CIVIL REVISION

Before Mr. Justice C. P. Sen.

25 April 1984

PUNJAB NATIONAL BANK, BETUL, Applicant*

v.

DEVIRAM and others, Non-applicants.

Public Moneys (Recovery of Dues) Act, M. P. (XXVII of 1981), Sections 3(1)(b) and 5 and Civil Procedure Code (V of 1908), Order 47, rule 1 and Section 115—Section 3(1)(b) of the Act applies only to loans granted under State Sponsored Scheme—Suit for recovery of loan not covered under the Act dismissed as abated under section 5 of the Act on an erroneous concession made by the plaintiff's counsel—Mistake apparent on the face of the record—Liable to be reviewed—Trial Court refusing to entertain review application—Revision maintainable.

Section 3(1)(b) of the M. P. Public Moneys (Recovery of Dues) Act, 1981 covers recovery of those loans by a Banking Company which are under a State Sponsored Scheme. Where the loan was not under a State Sponsored Scheme nor the State Govt. was the guarantor of the loan nor any subsidy given by the State Govt. for the loan, suit filed for the recovery of such loan is not covered under the Act nor the suit abates under Section 5 of the Act on coming into force of the Act.

It is settled law that an erroneous admission by a legal practitioner on a question of law is not binding on the party and does not preclude him from challenging the wrong concession. Thus, where the suit was dismissed as abated under section 5 of the M. P. Public Money (Recovery of Dues) Act, 1981 on a wrong concession made by the counsel for the Plaintiff, it was a mistake apparent on the face of the record and was liable to be reviewed under Order 47, Rule 1, C. P. C. and by refusing to entertain the review application, the trial Court refused to exercise jurisdiction vested in it under the law for review or it acted illegally and with material irregularity in rejecting the application and revision is maintainable.

M. M. B. Catholicos v. ***M. P. Athanasius*** (1); relied on.

*Civil Revision No. 1166 of 1982, for revision of the order of P. C. Ahirwal, Civil Judge, Class II, Betul, dated the 26th June 1982.

(1) A. I. R. 1954 S. C 526

Punjab National Bank, Betul v. *Devirem, 1984*

J. P. Sanghi for the applicant.

N. P. Dubey for the non-applicants.

Cur. adv. vult.

ORDER

C. P. SEN, J.—The applicant-plaintiff has preferred this revision against the order of the trial Court rejecting its application for review as not maintainable.

The plaintiff is a nationalised bank constituted under the Banking Companies (Acquisition and Transfer of Undertakings) Act, 1970. The plaintiff gave agricultural loan of Rs. 1400/- to late Khushalchand, father of defendant-non-applicant nos. 1 to 4 for purchase of water-pump and motor for agricultural purposes. The non-applicant no. 5-defendant no. 5 was a guarantor of the loan taken. The plaintiff filed a suit for recovery of Rs. 3731.40/- against the defendants for recovery of the loan amount with interest. The defendants nos. 1 to 4 resisted the suit denying their liability since their father had taken the loan without their consent or knowledge. The plaintiff has a cheaper remedy by raising a dispute before Assistant Registrar and in order to increase the expenses and harass the defendants. this suit has been filed. However, on 30-11-1981 the plaintiff's counsel conceded that under section 5 of the M. P. Public Money (Recovery of Dues) Act, 1981, the suit has abated and the suit was dismissed but on 1-1-1982 an application for review was made saying that a wrong concession was made on the question of law and the suit is maintainable as the loan was not under any State's sponsored scheme.

It may be mentioned here that the aforesaid Act was enacted to provide for the speedy recovery of certain classes of dues payable to the State Government or to the M. P. Financial Corporation or any other Corporation or to a banking company or any Government Company and for matters connected therewith. Section 3 provides for recovery of certain dues as arrears of land revenue, including any agreement relating to a loan, advance or grant given to a person or relating to credit in respect of, or relating to hire-purchase of, goods sold to him, by a banking company or a Government Company, as the case may be, under a State sponsored scheme under clause (b) of section 3(1). Under sub-section (1) a local agent of the banking company may send a certificate to the Collector for

recovery of the amount and under sub-section (2) the Collector on receiving the certificate shall proceed to recover the amount. Sub-section (3) bars any suit for recovery of any sum due as aforesaid and it shall not lie in civil Court against any person referred to in sub-section (1). Under sub-section (4) arbitration agreements are saved under certain conditions. Sub-section (5) provides that every certificate sent to the Collector under sub-section (1) shall be final and shall not be called in question in any suit. Under section 5 all suits, applications and arbitration proceedings of the nature referred to in section 3 and sending immediately before the commencement of this Act shall abate upon the commencement of this Act. It is not disputed that the plaintiff is a banking company, but it is evident that section 3(1)(b) covers recovery of those loans by a banking company which are under a State sponsored scheme. It is nobody's case here that the suit loan was under a State sponsored scheme nor the State Government was the guarantor of the loan nor any subsidy was given by the State Government for the loan. The Act safeguards the position of the State Government under such circumstances and provides for speedy recovery of the amount as arrears of land revenue under a certificate issued by the person so authorised. Therefore, the suit loan is not covered under the Act nor the present suit abated under section 5 of this Act on coming into force of the Act.

It is true that the counsel for the plaintiff made a wrong concession that the suit has abated and accordingly the suit was dismissed by the trial Court on 30-11-1981. It is settled law that an erroneous admission by a legal practitioner on a question of law is not binding on the party and does not preclude him from challenging the wrong concession *M. M. B. Catholicos* v. *M. P. Athanasius* (1). It is also evident that the order of the trial Court dated 30-11-1981 dismissing the plantiff's suit as abated under section 5 of the Act was a mistake apparent on the face of the record and was liable to be reviewed under Order 47, Rule 1, C. P. C.. There are cases that a decision on a review application amounts to a case decided and a revision lies if the order is covered by any of the clauses of section 115. In the present case, it can be said that by not entertaining the review application, the trial Court refused to exercise jurisdiction vested to it under the law for review or it acted illegally and with material irregularity in rejecting the application. So the revision is maintainable, of course, there are cases which lay down that no revision lies against rejection of an application for review of the decree passed because there is an appeal provided against the decree itself.

Accordingly, the revision is allowed, the orders of the trial Court dated

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(1) A. I. R. 1954 S. C. 526.

30-11-1981 and 26-6-1982 are set aside and the suit is restored to file. The trial Court is directed to proceed with the suit in accordance with law. There shall be no order as to costs.

Application allowed.

MISCELLANEOUS CIVIL CASE

Before Mr. G. L. Oza Ag. C. J. and Mr. Justice C. P. Sen.

31 Jan. 1984

PARMANAND BHAI PATEL and another, Applicants*

v.

COMMISSIONER OF INCOME-TAX, JABALPUR, Opposite-party.

Income-tax Act, Indian (XLIII of 1961)—Sections 55(1)(b), 49 and 256(1) and (2)—Capital gain—Computation of—Assessee a partner in a partnership firm—Expenses incurred by the firm—Only those expenses coming to the share of the assessee—Are liable to be considered while computing capital gains—Section 49—Not applicable when property itself acquired property of the assessee—Section 256(1)—High Court can answer only the question referred to it by the Tribunal—Section 256(2)—Remedy of the assessee in case of refusal by the Tribunal to refer a question of law arising out of its order—Available under.

Only those expenses which have been actually incurred by the assessee in making additions and improvements in the property ought to be taken into consideration while computing capital gains under section 55(1)(b) of the Income-tax Act, 1961. The expenses incurred by the firm which came to the share of the assessee has to be allowed while those came to the share of the other partners has to be disallowed. Since it is a self acquired property of the assessee, section 49 of the Income-tax Act has no application as the property is not acquired in any of the modes mentioned in that section.

* M.C. C. No. 117 of 1981. Reference under Section 256(1) of the Income-tax Act, 1961, by the Income-tax Appellate Tribunal, Jabalpur Bench, Jabalpur, dated 13th August 1979.

It is well settled that the High Court can answer only those questions which are actually referred to it; it cannot raise and answer new questions which have not been so referred. If the Tribunal has refused to refer under section 256(1) a question of law which arises out of its order, then the proper course is to require the Tribunal under section 256(2) to refer the same.

H S. Shrivastava for the applicants.

B. K. Rawat for the opposite party.

Cur. adv. vult.

JUDGMENT

The Judgment of the Court was delivered by C. P. SEN, J.—At the instance of the assessee the following question of law has been referred by the Income-tax Appellate Tribunal for opinion of this Court :—

> "Whether on the facts and in the circumstances of the case, the cost of the improvement to the property incurred by M/s Mohanlal Hargovinddas should be allowed as deduction under section 49 of the Income-tax Act, 1961, while computing the capital gain in the hands of the assessee ?"

Assessee Smt. Ujjambai was the owner of an immovable property at Jabalpur which was self occupied. 1/3rd of this property was sold for a sum of rupees 3 lacs during the accounting period relevant for the assessment year 1973-74. After making various deductions including the selling expenses and the cost of the property, the assessee offered a sum of Rs. 44,620/- as capital gain from this property. On the other hand, the Income-tax Officer worked out the amount of capital gain at a sum of Rs. 1,21,220/-. The difference arose on account of the fact that the assessee estimated the cost of improvement to the property during the period 1959 to 1964 at a sum of Rs. 5,00,650/-, whereas the Income-tax Officer worked out the cost of improvement at a sum of Rs.3,85,200/-. The difference arose for the following reasons. Smt. Ujjambai was a partner in the firm M/s Mohanlal Hargovinddas, Jabalpur. The expenses on the extension or renovations of the property were debited in the books of the firm. They were not debited to the personal account of Smt. Ujjambai. In the assessments of the firm

from 1962-63 to 1965-66, the Income-tax Officer disallowed the expenses on the ground that they relate to repairs and extensions of the building of the partners not connected with the business of the firm. In computing the cost of improvement the assessee had added all such expenses debited during the previous years relevant to the assessment years 1962-63 to 1965-66. On the other hand, the I. T. O. has taken account of only Smt. Ujjambai's share of such expenses as per her share in the partnership firm i.e. 50%. The assessee preferred appeal before Commissioner of Income Tax (Appeals) which upheld the order of the I. T. O. by holding that according to section 55(1)(b) of the Income-tax Act, 1961, "cost of improvement" means capital expenses incurred by the assessee in making any additions or alterations to the capital asset of the assessee i. e. only those capital expenses have to be taken into account which have been incurred by the assessee. However, the capital gains was reduced to Rs. 1,15,106/- from Rs. 1,21,220/-. The assessee then preferred second appeal before Income-tax Tribunal which also upheld the order of the I. T. O. by holding that during all these years there has been additions and alterations and the expenditure incurred was borne by the landlord as well as by the tenant i. e. firm Mohanlal Hargovinddas. Only those expenditure incurred by the assessee has been rightly allowed while computing the capital gain and in their opinion the expenditure incurred by the tenant has rightly been disallowed. Under section 55(1)(b) of the Act which is applicable in this case "cost of improvement" means capital expenses incurred in making any additions or alterations to the capital asset of the assessee incurred by the owner of the said property. In this case, expenses incurred for the improvement of the building were partly debited to the personal account of the assessee and partly debited in the account of the tenant. It is not the case of the assessee that the tenant subsequently realised the expenses incurred for the improvement of the property from the assessee. Had this been the case, then the entire expenses incurred by the tenant could have been claimed for computation of capital gain. During the course of the argument, the learned counsel for the assessee tried to take shelter under section 49 of the Act but this section has no relevance to the facts of the case, and, as such, the submission of the counsel was rejected. It appears thereafter an application for rectification was filed before the Tribunal contending that M/s Mohanlal Hargovinddas was never a tenant in the building in question. The Tribunal allowed the application by observing that the property at Jabalpur owned by the assessee was self occupied and not tenanted but this would not make any difference regarding the computation of capital gains.

Shri H.S. Shrivastava learned counsel for the assessee contended that a partnership firm has no legal existence apart from the partners constituting it and,

therefore, a firm's property or the firm's assets means property or assets in which all the partners have a joint and common interest by relying on a decision of this Court in *Addl. C.I.T.* v. *Agarwal Timber & Bans Co.* (1). He also contended on the basis of the Supreme Court decision in *K. P. Varghese* v. *I. T. O.* (2) that the Income-tax Act, 1961, and the Gift Tax Act, 1958, are parts of an integral scheme of taxation and the same amount which is chargeable as gift could not be intended to be charged also as capital gains and so it should have been held that the expenses incurred for making additions and improvement in the building borne by the assessee of the other partner Jadobai be treated as a gift to the assessee in view of definition of "gift" in section 2(12) of the Gift Tax Act. He further contended that though this question is not referred by the Tribunal it is open to this Court to resettle or reframe the question formulated by the Tribunal before answering it so as to bring out the real issue between the parties. Shri B. K. Rawat learned counsel for the Department supported the order of the Tribunal by saying that only those expenses which are incurred by the assessee have been rightly allowed in computing the capital gains under section 55(1)(b) of the Act.

We are unable to accept the contentions raised by the learned counsel for the assessee. There can be no quarrel with the propositions laid down in *Addl. C. I. T.* v. *Agarwal Timber & Bans Co.* and *K. P. Varghese* v. *I.T.O.* (*supra*) but these rulings are of no help to the assessee. It is well settled that the High Court can answer only those questions which are actually referred to it; it cannot raise and answer new questions which have not been so referred. If the Tribunal has refused to refer under section 256(1) a question of law which arises out of its order, then the proper course is to require the Tribunal under section 256(2) to refer the same. The assessee did refer the following question for reference to this Court before the Tribunal :—

> "Whether on the facts and in the circumstances of the case, if the amounts debited to the profit and loss account of M/s Mohanlal Hargovinddas on account of additions and improvements are treated as gifts, then whether section 49(i)(ii) will be applicable in the case or not?"

This question having not been referred, it is not open to the assessee to agitate this question in this reference. The learned counsel for the assessee also referred to a decision of the Delhi High Court in *C.I.T.* v. *Mithilesh Kumari* (3) that the interest paid by the assessee on money borrowed for purchase of a land constituted part of actual cost of assessee for the purpose of determining the

(1) (1983) 144 I. T. R 46. (2) (1981) 131 I. T. R. 597.

(3) 92 I. T. R. 9.

capital gain derived from the sale of the land, but this ruling has no relevance to the facts of the present case. We agree with the Tribunal that only those expenses which have been actually incurred by the assessee in making additions and improvements in the property ought to be taken into consideration while computing capital gains under section 55(1)(b) of the Act. The expenses incurred by the firm which came to the share of the assessee have been allowed while those came to the share of the other partners have been rightly disallowed. Since it was a self acquired property of the assessee, section 49 of the Income-tax Act has no application as the property was not acquired in any of the modes mentioned in that section.

Accordingly, the question referred is answered in the negative in favour of the Department and against the assessee. Under the circumstances, the parties to bear their own costs.

Reference answered accordingly.

MISCELLANEOUS CIVIL CASE

Before Mr. Justice G. L. Oza and Mr. Justice K. K. Adhikari.

20 July 1983

M/S FOOD CORPORATION OF INDIA, BHOPAL, Applicant*

v.

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

General Sales Tax Act, M. P., 1958 (II of 1959)—Sections 38(5), 43 and 18(8)—Jurisdiction of the appellate authority to enhance penalty under section 38(5)—Whether includes power to impose penalty for the first time when no penalty was levied by the assessing authority—Sections 43 and 18(8)—Appellate authority while hearing appeal under Section 38 finalising assessment and finding it to be a fit case falling within the ambit of Section 43 issuing notice to the assessee and after hearing imposing

*Misc. Civil Case No. 264 of 1980, Reference under Section 44(1) of the General Sales-tax Act, M. P., 1958, by the Board of Revenue, M. P., Gwalior, dated 15th July 1980.

M/s Food Corporation of India, Bhopal v. *Commissioner of Sales-tax, M. P., Indore, 1983*

penalty thereunder—Bar of limitation provided in Section 18(8) not attracted.

Section 38(5)(a) of the General Sales Tax Act, M. P., 1958 authorises the appellate authority, either to confirm, reduce, enhance or annul the penalty imposed by the assessing authority. The use of these terms clearly contemplates some order by the assessing authority in regard to the penalty so that the appellate authority may confirm it, annul it, enhance it or reduce it and the plain reading of the section, therefore, indicates that the power to enhance does not contemplate power to impose penalty for the first time. If the jurisdiction to enhance penalty under section 38(5) is interpreted to mean that the appellate authority could also impose a penalty for the first time, then the provisions contained in section 43 pertaining to jurisdiction of the appellate authority could be redundant and when the legislature enacted this section specifically, it clearly shows that the words used in section 38(5) were to be understood in the sense in which those words are understood in common parlance and, therefore, it could not be contended that the word 'enhance' in section 38(5) would even mean the imposition of penalty for the first time.

C. A. Abraham v. *Income-tax Officer, Kottayam* (1), *A. Velayutha Raja* v. *The Board of Revenue (C. T.), Madras* (2), *Commissioner of Sales Tax, U. P.* v. *Kanpur Dal and Rice Mills* (3) and *Commissioner of Sales Tax, M. P., Indore* v. *M/s Tansukhdas Madanlal, Rajnandgaon* (4); distinguished.

When the appellate authority started proceedings for imposition of penalty by giving a notice as contemplated under section 43 and this was done when the appeal was pending before the appellate authority, it is plain that the jurisdiction exercised under section 43 is exercised by the appellate authority during the pendency of the appeal from the order of assessment and while finally passing the order of assessment, as the appellate authority held that it was a fit case falling within the ambit of section 43 that a notice for imposition of penalty was issued and after hearing the assessee, ultimately passed the final order in appeal and in that order itself penalty was also imposed; under these circumstances it could not be disputed that the imposition of penalty is part of the appellate order and if the appellate order is an order of assessment, to this order, the provision of section 18(8) could not be attracted and, therefore, this provision of section 18(8) also could not be attracted to the order pertaining to penalty

(1) 41 I. T. R. 425. (2) 26 S. T. C. 176.
(3) 25 S. T. C. 511.
(4) M. C. C. No. 190 of 1980, decided on the 26th Feb. 1983.

M/s Food Corporation of India, Bhopal v. *Commissioner of Sales-tax, M. P., Indore, 1983*

as it is a part of the order of assessment by the appellate authority. Proviso (a) to clause 8 of Section 18 also indicates that the assessment which are ultimately finalised by the appellate authority are not subject to the provision of section 18(8) and even if after the finding of the appellate authority if a fresh assessment has to be made by the assessing authority under section 18 then also this proviso (a) has provided a further period. This is also clear from the scheme of section 18 that this section contemplates assessment by the officer who is entitled to assess at the first stage and, therefore, the provision contained in clause (8) of this section 18 will not be operative when the appellate authority exercises jurisdiction under section 38 or section 43.

B. L Nema for the applicant.

M. V. Tamaskar for the opposite-party.

Cur. adv. vult.

JUDGMENT

The Judgment of the Court was delivered by G. L. Oza, J.—This is a reference made by the President, Board of Revenue, Madhya Pradesh, for answering the following questions :—

1. Whether the power to confirm, reduce, enhance or annul the penalty in appeal as provided under section 38(5) of the State Act includes the power to impose penalty, where it has not been imposed by the assessing authority ?

2. Whether under the facts and circumstances of the case penalty imposed under section 43(1) read with section 9(2) of the Central Act was justified ?

The facts stated in the statement of the case are that the assessee M/s Food Corporation of India, Bhopal were assessed to tax under the Central Sales Tax Act, 1956 for the financial year starting from 1-4-1967 to 31-2-1968. Inter-State sales were determined as Rs. 6,38,14,360/- and were assessed to tax amounting to Rs. 13,44,682/-. The first return was delayed by two months and 9 days and, therefore, penalty of Rs. 4,000/- was imposed by the assessing authority under section 17(3) of the State Act read with section 9(2) of the Central Act.

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Against the assessment order, an appeal was preferred before the Deputy Commissioner of Sales Tax. The appellate authority maintained the order of assessment and penalty imposed under section 17(3). The Deputy Commissioner in this appeal further came to the conclusion that the total tax levied was Rs. 13,44,682/- out of which the Corporation had deposited Rs. 7,71,892/- with the returns, and thus Rs. 5,68,790/- had not been paid. The returns, therefore, were considered false and the corporation was noticed to show cause why penalty under section 43 should not be levied. The assessee Corporation represented that there was no *mens rea* on their part; that this was the second year of assessment of the appellant and the administrative set-up was not properly organised and that it was only after the accounts were finalised that the Corporation came to know of the short payment. It was also contended that the initiation of penal proceedings after the lapse of five years from the date of assessment was bad in law. The Deputy Commissioner held that under section 38(5) of the State Act, the appellate authority had power to impose penalty and no time limit was prescribed in this behalf. He further observed that the corporation had a big organisation and it was desirable that they should have filed correct returns and credited the correct amount of tax. It was also observed that if there was any mistake in calculation, there was a provision to file revised return but that was not done. He, therefore, held that Corporation had utilised this amount of Rs. 5,00,000/- in their business and thereby saved interest for a period of six to eight years. *Mens rea* was, therefore, fully established. The Commissioner, computing interest at 6%, held that penalty should be Rs. 1,80,000/-. However, the Deputy Commissioner felt that an amount of Rs. 1,00,000/- will meet the ends of justice and, therefore, he imposed this penalty of Rs. 1,00,000/- under section 43 of the State Act read with section 9(2) of the Central Act. Against this, a second appeal was filed before the Tribunal and the only point raised in the appeal was in respect of penalty of Rs. 1,00,000/- imposed under section 43 of the State Act.

It was contended before the appellate Tribunal that it was the first assessment under the Central Act and as the Corporation was a Government of India undertaking, the rice stock was transferred to the Regional Directors in different States as per directions of the Government of India and the Corporation honestly believed that such transfer did not amount to sale. The Corporation did not recover any sales tax on these transactions and the matter was referred to the Ministry of Law, Government of India and finally they were advised that the transactions amounted to inter-State sales and when this advice was received, the Corporation was of the view that it did not amount to sale and, therefore, the accounts were not made.

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It was also contended before the Tribunal that under section 38(5) of the State Act, the appellate authority could enhance the penalty but in this case, as no penalty was imposed by the assessing authority, there is no question of enhancement and, therefore, jurisdiction under section 38(5) could not be exercised. The Tribunal repelled the contentions advanced by the Corporation assessee and dismissed the appeal and, thereafter at the instance of the assessee, the Tribunal i. e. the Board of Revenue has made this reference for answering the questions mentioned above.

Learned counsel appearing for the assessee, Food Corporation of India, contended that under section 38(5), the appellate authority had jurisdiction to enhance, annul or to reduce the assessment or the penalty but in the present case where no penalty was imposed by the assessing authority, in exercise of jurisdiction under section 38(5), the appellate authority i. e. the Deputy Commissioner could not impose the penalty for the first time. It was, therefore, contended that he had no jurisdiction under section 38(5) to impose the penalty.

It was also contended that under section 43, the appellate authority could not impose penalty as penalty is part of the assessment itself and it ought to have been completed within 5 years as provided in section 18(8) and it was, therefore, contended that in this view of the matter also, the answer to question No. 2 could be in favour of the assesse. It was also contended that the circumstances which resulted in incorrect return submitted by the assessee, the Tribunal should have held that imposition of penalty is not justified. Learned counsel placed reliance on a decision reported in *C. A. Abraham* v. *Income Tax Officer, Kottayam* (1); *A. Veluyutha Raja* v. *The Board of Revenue (C.T.), Madras* (2) and *Commissioner of Sales Tax, U. P.* v. *Kanpur Dal and Rice Mills* (3).

It was also contended by the learned counsel for the assessee that although the Deputy Commissioner while exercising appellate jurisdiction stated in his order that notice was issued for imposition of penalty under section 43 but the notice was issued in Form No. 28 which purports to be a form of notice under section 38 and it indicated that the Deputy Commissioner was purporting to act under section 38(5).

The learned Government Advocate appearing for the State, on the other hand, contended that under section 38(5), the appellate authority had

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(1) 41 I. T. R. 425. (2) 26 S. T. C. 176.
(3) 25 S. T. C. 511

M/s Food Corporation of India, Bhopal v. *Commissioner of Sales-tax, M. P., Indore, 1983*

jurisdiction to confirm, reduce, enhance or annul the assessment and sub-clause (c) of clause (5) of section 38 confers jurisdiction on the appellate authority to pass such orders, as it may deem fit. This clearly indicates that the appellate authority had wide jurisdiction and the whole process of assessment was open when the appeal was pending before the appellate authority. It was contended that even section 43 indicates that if during the proceedings of an appeal the Commissioner feels satisfied that the assessee has deliberately concealed his turnover or that the return is false, it confers jurisdiction on the appellate authority or the commissioner to impose a penalty. The language of section 43 indicates that this power could only be invoked by the Commissioner or the appellate authority in the course of any proceedings under this Act and, therefore, if the appellate authority in the course of proceedings of the appeal felt satisfied that the return was false he could exercise jurisdiction under section 43 and impose a penalty. It was contended by the learned Government Advocate that when an appeal is pending before the appellate authority and in the proceedings of appeal if jurisdiction is exercised under section 43 the question of limitation as provided in section 18 will not be attracted as on appeal being preferred by the assessee the assessment is open and it is in that process that the jurisdiction is exercised under section 43. The learned counsel referred to a decision of this Court in *Commissioner of Sales Tax, M. P., Indore* v. *M/s Tansukhdas Madanlal, Rajnandgaon* (1) and contended that the appellate jurisdiction is wide enough to confer power to impose a penalty.

It was also contended that even under section 38(5) where jurisdiction is conferred on the appellate authority to enhance, confirm or reduce the penalty or the assessment, the jurisdiction to enhance also, in substance, amount to jurisdiction to impose the penalty and it was, therefore, contended that the penalty imposed could not be said to be bad in law.

Misc. Civil Case No. 190 of 1980, decided on 26-2-1983 was a case where the question was as to whether the Tribunal was justified in refusing to enhance the penalty under section 38(5) of the M. P. General Sales Tax Act. In that case, a Division Bench of this Court considered the scope of section 38(5) and the scope of jurisdiction under section 38(5)(a) has been considered but the question about enhancement in a case where no penalty at all was imposed by the assessing authority was not before the Court and has not been examined and in that context, the decision is of no assistance so far as this case is concerned. The decision in *C. A. Abraham* v. *Income-Tax Officer* (*supra*) on which reliance has been placed by the learned counsel for the assessee also is not directly on

(1) M. C. C No. 190 of 1980, decided on the 26th February 1983.

the point and is not of much help. The case reported in *A. Velayutha Raja* v. *The Board of Revenue (C. T.), Madras (supra)* is a case where the question of limitation for assessment was considered by the Madras High Court in the context of language of section 16(1) of their Act. In this case, a question of limitation was considered in the context of proceedings started by Board of Revenue under section 34 of the Act and was not a case of any proceeding pending in appeal and, therefore, this case also is of no assistance so far as the present case is concerned. The other case relied on is a decision of Allahabad High Court reported in *Commissioner of Sales Tax* v. *Kanpur Dal and Rice Mills* (1). In this decision, the scope of the appellate powers has been considered in the context of the language of that Act. But so far as the question of the case in hand is concerned, it also throws no light.

Section 38(5) of the M. P. General Sales Tax Act reads :—

"38(5) Subject to such procedure as may be prescribed and after such further inquiry as it may think fit the appellate authority, in disposing of any appeal under sub-section (1) or (2) may—

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

(b) set aside the assessment or the penalty or both, and direct the officer whose assessment order, has been appealed against to make a fresh assessment, after such further inquiry, as may be directed; or

(c) pass such orders, as it may think fit".

A perusal of the scheme of section 38 indicates that this section confers jurisdiction on the appellate authority to entertain an appeal. Clause (5) of this section confers jurisdiction on the appellate authority, as provided in sub-clause (a) of this clause, to confirm, reduce, enhance or annul the assessment or the penalty or both and it is only subject to the procedure as may be prescribed. It is, therefore, clear that in the case of penalty, clause (5), sub-clause (a) authorises the appellate authority either to confirm, reduce, enhance or annul the penalty imposed by the assessing authority. It was contended by the learned counsel for the department that the power to enhance impliedly confers powers on the appellate authority to impose penalty for the first time. But it is clear that it is not a case where the assessing authority found the assessee liable to

(1) 25 S. T. C. 511.

penalty but imposed a nominal penalty or chose not to impose penalty at all. Admittedly, the assessing authority did not consider the case of penalty at all nor did he impose any penalty against the assessee and, therefore, it could not be said that there was some penalty imposed which the appellate authority could enhance subject to the procedure that may be prescribed. If the word "enhance" impliedly meant imposition of penalty itself, the legislature may not have used these precise terms, "confirm, reduce, enhance or annul". The use of these terms clearly contemplate some order by the assessing authority in regard to the penalty so that the appellate authority either may confirm it, annul it, enhance it or reduce it and the plain reading of the section, therefore, indicates that the power to enhance does not contemplate power to impose penalty for the first time.

The provisions contained in section 43 further support this view as section 43 provides:--

> "43(1) Power of Commissioner or appellate authority to impose penalty.-
>
> If the Commissioner or the appellate authority in the course of any proceeding under this Act, is satisfied that a dealer has deliberately concealed his turnover in respect of any goods or furnished a false return, the commissioner or the appellate authority, as the case may be, may after giving the dealer a reasonable opportunity of being heard, direct that the dealer shall, in addition to the tax payable by him, pay by way of penalty a sum not exceeding the amount of the tax which would have been avoided if the return furnished by the dealer had been accepted as correct."

That is, if the Commissioner or the appellate authority in the course of any proceeding before it under this Act is satisfied-

(1) that the dealer has deliberately concealed the turnover; or

(2) furnished a false return,

the authority may after giving the dealer a reasonable opportunity of being heard, impose a penalty.This section empowers the Commissioner or the appellate authority and the powers conferred under section can only be exercised when some proceedings in the nature of appeal or other proceedings are before the authority, either the Commissioner or the appellate authority. This, therefore,

indicates that if the appellate authority during the hearing of the appeal comes to the conclusion on the two questions stated above, then it has jurisdiction to impose a penalty after giving the assessee an opportunity of being heard. If the jurisdiction to enhance penalty under section 38(5) is interpreted to mean that the appellate authority could also impose a penalty for the first time then the provisions contained in section 43 pertaining to jurisdiction of the appellate authority could be redundant and when the legislature enacted this section specifically it clearly shows that the words used in section 38(5) were to be understood in the sense in which those words are understood in common parlance and, therefore, it could not be contended that the word 'enhance' in section 38(5) would even mean the imposition of penalty for the first time. In this view of the matter, therefore, our answer to the first question is in the negative.

About the second question about imposition of penalty under section 43 read with section 9(2) of the Central Act, it was contended on behalf of the assessee that it is not justified because-

(1) it is beyond the period of limitation provided in section 18(8); and

(2) in the facts and circumstances of the case, there appears to be no justification for imposition of a penalty.

So far as the facts and circumstances are concerned, they have been considered by the authorities including the Board of Revenue and, in our opinion, whether any particular facts and circumstances justify or do not justify imposition of penalty is ultimately not a question of law which could be referred to this Court.

As regards clause (8) of section 18 which provides for the limitation for purposes of assessment, it is clear that section 18 provides for assessment of tax and clause (8) provides :-

"(8) The assessment shall be made under this section-

(i) in respect of a registered dealer, within a period of five calendar years from the end of the period for which assessment is to be made; and

(ii) in respect of a dealer who has failed to apply for registration, within a period of five calendar years from the commencement of proceedings under sub-section (6):

Provided that-

(a) where a fresh assessment has to be made to give effect, to any finding or direction contained in any order under sections 38,39 or 44 or to any order of the High Court or the Supreme Court such assessment shall be made within a period of three calendar years from the date of order containing such finding or direction of the order of the High Court or the Supreme Court, as the case may be;

(b) where assessment proceedings are pending on the date of commencement of the Madhya Pradesh General Sales Tax (Amendment and Validation) Act, 1969, such assessment shall be made within a period of three calendar years from the date of such commencement or within the period within which such assessment is required to be made in accordance with any other provision of this section, whichever is later; and

(c) nothing contained in this sub-section shall apply to proceedings initiated under section 19 or any proceeding other than assessment of tax that may be instituted under any other provisions of this Act."

This clause, therefore, provides that the assessment shall be made under this section within a period of 5 calendar years from the end of the period for which assessment is to be made. It is not disputed that these proceedings before the Deputy Commissioner were proceedings in appeal where the assessee has challenged the assessment and the language of sec. 38 makes the whole assessment open before the appellate authority. It is not disputed that the appellate authority would annul or modify the assessment either by reduction or enhancement and to this power of the appellate authority under section 38, it is not disputed that the provisions contained in clause (8) of section 18 would not be attracted as appeal is a right conferred on the assessee to challenge the assessment. But it was contended by the learned counsel for the assessee that under section 43 when proceedings for imposition of penalty are taken afresh then the question of limitation will arise as imposition of penalty is also a part of assessment.

Section 43, as quoted above, contemplates two things:

(i) is the power with the Commissioner; and

(ii) is the power with the appellate authority and it is also clear that this power under section 43 could only be exercised when some proceeding under this Act is pending before the authority concerned. So far as the case in hand is concerned, it is clear that the appellate authority started proceedings for imposition of penalty by giving a notice as contemplated under section 43 and this was done when the appeal was pending before the appellate authority. It is, therefore, plain that the jurisdiction exercised under section 43 is exercised by the appellate authority during the pendency of the appeal from the order of assessment and while finally passing the order of assessment, as the appellate authority held that it was a fit case falling within the ambit of section 43 that a notice for imposition of penalty was issued and after hearing the assessee, ultimately passed the final order in appeal and in that order itself penalty was also imposed.

It is, therefore, plain that what has been done by the appellate authority is done under the jurisdiction conferred on the appellate authority while hearing the appeal and while hearing the appeal has modified the order of assessment and imposed the penalty. But before finally deciding the appeal, the appellate authority has issued a notice as contemplated under section 43. Under these circumstances, therefore, it could not be disputed that the imposition of penalty is part of the appellate order and if the appellate order is an order of assessment, to this order, the provisions of section 18(8) could not be attracted and, therefore, this provisions of section 18(8) also could not be attracted to the order pertaining to penalty as it is a part of the order of assessment by the appellate authority.

It is not as if after the assessment is completed any fresh action was taken for imposition of penalty and, in fact, section 43 confers jurisdiction only to the Commissioner or the appellate authority when some proceeding under the Act is pending before them and in this case, it was the appellate authority when the appeal was pending before it that the appellate authority has exercised jurisdiction under section 43 and, therefore, the provisions contained in clause (b) of section 18 could not be invoked. Proviso (a) to this clause also indicates that if in pursuance of an order under appeal under section 38 or under other provisions of the Act a fresh assessment has to be made, then it can be made within 3 years from the date of such finding. This proviso also indicates that the

assessments which are ultimately finalised by the appellate authority are not subject to the provisions of section 18(8) and even if after the finding of the appellate authority if a fresh assessment has to be made by the assessing authority under section 18 then also this proviso (a) has provided a further period. This is also clear from the scheme of section 18 that this section contemplates assessment by the officer who is entitled to assess at the first stage and, therefore, the provisions contained in clause (8) of this section 18 will not be operative when the appellate authority exercises jurisdiction under section 38 or under section 43 as indicated above. In this view of the matter, therefore, it could not be contended that the appellate authority exercising jurisdiction under section 43 and section 38 when finalised the assessment and also imposed penalty, it could not be justified under section 43 because it has been done beyond the period which is prescribed under section 18(8).

It was also contended that although in the order the appellate authority has indicated that jurisdiction under section 43 is being exercised. But it was contended by the learned counsel for the assessee that a notice as contemplated under section 38(5) was issued to the assessee and it was, therefore, contended on the basis of the form of the notice that the authority purported to act under section 38(5). In fact, in the order passed by the appellate authority it has been clearly stated that the authority was acting under section 43, although it appears that the learned Tribunal took the view that the appellate authority also could impose penalty under section 38(5). But it is clear from the order passed by the Deputy Commissioner exercising appellate jurisdiction that he was exercising jurisdiction under section 43 of the M. P. General Sales Tax Act and merely because there was an error in issuing a notice in the proper form, it could not be said that the appellate authority was exercising jurisdiction under section 38(5).

It was also contended that section 43 contemplates a finding that a dealer has deliberately concealed his turnover or furnished a false return and as there is no such finding given by the Deputy Commissioner exercising appellate jurisdiction, the penalty could not be justified under section 43. Although in the order passed by the appellate authority, there is no finding that the dealer has deliberately concealed his turnover but there is a positive finding that the assessee has furnished a false return. The finding having been given about the furnishing a false return, it could not be said that the order is not justified under section 43.

As regards scope of jurisdiction under section 38(5), we have already

come to a conclusion that the appellate authority exercising jurisdiction under section 38(5) in the present case, could not have imposed a penalty but as discussed above, it is clear that the appellate authority had jurisdiction under section 43 to impose penalty for the first time after giving an opportunity to the assessee of being heard and it is not disputed that that opportunity was afforded and notice was issued before the final orders were passed by the appellate authority.

In the light of the discussion above, therefore, our answer to the second question is in the affirmative that the penalty imposed under section 43 read with section 9(2) of the Central Act was justified. In the circumstances of the case, parties are directed to bear their own costs.

Reference answered accordingly.

MISCELLANEOUS CIVIL CASE

Before Mr. Justice G.G. Sohani and Mr. Justice R.K. Vijayvargiya.

22 April 1983

COMMISSIONER OF SALES TAX, M. P., Applicant*

v.

M/S SANGHAI FINANCE CORPORATION, INDORE, Opposite-party.

General Sales Tax Act, M. P., 1958 (II of 1959)—Section 2(bb) and 2(f)—The term 'business' in—Meaning of—Sale of old car by the assessee connected with the business of the assessee is exigible to tax even if assessee is not a dealer in cars.

In view of the enlarged definition of 'business' in section 2(bb) of the M. P. General Sales Tax Act, 1958, it is not necessary for rendering a sale exigible to tax to show that the sale is of a commodity in which the assessee carries on

*Misc. Civil Case No. 195 of 1982. Reference under Section 44, General Sales-tax Act, M. P., 1958, by the Board of Revenue, Gwalior, dated 18th August 1982.

Commissioner of Sales-tax, M. P. v. *M/s Sanghai Finance Corporation, Indore, 1983*

business. Therefore, the fact that the assessee is not a dealer in cars is not decisive and as the sale of the car by the assessee is connected with the business of the assessee, the transaction of sale in question is 'business' within the meaning of that expression in section 2(bb) of the Act and is exigible to tax.

Commissioner of Sales-tax, M. P. v. *Shamandas Narayandas, Jabalpur* (1); distinguished.

Commissioner of Sales-tax v. *Ratlam Straw Board Mills Pvt. Ltd., Ratlam* (M. C. C. No. 129 of 1981, Indore Bench); followed.

Surjitsingh for the applicant.

G. M. Chapekar for the opposite-party.

Cur. adv. vult.

ORDER

The Order of the Court was delivered by SOHANI, J.—By this reference under Section 44 of the M. P. General Sales Tax Act, 1958 (hereinafter referred to as 'the Act'), the Board of Revenue has referred the following question of law to this Court for its opinion :—

> "Whether on the facts and circumstances of the case, the Tribunal was justified in holding that sale of old car by the appellant could not be included in the turnover and was exempt, when the appellant is a dealer in purchase and sale of motor cars on hire purchase agreement basis and when that car as sold was being used by the appellant for business purposes ?"

The material facts giving rise to this reference briefly are as follows :

The assessee carries on business of financing hire purchase transactions in motor vehicles. while framing assessment, for the assessment year 1970-71, the assessing Authority found that the assessee had sold a car for Rs. 40,000/-. The assessing Authority held that this amount was liable to be included in the taxable turnover of the assessee. In the appeal preferred by the assessee before the Appellate Assistant Commissioner, the finding of the Assessing Authority

(1) (1982) 5 V. K N. 52.

Commissioner of Sales-tax, M. P. v. *M/s Sanghal Finance Corporation, Indore, 1983*

was affirmed. In the second appeal before the Board, the Board held that the assessee was not a dealer in automobiles, that the transaction in question was a casual one involving purchase of a second hand car which was subsequently sold and, therefore, the transaction was not liable to be included in gross or taxable turnover of the assessee. Aggrieved by the order passed by the Board, the Department sought a reference and it is at the instance of the Department that the aforesaid question of law has been referred to this Court for its opinion.

Shri Joshi, learned Government Advocate appearing for the Department contended that in view of the definition of 'business' in Section 2(bb) of the Act, the Board erred in holding that as the assessee was not a dealer in Motor Vehicles, the sale of the car in question was not exigible to tax. It was urged that as the case of the assessee was that the car was purchased for office use, the transaction of sale of that car was in connection with and incidental to the business of the assessee. In reply, Shri Chapekar the learned counsel for the assessee contended that the decision in *Commissioner of Sales-tax, M. P.* v. *Shamandas Narayandas, Jabalpur* (1) was attracted in the instant case and the sale of the car could not be held to be a transaction amounting to the business of the assessee.

Now the decision in *Commissioner of Sales Tax, M. P.* v. *Shamandas Narayandas, Jabalpur (supra)* is distinguishable on facts. In that case, the finding by the Tribunal was that the car which was sold by the assessee was not used an ancillary to the assessee's business. In the instant case, however, the contention of the assessee before the Tribunal was that the car in question was for the office use of the assessee and that its sale proceeds were not exigible to tax as the assessee was not a dealer in cars. That is why in the question referred to this Court it is stated that the car was used by the assessee for business purposes and we must, therefore, proceed on the basis that the finding of the Tribunal is that the car was used by the assessee for business purposes. In Misc. Civil Case No. 129 of 1981 (*Commissioner of Sales Tax* v. *Ratlam Straw Board Mills Private Ltd., Ratlam*) we have held that in view of the enlarged definition of 'business' under the Act, it is not necessary for rendering a sale exigible to tax to show that the sale is of a commodity in which the assessee carries on business. Therefore, the fact that the assessee is not a dealer in cars is not decisive and as the sale of the car by the assessee is connected with the business of assessee, the transaction of sale in question is 'business' within the meaning of that expression in Sec. tion 2(bb) of the Act and is exigible to tax.

(1) (1982) 5 V. K. N. 52.

Commissioner of Sales-tax, M. P. v. *M/s Sanghai Finance Corporation, Indore, 1983*

For all these reasons, our answer to the question referred to this court by the Tribunal is in the negative and against the assessee. In the circumstances of the case, parties shall bear their own costs of this reference.

Reference answered accordingly.

MISCELLANEOUS CIVIL CASES

Before Mr. G. P. Singh C. J. and Mr. Justice R. C. Shrivastava.

16 Nov. 1979

COMMISSIONER OF SALES TAX, M. P., Applicant*

v.

M/S DILIP OIL MILLS, SAGAR, Opposite-party.

General Sales Tax Act, M. P., 1958 (II of 1959)—Sections 43(1), 18(4), 8(1) and 2(r)—No concealment of turnover by the assessee—Assessee not guilty of filing false returns—Penalty cannot be imposed—Section 18(4)—Assessee not bound to maintain day to day manufacturing account—Account books found to be reliable—Assessment to be made according to turnover mentioned in the account books—Sections 8(1) and 2(r)—Judicial discretion—Exercise of, while considering question of imposition of further penalty—Sales Tax Tribunal holding that no case for imposition of further penalty exists—Not arbitrary—Tribunal also holding that acts of assessee in selling oil-seeds under form XII was only trivial or venial breach and penalty not liable to be imposed—Discretion cannot be said to be erroneous

Where in the return filed by the assessee, the assessee claimed that sales tax paid by the purchasers did not form part of the turnover; these is no concealment of the turnover and all that can be said is that the assessee wrongly raised a plea that the turnover should not include the sales tax realized by the assessee from the purchasers. Even though the plea was unreasonable, it cannot

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*M. C. C. No. 390 of 1973. Reference under Section 44 of the General Sales-tax Act, M. P., 1958, by the Board of Revenue, M. P., Gwalior, dated 5th May 1971.

be said that the assessee was guilty of filing a false return under section 43(1) of the M. P. General Sales Tax Act, 1958.

Dadabhoy's New Chirimiri Ponri Hill Colliery Company Private Ltd. v. *Commissioner of Sales Tax, M. P.* (1); followed.

The account books of the assessee could not be rejected simply on the ground that he had not maintained day to day manufacturing account. When the finding is clearly that the books of account were reliable, the turnover mentioned in them has to be accepted for the purpose of assessment.

The Commissioner of Sales Tax v. *Messrs Ramchandra Badri Prasad* (2); relied on.

Whether in a particular case minimum penalty should alone be imposed or higher penalty should be imposed is a matter of judicial discretion to be exercised having regard to the facts and circumstances of each case. Thus, where the Tribunal noted the assessee's conduct in depositing the amount equivalent to the minimum penalty leviable under section 8(2) at the time of filing the returns and further noticed that value of oil cakes sold outside the State was comparatively small having regard to the total turnover of the assessee and that at the stage when the assessee makes purchases of raw material for manufacturing of goods for sale within the State or in the course of inter-State trade or commerce, it may not be possible for him to estimate exactly as to what quantity of raw material would be needed for this purpose and having regard to all these circumstances, the Tribunal was of the opinion that if the assessee had deposited the amount as stated by him at the time of filing the returns which amount to some extent exceeded the amounts leviable as minimum penalty under section 8(2), this was not a fit case for further imposition of penalty and the discretion exercised by the Tribunal is well within the limits of the law and cannot be said to be arbitrary.

When the assessee in the normal course in the year 1965-66 purchased oil seeds under form XII-A and paid 1% tax to the sellers and out of the quantity of oil seeds purchased, the assessee resold oil-seeds of the value of Rs. 19,123/- within the State to another dealer under form XII, i. e. for resale and the purchase made by the assessee in form XII-A were held by the Tribunal to be *bona fide* acts on his part and the intention was not to deprive the State of any tax which could have been lawfully recovered, rather the State was benefitted as the assessee paid 1% tax to the seller at the time of purchase which he could

(1) 1979 M. P. L. J. 56,
(2) M. C. C. No. 86 of 1971, decided on the 3rd August 1971.

have avoided by making purchases in form XII, the reasons given by the Tribunal cannot be said to be extraneous and it cannot be said that the discretion exercised by the Tribunal in directing the assessing authority to waive the penalty under section 8(2) was in any way erroneous.

Hindustan Steel Ltd. v. *State of Orissa* (1) and *M/s Jaswantlal Prahlad Bhai and Co.* v. *Commissioner of Sales Tax, M. P.* (2); relied on.

M. V. Tamaskar Govt. Adv. for the applicant.

H. S. Shrivastava for the opposite party.

Cur. adv. vult.

JUDGMENT

The Judgment of the Court was delivered by G. P. SINGH, C. J.—This order shall also dispose of Misc. Civil Case Nos. 397 of 1973 and 398 of 1973. These are three references made by the Sales Tax Tribunal referring for our answer the following questions of law :

(1) Whether in the facts and circumstances of the case, the Tribunal was justified in quashing the penalty under section 43(1) on the ground that the assessee seems to have omitted sales tax recovered from the taxable turnover due to a *bona fide* mistake ?

(2) Whether the Tribunal was right in its conclusion that when the assessing authority has not found the books of accounts to be otherwise unreliable, best judgment assessment cannot be resorted to—

(a) on the ground that day to day manufacturing account has not been required to be maintained under the provisions of the Act or statutory rules or by virtue of a lawful direction given by the Commissioner of Sales Tax, or

(b) on the ground that the loss in manufacture is too much, unless it is put to the assessee as to what the normal loss is and the assessee is called upon to explain why his loss was more.

(3) Whether the Tribunal was right in directing the assessing authority

(1) (1972) 83 I T. R. 26. (2) 1973 M. P. L. J. 331.

to waive the penalty under section 8(2) if the following facts are verified namely--

(a) for the year 1964-65 if the dealer has paid advance tax at 1% on Rs. 41,000/-. (The assessing authority estimated that out of oil-seeds purchased on form XII-A oil-seeds worth Rs. 35,000/- may be considered to have been utilised in the manufacture of a product sold outside the State. 1% tax was already paid on this amount. The assessing authority imposed a penalty of Rs. 600/- under section 8(2) which was maintained by the first appellate authority.)

(b) For the year 1965-66 if the sales tax authorities have assessed full sales-tax on the amount of Rs. 19,123/- in the hands of the purchaser from the assessee in addition to the purchase tax at 1% in the hands of the assessee. This amount represents the price of oil-seeds which were purchased on form XII-A but sold by the assessee to another dealer for resale getting from him form XII.

(c) For the year 1966-67 if the dealer has paid advance tax on Rs. 51,408/- as against Rs. 40,000/- estimated as the amount of raw material purchased on form XII-A corresponding to outside sale of the manufacturing product.

The relevant assessment years are Diwali 1964-65, 1965-66 and 1966-67. Question No. 1 relates to the assessment year 1964-65. In the return filed by the assessee, the assessee claimed that sales tax paid by the purchasers did not form part of the turnover. There was no concealment of the turnover and all that can be said is that the assessee wrongly raised a plea that the turnover should not include the sales tax realised by the assessee from the purchasers. It cannot be said that in these circumstances the assessee was liable to penalty under section 43(1) of the M.P. General Sales Tax Act, 1958. Even though the plea was untenable, it cannot be said that the assessee was guilty of filing a false return under section 43(1). The point is covered by a Division Bench decision of this Court in *Dadabhoy's New Chirimiri Ponri Hill Colliery Company Private Ltd.* v. *Commissioner of Sales Tax, M. P* (1). Question No. 1 must, therefore, be answered in the affirmative in favour of the assessee and against the department.

Question No. 2 relates to the year 1964-65. The Tribunal held that

(1) 1979 M. P. L. J. 56.

the account books of the assessee were not unreliable. The Tribunal was of opinion that when the books of account were not unreliable, no case was made out for enhancement of the turnover and that the turnover should be taken as per the books of account. The finding that the books of account of the assessee were reliable is a pure finding of fact. It is not vitiated by the consideration that the assessee did not maintain day to day manufacturing account or that the loss in manufacturing was too much. It may be that if a loss shown by an assessee is unusual, the assessing authority may infer that the books are not reliable, but when the books are held to be reliable they cannot be rejected simply on the ground that the loss shown is too much. On the finding that the books of account were reliable, the Tribunal in our opinion was right in accepting the turnover as disclosed in the books of account and in setting aside the enhancement in the turnover made by the Sales Tax Officer. In this connection we may point out that it was held by a Division Bench of this Court in *The Commissioner of Sales Tax* v. *Messrs Ramchandra Badri Prasad* (1) that an assessee is not bound to maintain manufacturing account of the lime mnufactured, sold and left over as closing stock. The principle of this case may be applied here in holding that the account books of the assessee could not be rejected simply on the ground that he had not maintained day to day manufacturing account. However, as earlier stated, when the finding is clearly that the books of account were reliable, the turnover mentioned in them has to be accepted for the purpose of assessment. Question No. 2 will have, therefore, to be answered in the affirmative in favour of the assessee and against the dapartment.

The point involved in question Nos. 3(a) and 3(c) is the same. The assessee in the assessment years 1964-65 and 1966-67 purchased oil-seeds on declaration in form XII-A. The declaration was to the effect that the assessee purchased the goods for purposes of manufacture of other goods for sale in the State of Madhya Pradesh or in the course of inter-State trade or commerce. The assessee paid only 1% tax on these purchases to the sellers. The goods manufactured by the assessee were oil and oil-cakes. Oil-cakes of the value of Rs.35,000/-were sold outside that State in 1964-65. Similarly, oil-cakes of the value of Rs.40,000/-were sold outside the State in the assessment year 1966-67. There was thus contravention of the declarations given by the assessee in that all the goods manufactured out of the purchases made under declarations in form XII-A were not utilised for manufacture of goods for sale within the State or in the course of inter-State trade or commerce. At the time when the returns were filed, the assessee deposited 1% tax on the estimated quantity of oil-seeds which was utilised for the manufacture of goods which were sold outside the State.

(1) M. C. C. No. 86 of 1971, decided on the 3rd Aug. 1971.

The Tribunal came to the conclusion that as the minimum penalty leviable under section 8(2) was 1% being the difference between the amount of tax on the sale of oil-seeds at full rate and the amount of tax payable under section 8(1), having regard to all the circumstances of the case the assessee was not liable for any further penalty. The Tribunal remanded the case to the assessing authority to find out whether the tax or penalty had been deposited in the manner stated by the assessee. It may here be mentioned that the full rate of tax on sale or purchase of oil-seeds at the relevant time was 2% and the concessional rate of tax under section 8(1) at the relevant time was 1%. Although the assessee paid 1% at the time of filing the returns showing it as balance of tax but the real nature of such a deposit was an advance minimum penalty to which the assessee could be made liable under section 8(2). In *Hindustan Steel Ltd.* v. *State of Orissa* (1) the Supreme Court observed that even if a minimum penalty is prescribed, the authority competent to impose the penalty will be justified in refusing to impose penalty, when there is a technical or venial breach of the provisions of the Act or where the breach flows from a *bona fide* belief that the offender is not liable to act in the manner prescribed by the statute. The Supreme Court further observed that an order imposing penalty for failure to carry out a statutory obligation is the result of a *quasi*-criminal proceeding and whether penalty should be imposed for failure to perform a statutory obligation is a matter of discretion of the authority to be exercised judicially and on a consideration of all the relevant circumstances. The principles laid down by the Supreme Court in the case of *Hindustan Steel Ltd.* have been applied to section 8(2) of the M. P. General Sales Tax Act by a Division Bench of this Court in *M/s Jaswantlal Prahlad Bhai & Co.* v. *Commissioner of Sales Tax, M. P.* (2). Even otherwise it is clear that the question whether in a particular case minimum penalty should alone be imposed or higher penalty should be imposed is a matter of judicial discretion to be exercised having regard to the facts and circumstances of each case. As earlier pointed out, the Tribunal has noted the assessee's conduct in depositing the amounts equivalent to the minimum penalty leviable under section 8(2) at the time of filing the returns. It has further noticed that value of oil-cakes sold outside the State was comparatively small having regard to the total turnover of the assessee. It has also noticed that at the stage when the assessee makes purchases of raw materials for manufacture of goods for sale within the State or in the course of inter-State trade or commerce, it may not be possible for him to estimate exactly as to what quantity of raw material would be needed for this purpose. Having regard to all these circumstances, the Tribunal was of opinion that if the assessee had deposited the amounts as stated by him at the time of filing the returns which amounts to some extent exceeded the amounts

(1) (1972) 83 I. T. R. 26. (2) 1973 M. P. L. J. 331.

leviable as minimum penalty under section 8(2), this was not a fit case for further imposition of penalty. In our opinion, the discretion so exercised by the Tribunal is well within the limits of the law and cannot be said to be arbitrary. Questions Nos. 3(a) and 3(c) will, therefore, have to be answered in favour of the assessee and against the department.

Coming to question No. 3(b), the relevant facts are that the assessee in the normal course in the year 1965-66 purchased oil-seeds under form XII-A and paid 1% tax to the sellers. Out of the quantity of oil-seeds purchased, the assessee resold oil-seeds of the value of Rs. 19,123/- within the State to another dealer under form XII, i. e. for re-sale. Oil-seeds are declared goods under the Central Sales Tax Act, 1956. Under section 15(a) of the Central Act the tax payable on declared goods is a single point tax. The declared goods are specified in Part I of Schedule II to the State Act. The definition of "taxable turnover" contained in section 2(r) of the State Act does not include sales to a registered dealer of goods specified in Part I of Schedule II and declared by him in the prescribed form as being intended for resale by him in the State of Madhya Pradesh or in the course of inter-State trade or commerce. In view of this definition of "turnover" sales tax on declared goods is payable at the last point sale, i. e., when the goods are sold to a consumer or manufacturer. The manufacturers of oil may purchase oil-seeds in form XII-A under section 8(1). If they do so, they are liable to pay tax at the rate of 1% to the seller. They can also purchase oil-seeds on form XII. In that case they would not be liable to pay any sales tax to the seller. They would not be liable to the payment of tax to the Government if they resell the goods to another dealer in form XII. But in case they utilise the oil-seeds purchased in form XII for manufacture, they are liable to pay tax at the rate of 1% under notification No. 2708/CR-85-V-SR, dated 18th December 1959. In this back ground the Tribunal was of opinion that the act of the assessee in selling oil-seeds under form XII was only a trivial or venial breach and the assessee should not be made liable for penalty under section 8(2). The Trihunal observed that if the assessee had purchased the goods under form XII, he would not have been liable to pay any tax. The assessee, however, purchased the goods in form XII-A and paid 1% tax to the seller which he could have avoided by purchasing them in form XII. The purchases made by the assessee in form XII-A were *bona fide* acts on his part and the intention was not to deprive the State of any tax which could have been lawfully recovered. Rather the State was benefitted as the assessee paid 1% tax to the seller at the time of purchase which he could have avoided by making purchases in form XII. The reason given by the Tribunal cannot be said to be extraneous in the light of the principles laid down by the Supreme Court in the case of *Hindustan Steel Ltd.* which were applied by this Court in the context of

section 8(2) in *M/s Jaswantlal's case (supra)*. We are of opinion that it cannot be said that the discretion exercised was in any way erroneous. Question No. 3(b) must also be answered in favour of the assessee and against the department.

For the reasons given above, all the questions referred are answered in favour of the assessee and against the department. There shall be no order as to costs.

Reference answered accordingly.

MISCELLANEOUS CRIMINAL CASE

Before Mr. Justice C. P. Sen and Mr. Justice M. D. Bhatt.

13 Dec. 1983

SHRI S. K. MALVIYA, Applicant*

v.

SHIVCHARAN KURMI and others, Non-applicants.

Contempt of Courts Act (LXX of 1971)—Section 12—Duty of counsel and care to be taken by him in making representations on behalf of his client—Application for cancellation of bail containing statement that accused had told villagers that he had given money to Sessions Judge for being released on bail—Constitutes contempt of Court—Liability of Advocate (Public Prosecutor) filing the application, persons filing affidavits and lodging police report to that effect and Advocate indentifying the deponants of those affidavits and found to be author of the application for punishment under the Act.

Counsel has to be careful in taking responsibility for the representation he makes on behalf of his client to the Court. When the parties in the application alleged misconduct or bias, the counsel if he signs the petition should see that such irresponsible allegations are not made. If they are made and if he yet signs the petition, he will be deemed to be in as much contempt of the Court as his

*Misc. Cr. Case No. 78 of 1983. Reference under Section 15(2) of the Contempt of Courts Act, 1971, by the District and Sessions Judge, Damoh.

party. It is most irregular and unfair for the members of the legal profession to make personal attacks or make reckless and unfounded charges of corruption and improper imputation against Court. If the lawyer thinks that he has a just case of complaint against a Judge, he can make a representation to the higher authorities against his conduct. No counsel should be punished for *bona fide* statements but he would be liable for contempt if he makes reckless allegations without making proper enquiry or concucts or mischieviously twists facts casting aspersions on the Court.

Perspective Publications v. *State of Maharashtra* (1), *M. Y. Shareef* v. *Judges of Nagpur High Court* (2), *Brahma Prakash* v. *State of M. P.* (3), *State of M. P.* v. *Revashankar* (4) and *Govind Ram* v. *State of Maharashtra* (5); referred to.

Thus, where in an apolication for cancellation of bail it is stated that the accused has gone to village with his brothers and had told villagers "वह अपने तौल के रूपये देकर जमानत पर रिहा हो गया है तथा इसी तरीके से अभियुक्तगण भगवानदास व सीताराम को भी छुड़ा लावेगा।" and this application is drafted by contemner No. 5 an Advocate and public prosecutor and it is accompained by the affidavits of Contemners Nos. 2 to 4 and copy of the police report lodged by contemner No. 1 and the report was found to be false by the Sessions Judge and the High Court and contemner No. 6 had identified contemners Nos. 2 to 4 in the affidavits filed with the application and on preliminary enquiry held by the Sessions Judg the contemner No. 6 is found to be the author of the application for cancellation of bail, the contemners Nos, 1 to 6 are guilty of committing gross contempt of Court by scandalizing the court and thereby interfering with the administration of justice and are liable to be punished under section 12 of the Contempt of Courts Act.

Rajendra Tiwari Govt. Advocate for the applicant.

S. C. Dutt for non-applicant no. 4.

H. Q. Tiwari for non-applicant no. 5.

Rajendrasingh for non-applicant no. 6.

Cur. adv. vult.

(1) A. I. R. 1971 S.C. 221. (2) A. I. R. 1955 S. C. 19.
(3) A. I. R. 1954 S. C. 10. (4) A. I. R. 1959 S.C. 102.
(5) A.I.R. 1972 S.C. 989.

