 Cal. 762.

1981

The Controller of Estate Duty, Bhopal v. *Smt. Rani Bahu*

Where in a family consisting of deceased and his wife, the deceased was the only coparcener and owner of the entire coparcenary interest, the property passing on his death is the entire property and not half of it.

N. V. Narendranath v. *Commr. of Wealth-tax* (1), *Gowli Buddanna* v. *Commr. of Income-tax* (2), *Attorney General* v. *Arunachalam Chettiar* (3) and *Smt. Ramkunwar Bai* v. *The Controller of Estate Duty, Bhopal* (4); distinguished.

C. Krishna Prasad v. *C. I. T.* (5); referred to.

Where the deceased made gifts of certain amounts to his grandsons in the year 1957 and the donees deposited it with a firm of which the deceased was not a partner but on reconstitution of the firm in 1961 became its partner and in 1965 the donees withdrew their amounts from that firm and reinvested them in new firms of which presumably the deceased was not a partner, it cannot be said that the possession and enjoyment of the property gifted is not retained by the donees to the entire exclusion of the donor or of any benefit to him by contract or otherwise within the meaning of section 10 of the Estate Duty Act, 1953 and the amount gifted to the grandsons cannot be deemed to be the property passing on the death of the deceased.

The Controller of Estate Duty, Madras v. *C. R. Ramachandra Gounder* (6); followed.

P. S. Khirwadkar for the applicant.

B. L. Nema for the opposite-party.

Cur. adv. vult.

JUDGMENT

The Judgment of the Court was delivered by G. P. SINGH C. J.—This is a case stated by the Income-tax Appellate Tribunal under section 64(1)

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(1) 74 I. T. R. 190 (S.C.). (2) 60 I. T. R. 293 (S.C.).
(3) 34 I. T. R. 42 (P.C.).
(4) M.C.C. No. 137 of 1976, decided on the 3rd August 1977.
(5) 97 I. T. R. 497. (6) A.I.R. 1973 S.C. 1170.

of the Estate Duty Act, 1953 referring for our answer the following questions of law :-

(1) Whether the Tribunal was justified in accepting that only half the property will be deemed to have passed on the death of Chhotelal ?

(2) Whether the Tribunal has correctly interpreted section 39(1) of the Estate Duty Act, and held that on the death of sole coparcener, it must be deemed that there was a partition of H. U. F. and that the wife was entitled to have a share equal to that of her son ?

(3) Whether, on the facts and in the circumstances of the case, the Tribunal was justified in holding that section 10 of the Estate Duty Act is not applicable to the facts of the case and whether it was justified in deleting the amount of Rs. 88,000/-?

The reference arises in respect of the principal value of the estate left by one Chhotelal Nanhelal who died on 2nd March 1967. The accountable person Rani Bahu is the widow of the deceased. The facts relevant to questions 1 and 2 are that the deceased, his wife Rani Bahu and his four sons constituted a joint Hindu Family. One of the sons died in 1944 leaving a grandson. The grandson stepped into the shoes of his father. On 11th November 1950 there was a partition by a surrender deed executed between the deceased and his three sons and the grandson of the predeceased son. The surrender deed gave particulars of the property which was allotted to the deceased. Clause (3) of the surrender deed stated that the deceased relinquished all his rights and other claims over the remaining assets of the joint family property. The sons and the grandson likewise declared that they had no claim or share in the property allotted to the deceased. The deceased and his wife continued as

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members of joint Hindu family after the partition. The Tribunal held that although the deceased was the sole coparcener in the joint Hindu family consisting of himself and his wife, yet having regard to section 39(1) of the Act his share in the joint family property would be one half and only this share passed on his death under section 7(1) of the Act.

A perusal of the surrender deed would go to show that no share whatsoever was allotted to the deceased's wife and she is not mentioned in the deed at all. It is also not her case that although not separately mentioned her share was included in the deceased's share at the time of partition. She did not sue for reopening the partition during the deceased's life time.

A wife is entitled to a share when there is a partition between her husband and his sons. But under the strict Hindu law the wife did not get any right of ownership in the joint family property until the property was divided by metes and bounds and a share was allotted to her. Even a declaration of her share in a preliminary decree did not confer on her any right of ownership. A wife could no doubt sue for reopening a partition if no share was allotted to her in the partition but her right of ownership did not arise till the actual division and allotment of a share to her [*Pratapmull Agarwalla* v. *Dhanbati Bidi* (1) and *Radhabai* v. *Pandharinath* (2). But this strict rule of Hindu law has no application after the enactment of the Hindu Succession Act, 1956. Section 14(1) of this Act declares that any property possessed by a female Hindu, whether acquired before or after the commencement of this Act, shall be held by her as full owner thereof and not as a limited owner.

(1) A. I. R. 1936 P. C. 20. (2) A. I. R. 1941 Nag. 135.

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The Explanation to the section defines "property" in very wide language to include both movable and immovable property acquired by a female Hindu by inheritance or devise, or at a partition, or in lieu of maintenance or arrears of maintenance, or by gift from any person, whether a relative or not, before, at or after her marriage, or by her own skill or exertion, or by purchase or by prescription, or in any other manner whatsoever, and also any such property held by her as stridhan immediately before the commencement of this Act. The wide definition of "property" in the Explanation has not to be narrowly construed with a gloss of Hindu law over it. The Act has overriding effect and any text, rule or interpretation of Hindu law on matters dealt with by the Act cease to have effect after its commencement. This is specifically provided in section 4. The effect of section 14 is that if a female Hindu was possessed of any right which could be described as property in the generic sense, the same became vested in her as a full owner in spite of the fact that the right was not recognized as property under the strict Hindu law. Section 14 is retrospective and it is immaterial for application of this principle whether such a right was acquired before or after commencement of the Act. This is how section 14 was interpreted by the Supreme Court in *Munnalal* v. *Rajkumar* (1). In that case it was held that a share allotted to a Hindu female in a preliminary decree passed before the commencement of the Act was property possessed by her although there was no division by metes and bounds and that this property vested in her absolutely after the commencement of the Act. The Supreme Court expressly laid down that the rule of law applied by the Privy Council in *Pratapmull's case* that till actual division of the share declared in her favour by a preliminary decree a

(1) A.I.R. 1962 S. C. 1493.

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Hindu wife or mother was not recognized as owner could not be applied after enactment of the Hindu Succession Act. In that context the Court observed: "It cannot be assumed.. .....that in enacting S. 14 of the Hindu Succession Act, the Legislature merely intended to declare the rule enunciated by the Privy Council in *Pratapmull's case*..... . Manifestly the Legislature intended to supersede the rules of Hindu law on all matters in respect of which there was an express provision made in the Act. Normally, a right declared in an estate by a preliminary decree would be regarded as property, and there is nothing in the context in which S. 14 occurs or in the phraseology used by the Legislature to warrant the view that such a right declared in relation to the estate of a joint family in favour of a Hindu widow is not property within the meaning of S. 14." The principle enunciated in *Munnalal's case* was applied by one of us (Singh C. J.) in *Bhanwarsingh* v. *Pilabai* (1). In that case the wife was not impleaded in a suit for partition and the preliminary decree was passed without declaring her share. Still it was held that on the passing of the preliminary decree the wife got a right to obtain her due share by instituting a suit for partition and that this right was property which vested in her absolutely and passed on her death, which took place before the passing of the final decree, to her heirs in accordance with section 15(1) of the Act. In holding so, it was said "Simply because parties to a partition do not assign any share to a woman who is entitled to a share on partition, she cannot be deprived of her rightful share and she can sue for it [*Radhabai* v. *Pandharinath* (*supra*). Thus, her right to share must be taken to accrue immediately a partition is made, although in that partition she is not assigned any share. Now,

(1) 1972 M. P. L. J. 639.

as decided in *Munnalal's case* this right to share has not to wait for its accrual till the property is actually divided, but arises even at the stage when shares in the property are declared by a preliminary decree. Therefore, the moment the preliminary decree for partition was passed in the suit the right to share in the property accrued." As already noticed, in *Bhanwarsingh's case* the wife was not impleaded in the suit and the preliminary decree did not mention her at all. Even so, it was held that this did not make any distinction and the principle enunciated in *Munnalal's case* applied. The same principle, in our opinion, must be applied when the partition effected is not through the agency of the Court but by act of parties. The partition in the instant case was effected by a deed of surrender executed on 11th November 1950. The wife was entitled to 1/6th share in the joint family property that was divided by the said partition between the deceased and his sons and a grandson of a predeceased son. The surrender deed did not mention her at all and no share was allotted to her. This fact, however, did not deprive the wife in getting the right to her share which she could have enforced by instituting a suit for reopening the partition. The right to get 1/6th share in the joint family estate which accrued to her at this stage was property within the meaning of section 14 of the Hindu Succession Act and vested in her absolutely from the date of commencement of the Act. This right to get 1/6th was in the entire property which after the partition came separately in the hands of the deceased and the three sons and a grandson. The wife did not sue for partition. She lived as a member of the joint Hindu family with her husband, the deceased. She was not a coparcener. The deceased was the sole coparcener in this family but still in

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view of the change of law brought about by the Hindu Succession Act she had a right to share 1/6th in the property which the deceased obtained in partition. The property that passed on the death of the deceased within the meaning of section 5 of the Estate Duty Act was only his 5/6th share in the estate that he got on partition and which he held at the time of his death, the reason being that 1/6th of this estate was held by the deceased's wife, the accountable person. The estate duty could not be charged on the whole of the estate but only on 5/6th which passed on the death of the deceased under section 5. Even applying section 7 and section 39, the same result follows. The coparcenary interest held by the deceased could not include the interest which was held by the wife and had there been a partition between the deceased and his wife immediately before his death, the wife would have got 1/6th share. The Tribunal was, however, wrong in holding that the interest of the wife was one half in the estate which came to the deceased on partition and that only half of the property would be deemed to have passed on the death of the deceased.

The learned Standing Counsel for the Department submitted to us that the deceased was the sole coparcener and the entire property that he got in the partition although joint family property, was in effect his separate property which could be disposed of by him and which on his death passed to his successors. The learned counsel relied upon the case of *C. Krishna Prasad* v. *C. I. T.* (1). There is no doubt that this would have been the position had the old Hindu law continued to apply; but in the instant case the death took place after the commencement of the Hindu Succession Act which enlarged the rights of the wife and had the effect of

(1) 97 I. T. R. 493 at p. 497.

vesting in her 1/6th share to which she was not entitled under the old Hindu law before actual division by metes and bounds. The learned Standing Counsel also relied upon the following cases : *Controller of Estate Duty* v. *Smt. Kalavati Devi* (1), *Vithal Das* v. *Controller of Estate Duty* (2), *Manohar Vithal Velankiwar* v. *Controller of Estate Duty* (3) and *Parshotam Dass* v. *Controller of Estate Duty* (4). These cases are not applicable to the facts of the instant case. In *Kalawati Devi's case* the separation of the deceased was from a bigger Hindu undivided family. It was not a case of a devision between the deceased and his sons where the deceased's wife was not allotted any share. In the other three cases, the persons whose estates were subjected to estate duty had died before the commencement of the Hindu Succession Act and, therefore, the question of application of section 14 of the Act could not arise. Indeed, in the Bombay case of *Manohar Vithal Velankiwar* section 14 was sought to be applied by the accountable person but its application was negatived on the ground that the death of the owner of the estate had taken place before the commencement of the Act.

The learned Standing Counsel also referred to the circumstances that the wife did not claim any share or sue for partition during the life time of the deceased. This fact, in our opinion, would not make any difference. There was no case of relinquishment advanced by the Department in the Courts below. Merely by standing by or by not raising any objection a woman does not lose her right to get a share and such a conduct does not amount to acquiescence or relinquishment. It was so held by

(1) 123 I. T. R 762 (All.). (2) 85 I. T R. 432 (All.).
(3) 63 I.T.R. 379 (Bom). (4) 62 I T. R. 449 (Punj.).

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the Privy Council in *Ganesh Dutt Thakoor* v. *Jewach Thakoorain* (1). This case was followed by our Court in *Radhabai's case* (*supra*). Very often in such cases no one has the knowledge that the woman has any right to a share. In the absence of such a knowledge it is difficult to make out a case of acquiescence or relinquishment. It is true that the wife did not sue for partition even though nearly 17 years had passed after the partition but from that also no inference against her can be raised. One does not know whether the deceased or the sons were denying the right of the wife. May be that they were willing, had the wife claimed her share, to part with the share to which she was rightfully entitled. We cannot give any finding on mere guess work and if the Department wanted to rely upon acquiescence or relinquishment or cesser of right by lapse of limitation, specific pleas to that effect should have been taken during the course of assessment and findings obtained on those questions. The Department cannot be allowed before us to argue the case of acquiescence, relinquishment or cesser of right by lapse of limitation.

The learned counsel for the accountable person relied upon a decision of a Division Bench of this Court in *Smt. Ramkunwar Bai* v. *The Controller of Estate Duty, Bhopal* (2) in support of the Tribunal's finding that the wife's interest in the property was half. The learned Judges in that case referred to a passage in *Krishna Prasad's case* (*supra*) where it is stated that the plea that there must be at least two male members to form a Hindu undivided family as a taxable entity has no force and that a joint family may consist of a single male member and a female member but the same passage makes a distinction

(1) I. L. R. 31 Cal. 262.

between a joint Hindu family and a Hindu coparcenary which is a much narrower body than the joint family and which includes only those persons who acquire by birth an interest in the coparcenary property. The decision in *Krishna Prasad's case* does not support the conclusion that in a family consisting of deceased and his wife where the deceased was the only coparcener and owner of the entire coparcenary interest, the property passing on his death is only half the property and not the entire property. It appears to us that in *Ramkunwar Bai's case* it was admitted or conceded probably under some mistake that the wife of the deceased had half interest in the joint family property and the conclusion could be supported on that admission. The learned Judges towards the end of paragraph 8 of the judgment in *Ramkunwar Bai's case* said: "It is only the deceased's share in the joint Hindu family which admittedly half will be the property which passed on his death." These observations give rise to the inference that the deceased's share was admitted to be half and it was not contended that he owned the entire joint family property.

The learned counsel for the accountable person also relied upon the decisions of the Supreme Court in *Gowli Buddanna* v. *Commissioner of Income-tax* (1) and *N. V. Narendranath* v. *Commissioner of Wealth-tax* (2). These decisions relate to the question of status. In *Gowli Buddanna's case*, A, his wife, his two unmarried daughters and B, his adopted son, constituted a Hindu undivided family. On A's death, the question arose whether the property ceased to be the joint family property and whether when B was the only male member in the family, the family could be assessed as a Hindu undivided family under

(1) 60 I. T. R. 293 (S. C.) (2) 74 I. T. R. 190 (S. C.)

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the Income-tax Act. The Supreme Court held that under the Hindu law it is not necessary for constituting a Hindu undivided family that there must be more than one male member and such a family may consist of a male member and his wife and daughters. It was also held that the joint family property did not lose that character even though B became the sole surviving coparcener and possessed rights of an owner. A perusal of this case would show that the question in this case was only of status. The case cannot be said to decide that female members of such a family share the ownership of the property. *Narendranath's case* is also a similar case of status under the Wealth-tax Act. Reliance was also placed on the case of *Attorney General* v. *Arunachalam Chettiar* (1). In this case it was held that the property of a family consisting of a sole surviving coparcener and some female members was joint property of the Hindu undivided family within the meaning of section 37 of the Estate Duty Act of Ceylon. Here also it was not held that the females who were entitled to maintenance only were owners or that on the death of the sole surviving coparcener the entire property did not pass on his death. The case is, therefore, not helpful to the accountable person.

Coming to question No. 3, the facts are that on 2nd March 1957 the deceased made gifts of Rs.88,000/- to his four grandsons. The donees deposited the amounts gifted to them with the firm of Babulal Dulichand in which the deceased was not a partner. This firm was later on reconstituted in October 1961 when the deceased was taken as a partner. The deceased continued to be a partner of this firm till his death. On 22nd October 1965 the donees withdrew their amounts deposited with this

(1) 34 I. T. R. 42 (P. C).

firm and reinvested them in new firms of which presumably the deceased was not a partner.

It is clear from the facts stated above that when the gifts were made in March 1957, the possession and enjoyment of the property gifted was immediately assumed by the donees and the amounts received were invested in a firm of which the deceased was not a partner. It was only in 1961 that this firm was reconstituted bringing the deceased as a partner but by the reconstitution of the firm which made the deceased a partner, it cannot be said that the possession and enjoyment of the property gifted was not retained by the donees to the entire exclusion of the donor or of any benefit to him by contrat or otherwise within the meaning of section 10. The benefit that the deceased received from this firm was under the contract of partnership which reconstituted the firm. It was wholly unconnected with the gifts made to the donees. Section 10 of the Estate Duty Act which was sought to be applied by the Department has no application here. In *The Controller of Estate Duty, Madras* v. *C. R. Ramachandra Gounder* (1) the deceased was a partner in a firm. He transferred sums of Rs. 25,000/-each to the credit of his five sons in the firm's books. He also wrote to the five sons informing them of the transfer. The sons did not withdraw their amounts from the firm. The amounts continued to be invested in the firm for which interest was paid to them. On these facts it was held that there was unequivocal transfer of Rs. 25,000/-to each of the sons and the donees had retained possession and enjoyment of the amounts transferred to them to the entire exclusion of the possession and enjoyment of the donor. This case and similar other cases were approved in *Controller*

(1) A. I. R. 1973 S.C. 1170.

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of Estate Duty, Kerala v. *M/s R. V. Vishwanathan and others* (1). Reference may also be made here to a decision of a Division Bench of this Court in *Smt. Pannabai & others* v. *The Controller of Estate Duty, M. P., Nagpur and Bhandara* (2) which followed these cases. It is clear to us that section 10 was not applicable here and the amounts gifted to the grandsons could not be deemed to be property passing on the death of the deceased.

For the reasons given above, we answer the questions as follows :

(1) The Tribunal was not justified in accepting that only half the property passed on the death of Chhotelal. 5/6th of the property passed on his death.

(2) The Tribunal did not correctly apply sec. 39(1). The wife was entitled to 1/6th share and 5/6th of the property passed on the death of Chhotelal.

(3) The Tribunal was justified in holding that section 10 of the Estate Duty Act was not applicable.

There will be no order as to costs of this reference.

Reference answered accordingly.

MISCELLANEOUS PETITION

Before Mr. Justice J.S. Verma and Mr. Justice Bhatt.

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Nov. 17

ASSOCIATION OF SCIENTIFIC WORKERS, JABALPUR and others, Petitioners*

v.

UNION OF INDIA and others, Respondents.

Department of Defence Production (Directorate General of Inspection)

*Misc. Petition No. 256 of 1978.

(1) A. I.R. 1977 S. C. 463

(2) M. C. C. No. 531 of 1973, decided on the 19th November 1979.

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Class III Non-Gazetted (Techanical Scientific and other Non-ministerial) Posts Recruitment Rules, 1964—S. R. O. 109 as amended by S. R. O. No. 320—Quota of appointments in the proportion of 33 1/3% by direct recruitment and 66 2/3% by promotion—Deviation from quota when permissible—Words 'failing which'—Meaning of—Rule of "carry forward"—Applicability of.

Department of Defence Production (Directorate General of Inspection) Class III Non-Gazetted (Technical Scientific and other Non-ministerial) Posts Recruitment Rules, 1964 notified in S.R. O. 109 as amended by S. R. O. 320 fix the quota as 2/3rd for direct recruits and 1/3rd for promotees. The rules permit a departure from quota only to the extent permitted therein. The words 'failing which' in the relevant rule permit a departure from the quota and enable filling of the vacancies from the other source only when attempt to fill the vacancies from the source for which they are meant, has failed. There can be no such failure to fill the vacancies from the source for which they are meant, unless a candid attempt has been made which has not been fruitful. The words 'failing which' require a more rigid adherence to the quota than the words 'as far as practicable'.

The words 'failing which' imply at least an honest and serious attempt which remains unsuccessful.

N. K. Chouhan v. *State of Gujarat* (1); referred to.

The rule of 'carry forward' has no relevance to a situation where the whole cadre of a particular service is divided into two parts. It has no application at all in situations where two sources of recruitments are designated in a certain proportion and short falls occur in one or the other category.

T. Devadasan v. *Union of India* (2) and *State of Kerala* v. *N. M. Thomas* (3); distinguished.

N. K. Chauhan v. *State of Gujarat* (1); referred to.

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(1) A. I. R. 1977 S. C. 251. (2) A.I.R. 1964 S.C. 179.
(3) A. I. R. 1976 S.C. 490

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Gulab Gupta for the petitioners.

R. P. Sinha for the respondents.

Cur. adv. vult.

ORDER

The Order of the Court was delivered by J. S. VERMA J. Petitions Nos. 2 to 14 are employees' of the Inspectorate of Armaments, Khamaria at Jabalpur. They are working in different capacities as Assistant Foreman, Chargeman Grade I, Chargeman Grade II, Supervisor Grade II and Supervisor Grade III. An advertisement (Annexure A) dated 20-2-1977 has been issued by the Inspectorate of Armaments, Khamaria, Jabalpur, for filling the vacancies specified therein of Foreman, Assistant Foreman, Chargeman Grade I and II etc. by direct recruitment. The petitioners are aggrieved by the proposal to fill all these vacancies by direct recruitment and accordingly this petition under Article 226 of the Constitution has been filed substantially for the relief of quashing of this advertisement.

The petitioners' case in substance is that the vacancies have to be filled by selection from two different sources, namely, direct recruitment and promotion in the ratio of 1/3rd and 2/3rd respectively, as provided in the rules applicable for this purpose. Their grievance is that filling of these vacancies only by direct recruitment is contrary to the rules applicable for this purpose. Several arguments detailed hereafter have been advanced in support of the petitioners' case.

It is common ground before us that the statutory rules applicable to the case, framed in exercise of the powers conferred by the proviso to Article

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309 of the Constitution by the President, are called the 'Department of Defence Production (Directorate General of Inspection) Class III Non-gazetted (Technical, Scientific and other Non-ministerial) Posts Recruitment Rules, 1964' . The method of recruitment to the aforesaid posts, as laid down in these rules notified in S. R. O. 109 and amended by S. R. O. 320, reads as under :-

> "33⅓% vacancies by direct recruitment failing which by promotion and 66 2/3% vacancies by promotion failing which by direct recruitment."

It is indeed the interpretation of the above extract from the rules laying down the method of recruitment from the two sources which is the real question for decision in this petition.

The existing vacancies advertised for being filled in accordance with the advertisement (Annexure A), are detailed in Annexure B to the petition, as they existed in January 1978. These are all vacancies which were required to be filled by direct recruitment in accordance with the quota fixed in the rules for direct recruits. It is common ground that these vacancies remained unfilled and for the purpose of administrative convenience *ad hoc* appointments were made to them by promotion and some of the petitioners have been working by virtue of these *ad hoc* appointments. The petitioners rightly did not claim any right to the posts by virtue of *ad hoc* appointments by promotion. However, the main contention of the petitioners is that in accordance with the above requirements in the rules fixing the quota for filling the vacancies from two different sources, namely, direct recruitment and promotion, any vacancy which remained unfilled by direct recruitment for a period of one year became automatically available for being filled by promotion

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and it ceased to be a vacancy available for being filled by direct recruitment. The petitioners also contend that it is of no consequence that such vacancies still remained unfilled for want of any substantive appointment by promotion to these posts. They claim that all such vacancies should now be filled only by promotion to which source the petitioners belong, and not by direct recruitment, even though they are vacancies which, according to the quota fixed by the rules, were required to be filled by direct recruitment. There is no dispute that the quota fixed by the rules for promotion has been made available to them and these vacancies pertain to the quota relating to direct recruits. The main question, therefore, is whether a deviation from the quota fixed by the rules can be made as claimed by the petitioners in order to fill all these vacancies now by promotion only, denying the same to the direct recruits to whose quota the vacancies belonged.

In support of the petition, Shri Gulab Gupta, learned counsel for the petitioners, had advanced the following arguments : (1) the expression 'failing which...' in the above extract from the rules means that if a vacancy relating to the quota of direct recruits cannot be filled by direct recruitment for any reason whatsoever at the end of the year in which the vacancy occurs, it gets released from the quota meant for direct recruits alone and becomes available for being filled only by a promotee; (2) in the alternative, there being no provision to carry forward any unfilled vacancy relating to the quota for direct recruits, all vacancies remaining unfilled at the end of the year get released with the result that all available vacancies at any time are required to be filled according to the 1/3rd and 2/3rd proportion

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provided in the rules and not only by direct recruits to whose quota they belong; and (3) giving of seniority to direct recruits from the date of availability of vacancies and not from the dates of actual appointments in such cases, where appointments are made much later, would result in placing them above the promotees who have been given promotion earlier, in spite of the promotees having a longer period of continuous officiation.

The last contention of Shri Gupta can be disposed of at the very outset for the short reason that this question does not really arise in the present petition. No such direct recruit, to whom such a benefit may have already been given as against the earlier promotees in substantive capacity is impleaded in this petition. Shri Gupta contends that this being the policy of the respondents, a decision on the point can be given in this very petition to ensure compliance subsequently when the occasion arises. In our opinion, it is not at all necessary to do so when such a grievance has not yet arisen. This argument is based anticipating the possibility in future of giving the persons directly recruited in response to the advertisement (Annexure A) seniority from dates to which, according to the petitioners, they would not be intitled. It is sufficient to say for the present that this situation can arise only subsequent to the selection made in pursuance of the impugned advertisement (Annexure A) and that selection has yet to be made. If the petitioners have any such grievance subsequently, the occasion would arise then to make such a challenge but that hypothetical situation cannot be visualised in this petition and for that reason there is no occasion to give any decision thereon. We accordingly express no opinion on the merits of the last contention raised

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by Shri Gupta, since that contention does not arise for decision in this petition.

The first contention of Shri Gupta is really the main contention in this petition, the second contention being merely an alternative argument. We shall, therefore, consider the first contention at this stage. This contention of Shri Gupta is based mainly on the decision in *N. K. Chauhan* v. *State of Gujarat* (1). It would, therefore, be appropriate to state the facts of *N. K. Chauhan's case* and the decision therein, before we proceed to examine the correctness of Shri Gupta's contention.

In *N. K. Chauhan's case* (*supra*), the dispute related to seniority *inter se* of Deputy Collectors appointed by direct recruitment in 1963 and those promoted as Deputy Collectors from the posts of Mamlatdars prior to them during the years 1960 to 1963 in excess of the quota fixed by the rules for the promotees. These promotee Deputy Collectors from 1960 to 1963 were appointed to substantive posts of Deputy Collectors prior to the appointment of the direct recruits in 1963. These were the two different sources for appointment of Deputy Cellectors, namely, by direct recruitment and promotion. According to the rules applicable for the purpose, which provide for these two sources of appointment to the posts of Deputy Collectors, either by direct recruitment or by promotion of suitable mamlatdars, the ratio of appointment by direct recruitment and by promotion was 50:50, 'as far as practicable'. These rules fixed the quota providing for half the vacancies to be filled by direct recruitment and the other half by promotion 'as far as practicable'. Significantly the rules did not provide for rotational or roster system, namely, that alternative vacancies were to go to the

(1) A. I. R. 1977 S. C. 251.

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two different sources. The claim of seniority made by the later direct recruits over the earlier promotees appointed to substantive vacancies in excess of the quota meant for promotees was required to be decided on the basis of these rules. In that case such a deviation from the quota fixed by the rules had been made after the State Government had taken steps for filling the vacancies within the quota of direct recruits by direct recruitment but it failed in that attempt and, therefore, instead of resorting to the mode of making purely *ad hoc* promotions to carry on the work, the promotees had been appointed to these unfilled vacancies in the quota meant for direct recruits by making substantive appointments of the available promotees in excess of the quota meant for the promotees. It may also be mentioned that these rules were subsequently amended in 1966 and the saving provision 'as far as practicable' was deleted with the consequence that deviation from the quota was no longer permissible thereafter and the quota was required to be adhered to rigidly. However, the claim of the direct recruits of seniority over the earlier promotees appointed substantively in excess of the quota meant for promotees was required to be decided according to the rules as they existed prior to the amendment in 1966. The claim of the direct recruits was rejected taking the view that the words 'as far as practicable' existing in the rules prior to the amendment in 1966. permitted the deviation when the attempt to fill the vacancies meant for direct recruits by direct recruitment had failed. The effect of the amendment made in 1966 was also considered for adjusting the seniority of Deputy Collectors who were governed by the amended rules from 1966. While deciding the case, certain principles were laid down by the Supreme Court which are summarised hereafter.

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The main principles culled out from the decision in *N. K. Chauhan's case*, are as under:-

(1) While laying down quota when filling up vacancies in a cadre from more than one source, it is open to the Government to choose a year or other period or the vacancy by vacancy basis to work out the quota among the sources.

(2) The 'quota' is not necessarily inter-locked with 'rota' so that where the former is expressly prescribed, the latter is impliedly inscribed. The quota methodology may itself take many forms of which rota is only one but not the only mode and not an inevitable consequence of quota in each case where quota is prescribed.

(3) The quota rule does not inevitably involve the application of rota rule. Where rota does not apply even though quota has to be adhered to, later direct recruits appointed against their quota cannot claim 'deemed' dates of appointment for seniority in service with effect from time, according to rota or turn, the direct recruits' vacancy arose, to get seniority above earlier promotees appointed substantively to deficient vacancies. This is because seniority, ordinarily, depends on the length of continuous officiating service and cannot be upset by late arrivals from open market save to the extent any excess promotee has to be pushed down when permissible.

(4) Where the requirement was to adhere to the quota 'as far as practicable', a deviation from the quota was permissible where despite honest and serious effort it had become impracticable or not feasible to adhere to the quota.

(5) Where a deviation from the quota had become permissible in the above manner, it was permissible to either make *ad hoc* aapointments from the other source till the vacancies could be filled from the source to which they belonged or make substantive appointments from the other available source without suffering the seats to lie indefinitely vacant, depending on the exigencies of administration.

(6) A case for deviation from the quota having been made out and permitted by rules which contained the words 'as far as practicable', substantive appointments from the other available source, namely, promotees, was justified and, therefore, the later direct recruits could not claim seniority over the earlier promotees appointed substantively in this manner in excess of the quota meant for promotees. Quota without rota being prescribed by rules.

(7) The absence of expression 'as far as practicable' or any similar expression indicates that a deviation from the quota is not permissible and the quota is required to be strictly adhered to.

(8) Strict adherence to the quota requires that where substantive appointments from the other source have been made in excess of the quota meant for that source, the express promotees have to be pushed down as against the later direct recruits who had been regularly appointed within their quota and to that extent appointment of these excess promotees is to be treated as temporarily invalid till the vacancies for their substantive appointment in their quota became available subsequently.

(9) Where inextricable interlinking between 'quota' and 'rota' springs from the specific provision rather than by way of any general proposition the relative seniority between direct recruits and promotees should be determined according to the rotation of vacancies between the different sources.

(10) The 'carry forward' rule has no relevance to a situation where two sources of recruitment are designated in a certain proportion and shortfalls occur in the one or the other category. In such a case, what is needed is conformity to the prescription of the proportion and no question of carrying anything forward strictly arises.

In the present case, we do not find that the petitioners can get any assistance from the decision in *N. K. Chauhan's case*. The rule in the present

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case fixes the quota as 1/3rd for direct recruits and 2/3rd for promotees. No doubt, the rule permits a departure from the quota but that departure can be made only to the extent permitted therein. The words 'failing which' in the above quoted extract from the rules laying down the quota, show that the rules permit a departure from the quota and enable filling of the vacancies from the other source only when attempt to fill the vacancies from the source for which they are meant, has failed. It is obvious that there can be no such failure to fill the vacancies from the source for which they are meant, unless a candid attempt has been made which has not been fruitful. In our opinion, the words 'failing which' require a more rigid adherence to the quota then the words 'as far as practicable' which came up for construction in *N. K. Chauhan's case*. The words 'failing which' necessarily imply at least an honest and serious attempt which remains unsuccessful. The making of an honest and serious effort, which does not succeed, was held to be a condition precedent even in *Chauhan's case* to permit a departure from the quota where the words 'as far as practicable' had been used in the rules. At any rate, the words 'failing which' used in the present case do not indicate that a more liberal departure from the quota has been contemplated so as to satisfy the condition precedent permitting a departure from the quota even without making an honest and serious effort which remains unsuccessful. It must, therefore, be held that the rules in the present case permit a departure only after an honest and serious effort has been made to fill the vacancies from the source for which they are meant and that attempt has ultimately failed.

In the present case, there is nothing to show

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that an honest and serious effort to fill the vacancies meant for the quota of direct recruits had been made and the same had failed. No such facts have been alleged or shown by the petitioners. On the other hand, it has been stated in the return that these vacancies meant for the quota of direct recruits had remained unfilled for certain technical reasons. Obviously this happened without any honest and serious attempt being made to fill the vacancies by direct recruitment. It is common ground that only *ad hoc* promotions had been made according to the exigencies of the administration to carry on the work and no substantive appointment by appointment of the promotees has yet been made to fill these vacancies meant for the direct recruits. It is, therefore, not even a case where substantive appointments of promotees in excess of their quota has already been made and filling of these vacancies now by direct recruits would have the effect of pushing down the promotees who have been substantively appointed. The question really is whether these unfilled vacancies belonging to the quota of direct recruits should be made available to the promotees alone and a departure should now be made for this purpose as claimed by the petitioners, no such departure from the quota having been made as yet. In short, the petitioner's claim is that these vacancies belonging to the quota of direct recruits having remained unfilled so far, there being no attempt made to fill them by direct recruitment, they should now be released from the quota meant for direct recruits and made available to the promotees alone. We do not find anything in the rules to justify such a course.