Shri S. K. Malviya v. *Shivcharan Kurmi, 1983*

ORDER

The Order of the Court was delivered by C. P. SEN J.—This is a reference under section 15(2) of the Contempt of Courts Act, 1971, made by Sessions Judge Damoh for taking action for contempt against contemners 1 to 6. Notices were issued to the contemners and also to Anandilal son of Ramdayal.

The said Anandilal, his brother Bhagwandas, one Sitaram and others resident of village Ghutariya, Tahsil Hatta, are being prosecuted under sections 147,148 and 302/149, I. P. C. for committing murder of Gopi on 9-7-1982 in Crime No. 48/82 of Gaisabad police station. Contemner no. 1 Shivcharan Kurmi is a relation of the deceased. In bail application no. 481/82 by order dated 31-7-1982 Anandilal was released on anticipatory bail by the Sessions Judge who rejected the application of Bhagwandas. While granting bail, the Sessions Judge observed that it is alleged that Anandilal came out with a Lathi and Bhagwandas with a gun and he shouted "Maro Sale Ko" but there is no overt act against Anandilal, thereafter the deceased was killed by the other co-accused. On 5-8-1982 contemner no. 5 Shri Balram Tiwari, Public Prosecutor, Damoh, moved an application for cancellation of bail of Anandilal alleging that he had gone to village Badkhera with his brothers and had told villagers

"वह अपने तौल के रूपये देकर जमानत पर रिहा हो गया है तथा इसी तरीके से अभियुक्तगण भगवानदास व सीताराम को भी छुड़ा लावेगा"

It was further alleged that Anandilal stayed in the village and was threatening the witnesses in the case. Alongwith the application, photostate copy of the report lodged by contemner no. 1 Shivcharan Kurmi to police station, Hatta on 4-8-1982 and also affidavits of contemners 2 to 4 Hariram, Sitaram and Ramsewak were enclosed in support of the allegations. The three deponents in their affidavits were identified by the contemner no. 6 Shri Harbanslal Awasthy, a practising Advocate of Damoh. Notice was issued to Anandilal and he denied the allegations. He submitted that he never visited the village and the allegations are false and mischievous. In fact, in pursuance of the order of the Sessions Judge he went and offered his bail but he was illegally detained in the police station and ultimately released on bail on 12.8.1982. According to him, he and his brothers were eye-witnesses in the murder case of Barelal Kurmi in village Barkheta in the year 1978 in which Raghvendra Hajari, the then sitting M. L. A., and his brothers were accused. Hajari brothers were convicted by the trial Court

but they have been acquitted by this Court in appeal and so in order to take revenge and by using their political influence Anandilal and his brother Bhagwandas have been falsely implicated in the present case. At present, Raghvendra Hajari's wife Snehlata Hajari is a sitting M. L. A. of the ruling party. He never made any imputation against the applicant nor he had threatened the witnesses. By order dated 27.8.1982 the Sessions Judge rejected the application for cancellation of bail observing that the allegations that Anandilal alongwith Bhagwandas and Sitaram visited village Barkhera and made the imputation and threatened the villagers are false. Anandilal was actually released on bail on 12.8.1982 and it was stupid on his part to go to Barkhera on 2.8.82 or 3.8.83 and would have boasted how he got bail. In the report lodged by Shivcharan, the visit was stated to be on 3.8.1982 but in the affidavits of Hariram, Sitaram and Ramsewak the visit was said to be on 2.8.1982. Neither in the report nor in the affidavits there is mention about the presence of Bhagwandas and Sitaram in the said visit. So the story is a work of imagination and has been purposefully concocted in order that Anandilal's may be cancelled and also that bail is not granted to Bhagwandas and Sitaram. This order of the Sessions Judge was affirmed by this Court in Criminal Revision No. 42/83 on 15-2-1983.

It appears the Sessions Judge thereafter decided to hold a preliminary enquiry into the allegations made in the application for cancellation of bail by registering Misc. Cr. Case No. 17/82 on 10.9.1982. The Sessions Judge recorded the statements of Shri Balram Tiwari, Shri Harbanslal Awasthy, Sri M. Y. Siddiqui Notary who had sowrn the affidavits, A. K. Tiwari, clerk of Sri Balram Tiwari and three Advocates Serva Shri Ramesh Shrivastava, G. S. Mehta and B. K. Tandon. The Sessions Judge then made this reference to this Cours saying that the contents of the application for cancellation of bail, the report given to the police station by Shivcharan and the affidavits sworn by Hariram, Sitaram and Ramsewak are contemptuous and are made with the intention of scandalizing the Court and interfering with the administration of justice. The allegations appear to have been made with the ulterior motive of influencing the probable orders which might be passed on the applications of bail which might be prsented in future on behalf on Bhagwandas and Sitaram. These allegations of payment of money to the Judge are false, mischieous and made with the intention of lowering down the prestige of the Court of Sessions and to make it a subject of public ridicule. Shri Tiwari stated that Shri Awasthy Advocate is the person who had drafted the application and who was instrumental in getting the affidavits sworn by the witnesses and this is corroborated from the statement of Shri A. K. Tiwari and Shri Siddiqui. It is worth noting that the person who drafted the application has exaggerated the allegation in the report and the

affidavits by adding "अपने तौल के रूपये देकर जमानत पर रिहा हो गया" So the contemners should be punished under section 3 of the Act.

In pursuance of the show cause notices issued, contemner Shivcheran submitted that the averments in the application for cancellation of bail were not made by him but the same was prepared and drafted by Shri Awasthy. This is evident from the mistake in the application by mentioning deceased Gopi as his father while his father is Kunjilal. Without reading and understanding the application, he had signed the same. Similar is the statements of contemners 2 to 4 Hariram, Sitaram and Ramsewak that they never gave any instructions to Shri Awasthy to make the allegations contained in their affidavits. Sitaram is illiterate while Hariram and Ramsewak had read upto 2nd and 6th class respectively. Without reading and understanding the contents, they had sworn the affidavits which were drafted by Shri Awasthy. In his reply hisBalram Tiwari, contemner no. 5, submitted that after anticipatory bail was granted to Anandilal, one application was moved by Mahantibai, widow of Gopi, before the District Magistrate stating that Shri Tiwari should be removed and in his place Shri Awasthy be instructed to appear for the State in the case. The application for cancellation of bail along with its enclosures were drafted and prepared by Shri Awasthy and he was instructed by the District Magistrate to file the application for concellation of bail. Without reading the application and relying on Shri Awasthy he had signed and presented the same in the Court, in fact, against the order rejecting the application he had himself drafted an application for cancellation of bail for being presented in the High Court and in that application he had not made any imputation against the Sessions Judge. In the reply of Shri Awasthy, he denied that he had drafted or prepared the application for cancellation of bail and the affidavits. He simply identified the deponents in the three affidavits. without knowing the contents. He was not engaged by Mahantibai or anybody to oppose the bail of Anandilal and others. However, all the contemners have expressed that they have full regard and trust in the impartiality and dignity of the Court and each of them has submitted an unqualified and unconditional apology and prayed for discharge of the notices.

The Supreme Court in *Perspective Publications* v. *State of Maharashtra* (1) has held that "it is open to anyone to express fair, reasonable and legitimade criticism of any act or conduct of a Judge in his judicial capacity or even to make a proper and fair comment on any decision given by him because Justice is not a cloistered virtue and she must be allowed to suffer the scrutiny and respectfully, even though outspoken, comments of ordinary men." It has been

(1) A. I. R. 1971 S. C. 221.

further observed that it will not be right to say that proceedings for contempt for scandalizing the Court have become obsolete and the proper course for the Judge is to institute an action for liable. The Supreme Court in the celebrated case of *M. Y. Shareef* v. *Judges of Nagpur High Court* (1) has held as under :—

> "There cannot be both justification and an apology. The two things are incompatible. Again an apology is not a weapon of defence to purge the guilty of their offence; nor is intended to operate as a universal panacea, but it is intended to be evidence of real contriteness.
>
> Counsel who sign applications or pleadings containing matter scandalizing the Court without reasonably satisfying themselves about the *prima-facie* existence of adequate grounds therefore, with a view to prevent or delay the course of justice, are themselves guilty of contempt of Court, and it is no duty of a counsel to his client to take any interest in such applications; on the other hand, his duty is to advise his client for refraining from making allegations of this nature in such applications.
>
> Once the fact is recognised that the members of the Bar have not fully realised the implications of their signing such applications and are firmly under the belief that their conduct in doing so is in accordance with professional ethics, in such cases even a qualified apology may well be considered by a Court. In border line cases where a question of principle about the rights of counsel and their duties has to be settled, an alternative plea of apology merits consideration; for it is possible for a Judge who hears the case to hold that there is no contempt in which case a defence of unqualified apology is meaningless, because that would amount to the admission of the commission of an offence. Every form of defence in a contempt case cannot be regarded as an act of contumacy. It depends on the circumstances of each case and on the general impression about a particular rule of ethics amongst the members of the profession."

It is clear that counsel has to be careful in taking responsibility for the representation he makes on behalf of his client to the Court. When the parties in the application allege misconduct or bias, the counsel if he signs the petition should see that such irresponsible allegations are not made. If they are made

(1) A. I. R. 1955 S. C. 19.

and if he yet signs the petition, he will be deemed to be inasmuch contempt to the Court as his party. It is most irregular and unfair for members of the legal profession to make personal attacks or make reckless and unfounded charges of corruption and improper imputations against Court. If the lawyer things that he has a just case of complaint against a Judge, he can make a representation to the higher authorities against his conduct. No counsel should be punished for *bona fide* statements but he would be liable for contempt if he makes reckless allegations without making proper enquiry or concocts or mischievously twists facts casting aspersions on the Court.

The Supreme Court in *Brahma Prakash* v. *State of M. P.* (1) has held as follows :-

> "Cases of contempt which consist of scandalising the court itself, are fortunately rare and require to be treated with much discretion. Proceedings for this species of contempt should be used sparingly and always with reference to the administration of justice. If a Judge is defamed in such a way as not to effect the administration of justice, he has the ordinary remedies for defamation if he should feel impelled to use them.
>
> There are two primary considerations which should weigh with the court when it is called upon to exercise the summary powers in cases of contempt committed by 'scandalising' the court itself. In the first place, the reflection on the conduct or character of a judge in reference to the discharge of his judicial duties, would not be contempt if such reflection is made in the exercise of the right of fair and reasonable criticism which every citizen possesses in respect of public acts done in the seat of justice. It is not by stifling criticism that confidence in courts can be created.
>
> In the second place, when attacks or comments are made on a judge or Judges, disparaging in character and derogatory to their dignity, care should be taken to distinguish between what is a libel on the judge and what amounts really to contempt of court. The fact that a statement is defamatory so far as the judge is concerned does not necessarily make it a contempt."

In that case the resolution of the Bar Council that certain judicial officers were incompetent was forwarded to the higher authorities and although the

(1) A.I.R. 1954 S. C. 10.

Shri S K. Malviya v. Shivcharan Kurmi, 1983

Supreme Court found that the imputations regarding incompetency are *prima-facie* contemptuous but no contempt has been committed since there was no publication as required under Contempt of Courts Act, though the publication was sufficient for an action for defamation. The Supreme Court in *State of M. P.* v. *Revashankar* (1) has held under :-

> "If in its true nature and effect, the act complained of is really "scandalising the court" rather than a mere insult, than it is clear that on the ratio of the decision in AIR 1952 SC 149 the jurisdiction of the High Court is not ousted by reason of the provision in Section 3(2) of the Act.
>
> Where the accused filed an application purporting to be one under Sec. 528, Criminal P. C. in which he made serious aspersions against the Magistrate, on aspersion being that the Magistrate had joined in a conspiracy to implicate the accused in a false case of theft and the other aspersion being that the Magistrate had taken a bribe of Rs. 500/-.
>
> Held that the aspersions amounted to something more than a mere intentional personal insult to the Magistrate; they scandalised the court itself and impaired the administration of justice. S. 3(2), therefore, did not stand in the way of the High Court taking cognizance of the Contempt."

The Supreme Court in *Govind Ram* v. *State of Maharashtra* (2) has held that the mere statement in an application for transfer that a Magistrate is friendly with a party who happens to be an advocate and enjoys his hospitality or has friendly relations with him will not constitute contempt unless there is an imputation of some improper motives as would amount to scandalizing the court itself and as would have a tendency to create distrust in popular mind and impair the confidence of the people in the Courts.

So keeping in view these principles and after having heard the parties and perused the record, we are of the opinion that gross contempt has been committed by these contemners by making false and reckless allegations against the Sessions Judge alleging that he had taken money for granting bail to Anandilal. This is not disputed by Shri Rajendra Singh who appeared for Shri Awasthy and by Shri S. C. Dutt who appeared for rest of the contemners including Shri Balram Tiwari. According to Shri Tiwari, the application and

(1) A. I. R. 1959 S. C. 102. (2) A. I. R. 1972 S. C. 989.

affidavits were drafted and prepared by Shri Awasthy and he simply presented the same under his signature relying on his colleague Shri Awasthy without reading the contents and he had filed the application on the instructions of the District Magistrate. This does not appear to be correct and he is belied by his own statement given before the Sessions Judge in the preliminary enquiry that he had corrected the application which was drafted and prepared by Shri Awasthy. This is also evident from the corrections made in the cause title and also in its body in his own hand by Shri Tiwari. Therefore, it cannot be accepted that without reading the application and by relying on Shri Awasthy he had signed and presented the application. He had presented the application fully knowing the contents. It appears that there was some sort of pressure on Shri Tiwari because earlier an application was made by Mahantibai, widow of deceased Gopi, to the District Magistrate that Shri Tiwari should be removed and instead Shri Awasthy should be appointed to conduct the case as Shri Tiwari did not oppose the bail of Anandilal. But we are inclined to accept his explanation that it was Shri Awasthy who drafted and prepared the application and the affidavits. In his turn Shri Awasthy wants to wash off his hands by saying that he has nothing to do in the matter except his identifying the deponents in the affidavits. Neither he has drafted or prepared the application or the affidavits nor he was aware of the contents. He was also not engaged by anyone to oppose the bail of Anandilal and others. Similar was his statement in the preliminary enquiry recorded by the Sessions Judge but he has been belied by his own clients i. e. contemners 1 to 4. According to them, the author of the application and the affidavits is Shri Awasthy who had prepared and drafted them without any instructions from them. These are illiterate villagers and it is just possible that so far as deponents Hariram, Sitaram and Ramsewak are concerned they might have sworn the affidavits without knowing the contents but this will not be so, so far as Shivcharan is concerned because he had also lodged a report in police station Hatta on 4.8.1982 alleging that Anandilal was boasting that he got bail by paying money. May be he was instigated by others to make such a report. The report has been found to be false by the Sessions Judge and also by this Court in revision. It is difficult to believe that without knowing the contemners 1 to 4 Shri Awasthy would have taken pains to get the affidavits sworn before Shri Siddiqui. The deponents were identified by him. Shri Tiwari is also corroborated by his younger brother and clerk Shri A. K. Tiwari that Shri Awasthy had prepared and drafted the application and the affidavits and he had handed over the papers for being presented by Shri Balram Tiwari who has the Public Prosecutor. We are also inclined to accept the statement of senior Advocate Shri G. S. Mehta who appeared for Anandilal for getting bail and for opposing the application for cancellation of bail that Shri Awasthy

was annoyed when bail was granted and he had instructed the Addl. Public Prosecutor at the time of arguments for cancellation of bail. Similar is the statement of Shri B. K. Tondon, another Advocate. We are not inclined to accept the statement of Shri Ramesh Shrivastava Addl. Public Prosecutor that he has taken no help from Shri Awasthy while arguing for cancellation of bail of Anandilal. If Shri Awasthy was not already engaged on behalf of the complainant's party, it is not understood why he should appear and take so much interest. In fact, the widow of the deceased also made one application before the District Magistrate that in place of Shri Tiwari, Shri Awasthy should be appointed to conduct the case. The Sessions Judge has also observed that while drafting the application for cancellation of bail some exaggerations have been made from the allegations in the report and the affidavite by adding "अपने तौल के रूपये देकर जमानत पर रिहा हो गया". We have no doubt that Shri Awasthy is the author of these imputations and he cannot escape his liability by saying that he has neither prepared nor signed the application for cancellation of bail

We, therefore, hold that contemners 1 to 6 have committed gross contempt of court by scandalizing the Court and thereby interfering with the administration of justice and they are liable to be punished under section 12 of the Act. We take a lenient view so far as contemners 2 to 5 are concerned and serve a stern warning to them that in case they are found to resort to similar attitude a severe action would be taken against them in public interest. However, no such leniency can be shown to contemners 1 to 6 Shivcharan Kurmi and Shri Harbanslal Awasthy. Both are responsible for making false and reckless allegations and each is sentenced to pay fine of Rs. 500/- or in default to undergo simple imprisonment for one month.

Reference accepted.

MISCELLANEOUS PETITION

Before Mr. G. L. Oza Ag. C. J. and Mr. Justice C. P. Sen.

20 Feb. 1984

GORELAL GUPTA and others, Petitioners*

v.

STATE OF M. P. and others, Respondents.

Dakaiti and Vyapaharan Prabhavit Kshetra Adhiniyam, M. P. (XXXVI of 1981), Section 14 and Constitution of India, Article 14—Provisions of the Adhiniyam are not discriminatory— Section 14 of the Adhiniyam does not give arbitrary or naked powers to the District Magistrate— Provides guidelines for exercise of powers of District Magistrate— Property acquired through the commission of specified offences in the affected area prior to the enactment of the Adhiniyam also fall within the mischief of the Adhiniyam—Exercise of powers by the District Magistrate under the Adhiniyam— Requirements of —Rational and intelligible nexus between reasons and belief necessary— District Magistrate attaching the property of the petitioner without strict compliance of the requirements of Section 14 of the Adhiniyam—Order ultra vires *and illegal—Liable to be quashed— Remedial Statute has to be given widest operation according to its language.*

The District Magistrate can act under Section 14 of the Adhiniyam if he has reason to think that a person holds property in dacoity and kidnapping affected area, acquired through commission of a specified offence and for which a owner cannot satisfactorily account for. Therefore, it is open to this Court to find out whether the District Magistrate had reason to think that the properties were acquired through commission of a specified offence on the basis of relevant facts or the order was within the restraints of the statute. If there is no rational or intelligible nexus between reasons and belief, no one properly instructed on facts and law could reasonably entertain the belief, the conclusion would be that District Magistrate had no such reasons to think.

Barium Chemicals Ltd. v. *Company Law Board* (1) and *Ganga Saran & Sons* v. *I. T. Officer* (2); relied on.

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*M. P. No. 261 of 1982.

(1) A. I. R. 1967 S. C. 295. (2) A.I.R. 1931 S.C. 1363.

Gorelal Gupta v. *State of M. P., 1984*

Oxford Companion to Law (1980 Editor, page 1037, Black's Law Dictionary (Vth Edition), page 1652 and *Strouds Law Dictionary (4th Edition, Vol. V at page 2763*; referred to.

Since seizure of property from the possession of an owner is deprivation of property, the District Magistrate while attaching property under Section 14 of the Adhiniyam has to strictly comply with the requirememts of the Statute giving reasons which made him to think that the property was acquired through the Commission of a specified offence and the owner was unable to satisfactorily account for the same. Thus, where the impugned order of the District Magistrate has not disclosed any reasons for the attachment except saying that the owners were unable to account for the same and he has also not recorded the satisfaction that the properties were acquired through Commission of a specified offence. the impugned order of attachment is *ultra vires* and illegal and is liable to be quashed and attached properties are released from attachment.

The object of M. P. Dakaiti and Vyapaharan Prabhavit Kshetra Adhiniyam, 1981 is for curbing the menace of organized and unorganized gangs of dacoits effectively, it is essential to break the chain of vested interests assisting or associate with such gangs. This is an enactment to curb the menace of dacoity and kidnapping in affected areas of the State in order to protect the public against organized gangs of dacoits. So it deals with special types. of people i e. dacoits and their associate areas in respect of specified offences. It has come to be realized that to stop the menace of dacoity and kidnapping more stringent and speedy measures are necessary and that is why this special enactment. Differential treatment does not '*per se*' constitute violation of Article 14 of the Constitution, it denies equal protection only when there is no reasonable basis for differentiation. The provisions of the Adhiniyam deal with a particular class of persons. Therefore, provisions of the Adhiniyam are not discriminatory and are not hit by Article 14.

Ameerunnissa v. *Mahboob Begum* (1) and *In re-Special Court Bill 1978* (2); relied on.

M. Chhaganlal v. *Greater Bombay Municipality* (3); referred to.

The procedure laid down under the Adhiniyam are not so harsh or onerous as to suggest that a discrimination would result if attachment is made under Section 14. The powers of the District Magistrate are well defined and fully

(1) A. I. R. 1953 S.C. 91. (2) A. I R. 1979 S. C. 478.
(3) A. I. R. 1967 S. C. 2009.

regulated. He has to act within the four corners of the Adhiniyam and the Rules. He cannot act arbitrarily or capriciously. Thus, Section 14 of the Adhiniyam does not give arbitrary or naked powers without any guide lines to the District Magistrate.

State of West Bengal v. *Anwar Ali* (1); referred to.

Some of the specified offences are those already existing in the Indian Penal Code and if some property has been acquired through Commission of such penal offences in the affected areas now so declared the same would come within the mischief of the Adhiniyam though acquired prior to its enactment. This is clear from the language used in the Adhiniyam. So it is not possible to read in the Adhiniyam that properties to be acquired after the coming of the Adhiniyam are alone to come within its perview.

State of Maharashtra v. *K. K. S. Ramaswamy* (2) and *Gulabchand* v. *State of M. P.* (3); referred to.

State of Bombay v. *Vishnu Ramchandra* (4) and *Sujjan Singh* v. *State of Punjab* (5); relied on.

Y. S. Dharmadhikari for the petitioners.

R. K. Verma Dy. Advocate General for respondents nos. 1 to 4.

Cur. adv. vult.

ORDER

The Order of the Court was delivered by C. P. SEN, J.—Under Article 226 of the Constitution the petitioners are seeking a writ of *certiorari* for quashing the order of the District Magistrate, Chhatarpur, dated 7-12-1981 attaching the properties of the petitioners under Section 14 of M. P. Dakaiti and Vyapaharan Prabhavit Kshetra Adhiniyam, 1981 (hereinafter referred to as the Adhiniyam).

Petitioner no. 1 Gorelal is the husband of petitioner no. 2 Mannubai and father of petitioners nos. 3 and 4 Laxmiprasad and Deviprasad. They constitute a joint Hindu family and residing in house no. 25 on Gandhi Road, Chhatarpur.

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(1) A. I. R. 1952 S. C. 75.
(2) A. I. R. 1977 S. C. 2090.
(3) 1982 M. P. L. J. 7.
(4) A. I. R. 1961 S. C. 307.
(5) A. I. R. 1964 S. C. 464.

They own Gupta Lodge and New Gupta Lodge near bus-stand, Chhatarpur. They also own some agricultural land. Gupta Lodge is run in partnership between petitioners 1 and 3 while New Gupta Lodge is in partnership between petitioners 2 and 4. The petitioners 1 and 2 settled down at Chhatarpur in the year 1948-49 and they had a modest beginning by running a grocery shop in the year 1951 and then they started a sweetmeat shop known as Gupta Mishthan Bhandar. They were also taking forest contracts in partnership with others. In 1964 a plot was purchased on the motor-stand and Gupta Lodge was constructed in the year 1965. The adjacent plot was purchased in 1965 and they constructed New Gupta Lodge later on. In the year 1970 the petitioners purchased one house on Gandhi Road, Chhatarpur and then constructed their present residential house thereon. The M.P. Dakaiti Prabhavit Kshetra Adhyadesh, 1981, was promulgated on 20-4-1981 specifying certain offences in the dacoity invested areas of the State, providing for more stringent punishment and speedy trial and making provision for attachment and confiscation of properties acquired through the commission of specified offences. In exercise of the power conferred by section 22(1) of the Adhyadesh, the State Government framed rules called M. P. Dakaiti Prabhavit Kshetra Niyam, 1981, brought into force from 20-8-1981. The Adhyadesh was amended by amending ordinance no. 11 of 1982 which came into force on 27-8-1982. The Adhyadesh was replaced by the present Adhiniyam which came into force on 7-10-1981. The definition of specified offences was enlarged to include cases of kidnapping also. The Adhiniyam was also amended by amending Act No. 29 of 1982 which came into force on 29-10-1982. It appears that the District Magistrate received certain reports and forwarded the same to the Sub-Divisional Magistrate for enquiry. The Police recorded statements of petitioners 1 and 3 i.e. Gorelal and Laxmiprasad on 6-12-1981. He then passed the impugned order that the petitioners own Gupta Lodge and New Gupta Lodge in bus-stand and house no. 25 at Gandhi Road, Chhatarpur, but they were unable to account for the same satisfactorily and, therefore, these properties have been attached under section 14(1) of the Adhiniyam. In the order-sheet of the same date he recorded that prior to 1965 the petitioners were living in a rented house and were in ordinary circumstances but they are in affluence after 1965. They have acquired valuable properties within the last 25 years, the acquisition of which have not been satisfactorily explained. In pursuanec thereof, the Tahsildar attached the properties on the same day but the petitioners were permitted to reside in the portion of house no. 25 in their occupation on execution of a supratnama and the management of the two lodges were given to the Municipal Council, Chhatarpur. The petitioners moved an application on 8-12-1981 for release of the two lodges on their supratnama for management till completion of the enquiry which was rejected on 4-1-1982. The petitioners made a representation against attachment on 27-1-1982 explaining how these properties were

acquired submitting that their business is being regularily assessed to sales-tax and income-tax purposes and regular accounts are being maintained. The petitioners then filed the present petition on 2-3-1982. Return was filed on 8-4-1982 by the respondents and re-joinder on 12-4-1982. However, by order dated 27-4-1982 the petitioners were permitted to manage the two lodges on their executing supratnamas during pendency of the petition. The lodges are being managed by the petitioners. By further order dated 3-6-1982 the District Magistrate opined that he was under the impression that reasons were not to be given as the rules framed under the Adhyadesh lapsed after the enactment of the Adhiniyam but on reconsideration it appeared that the same rules continued under the Adhiniyam in the absence of fresh rules being framed and so he is disclosing the reasons for attachment of the properties of the petitioners because the same were acquired out of the funds supplied by dacoit Muratsingh and his son Ramsingh.

The petitioners' case is that they are permanent residents of Chhatarpur doing business there and owning buildings and agricultural lands. They started a Kirana Shop in the year 1951 and thereafter a sweetmeat shop known as Gupta Misthan Bhandar. They also started doing business in forest contracts in partnership with others. Out of the income from their business, they acquired a plot in the year 1964 for Rs. 3,000/- and constructed Gopta Lodge in the year 1965 on an investment of Rs. 27,000/-. The Lodge was opened by the ex-President of the Municipal Council. Further they acquired adjacent plot in the year 1965 for Rs. 7,000/- and then constructed New Gupta Lodge by investing Rs. 46,955/-. Further improvements have been made in these properties. In the year 1970 they purchased a house at Gandhi Road for Rs. 20,000/- and thereon they constructed their residential house no. 25. They have been maintaining regular accounts and the same were scrutinised from time to time by the sales-tax, income tax and wealth-tax authorities. They have been paying taxes regularly amounting to thousands of rupees. They have taken necessary licences for running the two Lodges. In these two Lodges tourists from India and abroad come and stay. The petitioners are not at all connected with any activities relating to the specified offences as defined in the Adhiniyam. They have no connection with any dacoit nor they are in any way involved in any case of dacoity or kidnapping. Before passing the impugned order, the District Magistrate did not ask the petitioners to produce their accounts and documents to explain acquisition of these properties nor any notice was given to them. Without any application of mind, the District Magistrate has passed the order attaching the properties. The action is high-handed and arbitrary. The petitioners were arrested under section 12 of the Adhiniyam but they were granted bail by Special

Judge on 6th and 8th of December 1981 as he found that there is no *prima facie* case to connect the petitioners with any specified offences. Their representation is not being decided.

In their return, the respondents contended that the petitioners owned no property worth the name. Earlier the family was living in a rented house and running a grocery and sweetmeat shop with investment totalling Rs. 7,000/- to Rs.8,000/-.The family did not pay income-tax till the year 1967-68. The valuation given by the petitioners and that determined by the income-tax authorities leave a large gap which has not been explained. The Executive Engineer has calculated the present valuation of these properties at rupees five lacs while the petitioners have given an explanation to the extent of 2½ lacs only. There is a common talk in the town of Chhatarpur that the famous dacoit Muratsingh had very thick relations with the petitioners and even after his death his son Ramsingh is maintaining the same relations with the petitioners. These Lodges were constructed by the amounts invested by Muratsingh and his son Ramsingh though they are standing in the name of the petitioners. A report was received from the Town Inspector that dacoits are being given shelter in these two lodges. Statements of Laxmiprasad and Gorelal were recorded by the Police. On the basis of the report and statements recorded, the District Magistrate came to the conclusion that the petitioners were unable to explain how they have acquired these properties and so the same have been attached. The rules framed under the Adhyadesh did not survive after the Adhiniyam came into force. It is not necessary that the declaration of the District Magistrate under section 14(1) has to be in a particular form. The petitioners have filed their representation and also submitted their account-books which are being examined by the District Magistrate. There is no delay and the final orders will be passed in a month or so.

The petitioners in their rejoinder contended that the District Magistrate has acted on rumours and imaginary tales. The petitioner no. 1 has been paying income-tax from 1962 and thereafter the firms have also been assessed to income-tax. The valuation of Rs. 39,500/- for Gupta Lodges given by the petitioners has been accepted by the income-tax authorities while the valuation of Rs. 71,600/- for New Gupta Lodge is under dispute, since the Income-tax Officer has assessed the same at Rs. 1,03,586/- but that valuation has been accepted by the wealth-tax Officer. Their residential house has been valued at Rs. 1.25,200/- and the same has not been disputed by the income-tax authorities. The valuation of the Executive Engineer is inflated order to support the order of the District Magistrate. The petitioners had no connection with dacoit Murat Singh and his son Ramsingh. It is denied that they have been giving shelter and held to these dacoits. It is false that these two Lodges have been constructed out of the money

given by Muratsingh and Ramsingh. Ramsingh is a municipal councillor and owns a big house in Ward No. 20, Chhatarpur, while Muratsingh also owned a house in that ward. Since they had their own living house at Chhatarpur, there was no question of their taking shelter in these two Lodges. A false report was given by the Town Inspector for ulterior purposes. On 25-7-1980 in room no. 15 of Gupta Lodge a police Sub-Inspector committed rape on a woman. A report of the incident was lodged by the employees which led to public agitation. There was a agitation and then police firing, thereupon the State Government ordered a judicial enquiry by the District Judge. The entire police force at Chhatarpur are trying to shelter the Sub-Inspector and they are annoyed with the petitioners and their employees. The report is an act of vengeance and to cover up the mischief of the Sub-Inspector. The properties of the petitioners were valued by the registered valuers which have been accepted by the concerned authorities. Before the impugned order was passed, statements of Laxmiprasad and Gorelal were recorded and they did explain these acquisitions but their explanations were not considered. The District Magistrate can only act under section 14(1) if he has reasons to think that these acquisitions were through commission of the specified offences. Although the petitioners have submitted their representation, account-books and documents, the District Magistrate is sleeping over the matter. Since these properties were acquired much before the enactment of the present Adhiniyam, these properties cannot come within mischief of the Adhiniyam even assuming that the same were acquired out of the sums advanced by dacoit Muratsingh and his son Ramsingh.

In their additional return, the respondents further contended that some of the offences mentioned in the schedule of the Adhiniyam are not new offences. They were already in the Penal Code. Section 14 simply creates disabilities and does not create any new punishment. It is clear that the intention of the Legislature is to invoke section 14 in respect of past acquisitions also if they were acquired by committing dacoity or kidnapping. The attachment by the District Magistrate is only provisional subject to decision by the Special Judge who has the ultimate authority to confiscate the properties if he comes to the conclusion that the same were acquired through commission of the specified offences. There was material on record before the District Magistrate for subjective satisfaction i. e. before passing the order under section 14. The District Magistrate had examined and considered not only the reports of the police but also considered the statements of the witnesses, the income disclosed by the petitioners and the value of the properties.

Shri Y. S. Dharmadhikaree learned counsel for the petitioner contended

(i) section 14 of the Adhiniyam confers unrestricted and arbitrary powers without any guidelines to the District Magistrate and is void. It is *ultra-vires* of Articles 14 & 19(1)(g) of the Constitution inasmuch as it denies equal protection of law and puts on unreasonable restriction to carry on the business of running lodges. The jurisdiction of civil Court is barred under section 19. If the District Magistrate so chooses he can attach any property under section 14 if the owner is unable to satisfactorily account for the same. (ii) The provisions of the Adhiniyam are applicable to the specified offences committed after the Adhiniyam came in force in respect of the areas declared to be dacoity and kidnapping affected area. One of the offences specified in the schedule as a specified offence is under clause (VIII) i. e. receiving benefits from the persons committing all or any of the above-mentioned offences. This being a new offence, the mischief arising from it can only arise after the Adhiniyam came into force. Admittedly, in the present case, the properties acquired by the petitioners were much before the Adhiniyam came into force and. as such, the same are outside the purview of the Adhiniyam. Besides, under section 16(3) properties are liable to be confiscated if the same were acquired in the commission of the specified offences There is nothing to show that the petitioners have acquired these properties in committing specified offences. The words "in commission of" have been replaced by words "through commission of" by the amendment of the Ordinance effected on 27-8-1982 and by amendment of the Adhiniyam on 29-10-1982 i. e. much after the impugned order was passed. (iii) The impugned order is *non-est*. Since it is a penal enactment providing for more stringent punishment and also confiscation of property it has to be construed strictly. It was mandatory for the District Magistrate as required under the rules to give reasons for the attachment. No reasons were disclosed before attaching the properties. The reasons could not be supplied later on. This shows that the impugned order was passed without application of mind. It was not mentioned in the order that the properties were acquired through the commission of specified offences. The reasons subsequently supplied are based on surmises and conjectures without any material on record for attaching the properties under section 14. In reply, Shri R. K Verma Dy. Advocate General, for the respondents submitted that section 14 of the Act does not interfere with the right of a person to carry on business in a lawful manner but if the business is used for making money either by harbouring dacoits or giving shelter to them. reasonable restrictions can be placed to curb the mischief. There is no unrestricted or arbitrary power given to the District Magistrate to pass an order of attachment. He has to work within the framework of the Adhiniyam and the rules where proper guidelines have been given. The District Magistrate has only been empowered to pass an order of attachment which is subject to confirmation by the Special Judge who alone has the power to confiscate property. Section 14 is designed to protect the public in general against acts of harmful characters particularly dacoits and so the property already acquired

through dacoity and kidnapping come within the mischief of the Adhiniyam. Section 14 is not penal and is made to curb the activities of the dacoits and their associates. If the holder of a property can satisfactorily account for the same he has no reason to fear. If the District Magistrate has reason to think that any person owns property in the dacoity and kidnapping affected area for which he cannot satisfactorily account for can attach the property. though section does not provide for giving reasons before attaching the property and the rule in this regard is merely directory. However, reasons have been disclosed in the present case subsequently. The District Magistrate after making necessary enquiry and on consideration of the material on record has passed the impugned order and the representations of the petitioners is under consideration. If he does not accept the representation he would refer the matter to the Special Judge who would pass the final order.

Before considering these questions, it is necessary to consider the relevant provisions of the Adhiniyam. Under section 2(f) "specified offence" means—

(i) an offence specified in the schedule committed in relation to an area declared under section 3 being an offence forming part or arising out of/or connected with the commission of dacoity or kidnapping;

(ii) an offence for which punishment has been provided under sections 9, 11 and 12 of this Act,

Section 14(1) is as under :—

If the District Magistrate has reason to think that person living in a dacoity and kidnapping affected area holds property in that area or elsewhere or if a person living outside dacoity and kidnapping affected area holds property in the dacoity and kidnapping affected area, for which he cannot satisfactorily account for, he may make a declaration to that effect and order attachment of the said property.

Section 15 gives 3 months' time from the date of knowledge of attachment to make representation to the District Magistrate and if he is satisfied with the representation he may forthwith release the property Section 16(1) is as under:—

If the District Magistrate is not satisfied with the representation made

under sub-section (1) of section 15, he shall send the matter with his report to the special Court having jurisdiction for deciding whether or not the property or part thereof was or was not acquired through the commission of a specified offence.

Under section 16(3) the burden of proof that the property or part thereof mentioned in the representation was not acquired in the commission of a specified offence shall be on the person claiming the property. It may be mentioned that in sub-section (1) the words used are "through the commission of a specified offence" while in sub-section (3) the words used are "in the commission of a specified offence." Clearly the word "in" in place of "through" has been wrongly used and the same has been corrected by the amending Act No. 29 of 82. Therefore, any property acquired through the commission of any specified offence is liable to attachment and confiscation. It was never the requirement that the property acquired in the commission of a specified offence alone come within the mischief of the Adhiniyam. The subsequent amendment only clarified the mistake which was apparent in sub-section (3).

It is to be considered whether provisions of the Adhiniyam are discriminatory and hit by Article 14 of the Constitution. The object of the Adhiniyam is for curbing the menace of organised and unorganised gangs of dacoits effectively, it is essential to break the chain of vested interests assisting or associate with such gangs. The preamble says this is an act to make provisions for specifying certain offences in the dacoity and kidnapping affected areas of Madhya Pradesh and in respect of punishment and speedy trial thereof in order to curb effectively the commission of such specified offences and to make provision for attachment of properties acquired through the commission of specified offences and for matters connected therewith or incidental thereto. So this is an enactment to curb the menace of dacoity and kidnapping in affected areas of the State in order to protect the public against organised gangs of dacoits. So it deals with special types of people i. e. dacoits and their associates in affected areas in respect of specified offences. It has come to be realised that to stop the menace of dacoity and kidnapping more stringent and speedy measures are necessary and that is why this special enactment. Differential treatment does not '*per se*' constitute violation of Article 14 of the Constitution, it denies equal protection only when there is no reasonable basis for differentiation *Ameeunnissa* v. *Mahboob Begum* (1). Where a statute providing for a more drastic procedure different from the ordinary procedure covers the whole field covered by the ordinary procedure without any guidelines as to the class of cases in which either is to be resorted to, the statute will be hit by Article 14. Even a provision of appeal will cure the defect. If guidelines can be inferred the statute will not be hit by Article 14.Then

(1) A. I. R. 1953 S. C. 91.

again where the statute itself covers only a class of cases, the statute will not be bad *M. Chhaganlal* v. *Greater Bombay Municipality* (1). The classification provided for by the Special Courts Bill is valid and no objection can be taken. The preamble says that it is imperative for functioning of parliamentary democracy and the institutions created by or under the Constitution that commission of such offences during emergency should be judicially determined with utmost dispatch when committed by persons by misusing their high public or political office. Persons who are singalled out by the bill for trial before the special courts possess common character and those who fall outside that group do not possess them [In *re. Special Courts Bill* 1978 (2)]. Therefore, provisions of the Adhiniyam are not discriminatory and are not hit by Article 14.

It is further to be considered whether section 14 of the Adhiniyam gives arbitrary and naked powers without any guidelines to the District Magistrate. Our answer is no. A legislation which does not contain any provision which is directly discriminatory may yet offend against the guarantee of equal protection if it confers upon executive an unguided or uncontrolled discriminatory power in the matter of application of the law *State of West Bengal* v. *Anwar Ali* (3). Under this section the District Magistrate has been given power to attach any property if he has reason to think that the same has been acquired through the commission of a specified offence and the owner is unable to satisfactorily account for the same. The rules framed under the section required the District Magistrate to give reasons in his order of attachment which made him think that the property owns its source to commission of specified offence. Though the words "acquired through the commission of specified offences" are missing from the section, their import are clearly established from the following sections and the rules framed. So the District Magistrate can only attach any property if he has reason to think (i) that it has been acquired through the commission of the specified offences and (ii) the owner is unable to satisfactorily account for the same. It stipulates some sort of enquiry by the District Magistrate before passing of the order. Then section 15 gives the right of representation to the owner against the order within 3 months of the date of knowledge of the attachment and if the District Magistrate is satisfied with the rspresentation, then he has to release the property. If not so satisfied then under section 16 he has to refer the matter to the Special Judge (a Judge of the Sessions Court) for deciding whether or not the property was acquired through commission of specified offence The Special Court has been given powers of the civil court to decide the question though the burden is on the owner to rebut that it was not so acquired, which is not at all difficult for an owner to show if he had acquired the same by lawful means. Under section 17 if

(1) A. I. R 1967 S. C. 2009 (2) A.I.R 1979 S 478

(3) A I.R 1952 S C 7

the Special Judge is satisfied that it was acquired through commission of a specified offence he shall confiscate the property and in any other case he shall release the property. Section 18 gives a right of appeal to the High Court by the owner. Section 19 bars jurisdiction of civil court in the matter. It is clear that the procedure laid down under the Adhiniyam are not so harsh or onerous as to suggest that a discrimination would result if attachment is made under section 14. The powers of the District Magistrate are well defined and fully regulated. He has to act within the four corners of the Adhiniyam and the Rules. He cannot act arbitrarily or capriciously.

It is not in dispute that in this case the petitioners acquired the properties much before the Adhiniyam came to be enacted. It is to be seen whether acquisitions prior to the coming into force of Adhiniyam can come within its mischief. The Supreme Court held : Possession of disproportionate pecuniary resources or property-mere possession made an offence under section 5(e) of the Prevention of Corruption Act, 1947.-no evidence that the accused was in such possession after 18-12-1964 when clause (e) came into existence-accused is entitled to protection under Article 20(1) of the Constitution *State of Maharashtra* v. *K. K. S. Ramaswamy* (1) Penal statutes which create offences or which have the effect of increasing penalties for existing offences will only be prospective by reason of the Constitutional restriction imposed by Article 20 of the Constitution. There can be no quarrel with the decision of the Full Bench of this Court in *Gulabhand* v. *State of M. P.* (2) that specified offence means (i) an offence mentioned in the schedule committed in an affected area and (ii) the same must be forming part of or arising out of or connected with the Commission of dacoity and kidnapping. But the Supreme Court in *State of Bombay* v. *Vishnu Ramchandra* (3) has held as under ;-

> Penal statutes which create new offences are always prospective. But penal statutes which create disabilities or statutes which create no new punishment but authorise some action based on past conduct may be interpreted retrospectively when there is a clear intendment that they are to be applied to past events. Again, an Act designed to protect the public against acts of a harmul character may be construed restrospectively, if the language admits of such an interpretation, even though it may equally have a prospective meaning."

This means that in construing a remedical Statute the Courts ought to give to it the widest operation which its language would permit. The Supreme Court while

(1) A. I. R. 1977 S.C. 2090. (2) 1982 M. P. L. J. 7.
(3) A. I. R. 1961 S. C. 307.

construing section 5(3) of the Prevention of Corruption Act, 1947, in *Sujjan Singh* v. *State of Punjab* (1) has held as follows ;–

> "Looking at the words of the section and giving them their plain and natural meaning it is imposible to say that pecuniary resources and property acquired before the date on which the Prevention of Curruption Act came into force should not be taken into account even if in possession of the accused or any other person on his behalf. To accept the contention that such pecuniary resources or property should not be taken into consideration one has to read into the section the additional words "if acquired after the date of this Act" after the words "property". For this there is no justification."

It may be mentioned that some of the specified offences are those already existing in the Indian Penal code and if some property has been acquired through commission of such penal offences in the affected areas now so declared, the same would come within the mischief of the Adhiniyam, though acquired prior to its enactment. This is clear from the language used in the Adhiniyam. Section 15 uses the words ,'holds property" while section 15 uses the words "was or was not acquired" i. e. the property held when the Adhiniyam came and already acquired" by the commission of a specified offence. The preamble clears the matter by saying that whereas it is necessary to provide for attachment and confiscation of the properties which have been acquired through the commission of specified offences and are held in the name of relatives, associates or confidents of the dacoits. So it is not possible to read in the Adhiniyam that properties to be acquired after the coming of the Adhiniyam are alone to come within its purview. In that event it would have been recited that properties acquired hereinafter would come under its purview.

The District Magistrate can act under section of the Adhiniyam if he has reason to think that a person holds property in dacoity and kidnapping affected area, acquired through commission of a specified offence and for which the owner cannot statisfactorily account for. According to the Oxford Companion to Law (1980 Edition, page 1037) "reason" means the intellectual faculty of being able to discriminate, judge and evaluate, to know truth and to adapt one's action to a particular end. It is the faculties of imagination, memory, instinct, emotions, sensations and will. It is distinguishable from faith in that reason finds truth by arguments and evidence which persuade and carry conviction, whereas faith relies on belief in authority, divine or human, and from sense-perception in that it arrives at knowledge by application of logic, not

(1) A. I. R. 1964 S. C. 464.

solely by appearances. According to Black's Law Dictionary (Vth Edition, page 1659) "think" means to believe, to conclude, to esteem, to recollect or call to mind. as per Strouds Law Dictionary (5th Edition, Vol. V at page 2763) the words "think" means forming an opinion in the exercise of a proper legal discretion. The Supreme Court in *Berium Chemicals Ltd.* v. *Company Law Board* (1) has held as under :—

> "The words "reason to believe" or "in the opinion of" do not always lead to the construction that the process of entertaining "reason to believe" or "the opinion" is an altogether subjective process not lending itself even to a limited scrutiny by the Court that such "a reason to believe" or "opinion" was not formed on relevant facts or within the limits or within the restraints of the statute as an alternative safeguard to rules of natural justice where the function is administrative."

Further in *Ganga Saran & Sons* v. *I. T. Officer* (2) it has been held; Reopening of assessment under section 14(a) of the Income Tax Act, 1961, Import of-reasons must have bearing on the matters with regard to which I.T.O. is required to entertain belief. Therefore, it is open to this Court to find out whether the District Magistrate had reason to think that the properties were acquired through commission of a specified offence on the basis of relevant facts or the order was within the restraints of the statute. If there is no rational and intellegible nexus between reasons and belief, no one properly instructed on facts and law could reasonably entertain the belief, the conclusions would be that the District Magistrate had no such reason to think.

Since seizure of property from the possession of an owner is deprivation of property *Virendra* v. *State of U. P.* (3), the District Magistrate while attaching property under section 14 of the Adhiniyam has to strictly comply with the requirements of the statute. For no.1 has been prescribed by the Rules framed under the Adhyadesh, which are still in force. It requires the District Magistrate to give reasons which made him think that the property was acquired through the commission of a specified offence and the owner was unable to satisfactorily account for the same. The impugned order of the District Magistrate dated 7.12.1981 has not disclosed any reasons for the attachment except saying that the owners were unable to account for the same and he has also not recorded his satisfaction that the properties were acquired through commission of a specified

(1) A. I. R. 1967 S.C. 295. (2) A. I. R. 1981 S.C. 1363.
(3) 1955 (1) S. C. R 415.

offence. In the order-sheet of Criminal Code no. 3 of 1981 also no reasons are disclosed nor any satisfaction recorded that the properties were so acquired. So the order is *non-est* and bad. The petitioners 1,3 and 4 were arrested under section 12 of the Adhiniyam and while granting bail to them the special Judge in his order dated 8-2-1982 opined that they were arrested without there being reason of their having committed any specified offence or have any connection with any such offender, only material in the case diary being the order of attachment of the properties by the District Maristrate. From the return filed by the respondents, it appears that the District Magistrate acted on the undated report of the Town Inspector that there is remour that the properties were acquired out of amount supplied by dacoit Muratsingh. It does not appear that the District Magistrate looked into the statements of petitioners 1 & 3 Gorelal and Laxmiprasad giving account of the properties acquired. If he had looked into them, he would have further probed into the matter by asking the petitioners to produce their account books and documents to find out the truth. Surprisingly, there is no report prior to this against the petitioners. A telegram of the Superintendent of Police dated 25-7-1980 was also annexed. This was in connection with the incident of rape said to have been committed by P. S. I. Baghel in the Lodge, there was agitation and police firing and the S. P. reported that the Lodge is run by a staunch harbourer of ex-dacoit Muratsingh and his son Ramsingh and they are supposed to be the owners of the Lodge. The District Magistrate could not have acted on mere rumours. It may be mentioned that the State Government instituted a judicial enquiry by a District Judge about the police firing.

After filing of the return, the District Magistrate passed further order on 3-6-1982 disclosing reasons for the attachment of properties on 7-12-1981 that is the police have information that the petitioners have been harbouring and helping Muratsingh and his gang in committing specified offences and earning illegal money thereby. The Supreme Court in *Mohinder Singh* v. *Chief Election Commr.* (1) has held as under :—

> "When a statutory functionary makes an order based on certain grounds, its validity must be judged by the reasons so mentioned and cannot be supplemented by fresh reasons in the shape of affidavit or otherwise. Otherwise, an order bad in the beginning may, by the time it comes to court on account of a challenge, get validated by additional grounds later brought out."

(1) A. I. R. 1978 S. C. 851.

Besides, in the additional return the respondents have produced two more reports dated 3-12-1981 and 4-6-1982 of the Superintendent of police that these properties were acquired benami in the name of the petitioners by Muratsingh and his son Ramsingh who were taking shelter in these lodges. The District Magistrate after getting the representation of the petitioners, has recorded statements of Executive Engineer and Assistant Engineer about valuation of the properties. According to them, their present value is five lacs while the petitioners have given the costs of Construction at 2½ lacs and naturally the value of property has increased during all these years. He has also recorded statements of Town Inspector and the S. D. O. who have no personal knowledge in the matter. The petitioners in their representation dated 27-1-1982 have explained as to how they acquired these properties supported by documents and entries from account book. They are regularly assessed by the Sales tax and Income-tax authorities. In their return dated 3-4-1982 it was said that the District Magistrate will pass final order within a month or so but although about 2 years have passed, nothing has been done by the District Magistrate. We have no option but to hold that the orders of attachment dated 7-12-1981 and 8-6-1982 are *ultra-vires* and illegal.

With the result, the petition is allowed with costs and orders of attachment dated 7-12-1981 and 3-6-1982 are quashed and the attached properties released from attachment. Counsel's fee Rs. 250/- if certified.

Petition allowed.

MISCELLANEOUS PETITION

Before Mr. G. L. Oza Ag. C.J. and Mr. Justice C. P. Sen.

16 Feb. 1984

VISHWANATH VERMA and another, Petitioner*

v.

JABALPUR MUNICIPAL CORPORATION, JABALPUR and others, Respondents.

Municipal Corporation Act, Madhya Pradesh (XXIII of 1956), Section 421, Life

M. P. No. 69 of 1981

Vishwanath Verma v. *Jabalpur Municipal Corporation, Jabalpur, 1984*

Insurance Corporation Act (XXXI of 1956), Sections 30 and 44 (f) and Insurance Act (IV of 1938), Section 2(ii)—"Life Insurance business"—Meaning of—Family benefit fund scheme run by the Municipal Corporation wholly on the contribution made by its employees—Does not fall within the ambit of Life Insurance business—Sections 30 and 44(f) of the Life Insurance Corporation Act, 1956 and Section 421 of the Municipal Corporation Act—Not applicable to scheme not involving Municipal Corporations fund—Order of the State Govt. stopping the scheme and order of the Controller of Insurance relating thereto liable to be quashed.

Family Fund Scheme adopted by the Corporation by a resolution and run by it, whereunder the employees of the corporation contribute by getting deductions made from their salaries and on their retirement they get whatever is accumulated with interest and in case of mishap they are paid certain amount of compensation, is neither an insurance business nor anything which can attract the provisions of section 30 of the Life Insurance Corporation Act, 1956. The scheme will not fall within the ambit of "Life Insurance business" as defined in section 2(ii) of the Insurance Act, 1938 and, therefore, section 30 of the Life Insurance Corporation Act, 1956, will not be operative and Section 44 will also not apply to the scheme. The scheme does not also fall within the ambit of Section 421 of the Municipal Corporation Act, 1956, as municipal funds are not involved in it as the scheme is wholly run on contributions made by the employees and not on the funds of the Corporation Therefore, the order passed by the State Govt. stopping the scheme and referring the matter to the Central Govt. or the Controller of Insurance is without jurisdiction and this order and in turn the order passed by the Controller of Insurance are liable to be quashed.

S. K. Mukerjee for the petitioners.

D. M. Dharmadhikari for respondent no. 1.

S. L. Saxena Govt. Adv. for respondent no. 2.

A. G. Dhande for respondent no. 3.

A. P. Tare for respondents nos. 4 and 5.

Cur. adv. vult.

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ORDER

The Order of the Court was delivered by OZA Ag. C. J.–This is a petition filed by the petitioners challenging an order passed by the State Government dated 16th December 1980 directing the Municipal Corporation, Jabalpur, to stop the family welfare scheme run by the employees of the Corporation in co-operation with the Corporation itself.

According to the petitioners, the Corporation by a resolution has adopted family benefit fund scheme from 1974 which is run by the Corporation although this scheme was based on a scheme made by the State Government. Under this scheme the employees of the Corporation voluntarily contribute and on their retirement they get whatever is accumulated with interest and in case of mishap they are paid certain amount of compensation. It appears that the State Government by the impugned order stopped the functioning of the scheme on some misapprehension that it has to get the advice of the Central Government and thereafter the matter was considered by the Controller of Insurance and the Controller of Insurance in turn passed the order dated 23rd March 1981 (Annexure R-III). The petitioners by this petition have challenged these orders.

It is contended by learned counsel for the petitioners that the State Government had no jurisdiction to pass the order as it has passed as the only jurisdiction conferred on the State Government in matters of municipal corporations is under section 421 of the M. P. Municipal Corporation Act, 1956 and it is contended that section 421 will not apply in terms to stop this kind of scheme which is a voluntary scheme run by the employees of the Corporation. It is, therefore, contended that the order passed by the State Government is without jurisdiction. As regards the order of the Controller of Insurance it is contended that the question of the Life Insurance Corporation Act, 1956 does not arise, as the scheme will not be one which falls within the ambit of section 30 and, therefore, the order passed by the Controller also is without jurisdiction.

Admittedly the scheme is not any kind of business as no benefits derived from the scheme go to any one except the contributors. It is also not disputed that the employees of the Corporation make a voluntary contribution although the amount of contribution is deducted because they give declaration to the Corporation for getting the deductions done from their salaries. On their retirement they get whatever is accumulated with interest and on mishap certain amount is paid to the members of the family as provided in the scheme. It is,

therefore, clear that neither it is paid as insurance of the business nor anything which could attract the provisions of section 30 of the Life Insurance Corporation Act. Section 30 reads :-

> "30. Corporation to have the exclusive privilege of carrying on life insurance business -Except to the extent otherwise expressly provided in this Act, on and from the appointed day, the Corporation shall have the exclusive privilege of carrying on life insurance business in India; and on and from the said day any certificate of registration under the Insurance Act held by any insurer immediately before the said day shall cease to have effect in so far as it authorizes him to carry on life insurance business in India."

This section provides that the Corporation will have the exclusive privilege of carrying on life insurance business. The term "life insurance business" has been defined in section 2(11) of the Insurance Act, 1938 and it provides:

> "Life insurance business means the business of effecting contracts of insurance upon human life, including any contract whereby the payment of money is assured on death (except death by accident only) or the happening of any contingency dependent on human life, and any contract which is subject to payment of premiums for a term dependent on human life and shall be deemed to include-
>
> (a) the granting of disability and double or triple indemnity accident benefits, if so provided in the contract of insurance,
>
> (b) the granting of annuities upon human life, and
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> (c) the granting of superannuation allowance and annuities payable out of any fund applicable solely to the relief and maintenance of persons engaged or who have been engaged in any particular profession, trade or employment or of the dependants of such persons."

In view of this definition of "life insurance business" it is clear that the scheme as the present one adopted by the employees of the Municipal Corporation, Jabalpur, will not fall within the ambit of "life insurance business" and, therefore, section 30 will not be operative. The Controller of Insurance has said that section 44(f) of the Life Insurance Corporation Act, 1956 will not

apply to this scheme. It appears that no one has bothered to see what is life insurance business. As discussed earlier, section 30 will not come into operation in view of the scheme as it will not fall within the definition of life insurance business and, therefore, question of section 44 does not arise.

Apart from it, it is clear that the order passed by the State Government stopping the scheme and referring the matter to the Central Government or the Controller of Insurance is also without jurisdiction. As discussed earlier, Section 421 does not empower the State Government to pass an order as it has been passed in this case, as section 421 provides:

> "(1) If the Government is of opinion that the execution of any resolution or order of the Corporation or of any other authority or officer subordinate thereto or the doing of any act which is about to be done or is being done by or on behalf of the Corporation, is not in conformity with law or with the rules or bye-laws made thereunder, or is likely to lead to a breach of the peace or to cause injury or annoyance to the public or to any class or body of persons or is likely to cause waste of or damage to Municipal funds the Government may, by order in writing, suspend the execution of such resolution or order or prohibit the doing of any such act,
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> (2) A copy of such order of the Government shall be sent to the Corporation by the Government,
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> (3) On receipt of copy of the order as aforesaid, the Corporation may, if it is of opinion that the resolution, order or act is not in contravention or excess of the powers conferred by any law for the time being in force, or the execution of the resolution or the doing of the act is not likely to cause waste of or damage to the Municipal funds, make a representation to the Government against the said order,
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> (4) The Government may, after considering the said representation, either cancel, modify or confirm the order passed by it under section (1) or take such other action in respect of the matter as may in the opinion of the Government be just or expedient having regard to all the circumstances of the case."

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It is clear that section 421 confers powers on the State Government to modify, suspend or cancel a resolution of the Corporation if it falls within the ambit of the language of section 421. Apparently this scheme does not fall within the ambit of section 421. It is also clear that no question of municipal funds arises in this case as the scheme is wholly run on contributions made by the employees and not on the funds of the Corporation. The State Government had no jurisdiction to pass the impugned order stopping the scheme.

The petition is allowed. The orders passed by the State Government and the Controller of Insurance are hereby quashed and it is directed that the scheme shall be run by the Corporation as already sanctioned. In the circumstances, parties are directed to bear their own costs. Security amount be refunded to the petitioners.

Learned counsel appearing for Respondents Nos. 4 and 5 prays for leave to appeal. In view of the circumstances stated above in this order, in our opinion, it is not a fit case for grant of leave. The prayer is, therefore, rejected.

Certified copy of the order be given to the counsel for respondents Nos. 4 and 5 on payment of necessary charges early.

Petition allowed.

APPELLATE CIVIL

Before Mr. Justice M. D. Bhatt.

24 Oct. 1983

JAINENDRA KUMAR and others, Appellants*

v.

KAILASHCHAND, Respondent.

Specific Relief Act (I of 1877)—Section 10—Hindu Law—Property acquired without the aid of joint family property—May also be joint family property depending upon facts of each case—Ancestral or joint family

*F. A. No. 38 of 1977, from the decree of M. A. S. Khan, IInd Additional District Judge, Sagar, dated the 15th October 1976.

members—Presumption about nature of acquisition—Joint family status—Presumption—Does not relate to property held jointly—Property jointly acquired but not partaking the nature of joint family property—Inheritance of—After born son of the deceased—Whether acquires any interest in such property—Evidence Act—Section 115—Estoppel—Party alleging transaction to be nominal one and without consideration, not entering witness—box to prove it—Effect—Land Revenue Code, M. P., 1959—Section 190—Collusive entries in revenue records about acquisition of Bhumiswami *rights thereunder—Whether purchaser's right under agreement for sale affected.*

The law is well settled that the property jointly acquired by the members of the joint family without the aid of the ancestral property, it may or may not be joint family property whether it is so or not would be a question of fact in each case.

Shyamlal v. *Yesaram* (1); relied on.

In the absence of ancestral nucleus or joint family nucleus for the acquisition of property by the joint family there is no escape from the presumption that the property is the joint property of the joint acquires.

There is a presumption about joint family status but there is no presumption that the property jointly held, just because the family is joint, is the joint family property.

Kamalakant Gopalji v. *Madhavji Vaghji* (2), *Srinivas Krishnarao Kango* v. *Narayan Devji Kango and others* (3) and *K. V. Narayannswami Iyer* v. *K. V. Ramakrishna Iyer and others* (4); relied on.

When a transaction is alleged to be nominal one, without any consideration but the party alleging it to be so has not entered the witness-box, he is estopped to assail the nature of the transaction and also the nature of property.

K. C. Kapoor v. *Smt. Radhika Devi* (5); relied on.

Joint property of joint acquirers comes in the hands of their Legal heirs as their absolute property and after born sons of the deceased do not acquire any interest in it.

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(1) A. I. R. 1954 Nag. 334.
(2) 158 I. C. (1935) 145 (Bom).
(3) A. I. R. 1954 S. C. 379.
(4) A. I. R. 1965 S.C. 289.
(5) A. I. R. 1981 S. C. 2178.

Jainendra Kumar v. *Kailashchand, 1983*

C. N. Arunachala Mudaliar v. *C. A. Muruganatha Mudaliar and another* (1) and *Katragadda China Anjaneyulu and another* v. *Kattragadda China Ramayya and others* (2); referred to.

Y. S. Dharmadhikari for the appellants.

Y. K. Munshi for the respondent.

Cur. adv. vult.

JUDGMENT

M. D. BHATT, J.--This is the defendant's appeal against the trial Court's judgment and decree for specific performance, whereby, the defendants Nos.1 and 2 had been directed to execute, the registered *sale-deed* in the plaintiff's favour, on receipt of sale-consideration of Rs. 12,000/-.

The defendants Jainendra Kumar, Rajendra Kumar, Vijar Kumar, Ashok Kumar and Rishabh Kumar (defendants Nos. 1,2,4,5 and 6 respectively) are the sons of the defendant No. 3 Tekchand. It is no longer in dispute that the defendants No. 1 and 2, *vide* agreement Ex.P-1, dated 6-12-73, had contracted to sell 7. 55 acres of land out of Kh. No. 562 (old Kh. No. 664 village-Mokalpur) for sale-consideration of Rs. 19,000/-after having already received the earnest money of Rs. 7,000/-at the time of execution of the agreement.

It is also not in dispute that the defendant No. 3 Tekchand and his uncle Bhaiyalal had jointly executed the registered sale-deed Ex.P-3 dated 25-5-56 in favour of Tekchand's two minor sons Jainendra and Rajendra (defendants No. 1 and 2) through their maternal uncle Rajaram with respect to old Kh. No. 664 (present Kh. No. 562) area 8.55 acres and old Kh. No. 558 area 0.30 acres,-total area being, thus, 8.85 acres.

The plaintiff in his suit, filed initially only against the defendants No. 1 and 2 Jainendra Kumar and Rajendra Kumar had claimed specific performance of the contract, alleging that the defendants No. 1 and 2 had failed to execute the registered sale-deed in his favour as per the terms of the written agreement Ex.P-1, despite his readiness and willingness to perform his part of the contract. During the course of the trial, these defendants' other brothers and father (defendants No. 3,4,5 and 6) were also impleaded as the defendants in this suit,

(1) A. I. R. 1953 S. C. 495. (2) A. I. R. 1965 A. P. 177.

on their application, for being so joined. Their defence was, however, common. It was contended that the suit-land in question, being the ancestral and joint family property of all the defendants, the defendants No.1 and 2 had no right to alienate the undivided shares of other co-parceners as well. It was, next, urged that the registered sale-deed dated 25-5-56 executed by the defendant Tekchand and his uncle Bhaiyalal, in favour of the defendants No.1 and 2 was a sham transaction. As for the agreement in question, on which the plaintiff had based his claim, it was vehemently pressed that the document was not an agreement of sale but had been executed, only by way of security for the prepayment of loan of Rs.7,000/-, received by the defendants No.1 and 2 under document. In this context, it was pleaded that the market value of the suit-land being not less than Rs.30,000/-, it could not have been sold for a meagre consideration of Rs.19,000/- only. As the last resort, it was urged that Ratan Chand and Rajaram, who were not parties to the present suit, having already been granted *bhumiswami* rights in the suit-land under section 190 of the M. P. Land Revenue Code, the claim of the plaintiff was untenable, and more so, was incompetent in the absence of these two persons being necessary parties to the suit.

The trial Court, in the light of evidence and the attending circumstances, has held that the sale-deed Ex.P-3 dated 25-5-1956 was neither sham nor of *benami* nature; and as such, the defendants No.1 and 2 were the absolute owners of the suit-land by virtue of this sale-deed in their favour. As regards the nature of transaction Ex.P-1 dated 6-12-1973, it is held that it was an agreement of sale and not a document by way of security for any loan. Market price of the suit-land at the relevant time as being Rs.30,000/- was held not proved; and furthermore, it is held that inadequacy of price was not a valid ground to deny the claim for specific performance. As regards Rajaram and Ratan Chand, who were not joined in the suit, it was held that they were neither necessary nor proper parties for the suit. It was, however, further observed in this regard that conferral of *bhumiswamy* rights on these persons was a naive contrivence on the part of the defendants to play all sorts of unethical tricks, to defeat the plaintiff's claim and equally, to defeat the object and purpose of the Provision of M. P. Ceiling on Agricultural Holdings Act. The plaintiff's claim, therefore, for specific performance of the contract for getting the sale-deed executed and registered, by the defendants No. 1 and 2 was decreed. Hence, now, the present appeal.

The learned counsel for the appellants-defendants has urged, in the first place, that the trial Court was wrong in holding the sale-deed dated 25-5-1956 as genuine sale, conferring full exclusive ownership on the transferees *viz.* the defendants No.1 and 2 Jainendra Kumar and Rajendra Kumar. It is urged in this

connection that at the time of this sale by Bhaiyalal and Tekchand, other co-parceners *viz.* the present defendants No. 1,2,4,5 and 6 had also their respective share and interest in the suit-land; and therefore, these alienating co-parceners were not competent to sell the undivided shares of Jainendra Kumar and Rajendra Kumar, to them only; and were equally not competent to alienate the undivided shares of the defendants No. 4,5 and 6, who though not born at the relevant time, had come to have interest therein, by virtue of their birth later. Such sale is also assailed on the ground of want of legal necessity and benefit of estate. In the matter of agreement of sale Ex. P-1 dated 6-12-1973 also, it is vehemently argued that the defendants No. 1 and 2 *viz.* Jainendra Kumar and Rajendra Kumar, who had entered into the contract of sale, were not competent to enter into sale regarding the shares of other coparceners *viz.* the defendants No. 4, 5 and 6 (Vijay Kumar, Ashok Kumar and Rishabh Kumar). At worst, they could transfer, only their own undivided shares, and nothing beyond.

The learned counsel for the respondent-plaintiff has refuted the arguments advanced on the other side. It is urged that there is no proof regarding the suit-land, as being the ancestral property. In this connection, it is canvassed that Tekchand having not entered the witness-box, adverse inference against the defendants deserves to be drawn. It is also argued that Tekchand being the party to the earlier sale, he is estopped from challenging that sale in favour of his two sons. This sale being in his two sons' favour only *viz.* Jainendra Kumar and Rajendra Kumar, they are stated to be absolute owners; and as such, there is no question of any other co-parceners' right and interest in the suit-land. As regards the interest of the after-born sons *viz.* Vijay Kumar, Ashok Kumar and Rishabh Kumar, it is argued that the after-born sons under the Hindu Law, do not acquire any interest in the co-parcenary property or joint-family property, alienated or proposed to be alienated. Both sides have cited some case-law in support of their respective contentions.

I have considered the arguments on both sides. The foremost question for consideration is the nature of right, in which, Bhaiyalal and his nephew Tekchand had held the suit-land, which they had admittedly sold to the defendants No.1 and 2 (Jainendra Kumar and Rajendra Kumar) under the registered sale-deed dated 25-5-1956 Ex.P-3. The joint and undivided family is the normal condition of the Hindu Society. There is absolutely no material to substantiate the defendants' contention that the suit-land, held jointly by Bhaiyalal and his nephew Tekchand, was ancestral property of their any ancestor, so as to make them co-perceners with respect to this property. The defendant No.1 Jainendra Kumar, who is the son of Tekchand, has alone entered the witness-box to make a

sweeping statement that the suit-land was the ancestral property. He was obviously a very small child and a minor, at the time, when this sale-deed Ex.P-3 had been executed in favour of his ownself jointly with his younger brother Rajendra Kumar. Naturally, this witness does not have and could not have any knowledge as to how this land had come to be jointly hold by his father Tekchand and his paternal grand-uncle Bhaiyalal.

The defendant No. 3 Tekchand, who would have been the best person to prove the source of acquisition of the suit-land, has stayed away from the witness-box; and as such, the trial Court as well as this Court have been deprived of the only real evidence, which could throw light on the source of acquisition of the suit-land. On the defendants' failure to produce this material evidence, adverse inference has to be drawn against them,-negativing their contention regarding the suit-land as being the ancestral property in the hands of Bhaiyalal and Tekchand. There being no proof of any ancestral nucleus in the hands of Bhaiyalal and Tekchand for acquisition of the suit-land in question, the defendants are found to have miserably failed to prove the suit-land as being the ancestral property in the hands of Bhaiyalal and his nephew Tekchand. (See *Baikuntha* v. *Shashi Bhushan* (1). Thus, the suit-property having not proved to be ancestral, there is no question of formation of 'co-parcenary' of the joint Hindu family of Bhaiyalal and Tekchand, as would be evident from *State Bank of India* v. *Ghamandi Ram* (2), wherein, the incidents of coparcenary are succinctly summarised.

Now, presumption being, indubitably, there, regarding the joint family status of Bhaiyalal and his nephew Tekchand, there could, however, be no further presumption that the property, jointly held by them, just because their family was joint, would also be joint family property [See *Kamalakant Gopaljt* v. *Madhavji Vaghji* (3), *Srinivas Krishnarao Kango* v. *Narayan Devji Kango and others* (4) and *K. V. Naraynnaswami Iyer* v. *K. V. Ramakrishnan Iyer and others* (5)]. The law is well settled that the property, jointly acquired by the members of the joint family with the aid of the ancestral property, is joint family property; but, if the property is acquired by the members of the joint family, without the aid of the ancestral property, it may or may not be joint family property. Whether it is so or not, would be a question of fact in each case. [See *Shyamlal* v. *Yesaram* (6)].

There being no ancestral nucleus nor there being any joint family nucleus for the acquisition of the suit-land by the joint family of Tekchand and

(1) A. I. R. 1972 S. C. 2531.
(2) A. I. R. 1969 S. C. 1330.
(3) 158 I. C. (1935) 145 (Bom.).
(4) A. I. R. 1954 S.C. 379.
(5) A. I. R. 1965 S. C. 289.
(6) A. I. R. 1954 Nag. 334.

his uncle Bhaiyalal, there is no escape from the presumption that the suit-land was joint property of the joint acquirers viz. Tekchand and his uncle Bhaiyalal. There is no material on record on the defendant's side to rebut this presumption which, hence, stays to show the nature of the ownership of the suit-land by Tekchand and his uncle Bhaiyalal.

The suit-land, as held above, being thus the joint property of joint acquirers *viz.* Bhaiyalal and Tekchand and being not ancestral property or coparcenary property or even joint family property, both Bhaiyalal and Tekchand were competent to dispose of, the suit-land, in the manner as they liked, inasmuch as, sons of Teckchand, existing at that time, had no interest, whatsoever, of any sort, in the jointly acquired property *viz.* the suit-lanc. Therefore, the sale-deed Ex. P-3 dated 25-5-56, executed by the joint original acquirers *viz.* Tekchand and Bhaiyalal, with respect to the suit-land, held in absolute ownership, had passed valid title in favour of the alienees *viz.* Jainendra Kumar and Rajendra Kumar (defendants No. 1 and 2), as has been held by the trial Court. Bhaiyalal is dead, but Teckchand is alive and is actually one of the defendants in the present case. After about two decades, he and the alienees *viz.* the defendants No. 1 and 2 are trying to challenge the nature of the document Ex. P-3 dated 25-5-56 by contending that it was a nominal transaction, without any consideration. Teckchand, being one of the parties to the transaction and having also not entered the witness-box, is estopped now to assail the said sale and also the nature of the property sold by him jointly with his uncle Bhaiyalal (See *K C. Kapoor* v. *Smt. Radhika Devi* (1). It may be stated that in the sale-deed Ex. P-3, there is no mention of the suit-land being either ancestral property or joint family property; and that it has simply been mentioned therein that alieners Bhaiyalal and Teckchand are the full owners of the suit-land, with no encumbrances thereon. The alienees in the said sale-deed were Bhaiyalal's own two sons *viz.* defendants No. 1 and 2 who alone were in existence at that time. In the said sale-deed, these alienees are shown to be minors through their maternal uncle Rajaram as their guardian. The sale-deed was obviously for the benefit of these minors. If this sale-deed was sham, bogus or nominal, these minor alienees *viz.* defendants No. 1 and 2 could, well, have taken steps to get the sale deed cancelled; but no such thing was done. On the contrary, these defendants No. 1 and 2 are found to have, later, sold a small portion of the very same Khasra, of which the suit-land formed part, in their own right, to some third persons who too were their close relatives, probably the sons of their own maternal uncles. Thus, circumstances on record and the conduct of Teckchand (defendant No. 3) and his two sons *viz.* defendants No. 1 and 2 leave no room for doubt that the joint acquirers *viz.* Bhaiyalal and Teckchand had sold the

(1) A. I. R. 1981 S. C. 2128.

particular Khasra, of which the suit-land formed part, in their exclusive and absolute right in favour of the defendants No. 1 and 2, passing valid title to the latter.

Now, it is to be seen as to what was the nature of the property, coming in the hands of the defendants No. 1 and 2, consequent to their purchase *vide* sale-deed Ex. P-3 dated 25-5-56. It was not the coparcenary property nor joint family property which had come in their hands. Had it been so, the other brothers who had been born later, would have acquired their coparcenary interest in the said property; but, since the alienees *viz.* the defendants No. 1 and 2 had purchased the property in question, which was of the nature of joint property of the joint acquirers *viz.* Bhaiyalal and Teckchand, the said purchased property in the hands of defendants No. 1 and 2 had come to be their absolute property, as held by the trial Court [See *C. N. Arunachala Mudaliar* v. *C. A. Muruganatha Mudaliar and another* (1)]. As such, other after born sons of Teckchand (i. e. defendants No. 4, 5 and 6) could not acquire any interest by birth in such property which had been acquired by defendants No. 1 and 2, since the same was neither the ancestral/coparcenary property nor even the joint family property; and was, on the other hand, their absolute property under the sale-deed Ex. P-3 dated 25-5-56 [See *Katragadda China Anjanuvule and another* v. *Katragadda China Ramayya and others* (2)].

As regards the nature of the document Ex. P-1 dated 6-12-73, the evidence on the defendants' side is obviously concocted; and there is no basis to support the contention that this document had been executed by way of security for any loan. Evidence on the plaintiff's side in this regard, is obvisously more trustworthy. The plaintiff himself as (P. W. 5), the scribe P. W. 1 Kunjilal and the attesting witness P. W. 3 Sanadkumar have duly proved that the Ex. P-1 was a contract of sale executed by the defendants No. 1 and 2. It is pertinent to observe that their father Teckchand has also signed this document, clearly stating therein that in his presence, Rs. 7000/- were paid to the defendants No. 1 and 2, in the matter of this particular agreement. The trial Court's finding, therefore, is wholly correct that Ex. P-1 was the agreement of sale. Incidentally it may be stated that in this document also, the defendants No. 1 and 2 have described the suit-land as being their own, exclusively.

Coming to the last question whether Rajaram and Ratanchand were necessary parties to the suit, the trial Court is found to have rightly held that they were not. The observations of the trial Court in Para 12 of its Judgment,

(1) A. I. R. 1953 S.C. 495. (2) A. I. R. 1965 A.P. 177.

in the matter of revenue proceedings, resulting in the recording of Rajaram and Ratanchand as *Bhumiswamis* in the revenue records in accordance with Section 190 of the M. P. Land Revenue Code, do not appear to be extraneous and irrelevant. Copy of the revenue proceedings is on record as Ex. D-1 which shows that Rajaram and Ratanchand, had initiated the proceedings against Teckchand and his sons in the matter of the particular Khasra, of which the suit-land, formed part. Rajaram and Ratanchand are none else but Teckchand's own brother-in-laws and maternal uncles of the defendants No. 1 and 2, and 4 to 6. These proceedings before the Naib-Tahsildar and the consequent appeal before the SDO that might have been preferred against the N. T.'s order do not appear to be *bona-fide*; and apparently are collusive which may well be appreciated in the light of the "statement of objects and reasons" in the matter of the particular Legislation *viz.*, M. P. Ceiling on Agricultural Holdings Act, as has been reproduced by the trial Court in its Judgment. To appreciate this collusion, there are found to be further circumstances on record. It was this Rajaram who had acted as the guardian of the defendants No. 1 and 2 in the matter of this sale-deed Ex. P-3 dated 25-5-56. Then again, Rajaram and Rajaram's another close relative who probably is also the maternal uncle, had later got executed the registered sale-deed Ex. P-4 dated 4-5-72 in favour of their own respective minor sons by Teckchand, acting as guardian of his two minor sons *viz.* the defendants No. 1 and 2. In such circumstances, the recording of Rajaram and Ratanchand in the revenue records as *Bhumiswamis*, does not affect the plaintiff's claim for specific performance of contract, which the trial Court has rightly decreed, holding these persons as not the neeessary parties to the present suit.

In the result, thus, the defendants' appeal being without any merit, is dismissed; and the Judgment and Decree of the trial Court are affirmed. It may, however, be stated that the plaintiff has already got executed the registered sale-deed in execution of the Decree through the process of the Court and has equally obtained possession of the suit-land. Appellants-defendants to bear the respondent's costs of this Court and also of the Court below, besides bearing their own. Counsel' fee as per schedule, if certified.

Appeal dismissed.

CIVIL REVISION

Before Mr. Justice K. N. Shukla.

30 July 1983

KASTURI DEVI, Applicant*

v.

RAMSWAROOP, Non-applicant

Civil Procedure Code (V of 1908), Order 23, rule 3 and Section 151 and Accommodation Control Act, M. P. (XLI of 1961), Section 12(1)(F)—Inherent powers of the Court—Must be exercised to secure the ends of justice—Compromise petition and decree reciting that suit shop vacated by the defendant and possession delivered to plaintiff—But possession not in fact delivered—Court in exercise of its inherent power can amend the decree directing delivery of possession—Compromise decree based on admission of the defendant about plaintiff's bona-fide non-residential requirement is legal and executable.

Inherent powers of the Court cannot be defined in clear limits. Cases decided by High Courts and the Supreme Court are only illustrative and not exhaustive of the extent of such power. The whole matter has to be seen from the angle of justice and the Court has to frame a question to itself, whether, the ends of justice require that it should intervene and straighten out the folds created by the ingenuity of the parties.

Ramjanam v. *Bindeshwari Bai* (1), *Samarendra* v. *Krishna Kumar* (2), *Pema* v. *Dhanya* (3) and *Pariyakkal* v. *Dakshyani* (4); referred to.

In a suit for eviction under section 12(1)(a) and (F) of the M. P. Accommodation Control Act, 1961, the parties filed a compromise petition which contained a recital that the suit shop had been vacated by the defendant and possession was delivered to the plaintiff voluntarily and a decree in terms of the compromise was passed but in fact actual possession was not delivered at any stage and the defendant did not counter the allegations of the plaintiff that though the defendant had removed his goods from the shop, he had locked the door and he had refused to deliver the possession to the plaintiff. The plaintiff, therefore, invoked inherent powers of the Court for assistance so that

*Civil Revision No. 85 of 1982, for revision of the order of R. K. Goswamy, Civil Judge, Class II, Morena, dated the 17th October 1981.

(1) A. I. R. 1951 Pat. 299.
(2) A. I. R. 1967 S. C. 1440.
(3) A.I.R. 1972 M P. 211.
(4) (1983) 2 S. C. C. 127.

Kasturi Devi v. *Ramswaroop, 1983*

the decree may become effective and meaningful and prayed that the decree should direct delivery of possession in terms of the compromise.

Held:- It is the duty of the Court to intervene and exercise its inherent powers to do justice between the parties. It is, therefore, ordered that the decree be suitably amended and it should be added therein that defendant shall deliver peaceful possession to the plaintiff.

When there is a clear admission by the defendant in the compromise petition about the plaintiff's *bona-fide* non-residential requirement and, therefore, decree passed on one of the grounds mentioned in section 12 of the M. P. Accommodation Control Act, 1961, has to be held as legal and valid which can be enforced in execution.

R. C. Lahoti for the applicant.

R. D. Jain for the non-applicants.

Cur. adv. vult.

ORDER

K. N. SHUKLA J.—This revision has been filed by the plaintiff, challenging the order dated 17.10.81, passed by Civil Judge Class II, Morena, dismissing her application, purporting to be under Sections 151, 152 and 153 of the Code of Civil Procedure and, alternatively, under Order 47, Rule 1, CPC.

The facts are interesting and admittedly, learned counsel were unable to show any precedent on such a question. The non-applicant Ramswaroop, was a tenant of a non-residential accommodation, belonging to the plaintiff-petitioner. The petitioner had filed a suit for ejectment on the grounds available under Section 12(1)(a) and (f) of the M. P. Accommodation Control Act, 1961 (hereinafter called 'the Act'). The suit was registered as C.O.S. No. 28-A of 1977. On 19.4.1977, parties filed a compromise petition before the trial court. In this petition, the defendant non-applicant had admitted that the suit shop was genuinely required by the plaintiff for the business of her son. It was also admitted that the defendant was in arrears of rent, which had not been deposited in the Court within the prescribed time. The compromise deed contained a recital that the suit shop had been vacated by the defendant and possession was delivered to the plaintiff voluntarily.

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When the plaintiff sought a decree in terms of the compromise, the defendant resiled and denied the compromise. The court rejected the compromise application on 10.4.1978.

Plaintiff preferred a revision in the High Court. The High Court set aside the order rejecting the application for a decree in terms of the compromise and directed an enquiry into the factum of such a compromise and passing of appropriate orders thereon. In compliance, the trial Court conducted an enquiry under Order 23, Rule 3, C.P.C. and by order dated 11.4.1980, held that the compromise had been arrived at between the parties. It further directed that the said compromise be taken on record and a decree be drawn up accordingly. The decree was, therefore, drawn in terms of the compromise.

As narrated above, the compromise petition recited that possession had already been delivered to the plaintiff and the decree also was passed to that effect in these very words. In fact, however, actual possession had not been delivered. Neither during the enquiry before the trial court nor at any stage during the proceedings under Sections 151 etc., the defendant any where stated that he had actually delivered the possession in terms of the compromise. It may also be noted that, at no stage, defendant countered the allegation of the plaintiff that though the defendant had removed his goods from the shop, he had locked the door and had refused to deliver the possession to the plaintiff.

When the plaintiff found that the compromise decree was innocuous and she could not execute the same in order to obtain possession, she invoked the inherent powers of the Court for assistance so that the decree may become effective and meaningful. She came forward with the petition that the decree should direct delivery of possession in terms of the compromise.

This petition was opposed by the defendant non-applicant. In reply, he reiterated that there had never been any compromise between the parties. A technical plea was raised that the compromise was taken on record and the decree in terms thereof had been passed. It is not open to the court, now, to go behind the decree or in any way alter the terms of the compromise so as to direct delivery of possession. There was no error in the judgment and decree, which could be corrected either under Section 152 or order 47, rule 1, C.P.C. The trial court upheld this technical objection of the defendant-non-applicant and dismissed the petitioner's application under Sections 151, 152, C.P.C. etc.

The question, therefore, which arises is, whether the Court in exercise of its inherent powers can grant suitable relief to the plaintiff-petitioner on the facts and circumstances of the case ? As already observed, counsel were unable to show any precedent for such a situation.

Learned counsel for the petitioner cited *Ramjanam* v. *Bindeshwari Bai* (1), wherein it was observed that the court had complete jurisdiction to make consequential orders (under Section 151, C.P.C.) in order to give effect to the terms of compromise and to record the same. In the cited case, facts of which are complicated one of the parties was refusing to accept the amount, which was payable by a certain specified date in terms of compromise. The court observed that it had powers *ex dabito justitiae* to accept the deposit of the amount for giving effect to the terms of the compromise even after the passing of the decree.

In *Samarendra* v. *Krishna Kumar* (2), a preliminary decree for sale of the mortgaged property was passed but during the final decree proceedings, the purchaser of the equity of redemption wanted to be impleaded and he claimed that in terms of the mortgage-bond, final decree for foreclosure ought to have been passed and the said purchaser was entitled to redeem the said mortgage. Dealing with the inherent powers of the court, in such a situation, their Lordships said that though the preliminary decree was passed for sale, the final decree for foreclosure could be passed under the inherent powers of the court, in view of the real intention of the parties as expressed in the document.

In *Pema* v. *Dhanya* (3), this Court held that if a mistake in describing the property correctly was carried in the judgment and decree and later it was found that the decree as such was inexecutable, the court in its powers could rectify the mistake and pass appropriate decree.

In *Perivakkal* v. *Dakshyani* (4), their Lordships of the Supreme Court, while giving effect to an order under compromise, held that the court had freedom to act to further the ends of justice and exercising its inherent powers the court extended the time for making deposit of money in order to relieve the aggrieved party against the forfeiture clause in the compromise.

Inherent powers of the court cannot be defined in clear limits. Cases decided by the High Courts and the Supreme Court are only illustrative not

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(1) A. I. R. 1951 Pat. 299.
(2) A. I. R. 1967 S. C. 1440.
(3) A. I. R. 1972 M.P. 211.
(4) (1983) 2 S. C. C. 127

exhaustive of the extent of such power. The whole matter has to be seen from the angle of justice and the court has to frame a question to itself whether the ends of justice require that it should intervene and straighten out the folds created by the ingenuity of the parties. If this yardstick is applied to the facts of the present case, it is clear that justice requires court's intervention in order to give effect to the intention of the parties which merged in order of the Court. If the compromise petition is read from this angle, it is clear that the parties intended that a decree for delivery of possession ought to be passed in favour of the plaintiff-petitioner. The defendant cannot be allowed to wriggle out of his commitment and it is the duty of the court to intervene and exercise its inherent powers to do justice between the parties.

Learned counsel for the non-applicant raised an altogether new point before me. He contended that the compromise petition did not indicate explicitly that the plaintiff *bona fide* require the suit accommodation and has no other accommodation of her own suitable for the purpose. According to the learned counsel since this ground under section 12(1)(f) of the Act was not fully made out, the decree had become a nullity even though it was passed in terms of a compromise. I do not find any substance in this argument. There is a clear admission by the defendant-non-applicant in the compromise petition about the plaintiff's *bona-fide* non-residential requirement and therefore the decree passed on one of the grounds mentioned in section 12 of the Act, has to be held as legal and valid which can be enforced in execution.

Under these circumstances, it is necessary to exercise the inherent powers of the court so that the decree becomes effective and meaningful. It is, therefore, ordered that the decree be suitably amended and it should be added therein that defendant-non-applicant shall deliver peaceful possession to the plaintiff.

The revision is allowed. Costs of this revision shall be borne by the non-applicant-defendant. Counsel's fee Rs. 100/-, if certified.

Application allowed.

CRIMINAL REVISION

Before Mr. Justice C. P. Sen.

28 July 1982

LAXMINARAYAN SINGH and another, Applicants*

v.

SHRIRAM SHARMA, Non-applicant.

Penal Code, Indian (XLV of 1860)—Section 499 and Exceptions and Sections 500, 505 and 295-A, Criminal Procedure Code, 1973 (II of 1974), Section 199 and Constitution of India, Article 19(1)—Complaint under Sections 500 and 505 for publication of defamatory matter under the caption "Tulsi Ke Ram" by way of critical commentary on 'Ram Charit Manas' written by Sant Tulsidas—Lies at the instance of aggrieved person only—Complainant not claiming to be descendent of Sant Tulsidas alleged to have been defamed—Complainant cannot be an 'aggrieved person'—Not entitled to file the complaint—Critical commentary on 'Ram Charit Manas'—No offence committed—Constitution of India—Article 19—Freedom of speech and expression under—Extent of—Comments on author's work made in good faith are saved under Exception 6 to Section 499, Penal Code—Publication of article with malacious and deliberate intention of outraging religious feelings—Proper course to be adopted.

Under Section 499, I.P.C. whoever makes or publishes any imputation concerning any person intending to harm or knowing or having reason to believe that such computation will harm the reputation of such person is said subject to the exceptions, to defame that person. Under Section 11 of I.P.C. the word 'person' includes any company or association or body of persons, whether incorporated or not. An idol may be a judicial person capable of owning property but it is doubtful if it can, come within the meaning of the word 'person' in sections 499 and 500, I.P.C. because in the explanations there is reference to defamation of a dead person and a corporate body only. Under Explanation (1) it may amount to defamation to impute anything to a deceased person, if the imputation would harm the reputation of that person,

*Criminal Revision No. 232 of 1982, for revision of the order of K. C. Sharma, Judicial Magistrate, First Class, Jabalpur.

if living, and is intended to be harmful to the feelings of his family or other relatives. So imputation should not only be harmful to the deceased if living it must also hurt the sentiments of his family members. Thus, when according to the complainant, Sant Tulsidas died in 1680 i. e. 300 years back and he is not claiming himself to be the descendent of Sant Tulsidas nor any such descendent had come forward to make any such grievance, it is clear that second limits of the Explanation (1) is not satisfied and as such no action lies for defamation of Sant Tulsidas at the instance of the complainant. Even otherwise, section 199(1) of the Code of Criminal Procedure provides that no court shall take cognizance of an offence punishable under Chapter XXI of the I.P.C. i. e. for defamation, except upon a complaint made by some person aggrieved by the offence, provided if such person is a minor or lunatic or infirm or a pardanashin woman then by some other person with the leave of the Court. Complainant, tnough he may be a devotee of Lord Ram and an admirer and follower of Sant Tulsidas, he is not an aggrieved person within the meaning of section 199(1) of the Cr. P. C. and, as such, no cognizance of the offence under section 500 can be taken on his complaint and the trial is void and illegal.

G. Narasimhan v. *T. V. Chokkappa* (1); followed.

O. N. Sen v. *R. K. Bhandra* (2), *Ganesh Nand* v. *Swami Divyanand* (3) and *Prempal Singh* v. *Phool Singh* (4); relied on.

Under Article 19(1) of the Constitution all citizens have a right to freedom of speech and expression. This freedom means the right to express one's convictions and opinion freely. But nobody can so use his freedom of speech or expression to injure another's reputation. However, Exception 6 to Section 499, I.P.C. lays down that it is not defamation to express in good faith any opinion regarding the merits of any performance, in which its author has submitted to the judgment of the public, or respecting the character of the author so far as his character appears in such performance and no further.

Thus, when the article 'Tulsi Ke Ram' published in the two issues of 'Sarita' written by the applicant No. 1 and published by the applicant No. 2 is a critical commentary on 'Ram Charit Manas' written by Sant Tulsidas, it may be that many will not agree with writer's criticism and approval of the

(1) A. I. R. 1972 S. C. 2609
(2) 1970 Cr. L. J. 662.
(3) 1980 Cr. L. J. 1036.
(4) 1980 Cr. L. J. Noc. 16.

work of Sant Tulsidas and the language used in the article while criticising Tulsidas is not quite palatable and may have been couched in more milder language, nonetheless, it cannot be said that there is want of good faith or that the writer has attacked the personal character of Tulsidas which has no reference to his work. The attack on Tulsidas is with reference to his work and the writer therefore holds the Sant to be uncivilised, of corrupt influence and of narrow thoughts because of his projection of Ram and getting such dirty works through him and not otherwise. It cannot be said that the opinion expressed could not be the honest opinion of critic. If the complainant felt that the applicants with malacious and deliberate intention of outraging the religious feelings of the Hindus, have published the article, proper course would have been to move the Court for their prosecution under section 295-A, I.P.C. and also for forfeiture of the two issues of 'Sarita' under section 195 of the Code of Criminal Procedure.

R. N. Rai for the applicants.

R. P. Tiwari for the non-applicant.

Cur. adv. vult.

ORDER

C. P. SEN, J.—This is an application under sections 397/401, read with section 482 of the Code of Criminal Procedure, 1973, for quashing the proceedings in Criminal Case No. 96/82 against the applicants for the offence under section 500, I. P. C. pending in the Court of Judicial Magistrate, First Class, Jabalpur.

Applicant no. 2 is the Editor and Publisher for fortnightly Hindi magazine Sarita published from New Delhi, having wide circulation. In the two issues of September 1981 (nos. 633 & 634) an article written by the applicant no. 1 was published under the caption 'Tulsi Ke Ram'. criticising Tulsidas for depicting Ram, the hero of the epic 'Ramayana', in such a manner that though Ram was intended to be an incarnation of god, he was shown as an ordinary mortal with all the human weaknesses, with the result that it has not served the interests of the Hindu society. The non-applicant claims himself to be a traditionalist Hindu, a scholar, a teacher and a devotee of 'Shri Ram', as depicted in by Tulsidas in 'Ram Charit Manas' and he has profound regard for Sant Tulsidas. He filed the present complaint under sections 500 & 505, I.P.C. alleging that the aforesaid article 'Tulsi Ke Ram' published in the two

issues of Sarita has abused Sant Tulsidas who is being honoured and respected for well over 400 years not only in India but all over the world for his literary work and he has been described as of uncivilised mind, of corrupting influence and of low thoughts. The applicants have falsely blamed and abused lord Shri Ram and posed themselves as great scholars. They have set up one section of the Hindus against the other section. Since Sant Tulsidas died in 1680 and so he is not in a position to defend him, though after his death he has been a source or inspiration for the Hindus. So it is necessary to decide the charges levelled against Sant Tulsidas and to punish the applicants for defaming him, his work 'Ram Charit Manas' and Lord Shri Ram.

The grievances of the complainant are especially about the following passages in the article :—

(a) In his emotion Tulsidas has created character of Ram, which is dirty and shameful. He tried to depict Ram as incarnation of god but actually Ram has not even been shown as a good man, he has imposed his uncivilised mind and narrow thoughts on Ram, no one has corrupted Ram as much as he has done.

(b) Ram has been depicted as liar, unjust, trickster, of no understanding, believer in casteism and slavery, giver of all protection to criminals, whimsical and of low taste, lover of flattery and Kshatriya chief whose own brother used to stand before him with folded hands as a slave, he had declared that any one who dared to walk before him insolently with raised head, he would cut his head but one who bowed down before him, he would give him all protection, this shows him not as a protector of poor but as a feudal lord.

(c) By praising all the vices of Ram as his good qualities, Tulsidas has tried to throw dust on the god bearing Hindus, it is difficult to find another example of such a mean attempt to misguide others; &

(d) Instead of doing good to all in 'Ram Charit Manas', majority of Hindus i. e. non-Brahmins have been made helpless and backward while Brahmins have been made proud, shirker and hypocrats. So much encouragement has been given to blind faith, hypocracy, falsehood and corruption, as a result a

majority of the people have started treating 'Ram Charit Manas' as an unwanted and useless work.

After recording statement of the non-applicant, the complaint was registered under sections 500 & 505, I.P.C. and process issued to the applicants as the Magistrate found *prima-facie* case against them. On 10-2-1982 the applicant no. 2 appeared through his counsel and applied for exemption from personal appearance on the ground that he is of advanced age and keeping indifferent health. Another application was filed under sections 196/199 of the Code of Criminal Procedure for quashing the proceedings as no sanction has been obtained from the Government for prosecution of the offence under section 505, I.P.C., no offence under section 500 has been made out, the complainant is not an aggrieved person and he does not belong to the family of Sant Tulsidas and the complainant's own reputation or position has not been harmed. The non-applicant filed an application for production of the manuscript of the article by the applicant no. 2 and for his furnishing full address of the applicant no. 1 as the summons to him has been returned unserved. The trial Magistrate asked the applicant no. 2 to produce a medical certificate and fixed the case for arguments on the applications on 12-3-1982. On that day, after hearing the arguments the trial Magistrate directed the applicant no. 2 under section 91(1) of the Code to produce the written manuscript and supply full address of the applicant no. 1. Bailable warrant was ordered to be issued against the applicant no. 2 as he did not produce the medical certificate nor appeared. The full address of the applicant no. 1 was furnished on 13-3-1982 and on 16-3-1982 medical certificate of the applicant no. 2 was produced. Since the certificate advised rest up to 22-3-1982, the applicant no. 2 was asked to appear in the Court on the date already fixed i. e. 15-4-82.

On 9-4-82 the applicants filed this revision with the aid of section 482 contending that (i) the non-applicant has no *locus standi* to file the complaint as he is not a person aggrieved as required under section 199 of the Code, (ii) the publication is covered by Article 19 of the Constitution which guarantees freedom of expression. It is a fair comment and critical approach of the author with regard to the manner in which 'Ram Charit Manas' was written and its characters depicted. So no case under section 500 is made out. (iii) If the article has created ill-feelings and outraged the religious sentiments of the non-applicant and other members of the Hindu community, they should have approached the Government for prosecution of the applicants under section 295-A, I.P.C. and for forfeiture of the two issues of 'Sarita' under section 195 of the Code; & (iv) asking the applicant no. 2 to produce the manuscript amounts to compelling him to give evidence against himself and violates

Article 20(2) of the Constitution. Therefore, the applicants prayed for quashing of the proceedings against them. The non-applicant submitted that no revision lies against an interlocutory order and the inherent powers cannot be invoked to override section 397(2) of the Code. The author has picked up passages from 'Ram Charit Manas' without reference to context and the Sant has been criticised uncharitably. No case is made out for any of the exceptions to section 499 and the imputations against the Sant are uncalled for and highly defamatory.

Under section 499, I.P.C. whoever makes or publishes any imputation concerning any person intending to harm or knowing or having reason to believe that such imputation will harm the reputation of such person is said, subject to the exceptions, to defame that person. Under section 11 of I.P.C., the word 'person' includes any company or association or body of persons, whether incorporated or not. An idol may be a judicial person capable of owning property but it is doubtful if it can come within the meaning of the word 'person' in sections 499 & 500, I.P.C. because in the explanations there is reference to defamation of a dead person and a corporate body only. Under Explanation (1) it may amount to defamation to impute anything to a deceased person, if the imputation would harm the reputation of that person if living, and is intended to be hurtful to the feelings of his family or other relatives. So imputation should not only be harmful to the deceased if living, it must also hurt the sentiments of his family members. According to the complainant, Sant Tulsidas died in 1680 i. e. 300 years back and he is not claiming himself to be a descendant of Sant Tulsidas nor any such descendant had come forward to make any such grievance. Therefore, it is clear that second limb of the Explanation (1) is not satisfied and as such no action lies for defamation of Sant Tulsidas at the instance of the complainant.

Even otherwise, section 199(1) of the Code of Criminal Procedure provides that no Court shall take cognizance of an offence punishable under Chapter XXI of the I.P.C. *i. e.* for defamation, except upon a complaint made by some person aggrieved by the offence, provided if such person is a minor or lunatic or infirm or a Pardanashin woman then by some other person with the leave of the Court. The Supreme Court while considering scope of section 198 of 1898 Code which is similar to section 199 of the present Code, in *G. Narasimhan* v. *T. V. Chokkappa* (1) held as under :—

> "Section 198 lays down an exception to the general rule that a complaint can be filed by anybody whether he is an aggrieved

(1) A.I.R. 1972 S C. 2609.

person or not, and modifies that rule by permitting only an aggrieved person to move a magistrate in cases of defamation. The section is mandatory, so that if a magistrate were to take cognizance of the offence of defamation on a complaint filed by one who is not an aggrieved person, the trial and conviction would be void and illegal."

It was also held that the Chairman of the Reception Committee of the conference could not be said to be an aggrieved person as the conference was not an identifiable or a definite body. The Calcutta High Court in *D. N. Sen* v. *R. K. Bhandra* (1) held that where the defamation was of a spiritual head of a certain community, an individual person of that community was not the person aggrieved and as such the cognizance of offence taken on a complaint by that individual person was illegal. The Delhi High Court in *Ganesh Nand* v. *Swami Divyanand* (2) held:—Criminal Procedure Code, Section 199—Penal Code, Section 499—Complaint under section 500 by disciple of P for defamation of his guru-disciple is not an aggrieved person. A Division Bench of the Rajasthan High Court in *Prempal Singh* v. *Phool Singh* (3) has held as follows :—

"The grievance of the complainant, an ordinary member of the Mission, in his individual capacity cannot be more than a pain or hurting his sentiments, like any other ordinary member of the society and he cannot be considered as 'an aggrieved person' under Sec. 199, Cr. P. C.. Such an ordinary member of the Mission cannot espouse the cause of a senior active member of the Mission especially when the civil suit filed by the latter against the accused for damages for defamation etc. has already come to an end by a compromise arrived at between the parties."

Therefore, it is clear that the complainant though he may be devotee of Lord Shri Ram and an admirer and follower of Sant Tulsidas, he is not an aggrieved person within the meaning of section 199(1) and, as such, no cognizance of the offence under section 500 can be taken on his complaint and the trial is void and illegal.

Under clause (a) of Article 19(1) of the Constitution all citizens have right to freedom of speech and expression. This freedom means the right to

(1) 1970 Cr. L. J. 662. (2) 1980 Cr. L. J. 1036.
(3) 1980 Cr. L. J. NOC. 16

express one's convictions and opinions freely. Just as every person possesses the freedom of speech and expression, every person also possesses right to his reputation which is regarded as a property. Hence no body can so use his freedom of speech or expression to injure another's reputation. So defaming anyone has been made penal. However, Exception 6 to section 499, IPC. lays down that it is not defamation to express in good faith any opinion regarding the merits of any performance which its author has submitted to the judgment of the public, or respecting the character of the author so far as his character appears in such performance and no further. A Division Bench of the Bombay High Court while considering scope of Exception 6 to Section 499 has held as under :—

> "A fair comment upon a literary work, or other such production, submitted to the judgment of the public, that is to say, a comment which is the expression of honest opinion and does not go beyond the limits of what may fairly be called 'criticism' is no libel. A fair comment is a comment which is true, or which, if false, expresses the real opinion of its author, such opinion having been formed with a reasonable degree of care and on reasonable grounds. The right of fair comment involves two essentials: first, that the imputation should be a comment on the work criticised, and second, that it should be fair, that is to say, if it professes to be an inference drawn from the contents of that work, it must be an inference which it is possible to draw therefrom. It would be monstrous, for instance, for a critic to suggest as an inference from a mere grammatical inaccuracy in a work that its author was a swindler or a libertine. An imputation on an author made by a critic without reference to the work under criticism, if in terms so general as to be capable of conveying an unfavourable impression of him apart from what appears in his work, cannot be justified by the critic on the ground that his intention was to base his imputation solely on the work reviewed, and that he had in his mind passages therein supporting the imputation. The resposibility of the critic is to be gauged by the effect which his comment is calculated to produce and not by what he says was his intention.
>
> 'Good faith' under this Exception requires not logical infallibility but due care and attention. But how far erroneous actions or statements are to be imputed to want of due care and caution must in each case be considered with reference to the general circumstances and the capacity and intelligence of the person

Laxminarayan Singh v. *Shriram Sharma, 1982*

whose conduct is in question. It is only to be expected that the honest conclusions of a calm and philosophical mind may differ very largely from the honest conclusions of a person excited by sectarian zeal untrained to habits of precise reasoning. Good faith in the formation or expression of an opinion can afford no protection to an imputation which does not purport to be based on that which is the legitimate subject of public comment."

The article 'Tulsi Ke Ram' published in the two issues of 'Sarita' written by the applicant no. 1 and published by the applicant no. 2 is a critical commentary on 'Ram Charit Manas' written by Sant Tulsidas. It may be that many will not agree with writer's criticism and appraisal of the work of Sant Tulsidas. The language used in the article while criticising Tulsidas is not quite palatable and may have been couched in more milder language. Nonetheless it cannot be said that there is want of good faith or that the writer has attacked the personal character of Tulsidas whi h has no reference to his work. The attack on Tulsidas is with reference to his work and the writer therefore holds the Sant to be uncivilised, of corrupting influence and of narrow thoughts because of his projection of Ram and getting such dirty works through him and not otherwise. It cannot be said that the opinion expressed could not be the honest opinion of the critic. The writer has given his own reasons for criticising Sant Tulsidas though at one place he has praised him for the excellence of literary work, which according to the writer is un-surpassed though it is not an original work but merely Hindi translation from Sanskrit. His annoyance is about the manner in which Ram has been painted by Sant Tulsidas in his work. According to the writer, Ram is regarded by the Hindus to be an ideal person, just, merciful, honest and good friend but Tulsidas in his emotion and enthusiasm has painted Ram as a dirty, uncouth and shameful character while attempting to make Ram as an incarnation of God. This, according to the author, shows his meanness, low taste and uncivilised mind. According to Tulsidas, one may commit thousands of crimes or commit thousands of sins but everything would be condoned if he touches the feet of Ram. According to the writer, this would give encouragement to criminals and sinners. Even in the present immoral and corrupt world, no ruler can dare to give such protection. Ram had taken a vow to free the world of demons yet he allowed Vibhisan to rule over the remaining demons after the war with Ravan was over. To achieve his self interest, Ram encouraged traitor Vibhisan to disclose all the secrets of his friend Ravan, by tempting him with the throne of Ravan. Ram made friendship with Sugriv for his selfish ends. If there was such a magic in the feet of Ram to turn anything into a beautiful woman then why Ram was roaming in the hillocks to search out Sita. These are some

of the opinions expressed by the writer in his article 'Tulsi Ke Ram'. If the complainant feels that the applicants, with malicious and deliberate intention of outraging the religious feelings of Hindus, have published the article, proper course would have been to move the Government for their prosecution under section 295-A, I.P.C. and also for forfeiture of the two issues of 'Sarita' under section 195 of the Code of Criminal Procedure. Since the proceedings are being quashed, it is not necessary to consider as to whether by asking the applicant no. 2 to produce the written manuscript, there is violation of Article 20(2) of the Constitution.

Accordingly, the proceedings initiated on the complaint of the non-applicant for prosecution of the applicants for the offence under Section 500, I.P.C. are quashed and the complaint is dismissed.

Application accordingly dismissed.

MISCELLANEOUS CIVIL CASE

Before Mr. Justice C. P. Sen and Mr. Justice K. N. Shukla.

2 Feb. 1984

M/S BHILAI MOTORS, RAIPUR, Applicant*

v.

COMMISSIONER OF INCOME-TAX, M. P. II, BHOPAL, Opposite party.

Income-tax Act, Indian (XLIII of 1961)—Section 40-A (3) and Rule 6-DD, Clause (J) and Circulars issued by the Central Board of Direct Taxes—Payment of amount of expenditure exceeding Rs. 2500/—When can be made in cash—Whether such payment in cash is made in exceptional circumstances—Is a question of fact—No question of law arises for

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* M.C. C. No. 25 of 1981. Reference under Section 256(1) of the Income-tax Act, 1961, by the Income-tax Appellate Tribunal, Nagpur Bench, Nagpur, dated the 30th May 1980.

M/s Bhilai Motors, Raipur v. *Commissioner of Income-tax, M. P. II, Bhopal, 1984*

answer by the High Court Expenditure—Income Tax Officer and Commissioner of Income-tax (Appeals) holding use of motor car for personal use of the partners of assessee firm and disallowing expenditure over it—Finding confirmed by the Tribunal—Is a pure finding of fact—No Question of Law involved for answer by the High Court—Income Tax Officer assessing estimated suppressed profits of the assessee on account of on money for out of turn supplies of vehicles to customers—Commissioner brushing aside that finding of the I.T.O. on wrong premises—Assessee filing relevant documents before Tribunal for the first time—Nature of order which ought to have been passed by the Tribunal under such circumstances—However no question of law involved in it—High Court need not answer the question.

It is not sufficient for the assessee merely to show that the purchases were genuine and the payees were identifiable. He has further to show that due to exceptional and unavoidable circumstances or because payment by cheque was not practicable cash payments were made. Thus, where the Commissioner has allowed two purchases made on 31-12-1974 which were made on a Bank holiday, which is covered by the circular but regarding the other purchases, the only explanation of the assessee was that the sellers were insisting on cash payments and no evidence was produced to substantiate this contention and it was not the case of the assessee that those purchases were covered under any exceptional or unavoidable circumstances as contemplated by Rule 6-DD, Clause (J) or by any of the circulars issued by the Central Board of Direct Taxes, the question whether a payment in cash exceeding Rs. 2500/- was made in exceptional circumstances is a question of fact and the finding of the Tribunal is a finding of fact and no question of law arises.

C.I.T. v. *Satish Chandra* (1); relied on.

Where the Tribunal has found that the Income-tax Officer and the Commissioner of Income-tax have held that the motor car was used for personal use of the partners and the assessee has not produced any material to controvert the findings of the lower authorities and there was no reason to interfere with the order of the Commissioner of Income-tax (Appeals), it is pure finding of fact and there is no question of law involved.

The assessee is a partnership firm dealing in Tata Mercedeze Benz

(1) 143 I. T. R 331.

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Chasses Vehicles and Spare parts. The Income-tax Officer found that the assessee sold certain number of Vehicles out of turn and earned certain amount per vehicle as on money and as the assessee did not produce the booking register and the original order forms and that in some cases the office copy of the sale memo did not tally with the sales memo to the customer pertaining to a particular sale and some of the vehicles were registered with the R.T.O. before the date of their sale; no account books were maintained for the branch in the assessee's cash books balances were not drawn daily but on alternate days and in pencil which has been finalised sometimes in ink and the Income-tax Officer, therefore, estimated suppressed profits at Rs. 50,000/- and added it in the income of the assessee on account of on money for out of turn supplies of Tata Mercedeze Benz Chassis which was on short supply these findings were based neither on surmises nor on conjectures nor on suspicion and the Commissioner was not justified in brushing aside the findings of the I.T.O. on wrong premises even after finding that the irregularities in the assessee's accounts to be pretty serious and there have been out of turn supplies. However, when the assessee for the first time produced relevant documents i. e. booking register and the original orders forms before the Tribunal, it could have restored the findings of the I.T.O. and remanded the case giving fresh opportunity to the assessee to rebut the inference drawn and to further enable the I.T.O. to re-examine the matter in the light of these basic documents. So no question of law arises.

H. S. Shrivastava for the applicant.

B. K. Rawat for the opposite party.

Cur. adv. vult.

JUDGMENT

The Judgment of the Court was delivered by C. P. SEN, J.—At the instance of the assessee the Income-tax Appellate Tribunal, Nagpur Bench, Nagpur, has referred the following questions of law for opinion of this Court under section 256(1) of the Income-tax Act, 1961 :—

(1) Whether, on the facts and in the circumstances of the case, the Tribunal was justified in sustaining the disallowance of Rs. 24,119/- under section 40-A (3) of the Act ?

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(2) Whether, on the facts and in the circumstances of the case, the Tribunal was justified in sustaining the disallowance of the motor car expenses to the extent of Rs. 15,621/- ?

(3) Whether, on the facts and in the circumstances of the case, the Tribunal was justified in vacating the orders of the authorities below with reference to the addition of Rs. 50,000/- issuing a direction to the Income-tax Officer as detailed in para 12 of the Tribunal's order ?

The assessee, M/s Bhilai Motors, is a partnership firm dealing in Tata Mercedeze Benz Chassis, vehicles and spare parts having its head office at Tatibandh, Raipur and a spare parts shop at K. K. Road, Raipur. It has also a branch at Jagdalpur dealing in spare parts and a petrol pump at Tatibandh. The assessee showed income of Rs. 52,626/- for the assessment year 1975-76 for the accounting year 1974. The Income-tax Officer added Rs. 34,396/- under section 40-A (3) of the Income-tax Act consisting of certain purchases on cash payments on bills exceeding Rs. 2500/-. The only explanation was that sellers were insisting on cash payment, which was not accepted. The Income-tax Officer disallowed Rs. 15,621/- towards motor car expenses. The Income-tax Officer, out of a total claim amounting to Rs. 58,116/- towards car expenses, found only Rs. 27,524/- could be considered to be expenditure, out of which Rs. 9175/- was deducted as personal expenditure of the partners not incidental to the business of the firm and a sum of Rs. 6086/- did not pertain to the business of the assessee. The Income-tax Officer also added .Rs. 50,000/- in the income on account of on money for out of turn supplies of Tata Mercedeze Benz Chassis, which was on short supply. The Income-tax Officer found certain irregularities in the books of account which supported his findings that the assessee was taking on money and not accounting the same. He found that the assessee sold 30 vehicles out of turn in the year in question and earned Rs.2000/- per vehicle as on money. The assessee has in all sold 187 vehicles and the sales memos were not in serial order. Although the assessee had sold 187 vehicles during the year it was numbered upto 158 only making up the other sales memos by adding 1-A, 2-A etc. The assessee did not produce the booking register and in original order forms. The Income-tax Officer found that in some cases the office copy of sale memos did not tally with the sales memos to the customers pertaining to a particular sale. It was also noticed that some of the vehicles were registered with the R.T.O. before the date of their sale; no account books were maintained for the branches; in the assessee's cash books balances were not drawn daily but on alternate day and in pencil

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which has been finalised sometimes in ink. The Income-tax Officer assessed income at Rs. 1,89,237/-.

The assessee preferred an appeal before the Commissioner of Income-tax (Appeals). The Commissioner found that out of Rs. 34,396/-disallowed under section 40A(3) of the Act, two purchases made on 31.12.1974 amounting to Rs. 10,277/-on cash payment could be accepted since it was Bank holiday and cash payment was justified. Regarding the remaining amounts, the explanation of the assessee that the sellers insisted on cash payments is not supported by any evidence, even the confirmatory letters of the sellers were not produced to show that they were insisting on cash payments. Regarding the deduction of motor car expenditure, the finding of the Income-tax Officer was confirmed that these expenses were not pertaining to the business of the assessee. Regarding addition of Rs. 50,000/-on account of on money received by the assessee by selling chassis out of turn to the customers, it was held to be unjustified. The Commissioner found the descripancy pointed out by the Income-tax Officer in the books of account of the assessee to be pretty serious but they do not in any way establish that the assessee was charging on money and the Income-tax Officer took upon himself the responsibility of proving something which is not possible to prove. The sale price realised by the assessee is fully verifiable, the assessee is not a small dealer or a grocer and the finding of the Income-tax Officer is based on surmises and conjectures and it cannot be sustained. Therefore addition of Rs.50,000/-was deleted and the Income-tax Officer was directed to revise the assessment accordingly.

In further appeal by the assessee to the Tribunal, a cross-objection was preferred by the department regarding deletion of income of Rs.50,000/- by the Commissioner on account of on money received by sale of chassis out of turn to the customers. The addition of Rs.24,119/-under section 40A(3) of the Act was held to be justified. Though some of the bills on cash payments were less than Rs.2500/-each, it was evident that the bills were split up in order to avoid rigor of section 40A(3) of the Act because the bills bore consecutive numbers, being purchases of the same date. Regarding disallowance of Rs.15,621/-in the matter of car expenses account it has been found that the motor car was also used for personal use of the partners and there was no material to controvert this finding. However, the Tribunal set aside the order of the Commissioner regarding deletion of income of Rs. 50,000/-on account of on money received by the assessee by sale of chassis out of turn to the customers. The Income-tax Officer found several defects in the books of account of the

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assessee. The main piece of evidence which would establish whether the assessee was indulging in malpractices in supplying chassis to the customers is the booking register supported by the original order forms of the customers. These documents were not produced before the Income-tax Officer and the Commissioner and were for the first time produced before the Tribunal. On scrutiny of these documents it was found that the assessee indulged in malpractices in supplying chassis to the customers and so the Income-tax Officer was fully justified in making addition on this ground. The observations of the Commissioner that the Income-tax Officer had undertaken an impossible task is not justified. In the circumstances, the Income-tax Officer was directed to ascertain the actual dates of the booking of the orders for various vehicles and whether the chassis were supplied to the customers in that chronological sequence. If it is found, on scrutiny, that the assessee had indulged in irregularity in the sales to the customers, which will be conclusive proof that the assessee had indulged in malpractices of charging on money on out of turn deliveries. In respect of these sales, if the assessee has shown even one-day's favour to a customer over the previous customer, the Income-tax Officer would be justified in estimating suppressed profits. In the result, the appeal filed by the assessee was dismissed and the cross-objection of the department was allowed. On an application being made for reference, the aforesaid questions have been referred to this Court by the Tribunal.

Regarding the first question, section 40A(3) of the Act provides that where the assessee incurs any expenditure in respect of which payment is made, in a sum exceeding Rs.2500/-otherwise than by a crossed cheque, such expenditure shall not be allowed as a deduction. However, the second proviso provides that no disallowance under this sub-section shall be made where any payment in a sum exceeding Rs.2500/-is made, in such cases and under such circumstances as may be prescribed, having regard to the nature and extent of banking facilities available, considerations of business expediency and other relevant factors. The rigor of the section was further relaxed by framing Rule 6DD. Clause (j) of this Rule provides that where the assessee satisfies the Income-tax Officer that the payment could not be made by a crossed cheque:(i) due to exceptional or unavoidable circumstances or (ii) because payment in the manner aforesaid was not practicable or would have caused genuine difficulty to the payee and also furnish evidence to the satisfaction of the Income-tax Officer as to the genuineness of the payment and the identity of the payee. According to Shri H. S. Shrivastava, learned counsel for the assessee, section 40A(3) and Rule 6DD(j) have been misconstrued and purchase on cash payments

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even below Rs.2500/-have been disallowed because there were number of purchases on the same day and total purchases for the day exceeded Rs.2500/-. He also submitted that the rigor of the section has been further relaxed by various circulars issued by the Central Board of Direct Taxes. It is not sufficient for the assessee merely to show that the purchases were genuine and the payees were identifiable. He has further to show that due to exceptional and unavoidable circumstances or because payment by cheque was not practicable cash payments were made. The Commissioner has allowed two purchases made on 31.12.1974 which were made on a Bank holiday, which is covered by the circular. Regarding the other purchases, the only explanation of the assessee was that the sellers were insisting on cash payments. No evidence was produced to substantiate this contention. It was not the case of the assessee that these purchases were covered under any exceptional or unavoidable circumstances or by any of the circulars issued by the Central Board of Direct Taxes. The Allahabad High Court in *C. I. T.* v. *Satish Chandra* (1) has held that primarily the question whether a payment in case exceeding Rs. 2500/-was made in exceptional circumstances was a question of fact. So the finding of the Tribunal is a finding of fact and no question of law arises.

Regarding the second question, the Tribunal has found as under;—

> "The next objection is to the disallowance of Rs.15,621/-in the motor car expenses account. It is submitted on behalf of the assessee that findings of the facts recorded by the Income-tax Officer are contrary to the factual position involved and no element of personal nature was involved. The Income-tax Officer and the Commissioner of Income-tax have held that the motor car was used for personal use of the partners. The assessee has not produced any material to controvert the findings of the lower authorities. We see no reason why the order of the Commissioner of Income-tax (Appeals) should be interfered with on this ground."

This is a pure finding of fact and there is no question of law involved.

Regarding the third question, the learned counsel for the assessee contended that the Tribunal was not justified in reversing the finding of the Commissioner that the Income-tax Officer took upon himself the responsibility of proving something which was not possible to prove by holding that

(1) 143 I. T. R. 331.

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Rs.50,000/-was the income of the assessee made on account of on money for out of turn supplies of Tata Mercedze Benz Chassis. According to the counsel, the Tribunal ought not to have based its conclusion on mere conjectures and surmises of the Income-tax Officer without any evidence but on suspicion. [*Dhakeswari Cotton Mills Ltd.* v. *C. I. T.* (1)] and a criminal practise of selling at prices in excess of the controlled price cannot be attributed to the assessee in the absence of any evidence to show that the assessee followed such a practise [*A. S. Sivan Pillai* v. *C. I T.* (2)]. He further contended that the observations already made in this regard by the Tribunal left no scope to the Income-tax Officer to come to his own conclusion after reconsideration of the matter and the Tribunal has made too sweeping a statement by concluding that if the assessee has shown one day's favour to a customer, the Income-tax Officer would be justified in estimating suppressed profits. We are unable to accept the contentions. The finding of the Income-tax Officer was based neither on surmises nor on conjectures nor on suspicions. He had drawn certain inferences in view of the serious irregularities found in the books of account of the assessee coupled with out of turn supplies to some customers when there was acute shortage of truck chassis.The Commissioner was not justified in brushing aside the finding of the Income-tax Officer on wrong premises even after finding that the irregularities in the assessee's accounts to be pretty serious and there have been out of turn supplies. The Tribunal in fact, could have restored the finding of the Income-tax Officer but for the fact that the relevant documents, i. e. the booking register and the original order forms, were for the first time produced by the assessee before the Tribunal so the case has been remanded, giving fresh opportunity to the assessee to rebut the inferences drawn and to further enable the Income-tax Officer to re-examine the matter in the light of these basic documents. The Tribunal has kept at large the whole matter before the Income-tax Officer, no final conclusions have been reached, only guidelines drawn for the Income-tax Officer in case a set of circumstances are found against the assessee. It would be open to the assessee to explain how and why 30 vehicles were supplied out of turn However, the concluding observation of the Tribunal that even for one day's favour shown to a customer, the Income-tax Officer would be justified in estimating the suppressed profits is too wide. It is doubtful if for one day's out of turn supply of a chassis a customer would pay substantial on money So this observation is not conclusive on the Income-tax Officer. What the Tribunal wanted to convey was that there cannot be even one day's out of turn supply without some valid reason and it is for the assessee to explain the same. So no question of law arises

Accordingly we refuse to answer the questions, since no question of

(1) 26 I T. R. 775 (SC) (2) 34 I. T R. 328

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law arises from the statement of the case submitted by the Tribunal. There shall be no order as to costs.

Reference answered accordingly.