Shri Gupta strenuously urged that a year should be taken as the basis for working out the quota and no unfilled vacancy available in the quota should

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remain available in that quota for more than the year in which it occurs. In the first place, there is no such requirement in the rules and then the question in the present case is that there being nothing to indicate that direct recruits are not available, is there any occasion to shut out the direct recruits from entry to the vacancies meant for that source and convert these available vacancies for being filled only by the promotees, when no substantive appointment of any promotee against these vacancies has been made as yet? We do not think so. The return shows that the respondents have adopted the vacancy by vacancy basis for working out the quota against which there is no prohibition in the rules and as held in *N.K. Chauhan's case* (*supra*), that is a permissible basis. It appears that the first attempt to fill these vacancies by direct recruitment, the source for which they are meant, has been made only by issuance of the impugned advertisement (Annexure A). That being so, there is no reason to restrain the respondents from making this first serious attempt to fill the vacancies from the source for which they are meant in the quota rule. We do not find anything in *Chauhan's case* which requires adoption of the course suggested by the petitioners and, therefore, the first contention of Shri Gupta must be rejected.

The second contention of Shri Gupta, in the alternative, also has no force. This is really not a case of applying the 'carry forward' rule as suggested by Shri Gupta. Shri Gupta has placed reliance on *T. Devadasan* v. *Union of India* (1) and *State of Kerala* v. *N. M. Thomas* (2). Both these cases have been referred and distinguished in *N. K. Chauhan's case* (*supra*). It has been pointed out that a part from the fact that it is doubtful whether *Devadasan's case* survives the subsequent decision in *N.M. Thomas's*

(1) A.I.R. 1964 S.C. 179. (2) A. I. R. 1976 S.C. 490.

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case, the rule of carry forward has no relevance to a situation where the whole cadre of a particular service is divided into two parts. It has also been pointed that there is no application of the carry forward rule at all in situations where two sources of recruitments are designated in a certain proportion and short falls occur in one or the other category. In such a case what is needed is conformity to the prescription of the proportion and no question of carrying anything forward strictly arises. This not being a case to which the 'carry forward' rule applies or in which the same has been adopted, this argument advanced by Shri Gupta does not really arise. The alternative contention of Shri Gupta is also, therefore, rejected.

We have earlier dealt with the last contention of Shri Gupta regarding fixation of seniority and pointed out that the same does not arise in the present petition. We may, however, add that as pointed out in *N. K. Chauhan's case* (*supra*), the quota system does not necessitate the adoption of the rotational rule in practical application since quota can exist even without rota. In the rules applicable to the present case, quota has undoubtedly been prescribed but there is no indication that rota is inter-locked with it or that it is an inevitable consequence of the quota rule. In our opinion, the principle of rota cannot, therefore, be attracted in the present case and it is only the prescribed quota which has to be adhered to in the manner already pointed out by us. We are clarifying this position because this would become relevant in fixing the seniority of the direct recruits appointed hereafter. We have no doubt that this principle would be borne in mind by the respondents while fixing the seniority of the later direct recruits in relation to

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the earlier promotees appointed against substantive posts and not on *ad hoc* basis. In this connection, the settled rule reiterated in *N. K. Chauhan's case* that seniority normally is measured by the length of continuous officiating service has to be borne in mind. Since no occasion has arisen to test the correctness of fixation of seniority with reference to any specific case, the appointments by direct recruitment being yet to be made, this matter need not detain us further.

Consequently the petition fails and is dismissed but, in the circumstances of the case, without any order as to costs. The security amount shall be refunded to the petitioners.

Petition dismissed.

MISCELLANEOUS PETITION

Before Mr. Justice G.P. Singh and Mr. Justice J.S. Verma.

1976

Nov. 9

BANSMANI PRASAD, Petitioner*

v.

STATE OF M. P. and others, Respondents.

Panchayats Act, Madhya Pradesh (VII of 1962)—Section 116(1)—Power of State Government to remove a person from Presidentship—Quasi-judicial nature—Opportunity to show cause must be given—Must be a real opportunity—Natural justice—Principles of—Applicable to administrative orders also—Order of State Govt. must contain reasons—State Govt. holding an exparte inquiry against the petitioner—Material collected by Enquiry Officer not disclosed to petitioner—Report of inquiry also not given—Petitioner denying charges levelled against him and submitting explanation—No further inquiry held—

*M. P. No. 613 of 1976.

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Bansmani Prasad v. *State*

Order of removal not containing reasons for rejection of petitioner's explanation—Procedure vitiative of principles of natural justice—Order liable to be quashed—Order of State Govt. based on cumulative effect of all charges—Findings regarding serious charges not sustainable—Order on comparatively insignificant charge alone—Not maintainable.

Under the proviso to sub-section (1) of Section 116 of the Madhya Pradesh Panchayats Act, 1962 no Member, President or Vice-President is liable to be removed from his office unless he has been given an opportunity to show cause why he should not be removed from his office. A person who holds such office has a right to continue in office until the expiry of the term. The order of removal affects his valuable right and finding of misconduct casts a stigma on the public life of such person. Thus, the power of removal is *quasi*-judicial in nature.

Bhagat Ram v. *State of Punjab* (1); relied on.

Opportunity to show cause must be a real opportunity. The person proceeded against must not only be told the allegations of misconduct, but he must also be informed of the material which is sought to be used against him in support of the charges so that he may offer his explanation in respect of that material. The State Government should also give reasons in support of the order removing the person from the office so as to indicate why the explanation submitted is not reasonable.

The rule requiring reasons to be given is like the principle of *audi alteram partem*, a basic principle of natural justice. Even in cases of administrative orders where rights of parties are affected rules of natural justice have to be followed and it is desirable that the order should contain reasons.

Siemens Engg. & Mfg. Co. v. *Union of India* (2), *Hochtief Gammon* v. *State of Orissa* (3), *Mahabir Jute Mills* v. *Shibban Lal* (4) and *State of Gujarat* v. *Amba Lal* (5); relied on.

Where the order of removal is based on the cumulative effect of all the charges and when the binding regarding the more serious charges cannot be sustained, it is difficult to uphold the order on a comparatively insignificant charge alone.

(1) A. I. R. 1972 S. C. 1571. (2) A.I.R. 1976 S. C. 1785 at p. 1789.
(3) A.I.R. 1975 S.C. 2226 at p. 2234. (4) A.I.R. 1975 S.C. 2057.
(5) A. I. R. 1976 S. C. 2002 at p. 2005.

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Y. S. Dharmadhikari for the petitioner.

S. K. Dixit with *K. K. Adhikari* Govt. Advocate for the respondents.

L.S. Baghel for the Intervenor, *Ramdhani Mishra.*

Cur. adv. vult.

ORDER

The Order of the Court was delivered by G. P. SINGH J.--The petitioner, Bansmani Prasad, was elected a Panch of the Gram Panchayat, Kailashpur, in 1970. He was thereafter elected a member of the Janapada Panchayat, Hanumana. He was subsequently elected President of the Janapada Panchayat. By an order passed by the State Government on 12th May 1976 the petitioner was removed from the office of President as also from the membership of the Janapada Panchayat. The petitioner then filed this petition under Article 226 of the Constitution challenging this order.

It appears that an *ex parte* inquiry was held against the petitioner by the Additional Collector, Rewa, as a result of which the State Government framed seven charges. A notice was issued to the petitioner on 24th January 1976 calling upon him to show cause why he should not be removed from the office of President as also from the membership of Janapada Panchayat. Along with this notice, some particulars of the charges were also enclosed. The petitioner denied the charges and submitted his reply on 26th February 1976. The State Government then passed the impugned order on 12th May 1976. This order recites that as a result of the inquiry made by the Additional Collector, the petitioner was essentially found guilty of the following charges.

(1) The petitioner indiscriminately transferred teachers and misbehaved with lady teachers.

(2) The petitioner drew false travelling allowance and Dearness Allowance.

(3) The petitioner resided permanently in the Janapada office building.

The order further states that the explanation of the petitioner was found to be unsatisfactory and he was guilty of the aforesaid charges of misconduct.

The petitioner's grievance is that in passing the order of removal he was not afforded proper opportunity to show cause as is contemplated by the proviso to sub-section (1) of section 116 of the Madhya Pradesh Panchayats Act. The proviso referred to here requires that "no member, President or Vice-President shall be removed unless he has been given an opportunity to show cause why he should not be removed from his office.

It is an admitted position that the inquiry held by the Additional Collector was an *ex parte* inquiry in which the petitioner was not asked to participate. The show cause notice issued to the petitioner is, no doubt, accompanied by particulars of the charges, but it does not state as to what material or evidence was collected by the Additional Collector against the petitioner in the inquiry. The report of the inquiry was also not supplied to the petitioner. After the petitioner denied the charges and gave his explanation, there was no further inquiry. The order removing the petitioner does not give the reasons why the petitioner's explanation was rejected and the charges were held to be proved. In our opinion, the procedure followed in removing the petitioner cannot be said to have afforded him

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opportunity to show cause as required by the proviso.

It cannot be disputed that opportunity to show cause must be real opportunity. The person proceeded against must not only be told the allegations of misconduct, but he must also be informed of the material which is sought to be used against him in support of the charges so that he may offer his explanation in respect of that material. A person who holds office as a member or as President has a right to continue in the office until the expiry of the term. The order of removal which is passed under section 116 affects this valuable right and the finding of misconduct on which such an order is based casts a stigma on the public life of the person. Having regard to these consequences, we are of opinion that the power of removal is *quasi*-judicial in nature. In *Bhagat Ram* v. *State of Punjab* (1) a provision in the Punjab Municipal Act relating to the removal of members was considered by the Supreme Court. It was held in that case that the order contemplated by the provision removing a member was *quasi*-judicial in nature and that it was not only desirable but also essential that the authority passing the order should give reason. It was further pointed out that all the material should be disclosed to the person concerned so that he may give an effective answer not only to the averments contained in the show cause notice but also to the materials on the basis of which the show cause notice was issued. The principles laid down in *Bhagat Ram* v. *State of Punjab* (*supra*) equally apply to the exercise of power under section 116 of the Panchayats Act. The State Government while taking action under this provision should not only disclose the charges but also the entire material on which the

(1) A. I. R. 1972 S. C. 1571.

charges are based to the person concerned :so as to afford him real opportunity to show cause against the charges. Further, the State Government should give reasons in support of the order removing the person from the office so as to indicate why the explanation submitted is not acceptable. It has recently been observed that the rule requiring reasons to be given is like the principle of *audi alteram partem*, a basic principle of natural justice: [*Siemens Engg. & Mig. Co.* v. *Union of India* (1). Even in case of administrative orders where rights of parties are affected rules of natural justice have to be followed and it is desirable that the order should contain reasons: [*Hochtief Gammon* v. *State of Orissa* (2), *Mahabir Jute Mills* v. *Shibban Lal* (3) and *State of Gujarat* v. *Ambalal* (4).

We have earlier stated that the petitioner denied all the charges levelled against him. In respect of the charge of misbehaviour with the lady teachers, which is one of the charges, no particulars were given along with the show cause notice and no material was disclosed as to on what basis the said charge was levelled against the petitioner. As regards the charge of drawing false T. A. and D. A., the only thing communicated to the petitioner was that he did not submit the bus tickets. The petitioner, however, submitted in reply that the fact that he undertook the journey on the relevant dates in connection with the work of the Janapada Panchayat can be verified by referring to the registers maintained by the Panchayat. It was also pointed out that T.A. and D.A. bills were passed by the proper officer and

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(1) A. I. R. 1976 S.C. 1785 at p. 1789.
(2) A. I. R. 1975 S. C. 2226 at p. 2234.
(3) A. I. R. 1975 S.C. 2057.
(4) A. I. R. 1976 S.C. 2002 at p. 2005.

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the charge was false. The material, if any, in support of the charge was not disclosed to the petitioner at all and it is difficult to understand as to how the charge was held to be proved. Similar is the position relating to the charge that the petitioner permanently resided in the office building of the Panchayat. The material in support of this charge was also not disclosed to the petitioner. It appears that in support of all these charges the Government relied upon the material collected by the Additional Collector in the *ex parte* inquiry conducted by him as also on his inquiry report. Neither the report nor the material collected in the inquiry was disclosed to the petitioner. The State Government also failed to give reasons in the final order as to why the explanation submitted by the petitioner was not acceptable. In our opinion, therefore, it cannot be held that the petitioner was given proper opportunity of showing cause as contemplated by section 116 of the Act. The impugned order of removal, therefore, cannot be sustained.

The learned Government Advocate pointed out that the petitioner admitted in his reply that certain teachers were transferred by him contrary to the Government instructions and, therefore, at least one charge was established against the petitioner. It does appear that the petitioner passed order of transfer regarding certain teachers when there was a general order of the Government forbidding transfers except with the permission of the Head of the Education Department or the Government. The petitioner's explanation was that transfers were made in those cases only where the teachers affected consented or where there was surplus staff at a place. There is no exception in the Government order that in such cases transfers can be made. The petitioner, therefore, did transfer teachers contrary to the instructions of the

Government, presumably under a misapprehension. Be that as it may, even if this charge is taken to be proved, we do not think that this charge was so serious that the Government on this charge alone would have passed the impugned order. The order of removal is based on the cumulative effect of all the charges and when the finding regarding the more serious charges cannot be sustained, it is difficult to uphold the order on a comparatively insignificant charge alone.

The petition is allowed. The order removing the petitioner from the office of President as also from the membership of the Janapada Panchayat is quashed. There shall be no order as to costs of this petition. The security amount shall be refunded to the petitioner.

Petition dismissed.

APPELLATE CIVIL

Before Mr. Justice Bhachawat.

JAISUKHLAL DAVE, Appellant*

v.

M/S SHANKER THEATRES (FIRM), AMRAWATI and others, Respondents.

1980

Apr. 8

Partnership Act, Indian (IX of 1932), Section 22 and Negotiable Instruments Act (XXVI of 1881), Sections 4,5 and 80—Promissory note and Bill of exchange—Distinction between—Partnership Act, Indian—Section 22—Promissory note executed by one of the partners in the name and on behalf of the firm—Express authority in favour of the partner to raise loan and

*First Appeal No. 168 of 1976, from the decreee of L. N. Tiwari, I Additional District Judge, Raipur, dated 5th May 1976.

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Jaisukhlal Dave v. M/s Shanker Theatres (Firm), Amrawati

execute documents—Transaction binding on the firm—All partners liable to repay—Money Lenders Act, 1934-Section 3—Money-lender not complying with provisions of the section —Not entitled to interest.

On a comparison of the definition of promissory note and the bill of exchange the remarkable difference is that the essential character of a promissory note is that it shall contain a promise and the essential character of the bill of exchange is that it shall contain an order. In other words a bill of exchange contemplates three parties, a drawer, drawee and payee. It may be that the same person may fill the role of the drawer and the drawee/ acceptor. Thus, where the document contains a promise to pay and not an order to pay, it is a promissory note and not a bill of exchange.

Harsukhdas v. *Dhirendra Nath* (1); relied on.

When loan is taken and promissory notes are executed by one of the partners of the partnership firm, in the name and on behalf of the firm, who had an express authority to borrow money under the terms of the partnership, the transaction is binding on the partnership firm and as such all the partners are liable to repay the loan taken from the lender in view of the said express authority and section 22 of the Partnership Act.

Loan advanced against promissory notes is governed by the provisions of the Madhya Pradesh Money Lenders Act. When the plaintiff is a money lender and it is not proved that the provisions contained in section 3 of the Money Lenders Act have been complied with, interest has to be refused. Section 80, Negotiable Instruments Act has no application.

M. M. Sapre for the appellant.

Y. S. Dharmadhikari for the respondents.

Cur. adv. vult.

JUDGMENT

U. N. BHACHAWAT J.-This is an appeal by the plaintiff against the judgment and decree dated 5th

(1) A. I. R. 1941 Cal. 498.

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of May, 1976, in Civil Suit No. 17-B of 1974 of the Court of First Additional District Judge, Raipur.

The plaintiff had filed the present suit for Rs. 13,762.50 paise (Rs.10,000/-principal and Rs.3,762.50 paise interest at the rate of Rs.1.75 paise percent per month) against the defendants 1 to 4 on the basis of the two documents Ex.C-1 and Ex. C-2 for Rs. 5000/-each dated 3-11-1971 and 4-11-1971, respectively which in the plaint the plaintiff has described to be promissory notes whereas during the course of the argument in this Court, it has been contended that these documents are hundis.

The defendant No. 1 is a partnership firm and defendants Nos. 2,3 and 4 are its partners. The defendant-firm has been carrying on its business at Amrawati and other places.

The case of the plaintiff, as laid in the plaint, was that the defendant No.3 took from plaintiff at Raipur Rs.5,000/-on 3-11-1971 and 4-11-1971 for and on behalf of the defendant-firm against two promissory notes of Rs. 5,000/-each executed by defendant No. 3 in favour of the plaintiff for the respective loans on the respective dates promissing to pay the suit amount 90 days afterwards i. e. on 1-2-1972 and 2-2-1972, respectively.

It was further alleged that defendant No. 3 had at the time of taking the suit loans, orally agreed to pay interest at the rate of Rs 1.75 paise per cent per month; that the defendants failed to repay the suit loan amount on the stipulated dates and did not pay the same despite demand by registered notice dated 12-9-1973.

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The defendants nos. 1, 2 and 4 filed a joint written statement and defendant no. 3 filed a separate written statement. All the defendants resisted the claim of the plaintiff. While controverting the material allegations of the plaint, on which the plaintiff has based his claim, the defendants 1,2 and 4 *inter alia* contended that defendant No. 3 had no authority to take loan for and on behalf of the defendant firm nor was the loan taken for the business of the firm nor the plaintiff who was aware of the limitations of the powers of borrowing of defendant No. 3 as partner of the defendant-firm, had made inquiries as to whether defendant No.3 was taking loans for the business of the firm and whether he had prior to this unsuccessfully approached the other partners for loan. It was also alleged that the suit loans were advanced by the plaintiff to Shri V. Y. Solao, uncle of defendant No. 3 who was carrying on the business of exhibiting film at Nagpur and as a conspiracy between plaintiff, defendant No.3 and defendant No. 3's uncle Shri V. Y. Solao for that loan the suit promissory notes were executed by defendant No.3 in the name of the firm.

Defendant No.3 while admitting the execution of the suit promissory notes, denied the receipt of consideration of Rs.10,000/-; executed the suit promissory notes for himself as well as for the defendant-firm and that he had affixed the rubber seal of the defendant firm while executing the suit promissory notes. It was also contended by him that the suit promissory notes were executed by him at Amarawati and, therefore, the trial Court had no jurisdiction.

It may also be mentioned that defendant Nos.1,2 and 4 had also contended that plaintiff was a moneylender governed by the provisions of the

Moneylenders Act but did not get himself registered as a moneylender and also did not comply with the provisions of the Moneylenders Act and was, therefore, not entitled to maintain the suit and also to get costs and interest.

The trial Court framed the following issues and recorded its finding on these issues as noted against each of them:-

ISSUES	FINDINGS
I. Whether the plaintiff is a moneylender?	Yes.
II(a) Whether the plaintiff is not registered under the Moneylenders Act?	He is registered.
(b) If so, its effect?	Redundant.
III(a) Whether the defendant no. 1 firm is dissolved?	Yes.
(b) If so, its effect?	Nil.
IV(a) Whether the defendant no. 3 took a loan of Rs.10,000/-from the plaintiff at Raipur?	Yes.
(b) If so, whether the said loan was taken by defendant no. 3 on behalf of the defendant no. 1?	No.
(c) Whether there was an oral promise to pay interest at the rate of 1.75% per month?	Not proved.
V. Whether the defendants nos. 1,2 and 4 are not liable to repay the amount?	Yes.
VI. Relief and costs?	Suit decreed against defdt. No. 3 and dismissed against the rest.

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Consequent to the aforesaid findings on the various issues, the trial Court decreed the suit of the plaintiff for the principal amount of Rs. 10,000/-against defendant No. 3 with costs and dismissed the suit against all other defendants directing that they shall bear their own costs as incurred. The plaintiff being aggrieved by the aforesaid judgment and decree to the extent that interest and decree against defendants Nos. 1,2 and 4 have been refused, filed the present appeal.

The questions for determination in this appeal are two: (i) whether the plaintiff is entitled to interest, and (ii) whether the claim could be decreed against the defendants Nos. 1,2 and 4 also.

At the out set it may be mentioned that defendant No. 3 has filed no appeal.

I shall deal with the aforesaid questions *ad seriatim*.

It is an admitted position that the plaintiff is a moneylender. The contention of the learned counsel for the plaintiff was that even if the contract with regard to the payment of interest on the suit loan has not been proved, the plaintiff is entitled to the interest on suit amount at the rate of six per cent per annum from the due date of payment. This argument of the learned counsel was based on the following two submissions:-

(i) that the documents Exs.C-1 and C-2 are bills of exchange/ hundi and thus governed by the Negotiable Instruments Act (hereinafter referred to as the Act) and as no interest at specified rate is expressly made payable on these documents, Section 80 of the Act would apply; and

(ii) that the documents Exs. C-1 and C-2 are not promissory

notes and, therefore, in view of the definition of loan given in Section 2(7)(e) of the M. P. Moneylenders Act, the suit amount is not a loan governed by the provisions of the M. P. Moneylenders Act.

The arguments of the learned counsel for the defendants was that the documents Exs. C-1 and C-2 are promissory notes, the plaintiff has also described them to be promissory notes and, therefore, the advance made on the basis of these documents is covered in the definition of loan in the M. P. Moneylenders Act. The plaintiff has not complied with the requirements of maintenance of accounts by moneylenders and supply of statement thereof to debtors as contained in Section 3 of the Moneylenders Act, the plaintiff is not entitled to interest as well as to costs in case the suit is found worth decreeing.

Promissory note is defined in Section 4 of the Act as under:-

> "A 'promissory note' is an instrument in writing not being a bank-note or a currency-note containing an unconditional undertaking, signed by the maker, to pay a certain sum of money only to, or to the order of, a certain person, or to the bearer of the instrument."

On the analysis of the aforesaid section, it is obtainable that in order that a document should be a promissory note, it is necessary that there should be:

a) an unconditional undertaking to pay;

b) the sum should be a sum of money and should be certain;

c) the payment should be to or to the order of a person who is certain, or to the bearer of the instrument; and

d) the maker should sign it.

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If these four conditions are present, a document becomes a promissory note. The mere description of an instrument as a promissory note will not make it a promissory note, if it fails to satisfy the statutory requirements.

The definition of bill of exchange given in Section 5 of the Act reads as under :-

> "A 'bill of exchange' is an instrument in writing containing an unconditional order, signed by the maker, directing a certain person to pay a certain sum of money only to, or to the order of a certain person or to the bearer of the instrument."

On the comparison of the definition of promissory note and the bill of exchange the remarkable difference that is obtainable is that the essential character of a promissory note is that it shall contain a promise and the essential character of the bill of exchange is that it shall contain an order. In other words, a bill of exchange contemplates three parties, a drawer, drawee and payee. It may be that the same person may fill the role of the drawer and the drawee/acceptor.

In the back drop of the aforesaid discussion about the distinction between the promissory note and bill of exchange, it is pertinent to set out hereinbelow one of the documents Exs. C-1 and C-2) as both are alike in form to determine as to whether these documents can be categorised as promissory notes or bills of exchange :-

" R. No ..... 2 Rs. 50 np

Rs. 5000/- Date 2.2.1972

Date 4.11.1971

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At (90) Ninety days after date without grace days we promise to pay to Seth Jaisukhlal Dave or order at..... the sum of Rupees FIVE THOUSAND only for value received in cash this day.

Amarnath For Shankar Theatres A. Y. Solao Partner."

On a plain reading of the document, it is obtainable that it contains a promise to pay and not an order to pay. Thus, the essential ingredients of the bill of exchange is absent in the instant documents. These documents (Exs. C-1 and C-2) fill in all the characteristic of a promisory note. They have therefore, to be categorised as promissory notes neither as bill of exchange nor as hundi.

The view taken by me is in line with a Full Bench decision of the Calcutta High Court in *Harsukhdas* v. *Dhirendra Nath* (1). In that case, the document under consideration was as under:-

"Rs. 2500 83, Cossipore Road, Calcutta,
1st June 1936.

Sixty days after date without grace we promise to pay to Messrs. Hursookhdas Balkisendass or order at Calcutta the sum of rupees two thousand five hundred only for value received.

Sd/-Dhirendranath Roy.

Sd/-Girindranath Roy.

Sd/-Birendranath Roy."

Across the above document was an endorsement "Accepted. Dhirendranath Roy, Girindranath Roy, Birendranath Roy". With respect to the aforesaid document, it was contended on behalf of the person who had lent the money on the strength of this document that it was a hundi or a bill of exchange and as such outside

(1) A.I.R. 1941 Cal. 498.

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the purview of the Bengal Money Lenders Act which sought to affect liability of debtors under promissory notes but not under bill of exchange. Deciding the contention, it was held by the full bench that the document was a promissory note. Delivering the judgment of the full bench, Derbyshire, C.J. observed at page 500 of the report as under:-

> "To determine the character of the document we must look to the provisions of the document itself. From the definitions of "promissory notes" and "bills of exchange" it will be seen that the essential character of a promissory note is that it shall contain a promise and the essential character of a bill of exchange is that it shall contain an order. In this particular case each one of these instruments contains a promise. None of them contains an order. They, therefore, satisfy the definition of a promissory note, but do not satisfy the definition of a bill of exchange. Certainly it is not usual for the maker of a promissory note to write "accepted" across it, but it is sometimes the case that the maker of a bill of exchange writes "accepted" across it. But that in my view is not conclusive. The word "accept" simply means with regard to bills of exchange, to take responsibility for or to agree to meet. That is according to common language. In S.7, Negotiable Instruments Act, where reference is made to the acceptor of a bills of exchange, it is provided:
>
> After the drawee of a bill has signed his assent upon the bill ..... and delivered the same, or given notice of such signing to the holder or to some person on his behalf he is called the "acceptor."
>
> That indicates what acceptance means according to the Negotiable Instruments Act. It means assent, but it means assent on the part of the drawee. Here there is no drawee because there is no order. The effect of the word "acceptance", if it has any effect at all, which I very much doubt, is simply to add the assent of the maker of the note to the promise he has already given. In other words, it repeats the promise the promisor has already

made. That can have no further legal effect. In my view, it is clear from the definitions of "promissory note" and "bills of exchange" that these particular documents are nothing but promissory notes."

The upshot of the foregoing discussion is that Exs. C-1 and C-2 are promissory notes and as such the advance of the loan by the plaintiff against these promissory notes is governed by the provisions of the Madhya Pradesh Money Lenders Act. Admittedly the plaintiff is a money-lender and it is not proved that the provisions of the Money Lenders Act contained in Section 3 have been complied with. In such a situation even in face of Section 80 of the Act interest in the right exercise of the discretion of this Court on the amount of loan has to be refused. Thus, finding of trial Court regarding refusal of interest upto the date of the decree is sustained.

I now advert to the consideration of the second question. The contention of the learned counsel for the plaintiff was that the trial Court has incorrectly interpreted the under-quoted term of the partnership deed and committed an error in holding that the express authority given to defendant No. 3 for borrowing on behalf of the firm was not unabridged and was conditional and as the condition precedent that the other partners were not in position to give the loan in question and, therefore, he had to raise the loan from the plaintiff was not proved the defendant-firm and its other partners are not liable. The relevant term in the partnership deed reads as under:-

"If and when more capital would be required for the business of the firm the same will be raised from any or all the partners of the firm by way of loan to the firm and such creditor partner or partners will be entitled to receive an

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interest to the maximum extent of Re.1/-(one) p.c.p.m. In case any or all the partners are not in a position to give loan to this partnership, Shri S. L. Rathi or Shri A. Y. Salao is at liberty to raise loans at the above rate of interest from the outsiders and execute the loan documents and such loan will be binding to the partnership."

The learned counsel relying on a Division Bench decision of this Court in *Jayantilal Chauhan* v. *M/s Shanker Theatres and others* (1), wherein this very term was construed, argued that the only limit on the power of defendant No. 3 was about the rate of interest that the rate of interest payable was not to exceed 12%per annum and it was not necessary for him first to exhaust the possibility of raising such a loan from the partners of the firm before deciding to borrow from the outsider. The argument of the learned counsel for the defendants 1,2 and 4 was that the express authority given by the forequoted term to defendant No. 3 for borrowing money for the firm was conditioned with three conditions and unless the compliance of those conditions is proved, the firm and its other partners cannot be held liable for the loan taken by defendant No.3. In his submissions, the conditions were that: (i) the borrowing was for the business of the firm;(ii) before borrowing from an outsider, the other partners should be approached for the loan and if they do not advance then alone loan should be contracted from an outsider; and (iii) the rate of interest on the loan should not exceed 12%per annum. Interpreting the forequoted express authority in favour of defendant No. 3 in the aforesaid manner, the learned counsel for the defendants 1,2 and 4, Shri Dharmadhikari argued that neither there is an allegation nor a proof about the compliance of these conditions precedent, the finding

(1) F. Appeal No. 122 of 1975, decided on the 10th July 1979.

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of the trial Court that the firm and the other partners are not bound has to be sustained. The learned counsel in support of his argument that a partner can borrow a loan so as to bind the firm only when it is shown that it was contracted for the business of the firm relied upon decisions in *Higgins* v. *Beauchamp* (1) and *M/s M. M. Abbas Brothers* v. *Chethandas Fathechand* (2). He also argued that in view of Section 4 of the Partnership Act, a partner is an agent so as to bind the firm and other partners for the borrowings made by him in the name of the firm only if it is for the purposes of the business of the firm. It was also argued by the learned counsel that the construction of the fore-quoted term of the partnership deed regarding the authority to the defendant No. 3 for borrowing by the Division Bench of this Court is not binding as a precedent.

It is undisputed that the forequoted term regarding the authority for borrowing to defendant no. 3 had come up for consideration in *Jayantilal Chouhan* v. *M/s Shanker Theatres and others* (*supra*) arising out of a suit filed against these very defendants. The present plaintiff, of course, was not a party to that suit. The decision in that appeal may, therefore, not have the effect of *res judicata* but the decision on the construction of the forequoted term regarding the authority to borrow to the defendant no.3 operates as a binding judicial precedent. In this respect, I can do no better than to refer to a decision of the Supreme Court in *Sahu Madho Das and others* v. *Mukund Ram and others* (3) wherein their Lordships of the Supreme Court said:

"Now to go back to the year 1864 when Mst. Pato made

(1) 1915 A. E. R. 937. (2) A. I. R. 1979 Mad. 272.
(3) A. I. R. 1956 S. C. 481.

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the so-called will of 1864. This document was construed by the Privy Council in *Mst. Hardei* v. *Bhagwan Singh* (1) and their Lordships said–

> "In the events which happened this document did not become operative, but it is relevant as showing that at the date of its execution pato was claiming an absolute right to dispose of the whole of the scheduled property."

> "Mukund Ram was not a party to that litigation and the decision does not bind him but it operates as a judicial precedent about the construction of that document, precedent with which we respectfully agree."

It may also be mentioned that the authorities relied on by the learned counsel Shri Dharmadhikari relate to the implied power of a partner, of borrowing money and it is in that context it has been held in those authorities that the implied power of borrowing like every other implied power of a partner only exists when it is to carry on, in the usual way, business of the kind carried on by the firm and then alone the firm and other partners are bound. In the instant case, the case is of an express authority given under the forequoted term and that term having been construed by the Division Bench, I am bound by it and, therefore, it is not necessary for me to go into the question of construing the said term. The Division Bench in *Jayantilal's case* (*supra*) while construing the forequoted term regarding express authority has said:

> "This term is not qualified by saying that such a loan would be binding on the partnership firm only if the same was taken for the business of the firm. The contention, therefore, that in spite of this express authority to borrow conferred by this term contained in the partnership deed it must be further shown that the loan was contracted by defendant No. 3 A. Y. Salao for the business of the firm, has no basis. There is no such further rider contained in the partnership deed subject to which alone it

(1) A. I. R. 1919 P. C. 27 (A).

could be declared that the loan would be binding on the partnership.

X X X X

All that the term says is that whenever money in excess of the capital of the firm is needed for the business of the firm, the specified partners, which include defendant No. 3 A. Y. Salao, had the express authority to raise loans either from the partners of the firm or from outsiders, subject only to the condition that rate of interest payable on such loan was not to exceed 1 p.c.p.m, or 12 p.c.p.a. Thus, the only limit imposed on the power to borrow was that interest payable was not to exceed 12 p.c.p.a. It was left to the specified partners to decide in their discretion when the raising of such a loan was necessary and it was not necessary for them to first exhaust the possibility of raising such a loan from the partners of the firm before deciding to borrow money from an outsider. It was, therefore, unnecessary in the present case to require the plaintiff to further prove that the partners of the firm were unable to advance the loan which the authorized partner defendant No. 3 A. Y. Salao had chosen to take from the plaintiff."

The documents Exs. C-1 and C-2 are executed by defendant no. 3 in the name and on behalf of the defendant-firm. It was contended by defendant No. 3 in the written statement that the rubber stamp of the firm was not affixed by him but that part of the contention has been negatived by the trial Court and there is no reason to take a view contrary to that as absolutely there is no evidence to support that contention. It would be significant here to point out that even defendant no. 3 had not entered the witness-box and there is no other evidence also to support that contention. It may also be pointed out that the learned counsel did not stress much on that contention. The central core of his argument was about the construction of the forequoted term regarding the express authority. The document Exs. C-1

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and C-2 having been executed in the name and on behalf of the firm by the defendant no.3, who had an express authority as already discussed hereinabove the transaction is binding on the defendant-firm and as such all the defendants are liable to repay the loan taken from the plaintiff, in view of the said express authority and Section 22 of the Partnership Act.

In the result, the plaintiff's appeal is allowed to the extent that the plaintiff's suit for Rs. 10,000/- is decreed also against defendants Nos. 1,2 and 4. In other words, the suit of the plaintiff's for Rs.10,000/- principal amount stands decreed against defendants 1,2,3 and 4 with proportionate costs throughout. It is further decreed that the plaintiff shall be entitled to get interest on this principal amount of Rs.10,000/-from the defendants at the rate of six per cent per annum from the date of decree till realisation. The plaintiff's claim for interest claimed in the suit as well as *pendente lite* interest, i. e., upto the date of the decree, stands dismissed. The defendants shall bear their own costs throughout. Counsel's fee, as per schedule, if certified.

Appeal partly allowed.

APPELLATE CIVIL

Before Mr. Justice U. N. Bhachawat.

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Feb. 18

TEJKUMAR JAIN, Appellant*

v.

PURSHOTTAM and another, Respondents.

Accommodation Control Act, Madhya Pradesh (XLI of 1961)—Section

*Second Appeal No. 231 of 1979. Appeal by appellant from the appellate decree of M. V. Apte, First Addl. Distt. Judge, Indore, dated the 28th June 1979, confirming the decree of Third Civil Judge, Class II, Indore, dated the 28th July 1977.

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12(1)(a) and Civil Procedure Code (V of 1908), as amended by Act No. (CIV of 1976), Ordere 41, rule 22—Interpretation of—Accommodation Control Act, Madhya Pradesh—Section 12(1)(a) and (e)—Landlord claiming eviction of tenant under—Courts below passing decree under section 12(1)(e) only—Decree challenged in appeal by tenant-landlord entitled to assail findings under section 12(1)(a)—Filing of cross-objection not necessary—Section 12(1)(a)—Agreement existing for payment of rents in advance every month—Landlord by notice demanding payment of rents in advance—Tenant failing to comply—Grounds under section 12(1)(a) made out within the meaning of this clause—Postal cover not containing endorsement of refusal—Endorsement that addressee not available—Effect of.

The two expressions "but may also state that the findings against him in the Court below in respect of any issue ought to have been in his favour" and "may also take any cross-objection to the decree which he could have taken by way of appeal" used in Order 41, rule 22, Civil Procedure Code deal with two distinct matters and the proviso immediately associated to the later expression is limited to that expression only. The use of the words "such objection" in the proviso has a reference to the cross-objection occurring in the latter expression and it has no reference to the former expression. The use of the words "may also state" in the former expression and "also take any cross-objection" in the latter expression is an indication of the subtle distinction that the legislature intended between the two expressions.

Corpus Juris Secundum, Vol. 79, page 1038; referred to.

Thus, where landlord claimed eviction of the tenant of grounds under section 12(1)(a) and (e) of the M. P. Accommodation Control Act, 1961 and the courts below passed the decree under section 12(1)(e) only, in an appeal preferred by the tenant challenging the decree for eviction under section 12(1)(e), the landlord is entitled to assail the findings of the courts below regarding the ground under section 12(1)(a) even without filing a cross-objection within one month from the date of service of notice of appeal.

There is no prohibition either in the M. P. Accommadation Control Act, 1961 or Transfer of Property Act, prohibiting a term

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for payment of monthly rent in advance. Under Section 105 of the T. P. Act and in view of Section 6(2)(b) of the Madhya Pradesh Accommodation Control Act, 1961, rent can be agreed to be paid in advance and when it is so agreed, it would become due even though month of tenancy has not expired.

Where by a notice dated 16-10-1971, Landlord demanded from the tenant rents for the months commencing from 9-9-1971 and 9-10-1971 and under the agreement rent was payable in advance, the tenant cannot contend that in view of section 24(1) of the M. P. Accommodation Control Act, 1961, rent demanded in the notice had not become due and as such no rent was in arrears and accordingly section 12(1)(a) of the Madhya Pradesh Accommodation Control Act did not come into play.

Munnalal Tiwari v. *Laxminaryan Lohia* (1) and *S. B. Naronha* v. *Prem Kumari Khanna* (2); referred to.

Where on the postal registered cover alleged to be containing cheque for the amount of arrears of rents there is no endorsement of refusal and endorsements are that the addressee was not available and the postman has also not been examined, there is no tender of rent by the tenant in compliance of the demand made under section 12(1)(a) of the Madhya Pradesh Accommodation Control Act, 1961.

S. D. Sanghi for the appellant.

S. R. Joshi for the respondents.

Cur. adv. vult.

JUDGMENT

BHACHAWAT J.-This is an appeal arising out of a suit for ejectment by the defendant against the judgment and decree dated the 28th June, 1979 of the Court of First Additional District Judge, Indore, in Civil First Appeal No. 37-A of 1978, whereby it has confirmed the judgment and decree dated 28th July 1977 of the Court of Third Civil Judge, Class II, Indore, in Civil Suit No 8-A of 1972.

(1) 1968 M. P. L. J. 230. (2) 1980 M. P. R. C. J. 1.

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Plaintiff-landlord (respondent herein) had filed the present suit against the defendant (appellant herein) for evicting him from the suit accommodation being the claim for eviction on the grounds enumerated under sections 12(1)(a),12(1)(c) and 12(1)(e) of the M. P. Accommodation Control Act, 1961 thereinafter referred to as 'the Act').

The two Courts below negatived the plaintiff's contention regarding the ground under section 12(1)(a) and 12(1)(c) of the Act; but accepting the case of the plaintiff under section 12(1)(e) of the Act, decreed the suit.

It may be mentioned that the learned counsel for the plaintiff while supporting the decree on the ground under section 12(1)(e) of the Act which was found in favour of the plaintiff also asserted in support to the impugned decree, that the ground under section 12(1)(a) of the Act, which was decided against the plaintiff should have been decided in favour of the plaintiff.

Learned counsel for the defendant had raised a preliminary objection that as the plaintiff did not file a cross-objection within one month from the date of the service of the summons of this appeal, the counsel for the plaintiff was not entitled to assail the finding of the Courts below regarding the ground under section 12(1)(a) of the Act.

Submission of the learned counsel for the appellant in support of his preliminary objection was that earlier to the Civil Procedure Code Amendment Act of 1976 (Act No. 104 of 1976), the position was that a respondent could support the decree of the Court below by asserting that the matter decided against him should have been decided in his favour

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without filing any cross-objection; but after the amendment by the said Amendment Act, under Order 41, rule 22 of the Code of Civil Procedure (hereinafter referred to as 'the Code'), position has changed. He submitted that even to support the decree by the successful party on the question decided against him filing of cross-objection within the prescribed period of limitation is imperative.

Learned counsel for the respondent in counter submitted that the position remains unchanged even after the amendment in Order 41, rule 22 of the Code and the respondent has a right to support the decree, assailing the finding given by the lower Court, against him on a particular point.

The decision of the preliminary objection involves the interpretation of Order 41, rule 22 of the Code as it stands, at present. The relevant Order 41, rule 22(1) is as under :

"ORDER XLI—Appeals from Original Decrees

XXX XXX XXX

22. Upon hearing respondent may object to decree as if he has preferred separate appeal—

(1) Any respondent, though he may not have appealed from any part of the decree, may not only support the decree 'A' but may also state that the finding against him in the Court below in respect of any issue ought to have been in his favour; and may also take any cross-objection) 'A' to the decree which he could have taken by way of appeal, provided he has filed such objection in the Appellate Court within one month from the date of service on him or his pleader of notice of the day fixed for hearing the appeal, or within such further time as the Appellate Court may see fit to allow.

'B' (Explanation—A respondent aggrieved by a finding of the Court in the Judgment on which the decree appealed against is based may, under this rule, file cross-objection in respect of the decree in so far as it is based on that finding, notwithstanding that by reason of the decision of the Court on any other finding which is sufficient for the decision of the suit, the decree, is, wholly or in part, in favour of that respondent). 'B'

The portion A to A was substituted for the words "on any of the grounds decided against him in the Court below, but take any cross-objection" (by Act 104 of 1976. Section 87(x) (1-2-1977).

Portion 'B' to 'B' was inserted *ibid.*

Reliance was placed by the learned counsel for the appellant on the expression "provided he has filed such objection in the appellate Court" (hereinafter referred to as proviso). According to his submission this proviso governs "but may also state that the finding against him in the Court below in respect of any issue ought to have been in his fovour" (hereinafter referred to as 'expression No. 1) as well as to the expression "and may also take any cross-objection to the decree which he could have taken by way of appeal" (hereinafter referred to as 'expression No. 2').

For the reasons to follow the preliminary objection deserves to be repealed. It is to be noticed that in between expression No. 1 and expression No. 2 there is a semicolon. Semicolon is used to separate constituent part of a double sentence from one another. "The semicolon shows that two sentences, each of which should stand alone, have been combined into one sentence, and is the chief stop

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intermediate in value between the comma and the full stop" (*Corpus Juris Secundum*, Vol.79, page 1038). Thus, the expressions No. 1 and No. 2 deal with two distinct matters and as the proviso is immediately associated to expression No. 2 it is limited in its effect to expression No. 2; the comma between expression No. 2 and the proviso is to represent a short pause.

I am convinced that the proviso governs expression No. 2 only a *fortiori* the-prefacing of the word "Objection" in the proviso by the word "such". In *Corpus Juris Secundum*, vol. 83, page 771 it is stated. "In its natural and ordinary sense, and by grammatical usage the word "such" refers to an antecedent, some antecedent word or phrase, and, more specifically, to the last precedent antecedent, unless the meaning would thereby be impaired. Thus, the word "such" refers back to and identifies something previously spoken of, something that has gone before, something that has been specified. It always refers to a class just before pointed out, and should be construed as referring back to a common subject-matter. It may be used as representing the object as already particularized in terms which are not mentioned, and it may indicate or suggest a person or thing originally specified by a name of designation". Bearing this in mind it can be said without hesitation the word "such objection" has a reference to cross-objection occurring in expression No. 2 and has no reference to expression No. 1. It is also of significance to note that in expression No. 1, the legislature has used the words "may also state" whereas in expression No. 2 the words used are "also take any cross-objection". This is indicative of the subtle distinction that the legislature intended between the two.

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In the light of the foregoing discussion, I am of the firm view that it was not necessary for the plaintiff to file cross-objection to assail the finding of the Courts below regarding the ground under section 12(1)(a) of the Act. The plaintiff who has not filed cross-objection is entitled to assert that the finding regarding that ground should have been given in his favour so as to support the impugned decree.

This view of mine is buttressed from the objects and reasons which are set out below for making the legislative change in Order 41, rule 22 of the Code :

> "Clause 90. Sub-clause (xi) (now clause (x))—Rule 22 gives two distinct rights to the respondent in appeal. The first is the right of upholding the decree of the Court of first instance on any of the grounds on which that Court decided against him; and the second right is that of taking any cross-objection to the decree which the respondent might have taken by way of appeal. In the first case the respondent supports the decree and in the "second case he attacks the decree. The language of the rule, however, requires some modification because a person cannot support a decree on a ground decided against him. What is meant is that he may support the decree by asserting that the matters decided against him should have been decided in his favour, the rule is being amended to make it clear.
>
> An Explanation is also being added to Rule 22 empowering the respondent to file cross-objection in respect to a finding adverse to him notwithstanding that the ultimate decision is wholly or partly in his favour."

In the result the preliminary objection raised on behalf of the defendant is rejected and I shall decide the question relating to the ground under section 12(1)(a) of the Act for which arguments on

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merits of the learned counsel for parties have been heard.

While admitting the appeal substantial questions were formulated at the time of admission only regarding the ground under section 12(1)(e) of the Act. Since I have rejected the preliminary objection of the appellant and as already stated hereinabove, learned counsel for the parties during the time of the arguments were already heard on merits regarding the ground under section 12(1)(e) of the Act, I formulate the substantial questions of law, relating to this ground under section 12(1)(a) of the Act, as indicated hereinafter for decision. These substantial questions have to be formulated, in view of proviso to sub-section (5) of section 100 of the Code. The reasons for formulating these questions are that they are vital for the decision of the point in controversy and one of these questions involves the interpretation of section 12(1)(a) read with section 24(1) of the Act and there appears to be no authoritative pronouncement of this Court as yet on this point as during the course of the argument any decision of this Court on such a question was not brought to my notice; the one that was brought to my notice and to which I shall refer hereafter, had considered section 24(1) of the Act in a different context.

(A) Whether the finding of the lower appellate Court, that ground under section 12(1)(a) of the Act is not made out, is vitiated because the lower appellate Court has on misreading of the evidence and/or on no evidence held that defendant no. 1 had tendered the arrears of rent but plaintiff purposely avoided to accept it?

(B) Whether in view of section 24(1) of the Act, on 16-10-1971, when notice of demand Ex. P. 5 was given the rent demanded vide this notice had not become due,

as such no rent was in arrears and accordingly section 12(1)(a) of the Act did not come into play on account of the non-payment of the demanded rent within the statutory period in compliance with the notice.

Before I start dwelling on the aforesaid questions, it is advisable to give hereinbelow a brief calendar of relevant facts which have bearing and are beyond pole of dispute.

The month of tenancy began on the 10th of every month and ended on the 9th of the next month. The notice Ex. P. 5 dated 16-10-1971 demanding rent for the month which expired on 9-10-1971 and the advance rent of the current month was served on defendant on 19-10-1971. Defendant No. 1's contention that immediately after the receipt of notice Ex. P. 5, he had tendered the cheque Ex. D. 2-A for Rs. 131/-(Rs. 120/- rent for one month+Rs. 21/- electric charges) to plaintiff's counsel Jagirdar (D.W. 3), has been negatived.

The trial Court negatived plaintiff's ground under section 12(1)(a) of the Act holding that defendant had complied with both the limbs of section 13(1) of the Act, therefore, defendant no. 1 was entitled to protection under section 13(5) of the Act and not liable to ejectment on the ground under section 12(1)(a) of the Act.

The lower appellate Court has in paragraph 20 of its judgment found it as a fact that there was a default in compliance with the second limb of section 13(1) of the Act, inasmuch as the rent deposited on 26-10-1976, was deposited 2 days beyond the prescribed date for the deposit of the monthly rent but negatived the ground under section 12(1)(a) of the Act, holding that on reading paragraph 14 of the statement of Purshottam (P.W. 2) along with Ex.D.2,

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Ex. D. 2-A, Ex. D. 4, Ex. D. 5, Ex. D.7, Ex. D. 7A, Ex. D. 8 and Ex. D. 9, it appeared that defendant tendered the arrears of rent; but plaintiff purposefully avoided.

The finding of the lower appellate Court that there was a default in compliance with the second limb of section 13(1) of the Act was not assailed by the learned counsel for the parties. In other words, it is an admitted fact.

It is also an admitted position that on the question of tender, after the notice Ex. P. 5, the relevant documents are Ex.D. 1, the registered postal cover in which as per defendant the cheque dated 24-10-1971 for Rs. 131/- of the Krishnaram Baldeo Bank Ltd. along with the covering letter Ex. D. 2 was enclosed; the alleged tender of other amounts *vide* Ex. D. 4, Ex, D. 5, Ex. D. 7, Ex. D. 8 and Ex. D. 9 are not relevant.

I would now deal with the questions formulated by me, with regard to the ground under section 12(1)(a) of the Act, *ad seriatim.*

On a clear reading of the statement of Purshottam (P. W. 2) especially paragraph 14 which has been referred to be the lower appellate Court in paragraph 20 of the impugned judgment, it is clear that he denied the tender and refusal by him of Ex. D. 1, Ex. D. 3 (registered postal cover in which it is alleged, the cheque Ex. D. 4 dated 24-11-71 and the covering letter dated 23-11-1971 were enclosed), the registered cover Ex. D. 6, dated 20-12-1971, allegedly containing covering letter Ex. D. 7 dated 20-12-1971, and cheque Ex. D. 7A for Rs. 120/- dated 24-12-1971; the money order-acknowledgement receipts Ex. D. 8 and Ex. D. 9. On a plain reading

of the postal endorsements on the registered covers Ex. D. 1, Ex. D. 3 and Ex. D. 6, it is apparent that there is no endorsement of refusal; the endorsements were that addressee was not available. Postman has also not been examined. Thus, absolutely there is no evidence to support the conclusion of the lower appellate Court about the alleged tender and refusal by the plaintiff. The trial Court had rightly concluded that there was no tender of any rent by defendant no. 1 after the receipt of notice Ex. P. 5 by him.

In the light of the foregoing discussion question no. A has to be answered in the affirmative.

I now proceed to consider question no. (B). For the consideration of this question, it is advisable to set out hereinbelow sections 12(1)(a) and 24(1) of the Act.

"12. Restriction on eviction of tenants. (1)—

"Notwithstanding anything to the contrary contained in any other law of contract, no suit shall be filed in any Civil Court against a tenant for his eviction from any accommodation except on one or more of the following grounds only, namely;

(a) that the tenant has neither paid nor tendered the whole of the arrears of the rent legally recoverable from him within two months of the date on which a notice of demand for the arrears of rent has been served on him by the landlord in the prescribed manner;

XXX XXX XXX

24. Receipt to be given for rent paid.

(1) Every tenant shall pay rent within the time fixed by contract or in the absence of such contract, by the 15th

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day of the month next following the month for which it is payable."

The submission of the learned counsel for the plaintiff was that the plaintiff had alleged that there was an agreement between the parties for payment of monthly rent in advance and the defendant had in the written statement admitted this; in view of this specific agreement between the parties, the rent for the month ending on 9-10-1971 as well as for the current month when notice Ex. P. 5 was given, was in arrears; the defendant neither paid nor tendered the rent within the statutory period of two months from the date of the receipt of this notice and also committed default in the compliance with second limb of section 13(1) of the Act; the ground under section 12(1)(a) of the Act was made out and the two Courts below in the face of these facts committed a serious mistake of law in not upholding the ground under section 12(1)(a) of the Act for reasons which are unwarranted by law and facts on record.

Learned counsel for the defendant in his argument in counter submitted that according to section 12(1)(a) of the Act, crucial date for arrears was 16.10.1971, the date of notice Ex. P.5 and on this date neither the rent for the month ending on 9.10.1971 nor for the current month had become due as rent. His argument was that a rent becomes due as rent only after the expiry of the month of tenancy. If the amount of rent, is paid in advance by the tenant either at his own choice or being payable in advance under the terms of the contract between the landlord and tenant, would not be the payment of rent; it would only be an amount to remain in deposit with the landlord or be a loan to the landlord to be adjusted towards the rent which

would become due subsequently on the expiry of the month of tenancy. Then his submission was that section 24(1) of the Act in deviation from the general law; enlarges by 15 days the due date for the payment of rent. His submission was that ordinarily rent under the general law becomes due immediately after the expiry of the month of tenancy; but by virtue of section 24(1) of the Act, it would become due after the expiry of 15 days from the date of the expiry of the month of tenancy.

As a sequel to these submissions, the argument of the learned counsel for the appellant was that on 16.10.1971 neither the rent for the month ending on 9.10.1971, nor for the current month had become due and an amount would be in arrears only when it is not paid on the date it was due and payable. He argued that the rent for the month which ended on 9-10-1971, was payable on 25-10-1971 and for the current month, that is, month which was to end on 9-11-1971 on 25-11-1971; the demand for the month which ended on 9-10-1971 and the month which commenced on 10-10-1971 *vide* notice Ex.P. 5 was unlawful the rent for these months was not legally recoverable on that date. He also argued that a notice given for the demand of the rent for these months was not a notice for the demand of arrears; therefore, non-compliance within the statutory period of two months does not provide a ground under section 12(1)(a) of the Act.

On a dichotomy of section 24(1) of the Act, it is obtainable that it contemplates two classes of cases. One is where the parties have by contract fixed the time for payment of rent and second is where there is no specific time fixed by the parties and it provides that in the first class of cases the

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tenant shall pay rent within the time fixed by contract and in the cases falling in the second class the tenant shall pay rent by the 15th day of the month next following the month for which it is payable. In other words in the case of cases of class (i) the rent would become payable on the date for its payment fixed in the contract and in the cases of class (ii) the rent which is ordinarily payable on the expiry of the month of tenancy because of the statutory enlargement of period by section 24(1) of the Act, would be payable by the 15th day after the date of the expiry of the month of tenancy.

In the instant case, admitted case in the pleadings of the parties was that the monthly rent was payable in advance, that is, even before the commencement of the month of tenancy. Rent has not been defined in the Act. The definition of rent is obtainable from section 105 of the Transfer of Property Act. According to this section 'rent' is the periodical payment in money or kind to the landlord for the enjoyment of a property held by the tenant from the landlord. It is also true that as it is a payment for the enjoyment of the property held on tenancy would fall due on the expiry of the month of tenancy. In this view if the rent is paid in advance it would not be a payment as rent and it would either be a loan to the landlord or a deposit with the landlord deemed to have been made with an agreement that on the date when the rent becomes due it would be treated as payment in fulfilment of the obligation of the rent. But this general proposition cannot be true about the cases where there is specific agreement to pay the rent in advance. There is no prohibition either in the Transfer of Property Act or in this Act prohibiting a term for the payment of monthly rent in advance.

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On the contrary such a term is permissible. This is so in view of the expression in section 105 of the Transfer of Property Act.-"in consideration of price paid or promised, or of money, a share of crops, service or any other thing of value, to be rendered periodically or on specific occasions to the transferor by the transferee". (emphasis supplied by me) and also in view of section 6(2)(b) of the Act, which also provides that it would not be unlawful for a landlord to claim or receive the monthly rent in advance during the continuance of the tenancy. In this view of the legal position, it is clear that rent can be agreed to be paid in advance and when it is so agreed it would become due even though the month of tenancy had not expired. Section 24(1) of the Act also as discussed in the preceding paragraph provides that the tenant shall pay rent within the time fixed by the contract. This view is not in any manner counter to the view of this Court in *Munnalal Tiwari* v. *Laxminarayan Lohia* (1). In this case, the point under consideration was not like the one in the instant case. In this case, the question under consideration was whether in view of section 24(1) of the Act, the landlord's application before the Rent Controlling Authority for a direction to the tenant to deposit the arrears of rent was maintainable. While deciding that question and holding that landlord's application for compelling the tenant to deposit arrears of rent did not lie, under section 24 of the Act, it was observed-"What sub-section (1) of section 24 does is to enlarge the period for payment of rent upto the 15th of the next month. The provision is for the benefit of the tenant by giving him an additional period of 15 days when there is no specific contract." This observation

(1) 1968 M. P. L. J. 230.

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cannot be held to mean that if there is a contract for the payment of the rent in advance still it would not be binding and the rent would become payable only after 15 days of the month of expiry.

In the above setting of facts and law it cannot be said that there was no ground for eviction under section 12(1)(a) of the Act.

Before parting with this point, I would like to deal with one more argument that was raised by the learned counsel for the defendant that in the plaint the plaintiff had only alleged the non-payment of the rent within the statutory period after the receipt of the notice Ex. P. 5 by the defendant; but did not allege that rent was not tendered which it was necessary to aver for constituting the ground under section 12(1)(a) of the Act in view of the expression "tenant has neither paid nor tendered the whole of the arrears" in the section.

The argument raised by the learned counsel is too technical. The allegation in paragraph 6 of the plaint-"Aur Notice Ke Anusar Rupaye Bhi Aaj Tak Chukaye Nahin Atah Vadi Ko Yah Vad Niskashan Avashesh Kiraya Pani Kharch Ka Aakar *Mesne* Profit Aadi Babat Prastut Karna Bhag Hua",

impliedly contains this averment also.

In addition to this tendering was pleaded by the defendant and the parties had gone to the trial knowing full well that the question of tender was also at issue and as such no prejudice has been caused to the defendant by the alleged absence of the said averment. The pleadings have not to be construed with hypertechnicality especially in the above setting of the facts of this case. In this respect

it would be pertinent to refer the observation of their Lordships of the Supreme Court in *S. B. Naronha* v. *Prem Kumari Khanna* (1):

> "Pleadings are not statutes and legalism is not verbalism. Common sense should not be kept in cold storage when pleadings are construed. It is too plain for words that the petition for eviction referred to the lease between the parties which undoubtedly was in writing. The application, read as a whole, did imply that and we are clear that law should not be stultified by Courts by sanctifying little omissions as fatal flaws. The application for vacant possession suffered from no verbal lacunae and there was no need to amend at all. Parties win or lose on substantial questions, not technical tortures and Courts cannot be 'abettors'."

As a sequel to the above discussion, I hold that question no.(B) has to be answered in the negative. Accordingly it is held that section 12(1)(a) of the Act was attracted in the instant case and the ground thereunder has also been establised. The defendant admittedly having failed to comply with second limb of section 13(1) of the Act is not entitled to the protection under section 12(3) of the Act.

In the light of my finding regarding the ground under section 12(1)(a) of the Act, as this ground alone is sufficient to maintain the decree, it is not necessary to go into the question of ground under section 12(1)(e) of the Act.

In the result, the appeal deserves to be dismissed and is accordingly dismissed. However, in view of the fact that as borne out from the record, the defendant is a tenant for the last 10 to 11 years; is an Advocate by profession and looking to the scarcity of accommodation it may not at once be possible to find out a suitable accommodation and dislodging him

(1) 1980 M. P. R. C. J. 1.

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immediately may cause inconvenience and suffering not only to him but to his clients, the litigants, I grant six months time to the appellant to vacate the premises.

In the facts and circumstances of the case, I make no order as to costs.

Appeal dismissed.

APPELLATE CIVIL

Before Mr. Justice Vyas.

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Mar. 30

BIRBALSINGH, Appellant*

v.

CHANDRAWATIBAI, Respondent.

Contract Act, Indian (IX of 1872)—Section 74—Relief against penalty—Consent decree—Court entitled to grant relief against penal clause in a consent decree—Consent decree providing payment of rent by a certain date failing which decree holder entitled to evict the judgment-debtor from the property—Held to be a penal condition—Judgment-debtor entitled to be relieved against it.

It is now well settled that a consent decree is nothing but a contract between the parties to which is superadded the command of a Judge. The consent decree, however retains the character of a contract between the parties and the provisions of section 74 of the Contract Act would apply to such a consent decree.

Where a Court is called upon to execute a decree passed with the consent of the parties, the rights under the decree cannot be better than those, which could be enforced under the agreement on the basis of which the decree has been passed.

*Misc. Appeal No. 222 of 1975, from an order of R. S. Saxena, District Judge, Indore, dated the 20th October 1975, confirming the order of Third Civil Judge, Class I, Ujjain, dated the 7th May 1975.

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The provisions of Section 74 of the Contract Act apply to a case of compromise decree, which provides for payment of arrears of rents and in default of payment for ejectment.

Sundu Dhodu v. *Madhavrao Jivram* (1); *Kandarna Nag* v. *Banvari Lal Nag and others* (2); *Surendra Nath Banerjee* v. *Secretary of State* (3) and *Bahadursingh* v. *Smt. Gulabdevi* (4); referred to.

The contention in the consent decree that the appellant shall be evicted in the event of non-payment of the arrears of rent is regarded as a penal condition and the appellant is entitled to be relieved under Section 74 of the Contract Act against such penal condition of the decree.

P. Shastri for the appellant.

D. R. Saxena for the respondent.

Cur. adv. vult.

ORDER

VYAS J.—Briefly stated the facts material for the disposal of this appeal are these :

The appellant had mortgaged his house with the respondent for a sum of Rs. 20,000/-. In accordance with the terms of the mortgage deed, possession of the mortgaged property was delivered to the mortgagee but there was an agreement of lease back in accordance with which the appellant continued to remain in possession of the mortgaged property as a tenant of the mortgagee. The amount of rent agreed was Rs. 250/- per month. This appears to be in lieu of the interest of the mortgage money. As the appellant committed default in payment of the rent due under the agreement of lease, the mortgagee filed a civil suit (No. 42-A of 1972) in which she claimed ejectment, arrears of rent and

(1) A.I.R. 1923 Bom. 118.
(2) A. I. R. 1921 Cal. 356-2.
(3) A. I. R. 1920 Cal. 716.
(4) 1975 M. P. L.J. 470.

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future *mesne* profits. The suit was disposed of by a consent decree according to which a sum of Rs. 4000/-was agreed to be paid on or before 31-12-1974 by the appellant. With regard to the rent accruing due during the pendency of the suit, it was decreed that the appellant shall pay rent at the rate of Rs. 250/- per month from 1-7-1972 to 31-12-1974. It was also decreed that in case the appellant does not pay the decretal amount by 31-12-1974, the respondent-decree-holder shall be free to execute the decree for possession and evict the appellant. As, according to the respondent, the decretal amount was not paid on the date specified in the consent decree, she claimed a sum of Rs. 4000/- as decreed, Rs. 7500/- as *mesne* profits for the period from 1-7-1972 to 31-12-1974, costs of the execution application and possession of the decretal property.

The appellant resisted the execution application on the ground that decretal amount as claimed in the execution application was not due from him as payments were made since after the passing of the consent decree; that the condition for delivery of possession of the mortgaged property in the consent decree was by way of penalty, which could not be enforced in the light of the provisions of section 74 of the Contract Act and that the execution application was liable to be dismissed.

The learned executing Court disallowed the objection regarding payment of the decretal amount on the ground that the said payments were not certified as required by rule 2 of Order 21, Civil Procedure Code. The objection regarding the condition of delivery of possession was upheld on the ground that it was penal and could not be enforced. The decree-holder appealed to the District Judge,

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who by the order under appeal agreed with the executing Court regarding the payments alleged by the appellant but disagreed with regard to the condition of the delivery of possession being regarded as penal and not enforceable.

In this appeal it is contended that admittedly the appellant was the owner of the suit property which he had mortgaged with the respondent; that the amount claimed by the respondent on account of arrears of rent and *mesne* profits represented the amount of interest due on the mortgage money; that even though the decree-holder had relinquished a part of her claim in the original suit regarding costs and arrears of rent, yet the condition regarding delivery of possession was incorporated in the consent decree only with a view to secure the compliance regarding payment of arrears of rent and future *mesne* profits and that since the condition regarding delivery of possession in the event of default in making payment of decretal amount was by way of penalty the same could not be enforced. The appellant, in the aforesaid circumstances, according to the learned counsel for the appellant, was entitled to be relieved of the penal condition incorporated in the consent decree.

In reply to these contentions raised on behalf of the appellant, it was urged by the learned counsel for the respondent that the suit instituted by the respondent against the appellant was not only for arrears of rent and future *mesne* profits but also for the eviction of the appellant; that it was only by way of concession to the appellant that the respondent had agreed not to press her claim for eviction on the condition that the appellant shall pay not only the arrears but shall also pay future *mesne*

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profits as agreed to between the parties and that since there was nothing penal in the consent decree, the prayer for delivery of possession could not have been refused.

In the light of the rival contentions raised on behalf of both the parties, the only question that requires to be decided is as to whether the condition incorporated in the consent decree regarding delivery of possession in the event of default in payment of decretal amount should be regarded as a penalty or should be regarded as concession given to the appellant.

In order to decide the question referred to above, it would be proper to refer to certain facts resulting in the passing of the decree against the appellant.

In reply to the notice of the execution application, it was stated by the appellant that the decretal house was mortgaged with the decree-holder for Rs.20,000/-which was payable with interest at the rate of 1.25 per cent per month. In lieu of payment of interest, the mortgagee who had obtained formal possession of the mortgaged property from the appellant, granted a lease in favour of the appellant and agreed to receive Rs. 250/- per month as rent. As, according to the mortgagee, the appellant did not pay rent regularly and was in arrears, a suit was filed not only for the recovery of arrears of rent but for future *mesne* profits and eviction also. In this suit both the parties submitted a compromise application on 28-6-1974 according to which the appellant consented for a decree of Rs. 4000/- being passed against him instead of Rs. 4875/- claimed by the mortgagee. This amount was agreed to be paid on or before 31-12-1974. Both parties also agreed

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to bear their own costs of the suit. It was also agreed that in case the aforesaid amount of Rs.4000/- is not paid on or before 31-12-1974 the mortgagee-the plaintiff in the ejectment suit-shall be free to execute the decree for possession by evicting the defendant. On such a compromise application being filed a decree in terms thereof was passed by the Court.