MISCELLANEOUS CIVIL CASE

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

18 Jan. 1984

SMT. SHANTIBAI, Applicant*

v.

COMMISSIONER OF INCOME-TAX, JABALPUR, Opposite-party.

Income-tax Act, Indian (XLIII of 1961), Sections 246(n), 237,239 and 240— Refund-Order passed by Income Tax Officer refusing refund of tax deposited under provisional assessment, on cancellation of regular assessment by the Tribunal and consequential order passed by Income Tax Officer holding revised income as nil—Order falls under Section 237— Income Tax Officer required to make refund of tax under section 240— Provisions of section 239 not attracted—Order refusing refund of tax passed by Income Tax Officer—Appeal under section 246(n) maintainable.

Where the assessee filed his returns for the years 62-63 and 63-64 showing his taxable income and on that basis provisional assessment under section 141 of the Income-tax Act, 1961 was made and on that basis taxes payable thereon were deposited by the assessee and regular assessment by the Income-tax Officer was then made under section 141 of the Act but ultimately in the further appeal filed by the legal representatives of the assessee the Tribunal cancelled the regular assessment for both these years on the ground that the

*M. C. C. No. 13 of 1980. Reference under Section 256(2) of the Income-tax Act, 1961, by the Income-tax Appellate Tribunal, Jabalpur Bench, Jabalpur, dated the 6th January 1981.

legal representatives were not noticed by the Income-tax Officer before making the regular assessment after the death of the assessee and the Income-tax Officer then made a consequential order for both the assessment years showing therein the revised income as nil but a note was appended to this order that the tax deposited by the assessee as a result of the provisional assessment during his life time, is not to be refunded, it is in substance an order made under section 237 of the Act and the Income-tax Officer by virtue of section 240 is required to make that refund and the assessee is not required to prefer any claim for it in the manner prescribed by Section 239 and therefore, an appeal preferred by the applicant legal representatives to the Appellate Assistant Commissioner is an appeal falling within the ambit of clause (n) of Section 246 of the Income-tax Act, 1961 and is maintainable. The mere fact that the obligation imposed by Section 240 of the Act upon the Income-tax Officer to refund the amount to the assessee without his having to make any claim in that behalf, can be enforced even by a writ of mandamus under Article 226 of the Constitution or even a civil suit, does not deprive the assessee of the right of appeal available to him by virtue of clause (n) of Section 246.

R. A. Roga v. *A. A. C. of Income-tax* (1); distinguished.

Jaipur Udyog Ltd. v. *Commr. of Income-tax* (2); referred to.

B. L. Nema for the applicant.

B. K. Rawat for the opposite-party.

Cur. adv. vult.

JUDGMENT

The Judgment of the Court was delivered by J. S. VERMA J.- This judgment shall also dispose of Misc. Civil Case No. 2 of 1981 (*Smt. Malnabai* v. *Commissioner of Income-tax*).

In both these references made to this Court as a consequence of the direction given under Section 256(2) of the Income Tax Act, 1961, the question of law referred for decision of this Court is the same, which is as under :—

"Whether, in the facts and circumstances of the case, the appeal filed

(1) (1977) 110 I. T. R. 1 (P&H) (2) (1961) 71 I. T. R. 799. (S. C.)

by the applicant before the Appellate Assistant Commissioner of Income-tax was maintainable under section 246 ?"

Material facts are these. The assessee in both these cases was Badri Prasad Gour. For the assessment year 1962-63, for which the previous year ended on Diwali 1961, the assessee Badri Prasad Gour filed a return on 4-3-1964, showing Rs. 68,272/-, as the taxable income. Provisional assessment under section 141 was made on that basis the same day and the tax payable thereon was determined at Rs. 28,247/-, which was deposited by the assessee. Similarly, for the assessment year 1963-64, for which the previous year ended on Diwali 1962, the taxable income shown in the return filed by the assessee was Rs 55.617/- and Rs. 23,566/- was the tax determined under section 141 in the provisional assessment, which was deposited by the assessee. Thereafter, the assessee Badri Prasad Gour died on 7-11-1964. Regular assessment by the Income Tax Officer was then made under section 141 of the Act. The assessee's legal representatives then preferred appeal to the Appellate Assistant Commissioner against the regular assessment for both the assessment years. The Appellate Assistant Commissioner reduced the taxable income but did not set aside the regular assessment. A further appeal to the Tribunal was then filed by the legal representatives. The Tribunal has cancelled the regular assessment for both the years on the ground that the legal representatives were not noticed by the Income Tax Officer before making the regular assessment after the death of the assessee Badri Prasad Gour. The Income Tax Officer then made a consequential order for both the assessment years showing therein the revised income as nil. However, a note was also appended to this order passed by the Income Tax Officer, in which it was stated that the tax deposited by the assessee, as a result of the provisional assessment during his life time, is not to be refunded.

For both these assessment years, the legal representatives of the assessee preferred an appeal to the Appellate Assistant Commissioner under section 246 of the Act, aggrieved by the Income Tax Officer's direction that the amounts of Rs. 28,247/- and Rs. 23,566/- for the assessment years 1962-63 and 1963-64 respectively, deposited as a result of the provisional assessment, is not to be refunded. It was claimed that I.T.O. having said in the revised assessment order that the revised total income was nil, this amount deposited as tax ought to have been refunded. The Appellate Assistant Commissioner held that the appeal was not maintainable and accordingly the same was dismissed. The Tribunal has affirmed this view of the A.A.C. in a further appeal. The assessee sought a reference to this Court but the same having been refused, an application was filed in this Court under section 256(2) of the Act, which was allowed

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and the Tribunal was directed to state the case and refer the aforesaid question of law, which arises in respect of both the aforesaid assessment years. This is how the references arise.

The contention of Shri Nema, learned counsel for the assessee, is that the appeal was maintainable by virtue of clause (n) of section 246, which provides for an appeal against 'an order section 237'. He argues that section 237 has to be read along with section 240 and if that is done, the I.T.O.'s direction not to refund the tax deposited as a result of the provisional assessment in spite of the revised income being assessed as nil by the I.T.O. after cancellation of the regular assessment by the Tribunal's order, is clearly appealable. In reply Shri Rawat, learned counsel for the revenue, contends that an appeal is creature of the statute and, therefore, no appeal would lie in the present case, unless the impugned order of the I.T.O. is specified as an appealable order in section 246. He argues that clause (n) in section 246 provides for an appeal against an order under section 237, which requires the procedure laid down in section 239 to be followed for claiming refund, which was admittedly not adopted in the present case. According to him, section 240 is a distinct provision which may raise an obligation against the I.T.O. for giving refund enforceable by a writ of mandamus, but no appeal can lie against such an order.

Chapter XIX consists of sections 237 to 245 and relates to 'REFUNDS'. Section 237 provides for refund of the excess amount of tax paid by the assessee for any assessment year. Section 238 specifies the persons entitled to claim refund in certain cases. Section 239 provides for the procedure for claiming refund as well as limitation for it. Section 240 lays down that where refund of any amount becomes due to the assessee as a result of any order passed in appeal or other proceeding under this Act, the Income Tax Officer shall refund the amount to the assessee without his having to make any claim in that behalf. The remaining sections contained in this chapter are not relevant for our purpose.

Sections 237, 239 and 240, which alone are relevant in this context for our purpose, read as under :—

> "237. Refunds.—If any person satisfies the Income-tax Officer that the amount of tax paid by him or on his behalf or treated as paid by him or on his behalf for any assessment year exceeds the amount with which he is properly chargeable under this Act for that year, he shall be entitled to a refund of the excess.
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239. Form of claim for refund and limitation :—

(1) Every claim for refund under this Chapter shall be made in the prescribed form and verified in the prescribed manner.

(2) No such claim shall be allowed, unless it is made within the period specified hereunder, namely : -

(a) Where the claim is in respect of income which is assessable for any assessment year commencing on or before the 1st day of April, 1967, four years from the last day of such assessment year;

(b) Where the claim is in respect of income which is assessable for the assessment year commencing on the 1st day of April 1968, three years from the last day of the assessment year;

(c) Where the claim is in respect of income which is assessable for any other assessment year, two years from the last day of such assessment year.

240. Refund on appeal; etc.-Where, as a result of any order passed in appeal or other proceeding under this Act, refund of any amount becomes due to the assessee, the Income-tax Officer shall, except as otherwise provided in this Act, refund the amount to the assessee without his having to make any claim in that behalf."

It is not disputed that as a consequence of the Income-tax Officer's order of revised assessment passed pursuant to the Tribunal's order, cancelling the regular assessment, the revised income being assessed at nil, no tax for any of these assessment years was chargeable under the Act from the assessee. It follows that the amount deposited as tax for both these years by the assessee as a result of the provisional assessment was, therefore, refundable to the assessee since the assessment proceedings had ended for both these years with the making of the revised assessment order assessing the revised total income as nil for both the years. According to the learned counsel for the revenue, the assessee's legal representatives were required to apply for refund in the manner provided in section 239 of the Act on account of the entitlement for refund under section 237 and it is only thereafter that an appeal could have been filed under section 246(m), if refund was not made. He contends that refund

not having been claimed in the manner provided in section 239 no appeal lay, as the case fell under section 240 and not under section 237. Learned counsel for the revenue also contends that these amounts having become refundable to the assessee, the only remedies to enforce that right were by way of a civil suit or a petition under Article 226 of the Constitution for a writ of mandamus, but no appeal lies as the I. T. O.'s order directing that no refund be made, does not fall within the ambit of section 237 of the Income-tax Act, 1961.

In view of the stand taken by the revenue, there is no dispute that the assessee is entitled to the refund of the aforesaid amounts as a result of cancellation of the regular assessments for both the assessment years and the assessment proceedings ending with determination of revised income as nil by the Income-tax Officer, pursuant to the Tribunal's decision cancelling the regular assessments. The only question is whether after determining the tax liability as nil, the I. T. O.'s further direction refusing refund of the tax already deposited, which had become refundable, falls within the purview of section 237, so as to be appealable under clause (n) of section 236 of the Act.

The scheme of the relevant provisions may now be examined. Section 237 lays down the entitlement for refund of amount of tax which exceeds the amount with which the assessee is properly chargeable under the Act. This entitlement arises as a result of any amount in deposit being found in excess of the tax ultimately assessed as properly chargeable under the Act. Obviously, a direction of the Income-tax Officer for refund of the excess amount is contemplated to give effect to the assessee's right of getting back refund of the excess amount. Clause (n) of section 246 of the Act confers a right of appeal on any assessee aggrieved by 'an order under section 237'. It is apparent that the assessee can be aggrieved only when the Income-tax Officer declines to refund excess amount in deposit and not where such a refund has been directed by the Income-tax Officer. This right of appeal to the assessee is, therefore, against an order of the Income-tax Officer refusing to refund any amount which the assessee claims to be in excess of the tax properly chargeable from him under the Act. Any order of the Income-tax Officer satisfying this character is, therefore, an order under section 237 of the Act for the purpose of the right of appeal conferred on the assessee under clause (n) of section 246 of the Act. Section 239 merely prescribes the procedure for claiming refund and the limitation for it. Section 240, which follows section 239, is in the nature of a proviso to section 239, which carves out an exception from the general rule laid down in section 239, requiring the making of a claim for refund in the prescribed manner and within the prescribed limitation. Section 240 lays down that where refund

of any amount becomes due to the assessee as a result of any order passed in appeal or other proceeding under this Act, except as otherwise provided in this Act, the Income-tax Officer shall refund the amount to the assessee 'without his having to make any claim in that behalf'. The result is that where the entitlement of refund is the result of any order passed in appeal or other proceeding under the Act, the procedure prescribed in section 239 for claiming refund is not required to be adopted by the assessee and it is incumbent on the Income-tax Officer to refund that amount without any such claim being made by the assessee. Sections 237, 239 and 240 have to be read together. Section 237 entitles the assessee to refund of the excess amount of tax and an order of the Income-tax Officer, directing refund, is contemplated thereunder. An appeal under section 246(n) is provided to the aggrieved assessee where the Income-tax Officer refuses to refund the excess amount of tax deposited by the assessee. Section 239 requires the claim for refund to be made within the limitation prescribed in the manner prescribed therein for claiming refund, but section 240 provides an exception to that general rule by laying down that no such claim is required to be made where the entitlement to refund of the excess amount of tax is the consequence of an order passed in appeal or any other proceeding under the Act, which the Income-tax Officer is required to follow automatically and no further satisfaction of the Income-tax Officer is contemplated.

On the above construction made by us of the aforesaid relevant provisions of the Income Tax Act, 1961, it is clear that the order of the Income-tax Officer in both these references, refusing to refund the amounts of tax deposited by the assessee, which became refundable on assessment of the income as nil by the Income-tax Officer, after the Tribunal's order cancelling the regular assessment, is, in substance, an order made under section 237 of the Act. The Income-tax Officer, by virtue of section 240, was required to make that refund and the assessee was not required to prefer any claim for refund in the manner prescribed in section 239. The appeal preferred by the assessee to the Appellate Assistant Commissioner was, therefore, an appeal which fell within the ambit of clause (n) of section 246 of the Act, as the order of the Income-tax Officer, refusing to refund the amount for both the assessment years, which was in excess of his tax liability determined for these years, was an order under section 237 of the Act.

The mere fact that the obligation imposed by section 240 of the Act upon the Income Tax Officer to refund the amount to the assessee without his having to make any claim in that behalf, can be enforced even by a writ of mandamus under Article 226 of the Constitution or even a civil suit, does not deprive the assessee of the right of appeal available to him by virtue of clause

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(n) of section 246. Just as an appeal being a creature of the statute would not lie, unless it is provided by the statute, the right so conferred cannot be taken away merely because some other remedy may also be available to the assessee. It is, therefore, not necessary to refer to any decision cited by learned counsel for the revenue wherein such an obligation was enforced by a writ of mandamus issued under Article 226 of the Constitution.

Learned counsel for the revenue also referred to a Full Bench decision of the Punjab and Haryana High Court in *K.A.Boga* v. *A.A.C. of Income-tax* (1). That decision is distinguishable and does not assist the revenue. That was a case of remand to the Income-tax Officer, after setting aside the regular assessment, for making fresh assessment. It was in that context that the question of refund of the amount paid under the provisional assessment arose for consideration. The view taken was that the refund of the amount pending reassessment proceeding which had not concluded, was a mistake. Obviously, till the reassessment proceeding was completed and it was found that the amount of tax paid under the provisional assessment was in excess of the tax liability of the assessee, the question of making refund would not arise. The present case is not of that kind. Here, the revenue does not dispute the fact that the assessment proceeding has ended and the tax liability of the assessee in consequence of cancellation of the regular assessment by the Tribunal has been determined as nil by the Income-tax Officer, so that section 240 of the Act has been attracted, imposing an obligation on the Income-tax Officer to make the refund. As already held, the ultimate order of the I. T. O. containing the direction relating to refund of the amount falls within the ambit of section 237 of the Act.

We may, in this connection, also refer to the decision in *Jaipur Udyog Ltd.* v. *Commr. of Income-tax* (2), wherein the Supreme Court clearly pointed out that 'the provisional assessment does not bind the assessee nor the department: the quantum of tax computed and the levy thereof are not binding upon the assessee and the revenue. Tax paid pursuant to provisional assessment is liable to be adjusted in the light of the final order in the regular assessment.' We may also refer to sub-section (7) of section 141, applicable at the relevant time, which has has been deleted with effect from 1st April 1971, which prohibited any appeal against provisional assessment made under sub-section (1) of section 141. The reason for prohibiting such an appeal obviously was that such provisional assessment did not bind either the assessee or the revenue and an appeal is provided against the regular assessment at the end of the assessment proceeding. The prohibition contained in section 141(7) did not apply to the present case, because the appeal preferred was not against the provisional

(1) (1977) 110 I. T. R. 1. (2) (1969) 71 I. T. R. 799 (S.C.).

assessment but the order of the Income-tax Officer at the end of the assessment proceeding, refusing to refund the amount in deposit in excess of the tax liability determined in the assessment proceeding.

As a result of the aforesaid discussion, it follows that both these references must be answered in the affirmative in favour of the assessee and against the revenue, as under :—

> "In the facts and circumstances of the case, the appeal filed by the applicant before the Appellate Assistant Commissioner of Income-tax was maintainable under section 246 of the Income Tax Act, 1961."

Parties will bear their own costs.

Reference answered accordingly.

FULL BENCH

Before Mr. Justice M. L. Malik, Mr. Justice C. P. Sen and Mr. Justice S. S. Sharma.

12 Aug. 1980

MITTHULAL and others, Applicants*

v.

BADRIPRASAD and others, Non-applicants.

Civil Procedure Code (V of 1908)—Order 22, rules 3 and 5, Order 43, rule 1-A and Sections 96, 104 and 115—Application for substitution under Order 22, rule 3 on the basis of a will rejected without making any enquiry—Suit held to have abated and consigned to record—Order is not appealable—Revision lies against such an order—One part of the order not appealable but the other part is appealable as decree and second part is necessary consequence of first part the former part merges into decree and is open to challenge in the appeal filed against the decree—Revision against earlier part not tenable.

On the death of the plaintiff, an application for substitution was made by the legatee under Order 22, rule 3, C. P. C. on the basis of a will executed in their favour by the deceased. It was opposed by the defendants. Another application under Order 22, rule 3, C. P. C. was made by the daughter of the deceased claiming herself to be substituted in place of the deceased as the sole representative. The trial court rejected the application without holding an enquiry and held the suit to have abated and consigned it to the record. Against this order, revision has been preferred.

Per M. L. Malik and C. P. Sen JJ. S. S. Sharma J. Contra :—

Held—By the impugned order what the trial Court did is to reject the application of the applicants under Order 22, rule 3, for being substituted in place of the original plaintiff on the basis of a will in their favour without holding an enquiry. So this is an order under Order 22, rules 3 and 5 of the Code. An Order of substitution is not appealable. So also an order refusing to bring on record one as legal representative. A party aggrieved has a remedy of revision to show that the impugned order is vitiated by illegality as the Court acted with material

*Civil Revision No. 504 of 1976.

irregularity in exercise of its jurisdiction. When the impugned order of abatement did not follow any adjudication that the right to sue does not survive, and, as such, there was no adjudication of the right of the parties and it did not amount to a decree and no appeal lay. The trial court acted illegally and with material irregularity in rejecting the application for substitution made by the applicants without holding an enquiry. A revision lies against such a perverse order. There could not have been any abatement unless and until there was adjudication of the rights of the applicants to be substituted in place of the original plaintiff.

Sachdev v. *Vidyawati* (1), *Duni Chand* v. *Arju Nand* (2), *Ramcharan* v. *Hiranand* (3), *Kunwar Lal Singh* v. *Smt. Umadevi* (4), *Babulal* v. *Jugal* (5), *Bhagwan* v. *Vishwanath* (6) and *Kanai* v. *Pannasashi* (7); relied on.

In cases where a part of the order is not appealable while the other part of the order is appealable as a decree and the second part is followed as a necessary consequence of the first part of the order, normally a revision will not lie because the former order will merge in the decree. In an appeal preferred against the decree the first part of the order is also open to challenge. Under Section 115 of the Code revision can be entertained only if the order is not appealable. Under section 104 appeal is provided against the orders mentioned therein. Under section 105 save as otherwise expressly provided, no appeal shall lie from any order made by a Court in the exercise of its original or appellate jurisdiction; but where a decree is appealed from, any error, defect or irregularity in any order, affecting the decision of the case may be set forth as a ground of objection in the memorandum of appeal. In view of this provision, any earlier order can be challenged in an appeal preferred against the decree but only such order is not open to challenge in the decree in case where appeal is provided against the earlier order under the Code. Such orders have to be challenged only in appeal preferred under Section 104 read with Order 43, rule 1. But the position is now changed in view of addition of Order 43, rule 1-A in the Code. In view of this new provision, such appealable orders are also open to challenge in an appeal against the decree.

Per S. S. Sharma J.

Where one part of the order is not appealable, while the other part of the same is appealable as a decree, but the same is followed as a necessary

(1) A. I. R. 1926 Lah. 181. (2) I. L. R. 37 All. 272.
(3) A. I. R. 1945 Lah. 298. (4) I. L. R. 1945 Nag. 286=I. L. R. 1946 Nag. 482.
(5) A. I. R. 1954 Nag. 254. (6) A. I. R. 1953 Nag. 28.
(7) A. I. R. 1954 Cal. 588.

consequence of the former part of the order, no revision would lie from the part.

Where it is held that by reason of some of the legal representatives of the deceased having not been brought on record, the suit cannot proceed and stands abated, no revision would lie from such an order, if in the latter part of the same order the suit is dismissed or is consigned to the record.

J. P. Sanghi for the applicants.

Y. S. Dharmadhikari with *Ku. Kanti Rao* for the non-applicants.

Cur. adv. vult.

OPINION

The Opinion of the Court was delivered by C. P. SEN J.—The following questions have been referred to the Full Bench for opinion as the questions are of general importance :—

(i) Where one part of the order is not appealable, while the other part of the same order is appealable as a decree, but the second part is followed as a necessary consequence of the former part of the order, does a revision lie from the former part ?

(ii) Where it is held that by reason of some of the legal representatives of the deceased having not been brought on record, the suit cannot proceed and stands abated, will a revision lie from such order, although in the latter part of the same order, the suit is dismissed or consigned to the record ?

Certain material facts are required to be stated in order to fully appreciate the questions referred. The deceased plaintiff Parmabai filed a suit against the non-applicants—defendants for declaration of her title and for perpetual injunction restraining them from interfering with her possession of the property. Parmabai died on 24-10-1973. On 27-11-1973 the applicants filed an application under Order 22, Rule 3 of the Code of Civil Procedure for being substituted as legal representatives of the deceased plaintiff on the basis of a Will executed in their favour by Parmabai. Though the application was opposed by the

defendants, it was allowed tentatively on 28-6-1975 and the applicants were permitted to be substituted as plaintiffs in the case. However, on 28-1-1976 one Gendabai, claiming herself to be the daughter and sole representative of the deceased plaintiff, filed another application under Order 22, Rule 3 for being substituted in place of Parmabai. She also challenged the status of the applicants as legal representatives of the deceased plaintiff. The trial Court rejected this application as being barred by limitation and also on the ground that it is not tenable because of the triangular contest i. e. there would be 2 sets of plaintiffs making rival claims. Curiously enough, the trial Court also rejected the application for substitution made by the applicants which was tentatively allowed on 28-6-1975 without going into the questions as to whether such a Will was made and whether the applicants are entitled to be substituted as legal representatives. The grounds for rejection are (i) that it is being 2 in one suit because apart from the claim made by the original plaintiff the Court will have to adjudicate the question regarding validity of the Will and it can be treated to be an application for Probate or letters of administration. As the propounder of the Will has to disclose names of the nearest heirs of the testator and the applicants having not disclosed the names of Gendabai, daughter, and another son of the deceased plaintiff through her first husband, their application has to be rejected for non-inclusion of the necessary parties and (ii) the suit has abated under Order 22, rule 3(2) of the Code as the 2 legal representatives i.e. daughter and the son of the deceased plaintiff Parmabai were not brought on record within the period of limitation. The suit having abated, it shall be consigned to the record. Against this order, revision has been preferred.

The learned Single Judge found that the revision raises interesting preliminary questions apart from the merits of the case. According to him, the operative part of the order that the suit has abated amounts to a decree. He relied on *Purshottamdas Sakalchand* v. *Devkaran Kesheoji and others* (1). If that be so, an appeal lies and the present revision may not be tenable under section 115 of the Code. But he also observed that the second part of the order regarding abatement is consequent to the first order whereby the trial Court has rejected the application for substitution. The question is when one order is the foundation for another order which necessarily follows the former, and no appeal lies from the former part of the order, although an appeal lies from the latter part, whether revision will lie from the former part of the order. He, therefore, framed 2 questions for opinion of a larger Bench referred to above. The matter was placed before Division Bench which, looking to the general importance of the questions raised, referred the matter to the Full Bench.

(1) A. I. R. 1939 Nag. 39.

Before answering the questions raised, it is first of all necessary to consider whether the order holding that suit has abated amount to decree within the meaning of section 2(2) of the Code. The definition which defines decree is as under :-

> "Decree means the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final. It shall be deemed to include the rejection of a plaint and the determination of any question within section 47 or section 144, but shall not include–
>
> (a) any adjudication from which an appeal lies as an appeal from an order, or
>
> (b) any order of dismissal for default.
>
> Explanation-A decree is preliminary when further proceedings have to be taken before the suit can be completely disposed of. It is final when such adjudication completely disposes of the suit. It may be partly preliminary and partly final."

By amending Act No. 104 of 76 the definition has been modified by excluding the orders passed under section 47 to be decrees. The important elements of decree are (i) formal expression of an adjudication; (ii) Adjudication on the rights of the parties with regard to all or any of the matters in controversy; (iii) Conclusive determination of rights; & (iv) Adjudication must be in a suit. The decree shall also include rejection of a plaint (Order 7, Rule 11) and the determination of any question under section 74 but shall not include any adjudication from which an appeal lies (Order 43) or an order of dismissal for default (Order 9) etc. An order not falling under the definition of 'decree' may have all the force of a decree if expressly stated to be so, e. g. an order under O. 21, R. 50(2) Order 21, R. 58 etc.

There seems to be a general consensus of judicial opinion that all orders of abatement are not decrees Only those orders of abatement are decrees in which the Court comes to the conclusion that the right to sue does not survive on the death of the sole plaintiff or on the death of one of the plaintiffs to the surviving plaintiffs. The orders of abatement which follow consequent on the failure of the legal representative of plaintiff to be brought on record within the period allowed by law or

due to the Court deciding that a particular applicant is not the legal representative. such orders do not amount to decree. The reason being that the abatement is automatic consequent on the failure of the legal representative to be brought on record within the period of limitation and no formal order is necessary. So there is no adjudication on the rights of the parties in the suit or appeal by such an order. An order under Order 22, Rule 5 cannot obviously be said to fall within the definition of decree for the following reasons; (i) the order is made only for the purpose of determining who should continue the suit as brought by the original plaintiff. It is not intended to determine and it does not, in fact, determine the rights of the parties with regard to any of the matters in controversy in suit. The question that arises for decision and actually decided is not one arising in the suit itself but is one that arises in a collateral proceeding and has to be got decided before the suit can go on; & (ii) In order to operate as a decree, the adjudication must be one between the parties to the original suit or their legal representatives, and with regard to only matters in controversy between the original parties and. therefore, cannot include a decision of the question as to whether certain individual is or is not entitled to represent one or such parties. In cases where the Court comes to the conclusion that the right to sue does not survive consequent on the death of the sole plaintiff or one of the plaintiffs to the surviving plaintiffs, there is final adjudication of the rights of the parties and the order amounts to decree [*Niranjan Nath* v. *Afzal Hussain* (1), *Mt. Laxmi* v. *Ganpat* (2), *Venkatakrishna* v. *Krishna* (3), *Rampal Singh V. Abdul Hamid* (4). *Sabitribai* v. *Jugal Kishore* (5), *Ramcharan* v. *Hiranand* (6), *Brij Jivan Lal* v. *Shiamlal* (7), *Aiyappan* v. *Kesavaru* (8) and *Arjun* v. *Balwant* (9).

Wanchoo J. (as he then was) in *Brij Jivan Lal* v. *Shiam Lal (supra)* has held as under:-

> "In determining whether an order of abatement is open to appeal a distinction should be drawn between those cases of abatement where it is due to the failure of the heirs being brought on the record within the period allowed by law or due to the Court deciding that a particular applicant is not the legal representative, and those cases where the abatement is due to the Court deciding that the right to sue does not survive. In the latter class of cases, there is a decree meaning thereby a formal adjudication which

(1) A. I. R. 1916 Lah. 245 FB.
(2) A. I. R. 1921 Nag. 23
(3) A. I. R. 1926 Mad. 586 FB.
(4) A. I. R. 1928 Outh 362 FB
(5) A. I. R. 1938 Cal. 639 DB.
(6) A. I. R. 1945 Lah. 298 FB.
(7) A. I. R. 1950 All. 57.
(8) A. I. R. 1953 Tra-Co. 545 FB.
(9) A. I. R. 1954 M. B. 45.

'conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit."

Dixit J. (as he then was) in *Arjun* v. *Balwant* (*supra*) has held as under :—

"Where the abatement of a suit is due to the Court deciding that the right to sue does not survive, there is a formal adjudication which conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and the order of the Court falls within the definition of a decree. In such a case, it is open to the party to appeal against the decision of the Court holding that the suit has abated owing to the cause of action not surviving. It is not open to the party to apply for setting aside the abatement."

In the Travancore-Cochin Full Bench case it has been observed; Appeal dismissed on the ground of abatement-Order of dismissal is a purely formal order recognising the abatement which is a fait accompli and though it virtually disposes of the suit it is not a decree since it does not adjudicate upon the rights of parties-Lower Court's decree does not become merged in that order and the only decree which, is capable of execution is the lower Court's decree which is kept intact. In view of the unanimity of decisions mentioned above, it has to be held that only those orders of abatement which follow the finding of the Court that the right to sue does not survive on the death of the sole plaintiff or one of the plaintiffs to the surviving plaintiffs, the orders are decrees and the remedy is to file appeal. Even an application under Order 22, Rule 9 for setting aside abatement does not lie because this Rule applies only to cases where a person who had neve before applied to be the legal representative within the prescribed time, and not to a person who has applied within the time but whose application has been rejected. This Rule has also no application where the Court holds that the suit has abated owing to the right to sue not surviving on the death of sole plaintiff or one of the plaintiffs to the surviving plaintiffs, for in such a case there is a right of appeal.

Of course, there are certain decisions which appear to have been taken a contrary view but on close examination it is clear that there is no such apparent conflict. The Privy Council in *Inder Singh* v. *Kanshi Ram* (1) has observed

(1) A. I. R. 1917 P. C. 156.

that an order abating the suit under S. 371 of the Old Code is tantamount to a judgment in favour of the defendant and should not be passed *ex-parte* without notice to the opposite party. In that case, consequent to the death of the plaintiff his legal representatives were brought on record in a collateral proceeding but the trial Court without hearing those legal representatives held that the suit has abated. So it was observed that such an *ex-parte* order should not be passed when the opposite party has no notice of the proceeding as it vitally affects the plaintiff and his legal representatives as the order of abatement is really tentamount to judgment disposing of the suit. But the Privy Council has made observations in view of the circumstances of that case and the Privy Council has not said that the order of abatement is a judgment or a decree. What it stated is that it amounts to judgment because it vitally affects the plaintiff and his legal representatives and it should not be passed without hearing them. A Division Bench of this Court in *Purshottamdas Sakalchand* v. *Devkaran Kesheoji and others* (*supra*) has held that there is ample authority for the view that an order that the suit abates is appealable as decree. A general observation has been made. One of the cases relied upon is the Full Bench case of the Lahore High Court in *Niranjan Nath* v. *Afzal Hussain* (*supra*). So this ruling cannot be an authority for the proposition that all orders of abatement amount to decrees and they are appealable. Distinction has to be made between those abatement orders which are appealable and those which are not appealable by going into the cases cited in that decision. Another Single Bench of this Court in *Raddulal* v. *Mahabirprasad* (1) has held that where the Court rejects the application for making the preliminary decree in mortgage suit final on the ground that one of the plaintiffs having died before the preliminary decree and his legal representative not having been brought on record the whole suit abated, the rejection amounts to a decree and no revision is tenable as an appeal lies.Here what has been held to be a decree is not the order of abatement but the rejection of the application for making the preliminary decree final, though the ground for rejection was that the whole suit had abated as the L. Rs. of the plaintiff were not brought on record who had died before the preliminary decree. It has not been held in this case that all orders of abatement amount to decrees.

By the impugned order what the trial Court did is to reject the application of the applicants under Order 22, Rule 3 for being substituted in place of the original plaintiff on the basis of a Will in their favour without holding any enquiry. So this is an order under Order 22, Rules 3 and 5 of the Code. An order of substitution is not appealable. An order deciding whether a person is

(1) A. I. R. 1951 Nag. 269.

or is not a legal representative is not appealable [*Sachdev* v. *Vidyawati* (1), *Dumi Chand* v. *Arja Nand* (2), *Venkata Krishna* v. *Krishna* (*supra*), *Ramcharan* v. *Hiranand* (3), *Kunwarlal Singh* v. *Smt. madevi* (4) and *Bhagwan* v *Vishwanath* (5)]. So also an order refusing to bring on record one as legal representative [*Bhagwan* v. *Vishwanath* (*supra*), *Kanai* v. *Pannasashi* (6) and *Babulal* v. *Jugal* (7). A party aggrieved has a remedy of revision to show thar the impugned order is vitiated by illegality as the Court acted with material irregularity in exercise of its jurisdiction. So in the present case the order of abatement did not follow any adjudication that the right to sue does not survive and, as such, there was no adjudication of the rights of the parties and it did not amount to a decree and no appeal lay. The trial Court acted illegally and with material irregularity in rejecting the application for substitution made by the applicants without holding any enquiry. A revision lies against such a perverse order. There could not have been any abatement unless and until there was adjudication of the rights of the applicants to be substituted in place of the original plaintiff. How could there be abatement when the application for substitution was brought within time and the applicants, according to the trial Court, were tentatively brought on record in place of the original plaintiff.

Now remains the questions to be answered. The first question, according to us, is a hypothetical question and it does not arise in the present case. It has already been held that the order dismissing the suit as having abated does not amount to a decree as there is no adjudication of the rights of the parties. Besides, it is a perverse order and there could not have been any abatement when the application for substitution was filed within the prescribed period of limitation. Unless an enquiry was held the applicants could not have been denied to be substituted. The present revision is, therefore. competent. Even in cases where a part of the order is not appealable while the other part of the order is appealable as a decree and the second part is followed as a necessary consequence of the first part of the order, normally a revision will not lie because the former order will merge in the decree, In an appeal preferred against the decree, the first part of the order is also open to challenge. Under section 115 of the Code revision can be entertained only if the order is not appealable. Under section 104 appeal is provided against the orders mentioned therein. Under section 135 save as other wise expressly provided, no appeal shall lie from any order made by a Court in the exercise of its original or appellate jurisdiction; but where a decree is appealed from, any error, defect or irregularity

(1) A. I. R. 1926 Lah. 181. (2) I. L. R. 37 All. 272.
(3) A. I. R. 1945 Lah. 295 (FB). (4) I. L. R. 1945 Nag. 286=I. L. R. 1946 Nag. 482.
(5) A. I. R. 1953 Nag. 28. (6) A. I. R. 1954 Cal. 588.
(7) A. I. R. 1954 Nag. 254.

in any order, affecting the decision of the case, may be set forth as a ground of objection in the memorandum of appeal, In view of this provision, any earlier order can be challenged in an appeal preferred against the decree but only such order is not open to challenge in the decree in case where appeal is provided against the earlier order, under the Code. Such orders have to be challenged only in appeal preferred under section 104 read with O. 43, R. 1. But the position is now changed in view of addition of O. 43, R.1A in the Code. In view of this new provision, such appealable orders are also open to challenge in an appeal against the decree.

The second question is already answered earlier. Since the impugned order is a perverse order and the trial Court acted illegally and with material irregularity in rejecting the application of the applicants for substitution without holding any enquiry, revision lies. There could not have been any abatement unless the right of the applicants to be substituted was first adjudicated. It is settled law that a suit will not abate on the failure to bring all the legal representatives on record if some of the legal representives are already on record. The Supreme Court in *N. Jayaram Reddi* v. *Rev. Divnl Officer* (1) has held that even substitution in collateral proceedings would save the suit or appeal from being abated. If all the legal representatives are not impleaded and some are brought on record and if the Court is satisfied that the estate is adequately represented meaning thereby that the interests of the deceased party are properly represented before the Court, an action would not abate. One more decision mentioned by the learned Single Judge is the Division Bench decision in *Mathura Prasad* v. *Parmanand* (2), in which the learned Single Judge was also a party. That case has no application to the facts of the present case. There, an appeal was preferred under O.43, R.1(m) of the Code against the order recording compromise.The order recording compromise was followed by a decree. A preliminary objection was raised that since no appeal lay against the compromise decree u/s 96(3) of the Code, the appeal was not competent. This was rightly negatived by the Division Bench by holding that when the right of appeal against the order recording compromise has been specifically provided under O.43, R.1(m), the same right cannot be taken away because the order was followed by decree. The right is not lost because a decree has been drawn and it is open to the appellant to show that the order recording compromise was vitiated by fraud, misrepresentation etc. The same view has been taken by the Supreme Court in *K. C. Dora* v. *G. Annamanaidu* (3) wherein it has been held that bar to appeal against consent decree u/s 96(3) is based on the broad principle of estoppel and the order recording compromise is not open to challenge if it is lawful. The matter has been clarified by adding Rule 1A(2)

(1) A. I. R. 1979 S. C. 1393. (2) A. I. R. 1960 M P. 160.
(3) A.I.R. 1974 S.C. 1069.

to Order 43 that such an order is open to challenge in appeal.

The questions are answered accordingly.

OPINION

PER S, S. SHARMA J.—I regret my inability to agree. The application dated 27-11-1973 submitted by the present five applicants for being substituted as legal reprsentatives of deceased plaintiff Parmabai on the strength of the last wills executed in their favour, was opposed by non-applicant defendants. The Additional District Judge by order dated 31-8-1974 had framed some issues on which he was to hold an inquiry regarding that application for substitution. Some witnesses had also been summoned. Thereafter, on 11.8.1975, the trial Judge passed a long order observing that the trial of the suit cannot be continued and if the claim of the applicants under the wills is challenged that could as well be decided in the trial of the suit. He further observed:

> "स्वयं आवेदकगण चाहे भले किसी सहायता के अन्त में हकदार न पाये जावे पर बतौर एल. आर. रिकार्ड पर लाकर दावा तो आगे चलाने की क्षमता रखते हैं।"

He, therefore, allowed the application of the petitioners for being substituted as legal representatives and directed to amend the cause title accordingly. Yet another direction given was that in the body of the plaint there is no need for any amendment, but a paragraph be added stating as to in what manner and to what extent the applicants are entitled to continue the suit and to get the relief prayed for. Accordingly, the holding of inquiry on the questions as were framed was abandoned. In pursuance of the aforesaid order the applicants submitted an application (I. A. No. 8 dated 18.8.1975) for amending the plaint. This application was allowed on the same day as not opposed. The amendment was incorporated in the plaint. It may be mentioned that the cause title of the plaint had also been corrected by substituting the applicants as legal representatives of deceased-plaintiff Parmabai.

On 28-1-1976, Smt. Gendabai who admittedly is the daughter of deceased plaintiff Parmabai, filed an application for being brought on record as the sole legal representative of Parmabai. In that application she also challenged the present applicants being the legal representatives of deceased Parmabai. That application was supported by an affidavit. The defendants opposed this application of Gendabai. The present applicants while admitting Gendabai to be the

daughter of Parmabai, alleged that since the will was only in their favour, they alone had submitted an application for being substituted as legal representatives. They all the same conceded that Parmabai be added as a party to the suit, and so far as the defendants are concerned, they as also Gendabai opposed their claim over the suit property. It was further mentioned that as and when the question of will arises between them and Gendabai, they would get it settedl by filing a separate suit.

On 30.1.1976, the trial Judge framed certain questions on which according to him the parties would be required to address the Court. On that day it also was brought to the notice of the Court that Parmabai had a son also from another husband. He, therefore, directed that any of the three parties, namely, the plaintiffs, defendants or Gendabai may furnish the name and address of that son of Parmabai. It appears that the said son could neither be traced nor could for that reason any summons be issued to him. The trial Judge, therefore, heard the parties and passed the impugned order.

In the impugned order the trial Court considered the following questions:–

(A) In view of the fact that Gendabai has a claim adverse to the five legal representatives already brought on record, whether her application under Order 22, Rule 3,C.P.C., made considerably beyond 90 days from deceased-plaintiff Parmabai's death, is not time barred under Article 120?

(B) Whether two sets of persons with conflicting claims can continue or be placed on record as plaintiffs ?

(C) In view of the fact that the basic question was that of succession to the right, title and property of an absolute owner, deceased Parmabai as the *pro positus*, whether the non-inclusion of Gendabai and Parmabai's one son from her previous husband (as conceded by the five legal representatives *vide* order sheet dated 30.1.1976) even up till now does not cause the abatement of the suit ?

The trial Judge on point No. (A) held the application of Gendabai to be time barred. On point No. (B) he held that if Gendabai was brought on record as one of the legal representatives there would be two sets of plaintiffs with conflicting claims. Such a position was held by him to be not permissible. While dealing with point No. (C), the trial Judge firstly observed that "now, the question faced by the Court is whether the five legal representative-legatees

can lawfully represent the estate of the deceased-plaintiff, Parmabai. Admittedly, the deceased had a daughter, Gendabai. Moreover, she had also left a son from her previous husband *vide* order sheet dated 30.1.1976. She allegedly got her next husband's property by gift in absolute rights. When succession to her opens, her son or sons from any of her husbands (irrespective of the fact whether she got the property in gift from one or the other husband) would be entitled to inherit from her, because Section 15(1)(a) of the Hindu Succession Act, 1956 does not make any such distinction." He then went on to say that "then the position on record is that there were a son and a daughter of Parmabai who did not apply or were not brought on record as Parmabai's legal representatives within the prescribed limitation. If they are held to be necessary parties, the suit would be treated as abated under Order 22, Rule 3(2), C.P.C." According to the Court below the will was challenged by the defendants as well as by Gendabai and so in such a case the question regarding Will attracts all the procedural rules of the Civil Procedure Code. He in that behalf took into account sections 278 and 295 of the Indian Succession Act, 1925. Thus according to him if the propounder omits to disclose the near relations or heirs of the testator who take the position of the defendants, the result would be non-inclusion of necessary parties. On these reasonings he held that. " In the result, the suit deserves to be dismissed for not impleading necessary parties within the prescribed period of limitation. It is axiomatic that a suit cannot proceed in absence of a necessary party. That the suit abates would be another incident of the situation."

The operative part of the order was as follows:

"In the result the application (I.A. No. 15) of Gendabai under Order 22, Rule 3, C. P. C. is dismissed as time barred and also as untenable because of the introduction of a triangular contest.

Next the suit is held to have abated under Order 22, Rule 3(2), C.P.C. or is unfit to proceed for failure to bring on record the two legal representatives, a son and a daughter of the deceased plaintiff Parmabai within the period of limitation. The said two legal representatives were in addition to the necessary parties, may be, defendants to the suit.

The suit having abated shall be consigned to the record. The legal representative-legatees shall bear their own costs and shall

pay those of the defendants. Counsel's fee Rs. 300/- on either side, if certified".

When the matter was heard by the learned Chief Justice, he was of the opinion that "whatever phrasiology the Court may have employed, the effect of the operative part of its order is that the suit stands dismissed and nothing has remained to be done. It is not as if on the happening of some event, the Court will call back the record for proceeding further with the suit. So far as that Court is concerned, it has finally disposed of it. The final order is, therefore, decree, because in the present context the expression "consigned to the record" is as effective as that "the suit is dismissed." He further observed that on the authority of the Division Bench of this Court in *Purushottamdas Sakalchand* v. *Devkaran Kesheoji & others* (1) "the final order disposing of the suit is appealable as a decree. If a final decree has not been framed, the aggrieved party, who desires to appeal may take recourse to the procedure prescribed in *Jagat Dhish* v. *Jawaharlal Bhargava* (2)."

On behalf of the petitioners an argument was advanced that the impugned order of the trial Court was a composite one as by that order it was first held, that the suit is abated because of non-bringing on record the two legal representatives of the deceased-plaintiff and by the same order it has also disposed of the suit. Relying on the decision in *Kanailal Mitra* v. *Pannasashi Mitra* (3), it was urged that the plaintiff has a right to come up in revision from the first part of the order whereby the trial Court has held that the suit has abated notwithstanding that the latter part of the order may amount to a decree. It was in these circumstances that the two questions were referred to a larger Bench.

In my opinion we are not concerned with the legality or propriety of the order passed by the Additional District Judge. The application under Order 22, Rule 3 of the Code of Civil Procedure (hereinafter referred to as 'the Code') that was filed by the applicants, in view of the facts stated above, had been allowed by the trial Court. This order obviously was under Order 22, Rule 5 of the Code, which contemplates that where a question arises as to whether any person is or not the legal representative of a deceased plaintiff or a deceased defendant, such question shall be determined by the Court. After substitution of the applicants in place of deceased Parmabai, the suit had proceeded and it was long thereafter that Gendabai had submitted an

(1) A. I. R. 1939 Nag 39. (2) A. I. R. 1961 S.C. 832.
(3) A. I. R. 1954 Cal. 588.

application. That application was admittedly barred by limitation. It was not an application under Rule 9 of Order 22 of the Code. Admittedly, the impugned order was not appealable under Order 43, Rule 1(k) of the Code.

Brother C. P. Sen, J. in paragraph 9 of the order observed that—"Even in cases where a part of the order is not appealable while the other part of the order is appealable as a decree and the second part is followed as a necessary consequence of the first part of the order, normally a revision will not lie because the former order will merge in the decree." There is no difficulty when the order merely decides whether a person is or is not a legal representative, as such the order is admittedly not appealable. Admittedly the impugned order, unless it is not covered under Order 43, Rule 1 of the Code, could be appealable only if it amounts to a decree as defined in the Code. In ultimate analysis the question that has to be considered is whether against the impugned order as it is, the present revision is competent.

In *Purushottamdas Sakalchand* v. *Devkaran Kesheoji & others* (1), the observation about there being ample authority for the view that an order that a suit abates is appealable as a decree has to be read in the context of the facts of that of case as also of the decisions as have been referred to therein. It is clear from the observations in that decision that "there is no doubt that the order has conclusively determined the rights of the plaintiff...". Thus it is on the direction of the order in question in that decision that their Lordships construed to mean it as a decree.

As held in *Niranjon Nath* v. *Hussain* (2) when a Court passes a purely formal order recognising the abatement which is a fait accompli such an order, though virtually disposing of the suit, does not adjudicate upon any rights and cannot be treated as a decree. However, if, on the other hand, the order of abatement is the result of an adjudication upon the rights of the parties with respect to a matter in controversy, and is not passed upon an application for the revival of the suit made under Order 22, Rule 9 of the Code, it amounts to a decree and is appealable as such.

A Full Bench of the Madras High Court in *Venkata Krishna Reddi and others* v. *Krishna Reddi* (3), he had also considered a similar question. The question before the Full Bench was—"Whether an appeal lies against an order refusing an application of a person to be brought on record as the legal representative of a deceased plaintiff on the objection of the defendant when there

(1) A. I. R. 1939 Nag. 39. (2) A.I.R. 1916 Lah. 245.
(3) A. I. R. 1926 Mad. 586.

is no rival claimant for being brought on the record as his legal representatives." The applicant in this case prayed for being brought on record on the ground that he was the legatee of the deceased-plaintiff and took under her will the properties in the suit. The District Munsif passed an order saying—"Subject to the proof of the genuineness of the Will, the petitioner may be brought on record as the operation and validity of the will turns upon the findings of the first issue. On an inquiry about the genuineness of the will, the District Munsif held that the Will was not genuine and as a consequence the provisional order about his having been brought on record fell to the ground". The Full Bench answered the question as follows :—

> "For these reasons we are of the opinion that we should answer this reference by saying that no appeal lies against the order in this case; but we give no expression of opinion as to what would be the consequence if the petitioner appeals against the actual order of abatement or dismissal".

I may here point out that in the instant case as a consequence of the different reasonings given by the trial Judge, the suit has not only been held to have abated but has even been consigned to the record room, which learned Chief Justice has rightly construed to mean dismissal of the suit.

This decision in *Venkatakrishna Reddi's case* (*supra*) was considered by a Full Bench of the Lahore High Court in *Ramcharan Das* v. *Hiranand* (1). It was observed therein that the order of the trial Judge rejecting the application on the ground that the applicant was not proved to be the legal representative of the deceased, was not open to an appeal. There could be no appeal unless a decision under Order 22, Rule 3 of the Code could be held to amount to a decree and appealable as such. The learned Judges negatived the contention that the said order amounts to a decree. One of the reasons given was that although the trial Judge did mention about the non-surviving of the right to sue as a ground for disallowing the application under Order 22, Rule 2, but he did not record an order abating the suit on that ground and so in the absence of such an order, it cannot be said that there was in existence a decree from which an appeal could be filed. While referring to the Full Bench decision in *Venkatakrishna Reddi's case* (*supra*) their Lordships observed that the language as has been reproduced by them visualises the necessity of an actual order of abatement or dismissal in order to give rise to a possible right of appeal.

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(1) A. I. R. 1945 Lah. 298.

That such a distinction is to be drawn while considering the question about the remedy against this order is further clear from a decision of this Court in *Babulal* v. *Jugalkishore and others* (1). In this case Babulal's application for being substituted in appeal in place of deceased Kaluram was rejected. There were three such appeals. Against such an order, separate appeals were filed. An objection was raised that there is no provision in law whereunder an order refusing to bring on record a person as a legal representative of a deceased party cannot be appealed from. The orders admittedly were not appealable under Order 43 of the Code. The contention that the consequence of this rejection of this application for substitution was abatement of the appeal and so "the order must be deemed to be an order of abatement and so appealable as a decree," was negatived. The reasoning given was "whether an order of abatement is appealable as a decree or not is to my mind not relevant to the present case, because the present appeals are not against an order of abatement, but against a different kind of order altogether. It may be that as a consequence of that order, abatement has taken place, but that is entirely a different matter."

In *Dumi Chand* v. *Arju Nand and others* (2), also a similar distinction was drawn in that case, during the pendency of the appeal the plaintiff-appellant died leaving a widow. One Dumi Chand claiming himself to be the adopted son and the legatee of the deceased-appellant applied to be substituted in the appeal in place of the original plaintiff. That application was dismissed on merits. The appeal was preferred by Dumi Chand against that order. The Learned Judges constituting the Division Bench up-held the objection that the appeal was not maintainable as neither the order amounted to a decree nor was the order passed either under Rule 9 or Rule 10 of Order 22 of the Code. The Court had not passed any order abating or dismissing the appeal. Their Lordships also observed that—"It may also be possible to appeal against the order of the Court, when passed, dismissing the suit as having abated."

The Full Bench of the Travancore-Cochin High Court in *Atyappan Pillai Keshava Pillai* v. *Kesavaru Jathavatharu Shottathil and others* (3) had examined the question of abatement for purposes of limitation under Art. 182 of the Indian Limitation Act (since repealed). It was in that context that it was laid down that the effect of these provisions is only that the abatement takes place by operation of law and does not depend upon any order of the Court. However, in view of the language of Article 182 of the Indian Limitation Act, it was laid down that the preponderance of judicial opinion is in favour of the

(1) A. I. R. 1954 Nag. 254. (2) I. L. R. 37 All, 272.
(3) A. I. R. 1953 T. C. 545.

view that when the Appellate Court passes an order daclaring that the appeal has abated and dismissing the appeal on that ground it is the final order coming under clause 2, column III, Article 182 and that the period of limitation for the execution of the decree in the case commences from the date of that order. On the question whether the dismissal of the appeal on the ground of its having abated, if amounts to a decree the learned judges observed that a declaration that the suit or appeal is abated which abatement is the direct result of the default in the matter of taking the necessary steps to bring on the record the legal representatives of the deceased party cannot also amount to any formal expression of adjudication conclusively determining the rights of the parties with regard to all or any of the matters in controversy in the suit. In cases coming under these categories the decree under appeal remains intact and it is the only decree that is capable of being put into execution.

In *Brij Jivan Lal & another* v. *Shyamlal & others* (1), Wanchoo J, (as he then was) after referring to the different decisions observed as follows :—

> "A perusal of these four cases shows that they are clearly distinguishable from the case before me. The main point of distinction is that in the present case, there were other plaintiffs besides the plaintiff who had died and the Court when it held that the suit had abated, definitely decided the question that on the death of one plaintiff and the failure to bring his heirs on the record, the entire suit had abated. I do not think that it can be said that these four cases lay down that whenever there is an abatement for any reason and under any circumstances there can be no appeal because O. 43, Rule 1, Civil P. C. does not provide an appeal from such an order. Nor can it be said that these cases lay down that no order declaring that a suit had abated can ever have the force of a decree. It seems to me, therefore, that wherein an order, to the effect that the suit had abated in its entirety, amounts to an adjudication of the rights of the remaining plaintiffs as in the present case, it will amount to a decree which would be appealable under S. 96, Civil P. C. That such a distinction exists will be clear from the trend of authorities of other High Courts which are of a date later than that of the decision in *Moti Lal* v. *Bishambhar Nath* (2). In *Raja Rampal Singh* v. *Abdul Hamid* (3), a Full Bench of the then Chief Court

(1) A.I.R. 1950 All. 57. (2) I.L.R. 47 All. 741=A. I. R. 1925 All. 431.
(3) A. I. R. 1928 Oudh. 362 (F.B.)=I. L. R. 3 Luck. 628.

held that where on the death of a plaintiff his heir applied under the provisions of O. 22, R. 3, Civil P. C., to be entered as a legal representatives of the deceased and to continue the suit and the Court, while recognising him to be the legal representative of the deceased, arrived at the conclusion that the right to sue had come to an end with the death of the deceased and decided under the provisions of O. 22, R. 1 Civil P. C. that the suit had abated, the decision was a final adjudication which determined the matter in regard to the controversy in suit and the order giving effect to this decision was a decree within the meaning of S. 2(2), Civil C. P. and an appeal lay against it."

His Lordship also referred to the Full Bench decision is *Kamcharandas's case* (*supra*) and in *Niranjanmath's case* (*supra*), after referring to these two decisions his Lordship laid down as follows: –

"It seems to me that the distinction drawn in these cases is a very real one and should be drawn. In the first three cases of the Court, which are the only ones really dealing with the question of abatement, this point whether a distinction should be drawn between those cases of abatement where it is due to the failure of the heirs being brought on the record within the period allowed by law or due to the Court deciding that a particular applicant is not the legal representative. and those cases where the abatment is due to the Court deciding that the right to sue does not survive was not considered. In the latter class of cases. there is to my mind a decree meaning thereby a formal adjudication which conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit. The present case falls under the latter category while the three cases of this Court referred to earlier are apparently of the former type and, therefore, the order passed by the Munsif dismissing the suit amounted to a decree and was appealable."

Dixit J, (as he then was) in *Arjun and others* v. *Balwant* (1) had placed reliance on this Allahabad decision.

In *Raddulal Sharma & others* v. *Mahabirprasad* (2), V. R. Sen J, held

(1) A. I. R. 1954 M.B. 45. (2) A. I. R. 1951 Nag 269

that—"where the court rejects the application for making the preliminary decree in a mortgage suit final on the ground that one of the plaintiffs having died before the preliminary decree and his legal representative not having been brought on the record the whole suit abates, the rejection amounts to a decree and no revision is tenable as an appeal lies.

A Full Bench of the Oudh Court in *Rampal Singh* v. *Abdul Hamid* (1), held that the "right to sue not surviving was an adjudication which conclusively determined the legal representative's right in regard to a matter in controversy in the suit and was, therefore, a decree and was appealable". Wazir Hussain J., in a separate, but concurring order also observed that—"Matters in controversy in the suit are not merely matters which arise on the face of the plaint, as at first present. They may include matters which are of vital importance between the parties, but which may come to arise and in respect of which the parties may be at controversy at a subsequent stage of a suit, and the question as to whether a right to sue survives or not within the meaning of Rule 1, Order 22, Civil P. C., is to my mind such a matter."

The general consensus of the judicial opinion as is clear from the different decisions, referred to above, is that an order passed under Order 22, Rule 5 of the Code is not a decree and so no appeal would lie against such an order. It also is clear that the abatement of a suit or an appeal, being the automatic consequence of the failure of the legal representatives being brought on record within the period of limitation and no formal order being necessary, an abatement on that count will not amount to a decree, there being no adjudication of the rights of the parties. The abatement of a suit or an appeal on the ground of right to sue not surviving has been taken as amounting to a decree.

Learned Additional District Judge while deciding point No. 'C' considered the question whether the five applicants who had been brought on record could lawfully represent the estate of the deceased plaintiff, Parmabai. From the reasons given by him while dealing with this question, it is implicit that his conclusion was that the applicants cannot represent the estate of the deceased. This further finds support from the fact that he held the suit to be abated under Order 22, Rule 3(2) of the Code or that it is unfit to proceed for failure to bring on record two legal representatives, a son and a daughter of deceased plaintiff within the period of limitation. He in addition, held them to be necessary party, may be as defendants. According to him on Parmabai's

(1) A.I. R. 1928 Oudh 362.

death, her son or sons from any of her husbands would be entitled to inherit from her. It is further clear from the impugned order that so far as the abatement was concerned, it was in the circumstances neither automatic nor a formal expression recognising abatement. The facts do not at all indicate that abatement was a faith accompli. The order clearly decides the right of the applicant-plaintiff to file the suit for the relief as have been prayed for, on the basis of the alleged wills executed in their favour. I respectfully agree with the observations made by Wazir Hassain J., in his concurring order in *Rampal Singh's case (supra)* to the effect that the "Matters in controversy in the suit" may also include matters which are of vital importance between the parties and which may come to arise and in respect of which the parties may be at controversy at a subsequent stage of the suit, and the question as to whether a right to sue survives or not within the meaning of Rule 1, Order 22, C.P.C., is such a matter. They are not merely matters which arise on the face of the plaint. In my opinion, therefore, most of the questions that have been dealt with by the Additional District Judge are very well covered within the meaning of the words "Matters in controversy in the suit."

As a general rule, the legal representatives have to be brought on record and if any of them refuses to join as plaintiff or appellant, he could be impleaded as a defendant or a respondent. Their Lordships of the Supreme Court have in series of cases laid down that where the plaintiff or the appellant after diligent and *bona-fide* inquiry ascertains as to who are the legal representatives of a deceased defendant or a respondent and brings them on record, there is sufficient representation of the estate of the deceased and there will be no abatement of the suit or appeal unless there is fraud or collusion. *Dayaram* v. *Shamsundari* (1); *Ramdas* v. *Deputy Director of Consolidation* (2); *Mohammad Sulaiman Saheb* v. *Mohd. Ismail Saheb* (3) and *Dolai Maliko* v. *Krushna Chandra Patnik* (4). In *Dolai Maliko's case (supra)* their Lordships had approved of the decision in *Muhammad Zafaryab Khan* v. *Abdul Razzac Khan & others* (5). It was held that when by an order which has become final, a certain person's name which has been brought on record in an appeal as the legal representative of the deceased appellant, it is not open to the respondent to urge that the appeal has abated, because some other heirs have been left out.

Rightly or wrongly the rights of the applicants with regard to the suit property stand adjudicated. The matter could be examined from yet another

(1) A. I. R. 1965 S. C. 1049. (2) A. I. R. 1971 S. C. 673.
(3) A. I. R. 1966 S. C. 792. (4) A. I. R. 1967 S.C. 49.
(5) A. I. R. 1928 All. 532.

point of view. The effect of the impugned order if not set aside would be that the applicants shall not be entitled to bring a fresh suit on the same cause of action, and some of the findings may even operate as ***res-judicata*** between the parties.

Learned Chief Justice in his referring order, rightly felt that the final order is a decree. It would not be correct to say that only the orders wherein the Court finds that the right to sue does not survive would amount to a decree and in no other case. There may be other such orders also which may well be covered within the meaning of the word "decree". The observations of the Allahabad High Court in ***Dumichand's case*** (*supra*) of the Madras High Court in ***Venkata Krishna's case*** (*supra*) and of Lahore High Court in ***Ramcharandas's case*** (*supra*) also indicate that the actual order of abatement or dismissal can give rise to a right of appeal. In my opinion, the case in hand is of a type wherein in view of the order of abatement and dismissal an appeal would lie. In view of the facts as they are and the order of the Additional District Judge, I would answer the questions as follows:—

(1) Where one part of the order is not appealable, while the other part of the same is appealable as a decree, but the same is followed as a necessary consequence of the former part of the order, no revision would lie from the former part.

(2) Where it is held that by reason of some of the legal representatives of the deceased having not been brought on record, the suit cannot proceed and stands abated, no revision would lie from such an order, if in the latter part of the same order the suit is dismissed or is consigned to the record.

Reference answered accordingly.

MISCELLANEOUS PETITION

Before Mr. Justice C. P. Sen and Mr. Justice K. N. Shukla.

29 March 1984

STRAW PRODUCTS LTD., BHOPAL and another, Petitioners*

v.

ASSISTANT COLLECTOR OF CENTRAL EXCISE, BHOPAL and another, Respondents.

Central Excise Rules, 1944—Rule—8—Notification No. 46/83, as amended by Notification No. 133/83 issued thereunder by Central Govt. prescribing concessional rate of Excise duty on manufacture of paper—Petitioners running paper Mill in Rayagada with plaint attached for manufacturing bamboo and wood pulp and another paper mill at Bhopal using pulp for manufacture of paper—Production of paper from both the mills has to be added up for deciding question of benefit of concessional rate of the Mill at Bhopal using unconventional raw material.