In the execution application filed by the respondent, the aforesaid sum of Rs. 4000/- plus another sum of Rs. 7500/-was claimed on account of arrears of rent/*mesne* profits. A prayer for ejectment of the appellant was also made on the ground that the appellant did not pay Rs. 4000/- on or before the stipulated date i. e. 31-12-1974.

The appellant resisted the execution application on a number of grounds. The main ground being that even though he had consented to the decree for eviction being executed against him in the event of default of payment of the aforesaid amount, yet under section 74 of the Contract Act, he was entitled to be relieved of the penalty incorporated in the decree. The respondent, however, contended that what was incorporated in the decree on the basis of the compromise application was not a penalty but a concession given to the appellant as he was liable to be evicted on the ground of non-payment of arrears of rent and to avoid the decree for eviction, he agreed to pay the arrears by a particular date. Since the payment was not made by the stipulated date, the decree-holder was entitled to execute the decree, which was passed with the consent of the parties. It is on those facts that it has to be decided as to whether what was sought to be enforced by the decree-holder is a penalty or the

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appellant is entitled to be relieved against such a penal clause incorporated in the consent decree. It is now well settled by a long series of authorities that a consent decree is nothing but a contract between the parties to which is superadded the command of a Judge. The consent decree, however, in such a case retains the character of a contract between the parties and the provisions of section 74 of the Contract Act would apply to such a consent decree. See : *Sundu Dhodu* v. *Madhavrao Jivram* (1).

This question has been considered in great detail by Sir Ashutosh Mookerjee, C. J. in *Kandarpa Nag* v. *Banwari Lal Nag and others* (2) where on a consideration of various authorities on this question, it was held that :

> "Two principles are well settled with regard to the nature and operation of consent decrees. In the first place, there is high authority for the proposition that a consent decree is just as binding on the parties thereto as a decree after a contentious trial".

> "In the second place, it is equally well-settled that consent decree cannot have greater validity than the compromise itself. As was observed by the Court of appeal *Hudersfield Banking Co.* v. *Lister* (3) the real truth of the matter is that a consent order is a mere creature of the agreement, and if greater sanctity were attributed to it than to the original agreement itself, it would be to give the branch an existence which is independent of the tree."

It was further held in this case that :

> "From the second of the two principles enunciated above Jekins, C. J. in *Krishnabai* v. *Harigovind* (4) drew the conclusion that where the consent decree gives effect to an agreement which embodies a right to forfeiture, the

(1) A. I. R. 1920 Bom. 118.
(2) A. I. R. 1921 Cal. 356-2.
(3) 1895-2 Ch. 273.
(4) I. L. R. 31 Bom. 15.

> Court, in the exercise of its equitable jurisdiction, is competent to grant such relief against forfeiture as it might have granted if there had been no consent decree and a suit had been instituted to enforce the compromise."

From the aforesaid decision, it would, therefore, follow that even when a Court is called upon to execute a decree passed with the consent of the parties, the rights under the decree cannot be better than those, which could be enforced under the agreement on the basis of which the decree has been passed.

It was contended that if the relief against forfeiture in such cases is granted, it would be varying the terms of the decree itself which the executing Court is not competent to do. The answer to this question is found in *Surendra Nath Banerjee* v. *Secretary of State* (1) where it has been held that :

> "A consent decree can be varied only by consent. But as a compromise decree is to be in accordance with the agreement of compromise, it cannot alter the relations of the parties as they existed under the agreement, and where a right to relief against forfeiture is an incident of those relations, that are established by a decree passed in accordance with the agreement. (The decision in *Krishnabai* v. *Hari Govind* (2), followed)."

In *Bahadursingh* v. *Smt. Gulabdevi* (3) it was held that the provisions of section 74 of the Contract Act apply to a case of compromise decree, which provides for payment of arrears of rent and in default of payment for ejectment. In the light of the aforesaid decision it would, therefore, be evident that the provisions of section 74 of the

(1) A. I. R. 1920 Cal. 716. (2) I. L. R. 31 Bom. 15.
(3) 1975 M. P. L. J. 470.

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Contract Act are applicable to the facts of the present case also. According to the consent decree passed against the appellant, he was liable to be evicted in case he was not to make the payment on the date stipulated in the compromise and the consent decree. The respondent admittedly was a mortgagee only of the suit property. She was not its owner. The appellant had mortgaged the suit house with the respondent with possession but there was a contract of lease back in accordance with which the appellant was allowed to remain in possession on the condition that he would pay Rs. 250/- per month, which represented the amount of interest which the mortgage money carried. This is not a case where a person being the owner of the property grants a lease to the tenant and the tenant is sued for eviction on the ground that he has committed default in payment of arrears of rent. If in such a case the defendant agrees to avoid the decree for eviction, though he is otherwise liable to be evicted on the condition that he would pay the arrears by a particular date then in the event of non-payment, the landlord would become entitled to execute the decree for possession also. In that event it may be contended that the stipulation for forfeiture was not by way of penalty but was by way of concession only. Such, however, is not the present case. As already stated above, the interest of the respondent is only in securing the principal amount of the mortgage and the interest due thereon. In the circumstances of this case, I am clearly of the view that the condition in the consent decree for the appellant being evicted in the event of non-payment of the arrears of rent was by way of a penal condition and under section 74 of the Contract Act the appellant is entitled to be relieved against such penal condition of the decree.

If there has been an agreement between the appellant and the respondent and under that agreement the appellant had been put in possession of the decretal property from which he would have agreed to be evicted in the event of non-payment of certain amount by a particular date, then even in the event of non-payment of the agreed amount, the respondent would not have been entitled to evict the appellant as in that case the stipulation for eviction would have been recorded as a penalty. If such a condition has been embodied in the decree passed with the consent of the parties, the relations between the parties would remain the same as if no decree has been passed and such an agreement was sought to be enforced in a Court of law.

The learned executing Court has taken the view that this was a clear case where a penal clause in the decree was sought to be enforced against the appellant against which on equitable ground the executing Court was entitled to give relief to the appellant. No doubt a contrary view has been taken by the learned lower appellate Court but in the light of the decisions referred to above including the decision in *Bahadursingh's case* (*supra*), I am clearly of the opinion that the condition incorporated in the consent decree for the appellant's eviction was only by way of securiug the payment of the decretal arrears of rent/*mesne* profits by a particular date and that such a stipulation as to forfeiture of the rights of the appellant as a tenant being penal in nature could not be enforced by execution of that decree.

Accordingly for the reasons given above, this appeal is allowed. The impugned order passed by the learned lower appellate Court is hereby set aside

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and it is held that the execution of the consent decree against the appellant in so far as its directs eviction of the appellant from the suit premises is not executable. The decree-holder shall be entitled to execute the decree only with regard to the liability of the judgment-debtor for the payment of the decretal amount. Any plea regarding payment of the decretal amount which is not certified as provided by Order 21, rule 2 of the Code of Civil Procedure shall not be entertained. In case the decretal amount has not been paid the executing Court shall grant reasonable time to the judgment-debtor to pay this amount and if the amount is not paid within the time allowed by the excuting Court then the decree-holder shall be free to execute the decree for the realisation of the decretal amount according to law. Costs incurred by the parties in this Court as well as in the Court of the District Judge shall be borne by them as incurred. Costs in the executing Court shall abide the final result of the execution proceedings. Counsel's fee Rs. 150/-in this Court, if certified.

Appeal allowed.

MISCELLANEOUS CIVIL CASE

Before Mr. A. P. Sen C. J. and Mr. Justice J. S. Verma.

1978

Mar. 28

AMRITLAL SOMANBHAI, Applicant*

v.

COMMISSIONER OF INCOME TAX, BHOPAL, Opposite-party.

Income-tax Act, Indian (XI of 1922)—Sections 271(1)(a), 271(2)

*Misc. Civil Case No. 166 of 1972. Reference under Section 256(1) of the Income-tax Act, 1961, by the Income Tax Appellate Tribunal, Nagpur Bench Nagpur, dated the 8th July 1970.

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Amrtlal Somanbhai v. Commissioner of Income Tax, Bhopal

14(2)(a) and 26(4)—Assessee not filing return of his income within time or even after notice under section 22(2)—Pendency of application seeking renewal of registration of partnership firm—No ground to postpone filing of return by assessee—Section 271(2)—Partnership firm distinct entity from persons constituting it—Imposition of penalty on assessee validity of—Theory of double punishment inapplicable—Section 271(1)(a)—Quantum of penalty under.

The return which should have been actually filed on 11-8-59, was not filed by the assessee till 28-3-61, despite service of notice on him under section 22(2) of the Income-tax Act, 1922. After the assessee filed his return on 28-3-61 and that of the firm on 29-3-61, the Income-tax Officer made assessment under section 23(3) of the Income-tax Act, 1922. Thereafter, the assessee was served with a notice under section 274 read with section 271(1)(a) of the Act to show cause why penalty should not be imposed for late filing of returns. The assessee neither appeared nor filed any reply. The Income Tax Officer imposed a penalty of Rs. 6610/-, under section 271(1)(a). It was confirmed in appeals. On a reference, the assessee contended that the firm has already been levied a penalty for its default in late filing of returns under section 271(1)(a), by treating the firm as unregistered by virtue of section 271(2), hence there is no liability on him to file return or to pay tax till grant of registration of the firm. Levy of penalty on him would be a double punishment for the same offence.

Held-The firm is treated as an entity distinct from the persons constituting it. Under section 4(1) read with section 2(3-1)(iv) a firm is a unit of assessment. Pendency of an application for renewal of registration of the firm under section 26(4) of the Income-tax Act, 1922 hardly furnished a ground to the assessee not to file the return of his income i. e. share of profits as partner. Exemption from Income Tax to a partner of an unregistered firm under section 14(2)(a) of the Act in respect of his share from the profits does not imply that the partner need not file his return till the renewal of registration of the firm was granted.

Arunachalam Chettiar v. *Commissioner of Income Tax, Madras* (1); referred to.

The legal fiction contained in section 271(2) is for a limited

(1) (1936) 4 I. T. R. 173.

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purpose i. e. for computation of the amount of penalty on the registered firm treating it to be unregistered firm. The only purpose of the legal fiction is the quantification of the amount of penalty in cases of registered firms.

State of Travancore-Cochin v. *Sahmugha Vilas Cashewnut Factory* (1) and *Bengal Immunity Co.* v. *State of Bihar* (2); referred to.

Commissioner of Income Tax, M. P. and Nagpur v. *Chhotelal Kanhaiyalal* (3); relied on.

The firm and its partners are two distinct entities for the purpose of Income Tax and both are required to file their returns separately. That being so, the theory of double punishment is inapplicable.

Additional Commissioner of Income Tax, Lucknow v. *Smt. Triveni Devi* (4); distinguished.

Penalty under section 271(1)(a) of the Income-tax Act, 1961, has to be imposed at the fixed rate of 2% of the tax for each month's default, when the return is filed late, in response to a notice issued under section 22(2) of the Income-tax Act, 1922, subject only to the maximum amount not exceeding 50% of the assessed tax.

C. J. Thakkar with *P. D. Thakkar* and *A.L. Halve* for the applicant.

P. S. Khirwadkar for the opposite party.

Cur. adv. vult.

JUDGMENT

The Judgment of the Court was delivered by A. P. SEN, C. J.–This is a reference under section 256(1) of the Income Tax Act, 1961, at the instance of the assessee, by the Income Tax Appellate Tribunal, Nagpur Bench, Nagpur, referring certain questions of law said to arise from its order in Income Tax

(1) A.I.R. 1953 S.C. 233. (2) A. I. R. 1955 S.C. 661.
(3) (1971) 80 I. T. R. 656. (4) (1974) 97 I. T. R. 390.

Appeal No. 12152 of 1965-66, dated 8-7-1970, pertaining to the assessment year 1959-60, to the High Court for its opinion, namely:-

"(1) Whether on the facts and in the circumstances of the case, penalty under section 271(1)(a) is imposable on the assessee who was a partner of a registered firm on which also a separate penalty under section 271(1)(a) was imposed ?

(2) Whether on the facts and in the circumstances of the case, a penalty less than 2% of the tax for each month of default is imposable in law when the return of income was filed in response to a notice issued under section 22(2) of the Income Tax Act, 1922 ?"

The assessee is a partner in a registered firm styled "M/s Chhotalal Keshavram, Rajnandgaon." In the assessment year 1959-60, the relevant accounting year being 24-10-1957 to 12-11-1958, the assessee was served with a notice by the Income Tax Officer, Rajnandgaon, under section 22(2) of the Income Tax Act, 1922, to file a return of his income, on 6-7-1959. Despite the notice, the assessee did not file the return till 28-3-1961, when the return should actually have been filed on 11-8-1959, i. e., after a delay of nearly 19 months. The assessee filed his return on 28-3-1961, while the firm filed its return on 29-3-1961. On 5-3-1964, the Income Tax Officer, Rajnandgaon, made assessment under section 23(3) of the 1922 Act, computing the assessee's share income to be Rs.52494/-.Thereafter, on 10-3-1964, the assessee was served with a notice by the Income Tax Officer, under section 274, read with section 271(1)(a) of the Act to show cause why penalty should not be imposed. In response to the notice, the assessee neither appeared nor filed any explanation for the late filing of the return. The Income Tax Officer accordingly, by his order dated 19-12-1964,

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imposed a penalty of Rs.6,610/-under section 271(1)(a) of the Act. On appeal, the Appellate Assistant Commissioner, Income Tax, Raipur Range, Raipur, by his order dated 1-11-1965, upheld the order of the Income Tax Officer. On further appeal, the Income Tax Appellate Tribunal, Nagpur Bench, Nagpur, by its order dated 8-7-1970, declined to interfere with the levy of penalty under section 271(1)(a) of the Act.

The contention of the assessee before the Appellate Tribunal was two-fold, viz.(1) no penalty under section 271(1)(a) of the Income Tax Act, 1961, could be levied in respect of a default committed under section 28(1)(a) of the Income Tax Act, 1922, and (2) the assessee's only income was his share profits from the registered firm. Until such time as the firm was not granted renewal of its registration, the assessability to tax of the assessee remained dormant. The Income Tax Officer, therefore, could not have treated the assessee to be in default, as the assessment of the firm was completed only on 5-3-1964 and it was only on that date that the assessee's liability to tax was ascertained with reference to section 23(5)(a) of the 1922 Act.

The Appellate Tribunal referred to the decision of the Privy Council in *Arunachalam Chettiar* v. *Commissioner of Income Tax, Madras* (1), and observed that both the firm and the individual partners have to make return under the Income Tax Act. It also held that after applying the provisions of sections 23(3), 23(5)(a) and 23(6) of the 1922 Act, the Income Tax Officer only determined the share income of the partner and at that stage no liability attaches to the partner himself. For this purpose, the return of the income, either under

(1) (1936) 4 I. T. R. 173.

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section 22(1) or section 22(2) was necessary, more so, when the partner may have some other source of income, in addition to his share income from the firm. The Appellate Tribunal also rejected the assessee's contention that there was a reasonable cause for the delay in filing of the return, saying that merely because there was a default committed by the firm, that furnished no justification for the assessee not to have filed his return and commit similar default. In fact, the assessee filed his return of income on 28-3-1961, i. e. one day before the firm's return was filed.

In view of their Lordships' decision in *Jain Brothers* v. *Union of India* (1), the point that no penalty could be levied under section 271(1)(a) of the Income Tax Act, 1961, for a default committed under section 28(1)(a) of the Income Tax Act, 1922, was not pressed before the Appellate Tribunal.

Shri Thakkar, learned counsel for the assessee contends that the registered firm, of which the assessee is a partner, has already been levied a penalty for its default in late filing of its return under section 271(1)(a), by treating the firm as unregistered by virtue of section 271(2). It is, therefore, urged that there is no liability of the assessee to tax till registration to the firm is granted, and since there is no liability to tax, there is no liability to file the return. He further contends that levy of a penalty on the assessee under section 271(1)(a) would virtually amount to a double punishment for the same offence. In support of his contention, he places reliance on *Additional Commissioner of Income Tax, Lucknow* v. *Smt. Triveni Devi* (2). We are afraid, these contentions cannot prevail.

(1) (1970) 77 I. T. R. 107. (2) (1974) 97 I. T. R. 390.

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The firm and the individual partner are each required to render a return of total income and each may be required to produce accounts or documents : *Arunachalam Chettiar* v. *Commissioner of Income Tax, Madras* (*supra*). It is not disputed that the firm is treated as a entity distinct from the persons who constitute the firm. Under section 4(1) read with section 2(3-1)(iv), a firm is a unit of assessment. Merely because the application of the partners for renewal of the registration of the firm under section 26(A) of the 1922 Act, was pending before the Income Tax Officer, that hardly furnished a ground for the assessee not to have filed the return of his income, i. e. share of profits as partner, more particularly when he was issued a notice under section 22(2) of the 1922 Act. Simply because section 14(2)(a) of that Act grants exemption from income-tax to a partner of an unregistered firm in respect of his share from the profits, does not imply that the partner need not file his return under section 22(1) or section 22(2), i. e. till the renewal of the registration of the firm was granted. In this particular case, the assessment order passed by the Income Tax Officer shows the assessee's share of profits to be Rs. 52494/-. Admittedly, the firm maintains regular books of accounts according to the merchantile system. The accounting year closed on Diwali 1958 and on that date, the assessee could have ascertained his share of profits. Thus, there was a liability to file a return under section 22(1) irrespective of his liability to tax. If the renewal of registration was not granted, the assessee's share of profits would exempt under section 14(2)(a). All the same, a return had to be filed. That is because though the partner's share of profits is exempt from tax, in the event of non-registration of the firm, it is to be included in his total income, by reference to which

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the rate of tax applicable to his taxable income is determined. The Income Tax Officer was, therefore, right in holding the assessee to be in default, particularly when he failed to file the return in response to the notice issued to him under section 22(2) of the Act.

The whole controversy turns on the construction of section 271(2) of the Income Tax Act, 1961, which reads :-

> "(2) When the person liable to penalty is a registered firm or an unregistered firm which has been assessed under clause (b) of section 183, then, notwithstanding anything contained in the other provisions of this Act, the penalty imposable under sub-section (1) shall be the same amount as would be imposable on that firm if that firm were an unregistered firm."

In our view, the legal fiction contained in section 271(2) is for a limited purpose, i.e. for computation of the amount of penalty on the registered firm, treating it to be an unregistered firm. The key to construction of the section is the word "amount". It provides that notwithstanding anything contained in the other provisions of the Act, the penalty imposable under sub-section (1) shall be the same amount as would be imposable on that firm, if that firm was an unregistered firm. It would, therefore, appear that the only purpose of the legal fiction is the quantification of the amount of penalty in cases of registered firms. Although full effect must be given to the legal fiction, it should not be extended beyond the purpose for which it is created. In *State of Travancore-Cochin* v. *Sahumugha Vilas Cashewnut Factory* (1) and in *Bengal Immunity Co.* v. *State of Bihar* (2), S. R. Das, C. J., reaffirmed the principle stating that "legal fictions are created only

(1) A. I. R. 1953 S. C. 233. (2) A.I.R. 1955 S.C. 661.

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for some definite purposes" and that a legal fiction is to be limited to the purpose for which it was created and it should not be extended beyond that legitimate field.

In *Commissioner of Income Tax, M. P. and Nagpur.* v. *Chhotelal Kanhaiyalal* (1), the question before the Court was whether the advance tax paid by the partners of a registered firm should be treated as advance tax paid by the firm. The Division Bench constituting of both Bishambhar Dayal, C. J., and Singh, J. answered the question in the negative. Singh, J., while concurring with Bishambhar Dayal, C. J., adverted to section 271(2) of the Income Tax Act, 1961, and stated :-

> "Section 271(2) of the Income Tax Act, 1961, creates a statutory fiction by directing a registered firm to be treated as an unregistered firm for the computation of penalty."
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> "The logical conclusion of the fiction created by section 271(2) is to treat a registered firm as an unregistered firm and to assess the tax on the total income of the firm for the purpose of imposing penalty. But the language used in the section does not permit the extension of this fiction by treating advance tax paid by the partners of such a firm as advance tax paid by the firm. Extention of this nature would amount to creating a fiction upon fiction which is not permissible."

We are in respectful agreement with the construction placed by Singh, J. on the ambit of section 271(2) of the Act.

This aspect has been dealt with in Kanga and Palkhivala's Income Tax Act, Seventh Edition, Vol. 1, P. 1297. The learned authors observe :-

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(1) (1971) 80 I. T. R. 656.

"The Supreme Court's observations to the contrary in *Abraham* v. *Income Tax Officer* (1) and *Commissioner of Income Tax* v. *Bhikoji Dayabhai* (2), are, it is submitted, incorrect. Tax and penalty, like tax and interest, are distinct and different concepts under this Act."

We, however, refrain from expressing any opinion on this aspect. Suffice it to say that the firm and its partners are two distinct entities for the purpose of income tax and both are requiredto the returns separately. That being so, the theory of double punishment to the same person, enunciated by the Allahabad High Court in *Additional Commissioner of Income Tax, Lucknow* v. *Smt. Triveni Devi* (*supra*) appears to us to be inapplicable.

Shri Thakkar, learned counsel for the assessee, then contends that the rate of two per cent mentioned in Section 271(1)(a) is the maximum for one month's default and not the minimum and, therefore, the Income Tax Officer still had the discretion in the matter of quantum of penalty. That contention of his cannot also prevail. In *Commissioner of Income Tax* v. *Khubchand Meghraj* (3), Bishambhar Dayal, C. J., observed :-

"In view of the above authorities, there is no doubt that the imposition of penalty in this case had to be according to the provisions of section 271(1)(a) which provides a minimum of 2% in the case of delayed filing of return."

Similarly, in *Commissioner of Income Tax, M. P. and Nagpur* v. *Chhotelal Kanhaiyalal* (*supra*), Singh, J. observed :-

"It is true that sometimes the minimum penalty, which is now fixed by section 271(1), may, when so computed, look disproportionate to the lapse which is sought to be

(1) (1961) 41 I. T. R. 425. (2) (1961) 42 I. T.R. 123.
(3) (1973) 91 I.T. R. 498.

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penalised in cases where the partners may have paid substantial advance tax on the income of the firm. But considerations of equity have seldom, if ever, any application in construing an Act like the Income-tax Act. Hardship of any individual case can, however, be avoided by the Income-Tax Officer or the Appellate Assistant Commissioner deciding in his discretion not to impose any penalty or the Commissioner reducing or waiving the amount of minimum penalty by exercising his power under sub-section (4A)."

May be, learned counsel for the assessee is perhaps right in contending that section 271(1)(a)(i) of the Act does not prescribe the minimum. But, in our view, he is not right in contending that the rate of 2 per cent is the maximum. In fact, it is the fixed rate. No doubt, the discretion of the Income Tax Officer, or the Appellate Assistant Commissioner, to levy or not to levy penalty is preserved by section 271(1), by the use of the word "may"; but, if the decision is right to levy a penalty, it cannot be less than the prescribed rate, whosoever be the authority imposing or confirming imposition of penalty: Kanga and Palkhiwala's Income Tax Act, Seventh Edition, Vol. I, page 1208. The learned authors rightly observed at page 1210:-

> 'In sub-s. (1)(i)(b), the provision for penalty 'equal to two per cent of the assessed tax for every month' is a provision for a fixed rate of penalty which cannot be increased or reduced, apart from the Commissioner's discretion to reduce or waive penalty under s. 273A."

We must accordingly hold that penalty under section 271(1)(a)(i) of the Act had to be levied at two per cent, once the Income Tax Officer held that the assessee was in default.

For the reasons aforesaid, the reference is answered in favour of the Commissioner of Income

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Tax and against the assessee. It must accordingly be held that on the facts and in the circumstances of the case, the Income Tax Appellate Tribunal was justified in holding that:

"(1) penalty under section 271(1)(a) of the Income Tax Act, 1961, was imposable on the assessee who was a partner of a registered firm, on which also a separate penalty under section 271(1)(a) had been imposed, due to his default in not complying with the requirements of section 22(2) of the Income Tax Act, 1922;

and

(2) penalty under section 271(1)(a) of the Income Tax Act, 1961, has to be imposed at the fixed rate of 2 per cent of the tax for each month of default, when the return was filed late, in response to the notice issued under section 22(2) of the Income Tax Act, 1922, subject only to the maximum amount not exceeding 50 per cent of the assessed tax."

The Commissioner shall have his costs of the reference. Hearing fee Rs. 150/-.

Reference answered accordingly.

FULL BENCH

Before Mr. Justice C. P. Sen, Mr. Justice Sharma and Mr. Justice B. C. Varma.

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Sept. 15

POSTER J. S. SINGH, Applicant*

v.

SMT. JYOTSANA SINGH and another, Opposite Party.

Divorce Act, Indian (IV of 1869)—Section 3(3)—Words 'Reside or

*Misc. Civil Case No. 131 of 1981. Reference under Section 17 of Indian Divorce Act, 1869, by D. R. Pundalik, District Judge, Jabalpur, dated 7th March 1981.

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last resided together'—Meaning of—Spouses having no common permanent home—Wife visiting husband's place during holidays and residing together and also cohabiting—Inference of last resided together at the place where husband lived can be drawn—Adultery—Charges of, by husband against wife—Husband's testimony not controverted by wife by sworn testimony—Inference.

Under Section 3(3) of the Indian Divorce Act, 'District Court' means, in case of any petition under the Act, the Court of the District Judge within the local limits of whose ordinary jurisdiction under the Act, the husband and the wife reside or last resided together. The residence to which the Divorce Act points, must be something more than occupation during occasional usual visits within the local limits of the Court, more specially where there is residence outside those limits marked with a considerable measure of continuance. A casual visit to a place with no intention of dwelling there by a husband and wife who have a fixed place of residence elsewhere will not amount to residence in that place within the meaning of section 3 of the Divorce Act so as to give jurisdiction under the Act to the Court within the local limits of whose jurisdiction such place is situated.

Devid v. *Esther Dennies* (1); relied on.

Jagir Kaur v. *Jaswant Singh* (2); referred to.

Where husband resided at place 'J' and had his home there and wife stayed at place in connection with her service and during holidays in occasional usual visits wife came and stayed with her husband at his home under the same roof and also cohabited, it can well be inferred that the husband and the wife last resided together at place 'J' where husband lived and the suit is well within the cognizance of the District Judge at place 'J' who has jurisdiction to try it.

S. Saroja v. *P. G. Emmanual* (3); relied on.

Where evidence given by the husband charging wife with adultery is not controverted by the sworn testimony of wife and the other respondent, an inference can legitimately be drawn that

(1) A. I. R. 1951 Nag. 248. (2) A. I. R. 1963 S. C. 1521.
(3) A. I. R. 1965 Mys. 12.

the wife has since the soleminization of the marriage been guilty of adultery.

England v. *England* (1); referred to.

N. P. Pandey for the applicant.

None for the opposite party.

Cur. adv. vult.

ORDER

The Order of the Court was delivered by C. P. SEN, J.-This matter comes up before us under section 17 of the Indian Divorce Act, 1869, for confirmation of the decree nisi for divorce granted in favour of the petitioner, Poster J. S. Singh and against his wife Smt. Jyotsana Singh (respondent no. 1) by the District Judge, Jabalpur, on 7-3-1981.

Before the District Judge, the petitioner filed a suit under section 10 of the Indian Divorce Act seeking dissolution of his marriage with respondent no. 1 Smt. Jyotsana Singh. The marriage between them was performed on 27-12-1972 in the Methodist Church, Khursipar Baihar, district Balaghat. As a result of this marriage, they have three children. They lived peacefully up to the year 1976. Both of them are teachers. While respondent no. 1 continued serving at Baihar, the petitioner was transferred to Jabalpur and then to Narsimhapur for about a month and again retransferred to Jabalpur. As a result of the transfer, the petitioner resided at Jabalpur, while his wife, respondent 1 continued to live at Baihar upto December 1976 when she was transferred to Raipur. The petitioner's case is that when he resided at Jabalpur, the respondent no. 1 would often visit him during the holidays. They resided together at

(1) (1952) 2 All E. R. 784.

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Jabalpur under the same roof and also cohabited. This went on upto December 1976. The further allegation is that after respondent no. 1 was transferred to Raipur, she did not permit the petitioner any access to her. The petitioner noticed that at Raipur she came in contact with respondent no. 2, H. K. Sharma who was often found at the residence of respondent no. 1 and the two respondents started living together practically as husband and wife. It is also alleged that she conceived from respondent no. 2 and according to the petitioner she even has married him. The allegation, therefore, is that the respondent no. 1 had started living in adultery entitling the petitioner to a decree for divorce. After the filing of the suit, certain allegations were added in paragraph 4 of the original plaint. By the amendment, the plea introduced is that the petitioner and the respondent no. 1 last resided together at Jabalpur and, therefore, the District Judge, Jabalpur, has jurisdiction to try the suit in view of section 3(3) of the Act. Both the respondents remained absent and filed no written statement although they were duly served. The District Judge, therefore, proceeded in their absence, recorded the statement of the petitioner and relying upon it, has passed a decree *nisi* for divorce which is now sought to be confirmed by this Court.

Although the jurisdiction of the District Judge, Jabalpur was not questioned before that Court, the question of jurisdiction is one of paramount importance and since we had our own doubts in that behalf, we required the learned counsel for the petitioner to satisfy us on that count. It may be mentioned that the respondents also did not appear before us. The learned counsel for the petitioner submitted that from the deposition of the petitioner

himself, it is clear that the respondent no. 1 visited at him his place at Jabalpur and lived with him upto December 1976 and, therefore, they 'last resided together' within the jurisdiction of the District Judge, Jabalpur and hence the District Judge, Jabalpur had jurisdiction to try the suit. Under section 3 (3) of the Act, 'District Court' means, in the case of any petition under the Act, the Court of the District Judge within the local limits of whose ordinary jurisdiction under the Act, the husband and wife reside or last resided together. The question, therefore, is as to the meaning of the words 'reside' or 'last resided together' as are used in this section. The word 'residence' signifies a man's abode or continuance in a place and where there is nothing to show that it is used in a more extensive sense, it denotes the place where an individual eats, drinks and sleeps or where his family or his servants eat, drink and sleep. The word 'residence' has a variety of meaning according to the statute in which it is used. The term is flexible and must be construed according to the object and intent of the particular legislation where it may be found. Primarily, 'residence' or 'place of abode' means the dwelling and Home where a man is supposed usually to live and sleep; they may also include a man's business abode, the place where he is to be found daily [See Stroud's Judicial Dictionary (Sweet & Maxwell Ltd.), Fourth Edition, Volume 4, pages 2358-9]. The 'residence' to which the Divorce Act points, must be something more than occupation during occasional usual visits within the local limits of the Court, more specially where there is residence outside those limits marked with a considerable measure of continuance. A mere casual visit to a place with no intention of dwelling there by a husband and wife who have a fixed place of residence elsewhere will not amount to residence

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in that place within the meaning of section 3 of the Divorce Act so as to give jurisdiction under the Act to the Court within the local limits of whose jurisdiction such place is situated: [See *Devid* v. *Esther Dennis* (1)]. Under section 488 of the Code of Criminal Procedure, 1898, proceedings for maintenance could be taken against any person in any district where he resided or where he last resided with his wife or as the case may be the mother of the illegitimate child. Interpreting the word 'resides' as appearing in section 488 (8) of the Code, the Supreme Court in *Jagir Kaur* v. *Jaswant Singh* (2) held that the term 'resides' does not mean only domicile in the technical sense of that word. It was observed that the terms means something more than a flying visit to or a casual stay in a particular place. The Supreme Court ruled that there shall be *animus manendi* or an intention to stay for a period, the length of the period depending upon the circumstances of each case. Their Lordships said that a person resides in a place if he through choice makes it his abode permanently or even temporarily; whether a person has chosen to make a particular place his abode depends upon the facts of each case. what is important, therefore, to see in a given case is whether by choice a particular place is made an abode permanently or even temporarily, the casual residence excluded. If there is an *animus revertendi*, his temporary stay at another place, however long, will not have the effect of changing one's own permanent residence at the original place.

In the present case, the unquestioned testimony of the petitioner establishes that while he was living at Jabalpur and had his Home there, his wife (respondent no. 1) who stayed at Baihar in connection with her service, often came and stayed with the

(1) A. I. R. 1951 Nag. 248. (2) A. I. R. 1963 S. C. 1521.

petitioner at his home under the same roof. They so lived at Jabalpur upto December 1976. It is no doubt true that the respondent no. 1 also had a place of residence at Baihar where she was serving. In our opinion, from these facts, it can well be inferred that the petitioner and the respondent no. 1 last resided together at Jabalpur where the petitioner lived. The house of the petitioner was the residence of the spouses where they last resided together. Under somewhat similar circumstances, Somnath Iyer, J. in *S. Saroja* v. *P. G. Emmanue* (1) held that where the wife and the husband were serving in two different districts and the wife visited the husband's place for short intervals during her vacations, the husband's place where she stayed even for short intervals would be the place where they will be said to have last resided together within the meaning of section 3(3) of the Act. The learned Judge observed that where both the husband and the wife visits the husband's place or *vice versa* the purpose obviously is that each of the spouses should have the company of the other and the husband and wife should eat, drink and sleep together. It was further observed that nothing more is necessary to support the view that during that period of the visit the husband and the wife intended to reside together and the fact that the visit was for a short duration or did not have any appreciable degree of permanance cannot alter the situation. We are in respectful agreement with the view expressed by Somnath Iyer J. in *S. Saroja's case* (*supra*). We accordingly hold that the visits made by respondent no. 1 during vacations to the petitioner at Jabalpur and their residing together during that period at Jabalpur would mean that they resided together at Jabalpur. The suit was, therefore, well within the cognizance of the District

(1) A. I. R. 1965 Mys. 12.

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Judge, Jabalpur, who had jurisdiction to try it.

Coming to the merits of the case, we find that the evidence given by the petitioner is quite cogent and convincing. The refusal of the wife (respondent no. 1) for any access to the petitioner after she had gone to Raipur showed her inclination. She was seen in the company of respondent no. 2 who even stayed at her place. She used to live there alone while the petitioner lived at Jabalpur. She had thus ample opportunity. Her conduct as deposed to by the petitioner also leads to an inference that she had committed adultery. There is also evidence. The petitioner as P. W. 1 has deposed that when he visited Raipur/Gariaband where respondent no. 1 was serving, he found respondent no. 2 visiting her. He also noticed that respondent no. 1 was inclined towards respondent no. 2. He also came to know that the two respondents were practically living as husband and wife and that is how they were known in that region. Neither of the two respondents has come forward to controvert these allegations. The evidence given by the petitioner could well have been controverted by the sworn testimony of respondent no. 1 and of the respondent no. 2 as was done in the case of *England* v. *England* (1). That, however, was not done in the instant case. In our opinion, under these circumstances, an inference can legitimately be drawn that respondent no. 1 (wife) has since the solemnization of the marriage been guilty of adultery.

For the aforesaid reasons, the decree *nisi* of divorce passed by the District Judge in Civil Suit No. 34-A of 1980 is made absolute. Since the respondents have not appeared before this Court, we make no order as to costs.

Reference answered accordingly.

(1) (1952) 2 All E. R. 784.

MISCELLANEOUS PETITON

Before Mr. G. P. Singh Acting C. J. and Mr. Justice J. S. Verma.

SAKHRULLA KHAN, Petitioner* 1978

v. Jan. 20

STATE INDUSTRIAL COURT, INDORE and others, Respondents.

Industrial Employment (Standing Orders) Act (XX of 1946)—Section 1(4)—Word 'control'—Meaning of—Heavy Electrical (India) Ltd., Bhopal—Is controlled by the Central Govt.—Industrial Employment (Standing Orders) Act, 1961 (M. P.)—Section 4, proviso—Effect of—Constitution of India—Article 254(2)—Industrial Employment (Standing Orders) Acts—State Acts and Central Acts—Effect of State Act receiving assent of the President to Central Act—Standing orders made under the 1946 Central Act—Effect of enforcement of State Acts—Standing orders have the force of law—Standing Order No. 42(10)—Use of the word 'presumed' in—Import of.

The word 'control' as used in Section 1(3) of the Industrial Workmen (Standing Orders) Act, 1959 or Section 1(4) of the Central Act of 1946 (as amended by Act 39 of 1963) must mean legal control irrespective of the source from or the capacity in which it arises.

The Heavy Electricals (India) Limited, Bhopal, is not an undertaking carried on by or under the authority of the Central Government, but is under control of the Central Government.

H. E. M. Union v. *State of Bihar* (1) and *Sindri Workers' Union* v. *Labour Commr.* (2); relied on.

The proviso to Section 4 of the 1961 State Act was that proceedings pending under the Central Act of 1946 were allowed to continue. The effect of this provision was that the proceedings

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Misc. Petition No. 101 of 1973.

(1) A. I. R. 1970 S. C. 82. (2) A. I. R. 1959 Pat. 36.

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pending for certification of the Company's Standing Orders under the Central Act were validly continued and the standing orders were validly certified under section 5 of that Act.

Under Article 254 of the Constitution, in case of repugnancy between the Central law and State law, with respect to one of the matters enumerated in the concurrent list, the State law, if it has received the assent of the President prevails in the State. When the State Act prevails over a Central Act, the effect is merely to supersede the Central Act or to eclipse it by the State Act and the moment the State Act ceases to be operative, the Central Act revives.

The effect of the Standard Standing Orders made under Section 6 (1) of the State Act was to supersede or eclipse the Standing Orders certified under the Central Act because of repugnancy under Article 254 (2) of the Constitution. The Standing Orders certified under the Central Act were not obliterated or repealed; they were merely superseded or eclipsed by the Standard Standing Orders made under the State Act because the field of the Standing Orders became occupied by the Standard Standing Orders made under the State Act. By the Central Act 39 of 1963, the Company's undertaking being under the Control of the Central Government, was taken out of the field of operation of the State Act. The Standard Standing Orders made under the State Act then ceased to be applicable and the Standing Orders certified under the Central Act revived as the shadow of the State Act was removed and the field was made clear for their operation.

Though second part of the standing order does not expressly provide that the employee shall have opportunity to explain his absence as is provided for in the first part but the use of the word 'presumed' necessarily leads to the inference that the employee must be given that opportunity. The word 'presumed' implies that the presumption raised can be dislodged by showing that there was some satisfactory reason for absence from duty without leave and, therefore, the employee did not intend to leave the service. If the intention of the standing order was to raise a conclusive presumption of termination of employment at the instance of the employee on his absenting from duty without leave for more than 30 days, the word "deemed" would have been used in place of the word 'presumed'.

H. L. Handa v. *Industrial Court and others* (1) and *Jagdish Singh* v. *Asstt. Works Manager, H. E. L.* (2); distinguished.

Gulab Gupta for the petitioners.

G. M. Chapekar with *Vijay Gupta* and *K. L. Issarani* for respondent no. 3.

Cur. adv. vult.

ORDER

The Order of the Court was delivered by SINGH, Ag. C. J.-The petitioner Sakhrullah Khan was employed as a driver by the Heavy Electricals (India) Ltd., Bhopal, which is a Government Company. On 12th April 1966, the petitioner met with an accident while he was working in the factory. A wooden box fell on the toe of the petitioner's right foot with the result that the toe was injured. The petitioner was given first aid in the medical block of the factory. The petitioner was then removed on the same day to the company's hospital at Govindpura. The Medical Officer of the Company's hospital found that the injury was minor and advised rest for one day. The petitioner next day, i. e. on 13th April, went to his residence in the City of Bhopal. The petitioner absented from duty till 31st May 1966. The petitioner applied for joining duty on 1st June 1966, but he was not permitted to do so. The petitioner was served with an order of the same date that in accordance with Standing Order 42(10) it was presumed that he terminated his service by his own conduct, i. e. by remaining absent for more than 30 days without leave. The petitioner was also asked by the same order to pay to the Company one month's notice pay amounting to Rs. 197/- for

(1) M. P. No. 411 of 1967, decided on the 1st May 1969.

(2) M. P. No 219 of 1968, decided on the 19th Nov. 1969.

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failure to give notice. The petitioner moved the Labour Court under the Madhya Pradesh Industrial Relations Act, 1960, challenging the termination of his employment. The Labour Court dismissed the petitioner's application by its order dated 18th March 1971. The petitioner then filed a revision to the Industrial Court which was dismissed by order dated 24th April 1972. The petitioner then filed the present petition under Articles 226 and 227 of the Constitution for quashing of the orders of the Labour Court and Industrial Court.

Standing Order 42(10) under which the action was taken by the Company reads as follows :

> "42 (10). An employee who remains absent from duty without leave, or permission or in excess of the period of leave originally sanctioned or subsequently extended, shall be liable to disciplinary action unless he is able to explain his absence in a manner satisfactory to the sanctioning authority. Where the period of such absence exceeds 30 days, the employee shall be presumed to have left the service of the Company of his own accord without notice and shall be liable to deduction of wages for the notice period. In cases of overstayal of leave without competent sanction and authority, the period of such overstayal should be treated as leave on half pay to the extent such leave is due and as extra-ordinary leave i. e. leave without pay to the extent the period of half pay leave is not due or falls short of the period of overstayal. The employee will not be entitled to leave salary during such overstayal of leave not covered by an extension of leave by the competent authority. In other words, though the period will be debited to the half pay leave account of the employee (if he is due leave on half pay), no leave salary will be paid for the full period of the overstayal of leave."

The first contention raised by the learned counsel for the petitioner is that the aforesaid standing

order has no application to the petitioner. The standing orders of the Company out of which Standing Order 42(10) is one, were submitted for certification under section 3 of the Industrial Employment (Standing Orders) Act, 1946 (Central Act 20 of 1946) on 7th June 1961. The Standing Orders so submitted were certified under section 5 of the Act on 29th November 1962. The Madhya Pradesh Legislature in 1959 enacted the Madhya Pradesh Industrial Workmen (Standing Orders) Act, 1959. This Act had received the assent of the President and applied to every industrial establishment within the State but as provided in section 1(3), it did not apply "except with the consent of the Central Government to an industrial establishment under the control of the Central Government." The 1959 State Act was repealed and replaced by the Madhya Pradesh Industrial Employment (Standing Orders) Act, 1961. This Act came into force on 25th November 1961. It applied to every undertaking, but, as provided in section 2, it did not apply to "an undertaking carried on by or under the authority of the Central Government." It would be seen that the 1959 State Act did not apply except with the consent of the Central Government to an industrial establishment under the control of the Central Government. But so far as the 1961 State Act is concerned, the exemption from operation was in respect of an undertaking carried on by or under the authority of the Central Government and not in respect of an undertaking merely under the control of the Central Government. The 1961 State Act had also received the assent of the President. The undertakings under the control of the Central Government which were not carried on by or under the authority of the Central Government and which till then were governed by the Central Act 20 of 1946 on the subject of standing

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orders came to be governed by the 1961 State Act from 25th November 1961. Section 4 of this Act made that position clear. It provided that nothing in the Central Act 20 of 1946 shall apply to any undertaking to which this Act applies. There was, however, an important proviso to section 4 which reads :

> "Provided that any proceeding under the said Act pending on the date of the commencement of this Act may be continued and completed in accordance with the provisions of the said Act as if this Act had not been passed."

Section 6 of the 1961 State Act made provision for application of standing orders which reads as under :

> 'S. 6. Application of standard standing orders to undertakings.--(1) The State Government may, by notification, apply standard standing orders to such class of undertakings and from such date as may be specified therein.
>
> (2) Where immediately before the commencement of this Act standing orders are in force in respect of any undertaking, such standing orders shall, until standard standing orders are applied to such undertaking under sub-section (1), continue in force as if they were made under this Act.
>
> (3) The standard standing orders made or amendments certified under this Act shall provide for every matter set out in the Schedule."

Standard standing orders were made under section 6 read with section 21(2)(b) of the 1961 State Act and were brought into force from 22nd March 1963. The Central Act 20 of 1946 was amended by the Central Act 39 of 1963 which came into force on 23rd December 1963. One of the important amendments was insertion of sub-section (4) to section 1. This sub-section, in so far as relevant, provides that "notwithstanding anything contained in

the Madhya Pradesh Industrial Employment (Standing Orders) Act, 1961, the provisions of this Act shall apply to all industrial establishments under the control of the Central Government." Another important amendment was addition of a new section as 12-A. This section reads as follows :

> "12-A. Temporary application of model standing orders.—(1) Notwithstanding anything contained in sections 3 to 12, for the period commencing on the date on which this Act becomes applicable to an industrial establishment and ending with the date on which the standing orders as finally certified under this Act come into operation under section 7 in that establishment, the prescribed model standing orders shall be deemed to be adopted in that establishment, and the provisions of section 9, sub-section (2) of section 13 and section 13-A shall apply to such model standing orders as they apply to the standing orders as certified.
>
> (2) Nothing contained in sub-section (1) shall apply to an industrial establishment in respect of which the appropriate Government is the Government of the State of Gujarat or the Government of the State of Maharashtra."

The model standing orders referred to in section 12-A of the Central Act were prescribed on 28th December 1963. Neither the standard standing orders made under section 6 of the 1961 State Act, nor the model standing orders prescribed under section 12-A of the Central Act, contain any provision like Standing Order 42(10) of the certified standing orders of the Company. The contention of the learned counsel for the petitioner is that the certified standing orders out of which Standing Order 42(10) is one, have no application and that either the standard standing orders made under the 1961 State Act or the model standing orders prescribed under section 12-A of the Central Act apply to the petitioner.

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The first argument in support of the aforesaid contention is that the Company is not an undertaking under the control of the Central Government and, therefore, after the enactment of the 1959 State Act, the Central Act ceased to be applicable to the Company on the subject of the standing orders and that for the same reason the amendment of the Central Act inapplicable to the Company. It is not disputed before us that the Company is not an undertaking carried on by or under the authority of the Central Government. On this question the ruling of the Supreme Court in *H. E. M. Union* v. *State of Bihar* (1) is clear and there is no scope for any doubt. The only controversy before us is whether the undertaking of the Company is an undertaking under the control of the Central Government. It is the admitted position that the Company is a Private Limited Company whose share capital is wholly subscribed by the Central Government. There are only three share-holders. The President of India holds three shares; the Joint Secretary, Department of Heavy Engineering, Ministry of Industry and Supply and the Additional Secretary, Ministry of Finance, each holds one share. The Articles of Association make it clear that the Chairman, Deputy Chairman, Resident Director etc. are all appointed by the President. The Central Government has also power of appointment of auditors and of giving directions in the matter of maintenance of account and audit. The Articles enjoin upon the Chairman to reserve for the decision of the Central Government any proposal or decision of the Board of Directors which raises an important issue, and no decision on an important issue can be taken in absence of the Chairman appointed by the President. The Articles further authorise the Central Government to give

(1) A. I. R. 1970 S.C. 82.

directions to the Company as to the exercise and performance of its functions in matters involving the national security or substantial public interest and to ensure that the Company gives effect to such directions. Above all, Article 116 of the Articles provides that the President may, from time to time, issue such directive as he may consider necessary in regard to the conduct of the business and affairs of the Company or Directors thereof and in like manner may vary and annul any such directive. It is further provided that the Directors shall give immediate effect to directives so issued. In face of the above provisions in the Articles, it is difficult to accept the argument that the Company's undertaking is not under the control of the Central Government. It is clear that the President holds the shares in the Company not in his personal capacity but as head of the Central Government. Similarly, it is also clear that the control vested in him under the Articles is in the same capacity. In our opinion, full control of the Company's affairs is vested in the Central Government and so the Company's undertaking is under the control of the Central Government. Learned counsel for the petitioner, however, argues that the control vested in the Central Government under the Articles is *qua* share-holder and not as Government and that such a control does not make the Company under the control of the Central Government. In our opinion, the word "control" as used in section 1(3) of the 1959 State Act or section 1(4) of the Central Act 20 of 1946 (as amended by Act 39 of 1963) must mean legal control irrespective of the source from or the capacity in which it arises. Looking at it from this point of view, there can be no doubt that the Company's undertaking is under the control of the Central Government. In *Sindri Workers' Union* v. *Labour Commr.* (1) a Division Bench of the Patna

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High Court held that the Sindri Fertilisers and Chemicals Ltd., which is also a Government of India undertaking like the Company with which we are concerned here, was under the control of the Central Government within the meaning of that expression as used in section 2(b) of the Central Act 20 of 1946. It was observed that the test of finding out whether an industrial establishment is controlled by the Central Government is a realistic test, namely, whether the Central Government has control over the industrial establishment under the Articles of Association in the case of a private limited company or by the provisions of the special statute in the case of a public corporation. We are in respectful agreement with this view, which supports the conclusion reached by us above. In *H. E. M. Union* v. *State of Bihar* (*supra*) the Supreme Court was dealing with the Heavy Engineering Corporation Limited, another Government of India undertaking. After referring to the extensive powers exercised by the Central Government, their Lordships observed that "in the absence of a statutory provision, however, a commercial corporation acting on its own behalf, even though it is controlled wholly or partially by a Government department, will be ordinarily presumed not to be a servant or agent of the State." These observations show that although the undertaking of the Company was not held to be carried on by or under the authority of the Central Government, it was held that the Company was under the control of the Central Government. This ruling thus also indirectly supports our conclusion.

The second argument of the learned counsel for the petitioner is that the standing orders certified under the Central Act were obliterated by the standard standing orders made under section 6 of the 1961 State Act and that they were not revived when

this Act ceased to be operative on the enactment of the Central Act 39 of 1963. As held by us, the undertaking of the Company is under the control of the Central Government. The Company was governed by the Central Act 20 of 1946. The 1959 State Act had no application to the Company as the undertakings under the control of the Central Government were exempted from its operation. As earlier stated by us, the Company submitted its standing orders for certification on 7th June 1961 under section 3 of the Central Act 20 of 1946 which was then applicable to it. During the pendency of the proceedings for certification, the 1961 State Act came into force. This Act did not make any exemption in respect of undertakings under the control of the Central Government and, as it had received the assent of the President, it became applicable to the Company from 25th November 1961. We have also referred to sections 4 and 6 of this Act. Although section 4 of the 1961 State Act said that nothing in the Central Act 20 of 1946 would apply to any undertaking governed by the State Act, the proviso to the section allowed the continuance of any proceeding pending under the Central Act in accordance with the provisions of that Act as if the State Act had not been passed. The effect of this provision was that the proceedings pending for certification of the Company's standing orders under the Central Act were validly continued and the standing orders were validly certified under section 5 of that Act on 29th November 1962. Now when the 1961 State Act enabled the continuance of the proceedings for certification of the standing orders, it logically follows that the certified standing orders became applicable to the Company having been validly certified under the Central Act. Till then there was no repugnancy between the Central Act and the 1961 State Act.

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The repugnancy arose when the standard standing orders were made under section 6(1) of the State Act. As the State Act was to prevail under Article 254 of the Constitution, the standard standing orders made under section 6(1) of the State Act superseded the standing orders certified under the Central Act. The question to be considered is as to what is the effect of this supersession. Whether the certified standing orders were so obliterated that they could not revive after the State Act ceased to be applicable to the Company on the enactment of the Central Act 39 of 1963; or whether the standing orders were merely eclipsed so that they revived immediately after the State Act ceased to be operative? This question must be answered in the light of Article 254 of the Constitution.

Article 254(2) provides that "where a law made by the Legislature of a State with respect to one of the matters enumerated in the Concurrent List contains any provision repugnant to the provisions of an earlier law made by Parliament or an existing law with respect to that matter, then, the law so made by the Legislature of such State shall, if it has been reserved for the consideration of the President and has received his assent, prevail in that State." It will be seen that the State Act which has received the assent of the President does not repeal the Central Act or make it void, but only prevails in the State as against the Central Act. We are not here concerned with Article 254(1) or the proviso to Article 254(2) where the language is slightly different. We are also not here concerned with the well-known controversy on the question whether a post-constitution law violates any fundamental right it is still born and is not revived by an amendment of the Constitution removing the ground of invalidity or

by supersession of fundamental rights: [See *State of Gujarat* v. *Shri Ambica Mills* (1) and other cases referred to therein]. The only relevant provision for our purpose is Article 254(2). When the State Act prevails under Article 254(2) over a Central Act, the effect is merely to supersede the Central Act or to eclipse it by the State Act and the moment the State Act ceases to be operative, the field becomes clear for revival of the Central Act. The language of Article 254(2) is similar to section 109 of the Australian Constitution, which provides that "when a law of the State is inconsistent with the law of Commonwealth, the latter shall prevail and the former shall, to the extent of the inconsistency, be invalid." It is settled law that the effect of section 109 is merely to supersede the State Law to the extent of any inconsistency with the Commonwealth law and that on the repeal of the Commonwealth law the State law is revived without the necessity of re-enactment: [See Wyne's Legislative Executive and Judicial Powers in Australia, 5th edition, P. 106; *Butler* v. *A. G.* (*Vict.*) (2); *Carter* v. *Egg. etc. Board* (3); *Liquor Prohibition Appeal Case* (4) and *Tua* v. *Carriere* (5). This view was accepted by the Supreme Court in *Deep Chand* v. *State of U. P.* (6) and the observations of Latham, C. J., in the Australian case of *Carter* v. *Egg and Egg etc.* (*supra*) were cited with approval.

The standing order certified under the Central Act were validly certified. The coming into force of the 1961 State Act did not create any inconsistency or repugnancy with the standing orders or with the proceeding for their certification pending under the

(1) A. I.R. 1974 S. C. 1300.
(2) (1961) 106 C. L. R. 268.
(3) (1942) 66 C. L. R. 557.
(4) (1896) A.C. 348 (Canada).
(5) 117 U. S. 20.
(6) A. I. R. 1959 S.C. 648.

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Central Act for two reasons. First, the State Act itself made provision under the proviso to section 4 for continuance of proceedings under the Central Act as if it had not been passed; it even continued the standing orders in force under section 6(2). The second reason is that the principle of repugnancy requires that the repugnancy must exist in fact and should not be a made a mere possibility: [See *Tika Ramji* v. *State of U. P.* (1) and *K. S. E. Board* v. *Indian Aluminium Co.* (2). There was no repugnancy in fact until the standard standing orders were made under section 6(1) of the State Act. Although section 6(2) of the State Act which continued the standing orders in force was not in terms applicable to the standing orders which were till then not certified under the Central Act, yet when the proceedings for certification were permitted to be continued under the Central Act by the proviso to section 4 of the State Act, the standing orders after certification under the Central Act became applicable to the Company and continued to be operative until the standard standing orders were made under section 6(1) of the State Act. The effect of the standard standing orders made under section 6(1) of the State Act was to supersede or eclipse the standing orders certified under the Central Act because of repugnancy under Article 254(2) of the Constitution. The standing orders certified under the Central Act were not obliterated or repealed; they were merely superseded or eclipsed by the standard standing orders made under the State Act because the field of the standing orders became occupied by the standard standing orders made under the State Act. By the Central Act 39 of 1963, the Company's undertaking being under the control of the Central Government, was taken out of the field of operation of the State

(1) A. I. R. 1956 S.C. 676, p. 703.
(2) A. I. R. 1976 S.C. 1031 at p. 1046 (paragraph 23).

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Act. The standard standing orders made under the State Act then ceased to be applicable and the standing orders certified under the Central Act revived as the shadow of the State Act was removed and the field was made clear for their operation.

It is argued by the learned counsel for the petitioner that the rule contained in Article 254(2) of the Constitution will not apply to standing orders as they do not amount to law. Reference in this connection is made to *Co-op. Cr. Bank* v. *Ind. Tri., Hyderabad* (1). In this case, it was held that bye-laws of a co-operative society relating to the conditions of service of its employees have not the force of law. In that context it was in passing observed that certified standing orders do not have "such force of law" as to be binding on an Industrial Tribunal adjudicating an industrial dispute because the Tribunal's jurisdiction is not merely to administer exiting laws and enforcing existing contracts and that the Tribunal has even the right to vary existing contracts. Standing orders after they are certified apply uniformly to all employees of the undertaking. The authorities functioning under the Central Act are duty bound to examine the fairness or reasonableness of the standing orders before they are certified. The same duty is cast on the authorities when a proceeding is taken for modification of the standing orders. The model standing orders prescribed under the Act get replaced by the certified standing orders. The employer cannot enter into any agreement with a workman which is inconsistent with the standing orders. The violation of the standing orders by the employer is a criminal offence : [*See U. P. E. Supply Co.* v. *T. N. Chatterjee* (2); *Western India Match Co.* v. *Workmen* (3)]. Having regard to these

(1) A. I. R. 1970 S.C. 245. (2) A. I. R. 1972 S.C. 1201.
(3) A. I. R. 1973 S.C. 2650.

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features of the standing orders, it is difficult to accept that the standing orders certified under the Central Act have not the force of law even though they may not be having "such force of law" that the Industrial Tribunal cannot modify them while adjudicating an industrial dispute. In this connection, it may be pointed out that the Supreme Court in *Sukhdeo Singh* v. *Bhagat Ram* (1) has held that regulations made by Corporations under statutory powers laying down conditions of service of their employees have the force of law. *Sukhdeo Singh's* case overrules the cases of *Indian Airlines* v. *Sukhdeo Rai* (2) and *U.P.S.W. Corpn., Lucknow* v. *C. K. Tyagi* (3) where a contrary view was taken. In our opinion, certified standing orders have adequate statutory sanction and authority and generality of application as to confer upon them the status of law. Even assuming that they do not strictly amount to law, we do not find good reason why the principle of Article 245(2) of the Constitution should not apply when standing orders certified under the Central Act are superseded by standing orders made under the State Act which had received the assent of the President. As earlier stated by us, the standing orders certified under the Central Act were superseded or eclipsed by the standard standing orders made under the State Act and when the Central Act 39 of 1963 made the State Act inapplicable, the standing orders certified under the Central Act revived and became operative.

The next argument of the learned counsel for the petitioner is that on the enactment of the Central Act 39 of 1963, the model standing orders prescribed under section 12-A became applicable to the Company and not the certified standing orders. This argument cannot be accepted because the model

(1) A. I. R. 1975 S. C. 1331. (2) A. I. R. 1971 S.C. 1828.
(3) A. I. R. 1970 S.C. 1244.

standing orders under section 12-A are applicable only till the certified standing orders come into force. As earlier stated by us, the standing orders certified under the Central Act which were eclipsed during the operation of the standard standing orders made under section 6 of the State Act revived after the State Act ceased to be applicable on coming into force of the Central Act 39 of 1963. As the standing orders certified under the Central Act revived immediately on the coming into force of the Central Act 39 of 1963, there was no scope for the operation of the model standing orders prescribed under section 12-A inserted by the same Act.

Thus, the first contention that the Standing Order 42(10), which we have quoted in paragraph 2 above and under which action was taken against the petitioner, has no application fails.

The second contention raised by the learned counsel for the petitioner is that before termination of service is finally inferred and given effect to under Standing Order 42(10) on employee's absenting without leave for more than 30 days, reasonable opportunity should be given to him to explain his absence and that it is only when satisfactory reasons for absence are not given that the inference of termination of service can be acted upon. In the same context, it is contended that in the instant case no such opportunity was given to the petitioner and, therefore, the order of the Company holding that the petitioner's employment came to an end is invalid being contrary to the terms of the standing order. The first question that arises in this connection is whether any opportunity to explain the absence is contemplated when the employer raises the presumption of termination of employment under the standing order. An

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employee who remains absent from duty without leave or permission or in excess of the period of leave originally sanctioned or subsequently extended is liable to disciplinary action unless he is able to explain his absence in a manner satisfactory to the sanctioning authority. This is the first part of the standing order. The second part of the standing order with which we are concerned provides that "where the period of such absence exceeds 30 days, the employee shall be presumed to have left the service of the Company of his own accord without notice and shall be liable to deduction of wages for the notice period." The words "such absence" as they occur here mean absence from duty without leave or permission, or in excess of the period of leave sanctioned or extended. If such absence exceeds 30 days, the employee is presumed to have left the service of the Company of his own accord. Now the word "presumed" implies that the presumption raised can be dislodged by showing that there was some satisfactory reason for absence from duty without leave and, therefore, the employee did not intend to leave the service. If the intention of the standing order were to raise a conclusive presumption of termination of employment at the instance of the employee on his absenting from duty without leave for more than 30 days, the word "deemed" would have been used in place of the word "presumed". On the language of the standing order as it is the absence from duty without leave exceeding 30 days merely raises a presumption that the employee left the service of his own accord. But before action is taken on the basis of the presumptive inference that the employee has left the service and his employment has come to an end, the employee must be given opportunity to explain his absence. If the employee shows satisfactory reasons for his absence without

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leave, the presumption would be destroyed and it would not be possible for the employer to take action against the employee on the basis of the presumption. It is true that the second part of the standing order with which we are concerned here does not expressly provide that the employee shall have opportunity to explain his absence as is provided in the first part; but as explained above, the use of the word "presumed" necessarily leads to the inference that the employee must be given that opportunity. It is not difficult to conceive of cases where there may exist circumstances beyond the control of the employee under which he is compelled to remain absent from duty for more than 30 days without leave but without in any way intending to leave the service. If it is held that the presumption of termination of employment at the instance of the employee under the standing order is absolute, it would not be possible to mitigate the hardship in such cases. In our opinion, therefore, the learned counsel for the petitioner is right in his contention that before the employer proceeds to take action on the basis that the employee terminated his employment by remaining absent for more than 30 days without leave, opportunity should be given to him to explain the absence. Learned counsel for the Company submitted that in two previous cases contrary view has been taken by other Division Benches. The cases to which reference was made are *H. L. Handa* v. *Industrial Court & ors.* (1) and *Jagdish Singh* v. *Asstt. Works Manager, H. E. L.* (2). In *Handa's case* a Division Bench of which one of us (Singh, J.) was a member, came to the conclusion that on the facts of that case the employee was given sufficient opportunity to explain his absence

(1) M P. No. 411 of 1967, decided on the 1st May 1969.

(2) M. P. No 219 of 1968, decided on the 19th November 1969.

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and it was for this reason that no interference was made. A reading of the judgment in *Handa's* case shows that it was impliedly accepted that before inference of termination of employment arising out of the presumption is given effect to, the employer must give opportunity to the employee to explain the absence. As regards the case of *Jagdish Singh*, it is no doubt true that there are observations which show that no such opportunity need be given to the employee. But the learned Judges referred to the *Handa's* case and said that they did not find any reason to take a contrary view. So, in fact, *Handa's* case was accepted as an authority on the interpretation of the standing order even in the case of *Jagdish Singh*. *Jagdish Singh's* case, therefore, cannot be taken to have decided anything contrary to *Handa's* case. As earlier pointed out by us, *Handa's* case proceeds on the basis that before the employer gives effect to the presumption of termination of employment, the employee should get a chance for explaining the absence on the basis of which the presumption is raised. In the circumstances, it cannot be said that the interpretation accepted by us above is in any way contrary to the aforesaid two cases.

The next question is whether opportunity was given to the petitioner to explain the absence. It is pointed out by the learned counsel for the Company that by a notice issued on 18th May 1966, the Company drew the attention of the petitioner that he was absent for more than 30 days and he was asked to report for duty on 26th May 1966. The petitioner's case is that he was ill till 24th May 1966 and was unable to walk. His case further is that he received the Company's notice on 25th May, but he could not join duty on 26th May as required by the notice as his niece fell ill on the same date

and died on 30th May. The petitioner went to the office of the Company to report for duty on 1st June 1966 and made an application stating the above facts. The petitioner was then told that he was no longer in service and that an order to that effect had been issued. The injury received by the petitioner was minor. The Labour Court has found that the petitioner's case that he was unable to walk is not true. Indeed, the petitioner went to the Company's office in the beginning of May and collected his salary for the month of April. The injury was clearly not such which could have prevented him in making application for leave. The petitioner admittedly received the notice dated 18th May 1966 on 25th May when he was perfectly fit, yet he did not report for duty on the pretext of his niece's illness. The petitioner's case that the niece (a child of six months) died on 30th May is also false. The said niece admittedly died on 28th May. The petitioner reported for duty only on 1st June when the order giving effect to the termination of employment had been issued. Having regard to the facts, in our opinion, the notice of 18th May 1966 issued by the Company gave sufficient opportunity to the petitioner to explain his absence without leave and that there was no infraction of the standing order in giving effect to the presumption of termination of employment.

It was also argued by the learned counsel for the petitioner that the injury suffered by the petitioner amounted to temporary total disablement within the meaning of the Workmen's Compensation Act, 1923, and that absence from duty resulting from such an injury could not give rise to the presumption of termination of employment under the standing order. In our opinion, there is no merit in this argument. The standing order applies when an employee remains absent from

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duty without leave for more than 30 days. No such rule has been shown to us that if an employee suffers an injury which amounts to temporary total disablement, he is not required to apply for leave. In the instant case, the injury was not such that the petitioner could not move and was, therefore, unable to apply for leave. Moreover, the petitioner should have taken the opportunity after receiving the notice dated 18th May 1966 to put forward any explanation that he may have had, including the explanation that he was suffering from temporary total disablement, for his absence from duty. As earlier held by us, the petitioner did not avail of that opportunity. In the circumstances, the standing order was attracted and the Company acted within the authority conferred by it, in giving effect to the inference of termination of employment.

The petition fails and is dismissed, but without any order as to costs. The amount of security deposit shall be refunded to the petitioner.

Petition dismissed.

MISCELLANEOUS PETITION

Before Mr. Justice G. L. Oza.

1980

Aug. 19

ADMINISTRATOR, KRISHI UPAJ MANDI, SAGAR, Petitioner*

v.

STATE OF M. P. and others, Respondents.

Agricultural Produce Markets Act (XXIV of 1963), as amended,

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*M. P. No. 426 of 1979.

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Section 17(3) and Industrial Disputes Act (XIV of 1947), Section 2(J)—Definition of "Industry"—Scope of—Includes activities of Krishi Upaj Mandi Committee provided for in section 17(3) of M. P. Krishi Upaj Mandi Adhiniyam, 1972.