The petitioner No. 1 is running a paper mill with a plant attached for making bamboo and wood pulp which is a conventional raw material for manufacturing paper at Rayagada and has also a paper mill at Bhopal which does not have a plant attached for making bamboo or wood pulp and it manufactures paper out of pulp. The petitioners claimed concessional rate of duty under Notification No. 46/83, as amended by Notification No. 133/83 issued by the Central Govt. in exercise of its powers under Rule 8 of the Central Excise Rules, 1944 framed under the Central Excise and Salt Act, 1944 alleging that the total quantity of clearance of all varieties of paper manufactured out of unconventional raw material alone are to be added up and not the total quantity of clearance of all varieties of paper manufactured from its factory at Rayagada from conventional raw material which is to be excluded under the proviso to this notification.

HELD:- The concessional rates are claimable provided the factory (1) does not have a plant attached thereto for making bamboo or wood pulp and (ii) manufactures paper out of pulp and in addition that the total clearance are within the prescribed limit. Bhopal factory can claim concessional rate because it does not have a plant attached for making bamboo or wood pulp and it manufactures paper out of pulp concessional rate is not available to the

* M. P. No. 1497 of 1983.

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factory at Rayagada as it has a plant attached for making bamboo and wood pulp. However, for computing the total quantity of clearance of all varieties of paper in the preceding financial year, the production of both the factories has to be added up as is clear from the notification in question. The respondent No. 1 was therefore, right in holding that as the petitioner No. 1 did not include the clearance effected from its factory at Rayagada to the clearance of the paper manufactured at Bhopal, the eligibility for granting exemption under the revised notification does not arise and the petitioner No. 1 is liable to pay excise duty at the rate already prescribed under the Schedule and not as per the revised notification.

W. T. Commr., A.P. v. *Court of Wards, Paigah* (1); relied on.

Y. S. Dharmadhikari for the petitioners.

A. M. Mathur and *A. P. Tare* for the respondents.

Cur. adv. vult.

ORDER

The Order of the Court was delivered by C. P. SEN, J.—This is a petition under Article 226 of the Constitution challenging the order of the Assistant Collector, Central Excise, dated 17-5-1983 rejecting the revised classification list of the petitioner whereby payment of Excise duty was claimed on manufacture of paper under Notification No. 46/83 as amended by Notification No. 133/83.

The petitioner no. 1 is a public Limited Company having its registered office at Jaykaypur, Rayagada, District Koraput in the State of Orissa where it is running a paper mill with a plant attached for making bamboo and wood pulp which is a conventional raw material for manufacturing paper. The petitioner no. 1 has also a paper mill at Chola Road, Bhopal, in the State of M. P. and is manufacturing straw board, paper board and kraft paper using not less than 50 per cent by weight of pulp made out of bagasse, jute stalks, cereal straw, elephant grass and waste paper which are unconventional raw material for manufacturing paper. In the Bhopal factory the total clearance of kraft paper during the financial year ending 31st March 1983 was 6329.21 metric tonnes. Paper and paper board are liable to excise duty under the first schedule to

(1) A. I. R. 1977 S. C. 113.

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Central Excise and Salt Act, 1944, under section 3 thereof. Under Rule 8 of Central Excise Rules, 1944, framed under the Act, the Central Government is authorised to exempt whole or any part of duty leviable on such goods as may be notified from time to time. By Notification No. 128/77, dated 18-6-1977 certain concessional rate of duty was prescribed for certain small paper mills manufacturing paper using at least 50 per cent of unconventional raw materials. This was modified by Notification No. 46/83 dated, 1-3-1983 by substituting actual clearance during the preceding financial year in place of annual capacity to manufacture paper and paper board. This was further modified by Notification No. 133/83 dated 27-4-1983 by giving concession dependent on the annual clearance of paper manufactured instead of paper and paper board manufacture as per earlier notifications. Since the petitioner no. 1 is claiming concession under item no. 2 of the revised notification as the annual clearance of kraft paper is below 7500 metric tonnes, the same is quoted hereunder for ready reference :—

"In exercise of the powers conferred by sub-rule (1) of rule 8 of the Central Excise Rules, 1944, in supersession of the notification of the Government of India, in the Department of Revenue and Banking No. 128/77 – Central Excises, dated the 18th June 1977, the Central Government hereby exempts paper of the description specified in column (1) of the Table annexed hereto, falling under sub-item (1) of Item No. 17 of the First Schedule to the Central Excises and Salt Act, 1944 (1 of 1944), and containing not less than fifty per cent by weight of pulp made from bagasse, jute stalks, cereal straw, elephant grass (Imperata Cylindrica), mesta (Kenaf) or waste paper, cleared for home consumption on or after the 1st day of April, in any financial year, from so much of the duty of excise leviable thereon under the said Act at the rate specified in the said first Schedule as is in excess of the amount calculated at the rates specified in the corresponding entry in column (2) of the said Table, subject to the conditions specified therein.

Description.	Rates.
Paper, other than paper boards cigerette tissue, glassing proof paper, coated	(i)..... ....

paper (including waxed paper) and paper of a substance not exceeding 25 grammes per square metre.	(ii) Rs. 900 per metric tonne, provided that the total quantity of clearances of all varieties of paper.

(other than paper boards) in the preceding financial year, by or on behalf of a manufacturer, from one or more factories, or from a factory, by or on behalf of one or more manufacturers, exceeded 3,000 metric tonnes but did not exceed 7,500 metric tonnes.

(iii).....

Provided that the factory

(i) does not have a plant attached thereto for making bomboo or wood pulp; and

(ii) manufactures paper out of pulp."

Under the revised notification different concessional rates have been prescribed depending upon the quantity of clearance of all varieties of paper in the preceding financial year from one or more factories of a manufacturer. Rate of Rs. 560/- per metric tonne is provided when the total quantity of clearance is 3000 metric tonnes, Rs. 900/- per metric tonne if the clearance is between 3000 to 7500 metric tonnes and Rs. 1120 per metric tonne if the clearance is 7500 to 16500 metric tonnes. The petitioners are claiming concessional rate at item no. 2. It is not disputed that if the annual clearance of their paper mill at Jaykaypur, Rayagada in Orissa is also added to the clearance of the paper manufacture in their mill at Bhopal, then the petitioners would not be entitled to concessional rate under any of these items. The petitioners would be entitled to claim concessional rate at item no. 2 only if the clearance of all varieties of paper manufactured at Bhopal only is considered. It is also not disputed that if the manufacturer has more than one factory the total quantity of clearance of all varieties of paper from all its factories have to be taken together in order to consider whether any of its factory is entitled to any concessional rate. The petitioners' case is that the total quantity of clearance of all varieties of paper manufactured out of unconventional raw material alone are to be added up and not the total quantity of clearance of all varieties of

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paper manufactured from its factory at Rayagada from conventional raw material which is to be excluded under the proviso to this notification. Since the petitioners follow self removal procedure under Chapter VII-A of the Central Excise Rules, they submitted a revised classification list of 3/83, dated 30th April 1983 claiming concessional rate of excise duty at Rs. 900/- per metric tonne plus 5 per cent special excise duty and cess in respect of kraft paper manufactured by its mill at Bhopal and excluding the paper manufactured by its mill at Rayagada. The Superintendent of Central Excise, Bhopal, returned the said classification pointing out that the petitioners are entitled to claim concessional rate only if the total quantity of clearance of all varieties of paper manufactured by their factories at Bhopal and Rayagada was less than 7500 metric tonnes. So the petitioners were directed by letter dated 3.5.1983 to give particulars of total clearance of all varieties of paper manufactured at Rayagada. However, the petitioners did not furnish the necessary information regarding total quantity of clearance of all varieties of paper manufactured at Rayagada and again resubmitted the said classification list of 3/83 claiming payment of duty at concessional rate. By order dated 17.5.1983 the Assistant Collector of Central Excise, respondent no. 1, rejected the claim of the petitioner no. 1 holding that since the petitioner no. 1 did not include the clearance effected from its factory at Rayagada to the clearance of the paper manufactured at Bhopal, the eligibility for granting exemption under the revised notification does not arise and the petitioner No. 1 is liable to pay excise duty at the rate already prescribed under the schedule and not as per the revised notification. Aggrieved by this order, the present petition has been filed saying that the alternative remedy of appeal is not adequate since there is question of interpretation of the notification in question.

According to the return filed by the respondents, the petitioner no. 1 is entitled to concessional rate for the paper manufactured at its Bhopal mill if the total quantity of clearance of all varieties of paper manufactured from both their mills do not exceed 7500 metric tonnes per annum. But as the total quantity so manufactured exceeded 16500 metric tonnes, the petitioner no. 1 is not entitled to any concessional rate of payment of excise duty. The concessions were extended to give encouragement to small units manufacturing paper from unconventional raw material. So such a concession could not be available to big units like the petitioner no. 1 who has got more than one factory. Under the proviso to revised notification, the petitioner no. 1's factory at Bhopal alone could claim concessional rate and not its factory at Rayagada since in that factory there is a plant attached for making bomboo and wood pulp, but the paper manufactured at Rayagada has to be added up

to the paper manufactured at Bhopal for deciding whether the petitioner No. 1's factory at Bhopal is entitled to the concessional rate. There is an appeal provided against the impugned order of the Assistant Collector and the petition should be thrown out on this count alone. There is no question of interpretation involved in the present case and there is no ambiguity in the notification. The petition is misconceived and is liable to be dismissed with costs.

Having heard counsel for the parties, we are of the opinion that there is no merit in this petition. There is no ambiguity in the notification in question and the same cannot be read in the manner suggested by the petitioners. The petitioners do not dispute that total quantity of clearance of all verieties of paper manufactured from one or more factories of a manufacturer has to be taken into consideration while deciding whether concessional rate is available or not, but their case is that since the factory at Rayagada has a plant attached for manufacturing bamboo and wood pulp the quantity of paper manufactured in that factory has to be excluded altogether because that factory is not entitled to claim any concession under the proviso to the notification. We are unable to accept this contention. The concessional rates are claimable provided the factory (i) does not have a plant attached thereto for making bamboo or wood pulp and (ii) manufactures paper out of pulp. The concessional rates under the revised notification can be claimed provided these two conditions are also fulfilled in addition that the total clearances are within the prescribed limit. This means that the Bhopal factory can claim concessional rate because it does not have a plant attached for making bamboo or wood pulp and it manufactures paper out of pulp. The concessional rate is not available to its factory at Rayagada as it has a plant attached for making bamboo and wood pulp. However, for computing the total quantity of clearance of all varieties of paper in the preceding financial year, the production of both the factories has to be added up as is clear from the notification in question. There is no ambiguity and from the plain reading of the revised notification it is clear that the production of paper from both the factories have to be added up for deciding whether concessional rate is to be given to the petitioner no. 1's factory at Bhopal. Therefore, there is no justification for construing the notification as suggested by the petitioners as there is no ambiguity in the notification in question. So there is no question of construing the notification liberally in favour of the petitioners and if the notification is construed in the manner suggested by the petitioners it will be causing violence to the language used. The Supreme Court in *W. T. Commr., A. P.* v. *Court of Wards, Patgah* (1) held as under:—

(1) A. I. R. 1977 S. C. 113.

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> "The object of the Wealth Tax Act is to tax surplus wealth. It is clear that all land is not excluded from the definition of assets. It is only "agricultural land" which is exempted. Therefore, it is imperative to give reasonable limits to the scope of the "agricultural land", or, in other words, this exemption has to be necessarily given a more restricted meaning than the very wide ambit given to it in AIR 1969 Andhra Pradesh 345 (FB)."

If the notification is read as suggested by the petitioners then we have to add in column 2 after the words "from one or more factories" the words "manufacturing paper from uncoventional raw material". In that column no such words can be added and the words clearances of all varieties of paper from one or more factories means from all the factories manufacturing paper are to be taken into consideration whether or not one of the factories is also manufacturing paper from bamboo and wood pulp. This is also evident from the speech delivered by the Finance Minister while presenting the Finance Bill in the years 1980 and 83 that the purpose was to give concession to small paper mills depending upon the quantum of clearances in the financial year. So it is not correct as contended by the petitioners that the concession was given to those factories which were manufacturing paper from unconventional raw material.

With the result, the petition fails and it is dismissed with costs. Counsel's fee Rs. 200/-, if certified. The outstanding security amount be refunded to the petitioners.

Petition dismissed.

LETTERS PATENT APPEAL

Before Mr. Justice Mulye and Mr. Justice Faizanuddin.

31 Oct. 1983

KANHAIYALAL, Appellant*

v.

MULLA ABDUL HUSSAIN and others, Respondents.

Specific Relief Act (I of 1877)—Section 35—Application to rescind contract for

*L. P. A. No. 3 of 1980, arising against the judgment date 2nd February 1980, passed by Hon. Shri Justice H. G. Mishra, in F. A. 30 of 1966.

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sale can be made in the same suit in which decree for specific performance of contract for sale has been passed—Purchaser-defenaant defaulted in payment of purchase money when Specific Relief Act of 1877 was in force—Application claiming rescission of the contract made on 10.7.62 before Specific Relief Act, 1963 came into force—Such application maintainable under the Act of 1877—Decree for specific performance not fixing any time limit for payment of purchase money—Contract should be performed within a reasonable time—Civil Procedure Code, 1908—Order 22, rule 4(4)—Provision applicable to appeals as well—Power to exempt can be exercised at any time before delivery of judgment and even after abatement has taken place—Application in writing not necessary for such exemption—Effect of exemption from substitution of legal representatives of the deceased on judgment pronounced against the deceased.

A decree in a suit for specific performance of contract for sale is in the nature of preliminary decree and the court retains full control over the matter having power to make any just and necessary orders and it can also pass a decree for rescinding the contract under section 35 of the Specific Relief Act, 1877. Hence, a motion can be made in the same suit in which a decree for specific performance of the contract for sale is passed, by an application to rescind the contract.

Chaturbhuj v. *Kalyanji* (1); referred to.

Kurpal Hemraj v. *Shamrao* (2), *Tribeni* v. *Ramratan* (3) and *Anandilal* v. *Gunendra* (4); relied on.

When right of the vendor to have the decree rescinded was dependent upon the default of the purchaser in paying the purchase money and the said default occured when the Specific Relief Act, 1977 was inforce and reasonable time for the performance of the obligation under the decree had elapsed particularly when the plaintiff (Vendor) had made an application under Section 35 of the Specific Relief Act, 1877 on 10.7.62 when the Act of 1877 itself was inforce while the new Act of 1963 came into force on 1st March 1964, the application of the plaintiff (Vendor) under section 35 of the Specific Relief Act, 1877 for rescission of the contract was maintainable.

(1) A. I.R. 1927 Bom. 239.
(2) A. I. R. 1923 Bom. 211.
(3) A. I. R. 1959 Pat. 460.
(4) A. I. R. 1960 Cat. 107.

H. I. Trust v. *Haridas Mundhra* (1); relied on.

When no time for payment or deposit is fixed in the decree for specific performance the law implies a reasonable time within which the contract is to be performed. Reasonable time depends upon the facts and circumstances of each case.

Dinkerraj v. *Sukhdayal* (2); relied on.

Provisions of Order 22, Rule 4(4) are applicable to appeal as well. Power to exempt can be exercised at any time before delivery of judgment because the opening words "the Court whenever it thinks fit" occurring in sub-rule (4) of Rule 4 of Order 22 are indicative of the fact that such power can be exercised at any time before the judgment and even after the abatement has taken place. No application in writing is required for such exemption as there are no words in the sub-rule to that effect. According to sub-rule (4) the Court may exempt from the necessity of substituting the legal representatives of any defendant or respondent who has failed to file written statement or who having filed it has failed to appear and contest the suit at the hearing. It also provides that the judgment may, in such case, be pronounced against the said party who legal representatives have not been brought on record if the Court has exempted from the necessity of substitution of legal representatives notwithstanding the death of such a party and the judgment so pronounced shall have the same force and effect as if it has been pronounced before the death took place.

Nepal Chandra v. *Rebati Mohan* (3), *Janabai Ammal* v. *T. A. S. Palani Mudaliar* (4) and *Mohammad Mustaqeem* v. *Aftab Ahmad* (5); relied on.

S. L. Garg with *R. S. Garg* for the appellant.

S.D. Sanghi with *N.K. Sanghi* for respondent no. 1(c).

M. L. Agarwal for respondents nos. 2 and 4.

Cur. adv. vult.

(1) A. I. R. 1972 S.C. 1827.
(2) A. I. R. 1947 Bom. 293.
(3) A.I.R. 1979 Gouhati 1.
(4) A. I. R. 1981 Mad. 62.
(5) A. I. R. 1983 All. 368.

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JUDGMENT

The Judgment of the Court was delivered by FAIZAN UDDIN, J.—This appeal under Clause 10 of the Letters Patent has been directed by the defendant-appellant against the judgment dated 2nd February, 1980, passed by the learned Single Judge of this Court, in First Appeal No. 30 of 1966 affirming the judgment and decree dated 30th January, 1965 in Civil Suit No. 5 of 1960, passed by the Additional District Judge, Mandsaur, in Civil Suit No. 5 of 1960, rescinding the contract for sale of agricultural land in respect of which a decree dated 29th September 1961 for specific performance of contract was passed by the same Court in the same Civil Suit No. 5 of 1960.

The facts as they emerge out of this appeal are that late Mulla Abdul Hussain by an agreement dated 25th May, 1958, had contracted to sell his agricultural land to defendant-appellant Kanhaiyalal, of Khata No. 16 comprising an area of 12.92 acres, situated in village Garoth, district Mandsaur together with well entries, standing thereon for a consideration of Rs. 20,000/-. On the date of the aforesaid agreement a sum of Rs. 4000/- was paid by defendant Kanhaiyalal to late Mulla Abdul Hussain and Kanhaiyalal was put in possession of the said land. The balance of the consideration was agreed to be paid within a month when a registered sale-deed had to be executed and registered in favour of the defendant. Thereafter, a sum of Rs. 5000/- was also paid by Kanhaiyalal to Mulla Abdul Hussain towards the consideration. As the defendant Kanhaiyalal failed to obtain a registered sale-deed on payment of the balance of the consideration of Rs. 11,000/-, late Mulla Abdul Hussain instituted a suit on 26th September 1960, against defendant Kanhaiyalal for specific performance of the contract. Plaintiff late Mulla Abdul Hussain besides claiming a decree for balance of consideration also claimed a relief or *mesne* profits as the defendant was in actual possession of land and enjoying usufruct thereof or in the alternative interest on the outstanding balance of consideration.

Defendant-appellant contested the said suit mainly by contending that plaintiff late Mulla Abdul Hussain himself did not take steps to obtain permission from the Collector for sale of the land in accordance with the provisions of Madhya Bharat Tenancy and Land Revenue Act and that the agreement could not be specifically performed on account of the said default made by late Mulla Abdul Hussain. The learned trial Court, however, decreed the suit for specific performance on 29th September, 1961 by holding that the contract could not be carried through on account of the fault of defendant

Kanhaiyalal as he had no funds to pay the balance of consideration of Rs.11000/-. The trial Court also held that the plaintiff was entitled to interest at the rate of 9 percent per annum. Learned trial Court, therefore, passed a decree accordingly by directing that the defendant shall pay Rs.11,000/- to the plaintiff or deposit the same in the Court and on such payment or deposit, the plaintiff shall execute a registered sale-deed in favour of defendant Kanhaiyalal at the expenses of the defendant. It also directed that the said amount of Rs. 11,000/- shall carry interest at the rate of Rs.9/- per cent per annum from the date of the suit till realisation.

Defendant Kanhaiyalal did not file any appeal against the said judgment and decree for specific performance of contract and remained satisfied with the decree. However, plaintiff late Mulla Abdul Hussain preferred an appeal on 25th January, 1962 before the High Court in respect of the interest from the date of the contract till the institution of the suit which was disallowed by the trial Court. The said appeal (First Appeal No. 13/62), was allowed by the High Court by its judgment and decree dated 28th November, 1964 awarding interest at the rate of 6 per cent per annum from the date of the contract to the date of the suit.

After passing of the decree dated 29th September 1961 by the trial Court for specific performance of the contract and also after preferring an appeal before the High Court, plaintiff late Mulla Abdul Hussain waited for quite a long time but defendant Kanhaiyalal neither paid nor deposited the balance of consideration so that sale-deed may be executed and registered by late Mulla abdul Hussain in his favour. After a lapse of about 9 months from the date of decree for specific performance, late Mulla Abdul Hussain made an application on 10.7.1962 purporting to be an application under section 35(c) of the Specifi Relief Act, 1877 (Act No. 1 of 1877) before the trial Court in the same Civil Suit No. 5 of 1960 to rescind the contract for sale of land on the ground that defendant Kanhaiyalal had failed to pay or deposit in the Court the balance of consideration as per decree within a reasonable time. A prayer for restoration of possession and grant of interest was also made on the ground that defendant enjoyed the use and occupation as also the usufruct of the land since the date of the agreement and claimed forfeiture of the earnest money Rs. 400 /- paid at the time of entering into the agreement for sale of land.

Defendant Kanhaiyalal contested the said application by contending that it was not open to the plaintiff late Mulla Abdul Hussain to claim the relief of rescinding the contract in the same suit but by a separate suit. He also contended that as no time was fixed in the decree for payment of deposit of the balance of the consideration and, therefore, he was entitled to pay the amount at his choice. It was also contended that record of the case was with the High

Court in connection with the appeal and unless the record was received back and inspected by the defendant he was unable to submit any reply.

The learned trial Judge by its judgment dated 30th January, 1965 allowed the plaintiff's application and rescinded the contract by holding that defendant Kanhaiyalal had failed to pay or deposit within reasonable time the balance of the consideration and he was not prepared to pay the same till the date of passing of the decree. It was also held that under section 35 of the Specific Relief Act, 1877 a party can make a motion for rescission of the contract in the same case and not by a separate suit. Learned trial Judge, however, rejected the prayer for forfeiture of the earnest money. However, applying section 19 of the Specific Relief Act, 1877, learned trial Court allowed the interest at the rate of Rs.9 per cent per annum and restoration of possession. Defendant Kanhaiyalal preferred an appeal in the High Court being First Appeal No. 30 of 1966 against the said judgment and decree rescinding the contract; but the learned Single Judge of this Court (Late Mishra, J. as he then was) dismissed the same on 2.2.1980 against which this Letters Patent Appeal has been directed.

It may be pointed out here that after the decree ordering rescission of the contract for sale plaintiff Mulla Abdul Hussain took possession of the land in question after complying the directions of the decree on his part. The defendant-appellant on 29th April 1965 presented an application under Order 44, Rule 1 of the Code of Civil Procedure accompanied by a memorandum of appeal for grant of leave to file appeal as an indigent person which was registered as M. C. C. No. 97/65. The office reported that the same was barred by limitation by 12 days. Thereafter, an application was made on behalf of the defendant-appellant seeking amendment in the memo. of appeal accompanying the application under Order 44, Rule 1 of the Code of Civil Procedure to the effect that the court-fees stamp of Rs. 20/-was payable on the memo. of appeal which was affixed. Another application was made to register the appeal as First Appeal. The application amendment of the memo. of appeal was allowed; but on the second application for registering the appeal as First Appeal, the office reported that a court-fees of Rs. 1266/-was deficit and that the appeal was barred by limitation. The matter was placed before the Taxing Judge for his decision. The learned Taxing Judge (V. R. Newaskar, J. as he then was) ordered that *ad valoram* court-fees ought to be paid on the memorandum of appeal. Thereafter, on 29th March, 1966 an application on behalf of the defendant-appellant was made for extension of time for payment of deficit court-fees which was allowed upto 4.4.66 on which date the deficiency was made good and the delay in making the payment of court-fees was condoned by order dated

11-4-66 and by order dated 15-4-66 the application for leave to appeal as indigent person was dismissed and the appeal was registered as First Appeal No. 30/66 and then it was placed before Division Bench on 25.4.66 on which date the appeal was admitted for hearing and issue of notice was ordered to the other side.

It may also be noted that when the petition of the defendant for leave to appeal as an indigent person was pending the original plaintiff Mulla Abdul Hussain transferred an area of 11.12 acres out of the suit land to one Ramnarayan by registered sale-deed dated 26/28th March, 66 for a consideration of Rs.24,000/-and said Ramnarayan in turn transferred the said land to respondents 2 to 4 who were impleaded as respondents in First Appeal No. 30 of 1966 by registered sale-deed dated 1.11.68 for a consideration of Rs.33,000/-. Thereafter, Mulla Abdul Hussain died on 6.1.69 and his legal representatives, respondents 1(a) to (e) were brought on record being his widow, sons and daughter.

The respondents after their appearance in First Appeal before the learned Single Judge submitted an application objecting condonation of delay in payment of court-fees on the memo. of appeal on the ground that the delay was condoned without hearing them and prayed for dismissal of the appeal on the ground that it was barred by limitation on the date deficiency of court-fees was made good. By the impugned judgment the learned Single Judge took the view that respondents have a right to be heard in the matter of condonation of delay and after having heard them maintained the order of condonation of delay in exercise of the powers vested in the Court under section 149 of the Code of Civil Procedure regarding the question of limitation, the learned Single Judge took the view that the limitation for filing of an appeal in the normal course had not expired on 29th April 65 when the unstamped memorandum of appeal was submitted alongwith the application under Order 44, rule 1 of the Code of Civil Procedure.

Learned counsel for the defendant-appellant placing his massive reliance on the decision in *Chaturbhuj* v. *Kalyanji* (1) first contended that the remedy of the plaintiff for rescission of the contract did not lay in making an application for rescission of the contract in the same suit in which the decree for specific performance of the contract was passed but by a separate suit in that behalf. Here it would be relevant to refer section 35 of the Specific Relief Act, 1877 which runs as under:

(1) A. I. R. 1927 Bom. 239.

"35. Any person interested in a contract (in writing) may sue to have it rescinded; and such rescission may be adjudged by the Court in any of the following cases, namely;

(a) where the contract is voidable or terminable by the plaintiff;

(b) where the contract is unlawful for causes not apparent on its face, and the defendant is more to blame than the plaintiff,

(c) where a decree for specific performance of a contract of sale, or of a contract to make a lease, has been made, and the purchaser or lessee makes has been made, and the purchase money or other sums which the Court has ordered him to pay. When the purchaser or lessee is in possession of the subject-matter, and the court finds that such possession is wrongful, the Court may also order him to pay to the vendor or lessor the rents and profits, if any, received by him as such possessor. In the same case, the court may, by order in the suit in which the decree has been made and not complied with, rescind the contract either so far as regards the party in default, or altogether, as the justice of the case may require".

Relying on the decision in *Chaturbhuj* v. *Kalyanji* (*supra*) learned counsel for the appellant submitted that the words "In the same case" occurring in the last paragraph of section 35 refer to the first paragraph of section 35 but not to clause (c) of section 35. But after a careful reading of section 35 as a whole and other decisions of the Bombay High Court and other High Courts, we do not find ourselves in agreement with the proposition of the learned counsel for the defendant-appellant. It may be noted that the aforesaid decision of a learned Single Judge of the Bombay High Court in the case of *Chaturbhuj* v. *Kalyanji* (*supra*) is in direct conflict with the earlier decision of a Division Bench of the same High Court in *Kurpal Hemraj* v. *Shamrao* (1) wherein it has been held that the words "In the same case" occurring in last paragraph of section 35 must refer to clause (c) of section 35, so that the court is empowered to make an order in the suit in which a decree has already been made to rescind the contract instead of putting the opponent to file another suit for rescission. The same view was endorsed in *Tribeni* v. *Ramratan* (2),

(1) A. I. R. 1923 Bom. 211. (2) A. I. R. 1959 Pat. 460.

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Wherein it was observed that the phrase "In the same case" in the last clause of section 35, Specific Relief Act refers to the case provided in clause (c) of that section because the decree for specific performance of contract is in the nature of preliminary decree wherein the Court remains in seisin of the case until the money is paid or the contract is got rescinded as provided in section 35(c). The similar view was reiterated by the Calcutta High Court in *Anandilal* v. *Gunendra* (1) wherein it has been observed that not only does a suit lie for rescission of a contract after a decree for specific performance if the purchaser makes default in payment of any money which the court has ordered to pay; but the rescission can also be effected by making an application in the suit in which a decree for specific performance has been passed and that such an application lies under section 35(c) of the Specific Relief Act. We find ourselves in respectful agreement with the view taken by a Division Bench of the Bombay High Court in *Kurpal Hemraj* v. *Shamrao* (*supra*) and that of Calcutta High Court in *Anandilal* v. *Gunendra* (*supra*).

It is settled law that a decree in a suit for specific performance of contract for sale is not a final decree but it is in the nature of a preliminary decree which is clear from the provisions of section 35 itself as the original Court retains control over the matter by having full power to make any just and necessary orders therein including the power to extend the time fixed by the decree. On this analogy it, therefore, follows that if the decree is in the nature of preliminary decree and the Court retains full control over the matter having power to make any just and necessary orders can also pass a decree for rescinding the contract under section 35 of the Specific Relief Act. In this view of the matter, we find that the learned single Judge took the correct view in holding that a motion can be made in the same suit in which a decree for specific performance of the contract for sale of land was passed, by an application to rescind the contract.

Learned counsel for the appellant next contended that the learned Judge committed an error in holding that the defendant purchaser was neither prepared nor possessed of the funds to pay or deposit the balance of the consideration. After going through the evidence on record and after having heard the learned counsel for the parties we are of the view that there is no merit in this submission also and we fully agree with the conclusion recorded by the learned Single Judge in this behalf.

As stated earlier the defendant had entered into an agreement dated 25th May, 1958 for the purchase of the land in suit, the registered sale-deed

(1) A. I. R. 1966 Cal. 107.

in respect of which had to be obtained within a month on payment of the balance of the consideration. After the agreement the defendant did not pay the balance of consideration within a month but wrote a letter dated 17-8-58 (Ex. P. 1) to make the payment within 8 days. When the defendant did not pay as per his promise the plaintiff late Mulla Abdul Hussain gave a notice dated 4-10-58 (Ex. P. 7) reminding the defendant to make the payment and obtain a registered sale-deed. A similar notice dated 3-11-58 (Ex. D. 2) was repeated by late Mulla Abdul Hussain. Thereafter, the defendant Kanhaiyalal by his letter dated 3-1-59 (Ex. P. 6) wrote to Mulla Abdul Hussain to see him shortly in connection with the deed. By another letter dated 24-1-59 (Ex. P. 2) defendant Kanhaiyalal requested Mulla Abdul Hussain to wait for another 15 days to allow him to manage for the money to obtain the sale-deed; but by his letter dated 7-12-59 (Ex. P. 3) the defendant wrote to Mulla Abdul Hussain that if he could get the amount of compensation payable to him he would himself come down to him at Patan and if he could not get the money he will make some other arrangement and inform him accordingly. A similar letter (Ex. P. 4) was written on 13th February 1960 saying that he could not manage for the money. When ultimately the defendant failed to make payment of the balance of the consideration plaintiff Mulla Abdul Hussain gave a notice dated 8-7-60 (Ex. P. 8) requiring the defendant to pay the balance of consideration and obtain the sale-deed but when he failed to comply with the notice he instituted the suit for specific performance of contract on 26th September, 1966, contending that he was always ready and willing to execute the contract on his part but the defendant had no funds and was not willing to perform his part of the contract. Defendant filed the written statement by contending that he never denied to make the payment of balance of consideration but he neither paid nor deposited the amount nor pleaded that he was prepared to pay the balance of consideration.

It may also be pointed out here that after filing of the written statement by the defendant-appellant, late Mulla Abdul Hussain made an application dated 21-7-61 before the trial Court stating that in fact defendant Kanhaiyalal had neither funds nor any means to make the payment of the balance of consideration and if the defendant really wants to make the payment, he may deposit the same in the court and on such deposit being made he shall execute the sale-deed in his favour in accordance with the agreement. The record shows that defendant neither paid nor deposited the amount even after that. It is also noteworthy that when defendant Kanhaiyalal entered into the witness-box as D. W. 1, he categorically admitted that he was not in a position to make the payment of money on the day he made the statement nor on the day next to that nor after 8 days. He deposed that he can pay only by instalment

of Rs. 2000/- per year. He also admitted that he had no means to pay Rs. 11,000/- (balance of consideration) and that he was also not prepared to make the payment of the said amount. Ultimately the decree for specific performance was passed directing the defendant-appellant to pay Rs. 11,000/- to the plaintiff or deposit the same in the Court whereafter the plaintiff shall execute registered sale-deed in favour of the defendant.

As already stated above, the defendant neither paid nor deposited the amount and Mulla Abdul Hussain was forced by the circumstances to make an application under section 35 of the Specific Relief Act, 1877 on 10.7.62 for rescinding the contract after about 9 a period of about months from the date of decree for specific performance of the contract for sale. The defendant did not come forward even thereafter with the balance of consideration or at least with a positive assertion that he was prepared to make the payment and ultimately a decree rescinding the contract was passed against him directing the defendant to deliver back the possession of the land to the plaintiff and the plaintiff to refund the amount after necessary deductions as per decree granted in his favour. There is one more very strong and significant circumstance against the defendant-appellant that first of all he made an application under Order 44, rule 1 of the Code of Civil Procedure for grant of leave to appeal as an indigent person against the decree rescinding the contract showing that he possessed only movable property worth Rs. 500/- only which clearly indicated that the defendant-appellant had neither any funds nor any means to pay the balance even after the decree rescinding the contract was passed. Making of simple applications thereafter during the pendency of the appeal in the High Court that he was willing to pay and time be extended for the same, was of no avail. In the facts and circumstances stated above it could not be said that the learned Single Judge committed any error in arriving at the conclusion that the defendant had neither any funds nor any means to make the payment nor he was prepared to make the payment of the balance of consideration.

Apart from the above facts, as stated earlier after about a lapse of a period of more than an year from the date of the decree rescinding the contract the land in question was transferred to one Ramnarayan who in turn sold to respondents 2 to 4 for valuable consideration. They must have been satisfied that the contract was rescinded by a decree long back and they can safely purchase the land, by infering that defendant had abondoned his right. They were thus *bona-fide* purchasers. As is clear from the sale-deeds which were filed on record, the value of the land had considerably increased when it was transferred to respondents 2 to 4. In somewhat similar facts and circumstances

a Division Bench of the Madras High Court in *Shriram Cotton Pressing Factory* v. *Narayan Swamy* (1) in which there was a delay of about 9 months on the part of the purchaser during which period the purchaser did not show his inclination to obtain the sale-deed it was inferred that there was a waiver or abandonment of the contract. The case of the defendant in the present case is worse than the one decided in *Shriram Cotton Pressing Factory* v. *Narayan Swamy* (*supra*).

Learned counsel for the defendant-appellant then contended that the application for rescission of the contract for sale under section 35(c) of the Specific Relief Act, 1877 was not maintainable as the said act was repealed and new Specific Relief Act, 1963 had come into force. We do not find any merit in this submission also for the reason that the right of applicant to have the decree rescinded was dependent upon the default of the purchaser in paying the purchase money and the said default occurred when the Specific Relief Act, 1877 was in force and reasonable time for the performance of the obligation under the decree had elapsed particularly when the plaintiff had made an application under section 35 of the Act of 1877 on 10.7.62 when the Act of 1877 itself was in force while the new Act of 1963 came into force on 1st March, 1964. In this view of the matter we are supported by the decision of the Supreme Court in *H. I. Trust* v. *Haridas Mundhra* (2).

Learned counsel for the appellant lastly contended that plaintiff's First Appeal No.13/62 was pending before the High Court and the amount payable by the defendant could not be ascertained until the decision of that appeal in order to enable him to make the payment. It was also contended that neither in the decree passed by the trial Court for specific performance of contract nor in the decree passed by the High Court in First Appeal No. 13/62, no time was fixed for payment or deposit of the money and, therefore, the trial Court before ordering rescission of the contract ought to have allowed time to the defendant to deposit the money on the basis of the principle of equitable relief. Reliance was placed on the decision in *K. Kalpana Saraswathi* v. *P. S. S. Chettiar* (3). Learned counsel further submitted that the Court has discretion even now to fix the time within which the defendant may deposit all the amount due against the appellant defendant. In our opinion all these submissions were fully considered and dealt with by learned Single Judge which have been found without any substance. We also find ourselves in agreement with the findings recorded by the learned Single Judge in that behalf and, therefore, the same have to be rejected.

(1) A.I.R. 1963 Mad. 352 (Para 7). (2) A. I. R. 1972 S. C. 1827.
(3) A. I. R. 1980 S.C. 512.

Kanhaiyalal v. *Mulla Abdul Hussain, 1983*

As regards the principle decided by their Lordships of the Supreme Court in the case of *K. Kalpana Saraswath* v. *P. S. S. Chettiar* (*supra*) there is no dispute but the decision does not help the defendant-appellant in the facts and circumstances of the present case. In the decree for specific performance of the contract the rights and liabilities of the parties were determined against which the defendant did not prefer any appeal. According to the terms of the contract the amount of consideration was Rs. 20,000/- only on payment of which the plaintiff was liable to execute a registered sale-deed in favour of the defendant-appellant. Admittedly the defendant had paid in all a sum of Rs.9000/-and he had to pay Rs.11,000'-as balance of the consideration. The rest of the decretal amount was the compensation under paragraph 3 of section 19 of the Specific Relief Act which had nothing to do with the contractual consideration. The sale-deed could have been executed by the plaintiff if the defendant had deposited or paid the contractual amount of the consideration. If the plaintiff had filed an appeal for enhancement of the compensation it has nothing to do with the execution of the registered sale-deed which could have been executed on payment or deposit of the balance of consideration.

It is true that no time to pay or deposit was fixed in the decree for specific performance of the contract but the question of fixing the time by the High Court in the decree passed in First Appeal No. 13 of 1962 did not arise as it was not an appeal against the decree for specific performance of the contract but an appeal by the plaintiff only for enhancement of the compensation under section 19 of the Specific Relief Act. When no time for payment or deposit is fixed in the decree for specific performance the law implies a reasonable time within which the contract is to be performed. When the decree or contract is silent as to the performance it should be performed within reasonable time. Reasonable time depends upon the facts and circumstances of each case. In the present case, the contract as stated earlier was entered into on 25th May, 1958 and the sale-deed had to be obtained on payment of balance of consideration within a month. The non-payment of balance of consideration till 1-10-59 is understandable as the Madhya Bharat Tenancy and Land Revenue Act was in force under which the permission of the Collector was to be obtained for sale of land and as no permission was obtained the defendant could not be said to be at fault. But on 2-10-1959 the above Madhya Bharat Tenancy and Land Revenue Act was repealed and Madhya Pradesh Land Revenue Code, 1959 came into force under which there was no provision by which the permission of the Collector was necessary. As discussed above, the defendant had neither any funds nor any means to make the payment of consideration right from the year 1959 up to the date of passing of the decree for specific performance. The defendant could

not pay the money even upto the date of decree rescinding the contract. Thus more than sufficient time had elapsed within which the defendant could have made the payment but he failed to do so. In these circumstances, it could not be said that the contract was rescinded before the expiry of the reasonable time. See *Dinkerraj* v. *Sukhdayal* (1).

In *Abdul Shaker Sahib* v. *Abdul Rahiman Sahib* (2) a Division Bench took the view that it is a well established principle that persons who desire the assistance of the Court in obtaining equitable relief must come quickly. In the present case not only the defendant failed to come quickly but he absolutely failed to come forward with the amount at any stage of the relevant proceedings.

Learned counsel for the respondents took following preliminary objections in the maintainability of the present appeal by the defendant.

(i) That First Appeal before the learned Single Judge was barred by limitation and there was no justification for condoning the delay;

(ii) That the appellant having deleted the name of Smt. Mamoonabai respondent no. 1 (d), the daughter of original plaintiff late Mulla Abdul Hussain, the appeal is not now properly constituted as she and in her absence her legal representatives were the necessary party and that the appeal also abated as her heirs were not brought on record and, therefore, it deserves to be dismissed on this ground alone.

In the foregoing discussion we have already accepted the view taken by the learned trial Judge in rescinding the contract which has been further affirmed by the learned Single Judge of this Court in First appeal and in view of which findings in the foregoing paragraphs the preliminary objections remained only academic. Several decisions were cited by the learned counsel for the parties in support of the rival contentions raised by them on the aforesaid two questions but it is not necessary to catelogue them all here as there is no dispute as regards the principle decided in those decisions.

As regards the first question the delay was first condoned by the Division Bench in First Appeal No. 30/66 and thereafter the learned Single Judge after hearing the learned counsel for the defendant-appellant maintained

(1) A. I. R. 1947 Bom. 293. (2) A. I. R. 1923 Mad. 284.

the order of condonation of delay for the reasons stated in the impugned judgment. In our opinion there are no reasons to interfere with that finding as we do not find that it was a wrong exercise of the discretion.

In support of the second objection referred to above learned counsel for the respondents submitted that decree rescinding the contract passed by the trial court and affirmed by the learned Single Judge of this Court had become final in favour of Mst. Mamoonabai, respondent no.1(d) also who had been deleted from the cause title and the decree being indivisible the appeal abates as a whole. The second limb of his argument was that in the event we allow the appeal and set aside the decree for rescinding the contract no decree for specific performance of the contract can be passed in the absence of legal representatives of deceased-respondent no.1 (d) Mst. Mamoonabai.

It appears that on the oral request of the learned counsel for the defendant-appellant the name of respondent no. 1(d) Mamoonabai was deleted from the array of respondents although there was an application dated 27-4-1981 (I. A. No. 1774/81) filed on behalf of the appellant praying to allow to delete the name of respondent no. 1(a) and (d) and to exempt the appellant from bringing the legal representatives of respondent no.1(d) on record for the reasons stated in the said application. It appears that this application missed notice of the learned counsel for the appellant as well as the learned Single Judge and no order on the said application has so far been passed.

In the application referred to above (I.A. No. 1774/81) it was submitted that Mamoonabai respondent no. 1(d) had died and despite the best efforts the appellant could not trace out the names of her legal representatives. It was stated that though she was served in the First Appeal no. 30/66 but she preferred not to contest the said appeal and remained *ex-parte* and never took any part in proceedings of that appeal. It was in these circumstances that the prayer was made to delete her name and to exempt the appellant from bringing her legal representatives on record of this appeal. This application was supported by an affidavit. Although this application was made under section 151 of the Code of Civil Procedure but in our opinion it purports to be an application under Order 22, Rule 4(4) of the Code of Civil Procedure which runs as under:—

> "0.22, R.4-Procedure in case of death of one of several defendants or of sole defendant.
>
> (1) X X X

(2).	X	X	X
(3)	X	X	X

(4) The Court whenever it thinks fit, may exempt the plaintiff from the necessity of substituting the legal representatives of any such defendant who has failed to file a written statement or who, having filed it, has failed to appear and contest the suit, at the hearing; and judgment may, in such case, be pronounced against the said defendant notwithstanding the death of such defendant and shall have the same force and effect as if it has been pronounced before death took place."

A perusal of the record of First Appeal No. 30/66 will go to show that though Mst. Mamoona Bai deleted respondent no. 1(d) was served with the notice of the appeal; but she did not turn up to contest the appeal and took no interest in the proceedings. There is no dispute that the provisions of order 22, Rule 4(4) are applicable to appeal as well. A reading of the said provision distinctly goes to show that power to exempt can be exercised at any time before the delivery of judgment because the opening words "The Court whenever it thinks fit" occurring in sub-rule (4) of Rule 4 of Order 22 are indicative of the fact that such power can be exercised at any time before the judgment and even after the abatement has taken place. It is also clear from the said sub-rule that no application in writing is required for such exemption as there are no words in the sub-rule to that effect. According to said sub-rule (4) the Court may exempt from the necessity of substituting the legal representatives of any defendant or respondent who has failed to file written statement or who having filed it has failed to appear and contest the suit at the hearing. It also provides that the judgment may, in such case, be pronounced against the said party whose legal representatives have not been brought on record it the Court has exempted from the necessity of substitution of legal representatives notwithstanding the death of such a party and the judgment so pronounced shall have the same force and effect as if it has been pronounced before the death took place. In this view of the matter we are supported by the decision in *Nepal Chandra* v. *Debati Mohan* (1) and *Janabai Ammal* v. *T. A. S. Palani Mudaliar* (2). The same view has been reiterated by a recent decision of the Allahabad High Court in *Mohammad Mustaqeem* v. *Aftab Ahmad* (3) in which it has been observed that intention behind sub-rule (4) of Rule 4 of Order 22, C. P. C. is that the plaintiff

(1) A. I. R. 1979 Gouhati 1. (2) A. I. R. 1981 Mad. 62.
(3) A.I. R. 1983 All. 368.

need not be asked to file an application for bringing on record the heirs of the deceased defendant when he has not taken any interest in the suit and keeping this intention in mind it must be held that an application by the plaintiff for exemption from the substituting of legal representatives of non-contesting defendant is not required to be filed within 90 days of the death of the defendant. It has been further observed that the exemption granted under sub-rule (4) or rule 4 of Order 22 of the Code relieved the plaintiff from the liability of moving a separate application. Having regard to the facts of the present case we are of the view that there are no reasons to disallow the defendant-appellant's application (I. A. No. 1774/81) seeking exempting from bringing the legal representatives of deceased-respondent no.1(d) on record. We, therefore, allow the application and exempt the appellant from bringing the legal representatives of deceased-respondent no.1(d) on record. In the circumstances of the case, the appeal neither abates nor is found to be incompetent.

For the reasons stated above, the appeal fails and is hereby dismissed with costs. Counsel's fee as per schedule, if certified.

Appeal dismissed.

MISCELLANEOUS CIVIL CASE

Before Mr. G. L. Oza Ag. C. J. and Mr. Justice C. P. Sen.

1 Mar. 1984

J. A. TRIVEDI BROTHERS, BALAGHAT, Applicant*

v.

THE COMMISSIONER OF INCOME-TAX, JABALPUR, Opposite-party

Income-tax Act, Indian (XLIII of 1961)—Section 256(1) and Coal Mines Nationalisation Act, 1973—Section 26(5)—Coal Mines with machinary and equipment of contractor taken over by Govt.—Compensation payable therefor was to be apportioned between the owner of Coal mines and owner of machinery and equipment by the District Court—Before such

* M.C. C. No. 147 of 1982. Reference under Section 256(1) of the Income Tax Act, 1961, dated the 30th March 1982.

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apportionment, I. T. O. treating the entire compensation receivable by owner and determining profits on that basis—Commissioner of Income-tax (Appeals) holding that as liability to contractor was definite the owner had suffered a loss—On appeal Tribunal reopened the case and sent it back to the I. T. O. to pass order after award of District Court on question of apportionment of compensation— No question of law arises which needs a reference—Tribunal justified in sending case back to I. T. O.

Assessee's Coal mines were taken over by the Govt. under the Coal Mines Nationalisation Act, 1973 and a compensation of Rs.5,67,000/- was determined payable by the Commissioner of claims under section 17 of the said Act. Under Section 26, sub-section (5) of the Act where any machinery or equipment or other property in the Coal mines had vested in the Central Govt. or a Govt. company under the Act and such machinery, equipment or other property did not belong to the owner of such coal mines the amount of compensation has to be apportioned between the owner of the coal mines and the contractor owning such machinery and equipment and such apportionment has to be made by a Distritt Court on a referepce made to it by the Commissioner of claims. The Income-tax Officer, however, proceeded to determine the profits under section 41(2) of the Income-tax Act at Rs.35,228/-as if the entire compensation of Rs.5,67,000/-was receivable by the assessee on appeal, the commissioner of Income-tax (appeals) held that since the liability to the contractor where machinery was lying on the coal mines was a definite liability and since the assessee had indicated the quantum of such liability on a rational and scientific basis, the assessed had suffered a loss under section 32(i)(iii) of the Income-tax Act and not earned any profit under section 41(2) as determined by the Income-tax Officer. He, therefore, vacated the addition of Rs.36,228/-and allowed the loss of Rs.2,65,772/-under section 32 (i)(iii). On appeal the Tribunal held that whether the assessee would be entitled to terminal loss under section 32(i)(iii) or assessable to profit under section 41(2) would become clear only after the District Court passes the award apportioning the compensation between the assessee and the contractor. The Tribunal therefore, set aside the order of the Appellate Commissioner and also of the Income-tax Officer and sent the case back to the Income tax Offier to pass order after the award of the District Court is obtained on the question of apportionment of compensation.

HELD:- In view of the language of section 26(5) of the Coal Mines Nationalisation Act, it apppears that the Tribunal felt that the matter should be

kept open till the order is passed by the District Court apportioning the compensation and the Tribunal reopened the case and sent it back to the Income-tax Officer to decide after the award of the District Court. As the Tribunal has not finally deposed of the matter but only remanded it for decision after the matter is finally settled by the District Court about apportionment of compensation, no question of law arises which needs a reference.

C. J. Thakar for the applicant.

B. K. Rawat for the opposite-party.

Cur. adv. vult.

JUDGMENT

The Judgment of the Court was delivered by OZA Ag. C. J.—This is a reference made by the Income-tax Appellate Tribunal for answering the following question:-

> "Whether, under the facts and circumstances of the case, the Tribunal was justified in law in sending back the case to the Income-tax Officer?"

The facts as stated in the reference are that the assessee's three coal mines at Barkuhi East, Barkuhi West and Ghorawari and Hirdagarh were taken over by the Government under the Coal Mines Nationalisation Act, 1973. A compensation of Rs. 5,67,000/-was determined payable by the Commissioner of Claims appointed under section 17 of the said Act. It appeared that in addition to some assets of the assessee, the assets of the contractor employed by the assessee for exploitation of the mines, were lying on the mines. Under section 26, sub-section (5) of the Coal Mines Nationalisation Act, where any machinery or equipment or other property in the coal mine had vested in the Central Government or a Government Company under the Act, but such machinery, equipment or other property did not belong to the owner of such coal mine, the amount of compensation would, on a reference made to it by the Commissioner of Claims, apportioned by the District Court between the owner of such coal mine and the owner of such machinery, equipment or other property, having due regard to the value of such machinery, equipment or other property on the date of take over.

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The Income-tax Officer, however, proceeded to determine the profits under section 41(2) of the Income-tax Act at Rs. 36,228/-as if the entire amount of Rs. 5,67,000/- was receivable by the assessee who was the owner of the mines. The Commissioner of Income-tax (Appeals) held that the Income-tax Officer had committed a basic error in assuming that the entire compensation would be receivable by the assessee itself. Relying on the Supreme Court's decision in the case of *Calcutta Co. Ltd.* v. *Commissioner of Income-tax* (1), the Commissioner of Income-tax (Appeals) held that since the liability to the contractor whose machinery was lying on the coal mines was a definite liability and since the assessee had indicated the quantum of such liability on a rational and scientific basis, and if that position was accepted, the assessee had suffered a loss under section 32(i)(iii) of the Income-tax Act and not earned any profit under section 41(2) as determined by the Income-tax Officer. He, therefore, vacated the addition of Rs. 36,228/-made by the Income-tax Officer under section 41(2) and allowed the loss of Rs.2,65,772/-under section 32(i)(iii). On appeal against this order of the Commissioner of Income-tax (Appeals), the Tribunal held that the Commissioner of Claims has to make a reference to the District Court under section 26(5) of the Coal Mines Nationalisation Act, 1973, and as the Court has not yet made an award of apportionment of compensation between the assessee and the contractor, the fact whether the assessee would be entitled to terminal loss under section 32(i)(iii) or assessable to profit under section 41(2) would become clear only after the District Court passes the award apportioning the compensation between the assessee and the contractor. The Tribunal therefore set aside the order of the Appellate Commissioner and also of the Income-tax Officer and sent the case back to the Income-tax Officer to pass order after the award of the District Court is obtained on the question of apportionment of compensation. At the request of the assessee the Tribunal has made this reference for answering the question quoted above.

Learned counsel for the assessee contended that the Commissioner of Income tax (Appeals) following the decision of the Supreme Court in *Calcutta Co. Ltd.* v. *Commissioner of Income-tax* (1) came to the conclusion that as the question of apportionment was a definite affair and the assessee has given the value of the property of the contractor lying on the coal mines, he estimated the apportionment and came to the conclusion that the Income-tax Officer was not right in adding Rs. 36,228/-as profit under section 41(2) but he allowed Rs. 2,65,772/-as a loss under section 32 (i)(iii) of the Income-tax Act. It was

(1) 37 I T R. 1.

J. A. Trivedi Brothers, Balaghat v. *The Commissioner of Income-tax, Jabalpur, 1984*

contended by the learned counsel that as the estimates and the value of the property left by the contractor are ascertainable and have been stated by the assessee in a scientific manner, there was nothing which remained in doubt and therefore the Tribunal was not right in setting aside the order of the Commissioner of Income-tax (Appeals) and sending the case for its disposal after the District Court's award. It was contended that under Section 153 the question of limitation will arise and the matter may take long time for the District Court to dispose of the apportionment of compensation and pass an award and therefore the assessment cannot be finalised within the time as contemplated under section 153. Learned counsel, apart from the decision in *Calcutta Co.'s case* (*supra*), placed reliance on *Bharani Kanak Kumari Sahiba* v. *Commissioner of Income-tax* (1) and *United Commercial Bank* v. *C. I. T* (2). Learned counsel for the revenue, on the other hand, contended that the Tribunal's order in no way disposes of the matter finally. It was contended that under section 26(5) of the Coal Mines Nationalisation Act jurisdiction is conferred on the District Court for apportionment of the compensation and it is only after the award of the District Court that it could finally be determined as to what amount of compensation will be available to the assessee and therefore on that basis it could be worked out as to whether there will be profit taxable under section 41(2) or loss under section 32(i)(iii) of the Income-tax Act. It was contended that in view of the language of section 26(5) of the Coal Mines Nationalisation Act it could not be disputed that the matter will only be final when the District Court disposes of the reference and gives its award. It was contended that even the award may be more beneficial to the assessee as the quantum of compensation available to the assessee may even be reduced. It was also frankly admitted by the learned counsel for the assessee that ultimately the award may be more beneficial to the assessee or may not be but he contended that when the facts are ascertainable and certain, it is not necessary to keep the matter pending. As regards the question of limitation, learned counsel for the revenue contended that this question was not before the Tribunal and was not raised and therefore that does not form part of the question referred to this court and therefore it was not necessary to be considered, whereas according to the learned counsel for the assessee when the matter is sent back to the Income-tax Officer for consideration of assessment after the award of the District Court is received, it is inherent that question of limitation under section 153 may arise.

It is not in dispute that the compensation fixed for this coal mine will have to be apportioned in view of the property and assets of the contractor lying

(1) 28 I. T. R. 462. (2) 137 I. T. R 434.

on the coal mine apart from the property and assets of the owner of the coal mine and it is also not disputed that even before this apportionment if there are other claims, the Commissioner of Claims will determine them and it is only after payment of all other claims what remains will be apportioned between the owner and the contractor in the light of the property and assets which the contractor may have lost on the coal mines. The only controvery is that according to the learned counsel for the assessee these are matters which could be ascertained by taking the price of articles lying on the coal mines and applying a scientific basis for assessment of it. It was contended that the contractor's claim for loss was accepted by the Tribunal as it was before a different Tribunal whereas the estimate of the assessee, the owner of the coal mines, based on the same basis has not been accepted by the Tribunal where this case was heard.

Calcutta Co. Ltd v. *Commissioner of Income-tax* (1), on which reliance was placed by the learned Commissioner (Appeals), lays down that the diffculty in the estimation thereof did not convert the accrued liability into a conditional one, because it was always open to the income-tax authorities concerned to arrive at a proper estimate thereof having regard to all the circumstances of the case, What was held in this case was that where the facts are ascertainable they could be ascertained and it was contended that the assessee had given the estimates on the basis of the price of the property estimated on scientific basis. It is clear that *Calcutta Co.'s case* (*supra*) was not a case of the kind where the question of apportionment of the quantum of compensation was subject to the jurisdiction of a competent Court. In the present case it could not be disputed that the Commissioner of Claims has to ascertain various claims and after giving credit for these claims find out the balance of compensation which is payable and out of this for apportionment of the compensation between the owner and the contractor the Commissioner has to make a reference to the District Court and under section 26(5) of the Coal Mines Nationalisation Act the award of the District Judge will finally settle as to what will be available to an owner and what will be availaole to a contractor. In view of the language of section 26(5) it appears that the Tribunal felt that the matter should be kept open till the order is passed by the District Court apportioning the compensation as that will be the final order deciding as to what amount of compensation will be payable to the assessee and, therefore, the Tribunal felt that it is only then that it could be found out whether there will be profit available for taxation under section 41(2) or loss to be considered under section 32(i)(iii) of the Income-tax Act. It is, therefore, not a case where the Income-tax Officer's assessment would be final

(1) 37 I. T. R 1.

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until the District Court passes its award and it is in view of the matter it appears that the Tribunal reopened the case and sent it back to the Income-tax Officer to decide after the award of the District Court. It is, no doubt, true that the question of limitation whether will cause any impediment or not, it does not appear to be a question raised in this order of reference nor that question is referred to us and in that view of the matter it is not necessary for us to go into that question. As the Tribunal has not finally disposed of the matter but only remanded it for decision after the matter is finally settled by the District Court about apportionment of compensation, in our opinion, no question of law arises which needs a reference. In this view of the matter, therefore, our answer to the question referred to us is in the affirmative saying that the Tribunal was justified in law in sending the case back to the Income-tax Officer.

The reference is answered accordingly. In the circumstances, parties are directed to bear their own costs.

Reference answered accordingly.

MISCELLANEOUS CRIMINAL CASE

Before Mr. Justice B. C. Varma.

8 Mar. 1984

DILDAR SINGH and others, Applicants*

v.

STATE OF M. P., Non-applicant.

Dakaiti Prabhavit Khetra Adhiniyam, M. P. (XXXVI of 1981), Sections 4-A and 5(2), Proviso and Criminal Procedure Code, 1973 (II of 1974), Section 167(2), Proviso—Arrest of the accused on suspicion of having committed a specified offence under the Adhiniyam— Provisions of sections 4-A and 5(2) of the Adhiniyam applicable and not the provision of section 167(2)—Accused not entitled to be released on bail at the expiry of 90 days by force of proviso to section 167(2) of the Code—Accused when

*Misc. Cr. C. No. 312 of 1984.

Dildar Singh v. *State of M. P.*, *1984*

entitled to be released on bail within 120 days—Magistrate not forwarding the accused to special Court and continued granting remands after the period of 90 days—Detention of the accused not illegal—Accused not entitled to be released on bail on that ground.

When the accused have been arrested on a suspicion of having committed an offence punishable under section 396 of the Indian Penal Code, which is a specified offence under the M. P. Dakaiti Aur Vyapharan Prabhavit Kshetra Adhiniyam, 1981, they can be remanded to custody by the Special Judge for a period of 120 days in case he is of opinion that there exists ground to believe that the accusation is well founded. The case shall, therefore, be governed by sections 4-A and 5 of the Adhiniyam and not by section 167 of the Code of Criminal Procedure. The accused can be released on bail even during the period of 120 days of their arrest if they are able to show that no reasonable ground exists for believing that accusation or information against them is well founded. They, however, could not be released on bail on the expiry of 90 days by force of proviso to sub-section (2) of section 167 of the Code. In deciding an application for bail under section 5(2) of the Adhiniyam Judicial Scrutiny is permissible.

Gulabchand Kannoolal v. *State of M. P. and others* (1); relied on.

Kashmir Singh v. *State of Punjab* (2) and *Hussainara Khatoon* v. *State of Bihar* (3); referred to.

Pramod Kumar Khare v. *State of M. P. and others* (4); relied on.

It is true that in accordance with the provisions under section 4-A of the Adhiniyam, after the expiry of 15 days or under sub-section (2) when the Magistrate considers the detention of the accused unnecessary, whichever is earlier, the accused has to be forwarded to the Special Judge having jurisdiction in the matter. Even if the Magistrate has not done it and he has continued granting remands even after the period of 90 days, the detention of the accused would not be illegal and the accused cannot be released on bail on this ground because even if the Magistrate thought that there was no accusation or reasonable ground to believe that the accused were concerned with the commission of any specified offence, he was required to commit the accused to the Court of Sessions as other offences for which the accused are charged were only triable by that Court.

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(1) 1982 M. P. L. J. 7 (2) 1984 Cr. L. J. 51.
(3) A. I. R. 1979 S. C. 1377.
(4) M. P. No 827 of 1981, decided on the 24th November 1981 (MP).

State of U. P. v. *Lakshmi Brahman* (1); relied on.

Surendra Singh for the applicant.

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

Cur. adv. vult.

ORDER

B.C. VARMA J.—This order shall also govern the disposal of the connected Miscellaneous Criminal Case No. 338 of 1984 (State of M. P. v. Pritamsingh).