The Preamble of Industrial Disputes Act, 1947 indicates that the Act has been enacted for investigation and settlement of Industrial Disputes. The first sentence of Section 2 indicates the nature of the definition which has been provided for in the sub-section and the language suggests that it has to be understood in the wider context except if there is anything repugnant available from the subject or context. In section 2(J) although the word 'Industry' has been used but what has been provided therein makes it clear that things which in the ordinary parlance may not come within the word 'industry' have been included in the definition. Although various words have been used in the definition of the word 'Industry', it has been further enacted by an inclusive phrase 'includes any calling, service, employment, handicraft or industrial occupation or avocation of workmen'. Therefore, no inference can be drawn from the meaning of the word 'Industry' and the contention that from the words used in the term 'Industry' there could be no activity in the nature of trade or business except if it is not carried out with profit motive cannot be accepted. Definition has to be understood in the light of the phraseology employed in the context for the purpose for which it is enacted.

D. N. Banerji v. *P. R. Mukherjee* (1) and *Bangalore Water Supply and Sewerage Board* v. A. *Rajappa* (2); relied on.

Krishi Upaj Mandi Samiti, Sagar v. *Regional Provident Fund Commissioner, Indore* (3); distinguished.

The Secretary, Madras Gymkhana Club Employees' Union v. *The Management of the Gymkhana Club* (4); referred to.

The functions to be performed by the Krishi Upaj Mandi Committee as provided for in section 17(3) of M. P. Krishi Upaj Mandi Adhiniyam, 1972, of storing fertilizers, insecticides and other things and distributing them on payment, keeping tractors and run them on hire and do various things of this kind with an intention to increase the agricultural production, fall within the

(1) A. I. R. 1953 S. C. 58. (2) A.I.R. 1978 S. C. 548.
(3) 1980 M. P. L. J. 359. (4) A. I. R. 1968 S. C. 554.

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definition of the term 'industry' as provided for in section 2(J) of the Industrial Disputes Act, 1947.

K. N. Agrawal for the petitioner.

L. N. Malhotra for respondent no. 2.

Cur. adv. vult.

ORDER

G. L. OZA J.-This petition has been filed by the petitioner seeking a direction to quash the order dated 11-1-1979, passed by the Labour Court, Sagar, and further direction to respondent No. 2 not to recover anything in pursuance of this order passed by the Labour Court.

According to the petitioner, the petitioner is a statutory body constituted under the Madhya Pradesh Agricultural Produce Markets Act, 1960 (Act No. 19 1960), which has been later amended by Act No. 24 of 1973. The petitioner further contends that the object of the enactment under which the petitioner body is constituted is to save the agriculturists from exploitation of the middle-men and provide means so that the return is obtained by the agriculturists for their agricultural produce. In this Act provisions have been made to provide for better regulation of buying and selling of agricultural produce and proper administration of the market and in order that these objects be fulfilled the petitioner body is constituted under this Act.

Respondent No. 2 was appointed as a temporary clerk by the Joint Director of Agriculture, Sagar Division, Sagar, by his order dated 16.8.1975 and by order dated 3.12.1976 his services were terminated with effect from 1-1-1977. Respondent No. 2

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was thereafter appointed as a temporary clerk by the petitioner.

On 1-10-1977 the petitioner did not find the work of respondent No.2 satisfactory and as there were complaints, he was suspended on 27.4 1978 and his services were terminated by the petitioner on 16.5.1978, vide orders passed by the petitioner on 15.5.1978.

Respondent No. 2 moved respondent No. 3, the Labour Commissioner, Indore, praying that the order of termination of his service be declared illegal. Respondent No. 3 treating this dispute as an industrial dispute, made a reference to the Labour Court, Sagar, under S. 10(1) of the Industrial Disputes Act, 1947. Before the Labour Court the petitioner resisted the claim of respondent No. 2 contending that the petitioner will not fall within the definition of the term 'industry' as defined under S. 2(j) of the Industrial Disputes Act, and, therefore, the reference was bad. The Labour Court repelled the contention of the petitioner and held the termination of respondent No. 2's services as illegal and also directed the relief of wages during the period of unemployment.

It is contended on behalf of the petitioner that this order passed by the Labour Court is bad as the Labour Court exercised the jurisdiction not vested in it by law, as according to the petitioner, the petitioner will not fall within the ambit of the definition of the term 'industry' as provided for in S. 2 (j) of the Industrial Disputes Act, and, therefore, no reference could be made as the dispute will not be an industrial dispute and, therefore, the relief could not be granted by the Labour Court.

It was contended that S. 17 of the M. P.

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Agricultural Produce Markets Act provides the duties to be performed by the market committee and sub-sections (1) and (2) laid down the general duties and the detailed functions which a market committee is expected to perform. Sub-section (3) of this Section provides optional functions of the committee which it could undertake with the prior sanction of the State Govt. It was, therefore, contended that all these functions in the light of the purpose for which the market committee is constituted and the object for which this enactment provides for constitution of these committees, clearly go to show that the functions are neither commercial nor in the nature of trade nor they are with profit *motto* and under these circumstances, therefore, the petitioner committee will not come within the mischief of S. 2 (j) of the Industrial Disputes Act.

Learned counsel for the petitioner further contended that the question of application of the Provident Fund Act came for consideration before a Division Bench of this Court and it was held in *Krishi Upaj Mandi Samiti, Sagar* v. *Regional Provident Fund Commissioner, Indore* (1) that the petitioner will not be covered under the scheme of the Provident Fund Act. Learned counsel placing reliance on *Bangalore Water Supply & Sewerage Board* v. *A. Rajappa* (2) contended that in the light of the interpretation put on the term 'industry' in this decision the petitioner will not be covered. Reliance was also placed on the decision reported in *The Secretary, Madras Gymkhana Club Employees' Union* v. *The Management of the Gymkhana Club* (3).

Learned counsel for the respondent contended that the definition of the term 'industry' as defined

(1) 1980 M. P. L. J. 359. (2) A. I. R. 1978 S.C. 548.
(3) A. I. R. 1968 S. C. 554.

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in S. 2(j) of the Industrial Disputes Act is wide enough to cover the petitioner. The activities of the petitioner being not in the nature of trade or not being commercial and not motivated with profit *motto*, is altogether irrelevant. The tests laid down in *Bangalore Water Supply & Sewerage Board* v. *A. Rajappa* (*supra*) if applied to the functions that the petitioner committee perform, especially as contemplated in sub-section (3) of S. 17, which the Labour Court found as a fact, the petitioner would be covered in the definition of the term 'industry'. He also contended that the decision in the *Secretary, Madras Gymkhana Club Employee's Union* v. *The Management of the Gymkhana Club* (1) on which reliance is placed, has been over-ruled by the decision reported in *Bangalore Water Supply Sewerage Board* v. *A. Rajappa* (*supra*). As regards a Division Bench decision of this Court reported in *Krishi Upaj Mandi Samiti, Sagar* v. *Regional Provident Fund Commissioner* (2), it was contended by the learned counsel that in that case the definition of the term 'industry' was not for consideration. That case referred to the scheme of the Provident Fund Act. Apart from it was contended that unfortunately the functions of the market committee as contemplated under sub-section (3) of S. 17 were not brought to the notice of the Division Bench and it appears that in the absence of those functions the Division Bench ruled that the scheme of the Provident Fund Act is not applicable to the petitioner. But in the present case the learned Labour Court has found as a fact the functions which are carried out by the petitioner under sub-section (3) of S. 17 and, therefore, the petitioner will fall within the definition of the term 'industry' as defined in S. 2(j) of the Industrial Disputes Act, and, therefore,

(1) A. I. R. 1968 S. C. 554. (2) 1980 M. P. L. J. 359.

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the order passed by the Labour Court could not be said to be bad in law.

The petitioner is a statutory body and the functions of the petitioner have been provided in S. 17 of the M. P. Krishi Upaj Mandi Adhiniyam, 1972. Section 17, sub-sections (1) and (2) provide for the duties of the petitioner market committee and sub-section (3) of this Section provides for the functions which the market committee could perform with the prior sanction of the Government. Sub-section (3) of S. 17 reads :

> "S. 17 (3)-With the prior sanction of the State Government the market committee may at its discretion, undertake the following duties-
>
> (i) to give grant or advance funds to the Public Works Department of the State Government or any other agency authorised by the State Government for the construction of roads or godowns in the market area to facilitate storage and transportation of agricultural produce or for the purpose of development of the market yard;
>
> (ii) to maintain stock of fertilizers, pesticides, insecticides, improved seeds, agricultural equipments and pumps and distribute them to agriculturists on payment or to rent out tractors to agriculturists with a view to assist them to increasing agricultural production;
>
> (iii) to provide on rent storage facilities for stocking of agricultural produces to agriculturists;
>
> (iv) to give grant for maintenance of the 'Goshalas' recognised by the State Government."

This sub-section provides for keeping of stocks of fertilizers, pesticides, insecticides, improved seeds, agricultural equipments and pumps and it also

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provides that these things will be distributed to the agriculturists on payment. It also provides that the committee shall keep tractors which may be rented out to the agriculturists with a view to increase agricultural production. Learned Labour Judge in his order has considered this aspect of the matter and it is on these findings that the learned Labour Judge came to the conclusion that these activities when considered in the light of the tests laid down in *Bangalore Water Supply & Sewerage Board* v. *A. Rajappa* (1), the petitioner would fall within the definition of 'industry' as defined in section 2 (j) of the Industrial Disputes Act. Section 2 (j) of the Industrial Disputes Act reads :

> "S. 2-Definitions--In this Act, unless there is anything repugnant in the subject or context.....
>
> (J) "Industry" means any business, trade, undertaking, manufacture or calling of employees and includes and calling, service, employment, handicraft or industrial occupation or avocation of workmen."

The first sentence of this Section indicates the nature of the definition, which has been provided for in the sub-section and the language suggests that it has to be understood in the wider context except if there is anything repugnant available from the subject or context. The purpose of Industrial Disputes Act as it appears from the Preamble is--"Whereas it is expedient to make provision for the investigation and settlement of industrial disputes and for certain other purposes hereinafter appearing; it is hereby enacted as follows :"

This, therefore, clearly indicates that this law has been enacted for investigation and settlement of industrial disputes. In Section 2(j), although the

(1) A. I. R. 1978 S.C. 548.

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word 'industry' has been used, but what been provided in the definition of word 'industry' makes it clear that things which in the ordinary parlance may not come within the word 'industry', have been included in the definition and, therefore, from the meaning of the word 'industry' no inference could be drawn.

An attempt was made on behalf of the learned counsel for the petitioner that as the activities of the petitioner are not motivated with profit *motto*, therefore, it cannot be treated as a commercial establishment or connected with business or trade and ,apparently it could not be an industry. But reading of the definition clearly goes to show that although various words have been used, it has been further enacted by an inclusive phrase 'includes and calling, service, employment, handicraft or industrial occupation or avocation of workmen'.

Learned counsel for the petitioner placed reliance on a Division Bench decision of this Court in *Krishi Upaj Mandi Samiti, Sagar* v. *Regional Provident Fund Commissioner* (1), wherein the scheme of the Provident Fund Act was considered. In this decision a Division Bench of this Court considered the Notification of the Government of India applying the Provident Fund Act to various establishments, which reads--

> "Trading and Commercial establishments engaged in the purchase, sale or storage of any goods, including establishments of exporters, importers, advertisers, commission agents and brokers and commodity and stock exchanges but not including banks or warehouses established under any Central or State Act."

It appears that this Notification made the Provident

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Fund Act applicable to trading and commercial establishments engaged in the purchase, sale or storage of any goods and it was in this context that the Division Bench considered the duties of the market committee under S. 17. In this judgment S. 17, sub-sections (1) and (2) have been considered, but as pointed out by the learned counsel for the respondent, sub-section (3) has not been referred to at all and apparently as S. 17, sub-sections (1) and (2) does not refer to any functions like purchase and sale of any goods, the Division Bench of this Court held that the Provident Fund Act scheme will not be applicable to the Krishi Upaj Mandi Samiti constituted under this Act. The definition of 'industry', it could not be disputed is in much wider term and on examination of sub-section (3) of S. 17, it could not be disputed that the petitioner stores the fertilizers, insecticides and other things and distributes them on payment and also keeps pumps and distributes them on payment, keeps tractors and runs them on hire and do various things of this kind with an intention to increase the agricultural production. It is not disputed before me also that the petitioner is not performing any one of these functions. On the contrary it is admitted that the functions enumerated in sub-sec. (3) are being performed by the petitioner committee. It is, therefore, clear that these functions fall within the ambit of the definition of the term 'industry' as provided in S. 2 (j) of the Industrial Disputes Act.

Learned counsel for the petitioner laid much emphasis on non-profit motive for which all these activities are performed. In *Bangalore Water Supply and Sewerage Board* v. *A. Rajappa* (1), their Lordships of the Supreme Court re-affirmed what was laid

(1) A.I.R. 1978 S.C. 548.

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down in *D. N. Banerji* v. *P. R. Mukherjee* (1) and held :

" 'Industry', as defined in S. 2(j) and explained in *Banerji's case* (1) has a wide import.

(a) where (i) systematic activity, (ii) organised by co-operation between employer and employee (the direct and substantial element is chimercal), (iii) for the production and/or distribution of goods and services calculated to satisfy human wants and wishes (not spiritual or religious but inclusive of material things or services geared to celestial bliss, i. e. making, on a large scale prasad or food) *prima facie*, there is an industry in that enterprise.

(b) Absence of profit motive or grainful objective is irrelevant, be the venture in the public, joint, private or other sector.

(c) The true focus is functional and the decisive test is the nature of the activity with special emphasis on the employer-employee relations.

(d) If the organization is a trade or business, it does not cease to be one because of philanthrophy animating the undertaking.

II. Although Section 2(j) uses words of the widest amplitude in its two limbs, their meaning cannot be magnified to overreach itself.

(a) 'Undertaking' must suffer a contextual and associational shinkage as explained in Banerji and in this judgment; so also, service, calling and the like. This yields the inference that all organised activity possessing the triple elements in I (supra) although not trade or business, may still be an 'industry' provided the nature of the activity, viz., the employer-employee basis, bears resemblance to what we find in trade or business. This takes into the fold

(1) A. I. R. 1953 S.C. 58.

'industry' undertakings, callings and services, adventures 'analogous to the carrying on trade or business'. All features, other than the methodology of carrying on the activity viz. in organizing the co-operation between employer and employee, may be dissimilar. It does not matter, if on the employment terms there is analogy.

III. Application of these guidelines should not stop short of their logical reach by invocation of creeds, cults, or inner sense of incongruity or outer senses of motivation for or resultant of the economic operation. The ideology of the Act being industrial peace, regulation and resolution of industrial disputes between employer and workmen, the range of this statutory ideology must inform the reach of the statutory definition. Nothing less, nothing more.

(a) The consequences are (i) professions, (ii) Clubs, (iii) educational institutions, (iv) co-operatives, (v) research institutes, (vi) charitable projects and (vii) other kindred adventures, if they fulfil the triple tests listed in I (supra), cannot be exempted from the scope of Section 2(j).

(b) a restricted category of professions, clubs, co-operatives and even gurukulas and little research labs, may qualify for exemption if, in simple ventures, substantially and, going by the dominant nature criterion, substantially, no employees are entertained but in minimal matters, marginal employees are hired without destroying the non-employee character of the unit.

(c) If, in a pious or altruistic mission many employ themselves, free or for small honaria or like return, mainly drawn by sharing in the purpose or cause, such as lawyers volunteering to run a free legal services clinic or doctors serving in their spare hours in a free medical centre or ashramites working at the bidding of the holiness, divinity or like central personality, and the services are supplied free or at nominal cost and those who serve are not engaged for remuneration or on the basis of master and

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servant relationship, then, the institution is not an industry even if stray servants, manual or technical, are hired. Such eleemosynary or like undertaking alone are exempt—not other generosity compassion, developmental passion or project.

IV. The dominant nature test :

(a) Where a complex of activities, some of which qualify for exemption, others not, involves employees on the total undertaking, some of whom are not "workmen" as in *The University of Delhi's case* (1) or some departments are not productive of goods and services if isolated, even then, the predominant nature of the services and the integrated nature of the departments as explained in *The Corporation of Nagpur's case* (2) will be the true test. The whole undertaking will be 'industry' although those who are not 'workmen' by definition may not benefit by the status.

(b) Notwithstanding the previous clauses, sovereign functions, strictly understood, (alone) qualify for exemption, not the welfare activities or economic advantures undertaken by government or statutory bodies.

(c) Even in departments discharging sovereign functions, if there are units which are industries and they are substantially severable, then they can be considered to come within S. 2(j).

(d) Constitutional and competently enacted legislative provisions may well remove from the scope of the Act categories which otherwise may be covered thereby.

V. We overrule the case in—*Safdarjung's case* (3), *Solicitors' Case* (4), *Gymkhana's case* (5), *Delhi University's case* (1) and *Dhanrajgirji Hospital's case* (6) and other rulings whose ratio runs

(1) A.I.R. 1963 S.C. 1873.
(2) A.I.R. 1960 S.C. 675.
(3) A. I. R. 1970 S. C. 1407.
(4) A. I. R. 1962 S. C. 1080.
(5) A.I.R. 1968 S. C. 554.
(6) A. I. R. 1975 S.C. 2032.

counter to the principles enunciated above, and *Hospital Mazdoor Sabha's case* (1) is hereby rehabilitated."

The tests laid down by their Lordships as stated above if applied to the activities of the petitioner, it will be clear that the petitioner will fall within the ambit of the definition of the word 'industry'. This decision has ultimately settled the law as all the earlier decisions have been considered and the decision on which reliance was placed by the counsel for the petitioner, i. e. *The Secretary, Madras Gymkhana Club Employees' Union* v. *The Management of the Gymkhana Club* (2) have been clearly over-ruled.

Learned counsel for the petitioner laid much emphasis on the use of the words in the definition of the term 'industry' and contended that these words clearly indicate that there could be no activity in the nature of trade or business except if it is not carried out with profit motive. But as laid down by their Lordships of the Supreme Court in the decision quoted above, nothing could be made out from the meaning of the terms. Definition has to be understood in the light of the phraseology employed in the context for the purpose for which it is enacted. In the words of LORD DENNING :

> "At one time the Judges used to limit themselves to the bare reading of the Statute itself—to go simply by the words, giving them their grammatical meaning, and that was all. This view was prevalent in the 19th century and still has some supporters today. But it is wrong in principle. The meaning for which we should seek is the meaning of the Statute as it appears to those who have to obey it—and to those who have to advise them what to do about it; in short, to lawyers like yourselves. Now the Statute does not come to such folk as if they were eccentrics cut off from all that is happening around them. The

(1) A.I.R. 1960 S.C. 610. (2) A. I. R. 1968 S. C. 554.

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Statute comes to them as men of affairs—who have their own feeling for the meaning of the words and know the reason why the Act was passed—just as if it had been fully set out in a preamble. So it has been held very rightly that you can inquire into the mischief which gave rise to the Statute,—to see what was the evil which it was sought to remedy."

It is, therefore, clear that whatever the words that may be used in the definition, but reading the definition as a whole in the context of the purpose of the law, it could not be doubted that the petitioner when it is performing the functions, as contemplated by sub-sec. (3) of S. 17, will fall within the ambit of the definition of the term 'industry', as provided in S. 2 (J) of the Industrial Disputes Act, and, therefore, it could not be said that the learned Labour Judge exercised the jurisdiction not vested in it by law. The view taken by the learned Labour Court cannot be said to be incorrect.

The petition is, therefore, without substance and is dismissed. In the circumstances of the case, the parties are directed to bear their own costs. The security deposit be refunded to the petitioner.

Petition dismissed.

APPELLATE CIVIL

Before Mr. Justice C. P. Sen.

1980

July 29

HINDUSTAN GENERAL INSURANCE SOCIETY LTD., CALCUTTA, Appellant*
v.
KHUSHIRAM and others, Respondents.

Insurance—Insurance Contract—Enforceability of—Receipt of

*First Appeal No. 109 of 1975, from the decree of Ram Murti, District Judge, Betul, dated the 29th April 1975.

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Hindustan General Insurance Society Ltd., Calcutta
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premium and issue of cover-note—Revocation of proposal not communicated to the assured-Insurance Company liable for the risk covered under the cover-note-Insurance Agents-Action of, in excess of apparent authority-Effect of-Disclosure of material facts by assured-Requirement of-Under-valuation of stock in trade-Whether amounts to material suppression of facts.

Cover-note is a contract of Insurance and is governed by the Contract Act. Under Section 66 of the Contract Act, revocation has to be in the same manner and subject to the same rules as apply to the communication of a revocation of a proposal provided for under section 4 of the Contract Act.

Where the cover-note shows that it was valid till the policy in lieu of it was received by the insured or the insurance was cancelled and it is not established that in pursuance of a letter by the Insurance Company to its agent informing rejection of the proposal, the insured was informed about it by the agent, it cannot be held that there was any communication about the rejection of the proposal, to the insured. Consequently, risk covered by the cover-note subsisted.

R. Ratilal & Co. v. *N. S. A. Co.* (1); relied on.

If an agent acts in excess of his authority the liability of the principal remains when the third party enters into a contract with the agent under an honest belief in the existence of an authority to the extent apparent to him.

Firm Rai Bahadur Bansilal Abirchand v. *Kabulchand* (2); relied on.

Where the proposal for insurance for the structure, furniture, packing material and stock-in-trade at Multai was submitted by the plaintiff to the agent and Development Officer of the Insurance Company at Jabalpur by paying premium and a receipt and a cover-note was issued to the plaintiff, the Insurance Company cannot avoid the risk by contending that Multai was outside the Working jurisdiction of its agent and Development Officer and it was not open to them to accept the risk covering temporary structures. The plaintiff cannot be bound by the internal arrangements between the Insurance company, its agent and Development Officer for which he had no notice.

(1) A. I. R. 1964 S. C. 1396. (2) I. L. R. 1945 Nag. 204.

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There can be no doubt that misrepresentation or suppression of a material fact renders the contract of insurance void. There has to be utmost good faith and unless there has been full disclosure of material facts, the contract will be vitiated. An insured should not keep anything which might influence the insurer in deciding whether to accept or reject the risk. If the fact has any bearing on the risk, it is a material fact, if not, it is immaterial.

Where the value of the entire stock in trade was Rs. 60,000/- while it was insured only for Rs. 20,000/-at worth it is a case of under valuation and there is no material suppression of facts.

Rohini Nandan v. *O. A. & G. Corporation* (1) and *General Assurance Secy.* v. *Mohd. Salim* (2); relied on.

R. K. Thakur for the appellant.

N. S. Kale for the respondents.

Cur. adv. vult.

JUDGMENT

C. P. SEN, J.- Aggrieved by the decree for Rs.20,000/- as damages with costs and interest on account of loss due to fire passed by District Judge, Betul, in Civil Suit No. 3-B of 1969, the defendant no. 1 Insurance Company has preferred this appeal.

The facts not in dispute are that the plaintiff is a dealer in oranges and doing business at Santra Mandi in Multai. The defendant no. 1 is an Insurance Company while the defendants 2 & 3 were its Agent and Development Officer at Jabalpur at the relevant time. The plaintiff's case is that he purchases oranges in the Mandi and despatches them to Delhi and other places after packing them in wooden cases. For his business he has a structure in Santra Mandi of Multai where he has his office, stocks of oranges

(1) A.I.R. 1960 Cal. 696 (2) A. I. R, 1965 All. 561.

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and packing materials. The value of the stock in trade during orange season is not less than Rs.20,000/-. In the month of January 1969 almost all the dealers doing business at Santra Mandi at Multai got their shops and stock in trade insured by several Insurance Companies. The defendants 2 & 3 approached the plaintiff and at their instance he agreed to get his shop insured including the stock in trade, furnitures and packing materials to cover a risk of Rs.20,000/-. He, therefore, submitted a proposal form and paid premium of Rs.263/-. The defendant no. 3 issued a provisional receipt Ex.P.1 on 27.1.1969 and also cover-note Ex.P.2 of the same date provisionally covering the risk for the period 27.1.69 to 27.1.70. The proposal of the plaintiff was accepted but no policy of insurance was issued in the usual way and the plaintiff was under the impression because the premium amount was retained by the defendants. On 15.4.1969 long time after issuance of the said cover-note, a big fire broke out in the Santra Mandi of Multai due to electric short circuit, completely gutting to ashes the entire Santra Mandi. At the time of fire, the plaintiff had stock of oranges worth more than Rs.12000/-, besides the shop structure, furnitures and packing material, as it was then the peak season of oranges. The plaintiff lodged a report in the Multai police station on the same day and sent a telegram Ex.P.24 to the defendant no. 3 on 16-4-69. Then the plaintiff sent through his counsel a registered notice Ex.P.19 on 23. 4. 69 to the defendant no. 3. The plaintiff sent another registered notice through his counsel Ex. P. 20 on 19.7.69 to the defendant no. 1 with a copy to the defendant no. 3. The defendant no. 3 forwarded the two notices to the Branch Office of the defendant no. 1 at Nagpur on 28.7.69 and forwarded a copy Ex. P. 21 to the plaintiff requesting him that all future correspondence may be addressed to the

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Branch Office at Nagpur. Since nothing was heard so far, the plaintiff served another registered notice Ex. P. 22 through his counsel on 12.9.69 and this was replied by the defendant no. 1 intimating that the proposal was never accepted and consequently no liability arises as the particulars in the proposal form were found incorrect. The plaintiff, therefore, filed the present suit claiming Rs. 20,000/-as damages with interest from the date of the suit and costs.

The defendant no. 1 in its written statement submitted that one Kolhatkar (DW. 1) had contacted the defendant no. 3 on behalf of the plaintiff and furnished false information in the proposal form which was signed by the plaintiff. The proposal of the plaintiff was not accepted by this defendant and by its letter dated 5.2.69 Ex. D. 2 the defendant no. 3 was informed about the rejection of the proposal and he was further told to collect the cover-note from the plaintiff for cancellation and record. The defendant no. 1 did not receive the premium amount. The defendant no. 3 in his turn by letter no. 47 dated 21.2.69 requested Kolhatkar to inform the plaintiff that his proposal has been rejected and to collect the cover-note from the plaintiff. On the same day the defendant no. 3 also wrote to the plaintiff vide letter no. 48 to this effect. Accordingly, Kolhatkar contacted the plaintiff and informed him that his proposal has been rejected but the plaintiff did not return the cover-note saying that it has been misplaced. In spite of several visits by Kolhatkar, he could not collect the cover-note. The defendant no. 1 is, therefore, not liable to pay any damages because (i) the defendant no. 3 was not authorised to work at Multai as per his appointment letter, he being appointed to work only in the districts of Jabalpur, Satna, Damoh, Sagar and Chhatarpur. He

was also informed not to, accept insurance of goods kept in temporary, kuchcha and tatta sheds which is a third class risk. So even if the defendants 2 & 3 had accepted the premium and issued a cover-note, the defendant no. 1 is not bound by the same as they acted beyond their jurisdiction and against the rules and regulations of the Company. (ii) The plaintiff had suppressed and concealed material facts and gave inaccurate particulars in the proposal form and, as such, the cover-note was vitiated and there was no valid contract between the plaintiff and the defendants. (iii) The cover-note was provisional pending rejection or acceptance of the cover by the controlling branch of the defendant no. 1 and, in any case, it lapsed after a period of 30 days. The fire had occurred after the lapse of the cover-note. (iv) The defendant no. 1 did not accept the risk and the plaintiff was duly informed by the defendant no. 3 as well as through Kolhatkar who was representative of the plaintiff. The cover-note thus stood cancelled before the fire took place; & (v) the plaintiff has not given the schedule of the loss of goods destroyed in the fire. The defendants 2 & 3 in their written statement admitted that they had taken the proposal form from the plaintiff after receiving a premium of Rs. 263/-, the provisional premium receipt was passed and the cover-note was issued. Since the proposal was not accepted, the premium was refunded to the plaintiff through Kolhatkar vide cheque no. A-3234 dated 12.4.69 drawn on Co-operative Central Bank Ltd., Jabalpur. On one pretext or another, the plaintiff did not hand over the cover-note to Kolhatkar. The defendant no. 3 received telegram on 16.4.69 about the fire and the subsequent notices which he forwarded to the Branch Office at Nagpur. The defendant no.3 acted in his official capacity as Development Officer of the defendant no. 1 and had accepted

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the risk, issued a provisional cover-note and a provisional receipt and, as such, he cannot be made liable for the risk covered. These two defendants were neither necessary nor proper parties to the suit.

The learned District Judge came to the conclusion that at the relevant time the defendants 2 & 3 were working as Agent and Development Officer of the defendant no. 1 at Jabalpur. They had accepted the proposal of the plaintiff insuring his shop with stock in trade and other goods for Rs. 20,000/- after receiving the premium amount of Rs. 263/-. They then issued the cover-note which was valid till issuance of the insurance policy or rejection of the proposal and its intimation to the plaintiff. The cover-note did not lapse after a period of 30 days. The defendant no. 1 has failed to prove that Multai was out of the working jurisdiction of the defendants 2 & 3 and there were rules and regulations of company prohibiting acceptance of risk covering temporary structures. The defendants 2 & 3 acted in the discharge of their duties and they were only proper parties to the suit. The defendant no. 1 is bound by the contract entered into by the defendants 2 & 3 and the risk was covered under the cover-note till the rejection of the proposal was communicated to the plaintiff. No such communication was made to the plaintiff. The amount of the premium was also not refunded to the plaintiff. The cover-note was not vitiated because of any inaccurate particulars or misrepresentation of material facts. The loss suffered by the plaintiff was not less than Rs. 20,000/- and, therefore, decree for Rs. 20,000/- as damages has been passed with interest at 6% per annum from the date of the suit till realisation and costs.

The findings are assailed on the following

grounds :

(i) There is no enforceable insurance contract as the plaintiff's proposal was never accepted nor the premium was paid.

(ii) Material fact was suppressed inasmuch as the value of the stock in trade on the date of the fire was not less than Rs. 60,000/- but in the proposal the plaintiff gave the value to be Rs. 8000/-.

(iii) Since the fire broke out after the rejection of the proposal, the risk is not covered.

(iv) The defendants 2 & 3 exceeded their jurisdiction by taking the proposal form from the area which was beyond their charge and by accepting the risk covering temporary structure; and

(v) The plaintiff is not sure about his case against deft. no. 1 and that is why defendants 2 & 3 have also been made parties.

The plaintiff on the other hand supported the findings contending that the risk covered by the cover-note subsisted when the fire broke out because the rejection of the proposal was never intimated to the plaintiff. Even if Multai was beyond the jurisdiction of defendants 2 & 3, the plaintiff being a third party he cannot be bound by the internal arrangements between the defendants as he was never told about the limitations of the defendants 2 & 3.

The Supreme Court in *R. Ratilal & Co.* v. *N. S. A. Co.* (1) while dealing with a question whether duty was payable on cover-note has made the following observations regarding nature of a cover-note : "It may be shortly stated that a letter of cover no doubt contains a contract of insurance but

(1) A. I. R. 1964 S.C. 1396.

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it is not a policy of insurance in the common understanding of that word in the trade. It is well known that in order to obtain an insurance against the risk of fire the assured has first to send a proposal to the insurer and then the insurer takes a little time in making enquiries as to whether it would accept the proposal and undertake the obligation of covering the risk. He issues a policy only after he is satisfied that it would be a prudent business proposition to do so. Experience of trades people has however shown that some kind of protection for the interim period when the insurer is making the enquiries is necessary. This protection is given by what is called a 'letter of cover'. It is expressly a contract granting insurance for the period between its date and until a policy is prepared and delivered if one is eventually issued or otherwise up to a date mentioned in it, just as a period of 30 days is mentioned in the Interim Protection Note issued in this Case. A letter of cover is chargeable to stamp duty under Article 47 of the Stamps Act unless the letter cover is used only for compelling delivery of the policy mentioned in it".

In the present case the cover-note Ex. P. 2 covered risk to the extent of Rs. 20,000/-; Rs.6,000/- for the structure, Rs. 6000/- for furniture and packing materials and Rs. 8000/- for stock of oranges kept in the shop. The following note has been appended :

> "The Society does not assume any risk under this cover-note until the premium is paid by the insured and receipt is obtained. Please pay your premium by cheque in favour of the Hindusthan General Insurance Society Ltd. except in case of Bank Guarantee & Deposit account.
>
> The insurance is subject to the terms and conditions of the

Society's standard policy and Tariff terms, conditions and warranties.

Notwithstanding the period of liability mentioned in this cover-note, the insurance is held covered and continues to be valid until the policy in lieu of this cover-note is received by the Insured or the insurance is cancelled. In the event of cancellation, premium will be charged for the period during which the insurance has been in force."

A reading of this cover-note shows that the cover-note was valid till the policy in lieu of this cover-note was received by the insured or the insurance was cancelled. Cover-note was not valid for a period of 30 days only as was in the Supreme Court case. Since the cover-note is a contract of insurance it is governed by the Contract Act. Under section 66 of the Act revocation has to be in the same manner and subject to the same rules as apply to the communication or revocation of a proposal. Under section 4 the communication of a revocation is complete as against the person who makes it, when it is put into a course of transmission to the person to whom it is made, so as to be out of the power of the person who makes it; as against the person to whom it is made, when it comes to his knowledge. Therefore, in the present case the revocation of the proposal could be complete against the plaintiff when the same was communicated to him and not earlier. This position is admitted by the defendant no. 1 in its written statement, Para 17(d) that the cover-note stood cancelled when the information was received by the plaintiff.