Application in Miscellaneous Criminal Case No.312 of 1984 is one under Section 439, Criminal Procedure Code, for release of the 11 applicant/accused on bail. Miscellaneous Criminal Case No. 338 of 1984 relates to the cancellation of bail under section 439(2), Criminal Procedure Code, in respect of accused Pritamsingh who was released on bail by this Court, *vide* Order dated 30-1-1984, in Miscellaneous Criminal Case No. 43 of 1984. The accused persons in both these cases are being prosecuted jointly with others under Sections 302/149,396 147,148 and 149 of the Indian Penal Code. The incident leading to the death of one Prahlad as a consequence of which the accused were arrested was committed in Damoh District where the Madhya Pradesh Dakaiti Aur Vyapharan Prabhavit Kshetra Adhiniyam, 1981 has been made applicable. Special Judge under the Adhiniyam has been oppointed to try persons accused of certain specified offences. Offence punishable under Section 396 of the Indian Penal Code is one of such offence. The allegation against the applicant/accused is that they way-laid one Prahlad who himself was armed with a rifle and a few cartridges. Prahlad was beaten with lethal weapons, disabled and done to death. One of the accused persons then took away the rifle and cartridges which Prahlad had. After the accused were arrested, they were produced before the Judicial Magistrate First Class who, on request being made by the police, remanded them to police custody even for a period beyond 15 days and did not forward the accused to the Special Judge appointed under the Adhiniyam. It is common ground that the charge-sheet could not be filed within 90 days of their arrest. The accused applicants, therefore, claimed that they have become entitled to be released on bail by virture of the provision contained in proviso to Section 167(2) of the Code of Criminal Procedure, as they are ready to furnish bail as may be directed. In respect of accused Pritam Singh (non-applicant in Miscellaneous Criminal Case No. 338 of 1984), this contention

(1) A. I. R. 1933 S.C. 439.

prevailed with me and, therefore, I released him on bail, *vide* Miscellaneous Criminal Case No. 43 of 1984, dated 30-1-1984.

The contention on behalf of the State is that since the investigation of the crime for which the applicants have been arrested, relates to a specified offence as defined in section 2(f) of the Adhiniyam, remand is permissible for 120 days in terms of proviso to section 5(2) of the Adhiniyam and, therefore, release on bail cannot be claimed as of right immediately on expiry of 90 days after the arrest.

Shri Surendra Singh, learned counsel for the accused, argued that merely because the police in an area to which the Adhiniyam has been made applicable, registers a crime against any person for having committed any specified offence, it cannot be concluded that the provisions of the Adhiniyam alone will be attracted and those of the Criminal Procedure Code shall be completely out of consideration. The submission is that from the evidence collected by the prosecution so far offence under section 396, Indian Penal Code (a specified offence under the Adhiniyam) is not even remotely made out against the accused and, therefore, not section 5 of the Adhiniyam, but section 167(2) of the Code is attracted. Consequently, the accused are entitled to be released on bail on the expiry of 90 days of their arrest, as the charge-sheet till then was not filed. As against this, Shri M. V. Tamaskar, learned Government Advocate, appearing on behalf of the State, relying upon Section 4(A) of the Adhiniyam, argued that there exist grounds for believing that the accusations against the accused of having committed an offence under section 396, Indian Penal Code, are well founded and, therefore, it is the provisions of the Adhiniyam alone, which shall govern the matter of remand of the accused to custody. After hearing the learned counsel, I am of the opinion that the contention raised on behalf of the accused cannot be accepted.

The provisions contained in sections 4-A and 5 of the Adhiniyam more or less are in line with section 167 of the Code of Criminal Procedure and deal with the stage before the challan is filed. In the matter of grant of remand, it is these provisions which shall apply and not the provisions contained in section 167 of the Code, when a person is arrested and detained on a reasonable suspicion of having committed or being concerned with the commission of specified offence under the Adhiniyam. A Full Bench of this Court, in *Gulabchand Kannoolal* v. *State of M. P. and others* (1), concluded that proviso to sub section (2) of section 5 of the Adhyadesh which has later been passed as the Adhiniyam, with slight modification, deals with the stage before challan is filed. The Full Bench also observed that a person arrested on a dacoity or a

(1) 1982 M. P. L. J. 7.

specified offence under the Ordiance (now Adhiniyam) can bail inspite of section 5(2) at the stage immediately after his arrest on the ground that there was no reasonable suspicion of his being concerned with such offence; at the stage of 24 hours of his arrest and during investigation on the ground that there are no grounds that the accusation and information against him is well founded and at the stage after the investigation is complete on the ground that there is no sufficient evidence or *prima facie* proof against him in support of the accusation

The Madhya Pradesh Dakaiti Prabhavit Kshetra Adhyadesh, 1981 (Ordinance No. 5 of 1981) did not contain any provision prescribing the procedure relating to arrest of any person accused of any offence covered by the Ordiance. Similarly, investigation into such offence, including the production of the person arrested before a competent judicial officer for remand had to be governed by the provisions of Criminal Procedure Code. The arrest of such person had to be in accordance with Chapter V of the Code of Criminal Procedure. A person thus arrested had to be produced before the Magistrate if the investigation could not be completed within 24 hours and the matter of his remand for further investigation was governed by provisions contained in section 167 of the Code. Section 167 of the Code expressly provides for judicial scrutiny while granting remand and extends to examine whether the arrest was validly made in accordance with section 41 of the Code. A Full Bench of Punjab and Haryana High Court in *Kashmir Singh* v. *State of Punjab* (1), held that the presumption is that the exercise of power by the Judicial Magistrate under the Code would normally be judicial and only the clearest *indicia* to the contrary would be necessary to hold that it is executive in nature. With reference to exercise of powers under section 167, Criminal Procedure Code, it was held that sub-section (2) of section 167 permits detention of the accused produced before the Magistrate by the police for a period of 15 days on the basis of the material placed before him by the investigating agency and on satisfaction that the grounds exist for so doing. Consequently, it was held that the exercise of such power is essentially judicial in the nature. In paragraph 13 of the report, S. S. Sandhawalia, C. J., speaking for the Bench, expressed himself in these words :—

> "It would, therefore, follow that for the exercise of this jurisdiction, the Magistrate is obliged to apply his mind to the materials produced before him; hear the accused either in person or through his counsel as also the prosecution and then determine the significant question whether the accused should be detained at all and if so, the nature of such custody within the parametars

(1) 1984 Cr. L. J. 51.

prescribed in S. 167 of the Code. This, in essence, is a judicial function and there is no dearth of authority that in doing so, the Magistrate exercises his judicial mind."

Similar observations were made by J. S. Verma, J. while expressing his opinion, dated 14-10-1981, on difference between Sharma and Seth JJ., in *Pramod Kumar Khare* v. *State of M. P. and others* (1). In deciding a question for remand, the Magistrate would be guided by evidence already available and the prospect for getting further relevant evidence as regards the alleged offence. The Ordinance was superseded by Adhiniyam later. By the M. P. Dakaiti Aur Vyapaharan Prabhavit Kshetra (Sansodhan) Adhyadesh, 1982, the Adhiniyam too was amended and section 4-A was added. That section runs as below:—

"4-A. Procedure where investigation cannot be completed in 24 hours.—

(1) Whenever any person who has been concerned, or against whom a complaint has been made, or credible information has been received, or a reasonable suspicion exists, of having been so concerned, with the commission of a specified offence, is arrested and detained in custody, and it appears that the investigation cannot be completed within the period of twenty-four hours fixed by section 57 of the Code, and there are grounds for believing that accusation or information is well founded, the officer incharge of the police station or the police officer making investigation, if he is not below the rank of sub-Inspector shall forthwith transmit to the nearest Judicial Magistrate a copy of the entries in the diary as prescribed in the Code relating to the case, and at the case time forward the accused to such Magistrate.

(2) The Magistrate to whom the accused person is forwarded under sub-section (1) may, whether he has or has not the jurisdiction, from time to time authorise detention of the accused in such custody as such Magistrate may think fit, for a term not exceeding 15 days in whole.

(3) If the Magistrate at any time considers detention of the accused unnecessary or after the expiry of the period of detention of 15 days under sub-section (2), whichever is earlier, he shall forward the accused alongwith all papers to the Special Judge having jurisdiction in the matter.

(1) Misc. Petition No. 827 of 1981, decided on the 24th November 1981.

(4) On the accused being so forwarded alongwith the police papers the Special Judge may either take cognizance of the case treating the papers as police report under section 8 or may pass such orders with respect to remand as a Magistrate having jurisdiction could have passed under the provisions of the Code."

Then, this was superseded by the Amendment Act. This amended section 4-A is more or less the same as section 167 of the Code. Similar considerations for granting remand shall apply now in relation to the person arrested on suspicion of having committed a specified offence under the Adhiniyam. Judicial scrutiny, therefore, as indicated above, is permissible while remanding the person so arrested the only difference being that the jurisdiction under section 4-A has to be exercised by special Judge having jurisdiction in the matter.

The other relevant section is section 5 of the Adhiniyam which, after its amendment, reads thus:—

"5. Regulation of grant of bail–

(1) Notwithstanding anything contained in the Code, no application for an anticipatory bail shall be entertained by any Court in respect of a dacoit.

(2) Notwithstanding anything contained in the Code, no application for bail of a dacoit shall be allowed, if opposed:

Provided that no Court or Magistrate shall authorise the detention of a person accused of a specified offence in custody during the course of investigation for a period exceeding 120 days and on the expiry of such period, in the event of the police report under sub-section (2) of section 173 of the Code being not filed, the accused shall be released forthwith if he is prepared to and does furnish bail."

Here, in this case, we are not concerned with sub-section (1) of Section 5. What is relevant for consideration is proviso to sub-section (2) which is practically the same as sub-section (2) of Section 167 of the Code. In fact, J. S. Verma, J. in the case of *Pramod Kumar Khare* (*supra*) expressing his opinion, observed that but for modifying the other limit as 120 days, there is no material difference between sub section (2) of section 167 of the Code and proviso to sub-section (2)

of section 5 of the Adhyadesh and further that proviso to sub-section (2) of section 5 supersedes sub-section (2) of section 167 of the Code in that behalf. Repelling the argument that judicial scrutiny under sub-section (2) of section 5 is completely ousted and for that reason it was invalidly enacted, J. S. Verma, J. held that while deciding an application for bail under section 5(2), judicial scrutiny was permissible. It was also observed that the Court while considering an application for bail has to see whether the police officer has arrested the person on his satisfaction that at least a reasonable suspicion exists of the person detained having been concerned with any such offence. Once this is concluded, the result is that within a period of 120 days as provided in section 5(2) of the Adhiniyam, the special Judge would be entitled to and should scrutinise either while granting remand to custody or while considering an application for release on bail of a person arrested for an specified offence under the Adhiniyam that there are grounds for believing that the accusation of information against the person so arrested are well founded. The person arrested would be entitled to show that the information received by the police is not credible or that no amount of suspicion exists of his being so concerned with the commission of a specified offence. If the Special Court is of the opinion that reasonable suspicion exists of the person arrested of his being concerned with the commission of the offence and there are grounds for believing that the accusation or information is well founded, he may authorise detention of the accused in custody as provided in various clauses of that section. By force of proviso to sub-section (2) of section 5, this outer limit is 120 days and if during this period the investigation is not complete and the police report under sub-section (2) of section 173 of the Code is not filed, the person arrested shall be released on bail, if he is prepared to and does furnish bail. In *Hussainara Khatoon* v. *State of Bihar* (1), P. N. Bhagwati, J., while considering a case under proviso to sub-section (2) of Section 167 of the Code, expressed that on the expiry of the period of 90 and 60 days mentioned therein, the Magistrate must before making a further remand to judicial custody, point out to the under trial prisoner that he is entitled to be released on bail.

In the instant case, the accused have been arrested on a suspicion of having committed an offence punishable under section 396 of the Indian Penal Code, which is a specified offence under the Adhiniyam. The accused can, therefore, be remanded to custody by the Special Judge for a period of 120 days in case he is of opinion that there exists ground to belive that the accusation is well founded. The accused persons say that inspite of this particular offence (one u/s 396, I. P. C.) reasonable grounds do not exists of their having been

(1) A. I. R. 1979 S.C. 1377.

so concerned with the commission of any such offence and the facts *prima facie* show that the accusation in that behalf is completely groundless. This, however, they did not agitate for the period of 90 days of their arrest. It is, however, claimed that on the expiry of 90 days, they are entitled to be released on bail under section 167(2) as according to them proviso to sub section (2) of section 5 of the Adhiniyam will be entirely out of consideration. This argument, in my opinion, is fallicious for the reason that they have been arrested on an accusation of having committed a specified offence. The case shall, therefore, be governed by sections 4-A & 5 of the Adhiniyam and not by section 167 of the Code. The accused can, therefore, be released on bail even during the period of 120 days of their arrest if they are able to show that no reasonable ground exists for believing that accusation or information against them is well founded. This is the ratio of the opinion expressed by J. S. Verma J. in *Pramod Kumar Khare's case* (*supra*) and the Full in *Gulabchand case* (*supra*). Considering the facts of this case, I am of the opinion that the accusation against the accused relating to the offence under section 396 of the Indian Penal Code (the specified offence) is entirely groundless. True it is that after the assault on the deceased and after he fell down injured on the ground, one person out of the group of assailants took away the rifle and cartridges which the deceased had with him at that time. From the entire papers, report under sub-section (2) of section 173 of the Code being not filed, it is difficult to say that the accusation make out any offence under section 396 of the Indian Penal Code. I would have, therefore, directed the release of all the accused persons on bail after the expiry of period of 120 days if the challans were not filed because the proviso to sub-section (2) of section 5 of the Adhiniyam, if properly understood, is confined to investigation of the case before the challan is filed. [See: Para 17, *Gulabchand Kannoolal* v. *State of M. P. and others* (1)], I am not prepared to accede to the contention advanced on behalf of the accused that as no ground exists for believing that the accused are in any way concerned with the commission of the specified offence and their case shall be governed only by section 167 of the Code because they have been arrested on suspicion of their having been concerned with the commission of the specified offence and have been so accused. The investigation also relates to a specified offence and, therefore, too it is only section 4-A and section 5 of the Adhiniyam which shall govern the case and not section 167 of the Code. The accused, therefore, could have been released on bail before the expiry of 120 days for the reason that no reasonable ground existed for believing that they are concerned with the commission of the specified offence, i. e., one punishable under section 396 of the Indian Penal Code, and

(1) 1982 M P L J 7.

on the expiry of 120 days if the police report under section 173 of the Code was not filed within that period of 120 days. They, however, could not be released on bail on the expiry of 90 days by force of proviso to sub-section (2) of section 167 of the Code.

It was pointed out by the learned counsel for the accused that the matter was being dealt with by the magistrate before whom they were produced after their arrest even beyond the expiry of 15 days. The Magistrate did not forward the accused to the special Judge having jurisdiction in the matter in accordance with sub-section (3) of Section 4-A of the Adhiniyam. They were forwarded to the Special Judge on 21-8-1983, i. e., after the expiry of 120 days, of their arrest, and after rejecting their application for release on bail. It was, therefore, urged that the detention of the accused under the orders of the Magistrate was illegal after the period of 90/120 days and, therefore, also they are entitled to be released on bail. In my opinion, this contention is also not correct. It is true that in accordance with the provisions under section 4-A of the Adhiniyam, after the expiry of 15 days, or under sub-section (2) when the Magistrate considers the detention of the accused unnecessary, whichever is earlier, the accused has to be forwarded to the Special Judge having jurisdiction in the matter. That was not done in the present case. But the Magistrate continued granting remands, even if the Magistrate thought that there was no accusation or reasonable ground to believe that the accused were concerned with the commission of any specified offence, he was required to commit them to the Court of Sessions as other offences for which the accused are charged were only triable by that Court. The learned Magistrate granted remands even after the period of 90 days. Even so the detention would not be illegal. This is the law which has now been laid down by the Supreme Court in *State of U. P.* v. *Lakshmi Brahmen* (1). The accused cannot even now be released on bail on this ground because the matter has been sent to the Special Court and the police report under section 173(2) of the Code has been filed.

Pritam Singh was released on bail by me in Miscellaneous Criminal Case No. 43 of 1984 on a view that section 167(2) of the Code became applicable. In the light of what I have stated above, Pritam Singh also could not have been released on bail with the aid of section 167(2) of the Code. On a careful consideration of the matter, I am of the opinion that his release on bail on that count was erroneous and the order releasing him on bail on that count has to be cancelled. However, from the facts disclosed in the case-dairy, I find that he was a person who himself was severely assaulted and has received grievous

(1) A. I. R. 1983 S. C. 439.

injuries. He had to be immediately admitted in the hospital and for good number of days the police even did not arrest him. There was some controversy as to his actual arrest initially. The prosecution also has not shown that after his release on bail, he has in any way misused it. There is no such allegation against him. That being so, I direct that his release on bail shall continue but for entirely different reason.

For what I have stated above, both these applications are dismissed. Pritamsingh alone shall continue to remain on bail but for reasons other than those which weighed with me in my order dated 30th January, 1984, in Miscellaneous Criminal Case No. 43 of 1984.

Application dismissed.

MISCELLANEOUS PETITION

Before Mr. G. L. Oza C.J. and Mr. Justice C. P. Sen.

30 Mar. 1984

S. S. BHATIA AND COMPANY, RAJNANDGAON, Petitioner*

v.

STATE OF MADHYA PRADESH and others, Respondents.

Excise Act C. P. and Berar (II of 1915)—Section 62 (f) and conditions of auction published in the official Gazette dated 6-1-1980—Firm depositing earnest money but not producing registration certificate—Firm not entitled to offer bids—Deposit in the name of firm—Individual partner not entitled to offer bids—Instructions for auction published in the Gazette dated 6-1-1984 though administrative and not statutory rules, authorities are bound to follow them.

Although the petitioner-partnership firm had deposited the earnest money but it could not produce the registration certificate and, therefore, in accordance with the conditions of auction the firm was not entitled to offer bids.

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*M. P. No. 258 of 1984.

If the deposit stands in the name of the firm it could not have been adjusted or treated as deposit in the name of a particular person as it is clear that although the partnership firm is not a legal person but it means a group of persons and money deposited in the name of group of persons could not be treated as deposited in the name of one. If there was no deposit of earnest money by the petitioner in his own name, the question of his being permitted to offer bids is of no consequence as admittedly in accordance with the conditions of auction a person who had not deposited the earnest money could not be permitted to offer a bid.

Though instructions for auction published in the Gazette dated 6-1-1984 in exercise of the powers under section 62(f) of M. P. Excise Act are administrative instructions, the authorities are bound by them. If the authorities have followed these instructions which were also published in the auction notice long in advance no grievance that the authorities were wrong in following instructions could be made. In fact, the authorities are expected to act in accordance with the conditions laid down by the State Govt. and the conditions advertised. If the conditions for reauction as are stated in Rule 12(a) and (b) are not satisfied, the prayer for re-auction could not be granted either by the Excise Commissioner or by the State Govt.

Ramana v. *I. A. Authority of India* (1); referred to.

Y. S. Dharmadhikari for the petitioner.

S. L. Saxena Govt. Adv. for the respondents.

Cur. adv. vult.

ORDER

The Order of the Court was delivered by OZA, C. J.—This is a petition filed by the petitioner challenging the auction of a group of 24 shops in Raipur held on 15th January 1984. The petitioner by this petition has sought the cancellation of the acceptance of the bid of respondent No. 7 and in substance has sought the relief of re-auction on the ground that the petitioner was not permitted to offer bids and bids offered by him were not recorded.

(1) A. I. R. 1979 S.C. 1628, at p. 1632.

S. S. Bhatia & Company, Rajnandgaon v. *State of M. P., 1984*

The petitioner is a firm constituted under the Indian Partnership Act and in response to the notification issued by the Collector, Raipur, for auction which was notified to be held on 15th and 16th January 1984, the petitioner firm had deposited the earnest money Rs. 15,50,000/- in the name of the petitioner firm. This petition pertains to the auction of 24 country liquor shops in Raipur and adjoining areas as indicated in the auction notice. It is alleged by the petitioner that the petitioner firm had deposited the earnest money but as the date of auction, i. e. 15th January 1984 was a Sunday it was not possible for the petitioner to produce the registration certificate of the firm and on that count he was not permitted to offer the bids. Surjit Singh Bhatia who was one of the partners of the firm was present in person. It is also alleged that he made a request that if the firm is not permitted to offer bids because of the technical defect of non-production of registration certificate, the petitioner should be permitted to offer the bid in person and the earnest money deposited in the name of the firm be either treated as earnest money deposited by him personally or the amount be refunded so that he may deposit it in his individual name immediately, but according to the petitioner this was not done and even his request for postponement of the auction to the next day, i. e. 16th January 1984 was also not accepted and the bid of respondent No. 7 who was the only person offering the bid was accepted at Rs. 1,40,00,000/- and the petitioner was not permitted when he was prepared to offer a higher bid i.e. Rs.1,51,00,000/-. It is alleged by the petitioner that in so doing, the authorities not only did not permit the petitioner to offer the bid which was higher than that of respondent No. 7 and by doing so they also caused a loss of revenue to the tune of Rs. 11,00,000/- which was a substantial sum. It is also alleged by the petitioner that immediately thereafter he submitted an application to the Commissioner of Excise, which was dated 18th January 1984, wherein he drew the attention of the Commissioner that by not allowing the petitioner to offer the bids the authorities have caused loss to the revenue and it is alleged by the petitioner that he received a letter from the Commissioner of Excise on 30th January 1984 enquiring whether petitioner is prepared to offer a bid of 10% more than the bid of Rs. 1,40,00,000/-which was accepted, and whether he is prepared to deposit 1/3rd of his offer in advance. According to the petitioner, by his letter dated 8th February 1984 he replied that he was prepared to offer a bid of 10% above Rs. 1,40,00,000/- and is also prepared to deposit 1/3rd amount but according to the petitioner thereafter he did not hear anything from the Excise Commissioner and if the Excise Commissioner had directed him to deposit the amount, he would have deposited it. It was, therefore, contended by the petitioner that he was not permitted to offer bids in spite of the fact that earnest money was deposited and even when the Commissioner was prepared to consider his offer and the petitioner had expressed his

willingness, still the Commissioner did not issue any further directions for depositing the 1/3rd amount.

The material facts are not in dispute. It is not disputed that the earnest money Rs.15,50,000/- was deposited in the name of the petitioner, a partnership concern.

It is not in dispute that Surjit Singh Bhatia personally had not deposited in his own name any earnest money.

It is also not in dispute that the petitioner firm could not produce the registration certificate of the firm.

The only controversy is as to whether the petitioner offered any bids which were not recorded and as to whether the petitioner made a request for converting the deposit of Rs. 15,50,000/-in his personal name and permit Surjit Singh Bhatia personally to offer the bids. As according to the return filed by the respondents there was no such prayer nor it could have been done as admittedly the earnest money was deposited by the firm and in the name of the firm i. e. the petitioner, and this could not have been treated to be a deposit in the name of Surjit Singh Bhatia, a person who claims to be one of the partners of the firm. It is also disputed that any request for postponement was made and it is also contended that such a request could not have been accepted as the auction although was to proceed on both the days but these were not the only shops and a number of other shops had to be auctioned. Although there have been a petition, a rejoinder and an additional return but the facts stated above are the material facts. It is also not disputed that an application was made by the petitioner to the Commissioner of Excise on 18th January 1984 and that the Commissioner replied on 30th January 1984 but the stand taken in the return is that for re-auction the condition precedent is that 1/3rd amount should have been deposited although the petitioner showed his willingness to deposit the 1/3rd amount but in fact 1/3rd amount was never deposited and, therefore, re-auction could not have been ordered.

It was contended by the learned counsel for the petitioner that although the earnest money deposited was in the name of the firm but firm is not a legal person different from the partners. At best it is only a group of persons and, therefore, if the petitioner who was present in person wanted to offer the bids by treating the deposit in his individual name the authorities could not have prohibited or refused to record his bids. It was also contended that the petitioner's

prayer for treating this to be a deposit of Surjit Singh Bhatia in person could have been considered.

It was contended that when the auctions were fixed on 15th and 16th January 1984, 15th being a Sunday, in the interests of revenue the authorities could have postponed the auction to 16th so that the petitioner firm could have produced the certificate of registration of the firm so that the technical defect could have been avoided and the petitioner firm could have been permitted to offer bids which could have given further advantage to the revenue. Learned counsel for the petitioner contended that under the scheme of the Excise Act the State Government is the sole authority to confer the privilege of sale of liquor to any person and the basic consideration with the State Government should be the revenue and in this view of the matter the authorities on technicalities prevented the petitioner from offering the bids and thereby caused a loss of revenue to the tune of about Rs. 11,00,000/-. It was also contended by learned counsel for the petitioner that his application to the Commissioner was made within three days of the auction and the Commissioner asked the petitioner to offer a bid of 10% above and asked him whether he was prepared to deposit 1/3rd amount and the petitioner accepted the offer of the Excise Commissioner and it was necessary for the Excise Commissioner to direct the petitioner to deposit 1/3rd amount so that re-auction could have been ordered. It was even contended during the course of arguments that the application to the Excise Commissioner could have been treated as an appeal as is provided in the rules and the appeal also has not been decided. Learned counsel for the petitioner referred to the decisions of their Lordships of the Supreme Court in *P.N. Kaushal* v. *Union of India* (1), *Ramana* v. *I. A. Authority of India* (2) and *Nashirwar* v. *State of M. P.* (3) to contend that although the excise contracts are for sale of liquor which runs contrary to the directive principles of the State Policy but still when the State confers this privilege on a person and the scheme of auction is only a scheme to secure maximum revenue to the State, the State ought to have considered the question of loss of revenue as a material question. It was contended that the proceedings of auction themselves indicate that there was no one else to offer higher bids except respondent No. 7 and the manner in which the auction was hurried depriving the petitioner an opportunity to offer has ultimately resulted in the bid of respondent No.7 being accepted which was only Rs. 1,40,00,000/-, and more which could have been secured to the revenue has been lost merely because of the manner in which the auction was conducted and the manner in which the petitioner was kept back. Allegations are also made against the officers of the

(1) A. I. R. 1978 S. C. 1457. (2) A. I. R. 1979 S. C. 1628 at p. 1632.
(3) A I.R. 1975 S.C. 360.

Excise Department conducting the auction and it is alleged that they conducted the whole matter in the manner in which respondent No. 7 could secure the contract although it is a positive loss of the revenue to the tune of Rs. 11,00,000/-.

Learned Government Advocate, on the other hand, contended that the conditions of auction which have been laid by the State Government in the exercise of powers under section 62(f) of the M. P. Excise Act and which have been published in the Gazette dated 6th January 1984 provide the eligibility of a person to offer a bid and they also provide for eligibility of a person to pray for a re-auction. It was contended that there were two conditions necessary to be satisfied before a person could be allowed to offer a bid. The first was the earnest money which admittedly was Rs. 15,50,000/-which had to be deposited in advance and if it was a firm, a registration certificate of the firm had to be produced. The second condition to which emphasis has been laid by the learned Government Advocate is that if a person who offers a bid was not the previous contractor then he had to produce a solvency certificate or a revenue record certifying that the person holds agricultural land 2 hectares or odd as is provided in the condition of auction. It was contended that the petitioner firm which had deposited the earnest money did not produce the registration certificate and, therefore, was not entitled to offer the bid. Even the second condition of producing a solvency certificate or a revenue record showing holding of land was not fulfilled.

As regards Surjit Singh Bhatia, a person, it was contended that he is not before this Court as this petition has been filed by Surjit Singh Bhatia & Company, a firm. Apart from it, it was contended that as the person Surjit Singh Bhatia had not deposited the earnest money, he could not have been allowed to offer the bids. It was contended that even if this request of Surjit Singh Bhatia, a person and a partner of the firm, is considered, the deposit which was made in the name of the firm could not have been altered or adjusted in the name of a person as that could not be done unless the consent of the other partners was there, nor the amount could be withdrawn as the amount could only be refunded to the firm and not to Surjit Singh Bhatia. It was, therefore, contended that so far as Surjit Singh, Bhatia, the person, is concerned, he did not fulfil any one of the eligibility clauses entitling him to offer a bid. Under these circumstances, it was contended that the petitioner firm was not eligible as it did not produce the registration certificate nor satisfied the authorities about the requirement of the solvency certificate or the revenue record showing holding of land. Surjit Singh Bhatia personally was not entitled to offer the bid as he had not deposited the earnest money and, therefore, he was not a

person eligible to offer the bids nor there is anything to indicate that he satisfied the second condition of the solvency certificate or revenue record showing that he is holding a land as required under the eligibility clauses.

It was contended by the learned Government Advocate that so far as the question of re-auction is concerned, in the conditions of auction published in the Gazette rule 12 pertains to re-auction and the first requirement of a person who applies for re-auction is that he must be a person who had offered the bids. As the petitioner firm or Surjit Singh Bhatia were not entitled to offer the bids and as the bids were not offered, neither the petitioner firm nor Surjit Singh Bhatia were entitled to claim a re-auction as has been provided in Rule 12. It was contended that the second condition which is incorporated in Rule 12(b) is that the person who claims re-auction has to deposit 1/3rd of the amount of proposed bid along with the application. According to the learned Government Advocate admittedly when the prayer for re-auction was made to the Commissioner, 1/3rd of the proposed bid was not deposited. It was not even deposited when in response to the letter of the Commissioner dated 30th January 1984 the petitioner although expressed his willingness but in fact the 1/3rd amount was never deposited and in such a situation the petitioner was not entitled to claim re-auction as the conditions required under Rule 12 or instructions issued by the State Government were not fulfilled. Learned Government Advocate therefore contended that even if these instructions are not statutory rules, still it could not be disputed that they are administrative instructions and were notified long before and the petitioner knew them and therefore the authorities were bound to act in accordance with these instructions and could not give a go by to these conditions advertised and in support of his contention the learned Government Advocate placed reliance on the decision of their Lordships of the Supreme Court in *Ramana* v. *I. A. Authority of India* (1) where their Lordships have at length considered the question of the consideration or requirement following the conditions laid down in the notice of auction or tender even though they may not be statutory and have ruled that the authorities are bound to follow them. Learned Government Advocate also placed reliance on the Division Bench decisions in *Nanhelal Sahu* v. *State of Madhya Pradesh and another* (2) and *Pradeep Rajdeep & Company, Gadarwara* v. *State of M. P. and others* (3).

Learned counsel for the petitioner, on the other hand, contended

(1) A. I. R. 1979 S. C. 1628 at p. 1632.

(2) M. P. No. 2106 of 1983, decided on the 31th October 1983.

(3) M. P. No. 965 of 1983, decided on the 15th April 1983.

that the instructions published in the Gazette on which reliance is placed by the learned Government Advocate are not rules framed under section 62(f) of the M. P. Excise Act but are only instructions even if they are issued by the State Government and, therefore, they could not be said to be statutory rules. It was contended that under sections 13, 17 and 27 of the Excise Act it is the power of the State Government to give the privilege of selling liquor and the basic consideration before the State Government is the collection of revenue. It was, therefore, contended that apart from the technicalities of the matter, the petitioner has demonstrated as to how the State has suffered a loss of revenue to the tune of Rs. 11,00,000/- and therefore it is for the State to consider the question of re-auction.

As stated earlier, it is not disputed that the petitioner partnership firm although had deposited the earnest money but could not produce the registration certificate and therefore admittedly in accordance with the conditions of auction the firm was not entitled to offer bids. Even without going into the controversy as to whether a request was made or not for adjustment or treating the earnest money to be the deposit of Surjit Singh Bhatia personally, it is very clear that when the deposit stands in the name of the firm it could not have been adjusted or treated to be a deposit in the name of a particular person as it is clear that although the partnership firm is not a legal person but it could not be doubted that it means a group of persons and money deposited in the name of a group of persons could not be treated to be deposited in the name of one. It is also clear that it could not have been refunded to Surjit Singh Bhatia. It could only be refunded to the firm and therefore the controversy about his request is of no consequence.

It could not also be disputed that so far as Surjit Singh Bhatia personally is concerned, there was no deposit in his own name of the earnest money and, therefore, the question of his being permitted to offer bids also is of no consequence as admittedly in accordance with the conditions of auction a person who had not deposited the earnest money could not be permitted to offer a bid. It is also clear that so far as the conditions of re-auction are concerned as have been stated clearly in Rule 12 of the notification issued by the State Government, the conditions were not satisfied as the petitioner was not the person who offered the bid as he was not eligible and that 1/3rd amount was not deposited as is contemplated under Rule 12(b).

The material question which emerges is that even if these notifications issued by the State Government are administrative instructions, are the

authorities bound to follow them? In *Ramana* v. *I. A. Authority of India* (1) after dealing with this matter of the conditions of auction notice at length, their Lordships observed:

> "It is, therefore, obvious that both having regard to the constitutional mandate of Article 14 as also the judicially evolved rule of administrative law, the 1st respondent was not entitled to act arbitrarily in accepting the tender of the 4th respondent, but was bound to conform to the standard or norm laid down in paragraph 1 of the notice inviting tenders which required that only a person running a registered IInd Class hotel or restaurant and having at least 5 years' experience as such should be eligible to tender. It was not the contention of the appellant that this standard or norm prescribed by the 1st respondent was discriminatory having no just or reasonable relation to the object of inviting tenders, namely, to award the contract to a sufficiently experienced person who would be able to run efficiently a IInd class restaurant at the airport. Admittedly the standard or norm was reasonable and non-discriminatory and one such a standard or norm for running a IInd class restaurant should be awarded was laid down, the 1st respondent was not entitled to depart from it and to award the contract to the 4th respondent who did not satisfy the condition of eligibility prescribed by the standard or norm. If there was no acceptable tender from a person who satisfied the condition of eligibility, the 1st respondent could have rejected the tenders and invited fresh tenders on the basis of a less stringent standard or norm, but it could not depart from the standard or norm prescribed by it and arbitrarily accept the tender of the 4th respondent. When the 1st respondent entertained the tender of the 4th respondent even though they did not have 5 years' experience of running a IInd class restaurant or hotel, it denied equality or opportunity to others similarly situate in the matter of tendering for the contract. There might have been many other persons, in fact the appellant himself claimed to be one such person, who did not have 5 years' experience of running a IInd class restaurant, but who were otherwise competent to run such a restaurant and they might also have competent with the 4th respondent for obtaining the

(1) A. I. R. 1983 All. 368

> contract, but they were precluded from doing so by the condition of eligibility requiring five years' experience. The action of the 1st respondent in accepting the tender of the 4th respondent, even though they did not satisfy the prescribed condition of eligibility, was clearly discriminatory, since it excluded other persons similarly situate from tendering for the contract and it was also arbitrary and without reason. The acceptance of the tender of the 4th respondent was, in the circumstances invalid as being violative of the quality clause of the Constitution as also of the rule of administrative law inhibiting arbitrary action."

Therefore, if the authorities have followed the conditions of auction notified by the State Government in the Gazette and also published in the auction notice long in advance, the petitioner could not make any grievance that the authorities committed any wrong. In fact, the authorities were expected to act in accordance with the conditions laid down by the State Government and the conditions advertised It also could not be doubted that as the conditions for re-auction as are stated in Rule 12(a) and (b) are not satisfied, the prayer of the petitioner for re-auction could not be granted either by the Excise Commissioner or by the State Government. An attempt no doubt has been made by the petitioner to indicate that the revenue has suffered a loss, the learned Government Advocate has clearly stated that the matter is still with the State Government and the State Government may pass appropriate orders but it is plain that the petitioner in this petition cannot seek a direction as discussed either for re-auction or for cancellation of the acceptance of the bid in favour of respondent No. 7.

It was contended that the State Government is the ultimate authority for granting the licence for sale of liquor and it was vigorously contended by learned counsel for the petitioner that the State Government which have delegated the powers to various authorities can ultimately take a decision in the interests of revenue to order re-aution, It is, however, open to the State Government in its wisdom to do as they choose although we will like to quote from *P. N. Kaushal* v. *Union of India* (1) the following observations:

> "We have reasoned enough to justify the ways of the Constitution and the law to the consumers of social justice and spirituous potions. The challenge falls and the Writ Petitions Nos. 4108-4109 etc., of 1978 are hereby dismissed with costs (one hearing fee). May we hopefully expect the State to bear true faith and allegiance to that constitution orphan, Art. 47?"

(1) A. I. R. 1978 S C 1457.

For the reasons stated above, the petition is dismissed. In the circumstances of the case, parties are directed to bear their own costs. Security amount, if deposited, be refunded to the petitioner.

Petition dismissed.

APPELLATE CIVIL

Before Mr. Justice G. L. Oza.

3 May 1982

PUNJAB NATIONAL BANK, SEONI, Appellant*

v.

THE NATIONAL INSURANCE CO. LTD., CALCUTTA and others, Respondent.

Civil Procedure Code (V of 1908), Section 20 and Insurance Act (IV of 1938), Sections 46 and 2(9)(b)—Insurance policy providing particular forum—Jurisdiction of competent Court not ousted—Agreement between the parties ousting jurisdiction of a competent Court—When effective—Convenience of parties and interest of justice in deciding question of jurisdiction—Consideration of.

Definition of the word "Insurer" in sub-clause (b) of sub-section (9) of Section 2 of the Insurance Act clearly provides for the company incorporated in India and, therefore, the provision contained in section 46 of the Insurance Act will apply to an Indian Company and in view of the language of section 46 inspite of the contract to the contrary or any term in the policy, the competent Court which has jurisdiction to try the suit will alone be competent to try it and on the basis of the contract or term of the policy it cannot be said that the Court mentioned in the term of the policy or the contract will be the only court which will have jurisdiction to try the suit.

Misc. Appeal No. 336 of 1981, from an order of V D. Bajpai, District Judge, Seoni dated the 27th August 1981.

Punjab National Bank, Seoni v. *The National Insurance Co. Ltd., Calcutta, 1982*

Isaqmahmad Habibji v. *The United India Fire and General Insurance Co. Ltd., Hyderabad* (1); relied on.

M/s Barbigha Cold Storage Co. (P) Ltd. v. *National Insurance Co. Ltd. & another* (2), *M/s Surajmall Shiwbhagawan* v. *M/s Kalinga Iron Works* (3); referred to.

Maganlal Dayji Mewawala and others v. *Satya Narain and others* (4); referred to.

An agreement does not oust the jurisdiction of the competent Court. It is effective only where two Courts have jurisdiction and by agreement, parties can agree for jurisdiction of one of them. Thus, when it is not disputed that no part of the cause of action arose outside the Seoni Court, jurisdiction of the Seoni Court could not be ousted on the basis of contract or a term in the policy. Even without section 46 of the Insurance Act, the Court has to consider on the basis of convenience and in the interest of justice, whether to exercise jurisdiction or not and in coming to this conclusion, the Court has to weigh various circumstances and the agreement or a term in the policy is one of such circumstances for consideration.

Michaol Colodetz and others v. *Serajuddin and Co.* (5); followed.

J. P. Sanghi for the appellant.

P. D. Pathak for respondents nos. 1 and 2.

M. M. Sapre for respondent no. 3.

Cur. adv. vult.

ORDER

OZA J.—This appeal and Misc. A. No, 340/81,341 and 342/81 all involve a common question about the jurisdiction of the Court below.

The present appeal arises out of the order passed by the District Judge Seoni in C.S. No. 6/B/71, dated 27-8-81 filed by the appellant against the respondents. Misc.A.No.340/81 is an appeal filed against the order passed by the District

(1) A. I. R. 1978 Guj. 46. (2) A. I. R. 1981 Pat. 21.
(3) A. I. R. 1979 Orissa 126. (4) A. I. R. 1978 All, 455.
(5) A. I. R. 1963 S C. 1044.

Punjab National Bank, Seoni v. *The National Insurance Co. Ltd., Calcutta, 1982*

Judge, Seoni in C. S. No. 4-B/71, dated 14-8-81 filed by the appellant. Misc. A. No. 341/81 is filed by the appellant-plaintiff against the order passed by the District Judge. Seoni in C.S. N. 1-B/71, dated 21.8.81 and Misc. A. No. 342/81 arises out of C. S. No. 3-B/71, dated 14-8-81, filed by the plaintiff against the order passed by the District Judge, Seoni. In all these appeals, the question considered by the Court below is about jurisdiction on the basis of a term in the Insurance Policy which provides that the jurisdiction will be at Bombay or a place where the headquarters of the Insurance Company are situated.

This order shall govern the disposal of all these appeals.

It is not disputed that the cause of action accrued at Seoni, but an objection was raised on the basis of the clause in the Insurance Policy which reads:

> "In case of any claim arising in respect of the property hereby insured the same shall be settled and paid in Bombay and the entire cause of action shall be deemed to arise in Bombay and further that all legal proceedings in respect of any such claim shall be instituted in a competent Court in the city of Bombay only."

On the basis of the above clause in the Insurance Policy, the learned Court below held that it had no jurisdiction to try the suit and it could only be tried in the Bombay Court and, therefore, by the impugned Order, directed return of the plaint.

It was contended by the learned counsel for the appellant that the respondent No. 3 Firm had pledged certain goods and taken advance from the plaintiff bank. These goods lying in the godown, were destroyed by fire and, therefore, the plaintiff bank filed the suit for recovery of the amount against the respondent No. 3 as well as respondent Nos. 1 and 2, as the goods were insured with respondent No. 1 and the insurance was effected by respondent No. 2. It was also alleged that after the incident, the surveyor on behalf of the Insurance Compay, the respondent No. 1 surveyed the loss, assessed it and offered for acceptance to respondent No. 3 and the present appellant-plaintiff and thereby settled the claim which it was contended by the learned counsel for the appellant, created a fresh agreement where there was no term about jurisdiction.

It was contended that even originally, so far as the plaintiff-appellant is concerned, it was not a party to the agreement, i. e. the Insurance Policy, between respondent nos. 1 and 3. It was also contended that in the suit filed by the plaintiff-appellant, the condition of the policy issued by the respondent

No. 1 in favour of respondent No. 3 could not be enforced. It was also contended that even if such a condition was incorporated in the policy, it runs contrary to section 46 of the Indian Insurance Act and in view of this section, the competent Court having jurisdiction can try the suit. Learned counsel placed reliance on the decision reported in *Isaqmahmad Habibji* v. *The United India Fire and General Insurance Co. Ltd., Hyderabad* (1), *M/s Barbigha Cold Storage Co. (P) Ltd.* v. *National Insurance Co. Ltd. & another* (2), *Maganlal Devji Mewawala and others* v. *Staya Narain and others* (3) and *M/s Surajmall Shivbhagawan* v. *M/s Kalinga Iron Works* (4).

It was contended that apart from section 46 of the Insurance Act, in *Isaqmahmad Habibji* v. *The United India Fire and General Insurance Co. Ltd., Hyderabad* (*Supra*), their Lordships considered the impact of the agreement and held, placing reliance on a decision reported in *Michael Golodetz and others* v. *Serajuddin and Co.* (5), that such a clause in the agreement does not take away the jurisdiction of a competent Court which otherwise had jurisdiction, but is only an agreement between the parties to choose one of the Courts having jurisdiction and although ordinarily such an agreement is given effect to by Courts, but when it appears that by giving effect to such an agreement it is not convenient to the parties and it will not help the cause of justice, effect need not be given to the agreement, as it is the discretion of the Court and the Court which otherwise has jurisdiction to try the suit can try it, as by agreement, the jurisdiction is not ousted.

It was contended by the learned counsel that admittedly the incident took place within the jurisdiction of the learned District Judge, Seoni and that the contract between respondents 1 and 3 and plaintiff and respondent No. 3 took place at Seoni and it is clear that from the point of view of convenience, the Court at Seoni alone will have jurisdiction as all witnesses will be from places within the jurisdiction of the Court at Seoni. It was, therefore, contended that the Court below committed an error of law in holding that it had no jurisdiction to try the suit.

It was also contended that the suit was filed in 1971 and after more than 10 years, the plaintiff is still asked to go and file the plaint in the Court at Bombay where it will be not only inconvenient, but impossible for him to file the suit and proceed with it and produce all the necessary evidence. It was, therefore, contended that the Court below, even on consideration of

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(1) A. I. R. 1978 Guj. 46. (2) A. I. R. 1981 Pat. 21.
(3) A. I. R. 1978 All. 455. (4) A.I.R. 1979 Orissa 126.
(5) A.I.R. 1963 S. C. 1044.

convenience and cause of justice, ought to have held that the suit is triable in the Court of District Judge, Seoni.

It was also contended by the learned counsel that in spite of the fact that *Isiqmahmad's case* was cited before the Court below and this decision considers the impact of section 46 of the Indian Insurance Act, still the learned District Judge chose not to consider the impact of section 46, nor did he consider the question of convenience and the interest of justice and after 11 years, passed the order directing the return of the plaint.

Learned counsel appearing for the respondent Insurance Co. contended that there is a clear warranty clause in the Insurance Policy which not only makes all disputes referable to Bombay Courts, but provides that all cause of action wherefrom it may accrue, shall be deemed to have accrued in Bombay and it was contended that this clause has to be given effect to as it is a term of the contract between the parties. As regards Section 46 of the Indian Insurance Act. it was contended that it will not apply to local companies as insurer has been defined in section 2(9) of the Indian Insurance Act and the language used in this section clearly goes to show that the Courts in India will have jurisdiction to try the suit. It was, therefore, contended that reading the language of section 2(9) and section 46, it appears that this provision was only made for foreign companies transacting business in India so that the terms in the policy making the disputes subject to jurisdiction of Courts outside India, may not be given effect to and, therefore, in this provision, it was provided that Courts in India will have jurisdiction and payments to be made under the policy shall be made in India. It was, however, contended that although this question has been considered in the decision reported in *Isaqmahmad's case* and other decisions relied on by the learned counsel for the appellant, as there is no decision of this Court, the question does deserve consideration in view of the language of sections 2(9) and 46 of the Indian Insurance Act.

It was also contended by the learned counsel that although the present plaintiff is not a party to the contract, yet in substance the plaintiff is trying to recover what respondent No. 3 is entitled to get from respondent No. 1 under the policy and, therefore, the terms of the policy will have to be given effect to. It was also contended that if the parties enter into an agreement to have exclusive jurisdiction in a particular Court, it could not be said that, that agreement cannot be given effect to. Reliance was placed by the learned counsel on the decision reported in *Hakamsingh* v. *M/s Gammon (India) Ltd.* (1).

(1) A. I. R. 1971 S. C. 740.

Section 46 of the Insurance Act reads as under:

"46. Application of the law in force in India to policies issued in India. The holder of a policy of insurance issued by an insurer in respect of insurance business transacted in (India) after the commencement of this Act shall have the right, notwithstanding anything to the contrary contained in the policy or in any agreement relating thereto, to receive payment in (India) of any sum secured thereby and to sue for any relief in respect of the policy in any Court of competent jurisdiction in (India) and if the suit is brought in (India) any question of law arising in connection with any such policy shall be determined according to the law in force in (India);

(Provided that nothing in this section shall apply to a policy of marine insurance)."

This provision specifically enacts that notwithstanding anything to the contrary contained in the policy or in any agreement relating thereto 'to receive payment' the Court of competent jurisdiction in India will have jurisdiction to entertain the suit.

On the basis of the words 'Court of competent jurisdiction in India, it was contended by the learned counsel that this was enacted only for foreign companies who, in their policies, had a clause of payment of money at the Headquarters of the Companies, but it could not be disputed that this provision provides that in spite of a contract to the contrary or a condition in the policy, the suit can only be tried in the Court of competent jurisdiction in India and applying this test, it is not disputed that so far as the present suit is concerned, the only Court competent to try the suit is Seoni as the whole of cause of action accrued at Seoni.

It was also contended that the term 'Insurer' used in this section has been defined in section 2(9) of the Act and an ettempt was made on the basis of this definition that it applies to only an Insurance Company incorporated outside India. Section 2(9) of the Insurance Act reads as under:

(9) 'Insurer' means:—

(a) any individual or unincorporated body of individuals or body corporate incorporated under the law of any country (other

than India carrying on insurance business (not being a person specified in sub-clause (c) of this clause) which—

(i) Carries on that business in (India), or

(ii) has his or its principal place of business or is domiciled in (India) or

(iii) with the object of obtaining insurance business, employs a representative, or maintains a place of business, in (India);

(b) any body corporate (not being a person specified in sub-clause (c) of this clause) carrying on the business of insurance, which is a body corporate incorporated under any law for the time being in force in (India); or stands to any such body corporate in the relation of a subsidiary company within the meaning of the Indian Companies Act, 1913, as defined by sub-section (2) of section 2 of that Act; and

(c) any person who in (India) has a standing contract with underwriters who are members of the Society of Lloyd's whereby such person is authorised within the terms of such contract to issue protection notes, cover notes, or other documents granting insurance cover to others on behalf of the underwriters,

(but does not include principal agent, chief agent, special agent, or an insurance agent) or a provident society (as defined in Part III)".

Sub-clause (b) of this definition clearly provides for the Company incorporated in India and, therefore, even on the basis of this definition, it could not be said that this provision contained in section 46 will not apply to an Indian Company. It is, therefore, clear that in view of the language of section 46, in spite of the contract to the contrary or any term in the policy, the competent Court which has jurisdiction to try the suit will alone be competent to try it and on the basis of the contract or term of the policy, it could not be said that the Court mentioned in the term of the policy, or the contract will be the only Court which will have jurisdiction to try the suit.

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It is unfortunate that the learned District Judge disposed of these suits and returned the plaints for presentation to proper Court without considering the provisions contained in section 46 of the Insurance Act. This question was considered by the Division Bench of the Gujrat High Court reported in *Isaqmahmad Habibji* v. *The United India Fire and General Insurance Co. Ltd., Hyderabad* (*supra*), wherein the learned Judges, after quoting section 46 of the Insurance Act, came to the conclusion that in view of the language of section 46, coupled with section 2(9)(b), it could not be said that the clause in the policy or in the contract will oust the jurisdiction of the competent Court which otherwise has jurisdiction to try the suit. Learned counsel for the appellant contended that similar view has been taken in *M/s Surajmall Shiwbhagawan* v *M/s Kalinga Iron Works* (*supra*), *M/s Barbigha Cold Storage Co.* (*P*) *Ltd.* v. *National Insurance Co. Ltd. & another* (*supra*) and *Maganlal Devji Mewawala and others* v. *Satya Narain and others* (*supra*). Learned counsel for the respondents frankly conceded that there is no other decision which has taken a contrary view.

It was also contended by the learned counsel for the appellant that even apart from section 46, an agreement does not oust the jurisdiction of the competent court. It is effective only where two courts have jurisdiction and by agreement, parties can agree for jurisdiction of one of them, but in the present case, it is not disputed that no part of the cause of action accrued outside the jurisdiction of Seoni Court and, therefore, the jurisdiction of the Seoni Court could not be ousted merely on the basis of a contract or a term in the policy. The Division Bench of the Gujrat High Court in the case noted above also considered this question and placing reliance on a decision reported in *Michaol Goladetz and others* v. *Serajuddin and Co.* (*supra*) held as under :

> "...it was pointed out that as per the settled legal position, even under a contract, if the parties selected one of the two competent forums, that did not amount to ouster of the jurisdiction of the ordinary Courts. Therefore, such a contractual stipulation, in favour of which Court would have *prima facie* a great leaning for upholding the solemnity of the contract so as to bind the parties to their own bargains, could never operate as an absolute bar to the jurisdiction of the competent Court. Therefore, the competent Court would always have a discretion to resolve this question by taking into consideration this stipulation as only one of the factors which would be given great weight as the parties had selected a particular forum, but ultimately the

question would have to be decided not by treating the stipulation as if there was an absolute bar to the existence of jurisdiction but as one of the factors to be considered for exercise of the jurisdiction on sound judicial principles."

It is, therefore, clear that even without section 46 of the Insurance Act, the Court below had to consider on the basis of convenience and in the interest of justice, whether to exercise jurisdiction or not and in coming to this conclusion, the Court had to weigh various circumstances and the agreement or a term in the policy is one of such circumstance for consideration. But it could not be said that the term or the agreement will oust the jurisdiction of a court which otherwise is competent to try the suit.

In the light of the discussion, therefore, the view taken by the learned District Judge that he had no jurisdiction to try the suit is contrary to law. The appeal is, therefore, allowed. The order passed by the learned Court below is set aside and the case is sent back to the Court below for its trial in accordance with law. It is unfortunate that only this question has ultimately resulted in the delay of the suit for about 10 years and it is, therefore, directed that the Court below shall proceed to decide the suit expeditiously. Appellant shall also be entitled to costs of this appeal from the respondent No. 1 only. Counsel's fee Rs. 300.00, if certified.

Appeal allowed.

APPELLATE CRIMINAL

Before Mr. Justice M. D. Bhatt.

13 Sept. 1983

NANNUSINGH & others, Appellants*

v.

STATE OF MADHYA PRADESH, Respondent.

Penal Code, Indian (XLV of 1860), Sections 147, 429 and 436 and Evidence

*Cr. Appeal No. 499 of 1983, from the judgment of B.B.L. Agarwal Additional Sessions Judge, East Nimar, Khandwa, dated the 16th April 1983.

Act, Indian (I of 1872), Section 3—Prosecution alleging that accused persons started hurling abuses at P. W. 1 and others, collected at the house of one of the accused persons and after firing of some pistol-shots and throwing of hand-grenades emerged armed with lathi, weapons and buckets filled with kerosene oil and burnt houses of Bhils and others—Occurrence in a village involving rival fractions—Appreciation of evidence—Most of P Ws. victims and eye-witnesses—Evidence of partisan and inimical witnesses not liable to be rejected—Care and caution to be taken in appreciating such evidence—Principle of falsus in uno falsus in omnibus*—Applicability of—Criminal Procedure Code, 1973—Section 357 as amended by M.P. Act No. 29 of 1978—Constitution of India—Article 366, clauses (24) and (25) and the Constitution (Scheduled Tribes) Order, 1950—Accused persons committing aforesaid offences against Bhils belonging to scheduled Tribes—Imposition of sentence of fine besides imprisonment of accused persons—Desirability of payment of compensation to the victims.*

The law is well settled that even in the matter of partisan or inimical witnesses, one has simply to scrutinize their evidence with abundant caution, to ensure that innocent persons are not unnecessarily roped in.

Muthu Naicker v. *State of Tamil Nadu* (1); relied on.

In a faction-ridden society where an occurrence takes place, to reject the entire evidence on the sole ground that it is partisan, is to shut one's eyes to the realities of the rural life in our country. Large number of accused would go unpunished if such an easy course is charted. The law is equally well settled that the principle of *falsus in uno falsus in omnibus* does not apply to criminal trials and it is the duty of the Court to separate the grain from the chaff instead of rejecting the prosecution case on general grounds.

Bhe Ram v. *State of Haryana* (2); relied on.

Where witnesses claim to have seen the incident from different places and at various stages of the occurrence, it is but natural to expect that their perceptions would have been seemingly dissimilar and different at least to some degree, because, what one might see, others may not. Besides, in flurry the victim get too scared, and are actually more worried about their own safety and of there kith and kin and the security of their hearth and home and this circumstance too, naturally tends to lead to minor variations and

(1) A. I. R. 1978 S. C. 1647. (2) A. I. R. 1983 S. C. 957.

inconsistencies in their averments. What is of essence for balanced and judicious appreciation of evidence is the salient fact that the contradictions and discrepancies are not on such material facets of the incident as may render their evidence wholly unreliable. The evidence of such witnesses could well be partly unreliable and partly true. It is for this reason that the grain has to be scanned from the chaff; and one has to re-assure himself regarding the credibility or otherwise of the material prosecution witnesses.

When the whole incident of setting fire to various houses had taken quite sometime and since the accused had moved together in the whole village, from one particular house to the other, it is rational and reasonable to presume that the buckets of kerosene oil might have change hands and so also the weapons, during the course of whole episode, according to the convenience and the exigencies. If it is certain that the accused who were moving together, hurling abuses and threats were all armed; one accused with a pistol and others with ballams, pharsas and lathis, it is absolutely immaterial as to what particular accused was holding what particular weapon.

Section 357 of the Criminal Procedure Code, 1973 as stands amended in this state by M. P. Act No. 29 of 1978 where by payment of separate compensation to the victims belonging to scheduled caste and scheduled Tribes as defined in Clauses (24) and (25) of Article 366 of the Constitution has been made mandatory. As per the Constitution (Scheduled Tribes) Order, 1950 (SRO 510 date 6-9-1950) as it stands finally amended, Bhils of this village Bihar of the District East Nimar are found to be covered under Scheduled Tribes. It is just and proper to pass appropriate sentence of imprisonment and also fine so that out of fine, if realized, reasonable compensation could be paid to the victims in accordance with section 357 (1)(b) of the Code.

Rajendra Singh for the appellants.

K. L. Kathal Dy. Government Advocate for the State.

Cur. adv. vult.

JUDGMENT

M. D. BHATT J.—This is the appeal of the eight accused persons viz. Nannusingh, Abhaysing, Jagdish Singh, Naharu *alias* Naharsingh, Khushal Singh, Karan Singh, Indersingh and Nawal, who on their convictions under sections 147, 429 and 436 of the I. P. C. have each been sentenced to respective

terms of imprisonment of one year, two years and eight years,-with the direction for the concurrent running of these sentences.

Village Bihar of the district East Niwar comprises of a little over 100 houses, inhabitated by Thakurs and also Bhils, belonging to aboriginal tribe. From mid-noon till later afternoon on 15.5.82, about 41 houses and some thrashing grounds, all mostly of Bhils, were gutted with fire and were destroyed. In this village, not only the household effects and other sundry articles were destroyed but 34 cattle including 24 goats (grown-up as well as younger ones), one bullock and four calves were also roasted to death, and this apart, two bullocks and seven goats were sufficiently burnt and injured (P. W. 17 Dr. Chenana). All such damage, consequent to the burning of the houses, household effects, grain and cattle was to the tune of about Rs. 1, 13, 458.00 (Rupees one lac thirteen thousand four hundred fifty eight), as assessed by the Police Investigation-Agency, vide the detailed list Ex. P-4.

The case of the prosecution, in short, was that all the appellants-accused and one Salim *alias* Salimuddin, now absconding, just before the alleged incident, started hurling abuses at P. W. 1 Kachru Bhil and others, and then collected at the house of the accused Indersing; and after the firing of some pistol-shots by Salim and the throwing of hand-grenades from the house-top of Indersing, all emerged from the said house, armed with lethal weapons viz. fire-arms, *ballam*, *pharsi* etc. and also buckets filled with kerosene oil, and then started on their rampage, burning the houses of the *bhils* and others,-the first place burnt down was the *mandap* of P.W.1 Kachru and then the adjoined house of Dagdu; and then further, the houses of the rest of the respective persons, as detailed in the list Ex. P. 4.

The appellants-accused Jagdish and Abhaysingh were stated to be carrying, in turn, the buckets full of kerosene oil; and the absconding accused Salim, all along continued. setting fire to the houses, cattle sheds and thrashing grounds, with the help of rag covered wooden sticks (torches), doused with kerosene oil. Rest of the appellants accused, all the while, were brandishing their weapons and threatening the victims with usual filthy abuses, making the victims flee from the village to safer places. The police of P. S. Pipalod, in the meanwhile, was apprised of the incident. Consequently, the police arrived at the scene; and the fire-brigade extinguished the fire with the help of victims and their sympathisers. Some seizures of burnt and damaged articles were made on the spot. Fired empty cartridges were also seized from certain places. One fire-arm with cartridges was later recovered and seized from the accused Abhaysing.

Damage was got assessed; and the injured cattle were got treated; and after due investigation, all the appellants accused were put up for trial for commission of the very many offences including the ones, of which, they now stand convicted. All the appellants-accused abjured the guilt in the trial Court.

The appellants-accused Jagdish and Indersing pleaded *alibi* and claimed to be at Khandwa proper on the relevant date of the incident. The rest claimed to be falsely implicated. It was specifically contended by them that they were not responsible for the fire in the village. According to them, one Rajendra Singh Thakur, with his band of followers, comprised of *Bhils* had mobbed the house of Indersingh and hurled stones and brick-bats on the house, had opened fire-shots, had thrown hand-grenades) and had finally set fire to the *Payga* (cattle-shed) of Indersingh, and then to the house of one Nawalsingh and his father Babu. It was urged that this fire had accidentally spread in all neighbourhood, with the result that the particular houses of others also (as detailed in Ex.P-4) had got burnt down, resulting in loss of property and cattle. It was equally contended that Rajendrasing Thakur and his Coherts had started this mob-violence and blazing spree, just in order to pressurize Indersingh for not giving evidence in the Court against Rajendrasingh Thakur and others, who were being tried for murder of Salim's father Alimuddin. Only one witness was examined in defence, and that too, for proving the *alibi* of the accused Indersingh and Jagdish. The trial Court disbelieved the defence version and the defence evidence; and relying on the prosecution evidence, convicted and sentenced the appellants-accused to the extent as stated at the outset. Hence, now, the present appeal.

The learned counsel for the appellants-accused has vehemently urged that the prosecution evidence in the matter of the commission of the offences in question by the appellants-accused, should actually have been disbelieved by the trial Court, inasmuch as, it has already disbelieved the prosecution story regarding certain material facets of the incident viz. the origin of trouble, firing of the pistol-shots, throwing of hand-grenades etc. Material prosecution witnesses are stated to be infirm witnesses and it is urged on the strength of *Muluwa and others* v. *State of Madhya Pradesh* (1) that the evidence of such infirm witnesses does not become reliable merely because the same has been corroborated by a number of witnesses of the same brand. Oral evidence of the material prosecution witnesses is stated to be highly interested and partisan; and as such, unreliable; and more so, for the reason, that there are very many mutual contradictions on certain material aspect of the incident, eg., as to which of the appellants-accused were carrying buckets full of kerosene oil, and as to which

(1) A. I. R. 1976 S.C. 989.

particular accused person was holding which particular weapon. It is equally argued that the mere presents of all the accused persons together, cannot, by itself, inculpate all of them in the particular offences, inasmuch as, there is nothing on record to show that all were actuated with the common object on wrecking vengeance on the members of the rival party, by burning their houses and, thus, destroying the property. Finally, it is stated that the appellants-accused are already in jail for some months past, and the sentences of imprisonment as have been awarded against them, are actually quite harsh and severe; and as such, deserve to be suitably reduced.

On scrutiny of the evidence on record, the arguments advanced are apparently found to be without any merit. Although there is no dispute on the point that large number of houses were burnt down, with household effects completely destroyed, and that, sufficient number of cattle had equally died on being charred and roasted in the ghastly fire, yet this fact is equally found to be clearly proved from the prosecution evidence on record not only of the material prosecution witnesses who are the victims, and eye-witnesses, but else of certain police officers, who had seen the devastation in the village, wrought by the fire in question. Suffice to say, that the evidence of PWS. Kachru, Mangu, Misariya, Sirpat, Jhagya, Baiju, Redheshyam, Munshi, Rajendrasingh, Gangusingh, Dr. Chanana and police headconstable Shashikant Dube irrefutably proves this fact. It stands established that in the fire, about 41 village-houses and a few thrashing grounds with all household effects were destroyed; and about 34 heads of cattle including 23 goats, 1 bullock and 4 calves were burnt to death and 2 bullocks and 7 goats were badly injured.

Now comes the material question whether the appellants-accused were responsible for fire in question and for loss of all cattle-lives and property and whether all such destruction had been done by them by forming an unlawfull assembly in furtherance of their common object to cause such destruction, From the prosecution evidence, it is, no doubt, clear that PW. 12 Rajendrasingh on the one hand, and the appellants-accused Indersingh and the absconding accused Saleem on the other, were on inimical terms since some time past, inasmuch as, in the prosecution of Rajendrasingh and others for murder of Saleem's father Alimuddin, the appellant-accused Indersingh was one of the prosecution witnesses. It is also evident from the prosecution evidence itself that since the time of this murder and consequent to the prosecution, both Rajendrasingh and Indersingh had come to have their own rival factions in the village. There is, however, no satisfactory and reliable evidence that all those *Bhils* whose houses are found to be burnt down, belong to Rajendrasingh's party as against the rival one of Indersingh; but even presuming that they did belong, their evidence in the present case cannot,

just, be discarded on this sole ground. The law is well settled that even in the matter of partisan or inimical witnesses, one has simply to scrutinize their evidence with abundant caution, to ensure that innocent persons are not unnecessarily roped in. [See *Mutthu Nickar* v. *State of Tamil Nadu* (1)]. In a faction-ridden society where an occurrence takes place, to reject the entire evidence on the sole ground that it is bartisan, is to shut one's eyes to the realities of the rural life in our country. Large number of accused would go unpunished if such an easy course is charted. The law is equally well settled that the principle of *Falsus in uno falsus in omnibus* does not apply to criminal trials; and it is the duty of the Court to separate the grain from the chaff instead of rejecting the prosecution case on general grounds [See *Bhe Ram* v. *State of Haryana* (2)].

PW 1 Kachru, PW 2 Ramesh, PW 3 Mangu, PW 6 Misariya, PW 7 Sirpat, PW 8 Jhagya, PW 9 Baiju, PW 10 Radheshyam, PW 11 Munshi, PW 12 Rajendrasingh, PW 13 Gangusing and PW 14 Dama are the victims as well as the eye-witnesses of the fiendish conflagration. It is the quality and not the volume of such evidence which matters for evaluation. These witnesses claim to have seen the incident from different places and at varying stages of the occurrence. Hence, it is but natural to expect that their perceptions would have been seemingly dissimilar and different, at least to some degree; because, what one might see, others may not, besides, in flurry, the victims get too scared; and are actually more worried about their own safety and of their kith and kin, and the security of their hearth and home; and this circumstance too, naturally tends to lead to minor variations and inconsistencies in their averments. What is of essence for balanced and judicious appreciation of evidence is the salient fact that the contradictions and discrepancies are not on such material facets of the incident as may render their evidence wholly unreliable. The evidence of such witnesses could well be partly unreliable and partly true. It is for this reason that the grain has to be scanned from the chaff; and one has to re-assure himself regarding the credibility or otherwise of the material prosecution witnesses. No doubt, in the evidence of the prosecution witnesses, there are some mutual contradiction, as well as, inconsistencies, when confronted with their earlier police statements (Paras 30 and 32 of PW 1, Para 12 of PW 2, Para 11 of PW 7, Paras 8 and 9 of PW 8, Para 22 of PW 12, para 6 of PW 13 and Paras 18 & 19 of PW 14 and Exs. D-1 to D-7); but they are all found to be on extremely minor and negligible points. The salient aspects of the incident, as disclosed by these witnesses in their evidence, are, as a matter of fact, fully in keeping with these police statements. The particular portions of these police statements, with which, these witnesses have been confronted, do not go to

(1) A. I. R. 1978 S. C. 1647. (2) A. I. R. 1980 S. C. 957.

destroy the credibility of these witnesses nor do they expose these witnesses to be liars.

Argument of the appellants' learned counsel that the trial Court had disbelieved these prosecution witnesses in the matter of the material aspects of the incident, is factually incorrect. Trial Court's Judgment does not disclose in the least that the prosecution witnesses had been disbelieved at all on any salient aspects of the incident. It would be seen that the trial Court has started with the finding, that the prelude to the horrendous fire, was the hurling of filthy abuses to PW 1 Kachru Bhil by the accused Nannusingh,-the brother-in-law of the other accused Indersingh. It was, next, found that the appellants-accused had gone inside Indersingh's house, climbed the tin-roof, fired gun-shots, and hurled hand-grenades: the appellants-accused, thereafter, are found to have come out from that house with their respective lethal weapons and then to have set fire to the various houses,-the first one, being that of Kachru and the next, that of Dagdu; and then of the rest, in close succession. The presence and involvement of all the appellants-accused is also held to be fully proved by the trial Court (see mid-part of Para 15, Para 31, Para 34, mid-part and the last part of Para 35, mid-part of Para 42 and Para 44 of the trial Court's Judgment). The story regarding the hurling of abuses to Kachru has not actually been held to be false; but it has, just, been held, for want of support by 6 eye-witnesses to the other three, that the said fact does not stand proved beyond any shadow of doubt (para 10 of the trial Court's Judgment). Likewise, it has, no doubt, been held that the appellants-accused had climbed the tin-roof of Indersingh's house where from shots were fired and hand-grenades were thrown (Para 15 of the trial Court's Judgment); but it was held that from all this, intention to kill PW 1 Kachru could not be deduced. Then again, the trial Court is not found to have held, as the appellants'-learned counsel has tried to suggest, that the appellant-accused did not have any lethal weapons.What the trial Court has held is that the particular fact as to, what particular accused was holding which particular weapon, was not proved beyond any shadow of doubt. And, it was for this reason that due to the discrepancies in the matter of actual weapon, held by each particular-accused, conviction under Section 148, IPC was not made (Para 45 of the trial Court's Judgment). Thus, from the trial Court's Judgment, it is evident that the evidence of all the prosecution witnesses referred to above, had been implicitly relied on, on the main facets of the incident, inculpating all the appellants-accused in the particular offences of which they have been convicted; and the negligible and insignificant details on minor points, were naturally overlooked; and rightly so.

Credibility of the prosecution witnesses has been tried to be assailed

on the premise that some witnesses have stated regarding the accused Jagdishsingh, as holding the bucketful of kerosene oil, whereas, others have spoken of Abhayasingh, holding the bucket, and further on the premise, that the evidence of these witnesses in not uniform regarding the exact weapon, held by each of these appellants-accused. The trial Court has already given cogent reasonings for existence of such minor discrepancies; and I find myself in full agreement with the same. Since the whole incident of setting fire to various houses had taken quite some time, and since the appellants-accused had moved together in the whole village, from one particular house to the other, it is rational and reasonable to presume that the buckets of kerosene oil might have changed hands and so also the weapons, during the course of the whole episode, according to the convenience and the exigencies. But, this much is certain that the appellants-accused who were moving together, hurling abuses and threats, were all armed: Saleem with a pistol and others with ballams, pharsas and lathis. It is absolutely immaterial as to what particular accused was holding what particular weapon. It is also clear that in the group of the appellants-accused, they had with them, the bucketful of kerosene oil. The rag-covered wooden sticks were doused with kerosene oil; and then, Saleem, with the active assistance and collaboration of the present appellants-accused, had been setting fire to the various houses, thrashing grounds etc. Of these witnesses and other village-folk, who are detailed in Ex. p-4.

There is, thus, no scope for doubt, on the strength of the fully reliable evidence on the prosecution side that all the appellants-accused and Saleem had formed an unlawful assembly and that they were duly armed with lethal weapons and had made full preparation for setting fire with the help of kerosene oil and the rag-wrapped fire-sticks which they, all along had been carrying with them. All the appellants-accused, thus, are found to be animated with the common object of burning down the houses of these particular Bhils and thus destroying their hearth and home and all their property. It may, here, be stated that the defence stand and the defence evidence has been rightly discarded by the trial Court for the elaborate reasons, as given. The plea of alibi of the accused Jagdishsingh and Indersingh is rightly held to be concocted. Likewise, the appellant's principal defence, as consistently put forth by them during the course of cross-examination of all the material prosecution witnesses and equally so in their examination u/s 313 of the Code of Criminal Procedure, 1973, is a manoeuvred concoction, as has already been held by the trial Court.

There is also no substance in the basic contention that PW 12 Rajendrasingh with his band of loyals i. e. some of the prosecution witnesses had initiated

aggression by setting fire at first to the accused Indersingh's *payoga*-and later, to the houses of Naval and his father Babu,-leading finally to other houses also being just engulfed by this fire, spreading with the just of summer-wind. Falsity of this defence stand, stands exposed from the very circumstance that none of the appellants-accused are found to have lodged any complaint with the police in this regard; nor any positive defence has been led, to establish this plea. Such contention does not emerge, as a reasonable probability, even from the trenchant cross-examination of the prosecution witnesses. Incidentally, close scrutiny of the site map Ex. P-3 showing the situation of the various houses in the village, reasonably indicates that the houses of Bhils, situated in the farthest corner of the village, could not have come under the sweep of accidental fire; but must have been deliberately put to flames under the foray of the appellants-accused. Thus, the whole incriminating evidence on record leaves no room for doubt, that all these appellants-accused were guilty of the offences in question; and as such, the order of convictions as passed against them, obviously calls for no interference.

Now comes the question of sentence. Sentences of imprisonment, as awarded by the trial Court, at first glance, no doubt, appear to be quite harsh; but when one considers the ruthless oppression and ravage, committed concertedly under a well-hetched plan, there is no scope for much remorse and compassion for the appellants-accused. No doubt, human-lives were not lost, but the appellants-accused cannot take credit for this, since the victims themselves had run helter-skelter, and in the nearby jungles, to save themselves and their family. Houses of Bhils were all substantially destroyed, house-hold effects and scanty beddings were reduced to ashes and the cattle, mostly goats, and the few bullocks and calves were roasted to death. The whole holo-caust was horrendous and ghastly. Victims, mostly Bhils, are found to be reduced to state of acute penury. What satisfaction and consolation can they have, if the appellants-accused are sentenced merely to long imprisonment and to no fine or separate compensation, so as to, recompence them and to relieve them of their misery ? It is unfortunate that the trial Court has not considered this aspect of the matter and has totally ignored Sub-section (3) of Section 357 of the Court of Criminal Procedure, 1973 as stands amended in this State by M. P. Act No. 29 of 1978, whereby, payment of separate cempensation to the victims belonging to Scheduled Caste and Scheduled Tribes as defined in clauses (24) and (25) of Article 366 of the Constitution has been mandatory. As per 'The Constitution (Scheduled Tribes) Order, 1950' (SRO 510 dt. 6. 9. 1950) as it stands finally amended, Bhils of this particular village are found to be covered under Scheduled Tribes. Anyway, since separate compensation has not been awarded by the trial Court,

I consider it,now, just and proper to pass appropriate sentences of imprisonment and also fine, so that out of fine, if realised, reasonable compensation could be paid to the victims in accordance with Section 357 (1)(b) of the Code. Accordingly, considering all the facts of the present case, for purposes of sentence, the appeal is partly allowed, only in the matter of sentence.

In the result, thus, the appeal is partly allowed, only in the matter of respective sentences. Maintaining the convictions of the appellants-accused under sections 147,429 and 436 of the IPC; and setting aside the order of sentences as passed against the appellants-accused, it is ordered instead, that each of the appellants-accused, on their conviction u/s 147, IPC, be and is sentenced to four month's RI and to pay the fine of Rs. 400/-(four hundred) each, and in default of fine, to undergo four month's RI. The appellants-accused, further on their conviction u/s 429, IPC. be and are, each, sentenced to one year's RI and to pay the fine of Rs. 800/- (eight hundred) each, and in default of fine, to further undergo eight months' RI. The appellants-accused, on their conviction u/s 436, IPC, be and are now sentenced to three years' RI each and also to pay the fine of Rs. 8000/- (eight thousand) each, and in default of fine, to undergo two years' RI. Out of fine, if realised, following amounts to the respective victims who have suffered loss in respect to their houses, house-hold-effects and cattle, be paid by way of compensation in accordance with Section 357(1) (b) of the Code. (As per assessment Ex.P-4 and the averments of PWs):-

Name of the victim	Amount of compensation to be paid.
1. Kachru Bhil, s/o Madan (PW 1)	Rs. 25/- (Rs, Twenty five)
2. Shivlal Harijan, s/o Ganpat	Rs. 1,000/- (Rs. One Thousand only)
3. Devram Harijan, s/o Ganpat	Rs. 1,000/- (Rs. One Thousand)
4. Baiju, s/o Shanker Bhil (PW 9)	Rs. 3,000/- (Rs. Three thousand)
5. Hosilal Bhil, s/o Raghu	Rs. 1,500/- (Rs. One thousand five hundred)
6. Bhagwan Bhil, s/o Chhitar	Rs. 3,000/- (Rs. Three Thousand)
7. Jangli Bhil, w/o Chhitar	Rs. 1,000/- (Rs. One Thousand)
8. Mangu Bhil, s/o Ganpat (PW 3)	Rs. 1,000/- (Rs. One thousand)
9. Mayaram Bhil, s/o Sikdar	Rs. 1500/- (Rs. One thousand five hundred)

10. Pandhari Bhil, s/o Chhajju	Rs. 1,000/- (Rs. One thousand)
11. Hiralal Bhil, s/o Mohan	Rs. 1,000/- (Rs. One thousand)
12. Pandhari Bhil, s/o Mangtu	Rs. 500/- (Rs. five hundred)
13. Kadwamali, s/o Natthu	Rs. 300/- (Rs. Three hundred)
14. Tarabai Balahi, Wd/o Ganpat	Rs. 300/- (Rs. Three Hundred)
15. Natthu, s/o Kalu Mali	Rs. 500/- (Rs. five hundred)
16. Jasvant Rajput, s/o Natthusingh	Rs. 500/- (Rs. five hundred)
17. Molya Bhil, s/o Mannu	Rs. 300/- (Rs. three hundred)
18. Munshi Bhil, s/o Shobharam (PW 11)	Rs. 200/- (Rs. two hundred)
19. Fakariya Bhil, s/o Nanakya	Rs. 1,000/- (Rs. One thousand)
20. Jhagya Bhil, s/o Bichchu	Rs. 5,000/- (Rs. five thousand)
21. Ganpat Bhil, s/o Nana	Rs. 500/- (Rs. five hundred)
22. Kalu Bhil, s/o Shanker	Rs. 7,000/- (Rs. seven thousand)
23. Shripat Bhil, s/o Chhajju (PW 7)	Rs. 5,000/- (Rs. five thousand)
24. Gajya Bhil, s/o Gopal	Rs. 500/- (Rs. five hundred)
25. Kailash Bhil, s/o Shyam	Rs. 500/- (Rs. five hundred)
26. Kamalsingh, s/o Natthusingh Rajput	Rs. 200/- (Rs. two hundred)
27. Kadwa Balahi, s/o Thakur	Rs. 500/- (Rs. five hundred)
28. Kishan Nai, s/o Supdu	Rs. 500/- (Rs. five hundred)
29 Thakur Harijan, s/o Onkar	Rs. 1000/- (Rs. One thousand)
30. Shobharam Bhil, s/o Nyadar	Rs. 2,000/- (Rs. Two thousand)
31. Jaisingh Bhil, s/o Rama	Rs. 3,000/- (Rs. Three thousand)
32. Gangusingh Rajput, s/o Ramsing (PW 13)	Rs. 500/- (Rs. five hundred)
33. Chhajju Bhil, s/o Chenya	Rs. 300/- (Rs. three hundred)

34. Dagdu Bhil, s/o Tameriya	Rs. 1,000/- (Rs. One Thousand)
35. Ramabai Mali, Wd/o Ramlal	Rs. 1,000/- (Rs. One Thousand)
36. Dama Bhil, s/o Babu (PW 14)	Rs. 3,000/- (Rs. three thousand)
37. Ratan Bhil, s/o Naina	Rs. 1,500/- (Rs. One Thousand five hundred)
38. Totaram Kahar, s/o Dayaram	Rs. 3,000/- (Rs. Three Thousand)
39. Radheshyam Malvi, s/o Babulal (PW 10)	Rs. 200/- (Rs. Two hundred)
40 Ramu Bhil, s/o Jadhav	Rs. 500/- (Rs. five hundred)
41. Bholaram Bhil, s/o Babulal	Rs. 1,000/- (Rs. One Thousand)
42. Rajendrasingh Rajput, s/o Gajrajsingh (PW 12)	Rs. 100/- (Rs. One hundred)
43. Shashikala, Wd/o Sitaram Rajput	Rs. 500/- (Rs. One hundred)
44. Ramesh Harijan, s/o Bala	Rs. 1,000/- (Rs. One Thousand)
45. Kadwa Bhil, s/o Ganpat	Rs. 1,000/- (Rs. One Thousand)
46. Champya Bhil, s/o Butan	Rs. 1,000/- (Rs. One thousand)

In case, recovered amount of fine is less, proportionate reduction be made, in compensation to be paid. Substantive sentences of imprisonment, as now awarded against the appellants-accused, shall run concurrently. All the appellants-accused are presently in jail. The learned Sessions Judge, in case of the deposit of the fine amounts, shall ensure by due diligence and vigilance, that the respective amounts of compensation are duly directly paid to the victims concerned.

Appeal partly allowed.

CIVIL REVISION

Before Mr. Justice C. P. Sen.

12 Mar. 1982

B. D. GUPTA, Applicant*

v.

RATANLAL & another, Non-applicants.

Motor Vehicles Act (IV of 1939),—Sections 110-A-and 96(1), Motor Accidents Claims Tribunal Rules, M. P., 1959, rules 5 and 14 and Civil Procedure Code (V of 1908), Order 1, rule 9—Vicarious liability of insurer when arises—Vehicle at the time of accident was neither being driven by its owner nor by his employee or agent nor for owners business—Owner of the vehicle and insurer not necessary parties in the claim petition—Claim petition cannot be summarily dismissed under rule 5—Order 1, rule 9, C. P. C. not applicable in claims cases—Hence, claim petition cannot be dismissed for non-joinder of the owner of Vehicle—However, claim against insurer in the absence of owner of the vehicle not maintainable as insurer's liability co-extensive with the owner under section 96(1) of the Act.

Where the driver of a vehicle is neither the employee nor the agent of the owner of the vehicle nor driving the vehicle for owner's business, the owner is not vicariously liable and is not a necessary party to such a case. Consequently the insurer is also not liable and cannot be made a party. Therefore, an application for claiming compensation is not liable to be summarily rejected if either the owner or the insurer is not made parties. This is because in all cases the owner or the insurer need not be made parties. Rule 14 provides application of only certain provisions of the Code of Civil Procedure and that too can be applied in a modified form. Order 1 is not made applicable. So Order 1, rule 9 of the Code cannot be invoked to reject an application for not joining a necessary party, even assuming that an owner and the insurer are necessary parties to the case. Thus, a claim petition is not liable to be dismissed for not joining the owner of the vehicle as a party in the case and consequently dismissing the claim against the insurer also as its liability is co-extensive with the owner under section 96(1) of the Motor Vehicles Act, 1939 and the owner not being a party to the case.

*Civil Revision No. 1275 of 1981, for revision of the order of R. K. Verma, District Judge-Cum-Motor Accident Claim Tribunal, Chhindwara, dated the 25th July 1981.

Shankar Rao v. *Babulal* (1), *New India Insurance Co.* v. *Smt. Shanti Devi* (2), *Manzilal* v. *Parasram* (3), *M.P.S.R.T.C.* v. *Jahiram* (4), *Hindusthan Gen. Ins. Co.* v. *Surammn* (5) and *State of M. P.* v. *Premabai* (6); referred to.

None for the applicant.

N. S. Kale for the non-applicants.

Cur. adv. vult.

ORDER

C. P. SEN J.—This revision has been preferred against the order of the Claims Tribunal deciding the preliminary issue that the claim petition is not liable to be dismissed for not joining the owner of the vehicle as a party in the case and consequently dismissing the claim against the insurer only as its liability is co-extensive with the owner under section 96(1) of the Motor Vehicles Act, 1939 and the owner not being a party to the case.

The non-applicant No. 1/claimant presented the petition under section 110A of the Act, alleging that the applicant drove the scooter, C.P.J. 6756 rashly and negligently on 16.6.1969 and injured the non-applicant no. 1, causing a fracture of his leg. He, therefore, claimed Rs. 20,000/- as damages against the applicant and the non-applicant no. 2 Insurance Company, showing the applicant to be the owner of the vehicle. After notice, on learning that S. N. Gupta is the owner and not the applicant, the non-applicant no. 1 moved an application for joining him as a party in the case on 18.8.1980. The prayer was disallowed on 27.2.1981 as the application for joining as party was filled 14 months after the accident, when the limitation is 6 months. Then by amendment the applicant raised an objection that for non-joinder of the owner of the vehicle, who is a necessary party, the claim petition is liable to be dismissed. The objection has been over-ruled saying that the claim is primarily against the applicant for his rash and negligent driving and so the claim petition cannot be rejected but since the Insurance Company is only liable if there is an award against the owner, so the case against it alone has been dismissed.

(1) 1980 M. P. L. J. 563
(2) A. I. R. 1976 S.C. 237
(3) 1970 M. P. L. J. 1.
(4) 1968 M. P. L. J. 828
(5) A. I. R. 1969 A. P. 390.
(6) 1979 M. P. L. J. 214.

A Division Bench of this Court in *Shankar Rao* v. *Babulal* (1) has held—

> "In this Court it has never been doubted that in the case of fatal accidents resulting even from the use of a motor vehicle the substantive law for determination of the liability and its extent is that contained in the Fatal Accidents Act, 1855, the provisions contained in section 110-A to 110-F of the Motor Vehicle Act, 1939 being merely procedural or adjectival but not substantive in nature; these provisions introduced in the Motor Vehicles Act by the Amendment Act of 1956 are meant only to provide a cheap remedy to the claimants who were earlier required to file a Civil Suit paying *ad Valorem* court-fees in the Courts of general jurisdiction; and therefore, any question pertaining to a substantive right has to be determined in accordance with the general law of Tort and the Fatal Accidents Act."

In *New India Insurance Co.* v. *Smt. Shanti Devi* (2) it has been held that the provisions in the Motor Vehicles Act were only a change of adjectival or procedural law and not of substantive law and it was for this reason that the jurisdiction of the Civil Court was held to be barred retrospectively under section 110-F of the Act in respect of claims filed subsequent to the constitution of the Claims Tribunal and the claimant has to go to the new forum even if his cause of action accrued prior to the change of forum as the change in law being procedural, it operated retrospectively. Sections 94 to 96 provide for compulsory insurance, the right of the third party to claim directly from the insurer, limits of the liability the insurer and the defence open to him to avoid liability even if the insured has incurred liability. No defence is available to insurer about factum of accident or quantum of damages. Under section 96(1) a claimant is entitled to recover from the insurer the amount of compensation which he is in law entitled to obtain from the insured subject to the statutory limits of liability of the insurer, provided the insurer has notice of the proceedings. Insurance against third party risk is compulsory, which secures payment to the claimant against the insolvency or liquidation of the insured. A Full Bench of this Court in *Mangilal* v. *Parasram* (3) has held that to a proceeding for compensation for death or bodily injury in a motor accident, the owner of the vehicle, the driver and the insurer have to be impleaded as opposite party. The insured is a necessary party and he is bound by the award and he is liable to pay the amount minus the sum which is payable by the

(1) 1980 M.P.L.J. 563. (2) A. I. R. 1976 S. C. 237.
(3) 1970 M. P. L. J. 1.

insurer. A Division Bench of this Court in *M.P.S.R.T.C.* v. *Jahiram* (1) has held that it can hardly be asserted that insurer is not a party to an action for recovery of damages, the insurer must, of necessity, be a party to such proceedings. In the aforesaid two cases passenger buses were being driven by their drivers when the accidents took place, i. e., the drivers were driving their vehicles in the course of their employment and the cases were not dismissed for not joining the insurers but the claimants were directed to join them and the cases were remanded. Similar is the case of the Single Bench decision of the Andhra Pradesh High Court in *Hindusthan Gen. Ins. Co.* v. *Surammn* (2), it is not clear in that case whether the driver was made a party but the owner was directed to be made a party as he was a necessary party.

However, a Division Bench of this Court in *State of M. P.* v. *Premabai* (3) has held that—

> "The driver is primarily liable for the death of Ramavatar and Shivprasad due to his rash and negligent driving. Since at the relevant time he was driving the vehicle in discharge of his official duties, the State Government is vicariously liable for the acts of its employee. The Supreme Court in *Sitaram* v. *Santanuprasad* (4) has held that a master is vicariously liable for the acts of his servant acting in the course of his employment. For the master's liability to arise, the act must be a wrongful act authorised by the master or a wrongful and unauthorised mode of doing some act authorised by the master. The driver of a car taking the car on the master's business makes him vicariously liable if he commits an accident. Reiterating this principle in a recent case of *Pushpabai* v. *Ranjit G & P Co.* (5) the Supreme Court has further held that :—
>
> 'For the master's liability to arise the test is whether the act was done on the owner's business or that it was proved to have been impliedly authorised by the owner. The law is settled that master is vicariously liable for the acts of his servants acting in the course of his employment. Unless the act is done in the course of employment the servant's act does not make the employer liable.

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(1) 1968 M. P. L. J. 828. (2) A.I. R. 1969 A.P. 390.
(3) 1979 M. P. L. J. 214. (4) A. I. R. 1966 S. C. 1697.
(5) A.I.R. 1977 S. C. 1735.

> The recent rend in law is to make the master liable for acts which do not strictly fall within the term 'In the course of the employment' as ordinarily understood. The owner is not only liable for the negligence of the driver if that driver is his servant acting in the course of his employment but also when the driver is, with the owner's consent, driving the car on the owner's business or for the owner's purposes '
>
> Therefore, the State of Madhya Pradesh is liable for payment of compensation for the acts of its driver, even if the State Government is not the owner of the jeep in question."

Similarly an insurer is made vicariously liable under section 96(1) of the Act when compensation is awarded against the insured, provided it had notice of the proceeding and to the extent enumerated in section 95. Therefore, the owner is not only liable for the negligence of the driver if that driver is his servant acting in the course of his employment but also when the driver is, with the owner's consent, driving the car on the owner's business or for the owner's purposes. If the driver is neither the employee nor the agent of the owner nor driving the vehicle for owner's business, the owner is not vicariously liable and is not a necessary party to such a case, consequently the insurer is also not liable and cannot be made a party. In the present case it is nobody's case that the applicant at the relevant time was driving the scooter as driver or agent of the owner's S. N. Gupta and for his business.

Under section 110-C, the Claims Tribunal may, subject to any rules that may be made in this behalf, follow such summary procedure as it thinks fit but the Tribunal shall have all the powers of Civil Court for the purposes of taking evidence, enforcing attendance of witnesses, of compelling discovery of documents and for such other purposes as may be prescribed. Section 111-A empowers the State Government to make rules, in exercise of which the Madhya Pradesh Motor Accidents Claims Tribunal Rules, 1959 has been framed. Rule 3 prescribes that an application for compensation arising out of an motor accident shall be made in Form 'A' requiring the owner, driver and insurer as opposite parties. Rule 5 empowers the Claims Tribunal to summarily reject an application if (i) it is not made by a person competent to do, (ii) not made within the time prescribed (iii) not properly stamped, and (iv) not duly signed and verified. But summary rejection will not bar presentation of a fresh application. So an application is not liable to be summarily rejected if either the owner or the insurer is not made parties. This is because in all cases the owner or the insurer need not be made parties as in the present case. Rule 14 expressly provides that the following

provisions of the First Schedule to the Code of Civil Procedure, 1908, shall apply i. e. Order V, Rules 9 to 13 and 15 to 30 of Order XVI, Rules 2 to 21 of Order XVII and Rules 1 to 3 of Order XXIII, provided the Claims Tribunal may, construe them with such alterations as may be proper or necessary. So only certain provisions of the Code are applicable and that too can be applied in a modified form. Order I is not made applicable, so Order 1, Rule 9 of the Code cannot be invoked to reject an application for not joining a necessary party, even assuming that the owner and the insurer are necessary parties to this case.

Accordingly, the revision fails and it is dismissed with costs. Counsel's fee Rs. 100/-, if certified, to be shared half and half by the non-applicants 1 and 2.

Application dismisssd

CRIMINAL REVISION

Before Mr. Justice S. K. Seth.

16 Dec. 1983

MAHESHWAR SAHAI, Applicant*

v.

STATE OF M. P., Non-applicant.

Prevention of Corruption Act (II of 1947), Section 5(2) read with section 5(1)(d) and Penal Code, Indian (XLV of 1860), sections 161 and 21—Prosecution of the accused thereunder—When maintainable—Accused appointed as arbitrator by one of the parties to resolve certain disputes even if he is Assistant Director of Ordnance Factories is not a 'public servant' within section 21 and the alleged offence committed by him does not amount to abuse of the position as a public servant—Hence not liable for prosecution under section 161 Penal Code and Section 5(2) read with Section 5(1)(d) of the Prevention of Corruption Act.

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*Criminal Revision No. 524 of 1979, for revision of the order of S. K. Jain Special Judge, Jabalpur, dated the 18th August 1979.

It is no doubt true that in his position or capacity as Assistant Director of Ordnance factories, the accused was in the pay and service of the Govt. and was as such a "public Servant" under the relevant clause of section 21 of the Penal Code. But, then the position or capacity in which he was acting at the time when the acts complained of were committed by him was not that of Assistant Director of Ordnance Factories but that of an artritrator who was oppointed by one of the parties to a contract to resolve certain disputes between it and the other party inaccordance with the terms and conditions of the contract. His said position or capacity as an arbitrator was altogether different and independent one and had nothing to do with his position or capacity as Assistant Director of Ordnance Factories. The accused acting as an arbitrator was not covered even under clause sixth of section 21 Penal Code as he was not appointed arbitrator by any "Court of Justice" it cannot be therefore said that the accused was a "public servant" or expected to be a "public Servant" at the time when the offence was committed or liable to be prosecuted for the offence under section 161 of the Penal Code. For the Commission of an offence under section 5(1)(d) of the Prevention of Corruption Act abuse of the position as a public servant would be the necessary ingredient of the offence, the abuse being either by corrupt or illegal means or by other means mentioned in *M. Narayanan Nambiar* v. *State of Kerala* (1). The act of corruption attributed to the accused was in his capacity as an arbitrator appointed by one of the parties to the contract in which capacity he was not a public servant. In the circumstances it could not be said that there had been any abuse by him of his position as a 'public servant'. Thus, the challan and documents submitted therewith did not contain any material on the basis of which the Special Judge could from an opinion that there was ground for presuming that the accused had committed an offence punishable under section 5(2) read with section 5(1)(d) of the Prevention of Corruption Act and frame a charge under the said section against him.Hence, the proceedings taken against the accused are quashed.

Dhaneshwar Narain Saxena v. *The Delhi Administration* (2); relied on.

State of Ajmer v. *Shivji Lal* (3); referred to.

State of Gujarat v. *Maneshanker Prabhashanker Dwivedi* (4); followed.

M. Narayanan Nambiar v. *State of Kerala* (1); referred to.

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(1) A. I. R. 1963 S. C. 1116.
(2) A. I.R. 1962 S. C. 195.
(3) A. I. R. 1959 S. C. 847.
(4) A. I. R. 1973 S. C. 330.

Maheshwar Sahai v. *State of M. P., 1983*

S. C. Datt for the applicant.

M. V. Tamaskar for the State.

Cur. adv. vult.

ORDER

S C. SETH, J.-This petition by accused Maheshwar Sahai under sections 397/401 of the Code of Criminal Procedure is directed against order dated 18.8.1979 passed by the Special Judge, Jabalpur in Special Case No. 5 of 1978 whereby certain preliminary objections taken by him against his prosecution under section 161 of the Indian Penal Code and section 5(2) read with section 5(1)(d) of the Prevention of Corruption Act, 1947 were rejected by the Special Judge. The petition is also under section 482 of the Code of Criminal Procedure and it is prayed that the entire proceedings relating to his prosecution under the abovesaid provisions be quashed.

The relevant facts, briefly stated, are these; In pursuance of an agreement dated 3.3.1973 executed between him and the Central Government one Rewachand had obtained a lease of a shop forming part of Ordnance Factory Khamaria Estate in Jabalpur. The agreement contained the arbitration clause to the following effect:

> "All disputes and differences arising out of or in any way touching or concerning this agreement whatsoever (except as to matter the decision of which is specifically provided for) shall be referred to the sole Arbitration of any person nominated by the Director General of Ordnance Factories at the time of such nomination, or if there be no Director General, the Administrative Head of ordnance Factories at the time of such nomination. It will be no objection to any such appointment that the person appointed is a Government servant, that he had to deal with the matters to which the agreement relates, and that in the course of his duties as such Government servant he has expressed the views on all or any of the matters in dispute or difference. The award of such Arbitrator shall be final and binding on the parties to this agreement. It is a term of this agreement that in the event of such Arbitrator to whom the matter is originally referred being transferred or vacating his office or being unable to act for any

reason, the Director General or Administrative Head as aforesaid at the time of such transfer, vacation of office or inability to act, shall appoint another person to act as Arbitrator in accordance with the terms of this agreement. Such person shall be entitled to proceed with the reference from the stage at which it was left by his predecessor. It is also a term of this agreement that no person other than a person nominated by the Director General or Administrative Head of the Ordnance Factories as aforesaid should act as Arbitrator and for any reason that is not possible, the matter is not to be referred to arbitration at all."

It is not in controversy that there did arise a dispute between the lessor and the lessee i. e. the Central Government and Rewachand in respect of certain matters covered by the abovesaid arbitration clause under the agreement. It is also not in controversy that in the circumstance the Director General of Ordnance Factories acting in exercise of his right under the arbitration clause nominated accused Maheshwar Sahai who was at the material time working under him as Assistant Director of Ordnance Factories to act as the sole arbitrator in the matter and to resolve the dispute.

According to the case of the prosecution, it was while accused Maheshwar Sahai was conducting the proceedings between the parties in his capacity as the sole arbitrator nominated in the manner mentioned herein above that on 8.8.1977 he demanded Rs. 10,000/- as illegal gratification from the representative of one of the parties i. e. Rewachand for showing favour to it in the said proceedings. According to the further case of the prosecution, thereafter, a trap having been arranged by the Central Bureau of Investigation the accused was caught red-handed on 10.8.1977 accepting Rs. 3000/- as illegal gratification from the representative of the party.

After the investigation in the matter was complete, and after the Cental Government *vide* its order dated 3.4.1978 passed in the Ministry of Home Affairs accorded its sanction under section 197(1) of the Code of Criminal Procedure and section 6(1)(a) of the Prevention of Corruption Act, the challan for the prosecution of the accused under section 161 of the Indian Penal Code and section 5(2) read with section 5(1)(d) of the Prevention of Corruption Act was put up before the Special Judge, Jabalpur on 24.4.1978. Upon considering the challan and the documents submitted therewith, the Special Judge *vide* his order passed on 19.5.1979 was of the opinion that there was ground for presuming that the accused had committed the offences alleged against him. He

accordingly, *vide* his said order, framed charges under section 161 of the Indian Penal Code and section 5(2) read with section 5(1)(d) of the Prevention of Corruption Act against the accused.

It was thereafter on 3.8.1979 before according of evidence was commenced by the Special Judge that an application raising certain preliminary objections to his prosecution under the abovesaid section was made by the accused and the same after hearing of arguments was rejected by the Special Judge by his order dated 10.8.1979.

Now, it is no doubt true that in his position or capacity as Assistant Director of Ordnance Factories the accused was in the pay and service of the Government and was as such a 'public servant' under the relevant Clause of section 21 of the Indian Penal Code. But, then, the position or capacity in which he was acting at the time when the acts complained of were committed by him was not that of Assistant Director or Ordnance Factories i. e. a person who was in the pay and service of the Government but that of an arbitrator who was appointed by one of the parties to a contract to resolve certain dispute between it and the other party in accordance with the terms and conditions of the contract. His said position or capacity as an arbitrator was altogether a different and independent one and had nothing to do with his position or capacity as Assistant Director of Ordnance Factories i. e. the person who was in the pay and service of the Government. In his said position or capacity as an arbitrator he was not covered under any of the clauses contained in section 21 of the Indian Penal Code and as such could not be regarded as a 'public servant'. It is no doubt true that Clause Sixth of section 21 did include within the definition of that term 'every arbitrator to whom any cause or matter has been referred for decision by any court of justice'. But, then, as pointed out in section 20 of the Code, the words 'court of Justice' denote a judge who is empowered by law to act judicially alone, or a body of judges which is empowered by law to act judicially as a body, when such judge or body of judges is acting judicially. It is clear that the accused to whom the matter was referred for decision by the private act of the parties to the contract and not by any 'court of justice' did not fall under Clause Sixth of section 21.

It is bearing in mind the abovesaid fact that though the accused was a 'public servant' he was not acting in his position or capacity as a 'public servant' when the acts complained of were committed by him that it is to be considered whether the Special Judge was justified in forming the opinion on the basis of the challan and the documents submitted therewith that there was

ground for presuming that the accused had committed offences under section 161 of the Indian Penal Code and Section 5(2) read with section 5(1)(d) of the Prevention of Corruption Act and in framing the charges under the said sections against the accused.

Now, one of the essential ingredients of the offence punishable under section 161 of the Indian Penal Code is that the accused must be a public servant or expect to be a public servant at the time when the offence was committed. Another essential ingredient of the said section is that he must have accepted illegal gratification as a motive or reward for (a) doing or forbearing to do an official act, (b) doing or forbearing to show favour or disfavour to someone in the exercise of his official functions, or (c) rendering or attempting to render any service or disservice to someone with the Central or any State Government or Parliament or the Legislature of any State or any public servant. In the present case, as already explained above, when the acts complained of were committed by the accused, he was acting in his position or capacity as an arbitrator appointed by one of the parties to the contract and the said position or capacity had nothing to do with his being Assistant Director of Ordnance Factories i. e. a 'public servant' within the meaning of the relevant Clause under section 21 of the Indian Penal Code. It cannot, therefore, be said that he was a 'public servant' or expected to be a 'public servant' at the time when the offence was committed. For the same reason, it cannot also be said that the acts complained of were committed by him as a motive or reward for doing or forbearing to do an 'official act' or forbearing to show favour or disfavour to someone in the exercise of his 'official functions'. The third contingency i. e. 'rendering or attempting' to render any service or disservice to someone with the Central Government or any State Government or Parliament or the Legislature of any State or any public servant was not relevant in the present case and as such the question of the same being attracted did not arise. It is thus clear that the challan and the documents submitted therewith did not contain any material on the basis of which the Special Judge could form an opinion that there was ground for presuming that the accused had committed an offence punishable under section 161 of the Indian Penal Code and frame a charge under the said section against him.

Coming to section 5(1)(d) of the Prevention of Corruption Act, it cannot be disputed that the provisions thereof are more comprehensive and wider in amplitude than those of section 161 of the Indian Penal Code. Under section 5(1)(d) of the Prevention of Corruption Act, a public servant is said to commit the offence of criminal misconduct if he, by corrupt or illegal means or

by otherwise abusing his position as public servant, obtains for himself or for any other person any valuable thing or pecuniary advantage. (Emphasis supplied). By the Central Act 40 of 1964, the words 'in the discharge of his duty' were omitted from the section. But even before such omission it was held by their Lordships of the Supreme Court in *Dhaneshwar Narain Saxena* v. *The Delhi Administration* (1) overruling their earlier decision in *State of Ajmer* v. *Shivji Lal* (2) that in order to constitute an offence under section 5(1)(d) of the Prevention of Corruption Act it is not necessary that the public servant should do something in the discharge of his own duty and thereby obtain valuable thing or pecuniary advantage. He would be equally guilty of an offence under the said section if he obtained valuable thing or pecuniary advantage for a third person by corrupt or illegal means or otherwise abusing his official position as a public servant in order to corrupt some other public servant, without there being any question of his misconducting himself in the discharge of his own duty.

But, then, as thereafter pointed by their Lordships in *State of Gujarat* v. *Manshankar Prabhashankar Dwivedi* (3), the question whether for the Commission of an offence under section 5(1)(d) of the Prevention of Corruption Act abuse of position as a public servant was of the essence or the essential ingredient of the offence was not argued or decided by them in *Dhaneshwar Narain Saxena's case* (*supra*). The said question was specifically considered by their Lordships in *State of Gujarat* v. *M. P. Dwivedi's case* (*supra*). Placing reliance on certain observations made in their earlier decision in *M. Narayanan Nambiar* v. *State of Kerala* (4), it was held by them that the abuse of the position as a public servant would be the necessary ingredient of the offence-the abuse being either by corrupt or illegal means or by other means of the nature mentioned in *M. Narayanan Namblar's case* (*supra*).

In fact, the facts of the case before their Lordships in *State of Gujarat* v. *M. P. Dwivedi's case* (*supra*) were in all essential respects more or less similar to the facts of the present case. As in the present case, accused Dwivedi in that case had two position-(i) he was a lecturer in a Government college and (ii) he was an examiner appointed by the Gujarat University for doing examination work on remuneration paid by the University. As a lecturer in Government College he fell within the definition of 'public servant' but the act of corruption attributed to him was in his capacity as an examiner. The question arose whether section 5(1)(d) of the Prevention of Corruption Act would apply to the case of a

(1) A. I. R. 1962 S.C. 195.
(2) A. I. R. 1959 S. C. 847.
(3) A. I. R. 1973 S. C. 330.
(4) A. I. R. 1963 S. C. 1116.

Government servant who committed an act punishable under the said provision even though when the Act was committed by him he was holding a different position which was not that of a Government servant and in which capacity alone he could fall within the definition of a 'public servant'. It was held by their Lordships that as Dwivedi was not a 'public servant' when he was acting as an examiner it could not be said that there had been any abuse by him of his position as a 'public servant'. In the present case also, accused Maheshwar Sahai had two positions-(i) he was Assistant Director of Ordnance Factories and (ii) he was an arbitrator appointed by one of the parties to a contract to resolve certain dispute between it and the other party in accordance with the terms and conditions of the contract. As Assistant Director of Ordnance Factories he certainly fell within the definition of a 'public servant' but the act of corruption attributed to him was in his capacity as an arbirator appointed by one of the parties to the contract in which capacity he was not 'public servant'. In the circumstances, following *State of Gujarat* v. *M. P. Dwivedi (supra)*, it could not be said that that there had been any abuse by him of his position as a 'public servant'. It is thus clear that the challan and the documents submitted therewith did not contain any material on the basis of which the Special Judge could form an opinion that there was ground for presuming that the accused had committed an offence punishable under section 5(2) read with section 5(1)(d) of the Prevention of Corruption Act and frame a charge under the said section against him.

For the reasons stated above, it has to be held that the challan and the documents submitted therewith did not contain any material on the basis of which it could be presumed by the Special Judge that the accused had committed any offence punishable under section 161 of the Indian Penal Code or under section 5(2) read with section 5(1)(d) of the Prevention of Corruption Act. It is noteworthy that the jurisdiction to try any other offence under the Penal Code becomes available to a Special Judge only when he acquires the power to try the offence enumerated in section 6 of the Criminal Law (Amendment) Act, 1952. In the present case, as stated above, he had no jurisdiction to try the accused under section 161 of the Indian Penal Code or section 5(2) read with section 5(1)(d) of the Prevention of Corruption Act or for any other offence enumerated in section 6 of the Criminal Law (Amendment) Act. In the circumstances, there was no jurisdiction in him to try the accused for any other offence punishable under the Penal Code.

Accordingly, the petition is allowed. The proceedings taken against

the accused in Special Case No. 5 of 1978 pending in the Court of the Special Judge, Jabalpur are quashed.

Petition allowed.

MISCELLANEOUS CIVIL CASE

Before Mr. G. L. Oza Ag. C. J. and Mr. Justice C. P. Sen.

1 Mar. 1984

M/S SURENDRA MIRANI AND BROS., RAJNANDGAON, Applicant*

v

THE COMMISSIONER OF INCOME-TAX, MADHYA PRADESH, BHOPAL, Opposite-party.

Income-tax Act, Indian (XLIII of 1961)—Sections 273(b) and 212(3)—Failure on the part of the assessee to file the estimate of advance tax payable by him attracts penalty provisions of section 273(b)—However, while imposing penalty deposit of advance tax ought to be taken into consideration—Income-tax Officer imposing penalty without considering deposit of advance tax by the assessee—Appellate Assistant Commissioner directed the I. T. O. to consider the case of penalty after considering deposit of advance tax by assessee—Tribunal setting aside the order—Tribunal not justified—Order of Appellate Assistant Commissioner restored.

Section 273(b) of the Income-tax Act clearly provides that where an assessee fails to furnish an estimate of the advance tax payable by him without any reasonable cause in accordance with the provisions of Sub-section (3) of Section 212, penalty could be imposed. Thus, where the assessee failed to file the estimate of current income in time, even if advance tax was paid by him, there was a default within the language of section 212(3) and the Income-tax Officer has jurisdiction under section 273(b) to impose penalty for non-filing of estimates.

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*M. C. C. No. 183 of 1980. Reference under Section 256(1) of the Income-tax Act, 1961, from the Income-tax Appellate Tribunal, Nagpur, dated the 26th May 1980.

M/s Surendra Mirani & Bros., Rajnandgaon v. *The Commissioner of Income-tax, M. P., Bhopal, 1984*

Section 212(3) contemplates two things, filing of estimates and depositing the advance tax, and for this non-compliance penalty is attracted under section 273(b). Therefore, when the assessee had complied with one part i. e. he had deposited the advance tax to the tune of Rs. 50,000/-, the Income-tax Officer ought to have considered the compliance of one part by the assessee while imposing penalty for non-compliance of the other part, i. e. non-filing of estimate of the advance tax payable by him.

C. J. Thakar with *A. L. Halve* for the applicant.

B. K. Rawat for the opposite-party.

Cur. adv. vult.

JUDGMENT

The Judgment of the Court was delivered by OZA, Ag. C. J.—This reference is made by the Income-tax Appellate Tribunal for answering the following questions :—

(1) Whether, in the facts and circumstances of the case, the failure on the part of the assessee to file the estimate attracted penalty under section 273(b) of the Income-tax Act ?

(2) Whether, in the facts and circumstances of the case, the Tribunal was justified in setting aside the order of the Appellate Assistant Commissioner and restoring the order of the Income-tax Officer ?

The year of assessment is 1972-73, year ending in October 1971. It is alleged that the assessee committed default in not filing the estimates and, therefore, he was served with a notice under section 274 read with section 273(b) of the Income-tax Act, 1961. In compliance with the notice the assessee filed a reply stating that though the estimates were not filed but advance tax of Rs. 50,000/- was paid by the assessee in time and since the assessee admitted the default of non-filing of the estimates the Income-tax Officer levied a penalty of Rs. 5325/- under section 273(b) of the Act against which the assessee went up in appeal before the Appellate Assistant Commissioner.

The Appellate Assistant Commissioner considered the assessees

M/s Surendra Mirani & Bros., Rajnandgaon v. *The Commissioner of Income-tax, M. P., Bhopal, 1984*

submissions that the assessee had made an advance tax payment of Rs. 50,000/- on 15-12-1971. It was also admitted before the Appellate Assistant Commissioner that it was not full payment but it was contended that the Income-tax Officer had not given credit for the payment of advance tax and that merely non-filing of the estimates was not enough to attract the penalty provisions. The Appellate Assistant Commissioner after considering the submissions made by the assessee held that the Income-tax Officer should have considered the payment of Rs. 50,000/- as advance tax and should have considered the question of levy of penalty in that light.

On an appeal by the revenue before the Tribunal, the Tribunal by its order dated 5th September 1979 rejected the assessee's contention that non-filing of estimates was a mere technical default as the assessee was ignorant of the provisions of law and following the decision of the Madras High Court in *C. I. T.* v. *Smt. Vijayanthimala* (1) the Tribunal set aside the order of the Appellate Assistant Commissioner and restored the order passed by the Income-tax Officer. Arising out of this order passed by the Tribunal on an application made by the assessee, the Tribunal has made this reference to answer the question quoted above.

Learned counsel appearing for the assessee contended that penalty is provided in section 273(b) but this provision talks of failure to furnish an estimate of the advance tax without reasonable cause in accordance with section 212(3) and it is contended that section 212(3) provides that when a person is not previously assessed, he shall furnish estimate of the advance tax payable by him on the current income calculated in the manner laid down in section 209. It was, therefore, contended that penalty under section 273(b) is attracted when there is non-compliance with sub-section (3) of section 212 and sub-section (3) contemplates the estimates of income and advance tax. Admittedly, part of sub-section (3) of section 212 was complied with as advance tax was paid by the assessee and it was contended that failure on the part of the assessee to submit the estimates has shown a reasonable cause and under these circumstances merely for technical non-compliance with part of section 212(3) penalty could not be imposed. Learned counsel contended that the judgment in *C. I. T* v. *Smt. Vijayanthimala* (*supra*) on which reliance was placed by the Tribunal was a case of default of payment of advance tax and, therefore, could not have been used for imposing penalty only on the ground that estimates of income were not filed. Learned counsel also placed reliance on a decision of the Punjab and

(1) 103 I. T R. 882.

M/s Surendra Mirani & Bros., Rajnandgaon v. *The Commissioner of Income-tax, M. P., Bhopal, 1984*

Haryana High Court in *Addl.C.I.T.*v.*Bipan Lal Kuthiala* (1) to contend that under the penal provisions under section 273 the burden lay on the Department. Learned counsel for the assessee alternatively also contended that even if the first question is answered against the assessee that the penalty provisions under section 273(b) of the Income-tax Act are attracted, still the second question referred to deserves to be considered in favour of the assessee as the Appellate Assistant Commissioner although holding that the penalty provisions are attracted set aside the order of the Income-tax Officer and directed that the question about depositing of advance tax of Rs. 50,000/-should have been considered by the Incom-tax Officer while imposing penalty under section 273(b).

Learned counsel for the revenue placing reliance on the decision of the Punjab and Haryana High Court in *Abhilash Kumari Oswal* v. *C. I. T.* (2) contended that the levy of penalty was justified as admittedly there was default in filing the estimates.

Section 273 (b) provides:-

"273. If the Income-tax Officer, in the course of any proceedings in connection with the regular assessment for the assessment year commencing on the lst day of April, 1970, or any subsequent assessment year, is satisfied that any assessee-

X X X X

(b) has without reasonable cause failed to furnish an estimate of the advance tax payable by him in accordance with the provisions of sub-section (3) of section 212."

The section thus clearly provides that where an assessee fails to furnish an estimate of the advance tax payable by him without any reasonable cause in accordance with the provisions of sub-section (3) of section 212, penalty could be imposed. As regards the reasonable cause it could not be disputed that that is a question of fact and the Tribunal having held against the assessee it could not be reagitated in this reference. Learned counsel placed reliance on the language of section 212 to contend that penalty is attracted under section 273 not merely because the estimates are not filed but also because the advance tax is not paid, but in this case the advance tax to the tune of Rs. 50,000/- was deposited by the assessee in time. Sub-section (3) of section 212 on which reliance has been placed and which is also referred to in sub-section (b) of section 273, reads as follows:-

(1) 98 I. T. R 343. (2) 138 I. T. R. 277.

"212(3) Any person who has not previously been assessed by way of regular assessment under this Act or under the Indian Income-tax Act, 1922 (XI of 1922), shall, in each financial year, before the date on which the last instalment of advance tax is due in his case under sub-section (i) of Section 211, if his current income is likely to exceed the amount specified in sub-section (2) of section 208, send to the income-tax officer an estimate of—

(i) the current income, and

(ii) the advance tax payable by him on the current income calculated in the manner laid down in section 209,

and shall pay such amount of advace tax as accords with his estimate on such of the dates applicable in his case under section 211 as have not expired. by instalments which may be revised according to sub-section (?)."

This contemplates that the assessee should file estimate of current income and advance tax payable by him. It is, therefore, clear that penalty has been provided under sub-section (b) of section 273 for non-compliance of sub-section (3) of section 212 which contemplates two things, filing of estimates and payment of advance tax. The main contention advanced by the learned counsel for the assessee is that non-filing of estimates is a mere technical default, the substantial compliance was there as the advance tax was paid but it could not be disputed that even if advance tax was paid, there was a default within the language of section 212(3) as the estimate of current income was not submitted in time and therefore it could not be contended that the Income-tax Officer has no jurisdiction under section 273 (b) to impose penalty for non-filing of estimates.

It appears that the main contention of the learned counsel was that as advance tax was paid but estimates were not filed as the assessee pleaded ignorance, this was a sufficient reason in the circumstances of the case and therefore penalty should not have been imposed under section 273 (b). Whether in the facts of a particular case the cause shown by the assessee on facts could or could not be treated as a reasonable case is a question of fact which has been disposed of and is not before us. The first question referred to is as to whether the failure on the part of the assessee to file the estimate attracted the provisions of section 273 (b) of the Income-tax Act, and as it is clear from the language of of section 273(b) read with section 212(3), it could not be doubted that section 273(b) is attracted on failure to file the estimates. The decisions cited by learned

counsel for both the parties do not carry the case any further. Admittedly, there was default in filing the estimetes. In view of this, in our opinion, the first question has to be answered in favour of the revenue that in the facts and circumstances of the case, failure on the part of the assessee to file the estimate attracted penalty provisions under section 273(b) of the Income-tax Act.

The second question which is referred to us is about the order passed by the Appellate Assistant Commissioner and the order of the Tribunal setting aside this order. The Appellate Assistant Commissioner in his order felt that the penalty provision under section 273(b) no doubt is attracted but as the penalty could be imposed for both the things, failure to file estimates and failure to deposit advance tax, and therefore it was necessary for the Income-tax Officer to consider the question of imposition of penalty after considering the advance tax deposited by the assessee. This order was set aside by the Tribunal mainly on the ground that section 273(b) is attracted but it could not be disputed that the Income-tax Officer while imposing penalty had not considered the question of depositing the advance tax to the tune of Rs. 50,000/- as admittedly section 212(3) contemplates two things, filing of estimates and depositing the advance tax, and for this non-compliance penalty is attracted under section 273(b) and therefore the Income-tax Officer while imposing penalty ought to have considered that out of the two things necessary under section 212(3) the assessee had complied with one part i. e. he had deposited the advance tax to the tune of Rs. 50,000/- and it was in this light that the Appellate Assistant Commissioner directed the Income-tax Officer to consider the case of penalty after considering the deposit by the assessee of advance tax in time, in our opinion, there was no justification for the Tribunal to set aside this order of the Appellate Assistant Commissioner. In this view of the matter, therefore, our answer to the second question is in favour of the assessee saying that in the facts and circumstances of the case, the Tribunal was not justified in setting aside the order of the Appellate Assistant Commissioner and restoring the order of the Income-tax Officer.

The reference is answered accordingly. In the circumstances, parties are directed to bear their own costs.

Reference answered accordingly.

MISCELLANEOUS CRIMINAL CASE

Before Mr. Justice B. C. Varma.

28 March 1984

KARAMCHAND and others, Applicants*

v.

STATE OF M. P., Opposite-party.

Criminal Procedure Code, 1973 (II of 1974), Section 438, Essential Commodities Act (X of 1955), Section 12-AA and Rice Procurement (Levy) Order M. P., 1960—Anticipatory bail—Whether can be granted in cases involving offences punishable under Essential Commodities Act—When may be granted.

Section 12-AA, Essential Commodities Act, 1955, does not exclude the operation of section 438 of the Code of Criminal Procedure. It is unreasonable to think that clause (d) of Section 12-AA is attracted only in case when the person is arrested and not before it. Therefore, the Special Court or the High Court in exercise of power under section 438 of the Code can release a person accused of or suspected of commission of the offence under the Essential Commodities Act in the event of his arrest. However, proviso to clause (d) of Section 12-AA of the Act would also be attracted when an application is made for release on bail in the event of arrest (anticipatory bail) by a person accused of or suspected of Commission of offence under the Act and conditions mentioned in the proviso to clause (d) for grant of anticipatory bail shall also govern or atleast provide guidelines for decision of such application when presented before the High Court under Section 438 of the Code. Therefore, bail under Section 438 of the Code may be granted to a person accused of offence punishable under the Essential Commodities Act, 1955 even if opposed when there appears no sufficient evidence or *prima facie* proof in support of the accusation.

Gulabchand Kannoolal v. *The State of M. P.* (1), *Abbas Ali* v. *State of M. P.* (2) and *Badri Prasad* v. *State* (3); relied on.

Balchand v. *State of M. P.* (4); relied on.

*M. Cr. C. No. 164 of 1984. Application under Section 438, Criminal Procedure Code, 1973, for grant of anticipatory bail to the applicants.

(1) 1982 M. P. L. J. 7.
(2) 1975 M. P. L. J. S. N 109.
(3) A. I. R. 1953 Cal. 28
(4) A. I. R. 1977 S. C. 366.

Gurbuksh Singh v. *State of Punjab* (1); referred to.

S. C. Datt for the applicants.

M. V. Tamaskar Gen. Adv. and *L. S. Singh* for the State.

Cur. adv. vult.

ORDER

B C. VARMA J.–This application under Section 438 of the Code of Criminal Procedure for release of the applicants on bail in the event of their arrest has been made in these circumstances.

A truck No. B. H. V. 7680 loaded with rice bags was found on way between Pathalgaon and Jashpur Nagar in Raigarh district. The Additional Superintendent of Police stopped that truck, checked it and found that the rice was being transported for sale but without selling to the Purchase Officer the requisite quantity of rice in accordance with clause 3 of the Madhya Pradesh Rice Procurement (Levy) Order, 1960. The truck was seized. The driver and the cleaner were arrested. Chetandas, the applicant no. 2, is a licensed dealer in foodgrain. Rice was being sent to Jashpurnagar. After seizure, he applied for placing the rice under his *Suprudnama* and that was done. The driver and the *Khalasi* working on the truck have been released on bail. The applicants could not be arrested and it is the allegation against Karamchand that he has been escaping his arrest. His application for his release on bail in the event of arrest has been rejected by the Additional Sessions Judge, Raigarh on a finding that *prima facie* there appears to be breach under section 3/7 of the Essential Commodities Act, 1955. Now, it is Karamchand and Chetandas who have applied for their release on bail in the event of their arrest.

By this application, it was not disputed that the M. P. Rice Procurement (Levy) Order, 1960 is in force in District Raigarh where the rice was seized. 'Rice' under clause 2(f) of the Levy Order is defined to mean any variety of rice produced or manufactured in a rice mill worked by power. Clause 3 of the order requires that every licensed miller and licensed dealer shall sell to the Purchase Officer at the controlled price certain quantity of rice held in stock by him. Any breach under this order is punishable under the Essential Commodities Act, 1955. The Parliament has now enacted the Essential Commodities (Special

(1) A. I. R. 1980 S. C. 1632.