First of all it has to be considered whether proposal was submitted by the plaintiff to the defendants 2 & 3 by paying premium of Rs. 263/- and the defendants thereafter issued receipt Ex. P. 1 and

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cover-note Ex. P. 2. This fact has been admitted by the defendants 2 & 3 and not seriously disputed by the defendant no. 1. Its main contention is that Multai was outside the working jurisdiction of the defendants 2 & 3 and it was not open to them to accept the risk covering temporary structures. Even assuming that this was so, still the plaintiff who is an outsider cannot be bound by the internal arrangements between the defendants for which he had no notice. A Division Bench of this Court in *Firm Rai Bahadur Bansilal Abirchand* v. *Kabulchand* (1) has held that if an agent acts in excess of his authority the liability of the principal remains if the third party enters into a contract with the agent under an honest belief in the existence of the authority to the extent apparent to him. This apart, there is no evidence in support of these submissions. P. N. S. Narain (DW. 3), who was Branch Secretary at Nagpur, could not say as to what was the area of work of the defendant no. 3. Similarly, the defendant no. 3 Jawaharlal Jain was also unable to state the area of his work. On behalf of the defendant no. 1 a copy of the appointment letter Ex. D. 3 has been produced which is not original nor it is signed. No rules or regulations of the company are produced to show that the defendants 2 & 3 were prohibited from accepting the proposal covering temporary structures. P. N. S. Narain though spoke of such a prohibition, but Jawaharlal Jain did not say that any such instruction was received by him from the Insurance Company. Admittedly the defendant no. 3 was the Development Officer and he was authorised to accept proposal, issue premium receipt and cover-note which were subject to their acceptance by the Branch Office at Nagpur. Therefore, there was a valid contract of insurance entered

(1) I. L. R. 1945 Cal. 204.

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into between the plaintiff with the defendant no. 1 through the defendants 2 & 3 who were its authorised agents. The contention of the defendants is that the cover-note is vitiated because the plaintiff had given under estimate of the stock of oranges in his proposal. According to the plaint allegation, the stock in trade was not less than Rs. 20,000/-but in his Rojnamcha sanha Ex.P.26 he mentioned the value to be Rs. 60,000/-. According to the defendant no. 1, because of this under-valuation the proposal is vitiated. This plea has been rightly rejected by the trial Judge. There can be no doubt that misrepresentation or suppression of a material fact renders the contract of insurance void. There has to be utmost good faith and unless there has been full disclosure of all material facts, the contract will be vitiated. It requires that insured should not keep back anything which might influence the insurer in deciding whether to accept or reject the risk. Assuming that the value of the stock in trade was Rs. 60,000/-while it was insured only for Rs. 20,000/-, at worst it is a case of under-valuation and there is no material suppression of facts. The thing would have been otherwise of goods worth Rs. 20,000/-were insured for Rs. 60,000/-. In *Rohini Nandan* v. *O.A. & G. Corporation* (1) it has been held that if the fact has any bearing on the risk, it is a material fact, if not, it is immaterial. In *Gen. Assurance Socy.* v. *Mohd. Salim*(2) it has been held that where the entire stock in trade and goods with the assured were worth more than Rs. 70,000/-but in order to pay a lesser premium he insured it for Rs. 20,000/-. It was held that there was no misrepresentation and the contract of insurance was not liable to be avoided due to excessive under-valuation.

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(1) A. I. R. 1960 Cal. 696. (2) A. I. R. 1965 All. 561.

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Now the question remains whether the proposal was rejected on 5.2.69 and the same was communicated to the plaintiff on 21.2.69. Ex.D.2 is the copy of the letter sent by the Insurance Company to the defendant no. 3 on 5.2.69 informing that the proposal has been rejected and directing him to take back the cover-note from the plaintiff. There is an endorsement on this letter by defendant no. 3 dated 10.2.69 that the Insurance Company may reconsider the matter as it was a first case in that area. There is further endorsement of regret. So the learned trial Judge was not justified in holding this letter to be not admissible as the original of the letter has not been produced. In view of the endorsements, it is a original letter and is admissible in evidence, but this letter does not advance the case of the defendant no. 1 in any way. This is a communication to the defendant no. 3 and unless it is proved that in pursuance of this letter the plaintiff was informed by defendant no. 3, it cannot be held that there was any communication about rejection of the proposal to the plaintiff. It is pleaded that the defendant no. 3 in turn issued letter no. 47 to Kolhatkar and letter no. 48 to the plaintiff on 21.2.69 informing the rejection of the proposal, but these letters have not been produced. It has further been averred that there was a series of correspondence between the defendant no. 3 and Kolhatkar but those correspondence have not been placed on record. It is true that at the time of evidence Jawaharlal Jain (DW.2) volunteered to produce certain documents which he had brought but the same were rightly not permitted to be taken on record in the absence of any application under Order 13, rule 2 of C.P.C. Jawaharlal Jain being a party to the suit, he could not have been permitted to produce these documents without making

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out a case for their production at a later stage. Nothing also prevented the plaintiff from summoning those record. But then Kolhatkar who was in possession of the original letters has deposed that he has destroyed all the letters. A dispute having arisen between the parties, his conduct in destroying the letters, if that is a fact, is most unnatural. It may also be mentioned that Kolhatkar is a friend of defendant no. 3 and not of the plaintiff as has been alleged by the defendant no. 1. At the relevant time Kolhatkar was Development Officer of the Life Insurance Corporation at Multai. Kolhatkar (DW.1) and Jawaharlal Jain (DW.2) have both been found to be unreliable witnesses. It is difficult to believe that Kolhatkar would have handed over the premium amount of Rs. 263/-without obtaining any receipt from the plaintiff. He was not sure what was the amount refunded and also about the date. According to him, he had handed over the amount either two days prior or two days after the fire. It is difficult to believe that two days after the fire, the plaintiff would have taken back the premium amount when his shop was already gutted by fire. It has been pleaded that the defendant no. 3 had issued a cheque no. A. 3234 dated 12.4.69 drawn on Co-operative Central Bank, Jabalpur, to Kolhatkar and Kolhatkar has deposed that he had encashed the cheque and then handed over the amount to the plaintiff. The cheque was of the Co-operative Bank, Jabalpur and it could not have been encashed at Chhindwara immediately, the encashment would have taken at least 7 days. Therefore, the story of refund of premium has rightly not been accepted. It may be pertinent to note that in spite of telegram and registered notices, the defendant no. 1 never came forward with the story that the proposal has been rejected and the premium refupded. Only reply was that proposal

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was rejected because the particulars given were incorrect. The defendant no. 3 did pay the premium to the defendant no. 1 by issuing a cheque Ex. D. 1 but it was not honoured since the proposal was not accepted. If the defendants 2 & 3 acted beyond their jurisdiction, the defendant no. 1 would not have deposited the cheque for encashment in the bank. It has been found that defendants 2 & 3 are proper parties to the suit and, therefore, it cannot be said that the plaint is shaky because of joinder of defendants 2 & 3 as parties. Obviously, the liability is of the defendant no. 1 but by way of abundant caution the plaintiff joined the defendants 2 & 3 as parties because in the reply notice the defendant no. 1 had repudiated the contract.

Accordingly, the appeal fails and it is dismissed with costs. Counsel's fee as per schedule, if certified.

Appeal dismissed.

APPELLATE CIVIL

Before Mr. Justice G. L. Oza.

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Mar. 27

HARISINGH, Appellant*
v.
MADANLAL and another, Respondents.

Accommodation Control Act, Madhya Pradesh (XLI of 1961)—Section 12(1)(a),(e),(f) and section 12(4)—Notice demanding arrears of rent and terminating tenancy on other grounds—Such composite notice is valid—Tenant bound to comply with

*Second Appeal No. 571 of 1974, from the appellate decree of K.K. Kadomboude Addl. Distt. Judge, Indore, dated 23rd September 1971, confirming the decree of R. S. Bardia, Civil Judge Class II, Indore, decided on the 21st December 1972.

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demand for arrears of rent—Tenant failing to pay arrears within 2 months—Decree under section 12(1)(a) liable to be passed against him—Accommodation Control Act, Madhya Pradesh, 1961, Section 12(1)(a) and 12(4) and Civil Procedure Code, Order 6, rule 17—Suit premises transferred during the pendency of suit—Purchaser becoming plaintiff—Amendment of plaint after lapse of a year seeking eviction of tenant on ground of bona-fide *requirement for business—Bar of Section 12(4) operative—Decree for eviction under section 12(1)(f) cannot be passed.*

Where a composite notice was given by the landlord to the tenant on 1.4.1966, demanding arrears of rents for the month of March, 1966 and simultaneously calling upon the tenant to vacate the premises by midnight of 30th April, 1966, and the notice was served on the tenant on 7.4.1966 and the tenant failed to pay the arrears of rents within the time prescribed under section 12(1)(a) of the M. P. Accommodation Control Act, 1961, the landlord is entitled to a decree for eviction of the tenant under section 12(1)(a) of the Act and it is not open to the tenant to contend that rent should have been demanded during the subsistence of the lease and not on its termination and thereby no opportunity was given to him to pay off arrears of rent and protect his lease and, it is not a valid notice as contemplated by section 12(1)(a) of the Act.

Ram Krishna Prasad v. *Mohd. Yahia* (1); distinguished.

No suit for eviction of a tenant is maintainable under sub-section (1) of Section 12 on grounds specified in clauses (e) and (f) unless a period of one year has elapsed from the date of acquisition. If an amendment in the plaint is made; it takes effect on the date of the suit and plaint remains a plaint presented originally hence when the tenancy premises is transferred during the pendency of the suit for eviction and the transferee is brought on record as plaintiff, he is not entitled to seek eviction of the tenant on grounds provided for under clauses (e) and (f) as restrictions contained in Sec. 12(4) of the M. P. Accommodation Control Act, 1961, will be operative and it cannot be overcome by filing an amendment if one year has elapsed and the suit is still pending after the new landlord has acquired the property.

B. Banerjee v. *Smt. Anita Pan* (2) and *M/s R. B. Contractor & Co.* v. *Arunkumar and another* (3); distinguished.

(1) A. I. R. 1960 All. 482. (2) A. I. R. 1975 S. C. 1146.
(3) S. A. No. 170 of 1974, decided on 30th June 1976 (Indore).

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G. M. Chafekar for the appellant.

S. D. Sanghi for the respondents.

Cur. adv. vult.

JUDGMENT

G.L. OZA J.-This appeal has been filed by the appellant-tenant against the judgment and decree passed by Civil Judge Class II, Indore, and maintained on appeal by the Additional District Judge, Indore, by his judgment dated 23-9-1974.

Madanlal respondent No. 1 filed the present suit on 13-10-1966 against the defendant-appellant for ejectment and arrears of rent and future *mesne* profits. The premises in question are House No. 494 Mahatma Gandhi Road, Indore. According to the plaintiff-respondent, the property belonged to a joint family known as Messrs .Jamnalal Ramlal Kimti and the plaintiff Madanlal was its *karta*. It was alleged that the appellant-defendant was a tenant in the suit house paying Rs. 111/- per month as rent. The tenancy began from the 1st of every calendar month. It was also alleged that the suit house was given on rent to the defendant-appellant for purposes of his business. The defendant had failed to pay rent due from 1-3-1966 and thus the plaintiff-respondent claimed a decree for eviction on the ground under section 12(1)(a) of the M.P. Accommodation Control Act (hereinafter referred to as 'the Act'). It was also alleged that the plaintiff needed the premises for the purpose of starting a cloth business for his major son and that for this purpose he has no other suitable accommodation of his own in the city. A plea of sub-letting also was raised. The plaintiff-respondent gave a registered notice dated

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1-4-1966 which was received by the defendant-appellant on 7-4-1966. By this notice the plaintiff-respondent terminated the tenancy of the appellant by midnight of 30th April 1966 and also demanded arrears of rent.

The appellant-defendant in his initial written statement dated 23-12-1966 admitted that the house belonged to Messrs Jamnalal Ramlal Kimti. The relationship of landlord and tenant also was admitted. But it was contended that the house was taken on rent not for business only but for residence as well as business. It was alleged that the defendant-appellant was residing in the premises in the upper portion and running a shop on the ground floor. It was also contended that the tenancy does not commence from the 1st of every month. It was further pleaded that initially the rent was Rs. 93/- per month which was later raised to Rs. 111/- per month and it was alleged that in fact the plaintiff-respondent demanded Rs. 350/- p m. which the defendant-appellant refused to pay and, therefore, the suit was filed. Genuine requirement of the plaintiff also was denied. The validity of notice was also challenged.

By an application dated 25-4-1968 the defendant-appellant sought an amendment of the written-statement alleging that Madanlal is not the *karta* of Messrs Jamnalal Ramlal Kimti. It was further alleged that Jamnalal Ramlal Kimti was accepting rent in the name of Madanbai and, therefore, Madanlal had no right to file the present suit.

On 19-1-1970 Lakhiprasad respondent No. 2 made an application that he has purchased the suit house on 23-12-1969 from the former owner and, therefore, prayed that his name be added as plaintiff.

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This was allowed by the trial Court by its order dated 13.4.1970. Thus, Lakhiprasad was joined as plaintiff. He further submitted an application to amend the plaint. By this amendment it was alleged that the defendant had given over the suit house to his son under some fake family arrangement. It was also alleged that portion of the premises has been sub-let. It was also alleged that the plaintiff Lakhiprasad needed the premises for both his residence as well as business and that he had no other suitable accommodation of his own in the town. Thus, initially the suit filed by Madanlal for eviction was based on two grounds: one falling under section 12 (1) (a) and another falling under section 12 (1) (f) of the Act. By amendment Lakhiprasad added two more grounds: one about *bona fide* requirement of residence, and another-sub-letting, i. e. under section 12 (1) (a) and 12 (1) (b).

The learned trial Court decreed the suit on the ground under section 12 (1)(a), that the defendant-appellant has failed to pay rent as required, and on the ground of sub-letting. The learned lower appellate Court held that sub-letting has not been proved but maintained the decree under section 12 (1) (a). No decree was granted under section 12 (1) (f); but the learned lower appellate Court examined the requirement alleged by the new plaintiff Lakhiprasad and held that the need is established. But it did not grant a decree on that ground as Lakhiprasad could not file a suit for eviction till after one year had elapsed after he had acquired the property; and as this suit was instituted before respondent No. 2 acquired the property the learned Court below did not grant a decree on that ground.

Learned counsel appearing for the appellant

contended that no decree under section 12 (1) (a) could be passed as there was no notice demanding arrears of rent as the notice given by plaintiff-respondent No. 1 terminated the tenancy of the appellant on 30th April 1966. According to learned counsel, therefore, there was no demand of rent during the subsistence of the tenancy and thus it could not be said to be a proper notice under section 12 (1) (a). It was also contended that notice was issued on 1st of April and the only rent which was payable was for the month of March which became payable on 1st April. Thus, in fact, there were no arrears of rent and on that ground also decree for eviction under section 12 (1)(a) could not be passed. It was not disputed by learned counsel that in fact the rent demanded in accordance with the notice was not paid as required and that there were defaults committed by the appellant in subsequent deposits of rent in the court.

Learned counsel appearing for the respondent contended that the rent for the month of March became due on the midnight of 31st March 1966. Thus, on 1st April there was arrear of rent payable to the respondent-plaintiff which was rent for the month of March. According to learned counsel this notice dated 1.4.1966 was served on the appellant on 7th April. Thus, when the demand of rent reached the defendant-appellant there was arrear of one month as admittedly on 7th April the tenant was in arrears of rent. Thus, according to learned counsel it could not be disputed that a notice was sent demanding arrears of rent. As regards validity of notice learned counsel contended that under section 12 (1) (a) what is contemplated is that a demand of arrears of rent should be made. The notice clearly alleged that the tenant should pay off the arrears and obtain receipt.

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This, according to learned counsel, was clearly a demand of arrears of rent. He contended that it is not required that demand should be made during the subsistence of the tenancy. In fact, when arrears of rent were demanded and time up-to-date on which the tenancy was terminated was given, it does not mean that there was no demand of arrears of rent. He contended that the decision on which an attempt was made by learned counsel for the appellant to rely, i.e., *Ram Krishna Prasad* v. *Mohd. Yahia* (1), is of no help as that decision was given in the special circumstances appearing in that case.

Learned counsel further contended that so far as respondent No. 2 is concerned, his genuine requirement has been found as a fact by the learned lower appellate Court. But decree on that basis was not passed because of the judgment of this Court noted in *Rajaram* v. *Rameshwar* (2). But according to learned counsel, in view of the decision of their Lordships of the Supreme Court reported in *B. Banerjee* v. *Smt. Anita* Pan (3), now it could not be contended that a decree could not be passed merely because the suit initially was filed before the transfer when the application submitted by respondent No. 2 making out a case of genuine requirement was made for the first time after one year after he acquired the property. Learned counsel therefore contended that in view of the decision of their Lordships of the Supreme Court referred to above, the view taken by this Court in the case referred to above, no longer remains good law. And thus, respondent No. 2 is also entitled to a decree for eviction on the ground of genuine requirement.

(1) A. I. R. 1960 All. 482.
(2) 1971 M. P. W. R. Note 43=C. R. No. 512 of 1969, decided on the 22nd Sept. 1970 (Indore).
(3) A. I. R. 1975 S.C. 1146.

Learned counsel for the appellant, in reply, contended that the decision reported in A. I. R. 1975 S. C. 1146 (*supra*) is not a case laying down any interpretation of law as regards the Madhya Pradesh Accommodation Control Act is concerned. Before their Lordships of the Supreme Court, according to learned counsel, there was a special situation arising out of an amendment in the West Bengal Act and their Lordships were considering the impact of the amending Act and felt that in spite of the fact that the Act was amended, because of the restriction to file a suit within a particular time the relief could not be granted. According to learned counsel, thus their Lordships felt that the net result is that whereas on the one hand, the amendment gives a relief but that relief could not be granted and in order to resolve that special difficulty in view of the amendment of that Act, their Lordships observed what has been relied upon by learned counsel for the respondent. Learned counsel for the appellant therefore contended that it could not be said that this is the law laid down by their Lordships of the Supreme Court and will even be applicable to the provisions contained in the Madhya Pradesh Accommodation Control Act.

It is not in dispute that the notice which was issued on 1st April 1966 was received by the appellant-defendant on 7th April 1966. It is also clear that the rent for the month of March fell due after midnight of 31st March 1966 and thus on 1st of April or on 7th of April the appellant-tenant was in arrears with regard to a month's rent, i. e. rent for the month of March. This factual aspect of the matter is not in dispute. It, therefore, cannot be contended that there were no arrears at all on the basis of which the landlord could not have filed a suit under section 12(1)(a) of the Act.

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As regards the notice of demand, the language of section 12(1)(a) of the Act does not provide any specific mode of notice of demand. That section reads:

> "12. (1) Notwithstanding anything to the contrary contained in any other law or contract, no suit shall be filed in any Civil Court against a tenant for his eviction from any accommodation except on one or more of the following grounds only, namely;
>
> (a) that the tenant has neither paid nor tendered the whole of the arrears of the rent legally recoverable from him within two months of the date on which a notice of demand for the arrears of the rent has been served on him by the landlord in the prescribed manner;"

The contention advanced by learned counsel for the appellant is that the rent should have been demanded during the subsistence of the lease and not on termination and in support of his contention learned counsel placed reliance on the decision of the Allahabad High Court noted above. By the notice dated 1-4-1966 the plaintiff-respondent terminated the tenancy by midnight of 30th April 1966 and also demanded arrears of rent. Admittedly, the tenancy was terminated not on the sole ground of non-payment of arrears of rent but also on additional ground of genuine requirement. But it is clear from the notice that the arrears were demanded and even learned counsel for the appellant could not contend that the notice did not incorporate words indicating a demand of arrears of rent. The contention advanced by learned counsel is that the tenant was called upon to pay arrears of rent and simultaneously was also called upon to vacate the premises by midnight of 30th of April 1966. And it is on this ground that learned counsel contended that the.

tenant-appellant was not given an opportunity to pay off arrears and protect his lease as that came to an end by the midnight of 30th April. This argument has no substance as apparently, so far as failure to pay off the arrears is concerned, it was always open to the appellant-tenant to pay it off so that a ground under section 12 (1)(a) would not exist. The decision relied on by learned counsel (AIR 1960 Allahabad 482) is a decision where there were peculiar facts as is clear from paragraph 4 of that judgment :

> "(4) In my opinion the learned Civil Judge was wrong in his view that any tender of payment by a tenant prior to the service of notice of demand under S. 3(1)(a) is irrelevant to the question whether he had committed wilful default. The appellant had explained in his defence that he had been unable to make payment because the landlord would not accept it whenever it was tendered. If this explanation was true it is obvious that he was never in default and the landlord was deliberately manoeuvring him into a position where he could be accused of being a defaulter.
>
> If a landlord without lawful excuse refuses to accept rent tendered by the tenant, he cannot afterwards treat the tenant as a defaulter or serve a notice of demand under S. 3 (1)(a) as an excuse for filing a suit for ejectment. Such a notice *mala fide* and a fraud on the section. The learned Judge was, therefore, in error in treating as irrelevant the appellant's evidence that he had tendered payment several times before receiving the notice of demand."

And it is in this context that his Lordship observed :

> "But whatever may be the language of the notice demanding arrears of rent under S. 3 (1)(a) of the Control of Rent and Eviction Act it must fulfil one condition; it must give the tenant an opportunity to save his tenancy from the consequences of default by paying the rent. The

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demand may even be coupled with a conditional termination of tenancy, such as "If you fail to pay within one month of the receipt of this notice, the tenancy will be at an end". This combined notice does not violate the purpose of the notice required by S. 3(1)(a), for it preserves the tenant's right to save his tenancy by paying all the arrears within one month. But if the notice unconditionally terminates the tenancy and asks the tenant to vacate the accommodation irrespective of whether he pays the arrears or not, it is not a notice of demand as required by S. 3 (1)(a)."

It appears that in the notice before the Allahabad High Court the only ground was demand of arrears and it appears, as observed in the passage quoted above, that the notice unconditionally terminated the tenancy whether the tenant pays arrears or not. And in the context of the facts quoted above, it appears that the Learned Judge felt on the facts of that case that that notice of demand was not proper although his Lordship observed that a composite notice could not be said to be bad. In the present case, the notice is a composite notice; the tenancy is terminated and two grounds are urged; demand for arrears is specifically made. Thus, in my opinion, this decision of the Allahabad High Court also does not help the appellant and it could not be held that the notice of demand in the case in hand is not a legal notice of demand of arrears of rent.

Learned counsel for the respondent, on the basis of the decision reported in AIR 1975 SC 1146 (*supra*) contended that a decree on the ground of genuine requirement of present landlord-respondent also could be passed. This decision of their Lordships has considered the impact of an amendment in the West Bengal Premises Tenancy (Second Amendment) Act (34 of 1969). In this decision the validity of the amendment was challenged and their Lordships held

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it to be valid and in that context felt that the amendment has to be given effect to. Their Lordships observed :

"There is no doubt that the purpose of the law is to interdict, for a spell of three years, institution of suits for eviction on grounds (f) and (ff) of sub-s. (3A). Section 13 of the Amending Act makes it expressly applicable to pending actions, so much so the operation of the prohibition is not simply prospective as in the Kerala case cited before us. *Neelakandhayya Pillai* v. *Sankaran* (1). Section 13, fairly read, directs that the amendment made by S. 4 shall have affect in respect of suits, including appeals, pending at the commencement of the Act. We are, therefore, bound to give effect to Section 4 in pending actions, regardless of isolated anomalies and individual hardships. As earlier noticed, Section 4 has two limbs. It amends a Section 13 of the basic Act by substituting two new clauses (f) and (ff) in place of the old clause (f) of sub-section (1) of Section 13. Secondly, it forbids, for a period of three years from the date of acquisition, suits by new acquires of landlord's interest in premises, for recovery of possession on any of the grounds mentioned in cl. (f) or clause (ff) of sub-s. (i). The result of these two mandatory provisions has to be clearly understood. For one thing, although the old cl. (f) is substantially similar to the present cls. (f) and (ff), the latter impose more severe restrictions protecting the tenants. Much more has to be proved by the landlord now before he can get eviction than when he was called upon to under the earlier corresponding provision of the basic Act. Moreover, the three years prohibition against institution of the suit is altogether new. It follows, therefore, that on the present allegations and evidence the landlord may not get a decree, his suit having been instituted at a time when he could not have foreseen the subsequent enactment saddling him with new conditions."

Further, their Lordships observed :-

"The bigger roadblock in the way of the plaintiff in a pending

(1) 1961 Ker. L. T. 755.

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action lies in the prohibition of the institution of the suit within three years of transfer from the landlord. Indeed, such prohibitions are common in rent control legislation as has been noticed by the Calcutta High Court and is found even in agrarian reforms (vide Malabar Tenancy Act, as amended by Act VII of 1954, Madras). Section 13 of the Amendment Act compels the postponement of the institution of the suit (including appeal) for a period of three years from the date of the transfer. In both the cases before us, the suits were instituted within the prohibited period of three years. The argument therefore is that the suits must be straightway dismissed, the institution being invalid. We do not think that this consequence is inevitable. "To institute" is to begin or commence, in plain English. The question then is whether the suit can be said to begin on the date it was filed in 1961 or 1964 as the case may be. Here we have to notice a certain nice but real facet of sub-sec. (3A). The prohibition clamped down by sub-section (3A), carefully read is on suits for recovery of possession by transferee landlords on any of the grounds mentioned in cl. (f) or cl. (ff) of sub-s. (1). Obviously the suits with which we are concerned are not for recovery on grounds contained in cl. (f) or cl. (ff) of sub-s. (1). Obviously the suits with which we are concerned are not for recovery on grounds contained in cls. (f) and (ff). They were based on the repealed cl. (f) of S. 13 of the basic Act. Strictly speaking, sub-section (3A) brought in by S. 4 of the Amending Act applies only if (a) the suit is by a transferee landlords; (b) it is for recovery of possession of premises and (c) the ground for recovery is what is mentioned in cl. (f) and cl. (ff) of sub-s. (1). Undoubtedly the third condition is not fulfilled and therefore sub-s. (3A) is not attracted. This does not mean that the suit can be proceeded with and decree for recovery passed, because S. 13 of the basic Act contains a broad ban on eviction in the following words :

"13 (1) Notwithstanding anything to the contrary in any other law, no order or decree for the recovery of possession of any premises shall be made by any Court in favour of the landlord against a tenant except on one or

more of the following grounds, namely' (emphasis ours)

Since the new cls. (f) and (ff) are included by the Amendment Act in Section 13 of the basic Act and since the suits we are concerned with, as they now stand, do not seek eviction on those grounds they will have to be dismissed on account of the omnibus inhibition on recovery of possession contained in S. 13 itself."

And it is in this context, that their Lordships felt the difficulty created by the amendment, that their Lordships tried to find a solution in the special circumstances that existed and observed :

"A just resolution of this complex situation was put by us to counsel on both sides and the learned Advocate representing the State readily agreed that the policy of the legislation and the conditions in the Amendment Act would be fulfilled if the interpretation we proposed were to be accepted. We are satisfied that as far as possible courts must avoid multiplicity of litigation. Any interpretation of a statute which will obviate purposeless proliferation of litigation, without whittling down the effectiveness of the protection for the parties sought to be helped by the legislation, should be preferred to any literal, pedantic, legalistic or technically correct alternative. On this footing we are prepared to interpret Section 13 of the Amendment Act and give effect to S. 4 of that Act. How do we work it out ? We do it by directing the plaintiffs in the two cases to file fresh pleadings setting out their grounds under cls. (f) and/or (ff) of sub-s. (1) if they so wish. On such pleading being filed we may legitimately hold that the transferee landlord institutes his suit on grounds mentioned in cls. (f) or (ff) of sub-sec. (1) on that date. It is only when he puts in such a pleading setting out the specific ground covered by sub-sec. (3A) of Section 13 that we can say he has begun or instituted a suit for the recovery of possession of the premises on that ground. Institution of a suit earlier has to be ignored for this purpose since that was not based on grounds covered by cls. (f) and/or (ff) and is not attracted by sub-section (3A). He begins proceedings on these new grounds only

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when he puts in his pleading setting out these grounds. In spirit and in letter he institutes his suit for recovery on the new grounds only on the date on which he puts in his new pleading. We cannot be ritualistic in insisting that a return of the plaint and a representation thereof incorporating amendments is the sacred requirement of the law. On the other hand social justice and the substance of the matter find fulfilment when the fresh pleadings are put in, subject of course to the three-year interval between the transfer and the filing of the additional pleading. Section 13 of the Amendment Act speaks of suits including appeals. It thus follows that these fresh pleadings can be put in by the plaintiff either in the suit, if that is pending, or in appeal or second appeal, if that is pending. There upon, the opposite party, tenant, will be given an opportunity to file his written statement and the Court will dispose of it after giving both sides the right to lead additional evidence. It may certainly be open to the appellate Court either to take evidence directly or to call for a finding. Expeditious disposal of belated litigation will undoubtedly be a consideration with the court in exercising this discretion. The proviso to sub-sec. (eA) can also be complied with if the plaintiff gets the permission of the Rent Controller in the manner laid down therein before filing his fresh pleading."

And realising that their Lordships could reconcile the position with difficulty, their Lordships further observed:

> "We are conscious that to shorten litigation we are straining language to the little extent of interpreting the expression 'institution of the suit' as amounting to filing of fresh pleading. By this construction we do no violence to language but, on the other hand, promote public justice and social gain, without in the least imperilling the protection conferred by the Amendment Act."

It is, therefore, clear that by this decision their Lordships do not lay down the law that in all cases where during the pendency of a suit a new landlord enters as purchaser, if the suit is not disposed of

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early he can by an amendment after the lapse of time required under the law continue the suit on his own grounds. In facts, before their Lordships the question of our Accommodation Control Act was not there. Apart from it, the peculiar situation arose because of an amendment which was given retrospective effect and their Lordships held it to be valid and that ultimately created a situation which could not be reconciled except by following the course as their Lordships did. Apparently therefore this decision could not be used as a precedent to hold in the present case that a subsequent landlord after the lapse of a year by amendment could introduce his own requirement.

Learned counsel for the respondent placed reliance on a decision of a Single Judge of this Court in *M/s R. B. Contractor & Co.* v. *Arunkumar and another* (1) where according to learned counsel this Supreme Court decision was followed. In that case, in fact the new landlord had filed a separate suit but it was consolidated and it was in that context that the learned Single Judge observed that this consolidation could not be said to be bad in view of the Supreme Court decision. In any event, it does not lay down the law that the restriction contained in sub-section (4) of section 12 of the Madhya Pradesh Accommodation Control Act will not be operative and it could be overcome by filing an amendment if one year has elapsed and the suit is still pending after the new landlord has acquired the property. Sub-section (4) of section 12 provides:

> "12 (4) Where a landlord has acquired any accommodation by transfer, no suit for the eviction of tenant shall be maintainable under sub-section (1) on the ground specified

(1) S. A. No. 170 of 1974, decided on the 30th June 1976 (Indore).

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in cl. (a) or Cl. (f) thereof, unless a period of one year has elapsed from the date of the acquisition."

This in clear terms states that no suit for eviction of a tenant is maintainable under sub-section (1) on grounds specified in clauses (e) and (f) unless a period of one year has elapsed from the date of acquisition. It is well settled that if an amendment in the plaint is made it takes effect on the date of the suit and the plaint remains a plaint presented originally. Thus, in my opinion, the contention advanced by learned counsel for the respondent cannot be accepted and no decree could be passed on the basis of genuine requirement of the respondent landlord who has acquired the property during the pendency of the suit.

In the light of the discussion above, therefore, the appeal is dismissed. But in view of the fact that appellant has to vacate the premises he is permitted three months' time to vacate the premises failing which the decree passed by the Court below which is affirmed shall be given effect. In the circumstances of the case, parties are directed to bear their own costs.

Appeal dismissed.

CIVIL REVISION

Before Mr. Justice C. P. Sen.

1978

Apr. 26

M/S AMAR TALKIES, SAGAR, Applicant*

v.

APSARA CINEMA, SAGAR and others, Non-applicants.

Civil Procedure Code (V of 1908)—Order 39, rules land 2—Temporary

*Civil Revision No. 439 of 1978, for revision of the Order of R. L. Choudhari District Judge, Sagar, dated the 16th March 1978.

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Injunction—Principles for grant of—Temporary injunction granted by the trial Court—Jurisdiction of Appellate Court to interfere with the discretion of the trial Court—Extent of— Prima facie *case—Nature of—Suit contract not subsisting—No* Prima facie *case made out—Irreparable injury—Requirements of.*

Wherein a suit filed by the plaintiff praying for the reliefs of declaration, permanent injunction and mandatory injunction, no challenge has been made to the existence, effect or validity of the arbitration agreement nor the plaintiff wants the arbitration agreements to be amended, modified or set aside, Section 32 of the Arbitration Act has no application and the plaintiff's suit is not barred by that section.

It is now well settled that grant of a temporary injunction under the powers conferred by Order 39, rules 1 and 2 of the C. P. Code is a matter of discretion of the Judge trying the suit. If the Judge rightly appreciates the facts and applies to those facts the true principles, that is a sound exercise of judicial discretion and the Court hearing an appeal from such an order would not ordinarily interfere.