Provisions) Act, 1981 (Act No. 18 of 1981) with a view to make special provision by way of amendment to the Essential Commodities Act, 1955, for a temporary period for dealing more effectively with persons indulging in hoarding and blackmarketing of, and profiteering in essential commodities and with the evil of vicious inflationary prices or any matter connected therewith or incidental thereto. Section 12 of the Essential Commodities Act has been omitted and instead new sections 12-A, 12-AA, 12-AB and 12-AC have been substituted. Special Courts have been constituted to try the offences under the Essential Commodites Act. It will be useful to reproduce Section 12-AA and its relevant clauses which are as follows :—

"12-AA. Offences triable by Special Courts.—

(1) Notwithstanding anything contained in the Code,-

(a) all offences under this Act shall be triable only by the Special Court constituted for the area in which the offence has been committed or where there are more Special Courts than one for such area, by such one of them as may be specified in this behalf by the High Court;

(b) where a person accused of or suspected of the commission of an offence under this Act is forwarded to a Magistrate under sub-section (2) or sub-section (2A) of section 167 of the Code, such Magistrate may authorise the detention of such person in such custody as he thinks fit for a period not exceeding fifteen days in the whole where such Magistrate is a Judicial Magistrate and seven days in the whole where such Magistrate is an Executive Magistrate :

Provided that where such Magistrate considers—

(i) When such person is forwarded to him as aforesaid; or

(ii) upon or at any time before the expiry of the period of detention authorised by him;

that the detention of such person is unnecessary, he may, if he is satisfied that the case falls under the proviso to section 8, order the release of such person on bail and if he is not so satisfied, he shall order such person to be forwarded to the Special Court having jurisdiction;

(c) the Special Court may, subject to the provisions of clause (d) of this sub-section, excercise, in relation to the person forwarded to it under clause (b), the same power which a Magistrate having jurisdiction to try a case may exercise under section 167 of the Code in relation to an accused person in such case who has been forwarded to him under that section;

(d) save as aforesaid no person accused of or suspected of the commission of an offence under this Act shall be released on bail by any court other than a Special Court or the High Court;

Provided that a Special Court shall not release any such person on bail—

(i) without giving the prosecution an opportunity to oppose the application for such release unless the Special Court, for reasons to be recorded in writing, is of opinion that it is not practicable to give such opportunity; and

(ii) where the prosecution opposes the application, if the Special Court is satisfied that there appear reasonable grounds for believing that he has been guilty of the offence concerned:

Provided further that the Special Court may direct that any such person may be released on bail if he is under the age of sixteen years or is a woman or is a sick or infirm person, or if the Special Court is satisfied that it is just and proper so to do for any other special reason to be recorded in writing;

(e) a Special Court may, upon a perusal of police report of the facts constituting an offence under this Act take congnizance of that offence the accused being committed to it for trial;

(f) all offences under this Act shall be tried in a summary way and the provisions of sections 262 to 265 (both inclusive) of the Code shall, as far as may be, apply to such trial;

Provided that in the case of any conviction in a summary trial under this section, it shall be lawful for the Special Court to pass a

sentence of imprisonment for a term not exceeding two years;

(2) When trying an offence under this Act, a Special Court may also try an offence other than an offence under this Act, with which the accused may, under the Code, be charged at the same trial:

Provided that such other offence is under any other Law for the time being in force, triable in a summary way;

Provided further that in the case of any conviction for such other offence in such trial, it shall not be lawful for the Special Court to pass a sentence of imprisonment for a term exceeding the term provided for conviction in a summary trial under such other law.

(3) A Special Court may, with a view to obtaining the evidence of any person suspected to have been directly or indirectly concerned in, or privy to, an offence under this Act, tender a pardon to such person on condition of his making a full and true disclosure of the whole circumstances within his knowledge relating to the offence and to every other person concerned whether as principal or abettor in the commission thereof and any pardon so tendered shall for the purposes of Section 308 of the Code, be deemed to have been tendered under Section 307 thereof.

(4) Nothing contained in this section shall be deemed to affect the special powers of the High Court regarding bail under Section 439 of the Code and the High Court may exercise such powers including the power under clause (b) of sub-section (1) of that section as if the reference to "Magistrate" in that section included also a reference to a "Special Court" constituted under Section 12-A."

The effect of the aforesaid provisions is the change of forum by constituting Special Courts for trial of certain offence punishable under section 3/7 of the Essential Commodities Act. The Special Courts are authorised to exercise the same power which the Magistrate has under Section 167, Criminal Procedure Code in relation to an accused person who has been forwarded to

him by the Executive Magistrate. Clause (d) of section 12-AA(1) authorise the Special Courts or the High Court to release on bail a person accused or suspected for commission of offence under the Act. The Special Court, however, has to give an opportunity to the prosecution to oppose the application for release on bail unless in its opinion it is not practicable to give such opportunity. Apart from the class of persons mentioned in proviso to sub-clause (ii) of clause (d), when the application for release on bail is opposed by the, prosecution the Special Court shall not release on bail any person accused of offence under the Act if it is satisfied that there appears reasonable ground for believing that he has been guilty of the offence alleged. It was argued and in my opinion rightly that even so bail may be granted inspite of opposition where *prima facie* there appears to be no case against the accused. This argument finds support from a decision of this Court, in *Gulabchand Kannolal* v. *The State of M. P.* (1), and must be accepted. In that case, a somewhat similar provision contained in section 5(2) of the Madhya Pradesh Dacoity Prabhavit Kshetra Adhyadesh, 1981 came for consideration. The provision was that notwithstanding anything contained in Criminal Procedure Code, no application for bail of a dacoit shall be allowed, if opposed by the police or by the prosecution. Construing that provision, the Full Bench ruled that a person arrested for dacoity or for specified offence under the Ordinance can apply for bail inspite of section 5(2) at the stage immediately after his arrest on the ground that there was no reasonable suspicion of his being concerned in such offence; at the stage after twentyfour hours of his arrest and during investigation on the ground that there are no grounds that the accusation or information against him is well founded and at the stage after the investigation is complete on the ground that there is no sufficient evidence or *prima facie* proof against him in support of the accusation, [See also *Badrai Prosad* v. *State* (2) and *Abbas Ali* v. *State of M. P.* (3)]. Following that question, it must be held that bail may be granted to a person accused of offence punishable under section 3/7 of the Essential Commodities Act, even if opposed when there appears no sufficient evidence or *prima facie* proof in support of the accusation.

I am unable to agree with the argument advanced by Shri M. V. Tamaskar, learned Government Advocate, that the provisions of Section 12-AA are attracted only when a person is arrested of an offence under section 3/7 of the Essential Commodities Act. The contention is that a reading of section 12-AA excludes the operation of section 438 of the Code. Particular reference was made to clauses (b), (c) and (d) of sub-section (1) of section 12-AA. In my opinion, the argument is fallacious. Clauses (b) and (c) have special reference

(1) 1882 M. P. L. J. 7. (2) A. I. R. 1953 Cal. 28.

(3) M. Cr. C. No. 1004 of 1975, decided on the 20th Aug. 1975=1975 M.P.L J. S. N. 109.

to section 167 of the Code. What is laid down there is that when a person accused of or suspected of commission of an offence under the Essential Commodities Act is forwarded to a Magistrate for purposes of remand, the Magistrate may direct his detention in custody for a period of 15 days in the whole if he is a Judicial Magistrate or for 7 days in the whole if he is an Executive Magistrate. The Magistrate to whom the person is so forwarded may release him on bail in terms of proviso to clause (b) else in terms of clause (c), he has to forward such person to the Special Court having jurisdiction. The Special Court shall exercise the same powers as the Magistrate may exercise under section 167 of the Code in relation to the person so forwarded to him. Even this exercise of power under section 167 is subject to the provisions of clause (d). So far the reference is only to the exercise of power either by the Magistrate or the Special Court under section 167 of the Code in relation to the person forwarded to them as aforesaid. Clause (c) is followed by clause (d) which contains a general provision regarding release on bail of a person accused of or suspected of commission of an offence under the Act. It begins with a qualifying clause "Save as aforesaid". This, in my opinion, has a reference to the proviso to clause (b) which speaks of the powers of the Magistrate to release a person on bails in terms of proviso to clause (b) and in that case restriction imposed by proviso to clause (d) shall not apply. Clause (d) confers jurisdiction upon the Special Court or the High Court to release a person on bail when he is accused of or suspected of commission of the offence under the Act. Jurisdiction of others Courts to release such a person on bail except as contained in clause (b) is taken away. Clause (d) unlike clauses (b) and (c) has no reference to section 167 of the Code. It speaks of bail generally and only seeks to confer jurisdiction in that behalf in the Special Court or the High Court. The only restriction or curtailment on the exercise of that power is contained in the proviso which follows that clause. There is no other restriction. It will, therefore, be unreasonable to think that clause (d) is attracted only in case when the person is arrested and not before it.

A reference was also made by Shri M. V. Tamaskar, learned Government Advocate, to sub-section (4) of Section 12-AA and it was submitted that what is saved to the High Court is the power under Section 439 of the Code alone. It was, therefore, submitted that power under section 438 should be deemed to be impliedly taken away. This argument also cannot be accepted. Power to release on bail is conferred by clause (d) of sub-section (1) of Section 12-AA. What sub-section (4) says is that the special power of the High Court under section 439 of the Code regarding bail shall remain unaffected notwithstanding anything contained in section 12-AA and the High Court shall be in a position

to set aside or modify any condition imposed by the Special Court while granting bail. I am unable to read anything in this sub-section to exclude the operation of section 438 of the Code for an offence under the Act. I am, therefore, of the opinion that the Special Court or the High Court, in exercise of power under section 438 of the Code, can release a person accused of or suspected of commission of the offence under the Act in the event of this arrest. In *S. Murgeshappa* v. *State of Karnataka* (1), the Karnataka High Court has also held the provisions of section 438 of the Code to be available to a person accused of or suspected of commission of offence under section 3/7 of the Essential Commodities Act and for this support has been drawn from the provisions of section 12-AC of the Act. It has been further observed that as while exercising powers under section 12-AA to section 12-AC the Special Court shall be deemed to be the Court of Sessions, the Special Court shall have powers similar to that of Court of Sessions even in the matter of grant of bail, in the event of arrest.

Learned Government Advocate submitted that the restrictions imposed for release on bail of a person accused of or suspected of commission of the offence under the Act should also govern an application under section 438 of the Code. As against this, Shri Datt, learned counsel for the applicants, contended that those restrictions could apply only in case when the applicant is in custody. I feel inclined to accept the contention advanced by the learned Government Advocate. As I have shown earlier, the provision for bail is contained in section 12-AA(1)(d) of the Act. It is true that the earlier clauses (b) and (c) contemplate a person under arrest but then they envisage a case where a person so arrested is brought before a Magistrate or the Special Court for purpose of remand in terms of section 167 of the Code. Provisions contended in clause (d) alone provide for release on bail. I am not prepared to hold that this clause (d) is only a further extension of clauses (b) and (c). Instead, it is this clause which enacts a provision for release on bail a person who is accused of or suspected of commission of an offence under the Act. There does not appear to be any expression in this clause indicating that it is attracted only in case of a person in custody. There are no express words to that effect in this clause. In absence of any such indication in text of clause (d), it will be unreasonable to hold that its operation is limited to a person in custody alone for it will not be the function of the judiciary to supply words in any given Statute when on plain reading the Statute can be effectively applied and is workable. It is a cardinal rule of construction that intention of the Legislature is to be gathered from the language used and a construction which requires for its support, addition or substitution of words which results in rejection of words as meaningless, has to be avoided.

(1) 1984 E. F. R. 27—Criminal Petition No. 498 of 1983, decided on the 22nd June 1983.

Words in an Act should not be read unless it is absolutely necessary to do so. Supplying words would mean legislation and not construction. It will, therefore, be not permissible to read in clause (d) that it applies to a person in custody when there is no such indication in the body of that clause itself. Further, there also does not appear to be any good reason to restrict the operation of that clause to a person in custody alone. I am of opinion that clause (d) applies also to the person who applies for his release on bail in the event of his arrest and before he is taken in actual custody. As a necessary corollary, therefore, it must follow that the proviso to clause (d) also would be attracted when an application is made for release on bail in the event of arrest (anticipatory) bail by a person accused of or suspected of commission of offence under under the Act.

Shri S. C. Datt, learned counsel for the applicants, referred to a decision of the Supreme Court in *Balchand* v. *State of M. P.* (1), in suport of his contention that the operation of clause (d) and its proviso is restricted only to a person in custody. There the Court was concerned with a question of grant of anticipatory bail to a person accused of an offence falling under rule 184 of the Defence and Internal Security of India Rules, 1971. The relevant provision was as follows :

> "Notwithstanding anything contained in the Code of Criminal Procedure, 1898 (V of 1898), on person accused or convicted of a contravention of these Rules or Orders made thereunder shall, it in custody, be released on bail..... ....."(under lining is mine)

It was held that an application for grant of anticipatory bail under section 438 would be outside the mischief of rule 184. On the other had, Bhagwati, J., in paragraph 5 of the judgment in *Balchand's case* has observed that if these are the conditions provided by the rule-making authority for releasing on bail a person arrested on an accusation of having committed contravention of any Rule or order made under the Rules, it must follow a *fortiori* that the same conditions must provide the guidelines while exercising the power to grant 'anticipatory bail' to a person apprehending arrest on such accusation, though they would not be strictly applicable Fazl Ali, J., in his separate judgment in *Balchand' Case, in* paragraph 25, formulated four principles, the fourth of which reads as under:

> "(4) that in cases covered by Rule 184 of the Rules the Court exercising power under Section 436 or Section 438 of the Code has got to

(1) A. I. R. 1977 S. C. 366.

comply with the condltions mentioned in clauses (a) and (b) of Rule 184 and only after the Court has complied with those condition that an order under any of these sections of the Code in respect of such offences could be passed."

It may be mentioned that conditions in clauses (a) and (b) attached to Rule 184 of those Rules are practically the same as are contained in clauses (i) and (ii) of the provise to clause (d) of sub-section (1) of Section 12-AA of the Act. Thus, the aforesaid observations in *Balchand's Case* (*supra*) support the contention advanced by the learned Government Advocate Shri Dutt also referred to the decision in *Gurbaksh Singh* v. *State of Punjab* (1). That decision is an authority for the proposition that the High Court or the Court of Sessions to whom the application for grant of anticipatory bail is made ought to be left free to exercise their judicial discretion in that behalf. It was pointed out that the power conferred by Section 438 is an extra-ordinary character, namely, that it is not ordinarily resorted to like the power under sections 437 and 439 of the Code and this power to grant anticipatory bail should be exercised with due care and circumspection. Upholding the Constitutional validity of Section 438 of the Code, it was observed in regard to anticipatory bail that if the proposed accusation appears to stem not from motives of furthering the ends of justice but from some ulterior motive, the object being to injure and humiliate the applicant by having him arrested, a direction for the release of the applicant on bail in the event of his arrest would generally be made. Ultimately, it was observed that there are several other considerations, too numerous to enumerate, the combined effect of which must weigh with the Court while grantlig or rejecting anticipatory bail. It was held:

> "The nature and seriousness of the proposed charges, the context of the events likely to lead to the making of the charges, a reasonble possibility of the applicant's presence not being secured at the trial, a reasonable apprehension that witnesses will be tampered with and "the larger interests of the public or the State" are some of the considerations which the court has to keep in mind while deciding an application for anticipatory bail."

Finally, it was said that no hard and fast rule can be laid down in discretionary matter for the grant of refusal of bail, whether anticipatory or otherwise. It will thus be seen that *Gurbaksh Singh's Case* (*supra*) deals more with the scope and interpretation of Section 438 of the Code and principles governing the grant of anticipatory bail. It does not deal with any such question as has arisen in this

(1) A. I. R. 1980 S C. 1632.

case. Instead, *Balchand's case* (*supra*) is more in point as it also deals whether restrictions imposed for release on bail of a person in custody for offence under Rule 184 of the DIR. Rules can also apply to a case when the person is not in custody and applies for his release on bail under section 438 of the Code. In that case, although the Supreme Court overruled the High Courts decision when the High Court said that section 438 was not at all applicable, it held that while exercising power under section 438 of the Code also the Court has to comply with the conditions mentioned in clauses (a) and (b) of Rule 184 of those Rules.

My conclusion, therefore, is that restrictions imposed upon the power of the Special Court or the High Court to release on bail person accused of or suspected of commission of the offence under the Act shall also apply also to an application under section 438 of the Criminal Procedure Code, claiming anticipatory bail, i. e., release on bail in the event of arrest.

It was also an argument that proviso to clause (d) of Section 12-AA (1) governs the consideration of bail by the Special Court and not by the High Court whose special powers for grant of bail under section 439 of the Code are preserved by sub-section (4). Sub-section (4) does permit a reading that powers of the High Court for release on bail under section 439 are left unfettered by any restrictions imposed by various sub-clauses of sub-section (1). However, sub-section (4) has reference only to section 439 and not to section 438 of the Code. It is true that the proviso to clause (d) of Section 12-AA (1) refers only to the Special Court and no reference to the High Court is made thereunder, yet it seems to be reasonable to apply those limitations to an application under section 438 of the Code made before the High Court also. Even if, therefore, on the strict language used it were possible to hold that the proviso to clause (d) governs an application only before the Special Court, those condition can well be taken as providing guidelines for deciding an application for grant of anticipatory bail by the High Court. I am, therefore, of the opinion that the conditions mentioned in the proviso to clause (d) for grant of anticipatory bail to a person accused of or suspected of commission of the offence under the Act shall also govern or at least provide guidelines for decision of such application when presented before the High Court under section 438 of the Code.

The facts of the present case disclose *prima facie* that 150 bags of rice was being transported for sale without complying with the provision of clause 3 of the levy Order. This position was not disputed by the learned counsel for

the applicants. The contention had been that the rice was hand-pound and, therefore, not subject to any levy. The applicants are said to have made such a representation to the authority soon after the seizure of the rice. Apart from the question whether the definition of the term 'rice' as given in the Levy Order would also include hand-pound rice (which question), I do not propose to decide here), the result of analysis of the rice so seized placed before me by the learned Government Advocate shows that the rice seized contained 60% of the processed rice and 40% of the hand-pound rice. *prima facie* therefore, the contention raised by the applicants that the rice seized was only hand-pound has been found to be false. It can therefore, be safely said that the prosecution has *prima facie* shown that the breach of the levy order has been committed and, there are reasonable grounds for believing that at least applicant no. 2 is guilty of the offence concerned. The case-diary further show that the applicant no. 1 Karamchand who was also on the truck at the relevant time, could escape and since then has been absconding. Learned counsel argued that investigation is also most complete, the documents have been inspected and seized and the place of the business has been searched. It was further assured that the applicants are willing to submit themselves for interrogation or investigation at any time if necessary, and, therefore, they be released on bail. Since I have earlier held that the special provisions contained in clause (d) of section 12-AA (1) shall also govern an application under section 438 of the Code and since the bail is opposed and there are reasonable grounds for believing that at least the applicant no. 2 is guilty of the offence concerned, these arguments are of no avail to the applicants.

It was also argued that no case is made out against Karamchand who is not the licensed dealer. Karamchand is the son of Chetendas and it is the case of the prosecution that at the relevant time he was in the truck but could manage his escape. Even so, on the material collected by the prosecution, there appears to be no reason to say that Karamchand has also committed the offence charged. That being so, in my opinion, applicant Karamchand has succeeded in making out a case for his release on bail in the event of his arrest. The application, in so far as it relates to applicant Karamchand's release on bail in the event of his arrest, must, therefore, be allowed.

In the result, I direct that applicant Karamchand be released on bail of Rs. 10,000/- (Rupees ten thousand only) with two sureties in the like amount, in the event of his arrest, in connection with Crime No. 3 of 1984 in the Police Station Kunkuri in the Raigarh District, on the following conditions:

i) that he shall make himself available fo r interrogation by any officer

of police as and when required by him at such place or places which he may specify and direct;

ii) that he shall not directly or indirectly make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the Court or to any police officer when called upon to do so; and

iii) that he shall not leave India or his place of residence without previous permission of the Court exercising jurisdiction over him for the time being during the period his presence is required for purposes of interrogation.

Application on behalf of applicant no.2. Chetandas is rejected.

Application rejected.

MISCELLANEOUS PETITION

Before Mr. G. L. Oza Ag. C. J. and Mr. Justice B. M. Lal.

4 July 1984

SUNDERLAL and others, Petitioners*

v.

SUB-DIVISIONAL OFFICER, KATNI and others, Respondents.

Co-operative Societies Act, M. P., 1960 (XVII of 1961)—Section 64(2), Proviso and Section 66—Dispute under section 64 entertained before election of Chairman and Vice-Chairman of Board of Directors was complete according to election programme notified—It is without jurisdiction and liable to be quashed—Section 66—Contemplates a judicial order to be passed for transferring dispute for disposal to a nominee of Board of Nominee—Assistant Registrar transferring dispute under section 64 to S. D. O. by making reference to a Govt. Circular and without passing a Judicial

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*Misc. Cr. C. No. 218 of 1984.

order—Proceedings taken in pursuance of such order are without jurisdiction and liable to be quashed.

The proviso to section 64(2) of the M. P. Co-operative Societies Act, 1961 clearly enacts that a dispute under section 64 of the Act cannot be entertained unless the elections are complete in accordance with the election programme. Thus, where in accordance with the programme of elections notified as required under sub-rule (2) of Rule 41, election of Chairman and Vice-Chairman of the Board of Directors of Resource Society were still to be held; a dispute under section 64 of the Act could not be entertained by the S. D. O. as it was premature. Hence, entertainment of such a dispute by the S. D. O. prior to such election is without jurisdiction and liable to be quashed.

Section 66(1) of the M. P. Co-operative Societies Act, 1961 clearly provides that the Registrar on receipt of a dispute under section 64 either should dispose of the dispute himself or transfer it for disposal to a nominee or Board of nominees to be appointed by the Registrar. Thus, section 66 contemplates a judicial order to be passed by the Registrar. Where the Assistant Registrar transferred a dispute purporting to be under section 64 of the Act to the S. D.O. by merely referring to a Government circular, the order of transfer of dispute could not be read as a judicial order under section 66 and the Assistant Registrar only acted as a post office. It is apparent that the circular of the State Govt. was a sort of instruction. Even if the authorities exercising jurisdiction under section 66 wanted to act nor those instructions a judicial order had to be passed. When neither the Registrar nor the Assistant Registrar transferred the dispute to the S. D. O. Revenue, as a nominee by passing an appropriate order under section 66, the S. D. O. could not exercise jurisdiction on the dispute and, therefore, all proceedings before him and interlocutory orders passed by him are without jurisdiction and deserve to be quashed.

V. K. Taukha for the petitioners.

S. L. Saxena for the respondents.

Cur. adv. vult.

ORDER

The Order of the Court was delivered by

Sunderlal v. *Sub-Divisional Officer, Katni, 1984*

OZA, Ag. C. J.—This is a petition filed by the petitioners challenging the proceedings before respondent No. 1 and for quashing of the orders Annexures F and I passed by respondents 1 and 2.

Facts necessary for the disposal of this petition are that the petitioners and respondent No. 3 are members of respondent No. 4, a co-operative society registered under the M. P. Co-operative Societies Act, 1960. Respondent No. 4 is also known as Large Size Agricultural Co-operative Credit Society Ltd., Kaudiya. This society comes under classification of societies as a Resource Society. This society, among other things, advances loans and also provides for fertilizers, seeds and other consumer goods to its members. The society is also a member of the District Co-operative Central Bank Ltd., Jabalpur, and it is alleged that the society has 638 members spread over 24 adjacent villages.

According to the petitioners, the term of the Board of Directors of the Society, respondent No. 4, expired on 30th September 1982, but since the elections for incoming Committee were not held prior to the expiration of the said term, the Board stood automatically dissolved and in consequence thereof the Directors of the Board vacated their seats and the management of the society, therefore, was assumed by the Registrar till the next elections were held and the new Committee took over charge. It is alleged that in exercise of powers under section 45(8) of the Act, Shri L. D. Bairagi, Branch Manager, District Co-operative Central Bank Ltd., Jabalpur, was appointed as Officer-in-charge of the society respondent No. 4 until the constitution of a new Committee/Board of Directors.

It is further alleged that in due course the Assistant Registrar appointed Shri R. S. Tiwari, a Co-operative Inspector, as Returning Officer to complete the elections of the members and office-bearers of the said society by order dated 30th September 1983.

It is alleged that the first stage of the elections was preparation of the voters list as provided under Rule 23 of the rules framed under the Act and after preparation of the voters list the Returning Officer published the election programme on 25th November 1983. The petitioners have filed a copy of the final voters list as Annexure-A and a copy of the election programme as Annexure-B. It is alleged that the election programme is issued by the Returning Officer as required under Rule 41(2) of the rules framed under the Act. It is further alleged that the rule enjoins on the Returning Officer to notify the date for election of Directors of the Board, election of the delegates and the election

of Chairman and Vice-Chairman of the Board and the Committee is constituted only when the Chairman and Vice-Chairman are declared elected. It is further provided that if the election remains incomplete for want of valid nomination or for any other reason whatsoever, the same is completed by co-opting a member as provided in Rule 43(2-A) of the rules.

It is alleged by the petitioners that in pursuance of the election programme, the petitioners filed their nominations for the office of Directors of the Board and they were declared duly elected unopposed on 3rd December 1983 by the Returning Officer. Their names were also declared in the Annual General Meeting on 17th December 1983. It is alleged that out of the three delegates to be elected, only one delegate representing the society in the Committee of District Co operative Central Bank Ltd. was declared elected. The two offices of the representatives to represent the society in the meetings of the Marketing Society, Katni, and the District Co-operative Union, Jabalpur, were not filled up for want of valid nominations. It is alleged that under the rules these vacancies have to be filled up by co-option in the meeting of the elected Directors which is convened to elect the President and Vice-President of the Society. According to the notified programme, these elections/co-options were to take place on 30th December 1983.

According to the petitioners, on 20th December 1983, even before the elections of the society were completed, respondent No. 3, a member of the society, filed an election dispute before the Deputy Registrar, Co-operative Societies, Jabalpur. Alongwith it he also filed an application for temporary injunction under Order 39, Rule 1, Code of Civil Procedure, staying the subsequent elections of the society. This dispute was filed in the office of the Deputy Registrar. The office wrote a note on the order-sheet that since the society was in supersession, the dispute may be forwarded to the Sub-Divisional Officer, Revenue, Katni. With this officer note, the case was put up before the Deputy Registrar who initially declined to agree with the office-note but after scrutinising the same wrote that the same may be done under the rules. This endorsement was made by the Deputy Registrar on 20th December 1983 itself and the dispute was thereafter put up before the Assistant Registrar who, by his order dated 21st December 1983, ordered that the dispute be transferred to the S. D. O., Revenue, Katni, for disposal in accordance with the Circular of the State Government. According to the petitioners, therefore, the dispute alongwith the application for temporary injunction was placed before the S. D. O. on 28th December 1983 and the S. D. O. passed an order to summon both the parties for 6th January

1984. It appears that after the case had been adjourned, the counsel for respondent No. 4 again approached the S. D. O. with a request to pass orders on the stay application and upon this the S. D. O. after hearing the counsel passed an order on the same date, i. e. 28th December 1983 staying all the subsequent proceedings of the society with a further direction to send a copy of the stay order to the Returning Officer. This stay order was to be operative till 6th January 1984.

According to the petitioners, on 6th January 1984 the petitioners appeared and also submitted an application for permission to engage a counsel and after noting their presence the case was adjourned to 7th January 1984 and on 7th January 1984 the S. D. O. after hearing both the parties passed an order staying further election of the society till disposal of this dispute. The petitioners have filed a copy of this order of the S.D.O. dated 7th January 1984 (Annexure-F). The petitioners against this order preferred an appeal before the Joint Registrar alongwith an application for stay and according to the petitioners on 23rd January 1984 the Joint Registrar rejected the stay application. According to the petitioners, the orders passed by the Sub-Divisional Officer staying further proceedings and the entertainment of the dispute by the S. D. O. are illegal.

The main grounds urged in the petition are that under section 64 (2)(v) proviso, a dispute could only be entertained after the declaration of the result as indicated in the election programme and it is, therefore, contended that as the election programme provided for elections of the Chairman and Vice-Chairman to be held on 30th December 1983 and till those elections were held, a dispute under section 64 could not be entertained.

The next contention raised in the petition by the petitioners is that under section 66 of the Act power has been conferred on the Registrar which also can be exercised by the Deputy Registrar or the Assistant Registrar to transfer a dispute presented before him to a nominee or a Board of Nominees to be appointed by the Registrar but it is contended that the Assistant Registrar passed on the dispute to the S. D. O. without passing an appropriate order under section 66 just on the basis of the State Government's order whereas it is contended that the State Government had no power to authorise the S. D. O. to entertain a dispute under section 64. It is contended that the order dated 21st December 1983 shows that the Assistant Registrar transferred the dispute in obedience of the circular issued by the State Government to the S. D. O. but the circular of the State Government cannot be said to be an order passed by the Registrar under section 66 nor is there any order passed by the Assistant

Registrar under section 66 and thus there is no jurisdiction conferred on the S. D. O. to entertain the dispute or to pass interlocutory orders. It is, therefore, contended that all the proceedings before the S. D. O. deserve to be quashed on both the grounds. There are other grounds also raised but at the time of the hearing of the petition the above mentioned two grounds only were pressed and it was contended that on both these grounds the proceedings before the S. D. O. and the orders passed by him deserve to be quashed.

In the returns filed by the respondents, most of the facts are not in dispute but an interesting dispute has been raised by contending that the election programme, a copy of which has been filed by the petitioners as Annexure-B and a photo copy of it has been filed by the respondents alongwith the return (Annexure R-1), was not published as required under Rule 41 (2) as it was contended that in fact the Returning Officer prepared the programme and handed a copy of it to the Samiti Sevak but it was not posted on the notice board of the society as required under sub-rule (2) of Rule 41 and it is further contended that instead the Officer-in-charge received a pamphlet printed by the Central Co-operative Bank containing election programme up to 17-12-1983 and, therefore, at best the only election programme which was notified was up to 17-12-1983 and therefore the dispute could be entertained after the election was completed up to 17-12-1983, i. e., the elections of the Board of Directors.

Learned Government Advocate, on the other hand, contended that as the election programme was not notified, no dispute could be entertained as nothing had happened in accordance with properly notified election programme. In the alternative, it was contended that as the printed pamphlet was circulated by the Officer-in-charge which only contained the programme up to 17th December 1983, the dispute could be entertained after the election on 17-12-1983.

It was also contended by the learned Government Advocate that the State Government in exercise of powers under section 3 appointed various officers and issued a circular that as the officers of the department are connected with the elections, the disputes should be transferred to Sub-Divisional Officers and in accordance with this circular the Assistant Registrar who could exercise powers of the Registrar under section 66 transferred it to the S. D. O. and therefore the S. D. O. was authorised to entertain the dispute, and as he was authorised to entertain the dispute he could pass interlocutory orders and even if the interlocutory orders are held not to be proper, still in a petition under Article 226 they could not be interfered with.

It will be pertinent to consider the dispute of fact raised in the return. Annexure R-1, which is copy of the election programme filed alongwith the return which according to the learned Government Advocate is the photo copy of the election programme issued by the Returning Officer, bears an endorsement by the Returning Officer himself which says that "एक प्रति प्राप्त नोटिस बोर्ड में लगायी गया". There is another endorsement by the Samiti Sevak which reads "संस्थामे प्रकाशित किया,चुनाव कार्यक्रमकी एक प्रति प्राप्त किया"An attempt was made by the learned Government Advocate to contend that so far as the Returning Officer is concerned, he must have posted it on the notice board of the Returning Officer. However, this contention is not supported from the endorsement which, according to the learned Government Advocate, is the endorsement of the Returning Officer which reads" एक प्रति प्राप्त नोटिस बोर्ड में लगायो गया" and thereafter there is a seal and signature. Before accepting the contention of the learned Government Advocate, we will have to presume that if this endorsement is by the Returning Officer, the Returning Officer did not know the rule and this contention, therefore, apparently cannot be accepted. Rule 41(2) reads:

> "(2) Not less than ten days before the date fixed for the annual general meeting or the special meeting, as the case may be a society, the Returning Officer shall post a notice on the notice board of the society stating—
>
> (a) the number of members to be elected;
>
> (b) the last date of making nominations, which shall not be later than seven days before the date fixed for holding the said meeting, the hours between which, the place at which and the person to whom nomination papers shall be presented;
>
> (c) the date on which, the place at which and the hours between which scrutiny of nomination papers shall be made;
>
> (d) the last date for the withdrawal of candidatures;
>
> (e) The date for election of Chairman/President, Vice-Chairman/ Vice-Presidents and such other officers as are specified in byelaws."

This rule specifically provides that the Returning Officer shall post a notice on

the notice board of the society about the programme of elections and it is in this language of the rule that the endorsement of the Returning Officer which appears on Annexure R-1 has to be read, which reads "एक प्रति प्राप्त नोटिस बोर्ड में लगायो गया" If the contention of the learned Government Advocate is accepted that the Returning Officer has put this endorsement, it will have to be understood that the Returning Officer when he put this endorsement complied with sub-rule (2) of Rule 41 and, therefore, the contention that a copy of this election programme was not posted on the notice board of the society cannot be accepted. It is unfortunate that the Returning Officer and the Officer-in-charge both submitted affidavits saying that a copy of this programme was not put on the notice board of the society. These affidavits directly run contrary to the endorsement that appears on Annexure R-1 itself which has been filed by the respondents themselves which according to the learned Government Advocate is a photo copy of the original notice declaring the programme of elections. It is further significant that the Samiti Sevak has also put an endorsement by saying that "संस्था में प्रकाशित किया, चुनाव कार्यक्रम की एक प्रति प्राप्त किया" which also clearly shows that the election programme was notified as contemplated under sub-rule (2) of Rule 41. It is significant that an affidavit has not been filed of the Samiti Sevak saying that he had not posted it on the notice board of the Society. Under these circumstances, it is clear that the stand taken in the return that the notice (the programme of elections) was not notified on the notice board of the society is *prima facie* incorrect and is proved to be incorrect from the document filed by the respondents themselves i. e. Annexure R-1 and, therefore, it cannot be accepted. It is unfortunate that these officers unnecessarily on affidavits took a stand which is disproved by their own document. It it, therefore clear that this programme of of elections Annnxure R-1 was notified as required under sub-rule (2) of Rule 41.

Section 64(2), proviso, reads:

> "Provided that the Registrar shall not entertain any dispute under this clause during the period commencing from the announcement of the election programme till the declaration of result."

It is not disputed by the learned Government Advocate that this proviso clearly enacts that a dispute cannot be entertained unless the elections are complete in accordance with the election programme and, therefore, it is clear that as the election programme provided for the election of President and Vice-President to be held on 30th December 1983, the dispute filed by respondent No.3 on 20th December 1983 could not be entertained in view of a

clear provision provided in the proviso to section 64(2) as quoted above. It is, therefore, clear that the dispute which was entertained by the S. D. O. was entertained when it was premature and could not have been entertained in view of the proviso to section 64(2) and on this ground, therefore. all the proceedings including the interlocutory orders passed by the S. D, O. deserve to be quashed.

As regards the second question, it is clear that when the dispute was presented before the Deputy Registrar, a copy of the order-sheet filed by the petitioners which is not in dispute only shows the order passed by the Assistant Registrar which reads" विवाद प्रकरण विधिवत् प्रस्तुत हुआ । पंजीयन किया जावे एवं म. प्र. शासन के परिपत्र के अनुसार निराकरण हेतु अनु. वि. अधि. राजस्व कटनी तह. कटनी को भेजा जावे". It is not in dispute that this is the only order passed by the Assistant Registrar. The order of the State Government to which reference has been made apparently is not an order passed under section 66. Section 66 of the M. P. Co-operative Societies Act reads:

> "66(i) The Registrar may, on receipt of the reference of dispute under section 64 decide the dispute himself or transfer it for disposal to a nominee or board of nominees to be appointed by the Registrar."

This clearly provides that the Registrar on receipt of a dispute under section 64 either should dispose of the dispute himself or transfer it for disposal to a nominee or Board of Nominees to be appointed by the Registrar. Even if the contention of the learned Government Advocate is accepted that Assistant Registrar could also discharge the functions of the Registrar in transferring the dispute to a nominee, still section 66 contemplates a judicial order to be passed by the Assistant Registrar transferring it to a nominee nominated by him. The Assistant Registrar in the order quoted above only acted as a post office and directed that because of the Government circular the dispute be sent to the S. D. O. This order passed by the Assistant Registrar which has been quoted could not be read as a judicial order under section 66 and the learned Government Advocate also was not in a position to contend that this order could be read as a judicial order under section 66 to be passed by the Registrar or the Assistant Registrar. It is apparent that the circular of the State Government was a sort of instructions but even if the authorities exercising jurisdiction under section 66 wanted to act on those instructions. a judicial order had to be passed under section 66 to transfer the dispute to the nominee

or the Board of Nominees appointed by the Registrar. It is, therefore, clear that neither the Registrar nor the Assistant Registrar transferred this dispute to the S. D. O. Revenue, Katni, as a nominee by passing an appropriate order under section 66 and therefore on this ground also the S. D. O. could not exercise jurisdiction on this dispute and therefore also all proceedings before the S. D. O. and the interlocutory orders passed by the SDO., Katni, are without jurisdiction and deserve to be quashed.

No other point was raised. In the light of the discussion above, therefore, on both the grounds the petition is allowed. The proceedings before the S. D. O. Revenue, Katni, and all orders passed by the S. D. O. Revenue on the dispute filed by respondent No. 3 are hereby quashed. The proceedings also are quashed as the dispute could not be filed in the light of the proviso to section 64 as it is still premature. It is further directed that as the elections of the Board of Directors were completed but the elections which were to be held on 30th December 1983 were yet to be held, further steps shall be taken to complete the elections from the stage from which they were held up because of this dispute and the interlocutory order passed by the S. D. O. Under the circumstances of the case, parties are directed to bear their own costs. Security amount, if deposited, shall be refunded to the petitioners.

Petition allowed.

MISCELLANEOUS PETITION

Before Mr. G.L. Oza Ag. Chief Justice and Mr. Justice B.M. Lal.

4 July 1984

AWAS RAHAT GRIHA NIRMAN SAHKARI SAMITI MARYADIT, BHOPAL, Petitioner*

v.

STATE OF M. P. & others, Respondents.

Co-Operative Societies Act, M. P., 1960 (XVII of 1961), Sections 57 and 60

*M. P. No. 1296 of 1983.

Awas Rahat Griha Nirman Sahakari Samiti Maryadit, Bhopal v. *State of M. P., 1984*

and Constitution of India, Article 226—Enactment of section 57 neither inconsistent with co-operative jurisprudence nor in derogation of fundamental rights—State legislature competent to legislate it—Grave illegalities and irregularities reported in the affairs of the petitioner—Society inasmuch as membership found to be not genuine and proper procedure in admitting members in accordance with terms and conditions of allotment order and Bye laws of the society not followed—Action under sections 57 and 60 justified—Natural Justice—Principles of—Its applicability to orders passed by Govt. in administrative capacity—State Govt passing an order revoking allotment of land made in favour of the petitioner society earlier, without affording opportunity to society—Order violates principles of natural justice and cannot be sustained.

Section 57 of the Co-operative Societies Act, 1960 has been enacted with the aim and idea to fulfil the object of the whole scheme of the co-operative movement so that co-operative societies may not function arbitrarily. This section controls the society from fabricating the records. In the absence of provision of section 57, the function of the society may become murky affair for its members who may be deprived of their legitimate rights by the influential members of the society or by its office bearers and the very object of the co-operative movement will be frustrated. Therefore, provision of section 57 is not enacted against the Co-operative jurisprudence but enacted to safeguard the interests of the members of the Society so that under the fear of section 57 of the Act, the office bearers of the Society may not do any manipulations and fabrication in the records of the society. It is also not inconsistent with or in derogation of the fundamental rights and the State legislature is fully competent to legislate such provision.

Thus, when action of favouritism and nepotism of the petitioner society was brought to the knowledge of the Govt. and thereupon it was ordered that the Govt. should enquire into the affairs of the Society regarding its constitutional working and financial status by invoking the relevant provisions of the Act and the Deputy Registrar passed orders under sections 57 and 60 of the Act for seizure of the records of the society and handing over charge of the society to a person appointed by it, action taken against the society is justified and there is no illegality in it.

The broad concept of natural justice is that the authorities or bodies which are given jurisdiction by statutory provision to deal with the rights

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of the citizens may be required by the relevant statutes to act judicially in dealing with matters entrusted to them. In such cases, the authorities or bodies must act in accordance with the principles of natural justice.

Where allotment of the land in favour of the petitioner-society was done by the Govt. under its administrative authority on certain conditions but subsequently, on receipt of complaints about breach of conditions of the allotment order, the Govt. has revoked the order of allotment without giving any opportunity to the petitioner-Society in any manner whatsoever, the revocation order violates principles of natural justice and cannot be sustained.

A. K. Kraipak v. *Union of India* (1) and *Ridge* v. *Baldwin* (2); relied on.

Y. S. Dharmadhikari for the petitioner.

M. V. Tamaskar Government Advocate for the State.

Cur. adv. vult.

ORDER

The Order of the Court was delivered by B.M. LAL J.—This is a petition under Articles 226 and 227 of the Constitution of India.

The petitioner is a Co-operative Housing Society registered under the M. P. Co-operative Societies Act, 1960. It is styled as "Awas Rahat Griha Nirman Sahkari Samiti Maryadit, Bhopal" hereinafter referred to as the Society.

The Society was registered in the year 1981. Its object was to get land from the respondent No. 1 for purposes of constructing residential houses for its respective members. For this purpose, the Society applied for land by its application dated 6-7-82, for allotment of land admeasuring 16. 50 acres located in Arera Colony, Bhopal.

At the time of allotment of land, the Society had only 79 members, but soon after, in February 1982, it was reported that the membership had grown up by 187 and later on 226. During the course of arguments, it was pointed out

(1) A. I. R. 1970 S.C. 150. (2) 1964 A. C. 40.

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by the learned counsel for the petitioner society that some Officers of gazetted rank and even of I. A. S. cadre, are also members of this Society. This is also apparent from the action taken by the respondents in passing the allotment of the land, i. e. the application was made on 6-7-82 and it was dealt with like wind because of the interest taken by its members who are in Govt. service and were interested in getting the desired plot in their favour. Due to their efforts, the land applied for was made available to the Society within such a short span of time.

The Society was informed by the Govt. by its letter dated 11-8-82 (Annexure 1) that 13 acres of land was reserved for the Society and further by letter dated 22-9-82 (Annexure 2), addressed to the Collector, Bhopal, sanctioned advance possession of the land. This order of advance possession to the Society states terms and conditions for delivery of advance possession. Apart from other terms and conditions, some of the important conditions are as under:

(3)(a). No person will be allowed to acquire a plot through a Co-operative Society, if—

(i) he or any of his near relations (father, mother, dependant brother, dependant sister or children) owns a residential plot in the city in which the Co-operative Society exists;

(ii) he has already been allotted elsewhere a residential plot through a Co-operative Society.

(b) Before taking possession, the Society should deposit the premium.

The most important term and condition mentioned in condition No. 7 in Annexure 2 is that if the Society does not fulfil any condition, the advance possession will be deemed to be cancelled. The Society, however, deposited Rs. 19,65,726.85 by different treasury challans by 26-9-1982 which is the Nazul rent and premium.

The Society was delivered possession of 13 acres of land, i. e. about 566280 sq. ft. of Kh. No. 299/82/2, located at village Shahpura (Char Imli) Bhopal, on 11-10-82. It appears that allotment of land and delivery of possession were made within a span of 3 months only because of extra efforts of the members of the Society who are of I. A. S. Cadre. It is also apparent that the location

of the land is between Arera Colony and Moulana Azad College of Technology. But for the interested members of the Society, it was not possible to get this land allotted within such a short time in a posh locality like Arera Colony, Bhopal.

The Society prepared the lay out according to which different sizes of plots of the dimensions of 60/40,40/30,/40/25 and 43/12½ sq. ft. were sanctioned by the Town Country Planning Department, Bhopal, by its order dated 28-12-1984. The Society, through its Managing Committee, in accordance with the resolution of the general body, dated 24-10-1982, started allotment of plots in favour of its members, but the respondent Govt. had not executed a regular lease deed in favour of the Society. The allotment order of the land was only done in accordance with the provisions of Revenue Book Circular, sec. (iv), S. No. 1, vide Rule 26 under the heading 'Grant of land to the Housing Society.' Annexure 2 dated 22-9-82 is in the shape of a licence and is not granted in favour of the petitioner by the State Govt. in exercise of some statutory provision of law, but it was granted in exercise of administrative functions. The Revenue Book Circular contains executive instructions. Hence a look at Annexure 2 shows that the State Govt. has not exercised its powers as *quasi*-judicial authority, but has exercised the powers under administrative authority.

We have said earlier that membership of the Society had gone upto 226 because of the situation of the land. Therefore, it appears that all members of the Society, particularly the I. A. S. Officers, wanted plots according to their own choice which it appears was not possible for the managing committee to make allotment of plots in favour of such interested members particularly I. A. S. Officers. Hence the influential members of the society by whose active help and interest, the society got the land, had shown their reluctance to help the society. On the other hand, they exposed the management of the Society by alleging that certain allotment of plots was made by the Society in violation of the bye-laws and terms and conditions of allotment order, in favour of professional traders who are already having land for housing purposes in the city of Bhopal in the names of their relatives. Therefore, the said allotment was against the bye-laws and the allotment order.

This action of favouritism and nepotism of the society was brought to the knowledge of the Govt. by some disgruntled members of the Society who failed in their attempt to get the plots of their choice. The Govt., by its

order dated 7-2-83 (Annexure 5), directed the Society to maintain *status quo.*

The President of the Society further received Annexure P-7 from the Office of the Naib-Tahsildar, Capital Project Bhopal, who was appointed by the State Govt. to make necessary enquiries into the affairs of the Society. The President of the Society was also directed to appear before the Naib-Tahsildar on 25-2-1983 and to produce the relevant records and documents of the Society so that the Naib-Tahsildar could send his enquiry report to the Govt. early.

In between, the Society also received orders dated 4-2-83 and 8-2-83 respectively from the Office of the Dy. Registrar, Co-operative Societies, Bhopal (Annexures 11 and 12) purported to have been passed under sections 57 and 60 of the Co-operative Societies Act, 1960 (hereinafter referred to as the Act) for seizure of the records of the Society as it was reported that there were some illegalities and irregularities committed by the Society in allotment of the plots in favour of some members of the Society. Therefore, it had become necessary to make an enquiry into the affairs of the Society, i. e. regarding constitutional working and financial status of the society. Further, as no charge was handed over by the Society notwithstanding the Order of the Dy. Registrar, the orders referred to above under sections 57 and 60 of the Act were passed and Shri R. B. Guhe was appointed to take charge of the Society. However, somehow or the other, the Society managed not to hand over charge to Shri Guhe and instead started correspondence with the respondents.

The Dy. Registrar, by order dated 15-4-83 (Annexure 14), informed the society on the basis of the report of Shri Guhe that irregularities relating to the action against ineffective members of the Society may be completed within 15 days and the Dy. Registrar be informed accordingly.

The petitioner Society, initially being aggrieved by the order of the Dy. Registrar relating to the handing over of charge of the Society and giving inspection of the Society, filed this petition before this Court on 22-4-1983 challenging the legality of the order passed by the Dy. Registrar on various grounds. During the pendency of the petition, the Society also received Annexure 17, dated 2-6-83 which is an order passed by the Govt. revoking the allotment order of the land dated 22-9-82 (Annexure 2). Therefore, the petitioner amended the petition on 21-7-83 by incorporating the order dated 2-6-83 in the petition as Annexure 17.

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The petitioner in this petition, has challenged the orders dated 7-2-83 (Annexure 5), 8-2-83 (Annexure 11), 15-4-83 (Annexure 14) and 2-6-83 (Annexure 17) on various grounds for issuance of a writ of *certiorari* against respondent No. 1 and issue lease deed of 13 acres of land in favour of the Society with further directions that the respondents be restrained from interfering with the management of the society.

Respondents 1 to 5 have filed their joint return and having denied the averments of the petition, tried to justify their action taken *vide* Annexures 11, 14 and 17 which are under challenge on the ground, *inter alia*, that lot of complaints were received against the illegal working of the Society even to the extent that plots were allotted by the Society in favour of certain members who were having plots and houses in the city of Bhopal. Therefore, the said allotment in favour of certain members of the Society was against the terms and conditions of the allotment order, bye-laws of the Society and Revenue Book Circular Rule 26 which specifically lay down as under:

(3) (a). No person will be allowed to acquire a plot through a Co-operative Society, if—

(i) he or any of his near relations (father, mother, dependant brother, dependant sister or children) owns a residential plot in the city in which the Co-operative Society exists;

(ii) he has already been allotted elsewhere residential plot through a Co-operative Society.

(b) Before taking possession, the Society should deposit the premium.

It is further contended that on receipt of complaints, the Revenue Minister ordered that execution of the lease deed be stayed. It is further stated that Govt. could enquire into the affairs of the Society, by invoking the relevant provisions of the Act and as such any action taken under sections 57 and 60 of the Act against the Society is within the powers of the Dy. Registrar who has also submitted that respondent No. 5 had submitted his report (Annexure R-2) according to which the membership did not appear to be genuine and *bona-fide*. The proper procedure was even not followed by the Society in admitting the members in accordance with the terms and conditions of the allotment order and bye-laws of the society, particularly bye-law No. 5 which has been completely overlooked. Grave illegalities and

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irregularities were found, Hence there was no alternative except to take action under sections 57 and 60 of the Act.

After hearing arguments of the learned counsel for the petitioner and respondents, we have come to the conclusion that the action taken under sections 57 and 60 of the Act against the petitioner was justified under the facts and circumstances of the case. We see no illegality on the part of the respondents in taking action under sections 57 and 60 of the Act.

Section 57 of the Act has been enacted with the aim and idea to fulfil the object of the whole scheme of the co-operative movement so that Co-operative Societies may not function arbitrarily in the manner they liked. This section controls the Society from fabricating the records. In the absence of provisions of section 57, the function of the Society may become murky affair for its members who may be deprived of their legitimate rights by the influential members of the Society or by the Office bearers of the society and the very object of the co-operative movement will be frustrated. Therefore, we do not see any ground to hold that the provision of section 57 is, in any manner, enacted against the Co-operative Jurisprudence. On the other hand, we have no hesitation to say that the provision of section 57 of the Act has been enacted to safeguard the interests of the members of the Society so that under the fear of section 57 of the Act, the Office bearers of the society may not do any manipulations and fabrications in the records of the society. Further, we do not see that section 57 is inconsistent with or in derogation of the fundamental rights. On the other hand, we see that the State Legislature is fully competent to legislate such provision.

The next point urged very vehemently by the learned counsel for the petitioner was that respondent No.1 had no authority or jurisdiction to revoke the order of allotment of land by passing the order (Annexure 17) dated 2-6-83 without affording any opportunity to the Society and without assigning any cogent reasons for justifying the revocation of the allotment order dated 22-9-1982 (Annexure 2).

It is true that respondent No.1, while issuing the allotment order dated 22-9-1982, has not discharged its function under any statutory provision of law. Therefore, the order dated 22-9-1982, cannot be construed as a *quasi*-judicial order. The orders dated 22-9-82 and 2-6-83 have been passed by the Govt. in administrative capacity. Hence, the short question which arises for decision is whether before the revocation of any order passed in administrative capacity,

the principles of natural justice have to be observed or not by giving show cause notice and opportunity of being heard.

The concept of natural justice has been elaborately discussed by the House of Lords in *Ridge Baldwin* (1). The said discussion finds place in catena of cases decided by the Hon. Supreme Court of India and this Court. The broad concept of natural justice is that the authorities or bodies which are given jurisdiction by statutory provisions to deal with the rights of the citizens, may be required by the relevant statutes to act judicially in dealing with matters entrusted to them. In such cases, the authorities or bodies must act in accordance with the principles of natural justice before exercising their jurisdiction and powers. The obligation to violate the principles of natural justice need not be expressly imposed. Powers to determine questions affecting the rights of the citizens would impose the limitation that the power should be exercised in conformity with the principles of natural justice.

In democratic set up, with the increase of powers with the administrative bodies, their Lordships of the Supreme Court have laid down the guidelines for exercise of powers by the administrative bodies. The relevant discussion finds place in *A. K. Kraipak* v. *Union of India* (2). It is as under:

> "The dividing line between an administrative power and a *quasi*-judicial power is quite thin and is being gradually obliterated. For determining whether a power is an administrative power or a *quasi*-judicial power, one has to look to the nature of the power conferred, the person or persons on whom it is conferred, the framework of the law conferring that power, the consequences ensuing from the exercise of that power and the manner in which that power is expected to be exercised. In a welfare State like ours, it is inevitable that the organ of the State under our Constitution is regulated and controlled by the rule of law. In a welfare State like ours, it is inevitable that the jurisidiction of the administrative bodies is increasing at a rapid rate. The concept of rule of law would lose its validity if the instrumentalities of the State are not charged with the duty of discharging their functions in a fair and just manner. The requirement of acting judicially in essence is nothing but a requirement to act justly and fairly and not arbitrarily or capriciously. The procedures which are considered inherent in the exercise of a judicial power are merely those which facilitate if not ensure a just and

(1) (1964) A C. 40.

(2) A. I. R. 1970 S. C. 150.

fair decision. In recent years, the concept of *quasi*-judicial power has been undergoing a radical change. What was considered as an administrative power some years back is now being considered as a *quasi*-judicial power. The following observations of Lord Parker, C.J., in *Reg.* v. *Criminal Injuries Compensation Board* (1), *Ex parte* Iain, are instructive :-

> 'With regard to Mr. Bridge's second point, I cannot think that Atkin L. J. intended to confine his principle to cases in which the determination affected rights in the sense of enforceable rights. Indeed, in the Electricity Commissioner's case, the rights determined were at any rate not immediately enforceable rights since the scheme laid down by the commissioners had to be approved by the Minister of Transport and by resolutions of Parliament. The Commissioners nevertheless were held amenable to the jurisdiction of the court. Moreover, as can be seen from *Rex* v. *Postmaster-General Ex parte Carmichael* (2) and *Rex* v. *Boycott, Ex parte Keasley* (3), the remedy is available even though the decision is merely a step as a result of which legally enforceable rights may be affected.

The position as I see it is that the exact limits of the ancient remedy by way of *certiorari* have never been and ought not to be specifically defined. They have varied from time to time being extended to meet changing conditions. At one time, the writ only went to an inferior court. Later its ambit was extended to statutory tribunals determining a *lis inter partes*. Later again it extended to cases where there was no *lis* in the strict sense of the word, but where immediate or subsequent rights of citizen were affected. The only constant limits throughout were that it was performing a public duty. Private or domestic tribunals have always been outside the scope of *certiorari* since their authority is derived solely from contract, that is from the agreement of the parties concerned.

Finally, it is to be observed that the remedy has now been extended, see *Reg* v. *Manchester Legal Aid Committee Ex parte R. A. Brand and Co. Ltd.* (4), to cases in which the decision of an administrative officer is only arrived at after an inquiry or process of a

(1) (1967) 2 Q. B. 864 at p. 881.
(2) (1928) 1 K. B 129.
(3) (1939) 2 K. B. 651.
(4) (1952) 2 Q. B, 313.

judicial or *quasi*-judicial character. In such a case, this court has jurisdiction to supervise that process.

We have, as it seems to me, reached the position when the ambit of *certiorari* can be said to cover every case in which a body of persons of a public as opposed to a purely private or domestic character has to determine matters affecting subjects provided always that it has a duty to act judicially. Looked at in this way, the board in my judgment comes fairly and squarely, within the jurisdiction of this Court. It is, as Mr. Bridge said, 'a servant of the Crown charged by the Crown, by executive instruction, with the duty of distributing the bounty of the Crown. 'It is clearly, therefore, performing public duties."

The Court of Appeal of New Zealand has held that the power to make a zoning order under Dairy Factory Supply Regulation, 1936 has to be exercised judicially, see New Zealand and *Dairy Baord* v. *Okita-Co-operative Dairy Co. Ltd.* (1). This Court in *Purtabpore Co. Ltd.* v. *Cane Commissioner of Bihar* (2) held that the power to alter the area reserved under the Sugar-Cane (Control) Order, 1966 is a *quasi*-judicial power. With the increase of the power of the administrative bodies, it has become necessary to provide guide-lines for the just exercise of their power. To prevent the abuse of that power and to see that it does not become a new despotism, Courts are gradually evolving the principles to be observed while exercising such powers. In matters like these, public good is not advanced by a rigid adherence to precedents. New problems call for new solutions. It is neither possible nor desirable to fix the limits of a *quasi*-judicial power. But for the purpose of the present case, we shall assume that the power exercised by the selection board was an administrative power and test the validity of the impugned selections on that basis. (17).

The aim of the rules of natural justice is to secure justice or to put it negatively to prevent miscarriage of justice. These rules can operate only in areas not covered by any law validly made. In other words, they do not supplant the law of the land, but supplement it. The concept of natural justice has undergone a great

(1) 1953 M. Z. L. R. 366.

(2) C. A. No. 1464 of 1968, dated 21st November 1968. (S.C.).

deal of change in recent years. In the past, it was thought that it included just two rules, namely (1) no one shall be a judge in his own cause (*Nemo debet esse judex proprta causa*), and (2) no decision shall be given against a party without affording him a reasonable hearing (*audi alteram partem*). Very soon thereafter, a third rule was envisaged and that is that *quasi*-judicial enquiries must be held in good faith, without bias and not arbitrarily or unreasonably. But in the course of years, many more subsidiary rules came to be added to the rules of natural justice. Till very recently, it was the opinion of the courts that unless the authority concerned was required by the law under which it functioned to act judicially, there was no room for the application of the rules of natural justice. The validity of that limitation is not questioned. If the purpose of the rules of natural justice is to prevent miscarriage of justice, one fails to see why those rules should be made inapplicable to administrative enquiries. Often times, it is not easy to draw the line that demarcates administrative enquirés from *quasi*-judicial enquiries. Enquiries which were considered administrative at one time, are now being considered as *quasi*-judicial in character. Arriving at a just decision is the aim of both *quasi*-judicial enquiries as well as administrative enquiries. An unjust decision in an administrative enquiry may have more far reaching effect than a decision in a *quasi*-judicial enquiry. As observed by this Court in *Suresh Koshy Gaorge* v. *University of Kerala* (1), the rules of natural justice are not embodied rules. What particular rule of natural justice should apply to a given case must depend to a great extent on the facts and circumstances of that case, the frame-work of the law under which the enquiry is held and the constitution of the Tribunal or body of persons appointed for that purpose. Whenever a complaint is made before a court that some principle of natural justice had been contravened, the court has to decide whether the observance of that rule was necessary for a just decision on the facts of that case. (20).

Applying these principles, we have definitely reached to the conclusion that the Govt., while revoking the order of grant by order dated 2-6-83 (Annexure 17), has not given any opportunity to the petitioner Society in any manner whatsoever and for want of proper and adequate opportunity before revoking the allotment order, the revocation order dated 2-6-83 cannot be sustained. We, therefore, quash the order dated 2-6-83 contained in Annexure 17, for non-observance of principles of natural justice.

(4) C.A. No. 990 of 1968, decided on the 15th July 1968 = A. I. R. 1969 S. C. 198.

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No other point was pressed by the learned counsel appearing for the petitioner.

Before parting with the case, we must observe that the Govt. is not like a private individual who can pick and choose the person with whom it will deal, but the Govt. still remains a Govt. when it enters in even administrative largess and it cannot, without adequate reason, exclude any person from dealing with it or take away the rights of the citizens arbitrarily as has been done in the instant case. The democratic form of Govt. demands equality and absence of arbitrariness and discrimination in any of the functions of the Govt. may be *quasi*-judicial or administrative function of the Govt. The activities of the Govt. have a public element and, therefore, there should be fairness and equality. In the instant case, for the reasons best known to the Govt., it has completely acted arbitrarily departing from the standard norms and, therefore, we must, in the interest of not only the petitioner society, but in the interest of public at large, say that such arbitrary action of the Govt. is not appreciable.

From the discussion aforesaid, we allow the petition, thereby quashing the impugned order dated 2-6-1983 (Annexure 17). However, we make it clear that in enquiry, if the petitioner Society is found guilty in violating the terms and conditions of the allotment order, i. e. alloting the land in favour of members who are having plots or houses in their name or in the names of their near relatives, the Govt, shall be free to cancel the allotment order dated 22-9-82 contained in Annexure 2 after giving full opportunity to the petitioner Society as indicated above.

We pass no order as to costs. Security amount, it deposited, be refunded to the petitioner.

Petition allowed.