Durga Das Das v. *Nalin Chandra Nandan* (1); relied on.

When the contract provided that the suit contract would automatically terminate by efflux of time, the appellate Court is entitled to interfere with the order passed by the trial Court granting temporary injunction.

It is settled principle that a temporary injunction can be granted if the plaintiff has a *prima facie* case, the balance of convenience is in plaintiff's favour and the plaintiff would suffer an irreparable injury if the injunction is not granted.

American Cyanamid Co. v. *Ethicon Ltd.* (2), *Fellowes and another* v. *Fisher* (3) and *J. T. Stratford & Son Ltd.* v. *Lindley* (4); referred to.

Shankarlal Rathore v. *State of M. P.* (5); distinguished.

When the plaintiff has no subsisting contract, their being no

(1) A. I. R. 1934 Cal. 694. (2) (1975) 1 All E. R. 504.
(3) (1955) 2 All E. R. 829. (4) (1964) 3 All E. R. 102.
(5) 1978 J. L. J. 51.

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prima facie case, the plaintiff is not entitled to a temporary injunction.

When the trial Judge has not given any finding that any irreparable injury would be caused to the plaintiff but only held that the plaintiff would suffer great damages, that is not the requirement of law.

Mohd. Latif Choudhary v. *Smt. Amritkala Bavela* (1); relied on.

B. C. Varma and *S. S. Jha* for the applicant.

Y. S. Dharmadhikari for the non-applicants.

Cur. adv. vult.

ORDER

C. P. SEN. J.--The plaintiff has preferred this revision against the order of the lower appellate Court vacating the *ad interim* injunction granted to it by the trial Court restraining the defendants from exhibiting the film "Ganga-ki-Sougandh" in the Apsara Cinema at Sagar.

The plaintiff, Amar Talkies and defendant No. 1' Apsara Cinema are exhibiting cinema films in two different talkies at Sagar bearing their respective names. Defendant No. 2-M/s. Prabodh Pictures and defendant No. 3 M/s. Veena Raju Pictures are distributors of films. All the parties in this suit are members of the Central Circuit Cine Association, Bhusawal (hereinafter referred to as the C. C. C. A) and subject to the rules framed by the said Association, including the Standard Film Renting Contracts.

The plaintiff's case is that on 5-12-1975 it entered with a written agreement with the defendant No. 2-M/S. Prabodh Pictures for exhibition of the

(1) 1960 M. P. L.J. 725.

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film 'Ganga-ki-Sougandh' in the Amar Talkies at Sagar. Rupees 5,000/-were paid in advance by the plaintiff to the defendant No. 2 and the balance amount of Rs. 20,000/-was to be paid one week in advance at the time of taking delivery of the prints from the producers. The plaintiff is always ready and willing to fulfil the part of its contract, but inspite of subsisting contract with defendant No.2, defendant No. 3-M/S. Veena Raju Pictures, which is a sister concern of the defendant No. 2, has entered into a written agreement with the defendant No. 1-Apsara Cinema for exhibition of the film 'Ganga-ki-Saugandh' in the Apsara Cinema at Sagar. In fact the prints of the film had been delivered to the defendant No. 1 and the film was to be exhibited from 16-2-1978. The plaintiff has prayed for the following reliefs :

(i)- that, a declaration be given that the plaintiff alone is entitled to exhibit the film 'Ganga-ki-Sougandh' in the Amar Talkies at Sagar ;

(ii)-the defendant No. 1 be restrained permanently from exhibiting the film 'Ganga-Ki-Sougandh' in the Apsara cinema ;

(iii)-a mandatory injunction be issued to the defendant Nos. 2 and 3 to allow the plaintiff to exhibit the film 'Ganga-Ki-Sougandh' in the Amar Talkies, as per the contract dated 5-12-1975.

The plaintiff has also filed an application under O. 39, rules 1 and 2, C. P. C. for a temporary injunction restraining the defendants from exhibiting the film 'Ganga-ki-Sougandh' at Sagar. According to the plaintiff, if the temporary injunction is not granted, the good will earned by it for the last so many years would be seriously damaged and it would lose its reputation as an exhibitor. The loss so sustained

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could not be compensated in terms of money. If the temporary injunction is not granted, the object of the suit will be frustrated and the plaintiff will suffer an irreparable injury.

The learned trial Judge granted an *ex-parte ad interim* temporary injunction on 8-2-1978 restraining the defendants from exhibiting the film 'Ganga-ki-Sougandh' at Sagar. Notices were issued to the defendants to show cause, returnable by 27-2-1978. It appears that on 17-2-1978 the defendants filed two applications, one was an application under S. 34 of the Arbitration Act for stay of the suit on the ground that there is an arbitration clause in the plaintiff's contract dated 5-12-1975 and that all disputes are to be settled by the Court of Arbitrators mentioned therein. In fact the dispute had already been referred to the Court of Arbitrators and an interim injunction had been issued by the Arbitrators restraining the plaintiff from interfering with the exhibition of the film 'Ganga-Ki-Sougandh' in the Apsara Cinema at Sagar. The second application was filed under S. 151 of the Code for vacating the *ad interim* temporary injunction. The defendants also pleaded that the plaintiff's contract with the defendant No. 2, dated 5-12-1975, expired by efflux of time on 5-12-1977 and as such, the plaintiff is not entitled to any relief on the basis of that contract. The defendants did not file any reply as such to the plaintiff's application for a temporary injunction.

The learned trial Judge came to the conclusion that since it has been pleaded by the defendants that the plaintiff's contract came to an end by efflux of time, the arbitration clause also came to an end and, therefore, there was no question of staying the

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suit. The trial Judge was very much influenced because of the fact that the defendants did not file any reply to the plaintiff's application for a temporary injunction. He also was influenced from the fact that similar contracts executed earlier have been enforced by the parties, although the period of those contracts had expired long back. This being the important question as to whether the plaintiff's contract still subsists or not for agitation and the Court of Arbitrators cannot decide this question. Since there is no dispute between the plaintiff and defendant No. 2, who were parties to the suit contract, the question of arbitration does not arise. Accordingly, the application for stay has been rejected. The trial Judge also came to the conclusion that the suit will be frustrated if the film is allowed to be screened at Apsara cinema. The obligations of defendant No. 2 are binding on defendant No. 3, as per letter dated 29-12-1977 and the plaintiff has, therefore, a very strong *prima facie* case and a very strong point to agitate in the Court; the plaintiff will suffer great damages and the litigation will be multiplied if the injunction is not confirmed. Accordingly, the *ad interim* injunction was confirmed.

In appeal the learned District Judge vacated the temporary injunction granted in favour of the plaintiff. He was of the view that the Civil Suit is barred under S. 32 of the Arbitration Act and if indeed the plaintiff desired to challenge the existence or validity of the arbitration agreement or to have the effect thereof be determined by the Court, the proper procedure would have been to file an application under S. 33 of the Act. The plaint as framed, is not an application under S. 33 of the Act and, therefore, the Court does not get any jurisdiction. He also came to the conclusion that *prima facie* the contract

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of the plaintiff with defendant No. 2, dated 5-2-1975 came to an end by efflux of time on 5-12-1977. Therefore, the plaintiff has got no *prima facie* case. The defendants did not file any reply to the application for a temporary injunction because that would have amounted to taking steps in the proceedings and, therefore, their purpose of filing an application under S. 34 would have been defeated. This apart the contract between the plaintiff and defendant No.2 was subject to confirmation by the principal, i. e. the Producer of the film 'Ganga-Ki-Sougandh'. But, there is nothing on record to show that any such confirmation was received from the Producer. Since the plaintiff's contract expired on 5-12-1977, there was no obligation of defendant No. 3 under that contract. The defendant No. 3 has entered into a written contract with the Apsara cinema on 22-1-1978 and there is a subsisting contract in favour of defendant No. 1 and it has paid Rs.25,000/- for exhibiting the film 'Ganga-Ki-Sougandh' and the prints of the film have been delivered to it for exhibition from 16-2-1978. It has also been found that if the temporary injunction is refused to the plaintiff, it would not suffer any irreparable injury, because the loss can be easily estimated and compensated in terms of money. Accordingly, the temporary injunction granted by the trial Judge has been vacated.

The impugned order of the lower appellate Court is being challenged on the following grounds:

(1)-The appellate Judge mis-applied S. 32 of the Arbitration Act by holding that the Court has no jurisdiction to entertain the suit when S. 32 has no application here. The trial Judge was perfectly justified in refusing stay of the suit under S. 34 of the Arbitration Act because of

the complicated questions of law involved in the case:

(2)-the appellate Judge committed an error in deciding the application for temporary injunction as an original Court and exceeded its jurisdiction by interfering with the discretion properly exercised by the trial Judge;

(3)-an adverse inference should have been drawn against the defendants for not replying to the application for a temporary injunction, as the reply to such an application does not amount to taking steps in the proceedings ;

(4)-the plaintiff's contract with defendant No. 2 is still subsisting and the appellate Judge committed an error in relying on the amended Clause 9 (ii)(a), which came into force on 1-4-1977, and should have applied the rule which was then prevalent.

The defendants supported the order of the appellate Judge and submitted that the order is perfectly valid and legal order and the appellate Judge committed no error in the exercise of his jurisdiction and there can be no interference with it in a revision. It is further submitted that no irreparable injury would be caused to the plaintiff by the impugned order.

First of all it has to be considered whether the suit is barred in view of S. 32 of the Arbitration Act. Section 32 provides that 'notwithstanding any law for the time being in force no suit shall lie on any ground whatsoever for a decision upon the existence, effect or validity of an arbitration agreement or award, nor shall any arbitration agreement or award be set aside, amended, modified or in any way affected otherwise than as provided in this Act'. This can be done by filing an application to the Civil Court under S. 33 of the Act. But, here no body has challenged the existence, effect or validity of the arbitration agreement, nor the plaintiff wants

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the arbitration agreement to be amended, modified or set aside. As such, S. 32 has no application whatsoever in the present suit and the plaintiff's suit is not barred by this Section. However, it may be mentioned that the defendants did not press their application for stay of the suit under S. 34 of the Arbitration Act before the lower appellate Court. Therefore, it is not necessary to disturb the finding of the trial Judge on this application. However, it may be pointed out that the trial Judge was under a mis-apprehension in rejecting the application. He has relied on a decision of the Single Bench of this Court in *Hindustan Steel Limited, Bhilai* v. *M/s Ramdayal Dau & Co., Durg* (1) and a decision of the Supreme Court in *The Union of India* v. *Kishorilal Gupta* (2). There can be no doubt that if the existence of the contract itself is in dispute, that question has to be decided by the Civil Court. In the case of *Hindustan Steel Limited, Bhilai* (*supra*), there was allegation that no valid contract containing the arbitration clause existed as it was brought about by fraud. In the Supreme Court case of *The Union of India* v. *Kishorilal Gupta* (*supra*), the contract was said to be *non est*, as it was brought into being illegally and was, therefore, void *ab initio*. Here, that is not the position. The existence and validity of the contract of the plaintiff is not under challenge. What the defendants contended is that the contract came to an end by efflux of time on 5-12-1977. The trial Judge has not cared to look into the Clause 21 of the Standard Film Renting Contract, which provides that 'all disputes which may arise between the Exhibitor and Distributor, whether during the currency or after the determination of these presents and whether in relation to the interpretation of these presents or to any act or omission of either party

(1) 1972 M. P. L. J. 46. (2) A. I. R. 1959 S.C. 1362,

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to the dispute or as to any act, which ought to be done by the parties in dispute or either of them or in relation to any other matter whatsoever touching these presents or the transaction referred to herein shall be referred to C.C.C.A. for settlement and decision or to the Court of Arbitration, according to Rules and Regulations relating thereto formed by the Association, and in force at the time of filing of the dispute. The decision of the Association or the Award of the Court of Arbitration shall be binding on the parties to the dispute as if its terms were incorporated in these presents'. It means that although the contract came to an end by efflux of time, any dispute arising under that contract is still to be decided either by the Association or by the Court of Arbitration. The Supreme Court in *Michael Golodetz* v. *Serajuddin and Co.* (1) has held that 'the Court ordinarily requires the parties to resort for resolving disputes arising under a contract to the tribunal contemplated by them at the time of the contract. That is not because the Court regards itself bound to abdicate its jurisdiction in respect of disputes within its cognizance; it merely seeks to promote the sanctity of contracts, and for that purpose stays the suit. The jurisdiction of the Court to try the suit remains undisputed; but the discretion of the Court is on grounds of equity interposed'.

It is now well settled that the grant of a temporary injunction under the powers conferred by O. 39, rules 1 and 2 of the Code is a matter of discretion of the Judge trying the suit. If the Judge rightly appreciates the facts and applies to those facts the true principles, that is a sound exercise of judicial discretion and the Court hearing an appeal from such an order would not ordinarily interfere. ...(See... *Durga Das* v. *Nalin Chandra Nandan* (2). It has to be

(1) A. I. R. 1963 S. C. 1044. (2) A. I. R. 1934 Cal. 694,

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seen whether the trial Judge has rightly appreciated the facts and applied to those facts the true principles. As pointed out earlier, the trial Judge has not correctly decided the application for stay under S. 34 of the Arbitration Act, by misconstruing and in applying the decision of this Court and that of the Supreme Court, which have no application to the facts of the present case. The second mistake committed by the trial Judge in holding that the suit contract of the plaintiff is still subsisting because similar earlier contracts between the parties are still being enforced, though those contracts also came to an end by efflux of time. It has been rightly pointed out by the learned District Judge that if the distributor allowed exhibition of certain films even on the basis of a contract which had already expired, that would not mean that there is a general rule that would have been binding on the parties. It has to be seen what are the terms of the suit contract. If the contract provided that the suit contract would automatically terminate on efflux of time, it was not necessary for defendant No. 2 to revoke the suit contract by notice. The trial Judge erred in holding that such a revocation was necessary.

Clause 9 (ii)(a) of the Standard Film Renting Contract is as under :

> "The Distributor, at the option of the exhibitor to be exercised by the exhibitor in writing any time prior to the date of expiry of the life of the contract, shall terminate the contract as from the date of expiry and shall refund the deposit and/or advance/s received, within a period of 3 months from the date of expiry of the contract. In any case, the amount of deposit and/or advance, if any, received against the picture shall be refunded to the exhibitor prior to the release of the picture. In case the exhibitor fails to exercise his option in writing, the life of the contract shall stand extended

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for a further period of one year *ipso facto* (and on expiration of the extended period the contract shall stand automatically cancelled)."

The bracketed portion has been added by subsequent amendment, which came into force on 1-4-1977. In the suit contract no time has been prescribed for execution of the contract and, therefore, the contract would be for one year under Clause (3). Under this Clause 9 (ii)(a) the contract would be automatically extended by one more year if the exhibitor did not terminate the contract by giving written notice before the expiry of the first year. It is not possible to read this Clause as to hold that the contract automatically gets extended every year unless notice of termination is given by the exhibitor. So even reading the unamended clause, as it existed on 5-12-1975, the plaintiff's contract expired by efflux of time on 5-12-1977, as has been held by the District Judge. The bracketed portion in that Clause has been added by way of a clarification to remove any doubt. Under Clause 21, all the disputes are to be decided by the Association or by the Court of Arbitration, as per the Rules in force at the time of filing of such a reference. As such, the amended Clause 9 (ii)(a) would apply, which leaves no matter of doubt that *prima facie* the plaintiff has no subsisting contract after 5-12-1977. There being no *prima facie* case, the plaintiff is not entitled to a temporary injunction.

It is a settled principle that a temporary injunction can be granted if the plaintiff has a *prima facie* case, the balance of convenience is in plaintiff's favour and the plaintiff would suffer an irreparable injury if the injunction is not granted. Recently, the House of Lords in *American Cyanamid Co.* v. *Ethicon Ltd.* (1) has held that 'there was no rule of law that

(1) (1975) 1 All E. R. 504.

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the Court was precluded from considering whether, on a balance of convenience, an interlocutory injunction should be granted unless the plaintiff succeeded in establishing a *prima facie* case or a probability that he would be successful at the trial of the action. All that was necessary was that the Court should be satisfied that the claim was not frivolous or vexatious, i.e. that there was a serious question to be tried'. This case clearly made a departure from the settled rule that the plaintiff has to make out a *prima facie* case. This case has been relied on by this Court in *Shankarlal Rathore* v. *State of M.P.*(1). But the decision of the House of Lords has since been criticised, distinguished and explained in several cases by the Court of appeal. Lord Denning in *Fellowes and another* v. *Fisher* (2) has this to say:

> "The American Cyanamid case was only reported a little while ago, but we have already had two cases in which its effect has been canvassed in this Court. It has perplexed the profession. It has been criticised in the New Law Journal. So much that counsel have appealed to us for guidance."

It was a case of infringement of the patents. The case was much too difficult and complicated for the House to deal with in interlocutory proceedings. The interlocutory application was heard for 3 days by the trial Court, for 8 days by the Court of Appeal and for 12 days by the House of Lords. So it ought to go for trial. But meanwhile the best thing to do was to grant an interlocutory injunction so as to maintain the *status quo* until the trial The difficulty has arisen because some of the statements made in the House appear to undermine all we had previously understood. Previously the understanding of the profession was that, in order to get an interlocutory injunction, the plaintiff had to make out a *prima*

(1) 1978 J. L. J. 51. (2) (1975) 2 All E. R. 829,

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facie case. In support of this practice of the profession, there are decisions of the House of Lords more than 100 years old. The clearest and fullest statement of the principle was made in 1965 in the House of Lords itself in *J.T. Stratford & Son Ltd.* v. *Lindley* (1). But this case has not been referred to in the *American Cyanamid* case. Therefore, the case has to be read in the light of the peculiar circumstances of that case."

Now, I have to see whether the plaintiff would suffer irreparable injury if the temporary injunction is not granted. The trial Judge has not given any finding that any irreparable injury would be caused to it, but only held that the plaintiff would suffer great damages. That is not the requirement of law. P. V. Dixt, J. (as he then was) in *Mohd. Latif Choudhary* v. *Smt. Amritkala Baveja* (2) has held:

> "In a case where the granting of temporary injunction would virtually amount to decreeing it in a suit for perpetual injunction and likewise refusing to grant it would have the effect of dismissing it, the plaintiff seeking an order of temporary injunction pending the suit, must not only make out a *prima facie* case but also satisfy the Court that irreparable injury would be caused to him if the temporay injunction is not granted."

This was a case regarding showing of a film and a temporary injunction was sought for restraining the defendant from exhibiting the film. It was held that no irreparable injury would be caused by refusing the injunction because the damages that would be suffered by the plaintiff could be realised from the defendant. There was no difficulty in determining the amount that may be found due to the plaintiff for the realisation from the exhibition of the film from the accounts that the distributors have to submit to the producers

(1) (1964) 3 All E. R. 102. (2) 1960 M. P. L. J. 725.

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under the contract, and those of the exhibitors themselves. On the other hand, considerable inconvenience and injury would be caused to all the parties if the distribution and exhibition of the picture in the Central India territory is restrained for a considerable time. It is common knowledge that in cinema trade simultaneous release of any picture at several places is of considerable importance in order to secure that the success and popularity of a picture in any area is not marred or affected by the reception it has received or the reputation it has gained in any other area. There is thus a risk of the "exhibition value" of the picture going down in the Central India territory by the reports about it in places where it has already been exhibited or is being exhibited. Therefore, the order of the lower appellate Court granting the temporary injunction was vacated. Here also apart from the accounts, the defendant No.1 is required to maintain a statement of the gross receipts regarding exhibition of the film 'Ganga-Ki-Sougandh'. The defendant No. 1 is also required to furnish returns of entertainment tax, which is subject to supervision and scrutiny of the Government. As such, the District Judge was justified in holding that no irreparable loss or injury would be caused to the plaintiff in refusing the injunction. The defendant No. 1 has already parted with Rs.25,000/-. He has already received the prints of the film and was to exhibit the film from 16.2.1978, but for the temporary injunction granted by the trial Judge. The defendant No. 1 has got a subsisting contract and in fact the injury suffered by it would be much greater than the injury, if any, that may be suffered by the plaintiff.

It is true that the defendant did not file any reply to the application for a temporary injunction.

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The District Judge held that this was because if any reply was filed, it amounted to taking steps in the proceedings and would have defeated the defendant's application for stay under S. 34 of the Arbitration Act. This view does not seem to be correct. A Division Bench of this Court in *Sansarchand* v. *State of M. P.* (1) has held that :

> "The filing of a reply to the application of the plaintiff for securing a temporary injunction and arguing the said application itself does not amount to "taking other steps in the proceedings" by the defendant within the meaning of S. 34. Opposing the a pplication is not an unequivocal indication on behalf of the defendant to choose to give up his right under the agreement to refer the dispute to arbitration."

Though, no reply was filed, the plaintiff had filed an application under S. 151 of the Code for vacating the *ad interim* injunction and in which all the facts have been pleaded by the defendants. Moreover, the defendants were given notice to file their reply by 27.2.1978. In fact the application for temporary injunction was considered on an earlier date, i. e. on 17.2.1978. Therefore, the reply to that application might not have been filed. Non-filing of the reply is of no effect because the defendants have pleaded all the facts in their application under S. 151 of the Code.

The balance of convenience is also not in favour of the plaintiff. The defendant no. 1 has already received the prints from the producers after paying Rs. 25,000/- to the defendant No. 3. The film was to be exhibited from 16.2.1978, but this could not be done because of the temporary injunction granted by the trial Court. In their application for a temporary injunction there is no prayer for temporary

(1) A.I. R. 1961 M.P. 322.

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mandatory injunction by the plaintiff in order to enable it to exhibit the film 'Ganga-Ki-Sougandh' in the Amar Talkies at Sagar. Such a prayer could have been made when in the suit the plaintiff has claimed a mandatory injunction against the defendant Nos. 2 and 3 to allow the plaintiff to exhibit the film in the Amar Talkies. The grant of temporary injunction would result in not showing of the film till the decision of the suit, which may take years before it is finally decided. In the meanwhile the film will become stale and will lose its present market and after some years there will not be much demand for this film, as by that time the film would have been exhibited in different centres in India and opinion regarding the film would be formed. By refusing the temporary injunction, the plaintiff's claim in suit is not frustrated. In case he succeeds in this suit, he would be entitled to damages, which can be ascertained and there will be no irreparable injury to the plaintiff.

The counsel for the non-applicants-defendants pleaded that injunction cannot be granted under S. 41(e) of the Specific Relief Act to prevent breach of contract, the performance of which is not specifically enforced. Section 14(1)(a) provides that a contract cannot be specifically enforced for the non-performance of which compensation in money is an adequate relief. Section 10, Explanation II, provides that "the breach of a contract to transfer movable property can be compensated in terms of money unless the property is not an ordinary article of commerce, or is of special value or interest to the plaintiff, or consists of goods which are not easily obtainable in the market". It is true that all these principles have to be kept in view for granting a permanent injunction and if a permanent injunction

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cannot be granted, perhaps a temporary injunction will be refused. Section 37(1) provides that temporary injunctions are regulated by the Code of Civil Procedure. Section 41, which occurs in the Chapter relating to perpetual injunction, has no application as much to the temporary injunction. The Code is not exhaustive and that the Court has inherent jurisdiction to act *ex debito justitie.*

The revision, therefore, fails and is dismissed with costs. Counsel's fee Rs.100/-, if certified.

Application dismissed.

MISCELLANEOUS CIVIL CASE

Before Mr. A. P. Sen C. J. and Mr. Justice J. S. Verma.

M/S MUKHI MULCHAND SITALDAS, PARTNERSHIP FIRM AT CHAKARBHATA, TAH. & DISTT. BILASPUR, Applicant*

v.

THE COMMISSIONER OF INCOME-TAX, MADHYA PRADESH, BHOPAL, Opposite party.

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May 2

Income-tax Act, Indian (XI of 1922)—Sections 26—A and 66(2) and the Rules made under the Act—Rules 2 to 6-B framed thereunder—An assessee applying for registration of a Partnership firm—Department's refusal therefor—Validity of.

When a document purporting to be an instrument of partnership is tendered on behalf of a firm and an application is made for registration of the firm as evidenced by such instrument, the Income-tax Officer is entitled to inquire whether the instrument is

*Misc. Civil Case No. 648 of 1972. Reference under Section 66(2) of the Income-tax Act, 1922, by the Income-tax Appellate Tribunal, Nagpur, dated 30th May 1970.

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intended by the parties to have real effect as governing their rights and liabilities *inter se* in relation to the business or whether it has been executed by way of pretence in order to escape liability for tax and without intention that its provisions should in truth have effect as defining the rights of the parties as between themselves.

When the Income-tax authorities find from a case that profits were not distributed amongst partners; accounts were not closed according to partnership-deed; there was wrong totalling and the partnership firm was not genuinely constituted, the department is right in refusing to register the firm.

Commissioner of Income-tax, Madhya Pradesh, Nagpur and Bhandara v. *Madanlal Chhaganlal* (1); not followed.

Khanjan Lal Sewak Ram v. *Commissioner of Income-tax, U. P.* (2); followed.

A. L. Halve with *D. C. Bhamore* and *O.P. Namdeo* for the applicant.

P. S. Khirwadkar for the opposite party.

Cur. adv. vult.

ORDER

The Order of the Court was delivered by A. P. SEN, C. J.-This is an application under section 66(2) of the Income-tax Act, 1922, by the assessee, for requiring the Income-tax Appellate Tribunal, Nagpur Bench, Nagpur, for referring a certain question of law said to arise out of its order in Income-tax Appeal No. 16572 of 1966-67, dated 30-5-1970, to the High Court for its opinion, *viz.*

> "Whether in the circumstances of the case, registration was rightly refused under rules 2 and 6-B of the Income-tax Rules ?"

Here, by this application under section 66(2) of the

(1) (1963) 50 I. T. R. 477. (2) (1972) 83 I. T. R. 175.

Act, the assessee had tried to introduce various other questions; but it is not necessary for us to deal with such additional questions.

The Income-tax Appellate Tribunal, on the facts and in the circumstances of the case, found that the partnership, styled as "M/s Mukhi Mulchand Sitaldas, Chakarbhata", was not a genuine firm and, therefore, no registration could be granted under section 26A of the Income-tax Act, 1922. Whether a partnership is genuine and actually exists or not with the constitution as specified in the deed of partnership, is essentially a question of fact. As Rankin C. J. observed in *Bisseswarlal* v. *Commissioner of Income-Tax* (1) :

> "An instrument of partnership is not a magical talisman protecting its executants from the imposition of higher tax."

When a document purporting to be an instrument of partnership is tendered on behalf of a firm and an application is made for registration of the firm as evidenced by such instrument, the Income-tax Officer is entitled to inquire whether the instrument is intended by the parties to have real effect as governing their rights and liabilities *inter se* in relation to the business or whether it has been executed by way of pretence in order to escape liability for tax and without intention that its provisions should in truth have effect as defining the rights of the parties as between themselves; Kanga and Palkhivala's Income Tax, Seventh Edition, Vol. I, p. 1016. Here, on the facts found by the Tribunal it is amply clear that when the partners of the firm applied for registration for the assessment year 1959-60, *vide* their application dated 30-1-1958, which was received in the office of

(1) 4 I. T. C. 365.

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the Income-tax Officer, Bilaspur, on 6-2-1958, the Income-tax Officer required the firm to produce all its partners, but it was stated before the Income-tax Officer that the present whereabouts of all the partners were not known. The Income-tax Officer sent a registered letter by post to Chijumal, a partner of the firm, but the same was not served. Another partner, Dhalchand was also not produced before the Income-tax Officer, though required. During the course of the assessment proceedings, the aforesaid Chijumal appeared before the Income-tax Officer on 17-10-1964, in his capacity as a complainant, and stated that the firm was engaged in suppression of sales and evasion of income-tax and sales-tax.

The Income-tax Officer found that the firm had maintained three different sets of accounts. One of these sets was, admittedly, called a 'fictitious set'. In one set, the purchases were found to have been recorded at Rs.2,64,770/-and in another set, the purchases were found to have been recorded at Rs.4,47,335/-. In one set of books, on the basis of which the return of income was filed, the sales were shown at Rs.4,12,586/-, but in another set, the sales were found to have been recorded at Rs.7,52,485/-. The admitted total purchases were of the order of Rs. 8,09,859/-. Against the income declared at Rs. 8,091/- in the return of income filed on 7-11-1963, the income finally determined was Rs. 61,649/-. The firm had filed copies of the accounts of the partners along with the return of income, but no profit was shown to have been credited in the account of any partner. Subsequently, a revised balance-sheet was filed and revised copies of the partners' accounts were also filed. In these accounts, profit of Rs.7,298/- was shown to have been distributed amongst the partners. The amount of Rs. 8,091/- was arrived

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at by adding the sum of Rs. 793/- being the interest paid to one of the partners to the profit figure of Rs. 7,198/-.

Considering the fact that the firm had not distributed concealed income amongst the partners in their profit sharing ratio, the Income-tax Officer held that the terms of the deed of partnership were not acted upon. He further held that the accounts had not been closed in accordance with the terms of the partnership-deed. He also observed that the totals in the books were intentionally done wrongly. He even observed that this was a fit case for launching prosecution. Finally, he held that the firm was not genuinely constituted and was not entitled to registration.

In appeal, the Appellate Assistant Commissioner accepted the contention of the assessee that the reasons given by the Income-tax Officer did not warrant an inference that there was no genuine firm in existence. It was urged that the firm was dissolved sometime in 1961 and enquiries were conducted in the year 1964. Because of the disputes among the partners the whereabouts of all the partners could not be intimated to the Income-tax Officer. One of the partners, Chijumal had himself, however, appeared before the Income-tax Officer. It was, therefore, urged that the non-availability of the partners after a long lapse of time should not have been made a ground for the refusal of registration. It was also urged that though the sales, as originally shown, may have not been correct, but that, by itself, could not establish that the terms of the partnership-deed were not acted upon. Regarding the non-closure of the accounts on the stipulated date, it was submitted that the same was by mutual agreement between

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the partners. Reliance was placed on the decision of this Court in *Commissioner of Income-Tax, Madhya Pradesh, Nagpur and Bhandara* v. *Madanlal Chhaganlal* (1) wherein it was observed :

> "What we wish to emphasise is that the ground for refusing to register can be the non-existence of the firm as constituted by the instrument of partnership and not mere subsequent deviation from one of the terms relating to the making of accounts."

The Appellate Assistant Commissioner, relying upon the decision in the *Commissioner of Income-Tax, Madhya Pradesh, Nagpur and Bhandara* v. *Madanlal Chhaganlal* (*supra*), held that the Income-tax Officer had not made out a proper case which would justify the finding that the firm was not a genuine firm. He, therefore, set aside the order of the Income-tax Officer passed under section 26-A with a direction to register it.

On further appeal, the Appellate Tribunal found that only a sum of Rs. 7,298/- was shown as distributed amongst the partners, but there was no distribution whatsoever of the concealed income. After hearing both the parties, the Tribunal adverted to the provisions of section 26-A and rules 2 to 6-B of the Income Tax Rules. It then referred to the decision of the Allahabad High Court in *Khanjan Lal Sewak Ram* v. *Commissioner of Income-Tax, U.P.* (2) wherein it was observed :

> "If a firm makes profits which are not shown in the books of accounts and the undisclosed profits are not distributed among the partners, then the Income-tax Officer has discretion to refuse to renew the registration of the firm under section 26-A of the Indian Income-tax Act, 1922."

(1) (1963) 50 I. T. R. 477. (2) (1964) 53 I. T. R. 37.

In that case, there was deliberate concealment of a portion of the profits which were not shown in the books of account. The Allahabad High Court rightly distinguished the decision in *Commissioner of Income-tax, Madhya Pradesh, Nagpur and Bhandara* v. *Madanlal Chhaganlal* (*supra*) that there, whatever were the profits ascertained by the partnership had, in fact, been distributed and further that there the Court did not go into the question whether an Income-tax Officer has discretion under rule 4 or not; it only decided that the mere fact that in calculating the profits, the firm failed to credit interest on the capital investment was not a ground for refusing to register a firm.

The Appellate Tribunal accordingly found that, on the facts and in the circumstances of the case, the firm was not genuine; and that the non-distribution of profits earned was not due to any *bona fide* mistake, and thus the firm was not entitled to registration; more so, because the concealed part of the profits were not proved to have been distributed among the partners. As already stated, the view of the Tribunal was based on the decision of the Allahabad High Court in *Khanjan Lal Sewak Ram* v. *Commissioner of Income-Tax, U. P.* (*supra*). That decision of the Allahabad High Court has since been affirmed by their Lordships of the Supreme Court in *Khanjan Lal Sewak Ram* v. *Commissioner of Income-Tax, U. P.* (1).

In view of the decision of their Lordships of the Supreme Court in *Khanjan Lal Sewak Ram* v. *Commissioner of Income-Tax, U. P.* (*supra*), we have no hesitation in rejecting the application made by

(1) (1972) 83 I. T. R. 195.

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the assessee under section 66(2) of the Income-tax Act, 1922. The Commissioner shall have the costs of this reference application. Hearing fee Rs. 200/-.

Reference answered accordingly.